

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Opinion No. 2016-UP-368 (S.C.Ct.App. filed July 20, 2016)

Appellate Case No.: 2016-002151

Overland, Inc. d/b/a Land River Greenville..... Petitioner,

v.

Lara Marie Nance, Charlie Andrew Nance, Roger Fields,
Synovus Financial Corporation d/b/a NBSC, Branch Banking
And Trust Company, Bank of America Corporation, and
SunTrust Bank, Inc. Defendants.

Of which Bank of America Corporation, and SunTrust Banks, Inc. are the Respondents.

BRIEF OF RESPONDENT SUNTRUST BANKS, INC.

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QUESTIONS PRESENTED

- I. Can an extension of time be granted to file a Rule 59(e) motion where the South Carolina Rules of Civil Procedure and South Carolina case law forbid it?
- II. Can a party rely upon an unauthorized extension of time where the party was put on notice that such an extension cannot be granted and would therefore be invalid to toll the jurisdictional deadline for filing a notice of appeal?

STATEMENT OF THE CASE

The pertinent facts supporting the Court of Appeals' dismissal of Petitioner Overland's appeal as untimely are as follows. On December 15, 2014, circuit court Judge Letitia H. Verdin granted Respondents Bank of America's and SunTrust's motions for summary judgment in the underlying case concerning Respondents' lack of liability for the check fraud of Overland's former employee. (App. pp. 6-14). Two days later, on December 17, 2014, Overland received Judge Verdin's order granting summary judgment. *Id.*

Overland's 10-day deadline to file a Rule 59(e) motion to alter or amend the judgment fell on December 29, 2014. On that day, counsel for Overland, Hunter Reid, emailed counsel for Bank of America, Jim Sheedy and Susan Driscoll, seeking an extension to file Overland's Rule 59(e) motion. (App. p. 530). Bank of America's counsel advised Overland that neither he nor the circuit court could grant such an extension (App. p. 530):

From: Hunter Reid [<mailto:hunter@fayssouxlaw.com>]
Sent: Monday, December 29, 2014 2:08 PM
To: Jim Sheedy; Susan Driscoll
Subject: Overland's Rule 59(e) motion request for extension

Guys,

Do you have any problem if I seek an extension of time to file my Rule 59e motion with Judge Verdin? I have been out of town for Christmas and sick the whole time. I would like more time to submit a motion.

Let me know as soon as you can.

Thanks,

Hunter

From: Jim Sheedy [<mailto:jimsheedy@driscollsheedy.com>]
Sent: Monday, December 29, 2014 2:16 PM
To: Hunter Reid
Cc: Susan Driscoll

Subject: Overland's Rule 59(e) motion, request for extension

Hunter, look at Rule 6(b) and Rule 59(e). I don't think we can consent or that Judge Verdin has the discretion to extend, i.e. "shall be served not later than 10 days ..." If you have a case that says I can do this, I'm happy to oblige, but I honestly don't think there is one under Rule 59(e). Rather, the time is mandatory, I believe.

(App. pp. 540-541). Respondent SunTrust's counsel did not receive these emails, and no request for an extension to file a Rule 59(e) motion was sought from SunTrust.

Despite Bank of America's email indicating an extension could not be granted, Overland nonetheless requested one from the circuit court. (App. pp. 539-541). Again, Overland did not seek such an extension from SunTrust. *Id.* Also again, Bank of America noted that the time for filing a Rule 59(e) motion could not be extended. *Id.* The circuit court, however, granted Overland a 10-day extension to file its motion. *Id.* The email exchange in chronological order is as follows:

From: Hunter Reid [mailto:hunter@fayssouxlaw.com]
Sent: Monday, December 29, 2014 2:29 PM
To: lverdinsc@scourts.org
CC: Jim Sheedy
Subject: *FW:* Overland's Rule 59(e) motion, request for extension

Judge Verdin,

Good afternoon. I am writing you to request an extension of time to file a Rule 59(e) Motion in the Overland v. Nance lawsuit. I was out of the state all of last week for Christmas holidays, and I have been sick as well. If your Honor believes it cannot grant me an extension until the end of this week under these circumstances, then would your Honor please also consider allowing me to submit an Amended Motion at a later date?

I have conferred with opposing counsel, Jim Sheedy, and he doesn't have any objections to this request.

Thank you,

Hunter Reid

From: Jim Sheedy
Sent: Monday, December 29, 2014 2:38 PM
To: lverdinsc@scourts.org¹
Cc: 'Hunter Reid'; Susan Driscoll; 'Verdin, Letitia H. Law Clerk (Virginia Rogers)'
Subject: Overland's Rule 59(e) motion, request for extension

Judge Verdin,

Actually, I said to Hunter it was my belief upon review of Rules 6(b) and 59(e) that I do not have the power to extend, and the ten (10) day time limit is non-discretionary, i.e., "not later than", "shall", nor am I aware of any cases allowing for extensions under Rule 59(e).

But I was also unaware of any Rule or decisional law prohibiting an amended Rule 59(e) so long as the amendment is not tantamount to a new motion (beyond the time limit).

While I am willing to be accommodating, I cannot do more than what the law allows me to do.

Jim

From: Verdin, Letitia H. Secretary (Angela G. Hyder)
Sent: Monday, December 29, 2014 3:21 PM
To: Jim Sheedy; hunter@fayssouxlaw.com; sdriscoll@driscollsheedy.com
Subject: RE: Overland's Rule 59(e) motion, request for extension

Hunter, Judge Verdin grants a ten-day extension for you to file your Motion.

Thank you,
Angie Hyder
Administrative Specialist for Letitia H. Verdin
Greenville County Courthouse 305 East North Street, Suite 318
Greenville, SC 29601-2120
(864)467-8504 ice
(864)467-8504

¹ This email bounced back to Mr. Sheedy who then forwarded it to Judge Verdin's assistant, Angie Hyder.

(App. pp. 539-540).

Although the 10-day period under Rule 59(e) had passed, Overland filed its motion on January 7, 2015, within the court court's extended deadline. (App. pp. 66-91). Bank of America and SunTrust filed memoranda in opposition. In its brief, Bank of America asserted the argument that Overland's Rule 59 motion was untimely and that an extension could not be granted to file such a motion. (App. pp. 121-123). SunTrust expressly adopted this argument by Bank of America, which was the first opportunity it had to address the extension granted by the circuit court. (App. pp. 130-132).

The circuit court denied Overland's Rule 59 motion on February 5, 2015. (App. pp. 15-16). Overland subsequently filed its notice of appeal on March 4. (App. p. 786).

On March 31, Bank of America moved to dismiss the appeal, and SunTrust did the same on April 9. These motions were based on Overland's failure to file a notice of appeal within the time constraints required by the South Carolina Rules of Civil Procedure given that the filing of an untimely Rule 59 motion does not toll the time for filing a notice of appeal.

The Court of Appeals denied SunTrust and Bank of America's motions to dismiss on June 4, 2015, indicating that such arguments should be included in the briefs filed in response to Overland's initial brief. SunTrust and Bank of America incorporated the arguments from the motions to dismiss in the response briefs, and the Court of Appeals ultimately dismissed Overland's appeal as untimely. (App. pp. 1055-1056). Overland then filed a petition to this Court seeking review of that decision on October 20, 2016, and it was granted on August 22, 2017.

ARGUMENT

Rule 59 of the South Carolina Rules of Procedure addresses motions for a new trial and to alter or amend a judgment. Rule 59(a), (e), SCRPC. If timely served, a motion under this rule

tolls the time for filing a notice of appeal pursuant to Rule 203 of the South Carolina Rules of Appellate Procedure. *See* Rule 203(b)(1), SCACR; Rule 59(f), SCRCP. If such a motion is not timely served, however, the time for filing a notice of appeal is not extended. *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) (stating that a party's failure to comply with Rule 203(b), SCACR "divests this court of subject matter jurisdiction and results in dismissal of the appeal" (quoting *Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 4, 524 S.E.2d 416, 418 (Ct. App. 1999))). In this case, a timely motion was not served under Rule 59 of the South Carolina Rules of Civil Procedure, nor was a notice of appeal under Rule 203 of the South Carolina Appellate Court Rules, and the Court of Appeals therefore properly dismissed Overland's appeal as untimely.

I. The time constraints of Rule 59 are mandatory and jurisdictional, and failure to comply with them does not toll the requirements of filing a notice of appeal.

Rule 59(e) provides that service of an appropriate motion to alter or amend a judgment is mandatory within 10 days of receiving notice of entry of an order of judgment. Rule 59(e), SCRCP (stating that "[a] motion to alter or amend the judgment *shall* be served not later than 10 days after receipt of written notice of the entry of the order" (emphasis added)). Once this time has elapsed, the circuit court loses jurisdiction over the case. *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006) (stating that "[g]enerally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed"); *see also Pitman v. Republic Leasing Co.*, 351 S.C. 429, 433, 570 S.E.2d 187, 190 (Ct. App. 2002) (noting a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed).

Per the text of the rules of civil procedure and this Court's case law, the timeframe for filing post-trial motions, including those under Rule 59, is strictly enforced and cannot be extended or enlarged. *See* Rule 6(b), SCRCP ("The time for taking any action under rules 50(b),

52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated therein.” (emphasis added)); *see also* Rule 59, SCRCF (providing no grounds for extensions); *Citizens & S. National Bank of S.C. v. Easton*, 310 S.C. 458, 460, 427 S.E.2d 640, 641 (1993) (stating that the time limitation under Rule 59 may not be extended).

Indeed, this Court has found that trial courts cannot extend the time to take action under Rule 59. The ruling in *Citizens* is dispositive here. In that case, this Court framed the issue as “[d]id the trial court have jurisdiction to order a new trial upon its own initiative [under Rule 59]?” *Id.*, 310 S.C. at 460, 427 S.E.2d at 641. That is to say, can a trial court extend its jurisdiction beyond what is afforded in Rule 59?

In addressing this issue, this Court looked to Rule 59(d), which provides that a court may order a new trial “[n]ot later than 10 days after entry of judgment, . . . for any reason for which it might have granted a new trial on motion of a party” or that “[a]fter giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion.”² This Court started its rationale by finding that the time limitations in Rule 59(d) “may not be extended.” *Id.* (citing Rule 6(b), SCRCF; *Buxton v. Thompson Dental Co.*, S.C., 415 S.E. 2d 844 (S.C. App. 1992)). The Court then found that the trial court was without jurisdiction to declare a new trial 10 days after entry of judgment because the court lacked jurisdiction to do so. *Id.* (citing *Brewton v. Shirley*, 93 S.C. 365, 76 S.E. 988 (1913), for the proposition that a trial court is without jurisdiction to amend order, except for

² Importantly, motions seeking a new trial under Rule 59 are treated the same as motions seeking to alter or amend a judgment for purposes of tolling the time to file an appeal pursuant to Rule 203 of the South Carolina Appellate Court Rules. Rule 203, SCACR (“When a timely motion for judgment n.o.v. (Rule 50, SCRCF), motion to alter or amend the judgment (Rules 52 and 59, SCRCF), or a motion for a new trial (Rule 59, SCRCF) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.”).

clerical errors, beyond term of court). Thus, the trial court was not permitted, even on its own initiative, to extend the time for granting a new trial under Rule 59 because it was a jurisdictional deadline.³

Here, the circuit court could not extend the time for Overland to file a Rule 59(e) motion. As established by *Citizens* and the rules of procedure, the time limitations of Rule 59 cannot be extended and their lapse causes a loss of jurisdiction. Given that the circuit court lacked authority to extend the time to serve a Rule 59(e) motion, the extension given to Overland in this matter was a legal nullity, and Overland could not rely upon it to toll the requirement for filing a notice of appeal. Under South Carolina law, the deadlines of Rule 59 are jurisdictional, and the circuit court lost jurisdiction over this case when the 10-day period elapsed. The Court of Appeals therefore properly dismissed Overland's appeal for failure to file a notice of appeal within 30 days of receipt of the summary judgment order given the untimely Rule 59(e) motion. *See, e.g., Leviner v. Sonoco Prods. Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) (finding that the failure to serve a timely Rule 59 motion resulted in the circuit court losing jurisdiction over the case).

II. Overland's argument that Rule 59 is a "claims-processing rule" is rendered moot by the facts of this case.

As explained above, this Court's prior ruling establishes that the time for acting under Rule 59 is jurisdictional and cannot be extended. Despite this, Overland relies upon federal case law to contend that Rule 59 of the South Carolina Rules of Civil Procedure is not jurisdictional but instead is a more flexible "claims-processing rule" that can be extended by a trial court.

This is wrong for two reasons. First, it runs contrary to this Court's prior ruling, which

³ Overland argues that this matter is different because an extension was granted prior to the 10-day deadline under Rule 59, but that is irrelevant. Under *Citizens*, the circuit court cannot grant an extension of its jurisdiction on its own accord at any point.

establishes that the failure to comply with the deadlines in Rule 59 is jurisdictional. Second, even if this Court were to interpret Rule 59 differently than it has in the past and as a claims-processing rule per the federal cases cited by Overland, that does not change the outcome of Overland's appeal.

According to Overland, claim-processing rules can be extended whenever and jurisdiction does not end upon the specified timeframe in the rules when such extensions are granted. But Overland's contention is belied by the case law it cites. As explained in the most pertinent United States Supreme Court case cited by Overland, *Eberhart v. United States*, 546 U.S. 12, 19, 126 S. Ct. 403, 407 (2005), when a rule is found to be a "claim-processing rule," that does not lessen its mandatory nature. Instead, its mandatory nature is only waived if a party does not timely assert its rights. *Id.* That is to say, "***claim-processing rules . . . assure relief to a party properly raising them***, but do not compel the same result if the party forfeits them." *Id.* (emphasis added).

What that means here is that Overland's appeal was still untimely and improper even if Rule 59 is determined to be a "claims-processing rule." Supposing the circuit court had authority to extend the deadline to serve a Rule 59 motion, Bank of America and SunTrust⁴ timely advised the circuit court and Overland that the deadlines could not be extended. Specifically, Bank of America raised its position that an extension could not be granted twice before the extension was given and also raised the timeliness of the Rule 59 motion in its memorandum in opposition. SunTrust likewise objected at its first opportunity to contest the timeliness of the Rule 59 motion (given that it was not copied on the requests for an extension) via adoption of Bank of America's

⁴ Prior to the deadline for filing the Rule 59 motion, Bank of America advised both Petitioner and the circuit court that the time for filing a Rule 59 motion could not be extended. SunTrust likewise adopted this position at its first opportunity (given that no extension was sought from it) via its memorandum in response to Overland's eventual Rule 59 motion.

position in the memorandum opposing the motion. As such, the requirements of Rule 59 remained mandatory, and the timeframe for filing a motion under the rule could not be extended to toll the time for filing a notice of appeal.

Petitioner relies extensively on *National Ecological Foundation v. Alexander*, 496 F.3d 466 (6th Cir. 2007), for the proposition that an extension can be granted under Rule 59(e). But Petitioner omits the key fact from that case—that is, the Rule 59(e) motion in that case was unopposed. *Id.* at 474. As the Sixth Circuit explained, the United States Supreme Court precedent (including those relied upon by Petitioner here) provides that “the time limits set by Rules 6 and 59(e) constitute an affirmative defense to an untimely Rule 59(e) motion, which the party opposing the motion is capable of forfeiting.” *Id.* Bank of America and SunTrust both timely asserted their rights. As such, Petitioner’s argument is undermined by the very case it claims should control this appeal.

What is most interesting is the federal case law Petitioner fails to cite that addresses the issues at hand. In *Dill v. General American Life Insurance Company*, 525 F.3d 612 (8th Cir. 2008), for example, the defendant lost at trial and filed a motion for an extension of time to file a Rule 50 motion, which has a ten-day deadline and tolls the time for filing an appeal if timely filed. *Id.* at 615. The motion was not opposed by the plaintiff, and the trial court granted additional time to file the motion. *Id.* Once the Rule 50 motion was filed, however, the plaintiff raised for the first time that the Rule 50 motion was untimely and the trial court’s prior extension was impermissible. *Id.* The trial court agreed that it lacked jurisdiction and rejected the motion. *Id.*

On appeal, the Eighth Circuit affirmed the district court. In doing so, it concluded that the mandatory provisions of Rule 50 would be enforced because plaintiff “raised the timelines issue

prior to the district court reaching the merits of the Rule 50(b) motion.” *Id.* at 619. The Eighth Circuit further stated, “Although this is a harsh and unfortunate result for [the defendant], as it relied on the extension granted by the district court, [the defendant] is not without fault -- a simple scan of Rule 6(b)(2) would have provided [the defendant] notice that the district court lacked authority to grant an extension of time to file the Rule 50(b) motion.” *Id.* at 620.

Dill directly undercuts Overland’s position in this matter. Both Respondents raised the timeliness issue prior to the circuit court’s ruling on the Rule 59 motion, and thus protected their rights under Rule 59. Importantly, *Dill* makes clear that, like Overland here, a party cannot rely upon an improperly granted extension of time when such an extension runs contrary to the clear language of the rules. That is especially so here, where Overland was put on notice that no such extension could be granted prior to the extension being given.

To the extent Overland contends that SunTrust waived the right to object (even though it objected at its earliest opportunity), such argument is also belied by case law. In *Lizardo v. United States*, 619 F.3d 273 (3d Cir. 2010), the plaintiff filed an untimely Rule 59(e) motion, which was not objected to by the defendant. *Id.* at 276. The issue was therefore whether the plaintiff waived its right to object to this untimely motion as tolling the deadline to file an appeal. *Id.* at 278. The Third Circuit found that it was not. *Id.* at 280. Instead, it concluded that the forfeiture of a timeliness objection in the district court did not render an untimely motion timely for purposes of Appellate Rule 4(a)(4), which provides for the tolling the time for appeal. *Id.* The Third Circuit concluded that the defendant’s “failure to object to [the plaintiff’s] untimely Rule 59(e) motion in the [d]istrict [c]ourt did not foreclose its ability to challenge the timeliness of that motion for purposes of tolling under Rule 4(a)(4).” *Id.*

That same logic applies in this matter. Even if Petitioner can somehow make a case that

SunTrust failed to raise the timeliness defect in the Rule 59 motion (and it cannot),⁵ SunTrust should not be deemed to lose its right to challenge timeliness for purposes of tolling the time to appeal. The objections to Rule 59 motions and the tolling of the time to appeal should be treated separately given the language of South Carolina Appellate Court Rule 203. Rule 203, SCACR (providing for the tolling of the time to file an appeal by a timely rule 59 motion to alter or amend the judgment). This is especially so given that the issue of whether a notice of appeal is timely can only be raised for the first time on appeal.

Thus, even if this Court treats Rule 59 as a claims processing rule as Petitioner requests, Respondents did not waive their right to and did in fact object to the timeliness of Petitioner's motion and notice of appeal. As such, the Court of Appeals' ruling dismissing the case for lack of jurisdiction should be affirmed.

III. Even if an extension can be granted to file a Rule 59 motion, the extension in this case was not effective as to SunTrust.

Finally, this Court need not reach the above issues to determine that the appeal was properly dismissed as to SunTrust. Overland never requested nor sought an extension of time from SunTrust. As the emails referenced in the factual background above show, Overland never contacted SunTrust at all within the 10 days to file a motion to alter or amend the judgment. It did not even mention to the circuit court or SunTrust that it intended to challenge the ruling by the circuit court on summary judgment as to SunTrust. Under those circumstances, the extension of time to file a Rule 59 motion as to SunTrust is irrelevant and should be disregarded.

⁵ Petitioner may contend that SunTrust should have done more than adopt the arguments asserted by Bank of America in its response to the Rule 59 motion, but there is no sense in over-papering the court with identical arguments. Further still, Petitioner itself appears to argue that SunTrust and Bank of America should be treated the same because they have a joint defense agreement. That is wrong, as explained below, but Petitioner cannot take that position when convenient and reject it when not.

Overland's resulting untimely Rule 59 motion as to SunTrust and notice of appeal are therefore jurisdictionally barred. *See Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) (dismissing appeal because timely "[s]ervice of the notice of intent to appeal is a jurisdictional requirement").

To combat this, Petitioner argues in a footnote that SunTrust did not need to be contacted because it had a joint defense agreement with Bank of America. Of course, having a joint defense agreement does not make the parties the same for purposes of extensions or any other reason. If two defendants have an agreement among them about sharing documents and maintaining privilege, that does not mean the parties are identical and one can speak for the other. To rule otherwise would improperly impute all the obligations and decisions of one party to another by virtue of them having an agreement given certain common interests in litigation.

Petitioner further asserts that SunTrust falsely claims that a challenge to summary judgment was only sought as to Bank of America. However, the emails tell a different story. If a plaintiff seeks and obtains an extension via contacting the circuit court and only one of two defendants, the defendant not contacted should not be found to have been included in the extension. SunTrust was never given the opportunity to object before the extension was granted. It should not be punished because Petitioner failed to contact it. Under the circumstances, any extension of time, even if proper, should not be imputed to SunTrust, and the late filing of a Rule 59 motion and notice of appeal warrant dismissal of the suit as to SunTrust.

IV. The South Carolina Rules of Civil Procedure are clear and fair.

Contrary to Petitioner's claim that the rules of procedure create a trap for the unwary, the rules expressly provide that no extensions of time are permitted under Rule 59(e). The language in Rules 6 and 59 are not ambiguous, and it does not get more explicit than "[a] motion to alter or amend the judgment *shall* be served not later than 10 days after receipt of written notice of the

entry of the order” and “[t]he time for taking any action under rule[] . . . 59 . . . may not be extended” *See* Rule 6, SCRCP; Rule 59, SCRCP (emphasis added). The strictures of these rules do not leave room for doubt.

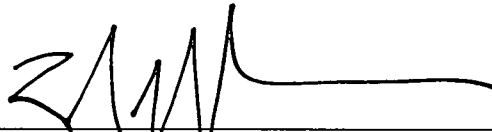
Furthermore, a claim of lack of due process rings hollow. Petitioner had its due process as it was afforded the right to move to amend/alter the judgment within a timely fashion and to appeal. A failure to properly exercise those rights is not equivalent to a lack of due process. *See McCullough v. McCullough*, 242 S.C. 108, 110, 130 S.E.2d 77, 78 (1963) (dismissing appeal and stating that “[t]he right of appeal is a matter of grace and is not an inherent or vested right. The rules of court and statutes must be followed in perfecting an appeal.” (internal citations omitted)). Petitioner was also provided notice that an extension could not properly be granted. That further undermines any claim of a loss of due process.

Permitting extensions of the type sought in this matter unnecessarily increase jurisdiction, extend the periods of time for a case to go on appeal potentially for indefinite periods, provide excuses for tardy litigants, and create additional work for the circuit and appellate benches. The rules are fair and clear. They have been properly enforced below, and SunTrust respectfully requests this Court do the same.

CONCLUSION

For all of the foregoing reasons, SunTrust respectfully requests that this Court affirm the Court of Appeals’ ruling dismissing Petitioner Overland’s appeal.⁶

⁶ In addition to the arguments made herein, SunTrust adopts and incorporates Bank of America’s arguments in its brief to this Court to the extent they are not in conflict with those made in this brief.



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The Honorable Letitia H. Verdin, Circuit Court Judge

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Of which Bank of America Corporation and SunTrust Banks, Inc. are the Respondents.

PROOF OF SERVICE

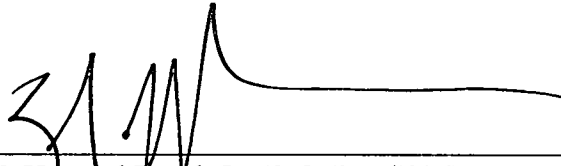
The undersigned hereby certifies that on the 18th day of October, 2017, he served a copy of the Brief of Respondent SunTrust Banks, Inc., upon all counsel of record, by depositing a copy thereof in the United States Mail, postage prepaid, and addressed as follows:

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