THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master in Equity

Civil Action No. 2013-CP-32-01709
Appellate Case No. 2019-002053

The Bank of New York Mellon, f/k/a The Bank of New York as successor-in-interest to JPMorgan Chase Bank, N.A. as successor in interest by merger to Bank One, N.A. as Trustee for Structured Asset Mortgage Investments, Inc., Mortgage Pass-Through Certificates, Series 2002-AR4, ... Respondent,

v.

Cathy C. Lanier; Branch Banking and Trust Company; Regions Bank, ... Defendants,

Of whom Cathy C. Lanier is the..... Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

This Court should deny the petition for writ of certiorari filed by petitioner Cathy C. Lanier. The master in equity properly found Respondent The Bank of New York Mellon, f/k/a The Bank of New York as successor-in-interest to JPMorgan Chase Bank, N.A. as successor in interest by merger to Bank One, N.A. as Trustee for Structured Asset Mortgage Investments, Inc., Mortgage Pass-Through Certificates, Series 2002-AR4 (the "Bank"), has standing to pursue this foreclosure action against Lanier. This case presents no novel issue, and Lanier fails to raise any issues worthy

of this Court's consideration. *See* Rule 242(b), SCACR. The high burden for certiorari cannot be met. Accordingly, the Bank requests that this Court deny the petition for certiorari.

Counter-Statement of the Questions Presented for Review

1. Did the Court of Appeals properly affirm the master's granting of summary judgment because Lanier failed to establish a genuine issue of material fact as to the Bank's standing to foreclose?

2. Did the Court of Appeals properly affirm the master's exclusion of the McCaffrey affidavit?

Counter-Statement of the Case

The Bank initiated this foreclosure action against Lanier in 2013. (R. 28). Each party filed a summary judgment motion addressing whether the Bank has standing to foreclose. (R. 205–26, 227–32, 327–35). The Bank presented an affidavit from the loan servicer, JPMorgan Chase Bank, N.A. ("Chase"), which holds the original note and mortgage as attorney-in-fact for the Bank, along with allonges to the note establishing the transfer of the note to the Bank and assignments of mortgage showing the transfer of the mortgage to the Bank. (R. 229–31, 233–52). The Bank also presented the original note and original mortgage to the master at a hearing on the standing issue. (R. 796–97, 806).

To support her argument that the Bank lacks standing, Lanier relied on an inadmissible and improper affidavit from a purported expert witness, William McCaffrey. (R. 17, 985–88). McCaffrey lacked any knowledge of the facts relating to the origination and servicing of Lanier's loan. *See generally* (R. 985–88). Instead, he claimed to have performed "extensive research" of "major banking databases" to reach his legal conclusions that the Bank is not a valid trust and therefore cannot foreclose and that the Bank does not satisfy his description of the requirements to pursue a foreclosure action. (R. 986–87).

The master granted summary judgment in favor of the Bank (and denied Lanier's competing summary judgment motion), finding the Bank has standing to foreclose and is a real party interest because it proved ownership of the note and mortgage:

> In sum, there is no genuine issue of material fact that [the Bank] has standing to foreclose. The policy behind proving ownership of the note and mortgage is to ensure a defendant is not sued multiple times with the same note. Given the original note and mortgage have been, and is [sic] in the possession of [the Bank], and there is no claim by any other party that they own the note or mortgage, or any permissible proof offered by [Lanier] that anyone else claims rights to the note, the underlying policy protection is in play to safeguard [Lanier]. Therefore, on the issue of whether [the Bank] has standing to foreclose, [the Bank]'s Motion for Summary Judgment is **GRANTED,** and [Lanier]'s Motion is **DENIED**.

(R. 20–21); *see also* (R. 14, 17).

The master also found the McCaffrey affidavit is inadmissible on four grounds: (1) the affidavit and its attachments—which McCaffrey claimed were filed with the Securities and Exchange Commission—were hearsay; (2) Lanier failed to properly authenticate the documents relied upon in the affidavit, and the documents were therefore inadmissible; (3) McCaffrey's opinions were impermissible legal conclusions; and (4) the affidavit was inconsistent with South Carolina law. (R. 17–20). Accordingly, the master did not consider the affidavit or supporting documents and found "the testimony and exhibits are inadmissible and do not create any issue of fact that [the Bank] is the current owner and holder of the subject note and mortgage, and has standing to foreclose." (R. 19).

Lanier moved to reconsider, but the master denied her motion. (R. 22–23, 779–85). Lanier appealed the order denying her motion to reconsider. In her brief to the Court of Appeals, Lanier raised the exact arguments she raises in her petition for certiorari—specifically, she argued the Bank lacked standing to foreclose, the master erred in excluding the McCaffrey affidavit, and summary judgment was premature. *See generally* (Appx. 24–44). The Court of Appeals affirmed

the master's rulings. (Appx. 3–9). It found the exclusion of the McCaffrey affidavit is the law of the case because Lanier failed to appeal all the grounds for exclusion and held the master properly excluded the McCaffrey affidavit because the affidavit contained improper legal conclusions. (Appx. 4–5). The court also held the master properly granted the Bank's summary judgment motion on standing because the Bank "established that it is a holder of the note and mortgage and, as a result, met its initial burden of demonstrating standing," and "Lanier did not present any evidence to the master tending to show that Bank was not the holder of the note and mortgage." (Appx. 5–8). Therefore, Lanier failed to present any evidence creating a genuine issue of material fact. (Appx. 8). Finally, the court held Lanier's argument that summary judgment was premature is unpreserved. (*Id.*).

Argument

The sole issue on which the master in equity granted summary judgment is the Bank's standing to foreclose. The Bank presented proof that it is the holder of the note and assignee of the mortgage and is therefore entitled to foreclose. Lanier presented no admissible evidence to the contrary. Instead, she asks the appellate courts to reverse because she claims—without support in evidence or law—that a question of fact might exist. The evidence in the record proves otherwise, and the relief she seeks is inconsistent with South Carolina law. Lanier has not identified any special or important reasons for this Court to grant certiorari, and this case does not implicate any of the reasons this Court normally grants review. *See* Rule 242(b), SCACR. This Court should deny her petition.

I. The Court of Appeals properly affirmed the master's granting of summary judgment because Lanier failed to present evidence creating a genuine issue of material fact as to the Bank's standing to foreclose.

The master found the Bank proved its standing to foreclose and Lanier failed to present any evidence to the contrary. The Court of Appeals agreed. Lanier's continued assertions, in the face of contrary evidence, that the Bank does not own the note and mortgage do not create a genuine issue of material fact or provide any "special or important" reasons for this Court to consider this case. This Court should deny Questions I, II, III, and VI in Lanier's petition.

A. The Bank proved it is the holder of the note and mortgage, and the Court of Appeals and master correctly held the Bank has standing to foreclose and is a real party in interest.

A plaintiff must have standing and be a real party in interest. *See S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 7, 809 S.E.2d 223, 226 (2018) ("Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." (quoting *Michael P. v. Greenville Cty. Dep't of Soc. Servs.*, 385 S.C. 407, 415, 684 S.E.2d 211, 215 (Ct. App. 2009))); Rule 17(a), SCRCP ("Every action shall be prosecuted in the name of the real party in interest."). A plaintiff generally has standing if it has "a personal stake in the subject matter of the lawsuit." *Evins v. Richland Cty. Historic Pres. Comm'n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000). In a foreclosure action, the holder of a note has standing and is a real party in interest. *See Bank of Am., N.A. v. Draper*, 405 S.C. 214, 220–23, 746 S.E.2d 478, 481–82 (Ct. App. 2013); S.C. Code Ann. § 36-3-301 ("'Person entitled to enforce' an instrument means (i) the holder of the instrument . . . ."); S.C. Code Ann. § 36-1-201(b)(21)(A) (defining a holder as "the person in possession of a

negotiable instrument that is payable either to bearer or an identified person that is the person in possession.").[1]

The Bank proved it is the holder of the note. It presented the note to the master, along with allonges indorsing the note to Bank One National Association, as trustee, then to the Bank. *See* (R. 233–36, 237–38).[2] The Bank therefore proved it is "the person in possession of a negotiable instrument that is payable . . . to . . . an identified person that is the person in possession," and it is entitled to enforce the note. S.C. Code Ann. § 36-1-201(b)(21)(A); S.C. Code Ann. § 36-3-301. The Bank also presented the mortgage, along with assignments of mortgage transferring the mortgage to Chase and then to the Bank. (R. 239–52). Based on this evidence, the master properly found "there is no genuine issue of material fact that [the Bank] has possession of the original subject note and mortgage, had possession at the time the foreclosure action was filed, and the note is made payable to [the Bank] through an allonge." (R. 14). The master also properly found the "[mortgage] assignments of record completely follow the chain of the allonge." (R. 800). Thus, the master ruled the Bank "has standing to enforce the note and mortgage." (R. 14). The Court of Appeals correctly agreed. (Appx. 6–7); *Draper*, 405 S.C. at 221, 746 S.E.2d at 481; *see also In re Field*, 604 B.R. 680, 690 (Bankr. D.S.C. 2019) ("By presenting the original note into evidence at

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[1] The Court of Appeals relied on the prior version of section 36-1-201 in effect at the time the foreclosure action was filed. *See* (Appx. 6 & n.1); S.C. Code Ann. § 36-1-201(20) (2003) (defining a holder as 'a person who is in possession of a document of title or an instrument or a certificated investment bank security drawn, issued, or indorsed to him or his order or to bearer or in blank"). The relevant provision of each version is the same—a holder is a person in possession of a note indorsed to bearer or indorsed to the person in possession.

[2] Lanier suggests the purported transfer of the note from Bank One to Chase is a gap in the chain of title. (Pet. 14) ("There is no allonge or assignment from Bank One to Chase."). Chase is the successor to Bank One by merger, as the second allonge shows, and as the Bank's counsel explained at the summary judgment hearing. (R. 238); *see also* (R. 806). Thus, Chase succeeded to Bank One's ownership of the note.

the hearing, Wilmington SFS demonstrated that it has possession of the original note, endorsed in blank, signed by Debtor. Therefore, it is a 'holder' of the note pursuant to S.C. Code Ann. § 36-1-201(20) and is entitled to enforce the note pursuant to § 36-3-301.").

Because the Bank presented evidence proving its right to foreclose, the burden shifted to Lanier to present evidence sufficient to create a genuine issue of material fact. *See Dawkins v. Fields*, 354 S.C. 58, 70–71, 580 S.E.2d 433, 439 (2003); Rule 56(e), SCRCP; *see also Fowler v. Hunter*, 380 S.C. 121, 125, 668 S.E.2d 803, 805 (Ct. App. 2008) ("[W]hen a party has moved for summary judgment the opposing party may not rest upon the mere allegations or denials of his pleading to defeat it. Rather, the non-moving party must set forth specific facts demonstrating to the court there is a genuine issue for trial." (citation omitted)). Lanier relied upon the McCaffrey affidavit, which the master properly excluded, (R. 17–19, 985–88); *see also* Part II, *supra*, and made numerous assertions—which are contradicted by the evidence—that the Bank did not establish its right to foreclose, *see, e.g.*, (Pet. 6–7) (stating she "still disputes factually as to whether [the Bank] does, in fact, hold the note and mortgage," and pointing to the excluded McCaffrey affidavit, which offers only a legal argument that the Bank lacks standing to foreclose). Her unsupported assertions do not create a genuine issue of material fact. *See Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) ("[I]t is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.").[3]

Lanier ignores both South Carolina law and the evidence presented by the Bank. Rather than acknowledging the allonge and assignment of mortgage to the Bank and attempting to present

[3] Lanier also conceded the standing issue should be decided as a matter of law by filing a motion for summary judgment on the issue. *See Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011) ("Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law.").

evidence supporting her arguments, Lanier argues as if those documents do not exist and asserts that the Bank "has never demonstrated when or where the note and mortgage were assigned to the [Bank]" and the Bank "has never produced any document showing where the note or mortgage were assigned to the trust." (Pet. 10). The evidence, even if viewed in the light most favorable to Lanier, shows the Bank satisfied the statutory requirements to foreclose. *See* S.C. Code Ann. § 36-3-301; *see also Town of Hollywood*, 403 S.C. at 477, 744 S.E.2d at 166; Rule 56(c), SCRCP. Lanier's arguments are inconsistent with the facts and the law. The Court of Appeals properly affirmed the master's granting of summary judgment.

To the extent Lanier challenges the Bank's rights under the "trust documents," (Pet. 9–12), she lacks standing to do so because she is not in privity with the contracting parties under those agreements. *See Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997); *In re Kain*, No. 7:12-CV-02031-JMC, 2013 WL 1115597, at *2 (D.S.C. Mar. 18, 2013) ("A majority of courts addressing the issue have determined that, where the matter concerns a negotiable instrument payable upon presentation by the holder in possession, the third-party debtor who is not a beneficiary of the pooling and servicing agreement lacks standing to challenge holders' rights to enforce the negotiable instrument due to an alleged invalidity in or noncompliance with the pooling and servicing agreement."); *Reese v. U.S. Bank Nat'l Ass'n*, No. 3:11-2990-CMC-SVH, 2012 U.S. Dist. LEXIS 75652, at *8–9 (D.S.C. Apr. 30, 2012) ("Plaintiff is only a party to the Mortgage and, because the Assignment is a separate contract to which Plaintiff is not a party, she cannot question its validity."); *see also Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) ("Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract.").

This Court should deny Questions I, II, and VI in Lanier's petition.[4]

B. Lanier's discovery-related arguments are not before this Court.

Lanier argues summary judgment was premature because she wishes to conduct discovery as to the Bank's status as a trust. (Pet. 10–12). Lanier did not raise this issue to the master and the master did not rule upon it; therefore, the Court of Appeals properly found the argument unpreserved. (Appx. 8); *see also Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Lanier does not dispute the Court of Appeals' preservation ruling in her petition for certiorari and did not do so in her petition for rehearing in the Court of Appeals. *See* (Pet. 10–12); *see generally* (Appx. 10–23). Because Lanier fails to challenge the Court of Appeals' preservation ruling, this issue is not properly before this Court. *See* Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court."); *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) ("Failure to argue is an abandonment of the issue and precludes consideration on appeal").

Regardless, the Court of Appeals properly found this argument unpreserved. Lanier did not argue to the master that summary judgment should be denied as premature and failed to follow the requirements of Rule 56(f) of the South Carolina Rules of Civil Procedure. A party opposing summary judgment on the ground that it is premature must present an affidavit setting forth the reasons that she is unable to "present by affidavit facts essential to justify [her] opposition." *See Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) ("Rule 56(f) requires

[4] Lanier's Question VI asserts only that the master did not properly apply the summary judgment standard and, therefore, is duplicative of other questions she presented.

the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery"). Lanier failed to do so and thus cannot argue summary judgment was improper on that basis. Consequently, she has not presented any discovery-related issue that this Court may rule upon, and the Court should deny her petition as to Question III.

II. The Court of Appeals properly affirmed the master's exclusion of the McCaffrey affidavit.

The Court of Appeals properly affirmed the master's exclusion of the McCaffrey affidavit on both substantive and procedural grounds. (Appx. 4–5). Rather than address the Court of Appeals' procedural rulings, Lanier repeats the exact arguments she made to the Court of Appeals. *See generally* (Pet.); (Appx. 24–44). Her failure to address the procedural grounds precludes review by this Court. *Biales*, 315 S.C. at 168, 432 S.E.2d at 484. Regardless, the Court of Appeals properly held Lanier abandoned her hearsay argument and failed to appeal the master's finding that the documents relied upon by McCaffrey were not authenticated and thus inadmissible. (Appx. 4).

Moreover, an additional sustaining ground remains—the master found the affidavit and opinions are inadmissible because they are inconsistent with South Carolina law.[5] Lanier did not appeal that ruling, the Court of Appeals did not address the ruling, Lanier did not raise the ruling

[5] For example, McCaffrey's description of which entities are legally entitled to foreclose or enforce a note is an incorrect statement of law. *Compare* (R. 987) (opining that "[t]he only potential party to foreclosure where the alleged financial injury and right to collect the obligation, enforce the note or enforce the security instrument is either a party who lost money or stands to lose money, or authorized representative demonstrating authority and answerable to claims, affirmative defenses and counterclaims of borrowers for such causes of action or defenses as might be applicable") *with* S.C. Code Ann. § 36-3-301 ("'Person entitled to enforce' an instrument means (i) the holder of the instrument . . . .") *and* S.C. Code Ann. § 36-1-201(b)(21) (defining a "holder" as "the person in possession of a negotiable instrument that is payable either to bearer or an identified person that is the person in possession").

or the Court of Appeals' decision not to address it in her petition for rehearing, and she does not raise the issue in her petition for certiorari. Consequently, the law of the case is that McCaffrey's opinions are inadmissible because they conflict with South Carolina law, and the two-issue rule bars reversal of the master's exclusion of the affidavit. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case."). The exclusion of the affidavit is therefore not before this Court.

Lanier's arguments also fail on the merits. First, the Court of Appeals properly held the affidavit contained improper legal conclusions. (Appx. 4–5); *Dawkins*, 354 S.C. at 66, 580 S.E.2d at 437 ("In general, expert testimony **on issues of law** is inadmissible."). Lanier fails to rebut the Court of Appeals' finding, instead offering only a conclusory statement that the affidavit "is not an effort/attempt to usurp the role of the Trial Judge and is distinguishable from the affidavit at issue in the *Dawkins* case." (Pet. 13). However, McCaffrey offers only two opinions, both of which are legal arguments and legal conclusions: (1) the note is not secured by real property because, in his view, the assignments of mortgage failed to satisfy legal requirements applicable to "REMIC" trusts; and (2) Chase and "its purported successors or trustees" do not have the right to foreclose. (R. 987). The sole purpose of the opinions is to state that judgment in favor of the Bank is improper and, instead, Lanier is entitled to judgment. In fact, in her standing argument, Lanier even relies on the affidavit for the legal conclusion that the Bank "does not have adequate proof of ownership to commence and pursue this action." (Pet. 6–7). Accordingly, the affidavit is inadmissible because it "is simply legal argument as to why summary judgment should be denied." *Dawkins*, 354 S.C. at 66–67, 580 S.E.2d at 437.

Second, Lanier's hearsay argument is a conclusory statement that "Rule 703 of the South Carolina Rules of Evidence provides that an expert may base his or her opinion on inadmissible evidence." (Pet. 13). As the Court of Appeals held, however, "Rule 703 *does not allow the admission of hearsay evidence* simply because an expert used it in forming his opinion; the rule only provides the expert can give an opinion based on facts or data that were not admitted into evidence." *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) (emphasis added) (quoting *Allegro, Inc. v. Scully*, 400 S.C. 33, 46–47, 733 S.E.2d 114, 122 (Ct. App. 2012)). Lanier and McCaffrey use the documents and McCaffrey's statements about the documents in an attempt to establish the truth of the matters asserted—namely, their claims that the Bank is not the holder of the note. *See* Rule 801(c), SCRE. The documents and McCaffrey's statements about the documents are therefore inadmissible hearsay. *See* Rule 802, SCRE. This Court should deny Questions IV and V in Lanier's petition.

Conclusion

Each of Lanier's arguments is procedurally barred or lacks merit, and Lanier has failed to establish special and important reasons that would justify this Court's consideration. *See* Rule 242(b), SCACR. The Court of Appeals correctly affirmed the master's granting of summary judgment in favor of the Bank and exclusion of the McCaffrey affidavit, and this Court should deny Lanier's petition for a writ of certiorari.

(signature page attached)

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Columbia, South Carolina

January 15, 2020

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The Honorable James O. Spence

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Of Whom Cathy C. Lanier is the Appellant,..... Petitioner.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for JPMorgan Chase Bank, N.A., do hereby certify that I have served all counsel in this action with copies of the pleading(s) hereinbelow specified to the following address(es):

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January 15, 2020