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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstien, Circuit Court Judge

75920

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Case No. 2011-CP-18-1013

Appellate Case No. 2013-002066

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The Bank of New York Mellon, as Successor Trustee
under NovaStar Mortgage funding Trust, Series 2004-1,.....Appellant,

v.

Rachel R. Lindsay; Jeffery Wayner; Tammy Wayner;
Tiffany Spann-Wilder, Esq.; The Steinberg Law Firm;
and United States of America, Acting by and through
its agency, the Internal Revenue Service, Defendants,

Rachel R. Lindsay .....Respondent,

v.

Saxon Mortgage Services, Inc.,.....Appellant.

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# PETITION FOR REHEARING

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The Respondent Rachel R. Lindsay by and through her counsel G. Thomas Hill hereby petitions the Court of Appeals to grant a rehearing of court's opinion in the above referenced case filed on April 22, 2015 (Opinion No. 2015-UP-208). The Court of Appeals is in erred by ruling that in a foreclosure lawsuit the filing of a permissive counterclaim amounts to waiver of one's constitutional right to a jury trial, by ruling that in a foreclosure lawsuit that the filing of a compulsory counterclaim fails to preserve one's constitutional right to a trial by

jury, and by ruling that Lindsay failed to file even one compulsory counterclaim. Furthermore, the rehearing is necessary based on the arguments delineated below:

I. **Opinion No. 2015-UP-208 issued by the South Carolina Court of Appeals in the case at hand erroneously extends the ruling by the South Carolina Supreme Court in the case of Carolina First Bank v. Badd, LLC Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015) far beyond what the Supreme Court intended.**

II. **The Court of Appeals should reconsider its ruling due to distinctions and differences between in the case at hand and Carolina First Bank v. Badd, LLC Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015), and, due to the fact that Lindsay did file compulsory counterclaim(s).**

In support of this Petition for Rehearing, Respondent refers to the Final Brief of Respondent, record on appeal, and arguments presented in this appeal.

WHEREFORE, Respondent Lindsay requests a rehearing and that the Court of Appeals reverse its decision and remand the case for trial by jury.

Respectfully submitted,

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**ATTORNEYS FOR RESPONDENT**
***(RACHEL R. LINDSAY)***

Ravenel, South Carolina

May 7, 2015

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Rachel R. Lindsay .....Respondent,

v.

Saxon Mortgage Services, Inc.,.....Appellant.

## PROOF OF SERVICE

I HEREBY CERTIFY that I have served the Petition for Rehearing and Memorandum of Law in Support of the Petition for Rehearing on Appellants, Plaintiff, Defendant and Third Party Defendant by hand-delivering copies of the same at the address of the Counsel of Record, below:

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---

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its agency, the Internal Revenue Service, Defendants,

Rachel R. Lindsay .....Respondent,

v.

Saxon Mortgage Services, Inc.,.....Appellant.

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# MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

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The Respondent Rachel R. Lindsay refers the Court of Appeals to the Statement of the Case, Procedural History - Case Filings, Statement of Facts and Argument contained in the Final Brief of Respondent, as being restated and incorporated herein. The rehearing is necessary for the reasons delineated below:

**I. Opinion No. 2015-UP-208 issued by the South Carolina Court of Appeals in the case at hand erroneously extends the ruling by the South Carolina Supreme Court in the case of Carolina First Bank v. Badd, LLC., Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015) far beyond what the Supreme Court intended.**

Upon reading the ruling in Bank of New York Mellon v. Lindsay, Opinion No. 2015-UP-208, it appears that the Court of Appeals ruled that once a party to a foreclosure action files just one permissive counterclaim that said party waives the right to a jury trial, whether or not the party has also asserted a compulsory counterclaim. Respondent Lindsay asserts that the converse is true, the ruling in Carolina First Bank v. Badd, LLC., indicates that the filing of just one compulsory counterclaim in a foreclosure action guarantees one's right to a trial by jury, even if permissive counterclaims are also pled. Surely, the filing of a permissive counterclaim does not taint a case initiated by foreclosure litigation to the point that a party waives her constitutional right to a trial by a jury of her peers.

**II. The Court of Appeals should reconsider its ruling due to distinctions and differences between in the case at hand and Carolina First Bank v. Badd, LLC., Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015), and, due to the fact that Lindsay did file compulsory counterclaim(s).**

A. The Court of Appeals relies primarily on the case of Carolina First Bank v. Badd, LLC., in formulating its opinion regarding the case at hand. The differences and distinctions between the facts in Carolina First Bank v. Badd, LLC., and Bank of New York Mellon v. Lindsay, are delineated as follows:

1. Reason for the Filing of the Foreclosure Action.

   (a) BADD, LLC actually failed to make loan payments to the lender and defaulted on the loan and involves the filing of one foreclosure action.

   (b) Lindsay actually made the loan payments to the lender but through an "accounting error" or other nefarious act or omission on the part of the lender, Lindsay was not

credited with making the loan payments, and was erroneously classified as being in default. *Where did the money for the monthly mortgage payments go?* But for, the Banks admitted "accounting error" (*euphemism)* regarding loan payments made by Lindsay, Lindsay would have never been considered to be in default, and the foreclosure action would have never been filed in the first place. Also, this case involves the negligent filing of the first foreclosure action and the malicious filing of a second foreclosure action.

2. Borrower/Lender Relationship.

   (a) McKown as a guarantor was ancillary to the dealings between borrower and lender; BADD, LLC was the primary participant in the borrower/lender relationship.

   (b) Lindsay was the primary participant in the borrower/lender relationship.

3. Extent of interaction in the Borrower/Lender Relationship.

   (a) McKown had no direct interaction with the lender regarding the making of loan payments, or the failure to make said payments.

   (b) Lindsay personally interacted with the lender periodically by making the loan payments directly to the lender.

4. Reason for being named as a Defendant in a Foreclosure action.

   (a) McKown was joined in as a party to the foreclosure action by the lender who did not claim that McKown was in default but only claimed that he was secondarily liable for the debt as a "guarantor", due to the failure of BADD, LLC to make the required loan payments.

(b) Erroneously, Lindsay was directly sued by the lender in the foreclosure action based on the claim that Lindsay was in default. (*Lender admits to making an "accounting error"*).

5. Counterclaims asserted.

(a) McKnown as an ancillary party counterclaimed asserting permissive counterclaims involving the lender and William Rempher.

(b) Lindsay as a primary party did in fact assert compulsory counterclaims[1] and delineated in the Final Brief of Respondent.

The transaction and occurrence involves the malevolent filing of the second foreclosure lawsuit after the Bank's misappropriation of Lindsay's monthly mortgage loan payments (*otherwise referred by the Appellant as an "accounting error" and by Respondent as fraudulent larceny*) and erroneous filing of the second foreclosure action. The Bank of New York Mellon admits to the fact that it took $6,557.04 from Lindsay and failed to show said sum on its "Books", and that since its "Books" did not account for said payments it considered Lindsay to be in default for failure to make the loan payments represented by said $6,557.04. It was after the filing the first foreclosure action against Lindsay, when confronted by Lindsay the Bank of New York Mellon inexplicably located said sum of money. The Bank dismissed the first case

[1] **SCRCP Rule 13(a) Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it ***arises*** ***out of the transaction or occurrence*** *that is the subject matter of the opposing party's claim* and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought the suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

after said revelation. It was later that the Bank, knowing that it created the circumstances which made it appear that Lindsay was in default, filed the second foreclosure action in complete disregard for Respondent Lindsay. At least one legal cause(s) of action pled by Respondent Lindsay (e.g., Breach of Contract, Negligence, Fraud, Negligent Misrepresentation,....) justify the judicial determination that the Lindsay is entitled to a Jury Trial in the case at hand. Based on the facts and circumstances of this case there are counterclaims filed by Lindsay which are compulsory as delineated in the Final Brief of Respondent.

## Conclusion

The filing of one compulsory counterclaim in a foreclosure action preserves a parties right to a trial by jury. Lindsay filed at least one compulsory counterclaim, therefore, the Court of Appeals should reverse its decision and remand the case for trial by jury.

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May 7, 2015

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May 7, 2015



**HAND-DELIVERED**

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Bank of New York Mellon v. Lindsey, et al
Appellate Case Number: 2013-002066

Dear Honorable Jenny Abbott Kitchings:

Enclosed you will find the Petition for Rehearing, and Memorandum of Law in Support of Motion for Rehearing, and filing fee, together with proof of service which have been served on all counsel of record.

If you have any questions concerning this matter, please do not hesitate to contact my office.

With kindest regards, I am

Very truly yours,

G. Thomas Hill

GTH

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