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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable James E. Chellis
Dorchester County Master-in-Equity

APELLATE CASE NO. 2020-001168

NCP PILIGRIM, LLC, ... Respondent,

v.

MARY LOU CERCOPELY, DAVID S. CLANCY, SOUTH CAROLINA FEDERAL
CREDIIT UNION, SOUTHCOAST COMMUNITY BANK, JOAN GEANURACOS
and DAVID SEAN CLANCY,

of whom MARY LOU CERCOPELY, DAVID S. CLANCY
and DAVID SEAN CLANCY are the Appellants.

RECORD ON APPEAL – VOLUME II

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Mary Lou Cercopely et al v. NCP Pilgrim, LLC
APPELLATE CASE NO.: 2020-1168

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nothing substantive had yet occurred when counsel for the various plaintiffs (all of the entities collectively labeled “Dittmer” above are represented by the same counsel) filed another action in Missouri state court in September 2011. This action was purportedly on behalf of Farrington, Dittmer Holdings, L.L.C., Barkley Center Holdings, L.L.C., and UMB Bank and against the FDIC and Richards (the second case). The state court petition expressly admitted that it comprised the “same claims” as the case simultaneously pending in federal court (the first case). The FDIC removed this second case as well. In November 2011, the FDIC moved to substitute CADC/RADC Venture 2011–1, L.L.C. (CADC) as a defendant in both pending cases on the ground that the FDIC had transferred the note and deed of trust to CADC. The motion was granted in the second case, but the first case was dismissed in January 2012 before the motion was ruled upon. Accordingly, except when necessary for analysis, we will refer to a single case, with “Dittmer” as the plaintiff and FDIC, CADC and/or Richards as defendants.

- 3 In § 1821, FIRREA establishes a comprehensive scheme for conservatorships and receiverships for insured financial institutions. *Hindes v. FDIC*, 137 F.3d 148, 159 (3d Cir.1998).
- 4 We note that the district court did not actually allow Dittmer to file its second amended complaint. It did not deny leave, it simply waited until the final order and denied the motion for leave to amend as moot. However, out of an abundance of caution, we refer to the claims in this second amended complaint, noting that the district court did the same in its final order.
- 5 The FDIC remains a party in one of these two cases, it seems, because the district court simply did not rule on the FDIC's motion to substitute CADC before the court dismissed the suit pursuant to Rule 12(b). As best we can tell, everyone agrees that the FDIC has, indeed, conveyed this note to CADC for valid consideration. Because of the outcome of our analysis, it does not matter whether the FDIC, CADC, or both, are the named parties in the suits.
- 6 This is the doctrine that prevents a losing state court party from seeking what in substance would be appellate review of the state court judgment in federal court, based upon *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923).
- 7 Section 1821(d) and § 1821(j) both contain jurisdictional bars to judicial review. Subsection (d) is the section of FIRREA that, in addition to setting forth the rights and duties of the receiver, provides for mandatory administrative review and the exhaustion of claims with the FDIC before judicial review. 12 U.S.C. § 1821(d)(3)(13). Subsection (j), of course, contains the anti-injunction provision at play here. Although (d) is not directly implicated here because administrative exhaustion has occurred, many of the cases discuss both (d) and (j) in the context of the jurisdictional bars present in FIRREA.
- 8 The fax from Joe Dittmer to the bank is a closer call as this document is not mentioned, directly or by inference, in the complaint. However, we find that the judgment in favor of the FDIC is proper on the basis of Missouri law, the partnership agreement and the POA documents alone. And if the district court did err in considering the fax without giving notice to the parties that it was considering matters outside of the pleadings, we find that any such error was harmless. See *Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir.1992) (“A failure [to give notice] is harmless if the nonmoving party had an adequate opportunity to respond to the motion and material facts were neither disputed nor missing from the record.”). Dittmer not only had a chance to respond to the motion to dismiss and address the fax, but in making arguments about the lack of Peters' apparent authority, pointed out that the bank president solicited the fax from Joe Dittmer. Dittmer's App. at 160. Also, given that this is a removed case that had a vigorous motion practice history in state court before removal, there is very little possibility that Dittmer was blind sided by a document in the removal record.
- 9 We do not agree with the district court's verbiage that “[b]ecause there was no injury to the partnership, the Court finds that plaintiff has no standing.” Dittmer's App. at 347. Rather, we find that because Dittmer cannot state a claim for which relief may be granted based upon the conduct of the lending bank, the Rule 12(b)(6) motion was properly granted. See *McCrary v. Stifel, Nicolaus & Co., Inc.*, 687 F.3d 1052, 1058 (8th Cir.2012) (noting that we may affirm the district court on any basis that is supported by the record). To the extent that the partnership may have been injured by the conduct of Peters, any possible claims against Richards were remanded to state court for further proceedings.
- 10 We deny CADC's motion to dismiss the appeal, and dismiss Appellants' motion to amend the statement of issues as moot.

56 F.3d 1394

United States Court of Appeals,
District of Columbia Circuit.Clyde C. FREEMAN and
Nancy F. Freeman, Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for Madison National Bank, Appellee.

No. 93-5395.

Argued Feb. 3, 1995.

Decided June 13, 1995.

Synopsis

Borrowers from failed bank brought suit against Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank, seeking to prevent FDIC from foreclosing on home and other properties, and FDIC removed case from the Superior Court of the District of Columbia. On cross-motions for partial summary judgment and defense motion to dismiss, the United States District Court for the District of Columbia, Stanley Sporkin, J., 842 F.Supp. 2, granted summary judgment in favor of FDIC. Borrowers appealed. The Court of Appeals, Wald, Circuit Judge, held that: (1) because borrower sought relief that would effectively restrain FDIC from foreclosing on their property, the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) precluded court from granting borrowers' motions for relief; (2) borrowers were subject to requirements of FIRREA administrative claims process; and (3) borrowers had predeprivation notice and opportunity to be heard despite their alleged lack of notice of claims filing deadline and, thus, they were not denied due process.

Affirmed.

West Headnotes (19)

[1] Finance, Banking, and Credit**Key Judicial Review or Intervention**

Under FIRREA provision giving Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank, power to collect all

obligations due to failed institution, exercise of FDIC's powers may not be restrained by any court, regardless of claimant's likelihood of success on merits of underlying claims. Federal Deposit Insurance Act, § 2[11](d)(2)(I)(i), as amended, 12 U.S.C.A. § 1821(d)(2)(I)(i).

[24 Cases that cite this headnote](#)**[2] Finance, Banking, and Credit****Key Collection and protection of assets****Finance, Banking, and Credit****Key Judicial Review or Intervention**

Federal Deposit Insurance Corporation's (FDIC) broad powers as receiver of failed institution include power to foreclose on property of debtor held by failed bank as collateral, and no court may enjoin exercise of that power. Federal Deposit Insurance Act, § 2[11](j), as amended, 12 U.S.C.A. § 1821(j).

[13 Cases that cite this headnote](#)**[3] Finance, Banking, and Credit****Key Judicial Review or Intervention**

Pursuant to FIRREA provision prohibiting court from taking any action to restrain powers of Federal Deposit Insurance Corporation (FDIC), federal district court could not grant debtors' pleas for nonmonetary remedies, including injunctive relief, declaratory relief, and rescission of promissory note, to prevent FDIC from foreclosing on debtors' residence, which served as collateral for note held by failed bank for which FDIC was receiver. Federal Deposit Insurance Act, § 2[11](d), as amended, 12 U.S.C.A. § 1821(d).

[40 Cases that cite this headnote](#)**[4] Finance, Banking, and Credit****Key Time for presentation and proof**

When liquidating failed bank's assets, Federal Deposit Insurance Corporation (FDIC) must publish notice to depository institution's creditors specifying date by which claims must be presented, not less than 90 days after publication, and in addition, must mail similar

notice to any creditor shown on institution's books. Federal Deposit Insurance Act, § 2[11](d)(3)(B, C), as amended, 12 U.S.C.A. § 1821(d)(3)(B, C).

8 Cases that cite this headnote

[5] **Finance, Banking, and Credit**

🔑 Time for presentation and proof

Claims against assets of failed bank held by Federal Deposit Insurance Corporation (FDIC) as receiver that are not timely filed must be disallowed unless claimant did not receive notice of appointment of receiver in time to file claim. Federal Deposit Insurance Act, § 2[11](d)(5)(C), as amended, 12 U.S.C.A. § 1821(d)(5)(C).

13 Cases that cite this headnote

[6] **Finance, Banking, and Credit**

🔑 Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators

No court has jurisdiction to hear any claim or action for payment from or action seeking determination of rights with respect to any asset of failed bank for which Federal Deposit Insurance Corporation (FDIC) is receiver, with one exception, which is that federal district courts in either District of Columbia or district where financial institution has its principal place of business may have jurisdiction to review de novo claims filed with and processed by FDIC under its administrative claims process. Federal Deposit Insurance Act, § 2 [11](d)(6), as amended, 12 U.S.C.A. § 1821(d)(6).

25 Cases that cite this headnote

[7] **Finance, Banking, and Credit**

🔑 Exhaustion of other remedies

Anyone bringing claim against or seeking determination of rights with respect to assets of failed bank held by Federal Deposit Insurance Corporation (FDIC) as receiver must first exhaust administrative remedies by filing administrative claim under FDIC's administrative claims process; claimant need not be "creditor" of failed bank. Federal Deposit

Insurance Act, § 2[11](d)(6), as amended, 12 U.S.C.A. § 1821(d)(6).

44 Cases that cite this headnote

[8] **Finance, Banking, and Credit**

🔑 Time for presentation and proof

Finance, Banking, and Credit

🔑 Conditions precedent and defenses in general

Under FIRREA, if claimant has failed to initiate administrative claim against failed institution's assets within filing period, claimant necessarily forfeits any right to pursue claim against failed institution's assets in any court. Federal Deposit Insurance Act, § 2[11](d)(6), (d)(13)(D), as amended, 12 U.S.C.A. § 1821(d)(6), (d)(13)(D).

4 Cases that cite this headnote

[9] **Finance, Banking, and Credit**

🔑 Exhaustion of other remedies

FIRREA section providing that no court may have jurisdiction over any claim against assets of failed institution for which FDIC has been appointed receiver acts as jurisdictional bar to claims or actions by parties who have not exhausted their administrative remedies. Federal Deposit Insurance Act, § 2 [11](d)(13)(D), as amended, 12 U.S.C.A. § 1821(d)(13)(D).

41 Cases that cite this headnote

[10] **Finance, Banking, and Credit**

🔑 Exhaustion of other remedies

FIRREA provision providing that no court has jurisdiction to hear claim against assets of failed institution unless administrative remedies have been exhausted is not limited to claims by creditors, but extends to all claims and actions against, and actions seeking determination of rights with respect to, assets of failed financial institutions for which Federal Deposit Insurance Corporation (FDIC) serves as receiver, including claims of institution's debtors. Federal Deposit Insurance Act, § 2[11](d), as amended, 12 U.S.C.A. § 1821(d).

41 Cases that cite this headnote

[11] Finance, Banking, and Credit

🔑 Exhaustion of other remedies

Even if claimants never received notice of period within which claims were to be filed against assets of failed institution for which Federal Deposit Insurance Corporation (FDIC) was serving as receiver, claimants were still obligated to exhaust their administrative remedies as condition of obtaining access to federal district court for review of claim. Federal Deposit Insurance Act, § 2[11](d)(3)(C), as amended, 12 U.S.C.A. § 1821(d)(3)(C).

3 Cases that cite this headnote

[12] Finance, Banking, and Credit

🔑 Time for presentation and proof

The only statutorily specified exemption from the strict requirements of administrative claims process for filing claims against assets of failed financial institution is if claimant did not receive notice of appointment of receiver in time to file a claim, and even in that case only consequence of lack of notice is that Federal Deposit Insurance Corporation (FDIC) may consider late-filed claim, provided claim is filed in time to permit payment. Federal Deposit Insurance Act, § 2[11](d)(5)(C), as amended, 12 U.S.C.A. § 1821(d)(5)(C).

32 Cases that cite this headnote

[13] Finance, Banking, and Credit

🔑 Claims; Rights and Liabilities of Claimants and Stakeholders

Because debtors of failed financial institution received notice of appointment of Federal Deposit Insurance Corporation (FDIC) as receiver of the institution, debtors were not relieved of their obligation to proceed through normal administrative claims process in order to assert their claim in court against the assets of the bank. Federal Deposit Insurance Act, § 2[11](d)(3)(C), as amended, 12 U.S.C.A. § 1821(d)(3)(C).

5 Cases that cite this headnote

[14] Constitutional Law

🔑 Duration and timing of deprivation; pre- or post-deprivation remedies

Root requirement of due process is that individual is to be given opportunity for hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing hearing until the event. U.S.C.A. Const.Amend. 5.

1 Cases that cite this headnote

[15] Constitutional Law

🔑 Debtor and creditor in general

For due process purposes, debtors had constitutionally protected property interest in their home. U.S.C.A. Const.Amend. 5.

2 Cases that cite this headnote

[16] Constitutional Law

🔑 Enforcement; proceedings

Finance, Banking, and Credit

🔑 Claims; Rights and Liabilities of Claimants and Stakeholders

Finance, Banking, and Credit

🔑 Exhaustion of other remedies

Because debtors had actual notice of impending deprivation, which was foreclosure of their home, some four and one-half months before deadline for filing administrative claims against assets of the foreclosing financial institution, which was taken over by Federal Deposit Insurance Corporation (FDIC), debtors' due process rights, including opportunity to be heard predeprivation, were not violated even though court could not hear their claim against institution because debtors had not exhausted their administrative remedies. U.S.C.A. Const.Amend. 5; Federal Deposit Insurance Act, § 2[11](d, j), as amended, 12 U.S.C.A. § 1821(d, j).

3 Cases that cite this headnote

[17] Finance, Banking, and Credit

🔑 Time for presentation and proof

Time bar for filing administrative claims against assets of failed financial institution pursuant to FIRREA is essentially statute of limitations subject to waiver, estoppel, and equitable tolling. Federal Deposit Insurance Act, § 2 [11](d), as amended, 12 U.S.C.A. § 1821(d).

9 Cases that cite this headnote

[18] Limitation of Actions

🔑 Suspension or stay in general; equitable tolling

For purposes of limitations periods, equitable tolling principles apply against government, just as against private parties.

[19] Limitation of Actions

🔑 Suspension or stay in general; equitable tolling

Courts may allow equitable tolling of statute of limitations if claimant has received inadequate notice.

8 Cases that cite this headnote

***1396 **326** Appeal from the United States District Court for the District of Columbia (No. 93cv02142).

Attorneys and Law Firms

Harvey A. Levin, Washington, DC, argued the cause and filed the briefs for appellants.

Kathryn R. Norcross, Counsel, F.D.I.C., Washington, DC, argued the cause for appellee. With her on the brief was Richard J. Osterman, Jr., Sr. Counsel, F.D.I.C., Bethesda, MD. Michelle H. Phillips, Washington, DC, entered an appearance.

Before WALD, SILBERMAN and TATEL, Circuit Judges.

Opinion

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

District of Columbia residents Clyde C. Freeman and Nancy F. Freeman brought suit seeking injunctive and declaratory relief to prohibit the Federal Deposit Insurance Corporation (“FDIC” or “Corporation”), as receiver for Madison National Bank (“Madison”), from foreclosing on their home. The Freemans also sought rescission of their underlying loan agreement with Madison, as well as compensatory damages for conversion, wrongful foreclosure, and breach of contract. The United States District Court for the District of Columbia entered summary judgment for the FDIC on the merits, and dismissed the Freemans' claims with prejudice. The Freemans now appeal. Because 12 U.S.C. § 1821(j) barred the district court from granting the equitable relief sought by the Freemans, and because 12 U.S.C. § 1821(d) deprived the district court of jurisdiction to hear *any* of the Freemans' claims, we affirm the district court's dismissal with prejudice without reaching the merits of their claims.

I. BACKGROUND

In January 1985, Robinson Broadcasting Corporation bought radio station WANT–AM in Henrico County, Virginia, financed by a \$600,000 loan from Madison National Bank. The loan was secured by a deed of trust on the 6.2 acres of real estate on which the radio tower was located. The Freemans, together with other stockholders in Robinson Broadcasting (“Robinson”), signed personal guarantees on the \$600,000 note.

***1397 **327** WANT–AM quickly encountered financial difficulties, and Robinson was unable to meet its repayment obligations. In early 1987, the Freemans sought and received Madison's consent to take over ownership and management of WANT–AM, and in June 1987, the Freemans became sole stockholders of Robinson. The station's financial problems continued, however, and its income was insufficient to service the debt. In January 1989, Madison and the Freemans agreed to a debt restructuring in which Madison would sell its position in the \$600,000 note (which by this time had a \$559,000 balance) to the Freemans, and thereupon make a new \$740,000 loan to the Freemans, secured by a deed of

trust on the Freemans' principal residence in the District of Columbia. The proceeds of the new loan would go to purchase the \$600,000 note, retire the \$75,000 existing debt on the residence, and establish an interest reserve of \$106,000. Madison also agreed to lend the Freemans an additional \$150,000, secured by a deed of trust on an office building they owned at 5223 Georgia Avenue, N.W. in the District of Columbia, with the loan proceeds to retire existing debt on the Georgia Avenue property and to pay off two other existing loans. Terms of the agreement were outlined in two letters of commitment from Madison to the Freemans, dated January 18, 1989.

One of the letters of commitment expressly provided that after Madison endorsed the \$600,000 note over to the Freemans, they would re-endorse the note back to Madison. On February 10, 1989, the transaction closed. The Freemans did in fact re-endorse the \$600,000 note back to Madison as provided in the commitment letter, and contemporaneously executed a separate document stating that they were endorsing the note to Madison as "additional collateral" on the \$740,000 loan.

The Freemans claim they agreed to the debt restructuring with the intention of collecting on the original stockholders' personal guarantees on the \$600,000 note, and using the proceeds to repay Madison. But under the transaction as it actually transpired, they were unable to do so: Madison had possession of the note, and refused either to surrender possession or to take any action itself to collect on the guarantees. In November 1990, the Freemans defaulted on both the \$740,000 note secured by their home and the \$150,000 note secured by their business property. Madison demanded accelerated payment, and stated that it would begin foreclosure proceedings if payment was not promptly received.

In May 1991, Madison failed. As receiver, the FDIC took possession of the \$600,000 note and deed of trust on the Henrico property, as well as the \$740,000 note and deed of trust on the Freemans' home and the \$150,000 note and deed of trust on their Georgia Avenue office building. Like Madison, the FDIC refused to surrender possession of the \$600,000 note, and declined to collect on the original stockholders' guarantees. On April 8, 1992, the FDIC demanded payment on the \$740,000 and \$150,000 notes, stating that it "intend[ed] to utilize all remedies available," and that both the Freemans' residence and the Henrico County property "may be foreclosed upon" if full payment were not received within twenty days. The Freemans were unable to

pay the amount due. On June 1, 1993, the FDIC initiated foreclosure proceedings on the Henrico property. In August, 1993, the FDIC initiated nonjudicial foreclosure proceedings on the Freemans' residence and office building.

On August 18, 1993, the Freemans brought suit in the Superior Court of the District of Columbia, seeking to enjoin the foreclosure on their residence, determine the rights of the parties with respect to the three notes, rescind the February 10, 1989 transaction, and recoup compensatory damages for Madison's alleged conversion, wrongful foreclosure, and breach of the debt restructuring agreement. The Freemans' principal allegation was that Madison had defrauded them by first agreeing to sell them its full rights in the \$600,000 note, and then at the last minute inducing them to reassign the note to the bank. They claimed that this changed the essential nature of the deal without their knowledge or assent, and that therefore the entire transaction, including the \$740,000 loan agreement and deed of trust on their home, was void *ab initio* on grounds of fraud *1398 **328 in the factum. The Freemans also alleged that by failing to turn over the \$600,000 note and to collect from its guarantors, Madison had breached its obligations under the terms of their "bilateral purchase-and-sale" agreement. They further contended that by retaining possession of the \$600,000 note, Madison and the FDIC had elected a remedy under the Uniform Commercial Code, taking the \$600,000 note in full satisfaction of the Freemans' debt. Finally, they argued that by refusing to collect from the guarantors of the \$600,000 note, Madison and the FDIC had impaired the value of the collateral, releasing the Freemans from their obligation to repay the \$740,000 loan to the extent of the impairment.

On October 15, 1993, the FDIC removed the case to the United States District Court for the District of Columbia. After initially issuing a temporary restraining order ("TRO"), the district court on December 1, 1994, dissolved the TRO and ruled in favor of the FDIC on its cross-motion for summary judgment on the merits, holding that the FDIC holds the \$600,000 note only as collateral on the \$740,000 loan. The district court declined to reach two defenses asserted by the FDIC: first, that 12 U.S.C. § 1821(j) bars the equitable remedies sought by the Freemans, and second that 12 U.S.C. § 1821(d) deprives the court of jurisdiction to hear *any* of their claims. The Freemans appeal from the district court's ruling.

II. ANALYSIS

A. Bar Against Judicial “Restraints”: 12 U.S.C. § 1821(j)

The FDIC asserted a defense below based on section 212(j) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), Pub.L. No. 101–73, codified at 12 U.S.C. § 1821(j), which states:

Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of the powers or functions of the Corporation as a conservator or receiver.

12 U.S.C. § 1821(j).

The FDIC argues that this provision broadly deprives any court of power to take any action that has the effect of restraining the FDIC, acting in its capacity as receiver, from conducting a nonjudicial foreclosure sale of assets acquired from a failed bank, whether the “restraint” is by injunction, rescission of a contract, or declaratory judgment. We said in *National Trust for Historic Preservation v. FDIC*, 21 F.3d 469 (D.C.Cir.), *cert. denied*, 513 U.S. 1065, 115 S.Ct. 683, 130 L.Ed.2d 615 (1994), that “§ 1821(j) does indeed bar courts from restraining or affecting the exercise of powers or functions of the FDIC as a conservator or a receiver ... unless it has acted or proposed to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions.” *Id.* at 472 (Wald, J., concurring) (internal quotation and citation omitted). *Accord*, *Lloyd v. FDIC*, 22 F.3d 335, 336 (1st Cir.1994); *Ward v. Resolution Trust Corp.*, 996 F.2d 99, 103 (5th Cir.1993); *Gross v. Bell Savings Bank*, 974 F.2d 403, 407 (3d Cir.1992). Although this limitation on courts' power to grant equitable relief may appear drastic, it fully accords with the intent of Congress at the time it enacted FIRREA in the midst of the savings and loan insolvency crisis to enable the FDIC and the Resolution Trust Corporation (“RTC”) to expeditiously wind up the affairs of literally hundreds of failed financial institutions throughout the country. See H.R.REP. No. 101–54(I), 101st Cong., 1st Sess. 291, 307, *reprinted in* 1989 U.S.C.C.A.N. 86, 87, 103.

[1] [2] In the present case, the FDIC is unquestionably acting in its capacity as “receiver,” and as such is authorized by statute to exercise “all rights, titles, powers, and privileges

of the insured depository institution ... with respect to ... the assets of the institution.” 12 U.S.C. § 1821(d)(2)(A)(i). This includes the power to “collect all obligations and money due the institution,” **329 12 U.S.C. § 1821(d)(2)(B)(ii), to “place the ... institution in liquidation and proceed to realize upon the assets of the institution,” 12 U.S.C. § 1821(d)(2)(E), to “transfer any asset or liability of the institution,” 12 U.S.C. § 1821(d)(2)(G)(i)(II), and to “exercise ... such incidental powers as shall be necessary to carry out” these express powers, *1399 12 U.S.C. § 1821(d)(2)(I)(i). The exercise of these powers may not be restrained by any court, regardless of the claimant's likelihood of success on the merits of his underlying claims. *Ward*, 996 F.2d at 102. In particular, the FDIC's broad powers as receiver include the power to foreclose on the property of a debtor held by the failed bank as collateral, and no court may enjoin the exercise of that power. *Lloyd*, 22 F.3d at 336–37; 281–300 *Joint Venture v. Onion*, 938 F.2d 35, 39 (5th Cir.1991), *cert. denied*, 502 U.S. 1057, 112 S.Ct. 933, 117 L.Ed.2d 105 (1992).

[3] Section 1821(j) does indeed effect a sweeping ouster of courts' power to grant equitable remedies to parties like the Freemans. Not only does it bar injunctive relief, but in the circumstances of the present case where appellants seek a declaratory judgment that would effectively “restrain” the FDIC from foreclosing on their property, § 1821(j) deprives the court of power to grant that remedy as well. See *National Trust*, 21 F.3d at 471 n. 2; *Carney v. Resolution Trust Corp.*, 19 F.3d 950, 957–58 (5th Cir.1994). For the same reason, § 1821(j) also bars the court from granting the Freemans' plea for rescission of the underlying transaction. See *Ward v. Resolution Trust Corp.*, 996 F.2d at 104 (“Like injunction, rescission is a ‘judicial restraint’ that is barred by 1821(j).”).

We conclude that under 12 U.S.C. § 1821(j) the district court could not have granted the Freemans' pleas for nonmonetary remedies, including injunctive relief, declaratory relief, and rescission of the promissory note. Nonetheless, as we noted in *National Trust*, serious due process concerns would be implicated if parties aggrieved by the FDIC's actions as receiver were left entirely without remedies. In many cases, however, aggrieved parties will have opportunities to seek money damages or other relief through the administrative claims process provided in 12 U.S.C. § 1821(d), and their claims are ultimately subject to judicial review. *National Trust*, 21 F.3d at 472. It is to that provision that we next turn.

B. Jurisdictional Bar of 12 U.S.C. § 1821(d)

The FDIC next contends that the district court lacked jurisdiction to hear *any* of the Freemans' claims, including claims for compensatory damages, because 12 U.S.C. § 1821(d) bars any court from hearing claims against, or actions to determine rights with respect to, the assets of a failed bank held by the FDIC as receiver unless the claimant first exhausts his administrative remedies by filing claims under the FDIC's administrative claims process.

[4] [5] FIRREA's section 212, 12 U.S.C. § 1821, creates an administrative claims process for claims against the assets of failed banks held by the FDIC as receiver. 12 U.S.C. § 1821(d)(3)–(13). The FDIC is authorized to decide such claims under a process established by the statute and FDIC regulations. 12 U.S.C. §§ 1821(d)(3)(A), 1821(d)(4). When liquidating a failed bank's assets, the FDIC must publish a notice “to the depository institution's creditors” specifying a date by which claims must be presented, not less than 90 days after publication, 12 U.S.C. § 1821(d)(3)(B), and in addition must mail a “similar” notice to “any creditor shown on the institution's books,” 12 U.S.C. § 1821(d)(3)(C). The FDIC has 180 days after a claim is filed to allow or disallow it. 12 U.S.C. § 1821(d)(5)(A). Claims not timely filed must be disallowed unless “the claimant did not receive notice of the appointment of the receiver in time to file such claim before such date”; in that case, a late-filed claim “may be considered by the receiver,” provided the claim is “filed in time to permit payment.” 12 U.S.C. § 1821(d)(5)(C). Finally,

[e]xcept as provided in this subsection, no court shall have jurisdiction over—

- (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
- (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

12 U.S.C. § 1821(d)(13)(D).

[6] Thus no court has jurisdiction to hear any “claim or action for payment from” or ****330 *1400** “action seeking a determination of rights with respect to” any “asset” of a failed bank for which the FDIC is receiver, with one relevant exception. Under § 1821(d)(6), both the United States District Court for the District of Columbia and the district court for the district where the financial institution has its principal place

of business have jurisdiction to review *de novo* claims filed with, and processed by, the FDIC under its administrative claims process. See *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 391–92 (3d Cir.), *cert. denied*, 502 U.S. 981, 112 S.Ct. 582, 116 L.Ed.2d 608 (1991). Such an action must be filed in district court within 60 days after the administrative claim is disallowed, or within 60 days after the expiration of the 180-day period allowed for processing the administrative claim, whichever comes first. 12 U.S.C. § 1821(d)(6).

[7] [8] [9] The effect of these provisions, read together, is to require anyone bringing a claim against or “seeking a determination of rights with respect to” the assets of a failed bank held by the FDIC as receiver to first exhaust administrative remedies by filing an administrative claim under the FDIC's administrative claims process. *Office and Professional Employees Int'l Union, Local 2 v. FDIC*, 962 F.2d 63, 65–66 (D.C.Cir.1992). As the First Circuit explained, “FIRREA makes participation in the administrative claims review process mandatory for all parties asserting claims against failed institutions,” and “where a claimant has ... failed to initiate an administrative claim within the filing period, the claimant necessarily forfeits any right to pursue a claim against the failed institution's assets in any court.” *Marquis v. FDIC*, 965 F.2d 1148, 1151–52 (1st Cir.1992) (citation omitted). Section 1821(d)(13)(D) thus acts as a jurisdictional bar to claims or actions by parties who have not exhausted their § 1821(d) administrative remedies. *Brady Development Co., Inc. v. Resolution Trust Corp.*, 14 F.3d 998, 1003 (4th Cir.1994). *Accord*, *Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 484 (8th Cir.1993); *Henderson v. Bank of New England*, 986 F.2d 319, 320–21 (9th Cir.), *cert. denied*, 510 U.S. 995, 114 S.Ct. 559, 126 L.Ed.2d 459 (1993); *Meliezer v. Resolution Trust Corp.*, 952 F.2d 879, 882 (5th Cir.1992); *Resolution Trust Corp. v. Elman*, 949 F.2d 624, 627 (2d Cir.1991); *Rosa v. Resolution Trust Corp.*, 938 F.2d at 392. See also H.R.REP. NO. 101–54(I), 101st Cong., 1st Sess. 418 (1989), *reprinted in* U.S.C.C.A.N. 86, 214 (“Resort to ... the District Courts ... is available only after the claimant has first presented its claim to the FDIC.”).

[10] Although each of the Freemans' claims is based upon a distinct legal theory, each ultimately “seek[s] a determination of rights with respect to” an asset of a failed bank for which the FDIC serves as receiver—specifically, Madison's \$740,000 loan to the Freemans upon which the FDIC seeks to foreclose. It is undisputed that the Freemans did not file any of these claims through the administrative claims process

prior to their filing of this lawsuit. On its face, then, § 1821(d) bars any court from hearing the Freemans' claims.

The Freemans nonetheless contend that § 1821(d) applies only to claims for payment by “creditors” of the failed institution. They insist that as debtors they are not Madison’s “creditors” and therefore are not subject to the § 1821(d) jurisdictional bar. This contention, however, does not comport with the statutory language. The statute expressly bars courts from hearing any “claim or action for payment from” or “action seeking a determination of rights with respect to” the assets of a failed bank held by the FDIC as receiver, unless the administrative claims process is exhausted. 12 U.S.C. § 1821(d)(13)(D). As the First Circuit explained in *Marquis*, this jurisdictional bar applies to three distinct kinds of claims or actions: “[1] all claims seeking payment from the assets of the affected institutions; [2] all suits seeking satisfaction from those assets; and [3] all actions for the determination of rights vis-a-vis those assets.” *Marquis*, 965 F.2d at 1152. Nor does the statutory text suggest that the jurisdictional bar applies only to “creditors”; on its face, it applies to *anyone* with a “claim for payment” or “action seeking a determination of rights” with respect to the failed institution’s assets. See *Lloyd v. FDIC*, 22 F.3d at 337. Concededly, the notice provisions of **331 *1401 §§ 1821(d)(3)(B) and (C) require that the FDIC give notice of the claims period to a failed financial institution’s “creditors,” but as we noted in *OPEIU, Local 2*, 962 F.2d at 67, “FIRREA’s very text appears to contemplate claims beyond those by ‘creditor[s] ... on the ... books’ to whom statutory notice must be sent.” For example, 12 U.S.C. § 1821(d)(13)(D) says that “any claim relating to an act or omission of the institution or the Corporation as receiver” is subject to the § 1821(d) exhaustion requirement.

Our sister circuits have broadly applied the § 1821(d) jurisdictional bar to all manner of “claims” and “actions seeking a determination of rights with respect to” the assets of failed banks, whether those claims and actions are by debtors, creditors, or others. See, e.g., *Lloyd v. FDIC*, 22 F.3d at 337 (suit by debtor seeking equitable reformation or cancellation of mortgage agreement to prevent foreclosure is a “determination of rights with respect to an asset” subject to § 1821(d)(13)(D) jurisdictional bar); *Henderson v. Bank of New England*, 986 F.2d at 321 (claims by unsuccessful credit card applicant for monetary damages and discovery of derogatory credit information are subject to § 1821(d)(13)(D) jurisdictional bar); *Meliezer v. Resolution Trust Corp.*, 952 F.2d at 883 (mortgagor’s claim that failed institution was negligent in allowing mortgagor to assume insufficient

insurance is subject to § 1821(d)(13)(D) jurisdictional bar); *Resolution Trust Corp. v. Elman*, 949 F.2d at 629 (law firm’s defensive assertion of retaining lien to retain custody of legal files of its former client, a failed bank under RTC receivership, is subject to § 1821(d)(13)(D) jurisdictional bar). And in *Local 2, OPEIU*, 962 F.2d at 67, we held that the § 1821(d) administrative claims process is *not* limited to claims by “creditors,” so that a union local could pursue an administrative claim on behalf of its members for payment of certain employment benefits, and under § 1821(d)(6) had recourse to *de novo* judicial review of the FDIC’s denial of that claim. But see *Homeland Stores, Inc. v. Resolution Trust Corp.*, 17 F.3d 1269 (10th Cir.) (construing § 1821(d)(13)(D) jurisdictional bar narrowly, so as not to bar claims arising after deadline for filing administrative claims), *cert. denied*, 513 U.S. 928, 115 S.Ct. 317, 130 L.Ed.2d 279 (1994).

The Freemans do garner some support for their position from a handful of recent decisions in bankruptcy cases holding that both the § 1821(d) administrative claims process and the § 1821(d)(13)(D) jurisdictional bar apply only to claims “by creditors” and therefore bankruptcy courts retain jurisdiction over claims “by debtors.” See *In Re Parker North American Corp.*, 24 F.3d 1145, 1152–53 (9th Cir.1994) and cases cited therein. The concern underlying these cases is clear: if bankruptcy courts are ousted of jurisdiction over a broad class of claims under the § 1821(d) jurisdictional bar, the unity of the bankruptcy process may be fractured and some bankruptcy-related claims would be determined, at least in the first instance, by FDIC administrative tribunals, which (it is argued) have little expertise in bankruptcy matters. *Id.* at 1153. For the reasons stated above, we do not think this construction of the § 1821(d)(13)(D) jurisdictional bar quite squares with the statutory text. But even if § 1821(d)(13)(D) is narrowly construed as a limitation on bankruptcy courts’ jurisdiction in order to effectuate the purposes of the Bankruptcy Code, *id.* at 1155–56, we decline to extend that approach to nonbankruptcy court contexts. To do so would not advance the purposes of the Bankruptcy Code, while it would undercut Congress’ core purpose in enacting FIRREA, which was to “ensure that the assets of a failed institution are distributed fairly and promptly among those with valid claims against the institution,” *Local 2, OPEIU*, 962 F.2d at 68, and to expeditiously “wind up the affairs of failed banks,” *id.* at 64. Cf. *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 584–85, 109 S.Ct. 1361, 1374–75, 103 L.Ed.2d 602 (1989) (to liquidate a failed institution’s assets “in an orderly manner,” the receiver would require timely notice of “the entire array of claims” against an insolvent institution and “an

initial opportunity to consider them in a centralized claims process” in order “to make rational and consistent judgments regarding which claims to allow or contest” or to “settle ... without resort to costly litigation”).

***1402 **332** We therefore hold that the § 1821(d) jurisdictional bar is not limited to claims by “creditors,” but extends to all claims and actions against, and actions seeking a determination of rights with respect to, the assets of failed financial institutions for which the FDIC serves as receiver, including debtors' claims. The Freemans' claims fall within the scope of that provision.

[11] Finally, the Freemans contend that they were not required to exhaust their administrative remedies because they never received notice of the period within which claims were to be filed, as required by § 1821(d)(3)(C) which provides: “The receiver shall mail a notice [of the period within which claims are to be filed] ... to any creditor shown on the institution's books...” 12 U.S.C. § 1821(d)(3)(C). The FDIC produced an affidavit from an FDIC official stating that the required notices had been mailed to creditors listed on Madison's books, including the Freemans, but the Freemans deny having received such a notice. Even if the Freemans never received the required § 1821(d)(3)(C) notice, however, they were still obliged to exhaust their administrative remedies as a condition of obtaining access to the district court.

[12] The Fifth Circuit squarely addressed this question in *Meliezer*, 952 F.2d at 882–83, and concluded that the receiver's failure to mail the notice required under 12 U.S.C. § 1821(d)(3)(C) does not relieve the claimant of the obligation to exhaust administrative remedies, because the statute does not provide for a waiver or exception under those circumstances. *Accord*, *Intercontinental Travel Marketing, Inc. v. FDIC*, 45 F.3d 1278, 1285 (9th Cir.1994); *but cf.* *Whatley v. Resolution Trust Corp.*, 32 F.3d 905, 910 & n. 1 (5th Cir.) (Duhe, J., concurring) (suggesting that failure to mail § 1821(d)(3)(C) notice would deprive the receiver of authority to determine administrative claims and relieve the claimant of its obligation to exhaust administrative remedies), *reh'g and reh'g in banc denied*, 38 F.3d 760 (5th Cir.1994). In our view, *Meliezer* and *Intercontinental Travel Marketing* correctly interpret the statute. The *only* statutorily-specified exemption from the strict requirements of the administrative claims process is provided if “the claimant did not receive notice of the appointment of the receiver in time to file ... [a] claim,” 12 U.S.C. § 1821(d)(5)(C) (emphasis added), and

even in that case the only consequence is that the FDIC “may” consider a late-filed claim, provided the claim is filed “in time to permit payment.” *But cf.* *Heno v. FDIC*, 20 F.3d 1204 (1st Cir.1994) (deferring to FDIC's interpretation of § 1821(d)(5)(C) as also authorizing FDIC to process late-filed claims that accrue after the bar date). That § 1821(d)(5)(C) *expressly* provides for a *partial* exemption for failure to provide notice undercuts appellants' argument that we should find an *implicit total* exemption from the claims process for failure to provide notice in § 1821(d)(3)(C); had Congress intended to provide such a broad exemption, it surely would have said so. *See Intercontinental Travel Marketing*, 45 F.3d at 1285.

[13] Here, it is undisputed that the Freemans *did* have timely notice of the appointment of the FDIC as receiver, whether or not they received the specific notice required to be mailed under § 1821(d)(3)(C). The FDIC sent a certified letter to the Freemans, dated April 8, 1992, explicitly stating that the FDIC had been appointed receiver, demanding payment on both the \$740,000 and the \$150,000 notes, and warning that the Freemans' residence “may be foreclosed upon” if payment is not made. Because they received “notice of the appointment of FDIC as receiver,” the Freemans were not relieved of their obligation to proceed through the normal administrative claims process.

We conclude that under § 1821(d)(13)(D), the district court lacked jurisdiction to hear *any* of the Freemans' claims. The district court would have jurisdiction only to review *de novo* the FDIC's determination of their administrative claims. The Freemans were thus required to exhaust their administrative remedies before bringing their claims to court, and by failing to do so, deprived the court of jurisdiction.

C. Due Process

The Freemans challenge the application of §§ 1821(d) and 1821(j) to their case on due ***1403 **333** process grounds, contending they were denied an opportunity to be heard before being deprived of their property. Their constitutional challenge is without merit.

[14] The Due Process Clause of the Fifth Amendment provides that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law.” The “root requirement” of due process is “that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.”

Boddie v. Connecticut, 401 U.S. 371, 378–79, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971) (emphasis in original). “The purpose of this requirement is not only to ensure abstract fair play to the individual” but “to minimize substantively unfair or mistaken deprivations of property....” *Fuentes v. Shevin*, 407 U.S. 67, 80–81, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972).

[15] Undoubtedly, the Freemans have a constitutionally protected property interest in their home. See *United States v. James Daniel Good Real Property*, 510 U.S. 43, —, 114 S.Ct. 492, 501, 126 L.Ed.2d 490 (1993); *Propert v. District of Columbia*, 948 F.2d 1327, 1331 (D.C.Cir.1991). Although “[w]e tolerate some exceptions to the general rule requiring predeprivation notice and hearing ... in extraordinary situations,” *James Daniel Good Real Property*, 510 U.S. at —, 114 S.Ct. at 501 (citation and quotation omitted), the government does not assert that such an exception is required here. Assuming without deciding that this case does not involve an “extraordinary situation” and the Freemans are entitled to predeprivation notice and opportunity to be heard, their due process challenge to the applicability of § 1821(d) and § 1821(j) is unavailing because they had notice of the deprivation and an opportunity to be heard prior to the deprivation.

[16] [17] [18] [19] In *National Trust* we raised the possibility that under some circumstances the denial of injunctive relief under § 1821(j) could constitute a violation of due process. *National Trust*, 21 F.3d at 473 (Wald, J., concurring). And in some circumstances, the jurisdictional bar of § 1821(d) might also implicate due process concerns by denying an aggrieved party any avenue of relief, administrative or judicial.¹ See *Homeland Stores*, 17 F.3d at 1274 n. 5; *National Union Fire Ins. Co. v. City Savings, F.S.B.*, 28 F.3d 376, 392 (3d Cir.1994). But such is not the case here. The Freemans had an opportunity to present their claims to the FDIC, and to have all those claims resolved through the administrative claims process prior to foreclosure, subject to *de novo* judicial review in the district court. The essential facts of their dispute with Madison were well known to the Freemans, and their claims had accrued long before the September 28, 1992 deadline set by the FDIC for filing claims involving Madison's assets under the § 1821(d) administrative claims process. The FDIC's April 8, 1992 certified letter to the Freemans not only put them on notice that the FDIC had been appointed receiver for Madison, but notified them of the impending deprivation of their property,² explicitly *1404 **334 stating that the Freemans had defaulted on

the \$740,000 loan for which the FDIC as receiver held a deed of trust on their home, demanding payment, and stating that if they failed to make payment in full “FDIC intends to utilize all remedies available” including foreclosure on the deed of trust on their home. Thus the Freemans had actual notice of the impending deprivation some four and one-half months before the September 28 deadline for filing administrative claims.³ At that point they could have filed claims seeking a determination by the FDIC of their rights and obligations under the various notes and agreements at issue here. Specifically, upon receiving the April 8 notice, they could have brought claims to the FDIC contending that they had no obligations under the \$740,000 note on grounds that the transaction was void for fraud in the factum; that Madison had breached the “bilateral purchase and sale agreement”; that Madison and the FDIC had elected a remedy under the Uniform Commercial Code by retaining possession of the \$600,000 note in full satisfaction of their \$740,000 debt; and that Madison and the FDIC had impaired the value of the \$600,000 note as collateral by declining to collect from the guarantors, relieving the Freemans of their obligations under the \$740,000 note to the extent of the impairment. Not only could they have brought these claims before the FDIC's administrative claims process, but if they were not satisfied with the results there they could have proceeded to seek *de novo* review in the district court, so long as they filed their action within 60 days after the FDIC's 180-day period for determining their claims, or within 60 days after the date of the FDIC's actual determination of their claim, whichever came first. See 12 U.S.C. § 1821(d)(6). If they had filed their administrative claims upon receipt of the FDIC's April, 1992 notice, they would have had an opportunity to file for review in district court by October, 1992 at the very latest—some 10 months before the FDIC initiated final foreclosure proceedings on their home in August, 1993. In sum, the Freemans had a predeprivation opportunity to be heard on each of the claims they later attempted to assert in court.

The Supreme Court has long recognized that the process that is due will vary in form “appropriate to the nature of the case,” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), depending on such factors as the nature of the private interest affected, the risk of erroneous deprivation, and the government's interests, including fiscal and administrative burdens. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). But as the Third Circuit cogently noted in response to a similar challenge to the § 1821(d) administrative process, we “find no ... support for ... [the] position that

the opportunity for a *de novo* court action six months after they file their [administrative] claims fails to provide them meaningful review.” *Rosa*, 938 F.2d at 397.

We do not know, and cannot speculate, what the outcome would have been had the Freemans exhausted their administrative remedies. Nonetheless, one possible outcome gives us pause. If the complainant's administrative claims are disallowed and the complainant proceeds to seek *de novo* judicial review as prescribed in § 1821(d), then § 1821(j) on its face would appear to bar the district court from granting injunctive or declaratory relief, or rescission of the underlying agreement, at least to the extent the relief granted would “restrain” the FDIC from exercising its powers as receiver. *See supra*, Part II.A. In some circumstances this might so tie the reviewing court's hands that the court would be unable to grant meaningful predeprivation relief, bringing the constitutional adequacy of the complainant's predeprivation review into question. *See Fuentes*, 407 U.S. at 80, 92 S.Ct. at 1994 (“opportunity to be heard must be granted at a meaningful time and in a meaningful manner,” and must generally occur in a time and manner that would allow the deprivation to be prevented) (internal quotation and citation omitted). But that certainly is not what actually transpired here, nor is there any reason to assume that if the Freemans had proceeded through the administrative claims process they would have faced such a problem. The Freemans might have won relief at the agency level. Even if they won no relief at that stage, the factual and legal issues might have appeared in a wholly different light by the time they sought judicial review. Finally, even if a constraint like the one we have described were to arise at the stage of judicial review, the reviewing court might construe the statute so as to avoid constitutional difficulties. *See International Ass'n of Machinists v. Street*, 367 U.S. 740, 749, 81 S.Ct. 1784, 1790, 6 L.Ed.2d 1141 (1961) (“Federal statutes are to be so construed as to avoid serious doubt of their constitutionality.”); *cf. Homeland Stores*, 17 F.3d at 1273–74 (construing § 1821(d)(13)(D) jurisdictional bar narrowly so as not to deprive complainant of all opportunities for administrative or judicial relief); *Heno v. FDIC*, 20 F.3d at 1209 (construing § 1821(d)

(5) to authorize FDIC to process a late-filed claim if the claim arose after the bar date, so as not to deprive claimant of all opportunities for administrative or judicial relief). We are in no position at this juncture to foretell whether such a case might ever arise, what it might look like, or how it might be resolved. It would be premature and beyond the scope of our Article III powers to read a judicially-crafted exemption into either § 1821(d) or § 1821(j) in anticipation of theoretically possible yet only dimly perceived due process concerns that are not squarely presented by the case before us. *See National Union Fire Ins. Co.*, 28 F.3d at 392.

We conclude that the Freemans did have predeprivation notice and an opportunity to be heard, and therefore they were not denied *1406 **336 due process. That they failed to avail themselves of the statutorily-prescribed administrative claims process, and thereby waived their right to pursue their claims against the FDIC in that or any other forum, is no violation of their constitutional rights.

III. CONCLUSION

Because the Freemans' pleas for equitable relief are barred by 12 U.S.C. § 1821(j) and *all* their claims are barred by 12 U.S.C. § 1821(d), we do not reach the merits of their underlying claims. Assuming that the Freemans were entitled to predeprivation notice and an opportunity to be heard, they have not shown a violation of their due process rights—they had an opportunity to be heard, but declined to avail themselves of it. We therefore affirm the judgment of the district court dismissing the Freemans' claims with prejudice, on grounds that the district court was statutorily barred from hearing the claims.

It is so ordered.

All Citations

56 F.3d 1394, 312 U.S.App.D.C. 324

Footnotes

- 1 For example, if the claimant's claim does not accrue until *after* the deadline set by FDIC for filing administrative claims, the administrative claim would apparently be barred as untimely, yet § 1821(d)(13)(D) would apparently deprive any court of jurisdiction over the claim because it had not been submitted to the administrative process. *But see Heno v. FDIC*, 20 F.3d at 1209 (affirming as reasonable FDIC's construction of § 1821(d)(5)(C) to authorize it to process a late-filed claim if the claim itself does not accrue until after the bar date).

2 The FDIC's April 8, 1992 letter did not apprise the Freemans of their opportunity to pursue their claims through the administrative claims process. Although the Freemans do not make a due process argument based on lack of notice of the claims process, we note that if they were not afforded notice of their exclusive opportunity to present their claims, serious due process concerns would be implicated, for notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

Nancy Freeman states in an affidavit that to the best of her and her husband's recollection, they did not receive the notice the FDIC was required to send under 12 U.S.C. § 1821(d)(3), see *supra* Part II.B., which would have informed them of the claims process. The FDIC responds with an affidavit by an FDIC official stating his personal knowledge that the required notice was sent to all "creditors ... on [Madison's] books," including the Freemans. The district court made no finding as to whether the required notice was given, but the contentions of the parties are not necessarily inconsistent: it is possible that the FDIC sent the required notice, and yet the Freemans never received it.

Whether or not the FDIC sent the required notice, however, the matter is best addressed through equitable tolling of the time bar if the Freemans did not have actual notice of the administrative claims process in time to file their claims. We think the time bar here is, like the requirement of timely filing of an administrative claim as a prerequisite to a Title VII suit, essentially "a statute of limitations ... subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982). And it is well established that equitable tolling principles apply against the government, just as against private parties. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95–96, 111 S.Ct. 453, 457–58, 112 L.Ed.2d 435 (1990). Courts may allow equitable tolling of a statute of limitations where "a claimant has received inadequate notice." *Mondy v. Secretary of the Army*, 845 F.2d 1051, 1057 (D.C.Cir.1988) (quoting *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151, 104 S.Ct. 1723, 1725, 80 L.Ed.2d 196 (1984) (per curiam)). See, e.g., *Bayer v. United States Dept. of Treasury*, 956 F.2d 330, 332–33 (D.C.Cir.1992) (before filing formal complaint alleging discrimination in federal employment, complainant must notify Equal Employment Opportunity counselor within 30 days after allegedly discriminatory event; but this time bar is subject to equitable tolling where complainant "was not notified of the time limits and was not otherwise aware of them"). Although the FDIC undoubtedly has a strong interest in expeditiously winding up the affairs of failed institutions, the equities will favor tolling where strict application of the bar date would deprive the complainant of any meaningful opportunity to be heard. See *Bayer*, 956 F.2d at 333. Cf. *Heno v. FDIC*, 20 F.3d at 1209 (construing 12 U.S.C. § 1821(d)(5)(C) to allow processing of late-filed claims that do not accrue until after the bar date, so as not to deny claimants all opportunity to be heard). If the FDIC were to disallow as untimely any administrative claims the Freemans might file, they would be entitled to *de novo* review in the district court, where they may "plead [] and prov [e] ... 'equitable reasons' for noncompliance" with the time bar, *Bayer*, 956 F.2d at 333 (quoting *Saltz v. Lehman*, 672 F.2d 207, 209 (D.C.Cir.1982)), including their inability to make a timely administrative filing due to lack of actual notice of the administrative claims process.

3 Authorities are divided as to whether the type of notice the Freemans received on April 8, 1992—stating that they were in default and that the FDIC intended to foreclose at some unspecified future date—is adequate notice of a foreclosure. Compare *Ricker v. United States*, 417 F.Supp. 133, 138–39 (D.Me.1976) (notice of default stating intent to foreclose is merely a "threat of foreclosure," not adequate notice of foreclosure) with *Vail v. Brown*, 841 F.Supp. 909, 914–15 (D.Minn.) (notice of default stating intent to foreclose is adequate notice of foreclosure, even if date and time of foreclosure sale are not specified), *aff'd*, 39 F.3d 208 (8th Cir.1994), *cert. denied*, 515 U.S. 1102, 115 S.Ct. 2245, 132 L.Ed.2d 254 (1995). Here, however, because the Freemans do not allege that they were given inadequate notice of the foreclosure, we must deem that argument waived. The Freemans instead complain that they lacked a predeprivation opportunity to be heard; for the reasons stated in the text, that contention is without merit.

22 F.3d 335
United States Court of Appeals,
First Circuit.

William Bart LLOYD, Plaintiff, Appellant,
v.
FEDERAL DEPOSIT INSURANCE
CORPORATION, Defendant, Appellee.

No. 93-1445.
|
Submitted Feb. 8, 1994.
|
Decided Feb. 8, 1994.

Synopsis

Mortgagor brought action against Federal Deposit Insurance Corporation (FDIC) as receiver for mortgagee. The FDIC removed action to the United States District Court for the District of Columbia which transferred case to United States District Court for the District of Rhode Island for the convenience of police and witnesses. The United States District Court for the District of Rhode Island, [Ronald R. Lagueux](#), J., dismissed action, [812 F.Supp. 293](#), and mortgagor appealed. The Court of Appeals, [Selya](#), J., held that: (1) the United States District Court for the District of Rhode Island lacked subject matter jurisdiction over action, but (2) appropriate remedy was retransfer of action to the United States District Court for the District of Columbia.

Vacated and remanded.

West Headnotes (5)

[1] Finance, Banking, and Credit

🔑 Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators

District court lacked jurisdiction to enjoin Federal Deposit Insurance Corporation (FDIC) from foreclosing against mortgaged property. Federal Deposit Insurance Act, § 2[11](d)(2)(B) (ii), (j), [12 U.S.C.A. § 1821\(d\)\(2\)\(B\)\(ii\), \(j\)](#).

[8 Cases that cite this headnote](#)

[2] Finance, Banking, and Credit

🔑 Exhaustion of other remedies

District court lacked jurisdiction over mortgagor's claims against Federal Deposit Insurance Corporation (FDIC) as receiver for failed mortgagee bank, for equitable reformation or cancellation of mortgage agreement; mortgagor sought "determination of rights with respect to assets of depository institution for which FDIC had been appointed receiver," within meaning of statute limiting federal jurisdiction over such claims. Federal Deposit Insurance Act, § 2[11] (d)(13)(D), [12 U.S.C.A. § 1821\(d\)\(13\)\(D\)](#).

[29 Cases that cite this headnote](#)

[3] Finance, Banking, and Credit

🔑 Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators

Federal courts are barred from asserting jurisdiction over claims against assets of failed depository institutions except as expressly or impliedly permitted by statute. Federal Deposit Insurance Act, § 2[11](d), [12 U.S.C.A. § 1821\(d\)](#).

[5 Cases that cite this headnote](#)

[4] Finance, Banking, and Credit

🔑 Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators

Statute governing which district courts may entertain suits based upon disallowed claims against Federal Deposit Insurance Corporation (FDIC) is jurisdictional limitation, rather than venue provision, and thus cannot be waived. Federal Deposit Insurance Act, § 2[11](d)(6)(A), [12 U.S.C.A. § 1821\(d\)\(6\)\(A\)](#).

[2 Cases that cite this headnote](#)

[5] Federal Courts

🔑 Proceedings by transferee court; improper change

Although district court for district in which financial transaction occurred lacked jurisdiction over action arising from claim disallowed by Federal Deposit Insurance Corporation (FDIC),

retransfer of case, rather than dismissal, was appropriate, where FDIC was responsible for transfer of case from district court with jurisdiction to district court without jurisdiction and time to refile action had expired. Federal Deposit Insurance Act, § 2 [11](d)(6)(A), 12 U.S.C.A. § 1821(d)(6)(A); 28 U.S.C.A. § 1404(a).

3 Cases that cite this headnote

Attorneys and Law Firms

*335 William Bart Lloyd on brief pro se.

Ann S. Duross, Asst. Gen. Counsel, Richard J. Osterman, Jr., Sr. Counsel, and Daniel H. Kurtenbach, Counsel, Washington, DC, on brief for appellee.

Before BREYER, Chief Judge, SELYA and BOUDIN, Circuit Judges.

Opinion

*336 SELYA, Circuit Judge.

William Bart Lloyd appeals from an order of the United States District Court for the District of Rhode Island dismissing his suit against the Federal Deposit Insurance Corporation (FDIC), as receiver for the failed Capitol Bank and Trust Company, of Boston, Massachusetts (the Bank), for want of jurisdiction, 812 F.Supp. 293 (1993).

Background

In November 1990, appellant purchased an apartment building in Providence, Rhode Island from the Bank. Under the sales agreement, the Bank undertook to provide financing for both the acquisition and the renovation of the complex. At the closing, appellant signed a promissory note, secured by a mortgage on the property. In December 1990, the Bank failed. The FDIC was appointed receiver. In June 1991, the FDIC, as receiver, disaffirmed the original agreement to finance renovations.

In due course, appellant filed a proof of claim with the FDIC. The proof was not acted upon within the required 180-day period, see 12 U.S.C. § 1821(d)(5)(A)(i). Nevertheless, the

FDIC notified appellant on March 4, 1992, that it intended to foreclose. On March 17, appellant responded by filing this action in a Rhode Island state court. He sought to enjoin the FDIC from proceeding with the foreclosure, and, moreover, to reform or cancel the sales agreement, note, and mortgage (based on an asserted mutual mistake).

On March 30, 1992, the FDIC removed the case to the United States District Court for the District of Columbia. See 12 U.S.C. § 1819(b)(2)(B) (giving FDIC authority to remove action “to the appropriate United States district court”) & 12 U.S.C. § 1821(d)(6)(A) (giving “district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia” jurisdiction over any claim disallowed by the FDIC). On April 2, the FDIC moved to transfer the case to the United States District Court for the District of Rhode Island “[f]or the convenience of parties and witnesses.” 28 U.S.C. § 1404(a). The district court transferred the case on April 23, 1992. Appellant's administrative claim was finally denied on June 9, 1992.

Once the case had returned north, the FDIC moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. At the same time, the FDIC also argued that appellant's claim for injunctive relief was barred by 12 U.S.C. § 1821(j).¹ The district court dismissed the case for want of jurisdiction. This appeal followed.²

Discussion

[1] A “district court lacks jurisdiction to enjoin the FDIC when the FDIC is acting pursuant to its statutory powers as receiver.” *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir.1992); see also 12 U.S.C. § 1821(j). The FDIC has the power as receiver to foreclose on the property of a debtor. See 12 U.S.C. § 1821(d)(2)(B)(ii) (giving FDIC power to “collect all obligations and money due the [failed] institution”). Thus, the district court was without jurisdiction to grant the injunctive relief appellant seeks. See 281–300 *Joint Venture v. Onion*, 938 F.2d 35, 39 (5th Cir.1991) (injunction against receiver's foreclosure of appellants' property barred by *337 § 1821(j)), cert. denied, 502 U.S. 1057, 112 S.Ct. 933, 117 L.Ed.2d 105 (1992).

[2] [3] Appellant's claims for equitable reformation and/or cancellation of the contract fare no better. These claims lie in the maw of the statute, for, in the statutory parlance, the plaintiff's complaint "seeks a determination of rights with respect to [] the assets of a [] depository institution for which the Corporation has been appointed receiver." 12 U.S.C. § 1821(d)(13)(D). By its terms, the statute limits federal court jurisdiction over such claims to those instances "otherwise provided" in section 1821(d). *Id.*; see also *Marquis v. Federal Deposit Ins. Corp.*, 965 F.2d 1148, 1153 (1st Cir.1992). We understand this to mean that the federal courts are barred from asserting jurisdiction over claims against the assets of failed depository institutions except as expressly or impliedly permitted, see *Marquis*, 965 F.2d at 1153 (suggesting that, in addition to its express grants of jurisdiction, section 1821(d) also implies the existence of jurisdiction in other circumstances), by virtue of the various subsections of section 1821(d). See *Resolution Trust Corp. v. J.F. Assocs.*, 813 F.Supp. 951, 954 (N.D.N.Y.1993); see also *Landmark Land Co. v. Office of Thrift Supervision*, 948 F.2d 910, 912–13 (5th Cir.1991) (interpreting similarly worded provision in 12 U.S.C. § 1818(i)(1) as limiting jurisdiction). We further understand the specific jurisdictional provision of section 1821(d)(13)(D) to control over the more general jurisdictional grant found in 12 U.S.C. § 1819(b)(2)(A).³ See *Gozlon-Peretz v. United States*, 498 U.S. 395, 407, 111 S.Ct. 840, 848, 112 L.Ed.2d 919 (1991) ("[a] specific provision controls over one of more general application") (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445, 107 S.Ct. 2494, 2499, 96 L.Ed.2d 385 (1987)).

[4] Appellant seeks to find safe haven in the statute itself: after all, section 1821(d)(6)(A) expressly confers jurisdiction upon federal courts to entertain suits based upon disallowed claims. The district court did not buy these wares. Rather, Judge Lagueux, adopting a position urged by the FDIC below, ruled that the only courts which had jurisdiction over appellant's claims were the federal district court for the district where the failed bank maintained its principal place of business (here, Massachusetts) and the federal district court for the District of Columbia, see 12 U.S.C. § 1821(d)(6)(A).⁴ Lloyd's appeal attacks this ruling. And appellant has acquired a rather surprising ally: reversing its field, the FDIC now contends that section 1821(d)(6)(A) is not a jurisdictional limitation, but is instead a venue provision that can be waived (and which the FDIC has waived in this instance). We think the FDIC was right the first time around.

For one thing, the plain language of section 1821(d)(6)(A) indicates that it is a jurisdictional grant limited to the federal district court for the district where the institution has its principal place of business and the United States District Court for the District of Columbia. See *id.* (providing that either such court "shall have jurisdiction to hear such claim"). Accord *J.F. Assocs.*, 813 F.Supp. at 958. For another thing, while the reasoning of the only court that, to our knowledge, has found section 1821(d)(6)(A) to be a venue provision supports the FDIC's new position, the reasoning is not persuasive—and the holding is not inconsistent, *simpliciter*; with reading the section as a jurisdictional provision. In *Vinton v. Trustbank Sav. F.S.B.*, 798 F.Supp. 1055 (D.Del.1992), the court held that section 1821(d)(6)(A) was not a grant of "exclusive jurisdiction" to the two listed courts and did not deprive a third court of jurisdiction which *338 it had previously obtained.⁵ *Id.* at 1065. But section 1821(d)(6)(A) can be read as a grant of jurisdiction to two designated courts without being read as a completely exclusive grant. Accord *J.F. Assocs.*, 813 F.Supp. at 955. As we interpret it, section 1821(d)(6)(A) does not extend jurisdiction beyond the two specified courts—but, by the same token, it does not deprive a court of jurisdiction where, as in *Vinton*, that jurisdiction has a source independent of section 1821(d)(6)(A). See *Marquis*, 965 F.2d at 1152–54 (determining that subsections of section 1821(d) other than section 1821(d)(6)(A) permit federal courts to retain jurisdiction in circumstances where a bank's failure postdates the institution of the action).

[5] In the instant case, section 1821(d)(6)(A) provides no basis for jurisdiction in the United States District Court for the District of Rhode Island. Nor has appellant or the FDIC indicated any source of federal jurisdiction in section 1821(d) other than section 1821(d)(6)(A). Consequently, even though, viewed simply from the perspective of policy, it might seem sensible to allow for suits of this sort to be tried in the district where the transactions occurred and where the court is likely to be most familiar with any applicable local law, the statutory language, especially that of § 1821(d)(13)(D), compels us, absent a more persuasive argument to the contrary, to find that the district court appropriately determined that it lacked subject matter jurisdiction over Lloyd's suit. See *Massachusetts Financial Services, Inc. v. Securities Investor Protection Corp.*, 545 F.2d 754, 756 (1st Cir.1976), ("a statute's plain language is the primary indicator of its meaning"), *cert. denied*, 431 U.S. 904, 97 S.Ct. 1696, 52 L.Ed.2d 388 (1977).⁶

The normal remedy in these circumstances would be for the district court to dismiss this case (as it did). Here, however, a dismissal seems unfair since it would deprive Lloyd, who is in effect a victim of the FDIC-inspired transfer to the District Court for the District of Rhode Island, of any means of redress. See [12 U.S.C. § 1821\(d\)\(6\)\(B\)](#) (unless claimant requests review of disallowance of claim within 60 days of determination, “disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim”). Since the transferor court was not empowered to order the transfer of this action to a court which lacked subject matter jurisdiction over it, see [28 U.S.C. § 1404\(a\)](#) (transfer may only be to a district where the action “might have been brought”), we think it more prudent that the district court retransfer this action to the United States District Court

for the District of Columbia on the ground that the transfer was improvidently granted. See [Turner v. Kelley](#), 411 F.Supp. 1331 (D.Kan.1976) (retransferring case to transferor court because transferee court lacked jurisdiction under 5 U.S.C. § 552(a)); [Majewski v. New York C.R. Co.](#), 227 F.Supp. 950 (W.D.Mich.1964) (retransferring case to transferor court because transferee court lacked jurisdiction).

The dismissal is therefore *vacated* for the purpose of allowing the district court to enter such an order. No costs.

All Citations

22 F.3d 335

Footnotes

- 1 Subsection 1821(j) provides, in part:
Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, *to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.*
[12 U.S.C. § 1821\(j\)](#) (emphasis supplied). According to the FDIC, none of the statutory exceptions authorize injunctive relief of the kind sought by appellant.
- 2 The district judge determined that the suit was barred both because the court lacked jurisdiction pursuant to [12 U.S.C. § 1821\(d\)\(6\)\(A\)](#) and because it had no jurisdiction over a case removed from a state court which itself did not have jurisdiction over the original case. While it was once settled law that a federal court's removal jurisdiction was derived from the state court's jurisdiction, this rule has been abolished by statute. See [28 U.S.C. § 1441\(e\)](#). Thus, we address only the effect of [12 U.S.C. § 1821\(d\)\(6\)\(A\)](#) on the district court's jurisdiction.
- 3 Subsection 1819(b)(2)(A) provides, in part, that:
all suits ... to which the [FDIC] is a party shall be deemed to arise under the laws of the United States.
[12 U.S.C. § 1819\(b\)\(2\)\(A\)](#).
- 4 The statute provides, in relevant part, that a claimant may:
file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district court or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).
[12 U.S.C. § 1821\(d\)\(6\)\(A\)](#).
- 5 In *Vinton*, the United States District Court for the District of Delaware had obtained jurisdiction over the case before the Resolution Trust Corporation took over as receiver.
- 6 We note that, liberally construed, appellant's complaint also invokes [12 U.S.C. § 1821\(e\)](#), a statute which provides that the FDIC may repudiate contracts entered into before its appointment as receiver, but affords an injured party a right to compensatory relief. See, e.g., [Howell v. Federal Deposit Ins. Corp.](#), 986 F.2d 569, 571 (1st Cir.1993). We do not decide whether the district court would have jurisdiction under this section because appellant has explicitly disavowed any intention of pursuing a breach of contract claim.

938 F.2d 35
United States Court of Appeals,
Fifth Circuit.

281-300 JOINT VENTURE, Plaintiff-Appellant,

v.

Robert F. ONION, Substitute Trustee, and San
Antonio Savings Association, Defendants-Appellees.

No. 90-5628

|
Summary Calendar.

|
June 12, 1991.

Synopsis

Appeal was taken from decision of the United States District Court for the Western District of Texas at San Antonio, [H.F. Garcia](#), J., denying motion for preliminary injunction prohibiting foreclosure sale of property and dismissing action against insolvent thrift on prudential grounds and against substitute trustee on mootness grounds. The Court of Appeals, [Jerry E. Smith](#), Circuit Judge, held that: (1) district court properly relied upon Federal Home Loan Bank Board (FHLBB) determination of worthlessness in dismissing suit against thrift, and (2) district court lacked the ability to enjoin nonjudicial foreclosure that was within statutorily authorized powers of Resolution Trust Corporation (RTC) as conservator.

Affirmed.

West Headnotes (2)

[1] Finance, Banking, and Credit

🔑 Federal Supervision and Control

District court properly relied upon Federal Home Loan Bank Board (FHLBB) determination that there would never be any assets with which to satisfy judgment in its determination to dismiss suit against failed thrift on prudential grounds; judicial review of FHLBB determination of worthlessness was never sought and that determination could not be collaterally attacked, and court, bound by determination of

worthlessness, would have no reason to grant equitable relief or to declare rights of parties.

[30 Cases that cite this headnote](#)

[2] Injunction

🔑 Liens and security interests

District court lacked the ability to enjoin Resolution Trust Corporation (RTC) from conducting nonjudicial foreclosure sale that was within its statutorily authorized powers as conservator. Federal Deposit Insurance Act, § 2[11] (d)(2)(B)(ii), (j), as amended, [12 U.S.C.A. § 1821\(d\)\(2\)\(B\)\(ii\), \(j\)](#).

[35 Cases that cite this headnote](#)

Attorneys and Law Firms

*[36 Joe K. Longley, Timothy R. Labadie](#), Longley & Maxwell, Austin, Tex., for plaintiff-appellant.

[Wm. M. McNaught, Fred Riley Jones](#), San Antonio, Tex., [Kirk K. Van Tine, Jesse R. Adams, III](#), Baker & Botts, Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Western District of Texas.

Before [JOHNSON](#), [SMITH](#), and [WIENER](#), Circuit Judges.

Opinion

[JERRY E. SMITH](#), Circuit Judge:

The plaintiff, 281-300 Joint Venture (Joint Venture), appeals a decision of the district court denying its motion for a preliminary injunction prohibiting the foreclosure sale of its property and dismissing its action against San Antonio Savings Association (SASA) on prudential grounds pursuant to [Triland Holdings & Co. v. Sunbelt Serv. Corp.](#), [884 F.2d 205 \(5th Cir.1989\)](#), and its progeny, and further dismissing its action against Robert F. Onion, as substitute trustee, on mootness grounds. On appeal, Joint Venture maintains that the court (1) should not have dismissed the case on prudential grounds and (2) should have enjoined the Resolution Trust Corporation (RTC), as conservator of San Antonio Savings Association, F.A. (new SASA), from conducting the foreclosure sale. Finding no error, we affirm.

I.

On December 28, 1987, Joint Venture entered into a wrap-around loan from SASA, in the amount of \$8,100,000, for the development of 296.69 acres of land in Bexar County, Texas. The loan was evidenced by a note, loan agreement, and deed of trust. At the time of the loan, the property was encumbered by two superior liens. Pursuant to the loan agreement, SASA agreed to make advances to or for the benefit of Joint Venture for principal and interest on the underlying notes and for a certain percentage of each interest payment due on the SASA note. The loan agreement further obligated Joint Venture to pay the remaining interest on the SASA note with funds other than the proceeds of the loan; it provided that, in the event of non-payment, SASA had the right to foreclose on the property.

Joint Venture claims that on January 2, 1989, SASA failed to make an annual timely payment on one of the underlying notes. Shortly thereafter, the holder of that note declared it in default and posted the property for foreclosure. At the time of this *37 event,¹ Joint Venture avers that it was current in its obligations and not in breach of the loan agreement. SASA, however, maintains that, beginning in January 1989, Joint Venture failed to make interest payments when due. SASA contends that as of November 30, 1989, Joint Venture had failed to make interest payments totaling approximately \$160,000.

On February 28, 1989, the Federal Home Loan Bank Board (FHLBB) determined that SASA was insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as conservator, and later as receiver, of the thrift. In its role as receiver, the FSLIC took possession of all the assets of SASA and succeeded to all of its rights, titles, powers, and privileges. It was also directed to liquidate the claims against SASA.

As a result, according to federal regulations and state law, if the assets of the failed institution were insufficient to pay depositors in full, general unsecured creditors who were in a lower priority class were not entitled to be paid anything. *See Tex.Rev.Civ.Stat.Ann. art. 852a, § 8.09(g)(2), (3), (4)* (Vernon Supp.1991). Since the FHLBB determined that SASA did not have enough assets to satisfy the depositors in full, the claims of general unsecured creditors such as Joint Venture could not be satisfied.

Approximately four months later, the FHLBB created new SASA and appointed the FSLIC as conservator; the FSLIC was responsible for liquidating SASA's assets by transferring them to new SASA. In consideration for receiving such assets, new SASA agreed to assume SASA's liabilities for tax claims, its liabilities to depositors to the extent of their deposits, and its liabilities to secured creditors to the extent of the value of their security.

New SASA did not agree, however, to assume any liability for claims by SASA's general unsecured creditors. While the loan agreement, note, and deed of trust executed by Joint Venture to SASA were transferred to new SASA, along with the right of collection or foreclosure, none of the liabilities for Joint Venture's claims against SASA was assumed by new SASA. Instead, the claims relating to SASA's conduct remained as claims against the FSLIC as receiver for SASA. After the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), [Pub.L. No. 101-73, 103 Stat. 183 \(1989\)](#), abolished the FSLIC, the RTC succeeded the FSLIC as receiver for SASA and as conservator for new SASA.²

II.

On June 30, 1989, Joint Venture filed suit in state district court, seeking a temporary restraining order (TRO) and a permanent injunction to prevent the FSLIC as conservator for SASA from foreclosing on the property that served as security for its loan. That day, Joint Venture secured a TRO restraining SASA and its substitute trustee, Onion, from conducting a foreclosure on the property.

Two weeks later, the case was removed to federal district court. Then, the property again was posted for foreclosure, this time by the RTC, acting as conservator for new SASA. The sale did not take place, however, as Joint Venture had filed a chapter 11 bankruptcy petition. On October 31, 1989, at the request of the RTC as conservator for new SASA, the bankruptcy court granted a motion to lift the stay, leaving no impediment to proceeding to a foreclosure sale.

In response, Joint Venture filed a motion for a preliminary injunction in district court on November 17, 1989. The court denied this motion and found that it was prohibited by section 212(j) of FIRREA, [12 U.S.C. § 1821\(j\)](#), from taking any action to restrain or affect the powers or functions of the RTC as conservator of new SASA. A *38 few days later, the RTC foreclosed on the lien.

On June 27, 1990, the RTC, as receiver for SASA, filed a motion to dismiss on prudential grounds, relying upon the FHLBB's determination of worthlessness. Joint Venture filed no response. The court then held that there would never be any assets with which to satisfy a judgment and granted RTC's motion. It also dismissed, as moot, the claims against Onion, as the property had been sold.

III.

[1] Joint Venture contends that, for two reasons, the court should not have dismissed this case on prudential grounds. First, it maintains that the RTC did not offer any evidence of the value of SASA's assets, thereby precluding a finding that it would be impossible for Joint Venture to collect on a favorable judgment for monetary damages. Second, even if Joint Venture would not have been able to collect any money, it argues that the court could have granted equitable relief and declared the rights of the parties. We disagree with both contentions.

The RTC presented sufficient evidence to demonstrate that SASA will never have any assets to satisfy a judgment against it by Joint Venture. The FHLBB determined that SASA's assets would be insufficient to satisfy its secured and deposit liabilities and that, after payment of the claims of secured creditors and depositors, "no amount remains for payment of general creditors ... and therefore, the Association's [SASA's] general creditors' claims ... are worthless...."³ FHLBB Resolution No. 89-1769P, at 4 (July 12, 1989).

While the FHLBB's findings and conclusions regarding the worthlessness of unsecured creditor claims constitute final agency action, they are subject to review under the Administrative Procedure Act (APA). See 5 U.S.C. §§ 702-706. Joint Venture, however, never sought judicial review of the FHLBB's determination of worthlessness. Instead, it argues that the determination alone is insufficient to prove that there will never be any assets in the receivership to satisfy the claims of unsecured creditors. Previously we have determined that such a collateral attack on the FHLBB's determination is improper and that, absent evidence to the contrary, we are bound by its decision. See *Gulley*, 902 F.2d at 351 n. 4.

The RTC also adequately demonstrates that a court, bound by the FHLBB's determination of worthlessness, would have no

reason to grant equitable relief for Joint Venture or to declare the rights of the parties. Indeed, the RTC already has shown that Joint Venture, as an unsecured general creditor, has no right to any of SASA's or new SASA's assets and that the new thrift has not assumed any of the liabilities of its predecessor emanating from the loan agreement with Joint Venture. Since Joint Venture has not mentioned any other rights that it is entitled to receive in connection with this loan, the court had no reason to grant it equitable relief. See *FSLIC v. Hall Whispertree Assocs.*, 653 F.Supp. 148, 150 (N.D.Tex.1986).

Thus, the court was correct in relying upon the FHLBB's decision, to the effect that there will never be any assets with which to satisfy a judgment by Joint Venture against SASA, in its determination to dismiss, on prudential grounds, Joint Venture's suit against this failed thrift. See *Triland*, 884 F.2d at 208 (where no means exist to collect on judgment, dismissal on prudential grounds is proper); *Adams v. RTC*, 927 F.2d 348, 354 (8th Cir.1991) (FHLBB's determination of worthlessness is sufficient to support dismissal on ground of prudential mootness); accord *39 *Morgan v. Heights Sav. Ass'n*, 741 F.Supp. 620, 621 (E.D.Tex.1990); *FSLIC v. Locke*, 718 F.Supp. 573, 586 (W.D.Tex.1989).

IV.

[2] Joint Venture also argues that the court's refusal to enjoin the RTC, as conservator of new SASA, from conducting the foreclosure sale was improper. It maintains that section 212(j) of FIRREA should not be read to grant conservators broad powers to act quickly in dealing with the assets of failed thrifts, especially where such actions involve foreclosing on property of owners who have a substantial likelihood of prevailing on the merits of the case and who may suffer irreparable injury from the foreclosure. See *Libertarian Party v. Fainter*, 741 F.2d 728, 729 (5th Cir.1984). Joint Venture further asserts that the refusal to enjoin the foreclosure was unconstitutional. Both arguments are unpersuasive.

The court properly refused to enjoin the RTC from conducting the foreclosure. Section 212(j) states that "no court may take any action ... to restrain or affect the exercise of powers or functions of the Corporation [RTC] as a conservator or a receiver." Prior to the enactment of FIRREA, the Federal Deposit Insurance Act contained a similar provision that was created to enable the FSLIC to act in a quick and decisive manner in reorganizing, operating, or dissolving failed savings and loan institutions. See *North Miss. Sav. &*

Loan Ass'n v. Hudspeth, 756 F.2d 1096, 1101 (5th Cir.1985), cert. denied, 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986). Since this policy has not been changed with the enactment of FIRREA, the courts lack the ability to enjoin nonjudicial foreclosures that are within the statutory powers of the RTC as conservator or receiver. *Hall*, 653 F.Supp. at 150.

In this case, the foreclosure was within the statutorily authorized powers of the RTC as conservator. While Joint Venture argues that this foreclosure was not within the “powers or functions” of the RTC as conservator of new SASA that are protected from collateral attacks by section 212(j) and its predecessor, 12 U.S.C. § 1464(d)(6)(C), the RTC correctly cites to *Coit Indep. Joint Venture v. FSLIC*, 489 U.S. 561, 109 S.Ct. 1361, 103 L.Ed.2d 602 (1989), to demonstrate that its actions were within this category.

In *Coit*, the Court stated that a court may not grant injunctive relief unless the power or function whose exercise is sought to be enjoined is beyond the powers granted to the RTC by statute. *Id.* at 574, 109 S.Ct. at 1369. The function under

consideration here is the ability of the conservator to foreclose on the property of a debtor, a power that Congress gave to the RTC under FIRREA. Indeed, when the RTC acts as a conservator or receiver, it has broad authority to dispose of assets and to “collect all obligations and money due the [failed] institution.” 12 U.S.C. § 1821(d)(2)(B)(ii).⁴ Hence, the court may not enjoin the exercise of the RTC's powers in this instance, see *Shoreline Group, Ltd. v. Commonwealth Fed. Sav. & Loan Ass'n*, No. 90–6703–CIV (S.D.Fla. Feb. 14, 1991), regardless of Joint Venture's likelihood of success on the underlying claims.⁵ See *Abbott Bldg. Corp. v. FSLIC*, 739 F.Supp. 532, 535 (D.Nev.1990).

Finally, Joint Venture's various claims that the court's denial of injunctive relief was unconstitutional are meritless. Accordingly, we AFFIRM.

All Citations

938 F.2d 35

Footnotes

- 1 The plaintiff claims that the breach of the loan agreement by SASA resulted in SASA's being elevated to a first lien position, caused injury to Joint Venture's credit reputation and standing in the community, and shortened the term of one of the notes.
- 2 The RTC later was appointed as receiver for new SASA.
- 3 In addition, the RTC correctly argued that Joint Venture cannot look to new SASA as a source of recovery, as it did not assert any claim in its complaint against the RTC as conservator for this new thrift. Also, as we have noted, the potential liabilities to unsecured creditors of SASA were not assumed by new SASA. Thus, Joint Venture had no right to assert any claim against SASA's transferred assets. See *Gulley v. Sunbelt Sav., F.S.B.*, 902 F.2d 348, 351 (5th Cir.1990), cert. denied, 498 U.S. 1025, 111 S.Ct. 673, 112 L.Ed.2d 665 (1991).
- 4 See also 12 U.S.C. § 1821(d)(2)(B)(iv) (RTC empowered to “preserve and conserve the assets and property of such institution”); 12 U.S.C. § 1821(d)(2)(D)(i) (RTC authorized to “put ... institution in sound and solvent condition ...”).
- 5 The anti-injunction provision of 12 U.S.C. § 1464(d)(6)(C) has been upheld on constitutional grounds. See *Haralson v. FHLBB*, 837 F.2d 1123, 1126 (D.C.Cir.1988); *Biscayne Fed. Sav. & Loan Ass'n v. FHLBB*, 720 F.2d 1499, 1503–04 (11th Cir.1983), cert. denied, 467 U.S. 1215, 104 S.Ct. 2656, 81 L.Ed.2d 363 (1984).

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866 F.Supp. 513

United States District Court, D. Utah, Central Division.

PYRAMID CONSTRUCTION COMPANY,
INC., a New Jersey corporation, Plaintiff,

v.

WIND RIVER PETROLEUM, INC.,
a Utah corporation, Defendant.

Civ. No. 94-C-428.

|
Sept. 12, 1994.**Synopsis**

Assignee of winning bidder for purchase of real property from Resolution Trust Corporation (RTC) brought action against actual purchaser, which had exercised right of first refusal in lease, seeking declaration that RTC's sale to actual purchaser was void, and preliminary and permanent injunctive relief preventing actual purchaser from making changes to property and requiring actual purchaser to transfer title of property to assignee. Actual purchaser filed motion to dismiss. RTC filed motions to intervene and to dismiss. The District Court, [Winder](#), Chief Judge, held that anti-injunction provision of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) deprived Court of jurisdiction to grant injunctive relief requested by assignee.

Actual purchaser's motion granted.

West Headnotes (9)

[1] Finance, Banking, and Credit

🔑 Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators

Rescission of sale of real property by Resolution Trust Corporation (RTC) and order that RTC sell property to another party would clearly violate anti-injunction provision of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). Federal Deposit Insurance Act, § 2[11](j), as amended, 12 U.S.C.A. § 1821(j).

4 Cases that cite this headnote

[2] Federal Civil Procedure

🔑 Construction of pleadings

Federal Civil Procedure

🔑 Matters deemed admitted; acceptance as true of allegations in complaint

In determining whether to grant motion to dismiss for failure to state claim upon which relief can be granted, court must accept all well-pled facts as true, and all inferences that can be drawn from allegations must be drawn in favor of plaintiff.

[3] Finance, Banking, and Credit

🔑 Conservatorship or receivership

Finance, Banking, and Credit

🔑 Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators

Anti-injunction provision of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which precludes court from “restraining or affecting” exercise of powers or functions of Resolution Trust Corporation (RTC) as conservator or receiver, deprived district court of jurisdiction to grant relief requested by assignee of winning bidder for purchase of real property from RTC, which included preliminary and permanent injunctive relief preventing actual purchaser from making changes to property and requiring actual purchaser to transfer title of property to assignee in exchange for purchase price to which assignee and RTC had previously agreed. Federal Deposit Insurance Act, § 2[11](j), as amended, 12 U.S.C.A. § 1821(j).

5 Cases that cite this headnote

[4] Federal Courts

🔑 Power to Grant Relief

When Congress enacts statute prohibiting federal court from granting certain type of remedy, that limitation is jurisdictional.

[5] Finance, Banking, and Credit

🔑 Sale or other disposition of assets

Disposition of failed thrift's assets is one of the quintessential statutory powers of Resolution

Trust Corporation (RTC) as receiver. Federal Deposit Insurance Act, § 2[11](d)(2)(E), as amended, 12 U.S.C.A. § 1821(d)(2)(E).

4 Cases that cite this headnote

[6] **Finance, Banking, and Credit**

🔑 **Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators**

Anti-injunction provision of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) prohibits federal court from granting party any sort of equitable relief that would directly “restrain or affect” Resolution Trust Corporation (RTC) in carrying out its statutory powers. Federal Deposit Insurance Act, § 2[11](j), as amended, 12 U.S.C.A. § 1821(j).

4 Cases that cite this headnote

[7] **Finance, Banking, and Credit**

🔑 **Conservatorship or receivership**

Finance, Banking, and Credit

🔑 **Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators**

Broad and all-encompassing language of anti-injunction provision of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) evidences intent by Congress to prohibit any interference with Resolution Trust Corporation (RTC) as receiver, either directly or indirectly. Federal Deposit Insurance Act, § 2[11](j), as amended, 12 U.S.C.A. § 1821(j).

3 Cases that cite this headnote

[8] **Finance, Banking, and Credit**

🔑 **Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators**

Breach of anti-injunction of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) is not confined to only those cases where Resolution Trust Corporation (RTC) is directly interfered with. Federal Deposit Insurance Act, § 2[11](j), as amended, 12 U.S.C.A. § 1821(j).

[9] **Finance, Banking, and Credit**

🔑 **Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators**

Action seeking to challenge title to property purchased from Resolution Trust Corporation (RTC) would “restrain or affect” RTC in violation of anti-injunction provision of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), where RTC gave purchaser a special warranty deed, and it was likely that purchaser would require RTC to defend that deed in any action challenging purchaser's title. Federal Deposit Insurance Act, § 2 [11](j), as amended, 12 U.S.C.A. § 1821(j).

1 Cases that cite this headnote

Attorneys and Law Firms

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Bruce A. Maak, Jeffrey J. Hunt, Kimball, Parr, Waddoups, Brown & Gee, Salt Lake City, UT, for Wind River Petroleum.

Florian Frederick Chess, Resolution Trust Corp., Denver, CO, **James Esparza**, The Woodlands, Salt Lake City, UT, for Resolution Trust Corp.

*ORDER DISMISSING PYRAMID'S
FIFTH CAUSE OF ACTION*

WINDER, Chief Judge.

This matter is before the court on three related motions: (1) Defendant Wind River Petroleum, Inc.'s (“Wind River”) motion to dismiss Plaintiff Pyramid Construction Company, Inc.'s (“Pyramid”) fourth and fifth causes of action; (2) Intervenor Resolution Trust Corporation's (“RTC”) motion to intervene for the express purpose of asking the court to dismiss Pyramid's fourth and fifth causes of action; and (3) the RTC's motion to dismiss Pyramid's fourth and fifth causes of action. A hearing on all three motions was held on August 25, 1994. At the hearing, Gordon C. Strachan and Todd D. Wakefield represented Pyramid, Bruce A. Maak and Jeffrey J. Hunt represented Wind River, and Florian Frederick Chess represented the RTC.

Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties relating to all three motions. The court had also read certain of the authorities cited by each of the parties. Following oral argument, and after taking the motions under advisement, the court has further considered the law and facts related to each motion. Having now fully considered the issues in this case, and good cause appearing, the court enters the following memorandum decision and order.

I. BACKGROUND

The case at bar concerns the validity of a sale by the RTC, as receiver for Western Savings and Loan Association (“Western”),¹ of the Snow Creek Parcel, a 51.84 acre tract of land situated near the intersection of Utah *515 highways U-224 and U-248 in Park City, Utah.

Wind River currently operates a “Top Stop” gas station and convenience store on a leased .861 acre portion of the 51.84 site. Wind River is also the successor-in-interest to a May, 1965 lease agreement covering the same .861 acres upon which its gas station is located. The 1965 lease agreement grants Wind River a “right of first refusal in the event the lessor, or its successor, desires to sell the Gas Station portion of the [Snow Creek] property.” See Pyramid’s Complaint, ¶ 9.

In 1991, the RTC, as receiver for Western, decided to sell the Snow Creek Parcel in liquidation of Western’s assets. As was required by the Coastal Barrier Resources Act,² the RTC, through its asset manager Transamerica Real Estate Management Co. (“Transamerica”), first offered the parcel, including Wind River’s .861 acre gas station site, to qualified governmental entities. Soon thereafter, Park City Municipal Corporation (“Park City”) expressed an interest in purchasing the property from the RTC.

On September 17, 1992, Park City published a Request For Proposal (“RFP”) in Utah newspapers of general circulation seeking a private financial partner to assist it in acquiring the property. Pyramid responded to Park City’s RFP on October 9, 1992 by advising Park City of its interest in pursuing the partnership.³ Soon thereafter, on December 9, 1992, Park City announced its selection of Pyramid as a financial partner in acquiring the Snow Creek Parcel from the RTC.⁴

Meanwhile, Park City and Transamerica were engaged in ongoing negotiations regarding the sale of the Snow Creek Parcel to Park City. On May 18, 1993, the RTC conditionally accepted an offer by Park City to purchase the land for \$1.9 million.⁵ The RTC’s conditional acceptance was prefaced with the following cautionary note however:

Transamerica [and the RTC] shall not be bound until it executes a contract of purchase and sale. Until such time as the contract is executed by both parties, the RTC reserves the right to consider other offers for the purchase of all or any part of the ... property.

See Letter from Suzanne Drake, Transamerica Assistant Vice-President, to Toby Ross, Park City Municipal Corporation, at 1 (May 18, 1993).

In early September of 1993, the RTC announced that Park City was the winning bidder for the Snow Creek Parcel. Later that same month, on September 24, 1993, Park City assigned all of its interest in the Snow Creek Parcel to Pyramid. Soon thereafter, on October 7, 1993, Mr. William J. Coleman of Pyramid sent a letter to the RTC. Mr. Coleman’s letter advised the RTC of the following:

We understand the reason we have not yet received an executed contract is the RTC’s concern over Top Stop’s potential right of first refusal. We do not wish to prepare to close with the potential for Top Stop to contest the sale hanging over us. Therefore, we suggest that should you accept our offer, you offer Top Stop the opportunity to exercise their right of first refusal. If they decline, we can enter into contract and close shortly thereafter.

See Letter from William J. Coleman, Pyramid Partner, to Suzanne Drake, Transamerica Assistant Vice-President, at 1 (Oct. 7, 1993).

On October 29, 1993, Wind River notified Pyramid that it intended to exercise its right *516 of first refusal on the .861 acre gas station site.⁶ Subsequently, on November 3, 1993, the RTC sent Pyramid a proposed final Purchase and Sale Agreement. That final agreement, among other things,

purported to give Wind River a right of first refusal on the entire Snow Creek Parcel, and not just the .861 acres of land upon which its gas station was located. Because of the RTC's erroneous calculation of the scope of Wind River's right of first refusal, Pyramid refused to execute the agreement.⁷

On or about December 28, 1993, the RTC informed Pyramid that Wind River had purchased the entire 51.84 acre Snow Creek Parcel from the RTC. Subsequently, on March 17, 1994, the RTC conveyed the property to Wind River via a special warranty deed. That deed, which was duly recorded in the Summit County, Utah Recorder's Office on March 23, 1994, requires the RTC to appear and defend Wind River against any challenge to its title in the Snow Creek Parcel.⁸

On April 22, 1994, Pyramid sued Wind River in this court asserting five causes of action against Wind River arising out of the aforementioned facts. Pyramid's fourth and fifth causes of action are now the subject of this memorandum decision and order.⁹ Pyramid's fourth cause of action seeks a declaration by this court that the RTC's sale of the Snow Creek Parcel to Wind River is "void and of no legal force and effect," and that Pyramid is "entitled to consummate its purchase of the Snow Creek Parcel under the terms previously offered to and accepted" by the RTC. See Pyramid's Complaint, ¶¶ 61–62. Pyramid's fifth cause of action asks this court for preliminary and permanent injunctive relief "[p]reventing defendant Wind River from taking any action to make any physical changes, alterations, modifications, or improvements to the Snow Creek Parcel," and "[r]equiring defendant Wind River to transfer to plaintiff ... title to the Snow Creek Parcel." *Id.* at ¶ 65.

On June 27, 1994, the RTC filed both a motion to intervene and a motion to dismiss Pyramid's fourth and fifth causes of action on the ground that the relief sought by Pyramid in those counts would "restrain or affect" the RTC in violation of 12 U.S.C.A. § 1821(j) and the jurisdictional bar thereunder.¹⁰ Soon thereafter, on July 8, 1994, Wind River filed a motion to dismiss Pyramid's fourth and fifth causes of action on the same ground.

[1] Subsequently, on July 27, 1994, Pyramid and Wind River stipulated to the dismissal of Pyramid's fourth cause of action "with prejudice and on its merits" because of a belief by the parties that the relief requested therein would violate section 1821(j).¹¹ *517 This court then signed an order dismissing with prejudice Pyramid's fourth cause of action on August 13,

1994. Wind River now argues that, in addition to its section 1821(j) argument noted *supra*, Pyramid's fifth cause of action should be dismissed for two additional reasons. First, Wind River argues that because the factual basis of Pyramid's fourth and fifth causes of action are identical, Pyramid's dismissal of its fourth cause of action also "jettisoned the legal basis for the injunctive relief requested in its Fifth Cause of Action." See Wind River's Reply Mem. in Supp. of Wind River's Mot. Dismiss Pl.'s Fourth and Fifth Causes of Action at 2–3. Second, Wind River argues that because Pyramid agreed to the dismissal of its fourth cause of action "with prejudice and upon its merits," Pyramid is also barred from litigating its fifth cause of action under the doctrine of *res judicata*. *Id.* at 3–5.

II. STANDARD OF REVIEW

[2] In determining whether to grant a motion to dismiss for failure to state a claim upon which relief can be granted, the court must accept all well-plead facts as true. *Arnold v. McClain*, 926 F.2d 963, 965 (10th Cir.1991). In addition, all inferences that can be drawn from the allegations must be drawn in favor of the plaintiff. *Id.* at 965. "[I]f as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,' a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailable one." *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 1832, 104 L.Ed.2d 338 (1989) (citation omitted) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984)).

III. DISCUSSION

[3] The dispositive issue to be decided here is whether the anti-injunction provision of the Financial Institutions Reform, Recovery, and Enforcement Act, 12 U.S.C.A. § 1821(j), deprives this court of jurisdiction to grant the type of relief requested in Pyramid's fifth cause of action. For the reasons discussed below, the court finds that such jurisdiction is indeed lacking, and accordingly grants Wind River's motion to dismiss Pyramid's fifth claim for relief.¹²

[4] When Congress enacts a statute prohibiting a federal court from granting a certain type of remedy, that limitation is jurisdictional. See *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522, 101 S.Ct. 1221, 1234, 67 L.Ed.2d 464 (1981) (holding that prohibitions against enjoining or restraining

IRS assessments in the federal Tax Injunction Act constitute limitations on federal district court jurisdiction). In this case, Wind River claims that the equitable relief Pyramid seeks in its fifth cause of action has been prohibited by Congress pursuant to 12 U.S.C.A. § 1821(j), and that this court therefore lacks jurisdiction to entertain it under the authority cited above. Section 1821(j) provides:

(j) Limitation on court action

Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, *to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.*

12 U.S.C.A. § 1821(j) (West 1988) (emphasis added).¹³

[5] [6] Clearly, the disposition of a failed thrift's assets, like the RTC's sale of the Snow Creek Parcel to Wind River in this case, is one of the quintessential statutory powers of the RTC as a receiver. *See id.* § 1821(d)(2)(E) (giving the RTC the express power to “realize upon the assets of the institution”); *518 *Ward v. Resolution Trust Corp.*, 996 F.2d 99, 104 (5th Cir.1993) (per curiam) (holding that the “sale of property acquired by the RTC from a failed institution, or administered by the RTC as conservator or receiver of such an institution, is beyond cavil a statutory power and function of the RTC”). Equally clear is that section 1821(j) prohibits a federal court from granting a party any sort of equitable relief that would directly “restrain or affect” the RTC in carrying out its statutory powers. *See, e.g., Carney v. Resolution Trust Corp.*, 19 F.3d 950, 956–58 (5th Cir.1994) (holding that section 1821(j) prevents a court from considering claims for declaratory and injunctive relief against the RTC); *Ward*, 996 F.2d at 104 (holding that section 1821(j) prevents a court from either enjoining or rescinding the RTC's sale of property acquired from a failed thrift); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1329 (6th Cir.1993) (holding that section 1821(j) prohibits a court from rescinding the RTC's transfer of the assets of a failed thrift).

Pyramid does not quibble with these authorities in opposing Wind River's motion to dismiss here. Indeed, Pyramid's argument in this case centers not on the concededly broad sweep of section 1821(j), but on whether section 1821(j) applies to the relief requested in Pyramid's fifth cause of action at all.¹⁴ As noted *supra*, Pyramid's fifth cause of action seeks injunctive relief requiring Wind River to transfer title in the Snow Creek Parcel to Pyramid in exchange for the

purchase price to which Pyramid and the RTC had previously agreed. *See* Pyramid's Complaint at ¶ 65. Pyramid contends that this relief does not violate section 1821(j)'s “restraining or affecting” language in any way, because “[h]aving already liquidated the property that is the subject of this litigation, and having realized the profits therefrom, RTC has entirely performed its role as receiver and has no remaining interest in the property.” *See* Pyramid's (Substituted) Mem. in Opp'n to Mot. to Intervene at 2.¹⁵

[7] [8] The court must reject Pyramid's narrow interpretation of section 1821(j), for several reasons. First, the plain language of the statute does not allow for such a limited reading. It provides that “no court may take any action ... to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.” 12 U.S.C.A. § 1821(j) (West 1988) (emphasis added). Such broad and all-encompassing language evidences, in the court's view, an intent by Congress to prohibit any interference with the RTC as a receiver—either directly or indirectly. Thus, to the extent that Pyramid attempts to confine section 1821(j)'s reach to only those cases where the RTC is *directly* interfered with, that attempt must be rejected as inconsistent with the statute itself. *See Volges v. Resolution Trust Corp.*, 32 F.3d 50, 52 (2d Cir.1994) (refusing to narrow section 1821(j)'s reach in light of the statute's broad and unequivocal language).

Second, Pyramid's narrow reading of section 1821(j) is controverted by the many federal courts around the United States which have also interpreted the statute. For example, in *Telematics Int'l v. NEMLC Leasing Corp.*, 967 F.2d 703 (1st Cir.1992), Telematics, a private, non-RTC plaintiff, sought declaratory relief permitting it to attach a certificate of deposit in which an insolvent bank in FDIC receivership held a security interest. The First Circuit refused to entertain such relief under section 1821(j), however, because it “would have the same effect, from the FDIC's perspective, as directly enjoining the FDIC from attaching the asset.” *Id.* at 707. Similarly, in *Homeland Stores, Inc. v. Resolution Trust Corp.*, 1992 WL 319659 (D.Kan. Oct. 13, 1992), *aff'd*, 17 F.3d 1269 (10th Cir.), *cert. denied*, 513 U.S. 928, 115 S.Ct. 317, 130 L.Ed.2d 279 (1994), Chief *519 Judge Kelly held that enjoining a non-RTC defendant in connection with a tortious interference with contract claim would violate section 1821(j) just as surely as if the RTC were enjoined directly. *Id.* at *9. In so holding, Chief Judge Kelly rejected an argument that was remarkably similar to the one raised by Pyramid here. Chief Judge Kelly wrote:

The statute states that the court may not take “any action” to restrain the receiver in its functions or powers. 12 U.S.C. § 1821(j). If an injunction against Bob's were to be granted, the effect would be to enjoin RTC in its capacity as a receiver, the very result the statute prevents. There seems [to be] no reason to allow a request for injunctive relief to circumvent the express statutory language. Thus, *the statute says the court cannot take “any action” to restrain the receiver, and this would apply to granting injunctive relief against Bob's.*

Id. (emphasis added); see also *Furgatch v. Resolution Trust Corp.*, 1993 WL 149084, at *2 (N.D.Cal. Apr. 30, 1993) (“Plaintiff contends that section 1821(j) is inapplicable in this case because he is attempting to enjoin Homefed and the trustee who is conducting the sale, not the RTC. However, enjoining these parties indirectly enjoins the RTC, which a district court has no power to do”). In this case, the RTC has already sold the Snow Creek Parcel to Wind River and Pyramid's fifth claim for relief would now rescind that deal in its entirety and order Wind River to sell the property to Pyramid. Such relief would undoubtedly “restrain or affect” the RTC in the performance of its statutory duties just as surely as the cases mentioned above. Accordingly, this court is without power to order such a transaction.

[9] Finally, to read section 1821(j) as narrowly as Pyramid suggests would violate the clear intent of Congress in enacting the statute. As is abundantly clear from its legislative history, section 1821(j) is “but part of a broader scheme enacted to allow the RTC expeditiously to wind up the affairs of defunct savings and loan institutions without judicial interference.”

See *Volges*, 32 F.3d at 52.¹⁶ If this court allows Pyramid to proceed with its fifth cause of action in this case, that congressional scheme would surely be violated. For example, because the RTC gave Wind River a special warranty deed when it transferred to it the Snow Creek Parcel, it is likely that Wind River would require the RTC to defend that deed in any action where a party, such as Pyramid does here, seeks to challenge Wind River's title. Such a result would by definition “restrain or affect” the RTC in violation of section 1821(j), as it would entrench the RTC in expensive and time-consuming litigation at the expense of fulfilling its statutory duties.¹⁷ Similarly, if this court were to entertain Pyramid's fifth claim for relief in this case, then future transactions might be unduly “chilled” as potential bidders of RTC assets might be wary of having the very type of relief imposed on them that Pyramid seeks to impose on Wind River now. This the court is not prepared to allow.

Thus, for all of the foregoing reasons, this court finds that it lacks jurisdiction under section 1821(j) to grant the type of relief Pyramid has requested in its fifth cause of action. Accordingly, this court grants Wind River's motion to dismiss that claim with prejudice as a matter of law.¹⁸

*520 IV. ORDER

For the foregoing reasons, and good cause appearing, IT IS HEREBY ORDERED as follows:

1. Wind River's motion to dismiss with prejudice Pyramid's fifth cause of action is hereby granted.
2. This order shall serve as the order of the court and no further order need be prepared by counsel.

All Citations

866 F.Supp. 513

Footnotes

- 1 Western is a failed Phoenix, Arizona thrift. In May, 1990, the RTC was appointed receiver of Western's assets and liabilities, including the 51.84 acre Snow Creek Parcel at issue here.
- 2 16 U.S.C.A. §§ 3501–3510 (West 1988 & Supp.1994).
- 3 At no time during the RFP process did Wind River ever express an interest in becoming Park City's financial partner.
- 4 Pyramid claims that it expended more than \$170,000 to bring the Snow Creek Parcel into compliance with Park City's zoning and planning requirements during the eighteen months following its selection as Park City's financial partner, and

that a substantial portion of those funds were spent to alleviate environmental damage caused by leaking petroleum at Wind River's gas station.

This offer was later revised downward to \$1.7 million to compensate Pyramid for the estimated cost of alleviating environmental damage on the property.

Apparently, this was the first time that Wind River had ever declared an interest in exercising its rights under the 1965 lease agreement.

That same agreement also stated that Wind River's contamination of its gas station site was a breach of the 1965 lease under which it claimed its right of first refusal.

Wind River's special warranty deed provides, in part:

Grantor hereby covenants with Grantee that Grantor will forever defend Grantee against claims of all persons claiming by, through, or under Grantor.

See Special Warranty Deed, Doc. No. 00400773, Book No. 00794, Pg. No. 00499005 (on file with the Summit County, Utah Recorder).

Pyramid's first and second causes of action state claims against Wind River for intentional interference with prospective economic relations and intentional interference with present economic relations respectively. See Pyramid's Complaint, ¶¶ 43–52. Pyramid's third cause of action states a claim against Wind River for injurious falsehoods. *Id.* at ¶¶ 53–58. Neither Wind River nor the RTC challenges the viability of these causes of action at the present time.

As is more fully discussed *infra*, section 1821(j) prevents a court from granting a litigant any form of relief which might “restrain or affect” the RTC in the exercise of its powers or functions as a receiver. See 12 U.S.C.A. § 1821(j) (West 1988).

As noted *supra*, Pyramid's fourth cause of action requested that the RTC's sale of the Snow Creek Parcel to Wind River be rescinded and that the RTC be ordered to sell the parcel to Pyramid. Such a remedy clearly violates the statutory mandate of section 1821(j). See, e.g., *Carney v. Resolution Trust Corp.*, 19 F.3d 950, 956–58 (5th Cir.1994) (holding that section 1821(j) deprives a district court of jurisdiction to issue declaratory and injunctive relief against the RTC); *Ward v. Resolution Trust Corp.*, 996 F.2d 99, 104 (5th Cir.1993) (per curiam) (holding that section 1821(j) bars a district court from enjoining or rescinding a sale by the RTC of the assets of a failed thrift).

Because of the disposition of this issue, the court need not determine whether the RTC should be allowed to intervene in this case or whether Wind River's “factual predicate/res judicata” argument also bars Pyramid from litigating its fifth cause of action.

Section 1821(j) originally applied solely to the FDIC. However, when Congress created the RTC in 1989, it gave the RTC the same rights and powers as those possessed by the FDIC under section 1821(j). See 12 U.S.C.A. § 1441a(b)(4) (West 1988); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1328 (6th Cir.1993).

Indeed, Pyramid even admits in its opposition papers that under section 1821(j), “ ‘courts are generally not permitted to enjoin any actions the RTC takes in its role as receiver or conservator.’ ” See Pyramid's (Substituted) Mem. in Opp'n to Mot. to Intervene at 10 (quoting *Gross v. Bell Sav. Bank PA SA*, 974 F.2d 403, 406 (3d Cir.1992)).

Pyramid's argument, pared to its basics, seems to be this: because Pyramid seeks injunctive relief against *Wind River* and not the RTC, such relief could not “restrain or affect” the RTC as a receiver and therefore could not violate section 1821(j).

Indeed, section 1821(d)(13)(C) of the same legislation prohibits the federal courts from attaching or executing upon the RTC's assets. See 12 U.S.C.A. § 1821(d)(13)(C) (West 1988). Similarly, section 1825(b)(2) prohibits the federal courts from either foreclosing or imposing liens upon the RTC's property. *Id.* § 1825(b)(2).

Pyramid argues that such a result is illusory here because “[n]either the integrity of RTC's title nor its ability to transfer that title are at stake.” See Pyramid's (Substituted) Mem. in Opp'n to Mot. to Intervene at 18. Pyramid's argument overlooks the fact that, while the RTC might indeed be free from any liability to Wind River under its special warranty deed, the RTC will be forced to expend countless resources to establish that proposition in court.

The court notes that Pyramid is not left without a remedy as a result of the decision issued today. For example, Pyramid remains free to prosecute the tort claims it has brought against Wind River in its first, second, and third causes of action. Similarly, Pyramid remains free to assert a damages claim against the RTC as part of the normal administrative claims process. See *Ward v. Resolution Trust Corp.*, 996 F.2d 99, 104 (5th Cir.1993) (per curiam) (discussing this remedy).

335 S.C. 635

Court of Appeals of South Carolina.

TWELFTH RMA PARTNERS, L.P., Respondent,

v.

NATIONAL SAFE CORPORATION, Barbara

B. Smith and Roy W. Smith, Appellants.

No. 2991.

Submitted April 13, 1999.

Decided May 10, 1999.

Synopsis

Holder of promissory note and guarantee acquired through assignment by the Resolution Trust Corporation (RTC) sued guarantors for balance due on note. The Circuit Court, Lexington County, George W. Jefferson, Master-in-Equity, entered judgment for holder, and guarantors appealed. The Court of Appeals, [Goolsby, J.](#), held that: (1) right to sue under six-year statute of limitations found in the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) is available to assignees of RTC; (2) laches did not bar holder from suing under six-year statute of limitations under FIRREA; (3) guarantors were not prejudiced by amendment of complaint to change name of holder; and (4) testimony of witness for holder was admissible under business records exception to hearsay rule.

Affirmed.

West Headnotes (11)

[1] Appeal and Error [Reference](#)**Appeal and Error** [Sufficiency of evidence](#)

In action at law referred to master-in-equity, the appellate court will correct any errors of law, but it must affirm the master's factual findings unless no evidence exists that reasonably supports those findings.

[3 Cases that cite this headnote](#)**[2] Finance, Banking, and Credit** [Time for proceedings; limitations and laches](#)

Right to sue under six-year statute of limitations found in the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) is not personal to the Resolution Trust Corporation (RTC), but is available to all assignees or transferees of the RTC. Federal Deposit Insurance Act, § 2[11](d)(14)(A), [12 U.S.C.A. § 1821\(d\)\(14\)\(A\)](#).

[1 Cases that cite this headnote](#)**[3] Assignments** [Nature and extent of rights of assignee in general](#)

An assignee stands in the shoes of its assignor.

[16 Cases that cite this headnote](#)**[4] Assignments** [Nature and extent of rights of assignee in general](#)

When a contract is assigned, the assignee should have all the same rights and privileges, including the right to sue on the contract, as the assignor.

[12 Cases that cite this headnote](#)**[5] Finance, Banking, and Credit** [Time for proceedings; limitations and laches](#)

Laches did not bar holder of promissory note and guarantee acquired through assignment by the Resolution Trust Corporation (RTC) from suing guarantors for balance due on note under six-year statute of limitations under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), where action was commenced within six-year limitation period. Federal Deposit Insurance Act, § 2[11](d)(14)(A), [12 U.S.C.A. § 1821\(d\)\(14\)\(A\)](#).

[1 Cases that cite this headnote](#)**[6] Equity**

 Prejudice from Delay in General

Laches is an equitable doctrine consisting of the elements of a delay that is unreasonable and that causes prejudice.

[2 Cases that cite this headnote](#)

[7] Equity **Delay short of statutory period**

Laches within the period of the statute of limitations is no defense at law.

That witness for holder of promissory note and guarantee was not the custodian of holder's records at or near the time the records were made did not preclude admission of her testimony under the business records exception to hearsay rule, in holder's action against guarantors to recover balance due on note, where witness' testimony conveyed information from a person with knowledge at the time the records were created. [Code 1976, § 19-5-510](#); [Rules of Evid., Rule 803\(c\)](#).

[3 Cases that cite this headnote](#)

[8] Bills and Notes **Amended and supplemental pleadings**

Guarantors of promissory note were not prejudiced by amendment of complaint to change name of holder of promissory note and guarantee, in holder's action to recover balance due under note, where amendment added no new claims against guarantors. [Rules Civ.Proc., Rule 15](#).

Attorneys and Law Firms

****45 *637** [S. Jahue Moore](#), of Kirkland, Wilson, Moore, Taylor & O'Day, of West Columbia, for appellants.

[F. Xavier Starkes](#) and [William T. Toal](#), both of Johnson, Toal & Battiste, of Columbia, for respondent.

Opinion

[GOOLSBY](#), Judge:

This is a collection case that was referred to the master-in-equity for final order with direct appeal to the supreme court. The master found that Roy Smith and Barbara Smith defaulted on a note held by Twelfth RMA Partners, L.P. The master awarded Twelfth \$1,002,421.86 in damages, including attorney fees. The Smiths appeal the decision. We affirm. ¹

[9] Pleading **Discretion of Court****Pleading** **Affidavits and other proofs**

A motion to amend complaint is within the sound discretion of the trial judge, and the opposing party has the burden of establishing prejudice. [Rules Civ.Proc., Rule 15](#).

[10] Appeal and Error **Objections to evidence and witnesses**

Whether trial court erred in admitting unsworn testimony of witness for holder of promissory note and guarantee was not preserved for review, in action brought by holder against guarantors for balance due on note, absent objection to testimony on that ground by guarantors at trial.

***638 FACTS**

National Safe Corporation borrowed \$300,000.00 and \$200,000.00 from Pioneer Savings Bank (Pioneer). Pioneer combined these two notes and formed a renewal line of credit for \$500,000.00. Mr. Smith signed the note as president of National Safe Corporation. Mr. and Mrs. Smith each signed an unconditional Guarantee of Payment and Performance that guaranteed payment of the note. Shortly thereafter, the United States government closed Pioneer as a result of the savings and loan crisis and appointed the Resolution Trust Corporation (RTC) as receiver. RTC then assigned the note and guarantee to Twelfth on November 15, 1994. National Safe Company filed for bankruptcy in December, 1996.

[11] Evidence **Form and Sufficiency in General**

R.M.A. Partners, L.P., sued the Smiths for the balance on the notes in June, 1995. R.M.A. Partners filed a motion for summary judgment, but the master denied it because of uncertainty as to the identity of the proper plaintiff. The master heard the case on August 13, 1997. On the day of trial, R.M.A. Partners made a motion to substitute Twelfth R.M.A. Partners, L.P., (Twelfth) as the appropriate plaintiff. The master granted this motion over the Smiths' objection.

During the trial, the master allowed the testimony of Judy Every, a portfolio manager with Twelfth, over the Smiths' objection that her testimony was hearsay. The master found that the Smiths had defaulted on the loan, that Twelfth was the holder of the note, and that the Smiths owed \$484,010.27 in principal, \$10,798.00 in late charges, \$504,113.59 in interest, and \$3,500.00 in attorney fees. The Smiths appeal.

ISSUES ON APPEAL

- (1) Is the lawsuit barred by South Carolina's three-year statute of limitations, or does the federal six-year statute of limitations apply?
- (2) Is the lawsuit barred by the equitable doctrine of laches?
- (3) Did the substitution of Twelfth as plaintiff on the day of trial unduly prejudice the Smiths?
- (4) Did the master err in allowing the testimony of Judy Ray Every?

*639 STANDARD OF REVIEW

[1] This case is an action at law that was referred to the master-in-equity with direct appeal to the supreme court. The appellate court will correct any errors of law, but it must affirm the master's factual findings unless no evidence exists that reasonably supports those findings. *Jefferies v. Phillips*, 316 S.C. 523, 451 S.E.2d 21 (Ct.App.1994).

DISCUSSION

(1) Statute of Limitations

[2] The Smiths argue the master incorrectly applied the six-year statute of limitations found in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1821(d)(14), instead of applying the South Carolina three-year statute of limitations. S.C.Code Ann. § 15-3-530 (Supp.1997). We disagree.

The relevant language in the FIRREA is found in 12 U.S.C. § 1821(d)(14)(A):

(1) Statute of limitations for actions brought by conservator or receiver

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation [i.e., the FDIC] as conservator or receiver shall be—

(i) in the case of any contract claim, the longer of—

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under state law.

The statute mentions “the Corporation,” which has been defined in the statute as the FDIC. FIRREA gives the RTC the same rights and powers as the FDIC. 12 U.S.C.A. § 1441a(b)(4)(A). The statute, however, is silent as to its applicability to the assignees of the RTC. The Smiths argue that this silence means the court must apply the three-year statute of limitations. Twelfth argues that the law of assignments, or alternatively, the UCC, should determine which statute applies.

[3] [4] In South Carolina, it is well established that an “assignee ... stands in the shoes of its assignor ...” *Singletary v. Aetna Cas. & Sur. Co.*, 316 S.C. 199, 201, 447 S.E.2d 869, 870 (Ct.App.1994). When a contract is assigned, the assignee should have all the same rights and privileges, including the right to sue on the contract, as the assignor. Under the UCC in South Carolina, a “[t]ransfer of an instrument vests in the transferee such rights as the transferor has therein.” S.C.Code Ann. § 36-3-201 (1976).

The Smiths argue that the right in question, the RTC's right to sue under the six year statute of limitations, would not transfer to Twelfth. They cite *Wamco, III, Ltd. v. First Piedmont Mortg. Corp.*, 856 F.Supp. 1076 (E.D.Va.1994) for

the proposition that the statute confers a personal benefit, or right, onto the RTC that would not transfer to an assignee.

****47** *Wamco*, however, is against the weight of authorities, as the case itself points out. Also, the Virginia Supreme Court refused to follow the *Wamco* decision and held that the right to sue under the six-year statute of limitations is not a personal benefit or right. The court further stated “the receiver’s right to sue within the statute of limitations period is inherent in its possession of the instruments at issue and would thus be among the ‘rights, remedies and benefits which are incidental to the thing assigned,’ and not merely a right ‘personal to the assignor and for [its] benefit only.’ ” *Union Recovery Ltd. Partnership v. Horton*, 252 Va. 418, 477 S.E.2d 521, 524 (1996).

The majority of state and federal courts have interpreted the federal statute to grant to the assignee a six-year statute of limitations. See, e.g., *FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir.1993); *N.S.Q. Associates v. Beychok*, 659 So.2d 729 (La.1995); *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244 (Colo.1994) (en banc); *Investment Co. of the Southwest v. Reese*, 117 N.M. 655, 875 P.2d 1086 (1994); *Jackson v. Thweatt*, 883 S.W.2d 171 (Tex.1994).

We agree that the right to sue under the six-year statute of limitations is not personal to the RTC, but is available to all assignees or transferees of the RTC. The claim brought by Twelfth, therefore, is not barred by the statute of limitations.

(2) Laches

[5] [6] [7] The Smiths next argue that laches should bar Twelfth from using the extended federal statute of limitations.

***641** We disagree. Laches is an equitable doctrine consisting of the elements of (1) a delay (2) that is unreasonable and (3) that causes prejudice. *Terry v. Lee*, 314 S.C. 420, 445 S.E.2d 435 (1994). Laches within the period of the statute of limitations is no defense at law. *Crotwell v. Whitney*, 229 S.C. 213, 92 S.E.2d 473 (1956) (citations omitted). We conclude the Smiths have not shown the requisite unreasonable delay since the action was within the statute of limitations period.

(3) Substitution of Plaintiff

[8] The Smiths next argue that the substitution of Twelfth RMA Partners, L.P., for RMA Partners, L.P., unduly prejudiced them. We disagree.

[9] *Rule 15, SCRPC*, provides that the complaint may only be amended by leave of the court and “leave to amend shall be freely given when justice requires and does not prejudice any other party.” A motion to amend is within the sound discretion of the trial judge and the opposing party has the burden of establishing prejudice. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 431 S.E.2d 587 (1993).

The Smiths rely on *Valentine v. Davis*, 319 S.C. 169, 460 S.E.2d 218 (Ct.App.1995) for the proposition that a plaintiff may not add a new plaintiff to a case to assert a claim against the defendant. In this case, however, no new claims are being added. The court is only changing the name of the plaintiff. The subject of the claim, the underlying note on which the Smiths defaulted, is still the same.

The Smiths also argue that the case was not brought in the name of the real party in interest and should be dismissed under *Rule 17, SCRPC*. The Smiths have not shown any prejudice. The trial court substituted the real party in interest, as *Rule 17, SCRPC*, expressly allows.

(4) Ms. Every's Testimony

[10] Finally, the Smiths argue that the master should not have allowed the testimony of Judy Every. We disagree.

First, they base this argument on the fact that she did not take an oath prior to giving the testimony. The record shows that no oath was given prior to Every's testimony. The record also shows, however, that the Smiths did not object. ***642** “The admission of unsworn testimony in a case is a mere irregularity which violates no constitutional provision, and does not affect the jurisdiction of the tribunal, and if unsworn testimony is received into evidence without objection, it may be considered the same as any other evidence in the case.” 98 C.J.S. *Witnesses* § 320, at 22 (1957).

****48** [11] The Smiths also argue that the master erred in allowing the testimony because it was hearsay. We disagree.

The master allowed the testimony under the business records exception to the hearsay rule. The business records exception is found in both the *South Carolina Code* at § 19–5–510

(1985) and Rule 803(6) of the South Carolina Rules of Evidence. Both exceptions require that the evidence be given by a “custodian or other qualified witness.” Ms. Every testified that the records about which she testified were part of her file that she maintained in Twelfth's regular course of business.

The Smiths argue, however, that she was not the custodian “at or near the time” the records were made. Here, Ms. Every's testimony merely conveyed information from a person “with

knowledge” at the time the records were created, a situation expressly allowed under Rule 803(6).

AFFIRMED.

HOWELL, C.J., and CONNOR, J., concur.

All Citations

335 S.C. 635, 518 S.E.2d 44

Footnotes

- 1 Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

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81 F.Supp.3d 735
United States District Court, D. Minnesota.

Thomas J. NEWMAN, Plaintiff,

v.

JP MORGAN CHASE BANK, N.A., Federal
National Mortgage Association, Defendants.

Civ. No. 14-2944 (MJD/JSM).

Signed Jan. 26, 2015.

Synopsis

Background: Mortgagor brought action against purchaser of failed lender's mortgage assets and Federal National Mortgage Association (Fannie Mae), alleging they failed to comply with Minnesota's foreclosure statute and seeking an injunction to prevent purchaser from proceeding with eviction. Defendants moved to dismiss for failure to state a claim.

[Holding:] The District Court, [Michael J. Davis](#), Chief Judge, adopting the report and recommendation of [Janie S. Mayeron](#), United States Magistrate Judge, held that purchase and assumption agreement was not an assignment that had to be recorded.

Motion granted.

West Headnotes (7)

[1] Mortgages and Deeds of Trust

🔑 Recording of mortgage or assignment

Purchase and assumption agreement between Federal Deposit Insurance Corporation (FDIC), as receiver for failed lender, and purchaser, which transferred lender's mortgage assets to purchaser, was not an assignment that had to be recorded pursuant to Minnesota's foreclosure statute; even though agreement included word "assigns" with respect to transfer of assets, it was included in a list of words which indicated that FDIC was transferring all of lender's assets to purchaser, and transfer was based on Financial

Institutions Reform, Recovery and Enforcement Act (FIRREA), which allowed FDIC to transfer lender's assets without assignment, such that transfer occurred by operation of law. Federal Deposit Insurance Act, § 2[11], [12 U.S.C.A. § 1821\(d\)\(2\)\(G\)\(i\)\(II\)](#); [M.S.A. § 580.02](#).

[1 Cases that cite this headnote](#)

[2] States

🔑 Conflicting or conforming laws or regulations

"Conflict preemption" occurs when compliance with both federal and state laws is impossible, and when a state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.

[1 Cases that cite this headnote](#)

[3] Finance, Banking, and Credit

🔑 Sale or other disposition of assets

States

🔑 Banking and financial or credit transactions

In a purchase and assumption transaction pursuant to FIRREA, the Federal Deposit Insurance Corporation (FDIC) is entitled to transfer the assets of a failed bank "without assignment" and in that regard, any restrictions on this power to transfer imposed by state law are preempted. Federal Deposit Insurance Act, § 2[11], [12 U.S.C.A. § 1821\(d\)\(2\)\(G\)\(i\)\(II\)](#).

[4] Finance, Banking, and Credit

🔑 Sale or other disposition of assets

Mortgages and Deeds of Trust

🔑 Necessity

States

🔑 Banking and financial or credit transactions

Even if purchase and assumption agreement between Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank, and purchaser, which transferred bank's mortgage assets to purchaser, qualified as an assignment that had to be recorded pursuant to Minnesota's foreclosure statute, recording requirement would

be preempted by Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) provision permitting FDIC to transfer assets of a failed bank “without an assignment,” since it would conflict with FIRREA. Federal Deposit Insurance Act, § 2[11], [12 U.S.C.A. § 1821\(d\)\(2\)\(G\)\(i\)\(II\)](#); [M.S.A. § 580.02](#).

[5] Injunction

🔑 Nature of remedy in general

An injunction is a remedy, not a cause of action.

[6] Courts

🔑 Injunction by United States Court Against Proceedings in State Court

Courts must construe the exceptions to the Anti-Injunction Act narrowly and resolve doubts in favor of letting the state action proceed. [28 U.S.C.A. § 2283](#).

[7] Federal Civil Procedure

🔑 Pleading over

When a complaint is so deficient or defective that a court is convinced that its defects cannot be cured through re-pleading, dismissal with prejudice for failure to state a claim is appropriate. [Fed.Rules Civ.Proc.Rule 12\(b\)\(6\)](#), [28 U.S.C.A.](#)

Attorneys and Law Firms

***736** [Caitlin Guilford](#), [Jonathan L.R. Drewes](#), Drewes Law PLLC, Minneapolis, MN, for Plaintiff.

[Curtis D. Ripley](#), Minneapolis, MN, for Defendants.

ORDER

[MICHAEL J. DAVIS](#), Chief Judge.

The above matter came before the Court on the Report and Recommendation of United States Magistrate Judge Janie S.

Mayeron dated November 17, 2014. Plaintiff objects to the recommendation that this Court grant Defendants' motion to dismiss.

Pursuant to statute, the Court has conducted a *de novo* review of the record. [28 U.S.C. § 636\(b\)\(1\)](#); Local Rule 72.2(b). Based on the Court's *de novo* review and upon all of the files, records and proceedings herein, the Court will adopt the Report and Recommendation.

IT IS HEREBY ORDERED that:

1. Defendants' Motion to Dismiss [Docket No. 3] is GRANTED;
2. This matter is dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

REPORT AND RECOMMENDATION

[JANIE S. MAYERON](#), United States Magistrate Judge.

The above matter came before the undersigned on defendants' Motion to Dismiss [Docket No. 3]. Jonathan L.R. Drewes, Esq. appeared on plaintiff's behalf. Curtis D. Ripley, Esq. appeared on defendants' behalf. This matter has been referred to the undersigned Magistrate Judge for a Report and Recommendation by the District Court pursuant to [28 U.S.C. § 636\(b\)\(1\)\(A\), \(B\)](#), and Local Rule 72.1.

I. BACKGROUND

Plaintiff seeks to invalidate the foreclosure of the mortgage on his home. Plaintiff asserts two claims against defendants: failure to comply with [Minn.Stat. § 580.02](#) and an injunction to prevent defendant JP Morgan Chase from proceeding with an eviction it initiated against plaintiff in Hennepin County, Minnesota.

For the reasons described below, the Court recommends that defendants' Motion to Dismiss be granted and plaintiff's claims be dismissed with prejudice.

***737 A. Plaintiff's Complaint**

Plaintiff sued JP Morgan Chase Bank, N.A. (“Chase”) and Federal National Mortgage Association (“Fannie Mae”) (collectively, “defendants”) in state district court on June 18, 2014. Notice of Removal, Ex. 1 (Summons and Complaint)

[Docket No. 1–1]. Based on diversity jurisdiction, defendants removed the suit to Federal District Court pursuant to 28 U.S.C. 1332(a). Notice of Removal [Docket No. 1]. Defendants moved to dismiss the Complaint in lieu of answering. Motion to Dismiss [Docket No. 3].

The facts bearing on defendants' motion to dismiss are as follows. Plaintiff executed a mortgage in favor of Washington Mutual Bank, FA (“WAMU”) on November 28, 2006, for property located in Hennepin County, Minnesota (“Property”). Complaint, ¶¶ 1, 6. The mortgage was recorded with the Hennepin County Registrar of Titles on January 5, 2007. *Id.*, ¶ 6. On September 25, 2008, the Federal Deposit Insurance Corporation (“FDIC”) was appointed as WAMU's receiver. *Id.*, ¶ 7. That same day, Chase and the FDIC entered into a Purchase and Assumption Agreement (“PAA”). Affidavit of Curtis Ripley in Support of Motion to Dismiss (“Ripley Aff.”), Ex. 1(PAA) [Docket No. 6–1]. Pursuant to the PAA, the FDIC transferred WAMU's mortgage assets to Chase. *Id.* On October 29, 2008, Chase recorded an affidavit from the FDIC with the Hennepin County Registrar of Titles. Complaint, ¶ 7, Ripley Aff., Ex. 2 (recorded Affidavit of Robert C. Schoppe, Receiver in Charge for FDIC as Receiver for Washington Mutual Bank). This Affidavit stated “[a]s authorized by Section 11(d)(2)(G)(i)(II) of the Federal Deposit Insurance Act, 12 U.S.C. § 1821(d)(2)(G)(i)(II),¹ the FDIC, as receiver of Washington Mutual, may transfer any asset or liability of Washington Mutual without any approval, assignment or consent with respect to such transfer.” Ripley Aff., Ex. 2, ¶ 3. “As a result, on September 25, 2008, JP Morgan Chase became the owner of the loans and loan commitments of Washington Mutual by operation of law.” *Id.*, ¶ 5.

Plaintiff defaulted on his mortgage payments² and Chase, “a party with no registered interest in the Subject Property,” foreclosed on the mortgage by advertisement. Complaint, ¶ 9. A sheriff's sale of the Property was held on April 15, 2014. *Id.* The Sheriff's Certificate of Sale and Foreclosure Record was recorded with the Hennepin County Registrar of Titles on April 23, 2014. *Id.*; see also Ripley Aff., Ex. 3 (Sheriff's Certificate of Sale and Foreclosure Record) [Docket No. 6–1]. The Property was sold to Chase at the sheriff's sale for \$352,075.33. Ripley Aff., Ex. 3. After the sheriff's sale, Chase transferred title of the Property to Fannie Mae by warranty deed. Ripley Aff., Ex. 4 (warranty deed).

Plaintiff did not redeem the Property during the statutory redemption period and failed to vacate the Property, claiming

that he was the “rightful owner of the Subject Property.” Complaint, ¶ 24. In June, 2014, Chase commenced an eviction action in Hennepin County Housing Court. *Id.*, ¶ 25. Plaintiff contended that Chase failed to comply with Minnesota's foreclosure-by-advertisement statute, Minn.Stat. § 580.02, because there is no recorded assignment of the mortgage to Chase. Complaint, ¶¶ 16, 20. Consequently, Chase *738 was not entitled to foreclose. *Id.*, ¶ 13. As relief, plaintiff sought a judgment declaring the sheriff's sale void and an injunction, enjoining “defendants and their successors-in-interest, from asserting claims of ownership, pursuing eviction, or purporting to transfer rights in the Subject property to third parties to which Defendants are not presently entitled.” *Id.*, Prayer for Relief, ¶¶ 1, 2.

B. Defendants' Motion to Dismiss and Plaintiff's Response

Defendants moved to dismiss the Complaint, contending that plaintiff's sole theory regarding the alleged violation of Minn.Stat. § 580.02—that Chase foreclosed without recording an assignment from the FDIC—was meritless and rejected by the district court in *Luzaich v. JP Morgan Chase*, Civ. No. 13–1869 (DWF/JSM), 2014 WL 300824 (D.Minn. Jan. 28, 2014) (Order Adopting Report and Recommendation). Defendants' Memorandum in Support of Motion to Dismiss (“Defs.' Mem.”), pp. 5–6 [Docket No. 5]. In *Luzaich*, the district court concluded that even if the FDIC's recording of an affidavit documenting Chase's acquisition of “all loans and all loan commitments” of WAMU did not fulfill the requirement of Minn.Stat. § 580.02,

the Court is persuaded that Chase was not obligated to record an assignment. Pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, the mortgage was assigned to Chase by operation of federal law, which specifically authorizes the FDIC to transfer assets of a failed financial institution “without ... assignment.” 12 U.S.C. § 1821(d)(2)(G)(i)(II). Through operation of the Supremacy Clause, U.S. Const. art. VI, cl. 2, “a transfer of a mortgage, authorized by federal law, obviates the need for the specific written assignment that state law would otherwise require.” *Demelo v. U.S. Bank Nat'l Ass'n*, 727 F.3d 117, 125 (1st Cir.2013). If no assignment was required to effectuate the transfer of plaintiff's mortgage to Chase, then it follows that no assignment was required to be recorded prior to the foreclosure sale of the Property.

Id., p. 5 (quoting *Luzaich*, 2014 WL 300824, at *7). Defendants also submitted that the same conclusion was reached in *Robinson v. Federal Nat'l Mortg. Ass'n*, Civ. No. 13–1868 (JNE/JSM), 2014 WL 258644 (D.Minn. Jan. 23, 2014) (Order Adopting Report and Recommendation). Moreover, courts in other jurisdictions have reached the same conclusion based on complaints following WAMU's collapse and the FDIC's transfer of WAMU's assets to Chase through the PAA. *Id.*, pp. 7–8 (citing *Drobny v. JP Morgan Chase Bank, N.A.*, 929 F.Supp.2d 839, 841 (N.D.Ill.2013); *Beka Realty, LLC v. JP Morgan Chase Bank, N.A.*, 41 Misc.3d 1213(A), Civ. No. 503666–12, 2013 WL 5629590, at *3 (N.Y.Sup.Ct. Sept. 25, 2013)).

Plaintiff did not address the holdings of *Luzaich* or *Robinson* in his opposition to Chase's motion. Plaintiff's Memorandum in Opposition to Motion to Dismiss (“Pl. Mem. in Opp.”), pp. 4–12 [Docket No. 10]. Plaintiff argued that the PAA was an assignment and was required to be recorded before Chase could foreclose. *Id.*, pp. 5–6. Plaintiff cited no cases to support this characterization of the PAA and instead relied on the definitions of “assignment” and “instrument” from Black's Law Dictionary. *Id.*, p. 5. Plaintiff submitted that while it “may potentially be technically possible for the FDIC to transfer the assets of Washington Mutual Bank to JPMorgan—pursuant to 12 U.S.C. § 1821(d)(2)(G)(i)(II)—without ‘a written legal document’ ‘of transfer,’ such an event is practically unlikely and nevertheless did not happen here.” *Id.*, p. 6.

***739** Plaintiff further contended that the Minnesota Supreme Court's statement in *Ruiz v. 1st Fid. Loan Serv., LLC*, 829 N.W.2d 53, 54 (Minn.2013), that all assignments had to be recorded “before the mortgagee has the right to engage in the process of foreclosure by advertisement,” was dispositive. To comply with Minn.Stat. § 580.02(3), plaintiff maintained that Chase was required to record an assignment from the FDIC, without exception. *Id.*, pp. 7–12. Plaintiff submitted a print-out of results from a search plaintiff's counsel conducted at the Hennepin County Registrar of Title's office, which showed hundreds of assignments of mortgage recorded by the FDIC. Declaration of Jonathan L.R. Drewes (“Drewes Decl.”), Exs. A–L [Docket No. 11, 11–1]. According to plaintiff, this showed that the FDIC assigned its interests in many other cases, and if it was true that it was unnecessary to record the assignment in this case, then “all of these other banks are wasting time and money actually doing what Chase insists is unnecessary.” Pl. Mem. in Opp., p. 11. Plaintiff argued that Chase could have conducted a judicial

foreclosure, which would have relieved it of the recording duties imposed by the foreclosure-by-advertisement statute. *Id.*, p. 9.

Plaintiff conceded that the Anti-Injunction Act, 28 U.S.C. § 2283, imposed an absolute prohibition on federal courts from enjoining state court proceedings unless the injunction fell within one of three exceptions described by the statute. *Id.*, p. 2. Consequently, plaintiff admitted that “Count II seeking injunctive relief cannot succeed here in federal court.” *Id.*

Defendants replied that plaintiff was simply wrong that *Ruiz* required the recording of an assignment, because FIRREA expressly provided that no assignment was necessary and federal law trumps the state recording requirement. Defendants' Reply Memorandum (“Defs.' Reply”), p. 1 [Docket No. 14]. Defendants reiterated the significance of *Luzaich* and *Robinson*. *Id.*, p. 4. Defendants also submitted a copy of a state district court order granting summary judgment to Chase on virtually the same claims plaintiff has alleged in the instant case. Second Affidavit of Curtis Ripley, Ex. A (summary judgment order dated August 18, 201, *Bakri v. JP Morgan Chase et al.*, 02–cv–11–4667 (Tenth Judicial District, Anoka County, Minnesota) [Docket Nos. 15, 15–1]).³ In *Bakri*, the plaintiff asserted that Chase's foreclosure of his mortgage was void because Chase did not record an assignment of the mortgage from the FDIC, acting as receiver for WAMU. *Id.*, p. 6.⁴ The state court considered whether “the FDIC may transfer an interest in the mortgage pursuant to [12 U.S.C. § 1821(d)(2)(G)(i)(II)] without such transfer being considered an assignment under Minnesota statutes.” *Id.* The state court concluded that the federal banking statute superseded Minnesota's foreclosure-by-advertisement statute and that the transfer from the FDIC to Chase was not an assignment requiring recording. *Id.* (citing *inter alia* *Luzaich*, 2014 WL 300824, at *6). The court noted:

Plaintiff's extensive citation of 19th century holdings of the Minnesota Supreme Court misses the point. Plaintiff is surely correct that a foreclosing party must have an interest in the mortgage and any assignments must be recorded before foreclosure. Neither of these ***740** propositions encumbers the power of Congress to carve out an exception pursuant to its authority to regulate interstate commerce. Here, the federal statute supersedes state law and prevents application of Minn.Stat. § 580.02(3) where the transfer of the mortgage occurs pursuant to the FDIC's receivership powers.

Id., p. 7. According to defendants, this recent case “is in line with the holdings from this District and across the nation, and further confirms that Chase did not need to record a mortgage assignment before foreclosing by advertisement under this circumstance.” Defs.’ Reply, p. 5.

Defendants rejected plaintiff’s argument about the availability of judicial foreclosure as “wholly irrelevant” because Chase was entitled to proceed with the foreclosure by advertisement. *Id.*, p. 8.

Lastly, defendants contended that it was impossible to draw any conclusions based on the print-outs plaintiff’s counsel submitted. *Id.*, p. 9. Defendants noted that nothing was known about the circumstances of these mortgages or what role the FDIC played in the mortgages. *Id.*, p. 9. As a result, the “information is not credible evidence of anything.” *Id.*

At the motion hearing, plaintiff’s counsel continued to insist that the PAA was an assignment that had to be recorded. Transcript of Hearing (“Tr.”), pp. 13–14 [Docket No. 20]. As evidence, counsel pointed to Article 3.1 of the PAA, which stated:

Subject to Sections 3.5, 3.6 and 4.8, the Assuming Bank hereby purchases from the Receiver and the Receiver hereby sells, assigns, transfers, conveys, and delivers to the Assuming Bank, all right, title and interest of the Receiver in and to all of the assets (real, personal and mixed, wherever located and however acquired) including all subsidiaries, joint ventures, partnerships and any and all other business combinations or arrangements, whether active, inactive, dissolved or terminated, of the Failed Bank whether or not reflected on the books of the Failed Bank as of Bank Closing.

Tr. 19 (citing Ripley Aff., Ex. 1, p. 9) (emphasis added). According to counsel, the use of the word “assigns” in this passage established that the PAA was an assignment. Tr. 20.

Further, at the hearing, plaintiff’s counsel raised for the first time a new argument regarding preemption, which was not

reflected in his responsive brief.⁵ Plaintiff’s counsel then argued that the *Demelo* case, relied upon by the court in *Luzaich*, was distinguishable because in *Demelo* there was a clear conflict between 12 U.S.C. § 1821(d)(2)(G)(i)(II) and a Massachusetts statute that required transfers of real property to be in writing. Tr. 16. According to counsel, “[h]ere in Minnesota *741 we don’t have that.” (*Id.*). As a result, implied conflict preemption—the only form of preemption that could be considered—did not apply because there is no conflict between the federal banking statute and Minn.Stat. § 580.02 where Chase had an assignment (*i.e.* the PAA) that it could have recorded, or alternatively, it could have foreclosed by action rather than advertisement. Tr. 25–26.

C. Defendants’ Supplemental Brief

Defendants responded to plaintiff’s preemption argument by first arguing that the PAA was not an assignment that would trigger Minn.Stat. § 580.02. Defendants’ Supplemental Memorandum in Support of Motion to Dismiss (“Def. Suppl. Mem.”), 3–7 [Docket No. 21]. Defendants noted that FIRREA expressly states that the FDIC may transfer assets “without assignment” and courts considering the application of the statute in connection with WAMU’s transfer of assets have recognized the distinction between transfers under FIRREA and mortgage assignments. *Id.* Defendants contended that consistent with FIRREA, the FDIC and Chase did not execute an assignment. *Id.*, pp. 4–5. Instead, the FDIC transferred WAMU’s assets through the PAA. *Id.*, p. 5. Furthermore, merely because the PAA used the word “assigns” in Article III did not make the PAA an “assignment.” *Id.*, pp. 5–7. That word appeared in a laundry list of terms intended to show that the FDIC was transferring all of WAMU’s assets to Chase. Not a single court to consider the PAA has treated it as a “mortgage assignment.” *Id.*, p. 6 (citing *Drobny*, 929 F.Supp.2d at 839; *Beka Realty, LLC*, 2013 WL 5629590; *Trice v. JP Morgan Chase Bank*, — Nev. —, Civ. No. 63052, 2013 WL 5432353 (Nev.2013); *FTBK v. Joshua Mgmt.*, 2013 N.Y. Misc. LEXIS 640).

Consequently, defendants submitted that no preemption analysis was necessary because there is no conflict between state and federal law. *Id.* FIRREA states that the FDIC can transfer assets “without assignment,” which is what the FDIC did when it transferred WAMU’s assets to Chase pursuant to the PAA. *Id.* Therefore, according to defendants, there was no assignment that Chase failed to record.

However, even if the Court conducted a preemption analysis, defendants contended that the result would be the same. *Id.*, pp. 11–17. Because FIRREA does not expressly preempt [Minn.Stat. § 580.02](#), defendants argued that the Court should analyze the issue under conflict preemption. *Id.*, pp. 12–13. Applying that analysis, FIRREA provides broad authority to the FDIC to dispose of a failed bank's assets free from any approval, assignment or consent requirements that might apply. *Id.*, p. 14. Any requirement that a transfer pursuant to FIRREA had to comply with state recording requirements would frustrate the purpose of the statute and conflict with the FIRREA provision that permits the FDIC to “transfer any asset or liability of the institution in default ... without any approval, assignment or consent with respect to such transfer.” *Id.*, pp. 16–17. Therefore, even if the Court construed the PAA as an assignment, conflict preemption rendered recording the assignment unnecessary. *Id.*, pp. 11–17.

D. Plaintiff's Response to Defendants' Supplemental Brief

In plaintiff's letter responding to defendants' supplemental brief, plaintiff took issue with defendants' statement that “no court has used or relied upon a preemption analysis to find that, notwithstanding the express provision of federal law that FDIC transfers are ‘without assignment,’ a foreclosing party must nonetheless record a *742 mortgage assignment pursuant to state law.” *Id.* (quoting Defendant's Supplemental Brief, p. 2). Plaintiff submitted that Chase “itself lost similar arguments” and directed the Court to [Kim v. JPMorgan Chase Bank, N.A.](#), 493 Mich. 98, 825 N.W.2d 329, 335–336 (2012). *Id.*

II. LEGAL STANDARD

In considering a motion to dismiss under [Rule 12\(b\)\(6\)](#), the pleadings are construed in the light most favorable to the non-moving party, and the facts alleged in the complaint must be taken as true. [Morton v. Becker](#), 793 F.2d 185, 187 (8th Cir.1986). In addition, a court must afford the plaintiff all reasonable inferences from those allegations. [Blankenship v. USA Truck, Inc.](#), 601 F.3d 852, 853 (8th Cir.2010). At the same time, to withstand a motion to dismiss under [Rule 12\(b\)\(6\)](#), litigants must properly plead their claims under [Rule 8 of the Federal Rules of Civil Procedure](#) and meet the principles articulated by the United States Supreme Court in [Ashcroft v. Iqbal](#), 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) and [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

As a general rule, the Court may not consider materials “outside the pleadings” on a motion to dismiss, without converting the motion to dismiss to a motion for summary judgment. [Fed.R.Civ.P. 12\(d\)](#). “The court, however, ‘may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings,’ ” without converting the motion into one for summary judgment. See [Little Gem Life Sciences, LLC v. Orphan Medical, Inc.](#), 537 F.3d 913, 916 (8th Cir.2008) (quoting [Porous Media Corp. v. Pall Corp.](#), 186 F.3d 1077, 1079 (8th Cir.1999) (internal citation and punctuation omitted)); see also [Fed.R.Civ.P. 10\(c\)](#) (“A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.”); [Mattes v. ABC Plastics, Inc.](#), 323 F.3d 695, 697, n. 4 (8th Cir.2003). Applying this standard, the Court has considered the Affidavit of Curtis Ripley and attached exhibits [Docket No. 6]; the Affidavit of Jonathan L.R. Drewes and attached exhibits [Docket No. 11] and the Second Affidavit of Curtis Ripley, attaching the state court's *Bakri* summary judgment decision. [Docket No. 15–1].

For the reasons set forth below, the Court concludes that plaintiff has failed to state a claim for relief and therefore, defendants' motion should be granted.

III. DISCUSSION

A. The PAA Was Not An Assignment

[1] Plaintiff's argument that the PAA was an assignment that had to be recorded pursuant to [Minn.Stat. § 580.02](#) is rejected. The Court agrees that the word “assigns” in Article III of the PAA did not make the PAA an assignment. That word appears in a list of words, all of which are plainly intended to state that the FDIC was transferring all of WAMU's assets to Chase. See Ripley Aff., Ex. 1, Article III. Additionally, it is abundantly clear that the FDIC's transfer WAMU's assets to Chase was based on FIRREA, which explicitly states that the FDIC can transfer the assets of a failed bank “without assignment.” This is precisely the basis of the holdings in *Luzaich* and *Robinson*—that no recording of an assignment was necessary because the transfers of assets took place “without assignment” and by operation of law. Plaintiff did not cite a single case in which a court has concluded that the PAA was an assignment required to be recorded. Courts to consider the transfer of WAMU's assets from the FDIC to Chase have generally concluded that *743 Chase was not required to record an assignment. For example, in *Drobny*,

plaintiffs argued that Chase acquired WAMU's banking assets through a PAA and then alleged that Chase failed to provide a mortgage assignment. 929 F.Supp.2d at 845, fn. 2. The court rejected that claim:

First, as to Chase's failure to supply a mortgage assignment, there is no such requirement, as made clear both by federal and state law. Federally, the FDIC, as receiver of Washington Mutual Bank, was empowered to transfer the Bank's assets without an assignment. See 12 U.S.C. § 1821(d)(2)(G)(i)(II) (receiver may "transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer"); *FTBK Investor II v. Mercy Holding*, 36 Misc.3d 1219(A), 2012 WL 3064864 at *5 (N.Y.Sup.Ct. July 24, 2012) (citing 12 U.S.C. § 1821(d)(2)(G)(i)(II) and rejecting borrowers' argument "that the note had to have been individually negotiated and physically indorsed to Chase [by the FDIC] through an allonge").

Id. at 845.

In *Beka Realty, LLC*, 2013 WL 5629590, plaintiff challenged the foreclosure of his mortgage, arguing that the foreclosure was void because there was no recorded assignment of the mortgage from WAMU to Chase. *Id.* at *2. The court held that the FDIC, as WAMU's receiver, was permitted to "transfer any asset or liability" of WAMU "without any approval, assignment, or consent with respect to such transfer." *Id.* (quoting 12 U.S.C. § 1821(d)(2)(G)(i)(II)). The court further held

Consistent with this statutory provision, the FDIC transferred all of WaMu's loans and loan commitments to Chase pursuant to the September 25, 2008 PAA. As noted above, sections 2.1 and 3.1 of the PAA provided that "[Chase] specifically assume[d] all of the mortgage servicing rights and obligations of [WaMu]." Courts have, therefore, consistently held that Chase became the owner of all of WaMu's loans and loan commitments by operation of law and that Chase is entitled to enforce the acquired WaMu loans ... [t]hus, by virtue of the PAA, Chase became the assignee of the Note and Mortgage. *Id.* at *3 (citations omitted).

The court in *Trice* reached the same conclusion when a property owner challenged a foreclosure on the ground that Chase failed to produce an assignment of her mortgage:

The district court correctly found that no assignment was necessary, as respondent obtained ownership of appellant's loan from the Federal Deposit Insurance Corporation as part of a large-scale acquisition of Washington Mutual's assets. See 12 U.S.C. § 1821(d)(2)(G)(i) (2006) (affording the FDIC the power to "transfer any asset or liability of the institution in default ... without any approval, assignment, or consent with respect to such transfer"); *Drobny v. JP Morgan Chase Bank, NA*, [929 F.Supp.2d 839, 845–46], 2013 WL 888628, *5 (N.D.Ill.2013) (indicating that the FDIC's power to transfer assets under 12 U.S.C. § 1821(d)(2)(G)(i) obviates the need for an assignment of each individual loan).

2013 WL 5432353, at *1.

Lastly, in *FTBK Invest.*, the court rejected a defendant's argument that plaintiff, a successor-in-interest to Chase, lacked standing to foreclose on a mortgage because plaintiff lacked written proof of an assignment to Chase from WAMU or the *744 FDIC as WAMU's receiver. 2013 N.Y. Misc. LEXIS 640, at *8. The court noted:

Plaintiff correctly points out that the FDIC clearly had the authority to transfer the loans in bulk to Chase pursuant to 12 U.S.C. § 1821(d)(2)(G)(i)(II), and that an individual negotiation, *i.e.* assignment, of each loan was not required. Pursuant to 12 U.S.C. § 1821(d)(2)(G)(i)(II), the FDIC, as receiver of a failed bank, is authorized to "transfer any asset or liability of the institution in default ... without any approval, assignment, or consent with respect to such transfer." According to the express terms of the statute, a valid transfer of the assets of a failed bank from the FDIC occurs even without a formal assignment instrument. As evidenced by the terms of the PAA, Chase acquired all assets of WaMu, with certain exceptions not applicable to this action. Specifically, Section 3.1 of the PAA provides that ... "[Chase] hereby purchases from the receiver [FDIC], and the Receiver hereby sells, assigns, transfers, conveys, and delivers to the Assuming Institution, all right, title, and interest of the Receiver in and to all of the assets ... of the Failed Bank [WaMu].

Id., at *14 (emphasis in original) (citation omitted).

[2] [3] [4] In the final analysis, plaintiff's *only* evidence that the PAA was an assignment is the use of the word "assigns" in Article III. That single word is completely inadequate to support a finding that the PAA was an

assignment that needed to be recorded pursuant to Minn.Stat. § 580.02. The PAA was not an assignment and the FDIC transferred WAMU's assets to Chase through operation of law. Therefore, there is no conflict between Minn.Stat. § 580.02, Ruiz, and FIRREA and no preemption analysis is necessary.⁶

*745 The evidence shows an unbroken chain of title from the FDIC to Chase (pre-foreclosure) and from Chase to Fannie Mae by warranty deed (post-foreclosure). See Ripley Aff., Exs. 1 (PAA dated September 25, 2008), 2 (FDIC affidavit), 4 (Limited Warranty Deed from Chase to Fannie Mae). The Sheriff's Certificate of Sale, (Ripley Aff., Ex. 3), is *prima facie* evidence that Chase (the foreclosing entity) complied with all legal requirements regarding the foreclosure and that the foreclosure and sale were proper. See Minn.Stat. § 580.19. Plaintiff stated no facts in his Complaint to rebut this evidence and there is no evidence that Chase was not entitled to foreclose on the Mortgage.

Finally, the Court agrees with defendants that the print-outs plaintiff submitted in response to defendants' motion to dismiss do not prove plaintiff's point regarding the alleged necessity of recording an assignment from the FDIC to Chase. As defendants observed, the Court has *no* information on these mortgages, why they were assigned, and under what circumstances. But assuming for the sake of argument that these assignments were made under exactly the same circumstances as presented in this case (and there is no evidence that is true), the Court's conclusion would be the same. Any assignment would be redundant because the FDIC's assignment of its interests to Chase occurred by operation of law. If other banks "are wasting time and money doing what Chase insists is unnecessary," that is the business of the other banks and does not change the Court's *746 analysis. Moreover, the availability of judicial foreclosure also does not change the outcome. Chase chose to proceed with the foreclosure by advertisement and was there no impediment to doing so.

B. Plaintiff Is Not Entitled to Injunctive Relief

[5] Count II of the Complaint is entitled "Injunction." Complaint, ¶¶ 23–27. An injunction is a remedy, not a cause of action. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211, N. 1, 122 S.Ct. 708, 151

L.Ed.2d 635 (2002) ("an injunction is inherently an equitable remedy...."); *Labrant v. Mortgage Electronic Regis. Sys., Inc.*, 870 F.Supp.2d 671, 683 (D.Minn.2012) (citing *Henke v. Arco Midcon., LLC*, 750 F.Supp.2d 1052, 1059–60 (E.D.Mo.2010) ("[i]njunctive relief, however, is a remedy, not an independent cause of action.")). As such, dismissal of this count is appropriate because the remedy depends wholly upon the viability of plaintiff's claims regarding the validity of the foreclosure. Because plaintiff's underlying claim fails, his claim for injunctive relief fails.

[6] Additionally, as plaintiff conceded, his claim for an injunction is barred by the Anti-Injunction Act, which states that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. "The Supreme Court has interpreted the Act as 'an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions' included in the language of the statute." *Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1013–1014 (8th Cir.2002) (quoting *Atlantic Coast Line R.R. v. Locomotive Eng'rs*, 398 U.S. 281, 286–87, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970), abrogation on other grounds as recognized by *Arkansas Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 821–22 (8th Cir.2009)). "Courts must construe the exceptions to the Anti-Injunction Act narrowly and resolve doubts in favor of letting the state action proceed." *Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Assocs.*, 77 F.3d 1063, 1068 (8th Cir.1996).

IV. RECOMMENDATION

For the reasons set forth above, it is recommended that:

1. Defendants' Motion to Dismiss [Docket No. 3] be **GRANTED**.

[7] 2. This matter be dismissed with prejudice.⁷

All Citations

81 F.Supp.3d 735

Footnotes

- 1 The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") is codified at [12 U.S.C. § 1821](#)
 2 *et seq.*
- 3 The Complaint does not state that plaintiff defaulted on his mortgage payments, but plaintiff has not denied that is the case.
 4 Plaintiff has filed a Notice of Appeal in *Bakri*. <http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1614611359>.
 5 The Court is referring to the page numbers assigned through the court's electronic filing system.
- 6 The Court could have refused to consider this argument. See, e.g., *American Prop. Dev. Sw., LLC v. Landform Eng'g. Co.*,
 Civ. No. 07–3556 (DWF/AJB), 2007 WL 4461506, at *3 (D.Minn.2007) ("The Court recognizes that because [plaintiff's]
 primary argument was not raised in its brief, the Court need not address it.") (citing *Thomsen v. Ross*, 368 F.Supp.2d
 961, 974, n. 9 (D.Minn.2005) (concluding that plaintiff had abandoned claims not addressed in response to summary
 judgment)). Nonetheless, the Court allowed the argument and permitted defendants to submit a supplemental brief in light
 of the fact that defendants were seeking dismissal of plaintiff's Complaint with prejudice. As the Court did not countenance
 plaintiff's untimely preemption argument, plaintiff was not given an opportunity to file a response to this supplemental
 brief. Nevertheless, on November 12, 2014, plaintiff's counsel requested the opportunity to file a short letter to address
 an allegedly improper citation by defendants in their supplemental brief. The Court agreed to this request and the letter
 was filed. See Docket No. 22.
- Even if assuming the PAA was an assignment, conflict preemption mandates that Chase could not be compelled to record
 the assignment pursuant to [Minn.Stat. § 580.02](#) because doing so would conflict with FIRREA. "Conflict preemption
 occurs when compliance with both federal and state laws is impossible, and when a state law 'stands as an obstacle to
 the accomplishment and execution of the full purpose and objectives of Congress.'" *Keller v. City of Fremont*, 719 F.3d
 931, 940 (8th Cir.2013) (quoting *Arizona v. United States*, — U.S. —, 132 S.Ct. 2492, 2501, 183 L.Ed.2d 351 (2012)).
 "Congress enacted [FIRREA] with the objects of preventing the collapse of the industry, attacking the root causes of the
 [savings and loan] crisis, and restoring public confidence." *United States v. Winstar Corp.*, 518 U.S. 839, 856, 116 S.Ct.
 2432, 135 L.Ed.2d 964 (1996). "Congress granted the FDIC broad powers in conserving and disposing of the assets of
 the failed institution. To enable the FDIC to move quickly and without undue interruption to preserve and consolidate the
 assets of the failed institution, Congress enacted a broad limit on the power of the courts to interfere with the FDIC's
 efforts...." *Deutsche Bank Nat'l Trust Co. v. F.D.I.C.*, 744 F.3d 1124, 1128 (9th Cir.2014); see also *Iberiabank v. Beneva*
41–I, LLC, 701 F.3d 916, 921 (11th Cir.2012) (FIRREA granted the FDIC broad powers to "manage the affairs of insolvent
 banks as receiver or conservator"); *GECCMC 2005–C1 Plummer Street Office P'ship v. JP Morgan Chase Bank, N.A.*,
 671 F.3d 1027, 1030 (9th Cir.2012) ("FIRREA provides for prompt and efficient resolution of the assets and liabilities
 of failed banks.").
- In a purchase and assumption transaction pursuant to FIRREA, the FDIC is entitled to transfer the assets of the failed bank
 "without assignment" and in that regard, any restrictions on this power to transfer imposed by state law are preempted.
 See *Sahni v. American Diversified Partners, Inc.*, 83 F.3d 1054, 1059 (9th Cir.1996) (assuming a provision of the California
 Corporations Code requiring consent of a limited partner to the sale of HUD partnerships was applicable, that provision
 was preempted by [12 U.S.C. § 1821\(d\)\(2\)\(G\)\(i\)\(II\)](#) because Congress explicitly authorized the FDIC to "transfer any asset
 or liability of the institution in default ... without any approval, assignment or consent to such transfer.") (emphasis in
 original); *Federal Deposit Ins. Corp. v. Bank of Boulder*, 911 F.2d 1466, 1472–1473 (10th Cir.1990) (state law restriction
 on transfer of letters of credit is preempted by [12 U.S.C. § 1823](#), which allows the FDIC to purchase "any assets" of a failed
 bank). Consistent with these cases, the Court finds that conflict preemption would require that the recording requirement
 of [Minn.Stat. § 580.02](#) yield to [12 U.S.C. § 1821\(d\)\(2\)\(G\)\(i\)\(II\)](#). To find otherwise would impermissibly restrain the powers
 of the FDIC under FIRREA.
- Also, this Court was not persuaded by the Michigan court's reasoning in *Kim v. JPMorgan Chase Bank, N.A.*, 493 Mich. 98,
 825 N.W.2d 329, 335–336 (2012) (Zahra, J., Young, C.J. and Kelly, J. dissenting). There, the court concluded that Chase
 had to comply with Michigan's recording statute to foreclose by advertisement because the PAA did not transfer the FDIC's
 interests in WAMU's assets "by operation of law." *Id.* at 333–339. The Michigan court conducted no preemption analysis
 and based its decision on an 1885 state case defining "operation of law" to mean "involuntarily" or "unintentionally." *Id.* at
 334–336. Because Chase entered into the PAA with the FDIC, its actions were not "involuntary." *Id.* at 334–335. Of course,
 this Court is not bound by the *Kim* decision, but in any event it was much more persuaded by three-justice dissent. *Id.*,
 pp. 340–348. The dissent emphasized the language of [12 U.S.C. § 1821\(d\)\(2\)\(G\)\(i\)](#), which permits the transfer of assets
 "without any approval, assignment, or consent with respect to such transfer" and rejected the majority's characterization
 of the PAA as an ordinary contract. *Id.* at 342. In fact, the PAA was intended to transfer WAMU's assets by operation of
 law, and without an assignment. *Id.* at 341. The dissent stated:

Chase was exempt from the requirements of [MCL 600.3204\(3\)](#) because it obtained the mortgage by operation of law.

* * *

[T]he statute implies that when no assignment has occurred, the party holding the mortgage has stepped into the shoes of the original mortgagee. When there has been no assignment of a mortgage, there can be no assignment to record. Accordingly, because Chase acquired the plaintiffs' mortgage by operation of law instead of by assignment, and was thus legally considered the original mortgagee, it was not required to record anything in the chain of title.

Id. at 346. At any rate, whether *Kim* was wrongly or rightly decided has no bearing on the Court's decision in the instant case because the case is not precedential, devoid of any conflict preemption analysis, and the majority opinion was based on Michigan state law not at issue in this case.

7 When a complaint is so deficient or defective that the court is convinced that its defects cannot be cured through re-pleading, dismissal with prejudice is appropriate. Such is the case here. See [McLean v. United States](#), 566 F.3d 391, 400 (4th Cir.2009) ("to the extent ... that a district court is truly unable to conceive of any set of facts under which a plaintiff would be entitled to relief, the district court would err in designating [a] dismissal to be without prejudice. Courts, including this one, have held that when a complaint is incurable through amendment, dismissal is properly rendered with prejudice and without leave to amend."); [McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.](#), 339 F.3d 1087, 1096 (9th Cir.2003) (dismissal with prejudice is appropriate where "deficiencies in [plaintiff's] claims cannot be cured by amendment"); [Ikechi v. Verizon Wireless](#), Civ. No. 10-4554 (JNE/SER), 2011 WL 2118797 at *5, n. 6 (D.Minn. April 7, 2011) (recommending dismissal with prejudice of plaintiff's fraud claims because it was unlikely that plaintiff could cure the defective pleading on re-pleading), 2011 WL 2118791 at *3 (D.Minn. May 25, 2011) (adopting the Report and Recommendation of Magistrate Judge Rau regarding dismissal of plaintiff's fraud claims for failure to satisfy the particularity requirement of Rule 9(b)).

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466 Fed.Appx. 763

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2. United States Court of Appeals, Eleventh Circuit.

Darryl HAYNES, Plaintiff–
Counter Defendant–Appellant,
v.
JPMORGAN CHASE BANK, N.A.,
Defendant–Counter Claimant–Appellee,
Washington Mutual Bank, et al., Defendants.

No. 11–13065
|
Non–Argument Calendar.
|
Feb. 9, 2012.

Synopsis

Background: Mortgagor filed pro se state court suit against mortgagee, seeking declaratory and injunctive relief to stay foreclosure of property. Following removal based on diversity jurisdiction, the United States District Court for the Middle District of Georgia, [Clay D. Land, J., 2011 WL 2581956](#), granted mortgagee summary judgment. Mortgagor appealed pro se.

Holdings: The Court of Appeals held that:

- [\[1\]](#) jurisdictional amount in controversy was satisfied;
- [\[2\]](#) proposed amendment adding fraud claim lacked particularized pleading;
- [\[3\]](#) motion to compel discovery was premature; and
- [\[4\]](#) mortgagee had right to foreclose upon mortgagor's default.

Affirmed.

West Headnotes (4)

[\[1\]](#) **Removal of Cases**

Amount or value claimed or involved

Removal of Cases

Allegations and prayers in pleadings

Removal of Cases

Amount in controversy

Removal of Cases

Evidence

Mortgagor's lawsuit, seeking declaratory and injunctive relief to stay mortgagee's foreclosure of property, satisfied amount in controversy requirement for removal under diversity jurisdiction requirements, even though mortgagor's complaint did not specify dollar figure for amount in controversy, since mortgagee's notice of removal stated that mortgagor owed at least \$417,000 on loan, and mortgagee filed copy of security deed in support of that statement. 28 U.S.C.A. §§ 1332(a)(1), 1441(a).

[9 Cases that cite this headnote](#)

[\[2\]](#) **Federal Civil Procedure**

Fraud, mistake and condition of mind

Mortgagor's proposed amendment adding fraud claim against mortgagee and asserting that mortgagee lacked standing to foreclose on property failed to allege fraud with particularity required by rule, since proposed amended did not allege what statements were made in what documents or oral representations, what omissions were made, time and place of such statements, person responsible for statements or omissions, content of statements and manner in which they misled mortgagor, and what mortgagee obtained as consequence of alleged fraud. Fed.Rules Civ.Proc.Rules 9(b), 15(a), 28 U.S.C.A.

[9 Cases that cite this headnote](#)

[\[3\]](#) **Federal Civil Procedure**

🔑 Order compelling answer

Federal Civil Procedure

🔑 Failure to Comply; Sanctions

Federal Civil Procedure

🔑 Failure to respond; sanctions

Mortgagor's motion to compel discovery after serving interrogatories, requests for admissions, and document requests, to which mortgagee objected on grounds that requests exceeded permissible number and related to information outside scope of discovery, was premature, where mortgagor had not certified that he had in good faith conferred or attempted to confer with mortgagee. [Fed.Rules Civ.Proc.Rule 37\(a\)\(1\)](#), 28 U.S.C.A.

4 Cases that cite this headnote

[4] Mortgages and Deeds of Trust

🔑 Lenders; beneficiaries

Mortgages and Deeds of Trust

🔑 Holders of obligations secured and their agents; non-holders in possession

Mortgagee was lawful holder of secured note on which mortgagor defaulted, and thus, mortgagee had right to foreclose on mortgagor's property.

1 Cases that cite this headnote

Attorneys and Law Firms

***764** Darryl Haynes, Madison, GA, pro se.

[John C. Porter, Jr.](#), Smiley Bishop & Porter, LLP, Atlanta, GA, for Defendant–Counter Claimant–Appellee.

Appeal from the United States District Court for the Middle District of Georgia. D.C. Docket No. 3:10–cv–00011–CDL.

Before [WILSON](#), [PRYOR](#), and [KRAVITCH](#), Circuit Judges.

Opinion

PER CURIAM:

****1** Darryl Haynes appeals *pro se* the district court's grant of summary judgment in favor of JPMorgan Chase Bank, N.A. (“Chase”) on Haynes's action for declaratory and injunctive

relief to stay foreclosure of his property. He argues that (1) the district court lacked jurisdiction to hear the case; (2) the district court abused its discretion by refusing to grant his motion to amend his complaint; (3) the district court abused its discretion by refusing to grant his motion to compel discovery; and (4) the district court erred in granting Chase's motion for summary judgment. ¹ We affirm the district court.

I.

Haynes first contests whether the district court had jurisdiction over his complaint, which Chase removed from Georgia state court. We review *de novo* whether a district court had subject matter jurisdiction following removal. [Castleberry v. Goldome Credit Corp.](#), 408 F.3d 773, 780–81 (11th Cir.2005). A civil action brought in state court can be removed to a federal district court that could have heard the case initially. 28 U.S.C. § 1441(a). A federal district court has diversity jurisdiction when the amount in controversy exceeds \$75,000 (exclusive of interest and costs) and is between citizens of different states. 28 U.S.C. § 1332(a)(1). When a plaintiff does not plead a specific amount of damages, a defendant wishing to remove the complaint from state court must show by a preponderance of the evidence that the amount in controversy exceeds \$75,000. [Williams v. Best Buy Co., Inc.](#), 269 F.3d 1316, 1319 (11th Cir.2001). If the amount in controversy is not apparent on the face of the complaint, we may consider the notice of removal. *Id.*

[1] Haynes does not dispute that diversity of citizenship exists, but argues that the amount in controversy is less than the jurisdictional amount because he owes no money to Chase. In his complaint, Haynes did not specify a dollar figure for the amount in controversy. Chase's notice of removal stated that Haynes owes at least \$417,000 on his loan, and Chase filed a copy of the security deed in support of this statement. Accordingly, the district court had jurisdiction.

II.

Haynes next argues that the district court improperly denied his motion to amend. We review a district court's denial of a motion to file an amended complaint for an abuse of discretion. [Hall v. United Ins. Co. of Am.](#), 367 F.3d 1255, 1262 (11th Cir.2004). Haynes wished to amend his pleading after Chase had filed its responsive pleading, and thus Haynes needed the ***765** court's permission or Chase's consent to

amend. See [Fed.R.Civ.P. 15\(a\)](#). If the facts and circumstances relied upon by a plaintiff in his amended complaint may be a proper subject of relief, leave to amend should be given. [Hall](#), 367 F.3d at 1262. However, denial of leave to amend is justified if amendment would be futile—that is, the amended complaint would still be subject to dismissal. *Id.* at 1263; [Corsello v. Lincare, Inc.](#), 428 F.3d 1008, 1014 (11th Cir.2005) (per curiam). *Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and should be liberally construed. See [Alba v. Montford](#), 517 F.3d 1249, 1252 (11th Cir.2008).

****2 [2]** Haynes's proposed amended complaint made allegations of fraud and asserted that Chase lacked legal standing to foreclose. In order to plead fraud sufficiently, a claimant must state with particularity the circumstances constituting the fraud. [Fed.R.Civ.P. 9\(b\)](#); [U.S. ex rel. Sanchez v. Lymphatx, Inc.](#), 596 F.3d 1300, 1302 (11th Cir.2010). “The particularity rule serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior.” [Durham v. Bus. Mgmt. Assocs.](#), 847 F.2d 1505, 1511 (11th Cir.1988). In order to satisfy the particularity rule, a complaint of fraud must set forth:

- (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

[Brooks v. Blue Cross & Blue Shield of Fla., Inc.](#), 116 F.3d 1364, 1371 (11th Cir.1997) (per curiam) (internal quotation omitted).

Haynes's proposed amended complaint did not satisfy these requirements, nor did it state any other legal claims supported by factual allegations. As such, amendment of his original complaint would have been futile and thus the denial of Haynes's motion was not an abuse of discretion.

III.

Haynes additionally argues that the district court erred by denying his motion to compel discovery from Chase. We review a district court's denial of a motion to compel discovery for an abuse of discretion; we will not second-guess its decision unless it reflects a clear error of judgment. [Holloman v. Mail-Well Corp.](#), 443 F.3d 832, 837 (11th Cir.2006). Furthermore, “we will not overturn discovery rulings unless it is shown that the District Court's ruling resulted in substantial harm to the appellant's case.” [Iraola & CIA, S.A. v. Kimberly-Clark Corp.](#), 325 F.3d 1274, 1286 (11th Cir.2003) (quotation marks omitted).

[3] Haynes served interrogatories, requests for admissions, and document requests on Chase, to which Chase objected on the grounds that the requests exceeded the permissible number and related to information not within the scope of discovery. Haynes then moved for an order to compel, without first consulting in good faith with Chase about its objection. [Federal Rule of Civil Procedure 37\(a\)\(1\)](#) requires that prior to moving to compel disclosure or discovery, a party must certify that he has “in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.” Therefore, Haynes's motion to compel was premature. Additionally, during ***766** the December 29, 2010 hearing, it was established that all the documents that Haynes required were either already in his possession or would be made available to him to inspect. Therefore, we do not find the district court's denial of Haynes's motion to compel to be an abuse of discretion.

IV.

****3** Finally, Haynes argues that the district court erred in granting summary judgment in favor of Chase. We review *de novo* a district court order granting summary judgment, viewing all of the facts in the light most favorable to the non-moving party. [Burger King Corp. v. E-Z Eating, 41 Corp.](#), 572 F.3d 1306, 1312–13 (11th Cir.2009). “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” [Fed.R.Civ.P. 56\(a\)](#). Once the movant has satisfied his burden of showing that there is no genuine issue of fact, the burden shifts to the

non-moving party to show that issues of material fact exist. *Burger King*, 572 F.3d at 1313. The party opposing a motion for summary judgment cannot rest upon mere allegations or denials in his pleadings, but must set forth specific facts showing a genuine triable issue. *Ellis v. England*, 432 F.3d 1321, 1325–26 (11th Cir.2005) (per curiam).

[4] Chase produced evidence that it is the lawful holder of Haynes's secured note and therefore has the right to foreclose because Haynes is in default. Haynes set forth no facts or legally cognizable arguments that would demonstrate that

Chase's right to foreclose is disputable. We find that Haynes's "mere conclusory allegations and assertions will not suffice" to create a material issue of fact to defeat Chase's well supported summary judgment motion. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir.1990).

AFFIRMED.

All Citations

466 Fed.Appx. 763, 2012 WL 399986

Footnotes

- 1 Haynes also alleges that Chase committed "fraud upon the court, fraud upon the Plaintiff, fraud upon the American People, fraud in the factum, fraud in the inducement, common law fraud, RICO's wire and mail fraud on Federal and State levels, bank fraud, mortgage servicing fraud and violate[d] the Real Estate Settlement and Procedures Act (RESPA), Georgia's Residential Mortgage Act and the Truth in Lending Act (TILA), just to name a few."

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CASE NO. 2018-CP-18-2053
NCP Pilgrim, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	DEFENDNANTS MARY LOU
	)	CERCOPELY, DAVID S. CLANCY and
Mary Lou Cercopely, David S. Clancy,	)	DAVID SEAN CLANCY'S
South Carolina Federal Credit Union,	)	POST-TRIAL MEMORANDUM
Southcoast Community Bank, John	)	
Geanuracos, and David Sean Clancy	)	
	)	
Defendants.	)	
	)	

TO: THE HONORABLE JAMES E. CHELLIS, DORCHESTER COUNTY MASTER IN EQUITY:

The Defendants Mary Lou Cercopely, Davis S. Clancy and David Sean Clancy ("Clancy") by and through their undersigned counsel, would respectfully submit the following Post-Trial Memorandum:

FACTUAL BACKGROUND

1. On June 4, 2010, Barbara Clancy executed a mortgage ("Mortgage") on 217 South Cedar Street, Summerville, South Carolina ("Property") to secure repayment on a Home Equity Line of Credit ("HELOC") granted David Clancy by Carolina Federal Savings Bank ("CFSB").

2. Two years later, on June 8, 2012, CFSB was closed by order of its federal regulator¹, which then appointed the Federal Deposit Insurance Corporation ("FDIC" or the "Corporation") as its receiver.

3. Separately, on or about December 11, 2012, the FDIC formed CRD/ADC Venture 2012-1, LLC ('CRD/ADC, LLC'), and assigned the Clancy HELOC and other non-performing

¹ The Office of the Comptroller of the Currency ("OCC"); see 12 U.S.C. §§ 1464(d)(2)(B) & 1821(c)(6)(B).

loans to it. The FDIC [which at that point owned 100% of its equity], solicited bids from private investors to purchase equity interests in the CRD/ADC, LLC

4. Colfin **2012** CRE ADC Funding, LLC (“Colfin **2012**”) – founded on November 11, 2012 – then purchased a 40% interest in CRD/ADC, LLC. The FDIC transferred management responsibility to Colfin **2012** and retained 60% of the ownership interest, including rights to vote and transfer assets. [See Exhibit A hereto].

INSTANT LAWSUIT & TRIAL

5. Plaintiff NCP Pilgrim, LLC (“NCP”) brought an action on 15 November 2018 against Clancy to foreclose Mortgage. Therein, it alleged that CFSB – and not the FDIC – had assigned the HELOC and Mortgage to the CRD/ADC, LLC. in January 2013 (¶ 12).

6. NCP said it again when it filed its Amended Summons and Complaint on April 5, 2019 – that CFSB assigned the HELOC and Mortgage to CRD/ADC, LLC.

7. But at trial, NCP submitted Exhibit 6 showed that the FDIC assigned the Mortgage on effective December 11, 2012. (Plaintiff’s Exhibit 6).

8. NCP then submitted Exhibit 7 at trial which showed that NCP was assigned the Mortgage on June 26, 2018. But Exhibit 7 was executed by Colfin **2013** CRE ADC Funding, LLC on behalf of CRD/ADC, LLC (“Colfin **2013**”) – not Colfin **2012**.

9. This is despite the fact that Colfin **2013** CRE ADC Funding, LLC is a separate Delaware company, founded October 2, 2013, and was never the minority owner in CRD/ADC, LLC. This is a huge hole in NCP’s chain of title. (See Exhibit “B”).

10. Curiously, the main witness for NCP Pilgrim could not state for sure whether it was a “servicer” or owner of the note.

11. Also, the Plaintiff's witness also could not confirm whether NCP Pilgrim has possession of the Note, required to perfect any security interest in the Mortgage. S.C. Code Ann. §§ 36-9-203(g) and 36-9-309(e) [which require actual possession of any note to foreclose, because Article 9 governs how the mortgage follows the note].

12. To date, neither Clancy nor the Court has received any proof – or been shown – that NCP even possesses the original note at all.

LEGAL ANALYSIS AND ARGUMENT

At a threshold level, Clancy does not allege that NCP must submit “its foreclosure claim,” to the FDIC.

However, “no court may take any action for or toward the removal of any conservator or receiver or, except at the request of the [OCC], to restrain or affect the exercise of powers or functions of a conservator or receiver. 12 U.S.C. §§ 1464(d)(2)(D) & 1821(c)(7).

As NCP concedes, the federal Financial Institutions Reform, Recovery, and Enforcement Act² (“FIRREA”), grants the FDIC authority to transfer or retain any asset of the failed bank. See 12 U.S.C. § 1821(d)(2)(G); 12 U.S.C. 1821(d)(3)(D). It was enacted in 1989, after the wake of the savings and loan crisis of the 1980s, and changed the governing statutes of the FDIC (12 U.S.C. § 1811 *et seq.*). FIRREA contemplates that the “FDIC has sweeping authority to manage

² In 1989, faced with a nationwide crisis in the savings and loan industry, Congress enacted Pub.L. No. 101-73, 103 Stat. 183 (1989). Convinced that inadequate enforcement powers and regulatory laxity were contributing factors to the failure of many thrift institutions, Congress granted expanded and strengthened enforcement powers to federal bank regulators, including the OCC. See H.R.Rep. No. 101-54(I), at 464-66 (1989), *reprinted in* 1989-2 U.S.C.C.A.N. 86, 260-62; H.R. Conf. Rep. No. 101-222, at 393, 439-42 (1989), *reprinted in* 1989-2 U.S.C.C.A.N. 432, 478-81. One of FIRREA's core purposes is “[t]o provide funds from public and private sources to deal expeditiously with failed depository institutions.” See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub.L. No. 101-73, § 101(8) (1989).

the affairs of a failed bank to further the purpose of expeditious resolution of the failed bank's affairs, regardless of whether the FDIC retains assets outright or through a "structured transaction." *See McCarthy v. FDIC*, 348 F.3d 1075, 1079 (9th Cir. 2003).

According to the FDIC, "[t]hese transactions are the sale of assets through the use of private/public partnership transactions. These structured sales utilize the asset management expertise of the private sector, while retaining for the FDIC a participation interest in all future cash flows generated by the workout of the assets over time. The future expenses and income will be shared on the percentage ownership between purchaser and FDIC." [www.fdic.gov/buying/historical/structured/index.html].

One of the goals of FIRREA was to provide an administrative claims process for claims against the assets of failed banks held by the FDIC as receiver. *See Freeman v. F.D.I.C.*, 56 F.3d 1394, 1399 (D.C. Cir. 1995). [Please note that the FDIC is referred to as the 'Corporation' in the statutes [12 U.S.C. § 1811(a)]].

At Section 1821(d) of FIRREA are set forth the "Powers and duties of Corporation as conservator or receiver" which enumerates many powers. At § 1821 (d)(13), are "[a]dditional rights and duties" and sub-paragraph (D) is found the "Limitation on judicial review." The parties disagree over this section of FIRREA – 'Limitation on Judicial Review.'

DISAGREEMENT

Plaintiff says that only a party making claims against a failed institution – which the Plaintiff argues it is not doing – must make them first in the FDIC under § 1821 (d)(13). (Pltf's Memo, pp. 3-4). Since the FDIC is: (1) authorized to foreclose against a failed bank's assets; and (2) it is well-settled that assignors step into the shoes of assignees, then – as NCP argues – the fact

that NCP cannot find any authority in favor of requiring third-party purchasers to litigate before the FDIC under § 1821 (d)(13) means that Clancy's argument is flawed (Pltf's Memo pp. 4-5). In other words, NCP says, a third-party purchaser like NCP can proceed against the debtor for foreclosure regardless of § 1821 (d)(13).

But there are three problems with Plaintiff's line of reasoning:

The first is that 12 U.S.C. 1821(d) [at subsections (3) to (13)] does not specifically speak of claims against a "failed financial institution", nor does it make any distinction between claims of a third-party purchaser v. the FDIC. The undersigned cannot find either the phrase "failed financial institution" or "third- party purchaser" in a word-search of this section.

Second, Plaintiff cites *Tillman v. Resolution Tr. Corp.*, 37 F.3d 1032, 1035 (4th Cir. 1994) for this proposition that it – as a Third-Party Creditor – can foreclose the mortgage. Plaintiff fails to comprehend the manner in which the receiver in *Tillman* [the Resolution Trust Company ("RTC")], structured a transaction that transferred assets of a failed bank to a newly created entity, but all the while maintaining all rights as the receiver, by naming itself as its conservator. *See Tillman*, 37 F.3d at 1034. Moreover, *Tillman* rejects any scheme whereby a third party, absent express authority by the receiver of the failed institution, may seek judicial review of its assertion of rights:

In *Brady Development Co., Inc. v. RTC*, 14 F.3d 998 (4th Cir.1994), we construed the § 1821(d)(13)(D) limitation on judicial review in FIRREA as a jurisdictional bar ... [r]easoning that the elaborate administrative scheme established in 12 U.S.C. §§ 1821(d)(5)-(14) would be rendered meaningless through improvident judicial review **because creditors would opt out of the administrative review**, we held that a plaintiff's failure to exhaust the administrative process deprives the courts of subject matter jurisdiction.

Tillman, 37 F.3d at 1035.

Third, the provision [12 U.S.C. § 1821(d)(13)(D)] set a jurisdictional bar over certain claims by providing for judicial review only after an administrative claims process as follows:

(D) Limitation on judicial review

Except as otherwise provided in this subsection, no court shall have jurisdiction over —

- (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
- (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

12 U.S.C. § 1821(d)(13)(D)(emphasis added).

Here, it is clear that NCP seeks **a determination of rights with respect to the “assets” of a depository institution – i.e., the CFSB loan to Clancy – which it claims it lawfully received from the FDIC**, but which it cannot (a) show that it has the note; or (b) show that the FDIC ever approved the assignment from CRD/ADC Venture 2012-1, LLC on 26 June 2018. Since NCP is seeking the Court determine its rights in this foreclosure – *based specifically on the assignment from CRD/ADC Venture 2012-1, LLC (!)* – then this honorable Court has lost its jurisdiction to determine this under FIRREA.

In other words, NCP seeks a determination from the Court that its chain of title is 100% correct, which is the essence an “any action seeking a determination of rights” – for which this court is denied jurisdiction. FIRREA says it says, and means what it says. It remains effective law:

Thus, no court has jurisdiction to hear any "claim or action for payment from" or "action seeking a determination of rights with respect to" any "asset" of a failed bank for which the FDIC is receiver, with one relevant exception. Under § 1821(d)(6), both the United States District Court for the District of Columbia and the district court for the district where the financial institution has its principal place of business have jurisdiction to review *de novo* claims filed with, and processed by, the FDIC under its administrative claims process. *See Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 391-

92 (3d Cir.), *cert. denied*, 502 U.S. 981, 112 S.Ct. 582, 116 L.Ed.2d 608 (1991). Such an action must be filed in district court within 60 days after the administrative claim is disallowed, or within 60 days after the expiration of the 180-day period allowed for processing the administrative claim, whichever comes first. 12 U.S.C. § 1821(d)(6).

The effect of these provisions, read together, is to require anyone bringing a claim against or "seeking a determination of rights with respect to" the assets of a failed bank held by the FDIC as receiver to first exhaust administrative remedies by filing an administrative claim under the FDIC's administrative claims process. *Office and Professional Employees Int'l Union, Local 2 v. FDIC*, 962 F.2d 63, 65-66 (D.C. Cir. 1992). As the First Circuit explained, "FIRREA makes participation in the administrative claims review process mandatory for all parties asserting claims against failed institutions," and "where a claimant has ... failed to initiate an administrative claim within the filing period, the claimant necessarily forfeits any right to pursue a claim against the failed institution's assets in any court."

Freeman v. F.D.I.C., 56 F.3d 1394, 1399-1400 (D.C. Cir. 1995); in *Willner v. Dimon*, 849 F.3d 93, 103 (4th Cir. 2017), the Fourth Circuit Court of Appeals held that "these provisions combine to create an exhaustion requirement that, we have concluded, is 'absolute and unwaivable'" and that "Subsection (i) bars any unexhausted 'claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver.'" *Id.*

Stated another way, NCP cannot ask any Court to review the "structured transaction" (and thus divest the FDIC of its 60% ownership claim) because FIRREA prohibits judicial actions which seek "to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver," 12 U.S.C. § 1821(j). *See Hindes v. FDIC*, 137 F.3d 148, 160-61 (3rd Cir.1998).

Since NCP concedes any right to foreclosure is *based specifically on the assignment from CRD/ADC Venture 2012-1, LLC*, this honorable Court has lost its jurisdiction under FIRREA. After all, it is clearly within Congress' power to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate under the Constitution. *See, e.g. Kalb v. Feuerstein*, 308 U.S. 433 (1940).

The cases cited by the Plaintiff in support of its position, such as *Dittmer Properties, LP v. FDIC*, 708 F.3d 1011, 1017 (8th Cir. 2013), merely state that that the FDIC is not subject to FIRREA. *Deutsche Bank Nat'l Tr. Co. v. Burke*, 902 F.3d 548, 552 (5th Cir. 2018), cited by Plaintiff does not even discuss FIRREA. Likewise, FIRREA's jurisdiction clause is not the subject of *Joint Venture v. Onion*, 938 F.2d 35, 39 (5th Cir. 1991), *cert. denied*, 502 U.S. 1057 (1992). There is simply no law which lets NCP do what it wants here.

FIRREA is a federal statute and must be upheld by this Court. The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution and provides that any state law that conflicts with federal law is "without effect." *Priester v. Cromer*, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012); *Weston v. Kim's Dollar Store*, 385 S.C. 520, 525-526, 684 S.E.2d 769, 772 (Ct. App 2009). Congress may expressly preempt state law through specific language clearly stating its intent. *Priester*, 401 S.C. at 43, 736 S.E.2d at 252. As far as NCP's argument that it has been unfairly "surprised by Clancy's FIRREA argument, Clancy points the longstanding law of South Carolina subject matter jurisdiction may not be waived. *Eaddy v. Eaddy*, 283 S.C. 582, 584, 324 S.E.2d 70, 72 (1984). Lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal, by a party or by the court. *Ex Parte Canon*, 385 S.C. 643, 654, 685 S.E.2d 814, 821 (Ct. App. 2009).

CONCLUSION

Simply put, NCP seeks a determination from the Court that an unrelated third party, Colfin **2013**, LLC – and not the FDIC –has the authority to transfer assets of CFSB to it. This defies the entire premise of FIRREA. In essence, NCP brought an "action seeking a determination of rights" – for which this court is denied jurisdiction. Something is extremely fishy with these facts; at best,

it requires NCP to apply to the FDIC under FIRREA. 12 U.S.C. § 1821(d)(13)(D) for a determination of its rights. At worst, there are huge holes in their chain of title, which militates in favor of the Court upholding the jurisdiction denying provisions of FIRREA.

Respectfully submitted,

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***Attorneys for the Defendants Mary Lou Cercopely,
David S. Clancy and David Sean Clancy.***

February 26, 2020
Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within ***Post-Trial Memorandum of the Defendant Mary Lou Cercopely, David S. Clancy and David Sean Clancy*** upon all parties to these matters by e-filing:

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February 26, 2020
Mount Pleasant, South Carolina

EXHIBIT A

Statutes and Case Law Cited in Memorandum

United States Code Annotated
Title 12. Banks and Banking
Chapter 16. Federal Deposit Insurance Corporation (Refs & Annos)

12 U.S.C.A. § 1821

§ 1821. Insurance Funds

Effective: January 1, 2013

[Currentness](#)

(a) Deposit insurance

(1) Insured amounts payable

(A) In general

The Corporation shall insure the deposits of all insured depository institutions as provided in this chapter.

(B) Net amount of insured deposit

The net amount due to any depositor at an insured depository institution shall not exceed the standard maximum deposit insurance amount as determined in accordance with subparagraphs (C), (D), (E) and (F) and paragraph (3).

(C) Aggregation of deposits

For the purpose of determining the net amount due to any depositor under subparagraph (B), the Corporation shall aggregate the amounts of all deposits in the insured depository institution which are maintained by a depositor in the same capacity and the same right for the benefit of the depositor either in the name of the depositor or in the name of any other person, other than any amount in a trust fund described in [paragraph \(1\) or \(2\) of section 1817\(i\)](#) of this title or any funds described in [section 1817\(i\)\(3\)](#) of this title.

(D) Coverage for certain employee benefit plan deposits

(i) Pass-through insurance

The Corporation shall provide pass-through deposit insurance for the deposits of any employee benefit plan.

(ii) Prohibition on acceptance of benefit plan deposits

The appropriate Federal banking agency shall not appoint a conservator for an insured depository institution under subparagraph (K) or (L) of paragraph (5) without the Corporation's consent unless the agency has given the Corporation 48 hours notice of the agency's intention to appoint the conservator and the grounds for the appointment.

(12) Directors not liable for acquiescing in appointment of conservator or receiver

The members of the board of directors of an insured depository institution shall not be liable to the institution's shareholders or creditors for acquiescing in or consenting in good faith to--

(A) the appointment of the Corporation as conservator or receiver for that institution; or

(B) an acquisition or combination under [section 1831o\(f\)\(2\)\(A\)\(iii\)](#) of this title.

(13) Additional powers

In any case in which the Corporation is appointed conservator or receiver under paragraph (4), (6), (9), or (10) for any insured State depository institution--

(A) this section shall apply to the Corporation as conservator or receiver in the same manner and to the same extent as if that institution were a Federal depository institution for which the Corporation had been appointed conservator or receiver; and

(B) the Corporation as receiver of the institution may--

(i) liquidate the institution in an orderly manner; and

(ii) make any other disposition of any matter concerning the institution, as the Corporation determines is in the best interests of the institution, the depositors of the institution, and the Corporation.

(d) Powers and duties of Corporation as conservator or receiver

(1) Rulemaking authority of Corporation

The Corporation may prescribe such regulations as the Corporation determines to be appropriate regarding the conduct of conservatorships or receiverships.

(2) General powers

(A) Successor to institution

The Corporation shall, as conservator or receiver, and by operation of law, succeed to--

(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

(B) Operate the institution

The Corporation may (subject to the provisions of [section 1831q](#) of this title), as conservator or receiver--

(i) take over the assets of and operate the insured depository institution with all the powers of the members or shareholders, the directors, and the officers of the institution and conduct all business of the institution;

(ii) collect all obligations and money due the institution;

(iii) perform all functions of the institution in the name of the institution which are consistent with the appointment as conservator or receiver; and

(iv) preserve and conserve the assets and property of such institution.

(C) Functions of institution's officers, directors, and shareholders

The Corporation may, by regulation or order, provide for the exercise of any function by any member or stockholder, director, or officer of any insured depository institution for which the Corporation has been appointed conservator or receiver.

(D) Powers as conservator

The Corporation may, as conservator, take such action as may be--

(i) necessary to put the insured depository institution in a sound and solvent condition; and

(ii) appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution.

(E) Additional powers as receiver

The Corporation may (subject to the provisions of [section 1831q](#) of this title), as receiver, place the insured depository institution in liquidation and proceed to realize upon the assets of the institution, having due regard to the conditions of credit in the locality.

(F) Organization of new institutions

The Corporation may, as receiver, with respect to any insured depository institution, organize a new depository institution under subsection (m) or a bridge depository institution under subsection (n).

(G) Merger; transfer of assets and liabilities

(i) In general

The Corporation may, as conservator or receiver--

(I) merge the insured depository institution with another insured depository institution; or

(II) subject to clause (ii), transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer.

(ii) Approval by appropriate Federal banking agency

No transfer described in clause (i)(II) may be made to another depository institution (other than a new depository institution or a bridge depository institution established pursuant to subsection (m) or (n)) without the approval of the appropriate Federal banking agency for such institution.

(H) Payment of valid obligations

The Corporation, as conservator or receiver, shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter.

(I) Subpoena authority

(i) In general

The Corporation may, as conservator, receiver, or exclusive manager and for purposes of carrying out any power, authority, or duty with respect to an insured depository institution (including determining any claim against the institution and determining and realizing upon any asset of any person in the course of collecting money due the institution), exercise any power established under [section 1818\(n\)](#) of this title, and the provisions of such section shall apply with respect to the exercise of any such power under this subparagraph in the same manner as such provisions apply under such section.

(ii) Authority of Board of Directors

A subpoena or subpoena duces tecum may be issued under clause (i) only by, or with the written approval of, the Board of Directors or their designees (or, in the case of a subpoena or subpoena duces tecum issued by the Resolution Trust

Corporation under this subparagraph and [section 1441a\(b\)\(4\)](#) of this title, only by, or with the written approval of, the Board of Directors of such Corporation or their designees).

(iii)Rule of construction

This subsection shall not be construed as limiting any rights that the Corporation, in any capacity, might otherwise have under [section 1820\(c\)](#) of this title.

(J)Incidental powers

The Corporation may, as conservator or receiver--

(i)exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this chapter and such incidental powers as shall be necessary to carry out such powers; and

(ii)take any action authorized by this chapter,

which the Corporation determines is in the best interests of the depository institution, its depositors, or the Corporation.

(K)Utilization of private sector

In carrying out its responsibilities in the management and disposition of assets from insured depository institutions, as conservator, receiver, or in its corporate capacity, the Corporation shall utilize the services of private persons, including real estate and loan portfolio asset management, property management, auction marketing, legal, and brokerage services, only if such services are available in the private sector and the Corporation determines utilization of such services is the most practicable, efficient, and cost effective.

(3)Authority of receiver to determine claims

(A)In general

The Corporation may, as receiver, determine claims in accordance with the requirements of this subsection and regulations prescribed under paragraph (4).

(B)Notice requirements

The receiver, in any case involving the liquidation or winding up of the affairs of a closed depository institution, shall--

(i) promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause (i).

(C)Mailing required

The receiver shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the institution's books--

(i) at the creditor's last address appearing in such books; or

(ii) upon discovery of the name and address of a claimant not appearing on the institution's books within 30 days after the discovery of such name and address.

(4)Rulemaking authority relating to determination of claims

(A)In general

The Corporation may prescribe regulations regarding the allowance or disallowance of claims by the receiver and providing for administrative determination of claims and review of such determination.

(B)Final settlement payment procedure

(i)In general

In the handling of receiverships of insured depository institutions, to maintain essential liquidity and to prevent financial disruption, the Corporation may, after the declaration of an institution's insolvency, settle all uninsured and unsecured claims on the receivership with a final settlement payment which shall constitute full payment and disposition of the Corporation's obligations to such claimants.

(ii)Final settlement payment

For purposes of clause (i), a final settlement payment shall be payment of an amount equal to the product of the final settlement payment rate and the amount of the uninsured and unsecured claim on the receivership; and

(iii)Final settlement payment rate

For purposes of clause (ii), the final settlement payment rate shall be a percentage rate reflecting an average of the Corporation's receivership recovery experience, determined by the Corporation in such a way that over such time period as the Corporation may deem appropriate, the Corporation in total will receive no more or less than it would have received in total as a general creditor standing in the place of insured depositors in each specific receivership.

(iv)Corporation authority

The Corporation may undertake such supervisory actions and promulgate such regulations as may be necessary to assure that the requirements of this section can be implemented with respect to each insured depository institution in the event of its insolvency.

(5) Procedures for determination of claims

(A) Determination period

(i) In general

Before the end of the 180-day period beginning on the date any claim against a depository institution is filed with the Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

(ii) Extension of time

The period described in clause (i) may be extended by a written agreement between the claimant and the Corporation.

(iii) Mailing of notice sufficient

The requirements of clause (i) shall be deemed to be satisfied if the notice of any determination with respect to any claim is mailed to the last address of the claimant which appears--

- (I)** on the depository institution's books;
- (II)** in the claim filed by the claimant; or
- (III)** in documents submitted in proof of the claim.

(iv) Contents of notice of disallowance

If any claim filed under clause (i) is disallowed, the notice to the claimant shall contain--

- (I)** a statement of each reason for the disallowance; and
- (II)** the procedures available for obtaining agency review of the determination to disallow the claim or judicial determination of the claim.

(B) Allowance of proven claims

The receiver shall allow any claim received on or before the date specified in the notice published under paragraph (3)(B)(i) by the receiver from any claimant which is proved to the satisfaction of the receiver.

(C) Disallowance of claims filed after end of filing period

(i) In general

Except as provided in clause (ii), claims filed after the date specified in the notice published under paragraph (3)(B)(i) shall be disallowed and such disallowance shall be final.

(ii) Certain exceptions

Clause (i) shall not apply with respect to any claim filed by any claimant after the date specified in the notice published under paragraph (3)(B)(i) and such claim may be considered by the receiver if--

(I) the claimant did not receive notice of the appointment of the receiver in time to file such claim before such date; and

(II) such claim is filed in time to permit payment of such claim.

(D) Authority to disallow claims

(i) In general

The receiver may disallow any portion of any claim by a creditor or claim of security, preference, or priority which is not proved to the satisfaction of the receiver.

(ii) Payments to less than fully secured creditors

In the case of a claim of a creditor against an insured depository institution which is secured by any property or other asset of such institution, any receiver appointed for any insured depository institution--

(I) may treat the portion of such claim which exceeds an amount equal to the fair market value of such property or other asset as an unsecured claim against the institution; and

(II) may not make any payment with respect to such unsecured portion of the claim other than in connection with the disposition of all claims of unsecured creditors of the institution.

(iii) Exceptions

No provision of this paragraph shall apply with respect to--

(I) any extension of credit from any Federal home loan bank or Federal Reserve bank to any insured depository institution; or

(II) any security interest in the assets of the institution securing any such extension of credit.

(E)No judicial review of determination pursuant to subparagraph (D)

No court may review the Corporation's determination pursuant to subparagraph (D) to disallow a claim.

(F)Legal effect of filing

(i)Statute of limitation tolled

For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii)No prejudice to other actions

Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(6)Provision for agency review or judicial determination of claims

(A)In general

Before the end of the 60-day period beginning on the earlier of--

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which the Corporation is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i),

the claimant may request administrative review of the claim in accordance with subparagraph (A) or (B) of paragraph (7) or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

(B)Statute of limitations

If any claimant fails to--

(i) request administrative review of any claim in accordance with subparagraph (A) or (B) of paragraph (7); or

(ii) file suit on such claim (or continue an action commenced before the appointment of the receiver),

before the end of the 60-day period described in subparagraph (A), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver) as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(7)Review of claims

(A)Administrative hearing

If any claimant requests review under this subparagraph in lieu of filing or continuing any action under paragraph (6) and the Corporation agrees to such request, the Corporation shall consider the claim after opportunity for a hearing on the record. The final determination of the Corporation with respect to such claim shall be subject to judicial review under chapter 7 of Title 5.

(B)Other review procedures

(i)In general

The Corporation shall also establish such alternative dispute resolution processes as may be appropriate for the resolution of claims filed under paragraph (5)(A)(i).

(ii)Criteria

In establishing alternative dispute resolution processes, the Corporation shall strive for procedures which are expeditious, fair, independent, and low cost.

(iii)Voluntary binding or nonbinding procedures

The Corporation may establish both binding and nonbinding processes, which may be conducted by any government or private party, but all parties, including the claimant and the Corporation, must agree to the use of the process in a particular case.

(iv)Consideration of incentives

The Corporation shall seek to develop incentives for claimants to participate in the alternative dispute resolution process.

(8)Expedited determination of claims

(A) Establishment required

The Corporation shall establish a procedure for expedited relief outside of the routine claims process established under paragraph (5) for claimants who--

- (i) allege the existence of legally valid and enforceable or perfected security interests in assets of any depository institution for which the Corporation has been appointed receiver; and
- (ii) allege that irreparable injury will occur if the routine claims procedure is followed.

(B) Determination period

Before the end of the 90-day period beginning on the date any claim is filed in accordance with the procedures established pursuant to subparagraph (A), the Corporation shall--

- (i) determine--
 - (I) whether to allow or disallow such claim; or
 - (II) whether such claim should be determined pursuant to the procedures established pursuant to paragraph (5); and
- (ii) notify the claimant of the determination, and if the claim is disallowed, provide a statement of each reason for the disallowance and the procedure for obtaining agency review or judicial determination.

(C) Period for filing or renewing suit

Any claimant who files a request for expedited relief shall be permitted to file a suit, or to continue a suit filed before the appointment of the receiver, seeking a determination of the claimant's rights with respect to such security interest after the earlier of--

- (i) the end of the 90-day period beginning on the date of the filing of a request for expedited relief; or
- (ii) the date the Corporation denies the claim.

(D) Statute of limitations

If an action described in subparagraph (C) is not filed, or the motion to renew a previously filed suit is not made, before the end of the 30-day period beginning on the date on which such action or motion may be filed in accordance with subparagraph (B), the claim shall be deemed to be disallowed as of the end of such period (other than any portion of such claim which was allowed by the receiver), such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(E)Legal effect of filing

(i)Statute of limitation tolled

For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii)No prejudice to other actions

Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(9)Agreement as basis of claim

(A)Requirements

Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in [section 1823\(e\)](#) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation.

(B)Exception to contemporaneous execution requirement

Notwithstanding [section 1823\(e\)\(2\)](#) of this title, any agreement relating to an extension of credit between a Federal home loan bank or Federal Reserve bank and any insured depository institution which was executed before the extension of credit by such bank to such institution shall be treated as having been executed contemporaneously with such extension of credit for purposes of subparagraph (A).

(10)Payment of claims

(A)In general

The receiver may, in the receiver's discretion and to the extent funds are available, pay creditor claims which are allowed by the receiver, approved by the Corporation pursuant to a final determination pursuant to paragraph (7) or (8), or determined by the final judgment of any court of competent jurisdiction in such manner and amounts as are authorized under this chapter.

(B)Payment of dividends on claims

The receiver may, in the receiver's sole discretion, pay dividends on proved claims at any time, and no liability shall attach to the Corporation (in such Corporation's corporate capacity or as receiver), by reason of any such payment, for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment.

(C)Rulemaking authority of Corporation

The Corporation may prescribe such rules, including definitions of terms, as it deems appropriate to establish a single uniform interest rate for or to make payments of post insolvency interest to creditors holding proven claims against the receivership estates of insured Federal or State depository institutions following satisfaction by the receiver of the principal amount of all creditor claims.

(11)Depositor preference

(A)In general

Subject to [section 1815\(e\)\(2\)\(C\)](#) of this title, amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

- (i) Administrative expenses of the receiver.
- (ii) Any deposit liability of the institution.
- (iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).
- (iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).
- (v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

(B)Effect on State law

(i)In general

The provisions of subparagraph (A) shall not supersede the law of any State except to the extent such law is inconsistent with the provisions of such subparagraph, and then only to the extent of the inconsistency.

(ii)Procedure for determination of inconsistency

Upon the Corporation's own motion or upon the request of any person with a claim described in subparagraph (A) or any State which is submitted to the Corporation in accordance with procedures which the Corporation shall prescribe, the Corporation shall determine whether any provision of the law of any State is inconsistent with any provision of subparagraph (A) and the extent of any such inconsistency.

(iii)Judicial review

The final determination of the Corporation under clause (ii) shall be subject to judicial review under chapter 7 of Title 5.

(C)Accounting report

Any distribution by the Corporation in connection with any claim described in subparagraph (A)(v) shall be accompanied by the accounting report required under paragraph (15)(B).

(12)Suspension of legal actions

(A)In general

After the appointment of a conservator or receiver for an insured depository institution, the conservator or receiver may request a stay for a period not to exceed--

(i) 45 days, in the case of any conservator; and

(ii) 90 days, in the case of any receiver,

in any judicial action or proceeding to which such institution is or becomes a party.

(B)Grant of stay by all courts required

Upon receipt of a request by any conservator or receiver pursuant to subparagraph (A) for a stay of any judicial action or proceeding in any court with jurisdiction of such action or proceeding, the court shall grant such stay as to all parties.

(13)Additional rights and duties

(A)Prior final adjudication

The Corporation shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Corporation as conservator or receiver.

(B)Rights and remedies of conservator or receiver

In the event of any appealable judgment, the Corporation as conservator or receiver shall--

(i) have all the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights; and

(ii) not be required to post any bond in order to pursue such remedies.

(C)No attachment or execution

No attachment or execution may issue by any court upon assets in the possession of the receiver.

(D)Limitation on judicial review

Except as otherwise provided in this subsection, no court shall have jurisdiction over--

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

(E)Disposition of assets

In exercising any right, power, privilege, or authority as conservator or receiver in connection with any sale or disposition of assets of any insured depository institution for which the Corporation has been appointed conservator or receiver, including any sale or disposition of assets acquired by the Corporation under [section 1823\(d\)\(1\)](#) of this title, the Corporation shall conduct its operations in a manner which--

(i) maximizes the net present value return from the sale or disposition of such assets;

(ii) minimizes the amount of any loss realized in the resolution of cases;

(iii) ensures adequate competition and fair and consistent treatment of offerors;

(iv) prohibits discrimination on the basis of race, sex, or ethnic groups in the solicitation and consideration of offers; and

(v) maximizes the preservation of the availability and affordability of residential real property for low- and moderate-income individuals.

(14)Statute of limitations for actions brought by conservator or receiver

(A)In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be--

For purposes of this subsection, the following definitions shall apply:

(A)Eligible commercial real property

The term “eligible commercial real property” means any property (i) to which the Corporation acquires title, and (ii) that the Corporation, in the discretion of the Corporation, determines is suitable for use for the location of offices or other administrative functions involved with carrying out a program referred to in paragraph (1)(B).

(B)Nonprofit organization and public agency

The terms “nonprofit organization” and “public agency” have the same meanings as in [section 1831q\(p\)](#) of this title.

CREDIT(S)

(Sept. 21, 1950, c. 967, § 2[11], 64 Stat. 884; [Pub.L. 89-695, Title III, § 301\(c\), \(d\)](#), Oct. 16, 1966, 80 Stat. 1055; [Pub.L. 91-151, Title I, § 7\(a\)\(3\), \(4\)](#), Dec. 23, 1969, 83 Stat. 375; [Pub.L. 93-495, Title I, §§ 101\(a\)\(3\), 102\(a\)\(3\), \(4\)](#), Oct. 28, 1974, 88 Stat. 1500, 1502; [Pub.L. 95-369, § 6\(c\)\(17\) to \(22\)](#), Sept. 17, 1978, 92 Stat. 619; [Pub.L. 95-630, Title XIV, § 1401\(a\)](#), Nov. 10, 1978, 92 Stat. 3712; [Pub.L. 96-153, Title III, § 323\(a\)](#), Dec. 21, 1979, 93 Stat. 1120; [Pub.L. 96-221, Title III, § 308\(a\)\(1\) \(C\), \(D\)](#), Mar. 31, 1980, 94 Stat. 147; [Pub.L. 97-110, Title I, § 103\(c\)](#), Dec. 26, 1981, 95 Stat. 1514; [Pub.L. 97-320, Title I, § 113\(j\), \(k\)](#), Oct. 15, 1982, 96 Stat. 1474; [Pub.L. 99-514, § 2](#), Oct. 22, 1986, 100 Stat. 2095; [Pub.L. 100-86, Title V, §§ 503\(a\), 507](#), Aug. 10, 1987, 101 Stat. 629, 634; [Pub.L. 101-73, Title II, §§ 201\(a\)\(1\), \(b\)](#), 211 to 214, Title IX, § 909, Aug. 9, 1989, 103 Stat. 187, 188, 218, 222, 243, 246, 477; [Pub.L. 101-647, Title XXV, §§ 2521\(a\)\(1\), 2526\(a\), 2527\(a\), 2528\(a\), 2532\(b\), 2534\(a\)](#), Nov. 29, 1990, 104 Stat. 4863, 4875, 4877, 4880, 4882; [Pub.L. 102-233, Title I, § 102, Title II, § 202\(a\), \(b\), Title III, § 302\(a\)](#), Dec. 12, 1991, 105 Stat. 1761, 1766, 1767; [Pub.L. 102-242, Title I, §§ 123\(a\), 133\(a\), \(e\), 141\(b\), \(d\), 161\(a\), \(e\), Title II, § 241\(c\)\(1\), Title III, § 311\(a\)\(1\), \(b\)\(1\), \(2\), \(5\)\(B\), \(C\), Title IV, §§ 416, 426, 446](#), Dec. 19, 1991, 105 Stat. 2252, 2270, 2272, 2277, 2278, 2285, 2286, 2331, 2363, 2364, 2366, 2376, 2378, 2382; [Pub.L. 102-550, Title XV, §§ 1501\(a\)](#), 1544, Title XVI, §§ 1603(e)(1), 1604(c)(2), 1606(c), 1611(b), Oct. 28, 1992, 106 Stat. 4044, 4069, 4081, 4083, 4090; [Pub.L. 103-66, Title III, § 3001\(a\), \(b\)](#), Aug. 10, 1993, 107 Stat. 336; [Pub.L. 103-204, §§ 3\(d\), 4\(b\), 8\(a\) to \(f\), \(i\), 11, 15\(b\), 16\(b\), 17\(b\), 20, 27\(b\), 38\(b\)](#), Dec. 17, 1993, 107 Stat. 2379, 2380, 2384, 2386 to 2389, 2399 to 2401, 2404, 2405, 2410, 2416; [Pub.L. 103-325, Title III, § 325, Title IV, § 411\(c\)\(2\)\(A\), Title VI, § 602\(a\)\(12\) to \(33\)](#), Sept. 23, 1994, 108 Stat. 2228, 2253, 2289; [Pub.L. 103-328, Title II, § 201\(a\)](#), Sept. 29, 1994, 108 Stat. 2368; [Pub.L. 103-394, Title V, § 501\(c\)\(2\)](#), Oct. 22, 1994, 108 Stat. 4143; [Pub.L. 104-208, Div. A, Title II, §§ 2602, 2704\(d\)\(1\) to \(4\), \(6\)\(C\), \(14\)\(H\), \(I\)](#), 2705, Sept. 30, 1996, 110 Stat. 3009-469, 3009-486, 3009-487, 3009-488, 3009-492, 3009-495; [Pub.L. 104-316, Title I, § 106\(i\)](#), Oct. 19, 1996, 110 Stat. 3831; [Pub.L. 106-102, Title I, § 117, Title VII, § 736\(a\), \(b\)\(2\)](#), Nov. 12, 1999, 113 Stat. 1372, 1479; [Pub.L. 106-400, § 2](#), Oct. 30, 2000, 114 Stat. 1675; [Pub.L. 106-569, Title XII, § 1222](#), Dec. 27, 2000, 114 Stat. 3036; [Pub.L. 108-271, § 8\(b\)](#), July 7, 2004, 118 Stat. 814; [Pub.L. 108-386, § 8\(a\)\(4\)](#), Oct. 30, 2004, 118 Stat. 2231; [Pub.L. 109-8, Title IX, §§ 901\(a\)\(1\), \(b\)\(1\), \(c\)\(1\), \(d\)\(1\), \(e\)\(1\), \(f\)\(1\), \(g\)\(1\), \(h\)\(1\), \(i\)\(1\)](#), 902(a), 903(a), 904(a), 905(a), 908(a), Apr. 20, 2005, 119 Stat. 147, 149, 151, 152, 155, 157 to 160, 165, 166, 183; [Pub.L. 109-171, Title II, §§ 2102\(b\), 2103\(a\) to \(c\)](#), Feb. 8, 2006, 120 Stat. 9 to 11; [Pub.L. 109-173, §§ 2\(a\), \(c\)\(1\), 8\(a\)\(11\) to \(14\)](#), Feb. 15, 2006, 119 Stat. 3601, 3602, 3611, 3612; [Pub.L. 109-351, Title VII, §§ 701\(b\), 718\(a\), 721\(a\), 722\(a\), 724](#), Oct. 13, 2006, 120 Stat. 1985, 1997 to 1999, 2001; [Pub.L. 109-390, §§ 2\(a\)\(1\), \(b\)\(1\), \(c\)\(1\), 3\(a\), 6\(a\)](#), Dec. 12, 2006, 120 Stat. 2692 to 2694, 2698; [Pub.L. 110-289, Div. A, Title I, § 1161\(i\), Title VI, § 1604\(a\), \(c\), \(d\)](#), July 30, 2008, 122 Stat. 2781, 2826, 2829; [Pub.L. 111-203, Title III, §§ 335\(a\), 343\(a\)\(1\), \(3\), 363\(5\)](#), July 21, 2010, 124 Stat. 1540, 1544, 1552; [Pub.L. 111-343, § 1\(a\)](#), Dec. 29, 2010, 124 Stat. 3609; [Pub.L. 112-215, § 1\(1\)](#), Dec. 20, 2012, 126 Stat. 1589.)

Footnotes

- 1 So in original. Probably should be “depository institution”.
- 2 So in original. Probably should be followed by “or”.
- 3 So in original. The semicolon probably should be preceded by an additional closing parentheses.
- 4 So in original. The comma probably should not appear.
- 5 So in original. Probably should be “Bridge depository institution”.
- 6 So in original. Probably should be “bridge depository institutions”.
- 7 So in original.
- 8 So in original. Probably should be “Title 28,”.
- 9 So in original. Probably should be preceded by “The”.

12 U.S.C.A. § 1821, 12 USCA § 1821

Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

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37 F.3d 1032

United States Court of Appeals,
Fourth Circuit.

Paul J. TILLMAN, Plaintiff–Appellant,

v.

RESOLUTION TRUST CORPORATION,
as Conservator for Standard Federal
Savings Association, Defendant–Appellee,

and

Standard Federal Savings Bank, F.S.B.;

Stephen R. Best, Trustee, Defendants.

No. 93–2536.

Argued May 11, 1994.

Decided Aug. 24, 1994.

Synopsis

Borrower brought state court action to enjoin deed of trust foreclosure action brought by the federally appointed trustees of insolvent savings and loan association, and borrower's action was removed, on motion of the Resolution Trust Corporation (RTC), to federal district court. The United States District Court for the District of Maryland, [Edward S. Northrop](#), Senior District Judge, granted RTC's motion to dismiss for lack of subject matter jurisdiction, and borrower appealed. The Court of Appeals, [Niemeyer](#), Circuit Judge, held that: (1) anti-injunction provisions of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) deprived district court of subject matter jurisdiction, and (2) borrower's failure to exhaust administrative remedies likewise deprived court of jurisdiction to consider his breach of contract claims against savings and loan association.

Affirmed.

West Headnotes (6)

[1] Federal Courts**🔑 Jurisdiction**

District court order dismissing case for lack of subject matter jurisdiction is legal determination subject to de novo review.

19 Cases that cite this headnote

[2] Finance, Banking, and Credit**🔑 Savings and loans, credit unions, and related entities**

Anti-injunction provision of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) deprived district court of subject matter jurisdiction to enjoin deed of trust foreclosure action brought by federally appointed trustees of insolvent savings and loan association, on theory that borrower's obligation on deed of trust note was more than offset by savings and loan association's obligation to indemnify borrower for legal fees incurred in unrelated action. Federal Deposit Insurance Act, § 2[11](j), as amended, [12 U.S.C.A. § 1821\(j\)](#).

13 Cases that cite this headnote

[3] Finance, Banking, and Credit**🔑 Conservatorship or receivership****Finance, Banking, and Credit****🔑 Exhaustion of other remedies**

Borrower's failure to present his breach of contract claims to the Resolution Trust Corporation (RTC) in the first instance, as receiver of insolvent savings and loan association, was failure to exhaust administrative remedies, which deprived district court of subject matter jurisdiction to consider borrower's claims by way of setoff to his obligation on deed of trust debt. Federal Deposit Insurance Act, § 2[11](d), as amended, [12 U.S.C.A. § 1821\(d\)](#).

10 Cases that cite this headnote

[4] Administrative Law and Procedure**🔑 Exhaustion of Administrative Remedies****Finance, Banking, and Credit****🔑 Exhaustion of other remedies**

Exhaustion of administrative remedies provision in the Financial Institutions Reform, Recovery, and Enforcement Act, (FIRREA) is absolute and unwaivable jurisdictional requirement for judicial review. Federal Deposit Insurance Act, § 2[11](d), as amended, [12 U.S.C.A. § 1821\(d\)](#).

19 Cases that cite this headnote

[5] **Finance, Banking, and Credit**

🔑 Conservatorship or receivership

Finance, Banking, and Credit

🔑 Time for proceedings; limitations and laches

Claimant's failure to timely file with the Resolution Trust Corporation (RTC) his claims against insolvent financial institution results in waiver of claims, unless claimant did not receive notice of appointment of receiver in time to file his claims before bar date. Federal Deposit Insurance Act, § 2[11] (d)(3)(B)(i), (d)(3)(C), as amended, 12 U.S.C.A. § 1821(d)(3)(B)(i), (d)(3)(C).

17 Cases that cite this headnote

[6] **Finance, Banking, and Credit**

🔑 Conservatorship or receivership

Finance, Banking, and Credit

🔑 Time for proceedings; limitations and laches

Borrower received timely notice of appointment of the Resolution Trust Corporation (RTC) as receiver for insolvent savings and loan association, and waived his breach of contract claims against association by failing to file his administrative claim prior to expiration of bar date, given evidence of publication of notice to savings and loan association's creditors in local newspapers. Federal Deposit Insurance Act, § 2[11](d)(3)(B)(i), (d)(3)(C), as amended, 12 U.S.C.A. § 1821(d)(3)(B)(i), (d)(3)(C).

6 Cases that cite this headnote

Attorneys and Law Firms

***1033 ARGUED:** John F. Carroll, Law Offices of Jack Paul Leon, San Antonio, TX, for appellant. P. Matthew Sutko, Resolution Trust Corp., Washington, DC, for appellee. **ON BRIEF:** Jack Paul Leon, Law Offices of Jack P. Leon, San Antonio, TX; Abbe David Lowell, Brand &

Lowell, Washington, DC, for appellant. Mark P. Hileman, Acting Asst. Gen. Counsel, Marilyn F. Drees, Resolution Trust Corporation; Jeffrey P. Bloom, Douglas E. Ginsburg, Metzger, Hollis, Gordon & Mortimer, Washington, DC, for appellee.

Before NIEMEYER, Circuit Judge, PHILLIPS, Senior Circuit Judge, and ERWIN, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Senior Judge PHILLIPS and Senior District Judge ERWIN joined.

***1034 OPINION**

NIEMEYER, Circuit Judge:

Paul J. Tillman filed this action in state court seeking to enjoin a foreclosure action brought by the federally-appointed trustees of a failed savings and loan institution against his house in Bexar County, Texas. The Resolution Trust Corporation ("RTC") substituted itself as the defendant, removed the case to federal court, and moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(1), arguing that under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub.L. No. 101-73, 103 Stat. 183 (codified as amended in Title 12) ("FIRREA"), the district court lacked subject matter jurisdiction to hear the case. The district court agreed, and granted the motion to dismiss. This appeal followed, and we affirm.

I

In June 1986, Tillman, who was the president and chairman of the board of CitySavings and Loan Association in Texas ("CitySavings"), purchased a house located on 400 Morningside Drive, San Antonio, Texas. The property was acquired with the proceeds of a loan from CitySavings in the amount of \$1,025,000, secured by a Deed of Trust on the property. The note had a one year term, but was periodically extended by CitySavings, with the last extended maturity date at June 1, 1990. Tillman never made any payments on the note, and it is not disputed that he has been in default on the loan since June 1990.

On October 25, 1990, the Director of Office of Thrift Supervision, U.S. Department of Treasury, appointed RTC as receiver of CitySavings. That same day, the Office of Thrift Supervision chartered a new federal mutual savings association, known as “CitySavings and Loan Association, F.A.” (“New City”), and appointed RTC as its conservator. The assets of CitySavings, including Tillman's note, and certain liabilities were transferred to New City pursuant to a purchase and assumption agreement.

By letter dated November 19, 1992, RTC notified Tillman of his default under the note. When, after five months, Tillman did not make any payments and the parties could not reach an agreement, RTC began foreclosure proceedings against the property under Texas Property Code. The substitute trustee under the deed of trust fixed the sale date for May 4, 1993, and so notified Tillman.

Tillman filed this action on May 3, 1993, one day before the scheduled sale, in the District Court of the 57th Judicial District of Bexar County, seeking a temporary restraining order against the substitute trustee and New City, and alleging damages in the amount of \$1 million. * Tillman asserted as a defense to the foreclosure action that he had had an agreement with CitySavings, entered into prior to the appointment of the RTC as its receiver, under which CitySavings agreed to reimburse Tillman for legal fees incurred in connection with the defense of an unrelated lawsuit brought by Dwight Lieb. Tillman asserted that he incurred fees in excess of \$1,000,000 in that action, that CitySavings never reimbursed him for the fees, and thus CitySavings' debt should offset the promissory note.

After the case was removed to the District of Maryland, the district court dismissed the complaint, holding that it is without jurisdiction to grant Tillman's motion for an injunction against the foreclosure and that Tillman's failure to exhaust his administrative remedies “works as a jurisdictional bar.” From the order of dismissal, Tillman appealed.

II

[1] The district court's order dismissing a case on the grounds of lack of subject matter jurisdiction is a legal determination subject to *de novo* review. See *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768–69 (4th Cir.1991), *cert. denied*, 503 U.S. 984, 112 S.Ct. 1667, 118 L.Ed.2d 388 (1992).

*1035 Tillman's argument in support of an injunction is essentially that his own indebtedness under the promissory note “has been paid as a result of [his] right of recoupment based on CitySavings Association's agreement to pay [his] legal fees in an unrelated case.” In addition, Tillman argues that he is entitled to damages from New City for breach of an agreement that he had with CitySavings, which was transferred to New City under the purchase and assumption agreement, under which his promissory note would be extended and renewed on conditions agreed upon by CitySavings.

The RTC contends that federal courts are without jurisdiction to enjoin the foreclosure sale under FIRREA's anti-injunction provision, and that Tillman failed to present his claims to the receiver and exhaust the administrative remedies, as required by statute. Moreover, the RTC contends, Tillman waived his claims by not filing them within the statutory time period, also depriving the courts of subject matter jurisdiction.

FIRREA was enacted in 1989 as an emergency measure to enable the RTC and the Federal Deposit Insurance Corporation (“FDIC”) to resolve and liquidate expeditiously the hundreds of failed financial institutions throughout the country. H.R.Rep. No. 101–541, 101st Cong., 1st Sess. 291, 307, *reprinted in* 1989 U.S.C.C.A.N. 86, 103. Under the statutory scheme, Congress prohibited courts from enjoining the RTC or a receiver in any manner that affects the exercise of its powers. The anti-injunction provision states:

Except as provided in this section, *no court may take any action*, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

12 U.S.C. § 1821(j) (emphasis added). This Court has embraced the breadth of this provision in *In re Landmark Land Co.*, 973 F.2d 283 (4th Cir.1992), stating:

The comprehensive scheme of FIRREA indicates Congress' intent to allow the RTC *full rein to exercise its*

statutory authority without injunctive restraints imposed by bankruptcy courts or district courts in other proceedings.

Id. at 290 (emphasis added).

Moreover, Congress required persons making claims against a failed financial institution or seeking to adjudicate rights against them to present their claims first to the receiver for resolution. More specifically, under 12 U.S.C. § 1821(d), a claimant must present his claim to the receiver for an initial determination of whether the claim should be allowed within 90 days of the publication of notice by the receiver. 12 U.S.C. § 1821(d)(3). The receiver has 180 days after the claim is filed to determine whether to approve the claim. 12 U.S.C. § 1821(d)(5)(A)(i). After the receiver's initial decision, or if the receiver makes no decision within the 180-day period, a claimant may file a suit on the claim in one of two designated federal courts, within 60 days of the earlier of (a) the end of the 180-day period in which the receiver may determine the claim, or (b) the date of notice from the receiver that the claim has been disallowed. 12 U.S.C. § 1821(d)(6)(A). The receiver's final determination is subject to *de novo* judicial review. 12 U.S.C. § 1821(d)(7)(A). To protect and enforce this administrative process, the statute imposes the following limitation on judicial review:

Except as otherwise provided in this subsection, *no court shall have jurisdiction over—*

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

12 U.S.C. § 1821(d)(13)(D) (emphasis added).

In *Brady Development Co., Inc. v. RTC*, 14 F.3d 998 (4th Cir.1994), we construed the § 1821(d)(13)(D) limitation on judicial review in FIRREA as a jurisdictional bar. Holding that the “[e]xhaustion of administrative remedies is a requirement for efficiently administering the massive volume of claims,” 14 F.3d at 1006, we stated, “[t]he orderly process Congress enacted would be threatened if

administrative *1036 remedies and judicial remedies were allowed to proceed simultaneously.” *Id.* Reasoning that the elaborate administrative scheme established in 12 U.S.C. §§ 1821(d)(5)-(14) would be rendered meaningless through improvident judicial review because creditors would opt out of the administrative review, we held that a plaintiff's failure to exhaust the administrative process deprives the courts of subject matter jurisdiction.

The statutory scheme of FIRREA thus provides a dispute resolution structure that allows the RTC initially to collect assets, determine rights, and resolve claims before disputes over such matters can be heard in court.

With this background at hand, we now turn to Tillman's claims to see if the district court had jurisdiction to consider them.

III

[2] Tillman's arguments in favor of his injunction motion in no way provide a reason to bypass FIRREA's anti-injunction provision. It is abundantly clear that the RTC is authorized to pursue its foreclosure of Tillman's property and that the courts may not interfere by entering any injunction to halt the sale. 12 U.S.C. § 1821(j); *In re Landmark Land Co.*, 973 F.2d at 290. Thus, the district court properly dismissed Tillman's request for injunctive relief on the basis that it lacked subject matter jurisdiction.

[3] [4] As for Tillman's claims that the RTC breached an agreement to extend his promissory note, or failed to honor a reimbursement debt, or failed to afford recoupment, he was required to present those claims to the RTC in the first instance to exhaust his administrative remedies. Tillman's failure to do so precludes our exercising jurisdiction over these claims. We recently stated in *Brady Development Co.* that the administrative scheme provided in FIRREA is “an absolute and unwaivable jurisdictional requirement” for judicial review. 14 F.3d at 1007 (citations omitted). Other courts have taken a similar view. See *RTC v. Elman*, 949 F.2d 624, 627 (2d Cir.1991); *Althouse v. RTC*, 969 F.2d 1544, 1545–46 (3d Cir.1992); *Meliezer v. RTC*, 952 F.2d 879, 882–83 (5th Cir.1992).

[5] [6] Moreover, the failure to timely file the claims as required by 12 U.S.C. § 1821(d)(3)(B)(i) results in a waiver of the claim, unless the claimant did not receive notice of the appointment of the receiver in time to file such claim before

such date. 12 U.S.C. § 1821(d)(3)(C). Tillman asserts in his brief that he did not receive notice of the commencement of the administrative proceeding, a fact vigorously denied by the RTC, and that therefore he did not receive notice of the so-called “bar date” for filing his claims. He argues that a holding that his claims are waived, in light of the alleged lack of adequate notice, would violate his due process rights. We have allowed the record to be supplemented on this issue to determine whether this issue would have to be remanded, and have been provided with evidence of publication of the notice to CitySavings' creditors in the local newspapers. In light of

such evidence, Tillman cannot sustain the argument that a lack of notice of the receivership provides him with a defense.

Accordingly, we affirm the district court's dismissal of the case for lack of subject matter jurisdiction.

AFFIRMED.

All Citations

37 F.3d 1032

Footnotes

- * The temporary restraining order was granted by the state court. After the district court dismissed the case after removal, the RTC rescheduled the foreclosure sale for April 5, 1994. A Texas state court again issued a temporary restraining order in a separate action brought by Tillman, and, as of the time of oral argument, the foreclosure sale has yet to be rescheduled.

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849 F.3d 93

United States Court of Appeals, Fourth Circuit.

Michael A. WILLNER, Debtor in Possession;
Marguerite Evans Willner, Plaintiffs–Appellants,
v.

James DIMON, individually, as President and CEO
of JP Morgan Chase Bank, National Association;
JP Morgan Chase Bank, N.A., a national banking
association; Select Portfolio Servicing, INC.,
a Utah Corporation; Does (1–19) inclusive,
persons yet to be determined, if any, involved
in the acts complained of herein; U.S. Bank
National Association, as Trustee, successor in
interest to Bank of America, N.A., as Trustee,
successor by merger to LaSalleBank, N.A., as
Trustee, of the WaMu Mortgage Pass–Through
Certificates Series 2006–AR15 Trust, a national
banking association, Defendants–Appellees.

No. 15-1678

Argued: October 25, 2016

Decided: February 16, 2017

Synopsis

Background: After the Federal Deposit Insurance Corporation (FDIC) was appointed as receiver for their insolvent lender, borrowers brought pro se action against entity that had purchased from FDIC the right to service their loan, successor trustee of trust to which their note had been assigned, and others, seeking, inter alia, a declaration that defendants could not foreclose on their home. The United States District Court for the Eastern District of Virginia, [Anthony J. Trenga, J., 2015 WL 12766135](#), dismissed certain counts of complaint for lack of subject-matter jurisdiction pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) and other counts for failure to state a claim. Borrowers appealed.

Holdings: The Court of Appeals, [Diaz](#), Circuit Judge, held that:

[1] though formally asserted against successor trustee and loan servicer, Counts 1 and 2 of the complaint, for a

declaratory judgment that there was no right to foreclose under the deed of trust and for breach of contract based on absence of right to foreclose because the note was defective, were functionally pleaded against lender's acts and omissions, and so fell within the scope of FIRREA's exhaustion requirement and, as unexhausted, were correctly dismissed for lack of subject-matter jurisdiction;

[2] addressing an issue of first impression for the court, for purposes of FIRREA's exhaustion requirement, the word “claim” is a term of art that refers only to claims that are resolvable through the FIRREA administrative process;

[3] requests for declaratory judgments are subject to the FIRREA exhaustion requirement at issue;

[4] addressing an issue of first impression for the court, a purported affirmative defense does not qualify as one for the purpose of avoiding FIRREA's exhaustion requirement if, after looking beyond the nomenclature of the request for relief, the remedy sought is actually a “claim” within the meaning of FIRREA;

[5] borrowers failed to state a claim for constructive fraud under Virginia law; and

[6] borrowers failed to state a claim for negligence.

Affirmed.

West Headnotes (31)

[1] **Federal Courts**

🔑 [Presumptions and burden of proof](#)

Federal Courts

🔑 [Dismissal for failure to state a claim](#)

When reviewing district court's grant of motion to dismiss for lack of subject-matter jurisdiction or for failure to state a claim in response to defendant's facial challenge to complaint, the Court of Appeals accepts as true all factual allegations set forth in complaint. [Fed. R. Civ. P. 12\(b\)\(1\), 12\(b\)\(6\)](#).

[3 Cases that cite this headnote](#)

[2] Finance, Banking, and Credit **Claims; Rights and Liabilities of Claimants and Stakeholders**

Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) establishes an administrative process that allows the Federal Deposit Insurance Corporation (FDIC), acting as receiver for a failed institution, to settle claims against that institution and liquidate its assets. Federal Deposit Insurance Act § 2[11], 12 U.S.C.A. § 1821(d).

[1 Cases that cite this headnote](#)

[3] Finance, Banking, and Credit **Administrative review of claims****Finance, Banking, and Credit** **Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators**

Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) allows claimants either to obtain administrative review, followed by judicial review, of any disallowed claim against a depository institution for which the Federal Deposit Insurance Corporation (FDIC) is receiver, or to file suit for de novo consideration of the disallowed claim in a district court. Federal Deposit Insurance Act § 2[11], 12 U.S.C.A. § 1821(d)(6)-(7).

[4] Finance, Banking, and Credit **Exhaustion of other remedies**

Exhaustion requirement of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) is absolute and unwaivable; FIRREA operates as a jurisdictional bar to claims that parties did not submit to the Federal Deposit Insurance Corporation's (FDIC) administrative process. Federal Deposit Insurance Act § 2[11], 12 U.S.C.A. § 1821(d)(13)(D).

[1 Cases that cite this headnote](#)

[5] Federal Courts **Jurisdiction**

Court of Appeals reviews de novo a district court's grant of a motion to dismiss for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1).

[3 Cases that cite this headnote](#)

[6] Federal Courts **Theory and Grounds of Decision of Lower Court**

Court of Appeals may affirm on any grounds supported by the record, notwithstanding the reasoning of the district court.

[7] Finance, Banking, and Credit **Exhaustion of other remedies**

While a subsection of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) bars unexhausted claims against an assuming bank that relate to an act or omission of an institution for which the Office of Thrift Supervision (OTS) appointed the Federal Deposit Insurance Corporation (FDIC) as receiver, a suit against a third-party bank for its own wrongdoing is not barred by that subsection. Federal Deposit Insurance Act § 2[11], 12 U.S.C.A. § 1821(d)(13)(D)(ii).

[1 Cases that cite this headnote](#)

[8] Finance, Banking, and Credit **Claims provable; estoppel to claim**

Where a claim is functionally, albeit not formally, against a depository institution for which the Federal Deposit Insurance Corporation (FDIC) is receiver, it is a "claim" within the meaning of the administrative claims process of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). Federal Deposit Insurance Act § 2[11], 12 U.S.C.A. § 1821(d)(13)(D).

[1 Cases that cite this headnote](#)

[9] Declaratory Judgment **Statutory remedy****Declaratory Judgment**

🔑 [Grounds for involuntary dismissal in general](#)

Finance, Banking, and Credit

🔑 [Pleading](#)

In borrowers' action against entity that had purchased from Federal Deposit Insurance Corporation (FDIC) the right to service their loan and successor trustee of trust to which their note had been assigned, those counts of complaint asserting claims for declaratory judgment that there was no right to foreclose under the deed of trust and for breach of contract based on absence of right to foreclose, though formally asserted against successor trustee and loan servicer, were functionally pleaded against lender's acts and omissions, so as to fall within the scope of the exhaustion requirement of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), and, as unexhausted, were correctly dismissed for lack of subject-matter jurisdiction; borrowers did not assert independent misconduct by successor trustee and loan servicer, but alleged that lender made misrepresentations and that the note and deed of trust were defective. Federal Deposit Insurance Act § 2[11], 12 U.S.C.A. § 1821(d)(13)(D)(ii).

[10] **Finance, Banking, and Credit**

🔑 [Exhaustion of other remedies](#)

Under the Financial Institutions Reform, Recovery and Enforcement Act of 1989's (FIRREA) exhaustion requirement for claims relating to any act or omission of an institution for which the Federal Deposit Insurance Corporation (FDIC) has been appointed receiver or the FDIC as receiver, the word "claim" is a term of art that refers only to claims that are resolvable through the FIRREA administrative process. Federal Deposit Insurance Act § 2[11], 12 U.S.C.A. § 1821(d)(13)(D)(ii).

[7 Cases that cite this headnote](#)

[11] **Declaratory Judgment**

🔑 [Statutory remedy](#)

Finance, Banking, and Credit

🔑 [Exhaustion of other remedies](#)

Administrative claims process of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) accommodates declaratory judgment actions and, thus, requests for declaratory judgments are "claims" subject to FIRREA's exhaustion requirement for claims relating to any act or omission of an institution for which the Federal Deposit Insurance Corporation (FDIC) has been appointed receiver or the FDIC as receiver. Federal Deposit Insurance Act §§ 2[11], 2[11], 12 U.S.C.A. §§ 1821(d), 1821(d)(13)(D)(ii).

[5 Cases that cite this headnote](#)

[12] **Declaratory Judgment**

🔑 [Scope and extent of review in general](#)

Borrowers, by not timely submitting what was on its face a "claim" to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) claims process, waived their argument on appeal in declaratory judgment action about how the Federal Deposit Insurance Corporation (FDIC), as receiver, would have resolved it. Federal Deposit Insurance Act, § 2[1] et seq., 12 U.S.C.A. § 1811 et seq.

[13] **Finance, Banking, and Credit**

🔑 [Exhaustion of other remedies](#)

Exhaustion requirement of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) does not encompass affirmative defenses. Federal Deposit Insurance Act § 2[11], 12 U.S.C.A. § 1821(d)(13)(D).

[14] **Finance, Banking, and Credit**

🔑 [Exhaustion of other remedies](#)

Purported affirmative defense does not qualify as an "affirmative defense," so as to fall outside the ambit of the exhaustion requirement of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), if, after looking beyond the nomenclature of the request for relief, the remedy sought is actually a "claim" within the meaning of FIRREA. Federal Deposit

Insurance Act § 2[11], 12 U.S.C.A. § 1821(d)(13)(D).

[15] Declaratory Judgment

🔑 Statutory remedy

Finance, Banking, and Credit

🔑 Exhaustion of other remedies

In borrowers' action against entity that had purchased from Federal Deposit Insurance Corporation (FDIC) the right to service their loan and successor trustee of trust to which their note had been assigned, those counts of complaint asserting claims seeking declaratory judgments that there was no right to foreclose under the deed of trust and that the note and the deed of trust were unenforceable were not affirmative defenses and, thus, were subject to the exhaustion requirement of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA); each request for declaratory judgment was a “claim” within the meaning of FIRREA. Federal Deposit Insurance Act § 2[11], 12 U.S.C.A. § 1821(d)(13)(D).

2 Cases that cite this headnote

[16] Declaratory Judgment

🔑 Statutory remedy

Finance, Banking, and Credit

🔑 Exhaustion of other remedies

In borrowers' action against entity that had purchased from Federal Deposit Insurance Corporation (FDIC) the right to service their loan and successor trustee of trust to which their note had been assigned, those counts of complaint asserting claims for negligence, for declaratory judgment that note was not secured by borrower-wife's ownership interest in the property, for fraudulent concealment in loan origination, for declaratory judgment that deed of trust was void as not the result of a meeting of the minds, for equitable estoppel related to misrepresentations made during loan origination, to quiet title, for unjust enrichment, for conspiracy to commit fraudulent concealment, and for conspiracy to commit fraud were not affirmative defenses, but were “claims”

subject to the exhaustion requirement of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). Federal Deposit Insurance Act § 2[11], 12 U.S.C.A. § 1821(d)(13)(D).

[17] Bankruptcy

🔑 Proceedings

Finance, Banking, and Credit

🔑 Exhaustion of other remedies

Exception to the exhaustion requirement of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), which exists within the bankruptcy system for a debtor who has a proof of claim filed against him by a creditor and then is allowed to bring a claim against the creditor in bankruptcy court outside of FIRREA's administrative process, is inapplicable where the debtor is not in bankruptcy court. Federal Deposit Insurance Act § 2[11], 12 U.S.C.A. § 1821(d)(13)(D).

[18] Finance, Banking, and Credit

🔑 Exhaustion of other remedies

District court had subject-matter jurisdiction over borrowers' unexhausted negligence claim against entity that had purchased from the Federal Deposit Insurance Corporation (FDIC) the right to service their loan and successor trustee of trust to which their note had been assigned; claim was not based upon lender's conduct, but upon borrowers' allegation that loan servicer and successor trustee had a duty to borrower based upon his “claim of recoupment,” and so claim did not fall within scope of the exhaustion requirement of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). Federal Deposit Insurance Act § 2[11], 12 U.S.C.A. § 1821(d)(13)(D)(ii).

[19] Constitutional Law

🔑 Financial impairment and insolvency; receivers

Plaintiff cannot challenge her failure to exhaust claims with the Federal Deposit Insurance Corporation (FDIC) on due process grounds if she has actual notice that the failed bank is in receivership or knows enough about the situation to have “inquiry notice” as to the details of the Financial Institutions Reform, Recovery and Enforcement Act of 1989’s (FIRREA) administrative process. [U.S. Const. Amend. 5](#); [Federal Deposit Insurance Act § 2\[11\]](#), [12 U.S.C.A. § 1821\(d\)\(13\)\(D\)](#).

[1 Cases that cite this headnote](#)

[20] Finance, Banking, and Credit

[Exhaustion of other remedies](#)

Section of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) setting forth the exhaustion requirement does not contain a discovery rule that tolls claims. [Federal Deposit Insurance Act § 2\[11\]](#), [12 U.S.C.A. § 1821\(d\)\(13\)\(D\)](#).

[21] Federal Civil Procedure

[Insufficiency in general](#)

Federal Civil Procedure

[Matters deemed admitted; acceptance as true of allegations in complaint](#)

To survive motion to dismiss, complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. [Fed. R. Civ. P. 12\(b\)\(6\)](#).

[138 Cases that cite this headnote](#)

[22] Federal Civil Procedure

[Fraud, mistake and condition of mind](#)

Circumstances constituting fraud or mistake, which must be stated with particularity when alleging fraud or mistake, are the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby. [Fed. R. Civ. P. 9\(b\)](#).

[1 Cases that cite this headnote](#)

[23] Fraud

[Elements of Constructive Fraud](#)

Fraud

[Weight and Sufficiency](#)

Under Virginia law, elements of a cause of action for constructive fraud are a showing by clear and convincing evidence that a false representation of a material fact was made innocently or negligently, and the injured party was damaged as a result of his reliance upon the misrepresentation.

[24] Fraud

[Elements of Constructive Fraud](#)

Fraud

[Weight and Sufficiency](#)

Under Virginia law, plaintiff asserting a claim of constructive fraud must show by clear and convincing evidence that one has represented as true what is really false, in such a way as to induce a reasonable person to believe it, with the intent that the person will act upon this representation.

[25] Finance, Banking, and Credit

[Fraud and misrepresentation](#)

Mortgages and Deeds of Trust

[Particular cases, contexts, and questions in general](#)

Mortgages and Deeds of Trust

[Fraud and misrepresentation](#)

Under Virginia law, borrowers' allegations that bank's agent directed borrower to a bank website which included a suggestion that he list his home for sale, that borrower also applied for a loan modification through the Making Home Affordable Program, that bank's review of borrower's application went on for longer than it was supposed to, and that bank eventually told him that he was ineligible failed to state a claim for constructive fraud; allegations did not constitute a false representation of a material fact, and the delay in reviewing borrower's application did not amount to concealment constituting actionable

fraud, absent any allegation of deliberate nondisclosure.

[26] Negligence

 Elements in general

Under Virginia law, the elements of an action in negligence are a legal duty on the part of the defendant, breach of that duty, and a showing that such breach was the proximate cause of injury, resulting in damage to the plaintiff.

[27] Negligence

 Contractual duty

Negligence

 Breach of Duty

Under Virginia law, a tort action cannot be based solely on a negligent breach of contract; though a party can, in certain circumstances, show both a breach of contract and a tortious breach of duty, the duty tortiously or negligently breached must be a common law duty.

[28] Finance, Banking, and Credit

 Torts

Mortgages and Deeds of Trust

 **Particular cases, contexts, and questions in general**

Mortgages and Deeds of Trust

 Negligence

Borrower's allegations that bank owed him a duty to act reasonably in modifying his loan and that it failed to act reasonably and seek the aid and direction of a court of equity before foreclosing on the property failed to state a claim for negligence under Virginia law; there was no freestanding common law duty in Virginia to grant a loan modification, such that any obligations bank might have had in processing borrower's application for a loan modification could only have arisen from a contractual relationship between the parties, and, as such, could not give rise to a tort claim.

[29] Federal Courts

 Pleading

Court of Appeals reviews a district court's denial of leave to amend a complaint for abuse of discretion.

[4 Cases that cite this headnote](#)

[30] Federal Civil Procedure

 Amendments by briefs or motion papers

Federal Civil Procedure

 Form and sufficiency of amendment; futility

District court did not abuse its discretion in denying pro se borrowers' requests to amend their complaint against entity that had purchased from the Federal Deposit Insurance Corporation (FDIC) the right to service their loan, successor trustee of trust to which their note had been assigned, and others; borrowers never filed a formal motion to amend but, rather, requested leave to amend in the conclusions of three oppositions to motions to dismiss and one surreply, and borrowers failed to show, even on appeal, how amendment would cure the deficiencies in their complaint.

[1 Cases that cite this headnote](#)

[31] Federal Civil Procedure

 Motion and Proceedings for Allowance

Federal Civil Procedure

 Requisites of motion

Where the plaintiff fails to formally move to amend complaint and fails to provide the district court with any proposed amended complaint or other indication of the amendments he wishes to make, the district court does not abuse its discretion in denying leave to amend.

[5 Cases that cite this headnote](#)

***99** Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony J. Trenga, District Judge. (1:14-cv-01708-AJT-MSN)

Attorneys and Law Firms

ARGUED: Benjamin Stark Softness, KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C., Washington, D.C.; Michael A. Willner, Lorton, Virginia, for Appellants. Brent J. McIntosh, SULLIVAN & CROMWELL, Washington, D.C.; Matthew Douglas Patterson, NELSON MULLINS RILEY & SCARBOROUGH LLP, Columbia, South Carolina, for Appellees. ON BRIEF: David C. Frederick, KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C., Washington, D.C., for Appellant Marguerite Evans Willner. Brian M. Barnwell, NELSON MULLINS RILEY & SCARBOROUGH LLP, Columbia, South Carolina; John Curtis Lynch, Mary Catherine Zinsner, Harrison Scott Kelly, TROUTMAN SANDERS LLP, Virginia Beach, Virginia, for Appellees.

Before AGEE, DIAZ, and THACKER, Circuit Judges.

Opinion

Affirmed by published opinion. Judge Diaz wrote the opinion, in which Judge Agee and Judge Thacker joined.

DIAZ, Circuit Judge:

Michael Willner (an attorney) and Marguerite Willner appeal the district court's dismissal of their pro se complaint wherein they seek, inter alia, a declaration that JP Morgan Chase Bank ("Chase") and U.S. Bank cannot foreclose on their home. The district court dismissed certain Counts for lack of subject matter jurisdiction pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 and other Counts for failure to state a claim. As we explain below, the district court lacked subject matter jurisdiction over most of the Counts that the Willners appeal because they did not first submit the claims underlying those Counts to administrative review. The other Counts relevant here fail to state a claim. Accordingly, we affirm.

I.

A.

[1] When reviewing a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6) in response to a defendant's facial challenge to a complaint, we accept as true all factual allegations set forth in

the complaint. *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). Applying that standard to the Willners' complaint, we assume the following facts.

*100 The Willners purchased as tenants by the entirety property (the "Property") in Lorton, Virginia, in 1989 and built a house thereupon. In August 2006, the Willners considered selling the Property but instead decided to refinance after speaking with an agent from Washington Mutual Bank, FA ("WMBFA"). The WMBFA agent told Mr. Willner to contact a Washington Mutual Bank ("WMB") agent to fill out a loan application. Mr. Willner did so, and told the WMB agent that he expected to earn about \$52,000 in 2006. The WMBFA agent also told the Willners that the Property was worth in excess of \$5 million. The same agent led the Willners to believe that WMBFA wouldn't foreclose on the Property in the event of a missed payment.

In September 2006, the Willners closed on a \$3 million loan (the "Loan") from WMBFA. Mr. Willner signed a note (the "Note"); Mrs. Willner did not. Mrs. Willner had previously told the WMBFA agent that she didn't want to put her ownership interest in the Property at risk, and said the same to a title agent at the closing. Based upon each agent's response, Mrs. Willner believed that her interest in the Property would remain unencumbered. However, both Mr. and Mrs. Willner signed a deed of trust (the "Deed of Trust"), which secured the Loan and for which WMBFA was the beneficiary.

The Deed of Trust provided that "any Borrower who co-signs this Security Instrument but does not execute the Note ... is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property ... [and] is not personally obligated to pay the sums secured by this Security Instrument." J.A. 489. Mr. Willner also signed an "Affiliated Business Arrangement Disclosure Statement Notice" which "indicated" that WMBFA and WMB "existed concurrently as separate and distinct entities." J.A. 40–41.

Less than two months after the closing, WMB sold the Note to WaMu Asset Acceptance Corporation, which securitized the Note by depositing it into the WaMu Mortgage Pass-Through Certificates Series 2006-AR15 (the "2006-AR15 Trust"), "a special purpose entity controlled by WMB." J.A. 42. WMB was the sponsor and servicer of the 2006-AR15 Trust (and Note), while LaSalle Bank was the trustee. WMBFA remained the beneficiary under the Deed of Trust.

On September 25, 2008, the Office of Thrift Supervision declared WMB insolvent and appointed the Federal Deposit Insurance Corporation (the “FDIC”) as receiver. On that same day, Chase entered into a Purchase and Assumption Agreement with the FDIC, whereby Chase purchased substantially all of WMB’s assets and assumed substantially all of its liabilities. Under the Purchase and Assumption Agreement, Chase did not assume any liability for WMB’s acts or omissions. Chase purchased the right to service the Loan, but allegedly did not purchase the Note or Deed of Trust because “WMB sold the Note and [Deed of Trust] on or before October of 2006.” J.A. 47–48.

In October 2008, the Willners received notice that the Office of Thrift Supervision had closed WMB and appointed the FDIC as receiver. Also in October 2008, LaSalle Bank merged into Bank of America, which became the trustee for the 2006–AR15 Trust. At some later point, U.S. Bank became the trustee for the 2006–AR15 Trust as successor in interest to Bank of America, and it remains so today.

In July 2010, the Willners attempted to refinance the Property through Chase. A Chase agent told the Willners that their income wasn’t sufficient to qualify for a loan. Mr. Willner spoke with Chase representatives, *101 who directed him to Chase’s website. One suggestion on the Chase website was to list the home for sale, which Mr. Willner did to no avail. In April 2011, Chase CEO James Dimon signed a Consent Order with the Office of the Comptroller of the Currency, in which Chase agreed to correct problems with its servicing and foreclosure practices. In May 2011, the Willners defaulted.

In June 2011, Mr. Willner applied for a loan modification from Chase through the Making Home Affordable Program. In August 2011, Chase identified the Note for collection through foreclosure, and Mrs. Willner tried to call Dimon to discuss the foreclosure process but was only able to speak with one of his assistants.

In September 2011, Mr. Willner came upon WMB documents from 2006 which showed that his financial status had not qualified him for the loan which he had ultimately received. One of those documents listed his annual income for 2006 at \$624,000. In March 2012, Mr. Willner discovered other information, including: a WMB document which showed that WMB had conducted another appraisal in 2006 prior to the closing, and that the Property was appraised for only \$4 million; a WMB document from the 2006 closing which listed his income at \$52,000 per month; and Securities and

Exchange Commission filings which showed that as of April 4, 2005, WMBFA allegedly ceased to exist.

In May 2012, Chase informed Mr. Willner that he was not eligible for a modification under the Making Home Affordable Program. That program allegedly only applied to loans for \$759,000 or less, and allegedly required that eligibility determinations be made within 30 days. On November 30, 2012, Chase informed the Willners that it intended to foreclose on the Property and auction it on December 18, 2012. On December 13, 2012, Mr. Willner (but not Mrs. Willner) filed for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Eastern District of Virginia. U.S. Bank then filed a proof of claim in the bankruptcy court claiming the right to foreclose on the Property.

In May 2013, U.S. Bank re-appointed Chase as the master servicer of the 2006–AR15 Trust, and in August 2013, Chase appointed Select Portfolio Servicing as the sub-servicer. U.S. Bank moved for relief from stay in the bankruptcy court in September 2014.

B.

Mr. and Mrs. Willner filed a pro se 27–Count complaint against Chase, Chase’s CEO James Dimon, U.S. Bank, and Select Portfolio Servicing. Of those 27 Counts, only the following are relevant to this appeal:

- Count 1 (against Chase and U.S. Bank) for a declaratory judgment that there is no right to foreclose under the Deed of Trust;
- Count 2 (against Chase and U.S. Bank) for breach of contract based on absence of right to foreclose because the Note is defective;
- Count 3 (against Chase and U.S. Bank) for negligence based on breach of duty to Mr. Willner to seek the aid and direction of a court of equity before foreclosing;
- Count 5 (against Chase, U.S. Bank, and Select Portfolio Servicing) for a declaratory judgment that the Note and Deed of Trust are unenforceable;
- Count 6 (against Chase and U.S. Bank) for a declaratory judgment that the Note is not secured by Mrs. Willner’s ownership interest in the Property;

- Count 7 (against U.S. Bank) for fraudulent concealment in the loan origination;

*102 • Count 8 (against Chase, U.S. Bank, and Select Portfolio Servicing) for a declaratory judgment that the Deed of Trust is void based on lack of meeting of the minds;

- Count 9 (against U.S. Bank) for equitable estoppel related to misrepresentations made during the loan origination;

- Count 14 (against Chase and U.S. Bank) for constructive fraud “in the servicing” of the Note;

- Count 15 (against Chase and U.S. Bank) for negligence “in the servicing” of the Note;

- Count 16 (against Chase, U.S. Bank, and Select Portfolio Servicing) to quiet title on the Property based on defects in the Deed of Trust;

- Count 17 (against Chase and U.S. Bank) for unjust enrichment premised upon misrepresentations by WMB and defects in the Note;

- Count 18 (against all defendants) for conspiracy to commit fraudulent concealment in the Loan’s origination, securitization, servicing, and foreclosure; and

- Count 19 (against all defendants) for conspiracy to commit fraud in the Loan’s origination, securitization, servicing, and foreclosure.

The parties engaged in motions practice, and in the conclusions of three oppositions to motions to dismiss and one surreply, the Willners “move[d] for leave to amend the[ir] [c]omplaint” in the event that the district court found it “deficien[t].” No. 1:14-cv-01708, Dkt. 18, 36, 37, 51. The district court dismissed the complaint without addressing the Willners’ requests to amend.

The court found that it lacked subject matter jurisdiction over Counts 1–9 and 16–19 (encompassing all of the Counts relevant here except Counts 14 and 15) because those Counts were based on WMB’s alleged misconduct and thus subject to an administrative remedies exhaustion requirement in the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (“FIRREA”) which the Willners had not satisfied.¹ To make sense of this part of the district court’s decision, we first outline FIRREA’s relevant provisions.

[2] [3] “FIRREA establishes an administrative process that allows the [FDIC], acting as receiver for a failed institution, to settle claims against that institution and liquidate its assets.” *Elmco Props., Inc. v. Second Nat’l Fed. Sav. Ass’n*, 94 F.3d 914, 919 (4th Cir. 1996) (citing 12 U.S.C. § 1821(d)). To effectuate that process, FIRREA requires that claimants submit all of their claims against a failed institution to the FDIC “before a certain date—the ‘bar date.’ ”² *Id.* (citing 12 U.S.C. § 1821(d)(3)(B)(i)). “FIRREA allows claimants either to obtain administrative review, followed by judicial review, of ‘any [disallowed] claim against a depository institution for which the [FDIC] is receiver,’ or to file suit for de novo consideration of the disallowed claim in a district court.” *Am. Nat’l Ins. Co. v. F.D.I.C.*, 642 F.3d 1137, 1141 (D.C. Cir. 2011) (citing 12 U.S.C. § 1821(d)(6)–(7)).

*103 But, “[e]xcept as otherwise provided” in the Act, a court may not exercise jurisdiction over

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver, including assets which the [FDIC] may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the [FDIC] as receiver.

12 U.S.C. § 1821(d)(13)(D).

[4] “These provisions combine to create an exhaustion requirement that, we have concluded, is ‘absolute and unwaivable.’ ” *Elmco Props.*, 94 F.3d at 919 (quoting *Brady Dev. Co. v. Resolution Tr. Corp.*, 14 F.3d 998, 1007 (4th Cir. 1994)). Put another way, FIRREA operates as a jurisdictional bar to claims that parties did not submit to the FDIC’s administrative process. *Am. Nat’l Ins.*, 642 F.3d at 1141.

The district court concluded that it lacked subject matter jurisdiction over these Counts pursuant to § 1821(d)(13)(D)(i) because the Willners had not exhausted their administrative remedies “against WMB with respect to their claims arising out of the Note and Deed of Trust, including the alleged misconduct by WMB.” As to Counts 14 and 15, the court dismissed them for failure to state a claim.

This appeal followed.

II.

The Willners jointly appeal the dismissal of Counts 1, 2, and 5, and also argue that the district court erred by dismissing their complaint without first providing an opportunity to amend. Mr. Willner, who appears pro se, appeals the dismissal of Counts 3, 6–9, and 14–19.³ We proceed in three parts. First, we consider the joint appeal of the dismissal of Counts 1, 2, and 5, which is a challenge to the district court’s decision on subject matter jurisdiction. In so doing, we also resolve the portion of Mr. Willner’s pro se appeal which concerns the district court’s decision on subject matter jurisdiction. Second, we address the remaining issues from Mr. Willner’s pro se appeal. Finally, we turn to the question of whether the district court erred by not addressing the Willners’ requests to amend their complaint.

A.

[5] [6] “We review a district court’s grant of a motion to dismiss under Rule 12(b)(1) ... de novo.” *Sucampo Pharm., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 550 (4th Cir. 2006). “[W]e may affirm on any grounds supported by the record, notwithstanding the reasoning of the district court.” *Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62, 75 n.13 (4th Cir. 2016). While generally we “liberally construe a pro se complaint,” we have “not determined whether a pro se plaintiff who is also an attorney receives the benefit of this liberal construction.” *Id.* at 72. We do not decide that issue because, liberally construed or not, the Willners’ complaint fails for the reasons discussed below. Nevertheless, “[o]ut of an abundance of caution ... and in accordance with the liberal *104 construction we afford a pro se complainant, we construe [the Willners’ complaint] as best we can.” *Id.*

The Willners jointly make four principal arguments for why the district court erred in dismissing Counts 1, 2, and 5 for lack of subject matter jurisdiction. Each is an attempt to exclude some or all of the Counts from FIRREA’s exhaustion requirement. We address them in turn.

1.

We first consider the Willners’ argument that Counts 1 and 2 are claims about independent misconduct by Chase

and U.S. Bank which fall outside of FIRREA’s exhaustion requirement. But before we address that argument, we must decide which of FIRREA’s two exhaustion requirements governs our analysis.

As an initial matter, the district court erred by applying § 1821(d)(13)(D)(i) rather than analyzing the Counts under § 1821(d)(13)(D)(ii). Subsection (i) bars any unexhausted “claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver.” 12 U.S.C. § 1821(d)(13)(D)(i). But the Willners are not pursuing recovery under this theory. Rather, their action seeks “a determination of rights with respect to the assets of a third-party that purchased [the assets in question] from the FDIC.” *Westberg v. F.D.I.C.*, 741 F.3d 1301, 1305 (D.C. Cir. 2014); see also *Rosa v. Resolution Tr. Corp.*, 938 F.2d 383, 393–94 (3d Cir. 1991) (refusing to apply § 1821(d)(13)(D)(i) to claims against an institution which the Office of Thrift Supervision had not placed into receivership). Thus, if FIRREA’s jurisdictional bar applies, it’s because the Willners’ claims fall within FIRREA’s other exhaustion requirement for “any claim relating to any act or omission of [an institution for which the FDIC has been appointed receiver] or the Corporation as receiver.” 12 U.S.C. § 1821(d)(13)(D)(ii).

[7] [8] Section 1821(d)(13)(D)(ii) bars unexhausted claims against an assuming bank that relate to an act or omission of an institution for which the Office of Thrift Supervision appointed the FDIC as receiver, but a suit “against a third-party bank for its own wrongdoing ... is not barred by” § 1821(d)(13)(D)(ii). *Am. Nat’l Ins.*, 642 F.3d at 1142. “Where a claim is functionally, albeit not formally, against a depository institution for which the FDIC is receiver, it is a ‘claim’ within the meaning of FIRREA’s administrative claims process.” *Id.* at 1144.

[9] Though Counts 1 and 2 are formally asserted against Chase and U.S. Bank, they are functionally pleaded against WMB’s acts and omissions. The allegations underlying Counts 1 and 2 are that WMB made misrepresentations and that the Note and Deed of Trust are defective. In particular, the Willners allege that WMB agreed not to foreclose on the Property, that the Note “does not exist” because Mrs. Willner never signed it, and that the Deed of Trust cannot be used to foreclose on the Property because the Note to which it refers does not exist. Because these unexhausted claims are functionally pleaded against the acts and omissions of WMB rather than against independent misconduct by Chase and

U.S. Bank, § 1821(d)(13)(D)(ii) operates as a jurisdictional bar. Compare *Rundgren v. Washington Mut. Bank, FA*, 760 F.3d 1056, 1064–65 (9th Cir. 2014) (holding under nearly identical facts that plaintiffs’ claims were related to WMB’s acts and omissions, and that a “claimant cannot circumvent [FIRREA’s] exhaustion requirement by suing the purchasing bank based on the *105 conduct of the failed institution”), and *Tellado v. IndyMac Mortg. Servs.*, 707 F.3d 275, 280 (3d Cir. 2013) (holding that § 1821(d)(13)(D)(ii) barred plaintiffs’ claims against assuming bank, where assuming bank refused to cancel a loan after being informed that the failed bank improperly originated it), with *Am. Nat’l Ins.*, 642 F.3d at 1139 (holding that § 1821(d)(13)(D)(ii) did not bar judicial review of unexhausted claim against Chase where plaintiffs alleged that Chase improperly “pressured the federal government to seize” WMB and then profited by purchasing WMB’s assets at a low price).

We also reject the Willners’ tangentially related argument that FIRREA’s exhaustion requirement doesn’t apply to Counts 1, 2, and 5 against U.S. Bank because U.S. Bank allegedly never acquired an asset that passed through the FDIC’s receivership estate. The Willners state that WaMu Asset Acceptance Corporation securitized the Note by depositing it into the 2006–AR15 Trust prior to WMB’s failure, and that U.S. Bank became trustee for the 2006–AR15 Trust as successor in interest to Bank of America (Bank of America became trustee after merging with LaSalle Bank, which was the trustee when WMB failed). Accordingly, the Willners argue, U.S. Bank’s status as trustee came free and clear of the receivership estate.

The problem with this argument is that it’s irrelevant. FIRREA requires exhaustion of “any claim relating to any act or omission of [any depository institution for which the FDIC has been appointed receiver].” 12 U.S.C. § 1821(d)(13)(D)(ii). As described above, Counts 1 and 2 are functionally pleaded against WMB’s conduct. So is Count 5, which is based entirely upon allegations that WMBFA did not exist when the Willners closed on the Loan. FIRREA required that the Willners exhaust these claims.

2.

Next, we consider the Willners’ argument that Counts 1, 2, and 5 could not be resolved through FIRREA’s administrative process and thus were not subject to FIRREA’s exhaustion requirement. The only reason the Willners offer for why Count 2, a claim for breach of contract with a request

for damages, could not be resolved through FIRREA’s administrative process is that it’s a claim for relief against Chase and U.S. Bank for their own wrongdoing. Having already rejected this argument, we turn to Counts 1 and 5—each a request for a declaratory judgment that, inter alia, the Deed of Trust can’t be used to foreclose on the Willners’ house.

The Willners make two arguments for why those Counts couldn’t be resolved through FIRREA’s administrative process: (a) § 1821(d)’s administrative claims process does not accommodate requests for declaratory judgments, and (b) the FDIC could not have adjudicated Count 1 because it cannot order a remedy against solvent third-party institutions. We address them in turn.

a.

FIRREA does not define the word “claim,” *Elmco Props.*, 94 F.3d at 919 n.1, and we have not done so. The Willners rely on that ambiguity to say that for the purposes of FIRREA a “claim” is only a request for payment from the assets of a failed bank, and thus their requests for declaratory judgments could not be resolved through FIRREA’s claims process. We do not agree.

[10] [11] “Courts interpreting ... § 1821(d)(13)(D)(ii) have universally concluded that [it] bars only claims that could be brought under the administrative procedures of § 1821(d), not any claim at all *106 involving the FDIC.” *Bank of New York v. First Millennium, Inc.*, 607 F.3d 905, 921 (2d Cir. 2010). We join those courts, and conclude that “[i]n FIRREA, the word ‘claim’ is a term-of-art that refers only to claims that are resolvable through the FIRREA administrative process.” *Am. Nat’l Ins.*, 642 F.3d at 1142. To hold otherwise would risk making § 1821(d)(13)(D) “an independent and outright bar of jurisdiction rather than a mere exhaustion requirement.” *Hudson United Bank v. Chase Manhattan Bank of Connecticut, N.A.*, 43 F.3d 843, 849 (3d Cir. 1994) (quotation marks omitted). Armed with a working definition of the word “claim,” we proceed to the question of whether § 1821(d)’s administrative claims process accommodates declaratory judgment actions. FIRREA’s vast grant of authority to the FDIC convinces us that it does.

The FDIC, “as conservator or receiver, and by operation of law, succeed[s] to all rights, titles, powers, and privileges of the insured depository institution.” 12 U.S.C. § 1821(d)(2)

(A)(i). In that position, the FDIC may “take over the assets of and operate the insured depository institution with all the powers of the members or shareholders, the directors, and the officers of the institution and conduct all business of the institution.” *Id.* § 1821(d)(2)(B)(i). The FDIC may also “exercise ... such incidental powers as shall be necessary to carry out” the powers and authorities otherwise granted to it under FIRREA. *Id.* § 1821(d)(2)(J)(i). Courts have interpreted the scope of this broad language in applying FIRREA’s anti-injunction provision, which states that “[e]xcept as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.” *Id.* § 1821(j).

In *Dittmer Properties, L.P. v. F.D.I.C.*, plaintiffs sued a bank and sought a declaratory judgment that a loan was void. 708 F.3d 1011, 1014–15 (8th Cir. 2013). Subsequently, the FDIC became receiver for that bank, and substituted itself as defendant. *Id.* at 1015. The FDIC then sold the note to a third-party bank, and moved to substitute the third-party bank for itself in the suit. *Id.* at 1015–16. The district court dismissed the claims for declaratory relief against the third-party bank under § 1821(j). *Id.* at 1016. The Eighth Circuit affirmed, employing a two-part test that asked (1) “whether the challenged action is within the receiver’s power or function[.]” and (2) whether the action requested would restrain or affect those powers. *Id.* at 1016–17. The court answered each question in the affirmative, noting that the challenged actions—“enforcing the note against the signers and the ability to sell the mortgaged property”—were “unquestionably within the receiver’s duties and powers.” *Id.* at 1017 (emphasis added)⁴; cf. *Tillman v. Resolution Tr. Corp.*, 37 F.3d 1032, 1036 (4th Cir. 1994) (holding that FIRREA’s anti-injunction provision precluded court’s enjoining foreclosure proceedings initiated by the Resolution Trust Corporation because “[i]t is abundantly clear that the [Resolution Trust Corporation] is authorized to pursue ... foreclosure”). The FDIC’s power to enforce a *107 note, of course, implies the power to declare that it will not do so.

Accordingly, we hold that a request for a declaratory judgment is a “claim” within the meaning of FIRREA because the FDIC can provide declaratory relief. *Accord Rundgren*, 760 F.3d at 1061–62 (stating that a request for a declaratory judgment is “susceptible of resolution” through FIRREA’s claims procedure); *Westberg*, 741 F.3d at 1305 (“[D]eclaratory relief against the FDIC is obtainable through the administrative process.”); cf. *Dittmer Props.*, 708 F.3d

at 1015 (FDIC reviewed and denied administrative claim for declaratory and injunctive relief). “Thus, [§ 1821(d)(13)(D)(ii)’s] reference to ‘any claim’ includes a request for declaratory relief.” *Westberg*, 741 F.3d at 1305; see also *Tri-State Hotels, Inc. v. F.D.I.C.*, 79 F.3d 707, 715 (8th Cir. 1996) (“[D]eclaratory judgment actions are covered by FIRREA.”); *Brown v. Resolution Tr. Corp.*, 30 F.3d 128, at *2 (4th Cir. 1994) (“[FIRREA’s] exhaustion requirement applies to ... declaratory judgment actions.”).

Our decision in *Elmco Properties* is not to the contrary. There, we considered whether the Resolution Trust Corporation’s failure to mail notice of a bank’s receivership to the plaintiff violated that plaintiff’s rights under the Due Process Clause of the Fifth Amendment. *Elmco Props.*, 94 F.3d at 918–22. In a footnote, we approved the district court’s conclusion that “although [plaintiff’s] complaint technically requested [a] declaratory judgment that it owned the funds and an order requiring [the Resolution Trust Corporation] to refund them, it was in essence a claim for monetary relief.” *Id.* at 919 n.1. “Accordingly,” we wrote, “we have no trouble treating [plaintiff’s] facially declaratory and injunctive action as what it genuinely is, i.e., a ‘claim’ against the assets of” a failed bank. *Id.* We did not elaborate on our conclusion beyond referencing, but not adopting the reasoning of, a Third Circuit case which defined “ ‘claim’ as ‘an action asserting a right to payment,’ in contrast to a mere request for declaratory judgment.” *Id.* (emphasis omitted) (quoting *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. City Sav., F.S.B.*, 28 F.3d 376, 387 (3d Cir. 1994)).

To the extent that the footnote in *Elmco Properties* suggests that a “claim” can only be a request for payment, we view it as dicta. And, in any event, *National Union Fire Insurance Company* does not stand for the proposition that FIRREA’s administrative process cannot resolve requests for declaratory judgments. The Third Circuit held there that § 1821(d)(13)(D) was a jurisdictional bar and that the term “any action seeking a determination of rights” in subsection (i) included declaratory judgment actions, but “le[ft] for another day” the question of whether FIRREA “requires or permits the [FDIC] to consider claims not asserting a right to payment, such as” a request for a declaratory judgment. *Nat’l Union Fire Ins.*, 28 F.3d at 387 n.12, 388–89. In other words, the Third Circuit left open the question of whether § 1821(d)(13)(D) was “an independent and outright bar of jurisdiction rather than a mere exhaustion requirement.” *Hudson United Bank*, 43 F.3d at 850 (quotation marks omitted) (explaining *National Union Fire Insurance Company*). Then, in *Hudson United Bank*, the

Third Circuit held that “the administrative claims procedures and the jurisdictional bar have concurrent scope,” *id.* at 849–50, “which suggests that declaratory judgment actions could be raised in the administrative forum,” *Tri-State Hotels*, 79 F.3d at 715 n.12 (explaining *Hudson United Bank*).⁵

*108 Finally, our decision creates no conflict between the meaning of the word “claim” in subsections (i) and (ii) of § 1821(d)(13)(D). *Westberg*, 741 F.3d at 1305 n.1. “Subsection (i) refers specifically to ‘any claim or action for payment.’ Subsection (ii)’s use of ‘claim,’ however, refers broadly to ‘any claim relating to any act or omission’ of the failed institution or the FDIC.” *Id.* “It is true that FIRREA is awkwardly written,” *Hudson United Bank*, 43 F.3d at 849, but we do not speculate on why Congress chose to qualify the word “claim” the way it did in subsection (i) and then complement that subsection’s reach by expanding it to “any action seeking a determination of rights,” 12 U.S.C. § 1821(d)(13)(D)(i). It suffices to say that the meaning of the word “claim” remains the same across the subsections—a term-of-art that refers only to claims that are resolvable through the FIRREA administrative process—and that subsection (ii) does not include language that limits its scope to a subset of claims the way that subsection (i) does.

b.

As for the Willners’ argument that the FDIC could not have adjudicated Count 1 because it cannot order a remedy against solvent third-party institutions, we have already addressed it to the extent we held above that Count 1 is functionally, if not formally, asserted against WMB rather than Chase and U.S. Bank. That would be the end of the story if Count 1, like Count 2, were a request for damages. It is undisputed that upon receiving a timely and meritorious claim for damages, the FDIC can resolve it by making a payment to the claimant. But there’s an argument to be made that the FDIC could not have adjudicated Count 1’s request for a declaratory judgment, even if the Willners had timely submitted it.

That argument, which the Willners only partially develop, goes as follows. The Willners never had a chance to seek administrative relief while the FDIC held their Loan, because the FDIC became WMB’s receiver and subsequently executed the Purchase and Assumption Agreement with Chase on the same day in September 2008. Though Count 1 is based on WMB’s conduct, the declaration that the Willners

seek through it—that there’s no right to foreclose under the Deed of Trust—nevertheless affects Chase and U.S. Bank.

Thus, assuming that the Willners had submitted a timely and meritorious claim for the relief that Count 1 requests, the argument concludes, the FDIC wouldn’t have been able to resolve it because the FDIC’s declaration as to an asset cannot bind a third-party bank after that bank has acquired the asset from the FDIC. *See Westberg*, 741 F.3d at 1308 n.3 (acknowledging but declining to resolve the issue of whether FDIC’s declaration would bind a third-party acquiring bank, because FDIC didn’t assign its interest in plaintiffs’ loan until eight months after plaintiffs filed an unrelated claim through FIRREA’s claims process and five months after plaintiffs filed suit against FDIC for declaratory judgment that they had no obligation to make loan payments).

We decline to decide whether the FDIC’s declaration would bind Chase and U.S. Bank. To do so, we would first have to blindly speculate about how the FDIC would have resolved the Willners’ request. We note that under the Purchase and Assumption *109 Agreement between the FDIC and Chase, liability for WMB’s acts and omissions stayed with the FDIC. By retaining liability for the acts upon which Count 1 is based, we assume without deciding that the FDIC could have resolved the Willners’ claim in a number of different ways.

[12] Instead, we hold that by not timely submitting what is on its face a “claim” to the FIRREA claims process, the Willners waived their argument about how the FDIC would have resolved it. *Cf. Rundgren*, 760 F.3d at 1061–62 (concluding that plaintiffs’ claim against Chase for a declaratory judgment voiding a loan plaintiffs received from WMB, and which Chase later acquired from the FDIC through the Purchase and Assumption Agreement, was “susceptible of resolution through FIRREA’s administrative procedure”). To hold otherwise would “allow [plaintiffs] to circumvent FIRREA’s exhaustion requirement by declining to pursue the remedies available to them and later arguing that such remedies are ineffective.” *Westberg*, 741 F.3d at 1308 n.3.

3.

We next consider the Willners’ argument that Counts 1 and 5 are affirmative defenses and thus fall outside the ambit of FIRREA’s exhaustion requirement. In so doing, we resolve the portion of Mr. Willner’s pro se appeal which challenges

the district court's decision on subject matter jurisdiction, as Mr. Willner's argument hinges on characterizing Counts 3, 6–9, and 16–19 as affirmative defenses.

[13] [14] We have acknowledged in an unpublished opinion, and reiterate now, that “FIRREA's exhaustion requirement does not encompass affirmative defenses,” *Fed. Fin. Co. v. Knott*, 217 F.3d 838, at *2 n.5 (4th Cir.2000); accord *Rundgren*, 760 F.3d at 1062; *Bolduc v. Beal Bank, SSB*, 167 F.3d 667, 671 (1st Cir. 1999); *Tri-State Hotels*, 79 F.3d at 715, but we have not weighed in on what constitutes an affirmative defense for the purpose of avoiding FIRREA's exhaustion requirement. While there is a general consensus that, by its plain terms, § 1821(d)(13)(D) applies to “claims” and “actions” but not “defenses,” the circuits differ as to what counts as a “defense.”

The Willners ask us to follow the First Circuit's reasoning from *Bolduc*. There, plaintiffs sued a solvent bank which had acquired a failed bank's assets from the FDIC, seeking to enjoin the solvent bank from foreclosing on their property. *Bolduc*, 167 F.3d at 670. The district court affirmed a magistrate judge's preliminary injunction on grounds that plaintiffs had a likelihood of prevailing at trial on claims that the failed bank obtained plaintiff's signature on mortgage notes in violation of federal law, and that mutual mistake invalidated contracts made between plaintiffs and the failed bank. *Id.* at 670–71. The solvent bank appealed, arguing that FIRREA required exhaustion of claims. *Id.* at 671.

The First Circuit rejected the bank's argument and adopted an expansive definition of what counts as an affirmative defense for the purpose of avoiding FIRREA's exhaustion requirement:

[W]ho happens to be the plaintiff is not controlling. The purpose of the exhaustion requirement is to make persons with claims against bank funds or property submit them promptly in a single administrative forum. One alleged merely to owe the bank money is not in this class, whether the debtor asks a court for a preemptive declaration or injunction against the bank claim or merely awaits suit by the bank and then defends.

*110 *Id.* at 671–72. Applying that rationale, the First Circuit held that the plaintiffs did not need to satisfy FIRREA's exhaustion requirement because they sought neither payment from a bank nor a determination of rights with respect to a bank asset. *Id.* at 672.

We decline to follow *Bolduc* because its reasoning is “neither clear nor persuasive.” *Rundgren*, 760 F.3d at 1064. Though FIRREA contains two exhaustion requirements, subsections (i) and (ii) of § 1821(d)(13)(D), *Bolduc* considered only subsection (i), even though the plaintiffs' suit was seemingly based upon the insolvent bank's acts and omissions and thus within the ambit of subsection (ii). Moreover, the First Circuit recognized, but did nothing to resolve, the fact that “a successful injunction suit by the [plaintiffs] could be viewed as cutting off the bank's rights to property currently in the bank's possession,” thereby depriving the suit of its characterization as an affirmative defense. *Bolduc*, 167 F.3d at 672.

We are more persuaded by the Ninth Circuit's approach to this issue. In *Rundgren*, the plaintiffs argued that their lawsuit for a declaration against Chase voiding a loan that they had received from WMB and which Chase later acquired from the FDIC under the Purchase and Assumption Agreement was actually an affirmative defense to Chase's foreclosure efforts. 760 F.3d at 1059–62 (explaining that plaintiffs sought to void the loan based on WMB's fraudulent acts).

The Ninth Circuit rejected that argument by construing the lawsuit as what it appeared to be on its face—“an independent action raising claims that provide a legal basis for enjoining” a nonjudicial foreclosure. *Id.* at 1062. The court refused to “recharacterize the [plaintiffs'] lawsuit for legal and equitable relief and damages as one raising affirmative defenses.” *Id.* at 1061–63; see also *Am. First Fed., Inc. v. Lake Forest Park, Inc.*, 198 F.3d 1259, 1264–65 (11th Cir. 1999) (defining an affirmative defense as “a response to a plaintiff's claim” and urging courts to “look beyond the nomenclature of a request for relief to ascertain whether ... the remedy sought by a party ... is encompassed by § 1821(d)(13)(D)”).

We hold that a purported affirmative defense does not qualify as one for the purpose of avoiding FIRREA's exhaustion requirement if, after looking beyond the nomenclature of the request for relief, the remedy sought is actually a “claim” within the meaning of FIRREA. Our holding fits with and facilitates FIRREA's requirement that a claimant submit all claims against a failed institution to the FDIC before

the “bar date.” See *Elmco Props.*, 94 F.3d at 919. The First Circuit’s approach in *Bolduc*, by contrast, risks vastly expanding the universe of claims exempt from FIRREA’s exhaustion requirement, thereby undermining FIRREA’s purpose of “establish[ing] a comprehensive scheme for efficiently administering all claims resulting from failed savings and loan institutions.” *Brady Dev.*, 14 F.3d at 1002.

[15] Applying this rule to Counts 1 and 5 reveals that they are not affirmative defenses because each is a “claim” within the meaning of FIRREA. As we explained above, each is a request for a declaratory judgment that the Deed of Trust cannot be used to foreclose on the Willners’ house. Furthermore, Counts 1 and 5 are functionally pleaded against WMB’s conduct. Therefore, neither qualifies as an affirmative defense, and the Willners were required to exhaust those claims.

[16] Application of this rule also resolves most of Mr. Willner’s pro se appeal as to Counts 3, 6–9, and 16–19. Mr. Willner tersely argues that each of these Counts is *111 an affirmative defense to U.S. Bank’s filing a proof of claim in bankruptcy court. We are satisfied that, with the exception of Count 3, each is functionally based upon WMB’s conduct and otherwise a “claim” within the meaning of FIRREA. Therefore, Counts 6–9 and 16–19 are not affirmative defenses, and Mr. Willner was required to exhaust them.

[17] We also reject Mr. Willner’s related argument that U.S. Bank’s filing a proof of claim in bankruptcy court created subject matter jurisdiction over his claims in the district court. Here, Mr. Willner appears to invoke an exception to FIRREA’s exhaustion requirement that exists within the bankruptcy system for a debtor who has a proof of claim filed against him by a creditor and then is allowed to bring a claim against the creditor in bankruptcy court outside of FIRREA’s administrative process. See, e.g., *In re Best Prod. Co., Inc.*, No. 93 CIV. 1115 (CSH), 1994 WL 141970, at *3 (S.D.N.Y. Apr. 20, 1994) (“[I]f [the FDIC] had not submitted a claim against the bankruptcy estate ... it also would not have waived its right to demand that [debtor] pursue administrative remedies within FIRREA prior to bringing its claim against [the FDIC] in the bankruptcy court.”). That exception is inapplicable though, because Mr. Willner is not in bankruptcy court.

[18] As for Count 3, the district court erred in characterizing it as being based upon WMB’s conduct and dismissing it for

lack of subject matter jurisdiction. See *Am. Nat’l Ins.*, 642 F.3d at 1142 (noting that a suit “against a third-party bank for its own wrongdoing ... is not barred by” § 1821(d)(13)(D)(ii)). In that Count, the Willners allege that Chase and U.S. Bank acted negligently because they “knew that Mr. Willner had a claim of recoupment against the Note” but failed “to seek the aid and direction of a court of equity before foreclosing on” the Willners’ home. J.A. 82. Count 3 has nothing to do with WMB’s conduct. Instead, it revolves exclusively around the allegation that Chase and U.S. Bank had a duty to Mr. Willner based upon his “claim of recoupment.” This precise issue of an alleged duty based upon a “recoupment claim” reappears in Mr. Willner’s pro se appeal as to the dismissal of Count 15, which is another claim for negligence against Chase and U.S. Bank. Accordingly, we will address the merits of Mr. Willner’s appeal as to Count 3 when we consider Count 15.

4.

Before turning to Mr. Willner’s pro se appeal, however, we take up the Willners’ argument that requiring administrative exhaustion of Counts 1, 2, and 5 violates the Fifth Amendment’s Due Process Clause because their claims didn’t accrue until Chase threatened foreclosure, which was years after the December 2008 “bar date” to submit claims against WMB to the FDIC. This argument also fails.

[19] A plaintiff cannot challenge her failure to exhaust claims with the FDIC on due process grounds if she has actual notice that the failed bank is in receivership or “kn[ows] enough about the situation to [have] ‘inquiry notice’ as to the details of the administrative process.” *Elmco Props.*, 94 F.3d at 918–22 (finding a due process violation where the FDIC’s predecessor did not mail notice of a failed-bank’s receivership to plaintiff, and plaintiff did not otherwise have “sufficient knowledge to charge it with a duty to inquire further into the claims process”). Here, the Willners had actual notice that WMB was in receivership prior to the “bar date.” As described above, Counts 1, 2, and 5 are functionally, if not formally, pleaded against WMB’s acts and omissions. Furthermore, *112 those Counts are based upon conduct of WMB which took place before WMB entered into receivership.

[20] Section 1821(d)(13)(D) does not contain a discovery rule that tolls claims. It is, by design, severe. The onus was on the Willners to timely submit any claims that they had

against WMB to the FDIC, and they failed to do so. There is no constitutional violation here.

* * *

To sum up, the district court correctly dismissed Counts 1, 2, 5–9, and 16–19 for lack of subject matter jurisdiction because the Willners didn’t exhaust their claims with the FDIC. We now turn to the remainder of Mr. Willner’s pro se appeal, where he challenges the district court’s dismissal of claims for constructive fraud (Count 14) and negligence (Count 15) against Chase and U.S. Bank. The district court held that the Willners had failed to plausibly state a claim in either Count.

B.

Mr. Willner makes different arguments with respect to the dismissal of his constructive fraud and negligence claims. We address them in turn, applying de novo review. *Partington v. Am. Int’l Specialty Lines Ins. Co.*, 443 F.3d 334, 338 (4th Cir. 2006).

1.

Mr. Willner argues that the district court erred by dismissing his constructive fraud claim in Count 14 because he pleaded false representations of material facts which Chase and U.S. Bank made to him as he was attempting to avoid foreclosure. We disagree.

[21] [22] In general, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, ‘to state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). However, Federal Rule of Civil Procedure 9(b) provides that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). “These circumstances are the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.” *Weidman v. Exxon Mobil Corp.*, 776 F.3d 214, 219 (4th Cir. 2015) (quotation marks omitted).

[23] [24] Under Virginia law, “the elements of a cause of action for constructive fraud are a showing by clear and

convincing evidence that a false representation of a material fact was made innocently or negligently, and the injured party was damaged as a result of his reliance upon the misrepresentation.” *Mortarino v. Consultant Eng’g Servs., Inc.*, 251 Va. 289, 467 S.E.2d 778, 782 (1996). The plaintiff must also show by “clear and convincing evidence that one has represented as true what is really false, in such a way as to induce a reasonable person to believe it, with the intent that the person will act upon this representation.” *Id.* (quotation marks omitted).

[25] The Willners’ complaint doesn’t contain sufficient facts, accepted as true, to plausibly show a false representation of a material fact by Chase or U.S. Bank. According to the Willners’ complaint, a Chase agent directed Mr. Willner to a Chase website which included a suggestion that he list his home for sale. Mr. Willner also applied for a loan modification through the Making Home Affordable Program, and Chase eventually told him that he was *113 ineligible. These allegations do not constitute a false representation of a material fact. And while Chase’s review of Mr. Willner’s application for the Making Home Affordable Program allegedly went on for longer than it was supposed to, that delay doesn’t amount to concealment which constitutes actionable fraud, as there is no allegation of deliberate nondisclosure. See *Van Deusen v. Snead*, 247 Va. 324, 441 S.E.2d 207, 209–10 (1994) (“[C]oncealment, whether accomplished by word or conduct, may be the equivalent of a false representation, because concealment always involves deliberate nondisclosure....”).

2.

Mr. Willner also contends that the district court mistakenly dismissed his negligence claim (Count 15) because he plausibly alleged that Chase owed him a duty to act reasonably in modifying his loan. Once again, we disagree.

[26] [27] Under Virginia law, “[t]he elements of an action in negligence are a legal duty on the part of the defendant, breach of that duty, and a showing that such breach was the proximate cause of injury, resulting in damage to the plaintiff.” *Blue Ridge Serv. Corp. of Virginia v. Saxon Shoes, Inc.*, 271 Va. 206, 624 S.E.2d 55, 62 (2006). However, “[a] tort action cannot be based solely on a negligent breach of contract.” *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 256 Va. 553, 507 S.E.2d 344, 347 (1998). Though “a party can, in certain circumstances, show both a breach of contract and a

tortious breach of duty[,] ... the duty tortiously or negligently breached must be a common law duty.” *Id.* (internal citation and quotation marks omitted).

[28] There is, as Mr. Willner admits, no freestanding common law duty in Virginia to grant a loan modification, and thus “any obligations [Chase] might have had in processing [Mr. Willner’s] application for a loan modification could only have arisen from” a contractual relationship between the parties. *Sherman v. Litton Loan Servicing, L.P.*, 796 F.Supp.2d 753, 764 (E.D. Va. 2011) (applying Virginia law). These facts, as Mr. Willner has pleaded them, can’t give rise to a tort claim in Virginia.

Mr. Willner resists that conclusion by arguing that his “recoupment claim against the Note” created a duty for Chase to act reasonably and “seek the aid and direction of a court of equity before foreclosing on the Property.” Appellants’ Br. at 48. “‘Recoupment’ has been defined as the right of the defendant to cut down or diminish the claim of the plaintiff in consequence of [the plaintiff’s] failure to comply with some provision of the contract sought to be enforced, or because [the plaintiff] has violated some duty imposed upon him by law in the making or performance of that contract.” *Virginia Fuel Corp. v. Lambert Coal Co.*, 291 Va. 89, 781 S.E.2d 162, 172 (2016) (alterations in original) (quotation marks omitted). There’s no binding appellate case to support Mr. Willner’s argument,⁶ and we won’t make Virginia law by stretching the definition of “recoupment” to create a new duty in tort.⁷

*114 We also reject Mr. Willner’s attempt to hold Chase CEO James Dimon liable for negligence. Mr. Willner makes two allegations against him: (1) Dimon signed a Consent Order with the Office of the Comptroller of the Currency, in which Chase agreed to correct problems with its servicing and foreclosure practices, and (2) Mrs. Willner tried to reach Dimon to discuss the foreclosure process but was only able to speak with one of his assistants. Mr. Willner’s allegations do not support liability for Dimon under any theory.

* * *

Footnotes

- ¹ The district court provided two alternative grounds for dismissing some or all of these Counts: (1) the Deed of Trust secures the Note, and (2) 12 U.S.C. § 1823(e) and the *D’Oench, Duhme* Doctrine bar claims “based on oral agreements or unrecorded side agreements with WMB.” We do not reach these alternative grounds in view of the resolution of this case on other bases.

Finally, we turn to whether the district court erred by not addressing the Willners’ requests to amend their complaint.

C.

[29] The Willners argue that the district court abused its discretion by not providing a reason for denying their requests to amend. We review a district court’s denial of leave to amend a complaint for abuse of discretion. *Cozzarelli v. Inspire Pharm. Inc.*, 549 F.3d 618, 630 (4th Cir. 2008).

[30] [31] We find no such abuse on this record. The Willners never filed a formal motion to amend, but rather requested leave to amend in the conclusions of three oppositions to motions to dismiss and one surreply. Equally important, they’ve not shown, even on appeal, how amendment would cure the deficiencies in their complaint. “[W]here, as here, the plaintiff fails to formally move to amend and fails to provide the district court with any proposed amended complaint or other indication of the amendments he wishes to make, the district court [does] not abuse its discretion” in denying leave to amend. *Estrella v. Wells Fargo Bank, N.A.*, 497 Fed.Appx. 361, 362 (4th Cir. 2012) (per curiam) (second alteration in original) (quotation marks omitted); accord *Cozzarelli*, 549 F.3d at 630–31 (finding no abuse of discretion in “declining to grant a motion [to amend] that was never properly made” but raised only in opposition to a motion to dismiss and in objections to the magistrate judge’s report).

III.

For the reasons given, we affirm the district court’s judgment.

AFFIRMED

All Citations

849 F.3d 93

- 2 In this case, the “bar date” to submit claims against WMB to the FDIC was December 30, 2008. The Willners filed Proofs of Claims with the FDIC after the district court issued its decision in 2015, and the FDIC disallowed them as untimely.
- 3 We recognize Appellees’ argument that parts of the Willners’ opening brief imply that they challenge the dismissal of only Counts 1, 2, 5, 14, and 15. However, we think that Mr. Willner makes enough of an argument with respect to Counts 3, 6–9, and 16–19 to avoid waiver. Furthermore, Mr. Willner purports to appeal the dismissal of Count 4, but he voluntarily dismissed that Count in its entirety before the district court. Thus, we do not consider it here.
- 4 The Eighth Circuit resolved the second question by reasoning that the challenged actions would restrain or affect the FDIC’s powers as receiver because, even though it had already sold the note, “if plaintiffs ... are allowed to attack the validity of a failed institution’s assets by suing the remote purchaser, such actions would certainly restrain or affect the FDIC’s powers to deal with the property it is charged with disbursing.” *Dittmer Props.*, 708 F.3d at 1017. We do not reach this issue here.
- 5 The Third Circuit also did not interpret subsection (ii) of § 1821(d)(13)(D) in *National Union Fire Insurance Company*. Thus, that decision presents an incomplete analysis of the meaning of the word “claim.”
- 6 One trial court opinion, *Bremer v. Bitner*, provides that “a trustee has a duty to seek the aid and direction of a court of equity before foreclosing if the amount of the debt is uncertain.” 44 Va. Cir. 505, 512 (Va. Cir. Ct. 1996) (citing *Morriss v. Virginia State Ins. Co.*, 90 Va. 370, 18 S.E. 843 (1893)). In our view, *Bremer* diverges from current Virginia law.
- 7 This same analysis resolves Mr. Willner’s appeal as to Count 3. That Count is a negligence claim which hinges on the allegation that Chase and U.S. Bank had a duty to Mr. Willner based upon his “claim of recoupment.” Because no such duty exists, Count 3 fails as a matter of law.

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708 F.3d 1011
United States Court of Appeals,
Eighth Circuit.

DITTMER PROPERTIES, L.P., Plaintiff–Appellant

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for Premier Bank, Jefferson
City, Missouri; Cathy Richards, Successor
Trustee of the Peters Family Trust u.t.a.
Restated September 27, 2007, Assignee of a
Fifty Percent General Partnership Interest in
Barkley Center General Partnership Derived
Origin; Cathy Richards, Defendants–Appellees.
Buford Farrington; Dittmer Holdings,
L.L.C.; Barkley Center Holdings, L.L.C.;
UMB Bank, N.A., Plaintiffs–Appellants

v.

Cathy Richards, Successor Trustee of the Peters
Family Trust and Successor Personal Representative
of the Estate of John Peters; CADC/RADC
Venture 2011–1, L.L.C., Defendants–Appellees.

Nos. 12–1327, 12–1329.

Submitted: Sept. 20, 2012.

Filed: Feb. 27, 2013.

Synopsis

Background: Limited partnership, as assignee of non-managing general partner's interest in Missouri general partnership, brought action in state court against the Federal Deposit Insurance Corporation (FDIC) as receiver for failed bank, successor personal representative of estate of managing general partner of general partnership, and purchaser from FDIC of promissory note made by general partnership, seeking declaratory judgment that bank's mortgage loan to general partnership should be declared void as to non-managing general partner because managing general partner had lacked authority from non-managing general partner to encumber general partnership's property, seeking to enjoin sale of encumbered property, and asserting common law claims. Limited partnership filed second action in state court. Both actions were removed. The United States District Court for the Western District of Missouri, Fernando J. Gaitan, Jr., Chief Judge, 2012 WL 253974, dismissed the claims for

declaratory and injunctive relief based on lack of subject matter jurisdiction, remanded first action's common law claims to state court, and dismissed second action based on res judicata. Limited partnership appealed.

[Holding:] The Court of Appeals, Beam, Circuit Judge, held that as a matter of first impression, limited partnership's request for declaratory and injunctive relief, after FDIC's sale of promissory note, would restrain or affect FDIC's powers as receiver, and thus, the anti-injunction provision of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) deprived the district court of power to grant the requested declaratory and injunctive relief.

Affirmed.

West Headnotes (10)

[1] Federal Courts

🔑 Jurisdiction

A district court's dismissal of a case for lack of subject matter jurisdiction or for failure to state a claim is reviewed de novo. [Fed.Rules Civ.Proc.Rule 12\(b\)\(1, 6\)](#), 28 U.S.C.A.

[6 Cases that cite this headnote](#)

[2] Finance, Banking, and Credit

🔑 Collection, settlement, or adjustment of loans

Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank which had made a mortgage loan, had the power under FIRREA to enforce the promissory note against the signers and to sell the mortgaged property. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, § 2, 12 U.S.C.A. § 1821(d)(2)(A, E).

[3 Cases that cite this headnote](#)

[3] Finance, Banking, and Credit

🔑 Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators

Request for declaratory and injunctive relief made by assignee of non-managing general partner's interest in Missouri general partnership, to declare a failed bank's mortgage loan to the partnership void as to non-managing general partner because managing general partner allegedly had lacked authority from non-managing general partner to encumber partnership's property, and to enjoin the purchaser of partnership's promissory note, which note the Federal Deposit Insurance Corporation (FDIC) had sold as receiver for failed bank, from selling the mortgaged property, would restrain or affect FDIC's powers as receiver, and thus, the anti-injunction provision of FIRREA deprived the district court of power to grant the requested declaratory and injunctive relief; if an asset sold by the FDIC to a third-party purchaser was subject to dilution in a later judicial proceeding, there would be a substantial chilling effect upon the FDIC's ability to perform its statutory functions as a receiver. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C.A. § 1821(j).

13 Cases that cite this headnote

[4] **Finance, Banking, and Credit**

🔑 **Conservatorship or receivership**

The disposition of a failed bank's assets is one of the quintessential statutory powers of the Federal Deposit Insurance Corporation (FDIC) as a receiver. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C.A. § 1821(d)(2)(A, E).

4 Cases that cite this headnote

[5] **Courts**

🔑 **Federal-Court Review of State-Court Decisions; Rooker-Feldman Doctrine**

The “*Rooker-Feldman* doctrine” prevents a losing state court party from seeking what in substance would be appellate review of the state court judgment in federal court.

2 Cases that cite this headnote

[6] **Federal Civil Procedure**

🔑 **Matters considered in general**

In adjudicating motions to dismiss, district courts are not strictly limited to the four corners of complaints. Fed.Rules Civ.Proc.Rule 12(b), 28 U.S.C.A.

7 Cases that cite this headnote

[7] **Federal Civil Procedure**

🔑 **Matters considered in general**

Federal Civil Procedure

🔑 **Motion**

While district courts primarily consider the allegations in the complaint in determining whether to grant a motion to dismiss for failure to state a claim, district courts additionally consider matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned, without converting the motion into one for summary judgment. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

32 Cases that cite this headnote

[8] **Removal of Cases**

🔑 **Review**

Any error was harmless to plaintiff, if district court, before granting defendant's motion to dismiss for failure to state a claim, failed to give notice to plaintiff that it would consider a document that was outside the complaint in federal court but that had been attached to defendant's answer in state court before removal of the case; plaintiff had a chance to respond to the motion to dismiss and to address the document, and because the case had a vigorous motion practice history in state court before removal, there was very little possibility that plaintiff was blindsided by a document in the removal record. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

8 Cases that cite this headnote

[9] Declaratory Judgment

🔑 [Motion to Strike or Dismiss Complaint, Petition or Bill](#)

Federal Civil Procedure

🔑 [Matters considered in general](#)

On motion to dismiss for failure to state a claim, in action for declaratory and injunctive relief challenging managing general partner's execution of a mortgage loan on partnership property, the district court could consider the durable power of attorney (POA) executed by non-managing partner, which document was referred to directly in the complaint, and could consider the amended partnership agreement, which was referred to by inference in the complaint. [Fed.Rules Civ.Proc.Rule 12\(b\)\(6\), 28 U.S.C.A.](#)

[3 Cases that cite this headnote](#)

[10] Partnership

🔑 [For individual debt](#)

Missouri general partnership was legally bound, under Missouri Uniform Partnership Act and under amended partnership agreement and durable power of attorney (POA) executed by non-managing partner, by mortgage loan that managing general took out on partnership property, though loan proceeds were used by managing general partner to fund his individual business interests and to service loans related to three properties owned solely by managing general partner; amended partnership agreement and the POA expressly indicated that managing general partner had the authority to manage partnership property, to execute mortgages against the property in non-managing general partner's name, and to generally transact partnership business in the manner that managing general partner thought proper. [V.A.M.S. § 358.090\(1\).](#)

Attorneys and Law Firms

***1014** [Thomas M. Schneider](#), argued and on the brief, Columbia, MO, for appellants.

[William L. Sauerwein](#), argued, [Michael C. Schroer](#), [Anne Johnston Kelly](#), on the brief, Saint Louis, MO, for appellees.

Before [WOLLMAN](#), [BEAM](#), and [MURPHY](#), Circuit Judges.

Opinion

[BEAM](#), Circuit Judge.

Dittmer Properties, L.P., Dittmer Holdings, L.L.C., Barkley Center Holdings, L.L.C., Buford Farrington, and UMB Bank, N.A. (collectively “Dittmer”) appeal the district court’s¹ dismissal under [Federal Rule of Civil Procedure 12\(b\)](#) of their two lawsuits against a failed bank, the Federal Deposit Insurance Corporation (FDIC) as the bank’s receiver, and Cathy Richards, successor personal representative to the Estate of John Peters. We affirm.

I. BACKGROUND

Barkley Center General Partnership (Barkley) is a Missouri general partnership, that, at all times relevant to this action, had two equal general partners—John Peters and Joe Dittmer. Peters was the managing general partner, and this position, set forth in the amended partnership agreement, in addition to a durable power of attorney (POA) executed by Joe Dittmer, gave Peters broad authority to act for the benefit of Joe Dittmer’s interest in Barkley. The amended partnership agreement and the POA expressly indicated that Peters had the authority to manage partnership property, execute mortgages against the property in Joe Dittmer’s name as a Barkley partner, and generally transact partnership business in the manner that Peters thought proper.

In a series of transactions from July through September 2006, Premier Bank loaned Barkley \$2,550,000, at the behest of Peters in his role as managing partner. Partnership property was used as collateral for the loan. Prior to the loan’s execution, Joe Dittmer faxed a letter to Premier stating, “I have no problem with John Peters using Power of Attorney to encumber on Comm. Property of Barkley Partnership.” The loan proceeds were used to fund Peters’ individual business interests and service loans related to three properties owned solely by Peters—the Ranch at Cedar Creek, the Lodge of Cedar Creek, and Sports at Cedar Creek.

Joe Dittmer died on October 18, 2007, and Peters died on February 10, 2008. Barkley eventually defaulted on the loan. In the first of two eventual lawsuits arising out of the 2006 loan transaction to Barkley, Dittmer,² representing Joe Dittmer's half interest in Barkley, sued Premier Bank, *1015 seeking declaratory judgment that the loan should be declared void as to Dittmer and sought to enjoin the bank from selling the encumbered property. The suit was filed in Missouri state court, and the primary basis for Dittmer's complaint was that Peters did not have authority from his partner, Joe Dittmer, to mortgage Barkley property for this transaction. Dittmer alleged that the bank improperly paid all of the loan proceeds to Peters' three Cedar Creek properties, and to itself to pay off other loans attributable to Peters' Cedar Creek properties.

On October 15, 2010, the FDIC was appointed receiver of Premier Bank after the bank became insolvent. See 12 U.S.C. § 1821 (section 1821 comprises the relevant portion of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA),³ for purposes of this case). Accordingly, the FDIC moved to be substituted for Premier Bank as the defendant in the case, and subsequently removed the case to federal court. The FDIC moved to dismiss the case based upon Federal Rule of Civil Procedure 12(b)(1) (for the declaratory and injunctive claims) and Rule 12(b)(6) (for the remaining common law claims). The district court denied the motion and instead stayed the action, pending the exhaustion of administrative remedies mandated by 12 U.S.C. § 1821(d) of FIRREA. After the FDIC had completed its administrative review and denied the administrative claim, Dittmer asked for leave⁴ to file a second amended complaint, and the FDIC renewed its motion to dismiss. In September 2011, while the renewed motion to dismiss was pending, Dittmer filed another suit in Missouri state court, which included the same claims as the first case, but included all of the various Dittmer successors as plaintiffs, and both the FDIC and Richards as defendants. The FDIC likewise removed the second case and it was assigned to a different federal district court judge. In November 2011, the FDIC moved to substitute CADC/RADC Venture 2011–1, L.L.C. (CADC) for itself in both cases, because it sold the Barkley note to CADC. This motion was granted by the district court in the second case, *1016 and shortly thereafter, in December 2011, the second case was transferred to the same district court judge as the first case. In January 2012, the district court granted the motion to dismiss with regard to the first case, finding that the anti-injunction provisions in FIRREA, 12 U.S.C. § 1821(j), precluded Dittmer's requests

for injunctive and declaratory relief, and that because Peters was authorized as the managing general partner to enter into the loan transaction, the partnership suffered no redressable injury and lacked standing. The district court remanded any possible claims against Richards to state court. The district court then dismissed the second case on res judicata grounds. Dittmer appeals.

II. DISCUSSION

[1] We review the district court's dismissal of a case pursuant to Rule 12(b) de novo. *Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 484 (8th Cir.1993) (reviewing de novo a Rule 12(b)(1) motion for lack of subject matter jurisdiction pursuant to FIRREA); *Illig v. Union Elec. Co.*, 652 F.3d 971, 976 (8th Cir.2011) (Rule 12(b) 6).

A. FIRREA

The FDIC alleged in its Rule 12(b)(1) motion that the district court did not have subject matter jurisdiction over the requests for injunctive relief due to the operation of the anti-injunction provisions in FIRREA. In its capacity as receiver of a failed institution, the FDIC is shielded from judicial action that restrains or affects the exercise of its powers as receiver. The anti-injunction provisions in FIRREA state: “Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.” 12 U.S.C. § 1821(j). This section has been construed broadly to constrain the court's equitable powers. *Hanson v. FDIC*, 113 F.3d 866, 871 (8th Cir.1997).

Part of the relief Dittmer seeks in its complaint—that the original note be declared void as to Dittmer, and that the bank be enjoined from selling the subject property—are requests for injunctive relief that would normally be barred by § 1821(j). *Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707, 715 (8th Cir.1996). However, Dittmer points out that the FDIC is no longer the holder of the note because it sold the note to CADC.⁵ Dittmer argues that CADC does not receive the same protections from the anti-injunction provisions of § 1821(j) as does the FDIC. On the other hand, the FDIC argues that the transfer of the note to CADC does not render § 1821 moot or meaningless because the transfer was an exercise of its statutory powers, set forth in § 1821(d) and protected by § 1821(j), and any declaration that the note was void as against the original signer would unduly restrain its powers as receiver.

[2] Accordingly, we believe we must determine whether Dittmer's lawsuit "restrain[s] or affect[s]" the FDIC's powers as receiver, even though the FDIC has already disposed of the asset in question. We have not had the occasion to construe the effect of § 1821(j) when the receiver *1017 has disposed of an asset to a remote third-party purchaser. Other circuits have held that the inquiry is two-fold: the court must first determine whether the challenged action is within the receiver's power or function; if so, it then determines whether the action requested would indeed "restrain or affect" those powers. *Bank of Am. Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir.2010). Here, the challenged action—enforcing the note against the signers and the ability to sell the mortgaged property—is unquestionably within the receiver's duties and powers. See 12 U.S.C. § 1821(d)(2)(A) & (E) (setting forth the duties of the FDIC as receiver of a failed bank, including that it succeeds to the assets of the institution, and may place the institution in liquidation and "realize upon the assets of the institution").

[3] Next, we look to whether the challenged action would indeed "restrain or affect" the FDIC's receivership powers. *Colonial Bank*, 604 F.3d at 1243. Dittmer asked the court to declare the original note void as to Dittmer. Even though the FDIC has apparently already sold the note in question, if plaintiffs such as Dittmer are allowed to attack the validity of a failed institution's assets by suing the remote purchaser, such actions would certainly restrain or affect the FDIC's powers to deal with the property it is charged with disbursing. "[A]n action can 'affect' the exercise of powers by an agency without being aimed directly at [the agency]." *Hindes v. FDIC*, 137 F.3d 148, 160 (3d Cir.1998). In *Hindes*, the Third Circuit held that the protections afforded to receivers in § 1821(j) extend to third parties. In rejecting the argument that § 1821(j) does not apply to a non-FDIC third party, the court stated, "the statute, by its terms, can preclude relief even against a third party, including the FDIC in its corporate capacity, where the result is such that the relief 'restrain[s] or affect[s]' the exercise of powers or functions of the [FDIC] as a conservator or a receiver." *Id.* (alterations in original) (quoting 12 U.S.C. § 1821(j)). Cf. *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir.1992) (holding that § 1821(j) applied to bar a claim seeking to attach a lien to a certificate of deposit in which the FDIC had a security interest because the attachment would ultimately have an effect upon the FDIC's exercise of its powers as receiver).

[4] We agree with the reasoning in *Hindes* and find that Dittmer's request for injunctive relief is barred by § 1821(j), even though the FDIC is no longer the holder of the note, because the relief requested—a declaration that the note is void as to Dittmer—affects the FDIC's ability to function as receiver in the case. The "disposition of a failed [bank's] assets ... is one of the quintessential statutory powers of the [FDIC] as a receiver." *Pyramid Constr. Co. v. Wind River Petroleum, Inc.*, 866 F.Supp. 513, 517 (D.Utah 1994). If an asset sold to a third-party purchaser is subject to dilution in a later judicial proceeding, there would be a substantial chilling effect upon the receiver's ability to perform its statutory functions. In *Pyramid*, the court rejected the argument that § 1821(j) did not apply because a plaintiff sought relief against the receiver's successor. The plaintiff's argument in *Pyramid* sounded much like Dittmer's here—because the receiver had already liquidated the subject property and realized the profits therefrom, the receiver had no remaining interest in the property. *Id.* at 518. The *Pyramid* court disagreed, finding that the plain language of the statute reflected Congress's intent to prohibit *any* interference, direct or indirect, with the functions of the receiver. *Id.* And, like *1018 Dittmer's lawsuit, the *Pyramid* court found that the plaintiff's suit would have the effect of rescinding the transfer of property from the receiver to the purchasing company, a move that "would undoubtedly 'restrain or affect' the [receiver] in the performance of its statutory duties." *Id.* at 519.

Other lower courts are in accord with the reasoning of *Hindes* and *Pyramid*. See, e.g., *Hoxeng v. Topeka Broadcomm, Inc.*, 911 F.Supp. 1323, 1334–35 (D.Kan.1996) (holding that the FDIC's agent could assert § 1821(j) to bar a claim for specific performance even when the FDIC was not, and could not have been, a party to the case); *Furgatch v. Resolution Trust Corp.*, No. 93–20304, 1993 WL 149084, at *2 (N.D.Cal. April 30, 1993) (unpublished) (holding that § 1821(j) barred a claim to enjoin a bank and its trustee from conducting a foreclosure sale because "enjoining these parties indirectly enjoins [the receiver], which a district court has no power to do").

[5] Of the many cases Dittmer cites in support of its argument that the protections of § 1821(j) end when the receiver transfers or distributes an asset at issue, the closest one purportedly on point is *Henrichs v. Valley View Development*, 474 F.3d 609 (9th Cir.2007). However, that case still misses the mark. *Henrichs* involved a rather convoluted land deal gone awry. The underlying dispute was over two tracts of land that could not be sold separately because there was no recorded tract map delineating the

boundaries of the tracts. A limited partnership desired to buy one of the tracts, and, anticipating a delay in the ability to obtain an approved, recorded tract map, the partnership bought both tracts. However, the buyer leased the second tract back to the seller and gave the seller the option to buy back the second tract for \$1, free of all liens and encumbrances, once the tract map was recorded. The seller exercised the option once the tract map was recorded, but in the meantime, both of the tracts were encumbered by a mortgage, unbeknownst to the seller. Ultimately, the bank that made the mortgage loan failed, and shortly thereafter, the partnership defaulted on the loan. Pursuant to FIRREA, the FDIC became the bank's receiver and acquired the bad loan. When the seller realized that the second tract was encumbered by a lien a few years later, it sued the members of the limited partnership in California state court to quiet title. The seller successfully quieted title in the second tract. Unhappy with this result, one of the limited partners sued the original seller in federal court, in relevant part asking the federal court to "void" the state court quiet title judgment. The district court dismissed this claim on *Rooker-Feldman*⁶ grounds. On appeal, seeking to avoid the *Rooker-Feldman* bar, the partner asserted that the state court never properly had jurisdiction over the quiet title suit because FIRREA vested exclusive jurisdiction in the federal courts over the claim.

The *Henrichs* court rejected the exclusive jurisdiction argument, noting that FIRREA's jurisdictional bars in § 1821(d) and (j)⁷ were "not applicable" because the *1019 FDIC was not a party to the state court quiet title litigation instigated by the seller against the original purchasers of the tracts of land. 474 F.3d at 614. Seizing upon this "not applicable" language, Dittmer argues that *Henrichs* stands for the proposition that the jurisdictional bar in § 1821(j) is not operable once the FDIC has conveyed receivership property to a third-party purchaser. However, we find that the rather elaborate factual scenario in *Henrichs* is distinguishable from the transactions at issue here. First, the FDIC was a party in one of these cases, and remains a party in the first case. And, in *Henrichs*, the subject matter of the underlying state court litigation was the title to the second tract of land, not the note formerly held by the FDIC. *Id.* Here, the subject of the litigation is and always has been Dittmer's attempts to avoid its obligations on the original note from Premier to Barkley. That the FDIC succeeded to title of the note (and ultimately sold it to a willing buyer) in its role as the bank's receiver is of the utmost relevance. Indeed, the Ninth Circuit itself recognized the distinction between the situation in *Henrichs* and a situation where the subject of the underlying lawsuit

relates to the act or omission of a failed banking institution. See *Benson v. JPMorgan Chase Bank, N.A.*, 673 F.3d 1207, 1213 (9th Cir.2012) ("[N]othing in *Henrichs* suggests that the quiet title action could have been related to the acts or omissions of a failed bank or the FDIC."). Accordingly, *Henrichs* is distinguishable.

Dittmer also argues that its claim deals with *assets* rather than the *functions* of the FDIC in its capacity as receiver, and, therefore, the provisions of § 1821(j) are inapposite, citing *Tri-State Hotels*, 79 F.3d 707. *Tri-State* involved an investor who had entered into agreements with various banks to purchase and finance distressed hotel properties. The banks allegedly promised to provide further financing when needed, and agreed to limit the investor's liability in the event of default. Ultimately, one of the banks stopped providing financing to the investor, and the FDIC was appointed receiver when the bank failed. The investor brought suit against the FDIC, the banks, and several bank officers, asking for rescission of the purchase agreement and loan documents, and for declaratory relief with respect to those same documents. A few months later, and while the investor's action was still pending, the FDIC in turn sued the investor for defaulting on the note. Pursuant to FIRREA, the district court dismissed the investor's claims against the FDIC. The investor had not submitted its claims through the administrative process pursuant to § 1821(d), and the investor argued on appeal that it was not required to do so. We disagreed and found that the exhaustion requirements of § 1821(d) and the anti-injunction provision in § 1821(j) barred the investor's claim against the FDIC, and further rejected the argument that the investor's inability to obtain declaratory and rescissory relief in its lawsuit would render the investor "defenseless" in the FDIC's lawsuit. *Tri-State*, 79 F.3d at 714–15.

Regarding the "defenseless" argument, we noted that because the suit by the FDIC was *against* the investor, the investor's affirmative defenses would not be subject to the exhaustion requirements of *1020 § 1821(d), as they would be responses, not claims or actions, against the FDIC. *Id.* at 715 & n. 13. The language of FIRREA precludes "claim[s] against or "action[s] seeking a determination of rights" against a receiver without first submitting the claim for administrative review. 12 U.S.C. § 1821(d)(13)(D). After this review has occurred, or if it is the FDIC bringing the claim, the jurisdictional bars in § 1821(d) are no longer in play. In discussing the reach of subsection (d), we noted, "when the FDIC has completed its administrative review, and has chosen a judicial forum in which to prosecute its rights, the policy of

avoiding unnecessary litigation is no longer applicable, and the party's Due Process rights to defend the claims in the FDIC's lawsuit become paramount.” *Tri-State*, 79 F.3d at 715 n. 13.

Attempting to apply this reasoning to § 1821(j) and this case, Dittmer argues that *Tri-State* stands for the proposition that so long as the exhaustion requirements of § 1821(d) are satisfied, the anti-injunction provisions of § 1821(j) are not implicated. We do not think this quote from *Tri-State* bears the weight that Dittmer asks us to place upon it. *Tri-State* simply stands for the unremarkable proposition that claims must be exhausted in front of the FDIC pursuant to § 1821(d) before there can be judicial review of those claims, and that if the FDIC or other receiver chooses to bring suit, the defendant in that suit may properly assert an affirmative defense untethered to the jurisdictional bar in § 1821(d). 79 F.3d at 714–15. Footnote 13 from *Tri-State*, upon which Dittmer relies, does not discuss or even contemplate the anti-injunction jurisdictional bar of § 1821(j). *Id.* at 715 n. 13. Accordingly, we find that under 12 U.S.C. § 1821(j), the district court correctly dismissed Dittmer's claims for injunctive and declaratory relief.

B. Common Law Claims

In the second amended complaint, Dittmer also alleged violations of the bank's common law duties to make a commercially reasonable loan and exercise ordinary care. Dittmer also asserted that the bank converted funds and was unjustly enriched when it used the proceeds of the loan to pay off another of Peters' loans held by the bank. Against Richards, Dittmer requested a money judgment in the amount of \$2,550,000. Because Dittmer requested money judgments reimbursing it for its share of any payments made on the note, prejudgment interest, costs and attorney fees, presumably based upon these common law theories, these claims are not barred by the anti-injunction provision of § 1821(j). The district court nonetheless dismissed the claims against the FDIC, finding that the partnership suffered no injury and that Dittmer therefore lacked standing. The court remanded the claims against Richards to state court. On appeal, Dittmer argues that the district court tested the adequacy of the answer, not the complaint; that it wrongly decided factual issues on a Rule 12(b)(6) motion, including Peters' alleged authority to act; that it wrongly considered matters outside of the pleadings; and that it erred in finding that Dittmer was not injured, and therefore lacked standing, when the proceeds were paid to Cedar Creek.

In deciding the motion to dismiss, the district court expressly noted that it was considering the documents attached to the answer filed in state court by Premier Bank, before the case was removed and before the FDIC was involved, including the amended partnership agreement, the POA, and the fax from Joe Dittmer to Premier Bank. As is required by statute, all of these documents comprising the record in the state court were attached to the *1021 notice of removal. *See* 28 U.S.C. § 1446(a).

[6] [7] [8] [9] In adjudicating Rule 12(b) motions, courts are not strictly limited to the four corners of complaints. *Outdoor Cent., Inc. v. GreatLodge.com, Inc.*, 643 F.3d 1115, 1120 (8th Cir.2011). As we recently stated,

[w]hile courts primarily consider the allegations in the complaint in determining whether to grant a Rule 12(b)(6) motion, courts additionally consider ‘matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned;’ without converting the motion into one for summary judgment.

Miller v. Redwood Toxicology Lab., Inc., 688 F.3d 928, 931 n. 3 (8th Cir.2012) (quoting 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004)). Following *Miller*, we find the district court properly considered the amended partnership agreement and POA⁸ because they were contemplated by or expressly mentioned in the complaint. There is no allegation that the amended partnership agreement or POA were inaccurate or fabricated. Instead, Dittmer argues that the district court should not have considered these extraneous documents on the motion to dismiss, or that the court should have given notice that it was considering them and converting the motion to one for summary judgment. *See BJC Health Sys. v. Columbia Cas. Co.*, 348 F.3d 685, 688 (8th Cir.2003) (holding that district court should not have considered documents not contemplated by the pleadings on the Rule 12(b)(6) motion, and the lack of notice that it was doing so was not harmless error). Because these two documents are referred to either directly (the POA) or by inference (the amended partnership agreement) in the complaint and their authenticity is not questioned, we find that the district court appropriately considered them in ruling on the motion to dismiss. *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697 n. 4 (8th Cir.2003).

[10] Given that the partnership and POA documents were properly considered, we turn to the question of whether the

district court properly dismissed the claims against the FDIC. The Missouri Uniform Partnership Act states:

Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner *1022 so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

Mo.Rev.Stat. § 358.090(1). This language indicates that Peters' conduct in taking out the loan and directing the proceeds effectively legally bound the partnership in relation to the lending bank. Further, the amended partnership agreement and the POA refute any notion that Peters had “in fact no authority to act for the partnership in the particular matter.” *Id.* Given the language of the Missouri Uniform Partnership Act, the amended partnership agreement and the POA documents, the district court correctly dismissed⁹ the claim against the FDIC.

C. Res Judicata

The district court concluded that the doctrine of res judicata required dismissal of the second case, which was filed in

September 2011. There is no credible argument that this is not the same case, or that these parties are not in privity with one another. Dittmer alleges in the state court petition that it is in privity with the other parties, and also alleges in the petition that the two cases have the “same claims.” At oral argument, counsel explained that the second lawsuit was filed “protectively” in the event that the motion to substitute parties was not granted. And, on appeal, Dittmer's arguments with regard to the propriety of the res judicata ruling again relate to the district court's alleged failure to timely rule on the motion to substitute and add parties plaintiff. Examining the record, we find that all of the parties related to Dittmer had the opportunity to, and did, litigate this same action against the bank, the FDIC, and CADC. These same entities are still litigating the remanded state law claims against Richards in state court. Therefore, we agree with the district court's res judicata ruling. *See Rutherford v. Kessel*, 560 F.3d 874, 881 (8th Cir.2009) (holding that the doctrine of res judicata barred successive lawsuits by siblings asserting the same claims because “[t]he doctrine of res judicata bars both parties and their privies from relitigating an issue already decided”).

III. CONCLUSION

The essence of this somewhat convoluted case is a dispute, not between the original partners, but between the partners' respective successors. Dittmer's state law claims against Richards, as Peters' successor, have been remanded to state court, where the dispute will, hopefully, be finally settled. We affirm the judgment of the district court.¹⁰

All Citations

708 F.3d 1011

Footnotes

- 1 The Honorable Fernando J. Gaitan, Jr., Chief Judge, United States District Court for the Western District of Missouri.
- 2 In actuality, UMB filed the first salvo in August 2009 in its capacity as successor trustee of the Joe Dittmer trust, suing Premier Bank in state court. In September 2010, UMB successfully moved to substitute Farrington as the party plaintiff because Farrington had recently been appointed Special Administrator of Joe Dittmer's estate. In October 2010, the FDIC was appointed receiver of Premier Bank, which had become insolvent, and consequently the FDIC successfully moved to be substituted for Premier Bank as the defendant. In January 2011, Farrington successfully moved to substitute Dittmer Properties, L.P., for himself as plaintiff on the ground that Joe Dittmer had assigned Dittmer Properties, L.P., his partnership interest in Barkley before he died. Also in January 2011, Farrington successfully moved to add Richards as a defendant, because she owned Peters' partnership interest in Barkley and had refused to join the litigation as a plaintiff. Shortly after gaining party status, the FDIC removed the case to federal court. The case proceeded in federal court. Dittmer asked for leave to file a second amended complaint, the FDIC filed a motion to dismiss and Richards filed a motion for judgment on the pleadings. Further, additional motions to add and substitute parties were also made, but

nothing substantive had yet occurred when counsel for the various plaintiffs (all of the entities collectively labeled “Dittmer” above are represented by the same counsel) filed another action in Missouri state court in September 2011. This action was purportedly on behalf of Farrington, Dittmer Holdings, L.L.C., Barkley Center Holdings, L.L.C., and UMB Bank and against the FDIC and Richards (the second case). The state court petition expressly admitted that it comprised the “same claims” as the case simultaneously pending in federal court (the first case). The FDIC removed this second case as well. In November 2011, the FDIC moved to substitute CADC/RADC Venture 2011–1, L.L.C. (CADC) as a defendant in both pending cases on the ground that the FDIC had transferred the note and deed of trust to CADC. The motion was granted in the second case, but the first case was dismissed in January 2012 before the motion was ruled upon. Accordingly, except when necessary for analysis, we will refer to a single case, with “Dittmer” as the plaintiff and FDIC, CADC and/or Richards as defendants.

- 3 In § 1821, FIRREA establishes a comprehensive scheme for conservatorships and receiverships for insured financial institutions. *Hindes v. FDIC*, 137 F.3d 148, 159 (3d Cir.1998).
- 4 We note that the district court did not actually allow Dittmer to file its second amended complaint. It did not deny leave, it simply waited until the final order and denied the motion for leave to amend as moot. However, out of an abundance of caution, we refer to the claims in this second amended complaint, noting that the district court did the same in its final order.
- 5 The FDIC remains a party in one of these two cases, it seems, because the district court simply did not rule on the FDIC's motion to substitute CADC before the court dismissed the suit pursuant to Rule 12(b). As best we can tell, everyone agrees that the FDIC has, indeed, conveyed this note to CADC for valid consideration. Because of the outcome of our analysis, it does not matter whether the FDIC, CADC, or both, are the named parties in the suits.
- 6 This is the doctrine that prevents a losing state court party from seeking what in substance would be appellate review of the state court judgment in federal court, based upon *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923).
- 7 Section 1821(d) and § 1821(j) both contain jurisdictional bars to judicial review. Subsection (d) is the section of FIRREA that, in addition to setting forth the rights and duties of the receiver, provides for mandatory administrative review and the exhaustion of claims with the FDIC before judicial review. 12 U.S.C. § 1821(d)(3)(13). Subsection (j), of course, contains the anti-injunction provision at play here. Although (d) is not directly implicated here because administrative exhaustion has occurred, many of the cases discuss both (d) and (j) in the context of the jurisdictional bars present in FIRREA.
- 8 The fax from Joe Dittmer to the bank is a closer call as this document is not mentioned, directly or by inference, in the complaint. However, we find that the judgment in favor of the FDIC is proper on the basis of Missouri law, the partnership agreement and the POA documents alone. And if the district court did err in considering the fax without giving notice to the parties that it was considering matters outside of the pleadings, we find that any such error was harmless. See *Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir.1992) (“A failure [to give notice] is harmless if the nonmoving party had an adequate opportunity to respond to the motion and material facts were neither disputed nor missing from the record.”). Dittmer not only had a chance to respond to the motion to dismiss and address the fax, but in making arguments about the lack of Peters' apparent authority, pointed out that the bank president solicited the fax from Joe Dittmer. Dittmer's App. at 160. Also, given that this is a removed case that had a vigorous motion practice history in state court before removal, there is very little possibility that Dittmer was blind sided by a document in the removal record.
- 9 We do not agree with the district court's verbiage that “[b]ecause there was no injury to the partnership, the Court finds that plaintiff has no standing.” Dittmer's App. at 347. Rather, we find that because Dittmer cannot state a claim for which relief may be granted based upon the conduct of the lending bank, the Rule 12(b)(6) motion was properly granted. See *McCrary v. Stifel, Nicolaus & Co., Inc.*, 687 F.3d 1052, 1058 (8th Cir.2012) (noting that we may affirm the district court on any basis that is supported by the record). To the extent that the partnership may have been injured by the conduct of Peters, any possible claims against Richards were remanded to state court for further proceedings.
- 10 We deny CADC's motion to dismiss the appeal, and dismiss Appellants' motion to amend the statement of issues as moot.

56 F.3d 1394

United States Court of Appeals,
District of Columbia Circuit.Clyde C. FREEMAN and
Nancy F. Freeman, Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for Madison National Bank, Appellee.

No. 93-5395.

Argued Feb. 3, 1995.

Decided June 13, 1995.

Synopsis

Borrowers from failed bank brought suit against Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank, seeking to prevent FDIC from foreclosing on home and other properties, and FDIC removed case from the Superior Court of the District of Columbia. On cross-motions for partial summary judgment and defense motion to dismiss, the United States District Court for the District of Columbia, Stanley Sporkin, J., 842 F.Supp. 2, granted summary judgment in favor of FDIC. Borrowers appealed. The Court of Appeals, Wald, Circuit Judge, held that: (1) because borrower sought relief that would effectively restrain FDIC from foreclosing on their property, the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) precluded court from granting borrowers' motions for relief; (2) borrowers were subject to requirements of FIRREA administrative claims process; and (3) borrowers had predeprivation notice and opportunity to be heard despite their alleged lack of notice of claims filing deadline and, thus, they were not denied due process.

Affirmed.

West Headnotes (19)

[1] Finance, Banking, and Credit **Judicial Review or Intervention**

Under FIRREA provision giving Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank, power to collect all

obligations due to failed institution, exercise of FDIC's powers may not be restrained by any court, regardless of claimant's likelihood of success on merits of underlying claims. Federal Deposit Insurance Act, § 2[11](d)(2)(I)(i), as amended, 12 U.S.C.A. § 1821(d)(2)(I)(i).

[24 Cases that cite this headnote](#)**[2] Finance, Banking, and Credit** **Collection and protection of assets****Finance, Banking, and Credit** **Judicial Review or Intervention**

Federal Deposit Insurance Corporation's (FDIC) broad powers as receiver of failed institution include power to foreclose on property of debtor held by failed bank as collateral, and no court may enjoin exercise of that power. Federal Deposit Insurance Act, § 2[11](j), as amended, 12 U.S.C.A. § 1821(j).

[13 Cases that cite this headnote](#)**[3] Finance, Banking, and Credit** **Judicial Review or Intervention**

Pursuant to FIRREA provision prohibiting court from taking any action to restrain powers of Federal Deposit Insurance Corporation (FDIC), federal district court could not grant debtors' pleas for nonmonetary remedies, including injunctive relief, declaratory relief, and rescission of promissory note, to prevent FDIC from foreclosing on debtors' residence, which served as collateral for note held by failed bank for which FDIC was receiver. Federal Deposit Insurance Act, § 2[11](d), as amended, 12 U.S.C.A. § 1821(d).

[40 Cases that cite this headnote](#)**[4] Finance, Banking, and Credit** **Time for presentation and proof**

When liquidating failed bank's assets, Federal Deposit Insurance Corporation (FDIC) must publish notice to depository institution's creditors specifying date by which claims must be presented, not less than 90 days after publication, and in addition, must mail similar

notice to any creditor shown on institution's books. Federal Deposit Insurance Act, § 2[11](d)(3)(B, C), as amended, 12 U.S.C.A. § 1821(d)(3)(B, C).

8 Cases that cite this headnote

[5] **Finance, Banking, and Credit**

🔑 Time for presentation and proof

Claims against assets of failed bank held by Federal Deposit Insurance Corporation (FDIC) as receiver that are not timely filed must be disallowed unless claimant did not receive notice of appointment of receiver in time to file claim. Federal Deposit Insurance Act, § 2[11](d)(5)(C), as amended, 12 U.S.C.A. § 1821(d)(5)(C).

13 Cases that cite this headnote

[6] **Finance, Banking, and Credit**

🔑 Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators

No court has jurisdiction to hear any claim or action for payment from or action seeking determination of rights with respect to any asset of failed bank for which Federal Deposit Insurance Corporation (FDIC) is receiver, with one exception, which is that federal district courts in either District of Columbia or district where financial institution has its principal place of business may have jurisdiction to review de novo claims filed with and processed by FDIC under its administrative claims process. Federal Deposit Insurance Act, § 2 [11](d)(6), as amended, 12 U.S.C.A. § 1821(d)(6).

25 Cases that cite this headnote

[7] **Finance, Banking, and Credit**

🔑 Exhaustion of other remedies

Anyone bringing claim against or seeking determination of rights with respect to assets of failed bank held by Federal Deposit Insurance Corporation (FDIC) as receiver must first exhaust administrative remedies by filing administrative claim under FDIC's administrative claims process; claimant need not be "creditor" of failed bank. Federal Deposit

Insurance Act, § 2[11](d)(6), as amended, 12 U.S.C.A. § 1821(d)(6).

44 Cases that cite this headnote

[8] **Finance, Banking, and Credit**

🔑 Time for presentation and proof

Finance, Banking, and Credit

🔑 Conditions precedent and defenses in general

Under FIRREA, if claimant has failed to initiate administrative claim against failed institution's assets within filing period, claimant necessarily forfeits any right to pursue claim against failed institution's assets in any court. Federal Deposit Insurance Act, § 2[11](d)(6), (d)(13)(D), as amended, 12 U.S.C.A. § 1821(d)(6), (d)(13)(D).

4 Cases that cite this headnote

[9] **Finance, Banking, and Credit**

🔑 Exhaustion of other remedies

FIRREA section providing that no court may have jurisdiction over any claim against assets of failed institution for which FDIC has been appointed receiver acts as jurisdictional bar to claims or actions by parties who have not exhausted their administrative remedies. Federal Deposit Insurance Act, § 2 [11](d)(13)(D), as amended, 12 U.S.C.A. § 1821(d)(13)(D).

41 Cases that cite this headnote

[10] **Finance, Banking, and Credit**

🔑 Exhaustion of other remedies

FIRREA provision providing that no court has jurisdiction to hear claim against assets of failed institution unless administrative remedies have been exhausted is not limited to claims by creditors, but extends to all claims and actions against, and actions seeking determination of rights with respect to, assets of failed financial institutions for which Federal Deposit Insurance Corporation (FDIC) serves as receiver, including claims of institution's debtors. Federal Deposit Insurance Act, § 2[11](d), as amended, 12 U.S.C.A. § 1821(d).

41 Cases that cite this headnote

[11] Finance, Banking, and Credit

🔑 Exhaustion of other remedies

Even if claimants never received notice of period within which claims were to be filed against assets of failed institution for which Federal Deposit Insurance Corporation (FDIC) was serving as receiver, claimants were still obligated to exhaust their administrative remedies as condition of obtaining access to federal district court for review of claim. Federal Deposit Insurance Act, § 2[11](d)(3)(C), as amended, 12 U.S.C.A. § 1821(d)(3)(C).

3 Cases that cite this headnote

[12] Finance, Banking, and Credit

🔑 Time for presentation and proof

The only statutorily specified exemption from the strict requirements of administrative claims process for filing claims against assets of failed financial institution is if claimant did not receive notice of appointment of receiver in time to file a claim, and even in that case only consequence of lack of notice is that Federal Deposit Insurance Corporation (FDIC) may consider late-filed claim, provided claim is filed in time to permit payment. Federal Deposit Insurance Act, § 2[11](d)(5)(C), as amended, 12 U.S.C.A. § 1821(d)(5)(C).

32 Cases that cite this headnote

[13] Finance, Banking, and Credit

🔑 Claims; Rights and Liabilities of Claimants and Stakeholders

Because debtors of failed financial institution received notice of appointment of Federal Deposit Insurance Corporation (FDIC) as receiver of the institution, debtors were not relieved of their obligation to proceed through normal administrative claims process in order to assert their claim in court against the assets of the bank. Federal Deposit Insurance Act, § 2[11](d)(3)(C), as amended, 12 U.S.C.A. § 1821(d)(3)(C).

5 Cases that cite this headnote

[14] Constitutional Law

🔑 Duration and timing of deprivation; pre- or post-deprivation remedies

Root requirement of due process is that individual is to be given opportunity for hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing hearing until the event. U.S.C.A. Const.Amend. 5.

1 Cases that cite this headnote

[15] Constitutional Law

🔑 Debtor and creditor in general

For due process purposes, debtors had constitutionally protected property interest in their home. U.S.C.A. Const.Amend. 5.

2 Cases that cite this headnote

[16] Constitutional Law

🔑 Enforcement; proceedings

Finance, Banking, and Credit

🔑 Claims; Rights and Liabilities of Claimants and Stakeholders

Finance, Banking, and Credit

🔑 Exhaustion of other remedies

Because debtors had actual notice of impending deprivation, which was foreclosure of their home, some four and one-half months before deadline for filing administrative claims against assets of the foreclosing financial institution, which was taken over by Federal Deposit Insurance Corporation (FDIC), debtors' due process rights, including opportunity to be heard predeprivation, were not violated even though court could not hear their claim against institution because debtors had not exhausted their administrative remedies. U.S.C.A. Const.Amend. 5; Federal Deposit Insurance Act, § 2[11](d, j), as amended, 12 U.S.C.A. § 1821(d, j).

3 Cases that cite this headnote

[17] Finance, Banking, and Credit

🔑 Time for presentation and proof

Time bar for filing administrative claims against assets of failed financial institution pursuant to FIRREA is essentially statute of limitations subject to waiver, estoppel, and equitable tolling. Federal Deposit Insurance Act, § 2 [11](d), as amended, 12 U.S.C.A. § 1821(d).

9 Cases that cite this headnote

[18] Limitation of Actions

🔑 Suspension or stay in general; equitable tolling

For purposes of limitations periods, equitable tolling principles apply against government, just as against private parties.

[19] Limitation of Actions

🔑 Suspension or stay in general; equitable tolling

Courts may allow equitable tolling of statute of limitations if claimant has received inadequate notice.

8 Cases that cite this headnote

***1396 **326** Appeal from the United States District Court for the District of Columbia (No. 93cv02142).

Attorneys and Law Firms

Harvey A. Levin, Washington, DC, argued the cause and filed the briefs for appellants.

Kathryn R. Norcross, Counsel, F.D.I.C., Washington, DC, argued the cause for appellee. With her on the brief was Richard J. Osterman, Jr., Sr. Counsel, F.D.I.C., Bethesda, MD. Michelle H. Phillips, Washington, DC, entered an appearance.

Before WALD, SILBERMAN and TATEL, Circuit Judges.

Opinion

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

District of Columbia residents Clyde C. Freeman and Nancy F. Freeman brought suit seeking injunctive and declaratory relief to prohibit the Federal Deposit Insurance Corporation ("FDIC" or "Corporation"), as receiver for Madison National Bank ("Madison"), from foreclosing on their home. The Freemans also sought rescission of their underlying loan agreement with Madison, as well as compensatory damages for conversion, wrongful foreclosure, and breach of contract. The United States District Court for the District of Columbia entered summary judgment for the FDIC on the merits, and dismissed the Freemans' claims with prejudice. The Freemans now appeal. Because 12 U.S.C. § 1821(j) barred the district court from granting the equitable relief sought by the Freemans, and because 12 U.S.C. § 1821(d) deprived the district court of jurisdiction to hear *any* of the Freemans' claims, we affirm the district court's dismissal with prejudice without reaching the merits of their claims.

I. BACKGROUND

In January 1985, Robinson Broadcasting Corporation bought radio station WANT-AM in Henrico County, Virginia, financed by a \$600,000 loan from Madison National Bank. The loan was secured by a deed of trust on the 6.2 acres of real estate on which the radio tower was located. The Freemans, together with other stockholders in Robinson Broadcasting ("Robinson"), signed personal guarantees on the \$600,000 note.

***1397 **327** WANT-AM quickly encountered financial difficulties, and Robinson was unable to meet its repayment obligations. In early 1987, the Freemans sought and received Madison's consent to take over ownership and management of WANT-AM, and in June 1987, the Freemans became sole stockholders of Robinson. The station's financial problems continued, however, and its income was insufficient to service the debt. In January 1989, Madison and the Freemans agreed to a debt restructuring in which Madison would sell its position in the \$600,000 note (which by this time had a \$559,000 balance) to the Freemans, and thereupon make a new \$740,000 loan to the Freemans, secured by a deed of

trust on the Freemans' principal residence in the District of Columbia. The proceeds of the new loan would go to purchase the \$600,000 note, retire the \$75,000 existing debt on the residence, and establish an interest reserve of \$106,000. Madison also agreed to lend the Freemans an additional \$150,000, secured by a deed of trust on an office building they owned at 5223 Georgia Avenue, N.W. in the District of Columbia, with the loan proceeds to retire existing debt on the Georgia Avenue property and to pay off two other existing loans. Terms of the agreement were outlined in two letters of commitment from Madison to the Freemans, dated January 18, 1989.

One of the letters of commitment expressly provided that after Madison endorsed the \$600,000 note over to the Freemans, they would re-endorse the note back to Madison. On February 10, 1989, the transaction closed. The Freemans did in fact re-endorse the \$600,000 note back to Madison as provided in the commitment letter, and contemporaneously executed a separate document stating that they were endorsing the note to Madison as "additional collateral" on the \$740,000 loan.

The Freemans claim they agreed to the debt restructuring with the intention of collecting on the original stockholders' personal guarantees on the \$600,000 note, and using the proceeds to repay Madison. But under the transaction as it actually transpired, they were unable to do so: Madison had possession of the note, and refused either to surrender possession or to take any action itself to collect on the guarantees. In November 1990, the Freemans defaulted on both the \$740,000 note secured by their home and the \$150,000 note secured by their business property. Madison demanded accelerated payment, and stated that it would begin foreclosure proceedings if payment was not promptly received.

In May 1991, Madison failed. As receiver, the FDIC took possession of the \$600,000 note and deed of trust on the Henrico property, as well as the \$740,000 note and deed of trust on the Freemans' home and the \$150,000 note and deed of trust on their Georgia Avenue office building. Like Madison, the FDIC refused to surrender possession of the \$600,000 note, and declined to collect on the original stockholders' guarantees. On April 8, 1992, the FDIC demanded payment on the \$740,000 and \$150,000 notes, stating that it "intend[ed] to utilize all remedies available," and that both the Freemans' residence and the Henrico County property "may be foreclosed upon" if full payment were not received within twenty days. The Freemans were unable to

pay the amount due. On June 1, 1993, the FDIC initiated foreclosure proceedings on the Henrico property. In August, 1993, the FDIC initiated nonjudicial foreclosure proceedings on the Freemans' residence and office building.

On August 18, 1993, the Freemans brought suit in the Superior Court of the District of Columbia, seeking to enjoin the foreclosure on their residence, determine the rights of the parties with respect to the three notes, rescind the February 10, 1989 transaction, and recoup compensatory damages for Madison's alleged conversion, wrongful foreclosure, and breach of the debt restructuring agreement. The Freemans' principal allegation was that Madison had defrauded them by first agreeing to sell them its full rights in the \$600,000 note, and then at the last minute inducing them to reassign the note to the bank. They claimed that this changed the essential nature of the deal without their knowledge or assent, and that therefore the entire transaction, including the \$740,000 loan agreement and deed of trust on their home, was void *ab initio* on grounds of fraud *1398 **328 in the factum. The Freemans also alleged that by failing to turn over the \$600,000 note and to collect from its guarantors, Madison had breached its obligations under the terms of their "bilateral purchase-and-sale" agreement. They further contended that by retaining possession of the \$600,000 note, Madison and the FDIC had elected a remedy under the Uniform Commercial Code, taking the \$600,000 note in full satisfaction of the Freemans' debt. Finally, they argued that by refusing to collect from the guarantors of the \$600,000 note, Madison and the FDIC had impaired the value of the collateral, releasing the Freemans from their obligation to repay the \$740,000 loan to the extent of the impairment.

On October 15, 1993, the FDIC removed the case to the United States District Court for the District of Columbia. After initially issuing a temporary restraining order ("TRO"), the district court on December 1, 1994, dissolved the TRO and ruled in favor of the FDIC on its cross-motion for summary judgment on the merits, holding that the FDIC holds the \$600,000 note only as collateral on the \$740,000 loan. The district court declined to reach two defenses asserted by the FDIC: first, that 12 U.S.C. § 1821(j) bars the equitable remedies sought by the Freemans, and second that 12 U.S.C. § 1821(d) deprives the court of jurisdiction to hear *any* of their claims. The Freemans appeal from the district court's ruling.

II. ANALYSIS

A. Bar Against Judicial “Restraints”: 12 U.S.C. § 1821(j)

The FDIC asserted a defense below based on section 212(j) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), Pub.L. No. 101–73, codified at 12 U.S.C. § 1821(j), which states:

Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of the powers or functions of the Corporation as a conservator or receiver.

12 U.S.C. § 1821(j).

The FDIC argues that this provision broadly deprives any court of power to take any action that has the effect of restraining the FDIC, acting in its capacity as receiver, from conducting a nonjudicial foreclosure sale of assets acquired from a failed bank, whether the “restraint” is by injunction, rescission of a contract, or declaratory judgment. We said in *National Trust for Historic Preservation v. FDIC*, 21 F.3d 469 (D.C.Cir.), cert. denied, 513 U.S. 1065, 115 S.Ct. 683, 130 L.Ed.2d 615 (1994), that “§ 1821(j) does indeed bar courts from restraining or affecting the exercise of powers or functions of the FDIC as a conservator or a receiver ... unless it has acted or proposed to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions.” *Id.* at 472 (Wald, J., concurring) (internal quotation and citation omitted). Accord, *Lloyd v. FDIC*, 22 F.3d 335, 336 (1st Cir.1994); *Ward v. Resolution Trust Corp.*, 996 F.2d 99, 103 (5th Cir.1993); *Gross v. Bell Savings Bank*, 974 F.2d 403, 407 (3d Cir.1992). Although this limitation on courts' power to grant equitable relief may appear drastic, it fully accords with the intent of Congress at the time it enacted FIRREA in the midst of the savings and loan insolvency crisis to enable the FDIC and the Resolution Trust Corporation (“RTC”) to expeditiously wind up the affairs of literally hundreds of failed financial institutions throughout the country. See H.R.REP. No. 101–54(I), 101st Cong., 1st Sess. 291, 307, reprinted in 1989 U.S.C.C.A.N. 86, 87, 103.

[1] [2] In the present case, the FDIC is unquestionably acting in its capacity as “receiver,” and as such is authorized by statute to exercise “all rights, titles, powers, and privileges

of the insured depository institution ... with respect to ... the assets of the institution.” 12 U.S.C. § 1821(d)(2)(A)(i). This includes the power to “collect all obligations and money due the institution,” **329 12 U.S.C. § 1821(d)(2)(B)(ii), to “place the ... institution in liquidation and proceed to realize upon the assets of the institution,” 12 U.S.C. § 1821(d)(2)(E), to “transfer any asset or liability of the institution,” 12 U.S.C. § 1821(d)(2)(G)(i)(II), and to “exercise ... such incidental powers as shall be necessary to carry out” these express powers, *1399 12 U.S.C. § 1821(d)(2)(I)(i). The exercise of these powers may not be restrained by any court, regardless of the claimant's likelihood of success on the merits of his underlying claims. *Ward*, 996 F.2d at 102. In particular, the FDIC's broad powers as receiver include the power to foreclose on the property of a debtor held by the failed bank as collateral, and no court may enjoin the exercise of that power. *Lloyd*, 22 F.3d at 336–37; 281–300 *Joint Venture v. Onion*, 938 F.2d 35, 39 (5th Cir.1991), cert. denied, 502 U.S. 1057, 112 S.Ct. 933, 117 L.Ed.2d 105 (1992).

[3] Section 1821(j) does indeed effect a sweeping ouster of courts' power to grant equitable remedies to parties like the Freemans. Not only does it bar injunctive relief, but in the circumstances of the present case where appellants seek a declaratory judgment that would effectively “restrain” the FDIC from foreclosing on their property, § 1821(j) deprives the court of power to grant that remedy as well. See *National Trust*, 21 F.3d at 471 n. 2; *Carney v. Resolution Trust Corp.*, 19 F.3d 950, 957–58 (5th Cir.1994). For the same reason, § 1821(j) also bars the court from granting the Freemans' plea for rescission of the underlying transaction. See *Ward v. Resolution Trust Corp.*, 996 F.2d at 104 (“Like injunction, rescission is a ‘judicial restraint’ that is barred by 1821(j).”).

We conclude that under 12 U.S.C. § 1821(j) the district court could not have granted the Freemans' pleas for nonmonetary remedies, including injunctive relief, declaratory relief, and rescission of the promissory note. Nonetheless, as we noted in *National Trust*, serious due process concerns would be implicated if parties aggrieved by the FDIC's actions as receiver were left entirely without remedies. In many cases, however, aggrieved parties will have opportunities to seek money damages or other relief through the administrative claims process provided in 12 U.S.C. § 1821(d), and their claims are ultimately subject to judicial review. *National Trust*, 21 F.3d at 472. It is to that provision that we next turn.

B. Jurisdictional Bar of 12 U.S.C. § 1821(d)

The FDIC next contends that the district court lacked jurisdiction to hear *any* of the Freemans' claims, including claims for compensatory damages, because 12 U.S.C. § 1821(d) bars any court from hearing claims against, or actions to determine rights with respect to, the assets of a failed bank held by the FDIC as receiver unless the claimant first exhausts his administrative remedies by filing claims under the FDIC's administrative claims process.

[4] [5] FIRREA's section 212, 12 U.S.C. § 1821, creates an administrative claims process for claims against the assets of failed banks held by the FDIC as receiver. 12 U.S.C. § 1821(d)(3)–(13). The FDIC is authorized to decide such claims under a process established by the statute and FDIC regulations. 12 U.S.C. §§ 1821(d)(3)(A), 1821(d)(4). When liquidating a failed bank's assets, the FDIC must publish a notice “to the depository institution's creditors” specifying a date by which claims must be presented, not less than 90 days after publication, 12 U.S.C. § 1821(d)(3)(B), and in addition must mail a “similar” notice to “any creditor shown on the institution's books,” 12 U.S.C. § 1821(d)(3)(C). The FDIC has 180 days after a claim is filed to allow or disallow it. 12 U.S.C. § 1821(d)(5)(A). Claims not timely filed must be disallowed unless “the claimant did not receive notice of the appointment of the receiver in time to file such claim before such date”; in that case, a late-filed claim “may be considered by the receiver,” provided the claim is “filed in time to permit payment.” 12 U.S.C. § 1821(d)(5)(C). Finally,

[e]xcept as provided in this subsection, no court shall have jurisdiction over—

- (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
- (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

12 U.S.C. § 1821(d)(13)(D).

[6] Thus no court has jurisdiction to hear any “claim or action for payment from” or ****330 *1400** “action seeking a determination of rights with respect to” any “asset” of a failed bank for which the FDIC is receiver, with one relevant exception. Under § 1821(d)(6), both the United States District Court for the District of Columbia and the district court for the district where the financial institution has its principal place

of business have jurisdiction to review *de novo* claims filed with, and processed by, the FDIC under its administrative claims process. See *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 391–92 (3d Cir.), *cert. denied*, 502 U.S. 981, 112 S.Ct. 582, 116 L.Ed.2d 608 (1991). Such an action must be filed in district court within 60 days after the administrative claim is disallowed, or within 60 days after the expiration of the 180-day period allowed for processing the administrative claim, whichever comes first. 12 U.S.C. § 1821(d)(6).

[7] [8] [9] The effect of these provisions, read together, is to require anyone bringing a claim against or “seeking a determination of rights with respect to” the assets of a failed bank held by the FDIC as receiver to first exhaust administrative remedies by filing an administrative claim under the FDIC's administrative claims process. *Office and Professional Employees Int'l Union, Local 2 v. FDIC*, 962 F.2d 63, 65–66 (D.C.Cir.1992). As the First Circuit explained, “FIRREA makes participation in the administrative claims review process mandatory for all parties asserting claims against failed institutions,” and “where a claimant has ... failed to initiate an administrative claim within the filing period, the claimant necessarily forfeits any right to pursue a claim against the failed institution's assets in any court.” *Marquis v. FDIC*, 965 F.2d 1148, 1151–52 (1st Cir.1992) (citation omitted). Section 1821(d)(13)(D) thus acts as a jurisdictional bar to claims or actions by parties who have not exhausted their § 1821(d) administrative remedies. *Brady Development Co., Inc. v. Resolution Trust Corp.*, 14 F.3d 998, 1003 (4th Cir.1994). *Accord*, *Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 484 (8th Cir.1993); *Henderson v. Bank of New England*, 986 F.2d 319, 320–21 (9th Cir.), *cert. denied*, 510 U.S. 995, 114 S.Ct. 559, 126 L.Ed.2d 459 (1993); *Meliezer v. Resolution Trust Corp.*, 952 F.2d 879, 882 (5th Cir.1992); *Resolution Trust Corp. v. Elman*, 949 F.2d 624, 627 (2d Cir.1991); *Rosa v. Resolution Trust Corp.*, 938 F.2d at 392. See also H.R.REP. NO. 101–54(I), 101st Cong., 1st Sess. 418 (1989), *reprinted in* U.S.C.C.A.N. 86, 214 (“Resort to ... the District Courts ... is available only after the claimant has first presented its claim to the FDIC.”).

[10] Although each of the Freemans' claims is based upon a distinct legal theory, each ultimately “seek[s] a determination of rights with respect to” an asset of a failed bank for which the FDIC serves as receiver—specifically, Madison's \$740,000 loan to the Freemans upon which the FDIC seeks to foreclose. It is undisputed that the Freemans did not file any of these claims through the administrative claims process

prior to their filing of this lawsuit. On its face, then, § 1821(d) bars any court from hearing the Freemans' claims.

The Freemans nonetheless contend that § 1821(d) applies only to claims for payment by “creditors” of the failed institution. They insist that as debtors they are not Madison’s “creditors” and therefore are not subject to the § 1821(d) jurisdictional bar. This contention, however, does not comport with the statutory language. The statute expressly bars courts from hearing any “claim or action for payment from” or “action seeking a determination of rights with respect to” the assets of a failed bank held by the FDIC as receiver, unless the administrative claims process is exhausted. 12 U.S.C. § 1821(d)(13)(D). As the First Circuit explained in *Marquis*, this jurisdictional bar applies to three distinct kinds of claims or actions: “[1] all claims seeking payment from the assets of the affected institutions; [2] all suits seeking satisfaction from those assets; and [3] all actions for the determination of rights vis-a-vis those assets.” *Marquis*, 965 F.2d at 1152. Nor does the statutory text suggest that the jurisdictional bar applies only to “creditors”; on its face, it applies to *anyone* with a “claim for payment” or “action seeking a determination of rights” with respect to the failed institution’s assets. See *Lloyd v. FDIC*, 22 F.3d at 337. Concededly, the notice provisions of **331 *1401 §§ 1821(d)(3)(B) and (C) require that the FDIC give notice of the claims period to a failed financial institution’s “creditors,” but as we noted in *OPEIU, Local 2*, 962 F.2d at 67, “FIRREA’s very text appears to contemplate claims beyond those by ‘creditor[s] ... on the ... books’ to whom statutory notice must be sent.” For example, 12 U.S.C. § 1821(d)(13)(D) says that “any claim relating to an act or omission of the institution or the Corporation as receiver” is subject to the § 1821(d) exhaustion requirement.

Our sister circuits have broadly applied the § 1821(d) jurisdictional bar to all manner of “claims” and “actions seeking a determination of rights with respect to” the assets of failed banks, whether those claims and actions are by debtors, creditors, or others. See, e.g., *Lloyd v. FDIC*, 22 F.3d at 337 (suit by debtor seeking equitable reformation or cancellation of mortgage agreement to prevent foreclosure is a “determination of rights with respect to an asset” subject to § 1821(d)(13)(D) jurisdictional bar); *Henderson v. Bank of New England*, 986 F.2d at 321 (claims by unsuccessful credit card applicant for monetary damages and discovery of derogatory credit information are subject to § 1821(d)(13)(D) jurisdictional bar); *Meliezer v. Resolution Trust Corp.*, 952 F.2d at 883 (mortgagor’s claim that failed institution was negligent in allowing mortgagor to assume insufficient

insurance is subject to § 1821(d)(13)(D) jurisdictional bar); *Resolution Trust Corp. v. Elman*, 949 F.2d at 629 (law firm’s defensive assertion of retaining lien to retain custody of legal files of its former client, a failed bank under RTC receivership, is subject to § 1821(d)(13)(D) jurisdictional bar). And in *Local 2, OPEIU*, 962 F.2d at 67, we held that the § 1821(d) administrative claims process is *not* limited to claims by “creditors,” so that a union local could pursue an administrative claim on behalf of its members for payment of certain employment benefits, and under § 1821(d)(6) had recourse to *de novo* judicial review of the FDIC’s denial of that claim. But see *Homeland Stores, Inc. v. Resolution Trust Corp.*, 17 F.3d 1269 (10th Cir.) (construing § 1821(d)(13)(D) jurisdictional bar narrowly, so as not to bar claims arising after deadline for filing administrative claims), *cert. denied*, 513 U.S. 928, 115 S.Ct. 317, 130 L.Ed.2d 279 (1994).

The Freemans do garner some support for their position from a handful of recent decisions in bankruptcy cases holding that both the § 1821(d) administrative claims process and the § 1821(d)(13)(D) jurisdictional bar apply only to claims “by creditors” and therefore bankruptcy courts retain jurisdiction over claims “by debtors.” See *In Re Parker North American Corp.*, 24 F.3d 1145, 1152–53 (9th Cir.1994) and cases cited therein. The concern underlying these cases is clear: if bankruptcy courts are ousted of jurisdiction over a broad class of claims under the § 1821(d) jurisdictional bar, the unity of the bankruptcy process may be fractured and some bankruptcy-related claims would be determined, at least in the first instance, by FDIC administrative tribunals, which (it is argued) have little expertise in bankruptcy matters. *Id.* at 1153. For the reasons stated above, we do not think this construction of the § 1821(d)(13)(D) jurisdictional bar quite squares with the statutory text. But even if § 1821(d)(13)(D) is narrowly construed as a limitation on bankruptcy courts’ jurisdiction in order to effectuate the purposes of the Bankruptcy Code, *id.* at 1155–56, we decline to extend that approach to nonbankruptcy court contexts. To do so would not advance the purposes of the Bankruptcy Code, while it would undercut Congress’ core purpose in enacting FIRREA, which was to “ensure that the assets of a failed institution are distributed fairly and promptly among those with valid claims against the institution,” *Local 2, OPEIU*, 962 F.2d at 68, and to expeditiously “wind up the affairs of failed banks,” *id.* at 64. Cf. *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 584–85, 109 S.Ct. 1361, 1374–75, 103 L.Ed.2d 602 (1989) (to liquidate a failed institution’s assets “in an orderly manner,” the receiver would require timely notice of “the entire array of claims” against an insolvent institution and “an

initial opportunity to consider them in a centralized claims process” in order “to make rational and consistent judgments regarding which claims to allow or contest” or to “settle ... without resort to costly litigation”).

***1402 **332** We therefore hold that the § 1821(d) jurisdictional bar is not limited to claims by “creditors,” but extends to all claims and actions against, and actions seeking a determination of rights with respect to, the assets of failed financial institutions for which the FDIC serves as receiver, including debtors' claims. The Freemans' claims fall within the scope of that provision.

[11] Finally, the Freemans contend that they were not required to exhaust their administrative remedies because they never received notice of the period within which claims were to be filed, as required by § 1821(d)(3)(C) which provides: “The receiver shall mail a notice [of the period within which claims are to be filed] ... to any creditor shown on the institution's books...” 12 U.S.C. § 1821(d)(3)(C). The FDIC produced an affidavit from an FDIC official stating that the required notices had been mailed to creditors listed on Madison's books, including the Freemans, but the Freemans deny having received such a notice. Even if the Freemans never received the required § 1821(d)(3)(C) notice, however, they were still obliged to exhaust their administrative remedies as a condition of obtaining access to the district court.

[12] The Fifth Circuit squarely addressed this question in *Meliezer*, 952 F.2d at 882–83, and concluded that the receiver's failure to mail the notice required under 12 U.S.C. § 1821(d)(3)(C) does not relieve the claimant of the obligation to exhaust administrative remedies, because the statute does not provide for a waiver or exception under those circumstances. *Accord*, *Intercontinental Travel Marketing, Inc. v. FDIC*, 45 F.3d 1278, 1285 (9th Cir.1994); *but cf.* *Whatley v. Resolution Trust Corp.*, 32 F.3d 905, 910 & n. 1 (5th Cir.) (Duhe, J., concurring) (suggesting that failure to mail § 1821(d)(3)(C) notice would deprive the receiver of authority to determine administrative claims and relieve the claimant of its obligation to exhaust administrative remedies), *reh'g and reh'g in banc denied*, 38 F.3d 760 (5th Cir.1994). In our view, *Meliezer* and *Intercontinental Travel Marketing* correctly interpret the statute. The *only* statutorily-specified exemption from the strict requirements of the administrative claims process is provided if “the claimant did not receive notice of the appointment of the receiver in time to file ... [a] claim,” 12 U.S.C. § 1821(d)(5)(C) (emphasis added), and

even in that case the only consequence is that the FDIC “may” consider a late-filed claim, provided the claim is filed “in time to permit payment.” *But cf.* *Heno v. FDIC*, 20 F.3d 1204 (1st Cir.1994) (deferring to FDIC's interpretation of § 1821(d)(5)(C) as also authorizing FDIC to process late-filed claims that accrue after the bar date). That § 1821(d)(5)(C) *expressly* provides for a *partial* exemption for failure to provide notice undercuts appellants' argument that we should find an *implicit total* exemption from the claims process for failure to provide notice in § 1821(d)(3)(C); had Congress intended to provide such a broad exemption, it surely would have said so. *See Intercontinental Travel Marketing*, 45 F.3d at 1285.

[13] Here, it is undisputed that the Freemans *did* have timely notice of the appointment of the FDIC as receiver, whether or not they received the specific notice required to be mailed under § 1821(d)(3)(C). The FDIC sent a certified letter to the Freemans, dated April 8, 1992, explicitly stating that the FDIC had been appointed receiver, demanding payment on both the \$740,000 and the \$150,000 notes, and warning that the Freemans' residence “may be foreclosed upon” if payment is not made. Because they received “notice of the appointment of FDIC as receiver,” the Freemans were not relieved of their obligation to proceed through the normal administrative claims process.

We conclude that under § 1821(d)(13)(D), the district court lacked jurisdiction to hear *any* of the Freemans' claims. The district court would have jurisdiction only to review *de novo* the FDIC's determination of their administrative claims. The Freemans were thus required to exhaust their administrative remedies before bringing their claims to court, and by failing to do so, deprived the court of jurisdiction.

C. Due Process

The Freemans challenge the application of §§ 1821(d) and 1821(j) to their case on due ***1403 **333** process grounds, contending they were denied an opportunity to be heard before being deprived of their property. Their constitutional challenge is without merit.

[14] The Due Process Clause of the Fifth Amendment provides that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law.” The “root requirement” of due process is “that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.”

Boddie v. Connecticut, 401 U.S. 371, 378–79, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971) (emphasis in original). “The purpose of this requirement is not only to ensure abstract fair play to the individual” but “to minimize substantively unfair or mistaken deprivations of property....” *Fuentes v. Shevin*, 407 U.S. 67, 80–81, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972).

[15] Undoubtedly, the Freemans have a constitutionally protected property interest in their home. See *United States v. James Daniel Good Real Property*, 510 U.S. 43, —, 114 S.Ct. 492, 501, 126 L.Ed.2d 490 (1993); *Property v. District of Columbia*, 948 F.2d 1327, 1331 (D.C.Cir.1991). Although “[w]e tolerate some exceptions to the general rule requiring predeprivation notice and hearing ... in extraordinary situations,” *James Daniel Good Real Property*, 510 U.S. at —, 114 S.Ct. at 501 (citation and quotation omitted), the government does not assert that such an exception is required here. Assuming without deciding that this case does not involve an “extraordinary situation” and the Freemans are entitled to predeprivation notice and opportunity to be heard, their due process challenge to the applicability of § 1821(d) and § 1821(j) is unavailing because they had notice of the deprivation and an opportunity to be heard prior to the deprivation.

[16] [17] [18] [19] In *National Trust* we raised the possibility that under some circumstances the denial of injunctive relief under § 1821(j) could constitute a violation of due process. *National Trust*, 21 F.3d at 473 (Wald, J., concurring). And in some circumstances, the jurisdictional bar of § 1821(d) might also implicate due process concerns by denying an aggrieved party any avenue of relief, administrative or judicial.¹ See *Homeland Stores*, 17 F.3d at 1274 n. 5; *National Union Fire Ins. Co. v. City Savings, F.S.B.*, 28 F.3d 376, 392 (3d Cir.1994). But such is not the case here. The Freemans had an opportunity to present their claims to the FDIC, and to have all those claims resolved through the administrative claims process prior to foreclosure, subject to *de novo* judicial review in the district court. The essential facts of their dispute with Madison were well known to the Freemans, and their claims had accrued long before the September 28, 1992 deadline set by the FDIC for filing claims involving Madison's assets under the § 1821(d) administrative claims process. The FDIC's April 8, 1992 certified letter to the Freemans not only put them on notice that the FDIC had been appointed receiver for Madison, but notified them of the impending deprivation of their property,² explicitly *1404 **334 stating that the Freemans had defaulted on

the \$740,000 loan for which the FDIC as receiver held a deed of trust on their home, demanding payment, and stating that if they failed to make payment in full “FDIC intends to utilize all remedies available” including foreclosure on the deed of trust on their home. Thus the Freemans had actual notice of the impending deprivation some four and one-half months before the September 28 deadline for filing administrative claims.³ At that point they could have filed claims seeking a determination by the FDIC of their rights and obligations under the various notes and agreements at issue here. Specifically, upon receiving the April 8 notice, they could have brought claims to the FDIC contending that they had no obligations under the \$740,000 note on grounds that the transaction was void for fraud in the factum; that Madison had breached the “bilateral purchase and sale agreement”; that Madison and the FDIC had elected a remedy under the Uniform Commercial Code by retaining possession of the \$600,000 note in full satisfaction of their \$740,000 debt; and that Madison and the FDIC had impaired the value of the \$600,000 note as collateral by declining to collect from the guarantors, relieving the Freemans of their obligations under the \$740,000 note to the extent of the impairment. Not only could they have brought these claims before the FDIC's administrative claims process, but if they were not satisfied with the results there they could have proceeded to seek *de novo* review in the district court, so long as they filed their action within 60 days after the FDIC's 180-day period for determining their claims, or within 60 days after the date of the FDIC's actual determination of their claim, whichever came first. See 12 U.S.C. § 1821(d)(6). If they had filed their administrative claims upon receipt of the FDIC's April, 1992 notice, they would have had an opportunity to file for review in district court by October, 1992 at the very latest—some 10 months before the FDIC initiated final foreclosure proceedings on their home in August, 1993. In sum, the Freemans had a predeprivation opportunity to be heard on each of the claims they later attempted to assert in court.

The Supreme Court has long recognized that the process that is due will vary in form “appropriate to the nature of the case,” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), depending on such factors as the nature of the private interest affected, the risk of erroneous deprivation, and the government's interests, including fiscal and administrative burdens. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). But as the Third Circuit cogently noted in response to a similar challenge to the § 1821(d) administrative process, we “find no ... support for ... [the] position that

the opportunity for a *de novo* court action six months after they file their [administrative] claims fails to provide them meaningful review.” *Rosa*, 938 F.2d at 397.

We do not know, and cannot speculate, what the outcome would have been had the Freemans exhausted their administrative remedies. Nonetheless, one possible outcome gives us pause. If the complainant's administrative claims are disallowed and the complainant proceeds to seek *de novo* judicial review as prescribed in § 1821(d), then § 1821(j) on its face would appear to bar the district court from granting injunctive or declaratory relief, or rescission of the underlying agreement, at least to the extent the relief granted would “restrain” the FDIC from exercising its powers as receiver. *See supra*, Part II.A. In some circumstances this might so tie the reviewing court's hands that the court would be unable to grant meaningful predeprivation relief, bringing the constitutional adequacy of the complainant's predeprivation review into question. *See Fuentes*, 407 U.S. at 80, 92 S.Ct. at 1994 (“opportunity to be heard must be granted at a meaningful time and in a meaningful manner,” and must generally occur in a time and manner that would allow the deprivation to be prevented) (internal quotation and citation omitted). But that certainly is not what actually transpired here, nor is there any reason to assume that if the Freemans had proceeded through the administrative claims process they would have faced such a problem. The Freemans might have won relief at the agency level. Even if they won no relief at that stage, the factual and legal issues might have appeared in a wholly different light by the time they sought judicial review. Finally, even if a constraint like the one we have described were to arise at the stage of judicial review, the reviewing court might construe the statute so as to avoid constitutional difficulties. *See International Ass'n of Machinists v. Street*, 367 U.S. 740, 749, 81 S.Ct. 1784, 1790, 6 L.Ed.2d 1141 (1961) (“Federal statutes are to be so construed as to avoid serious doubt of their constitutionality.”); *cf. Homeland Stores*, 17 F.3d at 1273–74 (construing § 1821(d)(13)(D) jurisdictional bar narrowly so as not to deprive complainant of all opportunities for administrative or judicial relief); *Heno v. FDIC*, 20 F.3d at 1209 (construing § 1821(d)

(5) to authorize FDIC to process a late-filed claim if the claim arose after the bar date, so as not to deprive claimant of all opportunities for administrative or judicial relief). We are in no position at this juncture to foretell whether such a case might ever arise, what it might look like, or how it might be resolved. It would be premature and beyond the scope of our Article III powers to read a judicially-crafted exemption into either § 1821(d) or § 1821(j) in anticipation of theoretically possible yet only dimly perceived due process concerns that are not squarely presented by the case before us. *See National Union Fire Ins. Co.*, 28 F.3d at 392.

We conclude that the Freemans did have predeprivation notice and an opportunity to be heard, and therefore they were not denied *1406 **336 due process. That they failed to avail themselves of the statutorily-prescribed administrative claims process, and thereby waived their right to pursue their claims against the FDIC in that or any other forum, is no violation of their constitutional rights.

III. CONCLUSION

Because the Freemans' pleas for equitable relief are barred by 12 U.S.C. § 1821(j) and *all* their claims are barred by 12 U.S.C. § 1821(d), we do not reach the merits of their underlying claims. Assuming that the Freemans were entitled to predeprivation notice and an opportunity to be heard, they have not shown a violation of their due process rights—they had an opportunity to be heard, but declined to avail themselves of it. We therefore affirm the judgment of the district court dismissing the Freemans' claims with prejudice, on grounds that the district court was statutorily barred from hearing the claims.

It is so ordered.

All Citations

56 F.3d 1394, 312 U.S.App.D.C. 324

Footnotes

- 1 For example, if the claimant's claim does not accrue until *after* the deadline set by FDIC for filing administrative claims, the administrative claim would apparently be barred as untimely, yet § 1821(d)(13)(D) would apparently deprive any court of jurisdiction over the claim because it had not been submitted to the administrative process. *But see Heno v. FDIC*, 20 F.3d at 1209 (affirming as reasonable FDIC's construction of § 1821(d)(5)(C) to authorize it to process a late-filed claim if the claim itself does not accrue until after the bar date).

2 The FDIC's April 8, 1992 letter did not apprise the Freemans of their opportunity to pursue their claims through the administrative claims process. Although the Freemans do not make a due process argument based on lack of notice of the claims process, we note that if they were not afforded notice of their exclusive opportunity to present their claims, serious due process concerns would be implicated, for notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

Nancy Freeman states in an affidavit that to the best of her and her husband's recollection, they did not receive the notice the FDIC was required to send under 12 U.S.C. § 1821(d)(3), see *supra* Part II.B., which would have informed them of the claims process. The FDIC responds with an affidavit by an FDIC official stating his personal knowledge that the required notice was sent to all "creditors ... on [Madison's] books," including the Freemans. The district court made no finding as to whether the required notice was given, but the contentions of the parties are not necessarily inconsistent: it is possible that the FDIC sent the required notice, and yet the Freemans never received it.

Whether or not the FDIC sent the required notice, however, the matter is best addressed through equitable tolling of the time bar if the Freemans did not have actual notice of the administrative claims process in time to file their claims. We think the time bar here is, like the requirement of timely filing of an administrative claim as a prerequisite to a Title VII suit, essentially "a statute of limitations ... subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982). And it is well established that equitable tolling principles apply against the government, just as against private parties. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95–96, 111 S.Ct. 453, 457–58, 112 L.Ed.2d 435 (1990). Courts may allow equitable tolling of a statute of limitations where "a claimant has received inadequate notice." *Mondy v. Secretary of the Army*, 845 F.2d 1051, 1057 (D.C.Cir.1988) (quoting *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151, 104 S.Ct. 1723, 1725, 80 L.Ed.2d 196 (1984) (per curiam)). See, e.g., *Bayer v. United States Dept. of Treasury*, 956 F.2d 330, 332–33 (D.C.Cir.1992) (before filing formal complaint alleging discrimination in federal employment, complainant must notify Equal Employment Opportunity counselor within 30 days after allegedly discriminatory event; but this time bar is subject to equitable tolling where complainant "was not notified of the time limits and was not otherwise aware of them"). Although the FDIC undoubtedly has a strong interest in expeditiously winding up the affairs of failed institutions, the equities will favor tolling where strict application of the bar date would deprive the complainant of any meaningful opportunity to be heard. See *Bayer*, 956 F.2d at 333. Cf. *Heno v. FDIC*, 20 F.3d at 1209 (construing 12 U.S.C. § 1821(d)(5)(C) to allow processing of late-filed claims that do not accrue until after the bar date, so as not to deny claimants all opportunity to be heard). If the FDIC were to disallow as untimely any administrative claims the Freemans might file, they would be entitled to *de novo* review in the district court, where they may "plead [] and prov [e] ... 'equitable reasons' for noncompliance" with the time bar, *Bayer*, 956 F.2d at 333 (quoting *Saltz v. Lehman*, 672 F.2d 207, 209 (D.C.Cir.1982)), including their inability to make a timely administrative filing due to lack of actual notice of the administrative claims process.

3 Authorities are divided as to whether the type of notice the Freemans received on April 8, 1992—stating that they were in default and that the FDIC intended to foreclose at some unspecified future date—is adequate notice of a foreclosure. Compare *Ricker v. United States*, 417 F.Supp. 133, 138–39 (D.Me.1976) (notice of default stating intent to foreclose is merely a "threat of foreclosure," not adequate notice of foreclosure) with *Vail v. Brown*, 841 F.Supp. 909, 914–15 (D.Minn.) (notice of default stating intent to foreclose is adequate notice of foreclosure, even if date and time of foreclosure sale are not specified), *aff'd*, 39 F.3d 208 (8th Cir.1994), *cert. denied*, 515 U.S. 1102, 115 S.Ct. 2245, 132 L.Ed.2d 254 (1995). Here, however, because the Freemans do not allege that they were given inadequate notice of the foreclosure, we must deem that argument waived. The Freemans instead complain that they lacked a predeprivation opportunity to be heard; for the reasons stated in the text, that contention is without merit.

22 F.3d 335
United States Court of Appeals,
First Circuit.

William Bart LLOYD, Plaintiff, Appellant,
v.
FEDERAL DEPOSIT INSURANCE
CORPORATION, Defendant, Appellee.

No. 93-1445.
|
Submitted Feb. 8, 1994.
|
Decided Feb. 8, 1994.

Synopsis

Mortgagor brought action against Federal Deposit Insurance Corporation (FDIC) as receiver for mortgagee. The FDIC removed action to the United States District Court for the District of Columbia which transferred case to United States District Court for the District of Rhode Island for the convenience of police and witnesses. The United States District Court for the District of Rhode Island, [Ronald R. Lagueux](#), J., dismissed action, 812 F.Supp. 293, and mortgagor appealed. The Court of Appeals, [Selya](#), J., held that: (1) the United States District Court for the District of Rhode Island lacked subject matter jurisdiction over action, but (2) appropriate remedy was retransfer of action to the United States District Court for the District of Columbia.

Vacated and remanded.

West Headnotes (5)

[1] Finance, Banking, and Credit

🔑 Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators

District court lacked jurisdiction to enjoin Federal Deposit Insurance Corporation (FDIC) from foreclosing against mortgaged property. Federal Deposit Insurance Act, § 2[11](d)(2)(B) (ii), (j), 12 U.S.C.A. § 1821(d)(2)(B)(ii), (j).

8 Cases that cite this headnote

[2] Finance, Banking, and Credit

🔑 Exhaustion of other remedies

District court lacked jurisdiction over mortgagor's claims against Federal Deposit Insurance Corporation (FDIC) as receiver for failed mortgagee bank, for equitable reformation or cancellation of mortgage agreement; mortgagor sought "determination of rights with respect to assets of depository institution for which FDIC had been appointed receiver," within meaning of statute limiting federal jurisdiction over such claims. Federal Deposit Insurance Act, § 2[11] (d)(13)(D), 12 U.S.C.A. § 1821(d)(13)(D).

29 Cases that cite this headnote

[3] Finance, Banking, and Credit

🔑 Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators

Federal courts are barred from asserting jurisdiction over claims against assets of failed depository institutions except as expressly or impliedly permitted by statute. Federal Deposit Insurance Act, § 2[11](d), 12 U.S.C.A. § 1821(d).

5 Cases that cite this headnote

[4] Finance, Banking, and Credit

🔑 Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators

Statute governing which district courts may entertain suits based upon disallowed claims against Federal Deposit Insurance Corporation (FDIC) is jurisdictional limitation, rather than venue provision, and thus cannot be waived. Federal Deposit Insurance Act, § 2[11](d)(6)(A), 12 U.S.C.A. § 1821(d)(6)(A).

2 Cases that cite this headnote

[5] Federal Courts

🔑 Proceedings by transferee court; improper change

Although district court for district in which financial transaction occurred lacked jurisdiction over action arising from claim disallowed by Federal Deposit Insurance Corporation (FDIC),

retransfer of case, rather than dismissal, was appropriate, where FDIC was responsible for transfer of case from district court with jurisdiction to district court without jurisdiction and time to refile action had expired. Federal Deposit Insurance Act, § 2 [11](d)(6)(A), 12 U.S.C.A. § 1821(d)(6)(A); 28 U.S.C.A. § 1404(a).

3 Cases that cite this headnote

Attorneys and Law Firms

*335 William Bart Lloyd on brief pro se.

Ann S. Duross, Asst. Gen. Counsel, Richard J. Osterman, Jr., Sr. Counsel, and Daniel H. Kurtenbach, Counsel, Washington, DC, on brief for appellee.

Before BREYER, Chief Judge, SELYA and BOUDIN, Circuit Judges.

Opinion

*336 SELYA, Circuit Judge.

William Bart Lloyd appeals from an order of the United States District Court for the District of Rhode Island dismissing his suit against the Federal Deposit Insurance Corporation (FDIC), as receiver for the failed Capitol Bank and Trust Company, of Boston, Massachusetts (the Bank), for want of jurisdiction, 812 F.Supp. 293 (1993).

Background

In November 1990, appellant purchased an apartment building in Providence, Rhode Island from the Bank. Under the sales agreement, the Bank undertook to provide financing for both the acquisition and the renovation of the complex. At the closing, appellant signed a promissory note, secured by a mortgage on the property. In December 1990, the Bank failed. The FDIC was appointed receiver. In June 1991, the FDIC, as receiver, disaffirmed the original agreement to finance renovations.

In due course, appellant filed a proof of claim with the FDIC. The proof was not acted upon within the required 180-day period, see 12 U.S.C. § 1821(d)(5)(A)(i). Nevertheless, the

FDIC notified appellant on March 4, 1992, that it intended to foreclose. On March 17, appellant responded by filing this action in a Rhode Island state court. He sought to enjoin the FDIC from proceeding with the foreclosure, and, moreover, to reform or cancel the sales agreement, note, and mortgage (based on an asserted mutual mistake).

On March 30, 1992, the FDIC removed the case to the United States District Court for the District of Columbia. See 12 U.S.C. § 1819(b)(2)(B) (giving FDIC authority to remove action “to the appropriate United States district court”) & 12 U.S.C. § 1821(d)(6)(A) (giving “district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia” jurisdiction over any claim disallowed by the FDIC). On April 2, the FDIC moved to transfer the case to the United States District Court for the District of Rhode Island “[f]or the convenience of parties and witnesses.” 28 U.S.C. § 1404(a). The district court transferred the case on April 23, 1992. Appellant's administrative claim was finally denied on June 9, 1992.

Once the case had returned north, the FDIC moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. At the same time, the FDIC also argued that appellant's claim for injunctive relief was barred by 12 U.S.C. § 1821(j).¹ The district court dismissed the case for want of jurisdiction. This appeal followed.²

Discussion

[1] A “district court lacks jurisdiction to enjoin the FDIC when the FDIC is acting pursuant to its statutory powers as receiver.” *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir.1992); see also 12 U.S.C. § 1821(j). The FDIC has the power as receiver to foreclose on the property of a debtor. See 12 U.S.C. § 1821(d)(2)(B)(ii) (giving FDIC power to “collect all obligations and money due the [failed] institution”). Thus, the district court was without jurisdiction to grant the injunctive relief appellant seeks. See 281–300 *Joint Venture v. Onion*, 938 F.2d 35, 39 (5th Cir.1991) (injunction against receiver's foreclosure of appellants' property barred by *337 § 1821(j)), cert. denied, 502 U.S. 1057, 112 S.Ct. 933, 117 L.Ed.2d 105 (1992).

[2] [3] Appellant's claims for equitable reformation and/or cancellation of the contract fare no better. These claims lie in the maw of the statute, for, in the statutory parlance, the plaintiff's complaint "seeks a determination of rights with respect to [] the assets of a [] depository institution for which the Corporation has been appointed receiver." 12 U.S.C. § 1821(d)(13)(D). By its terms, the statute limits federal court jurisdiction over such claims to those instances "otherwise provided" in section 1821(d). *Id.*; see also *Marquis v. Federal Deposit Ins. Corp.*, 965 F.2d 1148, 1153 (1st Cir.1992). We understand this to mean that the federal courts are barred from asserting jurisdiction over claims against the assets of failed depository institutions except as expressly or impliedly permitted, see *Marquis*, 965 F.2d at 1153 (suggesting that, in addition to its express grants of jurisdiction, section 1821(d) also implies the existence of jurisdiction in other circumstances), by virtue of the various subsections of section 1821(d). See *Resolution Trust Corp. v. J.F. Assocs.*, 813 F.Supp. 951, 954 (N.D.N.Y.1993); see also *Landmark Land Co. v. Office of Thrift Supervision*, 948 F.2d 910, 912–13 (5th Cir.1991) (interpreting similarly worded provision in 12 U.S.C. § 1818(i)(1) as limiting jurisdiction). We further understand the specific jurisdictional provision of section 1821(d)(13)(D) to control over the more general jurisdictional grant found in 12 U.S.C. § 1819(b)(2)(A).³ See *Gozlon-Peretz v. United States*, 498 U.S. 395, 407, 111 S.Ct. 840, 848, 112 L.Ed.2d 919 (1991) ("[a] specific provision controls over one of more general application") (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445, 107 S.Ct. 2494, 2499, 96 L.Ed.2d 385 (1987)).

[4] Appellant seeks to find safe haven in the statute itself: after all, section 1821(d)(6)(A) expressly confers jurisdiction upon federal courts to entertain suits based upon disallowed claims. The district court did not buy these wares. Rather, Judge Lagueux, adopting a position urged by the FDIC below, ruled that the only courts which had jurisdiction over appellant's claims were the federal district court for the district where the failed bank maintained its principal place of business (here, Massachusetts) and the federal district court for the District of Columbia, see 12 U.S.C. § 1821(d)(6)(A).⁴ Lloyd's appeal attacks this ruling. And appellant has acquired a rather surprising ally: reversing its field, the FDIC now contends that section 1821(d)(6)(A) is not a jurisdictional limitation, but is instead a venue provision that can be waived (and which the FDIC has waived in this instance). We think the FDIC was right the first time around.

For one thing, the plain language of section 1821(d)(6)(A) indicates that it is a jurisdictional grant limited to the federal district court for the district where the institution has its principal place of business and the United States District Court for the District of Columbia. See *id.* (providing that either such court "shall have jurisdiction to hear such claim"). Accord *J.F. Assocs.*, 813 F.Supp. at 958. For another thing, while the reasoning of the only court that, to our knowledge, has found section 1821(d)(6)(A) to be a venue provision supports the FDIC's new position, the reasoning is not persuasive—and the holding is not inconsistent, *simpliciter*; with reading the section as a jurisdictional provision. In *Vinton v. Trustbank Sav. F.S.B.*, 798 F.Supp. 1055 (D.Del.1992), the court held that section 1821(d)(6)(A) was not a grant of "exclusive jurisdiction" to the two listed courts and did not deprive a third court of jurisdiction which *338 it had previously obtained.⁵ *Id.* at 1065. But section 1821(d)(6)(A) can be read as a grant of jurisdiction to two designated courts without being read as a completely exclusive grant. Accord *J.F. Assocs.*, 813 F.Supp. at 955. As we interpret it, section 1821(d)(6)(A) does not extend jurisdiction beyond the two specified courts—but, by the same token, it does not deprive a court of jurisdiction where, as in *Vinton*, that jurisdiction has a source independent of section 1821(d)(6)(A). See *Marquis*, 965 F.2d at 1152–54 (determining that subsections of section 1821(d) other than section 1821(d)(6)(A) permit federal courts to retain jurisdiction in circumstances where a bank's failure postdates the institution of the action).

[5] In the instant case, section 1821(d)(6)(A) provides no basis for jurisdiction in the United States District Court for the District of Rhode Island. Nor has appellant or the FDIC indicated any source of federal jurisdiction in section 1821(d) other than section 1821(d)(6)(A). Consequently, even though, viewed simply from the perspective of policy, it might seem sensible to allow for suits of this sort to be tried in the district where the transactions occurred and where the court is likely to be most familiar with any applicable local law, the statutory language, especially that of § 1821(d)(13)(D), compels us, absent a more persuasive argument to the contrary, to find that the district court appropriately determined that it lacked subject matter jurisdiction over Lloyd's suit. See *Massachusetts Financial Services, Inc. v. Securities Investor Protection Corp.*, 545 F.2d 754, 756 (1st Cir.1976), ("a statute's plain language is the primary indicator of its meaning"), *cert. denied*, 431 U.S. 904, 97 S.Ct. 1696, 52 L.Ed.2d 388 (1977).⁶

The normal remedy in these circumstances would be for the district court to dismiss this case (as it did). Here, however, a dismissal seems unfair since it would deprive Lloyd, who is in effect a victim of the FDIC-inspired transfer to the District Court for the District of Rhode Island, of any means of redress. See [12 U.S.C. § 1821\(d\)\(6\)\(B\)](#) (unless claimant requests review of disallowance of claim within 60 days of determination, “disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim”). Since the transferor court was not empowered to order the transfer of this action to a court which lacked subject matter jurisdiction over it, see [28 U.S.C. § 1404\(a\)](#) (transfer may only be to a district where the action “might have been brought”), we think it more prudent that the district court retransfer this action to the United States District Court

for the District of Columbia on the ground that the transfer was improvidently granted. See [Turner v. Kelley](#), 411 F.Supp. 1331 (D.Kan.1976) (retransferring case to transferor court because transferee court lacked jurisdiction under 5 U.S.C. § 552(a)); [Majewski v. New York C.R. Co.](#), 227 F.Supp. 950 (W.D.Mich.1964) (retransferring case to transferor court because transferee court lacked jurisdiction).

The dismissal is therefore *vacated* for the purpose of allowing the district court to enter such an order. No costs.

All Citations

22 F.3d 335

Footnotes

- 1 Subsection 1821(j) provides, in part:
Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, *to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.*
[12 U.S.C. § 1821\(j\)](#) (emphasis supplied). According to the FDIC, none of the statutory exceptions authorize injunctive relief of the kind sought by appellant.
- 2 The district judge determined that the suit was barred both because the court lacked jurisdiction pursuant to [12 U.S.C. § 1821\(d\)\(6\)\(A\)](#) and because it had no jurisdiction over a case removed from a state court which itself did not have jurisdiction over the original case. While it was once settled law that a federal court's removal jurisdiction was derived from the state court's jurisdiction, this rule has been abolished by statute. See [28 U.S.C. § 1441\(e\)](#). Thus, we address only the effect of [12 U.S.C. § 1821\(d\)\(6\)\(A\)](#) on the district court's jurisdiction.
- 3 Subsection 1819(b)(2)(A) provides, in part, that:
all suits ... to which the [FDIC] is a party shall be deemed to arise under the laws of the United States.
[12 U.S.C. § 1819\(b\)\(2\)\(A\)](#).
- 4 The statute provides, in relevant part, that a claimant may:
file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district court or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).
[12 U.S.C. § 1821\(d\)\(6\)\(A\)](#).
- 5 In *Vinton*, the United States District Court for the District of Delaware had obtained jurisdiction over the case before the Resolution Trust Corporation took over as receiver.
- 6 We note that, liberally construed, appellant's complaint also invokes [12 U.S.C. § 1821\(e\)](#), a statute which provides that the FDIC may repudiate contracts entered into before its appointment as receiver, but affords an injured party a right to compensatory relief. See, e.g., [Howell v. Federal Deposit Ins. Corp.](#), 986 F.2d 569, 571 (1st Cir.1993). We do not decide whether the district court would have jurisdiction under this section because appellant has explicitly disavowed any intention of pursuing a breach of contract claim.

938 F.2d 35
United States Court of Appeals,
Fifth Circuit.

281-300 JOINT VENTURE, Plaintiff-Appellant,

v.

Robert F. ONION, Substitute Trustee, and San
Antonio Savings Association, Defendants-Appellees.

No. 90-5628

|
Summary Calendar.

|
June 12, 1991.

Synopsis

Appeal was taken from decision of the United States District Court for the Western District of Texas at San Antonio, [H.F. Garcia](#), J., denying motion for preliminary injunction prohibiting foreclosure sale of property and dismissing action against insolvent thrift on prudential grounds and against substitute trustee on mootness grounds. The Court of Appeals, [Jerry E. Smith](#), Circuit Judge, held that: (1) district court properly relied upon Federal Home Loan Bank Board (FHLBB) determination of worthlessness in dismissing suit against thrift, and (2) district court lacked the ability to enjoin nonjudicial foreclosure that was within statutorily authorized powers of Resolution Trust Corporation (RTC) as conservator.

Affirmed.

West Headnotes (2)

[1] Finance, Banking, and Credit

🔑 Federal Supervision and Control

District court properly relied upon Federal Home Loan Bank Board (FHLBB) determination that there would never be any assets with which to satisfy judgment in its determination to dismiss suit against failed thrift on prudential grounds; judicial review of FHLBB determination of worthlessness was never sought and that determination could not be collaterally attacked, and court, bound by determination of

worthlessness, would have no reason to grant equitable relief or to declare rights of parties.

[30 Cases that cite this headnote](#)

[2] Injunction

🔑 Liens and security interests

District court lacked the ability to enjoin Resolution Trust Corporation (RTC) from conducting nonjudicial foreclosure sale that was within its statutorily authorized powers as conservator. Federal Deposit Insurance Act, § 2[11] (d)(2)(B)(ii), (j), as amended, [12 U.S.C.A. § 1821\(d\)\(2\)\(B\)\(ii\), \(j\)](#).

[35 Cases that cite this headnote](#)

Attorneys and Law Firms

*[36 Joe K. Longley](#), [Timothy R. Labadie](#), Longley & Maxwell, Austin, Tex., for plaintiff-appellant.

[Wm. M. McNaught](#), [Fred Riley Jones](#), San Antonio, Tex., [Kirk K. Van Tine](#), [Jesse R. Adams, III](#), Baker & Botts, Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Western District of Texas.

Before [JOHNSON](#), [SMITH](#), and [WIENER](#), Circuit Judges.

Opinion

[JERRY E. SMITH](#), Circuit Judge:

The plaintiff, 281-300 Joint Venture (Joint Venture), appeals a decision of the district court denying its motion for a preliminary injunction prohibiting the foreclosure sale of its property and dismissing its action against San Antonio Savings Association (SASA) on prudential grounds pursuant to [Triland Holdings & Co. v. Sunbelt Serv. Corp.](#), [884 F.2d 205 \(5th Cir.1989\)](#), and its progeny, and further dismissing its action against Robert F. Onion, as substitute trustee, on mootness grounds. On appeal, Joint Venture maintains that the court (1) should not have dismissed the case on prudential grounds and (2) should have enjoined the Resolution Trust Corporation (RTC), as conservator of San Antonio Savings Association, F.A. (new SASA), from conducting the foreclosure sale. Finding no error, we affirm.

I.

On December 28, 1987, Joint Venture entered into a wrap-around loan from SASA, in the amount of \$8,100,000, for the development of 296.69 acres of land in Bexar County, Texas. The loan was evidenced by a note, loan agreement, and deed of trust. At the time of the loan, the property was encumbered by two superior liens. Pursuant to the loan agreement, SASA agreed to make advances to or for the benefit of Joint Venture for principal and interest on the underlying notes and for a certain percentage of each interest payment due on the SASA note. The loan agreement further obligated Joint Venture to pay the remaining interest on the SASA note with funds other than the proceeds of the loan; it provided that, in the event of non-payment, SASA had the right to foreclose on the property.

Joint Venture claims that on January 2, 1989, SASA failed to make an annual timely payment on one of the underlying notes. Shortly thereafter, the holder of that note declared it in default and posted the property for foreclosure. At the time of this *37 event,¹ Joint Venture avers that it was current in its obligations and not in breach of the loan agreement. SASA, however, maintains that, beginning in January 1989, Joint Venture failed to make interest payments when due. SASA contends that as of November 30, 1989, Joint Venture had failed to make interest payments totaling approximately \$160,000.

On February 28, 1989, the Federal Home Loan Bank Board (FHLBB) determined that SASA was insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as conservator, and later as receiver, of the thrift. In its role as receiver, the FSLIC took possession of all the assets of SASA and succeeded to all of its rights, titles, powers, and privileges. It was also directed to liquidate the claims against SASA.

As a result, according to federal regulations and state law, if the assets of the failed institution were insufficient to pay depositors in full, general unsecured creditors who were in a lower priority class were not entitled to be paid anything. *See Tex.Rev.Civ.Stat.Ann. art. 852a, § 8.09(g)(2), (3), (4)* (Vernon Supp.1991). Since the FHLBB determined that SASA did not have enough assets to satisfy the depositors in full, the claims of general unsecured creditors such as Joint Venture could not be satisfied.

Approximately four months later, the FHLBB created new SASA and appointed the FSLIC as conservator; the FSLIC was responsible for liquidating SASA's assets by transferring them to new SASA. In consideration for receiving such assets, new SASA agreed to assume SASA's liabilities for tax claims, its liabilities to depositors to the extent of their deposits, and its liabilities to secured creditors to the extent of the value of their security.

New SASA did not agree, however, to assume any liability for claims by SASA's general unsecured creditors. While the loan agreement, note, and deed of trust executed by Joint Venture to SASA were transferred to new SASA, along with the right of collection or foreclosure, none of the liabilities for Joint Venture's claims against SASA was assumed by new SASA. Instead, the claims relating to SASA's conduct remained as claims against the FSLIC as receiver for SASA. After the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), [Pub.L. No. 101-73, 103 Stat. 183 \(1989\)](#), abolished the FSLIC, the RTC succeeded the FSLIC as receiver for SASA and as conservator for new SASA.²

II.

On June 30, 1989, Joint Venture filed suit in state district court, seeking a temporary restraining order (TRO) and a permanent injunction to prevent the FSLIC as conservator for SASA from foreclosing on the property that served as security for its loan. That day, Joint Venture secured a TRO restraining SASA and its substitute trustee, Onion, from conducting a foreclosure on the property.

Two weeks later, the case was removed to federal district court. Then, the property again was posted for foreclosure, this time by the RTC, acting as conservator for new SASA. The sale did not take place, however, as Joint Venture had filed a chapter 11 bankruptcy petition. On October 31, 1989, at the request of the RTC as conservator for new SASA, the bankruptcy court granted a motion to lift the stay, leaving no impediment to proceeding to a foreclosure sale.

In response, Joint Venture filed a motion for a preliminary injunction in district court on November 17, 1989. The court denied this motion and found that it was prohibited by section 212(j) of FIRREA, [12 U.S.C. § 1821\(j\)](#), from taking any action to restrain or affect the powers or functions of the RTC as conservator of new SASA. A *38 few days later, the RTC foreclosed on the lien.

On June 27, 1990, the RTC, as receiver for SASA, filed a motion to dismiss on prudential grounds, relying upon the FHLBB's determination of worthlessness. Joint Venture filed no response. The court then held that there would never be any assets with which to satisfy a judgment and granted RTC's motion. It also dismissed, as moot, the claims against Onion, as the property had been sold.

III.

[1] Joint Venture contends that, for two reasons, the court should not have dismissed this case on prudential grounds. First, it maintains that the RTC did not offer any evidence of the value of SASA's assets, thereby precluding a finding that it would be impossible for Joint Venture to collect on a favorable judgment for monetary damages. Second, even if Joint Venture would not have been able to collect any money, it argues that the court could have granted equitable relief and declared the rights of the parties. We disagree with both contentions.

The RTC presented sufficient evidence to demonstrate that SASA will never have any assets to satisfy a judgment against it by Joint Venture. The FHLBB determined that SASA's assets would be insufficient to satisfy its secured and deposit liabilities and that, after payment of the claims of secured creditors and depositors, "no amount remains for payment of general creditors ... and therefore, the Association's [SASA's] general creditors' claims ... are worthless...."³ FHLBB Resolution No. 89-1769P, at 4 (July 12, 1989).

While the FHLBB's findings and conclusions regarding the worthlessness of unsecured creditor claims constitute final agency action, they are subject to review under the Administrative Procedure Act (APA). See 5 U.S.C. §§ 702-706. Joint Venture, however, never sought judicial review of the FHLBB's determination of worthlessness. Instead, it argues that the determination alone is insufficient to prove that there will never be any assets in the receivership to satisfy the claims of unsecured creditors. Previously we have determined that such a collateral attack on the FHLBB's determination is improper and that, absent evidence to the contrary, we are bound by its decision. See *Gulley*, 902 F.2d at 351 n. 4.

The RTC also adequately demonstrates that a court, bound by the FHLBB's determination of worthlessness, would have no

reason to grant equitable relief for Joint Venture or to declare the rights of the parties. Indeed, the RTC already has shown that Joint Venture, as an unsecured general creditor, has no right to any of SASA's or new SASA's assets and that the new thrift has not assumed any of the liabilities of its predecessor emanating from the loan agreement with Joint Venture. Since Joint Venture has not mentioned any other rights that it is entitled to receive in connection with this loan, the court had no reason to grant it equitable relief. See *FSLIC v. Hall Whispertree Assocs.*, 653 F.Supp. 148, 150 (N.D.Tex.1986).

Thus, the court was correct in relying upon the FHLBB's decision, to the effect that there will never be any assets with which to satisfy a judgment by Joint Venture against SASA, in its determination to dismiss, on prudential grounds, Joint Venture's suit against this failed thrift. See *Triland*, 884 F.2d at 208 (where no means exist to collect on judgment, dismissal on prudential grounds is proper); *Adams v. RTC*, 927 F.2d 348, 354 (8th Cir.1991) (FHLBB's determination of worthlessness is sufficient to support dismissal on ground of prudential mootness); accord *39 *Morgan v. Heights Sav. Ass'n*, 741 F.Supp. 620, 621 (E.D.Tex.1990); *FSLIC v. Locke*, 718 F.Supp. 573, 586 (W.D.Tex.1989).

IV.

[2] Joint Venture also argues that the court's refusal to enjoin the RTC, as conservator of new SASA, from conducting the foreclosure sale was improper. It maintains that section 212(j) of FIRREA should not be read to grant conservators broad powers to act quickly in dealing with the assets of failed thrifts, especially where such actions involve foreclosing on property of owners who have a substantial likelihood of prevailing on the merits of the case and who may suffer irreparable injury from the foreclosure. See *Libertarian Party v. Fainter*, 741 F.2d 728, 729 (5th Cir.1984). Joint Venture further asserts that the refusal to enjoin the foreclosure was unconstitutional. Both arguments are unpersuasive.

The court properly refused to enjoin the RTC from conducting the foreclosure. Section 212(j) states that "no court may take any action ... to restrain or affect the exercise of powers or functions of the Corporation [RTC] as a conservator or a receiver." Prior to the enactment of FIRREA, the Federal Deposit Insurance Act contained a similar provision that was created to enable the FSLIC to act in a quick and decisive manner in reorganizing, operating, or dissolving failed savings and loan institutions. See *North Miss. Sav. &*

Loan Ass'n v. Hudspeth, 756 F.2d 1096, 1101 (5th Cir.1985), cert. denied, 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986). Since this policy has not been changed with the enactment of FIRREA, the courts lack the ability to enjoin nonjudicial foreclosures that are within the statutory powers of the RTC as conservator or receiver. *Hall*, 653 F.Supp. at 150.

In this case, the foreclosure was within the statutorily authorized powers of the RTC as conservator. While Joint Venture argues that this foreclosure was not within the “powers or functions” of the RTC as conservator of new SASA that are protected from collateral attacks by section 212(j) and its predecessor, 12 U.S.C. § 1464(d)(6)(C), the RTC correctly cites to *Coit Indep. Joint Venture v. FSLIC*, 489 U.S. 561, 109 S.Ct. 1361, 103 L.Ed.2d 602 (1989), to demonstrate that its actions were within this category.

In *Coit*, the Court stated that a court may not grant injunctive relief unless the power or function whose exercise is sought to be enjoined is beyond the powers granted to the RTC by statute. *Id.* at 574, 109 S.Ct. at 1369. The function under

consideration here is the ability of the conservator to foreclose on the property of a debtor, a power that Congress gave to the RTC under FIRREA. Indeed, when the RTC acts as a conservator or receiver, it has broad authority to dispose of assets and to “collect all obligations and money due the [failed] institution.” 12 U.S.C. § 1821(d)(2)(B)(ii).⁴ Hence, the court may not enjoin the exercise of the RTC's powers in this instance, see *Shoreline Group, Ltd. v. Commonwealth Fed. Sav. & Loan Ass'n*, No. 90–6703–CIV (S.D.Fla. Feb. 14, 1991), regardless of Joint Venture's likelihood of success on the underlying claims.⁵ See *Abbott Bldg. Corp. v. FSLIC*, 739 F.Supp. 532, 535 (D.Nev.1990).

Finally, Joint Venture's various claims that the court's denial of injunctive relief was unconstitutional are meritless. Accordingly, we AFFIRM.

All Citations

938 F.2d 35

Footnotes

- 1 The plaintiff claims that the breach of the loan agreement by SASA resulted in SASA's being elevated to a first lien position, caused injury to Joint Venture's credit reputation and standing in the community, and shortened the term of one of the notes.
- 2 The RTC later was appointed as receiver for new SASA.
- 3 In addition, the RTC correctly argued that Joint Venture cannot look to new SASA as a source of recovery, as it did not assert any claim in its complaint against the RTC as conservator for this new thrift. Also, as we have noted, the potential liabilities to unsecured creditors of SASA were not assumed by new SASA. Thus, Joint Venture had no right to assert any claim against SASA's transferred assets. See *Gulley v. Sunbelt Sav., F.S.B.*, 902 F.2d 348, 351 (5th Cir.1990), cert. denied, 498 U.S. 1025, 111 S.Ct. 673, 112 L.Ed.2d 665 (1991).
- 4 See also 12 U.S.C. § 1821(d)(2)(B)(iv) (RTC empowered to “preserve and conserve the assets and property of such institution”); 12 U.S.C. § 1821(d)(2)(D)(i) (RTC authorized to “put ... institution in sound and solvent condition ...”).
- 5 The anti-injunction provision of 12 U.S.C. § 1464(d)(6)(C) has been upheld on constitutional grounds. See *Haralson v. FHLBB*, 837 F.2d 1123, 1126 (D.C.Cir.1988); *Biscayne Fed. Sav. & Loan Ass'n v. FHLBB*, 720 F.2d 1499, 1503–04 (11th Cir.1983), cert. denied, 467 U.S. 1215, 104 S.Ct. 2656, 81 L.Ed.2d 363 (1984).

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866 F.Supp. 513

United States District Court, D. Utah, Central Division.

PYRAMID CONSTRUCTION COMPANY,
INC., a New Jersey corporation, Plaintiff,

v.

WIND RIVER PETROLEUM, INC.,
a Utah corporation, Defendant.

Civ. No. 94-C-428.

|
Sept. 12, 1994.**Synopsis**

Assignee of winning bidder for purchase of real property from Resolution Trust Corporation (RTC) brought action against actual purchaser, which had exercised right of first refusal in lease, seeking declaration that RTC's sale to actual purchaser was void, and preliminary and permanent injunctive relief preventing actual purchaser from making changes to property and requiring actual purchaser to transfer title of property to assignee. Actual purchaser filed motion to dismiss. RTC filed motions to intervene and to dismiss. The District Court, [Winder](#), Chief Judge, held that anti-injunction provision of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) deprived Court of jurisdiction to grant injunctive relief requested by assignee.

Actual purchaser's motion granted.

West Headnotes (9)

[1] Finance, Banking, and Credit

🔑 Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators

Rescission of sale of real property by Resolution Trust Corporation (RTC) and order that RTC sell property to another party would clearly violate anti-injunction provision of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). Federal Deposit Insurance Act, § 2[11](j), as amended, 12 U.S.C.A. § 1821(j).

4 Cases that cite this headnote

[2] Federal Civil Procedure

🔑 Construction of pleadings

Federal Civil Procedure

🔑 Matters deemed admitted; acceptance as true of allegations in complaint

In determining whether to grant motion to dismiss for failure to state claim upon which relief can be granted, court must accept all well-pled facts as true, and all inferences that can be drawn from allegations must be drawn in favor of plaintiff.

[3] Finance, Banking, and Credit

🔑 Conservatorship or receivership

Finance, Banking, and Credit

🔑 Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators

Anti-injunction provision of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which precludes court from “restraining or affecting” exercise of powers or functions of Resolution Trust Corporation (RTC) as conservator or receiver, deprived district court of jurisdiction to grant relief requested by assignee of winning bidder for purchase of real property from RTC, which included preliminary and permanent injunctive relief preventing actual purchaser from making changes to property and requiring actual purchaser to transfer title of property to assignee in exchange for purchase price to which assignee and RTC had previously agreed. Federal Deposit Insurance Act, § 2[11](j), as amended, 12 U.S.C.A. § 1821(j).

5 Cases that cite this headnote

[4] Federal Courts

🔑 Power to Grant Relief

When Congress enacts statute prohibiting federal court from granting certain type of remedy, that limitation is jurisdictional.

[5] Finance, Banking, and Credit

🔑 Sale or other disposition of assets

Disposition of failed thrift's assets is one of the quintessential statutory powers of Resolution

Trust Corporation (RTC) as receiver. Federal Deposit Insurance Act, § 2[11](d)(2)(E), as amended, 12 U.S.C.A. § 1821(d)(2)(E).

4 Cases that cite this headnote

[6] **Finance, Banking, and Credit**

🔑 **Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators**

Anti-injunction provision of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) prohibits federal court from granting party any sort of equitable relief that would directly “restrain or affect” Resolution Trust Corporation (RTC) in carrying out its statutory powers. Federal Deposit Insurance Act, § 2[11](j), as amended, 12 U.S.C.A. § 1821(j).

4 Cases that cite this headnote

[7] **Finance, Banking, and Credit**

🔑 **Conservatorship or receivership**

Finance, Banking, and Credit

🔑 **Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators**

Broad and all-encompassing language of anti-injunction provision of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) evidences intent by Congress to prohibit any interference with Resolution Trust Corporation (RTC) as receiver, either directly or indirectly. Federal Deposit Insurance Act, § 2[11](j), as amended, 12 U.S.C.A. § 1821(j).

3 Cases that cite this headnote

[8] **Finance, Banking, and Credit**

🔑 **Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators**

Breach of anti-injunction of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) is not confined to only those cases where Resolution Trust Corporation (RTC) is directly interfered with. Federal Deposit Insurance Act, § 2[11](j), as amended, 12 U.S.C.A. § 1821(j).

[9] **Finance, Banking, and Credit**

🔑 **Actions by or Against Institutions and Their Receivers, Conservators, or Liquidators**

Action seeking to challenge title to property purchased from Resolution Trust Corporation (RTC) would “restrain or affect” RTC in violation of anti-injunction provision of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), where RTC gave purchaser a special warranty deed, and it was likely that purchaser would require RTC to defend that deed in any action challenging purchaser's title. Federal Deposit Insurance Act, § 2 [11](j), as amended, 12 U.S.C.A. § 1821(j).

1 Cases that cite this headnote

Attorneys and Law Firms

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Florian Frederick Chess, Resolution Trust Corp., Denver, CO, **James Esparza**, The Woodlands, Salt Lake City, UT, for Resolution Trust Corp.

*ORDER DISMISSING PYRAMID'S
FIFTH CAUSE OF ACTION*

WINDER, Chief Judge.

This matter is before the court on three related motions: (1) Defendant Wind River Petroleum, Inc.'s (“Wind River”) motion to dismiss Plaintiff Pyramid Construction Company, Inc.'s (“Pyramid”) fourth and fifth causes of action; (2) Intervenor Resolution Trust Corporation's (“RTC”) motion to intervene for the express purpose of asking the court to dismiss Pyramid's fourth and fifth causes of action; and (3) the RTC's motion to dismiss Pyramid's fourth and fifth causes of action. A hearing on all three motions was held on August 25, 1994. At the hearing, Gordon C. Strachan and Todd D. Wakefield represented Pyramid, Bruce A. Maak and Jeffrey J. Hunt represented Wind River, and Florian Frederick Chess represented the RTC.

Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties relating to all three motions. The court had also read certain of the authorities cited by each of the parties. Following oral argument, and after taking the motions under advisement, the court has further considered the law and facts related to each motion. Having now fully considered the issues in this case, and good cause appearing, the court enters the following memorandum decision and order.

I. BACKGROUND

The case at bar concerns the validity of a sale by the RTC, as receiver for Western Savings and Loan Association ("Western"),¹ of the Snow Creek Parcel, a 51.84 acre tract of land situated near the intersection of Utah *515 highways U-224 and U-248 in Park City, Utah.

Wind River currently operates a "Top Stop" gas station and convenience store on a leased .861 acre portion of the 51.84 site. Wind River is also the successor-in-interest to a May, 1965 lease agreement covering the same .861 acres upon which its gas station is located. The 1965 lease agreement grants Wind River a "right of first refusal in the event the lessor, or its successor, desires to sell the Gas Station portion of the [Snow Creek] property." See Pyramid's Complaint, ¶ 9.

In 1991, the RTC, as receiver for Western, decided to sell the Snow Creek Parcel in liquidation of Western's assets. As was required by the Coastal Barrier Resources Act,² the RTC, through its asset manager Transamerica Real Estate Management Co. ("Transamerica"), first offered the parcel, including Wind River's .861 acre gas station site, to qualified governmental entities. Soon thereafter, Park City Municipal Corporation ("Park City") expressed an interest in purchasing the property from the RTC.

On September 17, 1992, Park City published a Request For Proposal ("RFP") in Utah newspapers of general circulation seeking a private financial partner to assist it in acquiring the property. Pyramid responded to Park City's RFP on October 9, 1992 by advising Park City of its interest in pursuing the partnership.³ Soon thereafter, on December 9, 1992, Park City announced its selection of Pyramid as a financial partner in acquiring the Snow Creek Parcel from the RTC.⁴

Meanwhile, Park City and Transamerica were engaged in ongoing negotiations regarding the sale of the Snow Creek Parcel to Park City. On May 18, 1993, the RTC conditionally accepted an offer by Park City to purchase the land for \$1.9 million.⁵ The RTC's conditional acceptance was prefaced with the following cautionary note however:

Transamerica [and the RTC] shall not be bound until it executes a contract of purchase and sale. Until such time as the contract is executed by both parties, the RTC reserves the right to consider other offers for the purchase of all or any part of the ... property.

See Letter from Suzanne Drake, Transamerica Assistant Vice-President, to Toby Ross, Park City Municipal Corporation, at 1 (May 18, 1993).

In early September of 1993, the RTC announced that Park City was the winning bidder for the Snow Creek Parcel. Later that same month, on September 24, 1993, Park City assigned all of its interest in the Snow Creek Parcel to Pyramid. Soon thereafter, on October 7, 1993, Mr. William J. Coleman of Pyramid sent a letter to the RTC. Mr. Coleman's letter advised the RTC of the following:

We understand the reason we have not yet received an executed contract is the RTC's concern over Top Stop's potential right of first refusal. We do not wish to prepare to close with the potential for Top Stop to contest the sale hanging over us. Therefore, we suggest that should you accept our offer, you offer Top Stop the opportunity to exercise their right of first refusal. If they decline, we can enter into contract and close shortly thereafter.

See Letter from William J. Coleman, Pyramid Partner, to Suzanne Drake, Transamerica Assistant Vice-President, at 1 (Oct. 7, 1993).

On October 29, 1993, Wind River notified Pyramid that it intended to exercise its right *516 of first refusal on the .861 acre gas station site.⁶ Subsequently, on November 3, 1993, the RTC sent Pyramid a proposed final Purchase and Sale Agreement. That final agreement, among other things,

purported to give Wind River a right of first refusal on the entire Snow Creek Parcel, and not just the .861 acres of land upon which its gas station was located. Because of the RTC's erroneous calculation of the scope of Wind River's right of first refusal, Pyramid refused to execute the agreement.⁷

On or about December 28, 1993, the RTC informed Pyramid that Wind River had purchased the entire 51.84 acre Snow Creek Parcel from the RTC. Subsequently, on March 17, 1994, the RTC conveyed the property to Wind River via a special warranty deed. That deed, which was duly recorded in the Summit County, Utah Recorder's Office on March 23, 1994, requires the RTC to appear and defend Wind River against any challenge to its title in the Snow Creek Parcel.⁸

On April 22, 1994, Pyramid sued Wind River in this court asserting five causes of action against Wind River arising out of the aforementioned facts. Pyramid's fourth and fifth causes of action are now the subject of this memorandum decision and order.⁹ Pyramid's fourth cause of action seeks a declaration by this court that the RTC's sale of the Snow Creek Parcel to Wind River is "void and of no legal force and effect," and that Pyramid is "entitled to consummate its purchase of the Snow Creek Parcel under the terms previously offered to and accepted" by the RTC. See Pyramid's Complaint, ¶¶ 61–62. Pyramid's fifth cause of action asks this court for preliminary and permanent injunctive relief "[p]reventing defendant Wind River from taking any action to make any physical changes, alterations, modifications, or improvements to the Snow Creek Parcel," and "[r]equiring defendant Wind River to transfer to plaintiff ... title to the Snow Creek Parcel." *Id.* at ¶ 65.

On June 27, 1994, the RTC filed both a motion to intervene and a motion to dismiss Pyramid's fourth and fifth causes of action on the ground that the relief sought by Pyramid in those counts would "restrain or affect" the RTC in violation of 12 U.S.C.A. § 1821(j) and the jurisdictional bar thereunder.¹⁰ Soon thereafter, on July 8, 1994, Wind River filed a motion to dismiss Pyramid's fourth and fifth causes of action on the same ground.

[1] Subsequently, on July 27, 1994, Pyramid and Wind River stipulated to the dismissal of Pyramid's fourth cause of action "with prejudice and on its merits" because of a belief by the parties that the relief requested therein would violate section 1821(j).¹¹ *517 This court then signed an order dismissing with prejudice Pyramid's fourth cause of action on August 13,

1994. Wind River now argues that, in addition to its section 1821(j) argument noted *supra*, Pyramid's fifth cause of action should be dismissed for two additional reasons. First, Wind River argues that because the factual basis of Pyramid's fourth and fifth causes of action are identical, Pyramid's dismissal of its fourth cause of action also "jettisoned the legal basis for the injunctive relief requested in its Fifth Cause of Action." See Wind River's Reply Mem. in Supp. of Wind River's Mot. Dismiss Pl.'s Fourth and Fifth Causes of Action at 2–3. Second, Wind River argues that because Pyramid agreed to the dismissal of its fourth cause of action "with prejudice and upon its merits," Pyramid is also barred from litigating its fifth cause of action under the doctrine of *res judicata*. *Id.* at 3–5.

II. STANDARD OF REVIEW

[2] In determining whether to grant a motion to dismiss for failure to state a claim upon which relief can be granted, the court must accept all well-plead facts as true. *Arnold v. McClain*, 926 F.2d 963, 965 (10th Cir.1991). In addition, all inferences that can be drawn from the allegations must be drawn in favor of the plaintiff. *Id.* at 965. "[I]f as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,' a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailable one." *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 1832, 104 L.Ed.2d 338 (1989) (citation omitted) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984)).

III. DISCUSSION

[3] The dispositive issue to be decided here is whether the anti-injunction provision of the Financial Institutions Reform, Recovery, and Enforcement Act, 12 U.S.C.A. § 1821(j), deprives this court of jurisdiction to grant the type of relief requested in Pyramid's fifth cause of action. For the reasons discussed below, the court finds that such jurisdiction is indeed lacking, and accordingly grants Wind River's motion to dismiss Pyramid's fifth claim for relief.¹²

[4] When Congress enacts a statute prohibiting a federal court from granting a certain type of remedy, that limitation is jurisdictional. See *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522, 101 S.Ct. 1221, 1234, 67 L.Ed.2d 464 (1981) (holding that prohibitions against enjoining or restraining

IRS assessments in the federal Tax Injunction Act constitute limitations on federal district court jurisdiction). In this case, Wind River claims that the equitable relief Pyramid seeks in its fifth cause of action has been prohibited by Congress pursuant to 12 U.S.C.A. § 1821(j), and that this court therefore lacks jurisdiction to entertain it under the authority cited above. Section 1821(j) provides:

(j) Limitation on court action

Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, *to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.*

12 U.S.C.A. § 1821(j) (West 1988) (emphasis added).¹³

[5] [6] Clearly, the disposition of a failed thrift's assets, like the RTC's sale of the Snow Creek Parcel to Wind River in this case, is one of the quintessential statutory powers of the RTC as a receiver. *See id.* § 1821(d)(2)(E) (giving the RTC the express power to “realize upon the assets of the institution”); *518 *Ward v. Resolution Trust Corp.*, 996 F.2d 99, 104 (5th Cir.1993) (per curiam) (holding that the “sale of property acquired by the RTC from a failed institution, or administered by the RTC as conservator or receiver of such an institution, is beyond cavil a statutory power and function of the RTC”). Equally clear is that section 1821(j) prohibits a federal court from granting a party any sort of equitable relief that would directly “restrain or affect” the RTC in carrying out its statutory powers. *See, e.g., Carney v. Resolution Trust Corp.*, 19 F.3d 950, 956–58 (5th Cir.1994) (holding that section 1821(j) prevents a court from considering claims for declaratory and injunctive relief against the RTC); *Ward*, 996 F.2d at 104 (holding that section 1821(j) prevents a court from either enjoining or rescinding the RTC's sale of property acquired from a failed thrift); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1329 (6th Cir.1993) (holding that section 1821(j) prohibits a court from rescinding the RTC's transfer of the assets of a failed thrift).

Pyramid does not quibble with these authorities in opposing Wind River's motion to dismiss here. Indeed, Pyramid's argument in this case centers not on the concededly broad sweep of section 1821(j), but on whether section 1821(j) applies to the relief requested in Pyramid's fifth cause of action at all.¹⁴ As noted *supra*, Pyramid's fifth cause of action seeks injunctive relief requiring Wind River to transfer title in the Snow Creek Parcel to Pyramid in exchange for the

purchase price to which Pyramid and the RTC had previously agreed. *See* Pyramid's Complaint at ¶ 65. Pyramid contends that this relief does not violate section 1821(j)'s “restraining or affecting” language in any way, because “[h]aving already liquidated the property that is the subject of this litigation, and having realized the profits therefrom, RTC has entirely performed its role as receiver and has no remaining interest in the property.” *See* Pyramid's (Substituted) Mem. in Opp'n to Mot. to Intervene at 2.¹⁵

[7] [8] The court must reject Pyramid's narrow interpretation of section 1821(j), for several reasons. First, the plain language of the statute does not allow for such a limited reading. It provides that “no court may take any action ... to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.” 12 U.S.C.A. § 1821(j) (West 1988) (emphasis added). Such broad and all-encompassing language evidences, in the court's view, an intent by Congress to prohibit any interference with the RTC as a receiver—either directly or indirectly. Thus, to the extent that Pyramid attempts to confine section 1821(j)'s reach to only those cases where the RTC is *directly* interfered with, that attempt must be rejected as inconsistent with the statute itself. *See Volges v. Resolution Trust Corp.*, 32 F.3d 50, 52 (2d Cir.1994) (refusing to narrow section 1821(j)'s reach in light of the statute's broad and unequivocal language).

Second, Pyramid's narrow reading of section 1821(j) is controverted by the many federal courts around the United States which have also interpreted the statute. For example, in *Telematics Int'l v. NEMLC Leasing Corp.*, 967 F.2d 703 (1st Cir.1992), Telematics, a private, non-RTC plaintiff, sought declaratory relief permitting it to attach a certificate of deposit in which an insolvent bank in FDIC receivership held a security interest. The First Circuit refused to entertain such relief under section 1821(j), however, because it “would have the same effect, from the FDIC's perspective, as directly enjoining the FDIC from attaching the asset.” *Id.* at 707. Similarly, in *Homeland Stores, Inc. v. Resolution Trust Corp.*, 1992 WL 319659 (D.Kan. Oct. 13, 1992), *aff'd*, 17 F.3d 1269 (10th Cir.), *cert. denied*, 513 U.S. 928, 115 S.Ct. 317, 130 L.Ed.2d 279 (1994), Chief *519 Judge Kelly held that enjoining a non-RTC defendant in connection with a tortious interference with contract claim would violate section 1821(j) just as surely as if the RTC were enjoined directly. *Id.* at *9. In so holding, Chief Judge Kelly rejected an argument that was remarkably similar to the one raised by Pyramid here. Chief Judge Kelly wrote:

The statute states that the court may not take “any action” to restrain the receiver in its functions or powers. 12 U.S.C. § 1821(j). If an injunction against Bob's were to be granted, the effect would be to enjoin RTC in its capacity as a receiver, the very result the statute prevents. There seems [to be] no reason to allow a request for injunctive relief to circumvent the express statutory language. Thus, *the statute says the court cannot take “any action” to restrain the receiver, and this would apply to granting injunctive relief against Bob's.*

Id. (emphasis added); see also *Furgatch v. Resolution Trust Corp.*, 1993 WL 149084, at *2 (N.D.Cal. Apr. 30, 1993) (“Plaintiff contends that section 1821(j) is inapplicable in this case because he is attempting to enjoin HomeFed and the trustee who is conducting the sale, not the RTC. However, enjoining these parties indirectly enjoins the RTC, which a district court has no power to do”). In this case, the RTC has already sold the Snow Creek Parcel to Wind River and Pyramid's fifth claim for relief would now rescind that deal in its entirety and order Wind River to sell the property to Pyramid. Such relief would undoubtedly “restrain or affect” the RTC in the performance of its statutory duties just as surely as the cases mentioned above. Accordingly, this court is without power to order such a transaction.

[9] Finally, to read section 1821(j) as narrowly as Pyramid suggests would violate the clear intent of Congress in enacting the statute. As is abundantly clear from its legislative history, section 1821(j) is “but part of a broader scheme enacted to allow the RTC expeditiously to wind up the affairs of defunct savings and loan institutions without judicial interference.”

See *Volges*, 32 F.3d at 52.¹⁶ If this court allows Pyramid to proceed with its fifth cause of action in this case, that congressional scheme would surely be violated. For example, because the RTC gave Wind River a special warranty deed when it transferred to it the Snow Creek Parcel, it is likely that Wind River would require the RTC to defend that deed in any action where a party, such as Pyramid does here, seeks to challenge Wind River's title. Such a result would by definition “restrain or affect” the RTC in violation of section 1821(j), as it would entrench the RTC in expensive and time-consuming litigation at the expense of fulfilling its statutory duties.¹⁷ Similarly, if this court were to entertain Pyramid's fifth claim for relief in this case, then future transactions might be unduly “chilled” as potential bidders of RTC assets might be wary of having the very type of relief imposed on them that Pyramid seeks to impose on Wind River now. This the court is not prepared to allow.

Thus, for all of the foregoing reasons, this court finds that it lacks jurisdiction under section 1821(j) to grant the type of relief Pyramid has requested in its fifth cause of action. Accordingly, this court grants Wind River's motion to dismiss that claim with prejudice as a matter of law.¹⁸

*520 IV. ORDER

For the foregoing reasons, and good cause appearing, IT IS HEREBY ORDERED as follows:

1. Wind River's motion to dismiss with prejudice Pyramid's fifth cause of action is hereby granted.
2. This order shall serve as the order of the court and no further order need be prepared by counsel.

All Citations

866 F.Supp. 513

Footnotes

- 1 Western is a failed Phoenix, Arizona thrift. In May, 1990, the RTC was appointed receiver of Western's assets and liabilities, including the 51.84 acre Snow Creek Parcel at issue here.
- 2 16 U.S.C.A. §§ 3501–3510 (West 1988 & Supp.1994).
- 3 At no time during the RFP process did Wind River ever express an interest in becoming Park City's financial partner.
- 4 Pyramid claims that it expended more than \$170,000 to bring the Snow Creek Parcel into compliance with Park City's zoning and planning requirements during the eighteen months following its selection as Park City's financial partner, and

that a substantial portion of those funds were spent to alleviate environmental damage caused by leaking petroleum at Wind River's gas station.

This offer was later revised downward to \$1.7 million to compensate Pyramid for the estimated cost of alleviating environmental damage on the property.

Apparently, this was the first time that Wind River had ever declared an interest in exercising its rights under the 1965 lease agreement.

That same agreement also stated that Wind River's contamination of its gas station site was a breach of the 1965 lease under which it claimed its right of first refusal.

Wind River's special warranty deed provides, in part:

Grantor hereby covenants with Grantee that Grantor will forever defend Grantee against claims of all persons claiming by, through, or under Grantor.

See Special Warranty Deed, Doc. No. 00400773, Book No. 00794, Pg. No. 00499005 (on file with the Summit County, Utah Recorder).

Pyramid's first and second causes of action state claims against Wind River for intentional interference with prospective economic relations and intentional interference with present economic relations respectively. See Pyramid's Complaint, ¶¶ 43–52. Pyramid's third cause of action states a claim against Wind River for injurious falsehoods. *Id.* at ¶¶ 53–58. Neither Wind River nor the RTC challenges the viability of these causes of action at the present time.

As is more fully discussed *infra*, section 1821(j) prevents a court from granting a litigant any form of relief which might “restrain or affect” the RTC in the exercise of its powers or functions as a receiver. See 12 U.S.C.A. § 1821(j) (West 1988).

As noted *supra*, Pyramid's fourth cause of action requested that the RTC's sale of the Snow Creek Parcel to Wind River be rescinded and that the RTC be ordered to sell the parcel to Pyramid. Such a remedy clearly violates the statutory mandate of section 1821(j). See, e.g., *Carney v. Resolution Trust Corp.*, 19 F.3d 950, 956–58 (5th Cir.1994) (holding that section 1821(j) deprives a district court of jurisdiction to issue declaratory and injunctive relief against the RTC); *Ward v. Resolution Trust Corp.*, 996 F.2d 99, 104 (5th Cir.1993) (per curiam) (holding that section 1821(j) bars a district court from enjoining or rescinding a sale by the RTC of the assets of a failed thrift).

Because of the disposition of this issue, the court need not determine whether the RTC should be allowed to intervene in this case or whether Wind River's “factual predicate/res judicata” argument also bars Pyramid from litigating its fifth cause of action.

Section 1821(j) originally applied solely to the FDIC. However, when Congress created the RTC in 1989, it gave the RTC the same rights and powers as those possessed by the FDIC under section 1821(j). See 12 U.S.C.A. § 1441a(b)(4) (West 1988); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1328 (6th Cir.1993).

Indeed, Pyramid even admits in its opposition papers that under section 1821(j), “ ‘courts are generally not permitted to enjoin any actions the RTC takes in its role as receiver or conservator.’ ” See Pyramid's (Substituted) Mem. in Opp'n to Mot. to Intervene at 10 (quoting *Gross v. Bell Sav. Bank PA SA*, 974 F.2d 403, 406 (3d Cir.1992)).

Pyramid's argument, pared to its basics, seems to be this: because Pyramid seeks injunctive relief against *Wind River* and not the RTC, such relief could not “restrain or affect” the RTC as a receiver and therefore could not violate section 1821(j).

Indeed, section 1821(d)(13)(C) of the same legislation prohibits the federal courts from attaching or executing upon the RTC's assets. See 12 U.S.C.A. § 1821(d)(13)(C) (West 1988). Similarly, section 1825(b)(2) prohibits the federal courts from either foreclosing or imposing liens upon the RTC's property. *Id.* § 1825(b)(2).

Pyramid argues that such a result is illusory here because “[n]either the integrity of RTC's title nor its ability to transfer that title are at stake.” See Pyramid's (Substituted) Mem. in Opp'n to Mot. to Intervene at 18. Pyramid's argument overlooks the fact that, while the RTC might indeed be free from any liability to Wind River under its special warranty deed, the RTC will be forced to expend countless resources to establish that proposition in court.

The court notes that Pyramid is not left without a remedy as a result of the decision issued today. For example, Pyramid remains free to prosecute the tort claims it has brought against Wind River in its first, second, and third causes of action. Similarly, Pyramid remains free to assert a damages claim against the RTC as part of the normal administrative claims process. See *Ward v. Resolution Trust Corp.*, 996 F.2d 99, 104 (5th Cir.1993) (per curiam) (discussing this remedy).

335 S.C. 635

Court of Appeals of South Carolina.

TWELFTH RMA PARTNERS, L.P., Respondent,

v.

NATIONAL SAFE CORPORATION, Barbara

B. Smith and Roy W. Smith, Appellants.

No. 2991.

Submitted April 13, 1999.

Decided May 10, 1999.

Synopsis

Holder of promissory note and guarantee acquired through assignment by the Resolution Trust Corporation (RTC) sued guarantors for balance due on note. The Circuit Court, Lexington County, George W. Jefferson, Master-in-Equity, entered judgment for holder, and guarantors appealed. The Court of Appeals, [Goolsby, J.](#), held that: (1) right to sue under six-year statute of limitations found in the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) is available to assignees of RTC; (2) laches did not bar holder from suing under six-year statute of limitations under FIRREA; (3) guarantors were not prejudiced by amendment of complaint to change name of holder; and (4) testimony of witness for holder was admissible under business records exception to hearsay rule.

Affirmed.

West Headnotes (11)

[1] Appeal and Error

Reference

Appeal and Error

Sufficiency of evidence

In action at law referred to master-in-equity, the appellate court will correct any errors of law, but it must affirm the master's factual findings unless no evidence exists that reasonably supports those findings.

[3 Cases that cite this headnote](#)**[2] Finance, Banking, and Credit**

Time for proceedings; limitations and laches

Right to sue under six-year statute of limitations found in the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) is not personal to the Resolution Trust Corporation (RTC), but is available to all assignees or transferees of the RTC. Federal Deposit Insurance Act, § 2[11](d)(14)(A), [12 U.S.C.A. § 1821\(d\)\(14\)\(A\)](#).

[1 Cases that cite this headnote](#)**[3] Assignments**

Nature and extent of rights of assignee in general

An assignee stands in the shoes of its assignor.

[16 Cases that cite this headnote](#)**[4] Assignments**

Nature and extent of rights of assignee in general

When a contract is assigned, the assignee should have all the same rights and privileges, including the right to sue on the contract, as the assignor.

[12 Cases that cite this headnote](#)**[5] Finance, Banking, and Credit**

Time for proceedings; limitations and laches

Laches did not bar holder of promissory note and guarantee acquired through assignment by the Resolution Trust Corporation (RTC) from suing guarantors for balance due on note under six-year statute of limitations under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), where action was commenced within six-year limitation period. Federal Deposit Insurance Act, § 2[11](d)(14)(A), [12 U.S.C.A. § 1821\(d\)\(14\)\(A\)](#).

[1 Cases that cite this headnote](#)**[6] Equity**

 Prejudice from Delay in General

Laches is an equitable doctrine consisting of the elements of a delay that is unreasonable and that causes prejudice.

[2 Cases that cite this headnote](#)

[7] Equity **Delay short of statutory period**

Laches within the period of the statute of limitations is no defense at law.

That witness for holder of promissory note and guarantee was not the custodian of holder's records at or near the time the records were made did not preclude admission of her testimony under the business records exception to hearsay rule, in holder's action against guarantors to recover balance due on note, where witness' testimony conveyed information from a person with knowledge at the time the records were created. [Code 1976, § 19-5-510](#); [Rules of Evid., Rule 803\(c\)](#).

[3 Cases that cite this headnote](#)

[8] Bills and Notes **Amended and supplemental pleadings**

Guarantors of promissory note were not prejudiced by amendment of complaint to change name of holder of promissory note and guarantee, in holder's action to recover balance due under note, where amendment added no new claims against guarantors. [Rules Civ.Proc., Rule 15](#).

Attorneys and Law Firms

****45 *637** [S. Jahue Moore](#), of Kirkland, Wilson, Moore, Taylor & O'Day, of West Columbia, for appellants.

[F. Xavier Starkes](#) and [William T. Toal](#), both of Johnson, Toal & Battiste, of Columbia, for respondent.

Opinion

[GOOLSBY](#), Judge:

This is a collection case that was referred to the master-in-equity for final order with direct appeal to the supreme court. The master found that Roy Smith and Barbara Smith defaulted on a note held by Twelfth RMA Partners, L.P. The master awarded Twelfth \$1,002,421.86 in damages, including attorney fees. The Smiths appeal the decision. We affirm. ¹

[9] Pleading **Discretion of Court****Pleading** **Affidavits and other proofs**

A motion to amend complaint is within the sound discretion of the trial judge, and the opposing party has the burden of establishing prejudice. [Rules Civ.Proc., Rule 15](#).

[10] Appeal and Error **Objections to evidence and witnesses**

Whether trial court erred in admitting unsworn testimony of witness for holder of promissory note and guarantee was not preserved for review, in action brought by holder against guarantors for balance due on note, absent objection to testimony on that ground by guarantors at trial.

***638 FACTS**

National Safe Corporation borrowed \$300,000.00 and \$200,000.00 from Pioneer Savings Bank (Pioneer). Pioneer combined these two notes and formed a renewal line of credit for \$500,000.00. Mr. Smith signed the note as president of National Safe Corporation. Mr. and Mrs. Smith each signed an unconditional Guarantee of Payment and Performance that guaranteed payment of the note. Shortly thereafter, the United States government closed Pioneer as a result of the savings and loan crisis and appointed the Resolution Trust Corporation (RTC) as receiver. RTC then assigned the note and guarantee to Twelfth on November 15, 1994. National Safe Company filed for bankruptcy in December, 1996.

[11] Evidence **Form and Sufficiency in General**

R.M.A. Partners, L.P., sued the Smiths for the balance on the notes in June, 1995. R.M.A. Partners filed a motion for summary judgment, but the master denied it because of uncertainty as to the identity of the proper plaintiff. The master heard the case on August 13, 1997. On the day of trial, R.M.A. Partners made a motion to substitute Twelfth R.M.A. Partners, L.P., (Twelfth) as the appropriate plaintiff. The master granted this motion over the Smiths' objection.

During the trial, the master allowed the testimony of Judy Every, a portfolio manager with Twelfth, over the Smiths' objection that her testimony was hearsay. The master found that the Smiths had defaulted on the loan, that Twelfth was the holder of the note, and that the Smiths owed \$484,010.27 in principal, \$10,798.00 in late charges, \$504,113.59 in interest, and \$3,500.00 in attorney fees. The Smiths appeal.

ISSUES ON APPEAL

- (1) Is the lawsuit barred by South Carolina's three-year statute of limitations, or does the federal six-year statute of limitations apply?
- (2) Is the lawsuit barred by the equitable doctrine of laches?
- (3) Did the substitution of Twelfth as plaintiff on the day of trial unduly prejudice the Smiths?
- (4) Did the master err in allowing the testimony of Judy Ray Every?

*639 STANDARD OF REVIEW

[1] This case is an action at law that was referred to the master-in-equity with direct appeal to the supreme court. The appellate court will correct any errors of law, but it must affirm the master's factual findings unless no evidence exists that reasonably supports those findings. *Jefferies v. Phillips*, 316 S.C. 523, 451 S.E.2d 21 (Ct.App.1994).

DISCUSSION

(1) Statute of Limitations

[2] The Smiths argue the master incorrectly applied the six-year statute of limitations found in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1821(d)(14), instead of applying the South Carolina three-year statute of limitations. S.C.Code Ann. § 15-3-530 (Supp.1997). We disagree.

The relevant language in the FIRREA is found in 12 U.S.C. § 1821(d)(14)(A):

(1) Statute of limitations for actions brought by conservator or receiver

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation [i.e., the FDIC] as conservator or receiver shall be—

(i) in the case of any contract claim, the longer of—

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under state law.

The statute mentions “the Corporation,” which has been defined in the statute as the FDIC. FIRREA gives the RTC the same rights and powers as the FDIC. 12 U.S.C.A. § 1441a(b)(4)(A). The statute, however, is silent as to its applicability to the assignees of the RTC. The Smiths argue that this silence means the court must apply the three-year statute of limitations. Twelfth argues that the law of assignments, or alternatively, the UCC, should determine which statute applies.

[3] [4] In South Carolina, it is well established that an “assignee ... stands in the shoes of its assignor ...” *Singletary v. Aetna Cas. & Sur. Co.*, 316 S.C. 199, 201, 447 S.E.2d 869, 870 (Ct.App.1994). When a contract is assigned, the assignee should have all the same rights and privileges, including the right to sue on the contract, as the assignor. Under the UCC in South Carolina, a “[t]ransfer of an instrument vests in the transferee such rights as the transferor has therein.” S.C.Code Ann. § 36-3-201 (1976).

The Smiths argue that the right in question, the RTC's right to sue under the six year statute of limitations, would not transfer to Twelfth. They cite *Wamco, III, Ltd. v. First Piedmont Mortg. Corp.*, 856 F.Supp. 1076 (E.D.Va.1994) for

the proposition that the statute confers a personal benefit, or right, onto the RTC that would not transfer to an assignee.

****47** *Wamco*, however, is against the weight of authorities, as the case itself points out. Also, the Virginia Supreme Court refused to follow the *Wamco* decision and held that the right to sue under the six-year statute of limitations is not a personal benefit or right. The court further stated “the receiver’s right to sue within the statute of limitations period is inherent in its possession of the instruments at issue and would thus be among the ‘rights, remedies and benefits which are incidental to the thing assigned,’ and not merely a right ‘personal to the assignor and for [its] benefit only.’ ” *Union Recovery Ltd. Partnership v. Horton*, 252 Va. 418, 477 S.E.2d 521, 524 (1996).

The majority of state and federal courts have interpreted the federal statute to grant to the assignee a six-year statute of limitations. See, e.g., *FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir.1993); *N.S.Q. Associates v. Beychok*, 659 So.2d 729 (La.1995); *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244 (Colo.1994) (en banc); *Investment Co. of the Southwest v. Reese*, 117 N.M. 655, 875 P.2d 1086 (1994); *Jackson v. Thweatt*, 883 S.W.2d 171 (Tex.1994).

We agree that the right to sue under the six-year statute of limitations is not personal to the RTC, but is available to all assignees or transferees of the RTC. The claim brought by Twelfth, therefore, is not barred by the statute of limitations.

(2) Laches

[5] [6] [7] The Smiths next argue that laches should bar Twelfth from using the extended federal statute of limitations.

***641** We disagree. Laches is an equitable doctrine consisting of the elements of (1) a delay (2) that is unreasonable and (3) that causes prejudice. *Terry v. Lee*, 314 S.C. 420, 445 S.E.2d 435 (1994). Laches within the period of the statute of limitations is no defense at law. *Crotwell v. Whitney*, 229 S.C. 213, 92 S.E.2d 473 (1956) (citations omitted). We conclude the Smiths have not shown the requisite unreasonable delay since the action was within the statute of limitations period.

(3) Substitution of Plaintiff

[8] The Smiths next argue that the substitution of Twelfth RMA Partners, L.P., for RMA Partners, L.P., unduly prejudiced them. We disagree.

[9] **Rule 15, SCRPC**, provides that the complaint may only be amended by leave of the court and “leave to amend shall be freely given when justice requires and does not prejudice any other party.” A motion to amend is within the sound discretion of the trial judge and the opposing party has the burden of establishing prejudice. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 431 S.E.2d 587 (1993).

The Smiths rely on *Valentine v. Davis*, 319 S.C. 169, 460 S.E.2d 218 (Ct.App.1995) for the proposition that a plaintiff may not add a new plaintiff to a case to assert a claim against the defendant. In this case, however, no new claims are being added. The court is only changing the name of the plaintiff. The subject of the claim, the underlying note on which the Smiths defaulted, is still the same.

The Smiths also argue that the case was not brought in the name of the real party in interest and should be dismissed under **Rule 17, SCRPC**. The Smiths have not shown any prejudice. The trial court substituted the real party in interest, as **Rule 17, SCRPC**, expressly allows.

(4) Ms. Every's Testimony

[10] Finally, the Smiths argue that the master should not have allowed the testimony of Judy Every. We disagree.

First, they base this argument on the fact that she did not take an oath prior to giving the testimony. The record shows that no oath was given prior to Every's testimony. The record also shows, however, that the Smiths did not object. ***642** “The admission of unsworn testimony in a case is a mere irregularity which violates no constitutional provision, and does not affect the jurisdiction of the tribunal, and if unsworn testimony is received into evidence without objection, it may be considered the same as any other evidence in the case.” 98 C.J.S. *Witnesses* § 320, at 22 (1957).

****48** [11] The Smiths also argue that the master erred in allowing the testimony because it was hearsay. We disagree.

The master allowed the testimony under the business records exception to the hearsay rule. The business records exception is found in both the *South Carolina Code* at § 19–5–510

(1985) and Rule 803(6) of the South Carolina Rules of Evidence. Both exceptions require that the evidence be given by a “custodian or other qualified witness.” Ms. Every testified that the records about which she testified were part of her file that she maintained in Twelfth's regular course of business.

The Smiths argue, however, that she was not the custodian “at or near the time” the records were made. Here, Ms. Every's testimony merely conveyed information from a person “with

knowledge” at the time the records were created, a situation expressly allowed under Rule 803(6).

AFFIRMED.

HOWELL, C.J., and CONNOR, J., concur.

All Citations

335 S.C. 635, 518 S.E.2d 44

Footnotes

- 1 Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

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81 F.Supp.3d 735
United States District Court, D. Minnesota.

Thomas J. NEWMAN, Plaintiff,

v.

JP MORGAN CHASE BANK, N.A., Federal
National Mortgage Association, Defendants.

Civ. No. 14-2944 (MJD/JSM).

Signed Jan. 26, 2015.

Synopsis

Background: Mortgagor brought action against purchaser of failed lender's mortgage assets and Federal National Mortgage Association (Fannie Mae), alleging they failed to comply with Minnesota's foreclosure statute and seeking an injunction to prevent purchaser from proceeding with eviction. Defendants moved to dismiss for failure to state a claim.

[Holding:] The District Court, [Michael J. Davis](#), Chief Judge, adopting the report and recommendation of [Janie S. Mayeron](#), United States Magistrate Judge, held that purchase and assumption agreement was not an assignment that had to be recorded.

Motion granted.

West Headnotes (7)

[1] Mortgages and Deeds of Trust

🔑 Recording of mortgage or assignment

Purchase and assumption agreement between Federal Deposit Insurance Corporation (FDIC), as receiver for failed lender, and purchaser, which transferred lender's mortgage assets to purchaser, was not an assignment that had to be recorded pursuant to Minnesota's foreclosure statute; even though agreement included word "assigns" with respect to transfer of assets, it was included in a list of words which indicated that FDIC was transferring all of lender's assets to purchaser, and transfer was based on Financial

Institutions Reform, Recovery and Enforcement Act (FIRREA), which allowed FDIC to transfer lender's assets without assignment, such that transfer occurred by operation of law. Federal Deposit Insurance Act, § 2[11], [12 U.S.C.A. § 1821\(d\)\(2\)\(G\)\(i\)\(II\)](#); [M.S.A. § 580.02](#).

[1 Cases that cite this headnote](#)

[2] States

🔑 Conflicting or conforming laws or regulations

"Conflict preemption" occurs when compliance with both federal and state laws is impossible, and when a state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.

[1 Cases that cite this headnote](#)

[3] Finance, Banking, and Credit

🔑 Sale or other disposition of assets

States

🔑 Banking and financial or credit transactions

In a purchase and assumption transaction pursuant to FIRREA, the Federal Deposit Insurance Corporation (FDIC) is entitled to transfer the assets of a failed bank "without assignment" and in that regard, any restrictions on this power to transfer imposed by state law are preempted. Federal Deposit Insurance Act, § 2[11], [12 U.S.C.A. § 1821\(d\)\(2\)\(G\)\(i\)\(II\)](#).

[4] Finance, Banking, and Credit

🔑 Sale or other disposition of assets

Mortgages and Deeds of Trust

🔑 Necessity

States

🔑 Banking and financial or credit transactions

Even if purchase and assumption agreement between Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank, and purchaser, which transferred bank's mortgage assets to purchaser, qualified as an assignment that had to be recorded pursuant to Minnesota's foreclosure statute, recording requirement would

be preempted by Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) provision permitting FDIC to transfer assets of a failed bank “without an assignment,” since it would conflict with FIRREA. Federal Deposit Insurance Act, § 2[11], [12 U.S.C.A. § 1821\(d\)\(2\)\(G\)\(i\)\(II\)](#); [M.S.A. § 580.02](#).

[5] Injunction

🔑 Nature of remedy in general

An injunction is a remedy, not a cause of action.

[6] Courts

🔑 Injunction by United States Court Against Proceedings in State Court

Courts must construe the exceptions to the Anti-Injunction Act narrowly and resolve doubts in favor of letting the state action proceed. [28 U.S.C.A. § 2283](#).

[7] Federal Civil Procedure

🔑 Pleading over

When a complaint is so deficient or defective that a court is convinced that its defects cannot be cured through re-pleading, dismissal with prejudice for failure to state a claim is appropriate. [Fed.Rules Civ.Proc.Rule 12\(b\)\(6\)](#), [28 U.S.C.A.](#)

Attorneys and Law Firms

***736** [Caitlin Guilford](#), [Jonathan L.R. Drewes](#), Drewes Law PLLC, Minneapolis, MN, for Plaintiff.

[Curtis D. Ripley](#), Minneapolis, MN, for Defendants.

ORDER

[MICHAEL J. DAVIS](#), Chief Judge.

The above matter came before the Court on the Report and Recommendation of United States Magistrate Judge Janie S.

Mayeron dated November 17, 2014. Plaintiff objects to the recommendation that this Court grant Defendants' motion to dismiss.

Pursuant to statute, the Court has conducted a *de novo* review of the record. [28 U.S.C. § 636\(b\)\(1\)](#); Local Rule 72.2(b). Based on the Court's *de novo* review and upon all of the files, records and proceedings herein, the Court will adopt the Report and Recommendation.

IT IS HEREBY ORDERED that:

1. Defendants' Motion to Dismiss [Docket No. 3] is GRANTED;
2. This matter is dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

REPORT AND RECOMMENDATION

[JANIE S. MAYERON](#), United States Magistrate Judge.

The above matter came before the undersigned on defendants' Motion to Dismiss [Docket No. 3]. Jonathan L.R. Drewes, Esq. appeared on plaintiff's behalf. Curtis D. Ripley, Esq. appeared on defendants' behalf. This matter has been referred to the undersigned Magistrate Judge for a Report and Recommendation by the District Court pursuant to [28 U.S.C. § 636\(b\)\(1\)\(A\), \(B\)](#), and Local Rule 72.1.

I. BACKGROUND

Plaintiff seeks to invalidate the foreclosure of the mortgage on his home. Plaintiff asserts two claims against defendants: failure to comply with [Minn.Stat. § 580.02](#) and an injunction to prevent defendant JP Morgan Chase from proceeding with an eviction it initiated against plaintiff in Hennepin County, Minnesota.

For the reasons described below, the Court recommends that defendants' Motion to Dismiss be granted and plaintiff's claims be dismissed with prejudice.

***737 A. Plaintiff's Complaint**

Plaintiff sued JP Morgan Chase Bank, N.A. (“Chase”) and Federal National Mortgage Association (“Fannie Mae”) (collectively, “defendants”) in state district court on June 18, 2014. Notice of Removal, Ex. 1 (Summons and Complaint)

[Docket No. 1–1]. Based on diversity jurisdiction, defendants removed the suit to Federal District Court pursuant to 28 U.S.C. 1332(a). Notice of Removal [Docket No. 1]. Defendants moved to dismiss the Complaint in lieu of answering. Motion to Dismiss [Docket No. 3].

The facts bearing on defendants' motion to dismiss are as follows. Plaintiff executed a mortgage in favor of Washington Mutual Bank, FA (“WAMU”) on November 28, 2006, for property located in Hennepin County, Minnesota (“Property”). Complaint, ¶¶ 1, 6. The mortgage was recorded with the Hennepin County Registrar of Titles on January 5, 2007. *Id.*, ¶ 6. On September 25, 2008, the Federal Deposit Insurance Corporation (“FDIC”) was appointed as WAMU's receiver. *Id.*, ¶ 7. That same day, Chase and the FDIC entered into a Purchase and Assumption Agreement (“PAA”). Affidavit of Curtis Ripley in Support of Motion to Dismiss (“Ripley Aff.”), Ex. 1(PAA) [Docket No. 6–1]. Pursuant to the PAA, the FDIC transferred WAMU's mortgage assets to Chase. *Id.* On October 29, 2008, Chase recorded an affidavit from the FDIC with the Hennepin County Registrar of Titles. Complaint, ¶ 7, Ripley Aff., Ex. 2 (recorded Affidavit of Robert C. Schoppe, Receiver in Charge for FDIC as Receiver for Washington Mutual Bank). This Affidavit stated “[a]s authorized by Section 11(d)(2)(G)(i)(II) of the Federal Deposit Insurance Act, 12 U.S.C. § 1821(d)(2)(G)(i)(II),¹ the FDIC, as receiver of Washington Mutual, may transfer any asset or liability of Washington Mutual without any approval, assignment or consent with respect to such transfer.” Ripley Aff., Ex. 2, ¶ 3. “As a result, on September 25, 2008, JP Morgan Chase became the owner of the loans and loan commitments of Washington Mutual by operation of law.” *Id.*, ¶ 5.

Plaintiff defaulted on his mortgage payments² and Chase, “a party with no registered interest in the Subject Property,” foreclosed on the mortgage by advertisement. Complaint, ¶ 9. A sheriff's sale of the Property was held on April 15, 2014. *Id.* The Sheriff's Certificate of Sale and Foreclosure Record was recorded with the Hennepin County Registrar of Titles on April 23, 2014. *Id.*; see also Ripley Aff., Ex. 3 (Sheriff's Certificate of Sale and Foreclosure Record) [Docket No. 6–1]. The Property was sold to Chase at the sheriff's sale for \$352,075.33. Ripley Aff., Ex. 3. After the sheriff's sale, Chase transferred title of the Property to Fannie Mae by warranty deed. Ripley Aff., Ex. 4 (warranty deed).

Plaintiff did not redeem the Property during the statutory redemption period and failed to vacate the Property, claiming

that he was the “rightful owner of the Subject Property.” Complaint, ¶ 24. In June, 2014, Chase commenced an eviction action in Hennepin County Housing Court. *Id.*, ¶ 25. Plaintiff contended that Chase failed to comply with Minnesota's foreclosure-by-advertisement statute, Minn.Stat. § 580.02, because there is no recorded assignment of the mortgage to Chase. Complaint, ¶¶ 16, 20. Consequently, Chase *738 was not entitled to foreclose. *Id.*, ¶ 13. As relief, plaintiff sought a judgment declaring the sheriff's sale void and an injunction, enjoining “defendants and their successors-in-interest, from asserting claims of ownership, pursuing eviction, or purporting to transfer rights in the Subject property to third parties to which Defendants are not presently entitled.” *Id.*, Prayer for Relief, ¶¶ 1, 2.

B. Defendants' Motion to Dismiss and Plaintiff's Response

Defendants moved to dismiss the Complaint, contending that plaintiff's sole theory regarding the alleged violation of Minn.Stat. § 580.02—that Chase foreclosed without recording an assignment from the FDIC—was meritless and rejected by the district court in *Luzaich v. JP Morgan Chase*, Civ. No. 13–1869 (DWF/JSM), 2014 WL 300824 (D.Minn. Jan. 28, 2014) (Order Adopting Report and Recommendation). Defendants' Memorandum in Support of Motion to Dismiss (“Defs.' Mem.”), pp. 5–6 [Docket No. 5]. In *Luzaich*, the district court concluded that even if the FDIC's recording of an affidavit documenting Chase's acquisition of “all loans and all loan commitments” of WAMU did not fulfill the requirement of Minn.Stat. § 580.02,

the Court is persuaded that Chase was not obligated to record an assignment. Pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, the mortgage was assigned to Chase by operation of federal law, which specifically authorizes the FDIC to transfer assets of a failed financial institution “without ... assignment.” 12 U.S.C. § 1821(d)(2)(G)(i)(II). Through operation of the Supremacy Clause, U.S. Const. art. VI, cl. 2, “a transfer of a mortgage, authorized by federal law, obviates the need for the specific written assignment that state law would otherwise require.” *Demelo v. U.S. Bank Nat'l Ass'n*, 727 F.3d 117, 125 (1st Cir.2013). If no assignment was required to effectuate the transfer of plaintiff's mortgage to Chase, then it follows that no assignment was required to be recorded prior to the foreclosure sale of the Property.

Id., p. 5 (quoting *Luzaich*, 2014 WL 300824, at *7). Defendants also submitted that the same conclusion was reached in *Robinson v. Federal Nat'l Mortg. Ass'n*, Civ. No. 13–1868 (JNE/JSM), 2014 WL 258644 (D.Minn. Jan. 23, 2014) (Order Adopting Report and Recommendation). Moreover, courts in other jurisdictions have reached the same conclusion based on complaints following WAMU's collapse and the FDIC's transfer of WAMU's assets to Chase through the PAA. *Id.*, pp. 7–8 (citing *Drobny v. JP Morgan Chase Bank, N.A.*, 929 F.Supp.2d 839, 841 (N.D.Ill.2013); *Beka Realty, LLC v. JP Morgan Chase Bank, N.A.*, 41 Misc.3d 1213(A), Civ. No. 503666–12, 2013 WL 5629590, at *3 (N.Y.Sup.Ct. Sept. 25, 2013)).

Plaintiff did not address the holdings of *Luzaich* or *Robinson* in his opposition to Chase's motion. Plaintiff's Memorandum in Opposition to Motion to Dismiss ("Pl. Mem. in Opp."), pp. 4–12 [Docket No. 10]. Plaintiff argued that the PAA was an assignment and was required to be recorded before Chase could foreclose. *Id.*, pp. 5–6. Plaintiff cited no cases to support this characterization of the PAA and instead relied on the definitions of "assignment" and "instrument" from Black's Law Dictionary. *Id.*, p. 5. Plaintiff submitted that while it "may potentially be technically possible for the FDIC to transfer the assets of Washington Mutual Bank to JPMorgan—pursuant to 12 U.S.C. § 1821(d)(2)(G)(i)(II)—without 'a written legal document' 'of transfer,' such an event is practically unlikely and nevertheless did not happen here." *Id.*, p. 6.

***739** Plaintiff further contended that the Minnesota Supreme Court's statement in *Ruiz v. 1st Fid. Loan Serv., LLC*, 829 N.W.2d 53, 54 (Minn.2013), that all assignments had to be recorded "before the mortgagee has the right to engage in the process of foreclosure by advertisement," was dispositive. To comply with Minn.Stat. § 580.02(3), plaintiff maintained that Chase was required to record an assignment from the FDIC, without exception. *Id.*, pp. 7–12. Plaintiff submitted a print-out of results from a search plaintiff's counsel conducted at the Hennepin County Registrar of Title's office, which showed hundreds of assignments of mortgage recorded by the FDIC. Declaration of Jonathan L.R. Drewes ("Drewes Decl."), Exs. A–L [Docket No. 11, 11–1]. According to plaintiff, this showed that the FDIC assigned its interests in many other cases, and if it was true that it was unnecessary to record the assignment in this case, then "all of these other banks are wasting time and money actually doing what Chase insists is unnecessary." Pl. Mem. in Opp., p. 11. Plaintiff argued that Chase could have conducted a judicial

foreclosure, which would have relieved it of the recording duties imposed by the foreclosure-by-advertisement statute. *Id.*, p. 9.

Plaintiff conceded that the Anti-Injunction Act, 28 U.S.C. § 2283, imposed an absolute prohibition on federal courts from enjoining state court proceedings unless the injunction fell within one of three exceptions described by the statute. *Id.*, p. 2. Consequently, plaintiff admitted that "Count II seeking injunctive relief cannot succeed here in federal court." *Id.*

Defendants replied that plaintiff was simply wrong that *Ruiz* required the recording of an assignment, because FIRREA expressly provided that no assignment was necessary and federal law trumps the state recording requirement. Defendants' Reply Memorandum ("Defs.' Reply"), p. 1 [Docket No. 14]. Defendants reiterated the significance of *Luzaich* and *Robinson*. *Id.*, p. 4. Defendants also submitted a copy of a state district court order granting summary judgment to Chase on virtually the same claims plaintiff has alleged in the instant case. Second Affidavit of Curtis Ripley, Ex. A (summary judgment order dated August 18, 201, *Bakri v. JP Morgan Chase et al.*, 02–cv–11–4667 (Tenth Judicial District, Anoka County, Minnesota) [Docket Nos. 15, 15–1]).³ In *Bakri*, the plaintiff asserted that Chase's foreclosure of his mortgage was void because Chase did not record an assignment of the mortgage from the FDIC, acting as receiver for WAMU. *Id.*, p. 6.⁴ The state court considered whether "the FDIC may transfer an interest in the mortgage pursuant to [12 U.S.C. § 1821(d)(2)(G)(i)(II)] without such transfer being considered an assignment under Minnesota statutes." *Id.* The state court concluded that the federal banking statute superseded Minnesota's foreclosure-by-advertisement statute and that the transfer from the FDIC to Chase was not an assignment requiring recording. *Id.* (citing *inter alia* *Luzaich*, 2014 WL 300824, at *6). The court noted:

Plaintiff's extensive citation of 19th century holdings of the Minnesota Supreme Court misses the point. Plaintiff is surely correct that a foreclosing party must have an interest in the mortgage and any assignments must be recorded before foreclosure. Neither of these ***740** propositions encumbers the power of Congress to carve out an exception pursuant to its authority to regulate interstate commerce. Here, the federal statute supersedes state law and prevents application of Minn.Stat. § 580.02(3) where the transfer of the mortgage occurs pursuant to the FDIC's receivership powers.

Id., p. 7. According to defendants, this recent case “is in line with the holdings from this District and across the nation, and further confirms that Chase did not need to record a mortgage assignment before foreclosing by advertisement under this circumstance.” Defs.’ Reply, p. 5.

Defendants rejected plaintiff’s argument about the availability of judicial foreclosure as “wholly irrelevant” because Chase was entitled to proceed with the foreclosure by advertisement. *Id.*, p. 8.

Lastly, defendants contended that it was impossible to draw any conclusions based on the print-outs plaintiff’s counsel submitted. *Id.*, p. 9. Defendants noted that nothing was known about the circumstances of these mortgages or what role the FDIC played in the mortgages. *Id.*, p. 9. As a result, the “information is not credible evidence of anything.” *Id.*

At the motion hearing, plaintiff’s counsel continued to insist that the PAA was an assignment that had to be recorded. Transcript of Hearing (“Tr.”), pp. 13–14 [Docket No. 20]. As evidence, counsel pointed to Article 3.1 of the PAA, which stated:

Subject to Sections 3.5, 3.6 and 4.8, the Assuming Bank hereby purchases from the Receiver and the Receiver hereby sells, assigns, transfers, conveys, and delivers to the Assuming Bank, all right, title and interest of the Receiver in and to all of the assets (real, personal and mixed, wherever located and however acquired) including all subsidiaries, joint ventures, partnerships and any and all other business combinations or arrangements, whether active, inactive, dissolved or terminated, of the Failed Bank whether or not reflected on the books of the Failed Bank as of Bank Closing.

Tr. 19 (citing Ripley Aff., Ex. 1, p. 9) (emphasis added). According to counsel, the use of the word “assigns” in this passage established that the PAA was an assignment. Tr. 20.

Further, at the hearing, plaintiff’s counsel raised for the first time a new argument regarding preemption, which was not

reflected in his responsive brief.⁵ Plaintiff’s counsel then argued that the *Demelo* case, relied upon by the court in *Luzaich*, was distinguishable because in *Demelo* there was a clear conflict between 12 U.S.C. § 1821(d)(2)(G)(i)(II) and a Massachusetts statute that required transfers of real property to be in writing. Tr. 16. According to counsel, “[h]ere in Minnesota *741 we don’t have that.” (*Id.*). As a result, implied conflict preemption—the only form of preemption that could be considered—did not apply because there is no conflict between the federal banking statute and Minn.Stat. § 580.02 where Chase had an assignment (*i.e.* the PAA) that it could have recorded, or alternatively, it could have foreclosed by action rather than advertisement. Tr. 25–26.

C. Defendants’ Supplemental Brief

Defendants responded to plaintiff’s preemption argument by first arguing that the PAA was not an assignment that would trigger Minn.Stat. § 580.02. Defendants’ Supplemental Memorandum in Support of Motion to Dismiss (“Def. Suppl. Mem.”), 3–7 [Docket No. 21]. Defendants noted that FIRREA expressly states that the FDIC may transfer assets “without assignment” and courts considering the application of the statute in connection with WAMU’s transfer of assets have recognized the distinction between transfers under FIRREA and mortgage assignments. *Id.* Defendants contended that consistent with FIRREA, the FDIC and Chase did not execute an assignment. *Id.*, pp. 4–5. Instead, the FDIC transferred WAMU’s assets through the PAA. *Id.*, p. 5. Furthermore, merely because the PAA used the word “assigns” in Article III did not make the PAA an “assignment.” *Id.*, pp. 5–7. That word appeared in a laundry list of terms intended to show that the FDIC was transferring all of WAMU’s assets to Chase. Not a single court to consider the PAA has treated it as a “mortgage assignment.” *Id.*, p. 6 (citing *Drobny*, 929 F.Supp.2d at 839; *Beka Realty, LLC*, 2013 WL 5629590; *Trice v. JP Morgan Chase Bank*, — Nev. —, Civ. No. 63052, 2013 WL 5432353 (Nev.2013); *FTBK v. Joshua Mgmt.*, 2013 N.Y. Misc. LEXIS 640).

Consequently, defendants submitted that no preemption analysis was necessary because there is no conflict between state and federal law. *Id.* FIRREA states that the FDIC can transfer assets “without assignment,” which is what the FDIC did when it transferred WAMU’s assets to Chase pursuant to the PAA. *Id.* Therefore, according to defendants, there was no assignment that Chase failed to record.

However, even if the Court conducted a preemption analysis, defendants contended that the result would be the same. *Id.*, pp. 11–17. Because FIRREA does not expressly preempt [Minn.Stat. § 580.02](#), defendants argued that the Court should analyze the issue under conflict preemption. *Id.*, pp. 12–13. Applying that analysis, FIRREA provides broad authority to the FDIC to dispose of a failed bank's assets free from any approval, assignment or consent requirements that might apply. *Id.*, p. 14. Any requirement that a transfer pursuant to FIRREA had to comply with state recording requirements would frustrate the purpose of the statute and conflict with the FIRREA provision that permits the FDIC to “transfer any asset or liability of the institution in default ... without any approval, assignment or consent with respect to such transfer.” *Id.*, pp. 16–17. Therefore, even if the Court construed the PAA as an assignment, conflict preemption rendered recording the assignment unnecessary. *Id.*, pp. 11–17.

D. Plaintiff's Response to Defendants' Supplemental Brief

In plaintiff's letter responding to defendants' supplemental brief, plaintiff took issue with defendants' statement that “no court has used or relied upon a preemption analysis to find that, notwithstanding the express provision of federal law that FDIC transfers are ‘without assignment,’ a foreclosing party must nonetheless record a *742 mortgage assignment pursuant to state law.” *Id.* (quoting Defendant's Supplemental Brief, p. 2). Plaintiff submitted that Chase “itself lost similar arguments” and directed the Court to [Kim v. JPMorgan Chase Bank, N.A.](#), 493 Mich. 98, 825 N.W.2d 329, 335–336 (2012). *Id.*

II. LEGAL STANDARD

In considering a motion to dismiss under [Rule 12\(b\)\(6\)](#), the pleadings are construed in the light most favorable to the non-moving party, and the facts alleged in the complaint must be taken as true. [Morton v. Becker](#), 793 F.2d 185, 187 (8th Cir.1986). In addition, a court must afford the plaintiff all reasonable inferences from those allegations. [Blankenship v. USA Truck, Inc.](#), 601 F.3d 852, 853 (8th Cir.2010). At the same time, to withstand a motion to dismiss under [Rule 12\(b\)\(6\)](#), litigants must properly plead their claims under [Rule 8 of the Federal Rules of Civil Procedure](#) and meet the principles articulated by the United States Supreme Court in [Ashcroft v. Iqbal](#), 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) and [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

As a general rule, the Court may not consider materials “outside the pleadings” on a motion to dismiss, without converting the motion to dismiss to a motion for summary judgment. [Fed.R.Civ.P. 12\(d\)](#). “The court, however, ‘may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings,’ ” without converting the motion into one for summary judgment. See [Little Gem Life Sciences, LLC v. Orphan Medical, Inc.](#), 537 F.3d 913, 916 (8th Cir.2008) (quoting [Porous Media Corp. v. Pall Corp.](#), 186 F.3d 1077, 1079 (8th Cir.1999) (internal citation and punctuation omitted)); see also [Fed.R.Civ.P. 10\(c\)](#) (“A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.”); [Mattes v. ABC Plastics, Inc.](#), 323 F.3d 695, 697, n. 4 (8th Cir.2003). Applying this standard, the Court has considered the Affidavit of Curtis Ripley and attached exhibits [Docket No. 6]; the Affidavit of Jonathan L.R. Drewes and attached exhibits [Docket No. 11] and the Second Affidavit of Curtis Ripley, attaching the state court's *Bakri* summary judgment decision. [Docket No. 15–1].

For the reasons set forth below, the Court concludes that plaintiff has failed to state a claim for relief and therefore, defendants' motion should be granted.

III. DISCUSSION

A. The PAA Was Not An Assignment

[1] Plaintiff's argument that the PAA was an assignment that had to be recorded pursuant to [Minn.Stat. § 580.02](#) is rejected. The Court agrees that the word “assigns” in Article III of the PAA did not make the PAA an assignment. That word appears in a list of words, all of which are plainly intended to state that the FDIC was transferring all of WAMU's assets to Chase. See Ripley Aff., Ex. 1, Article III. Additionally, it is abundantly clear that the FDIC's transfer WAMU's assets to Chase was based on FIRREA, which explicitly states that the FDIC can transfer the assets of a failed bank “without assignment.” This is precisely the basis of the holdings in *Luzaich* and *Robinson*—that no recording of an assignment was necessary because the transfers of assets took place “without assignment” and by operation of law. Plaintiff did not cite a single case in which a court has concluded that the PAA was an assignment required to be recorded. Courts to consider the transfer of WAMU's assets from the FDIC to Chase have generally concluded that *743 Chase was not required to record an assignment. For example, in *Drobny*,

plaintiffs argued that Chase acquired WAMU's banking assets through a PAA and then alleged that Chase failed to provide a mortgage assignment. 929 F.Supp.2d at 845, fn. 2. The court rejected that claim:

First, as to Chase's failure to supply a mortgage assignment, there is no such requirement, as made clear both by federal and state law. Federally, the FDIC, as receiver of Washington Mutual Bank, was empowered to transfer the Bank's assets without an assignment. See 12 U.S.C. § 1821(d)(2)(G)(i)(II) (receiver may "transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer"); *FTBK Investor II v. Mercy Holding*, 36 Misc.3d 1219(A), 2012 WL 3064864 at *5 (N.Y.Sup.Ct. July 24, 2012) (citing 12 U.S.C. § 1821(d)(2)(G)(i)(II) and rejecting borrowers' argument "that the note had to have been individually negotiated and physically indorsed to Chase [by the FDIC] through an allonge").

Id. at 845.

In *Beka Realty, LLC*, 2013 WL 5629590, plaintiff challenged the foreclosure of his mortgage, arguing that the foreclosure was void because there was no recorded assignment of the mortgage from WAMU to Chase. *Id.* at *2. The court held that the FDIC, as WAMU's receiver, was permitted to "transfer any asset or liability" of WAMU "without any approval, assignment, or consent with respect to such transfer." *Id.* (quoting 12 U.S.C. § 1821(d)(2)(G)(i)(II)). The court further held

Consistent with this statutory provision, the FDIC transferred all of WaMu's loans and loan commitments to Chase pursuant to the September 25, 2008 PAA. As noted above, sections 2.1 and 3.1 of the PAA provided that "[Chase] specifically assume[d] all of the mortgage servicing rights and obligations of [WaMu]." Courts have, therefore, consistently held that Chase became the owner of all of WaMu's loans and loan commitments by operation of law and that Chase is entitled to enforce the acquired WaMu loans ... [t]hus, by virtue of the PAA, Chase became the assignee of the Note and Mortgage. *Id.* at *3 (citations omitted).

The court in *Trice* reached the same conclusion when a property owner challenged a foreclosure on the ground that Chase failed to produce an assignment of her mortgage:

The district court correctly found that no assignment was necessary, as respondent obtained ownership of appellant's loan from the Federal Deposit Insurance Corporation as part of a large-scale acquisition of Washington Mutual's assets. See 12 U.S.C. § 1821(d)(2)(G)(i) (2006) (affording the FDIC the power to "transfer any asset or liability of the institution in default ... without any approval, assignment, or consent with respect to such transfer"); *Drobny v. JP Morgan Chase Bank, NA*, [929 F.Supp.2d 839, 845–46], 2013 WL 888628, *5 (N.D.Ill.2013) (indicating that the FDIC's power to transfer assets under 12 U.S.C. § 1821(d)(2)(G)(i) obviates the need for an assignment of each individual loan).

2013 WL 5432353, at *1.

Lastly, in *FTBK Invest.*, the court rejected a defendant's argument that plaintiff, a successor-in-interest to Chase, lacked standing to foreclose on a mortgage because plaintiff lacked written proof of an assignment to Chase from WAMU or the *744 FDIC as WAMU's receiver. 2013 N.Y. Misc. LEXIS 640, at *8. The court noted:

Plaintiff correctly points out that the FDIC clearly had the authority to transfer the loans in bulk to Chase pursuant to 12 U.S.C. § 1821(d)(2)(G)(i)(II), and that an individual negotiation, *i.e.* assignment, of each loan was not required. Pursuant to 12 U.S.C. § 1821(d)(2)(G)(i)(II), the FDIC, as receiver of a failed bank, is authorized to "transfer any asset or liability of the institution in default ... without any approval, assignment, or consent with respect to such transfer." According to the express terms of the statute, a valid transfer of the assets of a failed bank from the FDIC occurs even without a formal assignment instrument. As evidenced by the terms of the PAA, Chase acquired all assets of WaMu, with certain exceptions not applicable to this action. Specifically, Section 3.1 of the PAA provides that ... "[Chase] hereby purchases from the receiver [FDIC], and the Receiver hereby sells, assigns, transfers, conveys, and delivers to the Assuming Institution, all right, title, and interest of the Receiver in and to all of the assets ... of the Failed Bank [WaMu].

Id., at *14 (emphasis in original) (citation omitted).

[2] [3] [4] In the final analysis, plaintiff's *only* evidence that the PAA was an assignment is the use of the word "assigns" in Article III. That single word is completely inadequate to support a finding that the PAA was an

assignment that needed to be recorded pursuant to Minn.Stat. § 580.02. The PAA was not an assignment and the FDIC transferred WAMU's assets to Chase through operation of law. Therefore, there is no conflict between Minn.Stat. § 580.02, Ruiz, and FIRREA and no preemption analysis is necessary.⁶

*745 The evidence shows an unbroken chain of title from the FDIC to Chase (pre-foreclosure) and from Chase to Fannie Mae by warranty deed (post-foreclosure). See Ripley Aff., Exs. 1 (PAA dated September 25, 2008), 2 (FDIC affidavit), 4 (Limited Warranty Deed from Chase to Fannie Mae). The Sheriff's Certificate of Sale, (Ripley Aff., Ex. 3), is *prima facie* evidence that Chase (the foreclosing entity) complied with all legal requirements regarding the foreclosure and that the foreclosure and sale were proper. See Minn.Stat. § 580.19. Plaintiff stated no facts in his Complaint to rebut this evidence and there is no evidence that Chase was not entitled to foreclose on the Mortgage.

Finally, the Court agrees with defendants that the print-outs plaintiff submitted in response to defendants' motion to dismiss do not prove plaintiff's point regarding the alleged necessity of recording an assignment from the FDIC to Chase. As defendants observed, the Court has *no* information on these mortgages, why they were assigned, and under what circumstances. But assuming for the sake of argument that these assignments were made under exactly the same circumstances as presented in this case (and there is no evidence that is true), the Court's conclusion would be the same. Any assignment would be redundant because the FDIC's assignment of its interests to Chase occurred by operation of law. If other banks "are wasting time and money doing what Chase insists is unnecessary," that is the business of the other banks and does not change the Court's *746 analysis. Moreover, the availability of judicial foreclosure also does not change the outcome. Chase chose to proceed with the foreclosure by advertisement and was there no impediment to doing so.

B. Plaintiff Is Not Entitled to Injunctive Relief

[5] Count II of the Complaint is entitled "Injunction." Complaint, ¶¶ 23–27. An injunction is a remedy, not a cause of action. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211, N. 1, 122 S.Ct. 708, 151

L.Ed.2d 635 (2002) ("an injunction is inherently an equitable remedy...."); *Labrant v. Mortgage Electronic Regis. Sys., Inc.*, 870 F.Supp.2d 671, 683 (D.Minn.2012) (citing *Henke v. Arco Midcon., LLC*, 750 F.Supp.2d 1052, 1059–60 (E.D.Mo.2010) ("[i]njunctive relief, however, is a remedy, not an independent cause of action.")). As such, dismissal of this count is appropriate because the remedy depends wholly upon the viability of plaintiff's claims regarding the validity of the foreclosure. Because plaintiff's underlying claim fails, his claim for injunctive relief fails.

[6] Additionally, as plaintiff conceded, his claim for an injunction is barred by the Anti-Injunction Act, which states that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. "The Supreme Court has interpreted the Act as 'an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions' included in the language of the statute." *Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1013–1014 (8th Cir.2002) (quoting *Atlantic Coast Line R.R. v. Locomotive Eng'rs*, 398 U.S. 281, 286–87, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970), abrogation on other grounds as recognized by *Arkansas Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 821–22 (8th Cir.2009)). "Courts must construe the exceptions to the Anti-Injunction Act narrowly and resolve doubts in favor of letting the state action proceed." *Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Assocs.*, 77 F.3d 1063, 1068 (8th Cir.1996).

IV. RECOMMENDATION

For the reasons set forth above, it is recommended that:

1. Defendants' Motion to Dismiss [Docket No. 3] be **GRANTED**.

[7] 2. This matter be dismissed with prejudice.⁷

All Citations

81 F.Supp.3d 735

Footnotes

- 1 The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") is codified at [12 U.S.C. § 1821](#)
 2 *et seq.*
- 3 The Complaint does not state that plaintiff defaulted on his mortgage payments, but plaintiff has not denied that is the case.
 4 Plaintiff has filed a Notice of Appeal in *Bakri*. <http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1614611359>.
 5 The Court is referring to the page numbers assigned through the court's electronic filing system.
- 6 The Court could have refused to consider this argument. See, e.g., *American Prop. Dev. Sw., LLC v. Landform Eng'g. Co.*,
 Civ. No. 07–3556 (DWF/AJB), 2007 WL 4461506, at *3 (D.Minn.2007) ("The Court recognizes that because [plaintiff's]
 primary argument was not raised in its brief, the Court need not address it.") (citing *Thomsen v. Ross*, 368 F.Supp.2d
 961, 974, n. 9 (D.Minn.2005) (concluding that plaintiff had abandoned claims not addressed in response to summary
 judgment)). Nonetheless, the Court allowed the argument and permitted defendants to submit a supplemental brief in light
 of the fact that defendants were seeking dismissal of plaintiff's Complaint with prejudice. As the Court did not countenance
 plaintiff's untimely preemption argument, plaintiff was not given an opportunity to file a response to this supplemental
 brief. Nevertheless, on November 12, 2014, plaintiff's counsel requested the opportunity to file a short letter to address
 an allegedly improper citation by defendants in their supplemental brief. The Court agreed to this request and the letter
 was filed. See Docket No. 22.
- Even if assuming the PAA was an assignment, conflict preemption mandates that Chase could not be compelled to record
 the assignment pursuant to [Minn.Stat. § 580.02](#) because doing so would conflict with FIRREA. "Conflict preemption
 occurs when compliance with both federal and state laws is impossible, and when a state law 'stands as an obstacle to
 the accomplishment and execution of the full purpose and objectives of Congress.'" *Keller v. City of Fremont*, 719 F.3d
 931, 940 (8th Cir.2013) (quoting *Arizona v. United States*, — U.S. —, 132 S.Ct. 2492, 2501, 183 L.Ed.2d 351 (2012)).
 "Congress enacted [FIRREA] with the objects of preventing the collapse of the industry, attacking the root causes of the
 [savings and loan] crisis, and restoring public confidence." *United States v. Winstar Corp.*, 518 U.S. 839, 856, 116 S.Ct.
 2432, 135 L.Ed.2d 964 (1996). "Congress granted the FDIC broad powers in conserving and disposing of the assets of
 the failed institution. To enable the FDIC to move quickly and without undue interruption to preserve and consolidate the
 assets of the failed institution, Congress enacted a broad limit on the power of the courts to interfere with the FDIC's
 efforts...." *Deutsche Bank Nat'l Trust Co. v. F.D.I.C.*, 744 F.3d 1124, 1128 (9th Cir.2014); see also *Iberiabank v. Beneva*
41–I, LLC, 701 F.3d 916, 921 (11th Cir.2012) (FIRREA granted the FDIC broad powers to "manage the affairs of insolvent
 banks as receiver or conservator"); *GECCMC 2005–C1 Plummer Street Office P'ship v. JP Morgan Chase Bank, N.A.*,
 671 F.3d 1027, 1030 (9th Cir.2012) ("FIRREA provides for prompt and efficient resolution of the assets and liabilities
 of failed banks.").
- In a purchase and assumption transaction pursuant to FIRREA, the FDIC is entitled to transfer the assets of the failed bank
 "without assignment" and in that regard, any restrictions on this power to transfer imposed by state law are preempted.
 See *Sahni v. American Diversified Partners, Inc.*, 83 F.3d 1054, 1059 (9th Cir.1996) (assuming a provision of the California
 Corporations Code requiring consent of a limited partner to the sale of HUD partnerships was applicable, that provision
 was preempted by [12 U.S.C. § 1821\(d\)\(2\)\(G\)\(i\)\(II\)](#) because Congress explicitly authorized the FDIC to "transfer any asset
 or liability of the institution in default ... without any approval, assignment or consent to such transfer.") (emphasis in
 original); *Federal Deposit Ins. Corp. v. Bank of Boulder*, 911 F.2d 1466, 1472–1473 (10th Cir.1990) (state law restriction
 on transfer of letters of credit is preempted by [12 U.S.C. § 1823](#), which allows the FDIC to purchase "any assets" of a failed
 bank). Consistent with these cases, the Court finds that conflict preemption would require that the recording requirement
 of [Minn.Stat. § 580.02](#) yield to [12 U.S.C. § 1821\(d\)\(2\)\(G\)\(i\)\(II\)](#). To find otherwise would impermissibly restrain the powers
 of the FDIC under FIRREA.
- Also, this Court was not persuaded by the Michigan court's reasoning in *Kim v. JPMorgan Chase Bank, N.A.*, 493 Mich. 98,
 825 N.W.2d 329, 335–336 (2012) (Zahra, J., Young, C.J. and Kelly, J. dissenting). There, the court concluded that Chase
 had to comply with Michigan's recording statute to foreclose by advertisement because the PAA did not transfer the FDIC's
 interests in WAMU's assets "by operation of law." *Id.* at 333–339. The Michigan court conducted no preemption analysis
 and based its decision on an 1885 state case defining "operation of law" to mean "involuntarily" or "unintentionally." *Id.* at
 334–336. Because Chase entered into the PAA with the FDIC, its actions were not "involuntary." *Id.* at 334–335. Of course,
 this Court is not bound by the *Kim* decision, but in any event it was much more persuaded by three-justice dissent. *Id.*,
 pp. 340–348. The dissent emphasized the language of [12 U.S.C. § 1821\(d\)\(2\)\(G\)\(i\)](#), which permits the transfer of assets
 "without any approval, assignment, or consent with respect to such transfer" and rejected the majority's characterization
 of the PAA as an ordinary contract. *Id.* at 342. In fact, the PAA was intended to transfer WAMU's assets by operation of
 law, and without an assignment. *Id.* at 341. The dissent stated:

Chase was exempt from the requirements of [MCL 600.3204\(3\)](#) because it obtained the mortgage by operation of law.

* * *

[T]he statute implies that when no assignment has occurred, the party holding the mortgage has stepped into the shoes of the original mortgagee. When there has been no assignment of a mortgage, there can be no assignment to record. Accordingly, because Chase acquired the plaintiffs' mortgage by operation of law instead of by assignment, and was thus legally considered the original mortgagee, it was not required to record anything in the chain of title.

Id. at 346. At any rate, whether *Kim* was wrongly or rightly decided has no bearing on the Court's decision in the instant case because the case is not precedential, devoid of any conflict preemption analysis, and the majority opinion was based on Michigan state law not at issue in this case.

7 When a complaint is so deficient or defective that the court is convinced that its defects cannot be cured through re-pleading, dismissal with prejudice is appropriate. Such is the case here. See *McLean v. United States*, 566 F.3d 391, 400 (4th Cir.2009) ("to the extent ... that a district court is truly unable to conceive of any set of facts under which a plaintiff would be entitled to relief, the district court would err in designating [a] dismissal to be without prejudice. Courts, including this one, have held that when a complaint is incurable through amendment, dismissal is properly rendered with prejudice and without leave to amend."); *McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1096 (9th Cir.2003) (dismissal with prejudice is appropriate where "deficiencies in [plaintiff's] claims cannot be cured by amendment"); *Ikechi v. Verizon Wireless*, Civ. No. 10-4554 (JNE/SER), 2011 WL 2118797 at *5, n. 6 (D.Minn. April 7, 2011) (recommending dismissal with prejudice of plaintiff's fraud claims because it was unlikely that plaintiff could cure the defective pleading on re-pleading), 2011 WL 2118791 at *3 (D.Minn. May 25, 2011) (adopting the Report and Recommendation of Magistrate Judge Rau regarding dismissal of plaintiff's fraud claims for failure to satisfy the particularity requirement of Rule 9(b)).

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466 Fed.Appx. 763

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2. United States Court of Appeals, Eleventh Circuit.

Darryl HAYNES, Plaintiff–
Counter Defendant–Appellant,
v.
JPMORGAN CHASE BANK, N.A.,
Defendant–Counter Claimant–Appellee,
Washington Mutual Bank, et al., Defendants.

No. 11–13065
|
Non–Argument Calendar.
|
Feb. 9, 2012.

Synopsis

Background: Mortgagor filed pro se state court suit against mortgagee, seeking declaratory and injunctive relief to stay foreclosure of property. Following removal based on diversity jurisdiction, the United States District Court for the Middle District of Georgia, [Clay D. Land, J., 2011 WL 2581956](#), granted mortgagee summary judgment. Mortgagor appealed pro se.

Holdings: The Court of Appeals held that:

- [1] jurisdictional amount in controversy was satisfied;
- [2] proposed amendment adding fraud claim lacked particularized pleading;
- [3] motion to compel discovery was premature; and
- [4] mortgagee had right to foreclose upon mortgagor's default.

Affirmed.

West Headnotes (4)

[1] Removal of Cases

Amount or value claimed or involved

Removal of Cases

Allegations and prayers in pleadings

Removal of Cases

Amount in controversy

Removal of Cases

Evidence

Mortgagor's lawsuit, seeking declaratory and injunctive relief to stay mortgagee's foreclosure of property, satisfied amount in controversy requirement for removal under diversity jurisdiction requirements, even though mortgagor's complaint did not specify dollar figure for amount in controversy, since mortgagee's notice of removal stated that mortgagor owed at least \$417,000 on loan, and mortgagee filed copy of security deed in support of that statement. 28 U.S.C.A. §§ 1332(a)(1), 1441(a).

9 Cases that cite this headnote

[2] Federal Civil Procedure

Fraud, mistake and condition of mind

Mortgagor's proposed amendment adding fraud claim against mortgagee and asserting that mortgagee lacked standing to foreclose on property failed to allege fraud with particularity required by rule, since proposed amended did not allege what statements were made in what documents or oral representations, what omissions were made, time and place of such statements, person responsible for statements or omissions, content of statements and manner in which they misled mortgagor, and what mortgagee obtained as consequence of alleged fraud. Fed.Rules Civ.Proc.Rules 9(b), 15(a), 28 U.S.C.A.

9 Cases that cite this headnote

[3] Federal Civil Procedure

🔑 Order compelling answer

Federal Civil Procedure

🔑 Failure to Comply; Sanctions

Federal Civil Procedure

🔑 Failure to respond; sanctions

Mortgagor's motion to compel discovery after serving interrogatories, requests for admissions, and document requests, to which mortgagee objected on grounds that requests exceeded permissible number and related to information outside scope of discovery, was premature, where mortgagor had not certified that he had in good faith conferred or attempted to confer with mortgagee. [Fed.Rules Civ.Proc.Rule 37\(a\)\(1\)](#), 28 U.S.C.A.

4 Cases that cite this headnote

[4] Mortgages and Deeds of Trust

🔑 Lenders; beneficiaries

Mortgages and Deeds of Trust

🔑 Holders of obligations secured and their agents; non-holders in possession

Mortgagee was lawful holder of secured note on which mortgagor defaulted, and thus, mortgagee had right to foreclose on mortgagor's property.

1 Cases that cite this headnote

Attorneys and Law Firms

***764** Darryl Haynes, Madison, GA, pro se.

[John C. Porter, Jr.](#), Smiley Bishop & Porter, LLP, Atlanta, GA, for Defendant–Counter Claimant–Appellee.

Appeal from the United States District Court for the Middle District of Georgia. D.C. Docket No. 3:10–cv–00011–CDL.

Before [WILSON](#), [PRYOR](#), and [KRAVITCH](#), Circuit Judges.

Opinion

PER CURIAM:

****1** Darryl Haynes appeals *pro se* the district court's grant of summary judgment in favor of JPMorgan Chase Bank, N.A. (“Chase”) on Haynes's action for declaratory and injunctive

relief to stay foreclosure of his property. He argues that (1) the district court lacked jurisdiction to hear the case; (2) the district court abused its discretion by refusing to grant his motion to amend his complaint; (3) the district court abused its discretion by refusing to grant his motion to compel discovery; and (4) the district court erred in granting Chase's motion for summary judgment. ¹ We affirm the district court.

I.

Haynes first contests whether the district court had jurisdiction over his complaint, which Chase removed from Georgia state court. We review *de novo* whether a district court had subject matter jurisdiction following removal. [Castleberry v. Goldome Credit Corp.](#), 408 F.3d 773, 780–81 (11th Cir.2005). A civil action brought in state court can be removed to a federal district court that could have heard the case initially. 28 U.S.C. § 1441(a). A federal district court has diversity jurisdiction when the amount in controversy exceeds \$75,000 (exclusive of interest and costs) and is between citizens of different states. 28 U.S.C. § 1332(a)(1). When a plaintiff does not plead a specific amount of damages, a defendant wishing to remove the complaint from state court must show by a preponderance of the evidence that the amount in controversy exceeds \$75,000. [Williams v. Best Buy Co., Inc.](#), 269 F.3d 1316, 1319 (11th Cir.2001). If the amount in controversy is not apparent on the face of the complaint, we may consider the notice of removal. *Id.*

[1] Haynes does not dispute that diversity of citizenship exists, but argues that the amount in controversy is less than the jurisdictional amount because he owes no money to Chase. In his complaint, Haynes did not specify a dollar figure for the amount in controversy. Chase's notice of removal stated that Haynes owes at least \$417,000 on his loan, and Chase filed a copy of the security deed in support of this statement. Accordingly, the district court had jurisdiction.

II.

Haynes next argues that the district court improperly denied his motion to amend. We review a district court's denial of a motion to file an amended complaint for an abuse of discretion. [Hall v. United Ins. Co. of Am.](#), 367 F.3d 1255, 1262 (11th Cir.2004). Haynes wished to amend his pleading after Chase had filed its responsive pleading, and thus Haynes needed the ***765** court's permission or Chase's consent to

amend. See [Fed.R.Civ.P. 15\(a\)](#). If the facts and circumstances relied upon by a plaintiff in his amended complaint may be a proper subject of relief, leave to amend should be given. [Hall](#), 367 F.3d at 1262. However, denial of leave to amend is justified if amendment would be futile—that is, the amended complaint would still be subject to dismissal. *Id.* at 1263; [Corsello v. Lincare, Inc.](#), 428 F.3d 1008, 1014 (11th Cir.2005) (per curiam). *Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and should be liberally construed. See [Alba v. Montford](#), 517 F.3d 1249, 1252 (11th Cir.2008).

****2 [2]** Haynes's proposed amended complaint made allegations of fraud and asserted that Chase lacked legal standing to foreclose. In order to plead fraud sufficiently, a claimant must state with particularity the circumstances constituting the fraud. [Fed.R.Civ.P. 9\(b\)](#); [U.S. ex rel. Sanchez v. Lymphatx, Inc.](#), 596 F.3d 1300, 1302 (11th Cir.2010). “The particularity rule serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior.” [Durham v. Bus. Mgmt. Assocs.](#), 847 F.2d 1505, 1511 (11th Cir.1988). In order to satisfy the particularity rule, a complaint of fraud must set forth:

- (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

[Brooks v. Blue Cross & Blue Shield of Fla., Inc.](#), 116 F.3d 1364, 1371 (11th Cir.1997) (per curiam) (internal quotation omitted).

Haynes's proposed amended complaint did not satisfy these requirements, nor did it state any other legal claims supported by factual allegations. As such, amendment of his original complaint would have been futile and thus the denial of Haynes's motion was not an abuse of discretion.

III.

Haynes additionally argues that the district court erred by denying his motion to compel discovery from Chase. We review a district court's denial of a motion to compel discovery for an abuse of discretion; we will not second-guess its decision unless it reflects a clear error of judgment. [Holloman v. Mail-Well Corp.](#), 443 F.3d 832, 837 (11th Cir.2006). Furthermore, “we will not overturn discovery rulings unless it is shown that the District Court's ruling resulted in substantial harm to the appellant's case.” [Iraola & CIA, S.A. v. Kimberly-Clark Corp.](#), 325 F.3d 1274, 1286 (11th Cir.2003) (quotation marks omitted).

[3] Haynes served interrogatories, requests for admissions, and document requests on Chase, to which Chase objected on the grounds that the requests exceeded the permissible number and related to information not within the scope of discovery. Haynes then moved for an order to compel, without first consulting in good faith with Chase about its objection. [Federal Rule of Civil Procedure 37\(a\)\(1\)](#) requires that prior to moving to compel disclosure or discovery, a party must certify that he has “in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.” Therefore, Haynes's motion to compel was premature. Additionally, during ***766** the December 29, 2010 hearing, it was established that all the documents that Haynes required were either already in his possession or would be made available to him to inspect. Therefore, we do not find the district court's denial of Haynes's motion to compel to be an abuse of discretion.

IV.

****3** Finally, Haynes argues that the district court erred in granting summary judgment in favor of Chase. We review *de novo* a district court order granting summary judgment, viewing all of the facts in the light most favorable to the non-moving party. [Burger King Corp. v. E-Z Eating, 41 Corp.](#), 572 F.3d 1306, 1312–13 (11th Cir.2009). “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” [Fed.R.Civ.P. 56\(a\)](#). Once the movant has satisfied his burden of showing that there is no genuine issue of fact, the burden shifts to the

non-moving party to show that issues of material fact exist. *Burger King*, 572 F.3d at 1313. The party opposing a motion for summary judgment cannot rest upon mere allegations or denials in his pleadings, but must set forth specific facts showing a genuine triable issue. *Ellis v. England*, 432 F.3d 1321, 1325–26 (11th Cir.2005) (per curiam).

[4] Chase produced evidence that it is the lawful holder of Haynes's secured note and therefore has the right to foreclose because Haynes is in default. Haynes set forth no facts or legally cognizable arguments that would demonstrate that

Chase's right to foreclose is disputable. We find that Haynes's "mere conclusory allegations and assertions will not suffice" to create a material issue of fact to defeat Chase's well supported summary judgment motion. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir.1990).

AFFIRMED.

All Citations

466 Fed.Appx. 763, 2012 WL 399986

Footnotes

- 1 Haynes also alleges that Chase committed "fraud upon the court, fraud upon the Plaintiff, fraud upon the American People, fraud in the factum, fraud in the inducement, common law fraud, RICO's wire and mail fraud on Federal and State levels, bank fraud, mortgage servicing fraud and violate[d] the Real Estate Settlement and Procedures Act (RESPA), Georgia's Residential Mortgage Act and the Truth in Lending Act (TILA), just to name a few."

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2018-CP-18-2053
NCP Pilgrim, LLC,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	PLAINTIFF'S RESPONSE TO
Mary Lou Cercopely; David S. Clancy; South	)	DEFENDANTS' POST-TRIAL
Carolina Federal Credit Union; Southcoast	)	MEMORANDUM
Community Bank; Joan Geanuracos; David	)	
Sean Clancy,	)	
DEFENDANTS.	)	
	)	

Plaintiff NCP Pilgrim, LLC ("NCP") respectfully submits its Response to Defendants' Post-Trial Memorandum, dated February 26, 2020 ("Memorandum").

Defendants' Memorandum presents issues that were waived at the January 28, 2020 trial. At the trial, after Plaintiff rested its case, Defendants expressly waived all defenses except for its contention that this Court lacked subject matter jurisdiction under section 1821(d)(13)(D) of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). 12 U.S.C. §1821(d)(13)(D). However, in their Memorandum, Defendants' assert an entirely new defense - the subject Home Equity Variable Draw Agreement ("Note") was not properly assigned to NCP from CRE/ADC Venture, 2012-1, LLC ("CRE/ADC"). It is Plaintiff's position this defense was clearly waived at trial and cannot be asserted.

Assuming, *arguendo*, that Defendants did not waive this new defense regarding the validity of the assignment from CRE/ADC to NCP during trial ("Assignment"), Plaintiff contends it is an unfounded defense for the following reasons.

First, Defendants did not raise any issue with the validity of the Assignment at trial. Plaintiff entered the Assignment into evidence through its witness, Brittany Loukus. Defendants

did not object to the Assignment and did not question the validity of the Assignment during their questioning of Ms. Loukus. Defendants cannot wait until after a trial has ended to raise an issue that could have been raised at trial. *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Defendants had ample opportunity throughout the trial to raise any issue regarding the validity of the Assignment but elected not to challenge the Assignment during the trial.

Second, Defendants' argument relies heavily on the terms of multiple documents, including a December 11, 2012 Private Owner Interest Sale and Assignment Agreement. None of these documents were entered into evidence at the January 28, 2020 trial. Thus, they are not properly before this Court.

Third, Defendants' argument assumes that NCP is not in possession of the original Note. NCP has repeatedly asserted in both written documents and through live testimony that it is in possession of the original Note. Furthermore, NCP will present the original Note to the Court and to Defendants at the status conference in front of Judge Chellis whenever it is rescheduled. As the owner and possessor of the original Note, NCP is entitled to enforce the terms of the Note and foreclose on the subject property.

Respectfully submitted,
Russell P. Patterson, P.A.

/s/Lauren P. Williams
Lauren P. Williams
Russell P. Patterson
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Attorneys for the Plaintiff

Hilton Head Island, SC
March 25, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CASE NO. 2018-CP-18-2053
NCP Pilgrim, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NOTICE OF MOTION AND
	)	EMEGENCY MOTION FOR STAY OF
Mary Lou Cercopely, David S. Clancy,	)	PROCEEDINGS TO ENFORCE
South Carolina Federal Credit Union,	)	JUDGMENT or for SUPERSEDEAS BOND
Southcoast Community Bank, John	)	and TO IMPOSE BOND ON PLAINTIFF
Geanuracos, and David Sean Clancy	)	
	)	
Defendants.	)	
	)	

TO: LAURENS P. WILLIAMS, ATTORNEY FOR THE DEFENDANT:

PLEASE TAKE NOTICE that the Defendants Mary Lou Cercopely, David S. Clancy and David Sean Clancy (“these Defendants”), by and through their below-counsel and pursuant to Rule 62(f) of the South Carolina Rules of Civil Procedure, and Rule 241(c) of the South Carolina Appellate Court Rules, will move before the Honorable James E. Chellis, Dorchester County Master in Equity, at such time, date and place as counsel may be heard, for an *Emergency Order for Stay of Proceedings to Enforce Judgment* [given Monday, July 13, 2020 in the above-case attached hereto as Exhibit “A”] and the Notice of Master’s Sale, given Tuesday, July 14, 2020, and attached hereto as Exhibit B). or alternatively to grant a *Supersedeas Bond*, and to preclude the judicial sale of the foreclosed property, TMS # 137-07-07-023-000-C, scheduled for September 1 and October 1, 2020.

This motion is based on the anticipated motion to reconsider, alter or amend to be taken by these Defendants of the judgment given on July 13, 2020, and the anticipated appeal therefrom to the South Carolina Court of Appeals.

1) Rule 62(b), SCRCPP, which provides, in relevant part: “[w]hen an appeal is taken, a party, by giving a supersedeas bond, may obtain a stay ... the bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the supersedeas as the case may be. The stay is effective when the supersedeas bond is approved by the Court.”

2) Section 18-9-170 of the South Carolina Code states:

“If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the judgment shall not be stayed unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which shall be specified in the undertaking. **When the judgment directs the sale of land to satisfy a mortgage thereon or other lien, the undertaking shall provide that in case the judgment appealed from be affirmed and the land be finally sold for less than the judgment debt and costs then the appellant shall pay for any waste committed or suffered to be committed on the land and shall pay a reasonable rental value for the use and occupation of the land from the time of the execution of the undertaking to the time of the sale, but not exceeding the amount of such deficiency, which sum shall be duly entered as a payment on the judgment;** and in case the land shall be unimproved land, then in any action or proceedings now pending or hereafter begun in any of the courts of this State the undertaking shall further provide for the payment by appellant, if the judgment be affirmed, of any taxes due at the time of the appeal or already paid by the mortgagee, or becoming due during the pendency of the appeal, and also for the payment by appellant of the interest on the debt falling due during the pendency of such appeal.”

(emphasis added).

3) Section 18-1-130(a)(2) of the South Carolina Code states in pertinent part:

“A plaintiff may not enforce a sale of property after a notice of appeal is filed without giving an undertaking or bond to the defendant, with two good sureties, in double the appraised value of the property or double the amount of the judgment, conditioned to pay all damages the defendant may sustain by reason of the sale in case the judgment is reversed. The plaintiff in such a case may not proceed with a sale of defendant's property if the defendant enters into an undertaking, with good sureties, in double the appraised value of the property or the amount of the judgment, to pay the judgment with legal interest and all costs

and damages the plaintiff may sustain by reason of the appeal or to produce the property levied on and submit to the sale if the judgment is confirmed.

emphasis added). Additionally, Rule 241(c)(3) of the South Carolina Appellate Court Rules states that “the granting of a supersedeas ... under this Rule, may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking as the lower court may deem appropriate.”

Accordingly,

(A) these Defendants seek that the Court impose a supersedeas bond upon them; to give these Defendants a reasonable time to post the bond; to postpone the judicial sale accordingly (scheduled to commence September 1, 2020); and for such other and further relief as the Court may deem just and proper.

(B) Additionally, if the Plaintiff still insists that the property be set for judicial sale and an appeal is filed, these Defendants move to have the Plaintiff post a bond or undertaking, with two good sureties, issued for double the appraised value of the property, pursuant to S.C. Code Ann. § 18-1-130(a)(2); and for such other and further relief as the Court may deem just and proper.

Pursuant to Rule 11, SCRCP, the undersigned certifies that consultation with counsel would serve no useful purpose.

(signature on following page)

Respectfully submitted,

BROWN & VARNADO LLC

/s Robert B. Varnado

Robert B. Varnado
103 Ronnie Boals Blvd. (29464)
P.O. Box 1127
Mount Pleasant, South Carolina 29465
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rvarnado@brown-varnado.com
***Attorneys for the Defendants Mary Lou Cercopely,
David S. Clancy and David Sean Clancy***

July 14, 2020
Mt. Pleasant, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within ***Notice of Motion and Emergency Motion for Stay of Proceedings to Enforce Judgment, or Supersedeas Bond and to Enforce Bond on Plaintiff*** upon all parties to these matters by depositing a true copy of the same in the U.S. mail, proper postage prepaid, addressed to counsel of record as follows:

Lauren P. Williams
Russell P. Patterson P. A.
P. O. Box 8047
Hilton Head Island, SC 29938
Attorney for Plaintiff

/s Robert B. Varnado

Robert B. Varnado

July 14, 2020
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CASE NO. 2018-CP-18-2053

NCP Pilgrim, LLC,	)
	)

Plaintiff,	)
	)

vs.	)
	)

Mary Lou Cercopely, David S. Clancy,	)
South Carolina Federal Credit Union,	)
Southcoast Community Bank, John	)
Geanuracos, and David Sean Clancy	)

Defendants.	)
	)

**NOTICE OF MOTION and
DEFENDANTS MARY LOU
CERCOPELY, DAVID S. CLANCY and
DAVID SEAN CLANCY'S
MOTION TO RECONSIDER**

**TO: RUSSELL P. PATTERSON, ESQUIRE and LAUREN P. WILLIAMS, ESQUIRE,
ATTORNEYS FOR THE PLAINTIFF:**

PLEASE TAKE NOTICE that the Defendants Mary Lou Cercopely, Davis S. Clancy and David Sean Clancy ("these Defendants") by and through their undersigned counsel and pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, will move before the Honorable James E. Chellis, Dorchester County Master in Equity, on August 3, 2020 at 11:00 a.m. at the Dorchester County Courthouse, 5200 East Jim Bilton Boulevard, St. George, South Carolina 29477, or at such other time, date and place as counsel may be heard, for an Order to Alter, Amend or otherwise Reconsider the *Master's Decree of Sale and Foreclosure* ("Order"), filed July 13, 2020, and the *Notice of Master's Sale* ("Notice") for September 1, 2020, also filed July 13, 2020.

BACKGROUND

The question on reconsideration is whether the Court has the power to proceed with Plaintiff NCP Pilgrim LLC's ("NCP") declaratory "action seeking a determination of rights with respect to, the assets of any depository institution for which the Federal Deposit Insurance

Corporation (“Corporation”)¹ has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver.” FIRREA at 12 U.S.C. 1821(d)(13)(D)(i).

Thus, the issue is **not** whether this court erroneously decided a matter of federal law; **nor** is it a question as to whether federal or state law properly governs a case properly before the Court. Rather, this motion seeks to have the Court reconsider the Order and Notice because this Court finally and erroneously asserted its jurisdiction to deal with a dispute beyond its power and instead in the exclusive domain of the Corporation.

RELEVANT FACTS

A few facts are needed to appreciate the jurisdictional bar here:

1. On June 10, 2004 David Clancy (“Clancy”) executed a Home Equity Variable Draw Agreement with Carolina Federal Savings Bank (“CFSB”) governing a line of credit (“Clancy LOC”) in an amount up to \$258,940.00.
2. His mother, Barbara Clancy executed a mortgage (“Mortgage”) on 117 South Cedar Street, Summerville South Carolina to secure repayment on the LOC.
3. On June 8, 2012, the Office of the Comptroller of the Currency (“OCC”) closed CFSB and named the Federal Deposit Insurance Corporation as Receiver (“FDIC-R”). See FDIC Press Release 2012-065, June 8, 2012.
4. Through a *structured transaction*, on December 11, 2012, FDIC-R sold and transferred the Clancy LOC (with 492 other “loans”) to itself, as the sole member of CRE/ADC Venture 2012-1, LLC (“CRE/ADC”) as evidenced by Assignment of Real Estate Mortgage

¹ The FDIC is referred to as ‘the Corporation’ in the statutes; 12 U.S.C. § 1811(a), *et seq.*

recorded with the Dorchester County ROD in Book 8718 at Pages 34-38. It later sold a minority interest in CRE/ADC to Colfin 2012 CRE ADC Funding, LLC.

5. Thereafter, Barbara A. Clancy died on October 31, 2012, and pursuant to her Will her interest in the subject property was left to Clancy and his sister, Mary Lou Cercopely (“Cercopely”), as evidenced by that Deed of Distribution recorded with the Dorchester County ROD in Book 9884 at Page 109.

6. On August 15, 2018, Colin Ferguson (“Ferguson”) a Kentucky attorney who performs various services for NCP, filed an Assignment of Mortgage from CRE/ADC to Plaintiff. (Plaintiff’s Pre-Trial Brief pp. 3).

7. The Assignment of Mortgage was signed by Plaintiff employee Marshall Burchard as Attorney-in-fact under a Limited Power of Attorney (“LPOA”) dated June 26, 2018 as evidenced by the Assignment of Mortgage recorded with the Dorchester County ROD in Book 11512 Pages 127-129.

8. On November 15, 2018, NCP filed a foreclosure action against these Defendants in Dorchester County as the “holder of said loan documents.”

9. Therein, NCP sought, *inter alia*, **a declaratory judgment as to perfect NCPP’s mortgage based on the following allegations in the complaint:**

“March 8, 2013, the Note and Mortgage was assigned by Carolina to CRE/ADC Venture 2012-1, LLC, as recorded with the ROD in Book 8718 at Page 33 (Exhibit 4).” (Complaint ¶ 12);

and that

“[t]hereafter, on or about August 23, 2018, CRE/ADC Venture 2012-1, LLC assigned the Note and Mortgage to NCP Pilgrim, LLC, as recorded with the ROD in Book 11512 at Page 126 (Exhibit 5).” (Complaint ¶ 13).

10. Based on public records in both Dorchester County² and on the Corporation's website,³ these Defendants challenged the validity of the purported assignments in their timely answer and requested further discovery memorializing a sale of the LOC from CRE/ADC to NCP.

11. NCP, however, produced no valid assignment under the UCC (because it is based on a Power of Attorney to assign the Mortgage, rather than delivery of the Clancy LOC which the Mortgage must follow); likewise, it has refused to take the simplest route of obtaining an order through the administrative process available from the Corporation to verify its rights.

12. Therefore, prior to the start of the trial, Defendants moved to dismiss the case for lack of subject matter jurisdiction pursuant to 12 U.S.C. 1821(d)(13)(D)(i)

13 Under FIRREA, 12 U.S.C. § 1821(d)(13)(D) sets a jurisdictional bar over certain claims by providing for judicial review only after an administrative claims process as follows:

(D) Limitation on judicial review

Except as otherwise provided in this subsection, no court shall have jurisdiction over —

- (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
- (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

² The LPOA, recorded Dorchester County ROD in Book 11512 at Pages 122-125, is signed on June 26, 2018 by Mark M. Hedstrom, Vice President of Colfin 2012 CRE ADC Funding, LLC, as Manager of CRE/ADC. The LPOA can be terminated at any time under December 31, 2018 when it automatically revokes. Page 124. The Court may take judicial notice.

³ https://www.fdic.gov/about/diversity/mwop/APIW_PP/6Structured_Transaction_Overview.pdf describing that the FDIC-R retains ownership and interest in the assets contributed to CRE/ADC.

LEGAL ARGUMENT AND ANALYSIS

I. FIRREA

The court's reliance on a procedural rule – i.e., that Clancy waived this argument⁴ – rests on an erroneous view of the scope of 12 U.S.C. § 1821(d)(13)(D)(i)'s pre-emption, and as matter of federal law, invokes federal jurisdiction⁵.

Acknowledging that other *federal courts* “have specifically recognized that the disposition of a failed banks’ assets is one of the quintessential statutory powers of the FDIC as receiver,” (Order pp. 5, ¶ 4), this Court nevertheless held the federal powers of the FDIC-R (rather than the failed institution) still got assigned to NCP anyway, citing *Twelfth RMA Partners, L.P. v National Safe Company*, 335 S.C. 635, 640, 518 S.E.2d. 44, 46 (Ct. App 1999) (“the receiver’s right to sue...would thus be among the ‘rights, remedies and benefits which are incidental to the thing assigned”).

The court's reasoning has some logic to it; but **“the point is not whether state law gives the state courts jurisdiction over particular controversies but whether jurisdiction provided**

⁴ While personal jurisdiction can be waived, subject matter jurisdiction may not be waived. *Eaddy v. Eaddy*, 283 S.C. 582, 584, 324 S.E.2d 70, 72 (1984). Lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal, by a party or by the court. *Ex Parte Canon*, 385 S.C. 643, 654, 685 S.E.2d 814, 821 (Ct. App. 2009).

⁵ The jurisdiction of federal courts is limited to that expressly authorized by the United States Constitution or statute enacted by Congress pursuant thereto. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005). The Supremacy Clause of the United States Constitution provides that federal law “shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. ART. VI. As the South Carolina Court of Appeals has ruled: “Thus, as has been clear since the Supreme Court's decision in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.), 316, 4 L.Ed. 579 (1819), any state law that conflicts with federal law is ‘without effect.’” *Weston v. Kim's Dollar Store*, 385 S.C. 520, 525-526, 684 S.E.2d 769, 772 (Ct. App 2009).

by state law is itself pre-empted by federal law vesting exclusive jurisdiction over that controversy in another body.” *International Longshoremen’s Association, AFL-CIO v. Davis* 476 U.S. 380, 388 (1985) (emphasis in original).

Fatal to *any court’s jurisdiction* (including this Court’s) is the undisputed fact that “[o]n Friday, June 8, 2012, Carolina Federal Savings Bank, Charleston, S.C. was closed by the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation (FDIC) was named Receiver.” FDIC Press Release PR-065-2012. Once the FDIC-R was involved, then the Corporation **alone** was authorized by Congress to say whether assignments are valid.

Thereupon, as explained by the Fourth Circuit Court of Appeals, “Subsection (i) bars any unexhausted ‘action seeking a determination of rights with respect to, the assets of any depository institution for which the which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver.’” *Willner v. Dimon*, 849 F.3d 93, 103 (4th Cir. 2017).

NCP’s position – adopted by the Court – is that the structured transaction between the FDIC-R and CRE/ADC somehow divested FDIC-R’s of its rights to the Clancy LOC and the Mortgage [ultimately finding that NCP got the right], is clearly an “action seeking a determination of rights with respect to, the assets of CFSB which the Corporation acquired from itself as such receiver.” 12 U.S.C. 1821(d)(13)(D)(i).

Therefore, as the United States Supreme Court explained in *Longshoremen v. Davis*, “when a particular issue has been placed by Congress within the primary and exclusive jurisdiction of [a federal agency], a state court will **have no subject matter jurisdiction to adjudicate the issue**” *Longshoremen*, 476 U.S. at 392. This Court could be right; it could be wrong; but it does not

matter because this Court lacks the subject matter jurisdiction to declare NCP's rights as it did in the Order. Only the Corporation has this power!

NCP's **own assignment to itself** fails no better. In *Brady Development Co., Inc. v. RTC*, 14 F.3d 998 (4th Cir.1994), the Fourth Circuit Court of Appeals construed the § 1821(d)(13)(D) limitation on judicial review in FIRREA as a *jurisdictional bar* "[r]easoning that the elaborate administrative scheme established in 12 U.S.C. §§ 1821(d)(5)-(14) would be rendered meaningless through improvident judicial review because creditors would opt out of the administrative review, we held that a plaintiff's failure to exhaust the administrative process deprives the courts of subject matter jurisdiction." See *Tillman v. Resolution Tr. Corp.*, 37 F.3d 1032, 1035 (4th Cir. 1994).

Thus, NCP cannot claim to the effect: "well, FIRREA gives the Corporation all this power, but since the Court found NCP got this power (by way of a series of assignments ending up with NCP) then NCP somehow steps into the shoes of the FDIC-R!"

This is not the law. By telling the Court to keep for itself the ability to rule that the assignments were 'A-OK' – despite FIRREA – NCP has in essence violated this Court's jurisdictional limits, because FIRREA says that only the Corporation can decide that fact! Congress decided it; the Fourth Circuit upheld it; and the United States Supreme Court has explained why this rule is important.

Still, the Court has been persuaded by NCP to declare a critical piece of its chain of title as basically "100% fine" despite lacking subject matter jurisdiction to make this finding. Moreover, by giving NCP all the rights of the Corporation **based on the assignments** completely puts FIRREA on its head. If NCP really had the power of the FDIC-R by assignment, then under FIRREA it would have to have brought this case in federal court, not state. Yet all the FIRREA

authority cited by NCP are *federal* cases – not South Carolina cases, until they get to decisions like *Twelfth RMA Partners*.

The *Brady Development* opinion focuses the Court on the following question: why would NCP circumvent a simple administrative process, and proceed at all cost, without any ability to prove, that it is the real party in interest? The answer is clear! NCP knows that to ask the Corporation to rule on this issue under 12 U.S.C. 1821(d)(13)(D)(i) would mean that the FDIC-R is the holder of the Clancy LOC and the FDIC-R has a secured interest in the Mortgage!

II. Other Problem with Chain of Title.

When it filed its *Amended Summons and Complaint* on April 5, 2019, NCP said that CFSB assigned the Clancy LOC and Mortgage to CRD/ADC, LLC, who then assigned it on down to NCP. But at trial, NCP submitted Exhibit 6 showed that the FDIC-R assigned the Mortgage on effective December 11, 2012 – which gives rise to Clancy’s FIRREA argument (Exhibit 6).

NCP also submitted Exhibit 7 at trial, which showed that NCP was assigned the Mortgage on June 26, 2018. But Exhibit 7 was executed by Colfin 2013 CRE ADC Funding, LLC (“Colfin 2013”) on behalf of CRD/ADC, LLC – not by Colfin 2012 CRE ADC Funding, LLC (“Colfin 2012”)

This is despite the fact that Colfin 2013 is a separate Delaware company from Colfin 2012 and was never the minority owner in CRD/ADC Venture 2012-1, LLC. This is a huge hole in NCP’s chain of title and is fatal to NCP’s claim!⁶

⁶ Keep in mind that Colfin 2012 was a **minority member** (40%) of CRD/ADC, LLC, because the Corporation kept a 60% interest. How does the *minority member* assign out the Mortgage from CRD/ADC, LLC when the Corporation was the last entity to have a secured interest in the Mortgage? And exactly how does Colfin 2013 perform the assigning of Colfin 2012’s interest? One would think the Corporation would like to know. Fortunately, FIRREA decides this for the parties and the Court!

III. Order of Reference

It should be noted that the Plaintiff's Order of Reference dated January 4, 2019 is absent consent and pertains to only a "non-jury" action. Rule 53(b), SCRPC sets the parameters for referring a matter to the master: only in foreclosure actions or in any action where a party is in default, can the circuit court or the clerk of court refer the matter to the master-in-equity. When the Defendants timely answered thereafter, requesting a jury-trial, Rule 53(c) required that the matter shall be returned to the circuit court. Therefore, the Plaintiff's declaratory action, determining the validity of the assignments and its purported mortgage perfection was also not properly before the Court for this reason as well. "When resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded. . . . In such a case, the federal-law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

CONCLUSION

"On the face of the statute, 12 U.S.C. § 1821(d)(13)(D), FIRREA's exhaustion requirement applies to any claim or action respecting the assets of a failed institution for which the FDIC is receiver," *McCarthy v. FDIC*, 348 F.3d 1075, 1081 (9th Cir. 2003), and must be upheld by this Court.

Under the preemption doctrine is rooted in the Supremacy Clause of the United States Constitution it is clearly within Congress' powers to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate under the Constitution. *See e.g. , Kalb v. Feuerstein*, 308 U. S. 433 (1940). Any challenge to a

state court's ability to adjudicate implicates a *choice of forum* rather than a *choice of law* question, therefore "a challenge to a court's power to adjudicate that may be raised at any time." *Longshoremen*, 476 U.S. at 382. "In such cases," as here, "any judgment issued by the state court will be *void ab initio* because subject matter jurisdiction is pre-empted." *Id.* at 392.

In light of FIRREA, and the other issues raised herein, these Defendants request the Court reconsider, alter or amend its rulings of July 13, 2020.

Respectfully submitted,

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David S. Clancy and David Sean Clancy.***

July 23, 2020
Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within ***Notice of Motion and Defendants Mary Lou Cercopely, David S. Clancy and David Sean Clancy's Motion to Reconsider*** upon all parties to these matters by e-filing:

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/s Robert B. Varnado

Robert B. Varnado

July 23, 2020
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2018-CP-18-2053
NCP Pilgrim, LLC,	)	
	)	PLAINTIFF'S MEMORANDUM IN
PLAINTIFF,	)	OPPOSITION TO DEFENDANTS
	)	MARY LOU CERCOPELY, DAVID S.
vs.	)	CLANCY, AND DAVID SEAN
	)	CLANCY'S EMERGENCY MOTION
Mary Lou Cercopely; David S. Clancy; South	)	FOR STAY OF PROCEEDINGS TO
Carolina Federal Credit Union; Southcoast	)	ENFORCE JUDGMENT or for
Community Bank; Joan Geanuracos; David	)	SUPERSEDEAS BOND and TO
Sean Clancy,	)	IMPOSE BOND ON PLAINTIFF
DEFENDANTS.	)	
	)	

Plaintiff NCP Pilgrim, LLC ("NCP") respectfully submits this Memorandum in Opposition to Defendants Mary Lou Cercopely, David S. Clancy, and David Sean Clancy's (collectively "Defendants") Emergency Motion for Stay of Proceedings to Enforce Judgment or for Supersedeas Bond and To Impose Bond on Plaintiff ("Motion"). For the reasons set forth below, NCP respectfully requests that this Court deny Defendants' Motion at this time.

A. PROCEDURAL HISTORY

This is a commercial mortgage foreclosure action, which was filed on November 15, 2018. Subsequently, Defendants' filed an Answer and Counterclaims, dated January 23, 2019, and an Amended Answer and Counterclaims, dated April 22, 2019. A non-jury trial was held before this Court on January 28, 2020. As a result of the trial, this Court issued its Master's Decree of Sale and Foreclosure, dated July 13, 2020 ("Decree"), and its Notice of Master's Sale, dated July 14, 2020 ("Notice of Sale"). The Notice of Sale established a sales date of September 1, 2020 at 11:00 a.m.. at the Dorchester County Courthouse. Shortly after the Decree and Notice of Sale were issued, Defendants' filed the instant Motion, followed by their Motion to Reconsider, dated July 23, 2020. As of the date of this Memorandum, Defendants' Motion to Reconsider is still pending

before this Court and Defendants have not yet filed an appeal with the South Carolina Court of Appeals.

B. STANDARD OF REVIEW

Defendants' filed their Motion pursuant to Rule 241, SCACR. Rule 241 establishes that the filing of a notice of appeal in a foreclosure case does not automatically stay the relief ordered in the Decree and Notice of Sale. Rule 241(b)(4), SCACR. If a party wishes to stay the relief ordered in the Decree and Notice of Sale, he must move for an order imposing a supersedeas of matters decided in the order on appeal *after service of the notice of appeal*. Rule 241(c)(1), SCACR. In determining whether an order imposing supersedeas should be issued, the court should consider "whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. In the event a court issues an order imposing supersedeas, the order may be conditioned upon such terms, "including but not limited to the filing of a bond or undertaking," as the court may deem appropriate. Rule 241(c)(3), SCACR. Specifically, S.C. Code Ann. § 18-9-170 explicitly outlines the bond or undertaking required to obtain a stay of a judgment directly the sale of land to satisfy a mortgage. *Muckenfuss v. Fishburne*, 68 S.C. 41, 46 S.E. 537, 538 (1903). This Section states that an execution of a judgment directing the sale of real property shall not be stayed unless the following requirements are met -

a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered.

S.C. Code Ann. § 18-9-170. This Section goes on to establish specific additional criteria in the event the judgment directs the sale of land to satisfy a mortgage on the property:

the undertaking shall provide that in case the judgment appealed from be affirmed and the land be finally sold for less than the judgment debt and costs then the appellant shall pay for any waste committed or suffered to be committed on the land and shall pay a reasonable rental value for the use and occupation of the land from the time of the execution of the undertaking to the time of the sale, but not exceeding the amount of such deficiency which sum shall be duly entered as a payment on the judgment.

Id. Thus, in order to stay the Decree and Notice, Defendants must comply with the requirements of both Rule 241, SCACR and S.C. Code Ann. § 18-9-170.

C. ARGUMENT

1. Defendants' Motion is Untimely and Should Be Denied.

Rule 241 specifically states that a motion for supersedeas cannot be filed until after the service of the notice of appeal. Rule 241(c)(1), SCACR. Here, Defendants have not yet even filed an appeal, let alone served a copy of the notice of appeal on all parties. Thus, Defendants Motion is untimely and should be dismissed without prejudice. If and when Defendants' file an appeal and serve a copy of the notice of appeal on all parties, then and only then, will they have an opportunity to file and argue their Motion for Supersedes. Thus, Defendants' motion for supersedeas should be denied without prejudice as untimely.

Similarly, Defendants' motion to stay is untimely and should be denied. Section 18-9-170 establishes the specific requirements to stay a foreclosure sale. S.C. Code Ann. § 18-9-170. At this time, Defendants have not complied with any of these requirements and have not posted any undertaking. If and when Defendants' file an appeal and serve a copy of the notice of appeal on all parties, they can then petition the court to establish a bond amount to be paid to the clerk of

court pursuant to S.C. Code Ann. § 18-9-230. Accordingly, Defendants' motion to stay should be denied without prejudice as untimely.

2. S.C. Code Ann. § 18-1-130(a)(2) Does Not Apply to Foreclosure Sales.

In their Motion, Defendants' assert that the undertaking outlined in Section 18-1-130(a)(2) applies to this matter and that NCP is required to file a bond to sell the subject property. Section 18-1-130(a)(2) deals specifically with the appeal of the execution of a monetary judgment and requires the plaintiff seeking the execution to post an undertaking before moving forward with the execution. However, South Carolina courts have explicitly held that this statute does not apply to sales due to mortgage foreclosures. *Carsten v. Wilson*, 241 S.C. 516, 521, 129 S.E.2d 431, 434 (1963). Instead, section 18-9-170 controls the process to stay a foreclosure sale subject to the filing of an appeal. *Id.* Thus, Defendants motion to require NCP to post a bond or undertaking in regard to the upcoming foreclosure sale should be denied.

D. CONCLUSION

For the reasons outlined above, this Court should deny Defendants' Emergency Motion for Stay of Proceedings to Enforce Judgment or for Supersedeas Bond and To Impose Bond on Plaintiff.

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 July 30, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2018-CP-18-2053
NCP Pilgrim, LLC,	)	
	)	
PLAINTIFF,	)	
	)	PLAINTIFF'S MEMORANDUM IN
vs.	)	OPPOSITION TO DEFENDANTS
	)	MARY LOU CERCOPELY, DAVID S.
Mary Lou Cercopely; David S. Clancy; South	)	CLANCY, AND DAVID SEAN
Carolina Federal Credit Union; Southcoast	)	CLANCY'S MOTION TO
Community Bank; Joan Geanuracos; David	)	RECONSIDER
Sean Clancy,	)	
DEFENDANTS.	)	
	)	

Plaintiff NCP Pilgrim, LLC ("NCP") respectfully submits this Memorandum in Opposition to Defendants Mary Lou Cercopely, David S. Clancy, and David Sean Clancy's (collectively "Defendants") Motion to Reconsider Master's Decree of Sale and Foreclosure and Notice of Master's Sale, dated July 23, 2020 ("Motion"). For the reasons set forth below, NCP respectfully requests that this Court deny Defendants' Motion and uphold its Master's Decree of Sale and Foreclosure, dated July 13, 2020 and Notice of Master's Sale, dated July 13, 2020 (collectively "Order").

A. STATEMENT OF FACTS

NCP relies upon, and incorporates by reference, the underlying facts set forth in their Pre-Trial Brief, dated January 27, 2020, their Post-Trial Memorandum of Law, dated February 11, 2020, as well as the facts entered into evidence during the January 28, 2020 trial ("Trial"). However, a brief summary of the facts relevant to Defendants' Motion is provided below.

This is a commercial mortgage foreclosure action. On or about June 10, 2004, the Defendant, David S. Clancy ("Borrower"), borrowed \$258,840 from Carolina Federal Savings Bank ("Carolina Federal") as was evidenced by a customary Note ("Note"). (P. Tr. Ex. 1). This

loan was secured by a first mortgage on property owned by his mother, Barbara A. Clancy, located at 117 S. Cedar Street ("Mortgage"). (P. Tr. Ex. 2). Pursuant to the Note, the loan had an original maturity date of June 10, 2009. Thereafter, David Clancy and his mother, Barbara Clancy, signed two note and mortgage modifications on August 18, 2009 (P. Tr. Ex. 4) and on June 24, 2010 (P. Tr. Ex. 5). On or about October 13, 2012, Barbara Clancy passed away, leaving the Subject Property to her surviving children, Defendant Mary Lou Cercopely and the Borrower.

On or about January 30, 2013, the FDIC, which had taken over Carolina Federal, sold the Note and Mortgage to CRE/ADC Venture, 2012-1 LLC ("CRE/ADC"). (P. Tr. Exs. 6, 17, & 19). Thereafter, CRE/ADC sold the Note and Mortgage to the Plaintiff, NCP Pilgrim, LLC. (P. Tr. Exs. 7 & 18). The Borrower has not made a payment on this Note since January 14, 2013. (Tr. Trans. P. 9, L. 24).

At Trial, Defense counsel explicitly waived all counterclaims and defenses except for Defendants' contention that this Court lacks subject matter jurisdiction pursuant to FIRREA. (Tr. Trans. P. 42, L. 19 - P.44, L. 13 - Exhibit 1). Defense counsel elected to not present any evidence. *Id.* This waiver of all defenses and counterclaims except for lack of subject matter jurisdiction was very clear at trial, as follows:

MR. VARNADO: Your Honor, at this time Mr. Clancy will not put up a defense. And I'll prosecute his counterclaims. We are going to go on the -- saying respectfully that we believe that the Court does not have jurisdiction.

THE COURT: So you're not going forward on your counterclaims? And you're resting your defense on the facts that this Court doesn't have jurisdiction over the matter because of the argument you made earlier?

MR. VARNADO: Yes, sir.

THE COURT: Thank you very much.

MR. VARNADO: Your Honor, would you issue order a Form 4, or do you just want to wait until you decide everything on jurisdiction?

THE COURT: On jurisdiction? Let me put that in the order itself. I guess -- and this is something you need to think about, if you appeal the case and its determined that I didn't have jurisdiction, are you reserving --I'm not sure if you're reserving your counterclaims? Or have you abandoned them all together?

MR. VARNADO: I haven't abandoned them all together, but if an Appellate Court holds that you really did in fact have jurisdiction, then I think that I would --think that I would waive the counterclaims.

THE COURT: That's what I would expect you --

MR. VARNADO: But however if you --respectfully, if Your Honor didn't have jurisdiction, then everything would be to the -- I think that's what it is, Your Honor.

MS. WILLIAMS: Your Honor, I guess it would be our position that either Mr. Varnado decides today to waive his counterclaims in full or he argues them today to preserve them for the record. If he does not argue them today, it would be our position that they're waived in full.

THE COURT: Well, I think he said that. He understands that if the jurisdictional issues comes out different than what my decision has been and he is correct and I didn't have jurisdiction, then I couldn't have heard them anyway. But if I had jurisdiction and I'm affirmed on the remainder of the decision, then he will have waived his counterclaims as of this moment.

THE COURT: Well, let me ask you this question. Let's suppose --I almost took this position earlier so I'm going to hold the question of jurisdiction in advance and hear the case but decide to go ahead and rule that I did have jurisdiction. And if I'm wrong, I can be corrected. **I didn't expect Mr. Varnado to waive his defenses, but nonetheless, that will be the result of his defenses if I'm affirmed on the jurisdiction.**

Id. Thus, the only issue available for the Court's consideration as part of Defendants' Motion is the issue of subject matter jurisdiction. All other arguments regarding the validity of loan documents and the procedural history of this matter have been explicitly waived by Defendants and can no longer be argued before the Court.

B. STANDARD OF REVIEW

Defendants' filed their Motion pursuant to Rule 59(e), SCRCP. A Rule 59(e) motion can be used to petition the court to reconsider its original ruling based on a party's belief that the court has misunderstood, failed to fully consider, or failed to rule on an argument or issue. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). However, a party cannot use a Rule 59(e) motion to present an issue the party could have previously raised but elected not to raise prior to the court's ruling. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990).

C. ARGUMENT

1. The "Relevant Facts" in Defendants' Motion Includes Information That Is Not Properly Before the Court and Is Erroneous.

In their Motion, Defendants include a section entitled "Relevant Facts." This section includes multiple statements and information that have not been entered into evidence in this matter and are not properly before the Court. Further, the section includes information that is simply incorrect. Specifically, NCP contends the following statements are improper -

3. "On June 8, 2012, the Office of the Comptroller of the Currency ("OCC") closed CFSB and named the Federal Deposit Insurance Corporation as Receiver ("FDIC-R"). See FDIC Press Release 2012-065, June 8, 2012." ("Statement 3").

4. "Through a *structured transaction*, on December 11, 2012, FDIC-R sold and transferred the Clancy LOC (with 492 other "loans") to itself, as the sole member of CRE/ADC Venture 2012-1, LLC ("CRE/ADC") as evidenced by Assignment of Real Estate Mortgage recorded with the Dorchester County ROD in Book 8718 at Pages 34-38. It later sold a minority interest in CRE/ADC to Colfin 2012 CRE ADC Funding, LLC." ("Statement 4").

9. "Therein, NCP sought, *inter alia*, **a declaratory judgment as to perfect NCP's mortgage based on the following allegations in the complaint...**" ("Statement 9").

11. "NCP, however, produced no valid assignment under the UCC (because it is based on a Power of Attorney to assign the Mortgage, rather than delivery of the Clancy LOC which the Mortgage must follow)..." ("Statement 11").

A. Statements 3 and 4 Are Not Facts of This Case and Are Not Properly Before This Court.

Specifically, Statements 3 and 4 are not supported by any evidence presented at Trial. In support of Statement 3, Defendants cite a June 8, 2012 FDIC press release. This press release was not entered into evidence at the Trial and no copy of the press release has been provided. Therefore, Statement 3 is not properly before this Court. Similarly, the structured transaction agreement referenced in Statement 4 was not entered into evidence at Trial and a copy of the agreement has never been provided to the Court. Further, the Court has already properly ruled that the agreement is not properly before this Court. The Court should uphold this ruling and disregarding the contents of Statement 4.

Furthermore, Defendants cannot attempt to enter these statements as facts through their Motion. As discussed above, a Rule 59(e) Motion cannot be used to present an argument Defendants could have previously raised but elected not to raise at the time of Trial. *Hickman* at 456, 392 S.E.2d at 482. Here, Statements 3 and 4 appear to rely on historic information which was readily available at the time of Trial. However, Defendants did not present these arguments at Trial and thus, cannot elect to raise them for the first time now, over six months after Trial.

B. Statement 9 Is Erroneous and Should Not Be Included as a Fact in This Case.

In Statement 9, Defendants state that NCP is seeking a "declaratory judgment" to perfect its mortgage. This statement is incorrect. As clearly shown in NCP's Summons and Complaint, dated November 15, 2018, and its Amended Summons and Complaint, dated April 5, 2019, NCP is not seeking a declaratory judgment. Instead, NCP filed a routine mortgage foreclosure action, which is properly before this Court. Thus, the Court should disregard this incorrect statement.

C. Statement 11 is Erroneous and Should Not Be Included as a Fact in This Case.

In Statement 11, Defendants state that NCP has provided no valid assignment under the UCC of the subject Note. Again, this statement is incorrect in light of the evidence presented at Trial, the original Loan Documents delivered to Defense counsel for review after the Trial, and Defense counsel's the express waiver of all defenses and counterclaims except for lack of subject matter jurisdiction. Specifically, at Trial, NCP entered Exhibit 18 into evidence without objection from Defendants. Exhibit 18 is the Assignment of Home Equity Variable Draw Agreement, dated June 26, 2018, assigning the subject Note from CRE/ADC Venture 2012-1, LLC to NCP Pilgrim, LLC. If Defendants' believed Exhibit 18 was not admissible, the proper time to raise this objection was during the Trial. Defendants' cannot wait until after the Court has issued its final ruling to make an objection to this evidence for the first time. *Hickman* at 456, 392 S.E.2d at 482. Therefore, this statement is plainly false.

2. The Court Properly Concluded that Defendants' Waived All Defenses and Counterclaims, Except for Lack of Subject Matter Jurisdiction.

As stated above, during the Trial, Defendants expressly stipulated that they waived all potentially applicable defenses and counterclaims, with the exception of their argument that this Court lacks subject matter jurisdiction pursuant to FIRREA. (Exhibit 1). Based on this express stipulation and waiver, this Court properly concluded that Defendants' waived any arguments Defendants' presented in their Post-Trial Memorandum, dated February 26, 2020, that were outside the scope of the lack of subject matter jurisdiction argument. *See Bodkin v. Bodkin*, 388 S.C. 203, 228, 694 S.E.2d 230, 243 (Ct. App. 2010) (the court must accept stipulations as binding); *C.A.N. Enterprises, Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 292 S.C. 556, 559, 357 S.E.2d 714, 715 (Ct. App. 1987), *aff'd*, 296 S.C. 373, 373 S.E.2d 584 (1998); (stipulations are binding upon parties who make them); *Gatewood v. Moses*, 39 S.C.L. 244, 247 (S.C. App. L. 1852) (appellant

was not permitted to raise and discuss a legal ground expressly waived at the circuit court trial). This same principle applies to the two new issues raised in Defendants' Motion - (1) "Other Problem with Chain of Title" and (2) "Order of Reference."

A. Defendants' Trial Waiver of Defenses Includes the Argument Contained in Defendants' Other Problem with Chain of Title Argument.

In their Motion, Defendants' assert for the first time that there is an issue with the June 26, 2018 assignment of Mortgage from CRE/ADC Venture 2012-1, LLC to NCP Pilgrim, LLC, which was entered into evidence at trial as Plaintiff's Exhibit 7. NCP asserts that Defendants' waiver of all potentially applicable defenses and counterclaims includes this new argument. Thus, Defendants' "Other Problem with Chain of Title" Argument was waived at trial and can no longer be asserted.

In the alternative, NCP also argues that this new argument is untimely. This argument should have been raised at Trial. Exhibit 7 was entered into evidence at Trial without objection by Defense counsel (Tr. Trans. P.21). Furthermore, Defense counsel had every opportunity to cross-examine NCP's witness regarding the validity of Exhibit 7 and to raise any concerns Defendants had with the Exhibit. However, Defendants' elected not to voice any concerns or objections at Trial. As discussed above, a Rule 59(e) motion cannot be used to present an argument Defendants could have previously raised but elected not to raise at trial. *Hickman* at 456, 392 S.E.2d at 482. Accordingly, if the Court finds that Defendants have not previously waived their "Other Problem with Chain to Title" Argument then it should be denied by the Court as untimely and improper.

B. Defendants' Trial Waiver of Defenses Includes the Argument Contained in Defendants' Order of Reference Argument.

In their Motion, Defendants' assert for the first time that the January 4, 2019 Order of Reference is improper. Similar to the reasoning applied above, NCP asserts that Defendants' waiver at Trial of all potentially applicable defenses and counterclaims includes this new argument and it can no longer be asserted.

In the alternative, if the Court determines Defendants did not previously waive this argument, the argument should be denied as untimely and improper. Specifically, Rule 53, SCRCP explicitly states that in "an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court." Here, NCP filed a foreclosure action on November 15, 2018, and the action was properly referred to the Dorchester County Master in Equity on January 4, 2019, by the Dorchester County Clerk of Court. Subsequently, on January 23, 2019, Defendants filed an Answer demanding a jury trial. Pursuant to this demand, a hearing was held before this Court on February 28, 2019. At that hearing, Defendants' failed to ever raise an objection regarding this Court's authority to rule on the jury trial demand. Furthermore, Defendants' failed to raise this argument at Trial or in the numerous other briefs filed with the Court in this matter. As discussed above, a Rule 59(e) motion cannot be used to present an argument Defendants could have previously raised but elected not to raise. *Hickman* at 456, 392 S.E.2d at 482. Accordingly, if the Court finds that Defendants have not previously waived their "Order of Reference" Argument then it should be denied by the Court as untimely and improper.

3. The Court Properly Concluded FIRREA Did Not Apply and that It Has Subject Matter Jurisdiction Over Plaintiff's Claims.

It is clear that this Court has subject matter jurisdiction over NCP's claims because the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") does not apply. 12 U.S.C. §1811 *et seq.* To reach this conclusion, the Court engaged in the detailed review of the jurisdictional bar established by FIRREA and the national case law regarding the applicability of this jurisdictional bar.

Subject matter jurisdiction is defined as "the power to hear and determine cases of the general class to which the proceedings in question belong." *Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 93-94, 668 S.E.2d 795, 796 (2008). "The question of subject matter jurisdiction is a question of law for the court." *Hammer v. Hammer*, 399 S.C. 100, 104-05, 730 S.E.2d 874, 876 (Ct. App. 2012). Subject matter jurisdiction "is distinct from the doctrine of exhaustion of administrative remedies, which is generally considered a rule of policy, convenience, and discretion, rather than one of law, and is not jurisdictional." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 100, 674 S.E.2d 524, 529 (Ct. App. 2009).

The Court properly relied upon *Tillman v. Resolution Tr. Corp.*, 37 F.3d 1032, 1035 (4th Cir. 1994) and *Freeman v. F.D.I.C.*, 56 F.3d 1394, 1399 (D.C. Cir. 1995) to conclude that FIRREA sections 1821(d)(3)-(13) require only those persons or entities making claims *against a failed financial institution* or seeking to adjudicate their rights *against the failed institution* to present their claims first to the Federal Deposit Insurance Corporation ("FDIC") through its administrative claims process. To protect and enforce this administrative process, FIRREA imposes a limitation on judicial review which encompasses (i) any claim or action for payment from, or any action seeking a determination of rights with respect to the assets of any depository institution for which the FDIC has been appointed receiver, including assets which the FDIC may acquire from itself

as such receiver; or (ii) any claim relating to any act or omission of such institution or the FDIC as receiver. 12 U.S.C. §1821(d)(13)(D)(i)-(ii).

After correctly establishing the criteria for the applicability of FIRREA's jurisdictional bar, the Court properly concluded that NCP's claims were not subject to the jurisdictional bar because NCP is not making a claim against the failed institution, Carolina Federal, or against the receiver, the FDIC, in this action. This conclusion is consistent with a review of the national case law evaluating the applicability of FIRREA's jurisdictional bar, which apply the principle that a third-party who purchases an asset from the FDIC also has the authority to foreclose on the assigned asset. *See Dittmer Properties, L.P. v. F.D.I.C.*, 708 F.3d 1011, 1017 (8th Cir. 2013); *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 640, 518 S.E.2d 44, 46 (Ct. App. 1999). *See also, Deutsche Bank Nat'l Tr. Co. v. Burke*, 902 F.3d 548, 552 (5th Cir. 2018); *Haynes v. JPMorgan Chase Bank, N.A.*, 466 F. App'x 763, 766 (11th Cir. 2012); *Newman v. JP Morgan Chase Bank, N.A.*, 81 F. Supp. 3d 735, 745 (D. Minn. 2015). Without this principle, it would be illogical for a third-party to ever accept an assignment of an asset from the FDIC, because without the ability to foreclose, the asset would be deemed worthless. Thus, the Court's conclusion that FIRREA's jurisdictional bar does not apply to NCP's claims is well founded and proper.

Additionally, Defendants reliance on *Brady Development Co., Inc. v. RTC*, 14 F.3d 998 (4th Cir. 1994) is inaccurate. The court in *Brady* focused solely on the issue of whether "litigants who have an action pending in court against a savings and loan that is subsequently placed in receivership (a pre-receivership claim) must avail themselves of FIRREA's administrative process in order to continue the action." *Brady Development Co.* at 1002. This central issue is different than the issue presented in the case at hand for one key reason - NCP has not asserted any claims

against a failed financial institution. Instead, NCP merely filed a routine mortgage foreclosure action.

Finally, it appears that couched in Defendants' jurisdictional argument is the assertion that NCP is not the holder of the Note and Mortgage. This argument has been refuted by the assignments submitted at Trial as Exhibits 6, 17, 19, 7, and 18, which were admitted without objection by Defendants. Furthermore, this argument fails in light of the fact that NCP is in possession of the original Note ("Original Note"). The Original Note was delivered to Defense counsel for inspection on May 20, 2020. Following this inspection, Defendants did not raise any objection to the Original Note. As repeated numerous times throughout this Memorandum, Defendants cannot wait until after a judgment has been issued to present an argument or objection that could have previously been raised. *Hickman* at 456, 392 S.E.2d at 482.

D. CONCLUSION

For the reasons outlined above, this Court should deny Defendants' Motion to Reconsider, dated July 23, 2020, and uphold its Master's Decree of Foreclosure, dated July 13, 2020 and Notice of Master's Sale, dated July 13, 2020.

RUSSELL P. PATTERSON, P.A.

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Attorneys for the Plaintiff

Hilton Head Island, SC
July 30, 2020

1 and Carolina Federal Savings Bank dated June 10,
2 2004; is that correct?

3 A. Yes.

4 Q. And what is the date of this agreement?

5 A. June 26, 2018.

6 MS. WILLIAMS: No further
7 questions, Your Honor.

8 MR. VARNADO: Briefly, Your Honor,
9 if I may.

EXAMINATION

10 BY MR. VARNADO:

11 Q. Britt, do you know who owns CRE Venture?
12 Do you know what kind of entity it is? Who owned
13 it?

14 A. I don't.

15 Q. Do you know if the FDIC owned it?

16 A. I don't.

17 Q. Do you know if the FDIC sold a
18 participation of 40 percent to ColFin?

19 A. I don't.

20 Q. Have you seen any other document that
21 shows the FDIC approved the last **Exhibit 18** that
22 you read? Do you have any knowledge of that that
23 was it was approved by the FDIC?

24 A. I don't believe so.

25 MR. VARNADO: Thank you, Your
Honor.

THE COURT: Thank you.

MS. WILLIAMS: No further
questions, Your Honor.

THE COURT: Thank you.

MS. WILLIAMS: Your Honor, at this
time, other than the attorney's fees that we've
agreed to take up a later date, plaintiff rests
its case.

THE COURT: Thank you. Mr.
Varnado?

MR. VARNADO: Your Honor, at this
time Mr. Clancy will not put up a defense. And
I'll prosecute his counterclaims. We are going
to go on the -- saying respectfully that we
believe that the Court does not have
jurisdiction.

THE COURT: So you're not going
forward on your counterclaims? And you're
resting your defense on the facts that this Court
doesn't have jurisdiction over the matter because
of the argument you made earlier?

MR. VARNADO: Yes, sir.

THE COURT: Thank you very much.

1 Then, what I'm going to do is I'm going to take
2 the matter under consideration. Ms. Williams, I
wonder if you would be so kind as to have the
record transcribed for my benefit?

3 MS. WILLIAMS: Of course, Your
Honor.

4 THE COURT: You can either have it
transcribed just simply electronically. Or if
5 you want the paper, I'm going to read it on my
computer.

6 MS. WILLIAMS: Okay.

7 THE COURT: And I'll make a
decision. Once I make a decision, what we'll do
is we'll reconvene for purposes of -- well, first
8 of all, we will need to get together soon to look
at the note -- what I call the note. It's the
9 line of credit.

10 MS. WILLIAMS: Right.

11 THE COURT: And once I've had an
opportunity to review the record and cogitate a
little bit on what I've heard, I'll render a
decision. Probably will ask one or two of you to
12 write an order for me. Although I've been known
to write my own orders. But even when you write
13 an order for me, I've been known to change it
dramatically.

14 So a lot of the reasons I ask people to
write orders for me is because usually in your
15 word processors you have all the dates and the
recording figures, and all that stuff is already
16 there. And I don't have to retype it.

17 MS. WILLIAMS: Correct.

18 THE COURT: So I often just simply
rely on the order for basically that purpose, so
I don't have to retype things like that. I'm the
best cut and paste judge in South Carolina.

19 MS. WILLIAMS: Quite a feat.

20 MR. VARNADO: Your Honor, would you
issue order a Form 4, or do you just want to wait
until you decide everything on the jurisdiction?

21 THE COURT: On jurisdiction? Let
me put that in the order itself. I guess -- and
22 this is something you need to think about, if you
appeal the case and it's determined that I didn't
23 have jurisdiction, are you reserving -- I'm not
sure if you're reserving your counterclaims? Or
24 have you abandoned them all together?

25 MR. VARNADO: I haven't abandoned
them all together, but if an Appellate Court
holds that you really did in fact have

1 jurisdiction, then I think that I would -- think
2 that I would waive the counterclaims.

3 THE COURT: That's what I would
4 expect you --

5 MR. VARNADO: But however if you --
6 respectfully, if Your Honor didn't have
7 jurisdiction, then everything would be to the --
8 I think that's what it is, Your Honor.

9 MS. WILLIAMS: Your Honor, I guess
10 it would be our position that either Mr. Varnado
11 decides today to waive his counterclaims in full
12 or he argues them today to preserve them for the
13 record. If he does not argue them today, it
14 would be our position they're waived in full.

15 THE COURT: Well, I think he said
16 that. He understands that if the jurisdictional
17 issue comes out different than what my decision
18 has been and he is correct and I didn't have
19 jurisdiction, then I couldn't have heard them
20 anyway.

21 But if I had jurisdiction and I'm
22 affirmed on the remainder of the decision, then
23 he will have waived his counterclaims as of this
24 moment.

25 MS. WILLIAMS: That's correct, Your
Honor. And also, I just want to offer if the
Court would find it helpful, we would be happy to
do a post-trial brief on FIRREA just since we
only found about it this morning. But we have
our Dura case, and you've heard our position on
it.

MR. PATTERSON: Your Honor, Russell
Patterson. If I can be heard. I've done a lot
of foreclosures. Never seen this defense and
found out about it when we were riding up here.
So our arguments are based on what we could read
on our phone. I was driving so Ms. Williams was
looking at it.

We would like just a week to be able to
brief that issue because now we find out for the
first time driving up here that's the whole
defense when we've been dealing with all these
other issues. They're now gone. Now we're
dealing with an issue we've never even heard of
until this morning.

We would like to be able to at least put
together a little bit of case law because again,
there's hundreds of thousands of loans the FDIC's
taken over and sold and been foreclosed. If
defendant is right, there's got to be a bunch of

1 cases out there saying State Court, you can't
2 foreclose. So we would like to have a little bit
of time to look for it.

3 THE COURT: Well, let me ask you
4 this question. Let's suppose -- I almost took
5 this position earlier so I'm going to hold the
6 question of the jurisdiction in advance and hear
7 the case but decide to go ahead and rule that I
8 did have jurisdiction. And if I'm wrong, I can
9 be corrected.

10 I didn't expect Mr. Varnado to waive his
11 defenses, but nonetheless, that will be the
12 result of his defenses if I'm affirmed on the
13 jurisdiction. I will be happy to allow you to --
14 let's say 15 days to do a supplemental post-trial
15 brief on the issue of jurisdiction understanding
16 that I may reverse my opinion after I read the
17 additional information.

18 And Mr. Varnado, if you wish to reply to
19 that brief, I would give you 15 days from the day
20 it is submitted to reply to it.

21 MR. VARNADO: So 15 days from today
22 or tomorrow for plaintiff to file their brief?
23 And 15 days from receipt for me to file mine?

24 THE COURT: To reply to it so that
25 you both will have flushed out the issue. And
26 I'll have the option -- again, I would have the
27 option to overrule myself. I just made a ruling
28 on the bench. I could always reverse myself. I
29 did it already today in another case.

30 MR. VARNADO: Thank you, Your
31 Honor.

32 THE COURT: So if I have to change
33 my mind, I change my mind when I enter the order.
34 So yeah, I'm happy to allow you-all to do the
35 additional research so I can understand it
36 myself.

37 MS. WILLIAMS: Thank you, Your
38 Honor.

39 MR. VARNADO: Thank you, Your
40 Honor.

41 THE COURT: I'll leave it at that.
42 I mean, I've got thoughts coming out of my head.
43 They just want to burst out into words, but I'm
44 going to reserve them. So yes. Let's do the
45 post-trial briefs on that one issue and nothing
else.

46 MS. WILLIAMS: Yes, sir.

47 MR. VARNADO: Yes, sir.

48 THE COURT: And maybe by 30 days

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CASE NO. 2018-CP-18-2053
NCP Pilgrim, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	SECOND
	)	NOTICE OF MOTION AND
	)	EMEGENCY MOTION FOR STAY OF
Mary Lou Cercopely, David S. Clancy,	)	PROCEEDINGS TO ENFORCE
South Carolina Federal Credit Union,	)	JUDGMENT or for SUPERSEDEAS BOND
Southcoast Community Bank, John	)	and TO IMPOSE BOND ON PLAINTIFF
Geanuracos, and David Sean Clancy	)	
	)	
Defendants.	)	
	)	

TO: LAURENS P. WILLIAMS, ATTORNEY FOR THE DEFENDANT:

PLEASE TAKE NOTICE that the Defendants Mary Lou Cercopely, David S. Clancy and David Sean Clancy (“these Defendants”), by and through their below-counsel and pursuant to Rule 62(f) of the South Carolina Rules of Civil Procedure, and Rule 241(c) of the South Carolina Appellate Court Rules, will move before the Honorable James E. Chellis, Dorchester County Master in Equity, at such time, date and place as counsel may be heard, for an *Emergency Order for Stay of Proceedings to Enforce Judgment* and the Amended Notice of Master’s Sale. or alternatively to grant a *Supersedeas Bond*, and to preclude the judicial sale of the foreclosed property, TMS # 137-07-07-023-000-C, scheduled for October 1, 2020 and November 1, 2020; and/or to impose a bond on the Plaintiff pursuant to S.C. Code Ann.

This motion is based on the appeal to the South Carolina Court of Appeals taken on August 18, 2020.

1) Rule 62(b), SCRCPP, which provides, in relevant part: “[w]hen an appeal is taken, a party, by giving a supersedeas bond, may obtain a stay ... the bond may be given at or after the

time of filing the notice of appeal or of procuring the order allowing the supersedeas as the case may be. The stay is effective when the supersedeas bond is approved by the Court.”

2) Section 18-9-170 of the South Carolina Code states:

“If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the judgment shall not be stayed unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which shall be specified in the undertaking. **When the judgment directs the sale of land to satisfy a mortgage thereon or other lien, the undertaking shall provide that in case the judgment appealed from be affirmed and the land be finally sold for less than the judgment debt and costs then the appellant shall pay for any waste committed or suffered to be committed on the land and shall pay a reasonable rental value for the use and occupation of the land from the time of the execution of the undertaking to the time of the sale, but not exceeding the amount of such deficiency, which sum shall be duly entered as a payment on the judgment;** and in case the land shall be unimproved land, then in any action or proceedings now pending or hereafter begun in any of the courts of this State the undertaking shall further provide for the payment by appellant, if the judgment be affirmed, of any taxes due at the time of the appeal or already paid by the mortgagee, or becoming due during the pendency of the appeal, and also for the payment by appellant of the interest on the debt falling due during the pendency of such appeal.”

(emphasis added).

3) Section 18-1-130(a)(2) of the South Carolina Code states in pertinent part:

“A plaintiff may not enforce a sale of property after a notice of appeal is filed without giving an undertaking or bond to the defendant, with two good sureties, in double the appraised value of the property or double the amount of the judgment, conditioned to pay all damages the defendant may sustain by reason of the sale in case the judgment is reversed. The plaintiff in such a case may not proceed with a sale of defendant's property if the defendant enters into an undertaking, with good sureties, in double the appraised value of the property or the amount of the judgment, to pay the judgment with legal interest and all costs and damages the plaintiff may sustain by reason of the appeal or to produce the property levied on and submit to the sale if the judgment is confirmed.

emphasis added). Additionally, Rule 241(c)(3) of the South Carolina Appellate Court Rules states that “the granting of a supersedeas ... under this Rule, may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking as the lower court may deem appropriate.”

Accordingly,

(A) these Defendants seek that the Court impose a supersedeas bond upon them; to give these Defendants a reasonable time to post the bond; to postpone the judicial sale accordingly (scheduled to commence September 1, 2020); and for such other and further relief as the Court may deem just and proper.

(B) Additionally, if the Plaintiff still insists that the property be set for judicial sale and an appeal is filed, these Defendants move to have the Plaintiff post a bond or undertaking, with two good sureties, issued for double the appraised value of the property, pursuant to S.C. Code Ann. § 18-1-130(a)(2); and for such other and further relief as the Court may deem just and proper.

Pursuant to Rule 11, SCRCP, the undersigned certifies that consultation with counsel would serve no useful purpose.

(signature on following page)

Respectfully submitted,

BROWN & VARNADO LLC

/s Robert B. Varnado

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***Attorneys for the Defendants Mary Lou Cercopely,
David S. Clancy and David Sean Clancy***

August 25, 2020
Mt. Pleasant, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within ***Second Notice of Motion and Emergency Motion for Stay of Proceedings to Enforce Judgment, or Supersedeas Bond and to Enforce Bond on Plaintiff*** upon all parties to these matters by depositing a true copy of the same in the U.S. mail, proper postage prepaid, addressed to counsel of record as follows, or via ECF if indicated.

Lauren P. Williams, Esquire
Russell P. Patterson P. A.
P. O. Box 8047
Hilton Head Island, SC 29938
Attorney for Plaintiff

VIA ECF

/s Robert B. Varnado

Robert B. Varnado

August 25, 2020
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CIVIL ACTION NO.: 2018-CP-18-2053
NCP Pilgrim, LLC,	)	
	)	PLAINTIFF'S MEMORANDUM IN
PLAINTIFF,	)	OPPOSITION TO DEFENDANTS
	)	MARY LOU CERCOPELY, DAVID S.
vs.	)	CLANCY, AND DAVID SEAN
	)	CLANCY'S SECOND EMERGENCY
Mary Lou Cercopely; David S. Clancy; South	)	MOTION FOR STAY OF
Carolina Federal Credit Union; Southcoast	)	PROCEEDINGS TO ENFORCE
Community Bank; Joan Geanuracos; David	)	JUDGMENT or for SUPERSEDEAS
Sean Clancy,	)	BOND and TO IMPOSE BOND ON
DEFENDANTS.	)	PLAINTIFF
	)	

Plaintiff NCP Pilgrim, LLC ("NCP") respectfully submits this Memorandum in Opposition to Defendants Mary Lou Cercopely, David S. Clancy, and David Sean Clancy's (collectively "Defendants") Second Emergency Motion for Stay of Proceedings to Enforce Judgment or for Supersedeas Bond and To Impose Bond on Plaintiff, filed August 25, 2020 ("Motion").

A. PROCEDURAL HISTORY

This is a commercial mortgage foreclosure action which was filed on November 15, 2018. Subsequently, Defendants' filed an Answer and Counterclaims, dated January 23, 2019, and an Amended Answer and Counterclaims, dated April 22, 2019. A non-jury trial was held before this Court on January 28, 2020. At the commencement of the trial, Defense counsel waived all defenses except subject matter jurisdiction. Defendants presented no evidence at trial. As a result of the trial, this Court issued its Master's Decree of Sale and Foreclosure, dated July 13, 2020 ("Decree"), and its Notice of Master's Sale, dated July 14, 2020. Shortly after the Decree and Notice of Sale were issued, Defendants' filed their Motion to Reconsider, dated July 23, 2020. This Motion to Reconsider was denied by the Court on August 5, 2020. At that same time, the Court issued an Amended Notice of Master's Sale rescheduling the judicial sales date for October

6, 2020, at 11:00 a.m. ("Notice of Sale"). Additionally, Defendants' filed a Notice of Appeal appealing the Decree and Notice on or about August 18, 2020.

B. LEGAL REQUIREMENTS FOR A SUPERSEDEAS.

Defendants' filed their Motion pursuant to Rule 241, SCACR. Rule 241 establishes that the filing of a notice of appeal in a foreclosure case does **not** automatically stay the relief ordered in the Decree and Notice of Sale. Rule 241(b)(4), SCACR. If a party wishes to stay the relief ordered in the Decree and Notice of Sale, he must move for an order imposing a supersedeas of matters decided in the order on appeal after service of the notice of appeal. Rule 241(c)(1), SCACR. In determining whether an order imposing supersedeas should be issued, the court should consider "whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. In the event a court issues an order imposing supersedeas, the order may be conditioned upon such terms, "including but not limited to the filing of a bond or undertaking," as the court may deem appropriate. Rule 241(c)(3), SCACR. Specifically, S.C. Code Ann. § 18-9-170 explicitly outlines the bond or undertaking required to obtain a stay of a judgment directing the sale of land to satisfy a mortgage. *Muckenfuss v. Fishburne*, 68 S.C. 41, 46 S.E. 537, 538 (1903). This Section states that an execution of a judgment directing the sale of real property shall not be stayed unless the following requirements are met -

a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered.

S.C. Code Ann. § 18-9-170. This Section goes on to establish specific additional criteria in the event the judgment directs the sale of land to satisfy a mortgage on the property:

the undertaking shall provide that in case the judgment appealed from be affirmed and the land be finally sold for less than the judgment debt and costs then the appellant shall pay for any waste committed or suffered to be committed on the land and shall pay a reasonable rental value for the use and occupation of the land from the time of the execution of the undertaking to the time of the sale, but not exceeding the amount of such deficiency which sum shall be duly entered as a payment on the judgment.

Id. These requirements can be summarized as follows:

1. Written undertaking with two sureties;
2. Written undertaking to address the following potential damages to respondent:
 - a. Any waste to the property during the pendency of the appeal; and
 - b. Value of use and ownership of property, including rental value during the pendency of the appeal.

Thus, in order to stay the Decree and Notice of Sale, Defendants must comply with the requirements of both Rule 241, SCACR and S.C. Code Ann. § 18-9-170 and post an undertaking with the Dorchester County Clerk of Court prior to the date of the judicial sale.

C. ARGUMENT

1. The Court Should Grant Defendants' Motion for a Supersedeas Bond of \$620,787.20.

Rule 241, SCACR, states that a judge should only issue an order imposing supersedeas when such an order is "necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Here, it is fairly straightforward that the imposition of a supersedeas bond on Defendants is necessary to preserve the jurisdiction of Defendants' appeal. Thus, the court must look to S.C. Code Ann. § 18-9-170 to determine the amount of the supersedes bond.

As outlined above, section 18-9-170 establishes strict requirements for calculating the amount of a supersedeas bond to stay the execution of a judgment directing the sale of real property. First, this section establishes that to stay the sale of real property, the appellant must undertake a written execution with two sureties. S.C. Code Ann. § 18-9-170. Second, this undertaking must provide that during the time appellant continues to possess the property he will not commit or suffer to be committed any waste to the property and if the judgment is affirmed he will pay the value of the use and occupation of the property from the time of the undertaking until the delivery of possession pursuant to the judgment. *Id.* Finally, the undertaking must provide that in the event the judgment is affirmed and the property is sold for less than the judgment debt and costs, appellant shall pay for any waste committed or suffered to be committed on the land plus a reasonable rental value for the use and occupation of the land from the time of the undertaking until the time of the foreclosure sale. *Id.*

There is little South Carolina case law interpreting the requirements of section 18-9-170, but it can be presumed that the value of the use and occupation of the property can be determined based upon the rental value, insurance costs, taxes, and maintenance costs for the property. Furthermore, the value of any waste committed or suffered to be committed on the land can likely be determined using the current appraised value of the property. NCP had the property appraised by a qualified commercial appraiser on July 31, 2020, a copy of which is attached hereto as Exhibit 1. In addition to the current appraised value, the appraisal also provided an estimated rental value, insurance costs, and maintenance costs for the property.

Based on the criteria discussed above, this Court should issue an order requiring Defendants to obtain a supersedeas bond in the amount of \$662,588.83 secured by two sureties.

This figure is based upon the assumption that it will take approximately three (3) years to resolve Defendants' appeal, although many appeals take much longer, and can be broken down as follows:

July 31, 2020 Appraised Value of the Subject Property (Exhibit 1)		\$453,000.00
Property Taxes		\$28,974.40
2019 Delinquent Tax Fee Not Included in Decree	\$882.76	
Estimated 2020 Taxes (2019 Taxes + 10%)	\$6,918.44	
Estimated 2021 Taxes (2020 Taxes + 10%)	\$6,987.62	
Estimated 2022 Taxes (2021 Taxes + 10%)	\$7,057.50	
Estimated 2023 Taxes (2022 Taxes + 19%)	\$7,128.08	
Rental Value		\$120,966.76
Prorated 2020 Reasonable Rental Value (10/6/20-12/31/20 - \$102.43 for 86 days) (based on rental value information provided on page 60 of Exhibit 1)	\$8,808.76	
Estimated 2021 Reasonable Rental Value	\$37,386.00	
Estimated 2022 Reasonable Rental Value	\$37,386.00	
Estimated 2023 Reasonable Rental Value	\$37,386.00	
Insurance		\$7,765.48
Prorated 2020 Insurance (10/6/20-12/31/20 - \$6.58 for 86 days) (based on insurance information provided on page 60 of Exhibit 1)	\$565.48	
Estimated 2021 Insurance	\$2,400.00	
Estimated 2022 Insurance	\$2,400.00	
Estimated 2023 Insurance	\$2,400.00	
Maintenance Costs		\$10,080.56
Prorated 2020 Maintenance Costs (10/6/20-12/31/20 - \$8.54 for 86 days) (based on maintenance information provided on page 60 of Exhibit 1)	\$734.06	
Estimated 2021 Maintenance Costs	\$3,115.50	
Estimated 2022 Maintenance Costs	\$3,115.50	
Estimated 2023 Maintenance Costs	\$3,115.50	
Loan Interest		\$41,801.64
Prorated 2020 Interest (10/6/20-12/31/20 - 5.5% of \$234,657.55 for 86 days)	\$3,083.14	
2021 Interest	\$12,906.17	
2022 Interest	\$12,906.17	
2023 Interest	\$12,906.17	
TOTAL		\$662,588.83

2. S.C. Code Ann. § 18-1-130(a)(2) Does Not Apply to Foreclosure Sales.

In their Motion, Defendants' assert that the undertaking outlined in Section 18-1-130(a)(2) applies to this matter and that NCP is required to file a bond to sell the subject property. Section 18-1-130(a)(2) deals specifically with the appeal of the execution of a monetary judgment and requires the plaintiff seeking the execution of a monetary judgment to post an undertaking before moving forward with the execution. South Carolina courts have explicitly held that this statute does not apply to sales due to mortgage foreclosures. *Carsten v. Wilson*, 241 S.C. 516, 521, 129 S.E.2d 431, 434 (1963). Instead, courts have ruled that section 18-9-170 controls the process to stay a foreclosure sale subject to the filing of an appeal. *Id.* Thus, Defendants motion to require NCP to post a bond or undertaking in regard to the upcoming foreclosure sale should be denied.

3. Defendants' Request to Postpone the October 6, 2020 Judicial Sale Should be Denied.

As part of their Motion, Defendants' request the October 6, 2020 judicial sale be postponed for the second time to provide them with a reasonable time to post their requested supersedeas bond. This judicial sale was originally scheduled for September 1, 2020. However, it was postponed until October 6, 2020, following the Court's August 5, 2020 denial of Defendants' Motion to Reconsider to give Defendants ample time to file their Appeal and Second Motion for a Supersedeas Bond. Defendants filed their Notice of Appeal on August 18, 2020, and filed their Second Motion for a Supersedeas Bond on August 25, 2020. A hearing is currently scheduled on the Motion for Monday, September 14, 2020. Defendants will have ample time between the September 14 hearing and the October 6 judicial sales date to obtain and post the necessary bond with the Dorchester County Clerk of Court. Thus, the Court should deny Defendants' request to postpone the October 6, 2020 judicial sale for the second time.

D. CONCLUSION

For the reasons outlined above, this Court should issue an Order imposing a supersedes bond on Defendants in the amount of \$662,588.83 to be guaranteed by two sureties. The bond must specifically provide that (1) during the time Defendants continue to possess the property they will not commit or suffer to be committed any waste to the property; (2) if the judgment is affirmed they will pay the value of the use and occupation of the property from the time of the undertaking until the delivery of possession pursuant to the judgment; and (3) if the judgment is affirmed and the property is sold for less than the judgment debt and costs, Defendants shall pay for any waste committed or suffered to be committed on the land plus a reasonable rental value for the use and occupation of the land from the time of the undertaking until the time of the foreclosure sale. This bond must be posted with the Dorchester County Clerk of Court prior to the October 6, 2020 judicial sale in order to effectively stay the sale of the subject property. If Defendants' supersedes bond with two sureties is not timely posted, the judicial sale should be allowed to proceed.

Furthermore, this Court should deny Defendants' Motions to Postpone the October 6, 2020 judicial sale and to Impose Bond on Plaintiff for the reasons discussed above.

RUSSELL P. PATTERSON, P.A.

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Attorneys for the Plaintiff

Hilton Head Island, SC
September 11, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CASE NO. 2018-CP-18-2053
NCP Pilgrim, LLC.,	)	
	)	
Plaintiff,	)	DEFENDANTS'
v.	)	REPLY MEMORANDUM
	)	TO PLAINTIFF'S
Mary Lou Cercopely, <i>et al.</i> ,	)	MEMORANDUM IN OPPOSITION
	)	
Defendants.	)	
_____	)	

TO: THE HON. JAMES E. CHELLIS, DORCHESTER COUNTY MASTER IN EQUITY:

COMES NOW THE Defendants Mary Lou Cercopely, David S. Clancy and David Sean Clancy ("Clancy") who submit the following Reply Memorandum to Plaintiff's Memorandum in Opposition (filed September 11, 2020) for Plaintiff's Second Emergency Motion for Supersedeas et al. (filed August 25, 2020).

BACKGROUND

NCP Pilgrim won a judgment of \$367,673.00 (with daily interest at \$35.80), plus fees of \$41,110.82. This brings the award to \$409,074.01 with interest.

Post-award, on August 17, 2020, NCP Pilgrim had the property appraised at \$453,000.00 as "commercial office/retail."

Now, NCP Pilgrim wants a bond of **\$620,787.20** – which is almost twice the original award and three times the value of the Note (\$234,657.55). The process in the South Carolina Court of Appeals generally takes 2 to 2.5 years to get a final decision.

LEGAL ARGUMENT

A bond of \$620,787.20 as requested by NCP Pilgrim is advanced in bad faith. It is intended to prevent Mr. Clancy from ever being able to afford a bond; its goal is to make the bond so "sky-

high” that his appeal is rendered moot. It also conflicts with both S.C. Code Ann. § 18-9-170 and Rule 241, SCACR, because: (1) the payment of a bond is not imposed by Rule 241; but if it is imposed then (2) Section 18-9-170 only requires the bond-holder to remunerate a respondent in case he loses his appeal for: (i) any waste; and (ii) a reasonable rate for the use and occupation of the property until the next sale. No other indicia are included. The “presumption” at p. 4 of NCP Pilgrim’s memorandum is just that – a presumption, unsupported by the law.

a. Most Indicia Advanced by Plaintiff is Unsupported by the Law.

Thus, asking for the appraised price of the building (\$453,000.00) is not consistent with either authority; neither is the request for annual taxes (\$28,974.00), insurance (\$10,080.56), or the “interest” (\$41,801.65) on the original Note consistent with either Rule 241 or Section 18-9-170. The “reasonable” rental value is set at \$37,386.00, which is fair – but receiving “real” rent is much, much more erratic. Also, maintenance costs (\$10,080.56 for 3.5 years) and insurance (\$7,765.48) are passed to the tenant and are part of the rent.

b. Calculation of the Bond by the Defendant.

Mr. Clancy will pay all rents received to NCP Pilgrim, less the costs of taxes, insurance and miscellaneous costs, while the case is on appeal. This will take care of the value of the use and occupancy of the Property while the matter is on appeal, which is by far the bulk of any reasonable bond.

In terms of waste, 117 North Cedar was Mr. Clancy’s childhood home. He is a native resident of Dorchester County and works as an automobile buyer in the county. He will not commit or suffer real waste to occur at his childhood home when he potentially has the chance to have the ruling overturned on appeal. None of NCP Pilgrim’s other requests meets the test of either S.C. Code Ann. § 18-9-170 and Rule 241, SCACR. Therefore, Clancy asks that the Court impose no

bond under Rule 241, or impose a bond in keeping with his ability to pay it willingness to pay all rents received to NCP Pilgrim.

c. The Bond to be Imposed on the Plaintiff.

NCP Pilgrim would have a point about S.C. Code Ann. § 18-1-130(a)(2) if they were seeking a non-deficiency judgment. But they are not. At Paragraph 15 of the *Master's Decree of Sale and Order of Foreclosure* (p. 14), the Court underlined and bolded that the Plaintiff demands a “personal or deficiency” judgment. Plaintiff refers to old cases [the most recent being *Carsten v. Williams*, 241 S.C 516, 521-522, 129 S.E. 431, 434-435 (1963)] which states that the only bond required if from the Appellant (not the Plaintiff) when the judgment orders the “sale of land to satisfy a mortgage thereon.”

None of the cases cited by NCP Pilgrim appear to cover the instant situation – in which it has obtained basically a monetary judgment secured by land, where Plaintiff must come up with the difference in the event that the land sells for less than appraised value at the sales. Had NCP Pilgrim been satisfied with a non-deficiency judgment, that would be correct. But in asking for a deficiency, they have turned it into a money judgment, and Section 18-1-130(a)(2) applies. Thus, if NCP Pilgrim wants to enforce the sale of the Property, it must give two bonds equal to double the appraised value (or \$906,000.00).

d. Date Defendant must pay.

Depending on the Court's discretion to impose a bond, Defendant should be given until the November 4, 2020 – which is the October 6, 2020 sale date plus 30 days required for deficiency judgments. There is no reason to require him to post his security prior to October 6, 2020 as NCP suggests.

CONCLUSION.

Clancy requests that the Court grant his Second Emergency Motion of August 25, 2020; not to impose a bond of \$620,787.20 on Clancy, but either no bond or a bond in keeping with his ability to pay and willingness to pay all rents received to NCP Pilgrim

BROWN & VARNADO LLC

/s Robert B. Varnado

By: _____

Robert B. Varnado

P.O. Box 1127

Mt. Pleasant, South Carolina 29465

Telephone: (843) 737-7300

Facsimile: (843) 654-5109

rvarnado@brown-varnado.com

Attorneys for Plaintiffs

September 14, 2020

Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

I did this date serve the attached document(s) on the parties listed below by placing them in the United States mail with proper postage affixed thereto and addressed as follows or via the E-flex system and email:

Lauren P. Williams

Russell P. Patterson

Attorney for Plaintiff

VIA E-FLEX/EMAIL

/s Robert B. Varnado

By: _____

Robert B. Varnado

September 14, 2020

Mount Pleasant, South Carolina

1 IN THE PROBATE COURT
2 FOR THE STATE OF SOUTH CAROLINA
3 DORCHESTER COUNTY

4 TRANSCRIPT OF PROCEEDINGS
5 JANUARY 28, 2020

6 NCP PILGRIM, LLC,

7 Plaintiff,

8 vs. CASE NO. 2018-CP-18-2053

9 MARY LOU CERCOPELY; DAVID S. CLANCY; SOUTH
10 CAROLINA FEDERAL SAVINGS BANK; SOUTHCOAST
11 COMMUNITY BANK; JOAN GEANURACOS; DAVID SEAN
12 CLANCY,

13 Defendants.

14 BEFORE THE HONORABLE: JAMES CHELLIS

15 TIME: 11:30 AM

16 LOCATION: DORCHESTER COUNTY COURTHOUSE
17 SAINT GEORGE, SC

18 REPORTED BY: MACKENZIE ALLEN
19 CLARK & ASSOCIATES, INC.
20 CHARLESTON, SC 29415
21 843-762-6294
22 WWW.CLARK-ASSOCIATES.COM
23
24
25

1 A P P E A R A N C E S

2 ON BEHALF OF PLAINTIFF:

3 RUSSELL PATTERSON
4 BY: LAUREN WILLIAMS
5 BY: RUSSELL PATTERSON
6 19 Shelter Cove Lane
7 Suite 107
Hilton Head, SC 29928

8 ON BEHALF OF DEFENDANT:

9 BROWN & VARNADO
10 BY: ROBERT VARNADO
11 103 Church Street
Mount Pleasant, SC 29464

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1 THE COURT: What I'm going to ask
2 plaintiff's counsel to do is give me sort of a
3 brief opening if you would, please, in the nature
4 of what you intend to be doing today. And we'll
5 let Mr. Varnado do the same. And then we'll get
6 started. Okay?

7 So first off, this is the matter of NCP
8 Pilgrim, LLC as the plaintiff against Mary Lou
9 Cercopely, David S. Clancy, South Carolina
10 Federal Credit Union, Southcoast Community Bank,
11 Joan Geanuracos. Did I pronounce that correctly?

12 MS. WILLIAMS: We did speak to her
13 yesterday, but I'm not exactly sure on how to
14 pronounce the name.

15 THE COURT: All right. I'm going
16 spell it for the court reporter. Joan
17 Geanuracos, G-E-A-N-U-R-A-C-O-S. And there is
18 also a defendant by the name of David Sean
19 Clancy. Before I go any further, let me make
20 sure. Those are two different people, or are
21 they one and the same, Mr. Varnado?

22 MR. VARNADO: I believe they're one
23 and the same, Your Honor, with Mr. Clancy here.

24 THE COURT: Is that correct, Mr.
25 Clancy?

26 MR. CLANCY: Yes, sir.

27 THE COURT: Is that your
28 understanding, Ms. Williams?

29 MS. WILLIAMS: That was my
30 assumption that -- yes.

31 THE COURT: Wait a minute. Let me
32 get your name right.

33 MS. WILLIAMS: It was Williams.
34 You're correct.

35 THE COURT: Okay. Ms. Williams.
36 MS. WILLIAMS: And yes, that's my
37 understanding. Also, just for the Court's
38 clarification, South Coast Community Bank is
39 represented by Samuel Altman. He is aware of the
40 hearing. And I think that he mailed your office
41 a letter, but he will not be here today.

42 THE COURT: I received a letter
43 from him indicating that he will not be present,
44 but that if in the event a foreclosure ensued and
45 there's a sale and a surplus that he would be
46 notified of the surplus.

47 MS. WILLIAMS: That's my
48 understanding, Your Honor.

49 THE COURT: Did you understand
50 that, Mr. Varnado?

1 MR. VARNADO: I believe that Mr.
2 Altman did write that, Your Honor. Yes, sir.

3 THE COURT: I think I saw -- if
4 he's answering on behalf of Joan Geanuracos, it's
5 a fairly typical and appropriate position to
6 take. The civil action number for the purposes
7 of the record is 2018-CP-18-02-053.

8 And today present is Ms. Lauren E.
9 Williams, Mr. Russell P. Patterson, both of the
10 South Carolina Bar, both who work out of Hilton
11 Head, South Carolina. We also have present Mr.
12 Robert B. Varnado.

13 MR. VARNADO: Yes, sir, Your Honor.
14 Thank you, sir.

15 THE COURT: Are you related to
16 Judge Brown?

17 MR. VARNADO: No. Very distantly,
18 sir.

19 THE COURT: Well, anyway, Mr.
20 Varnado is from the Charleston County Bar. And
21 he represents Mr. Clancy; is that correct?

22 MR. VARNADO: Yes, sir.

23 MR. CLANCY: Yes, sir.

24 MR. VARNADO: And I represent Ms.
25 Cercopely too, but she's not --

26 THE COURT: Cercopely?

27 MR. VARNADO: Cercopely, yes,
28 sir.

29 THE WITNESS: She's my sister, Your
30 Honor.

31 THE COURT: Mary Lou is your
32 sister?

33 MR. CLANCY: Yes, sir.

34 THE COURT: There's one other
35 person here today. Is that a witness for you,
36 Mr. Varnado?

37 MR. VARNADO: This is Mr. Ventrum
38 (ph), and he's assisting me with the case.

39 THE COURT: Oh, he's a lawyer
40 assistant?

41 MR. VARNADO: Not a lawyer, but
42 he's assisting me with the case.

43 THE COURT: He's your assistant?
44 Okay. Thank you. And again, Ms. Williams, will
45 you tell me who your witness is?

46 MS. WILLIAMS: Sure, your Honor.
47 This is Britt Loukos. She is a senior associate
48 with NCP Pilgrim. And I can spell her name if
49 that's helpful.

50 THE COURT: Britt?

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1 MS. WILLIAMS: Britt. B-R-I-T-T.
2 And then it's L-O-U-K-O-S.

3 THE COURT: Well, I would have
4 spelled that wrong.

5 MS. WILLIAMS: Correct. I think
6 I've done that many times.

7 THE COURT: Okay. Ms. Williams,
8 would you give me just a brief opening and tell
9 me where we're heading today and what you're
10 going to be seeking. And then I'll let Mr.
11 Varnado give me a brief presentation as well so I
12 can get acclimated with what we're talking about.

13 MS. WILLIAMS: Of course Your
14 Honor. So as we've all discussed, my name is
15 Lauren Williams. And I'm here on behalf of the
16 plaintiff, NCP Pilgrim, LLC. This is a
17 commercial foreclosure of a building located on
18 117 Cedar Street in the Summerville, South
19 Carolina that is jointly owned by Mr. Clancy and
20 his sister, Ms. Cercopely.

21 THE COURT: That's the name of --
22 excuse me. It's a curious pronunciation, but
23 it's Cercopely.

24 MS. WILLIAMS: Cercopely. I tried
25 to write it down to pronounce it correctly. I
26 will do my best.

27 THE COURT: It's a name that is a
28 kin to almost old -- I'm not sure if it's
29 Summerville, but it's at least Summerville when I
30 was growing up.

31 MS. WILLIAMS: Okay. Well, I will
32 do my best to honor the pronunciation.

33 THE COURT: Cercopely.

34 MS. WILLIAMS: Cercopely. So the
35 property is jointly owned by Ms. Cercopely and
36 Mr. Clancy, who is here today.

37 THE COURT: You told me it was
38 something 117?

39 MS. WILLIAMS: 117 Cedar Street.
40 My understanding it's located in downtown
41 Summerville.

42 THE COURT: Is it South Cedar or
43 North Cedar?

44 MS. WILLIAMS: I think that it is
45 South Cedar.

46 MR. VARNADO: Yes, sir.

47 THE COURT: Is this is property
48 that you used to serve as a -- I think it was
49 a --

50 MR. CLANCY: The Victorian house,

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1 Your Honor.

2 THE COURT: The Victorian house.
3 Yes. Okay. I know exactly where it is. All
4 right. It's in my mind. In my mind's eye.
5 Let's put it that way.

6 MS. WILLIAMS: Perfect. So NCP
7 Pilgrim is the current holder of a note signed by
8 Mr. Clancy, a line of credit that is secured by a
9 mortgage that was signed by his mother, the
10 current owner of the property at the time the
11 mortgage was placed.

12 The note was dated June 10, 2004. And
13 it was originally held by Carolina Federal
14 Savings Bank. As I'm sure you know, Carolina
15 Federal Savings Bank was taken over by the FDIC.
16 The FDIC subsequently assigned the note to
17 CRE/ADC Venture who subsequently assigned it to
18 NCP Pilgrim, LLC.

19 The note is in the amount -- original
20 amount of \$258,840. And as I said, it was
21 secured by a first mortgage on the property that
22 was owned by Barbara A. Clancy, now owned by Mr.
23 Clancy and his sister, located at 117 South Cedar
24 Street.

25 THE COURT: How did they acquire
the property?

26 MS. WILLIAMS: How did --

27 THE COURT: The current defendants
28 acquire the property?

29 MS. WILLIAMS: The current
30 defendants? I believe that when Ms. Clancy died,
there was a deed of distribution that transferred
the property to David Clancy and Mary Lou
Cercopely. The deed was record with the
Dorchester County Register of Deeds out of the
estate.

THE COURT: I don't want to
interrupt you -- well, I do want to interrupt you
because I have a question.

MS. WILLIAMS: Sure.

THE COURT: So Ms. Clancy who
originally -- who owned the property and the
mortgage placed on property has since died?

MS. WILLIAMS: Correct, Your Honor.
She's deceased.

THE COURT: And she left the
property to her daughter, Ms. Cercopely, and Mr.
Clancy, who is here in court today?

MS. WILLIAMS: That is my
understanding.

1 THE COURT: That's the -- 2 MS. WILLIAMS: Yes, Your Honor. 3 THE COURT: Okay. Go ahead. 4 MS. WILLIAMS: Pursuant to the 5 original terms of the note, there was an original 6 maturity date of June 10, 2009. Approximately 7 two years later in June 2006 the mortgage was 8 rerecorded apparently by the original closing 9 attorney, Mr. Stanley Claypoole, in order to add 10 the maturity date and loan amount to the recorded 11 mortgage. 12 Thereafter, Mr. Clancy and his mother 13 signed two note and mortgage modifications. The 14 first on August 18, 2009, and the second on 15 June 24, 2010. Both of these documents were 16 recorded with the Dorchester County Register of 17 Deeds. They also referenced the original and the 18 rerecorded mortgage and the principle amount of 19 the loan of \$258,940. 20 The 2010, the second modification, was 21 the end result of a February 2010 mortgage 22 foreclosure action filed by the original note 23 maker, Carolina Federal and a subsequent Chapter 24 13 bankruptcy filing by Ms. Clancy. 25 To resolve the foreclosure action and out of the bankruptcy, there is the second note and mortgage modification. And then as we've discussed in October 13, 2012, Ms. Barbara Clancy passed away. She left the property to her two children. And once NCP took over ownership of the loan, about four months later they initiated this lawsuit. They sent a demand letter to Mr. Clancy which was not responded to. And then we initiated this foreclosure action. In response to our summons and complaint, Mr. Varnado filed an answer and counterclaim. Subsequently, NCP discovered that there was a mathematical error in their calculation of the total amount owed. And we came before you, Your Honor, to seek permission to amend our complaint. That permission was granted. We amended our complaint. And Mr. Varnado subsequently filed an amended answer and counterclaim. THE COURT: Okay. MS. WILLIAMS: And it's undisputed that the last payment on this loan was made on January 14, 2013, over seven years ago. Sorry it's 2013. Yes, '13. It's 2020. Over 7 years	Page 9 1 ago. 2 THE COURT: Did you file a reply to 3 the counterclaim? 4 MS. WILLIAMS: We did, Your Honor. 5 We filed a timely reply. I'm happy to discuss 6 any of the counterclaims that were filed by 7 Mr. Varnado, but I believe he will summarize 8 that. 9 THE COURT: Let's let him address 10 that. I think I've got the overall picture in my 11 mind. I do recall this case coming up I guess it 12 was about a year ago maybe. 13 MS. WILLIAMS: It was some time 14 ago. Yes, Your Honor. 15 THE COURT: And I remember that I 16 granted the right or the request to amend the 17 complaint. And so now Mr. Varnado tell me about 18 your position. 19 MR. VARNADO: Well, Your Honor, we 20 have a counterclaim. And I will address that 21 momentarily if you'll let me. 22 THE COURT: All right. 23 MR. VARNADO: The first thing 24 though that I think I need to bring up is lack of 25 subject matter jurisdiction. And this is something that I recently discovered, but it is an older law. And the law is called FIRREA, which stands for the -- if you'll give me one second I can find it for you. I apologize, Your Honor. I thought I was all ready to go. THE COURT: FIRREA is the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. MR. VARNADO: Yes, sir. THE COURT: Public law 101-73. MR. VARNADO: That is the law. THE COURT: Is this codified at 12 U.S. Code § 1811, is that correct? MR. VARNADO: That is correct, sir. And, Your Honor, there are other consuls which I'll get to. But as Ms. Williams alluded to in her opening statement, this was originally a loan executed by Carolina First Savings Bank. I call them CFSB. I think that the plaintiff calls them Carolina. I don't know which Your Honor prefers, but CFSB is what I say. And CFSB was received by the FDIC, the Federal Deposit Insurance Corporation. So that's important because the date that the FDIC took over the Carolina First Savings Bank was in June
Page 11 1 of 2012. And as Ms. Williams noted, the debt -- 2 the final extension of the debt came to in July 3 of 2012. So it was a nonperforming loan that was 4 managed by the FDIC as part of its takeover of 5 Carolina First Savings Bank. 6 Now, the Financial Institution Reform, 7 Recovery, and Enforcement Act, FIRREA, was 8 enacted in 1989. And it was in the wake of the 9 savings and loan crisis. And one of its goals 10 was to provide an administrative claims process 11 or claims against the acts of the failed banks. 12 So what you have here is I think, but 13 I'm not quite sure, NCP Pilgrim is the last 14 person who has been transferred this note. As a 15 side, I don't think it's a negotiable instrument. 16 I don't think that -- it doesn't meet the test of 17 negotiability, and I can talk about that in a 18 little bit. 19 So basically it's a nonnegotiable 20 instrument, we say. The NCP Pilgrim owns it. 21 And I think that they say they got it from 22 somebody else who, if you go back in time, it was 23 the FDIC sold off all of Carolina First Savings 24 Bank's checking accounts and stuff to Bank of 25 North Carolina. And then they sold the nonperforming notes and loans to this LLC in which they gave a participation agreement to for 40 percent to this company that's trying to sell them any way they can. Now, the reason why that's important, Your Honor, is we say that the FIRREA at Section 1821(d)(13)(D) -- that's really hard -- but 1821(d)(13)(D) sets a jurisdictional bar over certain claims by providing for judicial review only after the administrative claims process has been followed. So that was 1821(d)(13)(D). And it's a statute. And it's out here. And it says, limitation of judicial review except as otherwise provided in this subsection, no court -- it says no court shall have jurisdiction over any claim or action for payment from or any other action seeking a termination of rights with respect to the assets of a depository institution in which the corporation, that means the FDIC, has been the appointed receiver. Now, Your Honor, I handed up to you -- or Ms. Williams handed up to you my pretrial brief. It contains two cases attached to it as well as the letter that Mr. Clancy received by	Page 12 1 certified mail on July 5, 2012 from the FDIC. 2 And the first case is Freeman versus the 3 Federal Deposit Insurance Company. And that's a 4 D.C. Circuit case from 1985. And the next one is 5 a case from the Fourth Circuit Court of Appeals 6 called Willner versus Diamond. Willner versus 7 Diamond in the Fourth Circuit Court of Appeals in 8 2017. 9 And basically it says that if you have a 10 loan that comes out of the FDIC then you have to 11 exhaust administrative remedies with the FDIC. 12 And that this court and every other court -- no 13 other court, whether it's federal, whether it's 14 state can rule on whether or not the assignments 15 were valid until we say the NCP Pilgrim goes to 16 FDIC. 17 So that's -- and it's an old law, but 18 it's still a good law that I can tell. And then 19 my brief, I put in that the subject matter 20 jurisdiction. Subject matter jurisdiction is the 21 power to hear and determine cases in the general 22 class to which the proceedings in question 23 belong. So yes, as a general rule, yeah, you 24 hear cases involving foreclosures. That's for 25 sure. But the jurisdiction of federal courts is limited to that expressly authorized by United States Constitution or Statute. And the Supremacy Clause in the United States Constitution provides that the federal law is the supreme law of the land. Basically what we say is that not only is there an administrative remedy which we feel that NCP Pilgrim has to accomplish, but that you can't hear the case until such time as that administrative function has been achieved. I don't even think you can hear it afterwards either, but I'll just say this that respectfully, Your Honor, we don't think you have the authority to hear this case until such time as they do their administrative remedy. And that you can raise subject matter jurisdiction at any time. And so therefore, we respectfully ask that you rule on that before you rule on anything else. And we would say that there's a Supreme Court case from 1995 -- I think it's Sherman versus Davis -- that says when a state court -- I believe it says when a state court is presented with something like this, it's got to rule on

1 this first. Does the FIRREA really say what it 2 says they have to go to the FDIC? 3 And I know it's probably pretty odd, but 4 this is a case that came out of the FDIC. It 5 came out of -- and the FDIC wanted to be able to 6 say one of the first bites and had Congress enact 7 a law that says they have the first bite. They 8 get to decide. Thank you, Your Honor. 9 MS. WILLIAMS: Your Honor, I would 10 be happy to respond if that will be appropriate. 11 THE COURT: Well, go ahead and 12 respond. I don't know what you're going to tell 13 me, but go ahead. 14 MS. WILLIAMS: Of course. So, Your 15 Honor, we researched this issue this morning. 16 And after a close reading, we've read both cases 17 and we've reviewed the pertinent portions of the 18 FIRREA statute. And in Freeman versus the FDIC, 19 that case involved borrowers who were seeking to 20 stop a foreclosure filed by the FDIC. 21 And in that case, the court held that 22 the borrower could not stop the foreclosure and 23 was not entitled to a stay of the foreclosure 24 because under FIRREA the borrower should have 25 filed its claims against the FDIC and the failed bank under the FDIC's administrative claims procedures. And the Court allowed the foreclosure to proceed. So the Court interpreted FIRREA to apply solely to -- in that case to the borrowers and to the claims that were asserted by the borrower against the FDIC and the failed bank. THE COURT: In this case you have a claim by the creditor against a borrower? MS. WILLIAMS: Correct, Your Honor. THE COURT: All right. MS. WILLIAMS: And also, the other case that was cited by the defendants is Willner versus Diamond. And in that case, it involved a foreclosure of a loan purchased from the FDIC just like this case. And again, just like this case, the borrower attempted to assert claims relating to the actions of a failed bank. The Court in Willner dismissed the counterclaims filed by the borrower as to the failed bank and the FDIC because the claims were not timely filed under the FDIC's administrative claims procedure. Ultimately, the Court allowed the purchaser of the loan to proceed with its	1 foreclosure. So our argument is that if anything 2 the FIRREA statute would apply to the argument 3 that the borrower has asserted against the failed 4 bank, CFSB, or the FDIC and that they had a very 5 short window of time to file these claims with 6 the FDIC under their administrative claims 7 procedure. 8 And the statute is very clear that 9 there's a small window of time if those claims 10 are not filed, they are time-barred. The Court 11 recognizes that's a harsh penalty, but the 12 purpose of the statute is to allow the FDIC to 13 timely administer and distribute and liquidate 14 any assets of the failed institution. 15 We would just also like to point out 16 that this is the first time -- this morning was 17 the first time we heard of this FIRREA argument. 18 The claim was not asserted in defendant's 19 pleadings. The case has been pending for a 20 significant period of time. And this is the 21 first time we were made aware of this issue. 22 THE COURT: Mr. Varnado, I would 23 like a brief reply. 24 MR. VARNADO: Yes, sir. Brief 25 reply. I disagree with my colleague's interpretation of these cases. I believe that if you look at it, it says anything even having to do with NCP Pilgrim would have to file the case. Maybe I would too. But we think that ultimately this Court lacks a jurisdiction to hear it. And honestly, Ms. Williams can say well, we didn't know about it. But again, subject matter jurisdiction can be raised at any time. And this is a subject matter jurisdiction fight. And if she says, well, it doesn't apply to my claims, then it certainly doesn't apply to hers either. Thank you, Your Honor. THE COURT: Well, here is a -- obviously I haven't spent a long time on this because you're just raising it this morning. Here is the way I read it. It pops out my -- like, it's kind of like you can't see the forest for the trees. This statute appears to me to be talking about claims against the creditor. Not the debtor. This is a claim against the entity of the bank. For instance, let's say there was a deposit -- a demand deposit at the bank. And the person who has the right to that demand deposit
1 knocks on the door of the bank. And the bank has 2 got this big, black sheet across the door saying, 3 we're closed by the FDIC. And this guy is 4 wanting his money, which is the demand deposit. 5 In order to make his claim against the 6 bank to get his demand deposit, at that point in 7 time, he has to take an administrative -- that's 8 an administrative claim governed by the FDIC 9 because the claim is against the bank. 10 Here we have a claim of the bank against 11 the debtor or the purchaser of an interest that 12 the bank once held against the debtor. I don't 13 see anything in that line as it talks about 14 claims against the bank. 15 Now, you have some counterclaims, which 16 if I rule that I don't have any jurisdiction, I 17 can't -- can I look behind to see if there's 18 really a claim against the bank? 19 MR. VARNADO: Well, I think it's 20 one thing, Your Honor. I understand what you're 21 saying. And I understand you've been surprised 22 by this so you're trying to understand it. But 23 the case out of the D.C. Circuit, which I cited, 24 and that is the Freeman case, it says at 25 page 1401 and 1402, which is on the page 6 of 10 of my case, at 1402 it says, we therefore hold that 1821(d) jurisdictional bar is not limited to claims by creditors, which I would say is NCP Pilgrim, but extends to all claims and all actions seeking a determination of rights with respect to the assets of the failed financial institution. And then above it, it says, again, that it's by creditor. So it applies to both, Your Honor. And our position is that FIRREA applies to both. It applies to both the claim of NCP Pilgrim. It applies to my counterclaims. Everything has to go in front of the FDIC. MS. WILLIAMS: Your Honor, I would just respond by saying NCP, I would echo your initial explanation, mirrors what our thoughts were that NCP is not a creditor. It's not a borrower. It's not either one of the underlying institution or of the FDIC. They were assigned this asset from the FDIC and are seeking to enforce it against the borrower. They are not seeking anything from the underlying bank. They don't have any claims against the FDIC or the underlying bank. Also, as I'm sure you're aware, millions	1 of loans are sold routinely by the FDIC to 2 third-party purchasers. Those third-party 3 purchasers go on to foreclose against these 4 loans. There's nothing in either one of these 5 claims that says a third-party purchaser cannot 6 foreclose against a loan. 7 And if that was the case, I would 8 imagine there would be at least a few cases if 9 not many, many cases saying that a third-party 10 purchaser could not foreclose on a loan that they 11 purchased by the FDIC. 12 Also, why would a third-party purchaser 13 try to purchase a loan from the FDIC if they were 14 not allowed to collect it? So it's our position 15 that FIRREA does not apply to the FDIC in this 16 case. We are not making any claims or actions 17 against the assets of the underlying financial 18 institution, Carolina Federal Savings Bank. 19 MR. VARNADO: Your Honor, just 20 briefly. Ms. Williams can say that they're not a 21 creditor, but they are a creditor. And they are 22 a creditor because in the nonnegotiable note was 23 a transfer to sign from bit to bit to bit to 24 them. 25 So in order for you to be able to say well, I find all these assignments are valid, then you would have to -- I think would run into the FIRREA. And so I don't think that Ms. Williams can say, well, I just don't see how a third party can do it because everyone, whether you're a creditor, third party, counterclaimant, has to go and do this and has to go in front of the FDIC. And if she can say, well, I don't know why people would buy it, I haven't handled a lot of FDIC cases, but I think that the statute is clear. The federal statute is clear. The Congress is clear that in order to get this done you have to follow the jurisdictional guidelines set by them. Thank you, Your Honor. THE COURT: All right, I'm going to say that I have jurisdiction. What are your counterclaims, Mr. Varnado? MR. VARNADO: Thank you, Your Honor. Give me one second, and I'll bring them up. My counterclaims were first in accounting just to make sure that we knew the exact amount because there was a HELOC, and there was at least a huge discrepancy between the first number and the second number.

1 My second claim was for unfair trade
2 practices. My third claim was for negligent
3 misrepresentation. My fourth claim was for
4 constructive fraud. My fifth claim was that it
5 was unauthorized practice of law.
6 THE COURT: Okay. Let's take the
7 last one first. What basis do you have for
8 making a claim against a party that they are not
9 authorized to practice law? Is there any civil
10 action claim for that civil claim?
11 MR. VARNADO: It's not a civil
12 claim. It's not a claim that belongs to me that
13 I can assert and get damages for, but I think
14 it's a claim that we can assert because under
15 this case -- the South Carolina Supreme Court
16 case -- I had it right on the tip of my tongue.
17 I can't remember it.
18 THE COURT: The Wachovia case?
19 MR. VARNADO: No. It involves a
20 firm in Columbia. And it will come to me in a
21 second, Your Honor. I'm so sorry. But basically
22 the case says that these documents that are done
23 are very -- have a lot of legal effect. So
24 therefore, because you were doing this without
25 being authorized, then that was the claim that
26 you could be enjoined from doing it. So that's
27 the base of that claim. Your Honor.
28 THE COURT: Are you addressing that
29 in the sense that it's -- it violates a maxim
30 that he who seeks equity must do equity, or is it
31 some sort of equitable maxim that you're raising
32 those factual issues?
33 MR. VARNADO: I don't think it's a
34 legal maxim so much as it's --
35 THE COURT: Well, it wouldn't be a
36 legal maxim. It would be an equitable maxim.
37 MR. VARNADO: That's true, Your
38 Honor. I'm sorry. And it's not an equitable
39 maxim like the one that trips off the tongue, but
40 it basically says that entities like NCP Pilgrim
41 cannot do assignments and transfer. Like for
42 instance, there was an assignment of a
43 mortgage-owed security from CRE Venture to NCP
44 Pilgrim, but there was also known under a limited
45 power of attorney and also then signed by NCP
46 Pilgrim I believe to give them the home equitable
47 variable rate draw.
48 So basically we don't understand how and
49 why CRE Venture gave NCP Pilgrim limited power of
50 attorney, which NCP Pilgrim then gave the note to

1 themselves. And again, we say that would under
2 FIRREA, but I understand your ruling. But if the
3 Supreme Court of South Carolina is right, then
4 that has to be done by South Carolina attorneys.
5 And they say in their pretrial brief
6 that it wasn't. They said well, we have other
7 lawyers who did do it. And they're good lawyers.
8 But again, that's the basis of our claim.
9 THE COURT: Okay. I think that
10 Wachovia case turned on the maxim of unclean
11 hands. And I think in that case my recollection
12 of the facts on that case was that the lender
13 closed a mortgaged loan, which was a second
14 mortgage lien. And the Supreme Court -- I think
15 Justice Toal was the writer of that case?
16 MS. WILLIAMS: I think that's
17 correct, Your Honor.
18 THE COURT: Stated that the closing
19 itself required that under our rules -- under
20 South Carolina rules that that process itself is
21 a practice of law. And therefore, the lender had
22 unclean hands in trying to enforce a mortgage
23 that had not been explained through the expertise
24 of lawyer who would be able to explain to the
25 borrower that kind of document.
26 And then I remember shortly thereafter,
27 Wachovia began hiring lawyers to do the second
28 mortgage.
29 MS. WILLIAMS: Yes.
30 THE COURT: That was the practical
31 effect of that decision if I recall that as well
32 as practice of law. At any rate, it was an
33 unclean hands issue. What I'll let you do on
34 the -- so I think you're acknowledging to me, Mr.
35 Varnado, that there's really no civil claim.
36 There's no civil action the party holds for the
37 undue practice of law.
38 MR. VARNADO: There is none.
39 THE COURT: And unauthorized
40 practice of law. So we will -- I'll keep that in
41 mind as I go through the case for purposes of
42 unclean hands doctrine or maybe some equitable
43 maxim. But the other two you had was unfair
44 trade practices and --
45 MR. VARNADO: Constructive fraud.
46 And those are not -- if you remember the last
47 time we were before you, Your Honor, I said that
48 they were really against Carolina First Savings
49 Bank. And it's our position that if it is a
50 nonnegotiable note, so there's no holder or

1 holder in due course, we think that's gone.
2 And then that would also apply to our
3 defense. It would at least be a defense to the
4 action against NCP. But I don't really think
5 that it would lie versus NCP Pilgrim if that
6 makes sense.
7 THE COURT: I understand what
8 you're saying. I do want to you to explain to me
9 why you're saying this is a nonnegotiable
10 instrument, though.
11 MR. VARNADO: Okay. Your Honor, a
12 negotiable instrument --
13 MS. WILLIAMS: Your Honor, I think
14 that we are in a position we could agree that
15 it's not a negotiable instrument as a line of
16 credit. There's no pay to the order of. I think
17 that's what Mr. Varnado is going to argue. But
18 just to save the Court's time.
19 THE COURT: Okay.
20 MS. WILLIAMS: But you're welcome
21 to keep hearing him. I just wanted to let you
22 know our position.
23 THE COURT: All right. So you
24 agree that it's nonnegotiable? Then let's move
25 on.
26 MR. VARNADO: Thank you, sir.
27 THE COURT: So give me those other.
28 Unfair trade practices, letter of
29 misrepresentation, and what else?
30 MR. VARNADO: And negligence all
31 really lie in our opinion against Carolina First
32 Savings Bank. And at the minimum, they would be
33 defenses that Mr. Clancy could raise against the
34 transfer order. Since we're not in Article 3, we
35 can set that aside. And we're back and looking
36 at a nonnegotiable note, then the transferee
37 steps into the right as transferor on down the
38 line.
39 And the defendant, Mr. Clancy, then has
40 all the defenses that he would have against the
41 initial transferor. Does that make sense, Your
42 Honor?
43 THE COURT: I'm trying to follow
44 it. Let's go back to the original concept so I
45 can eliminate this from my thought process. But
46 a holder in due course is one who holds the
47 property without the claims of others. Is that
48 correct?
49 MR. VARNADO: Yeah. Basically I
50 think a holder in due course buys a negotiable

1 instrument on the open market. And as long as if
2 he or it doesn't know about any of the problems,
3 then he just wipes out everybody.
4 THE COURT: Is there a difference
5 between a holder in due course and a negotiable
6 instrument?
7 MR. VARNADO: I think that, Your
8 Honor, what you're asking is is that the holder
9 in due course is something that a holder of a
10 negotiable instrument can be a superholder and
11 wipe out everybody, but it has to be in the
12 context of a negotiable instrument, which has to
13 be -- a negotiable instrument, which under 3-603,
14 304 has to be paid to the order of, has to be for
15 a sum certain, which is not an HELOC obviously.
16 And for those reasons I think as Ms. Williams
17 alluded to, it's not a negotiable instrument.
18 Therefore, the holder and the holder in
19 due course -- and I know that can drive people
20 crazy -- it goes away. And then you're back to
21 well, under like Dixie Wood Preserving Company
22 versus Albert Gersten which is a case from 1964
23 that I cited in my brief. Then you kind of go
24 back to that. Okay, we're just going to look at
25 nonnegotiable instruments, the transfer,
26 transfer, transfer, and all the rights of the
27 transferee from the transferor.
28 I hope that makes sense, Your Honor.
29 That's as good as I can say it. I'm sorry.
30 THE COURT: So I think that takes
31 care of your opening, right?
32 MR. VARNADO: Yes, sir.
33 THE COURT: I understand where
34 you're coming from, but I'm going to let Ms.
35 Williams rapport on the case too.
36 MS. WILLIAMS: Thank you, Your
37 Honor. I would like to call to the stand Ms.
38 Britt Loukos here on behalf of NCP Pilgrim, LLC.
39 BRITT LOUKOS,
40 having been first duly sworn, was examined and
41 testified as follows:
42 THE COURT: You're under oath.
43 Please answer any questions Ms. Williams has.
44 Q. I'm going to call you Britt if that's
45 okay with you. Thank you for being here today.
46 I would ask -- I know that you have a quiet
47 voice. If you could just speak loudly so
48 everybody in here can hear you.
49 A. I'll do my best.
50 Q. Thank you.

1 (Off-the-record discussion.)
2 Q. Thank you, Your Honor. Ms. Loukos, so
3 what is your official position with the
4 plaintiff?

5 A. I am a senior associate.
6 Q. And in that role, are you someone who is
7 responsible with keeping the records of the
8 plaintiff?

9 A. Yes.
10 Q. Okay. And how about have you been the
11 person responsible for keeping track of the
12 records for this case for this loan with Mr.
13 Clancy?

14 A. Yes.
15 Q. And do you -- I'm going to hand you an
16 exhibit.

17 A. Okay.
18 (Plaintiff's Exhibit No. 1 was
19 marked for identification.)

20 MS. WILLIAMS: Your Honor, I have a
21 separate copy of the exhibits if you would like
22 one to look at.

23 THE COURT: Have all the exhibits
24 that you intend to have her identify been shown
25 to Mr. Varnado?

26 MS. WILLIAMS: Yes, they have. And
27 I have a copy for him here today, Your Honor.

28 THE COURT: Mr. Varnado, do you
29 have any objections to the exhibits coming into
30 evidence that she wants to enter?

31 MR. VARNADO: No, Your Honor.

32 THE COURT: So the exhibits that
33 have been pre-filed. Let me make sure I've got
34 these correctly. I'm going to have you do this
35 for me, Ms. Williams. If you will identify the
36 11 pre-filed exhibits that are filed on January
37 the 27th.

38 Would you identify them by publishing
39 the title and the number of the exhibit? And we
40 can save the Court a lot of time, you a lot of
41 foundational questions, and Mr. Varnado --

42 MS. WILLIAMS: Of course, Your
43 Honor, I --

44 THE COURT: His position allows --
45 MS. WILLIAMS: Okay. It's my
46 understanding you were discussing the exhibits
47 that were attached on January 27th to our
48 pretrial brief? I just want to make sure.

49 THE COURT: Yes. January 27th
50 there were 11 exhibits filed to what appears to

1 be a pretrial -- I guess your pretrial -- hold on
2 just a second.

3 MS. WILLIAMS: That is correct,
4 Your Honor. So Exhibit Number 1 is titled Prime
5 + 1 Line of Credit nonresidential loan. And it
6 is dated June 10, 2004.

7 THE COURT: Okay.
8 MS. WILLIAMS: Exhibit 2 is a
9 mortgage recorded --

10 THE COURT: Excuse me one second.
11 Have each of these exhibits been marked by the
12 reporter?

13 MS. WILLIAMS: I have originals
14 right here today, Your Honor.

15 THE COURT: Let's go ahead and as
16 you publish the name of the exhibit, have her --
17 you've premarked them.

18 MS. WILLIAMS: I have premarked
19 them, Your Honor.

20 THE COURT: So go ahead. And what
21 I'm going to ask you to do is let me look at them
22 as you -- I have copies on the pretrial brief,
23 right?

24 MS. WILLIAMS: Not all of them.
25 There is a full set right here that I just handed
26 to Mr. Varnado that has the majority of the
27 exhibits. I think there are five additional
28 exhibits, Your Honor.

29 THE COURT: Okay. That will save
30 some time. So the first exhibit, Plaintiff's 1,
31 is the Prime + 1, LLC, nonresidential.

32 MS. WILLIAMS: Correct, Your Honor.
33 THE COURT: Okay. Go ahead.

34 Number 2.
35 (Plaintiff's Exhibit No. 2 was
36 marked for identification.)

37 MS. WILLIAMS: Exhibit Number 2 is
38 a mortgage recorded with the Dorchester County
39 Register of Deeds on June 16, 2004 in book 4189
40 at page 82.

41 THE COURT: Okay. Exhibit 3?
42 (Plaintiff's Exhibit No. 3 was
43 marked for identification.)

44 MS. WILLIAMS: Exhibit 3 is a
45 mortgage that was rerecorded with the Dorchester
46 County Register of Deeds on June 5, 2006 at book
47 5393 at page 356.

48 THE COURT: Let me make sure I
49 understand what you're saying. The mortgage
50 which was filed on June 16, 2004, the 4189 at

1 page 82 was recorded again with the corrective
2 measure in it?

3 MS. WILLIAMS: This is our
4 position. I know Mr. Varnado has his different
5 opinions about the rerecorded mortgage.

6 THE COURT: But at any rate, that's
7 what's on the record in Dorchester County? It's
8 a re --

9 MS. WILLIAMS: It's a rerecorded
10 version of Exhibit 1 -- or Exhibit 2.

11 THE COURT: Got it. Thank you.
12 (Plaintiff's Exhibit No. 4 was
13 marked for identification.)

14 MS. WILLIAMS: Sure. Exhibit 4 is
15 a note and mortgage modification dated
16 August 13th, 2009 and recorded with the
17 Dorchester County Register of Deeds in book 7202
18 at page 108.

19 THE COURT: Thank you.
20 (Plaintiff's Exhibit No. 5 was
21 marked for identification.)

22 MS. WILLIAMS: Exhibit 5 another
23 note and mortgage modification agreement dated
24 June 24, 2010 and recorded with the Dorchester
25 County Register of Deeds at book 7560 at
26 page 145.

27 THE COURT: Okay.
28 (Plaintiff's Exhibit No. 6 was
29 marked for identification.)

30 MS. WILLIAMS: Exhibit 6 is an
31 assignment of the real estate mortgage recorded
32 with the Dorchester County Register of Deeds in
33 book 8718 at page 33.

34 THE COURT: Thank you.
35 (Plaintiff's Exhibit No. 7 was
36 marked for identification.)

37 MS. WILLIAMS: Exhibit 7 is an
38 assignment of mortgage or other security
39 instrument. And it was recorded with the
40 Dorchester County Register of Deeds in book 11512
41 at page 126.

42 THE COURT: That's correct. Thank
43 you.

44 (Plaintiff's Exhibit No. 8 was
45 marked for identification.)

46 MS. WILLIAMS: Exhibit 8 is a
47 limited power of attorney from CRE/ADC Venture
48 2012-1, LLC recorded with the Dorchester County
49 Register of Deeds in book 11512 at page 122.

50 MR. VARNADO: Ms. Williams, is that

1 Exhibit 8? I'm sorry.

2 MS. WILLIAMS: Correct.

3 MR. VARNADO: Thank you.

4 (Plaintiff's Exhibit No. 9 was
5 marked for identification.)

6 MS. WILLIAMS: Exhibit 9 is a loan
7 history report from KeyBank Real Estate Capital.
8 And it says that it was printed on January 1 --
9 24, 2013.

10 THE COURT: Hold on one second.

11 I'm trying to -- January --

12 MS. WILLIAMS: 24th, 2013. It's in
13 the bottom left corner. It says date printed.

14 THE COURT: Oh, I see. 1/24/13.

15 Got it. Number 9. Next?

16 (Plaintiff's Exhibit No. 10 was
17 marked for identification.)

18 MS. WILLIAMS: Exhibit 10 is a
19 letter from my office dated October 25, 2018 to
20 Ms. Cercopely and Mr. Clancy.

21 THE COURT: Thank you.
22 (Plaintiff's Exhibit No. 11 was
23 marked for identification.)

24 MS. WILLIAMS: Exhibit 11 is a copy
25 of the original complaint filed by my office. It
26 doesn't include the mini exhibits.

27 THE COURT: Okay.
28 (Plaintiff's Exhibit No. 12 was
29 marked for identification.)

30 MS. WILLIAMS: Exhibit 12 is the
31 amended complaint filed by my office on April 5,
32 2019.

33 THE COURT: Thank you.

34 (Plaintiff's Exhibit No. 13 was
35 marked for identification.)

36 MS. WILLIAMS: Exhibit 13 is NCP

37 Pilgrim's affidavit of debt. Dated today.

38 MR. VARNADO: I think -- Your
39 Honor, I think Ms. Williams gave that to me via
40 e-mail, but I don't have a copy in this file.

41 (Off-the-record discussion.)
42 (Plaintiff's Exhibit No. 14 was
43 marked for identification.)

44 MS. WILLIAMS: Exhibit 14 is a copy
45 of the February 11, 2010 foreclosure action filed
46 by Carolina Federal Savings Bank against David S.
47 Clancy, Barbara A. Clancy, South Coast Community
48 Bank, and Ms. Joan -- you pronounce it so great
49 -- Geanuracos.

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1 (Plaintiff's Exhibit No. 15 was
2 marked for identification.)
3 MS. WILLIAMS: And Exhibit 15 is a
4 copy of the March 29, 2010 answer filed on behalf
5 of David S. Clancy and Barbara A. Clancy.
6 THE COURT: In your 2010 case?
7 MS. WILLIAMS: Correct.
8 (Plaintiff's Exhibit No. 16 was
9 marked for identification.)
10 MS. WILLIAMS: And Exhibit 16 is a
11 copy of the current tax bill and tax notice for
12 the property of 117 South Cedar Street in
13 Dorchester County.
14 THE COURT: All right.
15 MS. WILLIAMS: We did also file an
16 affidavit of attorney's fees with the Court prior
17 to the hearing today. Happy to enter it into
18 evidence as an exhibit, but it is part of the
19 Court's records.
20 THE COURT: It depends on how I
21 handle this, but it's likely if I don't rule
22 today and I rule later, I may have a separate
23 hearing on the attorney's fees. So let me make
24 that decision later.
25 MS. WILLIAMS: Thank you, Your
Honor.
THE COURT: It's not part of the
record as we speak right now.
MS. WILLIAMS: Okay. And Your
Honor, I know we just walked through all of
these. I just want to confirm that all these
exhibits have been admitted.
THE COURT: All of the exhibits
without objection has been admitted into
evidence.
MS. WILLIAMS: Thank you, Your
Honor.
THE COURT: That means, Ms.
Williams, to the extent you can do so without
interfering with the rhythm of your examination,
you'll need to go through the foundational bases
from the admission of the document.
MS. WILLIAMS: Okay, Your Honor. I
will be as timely as possible.
THE COURT: Sometimes that throws
lawyers off, and they're prepared to go down one
path. And the judge all of a sudden takes all
that necessity out from underneath them. And
then they're at a loss of where to get back on
the railroad train. So good luck to you.

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1 Q. And while you're still looking at
2 Exhibit 1, in the top right corner, what is the
3 maturity date of this loan?
4 A. June 10, 2004. Oh, I apologize.
5 June 10, 2009.
6 Q. Okay. And if you look back at the
7 maturity date that was added to Exhibit 3, is
8 that the same maturity date, June 10, 2009?
9 A. It is.
10 Q. All right. And let's add -- let's
11 discuss the second addition to paragraph 4A on
12 Exhibit 3, the loan amount of \$258,940. If you
13 look at paragraph 3 of Exhibit 3, does it state
14 -- does the mortgage state the loan amount?
15 A. It does.
16 Q. And what amount does it say?
17 A. \$258,940.
18 Q. And if you also look at Exhibit 2 on
19 paragraph 3, does it state the loan amount?
20 A. It does.
21 Q. And what is that number?
22 A. \$258,940.
23 Q. So really the only change to Exhibit 3
24 was the addition of the maturity date because the
25 loan amount was already on the face of the
mortgage; is that correct?
A. Correct.
Q. All right. And is it your understanding
that this loan and mortgage were modified?
A. Yes.
Q. Okay. I'm going to hand you Exhibit 4.
If you flip to the second page of Exhibit 4, this
is a note and mortgage modification agreement
dated August 13, 2009, correct?
A. Correct.
Q. And as we already talked about, if you
look at the first page of this exhibit, was it
recorded with the Dorchester County Register of
Deeds?
A. It was.
Q. Okay. And if you look at the bottom of
the second page of Exhibit 4, does this
modification agreement appear to be signed by Mr.
David S. Clancy and Ms. Barbara A. Clancy?
A. Yes.
Q. Do you know anything about what
disclosures were made to Mr. Clancy and Ms.
Barbara Clancy in connection with Exhibit 4?
A. I don't.
Q. So looking at Exhibit 4, let's look at

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1 MS. WILLIAMS: Well, thank you.
2 EXAMINATION
3 BY MS. WILLIAMS:
4 Q. Ms. Loukos, I'm going to hand you what
5 has been admitted as Plaintiff's Exhibits 1 and
6 2. And if you look at Exhibit 1, which is the
7 note in the principle amount of \$258,400 dated
8 June 10, 2004; is that correct?
9 A. Correct.
10 Q. And looking at Exhibit 2, the date of
11 this mortgage is June 16, 2004; is that correct?
12 A. Yes.
13 Q. And do your records looking at Exhibit 2
14 does that indicate that this mortgage was
15 recorded with the Dorchester County Register of
16 Deeds?
17 A. Yes.
18 Q. And I'm going to hand you what has been
19 marked -- or entered into evidence as Plaintiff's
20 Exhibit 3. Does Exhibit 3 show that the original
21 mortgage was rerecorded on June 5, 2006 with the
22 Dorchester County Register of Deeds?
23 A. Yes.
24 Q. And looking at Exhibit 3, was there
25 information added to the mortgage after it was
originally recorded?
A. Yes.
Q. And what changes were made?
A. I believe section 4. They added the
maturity date and loan amount.
Q. Okay. And also looks there was added at
the very top was some asterisks. There was some
information added to Exhibit 3; is that correct?
A. Yes.
Q. And what was that information?
A. It says, this mortgage is being
rerecorded to add maturity date and loan amount.
Q. So I'm going to ask you to do some
comparisons of Exhibit 2 and Exhibit 3. So as
you talked about in paragraph 4, the maturity
date was added to Exhibit 3; is that correct?
A. Correct.
Q. Okay. And if you look right above that
on paragraph 4A of Exhibit 3, it says the equity
line of credit number; is that correct?
A. Yes.
Q. If you look at that number, does it
match the loan number at the very top right
corner of Exhibit 1?
A. Yes.

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1 the first whereas clause. What does that say is
2 the original principle amount of the loan?
3 A. \$258,940.
4 Q. And if you're still looking at that same
5 paragraph, what is does it say is the current
6 principle balance of the loan at the time this
7 modification agreement was signed?
8 A. I believe it's the same amount. The
9 \$258,940.
10 Q. If you look at the end of the first
11 whereas clause, it says, the current principle
12 balance --
13 A. Oh, I apologize. \$237,990.52.
14 Q. And if you look at the second whereas
15 clause, is there reference made to a recorded
16 mortgage that secured this loan?
17 A. Yes.
18 Q. And what is the amount of the mortgage?
19 A. \$258,940.
20 Q. And then looking at item number 1 on
21 this note and mortgage modification, was there an
22 adjustment made to the maturity date of the note?
23 A. Can you tell me where that one is again?
24 THE COURT: Item 1.
25 Q. Item number 1. It says, we are hereby
extending the loan --
A. Extending the loan. August 5, 2019.
Q. I'm going to hand you what's been marked
as Exhibit Number 5. Looking at Exhibit
Number 5, is it your understanding this was
recorded with the Dorchester County Register of
Deeds?
A. Yes.
Q. If you look at page number 2, this is a
note and mortgage modification agreement dated
June 24, 2010; is that correct?
A. Correct.
Q. And if you look at the bottom of the
second page of Exhibit 5, does it appear that
this document was signed by David S. Clancy and
Barbara A. Clancy?
A. Yes.
Q. Do you know anything about what
disclosures were made to Mr. Clancy and Ms.
Barbara Clancy in connection with this exhibit?
A. No.
Q. So again, we're going to look at the two
whereas clauses. So looking at the first whereas
clause of Exhibit 5, what did it state was the
original principle amount of this loan?

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1 A. \$258,940.
 2 Q. And what was the current principle
 3 balance at the time that this modification
 4 agreement was executed?
 5 A. \$237,990.52.
 6 Q. Okay. And again, looking at the second
 7 whereas clause, does it again reference a
 8 recorded mortgage in the amount of \$258,940?
 9 A. It does.
 10 Q. Okay. And then looking at item number 1
 11 after the Now Therefore paragraph, was the
 12 maturity date of this loan changed from August 5,
 13 2019 to July 5, 2012?
 14 A. Yes.
 15 Q. So after looking at Exhibits 4 and 5,
 16 even if there was a question about the maturity
 17 date that was added to the rerecorded mortgage,
 18 it looks like Mr. Clancy signed two note and
 19 mortgage modification agreements confirming the
 20 existence of the mortgage on the subject property
 21 after the original mortgage was rerecorded; is
 22 that correct?
 23 A. Yes.
 24 Q. I'm going to hand you what has been
 25 marked as Plaintiff's Exhibit 6. Looking at
 Exhibit 6, does it appear this document was
 recorded with the Dorchester County Register of
 Deeds?
 A. Yes.
 Q. And again, looking at Exhibit 6, was the
 note and mortgage originally assigned by the FDIC
 acting as a receiver for Carolina Federal Savings
 Bank to CRE/ADC Venture 2012-1, LLC?
 A. Yes.
 Q. And that assignment occurred -- if you
 flip to the last page or second-to-last page, it
 appears that this assignment was effective the
 11th day of December 2012; is that correct?
 A. Correct.
 Q. I'm going to hand you what has been
 marked as Plaintiff's Exhibit 7. Looking at
 Exhibit 7, does it appear this document was
 recorded with the Dorchester County Register of
 Deeds?
 A. Yes.
 Q. And looking at the top left corner of
 the second page of Exhibit 7, who prepared this
 document?
 A. Collin Ferguson.
 Q. And do you know if Mr. Ferguson is a

1 lawyer?
 2 A. Yes.
 3 Q. Do you routinely do business with him on
 4 behalf of NCP Pilgrim?
 5 A. Yes.
 6 Q. And if you look at the third page of
 7 Exhibit 7, who assigned this assignment?
 8 A. Marshall Burchard.
 9 Q. And did he sign on behalf -- he worked
 10 for NCP Pilgrim; is that correct?
 11 A. Correct.
 12 MR. VARNADO: I'm sorry, Counsel.
 13 Is this 7? Were you talking the signature on 7?
 14 MS. WILLIAMS: Correct. Yes.
 15 MR. VARNADO: Sorry, Your Honor.
 16 Q. Just for clarification, Exhibit 7 is the
 17 assignment from CRE/ADC Venture 2012-1, LLC, to
 18 NCP Pilgrim of the note -- of the mortgage; is
 19 that correct?
 20 A. Yes.
 21 Q. And if you flip to Exhibit A of the
 22 assignment which is the last page, it states that
 23 what's being assigned is the mortgage from
 24 Barbara Clancy in favor of Carolina Federal
 25 Savings Bank dated June 10, 2004 in the original
 principle amount of \$258,940; is that correct?
 A. Yes.
 Q. And the effective date of this
 assignment is June 6, 2018; is that correct?
 A. Yes.
 Q. I'm going to hand you what's been marked
 as Plaintiff's Exhibit 8. Does it appear that
 this document was recorded with the Dorchester
 County Register of Deeds?
 A. Yes.
 Q. Exhibit 8 is a limited power of attorney
 from CRE/ADC Venture 2012-1, LLC; is that
 correct?
 A. Yes.
 Q. And if you look at the language of
 Exhibit 8, CRE/ADC Venture is designating
 Marshall Burchard as an authorized signatory; is
 that correct?
 A. Yes.
 Q. And how many other loans does NCP
 Pilgrim own in South Carolina?
 A. Nine.
 Q. So in your opinion has Mr. Clancy
 complied with the terms and provisions of the
 loan documents?

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1 A. No.
 2 Q. Has he made the required monthly payment
 3 to principle and interest?
 4 A. No.
 5 Q. I'm going to hand you what's been marked
 6 as Exhibit Number 9. Looking at Exhibit 9, what
 7 is the last date that Mr. Clancy made a payment
 8 on this loan?
 9 A. January 14, 2013.
 10 Q. So the last payment was made over 7
 11 years ago; is that correct?
 12 A. Yes.
 13 Q. So if you flip back to Exhibit 1, if you
 14 look at page 2 and paragraph 23, does this loan
 15 provide for the collection of reasonable
 16 attorney's fees and costs?
 17 A. Yes.
 18 Q. I'm going to hand you what's been marked
 19 as Plaintiff's Exhibit 10. Before the initiation
 20 of this litigation, did you ask our office to
 21 send a demand letter to Mr. Clancy?
 22 A. I did.
 23 Q. And is Exhibit 10 a copy of that letter?
 24 A. Yes.
 25 Q. And if you look at Exhibit 10, it's
 right there in bold, what was the stated amount
 to cure?
 A. \$430,391.52.
 Q. And shortly after this demand letter was
 sent, NCP filed this foreclosure action; is that
 correct?
 A. Yes.
 Q. I'm going to hand you what's been marked
 as Plaintiff's Exhibit 11, a copy of the original
 complaint filed in this action. If you turn to
 the fourth page or what is page 4 at the bottom,
 Exhibit 16 -- paragraph 16 of Exhibit 11, how
 much was -- what is the amount that was due under
 the loan documents as of October 31, 2018?
 A. \$430,391.52.
 Q. And at some point after this complaint
 was filed and the demand letter was sent out, did
 you later determine that the \$430,000 number was
 incorrect?
 A. Yes. We found a mathematical error.
 Q. Okay. And is it correct to say that
 specifically NCP inadvertently incorporated a
 default interest rate of 5 percent that was not
 included in the terms of the note?
 A. Yes.

1 Q. And did NCP take immediate actions to
 2 try to fix this mathematical error?
 3 A. Yes. We filed an amended document.
 4 Q. And is it fair to say that this loan was
 5 the first loan you worked on for NCP and it was
 6 the first time you reviewed loan documents?
 7 A. It was.
 8 Q. I'm going to hand you what's been marked
 9 as Exhibit 12. This is a copy of the amended
 10 complaint filed by NCP on April 5, 2018. And if
 11 you flip to the third page, again, to
 12 paragraph 16, what is the amount there that was
 13 stated that's due under the loan documents as of
 14 January 7, 2019?
 15 A. \$347 -- well, \$347,020.03.
 16 Q. Okay. And how did you calculate that
 17 figure? Did you remove the 5 percent incorrect
 18 default interest rate?
 19 A. We removed the 5 percent incorrect
 20 default rate.
 21 Q. And then I'm going to hand you what's
 22 been marked as Exhibit 13. This is a copy of
 23 your affidavit -- or NCP's affidavit of debt that
 24 you signed; is that correct?
 25 A. Correct.
 Q. And looking at that exhibit, what is the
 total amount of principle due on this loan?
 A. \$234,657.55.
 (Off-the-record discussion.)
 Q. And if you look at the bottom of the
 affidavit of debt, Exhibit 13, what is the total
 amount due on this loan?
 A. \$367,963.19.
 Q. And what is the per diem interest rate?
 A. \$35.85 per day.
 Q. And is it your understanding that this
 figure is based on all the information that NCP
 has in its loan file?
 A. Yes.
 Q. And do you believe the total amount due
 of \$367,963.19 to be true and correct?
 A. Yes.
 Q. And as part of that figure, did you also
 include the outstanding 2019 property taxes?
 A. Yes.
 Q. Is it your understanding that those
 property taxes have been paid?
 A. I believe they're unpaid.
 Q. I'm going to hand you Plaintiff's
 Exhibit 16, which is a copy of the tax bill and

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1 current tax status of the taxes on 117 South 2 Cedar Street. 3 Looking at the bottom of Exhibit 16, 4 what is the total amount of taxes currently due? 5 A. \$7,104.88. 6 Q. If you look at the top right left corner 7 of this document, what is the date that it was 8 printed? 9 A. January 23, 2020. 10 MS. WILLIAMS: Thank you. I don't 11 have any additional questions then. If you will 12 answer any that Mr. Varnado may have for you. 13 THE COURT: Excuse me one second. 14 Just so I'm clear. The Exhibit 13 that I hold in 15 my hand is not a copy -- or doesn't appear to be 16 a copy. Have I got a copy of it or have I got 17 the actual -- 18 MS. WILLIAMS: Sure. That was the 19 same question Mr. Varnado just had. Ms. Loukos 20 just signed these this morning. So I had her 21 sign three. So there is an original in the court 22 file. You have an original. And Mr. Varnado has 23 an original as well. 24 (Off-the-record discussion.) 25 (Defendant's Exhibit No. 1 was marked for identification.) (Defendant's Exhibit No. 2 was marked for identification.) MR. VARNADO: Your Honor, may it please the Court. I have premarked two exhibits. I don't have extra copies of them. Ms. Williams has -- THE COURT: Did she agree to them? MS. WILLIAMS: I did just look at them, Your Honor. And yes. THE COURT: They are acceptable and you'll let them be entered without objection? MS. WILLIAMS: That is correct, Your Honor. THE COURT: All right. Now if you would like, Mr. Varnado, we can turn on the projector. Everybody can see the exhibits at the same time. Or we can struggle along. I can maybe send those out to be copied. What would you like me to do? MR. VARNADO: Whatever is easiest, Judge. I think copies would be quick. It's only three pages, but if you want to use the projector. THE COURT: I am totally incapable	1 of operating either one of those machines. 2 MS. WILLIAMS: We may have at least 3 one extra copy of this letter. (A recess was taken.) 4 MR. VARNADO: May it please the 5 Court. 6 EXAMINATION 7 BY MR. VARNADO: 8 Q. Hey, I'm sorry. I already forgot your 9 name. 10 A. It's Britt. 11 Q. Britt, Okay. And what was your last 12 name again? 13 A. Loukos. 14 Q. Loukos. Okay. And you work at NCP's 15 office? 16 A. Yes. 17 Q. And where is that located? 18 A. Charlotte. 19 Q. Charlotte, North Carolina. And your 20 title is what again? 21 A. Senior associate. 22 Q. Junior associate? 23 A. Senior. 24 Q. Senior associate. I'm sorry. How many 25 senior associates are there? A. Just me. Q. Just you? A. Yes. Q. And then how many work underneath you, junior associates? A. Yeah, I don't really feel like we're structured that way. There's a few accountants and a couple of other associates that don't report to me directly. Q. Okay. Are you an accountant? A. No. Q. What is your degree in? A. I have a masters degree in finance. Q. Okay. And just tell me where you went to school just really quickly? A. I got my masters at University of North Carolina of Charlotte. And my undergraduate work is at Colorado Christian University. Q. Okay, Britt. Thank you very much. THE COURT: They're both in finance? THE WITNESS: No. THE COURT: What was your undergraduate degree in?
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1 THE WITNESS: Biblical studies. 2 Yeah. Unrelated. 3 Q. But you got a masters in finance? 4 A. I did. 5 Q. When I say you, I'm going to talk about 6 NCP Pilgrim. Is that a fair -- 7 A. I understand. 8 Q. Do you own the Clancy debt? 9 A. Yes. 10 Q. You own the debt? 11 A. I believe so. Yes. 12 Q. Okay. Well, how do you own the Clancy 13 debt? What would you point to to show that you 14 own -- 15 A. We have an assignment. 16 Q. You have an assignment of mortgage, 17 right? 18 A. I believe so. 19 (Off-the-record discussion.) 20 Q. Britt, this is Exhibit Number 7. This 21 is a plaintiff's exhibit. 22 A. Got it. 23 Q. You have it? 24 A. Yes, sir. 25 Q. Okay, great. And this is -- what is this? What is it titled on the second page? A. Assignment of mortgage or other security instrument. Q. So you've got a mortgage, correct? A. Correct. Q. I'm going to come back to that in a little bit, but what about the debt? What about the note? Where is that? A. In a file. Q. It's what? A. I don't have it in an exhibit. Q. Okay. Do you have it? Do you know it exists? A. Yes. Q. It exists? A. Yes. Q. Did you turn it over to your attorneys in discovery? A. I don't recall. Q. Okay. A. It's no problem to pull the note. We have it in a file. I just don't have it with me currently. Q. Well, this is the trial. So do you have an original copy of the note?	1 A. Not with me. 2 Q. Do you have it even here in the 3 courtroom? In other words, can we take a few 4 minutes and have you fish it out, or is it too 5 much trouble? 6 A. It's not too much trouble. I just don't 7 have it with me. 8 Q. You don't have it with you at all? 9 A. No. 10 Q. It's back in Charlotte? 11 A. I believe that it's actually in our 12 Connecticut office which is where we keep all of 13 our files just for safekeeping. We keep them all 14 in one place. 15 Q. Okay. Britt, was NCP a servicer? 16 A. Yes. 17 Q. It was a servicer? 18 A. Yes. 19 Q. Can you speak up a little bit? I'm 20 sorry. 21 A. I mean, I guess I'm not necessarily 22 understanding what you're asking, but do I -- 23 MS. WILLIAMS: Your Honor, I would 24 just object. She doesn't -- I don't think -- 25 maybe Mr. Varnado could define the word servicer. I don't know that Ms. Loukos knows exactly what that term means. MR. VARNADO: Okay. That's fair enough. THE COURT: Why don't you ask if she knows what it means? Q. Ms. Loukos, do you know what a servicer is? What it commonly means? A. I think I generally understand, but I don't know exactly what you're referring to. So if I could define -- Q. No. I want to know based on your understanding of a servicer is, was NCP the servicer? A. I'm representing NCP so I just want to make sure that I'm answering on behalf of the company that I work for in an appropriate way. Q. And I think that's fine. I think we all -- A. Because what if I misunderstand? You know? Q. We all appreciate that. I want to know based on your understanding of what a servicer is, was NCP a servicer? MS. WILLIAMS: Your Honor, I would

1 just object. I don't know that it matters what 2 Ms. Loukos's definition of a servicer is. There 3 is a general definition of a servicer that I 4 would assume that Mr. Varnado is using. If he 5 could just define the term, I'm sure Ms. Loukos 6 would be happy to answer the question. 7 MR. VARNADO: I think she can 8 answer it. She knows -- 9 THE WITNESS: The way that I see a 10 servicer -- 11 THE COURT: Hold on. I'm going to 12 overrule the objection. Let her explain to us 13 what she knows of a servicer and whether or not 14 the company she works for is a servicer or not. 15 A. I'm happy to do that. So I think I have 16 a general idea of what it is that we do. We buy 17 notes. And then I typically manage those assets. 18 I'm not sure what your definition necessarily of 19 servicer is. But we go through, we see who 20 potentially hasn't made their payment in a while. 21 I take note of it. And then I kind of 22 pass it on to Lauren and have her investigate 23 further. 24 Q. Ms. Williams? 25 A. Yes. Q. Okay. Great. Do you know if servicer is a federally-defined term? A. I'm not sure. Q. Okay. Does CRE Venture, did that entity, did it own the note? A. I believe so. Q. Does it still own the note? A. I believe that they have sold it to us. Q. You believe that they sold the loan, the note to you, but you don't have it here? You think it could be in Connecticut? A. Correct. So to explain to you a little bit about how our office works, frankly, I work remote the majority of the time. And I think that that would be kind of silly to leave client files at my personal house. So we keep all of our corporate files just for safekeeping. I mean, these are pretty important documents. So we keep them all stored away in Connecticut. Our team that physically looks through stuff like that wasn't available when I made the request, which, to be honest, it was I believe Thursday afternoon. So it wasn't possible to go to where we keep all of the original files like a	Page 37 1 note that you're requesting and have it here on 2 time. But it's no problem for me to pull that 3 for you. 4 MS. WILLIAMS: Your Honor, I would 5 just ask that we would be allowed to provide the 6 original note to the Court and to Mr. Varnado at 7 a later date. 8 THE COURT: Let me ask you 9 something. I'm a little confused. 10 MR. VARNADO: Yes, sir. 11 THE COURT: Exhibit Number 1 12 directly states, I promise to pay to you -- that 13 would be the lender -- or your order at your 14 address or at such other location as you may 15 designate so much of the credit limit as may be 16 advanced under the agreement plus finance 17 charges, fees, charges, costs and expenses as 18 described in the line of credit. 19 Doesn't that create a promise to pay? 20 MR. VARNADO: It creates a promise 21 to pay. It creates a nonnegotiable promise to 22 pay because it doesn't have a total -- it doesn't 23 have a set sum certain amount. So therefore, 24 it's a nonnegotiable promissory note. That's our 25 position, Your Honor. THE COURT: Is there a separate obligation to pay someone other than this? I don't think there would be. I've never -- I mean, I've closed hundreds of these when I was practicing law. And all we do is just -- I mean, you sign a line of credit and a mortgage. And that's the note and mortgage. MR. VARNADO: Yes, sir. But I asked Ms. Britt if she had the original. She doesn't. THE WITNESS: I don't have it with me. We have the note. MR. VARNADO: Ms. Williams, if you're willing to have her send it to the Court, I don't have if mind having it be made a -- leave it open for an exhibit if that would be something we would be willing to do. MS. WILLIAMS: Yes. We're happy to provide that. MR. VARNADO: Would that be acceptable, Your Honor? MS. WILLIAMS: If that's what the Court requests. THE COURT: Exhibit 1 is the obligation to pay, correct?
Page 39 1 MR. VARNADO: It is a copy of the 2 obligation to pay. 3 THE COURT: Copy of the obligation. 4 MR. VARNADO: Yes, sir. 5 THE COURT: And you want to see the 6 original of this document? 7 MR. VARNADO: Yes, sir. That's 8 all. Thank you. 9 THE COURT: All right. I'll allow 10 the record to remain open for purposes of the 11 plaintiff to submit in camera the original note 12 with you present, Mr. Varnado. I will examine in 13 camera the original of this document, Exhibit 1, 14 and determine if it is -- if Exhibit 1 the copy 15 is the accurate copy of the original note -- of 16 the original obligation to pay. 17 And if so, I will allow Exhibit 1 to 18 stand as an exhibit of the obligation to pay. 19 MR. VARNADO: Thank you, Your 20 Honor. 21 THE COURT: Is that okay? 22 MR. VARNADO: Yes, sir. It's very 23 okay. Thank you, sir. 24 (BY MR. VARNADO) 25 Q. The last questions I'm going to have for you, Britt, are this. In Exhibit Number 8 -- Plaintiff's Exhibit Number 8, which I believe you have, on the last page of Exhibit Number 8 is the signature by Mark Hedstrom. Do you know Mark Hedstrom? A. I don't personally know him. Q. Do you know if he's involved with your company? A. No. Q. He's not? A. I don't know him. Q. You don't know him at all. Okay. I'm sorry. Thank you. And how do you know -- do you have any knowledge today -- and I don't think you do, but do you -- if Mr. Hedstrom had the authority to sign Exhibit 8? A. I don't know. Q. Okay. MR. VARNADO: Your Honor, may I have one minute? And I may be able to finish. Your Honor, that's all I have. Thank you very much, Britt. You may have some more questions from Ms. Williams. MS. WILLIAMS: I just have two quick things, Your Honor. We'll be very fast.	Page 40 1 Two additional exhibits. And I don't have 2 copies, but these have been produced. 3 MR. VARNADO: Your Honor, we accept 4 Exhibits 16 and 17. 5 MS. WILLIAMS: I think it's 17 and 6 18. So I have Plaintiff's Exhibit 17 and 18. 7 And I'm happy to have the witness identify them, 8 or I can just say them out loud. 9 THE COURT: Are you objecting to 10 them? 11 MS. WILLIAMS: He's not objecting. 12 MR. VARNADO: No, sir. I'm not. 13 THE COURT: So why don't you use 14 your ELMO? I want to use this. 15 MS. WILLIAMS: Sure. We got it all 16 set up. 17 (Plaintiff's Exhibit No. 17 was 18 marked for identification.) 19 (Plaintiff's Exhibit No. 18 was 20 marked for identification.) 21 MS. WILLIAMS: I don't know if 22 everybody can read that, but maybe you have it on 23 your computer in front of you. 24 THE WITNESS: I can see it. It's 25 fancy. THE COURT: You can flip your screen up and it'll turn on. Turn your screen on. MS. WILLIAMS: I'll wait for Mr. Varnado. MR. VARNADO: Thank you, Your Honor. I do have the screen up. THE COURT: All right. EXAMINATION BY MS. WILLIAMS: Q. And for the record, we are looking at Plaintiff's Exhibit 17. I can't fit it all in the picture at the same time. Britt, looking at Exhibit 17, the title of this document is the assignment of the home equity variable draw agreement; is that correct? A. Yes. Q. If you look at the face of the agreement, does this say that the FDIC in its capacity as receiver for Carolina Federal Savings Bank is assigning the home equity variable draw agreement between David S. Clancy and Carolina Federal Savings Bank to CRE/ADC Venture 2012-1, LLC? A. Yes.

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1 Q. What is the date of this agreement?
 2 A. December 11, 2012.
 3 Q. And just for clarity, this third
 paragraph says that the home equity variable draw
 4 agreement is being assigned; is that correct?
 5 A. Correct.
 6 Q. And it says it's between David S. Clancy
 and Carolina Federal Savings Bank --
 7 A. Yes.
 8 Q. -- dated June 10, 2004, correct?
 9 A. Yes.
 10 MS. WILLIAMS: Okay. I have an
 additional last-minute addition for the exhibits.
 11 This is what's been marked as Exhibit 19. This
 was produced as well.
 12 MR. VARNADO: No objection, Your
 Honor.
 13 THE COURT: Thank you, sir.
 (Plaintiff's Exhibit No. 19 was
 14 marked for identification.)
 15 Q. I'll have it over here for everyone to
 see. You're looking at what's been marked as
 16 Plaintiff's Exhibit 19. This is an omnibus
 agreement. Is that correct, Ms. Loukos?
 17 A. Yes.
 18 Q. And under this agreement, the FDIC in
 its capacity as receiver for Carolina Federal
 19 Savings Bank is assigning all loan documents to
 CRE/ADC Venture 2012-1, LLC; is that correct?
 20 A. Yes.
 21 Q. And so specifically, it is assigning all
 loan documents if you look at the bottom of the
 22 first paragraph associated with the loan made by
 Federal -- Carolina Federal Savings Bank to David
 23 S. Clancy dated June 10, 2004 in the amount of
 \$258,940; is that correct?
 24 A. Yes.
 25 Q. And what is the date of Exhibit 19?
 A. December 11, 2012.
 Q. And I'm now going to show you what has
 been marked as Plaintiff's Exhibit 18. Looking
 at Exhibit 18, this is the assignment of the home
 equity variable draw agreement; is that correct?
 A. Yes.
 Q. And it is from CRE/ADC Venture 2012-1,
 LLC to NCP Pilgrim, LLC; is that correct?
 A. Yes.
 Q. And if you look at the center indented
 paragraph, CRE is assigning the home equity
 variable draw agreement between David S. Clancy

1 and Carolina Federal Savings Bank dated June 10,
 2004; is that correct?
 3 A. Yes.
 4 Q. And what is the date of this agreement?
 5 A. June 26, 2018.
 6 MS. WILLIAMS: No further
 questions, Your Honor.
 7 MR. VARNADO: Briefly, Your Honor,
 if I may.
 8 EXAMINATION
 9 BY MR. VARNADO:
 10 Q. Britt, do you know who owns CRE Venture?
 Do you know what kind of entity it is? Who owned
 11 it?
 12 A. I don't.
 13 Q. Do you know if the FDIC owned it?
 14 A. I don't.
 15 Q. Do you know if the FDIC sold a
 participation of 40 percent to ColFin?
 16 A. I don't.
 17 Q. Have you seen any other document that
 shows the FDIC approved the last Exhibit 18 that
 18 you read? Do you have any knowledge of that that
 was it was approved by the FDIC?
 19 A. I don't believe so.
 20 MR. VARNADO: Thank you, Your
 Honor.
 21 THE COURT: Thank you.
 22 MS. WILLIAMS: No further
 questions, Your Honor.
 23 THE COURT: Thank you.
 24 MS. WILLIAMS: Your Honor, at this
 time, other than the attorney's fees that we've
 25 agreed to take up a later date, plaintiff rests
 its case.
 THE COURT: Thank you. Mr.
 Varnado?
 MR. VARNADO: Your Honor, at this
 time Mr. Clancy will not put up a defense. And
 I'll prosecute his counterclaims. We are going
 to go on the -- saying respectfully that we
 believe that the Court does not have
 jurisdiction.
 THE COURT: So you're not going
 forward on your counterclaims? And you're
 resting your defense on the facts that this Court
 doesn't have jurisdiction over the matter because
 of the argument you made earlier?
 MR. VARNADO: Yes, sir.
 THE COURT: Thank you very much.

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1 Then, what I'm going to do is I'm going to take
 2 the matter under consideration. Ms. Williams, I
 wonder if you would be so kind as to have the
 record transcribed for my benefit?
 3 MS. WILLIAMS: Of course, Your
 Honor.
 4 THE COURT: You can either have it
 transcribed just simply electronically. Or if
 5 you want the paper, I'm going to read it on my
 computer.
 6 MS. WILLIAMS: Okay.
 7 THE COURT: And I'll make a
 decision. Once I make a decision, what we'll do
 8 is we'll reconvene for purposes of -- well, first
 of all, we will need to get together soon to look
 9 at the note -- what I call the note. It's the
 line of credit.
 10 MS. WILLIAMS: Right.
 11 THE COURT: And once I've had an
 opportunity to review the record and cogitate a
 12 little bit on what I've heard, I'll render a
 decision. Probably will ask one or two of you to
 13 write an order for me. Although I've been known
 to write my own orders. But even when you write
 an order for me, I've been known to change it
 14 dramatically.
 15 So a lot of the reasons I ask people to
 write orders for me is because usually in your
 word processors you have all the dates and the
 16 recording figures, and all that stuff is already
 there. And I don't have to retype it.
 17 MS. WILLIAMS: Correct.
 18 THE COURT: So I often just simply
 rely on the order for basically that purpose, so
 I don't have to retype things like that. I'm the
 19 best cut and paste judge in South Carolina.
 20 MS. WILLIAMS: Quite a feat.
 21 MR. VARNADO: Your Honor, would you
 issue order a Form 4, or do you just want to wait
 until you decide everything on the jurisdiction?
 22 THE COURT: On jurisdiction? Let
 me put that in the order itself. I guess -- and
 23 this is something you need to think about, if you
 appeal the case and it's determined that I didn't
 have jurisdiction, are you reserving -- I'm not
 24 sure if you're reserving your counterclaims? Or
 have you abandoned them all together?
 25 MR. VARNADO: I haven't abandoned
 them all together, but if an Appellate Court
 holds that you really did in fact have

1 jurisdiction, then I think that I would -- think
 that I would waive the counterclaims.
 2 THE COURT: That's what I would
 expect you --
 3 MR. VARNADO: But however if you --
 respectfully, if Your Honor didn't have
 4 jurisdiction, then everything would be to the --
 I think that's what it is, Your Honor.
 5 MS. WILLIAMS: Your Honor, I guess
 it would be our position that either Mr. Varnado
 6 decides today to waive his counterclaims in full
 or he argues them today to preserve them for the
 7 record. If he does not argue them today, it
 would be our position they're waived in full.
 8 THE COURT: Well, I think he said
 that. He understands that if the jurisdictional
 9 issue comes out different than what my decision
 has been and he is correct and I didn't have
 10 jurisdiction, then I couldn't have heard them
 anyway.
 11 But if I had jurisdiction and I'm
 affirmed on the remainder of the decision, then
 12 he will have waived his counterclaims as of this
 moment.
 13 MS. WILLIAMS: That's correct, Your
 Honor. And also, I just want to offer if the
 14 Court would find it helpful, we would be happy to
 do a post-trial brief on FIRREA just since we
 15 only found about it this morning. But we have
 our Dura case, and you've heard our position on
 16 it.
 17 MR. PATTERSON: Your Honor, Russell
 Patterson. If I can be heard. I've done a lot
 18 of foreclosures. Never seen this defense and
 found out about it when we were riding up here.
 19 So our arguments are based on what we could read
 on our phone. I was driving so Ms. Williams was
 looking at it.
 20 We would like just a week to be able to
 brief that issue because now we find out for the
 21 first time driving up here that's the whole
 defense when we've been dealing with all these
 22 other issues. They're now gone. Now we're
 dealing with an issue we've never even heard of
 23 until this morning.
 24 We would like to be able to at least put
 together a little bit of case law because again,
 25 there's hundreds of thousands of loans the FDIC's
 taken over and sold and been foreclosed. If
 defendant is right, there's got to be a bunch of

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1 cases out there saying State Court, you can't
2 foreclose. So we would like to have a little bit
3 of time to look for it.
4 THE COURT: Well, let me ask you
5 this question. Let's suppose -- I almost took
6 this position earlier so I'm going to hold the
7 question of the jurisdiction in advance and hear
8 the case but decide to go ahead and rule that I
9 did have jurisdiction. And if I'm wrong, I can
10 be corrected.
11 I didn't expect Mr. Varnado to waive his
12 defenses, but nonetheless, that will be the
13 result of his defenses if I'm affirmed on the
14 jurisdiction. I will be happy to allow you to --
15 let's say 15 days to do a supplemental post-trial
16 brief on the issue of jurisdiction understanding
17 that I may reverse my opinion after I read the
18 additional information.
19 And Mr. Varnado, if you wish to reply to
20 that brief, I would give you 15 days from the day
21 it is submitted to reply to it.
22 MR. VARNADO: So 15 days from today
23 or tomorrow for plaintiff to file their brief?
24 And 15 days from receipt for me to file mine?
25 THE COURT: To reply to it so that
you both will have flushed out the issue. And
I'll have the option -- again, I would have the
option to overrule myself. I just made a ruling
on the bench. I could always reverse myself. I
did it already today in another case.
MR. VARNADO: Thank you, Your
Honor.
THE COURT: So if I have to change
my mind, I change my mind when I enter the order.
So yeah, I'm happy to allow you-all to do the
additional research so I can understand it
myself.
MS. WILLIAMS: Thank you, Your
Honor.
MR. VARNADO: Thank you, Your
Honor.
THE COURT: I'll leave it at that.
I mean, I've got thoughts coming out of my head.
They just want to burst out into words, but I'm
going to reserve them. So yes. Let's do the
post-trial briefs on that one issue and nothing
else.
MS. WILLIAMS: Yes, sir.
MR. VARNADO: Yes, sir.
THE COURT: And maybe by 30 days

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1 CERTIFICATE OF REPORTER
2 I, MACKENZIE ALLEN, Court Reporter and Notary
3 Public in and for the State of South Carolina at
4 Large, do hereby certify that I correctly
5 reported the within-entitled matter and that the
6 foregoing is a full, true and correct
7 transcription of my shorthand notes of the
8 testimony and/or other oral proceedings had in
9 the said matter.
10 I further certify that I am neither
11 related to nor counsel for any party to the cause
12 pending or interested in the events thereof.
13 Witness my hand, I have hereunto affixed
14 my official seal this 7th day of February, 2020,
15 at Charleston, Charleston County, South Carolina.
16
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24
25
MACKENZIE ALLEN
My commission expires
August 30, 2029

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1 from now we can have a staffs conference of which
2 term we can look at the document that you're
3 going to produce. And I'll make my decision on
4 whether or not it's the same as what you've
5 entered in the record.
6 MR. VARNADO: Thank you, Your
7 Honor.
8 MS. WILLIAMS: Thank you, Your
9 Honor.
10 THE COURT: Thank you. It's a
11 pleasure seeing everybody.
12 MS. WILLIAMS: Thank you.
13 (The hearing was adjourned at 1:40
14 PM.)
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Trial Exhibit 1



As Receiver for Carolina Federal Savings Bank
1509 Hwy. 17 North, Mount Pleasant, SC 29464

CERTIFIED MAIL: _____

July 5, 2012

Mr. David Clancy
418 Lakeview Drive
Summerville, SC 29485

SUBJECT: Carolina Federal Savings Bank-FIN 10441
Mount Pleasant, South Carolina – **In Receivership**
Closing Date: June 8, 2012

LOAN NUMBER: 244015970

Dear Mr. Clancy:

On June 8, 2012, Carolina Federal Savings Bank (the "Institution"), was closed by the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation (the "FDIC") was appointed as receiver of the Institution (the "Receiver"). Under the laws of the United States, the Receiver is charged with the duty of winding up the affairs of the former Institution in a manner that conserves and preserves the assets of the Institution and that maximizes the net present value return to the receivership from the sale or disposition of such assets.

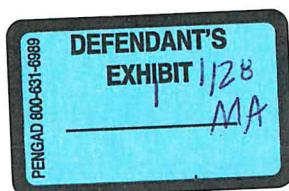
The records of the Institution indicate you have a loan obligation to the former Institution and that you are in default of your obligations with respect to this loan because you are 61 days past due on your loan payment due for May 5, 2012.

The Receiver expects you to abide by the terms and conditions of your current loan agreement or promissory note, and you are legally obligated to do so. **The Receiver hereby advises you that you are in default, due to non payment of the loan payments and the Receiver demands payment to bring the note current. As of this writing, the total amount due as of July 5, 2012 is \$26,000.98, consisting of the following:**

May 5, 2012 Payment:	\$1,365.72
June 5, 2012 Payment:	\$1,365.72
Late Charges:	\$1,502.16
Legal Fees:	\$3,884.29
Accrued Interest to 6/24/10:	\$16,831.82
Late Charges to 6/24/10:	\$1,051.27

TOTAL DUE: \$26,000.98

This loan continues to accrue interest at the rate of \$ 35.85 per day.



This letter serves as formal demand for payment of this amount plus accruing interest. Unless paid in full by August 6, 2012, the Receiver intends to pursue all rights and remedies available under the loan documents, including accelerating the note if the default is not timely cured.

All payments should be made payable to "FDIC as Receiver for Carolina Federal Savings Bank," and you should send all future correspondence and payments to the address you are currently using for this purpose.

FDIC representatives are available to talk to you about your options. In order to expedite this process, we ask that you submit within ten (10) days from the date of this letter a complete financial package for our consideration. Below is an outline of what the package should contain.

- o Daytime and evening phone number for a representative to contact you.
- o Hardship letter outlining in detail what led to the loan default.
- o Completed and notarized current financial statement for all borrowers and guarantors.
- o Last 2 years federal tax returns for all borrowers and guarantors, including K-1s.
- o Previous 90 day bank statements.

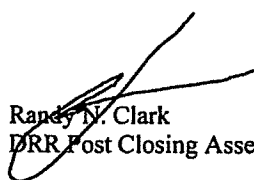
An FDIC financial statement format and affidavit is attached to this letter for you to use.

Thank you for your cooperation. If you have any questions, you may call 843-571-6900 to speak to an FDIC representative. You also may contact the Receiver in writing at the below address:

FDIC as Receiver for Carolina Federal Savings Bank
1509 Highway 17 North
Mount Pleasant, SC 29464

Sincerely,

FEDERAL DEPOSIT INSURANCE CORPORATION
AS RECEIVER FOR CAROLINA FEDERAL SAVINGS BANK


Randy N. Clark
DRR Post Closing Asset Manager

Trial Exhibit 2

CAROLINA FEDERAL SAVINGS BANK
POST OFFICE BOX 30518
1105 ST ANDREWS BOULEVARD (29407)
CHARLESTON, SC 29417

DAVID S. CLOUD
4 LATHAM CIRCLE
CHARLESTON, SC 29407

Loan Number 0244016970

Agreement Date 06-10-2004

Credit Limit \$ 258,940.00

Maturity Date 06-10-2009

Lender

Borrower

PRIME + 1 LOC NON RESIDENTIAL

1. DEFINITIONS. In this Agreement, these terms have the following meanings.

A. **Pronouns.** The pronouns "I," "me" and "my" refer to all Borrowers signing this Agreement, jointly and individually, and each other person or legal entity that agrees to pay this Agreement. "You" and "your" refer to the Lender, or any person or legal entity that acquires an interest in the Line of Credit.

B. **Agreement.** Agreement refers to this PRIME + 1 LOC NON RESIDENTIAL, and any extensions, renewals, modifications or substitutions of it.

C. **Billing Cycle.** Billing Cycle means the interval between the days or dates of regular periodic statements.

D. **Credit Limit.** Credit Limit means the maximum amount of principal you will permit me to owe you under this Line of Credit, at any one time. My Credit Limit is stated at the top of this Agreement.

E. **Line of Credit.** Line of Credit refers to this transaction generally, including obligations and duties arising from the terms of all documents prepared or submitted for this transaction such as applications, security agreements, disclosures, and this Agreement.

F. **Loan Account Balance.** Loan Account Balance means the sum of the unpaid principal balance advanced under the terms of this Agreement, finance charges, fees, and other charges that are due, and other amounts advanced to me or others under the terms of this Line of Credit.

G. **Property.** Property means any real or personal property that secures my obligations under this Line of Credit.

Other important terms are defined throughout this Agreement.

2. **PROMISE TO PAY.** I promise to pay to you or your order, at your address, or at such other location as you may designate, so much of the Credit Limit as may be advanced under this Agreement, plus finance charges, fees, charges, costs, and expenses as described in this Line of Credit.

3. **AGREEMENT TERM.** This Agreement begins on the Agreement Date and continues until the Maturity Date. I may request advances for 5 YEARS (Draw Period) beginning on the Agreement Date.

4. **ADVANCES.** I may request advances by the following methods:

- A. ☒ I write a CHECK.
- B. ☐ I draw my transaction account below \$_____ (Triggering Balance). Transaction account number _____.
- C. ☒ I request a withdrawal IN PERSON, BY PHONE OR BY MAIL.
- D. ☐ I make a purchase or withdrawal with my _____.
- E. ☒ I authorize you to make a payment to a third person or another account.

You will make the advance by advancing the amount directly to me, depositing it in my transaction account, or by paying a designated third person or account. You will record the amount as an advance and increase my Loan Account Balance.

5. **ADVANCE LIMITATIONS.** You do not have to make any advances during any period in which I have a right to cancel. My ability to request and access advances is also subject to the following additional limitations.

A. ☐ **Initial Advance.** On _____ I will receive an Initial Advance of \$_____.

B. **Minimum Advance.** Subject to the limitations contained in this Agreement, when I request an advance:

THE MINIMUM AMOUNT YOU WILL ADVANCE WILL BE \$500.00 (MINIMUM ADVANCE). YOU WILL ADVANCE EITHER THE MINIMUM ADVANCE OR EXACTLY THE AMOUNT I REQUEST, PROVIDED THE REQUESTED AMOUNT EQUALS OR EXCEEDS THE MINIMUM ADVANCE.

C. ☐ **Maximum Amount of Advances.** I may not request advances totaling more than \$_____ per _____.

D. ☐ **Maximum Number of Advances.** I may not request more than _____ advances per _____.

6. ☐ **MINIMUM BALANCE.** I agree to maintain a principal balance outstanding during the term of this Agreement of at least \$_____ (Minimum Balance).

7. **CREDIT LIMIT.** Subject to the terms and conditions of this Agreement, I may borrow on this Line of Credit up to the Credit Limit. I agree not to request or obtain an advance that will cause the unpaid principal of my Loan Account Balance to exceed the Credit Limit. I understand that you will not ordinarily grant a request for an advance that would cause the unpaid principal of my Loan Account Balance to be greater than the Credit Limit, but that you may, at your option, grant such a request without obligating yourselves to do so in the future. My Credit Limit will not be increased if I overdraw the Line of Credit. If I exceed the Credit Limit, I agree to pay the amount by which the unpaid principal of my Loan Account Balance exceeds the Credit Limit immediately, even if you have not yet billed me. Any sums in excess of the Credit Limit will not be secured by the Property, unless they are for accrued but unpaid interest or expenditures made pursuant to the security instrument securing the Property.

8. **COMPUTATION OF FINANCE CHARGES.** Finance charges begin to accrue immediately when you make an advance to me. Finance charges will be computed as follows:

TO FIGURE THE FINANCE CHARGE FOR EACH BILLING CYCLE, A DAILY PERIODIC RATE IS MULTIPLIED BY THE DAILY BALANCE OF MY LOAN ACCOUNT BALANCE EACH DAY. TO FIGURE THE DAILY BALANCE, YOU FIRST TAKE MY LOAN ACCOUNT BALANCE AT THE BEGINNING OF EACH DAY, AND ADD ANY NEW ADVANCES, AND SUBTRACT ANY PAYMENTS OR CREDITS THAT APPLY TO DEBT REPAYMENT, AND ANY UNPAID FINANCE CHARGES, FEES, AND CHARGES. THIS GIVES YOU THE DAILY BALANCE.

9. **PERIODIC RATE AND ANNUAL PERCENTAGE RATE.** The periodic rate used in calculating the Finance Charge is 0.013689% and the corresponding Annual Percentage Rate is 5.000%. The annual percentage rate includes interest and not other costs.

10. **VARIABLE RATE.** The annual percentage rate may change. It will always be the value of the Index described as the:

THE HIGHEST RATE ON CORPORATE LOANS POSTED BY AT LEAST 75% OF THE USA'S THIRTY LARGEST BANKS KNOWN AS THE WALL STREET JOURNAL PRIME RATE

plus 1.000 percentage points.

A. ☒ **Rounding.** This rate will be rounded TO THE NEAREST .001.

B. **Rate Changes.** The annual percentage rate may increase if the Index rate increases. An Index rate increase will result in a higher finance charge and it may have the effect of increasing my periodic Minimum Payment. A decrease in the Index rate will have the opposite effect as an increase. An Index rate increase or decrease will take effect ON THE FIRST OF THE MONTH.

The annual percentage rate can increase or decrease QUARTERLY (☐ after remaining fixed for _____). If the Index rate changes more frequently than the annual percentage rate, you will use the Index rate in effect on the day you adjust the annual percentage rate to determine the new annual percentage rate. In such a case, you will ignore any changes in the Index rate that occur between annual percentage rate adjustments.

C. ☐ **Carryover.** Any annual percentage rate increases or decreases not implemented by you either because of periodic, annual or lifetime rate caps, or because of a statutory limitation, may be carried over to subsequent rate adjustment periods and may be implemented to the extent not offset by opposite movement in the Index rate. If this occurs, the annual percentage rate will not relate to the Index rate in the manner described. When you have adjusted the annual percentage rate to take advantage of all increases or decreases in the Index rate, the initial relationship between the Index rate and the annual percentage rate will resume.

D. **Rate Change Limitations.** Annual percentage rate changes are subject to the following limitations:

(1) ☐ **Periodic Limits.** The Annual Percentage Rate cannot increase by more than _____ percentage points (☐ or decrease by more than _____ percentage points).

(2) ☒ **Lifetime Floor.** The Annual Percentage Rate will never be lower than: 5.000%.

(3) **Lifetime Cap.** The Annual Percentage Rate will never be higher than: 18.000%.

11. **FEES AND CHARGES.** I agree to pay, or have paid, the fees and charges listed in the FEES APPENDIX that appears at the end of this Agreement.

DC

12. **PAYMENT DATE.** During the term of this Agreement, a Minimum Payment will be due on or before the Payment Date indicated on my periodic statement for any Billing Cycle in which there is an outstanding balance on my account. My Minimum Payments will be due: MONTHLY

13. **MINIMUM PAYMENT.** On or before each Payment Date, I agree to make a payment of at least the Minimum Payment amount. The Minimum Payment will equal the following:

Interest only

A. ☒ **Rounding.** The Minimum Payment will be rounded TO THE NEAREST .01

B. ☒ **Payment Of Balance.** If my Loan Account Balance at the end of a Billing Cycle is less than \$100.00, my Minimum Payment will equal the entire outstanding Loan Account Balance.

C. **Payment At Maturity.** On the Maturity Date I must pay the entire outstanding Loan Account Balance.

14. ☒ **PRINCIPAL REDUCTION.** The Minimum Payment ☐ will not reduce ☒ may not fully repay the principal balance outstanding on my Loan Account Balance.

15. ☒ **FINAL PAYMENT.** At maturity, I ☐ may have to ☒ will repay the entire outstanding Loan Account Balance in a single payment. At that time you may, but are not obligated to, refinance this Line of Credit. If you do refinance this Line of Credit at maturity, I understand that I may have to pay some or all of the closing costs normally associated with a new loan.

16. **ADDITIONAL PAYMENT TERMS.** If my Loan Account Balance on a Payment Date is less than the Minimum Payment amount, I must pay only the amount necessary to reduce my Loan Account Balance to zero or to any required Minimum Balance. If I otherwise fail to fully pay the Minimum Payment amount, you may, but are not required to, advance money to me to make the payment. All the terms of this Agreement will apply to such an advance. Subject to any required Minimum Balance, I can pay off all or part of what I owe at any time. I must continue to make my periodic Minimum Payment so long as I owe any amount. Unless otherwise agreed or required by applicable law, payments and other credits will be applied first to any charges I owe other than principal and finance charges, then to any finance charges that are due, and finally to principal. No late charge will be assessed on any payment when the only delinquency is due to late fees assessed on earlier payments and the payment is otherwise a full payment.

17. ☐ **NEGATIVE AMORTIZATION.** Under some circumstances, my payments will not cover the finance charges that accrue and negative amortization will occur. Negative amortization will increase the amount that I owe you and reduce my equity in my home. In the event that negative amortization occurs, the unpaid portion will be:

18. **SECURITY** You have secured my obligations under this Line of Credit by taking a security interest (by way of a separate security instrument dated 08-10-2004) in the following Property:

THE DWELLING AND REAL PROPERTY LOCATED AT 117 SOUTH CEDAR STREET, SUMMERVILLE, SC, 29483

Property securing any other loans that I have with you may also secure this Agreement.

19. **PROPERTY INSURANCE.** I will insure or retain insurance coverage on the Property and abide by the insurance requirements of any security instrument securing this Line of Credit. I may obtain property insurance from anyone I want that is reasonably acceptable to you. If I get the insurance from or through you, I will pay \$_____ for _____ of coverage.

20. **COMMISSIONS OR OTHER REMUNERATION.** I understand and agree that any insurance premiums paid to insurance companies as part of this Agreement will involve money retained by you or paid back to you as commissions or other remuneration.

In addition, I understand and agree that some other payments to third parties as part of this Agreement may also involve money retained by you or paid back to you as commissions or other remuneration.

21. **DEFAULT.** I will be in default if any of the following occur.

A. **Payments.** I fail to make a payment as required by this Agreement.

B. **Property.** My inaction adversely affects the Property or your rights in the Property.

C. ☐ **Fraud.** I engage in fraud or material misrepresentation in connection with this Line of Credit.

22. **REMEDIES.** After I default, and after you give any legally required notice and opportunity to cure, you may at your option do any of the following:

A. **Termination and Acceleration.** You may terminate this Line of Credit and make all or any part of the amount owing by the terms of this Agreement immediately due.

B. **Advances.** You may temporarily or permanently prohibit any additional advances.

C. **Credit Limit.** You may temporarily or permanently reduce the Credit Limit.

D. **Additional Security.** You may demand additional security or additional parties to be obligated to pay this Agreement.

E. **Insurance Benefits.** You may make a claim for any and all insurance benefits or refunds that may be available on my default.

F. **Payments Made On My Behalf.** You may make amounts advanced on my behalf immediately due, and you may add these amounts to the Loan Account Balance.

G. **Sources.** You may use any and all remedies you have under applicable law or any agreement securing this Agreement.

Except as otherwise required by law, by choosing a remedy you do not give up your right to use another remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

23. **COLLECTION EXPENSES AND ATTORNEYS' FEES.** On or after default, to the extent permitted by law, I agree to pay the following:

ALL EXPENSES OF COLLECTION, ENFORCEMENT OR PROTECTION OF YOUR RIGHTS AND REMEDIES UNDER THIS AGREEMENT INCLUDE, BUT ARE NOT LIMITED TO, REASONABLE ATTORNEYS' FEES NOT IN EXCESS OF 15 PERCENT OF THE UNPAID DEBT AFTER DEFAULT AND REFERRAL TO AN ATTORNEY WHO IS NOT YOUR SALARIED EMPLOYEE. THESE EXPENSES ARE DUE AND PAYABLE IMMEDIATELY. IF NOT PAID IMMEDIATELY, THESE EXPENSES WILL BEAR INTEREST FROM THE DATE OF PAYMENT UNTIL PAID IN FULL AT THE HIGHEST INTEREST RATE IN EFFECT AS PROVIDED FOR IN THE TERMS OF THIS AGREEMENT. ALL FEES AND EXPENSES WILL BE SECURED BY THE PROPERTY I HAVE GRANTED TO YOU, IF ANY. TO THE EXTENT PERMITTED BY THE UNITED STATES BANKRUPTCY CODE, I AGREE TO PAY THE REASONABLE ATTORNEYS' FEES YOU INCUR TO COLLECT THIS DEBT AS AWARDED BY ANY COURT EXERCISING JURISDICTION UNDER THE BANKRUPTCY CODE.

24. **SUSPENSION OF CREDIT AND REDUCTION OF CREDIT LIMIT.** You may temporarily prohibit me from obtaining additional advances or reduce my Credit Limit during any period in which any of the following are in effect.

A. The value of the Property securing this Line of Credit declines significantly below its appraised value for purposes of this Line of Credit;

B. You reasonably believe that I will not be able to meet the repayment requirements under my Line of Credit due to a material change in my financial circumstances;

C. I am in default of a material obligation under this Line of Credit. I understand, that you consider all of my obligations to be material. Categories of obligations that you consider material include, but are not limited to: my obligation to not commit fraud or misrepresentation in connection with this Line of Credit; my obligation to meet the repayment terms of this Line of Credit; my obligation to not adversely affect the Property or your rights in the Property; my obligation to pay fees and charges; my advance obligations; my obligation to fulfill the terms of the instrument securing this Agreement, and any other security instruments on the Property; my obligation to notify you; and my obligation to provide you with information;

D. Government action prevents you from imposing the annual percentage rate provided for in this Agreement;

E. The priority of your security interest is adversely affected by government action to the extent that the value of the security interest is less than 120 percent of my Credit Limit;

F. The maximum annual percentage rate allowed under this Agreement is reached;

G. You are notified by a regulatory agency that continued advances constitute an unsafe and unsound practice; or

H. Any Borrower requests a suspension of credit privileges.

In order to reinstate my credit privileges under the original terms of this Agreement, I must send you a written request to that effect. My credit privileges will only be reinstated if you determine that the condition which caused you to prohibit additional extensions and/or reduce the Credit Limit no longer exists. If appraisal or credit report fees are incurred in making this determination, you may (if allowed by applicable law) charge me such fees. If credit privileges were suspended at my request, they need not be reinstated unless all Borrowers request reinstatement.

25. SET-OFF. You may set-off any amount due and payable under the terms of this Agreement against my right to receive money from you, unless prohibited by applicable law. For example, your right of set-off will not apply if I may obtain credit under this Agreement by using a credit card.

26. AMENDMENTS. Generally, the terms of this Agreement cannot be changed. You may, however, make the following changes:

A. You may make changes that I agree to in writing at the time of the change.

B. You may make changes that will unequivocally benefit me.

C. You may make insignificant changes.

D. You may change the index and margin if the original index becomes unavailable. Any new index will have an historical movement substantially similar to the original index, and together with the new margin, produce an annual percentage rate substantially similar to the rate in effect at the time the original index became unavailable.

E. You may make changes that are described elsewhere in this Agreement.

27. TERMINATION. I may terminate this Line of Credit at any time upon written notice to you. Termination by one Borrower terminates the Line of Credit for all Borrowers. Termination will not affect my obligation to repay advances made prior to the termination, nor will it alter my duties to perform under the terms of an instrument securing this Agreement until such instrument is released. Upon termination I will return to you any remaining access devices in my possession that were issued or used in connection with the Line of Credit.

28. WAIVERS AND CONSENT. To the extent not prohibited by law and except for any required notice of right to cure for the failure to make a required payment, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor. To the extent not prohibited by law, I and any other party to this Line of Credit, also consent to the following actions that you may take, and waive defenses that may be available based on these actions, or based on the status of a party to this Line of Credit.

A. You may renew or extend payments on this Agreement, regardless of the number of such renewals or extensions.

B. You may release any Borrower or other person who may be liable for the indebtedness under this Agreement.

C. You may release, substitute or impair any Property securing this Agreement.

D. You may invoke your right of set-off.

E. You may enter into any sales or repurchases of this Agreement to any person in any amounts and I waive notice of such sales or repurchases.

F. I agree that any Borrower is authorized to modify the terms of this Agreement or any other Line of Credit document.

G. You may inform any party who guarantees this Line of Credit of any loan accommodations, renewals, extensions, modifications, substitutions, or future advances.

No delay or forbearance on your part in exercising any of your rights or remedies will be construed as a waiver by you, unless such waiver is in writing and is signed by you.

29. TAX DEDUCTIBILITY. I should consult a tax advisor regarding the deductibility of interest and charges under this Line of Credit.

30. PERIODIC STATEMENTS. If I have an outstanding balance on my account or have any account activity, you will send me a periodic statement at the end of each Billing Cycle. This periodic statement will reflect, among other things, credit advances, finance charges, other charges, payments made, other credits, my previous account balance

SIGNATURES. I understand that terms following a ☐ only apply if checked. By signing, I agree to the terms of this Agreement and acknowledge receipt of a copy of this Agreement.

BORROWER:

x David S. Clancy x
DAVID S. CLANCY

LENDER:

x Brian J. Michel x
BRIAN J. MICHEL, VICE PRESIDENT

**YOUR BILLING RIGHTS
KEEP THIS NOTICE FOR FUTURE USE**

This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

Notify Us In Case of Errors or Questions About Your Bill

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us at the address listed on your bill. Write to us as soon as possible. We must hear from you no later than 60 days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights.

and my new account balance. The periodic statement will identify my Minimum Payment for the cycle and the date it is due (Payment Date).

31. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS. My obligation to pay this Line of Credit is independent of the obligation of any other person who has also agreed to pay it. You may sue me alone, or anyone else who is obligated on this Line of Credit, or any number of us together, to collect on this Line of Credit. Extending this Line of Credit or new obligations under this Line of Credit, will not affect my duty under this Line of Credit and I will still be obligated to pay this Line of Credit. The duties and benefits of this Line of Credit will bind and benefit the successors and assigns of you and me.

32. INTEGRATION AND SEVERABILITY. This Agreement is the complete and final expression of the agreement. If any provision of this Agreement is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

33. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Agreement.

34. NOTICE, FINANCIAL REPORTS, AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address above, or to any other address designated in writing. Notice to one Borrower will be deemed to be notice to all Borrowers. I will inform you in writing of any change in my name, address or other application information I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Line of Credit and to confirm your lien status on any Property. Time is of the essence.

35. CREDIT INFORMATION. I agree to supply you with whatever information you reasonably feel you need to decide whether to continue this Line of Credit. You will make requests for this information without undue frequency, and will give me reasonable time in which to supply the information.

36. APPLICABLE LAW. This Agreement is governed by: THE LAWS OF SOUTH CAROLINA, THE UNITED STATES OF AMERICA AND, TO THE EXTENT REQUIRED, BY THE LAWS OF THE JURISDICTION WHERE THE PROPERTY IS LOCATED.

37. OTHER TERMS. If checked, the following addenda are attached to and made a part of this Agreement:

A. ☐ Automatic Withdrawal

B. ☐ Conversion Option

C. ☐ Credit Insurance

D. ☐ Discounted Rate

E. ☐ Preferred Rate

F. ☐

38. ADDITIONAL TERMS.

In your letter, give us the following information: (a) Your name, account number, (b) The dollar amount of the suspected error, (c) Describe the error and explain, if you can, why you believe there is an error. If you need more information, describe the item you are not sure about. If you have authorized us to pay your bill automatically from your savings, checking, share draft or other account, you can stop the payment on any amount you think is wrong. To stop the payment your letter must reach us three business days before the automatic payment is scheduled to occur.

Your Rights and Our Responsibilities After We Receive Your Written Notice

We must acknowledge your letter within 30 days, unless we have corrected the error by then. Within 90 days, we must either correct the error or explain why we believe the bill was correct.

After we receive your letter, we cannot try to collect any amount you question, or report you as delinquent. We can continue to bill you for the amount you question, including finance charges, and we can apply any unpaid amount against your Credit Limit. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question.

If we find that we made a mistake on your bill, you will not have to pay any finance charges related to any questioned amount. If we didn't make a mistake, you may have to pay finance charges, and you will have to make up any missed payments on the questioned amount. In either case, we will send you a statement of the amount you owe and the date that it is due.

If you fail to pay the amount that we think you owe, we may report you as delinquent. However, if our explanation does not satisfy you and you write to us within ten days telling us that you still refuse to pay, we must tell anyone we report you to that you have a question about your bill. And, we must tell you the name of anyone we reported you to. We must tell anyone we report you to that the matter has been settled between us when it finally is.

If we don't follow these rules, we can't collect the first \$50 of the questioned amount, even if your bill was correct.

Special Rule for Credit Card Purchases

If you have a problem with the quality of property or services that you purchased with a credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the property or services. There are two limitations on this right: (a) You must have made the purchase in your home state or, if not within your home state within 100 miles of your current mailing address; and (b) The purchase price must have been more than \$50.

These limitations do not apply if we own or operate the merchant, or if we mailed you the advertisement for the property or services.

FEES APPENDIX

OTHER CHARGES

APPRAISAL FEE: \$225.00

CREDIT REPORT FEE: \$25.00

TITLE INSURANCE FEE: APPROXIMATELY \$3 PER \$1000 BORROWED

ATTORNEY FEE: \$250.00

FLOOD CERT. FEE: \$15.00

COURIER FEE: \$15.00

IF PAYMENT IS MADE MORE THAN 15 DAYS AFTER IT IS DUE, I AGREE TO PAY A LATE CHARGE OF 5.00% OF THE LATE AMOUNT.

RETURNED CHECK CHARGE: I AGREE TO PAY A FEE NOT TO EXCEED \$15.00 FOR EACH CHECK, NEGOTIABLE ORDER OF WITHDRAWAL OR DRAFT I ISSUE IN CONNECTION WITH THIS LINE OF CREDIT THAT IS RETURNED BECAUSE IT HAS BEEN DISHONORED.

STOP PAYMENT CHARGE: \$15.00

TERMINATION FEE: \$200.00

TERMINATION FEE: IF I CLOSE ACCOUNT WITHIN 12 MONTHS

BELOW MINIMUM ADVANCE FEE: \$10.00 IF ADVANCE ON ACCOUNT UNDER MINIMUM

Trial Exhibit 3

Delinquent Tax Collector
Sidney B. Jones III

County of Dorchester

201 Johnston St
St George, SC 29477

RECEIVED IN PAYMENT OF 2018 AD VALOREM TAXES IN THE AMOUNT OF 6609.77 TOTAL TAX
PAID ONLY ON THE PROPERTY DESCRIBED HEREON.

DISTRICT 207 TMS # ASSESSMENT: 15,000
137-07-07-023000 TOTAL MILLS: 381.30

75.00 SWUF PAID
22.38 STWMF PAID
118.20 SWCF PAID
115.00 COST PAID
6940.35 TOTAL PAID

R-2018-00021914-00
CERCOPELY MARY LOU & DAVID S

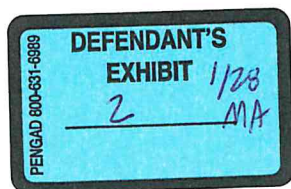
DATE PAID: 11/15/2019 10:42:22

209 W 7TH NORTH ST APT 13A
SUMMERVILLE SC 29483-6646

BATCH: 9115

TRAN-NO 117893 DELDCJQB02

*** Customer Copy ***



Trial Exhibit 4

BK 41896082
 J. STANLEY CLAYPOOLE, P.A. FILED-RECORDED
 ATTORNEY AT LAW RHC / ROD
 215 S. BROADWAY LANE
 N. CHICAGO, IL 60642
 2004 JUN 16 AM 10:37
 LINDA W. HESSERVY
 DORCHESTER COUNTY, SC
 CLANCY 04-1307

This document was prepared by CAROLINA FEDERAL SAVINGS BANK POST OFFICE BOX 10518 CHARLESTON, SC 29417

State of South Carolina _____ Space Above This Line For Recording Data _____

MORTGAGE (With Future Advance Clause)

1. DATE AND PARTIES. The date of this Mortgage (Security Instrument) is 04/10/2024 and the parties, their addresses and tax identification numbers, if required, are as follows:

MORTGAGOR: BAREEM A. CLANCY
 411 LAKESHORE DRIVE
 SUMMERVILLE, SC 29583

☐ If checked, refer to the attached Addendum incorporated herein, for additional Mortgages, their signatures and acknowledgment.

LENDER: CAROLINA FEDERAL SAVINGS BANK
 ORGANIZED AND EXISTING UNDER THE LAWS OF THE UNITED STATES OF AMERICA
 POST OFFICE BOX 30518
 1108 ST ANDREWS BOULEVARD (29407) CHARLESTON, SC 29417

2. CONVEYANCE. For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (defined below) and Mortgagee's performance under this Security Instrument, Mortgagee grants, bargains, sells, assigns, conveys, transfers, conveys, and conveys to Lender the following described property:

The property is located in _____ at 117 SOUTH GERM STREET
 (County) _____ (City) _____ South Carolina 29403
 (Address) _____ (ZIP Code)

Together with all rights, easements, appurtenances, riparian rights, oil and gas rights, all water and riparian rights, ditches, and water stock and all existing and future improvements, fixtures, and replacement that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property").

3. MAXIMUM OBLIGATION LIMIT. The total principal amount secured by this Security Instrument at any one time shall not exceed \$250,000. This limitation of amount does not include interest and other fees and charges validly made pursuant to this Security Instrument. Also, this limitation does not apply to advances made under the terms of this Security Instrument prior to the date of recording of this Security Instrument. Interest under the Note will be determined, accrued or capitalized; however, Mortgagee shall not be required to defer, accrue or capitalize any interest except as provided in the Note.

4. SECURED DEBT AND FUTURE ADVANCES. The term "Secured Debt" is defined as follows:
 A. The amount due under the terms of all promissory notes, contracts, guaranty or other evidence of debt described below and all other obligations, renewals, modifications or substitutions. (You must specifically identify the debt(s) secured and you should include the principal and maturity date of each debt(s).)
 HOME EIGHT LINE OF CREDIT #1024015770

SOUTH CAROLINA - HOME EIGHT LINE OF CREDIT MORTGAGE SHOT FOR PANA, PA, SC, PIA ON VA 1020
 01964 Return System, Inc., St. Cloud, LA Form 00P-80715-SC 10/9/94

BAC (page 1 of 4)

OK 4189PG083

[illegible]

2. All other obligations Mortgagee owes to Lender, which may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Mortgagee and Lender.
3. All additional sums advanced and expenses incurred by Lender for lending, preserving or otherwise protecting the Property and its value and any other sums advanced by Lender in connection with the loan, including the costs of any instrument.

the event that Lender fails to provide any necessary notice of the right of rescission with respect to any additional credit advances secured under paragraph B of this Section, Lender waives any subsequent security interest in the Mortgagor's real property dwelling that is created by this Security Instrument (but does not waive the security interest in the Mortgagor's real property dwelling created by paragraph A of this Section).

MORTGAGE COVENANTS. Mortgagor agrees that the covenants in this section are material obligations under the Secured Note and this Security Instrument. If Mortgagor breaches any covenant in this section, Lender may refuse to make additional advances under the Secured Note and may exercise either remedy on Mortgagor's breach. Lender does not intend to waive or release Mortgagor's right to bring counter the event a breach if it happens.

payments, Mortgagor agrees that all payments under the Secured Debt will be paid when due and in accordance with the terms of the Secured Debt and this Security Instrument.

Other charges relating to the Property, such as taxes, assessments, liens, encumbrances, lease payments, and other charges, shall be the responsibility of the Borrower. The Borrower shall be responsible for the payment of all such charges, and the Lender shall not be responsible for the payment of any such charges. The Borrower shall be responsible for the payment of all such charges, and the Lender shall not be responsible for the payment of any such charges.

Lender may require Mortgagor to provide to Lender copies of all notices and receipts evidencing Mortgagor's payments. Mortgagor will defend title to the Property and, if necessary, defend the validity of this Security Instrument. Mortgagor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses Mortgagor may have against parties who supply labor or materials to maintain or improve the Property.

any use, consumption, alterations and inspection. Mortgagee will keep the Property in good condition and make all repairs as may be reasonably necessary. Mortgagee shall not commit or allow any waste, impairment, or deterioration of the Property. Mortgagee agrees that the nature of the occupancy and use will not substantially change without Lender's prior written consent. Mortgagee will not permit any change in use without Lender's prior written consent. Mortgagee will notify Lender of all demands, proceedings, claims, suits, judgments, or other legal actions relating to the Property.

or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the same. Lender shall give Mortgagee notice at the time of or before an inspection specifying a reasonable purpose for the inspection. Any inspection of the Property shall be entirely for Lender's, benefit and Mortgagee's inspection.

orty to Perform. If Mortgagor fails to perform any duty or any of the covenants contained in this Security Instrument, it may, without notice, perform or cause them to be performed. Mortgagor appoints Lender as attorney in fact to sign and execute all documents necessary for performance. Lender is right to perform for Mortgagor's obligations to perform, and Lender's failure to perform will not constitute a breach of this Security Instrument.

Holder, Condominiums: Planned Unit Developments. Mortgagee agrees to comply with the provisions of any lease if the lease is a bona fide lease and the lease is not in violation of any applicable law, ordinance or regulation. Mortgagee will not prohibit Lender from exercising any of Lender's other rights under the Security Instrument.

annulment. Mortgagee will give Lender prompt notice of any pending or threatened action, by private or public entities to annul or set aside or take any or all of the Property through condemnation, eminent domain, or any other means. Mortgagee will not attempt to intervene in Mortgagee's name in any of the above described actions or claim. Mortgagee authorizes Lender to attempt to intervene in any of the above described actions or claim for damages.

Since, Mortgagor shall keep Property insured against loss by fire, flood, theft and other hazards and shall comply with the Property due to its time and location. Title Insurance shall be considered prima facie evidence that the Property is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

The insurance carrier providing the insurance shall be malimined in the amounts and for the periods shall not be unreasonable withhold. If Mortgagee fails to maintain the coverage described above, Lender may, at its option, obtain coverage to protect Lender's rights in the Property according to the terms of this Security Instrument.

The insurance policies and materials shall be acceptable to Lender and shall include a standard form, available from the National Fire Insurance Association, Inc., for fire insurance clauses. The

otherwise agreed in writing, all insurance proceeds shall be payable to the estate of the insured. Mortgagee shall immediately notify Lender of cancellation or termination of mortgage clause¹ and where applicable, shall have the right to hold the policies and renewals. If Lender requires, Mortgagee shall immediately give to Lender copies of paid premiums and renewal notices. Upon loss, Mortgagee shall give immediate notice to the insurance carrier.

or cash, whether or not then due. Any application of proceeds to principal shall not extend or alter the due date of the scheduled payments. If the Property is acquired by or for the Property before the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition, then the proceeds shall be applied to the satisfaction or repair of the Property or to the satisfaction of the Secured Debt, in Lender's option. Any application of proceeds to principal shall not extend or alter the due date of the scheduled payments, nor change the amount of any payment. Any excess will be paid to the owner. If the Property is acquired by Lender, Montgomerie's right to any insurance policies and proceeds resulting from the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition, then the proceeds shall be applied to the satisfaction or repair of the Property or to the satisfaction of the Secured Debt, in Lender's option.

Robert Systems, Inc., 81 Chard. Way, Farm. OOH-80719-SC 150/21

DORCHESTER - COMMON PLEAS - CASE#2018CP18020

© 1994 Bunkers Systems, Inc., 81 Canal Way, Farmington, CT 06031

Page 2 of 4

1500

13. **JOINT AND INDIVIDUAL LIABILITY; CO-SIGNERS; SUCCESSORS AND ASSIGNS BOUND.** All under this deed, security instrument and this promissory note are jointly and severally bound to pay to the lender under this mortgage the sum of the principal and interest thereon and does not sign as evidence of debt. Mortgagor does not agree to be personally liable for the payment of the Secured Debt and assigns Mortgage or any party indebted to the Secured Debt may incur a guaranty between assignor and Mortgagor, Mortgagor agrees to waive any defense from paying any portion or claim against Mortgagor or any party indebted to the obligation. These signs may include, but are not limited to, any assignment or co-action laws. The duties and benefits of this security instrument shall bind and benefit the lender, assigns of Mortgagor and Lender.

14. **SEVERABILITY; INTERPRETATION.** This Security Instrument is complete and fully integrated. This Security Instrument may not be amended orally or by written agreement. Any section in this Security Instrument, instrument, or any agreement related to the Second Deed that conflicts with applicable law will not be effective, unless the instrument, instrument, or any agreement permits the variations by written agreement. If any section of this Security Instrument cannot be enforced according to its terms, the singular shall include the plural and the plural shall include the singular. The captions and headings of the sections of this instrument are for convenience only and are not to be used to interpret or define the terms of this Security Instrument. The provisions of the covenants in this Security Instrument shall survive the termination of this Security Instrument.

15. **NOTICE.** Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Security Instrument, or to any other address designated in writing. Notice to one mortgagee will be deemed to be notice to all mortgagees.

16. **WARRANTS.** Except to the extent prohibited by law, Mortgagor waives all homestead exemption rights relating to the Property.

17. **LINE OF CREDIT.** The Secured Debt includes a revolving line of credit. Although the Secured Debt may be reduced to a zero balance, this Security Instrument will remain in effect until released.

18. **APPLICABLE LAW.** This Security Instrument is governed by the laws as agreed to in the Secured Debt, except to the extent required by the laws of the jurisdiction where the Property is located, and applicable federal laws and regulations.

(Check all applicable boxes)

☐ Assignment of Leases and Rentals ☐ Other

20. ☐ **ADDITIONAL TERMS.**

SIGNATURES: By signing below, Mortgagor agrees to the terms and covenants contained in this Security Instrument and in any attachments. Mortgagor also acknowledges receipt of a copy of this Security Instrument on the date stated on page 1.

.....
 I have also acknowledged receipt of a copy of this Security Instrument on the date stated on page 1.
 _____ (Seal)
 (Signature)
 _____ (Seal)
 (Date)
 Barbara A. Clark
 (Signature) BARBARA A. CLARK

Signed, sealed and delivered in the presence of:
Samy Guedes (Witness)
Hester Gleser (Witness)

STATE OF NORTH CAROLINA, COUNTY OF CHARLESTON.
Personally appeared before me the undersigned witness who, being duly sworn, deposed and said that (you saw the Mortgage) and each Mortgage (if more than one) sign, seal and deliver the foregoing Mortgage- and that (you, together with the other witness whose name appears as a witness, witnessed the execution thereof).

Sworn to and subscribed before me this 14th day of June, 2009.

Heath P. Peltier

Notary Public for the State of Oregon

My Commission expires: 06/14/12

Sammyth Bond

©1994 Bartlett Systems, Inc., St. Cloud, MN Form 00940010-00C 10/2/98

Page 4 of 41

BK 4189PG086

Exhibit "A"

All that lot, piece, or parcel of land, with the buildings thereon, situate, lying and being in the Town of Summerville, in the County of Dorchester (formerly Berkeley), in the State of South Carolina, measuring and containing sixty-three (63) feet, six inches, in front on Black Jack Street, now known as Cedar Street, and the same on the back line, by two hundred and ten (210) feet in depth, be the said dimensions more or less; butting and bounding, Northwest on Black Jack Street, now known as Cedar Street, Northeast on Lands now or formerly of John H. Grainger, Southeast on Lands now or formerly of Thaddeus W. Phelon, and Southwest on lands now or formerly of the Estate of C.H. Kornahrens.

Being the same property conveyed to William E. Clancy and Barbara Anne Clancy by deed of John Grainger Lameau, George Johnston Lameau, and Jessie L. Finucan on March 20, 1981 and recorded on March 23, 1981 in book 436 at page 118 of the Dorchester County RMC office. Thereafter being the same property conveyed to the Mortgagee herein, Barbara Anne Clancy, by deed of distribution of William E. Clancy on January 25, 1980 and recorded on January 25, 1980 in book 717 at page 101 of the Dorchester County RMC office.

TMS: 137-07-07-023

Initials: _____

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
Filed for record this 11th day of Sept 2022
at 11:10 AM and recorded
in book 436 page 118
LINDA T. MESSERVY
REGISTER OF MESSE CONVEYANCES

Trial Exhibit 5

BK 5393PG356

BK 4180 82

STANLEY CLAYPOOLE, P.A.
ATTORNEY AT LAW
2155 HORTON PARK LANE
N. CHARLESTON, S.C. 29406

FILED-RECORDED
RMC / ROD

2006 JUN 16 AM 10:37

L. BAILEY
DORCHESTER COUNTY, SC

Clancy 04-1307

**This Mortgage is being re-recorded to add the Maturity Date and Loan Amount.

This document was prepared by CAROLINA FEDERAL SAVINGS BANK POST OFFICE BOX 30518 CHARLESTON, SC 29417

State of South Carolina

Space Above This Line For Recording Data

MORTGAGE

(With Future Advance Clause)

1. **DATE AND PARTIES.** The date of this Mortgage (Security Instrument) is 06-10-2004..... and the parties, their addresses and tax identification numbers, if required, are as follows:

MORTGAGOR: BARBARA A CLANCY
418 LAKEVIEW DRIVE
SUMMERVILLE, SC 29483

☐ If checked, refer to the attached Addendum incorporated herein, for additional Mortgagors, their signatures and acknowledgments.

LENDER: CAROLINA FEDERAL SAVINGS BANK
ORGANIZED AND EXISTING UNDER THE LAWS OF THE UNITED STATES OF AMERICA
POST OFFICE BOX 30518
1106 ST ANDREWS BOULEVARD (29407) CHARLESTON, SC 29417

FILED-RECORDED
RMC / ROD
2006 JUN -5 PM 3:05
MARGARET L. BAILEY
DORCHESTER COUNTY, SC

2. **CONVEYANCE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (defined below) and Mortgagor's performance under this Security Instrument, Mortgagor grants, bargains, conveys and mortgages to Lender the following described property:
T.M.S. # 137-07-023

The property is located in at 117 SOUTH CEDAR STREET.....
(County)
....., South Carolina
(Address) (City) (ZIP Code)

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, all water and riparian rights, ditches, and water stock and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property").

3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount secured by this Security Instrument at any one time shall not exceed \$ 258,940.00..... This limitation of amount does not include interest and other fees and charges validly made pursuant to this Security Instrument. Also, this limitation does not apply to advances made under the terms of this Security Instrument to protect Lender's security and to perform any of the covenants contained in this Security Instrument. Interest under the Note will be deferred, accrued or capitalized; however, Mortgagee shall not be required to defer, accrue or capitalize any interest except as provided in the Note.
4. **SECURED DEBT AND FUTURE ADVANCES.** The term "Secured Debt" is defined as follows
A. Debt incurred under the terms of all promissory note(s), contract(s), guaranty(s) or other evidence of debt described below and all their extensions, renewals, modifications or substitutions. (You must specifically identify the debt(s) secured and you should include the final maturity date of such debt(s).)
HOME EQUITY LINE OF CREDIT # 0244015970
Maturity Date 6/10/2009
Loan Amount \$258,940.00



B. All future advances from Lender to Mortgagor or other future obligations of Mortgagor to Lender under any promissory note, contract, guaranty, or other evidence of debt executed by Mortgagor in favor of Lender executed after this Security Instrument whether or not this Security Instrument is specifically referenced. If more than one person signs this Security Instrument, each Mortgagor agrees that this Security Instrument will secure all future advances and future obligations that are given to or incurred by any one or more Mortgagor, or any one or more Mortgagor and others. All future advances and other future obligations are secured by this Security Instrument even though all or part may not yet be advanced. All future advances and other future obligations are secured as if made on the date of this Security Instrument. Nothing in this Security Instrument shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment must be agreed to in a separate writing.

C. All other obligations Mortgagor owes to Lender, which may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Mortgagor and Lender.

D. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Security Instrument.

In the event that Lender fails to provide any necessary notice of the right of rescission with respect to any additional indebtedness secured under paragraph B of this Section, Lender waives any subsequent security interest in the Mortgagor's principal dwelling that is created by this Security Instrument (but does not waive the security interest for the debts referenced in paragraph A of this Section).

5. **MORTGAGE COVENANTS.** Mortgagor agrees that the covenants in this section are material obligations under the Secured Debt and this Security Instrument. If Mortgagor breaches any covenant in this section, Lender may refuse to make additional extensions of credit and reduce the credit limit. By not exercising either remedy on Mortgagor's breach, Lender does not waive Lender's right to later consider the event a breach if it happens again.

Payments. Mortgagor agrees that all payments under the Secured Debt will be paid when due and in accordance with the terms of the Secured Debt and this Security Instrument.

Prior Security Interests. With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property, Mortgagor agrees to make all payments when due and to perform or comply with all covenants. Mortgagor also agrees not to allow any modification or extension of, nor to request any future advances under any note or agreement secured by the lien document without Lender's prior written approval.

Claims Against Title. Mortgagor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Mortgagor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Mortgagor's payment. Mortgagor will defend title to the Property against any claims that would impair the lien of this Security Instrument. Mortgagor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses Mortgagor may have against parties who supply labor or materials to maintain or improve the Property.

Property Condition, Alterations and Inspection. Mortgagor will keep the Property in good condition and make all repairs that are reasonably necessary. Mortgagor shall not commit or allow any waste, impairment, or deterioration of the Property. Mortgagor agrees that the nature of the occupancy and use will not substantially change without Lender's prior written consent. Mortgagor will not permit any change in any license, restrictive covenant or easement without Lender's prior written consent. Mortgagor will notify Lender of all demands, proceedings, claims and actions against Mortgagor, and of any loss or damage to the Property.

Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Lender shall give Mortgagor notice at the time of or before an inspection specifying a reasonable purpose for the inspection. Any inspection of the Property shall be entirely for Lender's benefit and Mortgagor will in no way rely on Lender's inspection.

Authority to Perform. If Mortgagor fails to perform any duty or any of the covenants contained in this Security Instrument, Lender may, without notice, perform or cause them to be performed. Mortgagor appoints Lender as attorney in fact to sign Mortgagor's name or pay any amount necessary for performance. Lender's right to perform for Mortgagor shall not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Security Instrument.

Leaseholds; Condominiums; Planned Unit Developments. Mortgagor agrees to comply with the provisions of any lease if this Security Instrument is on a leasehold. If the Property includes a unit in a condominium or a planned unit development, Mortgagor will perform all of Mortgagor's duties under the covenants, by-laws, or regulations of the condominium or planned unit development.

Condemnation. Mortgagor will give Lender prompt notice of any pending or threatened action, by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Mortgagor authorizes Lender to intervene in Mortgagor's name in any of the above described actions or claims. Mortgagor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds shall be considered payments and will be applied as provided in this Security Instrument. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

Insurance. Mortgagor shall keep Property insured against loss by fire, flood, theft and other hazards and risks reasonably associated with the Property due to its type and location. This insurance shall be maintained in the amounts and for the periods that Lender requires. The insurance carrier providing the insurance shall be chosen by Mortgagor subject to Lender's approval, which shall not be unreasonably withheld. If Mortgagor fails to maintain the coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property according to the terms of this Security Instrument.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard "mortgage clause" and, where applicable, "loss payee clause." Mortgagor shall immediately notify Lender of cancellation or termination of the insurance. Lender shall have the right to hold the policies and renewals. If Lender requires, Mortgagor shall immediately give to Lender all receipts of paid premiums and renewal notices. Upon loss, Mortgagor shall give immediate notice to the insurance carrier and Lender. Lender may make proof of loss if not made immediately by Mortgagor.

Unless otherwise agreed in writing, all insurance proceeds shall be applied to the restoration or repair of the Property or to the Secured Debt, whether or not then due, at Lender's option. Any application of proceeds to principal shall not extend or postpone the due date of the scheduled payment nor change the amount of any payment. Any excess will be paid to the Mortgagor. If the Property is acquired by Lender, Mortgagor's right to any insurance policies and proceeds resulting from damage to the Property before the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition.

Financial Reports and Additional Documents. Mortgagor will provide to Lender upon request, any financial statement or information Lender may deem reasonably necessary. Mortgagor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Mortgagor's obligations under this Security Instrument and Lender's lien status on the Property.

6. **WARRANTY OF TITLE.** Mortgagor warrants that Mortgagor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to grant, bargain, convey, sell and mortgage the Property. Mortgagor also warrants that the Property is unencumbered, except for encumbrances of record.
7. **DUE ON SALE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of, or contract for the creation of, a transfer or sale of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable.
8. **DEFAULT.** Mortgagor will be in default if any of the following occur:

Payments. Any Consumer Borrower on any Secured Debt that is an open end home equity plan fails to make a payment when due.

Property. Any action or inaction by the Borrower or Mortgagor occurs that adversely affects the Property or Lender's rights in the Property. This includes, but is not limited to, the following: (a) Mortgagor fails to maintain required insurance on the Property; (b) Mortgagor transfers the Property; (c) Mortgagor commits waste or otherwise destructively uses or fails to maintain the Property such that the action or inaction adversely affects Lender's security; (d) Mortgagor fails to pay taxes on the Property or otherwise fails to act and thereby causes a lien to be filed against the Property that is senior to the lien of this Security Instrument; (e) a sole Mortgagor dies; (f) if more than one Mortgagor, any Mortgagor dies and Lender's security is adversely affected; (g) the Property is taken through eminent domain; (h) a judgment is filed against Mortgagor and subjects Mortgagor and the Property to action that adversely affects Lender's interest; or (i) a prior lienholder forecloses on the Property and as a result, Lender's interest is adversely affected.

Executive Officers. Any Borrower is an executive officer of Lender or an affiliate and such Borrower becomes indebted to Lender or another lender in an aggregate amount greater than the amount permitted under federal laws and regulations.

9. **REMEDIES ON DEFAULT.** In addition to any other remedy available under the terms of this Security Instrument, Lender may accelerate the Secured Debt and foreclose this Security Instrument in a manner provided by law if Mortgagor is in default. In some instances, federal and state law will require Lender to provide Mortgagor with notice of the right to cure, or other notices and may establish time schedules for foreclosure actions.

At the option of the Lender, all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable, after giving notice if required by law, upon the occurrence of a default or anytime thereafter. The acceptance by Lender of any sum in payment or partial payment on the Secured Debt after the balance is due or is accelerated or after foreclosure proceedings are filed shall not constitute a waiver of Lender's right to require complete cure of any existing default. By not exercising any remedy on Mortgagor's default, Lender does not waive Lender's right to later consider the event a default if it happens again.

10. **EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS.** If Mortgagor breaches any covenant in this Security Instrument, Mortgagor agrees to pay all expenses Lender incurs in performing such covenants or protecting its security interest in the Property. Such expenses include, but are not limited to, fees incurred for inspecting, preserving, or otherwise protecting the Property and Lender's security interest. These expenses are payable on demand and will bear interest from the date of payment until paid in full at the highest rate of interest in effect as provided in the terms of the Secured Debt. Mortgagor agrees to pay all costs and expenses incurred by Lender in collecting, enforcing or protecting Lender's rights and remedies under this Security Instrument. This amount may include, but is not limited to, reasonable attorneys' fees of not more than 15% of the unpaid debt when it is referred for collection to an attorney who is not a salaried employee of the Lender, court costs, and other legal expenses allowed by law. To the extent permitted by the United States Bankruptcy Code, Mortgagor agrees to pay the reasonable attorneys' fees Lender incurs to collect the Secured Debt as awarded by any court exercising jurisdiction under the Bankruptcy Code. This Security Instrument shall remain in effect until released. Mortgagor agrees to pay for any recordation costs of such release.

11. **ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES.** As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), and all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste" or "hazardous substance" under any Environmental Law.

Mortgagor represents, warrants and agrees that:

- A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance is or will be located, stored or released on or in the Property. This restriction does not apply to small quantities of Hazardous Substances that are generally recognized to be appropriate for the normal use and maintenance of the Property.
- B. Except as previously disclosed and acknowledged in writing to Lender, Mortgagor and every tenant have been, are, and shall remain in full compliance with any applicable Environmental Law.
- C. Mortgagor shall immediately notify Lender if a release or threatened release of a Hazardous Substance occurs on, under or about the Property or there is a violation of any Environmental Law concerning the Property. In such an event, Mortgagor shall take all necessary remedial action in accordance with any Environmental Law.
- D. Mortgagor shall immediately notify Lender in writing as soon as Mortgagor has reason to believe there is any pending or threatened investigation, claim, or proceeding relating to the release or threatened release of any Hazardous Substance or the violation of any Environmental Law.

12. **ESCROW FOR TAXES AND INSURANCE.** Unless otherwise provided in a separate agreement, Mortgagor will not be required to pay to Lender funds for taxes and insurance in escrow.

13. **JOINT AND INDIVIDUAL LIABILITY; CO-SIGNERS; SUCCESSORS AND ASSIGNS BOUND.** All duties under this Security Instrument are joint and individual. If Mortgagor signs this Security Instrument but does not sign an evidence of debt, Mortgagor does so only to mortgage Mortgagor's interest in the Property to secure payment of the Secured Debt and Mortgagor does not agree to be personally liable on the Secured Debt. If this Security Instrument secures a guaranty between Lender and Mortgagor, Mortgagor agrees to waive any rights that may prevent Lender from bringing any action or claim against Mortgagor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws. The duties and benefits of this Security Instrument shall bind and benefit the successors and assigns of Mortgagor and Lender.
14. **SEVERABILITY; INTERPRETATION.** This Security Instrument is complete and fully integrated. This Security Instrument may not be amended or modified by oral agreement. Any section in this Security Instrument, attachments, or any agreement related to the Secured Debt that conflicts with applicable law will not be effective, unless that law expressly or impliedly permits the variations by written agreement. If any section of this Security Instrument cannot be enforced according to its terms, that section will be severed and will not affect the enforceability of the remainder of this Security Instrument. Whenever used, the singular shall include the plural and the plural the singular. The captions and headings of the sections of this Security Instrument are for convenience only and are not to be used to interpret or define the terms of this Security Instrument. Time is of the essence in this Security Instrument.
15. **NOTICE.** Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Security Instrument, or to any other address designated in writing. Notice to one mortgagor will be deemed to be notice to all mortgagors.
16. **WAIVERS.** Except to the extent prohibited by law, Mortgagor waives all homestead exemption rights relating to the Property.
17. **LINE OF CREDIT.** The Secured Debt includes a revolving line of credit. Although the Secured Debt may be reduced to a zero balance, this Security Instrument will remain in effect until released.
18. **APPLICABLE LAW.** This Security Instrument is governed by the laws as agreed to in the Secured Debt, except to the extent required by the laws of the jurisdiction where the Property is located, and applicable federal laws and regulations.
19. **RIDERS.** The covenants and agreements of each of the riders checked below are incorporated into and supplement and amend the terms of this Security Instrument
- [Check all applicable boxes]
- ☐ Assignment of Leases and Rents ☐ Other
20. ☐ **ADDITIONAL TERMS.**

SIGNATURES: By signing below, Mortgagor agrees to the terms and covenants contained in this Security Instrument and in any attachments. Mortgagor also acknowledges receipt of a copy of this Security Instrument on the date stated on page 1

Barbara A. Clancy (Seal) (Seal)
(Signature) BARBARA A. CLANCY (Date) (Signature) (Date)

Signed, sealed and delivered in the presence of:

Sammy L. Ford *Heather Feliciano*
(Witness) (Witness)

PROBATE:

STATE OF SOUTH CAROLINA , COUNTY OF ..CHARLESTON..... } ss.
Personally appeared before me the undersigned witness who, being duly sworn, deposed and said that (s)he saw the Mortgagor (and each Mortgagor if more than one) sign, seal and deliver the foregoing Mortgage and that (s)he, together with the other witness whose name appears as a witness, witnessed the execution thereof.

Sworn to and subscribed before me this 18TH Jay
of JUNE, 2004

Heather Feliciano (Seal) *Sammy L. Ford*
Notary Public for South Carolina

My commission expires: 01/14/12

BK 3916086

Exhibit "A"

BK 5393PG360

All that lot, piece, or parcel of land, with the buildings thereon, situate, lying and being in the Town of Summerville, in the County of Dorchester (formerly Berkeley), in the State aforesaid, measuring and containing sixty-three (63) feet, six inches, in front on Black Jack Street, now known as Cedar Street, and the same on the back line, by two hundred and ten (210) feet in depth, be the said dimensions more or less; butting and bounding, Northwest on Black Jack Street, now known as Cedar Street, Northeast on Lands now or formerly of John H. Grainger, Southeast on lands now or formerly of Thaddeus W. Phelon, and Southwest on lands now or formerly of the Estate of C.H. Kornahrens.

Being the same property conveyed to William E. Clancy and Barbara Anne Clancy by deed of John Grainger Lanneau, George Johnston Lanneau, and Jessie L. Finucan on March 20, 1981 and recorded on March 23, 1981 in book 436 at page 118 of the Dorchester County RMC office. Thereafter being the same property conveyed to the Mortgagor herein, Barbara Anne Clancy, by deed of distribution of William E. Clancy on January 25, 1990 and recorded on January 25, 1990 in book 717 at page 101 of the Dorchester County RMC office.

TMS: 137-07-07-023

Initials: _____

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
Filed for record this 16th
Day of Sept 2020
at 10:37a M and recorded
in book 4189 page 82
LINDA T. MESSERVY
REGISTER OF MESNE CONVEYANCES