THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master in Equity for Spartanburg County

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Case No. 2019-CP-42-01210

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Appellate Case No. 2019-002071



Joe Hand Promotions, Inc., Appellant,

v.

Christopher Michael Ruegsegger a/k/a Chris Ruegsegger, Founders Federal Credit Union and Springleaf Financial Services, Defendants,

Of which Founders Federal Credit Union is the Respondent.

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# [INITIAL] REPLY BRIEF

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## REPLY TO RESPONDENT'S ARGUMENTS

### I. THE MASTER IN EQUITY RULED THAT FOUNDERS' JUDGMENT HAS PRIORITY OVER JOHN HAND'S JUDGMENT AFTER RULING THAT JOE HAND WAS ENTITLED TO AN ELEVATED-PRIORITY AS A REWARD FOR ITS SUPERIOR DILIGENCE.

The following comments address Founders' argument, citing *FCX, Inc. v. Long Meadow Farms, Inc.*, and *In re Knight*, that there is a lack of ". . . sufficient justification for granting it a preference in the payment of its judgment . . . ." [R. Brief, pp. 16, 20, 25].

Following the "first hearing" on July 17, 2019, which was the only hearing (of the three hearings held by the Master) wherein the facts of this case were discussed in depth, the Master, in the First Order, granted Joe Hand an elevated priority, unambiguously finding that **Joe Hand "... made all the effort, and sustained all the risk and expense, of bringing the subject real property before the Court, and . . . that the other judgment creditors took no action whatsoever to preserve this asset."** (emphasis added) [R.p. ____]

To be clear, Founders appeared, through its counsel, at the first hearing. (The Brief of Respondent implies that oral arguments were only had at the two subsequent hearings. [R.pp. ____]) At this hearing, Founder's counsel acknowledged that he agreed with the facts presented by Joe Hand's counsel – the enumerated post-judgment actions undertaken by Joe Hand,[1] when no other creditor stepped-up – before arguing the application of the law to those facts, specifically discussing *FCX, Inc. v. Long Meadow Farms, Inc.* at length. [R.p. _____]

Then, following the "third hearing" on November 12, 2019, on Joe Hand's Rule 59(e) motion, the Master, in the Third Order, curiously found (for the first time) that, **". . . the actions**

[1] See page 19 of Brief of Appellant. Add to the list of the post-judgment actions undertaken by Joe Hand that it also redeemed the subject property from the tax sale.

**and efforts of Joe Hand fail to warrant application of the 'Superior Diligence Doctrine' or the 'Creditor Diligence Doctrine' . . . ."** (emphasis added) [R.p. ____] This finding was made without any explanation whatsoever. The Master did not retract or otherwise explain his previous findings (all of which accepted Joe Hand's claims). This flip-flop by the Master is curious because no new facts were presented at either the "second hearing" on August 27, 2019, or the third hearing. Interestingly, neither the Second Order, wherein the Master reversed his initial ruling, nor the Third Order discussed at all (other than the aforesaid conclusory order) Joe Hand's post-judgment actions or the insufficiency thereof to justify an elevated priority.

## II. S.C. CODE SECTION 15-35-810 DOES NOT STATE THAT COMPETING JUDGMENT LIENS ARE GIVEN PRIORITY BASED UPON THE ORDER OF RECORDING.

Contrary to Founders' argument [R. Brief, I.A.], S.C. Code Section 15-35-810 does not clearly and unambiguously state that competing judgment liens are given priority based on the order in which each judgment is recorded. In fact, "competing judgment liens" (or anything similar) is not mentioned in that statute. Founders, through a forced construction of this statute, is trying to expand its operation.

Section 15-35-810[2] involves the perfection and duration of a judgment lien. It does not "mandate" that "priority" (also not mentioned in that statute) is fixed (or absolute, inalterable or the like), as Founders claims is clear.

*In re Fleishman – Wilson*, 72 B.R. 30, 31 (1987), cited in Respondent's Brief, p. 12, as

[2] S.C. Code Ann. §15-35-810, on which Founder's argument regarding priority of competing judgments is now based, was not mentioned at either the first hearing or the second hearing or in either the First Order or the Second Order. It was first mentioned in Founders' Motion. [R.p. ____]

supportive of the dictum in *FCX, Inc. v. Long Meadow Farms, Inc.*,[3] does, in background, involve the issue of the relative priority of judgment liens, but it primarily has to do with the point when a judgment is perfected (first constitutes a lien upon real estate): "when it is entered upon the books of abstracts of judgments and duly indexed," citing Section 15-35-810. Neither of said cases supports Founders' claim that the Master ruled, in the Third Order, that ". . .Section 15-35-810 is the sole determining factor in adjudicating lien priorities . . . ." NOTE: this is a quote from Respondent's Brief, not from the Third Order, wherein "sole determining factor" is not mentioned.

Founders, at two points in Respondent's Brief, pp. 12 and 16, makes the following statements: (a) ". . . the case law is clear that Section 15-35-810 prioritizes competing judgment liens as first-in-time, first-in-right" (citing *FCX* and *Fleishman-Wilson*) and (b) ". . . Section 15-35-810 governs with the statutory rule of first-in-time and first-in-right" (citing the Third Order). Interestingly, neither the opinions in *FCX* and *Fleishman-Wilson* nor the Third Order contains these conclusions.

Contrary to Founders' argument [R. Brief, I.C.], the Master did not rule, in the Third Order, that Section 15-35-810 is ". . .the sole determining factor in adjudicating lien priorities . . . ." The Third Order, which was drafted by Founders' counsel, simply does not say that. The Master did indicate, at the third hearing, that he relied upon §15-35-810 [R.p. _____]; but that's it.

Contrary to Founders' argument [R. Brief, I.C.], "lien competitions" are not governed by Section 15-35-810, which makes no mention whatsoever of "competing judgment liens."

As discussed in Appellant's Brief [I. and II.], there have been more than a few cases, which resulted in either re-prioritizing judgments or refusing to re-prioritize judgments but at the same

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[3] *FCX, Inc.* dictum: ". . . the judgments would constitute a lien upon the real estate in the order of their filing and there would be no question of priority." (This case did not involve judgment liens upon real estate.)

time recognizing that, by the application of equitable principles, re-prioritizing judgments could be appropriate.[4] If the Court can re-prioritize judgments, then obviously Section 15-35-810 cannot be construed to mean that "judgment liens are statutorily fixed as of the date of recording" (i.e. absolute or inalterable), as the Master mistakenly concluded. [R.p. ____]

## III. S.C. CODE SECTION 15-35-810 DOES NOT SUPERCEDE THE EQUITABLE DOCTRINE OF SUPERIOR DILIGENCE.

There is no "well-settled case law," which holds that "the equitable doctrine of superior diligence should not be applied to contradict Section 15-35-810," as claimed in Respondent's Brief [I.C.]. If that were so, the Court could not, under any circumstances, reprioritize a judgment lien on real property. If the Legislature had intended that a purpose of Section 15-35-810 is to negate the doctrine of superior diligence with regard to judgments on real property, it could easily have written the statute to so provide.

Founders cannot point to a single statute or case that holds that the superior diligence doctrine established in *Ex parte Roddey* is not applicable to judgment liens on real property. The case of *FCX, Inc. v. Long Meadow Farms, Inc.,* upon which Founders and the Master rely almost exclusively, did not so hold. It could not, as the case involved personal property, not real property. The cases of *In re Knight* and *Crown Central Petroleum Corp. v. Elmwood Properties* – both involving judgments on real property – cited the superior diligence doctrine favorably. They did

[4] It is quite obvious from the case law in South Carolina that the priorities among competing creditors holding liens on real property, be they holders of multiple judgments or a holder of a judgment vis-à-vis a mortgage or other recorded lien, are not resolved simply by consulting Section 15-35-810. Founders would have the Court believe that this statute constitutes "a clear and unambiguous mandate" [R.pp. ____] (i.e. "the sole determining factor" [R.p. ____]) establishing the priority of the competing judgment liens; but as reflected in the cases cited in Appellant's Brief, the resolution of this issue often involves equitable considerations.

not conclude that Section 15-35-810 effectively negated the superior diligence doctrine with regard to judgment liens on real property. In fact, *Crown Central* affirmed the lower court's decision awarding elevated-priority to the plaintiff.

*In re Knight* had nothing whatsoever to do with the perfection and relative-priority of the identified judgments. Therefore, contrary to Founder's arguments, that case does not stand for any position construing Section 15-35-810 or that the superior diligence doctrine (cited favorably in *Knight*) cannot be utilized under different facts. The evidence in that case demonstrated that the judgment creditor's two, perfected judgment liens attached to the subject real property prior to the transfer of the property, and the subsequent filing for bankruptcy protection, by the judgment-debtor. The fact that the bankruptcy trustee was successful in setting aside, as fraudulent, the debtor's pre-petition transfer of the property did not preserve the property (at least not ahead of the judgment-creditor's interest), as the judgments were, at all relevant times, perfected as liens upon the property (no matter who subsequently owned the property). The trustee's actions, which did not name the judgment-creditor, could have done nothing to alter the judgment-creditor's lien status. Under the circumstances, the judgment-creditor was required to do nothing to preserve its already-perfected liens. As the Court ruled, it did not sleep on its rights.

Founders claims that the case law cited by Joe Hand (cases discussing whether or not to reprioritize competing liens) are distinguishable because they involve lien competitions not governed by Section 15-35-810 [R. Brief, I.C.]. The error in this claim is that said statute does not mention "lien competitions." If a purpose of Section 15-35-810 is to eliminate altogether any possibility of re-prioritizing judgments, as Founders claims, then what was the purpose of these other cases? The clear take-away from these cases is that judgment-lien priority is not absolute or inalterable.

Section 15-35-810 (including its predecessors) is a statute that has been around since 1870 (it even refers to judgments and decrees entered after November 25, 1873). If it is so "clear" that this statute supersedes the doctrine of superior diligence, why then didn't the Court in *Roddey* (a 1934 case) or the Court in *Crown Central* (a 1964 case) reach that conclusion?

Interestingly, *FCX* (at 207) addressed specifically whether or not Section 15-35-810 invalidated the common law rule that a vendee's equitable title is not subject to the lien of a judgment. That is the only mention of this statute in *FCX*. Obviously, if *FCX* stands for the proposition that "Section 15-35-810 governs with the statutory rule of first-in-time, first-in-right," as Founders claims, you would expect to find something in the case which addresses this statute directly to establish a precedent.

## IV. JOE HAND'S ACTIONS WERE THE ONLY REASON THAT THE SUBJECT REAL PROPERTY COULD BE BROUGHT INTO COURT AND HAS REMAINED BEFORE THE COURT.

A. While the institution of supplementary proceedings by Joe Hand (especially when no other creditor made any effort) is an important action taken by Joe Hand, the real effort made by it to preserve the subject property was its successful objection to the claim by Mr. Ruegsegger, in Bankruptcy Court, that his homestead exemption effectively eliminated the three judgment liens on the subject property. The exemption amounted to $60,000.00 (slightly more or less) and greatly exceeded the current value of the property. If the debtor's homestead exemption claim were sustained, there would have been be nothing of value left for the judgment creditors to pursue.

Since Mr. Ruegsegger failed to sustain his homestead exemption claim (to which only Joe Hand objected), even if he had subsequently moved to avoid the liens, Joe Hand's successful objection would, logically, have placed all the judgment creditors in a much stronger position to

prevail.

Somehow, Founders believes that the reason the asset was preserved was not due to Joe Hand's successful objection but was solely because Mr. Ruegsegger did not file a motion to avoid the liens under his "wildcard" exemption. (According to Founders' counsel, "We're here today, honestly, Your Honor, because the bankruptcy attorney failed to file a Motion to Avoid the Judicial Liens." [R.p. ____]) In other words, Founders' position is that, under any realistic scenario, the asset was not going to be preserved. It was resigned that it was a lost cause. [R.p. ____] Founder's counsel stated that, ". . . it's not worth the time, money and effort . . . we were going to lose . . . ." [R.p. ____] For that reason, it consciously decided to continue to do nothing. In other words, it didn't just slumber on its rights, it awakened long enough to consider its options and then rolled-over and went back to sleep.

The bottom line is that Mr. Ruegsegger took no action seeking to avoid the judgment liens (other than his homestead exemption claim), and there is no reason to reanalyze, or cast blame on, that decision. Even if Mr. Ruegsegger's circumstances entitled him to claim successfully the "wildcard" exemption, of which we have little information,[5] and even if he had moved to avoid liens under the "wildcard" exemption, there is no indication or presumption that he would have prevailed. In any event, Mr. Ruegsegger did not move to avoid the liens, so the point is moot. Whatever the reason, Founder's left it to Joe Hand to go to the effort and expense to try to preserve the asset on its own; and after Joe Hand was successful in doing so, Founders now wants to deny Joe Hand any benefit for its vigilant effort.

By acting aggressively, Joe Hand saved the property. It is for this reason that the Master found, in the First Order, that, **". . . it would be unjust that the one judgment-creditor, who**

5 See Argument V., *supra*.

**sustained all the risk and expense of preserving and bringing the subject real property to this court, should have to take a junior-priority position to other judgment-creditors, who have done nothing to collect their debt against this property."** (emphasis added) [R.p. ____]

B. Just as important as Joe Hand's successful objection in the bankruptcy case, if not more so, is the fact that Joe Hand volunteered to redeem the subject property from the Spartanburg County Tax Sale (when Founders refused to do so). [R.p. ____] Not only had Joe Hand taken diligent steps to avoid losing its judgment lien in Mr. Ruegsegger's bankruptcy case, it – even after obtaining an adverse ruling in this case – continued its fight to preserve the asset in the hope that its judgment could be paid, even in part, from the sale of the property. No other creditor did this.

The property had been sold at the December 2018 tax sale, and the one-year redemption period was expiring in early-December 2019. If not timely redeemed, the property, which Joe Hand had brought into Court, would be lost for good. In order to continue to preserve the property, Joe Hand advanced the amount of $2,871.11 to redeem the property from the tax sale.

Even after obtaining the Third Order, which confirmed the realignment of the lien priorities in accordance with Founders' position, Founders still did nothing to preserve the asset. It refused to step-up and redeem the property from the tax sale. Founders, it seems, was quite willing to let the property be lost for good.

## V. FOUNDERS' ARGUMENT THAT THE "WILDCARD" EXEMPTION WOULD LIKELY HAVE STRIPPED THE JUDGMENT LIENS FROM THE SUBJECT PROPERTY IS MISINFORMED.

Founders claims that, "It is likely a motion to avoid liens under the "wildcard" exemption would have been very challenging for the judgment creditors," citing Section 522(f)(2)(A). [R. Brief, p. 22] It then goes on to indicate that it was likely that, just by the debtor filing a motion

to avoid the liens, the judgment liens would be discharged or avoided [p. 23].[6] That's not the way a motion to avoid lien would have worked in this case.

*In re Ware*, 274 B.R. 206, 209 (2001), held that South Carolina follows the equity analysis approach in interpreting Section 522(f)(2)(A) (rather than its literal language). According to this approach, the judgment liens, according to their priority, could remain unaffected or be avoided only after a calculation to determine the value of the debtor's equity, if any, in the exempt property.[7]

Even if Mr. Ruegsegger had filed a motion to avoid liens, and assuming that he prevailed on his motion, the debtor's net equity in the property would still be encumbered by one or more of the judgments. In light of Joe Hand's involvement in negating Mr. Ruegsegger's homestead exemption, it would be possible (if not expected) that Joe Hand's judgment would have been the one (or the first one) selected to remain as a lien upon the debtor's property.

Contrary to Founders' comment that, "it is incorrect to say that a sustained objection to a

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6 Founders, in its Motion [R.p. _____] stated, "If the judgment debtor had filed a motion in the Bankruptcy Court to avoid the judicial liens at issue, it is very likely that he could have done so, even with just the "wildcard" exemption. This is why Founders made the decision not to object to the judgment debtor's homestead exemption."

7 In Mr. Ruegsegger's bankruptcy, the calculation would start with the property value, which was $37,300.00 (according to the Debtor's Schedules), from which the "wildcard" exemption is deducted (there being no mortgage). That would be $37,300.00 – less, say, $6,000.00 (the statutory maximum) – or a net equity of, say, $31,300.00. Then, by relative-priority, the judgments would be applied against said net equity. Depending upon the order in which the subject judgments were applied, as few as one or as many as all three would be able to escape being avoided. Interestingly, according to the Debtor's Schedule C, the Debtor had elected to apply his "wildcard" exemption, under Section 15-41-30(A)(7), to the following properties:

| | |
|---|---|
| Taurus G2 Compact | $ 200.00 |
| Cash | $ 20.00 |
| Checking: Bank of America | $ 2,800.00 |
| Savings: Bank of America | $ 16.15 |

Therefore, his unused exemption was, at most, less than $3,000.00, and the equity (after deducting the exemption) would be $34,300.00 (more or less).

debtor's homestead exemption prevented the judgment liens from being avoided," [R. Brief, p. 21], Joe Hand's vigilant actions did, in fact (in result), prevent the judgment liens from being avoided.

## VI. ALL JUDGMENT LIENS ATTACHED SIMULTANEOUSLY TO THE ONE-HALF INTEREST IN THE SUBJECT PROPERTY ACQUIRED BY MR. RUEGSEGGER SUBSEQUENT TO THE FILING OF THE THREE JUDGMENTS.

Joe Hand acknowledges that this issue was first raised by it in its Motion to Reconsider. [R.p. ___] It had no reason to introduce this issue at the first hearing on July 17, 2019, wherein it successfully argued that its (full) judgment debt was entitled to be elevated to first-lien position. What motivation would Joe Hand have to argue, at that point, that it was entitled to a blended-priority with the other judgments?

The second hearing was based upon Founders' Motion to Reconsider, and the arguments at that hearing were limited to the arguments raised by that Motion.

The third hearing involved a completely different perspective of the case. Joe Hand had moved the Master to reconsider his ruling relegating its judgment to a third-priority position. It was at that point that it made sense that this issue should be raised by Joe Hand, in its Motion [R.p. ____] as well as in oral argument. [R.p. _____]

Notwithstanding the ever-changing posture of this case, this simultaneous attachment of the judgments is a matter of fact which should be addressed – only if Joe Hand's arguments are not sustained and the appealed Order is not reversed.

## VII. A COURT OF EQUITY SHOULD REWARD A JUDGMENT-CREDITOR, WHICH HAS EXERCISED SUPERIOR DUE DILIGENCE TO PRESERVE AN ASSET, OVER ANOTHER JUDGMENT-CREDITOR, WHICH HAS DONE NOTHING TO TRY TO COLLECT ITS DEBT AGAINST SUCH ASSET BUT INSTEAD ANNOUNCED ITS INTENTION TO TAKE NO STEPS TO PROTECT ITS INTEREST WITH REGARD TO SUCH ASSET.

Founders did not directly address this argument [A. Brief, V.] in Respondent's Brief.

The issue is not whether or not Founders perfected its judgment. Its judgment was perfected by its filing (and its being indexed). The issue is whether Founders, which has indicated that it has no interest in collecting its judgment against the subject property, should be allowed, in equity, to hinder another judgment creditor, which has been impressively vigilant in preserving the property, from successfully enforcing its judgment against the property.

As Joe Hand's counsel stated at the third hearing, "We are in equity here. They are not trying to get equity done. They are not trying to protect their interest in any kind of asset. . . they are not interested in protecting their interest by redeeming the property from the tax sale. They don't really even care about going to sale on this property." [R.p. ____] Founders' counsel responded that, "We never intimated that we had any desire to sell this property." [R.p. ____]

This issue has to do with "doing equity." Founders is guilty of not "doing equity."

## VIII. DOES THE CONCEPT OF "DISCOVERY" MEAN THAT THE ASSET WAS UNKNOWN TO ANY JUDGMENT CREDITOR BEFORE IT WAS IDENTIFIED THROUGH THE DILIGENT EFFORTS OF ONE JUDGMENT-CREDITOR OR DOES IT MEAN SIMPLY TO REACH PROPERTY NOT ACCESSIBLE TO EXECUTION?

Founders argues that "Joe Hand did not discover an unknown asset" [R.Brief, p. 17], and the Second and Third Orders [R.pp. ____] ordered "that the Subject Property is not an 'undiscovered asset.'" This matter was addressed at length in the Brief of Appellant (pp. 15-17).

Founder's also argues, in effect, that everyone has "constructive knowledge" of all things having to do with the title and other circumstances involving real estate, stating ". . . a debtor's ownership of . . . real estate where ownership is on public record for the world to see." [R. Brief, p. 14] Founders' argument is that you can't discover something that everyone already knows, including by way of imputed or constructive knowledge. That's illogical. Discovery involves identifying and learning, which requires the acquiring of actual knowledge. There is no evidence whatsoever that Founders had actual knowledge of the material facts actually found, and reacted to, by Joe Hand.

It might be assumed that Founders actually knew about Mr. Ruegsegger's residence: the subject property; but even this assumption may be a stretch when Founders did not file an execution or make any effort whatsoever to try to enforce its judgment against the subject (or any other) property. Even if it had investigated the subject property between 2014 and 2016, Founders (or anyone else) would have concluded that this asset had no value – for the following reasons:

a. Mr. Ruegsegger (the sole debtor on the three judgments) only owned an undivided one-half interest [R.p. ____];

b. The property was Mr. Ruegsegger's residence, and he therefore would have an easily-enforceable, homestead exemption (amounting to around $60,000.00) [R.p. ____]; and

c. The property was also subject to a large mortgage [R.p. _____].

There is no evidence that Founders independently discovered that:

a. In 2016, the subject property was severely damaged by fire [R.p. _____];

b. The property was abandoned – potentially eliminating Mr. Ruegsegger's homestead exemption [R.p. _____];

c. The large mortgage loan was paid in full and satisfied [R.p. _____]; and

d. In 2017, Mr. Ruegsegger and his wife divorced, and she deeded to him her undivided one-half interest in this subject property [R.p. ____].

These matters of fact, which resulted in a significant increase in the net value of the property to lien-creditors, were discovered by Joe Hand. Sure, anyone who felt inclined to investigate the circumstances of the judgment-debtor could probably have "discovered" these facts, which greatly-enhanced the value of the property (to the lien-creditors). Joe Hand did just that. By being vigilant, Joe Hand discovered (acquired actual knowledge of) a valuable asset, which may have been previously known (to all interested parties) to have no net value (no equity). While others may be charged with having "constructive knowledge" of these facts, there is no evidence that anyone other than Joe Hand had actual knowledge of these facts.

## CONCLUSION

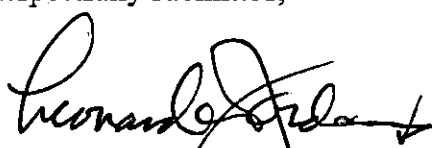
Joe Hand went well beyond the actions which a typical creditor would do to collect its debt. It (alone) exercised superior diligence. According to the First Order, the Master found that Joe Hand, **". . . presented a compelling case that it made all the effort, and sustained all the risk and expense, of bringing the subject real property before the Court, and it appears that the other judgment-creditors took no action whatsoever to preserve this asset."** (emphasis added) [R.p. ____] In light of Joe Hand's redemption of the property from the tax sale, this finding can now be expanded to include keeping the subject real property before the Court.

There can be no argument denying that, but for Joe Hand's superior diligence, the subject property would not be before the Court.

The Second Order and the Third Order, insofar as they deal with the priority of the respective judgments, should be reversed; and the Master's Order and Judgment of Foreclosure

and Sale should be declared to be the final Order of the Court.

Respectfully submitted,



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May 28, 2020

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In The Court of Appeals

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Gordon G. Cooper, Master in Equity for Spartanburg County

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CERTIFICATE OF MAILING

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I, Kelly McVey, of Jordan Law Firm, attorney for the Appellant, Joe Hand Promotions, Inc., hereby certify that I have this 28th day of May, 2020, served a copy of the [Initial] Reply Brief of Appellant upon Suzanne G. Grigg, Esquire, attorney for the Respondent, Founders Federal Credit Union, by mailing a copy thereof, postage prepaid, directed to the address indicated below:

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May 28, 2020



Honorable Jenny Kitchings
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RE: Joe Hand Promotions, Inc. vs. Christopher Michael Ruegsegger
Appellate Case No.: 2019-002071

Dear Ms. Kitchings:

Enclosed for filing is the [Initial] Reply Brief.

If you have any questions, please do not hesitate to contact me.

With kindest regards, I am

Sincerely yours,

Leonard R. Jordan, Jr.

LRJjr/km
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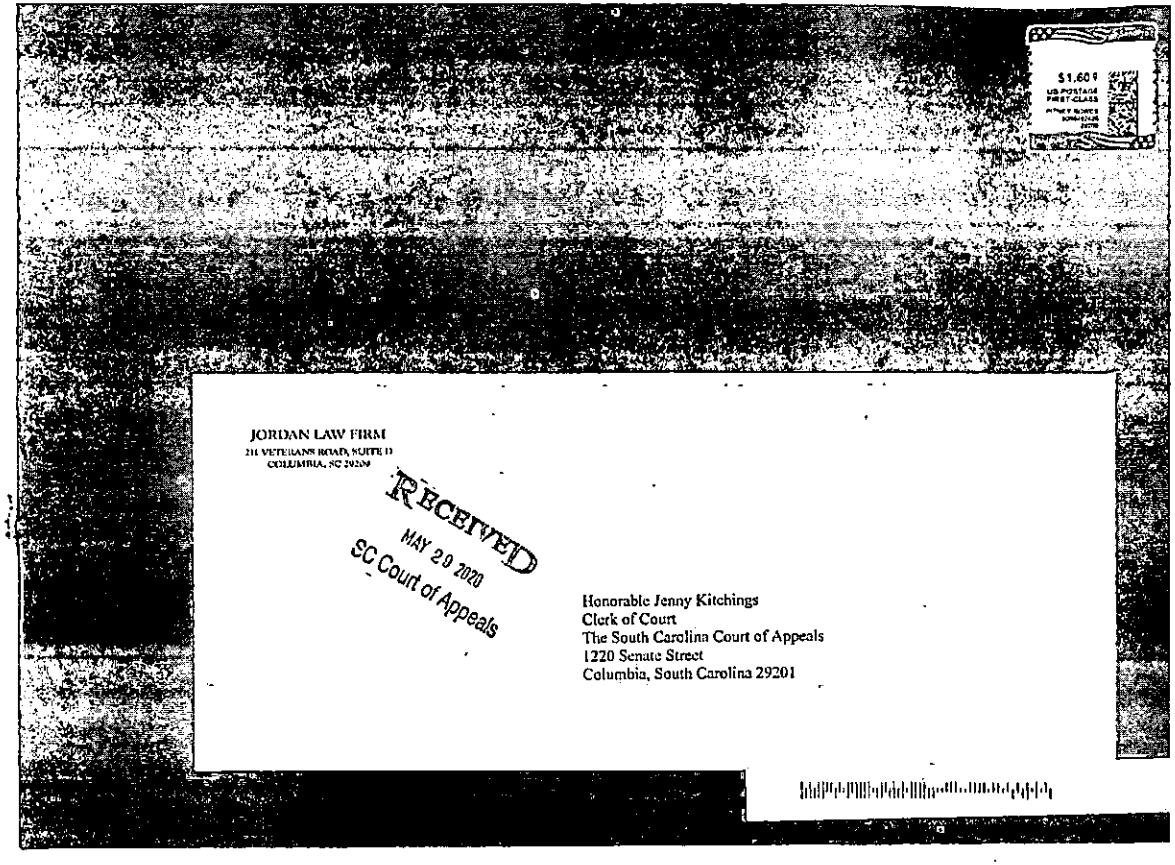
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