

IN THE SUPREME COURT OF MISSISSIPPI

No. 2010-CP-02034

JONATHAN HICKMAN

APPELLANT

v.

***CITIBANK (SOUTH DAKOTA), N. A.,
NOW MERGED INTO, CITIBANK, N. A.***

APPELLEE

**BRIEF OF CITIBANK (SOUTH DAKOTA), N.A., NOW MERGED
INTO, CITIBANK, N.A., APPELLEE**

(On Appeal from the Circuit Court of Marshall County, Mississippi)

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Citibank (South Dakota), N.A., now merged into,
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3. Jonathan Hickman
574 Farley Rd.
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4. Honorable Henry Lackey, Circuit Court Judge
RETIRED

DATED this the 4th day of August, 2011.



Michele C. Arnold
Attorney of Record for Appellee

CERTIFICATE OF SERVICE

I, John S. Simpson, one of the attorneys for the Appellee, do hereby certify that I have this date hand-delivered and/or mailed, via United States mail, postage prepaid, a true and correct copy of this Certificate of Interested Persons to the following:

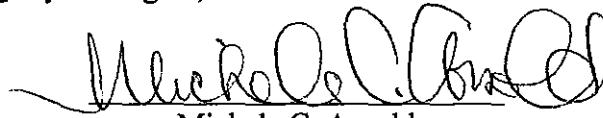
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Honorable Henry Lackey

RETIRED

DATED this the 4th day of August, 2011.


Michele C. Arnold

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STATEMENT OF THE ISSUES

- I. Whether the Circuit Court properly entered summary judgment against Hickman.
- II. Whether Citibank proffered competent evidence of material facts in support of its Motion for Summary Judgment in the Circuit Court.
- III. Whether the Circuit Court abused its discretion in awarding additional attorney's fees to Citibank where such fees were justified by the circumstances.

STATEMENT OF THE CASE

A. Course of Proceedings. This is a simple collection case involving recovery on a delinquent credit card debt. When Defendant refused to pay the account at issue, Citibank (South Dakota), N.A. ("Citibank"), brought an action against Jonathan Hickman styled *Citibank (South Dakota), N.A. v. Jonathan Hickman*, In the Circuit Court of Marshall County, Mississippi, Civil Action Number CV2009-000377.

The course of proceedings and statement of facts are as follows:

Citibank commenced this action by filing a Complaint against Jonathan Hickman¹ ("Hickman"), in the Circuit Court of Marshall County, Mississippi, on January 28, 2009. [pp.1-6, record]. Citibank's Complaint sought to collect the sum of \$2,299.20, owing pursuant to a delinquent credit card account, plus interest, attorneys fees and all costs.

Hickman responded with "Defendant's Motion to Dismiss for Failure to State a Cause of Action" which was supported by "Defendant's Memorandum of Law Supporting Motion to Dismiss". [pp.12-21, record]. Citibank filed a "Response to Defendant's Motion to Dismiss for Failure to State a Cause of Action". Hickman also filed "Defendant's Answer and Motion to Dismiss with Prejudice". [pp. 23-25, record]. At a hearing on February 22, 2010 at the Marshall County courthouse in Holly Springs, Mississippi, the lower court ruled that

¹ Jonathan Hickman appeared *pro se* in the Court below and on this appeal.

Hickman's Motion should be denied. Citibank's counsel submitted an order incorporating the Court's ruling. Hickman then filed an "Objection to Plaintiff's Proposed Order." [pp.35-36, record]. On March 6, 2010, Honorable Henry Lackey, for the Circuit Court of Marshall County, signed an Order denying Hickman's Motion to Dismiss. [p. 38, record].

Citibank served Hickman with its First Set of Interrogatories, First Set of Requests for Production of Document and Things and First Set of Requests for Admission to the Defendant and the Notice of Service of Written Discovery was filed with the Clerk of the Court on April 7, 2010.[p. 39, record]. Hickman never responded to the requests for admissions or other discovery. Hickman filed a "Motion to [*sic*] Finding of Fact and Conclusion of Law on April 15, 2010. [pp.41-42, record]. Citibank filed a "Motion to Amend Complaint" on May 5, 2010. [p. 44, record]. Citibank also filed a properly supported "Plaintiff's Motion for Summary Judgment" on May 5, 2010. [pp. 48-73 , record]. The hearing on Plaintiff's Motion for Summary Judgment and Motion to Amend Complaint were set for hearing on July 12 ,2010. [p.74 , record]. In response, Hickman filed a "Motion to Continue Hearing on Plaintiff's Motion for Summary Judgment" and Motion to Continue Hearing on Plaintiff's Motion to Amend Complaint". [pp. 77-78, record]. The hearings on Citibank's motions were postponed several times.

Citibank brought its Motion to Amend Complaint and Motion for Summary Judgment on for hearing before the Honorable Henry Lackey on October 14, 2010 as evidenced by the Re-Notice of Hearing. [pp. 85-86, record]. Hickman was duly served with the Motion for Summary Judgment and with notice of the hearing, however, Hickman did not file any affidavits in opposition to the affidavits filed on behalf of Citibank or otherwise respond to Citibank's Motion for Summary Judgment. After considering the arguments of the parties and evidence presented, the Circuit Court granted the relief requested by Citibank on November 15, 2010. In its decision, the Circuit Court found that Hickman's name should be corrected in the prayer of the Complaint, that Hickman wholly and completely failed to respond to Plaintiff's Requests for Admissions, that pursuant to Rule 36 of the Mississippi Rules of Civil Procedure,

the Requests for Admissions were deemed admitted and that Citibank was entitled to a Final Judgment against Hickman in the principal amount of \$2,299.20, plus post-judgment interest at the rate of 8.00% per year, reasonable attorneys' fees of \$2,000.00, and all costs of court. [p. 90-91, record]. Hickman filed his Notice of Appeal on December 13, 2010. [p. 92, record]. Hickman then filed a "Motion to Vacate Judgment" on December 20, 2010. [pp. 99-104, record].

B. Statement of Facts.

This case from which this appeal emanates is a garden-variety suit to collect a delinquent credit card account balance. The material facts are straightforward.

Hickman opened a credit card account with Citibank. [pp.1-2, record]. Hickman used the account to purchase goods and services and/or to obtain cash advances. [pp. 1-2, record].

Hickman failed to make payment on the account according to the terms of his Agreement with Citibank and as specified on the statements of account sent to Hickman each month. [pp.1-2, record]. By letter dated December 3, 2008, Citibank demanded that Hickman pay the balance on the account. [p. 5, record]. Hickman failed to pay the outstanding balance of \$2,299.20, prompting Citibank's action in the Circuit Court.

SUMMARY OF THE ARGUMENT

The Circuit Court of Marshall County, Mississippi, did not err in granting Citibank's Motion for Summary Judgment. Hickman, as the non-moving party responding to a Motion for Summary Judgment, must establish by affidavit or otherwise the existence of a genuine issue of material fact. Hickman, however, failed to present any evidence in opposition to Citibank's motion. The undisputed, material facts show: (1) that Hickman obtained and used the credit card account and became indebted to Citibank; (2) that he subsequently failed to pay the indebtedness as agreed; and (3) that Citibank suffered a monetary loss resulting from Hickman's failure to repay the money loaned in the context of the account relationship. The record before this Court and applicable law demonstrate that Hickman's debt to Citibank is valid

and accurate. Hickman failed to demonstrate the existence of any genuine issue of any material fact as required to avoid entry of judgment as a matter of law. As no genuine issue of material facts exist, the Circuit Court's award of summary judgment was appropriate. This Court should, therefore, affirm the Circuit Court's judgment in favor of Citibank.

STANDARD OF REVIEW

1. Motion for Summary Judgment

The Court applies a *de novo* standard of review on appeal from a grant of summary judgment by the trial court. *Vaughn ex rel. Vaughn v. Estate of Worrell*, 828 So.2d 780, 782 (Miss.2002); *Russell v. Orr*, 700 So.2d 619, 622 (Miss.1997); *Richmond v. Benchmark Constr. Corp.*, 692 So.2d 60, 61 (Miss.1997); *Merrimack Mut. Fire Ins. Co., v. McDill*, 674 So.2d 4, 7 (Miss.1996); *Northern Elec. Co. v. Phillips*, 660 So.2d 1278, 1281 (Miss.1995). Rule 56(c) of the Mississippi Rules of Civil Procedure provides that summary judgment shall be granted by a court if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss.R.Civ.P. 56(c). The determination of relevancy and admissibility of evidence is within the discretion of the trial judge and will be reversed only if that discretion has been abused. *Abrams v. Marlin Firearms Co.*, 838 So.2d 975, 979 (Miss. 2003). A circuit court judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor, whose findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence. *City of Jackson v. Internal Engine Parts Group, Inc.*, 903 So. 2d 60, 63 (Miss. 2003).

Rule 56 provides an expedited determination of actions on their merits and eliminates meritless claims or defenses without the necessity of a full trial. In responding to a motion under Rule 56, the opposing party must produce specific facts showing that there is a genuine material issue for trial. *Frutcher v. Lynch Oil Co.*, 522 So.2d 195, 199 (Miss.1988). "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his

response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.” Miss.R.Civ.P. 56(e). The non-moving party's claim must be supported by more than a mere scintilla of colorable evidence; rather, it must be evidence upon which a fair-minded jury could return a verdict in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

2. Court’s granting of additional attorneys fees.

Pursuant to Miss. Code Ann. §9-1-41 (1991), the Mississippi Supreme Court stated that the standard of review to be applied for review of the award of attorneys’ fees by the lower court is an abuse of discretion, supported by credible evidence. See *Par Industries, Inc. v. Target Container Company*, 708 So. 2d 44, 54 ¶26 (Miss. 1998).

ARGUMENT AND AUTHORITIES

I. The Circuit Court properly entered summary judgment against Hickman.

On appeal, this Court is asked to review the Circuit Court’s summary determination of a simple suit to collect a delinquent credit card debt. In pursuing the collection of this account counsel for Citibank filed a complaint against Hickman. The complaint and exhibits filed by Citibank show the amount of the debt and Hickman as the debtor of the subject debt. The only exception is where a typographical error appeared in the prayer for relief of the complaint and referred to Hickman as Jonathan Carpenter. This was simply an error of form and not substance with regard to the relief that was granted to Citibank by the lower court. Hickman appears to argue that Summary Judgment should not have been granted because on the date the Motion for Summary Judgment was granted, the actual amended complaint had only been attached to Citibank’s Motion to Amend Complaint and not separately filed with the Clerk of the Court. Hickman takes this argument one step further, and alleges because the amended complaint had not been separately filed with the Clerk of the Court, he should be alleviated of his responsibility to respond to Citibank’s First Set of Requests for Admissions pursuant to

Mississippi Rules of Civil Procedure Rule 36.

The record reflects that an oral order was entered by the Court at a previous hearing regarding allowing Plaintiff to amend the prayer of the complaint to state the name of “Jonathan Hickman” instead of “Jonathan Carpenter”. [p. 11, transcript]. The record reflects that Hickman was present at this hearing, and aware of the court’s allowing Citibank to amend his name in the prayer for relief. [p. 9, transcript]. The lower court stated at the hearing on Citibank’s Motion for Summary Judgment that since Citibank was merely correcting the incorrect spelling of Hickman’s last name in the prayer for relief of the complaint, the Court could have allowed Citibank to interlineate or strike out the name, but, out of abundance of caution, the Court asked Citibank to mail a copy of the amended complaint to Hickman. Hickman admitted that he had, in fact, prior to the hearing on Citibank’s Motion for Summary Judgment, received a copy of the amended complaint with his name correctly stated in the prayer for relief. [p. 9, transcript]. The court determined that Hickman had been afforded proper notice of the amended complaint and had received due process in the matter. [p. 9, transcript].

A portion of Citibank’s Motion for Summary Judgment relied upon the fact that Hickman had not responded to its First Set Requests for Admissions. Mississippi Rules of Civil Procedure Rule 36 (a) allows a party to serve upon another party written request for admissions. The party upon which they are served has thirty days after service of the requests to respond or the requests are deemed admitted. A copy of Citibank’s First Set of Requests for Admissions are attached to its Motion for Summary Judgment as Exhibit “C”. [p. 61-64, transcript]. Pursuant to Miss. R. Civ. P. Rule 36 (b) any matter admitted under this rule is conclusively established *unless the court on motion permits withdrawal or amendment of the admission.* (emphasis added). Hickman had filed no motion for relief or protective order prior to the hearing on the Motion for Summary Judgment for the lower court to consider. Judge Lackey noted that Hickman had received the requests for admissions and no motion or protective order had been filed to keep Hickman from having to answer the requests for admissions. [p. 12, transcript]. Therefore, the requests for admissions were deemed admitted. Therefore, the requests for

admissions established that Hickman had the subject credit card, used the subject credit card, was in default in payment on the credit card, that the amount being sought in the complaint was accurate and that Citibank was entitled to a judgment against him in that amount. Additionally, the lower court found that Citibank's Motion for Summary Judgment was supported by exhibits regarding the subject credit card account that reflected Hickman's name. [p. 11, transcript]. [p. 48-73 , record]. Contrary to Hickman's argument, Citibank properly supported its Motions for Summary Judgment with competent evidence of material facts. Citibank established, as a matter of law, that it was and is entitled to judgment on the claims advanced by its complaint against the Hickman.

A. Citibank proffered competent evidence of material facts in support of its Motions for Summary Judgment in the Circuit Court.

As held by the trial court in the underlying cases, Citibank proffered complete and competent evidence, including affidavits, itemizations of undisputed facts, pleadings and other supporting documents demonstrating that no genuine issue of a material fact existed. As required by Rule 56 of the Mississippi Rules of Civil Procedure and applicable Mississippi law articulating the standard for an award of summary judgment, the trial court's decisions in each case are proper.

On a motion for summary judgment, the trial court must review all evidentiary matters before it, including admissions made in pleadings, answers to interrogatories, depositions and affidavits, in the light most favorable to the party against whom summary judgment is sought. *Johnson v. City of Cleveland*, 846 So. 2d 1031, 1035 (Miss. 1993). The burden in proving the existence of a genuine issue of material fact rests upon the non-moving party. *Id.* at 1035. Applying these standards, the Circuit Court determined that summary judgment was warranted. This Court has explained its review of such a determination as follows:

When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest

upon the mere allegations or denials of his pleadings, his response must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. If any triable issues of fact exist, the lower court's decision will be reversed. Otherwise, the decision is affirmed.

Miller v. Meeks, 762 So. 2d 302, 304 (Miss. 2000). The evidence proffered by Citibank, when compared with Hickman's failure to present any evidence disputing his liability, conclusively establishes the absence of any genuine issue of material fact. As a result, summary judgment was appropriate.

Hickman never disputed that he obtained and used the subject credit card account and became indebted to Citibank. [pp. 4, 9 transcript]. He failed to pay his debt as agreed and remained in default. Citibank's monetary loss—a liquidated sum—arises from the Hickman's failure to repay the money loaned in the context of the account relationship. The relevant facts are supported by the evidence and reflected in the record. Hickman wholly failed to respond to Citibank's Motion for Summary Judgment. As a result, he has preserved no issue for appeal. *Halle v. Harper*, 869 So. 2d 439, 441 (Miss. Ct. App. 2004)(court may only consider what is in record; if no objection is made, issue waived on appeal).

The instant matter is virtually identical to *Bank of Louisiana v. Berry*, 648 So. 2d 991 (La. App. 5 Cir. 12/14/94). Therein, the Bank of Louisiana (the "Bank"), filed suit against William Berry ("Berry"), the debtor, to collect monies due on a revolving credit card account. *Id.* The trial court granted summary judgment in favor of the Bank, and Berry appealed. *Id.* The Court of Appeals held that the Bank did not have to present detailed and verified statement of credit card charges to be granted summary judgment against the account debtor. *Id.* at 993. The Court further found that contract between the Bank and Berry was perfected upon use of the credit card by the debtor and that no signature on the credit card agreement was necessary. *Id.* at 993.

Like Citibank, the Bank of Louisiana had filed suit to collect the past due balance

on a credit card account, plus interest, attorneys' fees and costs due the Bank under a revolving credit card account. *Id* at 992. Attached to the Bank's Complaint was a copy of Berry's account statement. *Bank of Louisiana*, 648 So. 2d at 992. Berry denied liability and alleged that he had not been served with a copy of a credit card agreement. *Id*. The Bank subsequently filed a Motion for Summary Judgment. *Id*.

Attached to the Bank's Motion for Summary Judgment (as is the case in the instant litigation) was an affidavit executed by the Bank's Vice President stating that the balance on the account was correct, due and owing. *Id*. Berry did not file any countervailing affidavits or any other response to the motion. *Id*. At hearing on the Bank's Motion, the trial court rendered judgment for the Bank for the unpaid balance, interest, attorneys' fees and costs. *Id*. The trial court denied Berry's request, and an appeal followed. *Id*.

The Court of Appeals affirmed the grant of summary judgment. *Id*. In so doing, the Court noted that the Bank had produced a statement of account stating the balance due at the time of the Complaint and an affidavit verifying the account statement and credit card agreement. *Id* at 993. The Court stated

These documents, challenged only by a general denial made by the defendant to the contrary, were sufficient to resolve all material fact issues. Thus, it became incumbent upon the defendant to prove that there were still unresolved issues of material fact. **Defendant did not produce any evidence to negate the evidence presented by the bank and/or to raise any issues of fact which would preclude summary judgment.** We, therefore, conclude that the trial court did not err in granting the motion for summary judgment filed by Bank of Louisiana.

Bank of Louisiana, 648 So. 2d at 992 (emphasis added).

The Louisiana Court further noted, as is the case here, that Berry did not claim to have satisfied the debt or to have disputed the accuracy of the charges on the account. *Id*. Instead, Berry merely blanketed the Bank's allegations with a general denial and argued that the evidence presented was insufficient to support a motion for summary judgment. As a result, the

award of summary judgment was affirmed. *Id.*

At the hearings in the case *sub judice*, Citibank moved for summary judgment on its claims against Hickman. A review of the record shows that Citibank complied with all applicable state and federal law regarding collection of Hickman's delinquent credit card account. A review of the record also shows that the Hickman offered no proof to contest his liability on the indebtedness. Since Hickman offered no proof to refute his liability, summary judgment in favor of Citibank was appropriate. A reversal of the Circuit Court's decisions is not supported by the evidence and would be without any foundation in law or fact. The judgment, therefore, should be affirmed.

B. Citibank established that it is entitled to judgment as a matter of law in support of its Motion for Summary Judgment in the Circuit Court.

In order for a summary judgment motion to be granted, no genuine issue of material fact may exist, and the moving party must be entitled to judgment as a matter of law. *Johnson*, 846 So. 2d at 1034. Here, the evidence before the trial court shows that Citibank is entitled to judgment on its actions to collect the delinquent credit card accounts. Citibank presented uncontroverted proof resolving the correctness and validity of the subjects account, and thus established its entitlement to judgment as a matter of law.

Controlling federal authority states that the relationship between Citibank and Hickman is that of lender and borrower. *See In re Mercer*, 246 F.3d 391, 406 (5th Cir. 2001)(*en banc*)("[C]ard-use signified acceptance of the agreement, including the obligation to pay the charges by making at least the minimum monthly payments. . . . [B]y card-use, she requested a loan against that line; and, by approving each card-use, and therefore reimbursing the merchant, . . . [the credit card issuer] made a loan to her."). *See also* Regulation Z, 12 C.F.R. 226.12, n. 1 (contract and binding obligation formed through use of credit). It is axiomatic that a borrower must repay sums loaned, with interest, failing which, the lender may resort to the courts for a remedy. Therefore, a creditor does not have to lend money directly to the debtor to create

liability. Regulation Z, 12 C.F.R. 226.12. The fact that Citibank extended credit and not money does not discharge Hickman's liability, and Citibank's payment to merchants for purchases made by Hickman as a cardholder supplies consideration supporting an enforceable contract.

There is no evidence to raise a triable issue of fact with respect to Citibank's award of summary judgment. Other than Hickman's allegations that the trial judge improperly weighed the actual amended complaint not being filed with the Clerk of the Court and in turn, his failure to respond to Citibank's First Set of Requests for Admissions, Hickman failed to file any counter affidavits to the Motion for Summary Judgment to set forth any specific facts showing that there is a genuine issue for trial. Hickman, as the adverse party, cannot rest upon mere allegations or denials to overcome a motion for summary judgment, he must respond specifically with a genuine issue for trial. *Johnson*, 846 So. 2d at 1034; *see also* Miss. R. Civ. P. 56. Hickman's response as to the action against him failed to present evidence of an issue of fact. Hickman completely failed to respond to the action against him. Hickman failed to demonstrate the existence of a triable issue of material fact. The undisputed, relevant, material facts, however, establish that Citibank is entitled to the relief demanded in its Complaints.

II. Pursuant to the applicable standard of review the Circuit Court properly granted additional attorneys fees to Citibank in this matter.

Pursuant to Miss. Code Ann. §9-1-41 (1991), the Mississippi Supreme Court stated that the standard of review to be applied for review of the award of attorneys' fees by the lower court is an abuse of discretion, supported by credible evidence. *See Par Industries, Inc. v. Target Container Company*, 708 So. 2d 44, 54 ¶26 (Miss. 1998). The record supports the basis upon which Judge Henry Lackey granted the additional attorneys fees in this matter. Judge Lackey noted "the attorney for Plaintiff resides in Jackson, Mississippi. He's made trips to Marshall County and to New Albany, and out of fairness to him, that is a fair and reasonable fee." Based on the standard of review the award for additional attorneys fees should stand.

Conclusion

Hickman failed to demonstrate the existence of any genuine issue of material fact precluding summary judgment and further failed to demonstrate that Citibank was not entitled to judgment as a matter of law. Hickman has not met his burden on appeal to establish that the Circuit Court erred in granting summary judgment in Citibank's favor, or in the granting of attorneys fees in the amount of \$2,000.00. Accordingly, Citibank asks that this Court affirm the Circuit Court's judgment for all sums due on the credit card account. Citibank further requests that it be awarded its costs in this proceedings and other appropriate relief.

RESPECTFULLY SUBMITTED, this the 4th day of August, 2011.

**CITIBANK (SOUTH DAKOTA), N.A.,
NOW MERGED INTO, CITIBANK, N.A.**

By its attorneys

SIMPSON LAW FIRM, P.A.

By:



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CERTIFICATE OF SERVICE

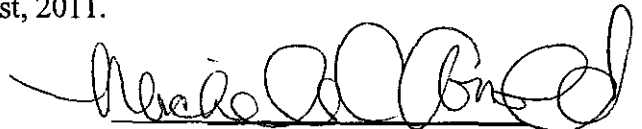
I, John S. Simpson, do hereby certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing **Brief of the Appellee** to the following:

Jonathan Hickman
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Ms. Kathy Gillis
Mississippi Supreme Court
Post Office Box 117
Jackson, Mississippi 39205

Honorable Henry Lackey
RETIRED

DATED this the 4th day of August, 2011.


Michele C. Arnold