

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph M. Strickland, Master-In-Equity

Appellate Case No. 2016-00958

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SC Court of Appeals

Wells Fargo Bank, N.A., Plaintiff,

v.

William R. Hudspeth, Marcia E. Hudspeth; TD Bank, N.A. s/b/m to Carolina First Bank; The Lender Group, Inc.; Business Carolina, Inc.; South Carolina Department of Revenue; Carapace, LLC; Wurth Wood Group, Inc.; The Estate of Harry William Boyd, by Joan L. Boyd, Personal Representative; Adecco USA, Inc., Defendants,

Of Whom TD Bank, N.A. successor by merger to Carolina First Bank is the Appellant,

and Of Whom The Lender Group, Inc. is the Respondent.

FINAL BRIEF

S. Lindsay Carrington S.C. Bar No.: 76420
J. Martin Page S.C. Bar No.: 100200
BELL CARRINGTON & PRICE, LLC
508 Hampton Street, Suite 301
Columbia, SC 29201
(803) 509-7692
Attorneys for Appellant

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FINAL BRIEF OF APPELLANT, TD BANK, N.A.,
S/B/M TO CAROLINA FIRST BANK

S. Lindsay Carrington S.C. Bar No.: 76420
J. Martin Page S.C. Bar No.: 100200
BELL CARRINGTON & PRICE, LLC
508 Hampton Street, Suite 301
Columbia, SC 29201
(803) 509-7692
Attorneys for Appellant

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STATEMENT OF ISSUE ON APPEAL

- I. Whether the trial court erred when it provided surplus proceeds from a foreclosure sale to a lienholder in the third position before providing them to Appellant, who was in the second position, when it is well-settled that the priority of a junior lien attaches to the sale proceeds before foreclosure?

STATEMENT OF THE CASE

This appeal arises from the foreclosure sale of the property located at 222 Treyburn Circle, Irmo, South Carolina (the “**Property**”), on which Appellant, TD Bank, N.A. s/b/m to Carolina First Bank (“**TD Bank**”), held a second position mortgage. The only issue presented to this Court for review is the trial court’s distribution of the foreclosure sale’s surplus proceeds.

The procedural history of the foreclosure and subsequent sale is undisputed. On July 17, 2015, the trial court entered the Order of Foreclosure and Sale in favor of Wells Fargo Bank, N.A. (“**Wells Fargo**”) and ordered that the Property be sold. On August 3, 2015, the Property was sold at the foreclosure sale to TD Bank for the purchase price of \$350,000. This purchase price paid off the entire debt owed to Wells Fargo and resulted in \$224,956.01 in surplus funds. On September 17, 2015, the trial court filed its final statement of receipt and disbursements and set a hearing on the surplus funds for October 23, 2015.

Several junior lienholders timely submitted claims for the surplus funds, including TD Bank and Respondent, The Lender Group, Inc. (“**Lender Group**”), the holder of a third-position lien. A hearing was held on the surplus funds on April 1, 2016. By order dated April 29, 2016, the trial court awarded \$224,921.01 of the surplus funds to Lender Group, ahead of TD Bank’s properly perfected second position lien, and designated \$35.00 to cover court costs. This order also denied TD Bank’s request that the trial court hold the funds until after TD Bank’s appeal.

On May 5, 2016, TD Bank filed a Notice of Appeal of the surplus funds disbursement order and served it on Lender Group. Additionally, on May 11, 2016, TD Bank filed a motion for order to stop payment on the surplus funds pursuant to Rule 241(a). On May 17, 2016, the trial court denied TD Bank's motion and issued a supplemental disbursement order again awarding the surplus funds to Lender Group. On May 19, 2016, TD Bank filed a second Notice of Appeal of the supplemental disbursement order and served it on Lender Group. This Court consolidated the two appeals on June 6, 2016.

Accordingly, TD Bank appeals both the April 29, 2016 disbursement order and the May 17, 2016 supplement disbursement order, which both denied TD Bank's claim to the \$224,921.01 in surplus funds.

STATEMENT OF THE FACTS

On February 27, 2014, Wells Fargo filed a complaint in foreclosure in the Court of Common Pleas for Richland County. (R. p. 1, line 8). Wells Fargo was the assignee of a first-position, purchase-money mortgage on the Property (the "***First Mortgage***"). The First Mortgage secured the original principal amount of \$120,800 and was recorded on July 14, 2004 in the Richland County Records. (R. p. 2, lines 10-25).

In the foreclosure complaint, Wells Fargo properly named all junior lienholders as defendants. TD Bank was the holder of the second mortgage, which secured the original principal amount of \$345,000 and was recorded on **July 14, 2004** in the Richland County Records (the "***Second Mortgage***"). (R. p. 4, lines 21-26; R. pp. 33-34, lines 13-16, 1-4). Lender Group was the holder of a judgment lien in the amount of \$1,075,923.50, which was filed in the Richland

County Records on **December 12, 2008** (the “*Third Lien*”), four years after TD Bank’s Second Mortgage. (R. p. 4, lines 27-31).¹

On July 17, 2015, the trial court entered the Order of Judgment of Foreclosure and Sale in favor of Wells Fargo. (R. pp. 1-9). This Order provided that the Property to be sold at public auction. (R. p. 6, lines 25-26). The winning bidder’s payment was directed be applied first to pay off the amount due on the First Mortgage, which was \$121,581.11 as of the date of the judgment. (R. p. 6, lines 27-29; R. p. 8, lines 10-12). It was further ordered that “in the event there is a surplus from the sale of the subject property, the validity, priority and amount of any such lien claims will be determined at a hearing subsequent to the sale, in accordance with Rule 71(c).” (R. p. 4, lines 17-20; R. p. 8, line 13). All junior lienholders were entitled to file a claim to such funds, including TD Bank and Lender Group. (R. pp. 4-6).

On August 3, 2015, the Property was sold by the Master in Equity to TD Bank for the purchase price of \$350,000. (R. p. 14, lines 1-4). This purchase price paid off the First Mortgage and resulted in \$224,956.01 in surplus funds. (R. p. 14, lines 4-6). On September 17, 2015, the trial court filed its final statement of receipt and disbursements and set a hearing on the surplus funds for October 23, 2015. (R. pp. 19-20).

Several junior lienholders submitted claims for the surplus funds. On October 22, 2015, TD Bank filed its Notice of Claim. (R. p. 33). At the time of the foreclosure sale, \$324,778.10 was due on the Second Mortgage. (R. p. 34, lines 7-8). Accordingly, TD Bank claimed the full amount of surplus funds, \$224,956.01, an amount less than the full amount due on the Second Mortgage. (R. p. 33, lines 8-16; R. p. 34, lines 1-11). On October 30, 2015, Lender Group

¹ There were six additional lienholders junior to the Lender Group, but these lienholders are not at issue in this appeal.

submitted a Notice of Claim to Surplus Funds to cover the amount due on its Third Lien. (R. pp. 48-49). Although other claims were also filed, only these two claims to surplus funds are relevant to the present appeal.²

The hearing on surplus funds was rescheduled several times, and eventually was held on April 1, 2016. (Supp. R. 1). In advance of the hearing, at the trial court's request, TD Bank provided the Court with a brief explaining why TD Bank was entitled to surplus funds as a second-position lienholder that had purchased the Property at the foreclosure sale. (R. pp. 52-55). This brief was filed on March 10, 2016 and served as the basis for TD Bank's argument at the hearing. (R. pp. 52-55).

On April 1, 2016, TD Bank, Lender Group and the South Carolina Department of Revenue appeared at the hearing in support of their filed claims. (Supp. R. pp. 1-11). TD Bank argued that because its Second Mortgage had attached to the surplus funds before the foreclosure sale, it was irrelevant to the analysis that TD Bank had been the purchaser of the Property. TD Bank highlighted that:

South Carolina follows the restatement and a whole host of other jurisdictions that say your lien is extinguished [] at the foreclosure sale, and the surplus funds that are created stand in the place of that real estate to satisfy the creditors ***in the order of priority that they [] enjoyed at the time that the foreclosure was filed.***

(Supp. R. p. 4, lines 9:20-10:3). In support, TD Bank specifically cited to the decision in *BAC Home Loan Servicing, L.P. et al. v. Debra Kinder, et al.*, 398 S.C. 619 (2012) (hereinafter *Kinder*), in which this Court ruled that the extinguishment of a second mortgagee's lien on real property,

² Junior lienholders Wurth Wood Group, Inc., Adecco USA, Inc., Certified Packaging and Transport and The Estate of Harry Boyd filed notice of claims that were either withdrawn or not at issue at the April 1, 2016 hearing. The South Carolina Department of Revenue conceded at the hearing that its liens were junior to TD Bank and the Lender Group. (Supp. R. p. 8, lines 27:24 – 28:6).

by the foreclosure sale on a first mortgage, *did not* extinguish mortgagee's interest in surplus funds resulting from the sale. (Supp. R. p. 4, lines 9:2-9:6; R. pp. 54-55).

Despite this guidance, the trial court concluded that TD Bank no longer held a valid lien on the surplus funds because it purchased the Property at the sale. (Supp. R. p. 4 lines 10:4-10:5) ("the kicker is, your client no longer has a lien. Your client has the property."). TD Bank explained that it didn't believe that its "status as the winner of the bid has any bearing on [its] rights and priority to the surplus funds" that were meant to recover against the Second Mortgage, not the purchase price of the Property. (Supp. R. p. 4, lines 11:9-11:11). TD Bank further clarified that it was simply "trying to get back money on [its] mortgage just as if any other junior creditor or junior lienholder would. . . ." (Supp. R. p. 6, lines 19:11-19:14).

Noting the absence of South Carolina law directly on point, the trial court decided that it would "stand on the fact that the other lienholders [] would take the money somehow," rather than determining the equities. (Supp. R. p. 5, lines 15:22-16:4). But, the trial court conceded that "if a third party had bid this money and [TD Bank] were here arguing about surplus funds, *TD Bank would be treated differently* at that point because [it was] not a third party bidder." (Supp. R. p. 5, lines 16:4-16:9).

Since the trial court made it clear during the hearing that it was not going to award any surplus funds to TD Bank, TD Bank requested that the trial court hold the funds until after TD Bank had exhausted its right to appeal the disbursement order. (R. p. 79, lines 35:4-35:7).

By order dated April 29, 2016, the trial court awarded \$224,921.01 of the surplus funds to Lender Group and designated \$35.00 to cover court costs. (R. p. 14, lines 15-16). In the order entered by the trial court, the trial court stated that TD Bank "inexplicably" submitted a claim to the funds, and that, despite TD Bank's briefing of the issue, TD Bank "could not cite any South

Carolina case, rule or statute to support TD Bank's position." (R. p. 14, lines 8-9). The trial court determined that "[a]n award of surplus funds to TD Bank would prejudice other claimants and require a change in South Carolina law." (R. p. 14, lines 9-10). This order also denied TD Bank's request that the trial court hold the funds until after TD Bank's appeal. (R. p. 14, lines 11-12).

On May 5, 2016, TD Bank filed a Notice of Appeal of the surplus funds disbursement order. Additionally, on May 11, 2016, TD Bank filed a motion for order to stop payment on the surplus funds pursuant to Rule 241(a). (R. pp. 61-62).

On May 17, 2016, the trial court denied TD Bank's motion and issued a supplemental disbursement order again awarding the surplus funds to Lender Group. (R. p. 15, lines 15-16). However, this time the trial court recognized that TD Bank and Lender Group had agreed that the surplus funds would not be disbursed until there was a ruling on TD Bank's appeal. (R. p. 16, lines 1-4). Accordingly, the funds have not been disbursed.

On May 19, 2016, TD Bank filed a Notice of Appeal of the supplemental disbursement order. (R. pp. 65-66). On May 25, 2016, TD Bank filed a motion to consolidate both appeals, which this Court granted on June 6, 2016 (R. pp. 68-73).

ARGUMENTS

This Court must correct the trial court's error in not properly applying SCRCF 71(c), which provides that junior liens attach to any surplus funds in the priority that they existed at the beginning of the foreclosure sale, irrespective of the identity of the sale's purchaser. As the second lienholder, TD Bank has an unequivocal right to recover surplus funds to pay down the \$324,778.10 due on its Second Mortgage at the time of the sale before any payment of the surplus to a subordinate lienholder. TD Bank's purchase of the property during the sale has no bearing on

its entitlement to the surplus proceeds to satisfy its second position lien, as it existed before the sale under South Carolina law.

Further, it is imperative that junior lienholders' interests are determined before a foreclosure sale so that surplus funds are properly disbursed, and the interests of all mortgagees are protected. After all, the core reason that any junior lienholder would bid at a foreclosure sale is to increase the purchase price to protect its lien interests. Here, the trial court's decision would disincentivize junior lienholders from bidding at foreclosure sales and contradict South Carolina public policy.

This Court should vacate both trial court orders for three reasons: (1) South Carolina law requires that the interests of junior lienholders, such as TD Bank,, attach to the sale proceeds in the order they enjoyed before the sale; (2) the equities indicate that TD Bank's should recover surplus funds to recoup its Second Mortgagee; and (3) if TD Bank is denied its right to surplus liens, this would create an impermissible precedent that would deter any junior lienholders from bidding at foreclosure sales in the future, depress foreclosure sales and harm junior lienholders and borrowers.

I. Standard of Review

An action to foreclose a real estate mortgage is one in equity. *Dockside Ass'n v. Detyens*, 362 S.E. 2d 874, 875 (S.C. 1987). In an equitable action, the appellate court may review the evidence to determine the facts in accordance with its own view of the preponderance of the evidence. *Hayne Fed. Credit Union v. Bailey*, 489 S.E.2d 472, 475 (S.C. 1997). An appellate court is not bound by the trial court's legal conclusions. *BB&T of South Carolina v. Kidwell*, 565 S.E.2d 316, 319 (S.C. Ct. App. 2002), *I'On, LLC v. Town of Mt. Pleasant*, 526 S.E.2d 716, 718-19 (S.C. 2000), *see also* S.C. CONST. Art. V, § 5 (providing this state's appellate courts have jurisdiction to correct trial courts' erroneous legal findings in law and equity cases), S.C. Code

Ann §§ 14-3-320 and 14-8-200 (1976 & Supp. 2001) (providing this state's appellate courts have jurisdiction to correct trial courts' erroneous findings of law in equity cases).

II. Under South Carolina Law, TD Bank's Second Position Lien Attached To The Surplus Funds Before The Foreclosure Sale.

The trial court's denial of TD Bank's claim to surplus funds was based on its incorrect conclusion that TD Bank should be treated solely as a purchaser, instead of as both a purchaser and a lienholder. (Supp. R. p. 5, lines 16:9-16:15. This position is not supported by South Carolina law.

First, the trial court mistakenly evaluated the junior lienholders' priority based on the outcome of the sale. This is contrary to South Carolina procedure and the equitable goal of protecting junior creditors' rights.

The Rules of South Carolina Civil Procedure expressly recognizes that a junior lienholder's interest attaches to the sale proceeds based on its priority *at the beginning* of the foreclosure sale, not based on the outcome or the identity of the final purchaser.

Any party to the action, or any person who had a lien on the mortgaged premises *at the time of the sale*, upon filing with the master or other officer conducting the sale a claim of entitlement to the surplus fund, may have a hearing to determine such entitlement.

Rule 71(c), SCRCP.³ This rule reflects the key principle of mortgage that "when a surplus occurs, it represents what remains of the equity of redemption and is, as such, a substitute *res*. The surplus stands in the place of the foreclosed real estate, *and the liens and interests that previously attached to the real estate now attach to the surplus*." Restatement (Third) of Property: Mortgages § 7.4, cmt. a (1997); *see Matrix Fin. Servs. Corp. v. Frazer*, 714 S.E.2d 532, 534 (S.C. 2011) (applying Restatement (Third) of Property: Mortgages).

³ Emphasis added unless otherwise noted.

Moreover, “the liens and other interests terminated by the foreclosure attach to the surplus in order of the priority *they enjoyed prior to the foreclosure*. Payment of the surplus will be *governed by that priority*.” Restatement (Third) of Property: Mortgages § 7.4, cmt. b; 1 Real Estate Finance Law § 7:32 (6th ed.) (2014) (“[T]he surplus stands in the place of the foreclosed real estate and the liens and interests that previously attached to that real estate now attach to the surplus. The junior interest holders are entitled to be paid out of the surplus in the order of priority that existed before foreclosure.”).

South Carolina law is consistent with other jurisdictions on this issue. Several state supreme courts have held that “an equitable conversion of a lien on encumbered property to the surplus proceeds from a foreclosure sale occurs after foreclosure, and liens should be paid out of the surplus in *the order of priority they enjoyed prior to foreclosure*.” *Michael’s Const., Inc. v. Am. Nat. Bank*, 278 P.3d 701, 709-10 (Wyo. 2012); *Bank of America, N.A. v. BA Mortg., LLC, et al.*, 111 P.2d 226 (N.M. Ct. App. 2005) (citing rule for surplus funds set out by G. Nelson and D. Whitman, Real Estate Finance Law § 7.31, at 588 (2d ed. 1985)).

Accordingly, Rule 71(c) reflects that junior lienholders’ interests attach based on the order of priority before the foreclosure sale. The trial court failed to identify any authority whatsoever for its determination – to the contrary – that the interests in the surplus funds should be determined according to the priorities existing after the foreclosure sale. There is simply no legal basis to deprive TD Bank of the funds to pay off its Second Mortgage lien, which attached to the sale proceeds in advance of the foreclosure sale.

Nor is there a basis in South Carolina law supporting the trial court’s position that the identity of the purchaser impacts the awarding of surplus funds. In at least one prior decision, this

Court has suggested that post-foreclosure proceedings are the same regardless of whether the purchaser was a third-party or a mortgagee. In a concurring opinion, Judge Cureton opined:

I discern *nothing in the South Carolina case or statutory law which would require us to treat a mortgagee who purchases at a foreclosure sale differently from a nonparty purchaser*. . . I see no reason why a mortgagee who accepts the risk of buying and disposing of or holding property bought at judicial sale should not be entitled to the same discounts as a third party who takes the same risk.

Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Ret. Grp., Inc., 394 S.E.2d 849, 855 (S.C. Ct. App. 1990) (reviewing mortgagee-purchaser's right to a profit discount in the appraisal value for purposes of determining deficiency judgment) (Sanders, C.J. concurring). Judge Cureton's observation is in line with decisions outside South Carolina. *See, e.g., Great S. Land Co. v. Valley Sec. Co.*, 137 So. 510, 511 (Miss. 1931) ("Where a surplus remains after satisfying a senior mortgage, it should be applied on the junior mortgage. And this rule obtains where the junior mortgagee is the purchaser at the foreclosure of the senior mortgage.").

Second, the trial court erred in equating the extinguishment of TD Bank's lien on the Property with the extinguishment of TD Bank's lien on the surplus funds. In so doing, the trial court treated TD Bank solely as a purchaser. Because TD Bank's interest in the proceeds attached before the foreclosure, it is irrelevant that TD Bank was also the winning bidder at the sheriff's sale. Purchase aside, TD Bank maintains its lien in and rights to the surplus funds.

Considering a similar issue, this Court has already determined that "the extinguishment of the lien has no bearing on this case because [mortgagee] is not claiming it still has a lien over the property. ***Instead, it merely claims an interest in the proceeds from the foreclosure sale.***" *Kinder*, 731 S.E.2d at 549. As in *Kinder*, which TD Bank raised to the trial court as guiding law, the "master's ruling ignores the fact that [second mortgagee] retained the right to claim the surplus funds pursuant to its original lien and the underlying note." *Id.* Because TD Bank was in second

position before the foreclosure sale, TD Bank is entitled to recover the surplus funds to recoup as much of the \$324,778.10 due on the Second Mortgage as possible. TD Bank's Second Mortgage must be protected, not discarded.

The trial court's argument that TD Bank's lien merged into the Property is misplaced. The doctrine of merger of title would only apply to invalidate a mortgage when a mortgagee obtains the property outside of the context of a foreclosure sale. *Peoples Fed. Sav. & Loan Ass'n*, 425 S.E.2d at 783. Where the mortgaged property is sold to pay the mortgage debt at a foreclosure sale and the mortgagee may purchase and take good title, the doctrine would not apply. *Agnew v. Charlotte, C. & A.R. Co.*, 24 S.C. 18, 22 (1885).

A junior mortgagee's purchase pays off the senior mortgage, but the junior mortgagee's debt does not merge into the first debt.

The general rule is that, where a surplus remains after satisfying a senior mortgage, it should be applied on the junior mortgage. And this rule obtains where the junior mortgagee is the purchaser at the foreclosure of the senior mortgage. ***A merger will not take place if it be apparent that the junior mortgagee, in purchasing, did not so intend, or that a merger is against his manifest interest.***

Great S. Land Co., 137 So. at 514; *Builders Supply Co. of Hattiesburg v. Pine Belt Sav. & Loan Ass'n*, 369 So.2d 743, 745 (Miss. 1979) (citing same).

The purchase price of \$350,000 first was applied to pay off Wells Fargo's lien, and the rest of the funds became the surplus, which should be used to pay off all existing junior liens in the order of priority that existed before the sale. To disregard the second position lien on the property would introduce a new requirement unspecified by SCRCP 71(c) or South Carolina law.

The trial court erred in deciding, without authority, that TD Bank should be treated differently than a third-party purchaser and that TD Bank's interest in the proceeds was extinguished by its purchase. Rather, TD Bank has the rights of ***both*** a second lienholder and a

purchaser – as a second lienholder, to satisfy its debt from the surplus proceeds, and as the purchaser to pay the purchase price in exchange for the property. Accordingly, the Orders should be vacated and this case remanded to the trial court for decision in accordance with this well-settled mortgage law.

III. The Equities Dictate That TD Bank Should Receive Surplus Funds To Recover Its Second Mortgage.

This Court is entrusted to correct any inequitable determination by a lower court. The trial court's decision relied on the belief that it would prejudice the other claimants if TD Bank were awarded the surplus funds. But, TD Bank is the party who is highly prejudiced by this decision. As with all junior lienholders, TD Bank's only goal in bidding at the foreclosure sale was to increase the purchase price to protect its ability to recoup funds.

Presumably, the trial court's conclusion relied on the assumption that TD Bank can re-sell the Property to recoup its debt. However, TD Bank is not in a position to profit from ownership of this Property even if it does re-sell it. As indicated below, if this Court takes no action and TD Bank is denied the surplus funds, then *just to break even* TD Bank would have to sell the Property for \$647,778.10 – a price 85% higher than what it paid – in order to recoup the full debt due under its Second Mortgage. See Chart, *supra*, Scenario 1. This is a highly unlikely scenario under normal market conditions. Alternatively, if TD Bank is able to re-sell the Property for the purchase price it paid *and* is awarded the rightfully-owed surplus funds, then TD Bank will still suffer a financial loss of almost \$100,000. See Chart, *supra*, Scenario 2.

	<u>Scenario 1:</u> TD is Denied Surplus Funds	<u>Scenario 2:</u> TD is Awarded Surplus Funds
Second Mortgage Debt	\$324,778.10	\$324,778.10
Purchase Price	\$350,000.00	\$350,000.00

TD Bank Expenditure	\$647,778.10	\$647,778.10
Surplus Funds	n/a	(\$224,956.01)
<i>Hypothetical Sale Price</i>	(\$350,000.00)	(\$350,000.00)
TD Bank Net Loss	(\$324,7878.10)	(\$99,822.09)

Weighing the equities of this case, TD Bank should be permitted to exercise its right to recover the surplus funds to mitigate its significant financial expenditure on the Property. TD Bank's bidding at the foreclosure sale was solely to recover under the Second Mortgage, not to purchase the Property for ownership and resale. TD Bank's claim for surplus funds was not to recoup its purchase price, but was to recoup its Second Mortgage.

This Court should vacate the trial court's decision to ensure this debt is recovered to the fullest extent possible.

IV. Because Public Policy Is Satisfied When Junior Lienholders Actively Participate In Bidding, This Court Should Clarify Junior Lienholders Maintain Rights to Surplus Funds After Purchasing.

This Court also must vacate the trial court's orders to protect the rights of future junior lienholders in South Carolina. If TD Bank is denied the funds, then this decision would create law that *dissuades any junior lienholder from bidding at any future foreclosure sale* rather than protecting the value of a property. This contradicts the current law and violates public policy.

TD Bank bid appropriately at the sale to protect its Second Mortgage. "Unquestionably, a mortgagee will always best protect its interests by participating in the sale itself." *Citifinancial Mortgage Co. v. Clark*, 177 P.3d 986, 992 (Kan. 2008); *Foxworth v. Murchison Nat. Bank*, 134 S.E. 428, 430 (S.C. 1926) ("If necessary to the protection of his [mortgagee] client's interest, it is usual for the attorney to participate in the sale; indeed he would be derelict in his duty should he permit property to be bought for a grossly inadequate amount which would result in his client receiving nothing upon his demand.").

Specifically, it is recognized that “junior lienholders may protect their interests by bidding at foreclosure in order to retain their secured interest in the property.” *In re Indian Palms Associates, Ltd.*, 61 F.3d 197, 209 (3d Cir. 1995). “The surplus proceeds from the sale of the property under the first deed of trust is [junior lienholders’] ***only possible means of repayment on its loan.***” *Stulz v. Citizen's Bank And Trust Co.*, 160 S.W.3d 423, 429 (Mo. Ct. App. 2005) (affirming mortgagee purchaser’s application of purchase price to its own first and second position mortgages); *see also Commerce Bank v. Rice*, 781 N.W.2d 100 (Iowa Ct. App. 2010) (“the junior lienholder has protected its claim either by bidding at the foreclosure sale or redeeming in a deliberate manner”); *Bank of Seoul & Trust Co. v. Marcione*, 244 Cal. Rptr. 1 (Cal. Ct. App. 1988) (noting that depriving junior lienholders opportunity to bid at sale “prevented the junior lienholder from recovering any of the funds it loaned and which this property secured”).

Junior lienholders bid at foreclosure sales in order to maximize the surplus funds available to pay off junior liens. A first lienholder is only interested in bidding up any junior lienholders or third party bidders to an amount in excess of the first lien alone. A second lienholder is interested in bidding up any junior lienholders or third party bidders to an amount in excess of the first lien ***and*** second lien so that the entire amount of the second lien is covered by the purchase price of a foreclosure sale.

This strategy protects the public’s interest in competitive bidding, which preserves property values and ensures that debts are paid off to all creditors at foreclosure. *See Hamrick v. Summey*, 320 S.E.2d 703, 705 (S.C. 1984) (“It is axiomatic that public policy requires open, free competitive bidding at auctions so that the owners may receive a fair price through competitive bidding”).

Here, TD Bank had the interest of bidding up the Lender Group to approximately \$445,359.00 to cover the First Mortgage and Second Mortgage in full. The winning bid never

reached that price. If TD Bank had failed to bid on the Property, then it risked that the purchase price would be artificially low, which would then cover only the First Mortgage.⁴ In that scenario, TD Bank and all other junior lienholders would never recover a penny on the significant debts owed.

It is imperative that this Court protect South Carolina creditors and prevent a future trend in foreclosure sales in which junior lienholders are dissuaded from bidding out of fear of jeopardizing priority. If the trial court decision is enforced, then lienholders in the second position likely would never attempt to bid up junior lienholders or other third-party bidders. Subsequently, properties would sell below market value and junior lienholders would never recoup any surplus funds

Accordingly, this Court should vacate the trial court disbursement order and clarify for all South Carolina lienholders that attachment to surplus proceeds affixes before the foreclosure sale and regardless of the identity of the final purchaser.

* * *

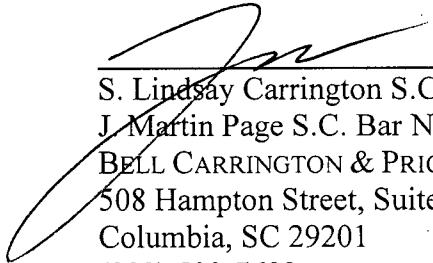
CONCLUSION

TD Bank requests that this Court vacate the trial court's April 29, 2016 disbursement order and the May 17, 2016 supplement disbursement order, and remand for further proceeding with the recognition that TD Bank has a second position lien ahead of the Lender Group third position judgment, which attached to the surplus funds before the foreclosure sale.

⁴ Under the unique facts of this case, TD Bank had to bid up because there were other bidders. If TD Bank been the only junior lien, then absent any third-party bidder, TD Bank possibly could have purchased the Property for the amount of the First Mortgage.

RESPECTFULLY SUBMITTED,

Dated: September 26, 2016



S. Lindsay Carrington S.C. Bar No.: 76420

J. Martin Page S.C. Bar No.: 100200

BELL CARRINGTON & PRICE, LLC

508 Hampton Street, Suite 301

Columbia, SC 29201

(803) 509-7692

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph M. Strickland, Master-In-Equity

Appellate Case No. 2016-00958

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SC Court of Appeals

Wells Fargo Bank, N.A., Plaintiff,

v.

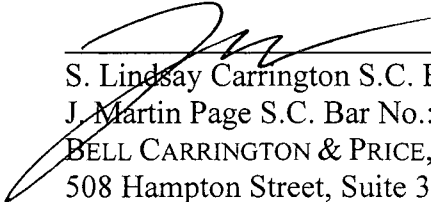
William R. Hudspeth, Marcia E. Hudspeth; TD Bank, N.A. s/b/m to Carolina First Bank; The Lender Group, Inc.; Business Carolina, Inc.; South Carolina Department of Revenue; Carapace, LLC; Wurth Wood Group, Inc.; The Estate of Harry William Boyd, by Joan L. Boyd, Personal Representative; Adecco USA, Inc., Defendants,

Of Whom TD Bank, N.A. successor by merger to Carolina First Bank is the Appellant,

and Of Whom The Lender Group, Inc. is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief complies with Rule 211(b).



S. Lindsay Carrington S.C. Bar No.: 76420
J. Martin Page S.C. Bar No.: 100200
BELL CARRINGTON & PRICE, LLC
508 Hampton Street, Suite 301
Columbia, SC 29201
(803) 509-7692
Attorneys for Appellant

September 26, 2016