THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough

Case No. 2018-CP-10-00749

Appellate Case No. 2019-002044

CAHOC 8, LLC.....Respondent,

v.

King and Calhoun, LLC a/k/a King and Calhoun, LLC a/k/a K&C, LLC, Curtis Corp., and Werner Real Estate Holdings, LLC., ...Appellants.

APELLANTS' INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATEMENT OF ISSUES ON APPEAL

I. THE MASTER IN EQUITY ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENTS AFTER DENYING ALL MOTIONS FOR SUMMARY JUDGMENT WHERE HE ADMITTED NOT BEING CLEAR ON THE FACTS OR THE LAW OF THE CASE AND WHERE THE MASTER IN EQUITY CONFIRMED HE WAS DENYING ALL MOTIONS FOR SUMMARY JUDGMENT, AFFIRMED HE WOULD NOT BE RULING ON ANY ISSUES, AND THERE WERE DISPUTES TO BE DECIDED FURTHER

II. THE MASTER IN EQUITY ERRED IN GRANTING SUMMARY JUDGMENT BY WAY OF A FORM ORDER RELYING SOLELY UPON THE ARGUMENTS OF COUNSEL WHICH DOES NOT CONSTUTIE EVIDENCE AND THERE WAS NOTHING IN THE RECORD REGARDING THIS ISSUE UPON WHICH THE COURT COULD BASE SUCH AN ORDER BESIDES THE ARGUMENTS OF COUNSEL

STATEMENT OF THE CASE

This matter arises out of a Lease dispute for property located at the corner of King and Calhoun Streets in downtown Charleston (Lease). King & Calhoun, LLC, is the owner of the property and the Landlord under the terms of the Lease. *Id.* King & Calhoun, LLC, negotiated the Lease with Cahoc 8, LLC, which operates the Carolina Ale House at the property. *Id.*

On February 12, 2018, Cahoc 8, LLC, filed its Complaint alleging causes of action for breach of contract, violation of the South Carolina Unfair Trade Practices Act, and tortious interference with a contract. (Complaint, 2/12/2018) The original Complaint named King and Calhoun, LLC, and Thalhimer Charleston LLC as Defendants. *Id.* Thalhimer Charleston, LLC, was named as the Appellant's property management company. *Id.*

On March 29, 2019, Cahoc 8, LLC, filed its Amended Complaint. (Amended Complaint) In its Amended Complaint, Cahoc 8, LLC, added Curtis Corporation and Werner Real Estate Holdings, LLC, as an additional Defendant. *Id.* An additional cause of

action to pierce the corporate veil, for a joint venture, and alter ego/amalgamation claim was asserted as to King & Calhoun, LLC, Curtis Corporation, and Werner Holdings. *Id.* No additional causes of action were asserted. *Id.*

On April 26, 2018, the Defendants filed their Answer and Counterclaim. (Answer and Counterclaim 4/26/2018). In the Answer and Counterclaim, the Defendants set forth affirmative defenses of voluntary payment, waiver and estoppel, and the applicable statute of limitations. *Id.* As for the Counterclaim, King & Calhoun, LLC, alleged breach of contract and negligence arising out of the terms of the Lease and Cahoc's carelessness in operating its business at the premises. *Id.*

On May 9, 2018, Cahoc 8 filed its "Answer" to the Counterclaim. (Answer, May 9, 2018).

The parties entered into a Scheduling Order on July 6, 2018 (Consent Scheduling and Discovery Order).

Discovery commenced.

On November 30, 2019, the parties unsuccessfully mediated the case. (Proof of ADR or Exemption, Jan. 14, 2019)

On March 8, 2019, the parties stipulated to the dismissal of Thalhimer Charleston, LLC, only. (Stipulation of Dismissal, 3/8/2019)

On March 14, 2019, the parties agreed to refer the case to the Honorable Mikell R. Scarborough, Master in Equity for Charleston County. (Consent Order of Reference, 3/14, 2019).

Judge Scarborough held a Status Conference on June 10, 2019, and entered a Scheduling Order setting forth December 6, 2019, as the date of pretrial motions and a trial to be held December 16 to 18, 2019. (Scheduling Order, June 13, 2019).

On November 15, 2019, the Plaintiff filed its Motion to Dismiss and/or Motion for Summary Judgment as to the Defendant's Negligence Counterclaim only. (Motion, Nov. 15, 2019). That motion was based ONLY upon the negligence cause of action and was based upon the economic loss rule. *Id.* There was no motion or grounds for striking or excluding King & Calhoun, LLC's request for damages for build out costs which had become an element of King & Calhoun, LLC's damages in the case. *Id.*

On November 22, 2019, King & Calhoun, Curtis Corporation, and Werner Real Estate Holdings, LLC, filed its Motion for Summary Judgment. (Motion, Nov. 22, 2019). King & Calhoun, LLC, based its motion upon the record showing that Cahoc 8, LLC, had occupied an additional five thousand (5,000) square feet of space for which they were obligated to pay additional rent, taxes, insurance and common area maintenance ("CAM") charges. *Id.* King & Calhoun, LLC, also moved for summary judgment on the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, cause of action due to their being no impact on the public interest arising form a private contractual matter. *Id.*

On November 25, 2019, the parties filed Joint Stipulation agreeing that the veil pierce, join venture, alter ego/amalgamation cause of action was withdrawn as to King & Calhoun, LLC, Werner Real Estate Holdings, LLC, and Curtis Corporation. (Join Stipulation, 11/25/19).

Also on November 25, 2019, Cahoc 8, LLC filed a Second Motion for Summary Judgment. (Second Motion for Summary Judgment, 11/25/2019). That motion related to rent increases due to charges under the Lease including additional build out charges which the Cahoc 8, LLC claimed were barred by the applicable statute of limitations, remeasurement of additional occupied space being untimely, issues as to damage to the parking lot and roof grease and continued prosecution of claims under the Unfair Trade Practices Act. *Id.*

The Defendants submitted their Memorandum in Support of their Motions on December 5, 2019, along with Exhibits (Defendants' Memorandum 12/5/2019). The Defendants claimed that pursuant to Article 17 of the Lease at issue, Cahoc 8, LLC, was to have paid for the additional five thousand ($5,000.00) square feet of occupied space. *Id.* All other issues in the case would have been moot had the Court found that this additional space had been occupied upon a final survey. *Id.*

On December 6, 2019, Judge Scarborough heard arguments for the cross motions for summary judgment filed by Appellant and Respondent. (Transcript, 12/6/2019)

On December 10, 2019, Judge Scarborough issued a Form Four Order as ordering the following

> Parties appeared before this court on cross Motions for Summary Judgment and pre-trial. Defendant's Motion for Summary Judgment is respectfully DENIED. Plaintiff's Motion for Summary Judge is respectfully DENIED on all issues but is GRANTED as to Breach of Contract to the extent if excludes Landlord's claim for Build Out Costs for the Change Orders in the amount of $100,503.

(Form Order, 12/10/2019). There are no further findings in the Form Order. *Id.*

This Appeal followed. (Notice of Appeal, December 12, 2019)

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56 (c) SCRCP, *Lanham v. Blue Cross & Blue Shield of SC, Inc.*, 349 S.C. 356, 563 S.E.2d 331. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law and should not be granted even when there is no dispute as to the evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. *Holmes v. East Cooper Community Hospital, Inc.* 408 S.C. 138, 758 S.E.2d 483 (2014). A trial court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party. *Id.* (citing *Lanham, id.* at 349 S.C. 356; 563 S.E.2d 331; *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976)). In cases applying the preponderance of evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 673 S.E.2d 801 (2009).

STATEMENT OF FACTS

This matter arises out of a Lease dispute for the property located at the corner of King and Calhoun Streets in downtown Charleston (Lease). King & Calhoun, LLC, is the owner of the property and the Landlord under the terms of the Lease. *Id.* King & Calhoun, LLC, negotiated the Lease with Cahoc 8, LLC, which operates the Carolina Ale House at the property. *Id.* On November 12, 2013, the parties entered the Lease for a fifteen (15) year term. *Id*; (Complaint; Answer and Counterclaim). King & Calhoun, LLC, continued to claim that there are no genuine issues of material fact regarding the Plaintiff's occupancy

of additional square footage within the Leased Premises or that the Plaintiff is obligated to pay Common Area Expenses, Taxes, and Insurance based upon pro rata share of occupied square footage, pursuant to Article 17 of the Lease, as hereinafter defined. (Lease, Article 17).

On November 21, 2013, Cahoc 8, LLC and King & Calhoun, LLC executed the Lease agreement for a fifteen (15) year lease term of the Leased Premises (the "Lease"). The Lease was attached to the Plaintiff's Complaint as Exhibit A. (Complaint). The terms of the Lease have never been in dispute. During the Tenant's upfit, the Tenant occupied nearly 5,000 additional square feet of space beyond the original 11,644 square feet of space contracted for the Tenant's occupancy within the building.

Article 1(I) of the Lease states as follows

> For purposes of this Lease Agreement, the gross leasable square footage of the Leased Premises shall be deemed to be approximately 11,644 square feet, in space located on the first (1st), second (2nd) and third (3rd) floors, such premises being identified on the plans attached hereto as Exhibit A, and being a part of the Building. Upon completion of **all tenant improvements for the building**, a final survey will be commissioned by the Landlord to determine the final square footage of the Leased Premises.

(Lease)(emphasis added)

This survey was commissioned in 2017 and it was discovered that the Plaintiff was occupying over 17,000 square feet of space after all tenant improvements for the building were completed. (Trent Watts Deposition). After the survey, King & Calhoun, LLC, charged Cahoc 8, LLC, additional rents as allowed under the terms of the Lease. (Lease)

At issue, and giving rise to this matter, were additional rent charges that King & Calhoun, LLC, advised Cahoc 8, LLC that was obligated to pay due to a final tenant survey to be conducted pursuant to the Lease once all of the upfit by the tenants was completed.

(Lease) "Per the terms of the Lease Agreement, upon completion of **all** tenant improvements for the building, a final survey would be commissioned by the Landlord to determine the final square footage of the Leased Premises." (Lease, Amended Complaint)(emphasis added). The square footage of the Leased Premises is used to calculate Tenant's pro rata share of the common expenses, taxes, and insurance." (Lease, Amended Complaint) Cahoc 8, LLC, expanded into the first floor atrium, stairwell along Calhoun Street, and the third floor of the building and also required the installation of an additional elevator in the building for its exclusive use, none of which were included in the initial 11,644 square feet originally contracted for by the Tenant. The Landlord measured the new space occupied upon the Tenant's expansion and found the square footage occupied by the Tenant increased from 11,644 square feet to 17,346 square feet. (Defendants' Answer to Plaintiff's Amended Complaint and Counterclaim, ¶ 52). Testimony in the case prior to the motions hearing bore this out, for example:

The service elevator is reserved for the sole use of the Plaintiff. According to the former property manager, Jessica King, Cahoc 8, LLC, as exclusive use of two elevators as well.

> **Q. We're going to talk about the elevators for a minute. How many elevators are in the building at 145 Calhoun?**
> A. Two.
> **Q. And what are the differences in those two elevators?**
> A. One is at the front of Carolina Ale House used for the public, and the other is in the back of Caroline Ale House, used for the employees, to my understanding, that services.

(Deposition of Jessica King)

In addition to the elevator space, the Plaintiff occupied additional space in the first-floor atrium, second, and third floor including the front and back stairwell.

As stated by Trent Watts, who is effectively King & Calhoun LLC's boots on the ground representative:

> **Q. So going back - - we'll visit right there in a second. I'm following you. I will be there too. Let's go back to Exhibit 167 on 25551. You say, I'm trying to find out what the CAH square foot leased space is, correct?**
> A. Yes.
> **Q. And then your bottom paragraph says you want - - what are you looking for in the last paragraph?**
> A. And if you have it, the total square foot for the first floor atrium, second, third floor including front and back stairwell and first floor Carolina Ale House back entrance where the elevator is. I'm asking for the total occupied square footage of Carolina Ale House.
> **Q. But you say "and," correct?**
> A. Yes.
> **Q. And then the first one you're asking for their leased space, correct?**
> A. What their stated lease space is, yes.
> **Q. Let me ask this. How many items are you asking Tony for?**
> A. Square footage -- one item, technically. Square footage of Carolina Ale House's current space usage.

(Deposition of Trent Watts)

Pursuant to the Lease, the King & Calhoun, LLC, would perform a final survey after the upfit was completed in order to verify the square footage occupied by the Tenants after all the upfit work was completed in order to determine complete square footages for lease charge determination, including base rent, taxes, insurance, and any common area maintenance ("CAM") charges. (Lease)

> **Q. What do you have highlighted on your copy of the lease in front of you for this page?**
> A. A final survey will be commissioned by the landlord to determine the final square footage of the leased premises.

(Deposition of Trent Watts) King & Calhoun, LLC, completed the survey after all of the building was built out by the tenants.

After the re-survey was performed, it became apparent that the Cahoc 8, LLC, was occupying over 17,000 square feet of space, when they had initially contracted for 11,644 square feet of space .

> **Q. And what do you think was in that CAM that you assert you were paying?**
> A. A large portion of it - - they were paying CAM on 11,644 square foot. They were utilizing over 17,000 square foot. CAM gets charged per square foot.

(Deposition of Trent Watts)

Cahoc 8, LLC, contends that this survey was performed so that the Landlord could "receive more money from us and offset their expenses." (Deposition of Christopher Patrick Sullivan, p. 92-93)

> **Q. All right. Just making sure. And you knew at the time of the lease - - when I say you, I mean CAHOC 8 knew there was going to be a survey of the premises at some point, correct?**
> A. I knew that there would be a remeasurement upon completion of tenant upfit.
> **Q. And that was the remeasurement that was done in 2017, correct?**
> A. Well, no. I don't believe that that remeasurement was ever done.
> **Q. All right. So - -**
> A. I believe that the remeasurement in 2017 was for a completely different reason.
> **Q. Okay. What different reason was that, or is that the reason you talked about? So that the landlord could charge CAHOC more money?**
> A. Yeah. So they could receive more money from us and offset their expenses. They didn't like how they negotiated the lease.
> **Q. On page 199 of the lease, under Item H, is that the survey you're talking about? The last sentence: Upon completion of all tenant improvements for the building, a final survey will be commissioned by the landlord to determine the final square footage of the lease premises. Is that the survey you were just referencing?**
> A. That's correct. That was never completed.

Id.

At the hearing of the Motions, arguments were heard for almost an hour and a half regarding square footage, occupied space, notices to the Cahoc 8, LLC, additional charges by the landlord, where notices were to be provided, and which party, if any, may have breached the Lease first, and which party would be entitled to attorneys' fees. (Transcript, p. 1, p. 67)

At the end of the arguments, Judge Scarborough stated, "So, based upon that, I'm not granting any motions for summary judgment. I think we are going to have to try the case." (Transcript, p. 55) Judge Scarborough advised that the case would ultimately be decided upon the contract, the Lease. *Id.* He also left the negligence and Unfair Trade Practices Act causes of action because he was "not clear at this point in time on the facts of [sic] the law" as it is his "firm policy not to grant summary judgment if [he's] not clear on the facts in the law." *Id* at 56.

Judge Scarborough went on to say

> It's my firm policy not to grant summary judgment if I'm not clear on the facts in the law. It's also my firm policy not to make a decision unless I'm clear on the facts of the law at the conclusion of the case, whish is when I like to render my rulings....
>
> So I'm trying to figure out how it was that the landlord put the tenant on – how the landlord has held the tenant accountable for a 50 percent increase in rent –okay – and effective CAM charges. That's what I'm focusing my inquiry on because I think that's really what this case is about. It think it's a breach of contract, breach of lease.

Id. at 56

At the hearing, counsel for Cahoc 8, LLC, sough clarification about the very issue ruled upon by Judge Scarborough's Form Order. *Id.* at 62-63

Asking for clarification, King & Calhoun LLC's counsel asked the following question:

Mr. O'Kelley:	It is my understanding that Your Honor denied all motions in this case.
The Court:	I did because I want to be clear. Is that in dispute? That's my question.

Id. at 63

Judge Scarborough went on to say "Okay. All right. Let me do this. I'm not go to rule on it now. I'll withhold that. You-all let me know at the time of trial. Okay?" *Id.*

Then, ultimately, the Court struck that claim for damages by way of a Form Order having already ruled that the matter was one for trial. The Court then ruled upon that very matter which it stated it would reserve for further discussion during trial.

ARGUMENT

I. THE MASTER IN EQUITY ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENTS AFTER DENYING ALL MOTIONS FOR SUMMARY JUDGMENT WHERE HE ADMITTED NOT BEING CLEAR ON THE FACTS OR THE LAW OF THE CASE AND WHERE THE MASTER IN EQUITY CONFIRMED HE WAS DENYING ALL MOTIONS FOR SUMMARY JUDGMENT, AFFIRMED HE WOULD NOT BE RULING ON ANY ISSUES, AND THERE WERE DISPUTES TO BE DECIDED FURTHER

The Master in equity erred in granting summary judgment after denying all motions where he admitted not being clear on the facts or the law of the case and where he confirmed he would be denying all motions where there were disputes to be decided further at trial. Having denied the motions for summary judgment, Judge Scarborough should have set all issues for the trial of the case. When determining if any triable issue of fact exists, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002).

Where cross motions for summary judgment are filed, the parties concede the issue before the court should be decided as a matter of law. *Wiegand v. U.S. Auto Ass'n*, 391 S.C. 159, 705 S.E.2d 432 (2011) Here, the Master in Equity chose to eviscerate a potential element of King & Calhoun, LLC's damages where he had conceded he did not have a full understanding of the facts or law of the case. (Transcript, p. 56) Even after an hour and half of arguments and review of the Lease, deposition transcripts, and further evidence, he stated that he would not be able to make any ruling, yet he eliminated the damages for build out costs in the amount of $100,503.00. (Form Order) By his own conclusion of not granting summary judgment due to the applicable standards of review, he then mistakenly tossed an element of damages where such an element was a question of fact to be determined at trial as the Master in Equity noted at the hearing. (Transcript 55-56). He based this ruling solely on the assertion from opposing counsel at the end of the hearing that the matters should be stricken from the damages claim. *Id.* He did not review the record or the matters presented to him, but, instead ignored the standard of "light most favorable to the non-moving party" and made a factual ruling gutting a large element of damages. He took this on himself and not because the evidence bore it out. Instead, he agreed with the moving party despite there being questions in the Master in Equity's own mind as to the law and facts as he stated several times during the hearing.

There were and are issues of fact related to these issues of damages, as there are to the entire case. The Master in Equity failed to apply all reasonable inferences to King & Calhoun, LLC, as required. *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002); *Keith v. River Consulting, Inc.*, 365 S.C. 500; 618 S.E.2d 302 (Ct. App. 2005) The Master in Equity held the hearing on December 6, 2019, as to the cross motions for summary

judgment and to see if the parties could get the matter "focused for trial." (Transcript, p. 4). As in *Keith v. River Consulting, id.*, it was error for the Master in Equity to rule upon an element of damages pursuant to the Lease at issue where issues of contract interpretation and factual issues as to the timing of the claims for build out where to be determined at trial as the Master in Equity had ruled earlier in the hearing. (Transcript, p. 55). Precluding the issue for trial ignored the standard to be applied and the Master's own determination that there were issues of law and fact yet to be determined.

II. THE MASTER IN EQUITY ERRED IN GRANTING SUMMARY JUDGMENT BY WAY OF A FORM ORDER RELYING SOLELY UPON THE ARGUMENTS OF COUNSEL WHICH DOES NOT CONSTUTIE EVIDENCE AND THERE WAS NOTHING IN THE RECORD REGARDING THIS ISSUE UPON WHICH THE COURT COULD BASE SUCH AN ORDER BESIDES THE ARGUMENTS OF COUNSEL

The Master in Equity erred in striking a portion of the damages by Form Order based only upon arguments of counsel. The only material before Judge Scarborough regarding the alleged build out claims were from the arguments of counsel submitted during the hearing. (Transcript pp. 56-67). This material is simply arguments of counsel. Argument is not evidence. *Bowers v. Bowers,* 304 S.C. 65, 65, 403 S.E.2d 127, 129 (Ct. App. 1991); *see also McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473 (1933) ("This [Supreme] court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.") There was not substantiation in the record before Judge Scarborough, who had previously denied all motions, then advised he was striking the matter and issued a simple Form Order to eviscerate an element of damages. Whether or not those damages were time barred was a question of fact to be determined at trial and such a determination should have been accompanied by a recitation of facts as such issues, including issues of estoppel of statutes of limitation, are generally questions

of fact. *Black v. Lexington School Distr. No. 2*, 327 S.C. 55 , 488 S.E.2d 327 (1997); *Doe v. Howe,* 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005). The Master in Equity effectively barred King & Calhoun, LLC, from putting on any evidence regarding the issue after it had already denied all motions. In a small comment based upon arguments of counsel, the court struck the damages claim by way of a few words in a Form Order, which is in error.

CONCLUSION

The Master in Equity improperly granted summary judgment as to breach of contract to the extent it excludes Landlord's claims for Build out Costs for the Change Orders in the amount of $100,503.00 when the motion was denied and then improperly struck by the Court at the time of the hearing on December 6, 2019, and then ruled upon in Form Order issued four days later. For these reasons, the decision of the Master in Equity should be REVERSED.

Respectfully submitted

Mt. Pleasant, South Carolina
June 25, 2020

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough

Case No. 2018-CP-10-00749

Appellate Case No. 2019-002044

CAHOC 8, LLC.....Respondent,

v.

King and Calhoun, LLC a/k/a King and Calhoun, LLC a/k/a K&C, LLC, Curtis Corp., and Werner Real Estate Holdings, LLC., ...Appellants.

PROOF OF SERVICE

I certify that I have served the Appellants' Initial Brief and Designation of Matter by depositing a copy of same on June 25, 2020, via South Carolina Court of Appeals E Filing address ctappfilings@sccourts.org and via Electronic Mail delivery addressed to Justin O'Toole Lucey, Esquire, jlucey@lucey-law.com and Lauren Milton, Esquire, lmilton@lucey-law.com and a hard copy of same sent via U.S. Mail addressed to Justine O'Toole Lucey, Esquire and Lauren Milton, Esquire at Justin O'Toole Lucey, P.A., 415 Mill Street, Mount Pleasant, SC 29464.

Mt. Pleasant, South Carolina
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June 25, 2020

VIA ELECTRONIC MAIL: ctappfilings@sccourts.org

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29211

Re: CAHOC 8, LLC v King and Calhoun LLC et al.,
C/A No. 2018-CP-10-00749
Appellate Case No.: 2019-002044
BBT File No. 1240.0004

Dear Ms. Kitchings:

Enclosed please for filing please find the Appellants' Initial Brief and Designation of Matter along with the Proof of Service in the above-referenced matter.

Kindly file the originals and email the file-stamped copies to me at your convenience. By copy of this letter, I am serving same upon all counsel. Should you have any questions, please feel free to contact me.

With kindest regards, I remain

Yours very truly,

G. Hamlin O'Kelley, III

GHOIII/act
Enclosures

Cc: (w/ Encl. via Electronic Mail and US Mail)
Justin O'Toole Lucey, Esquire
Lauren Milton, Esquire