



**FORECLOSURE DEFENSE
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December 2, 2013

VIA OVERNIGHT MAIL

Honorable Jenny Abott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RECEIVED

DEC 03 2013

SC COURT OF APPEALS

RE: Edward J. Rivera and Michele L. Rivera vs. BAC Home Loans Servicing, L.P.
Appellate Case No. 2012-212893

Dear Ms. Kitchens:

I am writing in response to counsel for the respondent, Ms. Genevieve Johnson's, letter to you dated November 22, 2013 which I received on November 25, 2013. Ms. Johnson's letter requests that the above Appeal be dismissed in light of the recent Court of Appeals Opinion No. 5140, *Bank of America v. Draper*. Appellants respectfully request that the respondents request be denied for several reasons. First, respondent's letter fails to comply with the requirements set forth in South Carolina Appellate Court Rule 240(c) and (d). The failure of any moving party to comply with Rule 240 may be deemed as an abandonment of the motion or petition, *Rule 240(g), SCACR*. Second, it is the Appellants' position that the issues before the Court in this matter are not the same issues as those presented in *Bank of America v. Draper*. The Appellants agree with Respondent's statement that the *Draper* decision held that the servicer of a loan can have standing to foreclose. However, the Plaintiff has never alleged that it had standing to sue based on its role as the loan servicer. Rather, the Complaint alleges that the respondent had standing to foreclose and was the holder of the note and mortgage based on a mortgage assignment to the Plaintiff that was not dated or filed until after the underlying foreclosure Complaint was filed. In addition, the Final Judgment of Foreclosure and Sale also incorrectly holds that the Plaintiff is the owner and holder of the note and mortgage by virtue of the mortgage assignment dated August 27, 2009. The Appellant's arguments are not premised solely on the fact that the respondent lacked standing by virtue of the late assignment. Rather, it is the respondent that alleged the right to foreclosure based on its status as the holder of the note and mortgage by virtue of the August 27, 2009 Assignment of Mortgage. Conversely, the Appellant's have argued that a mortgage assignment alone does not carry with it an assignment of the note and that Respondent lacked standing to bring the underlying foreclosure complaint because it failed to allege or prove that it had the authority to enforce the underlying promissory note under Article 3 of the South Carolina Uniform Commercial Code.



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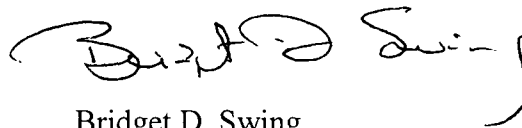
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The respondent cannot now, after the fact, argue that they were asserting their right to foreclose based on their role as the loan servicer. That is not what they alleged in the Complaint and that was not the findings in the foreclosure Judgment and Order. In addition, unlike the facts in *Draper*, the respondent never introduced evidence that it was the holder of the promissory note at issue and only attached to its foreclosure complaint a copy of a promissory note that was neither endorsed in blank nor endorsed to the Plaintiff BAC Home Loans Servicing, L.P f/k/a Countrywide Home Loans Servicing, L.P.

For the reasons set forth above and for other good cause, the Appellant respectfully requests that the request for dismissal made in Ms. Johnson's November 22, 2013 letter be denied.

Sincerely,



Bridget D. Swing

CC: Ms. Genevieve S. Johnson, 1201 Main Street, Suite 1110, Columbia, South Carolina 29201