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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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DEC 13 2018

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity for Richland County

Appellate Case No. 2016-000958

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.

RESPONDENT'S PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Respondent, The Lender Group, Inc., (hereinafter, "The Lender Group"), hereby submits its Petition for Rehearing following this Court's Unpublished Opinion filed November 14, 2018.

TD Bank's purchase of the Subject Property satisfied the Second Mortgage (held by TD Bank), and TD Bank's lien therefore merged into the Subject Property upon the Master's execution of the Deed<sup>1</sup>. This rule was correctly articulated by the trial court, and, as stated

<sup>1</sup> The Deed conveying the Subject Property to TD Bank, this deed being recorded in the Official Records of Richland County, South Carolina in Book 2058, at Page 374, on September 15, 2015 (R. p. 83).

further below, any interest in the surplus that TD Bank might have had was extinguished by its purchase and subsequent receipt of the Subject Property. (R. p. 76, lines 10:4-10:8). During Oral Argument for the instant proceeding, counsel for The Lender Group informed the Court that TD Bank's Mortgage *was not* the subject of the foreclosure sale, instead the First Mortgage on the Subject Property, held by Wells Fargo, was the lien that was the subject of the foreclosure action. The Lender Group held a judgment lien in the original amount of \$1,075,923.50, filed in the Official Records of Richland County, South Carolina on December 12, 2008 (hereinafter, "**The Lender Group Judgment**").

#### POINTS OVERLOOKED OR MISAPPREHENDED

The crux of the Lender Group's Argument, as further explained in its Final Brief and during Oral Argument, was that the doctrine of merger acted to extinguish any lien interest that TD Bank had in the Subject Property when it became the successful bidder of the Subject Property and as a result, the record owner of the Subject Property. In support of this theory, The Lender Group cited to Agnew v. Charlotte, C. & A.R. Co., which provides that "[i]n this State the legal doctrine of merger has been applied to the case of a mortgagee purchasing from the mortgagor, or under legal process against him, the interest known as the equity of redemption." 24 S.C. 18, 22 (1885). "In short, where the legal ownership of the land and the absolute ownership of the encumbrance become vested in the same person, the intention governs the merger in equity." *Id.* at 23; *accord* McCreary v. Coggeshall, 74 S.C. 42, 53 S.E. 978 (1906) (discussing merger as cited in Agnew); Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 164, 425 S.E.2d 764, 783 (Ct. App. 1992) (citing Agnew for the proposition that when a mortgagee purchases mortgaged property, the

mortgage interest is merged within the field of the estate and the mortgage debt is extinguished).

The three authorities cited by the Court in its Order dated November 14, 2018 have either been misapprehended or portions overlooked, and each will be addressed below.

***1. Agnew v. Charlotte, C. & A.R. Co., 24 S.C. 18 (1885)***

While this Court cited to Agnew, the Court overlooked the differences of the present proceeding from the circumstances of Agnew, specifically that the parties in Agnew had an express agreement that prevented merger, and thus the doctrine of merger did not apply. 24 S.C. at 23. Furthermore, and of more importance, while this Court did cite to the portion of Agnew that has bearing on the present situation (“[A] mortgagee, who buys the estate under mortgage, not under process of foreclosure of his lien, extinguishes the debt or claim with lien on the land”) the Court misapprehended the critical detail of the scenario applicable to the present case, specifically that the merger doctrine *does apply* when the mortgagee is purchasing property “not under process of foreclosure of *his* lien”. 24 S.C. at 22 (emphasis added). As provided by Agnew, when a mortgagee forecloses its own mortgage, and purchases the property on which it had such mortgage through a foreclosure sale, the doctrine of merger does not apply. This is not the scenario here, as TD Bank was a second lien holder purchasing the property not through foreclosure of the TD Bank lien, but through the foreclosure sale of the senior mortgage holder’s lien. Likewise, and as provided by Agnew, the mortgagee who purchases *not under process of foreclosure of his lien*, extinguishes the debt or claim with lien on the land”. 24 S.C. at 22 (emphasis added). Simply put, this Court relied only on the portion of Agnew that dealt with a mortgagee who obtains the property by

virtue of foreclosure of *his* mortgage lien, a scenario in which merger would not apply, and a scenario removed from the present case.

2. **BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 731 S.E.2d 547 (2012).**

Second, this Court looked to BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 731 S.E.2d 547 (2012). Again, the situation in Kinder is different from that of the present situation. Kinder focuses on the rights of an *assignee* of a mortgage in regard to surplus funds and establishes that an assignee of the lien is entitled to make a claim for the surplus resulting from the foreclosure sale (just as the assignor would have been able to claim). Kinder, 398 S.C. at 624. The Lender Group does not dispute that TD Bank does not have the same rights as Carolina First Bank did with regard to the Second Mortgage on the Subject Property. BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 621, 731 S.E.2d 547, 548 (2012) (“We hold the assignee may recover the surplus funds even though it was not a lienholder of record at the time of the sale”). The Court’s reliance on Kinder in the present situation is misplaced and The Lender Group would contend that Kinder does not stand for the proposition stated by the Court when it found that merger would not apply to the present situation,

3. **27 S.C. Jur. Mortgages § 61.**

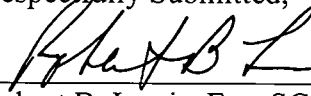
Finally, the Court cites to 27 S.C. Jur. Mortgages § 61. The Lender Group would agree that in certain situations, and as cited by the Court, that “[t]he doctrine of merger operates to extinguish a mortgage where the mortgagee purchases the property other than through the foreclosure process, *unless the parties intended and agreed at the time of the conveyance to keep the mortgage open.*” 27 S.C. Jur. Mortgages § 61 (emphasis added). In the instant case,

and as an initial matter, there was no express or implied agreement to that TD Bank's Mortgage line would remain after the foreclosure. Furthermore, the Lender Group would contend, that the Court misapprehended the general proposition of this statement in that it does not specify the scenario in which the foreclosure occurred, i.e. it does not take into account a situation like the present in which a first mortgage is foreclosed and the property is purchased by a second lienholder at the foreclosure sale. In fact, the footnote that follows the proposition cited by the Court cites to Bleckley v. Branyan, 26 S.C. 242, 2 S.E. 319 (1887), which supports the argument advanced by The Lender Group: "So far as the mortgage debt is concerned . . . after the purchase of the equity of redemption, the mortgagee cannot enforce it against himself, and therefore the purchase may be regarded as payment or extinguishment of the mortgage debt . . ." As such, it is clear that the South Carolina Jurisprudence cited by the Court establishes that in the scenario in which a mortgagee purchases a property under foreclosure of a lien other than his own, merger of title would occur and extinguish that mortgagee-purchaser's lien.

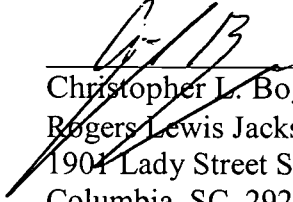
#### CONCLUSION

For the reasons set forth above, The Lender Group respectfully requests that this Court grant the Petition for Rehearing, withdraw the current Opinion, and issue a new Opinion denying TD Bank's request to vacate the trial court's April 29, 2016 Disbursement Order and the May 17, 2016 Supplemental Order, affirm the award of the surplus funds as stated in the aforementioned Orders, and not remand this action for further proceeding.

Respectfully Submitted,



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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 SERVICE

I certify that I have served a copy of *Respondent's Petition for Rehearing* by depositing a copy of the same in United States Mail, postage prepaid, on December 12, 2018, to Appellant's Attorney of record, listed herein:

J. Martin Page, Esq.  
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December 12, 2018

# ROGERS LEWIS

ATTORNEYS AT LAW

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December 12, 2018

Via Hand Delivery

The Honorable Jenny A. Kitchings  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

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RE: *Wells Fargo Bank, N.A. v. Hudspeth, et al.*  
Appellate Case No. 2016-000958

Dear Ms. Kitchings:

Enclosed please find an original and six copies of Respondent's Petition for Rehearing, Certificate of Service for same, and the Motion fee of \$50.00. Once filed, it may be returned in the enclosed envelope.

Thank you for your assistance. If you have any questions, please do not hesitate to contact me.

Sincerely,

**ROGERS LEWIS JACKSON MANN & QUINN, LLC**

  
Christopher L. Boguski, Esq.

Enclosures

cc: J. Martin Page, Esq.  
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