

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

MAR 19 2013

Carmen Tevis Mullen, Presiding Judge

**S.C. SUPREME COURT**

Opinion No. 4842 (S.C. Ct. App. filed June 15, 2011)

In the Matter of the Estate of Charles Galen  
Rider, a/k/a C.G. Rider

Carolyn S. Rider,..... Petitioner,  
v.

Estate of Charles Galen Rider, Thomas M.  
Grady, Personal Representative,..... Respondent,

and

Deborah Rider McClure, Ginger C. Rider,  
Christian McClure, and Austin McClure,..... Respondents.

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BRIEF OF RESPONDENTS  
DEBORAH RIDER McCLURE, GINGER C. RIDER,  
CHRISTIAN McCLURE, AND AUSTIN McCLURE

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STATEMENT OF ISSUES ON APPEAL

- I. Whether Wells Fargo had the authority to transfer assets after Charles Rider's death.
- II. Whether Carolyn Rider acquired a securities entitlement to assets transferred to her agency account after Charles Rider's death.

## STATEMENT OF THE CASE

This was an action to determine whether certain financial assets should be included in a probate estate. On June 30, 2006, the Personal Representative of the Estate of Charles Rider filed a petition with the Probate Court in Beaufort County requesting an order that either: (a) all assets transferred to an agency account for Carolyn Rider, decedent's second wife, pursuant to a letter signed on June 17, 2005, were completed transfers as of the date of the letter; or (b) assets transferred after Charles Rider's death, on July 8, 2005, were incomplete transfers and, therefore, part of the probate estate. App., Vol. I, pp. 38-43.

On August 14, 2006, Deborah Rider McClure and Ginger C. Rider, daughters of Charles Rider; and Christian M. and Austin M., grandsons of Charles Rider (hereinafter referred to as "Respondents McClure"), filed a response to the petition in which they denied: (1) the June 17, 2005 letter was an entitlement order pursuant to Section 36-8-102(8) of the South Carolina Code; (2) the financial assets were effectively transferred to Carolyn Rider as of the date of the letter; and (3) the transfers were completed *inter vivos* gifts as of the date of the letter. App., Vol. I, pp. 66-68.

On September 11, 2006, Carolyn Rider filed an answer to the petition in which she admitted that Wells Fargo made the following four transfers on the book entry dates set forth by Wells Fargo: (1) On June 21, 2005, Wells Fargo transferred \$733,228.00 dollars worth of securities to her account; (2) on July 8, 2005, Wells Fargo transferred \$39,672.00 dollars worth of securities to her account; (3) on July 11, 2005, Wells Fargo transferred \$935,032.64 worth of securities to her account; and (4) on October 20 2005,

Wells Fargo transferred \$304,182.46 worth of securities to her account. App., Vol. I, p. 58.

On July 10, 2007, the parties filed a Stipulation of Facts. App., Vol. I, pp. 71-73. On that same date, a trial on the petition was held before the Honorable Kenneth E. Fulp, Jr., Associate Judge of the Beaufort County Probate Court. On October 12, 2007, the judge entered an order of judgment in which the court held the following: (1) The June 17, 2005 letter was an entitlement order pursuant to Article 8 of the Uniform Commercial Code; (2) the securities transfers required delivery for completion; (3) Wells Fargo's authority to act as an agent for Charles Rider terminated upon notification of his death on July 8, 2005; (4) the first three transfers were effective because Wells Fargo testified at trial that it generally takes several days to transfer securities from one account to another; (5) the October 20, 2005 transfer was part of the probate estate because Wells Fargo did not take the necessary steps to effectuate that transfer prior to the death of Charles Rider; and (6) the law of principal and agency supplements the provisions of Article 8. App., Vol. I, pp. 19-30.

On October 19, 2007, Carolyn Rider appealed the Order of Judgment to the Beaufort County Court of Common Pleas. App., Vol. I, pp. 119-20. On November 11, 2007, Carolyn Rider filed her grounds for appeal, which were: (1) the entitlement order was effective on the day it was made; (2) the Probate Court erred in applying the law of agency; (3) the Probate Court erred in not applying the "prior acts" provisions of the Agency Agreement to the actions of the principal; and (4) the Probate Court's order frustrated the intent of Charles Rider. App., Vol. I, pp. 121-22. The Personal Representative neither appealed nor defended the decision of the Probate Court. On

November 17, 2008, the Court of Common Pleas entered its Appellate Order in which it affirmed the holding of the Probate Court. App., Vol. I, pp. 32-37.

On December 17, 2008, Carolyn Rider appealed the Appellate Order of the Circuit Court to the South Carolina Court of Appeals. App., Vol. I, pp. 124. The personal representative neither appealed nor defended the decision of the Court of Common Pleas. The case was heard before the Court of Appeals on May 5, 2011, and the Court filed its opinion on June 15, 2011. The Court of Appeals held: (A) Wells Fargo's authority to transfer assets pursuant to the Agency Agreement terminated upon the death of Charles Rider; (B) the book entry date is the date the appellant acquired a securities entitlement to the transfers; (C) the Fourth Transfer is part of the probate estate; and (D) appellant did not preserve the issue of whether the transfers were completed or incomplete gifts. App., Vol. I, pp. 607-19. Carolyn Rider appealed the decision of the Court of Appeals.

#### STATEMENT OF FACTS

On September 27, 1993, Charles Rider entered into an Investment Agency Agreement (the "Agency Agreement") with First Union National Bank of North Carolina, a predecessor of Wachovia, N.A. App., Vol. I, pp. 246-47, 71; Vol. II, p. 608. Wells Fargo & Company merged with Wachovia on December 31, 2008.<sup>1</sup>

Under the terms of the Agency Agreement, Charles Rider authorized First Union and, by succession, Wells Fargo, to do the following on his behalf:

[O]pen and maintain an Agency Account (Discretionary) for me, and . . . hold therein, as my Agent, all cash, stocks, bonds, securities and other property time to time deposited with or collected by you for such account,

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<sup>1</sup> See [https://www.wellsfargo.com/press/2009/20090101\\_Wachovia\\_Merger](https://www.wellsfargo.com/press/2009/20090101_Wachovia_Merger) (accessed on March 13, 2013). The Trust Agreement also lists Wachovia as the successor (now acting) trustee. App., Vol. I, pp. 406-08.

subject to the following instructions and such other instructions as may from time to time be furnished in writing by me or my attorney-in-fact.

App., Vol. I, pp. 246-47; Vol. II, p. 608. The instructions set forth in the Agency Agreement included the following:

1. You are to provide investment review and management of the Account, taking such action as you, in your discretion, deem best with respect to the investment and reinvestment of the property held herein as though you were the owner of such property. Your authority extends, though is not limited to the sale and purchase of securities, the sale of [sic] exercise of warrants, subscription rights and other rights of similar nature.

...

App., Vol. I, pp. 246, 21; Vol. II, p. 608. The Agency Agreement provided for its termination upon death of the principal:

This agreement may be terminated by either party by giving thirty (30) days notice in writing to the other party or by my death, provided that termination by reason of my death shall be effective only upon receipt of actual knowledge thereof by one of your responsible officials and shall not affect the validity of any prior actions. . . .

App., Vol. I, pp. 247, 23; Vol. II, pp. 608-09.

Less than three weeks before his death from colon cancer, Charles Rider signed a letter (the "Letter"), dated June 17, 2005, giving Wells Fargo authority to transfer unspecified securities and cash to a "new agency account" to be opened for his then-wife, Carolyn Rider. App., Vol. I, p. 78; Vol. II, p. 609. Despite the fact that Charles Rider was, during his lifetime, a sophisticated businessman who owned a racing team and amassed a net worth of over \$15 million, the documents involved in this transfer of over \$2 million (or roughly 12.5 percent of his net estate) are rudimentary, if not perfunctory, and fail in these particulars: (1) The Letter does not state what assets are to be transferred; (2) the Letter does not state the amount or value of the assets to be transferred; (3) the Letter does not state when the assets are to be transferred; (4) the

Letter does not provide a date by which any transfers should occur take place; (5) the Letter references assets listed on a "following page"; (6) the page attached to the Letter lists assets totaling \$2,000,000.00; (7) the page attached to the Letter was neither signed nor initialed by Charles Rider; (8) the page attached to the Letter has a market values date that is several days before the date of the Letter; and (9) the page attached is not otherwise dated. App., Vol. I, pp. 78-79.

With respect to delivery of the Letter, it also fails in these respects: (1) There is no evidence in the record to indicate how the letter was delivered to Wells Fargo; (2) there is no evidence in the record to indicate when the Letter was delivered to Wells Fargo; (3) there is no evidence in the record to indicate when Carolyn Rider was apprised of the Letter; (4) there is no evidence in the record to indicate when Carolyn Rider was apprised of the transfers; and (5) there is no evidence in the record as to when the transfers occurred other than the book entry dates provided by Wells Fargo.

During the three weeks (exactly 21 days) between the date of the June 17, 2005 Letter and the day Charles Rider died, on July 8, 2005 (App. Vol. I, pp. 22, 289), Wells Fargo made the following transfers of financial assets from Charles Rider's agency account to an agency account for Carolyn Rider:

1. On June 21, 2005, Wells Fargo transferred shares of various stocks with a value of \$733,228.00 (the "First Transfer") from Charles Rider's agency account to Carolyn Rider's account as indicated by book entries to Carolyn Rider's account, as admitted by Carolyn Rider. App., Vol. I, pp. 80-82, 59, 71-73; Vol. II, p. 609.
2. On July 8, 2005, Wells Fargo transferred shares of stocks with a value of \$39,672.00 (the "Second Transfer"), from Charles Rider's agency account to Carolyn Rider's account, as indicated by book entries to Carolyn Rider's account, as admitted by Carolyn Rider. App., Vol. I, pp. 80-82, 59, 71-73; Vol. II, p. 609.

Carolyn Rider does not contest the fact that these transfers occurred as of the dates of these bank entries. App., Vol. I, pp. 80-82, 59, 71-73. Indeed, in her Answer to the Petition for Declaratory Judgment filed with the Probate Court, Carolyn Rider admits all of the transactions occurred on the dates of the book entries:

The Respondent, Carolyn S. Rider, admits . . . [o]n June 21, 2005, Wells Fargo transferred . . . (\$733,228.00) . . . worth of securities to Carolyn Rider; that on July 8, 2005, Wells Fargo transferred . . . (\$39,672.00) . . . worth of securities to Carolyn Rider; that on July 8, 2005, Wells Fargo transferred . . . (\$935,032.64) . . . worth of securities to Carolyn Rider; and, that on October 20, 2005, Wells Fargo transferred . . . (\$304,182.64) . . . worth of securities to Carolyn Rider.

App., Vol. I, p. 59, 50-52, 71-73.

Charles Rider's daughter Deborah Rider McClure kept Wells Fargo apprised of her father's condition. App., Vol. I, pp. 188-90. On the day her father died, she informed Leila Evans, Charles Rider's relationship manager at Wells Fargo, by telephone, of Charles Rider's passing. App., Vol. I, pp. 188-90. The relationship manager is the customer's primary contact with Wells Fargo. App., Vol. I, pp 183-84. By Sunday, July 10, 2005, Leila Evans informed Lynn DiLella, an officer with Wells Fargo's Wealth Management Group which managed Charles Rider's investment account, of Charles Rider's death. App., Vol. I, p. 163; Vol. II, p. 609. The next day—three days after Charles Rider passed, and over three weeks after the date of the Letter—Wells Fargo made the following transfers of financial assets from Charles Rider's agency account to a securities account for Carolyn Rider:

3. On July 11, 2005, Wells Fargo transferred various units of bonds (Evergreen International; Evergreen Adjustable; Evergreen North Carolina Municipal; and Evergreen Emerging Markets) with a value of \$935,032.64 (the "Third Transfer") from Charles Rider's agency account to Carolyn Rider's account, as indicated by book entries to Carolyn Rider's account, as admitted by Carolyn Rider. App., Vol. I, pp. 80-82, 59, 71-73. Wells

Fargo held the Evergreen Mutual fund—it was an internal company. App., Vol. I, pp. 182-83; Vol. II, p. 609.

Over four months after the June 17, 2005 Letter—and over 100 days after Charles Rider died—Wells Fargo made the following transfers of financial assets from Charles Rider's agency account to a securities account for Carolyn Rider:

4. On October 20, 2005, Wells Fargo transferred various units of municipal bonds with a value of \$304,182.46 (the "Fourth Transfer") from Charles Rider's agency account to Carolyn Rider's account, as indicated by a book entry by Wells Fargo to a securities account for Carolyn Rider, as admitted by Carolyn Rider. App., Vol. I, pp. 80-82, 59, 71-73; Vol. II, p. 609.

## ARGUMENT

### I. STANDARD OF REVIEW

The applicable standard of review of a matter originating in the probate court is determined by whether the cause of action is at law or in equity. Jean Hoefler Toal, et al., *Appellate Practice in South Carolina* 173, 184 (2nd ed. 2002) (citing *Dean v. Kilgore*, 313 S.C. 257, 437 S.E.2d 154 (Ct.App.1993)). "To make this determination, the appellate court must look to the essential character of the cause of action alleged by the petitioners in the court below." *Id.* "A declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Toal at 172. In this case, the personal representative brought a declaratory judgment before the probate court for a ruling as to whether the Decedent's letter of instruction was a completed transfer of the securities identified therein as of the date of the Letter or, in the alternative, certain securities transferred after the Decedent's death were incomplete transfers. App. 38-42. A claim for money due or seeking an accounting from an estate is an action at law. Toal at 183. "When a probate court proceeding is an action at law, the circuit court and the

appellate court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them. Questions of law, however, may be decided with no particular deference to the lower court." *Neely v. Thomasson*, 365 S.C. 345, 350, 618 S.E.2d 884, 886 (2005) (citations omitted).

II. THE SUPREME COURT SHOULD AFFIRM THE DECISION OF THE COURT OF APPEALS THAT WELLS FARGO'S AUTHORITY TO TRANSFER ASSETS PURSUANT TO THE AGENCY AGREEMENT TERMINATED UPON CHARLES RIDER'S DEATH.

The Court of Appeals held that Wells Fargo had the authority pursuant to the Agency Agreement to transfer assets until the bank was advised of his death. App., Vol. II, pp. 607-19. The decision of the Court of Appeals should be affirmed because: (A) the law of agency and the Agency Agreement supplement the applicable provisions of the UCC; and, (B) pursuant to the Agency Agreement, Wells Fargo only had the authority to act on Charles Rider's behalf until Wells Fargo was advised of his death.

A. The Law of Agency and the Agency Agreement Supplement the Applicable Provisions of the UCC.

Carolyn Rider asserts that the Uniform Commercial Code should displace the law of agency and the Agency Agreement. The Court of Appeals held that agency law and the Agency Agreement supplement the applicable provisions of the UCC, as set forth in the UCC. The holding of the Court of Appeals should be affirmed.

Section 103 of Article 1 of the UCC states that the law relative to principal and agent "shall supplement" the provisions of the UCC unless common law provisions are displaced by particular provisions of the UCC. S.C. Code Ann. § 36-1-103 (1976 & Supp. 2012). The Official Comment to Section 509 of Article 8 makes it clear the

common law of principal and agency supplement the provisions of Article 8 and govern the relationship between a securities intermediary and its customers:

This Article is not a comprehensive statement of the law governing the relationship between . . . securities intermediaries and their customers. Most of the law governing that relationship is the common law of contract and agency, supplemented or supplanted by regulatory law. This Article deals only with the most basic commercial/property law principles governing the relationship. Although Sections 8-504 through 8-508 specify certain duties of securities intermediaries to entitlement holders, the point of these sections is to identify what it means to have a security entitlement, not to specify the details of performance of these duties.

S.C. Code Ann. § 36-8-509 cmt. (1976 & Supp. 2012). Because the UCC clearly states that the law of agency and the contracts between the parties supplement its provisions, this Court should affirm the holding of the Court of Appeals that the law of agency and the Agency Agreement supplement the UCC to govern the relations of the parties relative to the transactions at issue in this case.

B. Wells Fargo Was Charles Rider's Agent and Had the Authority to Act on His Behalf Until Wells Fargo Was Advised of His Death.

An agency is a fiduciary relationship whereby one party, the agent, acts on behalf of another party, the principal, subject to the principal's control. 3 Am. Jur. 2d Agency § 1; Restatement (Third) of Agency § 1.01. Here, Wells Fargo acted as an agent for Charles Rider pursuant to the terms of the Agency Agreement. App., Vol. I, pp. 76-77. Pursuant to the Agency Agreement, Wells Fargo had the authority to, among other things, provide investment review and management of an investment account, and purchase and sell securities and perform other duties in accordance with his investment objective. App., Vol. I, pp. 76-77.

The death of a principal terminates an agent's authority once the agent has notice of the principal's death. Restatement (Third) of Agency § 3.07(2); *Carver v. Morrow*,

213 S.C. 199, 48 S.E.2d 814, 817 (1948). "The reason for this rule is that the authorized acts of the agent are in their nature the acts of the principal, and by legal fiction the agent's exercise of authority is regarded as an execution of the principal's continuing will." *Carver* at 817. This principle is set forth in the Agency Agreement which states, in relevant part: "This agreement may be terminated by either party by giving thirty (30) days notice in writing to the other party or by my death . . .". App., Vol. I, pp. 76-77. Wells Fargo received notice of Charles Rider's death on the day he died. App., Vol. I, pp. 163, 183-84, 188-90. Therefore, under the law and terms of the Agency Agreement and the facts of this case, Wells Fargo had the authority to transfer the assets until July 8, 2005, when Wells Fargo was advised of Charles Rider's death. Any assets transferred after that date are part of the estate.

III. THE SUPREME COURT SHOULD AFFIRM THE DECISION OF THE COURT OF APPEALS THAT CAROLYN RIDER DID NOT ACQUIRE A SECURITIES ENTITLEMENT TO THE ASSETS UNTIL WELLS FARGO INDICATED BY BOOK ENTRY THAT THE ASSETS WERE CREDITED TO HER SECURITIES ACCOUNT.

The Court of Appeals held that Carolyn Rider did not acquire a securities entitlement to the assets until Wells Fargo indicated by book entry that the assets were credited to her securities account. App., Vol. II, pp. 607-19. The holding of the Court of Appeals should be affirmed because: (A) pursuant to Article 8 of the UCC, Carolyn Rider did not acquire a securities entitlement until Wells Fargo indicated by book entry that the financial assets were credited to her account; (B) Sections 506 and 507 of Article 8 are inapplicable in the instant case; and (C) the entitlement order was not effective after Charles Rider's death.

- A. Pursuant to Article 8 of the UCC, Carolyn Rider Did Not Acquire a Securities Entitlement Until Wells Fargo Indicated By Book Entry That the Financial Assets Were Credited to Her Account.

Pursuant to Article 8 of the UCC, a “‘securities entitlement’ means the rights and property interest of an entitlement holder with respect to a financial asset . . . .” S.C. Code Ann. § 36-8-102(17) (1976 & Supp. 2012); App., Vol. II, pp. 13-18. A “financial asset” is a security. S.C. Code Ann. § 36-8-102(9) (1976 & Supp. 2012); App., Vol. II, pp. 613-18. An “‘entitlement holder’ means a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary.” S.C. Code Ann. § 36-8-102(7) (1976 & Supp. 2012); App., Vol. II, pp. 613-18. A “securities intermediary” includes a bank “that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.” S.C. Code Ann. § 36-8-102(4) (1976 & Supp. 2012); App. Vol. II, pp. 613-18.

There are three tests to determine whether a person has acquired a securities entitlement: (1) when the securities intermediary indicates by book entry that a financial asset has been credited to the person's securities account; (2) when the securities intermediary receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person's securities account; or (3) when the securities intermediary becomes obligated under other law, regulation, or rule to credit a financial asset to the person's securities account. S.C. Code Ann. § 36-8-501(b) (1976 & Supp. 2012). The "precise form in which the intermediary manifests that acknowledgement is left to private ordering." S.C. Code Ann. § 36-8-502 cmt. 2 (1976 & Supp. 2012). "In the indirect holding system, the significant fact is that the securities intermediary has undertaken to treat the customer as entitled to the financial asset." S.C.

Code Ann. § 36-8-501 cmt. 3 (1976 & Supp. 2012). Under the first two tests, the key to determining whether an individual has acquired a securities entitlement is that the intermediary has credited the individual's account; under the third test, the otherwise "significant fact is that the securities intermediary has undertaken to treat the customer as entitled to the financial asset." *Id.* cmts. 2, 3.

In this case, there is clear evidence as to when Carolyn Rider acquired a securities entitlement from Wells Fargo, because Wells Fargo indicated by book entry when the financial assets were credited to Carolyn Rider's account. App., Vol. I, pp. 51-53. Wells Fargo chose book entry dates as the method by which it acknowledged that Carolyn Rider acquired a securities entitlement to the financial assets. App. Vol. I, pp. 79-81. There is no mistaking this clear indication—it is in black and white. App., Vol. I, pp. 51-53. Carolyn Rider does not dispute the fact that she acquired a security entitlement on the book entry dates as to the financial assets credited to her securities account on the dates of the other transfers, and she admitted that the book entries are the dates the transfers were made. App., Vol. I, pp. 59, 71-73, Vol. II, p. 536. Indeed, the book entry dates are the only evidence introduced at trial as to when Carolyn Rider acquired a securities entitlement to any of the financial assets. App., Vol. I, pp. 51-53; Vol. II, p. 618. Accordingly, the holding of the Court of Appeals that Carolyn Rider acquired a securities entitlement to the assets when they were credited to her account should be affirmed, and the assets not credited to her account by the date of Charles Rider's death are property of the estate.

- B. Sections 506 and 507 of Article 8 Set Forth a Securities Intermediary's Duties to Comply with an Entitlement Order and Are Inapplicable in the Instant Case.

Carolyn Rider attempts to avoid a straightforward application of the applicable provisions of Article 8 by arguing she became an entitlement holder as of the date of the Letter. She bases this argument on an assertion that Sections 506 and 507 of the UCC govern when an individual becomes an entitlement holder. She misleads the Court with this argument.

Sections 506 and 507 set forth the duties of a securities intermediary to comply with entitlement orders. S.C. Code Ann. §§ 36-8-506, 36-8-507 (1976 & Supp. 2012). They state that a securities intermediary satisfies its duties if it acts pursuant to an agreement or, in the absence of an agreement, if it "exercises due care in accordance with reasonable commercial standards." S.C. Code Ann. § 36-8-506 (1976 & Supp. 2012). In other words, these sections may serve as a basis for Wells Fargo's liability for its transfer of the financial assets but they do not speak to the issues in the instant case. The Official Comment to Section 509 makes this abundantly clear:

Although Sections 8-504 through 8-508 specify certain duties of securities intermediaries to entitlement holders, the point of these sections is to identify what it means to have a security entitlement, *not to specify the details of performance of these duties.*

S.C. Code Ann. § 36-8-509 cmt. (1976 & Supp. 2012) (emphasis added). Indeed, "[m]ost of the law governing that relationship is the common law of contract and agency, supplemented or supplanted by regulatory law." *Id.* Accordingly, any attempt by Carolyn Rider to use these sections of Article 8 to circumvent a clear application of the relevant sections of Article 8 must fail, and this Court should hold that the assets not credited to her account by the date of Charles Rider's death are property of the estate.

C. The Letter, As An Entitlement Order, Was Not Effective After Charles Rider's Death.

Carolyn Rider also argues that the Letter, as an entitlement order, remained effective after Charles Rider's death such that Wells Fargo had the authority to act after Charles Rider's death. Appellant attempts to circumvent the straightforward application of the UCC and the law of agency, and misleads the Court, with this argument.

As set forth above, most of the law governing the relationship between a securities intermediary and an entitlement holder is the common law of contract and agency, supplemented or supplanted by regulatory law. S.C. Code Ann. § 36-8-509 cmt. (1976 & Supp. 2012). Indeed, as the Court of Appeals held, an "entitlement order's 'effectiveness' does not refer to the security intermediary's power to complete the transfer." App., Vol. II, p. 616. Instead, as with other provisions of the UCC upon which appellant incorrectly applies, "'effectiveness' is a term used by Article 8 to frame whether a securities intermediary is liable for a transfer of financial assets . . . ." *Id.*

Even assuming, *arguendo*, the Agency Agreement did not govern the authority of Wells Fargo to transfer the assets, which the Respondents reject, Sections 506 and 507 state that in the absence of such an agreement, a securities intermediary satisfies its duties if it "exercises due care in accordance with reasonable commercial standards." S.C. Code Ann. § 36-8-506 (1976 & Supp. 2012). *Reasonableness* governs the effect of the provisions of the Uniform Commercial Code. S.C. Code Ann. §36-1-102(3)(1976 & Supp. 2012). The obligations of good faith, diligence, reasonableness, and care mandated by the UCC "may not be disclaimed." S.C. Code Ann. §36-1-102(3) (1976 & Supp. 2012). "What is a reasonable time for taking any action depends on the nature, purpose, and circumstances of such action." S.C. Code Ann. § 36-1-204(2) (1976 & Supp. 2012).

The purpose of Article 8 of the UCC is to effectuate the "*rapid* transfer in settlement of trades." S.C. Code Ann. § 36-8-507 cmt. 1 (1976 & Supp. 2012) (emphasis added). The Fourth Transfer consisted of municipal bonds which "can *only* be held indirectly because they are issued in book-entry form." App., Vol. I, pp. 51-31; Russell A. Hakes, *UCC Article 8: Will the Indirect Holding of Securities Survive the Light of Day?*, 35 LOYOLA LAW REV. 664, 685 (2002) (emphasis added). They are transferred from entitlement holder to entitlement holder by book entry.

Here, four months lapsed between when the Letter was delivered to Wells Fargo, and when Wells Fargo acknowledged by book entry that Carolyn Rider had a securities entitlement to the Fourth Transfer. App., Vol. I, pp. 19-29, 51-53; Vol. II, pp. 608-11. Jonathan Rhoney of then-Wachovia's Trust Department testified that "it would not be the norm" for it to take the significant amount of time it took to [transfer the assets]—it was "unusual." App., Vol. I, pp. 28-29, 165-66, 181-83; Vol. II, p. 610. Based on the evidence presented at trial, the Probate Court found that the "time that elapsed between Wells Fargo's receiving the transfer instruction and completing the final transfer was *patently unreasonable*." App. Vol. I, pp. 28-29 (emphasis added). Pursuant to the applicable provisions of the UCC and the facts of this case, appellant became an entitlement holder as to the financial assets as of the book entry dates; accordingly, the decision of the Court of Appeals that the book entry dates determine when she became an entitlement holder as to the transfers should be affirmed.

D. Widespread Panic Has Not, And Will Not, Result From the Court of Appeals Holding.

Carolyn Rider asserts that the Court of Appeals opinion "will cause widespread commercial, systemic uncertainty" unless Section 501(b)(3) is read and applied to the

particular facts of this case such that Carolyn Rider is held to be an entitlement holder as to the Fourth Transfer as of the date that Wells Fargo received the Letter from Charles Rider. Appellant raises this issue for the first time on appeal to this Court, and there is no evidence in the argument on which to base (or respond to) this argument; accordingly, it is not reserved for appeal. In any event, the truth appears quite to contrary. Indeed, one can easily surmise that financial markets worldwide would come to a screeching halt if it took four months to transfer and/or settle shares in stocks or bonds. In fact, "[o]ne of the main reasons for holding securities through securities intermediaries is to enable rapid transfer in settlement of trades." S.C. Code Ann. § 36-8-507 cmt. 1 (1976 & Supp. 2012).

To that end, Section 504 of Article 8 mandates that a "securities intermediary shall *promptly* obtain and thereafter maintain a financial asset in a quantity corresponding to the aggregate of all security entitlements it has established in favor of its entitlement holders with respect to that financial asset." S.C. Code Ann. § 36-8-504 (1976 & Supp. 2012) (emphasis added). Therefore, Wells Fargo had a duty to maintain shares of the First, Second, Third, and Fourth Transfers on behalf of Mr. Rider, which they then could have promptly transferred to another securities account. However, Wells Fargo did not make the Fourth Transfer until four months after the date of the Letter and over 100 days after Mr. Rider died—when they were without the legal authority to do so.

Carolyn Rider's argument also ignores how securities are held. The Depository Trust Company (DTC) "holds" the "vast majority" of publicly held securities: "Approximately 600 banks and their brokers have accounts with the Depository Trust Company for their own holdings and for the holdings of those whom they act as securities intermediaries." Hakes, *id.* at 685.

The Fourth Transfer—municipal bonds—"can only be held indirectly because they are issued in book-entry form." *Id.* (emphasis added). App., Vol. I, pp. 53. That is, the only holder of municipal bonds is a clearing corporation, and the single interest is divided among all those having a security entitlement on the books of the clearing corporation. *Id.* This indirect holding allows for the "rapid transfer in settlement of trades." S.C. Code Ann. § 36-8-507 cmt. 1 (1976 & Supp. 2012). Were securities intermediaries given months to effectuate transfers in a system of rapid, daily trading of over \$150 million a day, the effect on consumers-entitlement holders would be unfathomable.

Were Carolyn Rider accurate in this assessment, no doubt Wells Fargo and other national banks would have persuaded this Court to appear as *amicus curiae* on behalf of their interests and the banking industry. Accordingly, as the Court of Appeals found, the assertion that the Fourth Transfer took months to transfer has no basis in reality—in addition to having no factual basis in this case.<sup>2</sup>

IV. Because There is No Evidence in the Record to Support a Finding that the Financial Assets Transferred After Charles Rider's Death Were in the Process of Being Transferred Before His Death, the Assets Transferred After His Death Are Part of the Probate Estate.

Carolyn Rider asserts that Wells Fargo began the process of transferring the

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<sup>2</sup> Appellant also claims that the Court of Appeals opinion will disrupt estate planning and administration. There is nothing in the record from which to glean the intent, if any, of a man who, while terminally ill, choose to transfer \$2 million in stock and bonds from his Wells Fargo account to an account for Carolyn Rider at the same bank, other than the perfunctory Letter and the statement by Wells Fargo that it was part of his estate planning. App., Vol. I, p. 156; App., Vol. II, p. 418. Other estate-planning alternatives include: (1) funding and executing a trust or trust amendment directing that the assets be delivered to a beneficiary by the successor trustee upon the grantor's death (S.C. Code Ann. § 62-7-602(a) (1976 and Supp. 2012)); (2) executing a will or will codicil making a testamentary gift to the donee (S.C. Code Ann. § 62-2-901 (1976 and Supp. 2012)); (3) granting the spouse a durable or limited power of attorney to transact business involving the grantor's assets (S.C. Code Ann. § 62-5-501 (1976 and Supp. 2012)); and/or (4) placing property, including accounts, into joint tenancy with full survivorship rights to the spouse (Vaughn v. Bernhardt, 339 S.C. 125, 528 S.E.2d 82 (Ct. App. 2000)). Because other alternatives are available to effect the transfer of financial assets; and, most importantly, appellant did not preserve this issue for appeal, and there is no factual or legal basis to support a finding that it takes four months to transfer financial assets from one account to another—especially between spouses at the same bank—Carolyn Rider's assertion that the Court of Appeals opinion will affect estate planning and administration is without merit.

financial assets of the Third and Fourth Transfers before Charles Rider's death; that such actions should be considered "prior acts" of the agent; and, as such, the actions should constitute acts of the principal. Appellant does not cite any authority for this strained interpretation of the Agency Agreement and agency law. The Court of Appeals held that actions by an agent before the principal's death do not preserve the agent's power to complete the transaction after the principal's death.

Under general principals of agency law, when a principal terminates or repudiates an agency agreement, the principal "cannot deprive the agent of compensation for a result which the agent actually accomplished." 3 Am.Jur.2d Agency § 256. That is, an "agent whose appointment is terminated without fault is entitled to the fair value of his or her services." *Id.*; *see also*, *Wood v. Hutchinson Coal Co.*, 176 F.2d 682 (4th Cir. 1949). This is the law as to "prior actions" under an agency agreement; the Agency Agreement at issue reiterates this principle of law. App., Vol. I, pp. 246-47. In this case, it assures that Wells Fargo is compensated for its actions in making the transfers it was authorized to make pursuant to the Agency Agreement.

Under applicable principles of agency law, the "fact that the agent has performed, as authorized, one or several acts of that which was contemplated as a single transaction does not operate to preserve or keep alive the power until the completion of the transaction." C.J.S. Agency § 122 (2003). Further, neither Carolyn Rider nor Wells Fargo offered any evidence at trial to support the contention that Wells Fargo began the process of transferring the financial assets of the Third and Fourth Transfers before Charles Rider's death. Carolyn Rider did not testify at the trial. The two representatives from Wells Fargo who testified at trial did not testify with any specificity or as to when

the transfer process began as to any of the financial assets, nor did they provide written instructions they "believed" were issued to direct the transfers. App., Vol. I, pp. 164-68, 175-75, 182-83. The representatives from Wells Fargo only spoke in general terms as to how long the process may take as to various types of assets. App., Vol. I, pp. 164-68, 182-83. Lynn DiLella, who managed the wealth management relationship with Charles Rider at Wells Fargo, testified that "[s]tock assets can be transferred relatively quickly if [they] have the certificate in good form in [their] vault in New York. . . . That can be done within a day, or three days, excuse me. If a trade is made, it settles within three days." App., Vol. I, pp. 165-66. "Mutual funds take a lot longer. . . . I have found it can take a week . . . ." App., Vol. I, pp. 165-66. Jonathan Rhoney, who was the successor to the employee in the trust department at Wells Fargo when the financial assets were transferred, testified that stocks transfer "very quickly"; mutual funds could take ten days to a few weeks. Maybe longer."<sup>3</sup> App., Vol. I, pp. 181-83; App., Vol. II, p. 610. He also admitted that he was surprised to learn the transfers took this long—it was unusual. App., Vol. I, pp. 185-86; Vol. II, p. 610.

Neither Carolyn Rider nor Wells Fargo produced any documents showing when the transfer process began as to any of the financial assets. App., Vol. II, p. 618. Importantly, Wells Fargo testified that such documents exist. App., Vol. I, pp. 182-83. Wells Fargo testified that when a letter, such as Charles Rider's, was received by Wells Fargo's trust department, Wells Fargo used a specific form that gives instructions to various departments, depending upon what securities are being transferred. App., Vol. I, pp. 182-83, 175. Neither Carolyn Rider nor Wells Fargo produced this initial form nor

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<sup>3</sup> Mr. Rhoney also testified that Wells Fargo internally held the fund from which the Third Transfer was made—further undermining any claim that the transfer took over three weeks to settle. App., Vol. I, pp. 182-83.

any other or subsequent forms or documentation showing when the transfer process began or was underway as to the transfer of any of the financial assets. App., Vol. II, p. 618. Equally important, Wells Fargo maintained its silence when asked if the Third Transfer was started at least a couple of days prior to that date. App., Vol. I, p. 173. Admissions may be implied from mere silence. *Guignard Brick Works v. Allen University*, 155 S.C. 507, 152 S.E. 707, 708 (1930). Only when questioned in broader terms did Wells Fargo assent to questioning as to when transfers were initiated. App., Vol. I, pp. 171-75.

Under the law and terms of the Agency Agreement and the facts of this case, Wells Fargo had the authority to manage Charles Rider's agency account until July 8, 2005, when Wells Fargo was notified of Charles Rider's death. Wells Fargo did not have the authority to transfer assets after his death. Accordingly, the holding of the Court of Appeals that Wells Fargo did not have the authority to transfer assets after his death should be affirmed.

V. THE SUPREME COURT SHOULD AFFIRM THE HOLDING OF THE COURT OF APPEALS THAT CAROLYN RIDER DID NOT PRESERVE THE ISSUE FOR APPEAL OF WHETHER THE FOURTH TRANSFER WAS A COMPLETED *INTER VIVOS* GIFT; IN ANY EVENT, THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT A FINDING THAT THE FOURTH TRANSFER WAS AN *INTER VIVOS* GIFT, MUCH LESS A COMPLETED *INTER VIVOS* GIFT.

The Court of Appeals held that Carolyn Rider failed to preserve the issue for appeal because she made a different argument to the Circuit Court than she made to the Court of Appeals. App., Vol. II, pp. 618-19. This Court should affirm the decision of the Court of Appeals because: (A) Carolyn Rider did not preserve the issue for appeal as to whether the fourth transfer was a completed *inter vivos* gift; (B) even assuming, *arguendo*,

Carolyn Rider could have asserted this issue on appeal, her claim would have failed because there is no evidence in the record that the Fourth Transfer was a completed *inter vivos* gift.

A. Carolyn Rider Did Not Preserve for Appeal the Issue of Whether the Fourth Transfer Was a Completed *Inter Vivos* Gift.

The Court of Appeals held that Carolyn Rider failed to preserve the issue of whether the Fourth Transfer was a completed *inter vivos* gift. App., Vol. II, pp. 618-19. This Court should affirm the holding of the Court of Appeals.

In order to preserve an issue for appeal, the party must comply with four requirements: "The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *Toal id.* at 57-67; Rule 242(d), SCACR; *Kleckley v. Northwestern Nat. Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000). In this case, the appellant did not raise the issue to the trial court as to whether the financial assets constituted completed *inter vivos* gifts. App., Vol. I, pp. 144-212. Appellant did not plead a claim or affirmative defense that any of the transfers were completed *inter vivos* gifts. App., Vol. I, pp. 58-62. Instead, appellant acted to the contrary in these four ways: (1) appellant argued the "Article 8 of the UCC fully encapsulates all of the facts in this matter, supplants any common law notions" (App. Vol. I, p. 133); (2) appellant objected at trial when the transfers were characterized as gifts and, in response, Wells Fargo made clear that Charles Rider did not intend the financial assets to be gifts; (App. Vol. I, p. 155); (3) appellant argued, in her trial brief, filed before the trial, that the UCC controls the facts of the case, not common law; (App., Vol. I, pp. 359-64); and (4) following trial, appellant submitted a letter to the court in which she reiterated that "Mr. Rider, in his

discussions relative to this June 17, 2005 letter, did not term it a gift, he termed it part of his estate planning" (App., Vol. I, pp. 418-19 (emphasis added)). Because the appellant did not raise the issue of whether any of the transfers constituted completed *inter vivos* gifts to the probate or circuit courts—and argued to the contrary—the appellant did not preserve the issue for appeal, and the holding of the Court of Appeals that appellant failed to preserve this issue for appeal should be affirmed.

B. Even assuming, *arguendo*, Carolyn Rider Could Assert this Claim on Appeal, Her Claim Fails Because There is No Evidence in the Record that the Fourth Transfer Was a Completed *Inter Vivos* Gift.

Even assuming, *arguendo*, that Carolyn Rider could assert on appeal that the October 20, 2005 transfer was an *inter vivos* gift, the argument fails because there is no evidence to support a finding that the transfer was a completed *inter vivos* gift.

A completed *inter vivos* gift of securities requires three elements to be valid: (1) donative intent; (2) sufficient delivery of the stock in order to effect a gift; and (3) acceptance of the gift by the donee. 38 Am.Jur.2d Gifts § 48; *Worrell v. Lathan*, 324 S.C. 368, 371, 478 S.E.2d 287, 288 (Ct.App.1996). In this case, none of the elements is present.

1. There Is No Donative Intent Because Charles Rider Did Not Intend That the Transfers Be *Inter Vivos* Gifts.

In order for a completed *inter vivos* gift to be valid, the purported donor must have intended that the thing be a gift. *Id.* At the trial before the Probate Court, the only testimony, evidence, or argument as to whether the four transfers constituted gifts consisted of the following four proffers followed by a post-trial letter by Carolyn Rider reiterating the fact that Mr. Rider did not intend the transfers to be gifts: first, a denial by Wells Fargo that Mr. Rider ever intended the transfers as gifts (App., Vol. I, pp. 155-56);

second, an objection by Carolyn Rider that the transfers be characterized as gifts (*id.*); third, testimony by one of Mr. Rider's attorneys that he wanted the transfers to be made to make sure his wife had adequate funds to maintain her standard of living during probate of his estate (App., Vol. I, pp. 193-94); fourth, the contrast in language between the Letter in which Mr. Rider directs the transfer of assets, and his Will in which he makes specific gifts (App., Vol. I, pp. 254-56); and, Carolyn Rider's post-trial letter to the Probate Court in which she reiterates the fact that "Mr. Rider, in his discussions relative to th[e] June 17, 2005 letter, did not term it a gift, he termed it part of his estate planning." App., Vol. I, p. 418.

Accordingly, because there is no evidence in the record to support a finding that the transfers were completed *inter vivos* gifts, and because Carolyn Rider argued to the contrary before the Probate and Circuit Courts, her claim that the Fourth Transfer was a completed *inter vivos* gifts fails.

2. The Fourth Transfer Was Not Sufficiently Delivered to Effect a Gift to Carolyn Rider.

The law is clear that a gift must be delivered to be completed: The "mere intention to give [a gift] without delivery is unavailing, the intention must be executed by a complete and unconditional delivery. The transfer of possession and title must be absolute and go into immediate effect, so far as the donor can make it so by intent and delivery." *Worrell v. Lathan*, 324 S.C. 368, 371, 478 S.E.2d 287, 288 (Ct.App.1996) quoting *Baptist Found. for Christian Educ. v. Baptist College at Charleston*, 282 S.C. 53, 58, 317 S.E.2d 453, 457 (Ct.App.1984). "To constitute a valid gift, the donee must have an immediate right to the property; in other words, *the donee must be vested with immediate dominion and control.*" *Baptist Found., id.* (emphasis added). In this case, the

unconditional delivery was not complete until title to the financial assets was transferred to Carolyn Rider's account. Not until the stock was delivered to her account did she have a right to the property—not until it was transferred to her account was she vested with the ability to exercise dominion and control over the assets. The only evidence in the record that demonstrates when Carolyn Rider had a right to the financial assets are the bank records showing the entry dates for the transfers. App., Vol. I, pp. 51-53; Vol. II, p. 618. There is no evidence in the record from which to infer that Carolyn Rider had the right to exercise dominion and control over the assets before the date of the bank entries.

3. Carolyn Rider Did Not Accept the Transfers As a Gift.

Acceptance by the donee of a gift *inter vivos* is an essential element of a gift. *Worrell*, 324 S.C. at 371, 478 S.E.2d at 289, citing 38 Am.Jur.2d Gifts §§ 34, 35. “Acceptance is sufficient if the gift is accepted before revocation by the donor, or *before revocation by the death of the donor*.” *Id.* (emphasis by court). Acceptance by a donee is demonstrated in two ways: (1) by the donee's exercise of dominion over the property; or (2) by the donee's assertion of a right to the property. 38 Am.Jur.2d Gifts § 33. Where a constructive delivery is completed, a like acceptance will suffice. For instance, where the shareholder delivers the fully endorsed stock certificates to his donee prior to writing a letter advising him of the gift, the donee's letter to the donor stating the gift was accepted qualifies as acceptance of the gift. *Little City Foundation v. Capsonic Group, Inc.*, 231 Ill.App.3d 122, 596 N.E.2d 146 (1<sup>st</sup> Dist. 1992). *Because Charles Rider requested the financial assets be delivered to an agency account to be opened for Carolyn Rider, Carolyn Rider could not exercise dominion over, or assert a right to, the financial assets until the account was opened and the assets were transferred to her account.* App., Vol.

I, p. 48.

Further, Carolyn Rider did not accept a donee gift with any prior act, such as a letter to Charles Rider accepting the purported gifts, nor is there any evidence in the record as to when Carolyn Rider became aware of the Letter or the transfers, other than the record of Wells Fargo indicating the book entries. App. Vol. I, pp. 51-53. Because the only act of acceptance of the asset transfers was their actual transfer into Carolyn Rider's account, as demonstrated by the book entries, the transfers that occurred after Charles Rider's death on July 8, 2005 were not, and could not be, legally accepted by Carolyn Rider. App., Vol. II, p. 618. Accordingly, because there is no evidence in the record to support a finding that the Fourth Transfer was a completed gift, Carolyn Rider's claim that the post-death transfers were completed gifts fails.

Carolyn Rider argues that there are sometimes "exceptional cases or circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court . . . below." *Hormel v. Helvering*, 312 U.S. 552 (1941). The Respondents vehemently reject this assertion by Carolyn Rider as to her issues and arguments to this Court. Quite to the contrary. This is a case where an otherwise sophisticated businessman, while in terminal condition, signed a perfunctory letter transferring \$2 million in assets from his estate and revised his Will and trust. App., Vol. II, p. 609; Vol. I, pp. 380-414. The exceptional circumstances are on the side of the Respondents who stepped into the shoes of the personal representative and defended the estate on appeal.

V. THIS COURT SHOULD REVERSE THE HOLDING OF THE COURT OF APPEALS THAT THE THIRD TRANSFER IS NOT PART OF THE ESTATE.

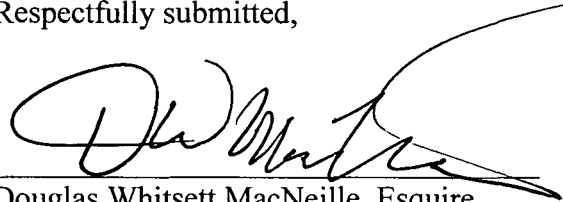
The Court of Appeals held that the Probate Court erred in finding that the mutual funds of the third transfer were not part of Charles Rider's estate because of an error of law; this Court should affirm that holding. The Court of Appeals based its decision on the same holding that applied to the Fourth Transfer. Pursuant to the appellate court rules, a "question presented will be deemed to include every subsidiary question fairly comprised therein." Rule 242(d)(2) SCACR. In this case, because the law that applies to determine whether Carolyn Rider acquired a securities entitlement to the Fourth Transfer, necessarily applies to whether she acquired a securities entitlement to all of the transfers, the "question presented" in this case is what law applies to the transfers. In other words, the facts of this case present a closer correlation than whether a question is a subsidiary question under Rule 242(d)(2). Indeed, all of the lower courts ruled that the transfers took place on the dates indicated by the book entries, as stipulated by the parties in writing. Accordingly, this Court should reverse the holding of the Court of Appeals that the Third Transfer is not part of the estate.

CONCLUSION

For the foregoing reasons, Deborah Rider McClure, Ginger C. Rider, Christian McClure, and Austin McClure respectfully request this Court affirm the decision of the Court of Appeals except to the extent that it ruled the Third Transfer was not part of the estate, and hold that the Third Transfer is part of the estate.

March 18, 2013

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Carmen Tevis Mullen, Presiding Judge

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Opinion No. 4842 (S.C. Ct. App. filed June 15, 2011)

In the Matter of the Estate of Charles Galen  
Rider, a/k/a C.G. Rider

Carolyn S. Rider,..... Petitioner,

v.

Estate of Charles Galen Rider, Thomas M.  
Grady, Personal Representative, ..... Respondent,

and

Deborah Rider McClure, Ginger C. Rider,  
Christian McClure, and Austin McClure ..... Respondents.

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CERTIFICATE OF SERVICE

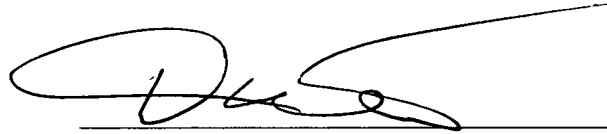
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I certify that on the 18<sup>th</sup> day of March 2013, I served the Brief of Respondents on Carolyn S. Rider, Appellant, and Thomas M. Grady, Personal Representative for the Estate of Charles Rider, by depositing copies in the U.S. Mail, postage prepaid, to counsel as follows:

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A handwritten signature in black ink, appearing to read 'D. MacNeille', written over a horizontal line.

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