THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY
Hon. Joe M. Crosby, Master in Equity

Case No. 2020-CP-22-00882

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Appellate Case No. 2023- 000017

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South Carolina Board of Financial Institutions, …….. Appellant,

v.

CDM Corporation, Inc. and Guardian Fiduciary Services, LLC, ……..… Respondents

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# RECORD ON APPEAL – VOLUME II

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| STATE OF SOUTH CAROLINA<br>COUNTY OF GEORGETOWN | ) | BEFORE THE MASTER IN EQUITY<br>OF GEORGETOWN COUNTY |
| South Carolina Board of Financial Institutions,<br><br>Plaintiff,<br><br>v.<br><br>CDM Corporation, Inc. and Guardian Fiduciary Services, LLC,<br><br>Defendant. | ) | CASE NO.: 2020-CP-22-00882<br><br>**PLAINTIFF'S MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL RECONSIDERATION** |

TO: JAMES D. MYRICK, ESQ., ATTORNEY FOR DEFENDANTS:

PLEASE TAKE NOTE that, pursuant to Rule 59(e), Plaintiff Board of Financial Institutions hereby moves before this Court for partial reconsideration, alteration, or amendment of the Court's Order regarding the parties' Motion for Summary Judgment dated November 3, 2022, attached as EXHIBIT A. This motion is made on the following grounds:

I. BOFI alone licenses and regulates non-exempt persons conducting trust business, and the Court erred in finding that the Probate Court has authority to "regulate" such persons, or to appoint unqualified persons like Defendants to fiduciary positions.

II. Even if the Probate Court had the authority to appoint unqualified persons to fiduciary positions, this Court erred in failing to hold that Defendants, who are non-exempt, unlicensed persons, are prohibited from accepting and acting under such appointments.

III. The usual and customary meaning of "trust business" includes serving in "non-trustee" fiduciary roles, and the interpretation applied by the Court erroneously renders numerous provisions of the South Carolina Code meaningless.

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IV. To the extent that the term "trust business," as used in S.C. Code Ann. § 34-21-10, is ambiguous, the Court erred by failing to give deference to BOFI's published guidance in interpreting that term.

V. The Court must not consider the testimony of Dundee W. Carter or Julian W. Walker, Jr., as their testimonies purport to be that of "legal experts" and are irrelevant and inadmissible.

## BACKGROUND

Plaintiff Board of Financial Institutions ("BOFI") brought this declaratory judgment and permanent injunction action against Defendants, alleging that they had conducted and continued to conduct unlicensed trust business by serving as trustee, guardian, conservator, personal representative, and/or agent, any or all of which constituted violations of S.C. Code Ann. § 34-21-10. That Section, which requires non-exempt persons to obtain BOFI's written approval prior to conducting trust business, provides as follows:

> No corporation, partnership or other person shall conduct a trust business in this State without first making a written application to the State Board of Bank Control and receiving written approval from the Board. Before any such application shall be approved, the Board shall make an investigation to determine whether or not the applicant has complied with all the provisions of law, whether in the judgment of the Board the applicant is qualified to conduct such a business and whether the conduct of such a business would serve the public interest, taking into consideration local circumstances and conditions at the place where such applicant proposes to do business; provided, however, that any person actively engaged in conducting a trust business in this State on January 1, 1972, shall not be required to make the application and receive the approval provided for herein. Provided, further, that nothing contained in this section shall prevent a natural person or a national banking association having its principal place of business in this State from qualifying and acting as trustee, executor, administrator, guardian, committee or in any other fiduciary capacity.

Defendants counterclaimed, seeking declaratory judgment that "trust business" means serving as a trustee of a trust instrument, and that serving in other "non-trustee" fiduciary roles did not constitute trust business, and could not be regulated by BOFI. Defendants also declared in their Answer, dated December 11, 2020, that they had withdrawn or were in the process of withdrawing from all trusteeships. This representation was false. As recently as January 5, 2022, Defendant CDM Corporation pursued a trustee appointment in the Georgetown Probate Court, and

represented to that court that CDM could legally serve in such capacity.[1] (Exhibit B - CDM Filing Seeking Trustee Appointment).

Defendants moved, and BOFI consented, for reference to the Georgetown County Master in Equity. Following discovery, the parties filed motions for summary judgment. The undisputed evidence and admissions indicated that Defendants have served as trustee, guardian, conservator, personal representative, and power of attorney without BOFI's prior written approval.

The Court ruled, without oral argument, partially granting each party's motion. The Court granted BOFI's summary judgment motion as to Defendants' actions in serving as a trustee of a trust instrument, but denied BOFI's contention that the remaining "non-trustee" fiduciary roles constituted trust business as contemplated in S.C. Code Ann. § 34-21-10. The Court granted Defendants' summary judgment motion as to the remaining fiduciary roles, holding that "non-trustee" roles such as conservator, guardian, personal representative, and agent do not constitute trust business, and furthermore are "regulated by the probate courts."

BOFI now moves this Court to reconsider its partial denial of BOFI's summary judgment motion, and its partial granting of Defendants' summary judgment motion.

## STANDARD

Rule 59(e), SCRCP allows a party to move for an order altering or amending a judgment. Pursuant to Rule 59, upon motion, a court may, in its discretion, "amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

[1] Despite Defendants' supposed concession that their trusteeships constituted trust business, and representations to this Court that it ceased all trustee activity, Defendant CDM tells the Probate Court in January 2022 that this Court "has not determined that CDM Corporation or Stephen Mantell may not serve as Trustee…" and asks the Probate Court to "confirm the installation of Stephen Mantell or CDM Corporation as the Second Successor Trustee…" Id. at ¶11-12.

## ARGUMENT

### I. BOFI ALONE LICENSES AND REGULATES NON-EXEMPT PERSONS CONDUCTING TRUST BUSINESS, AND THE COURT ERRED IN FINDING THAT THE PROBATE COURT HAS AUTHORITY TO "REGULATE" SUCH PERSONS, OR TO APPOINT UNQUALIFIED PERSONS LIKE DEFENDANTS TO FIDUCIARY POSITIONS.

BOFI alone licenses and regulates trust business in South Carolina, as mandated by S.C. Code Ann. §§ 34-21-10 and 20, and various other provisions of the Banking Code (Title 34). This regulatory oversight is entirely consistent with, and indeed supports the provisions of the Probate Code (Title 62) and the jurisdiction of the Probate Court in appointing fiduciaries.

The Court incorrectly finds that the Probate Code stands alone, voiding any other statute or provision of law which may interact with the jurisdiction of the Probate Courts.[2] This is not a proper application of statutory construction. When the rules of statutory construction are applied, BOFI's regulation of trust business coincides perfectly with the Probate Court's jurisdiction.

"Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative." Hodges v. Rainey, 341 S.C. 79, 88–89 (2000). "It is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would ... expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first." Justice v. Pantry, 330 S.C. 37, 43–44 (Ct.App.1998) (quoting State v. Hood, 181 S.C. 488, 491 (1936)).

#### a. The Probate Court does not have statutory authority to regulate trust business, nor does its jurisdiction void or negate any provision of the Banking Code.

It is the statutory duty of BOFI to regulate trust business. The Probate Court has jurisdiction to hear and preside over matters concerning fiduciaries, in accordance with its own

[2] Defendants' Answer and Counterclaim fails to assert any claim or allegation that they seek Declaratory Judgment concerning the authority of the Probate Court, or any supposed conflict between the jurisdiction of the Probate Court and the regulatory duties and powers of BOFI.

statutory authority, but it has no regulatory authority. This Court errs by making the unsupported declaration that the existence of the Probate Code or the Probate Courts invalidates all provisions of the Banking Code corresponding to Probate Court appointments.

The Probate Court is created by and derives its authority from statute, and it must act in accordance with the South Carolina Constitution and the laws of this State. The Supreme Court of South Carolina has stated "…we have definitively recognized that the probate court is not a constitutional court." Judy v. Judy, 393 S.C. 160, 169 (2011). "[T]he probate court has only such jurisdiction as vested in it by the General Assembly." Id. citing Davis v. Davis, 214 S.C. 247 (1949). This concept is derived directly from the South Carolina Constitution, which states that "Jurisdiction in matters testamentary and of administration ... shall be vested as the General Assembly may provide, consistent with the provisions of Section 1 of this article." S.C. Const. art. V, § 12. "Thus, the extent of the probate court's jurisdiction is defined by our legislature." Judy, 393 S.C. at 169 (2011).

The Probate Court does indeed have jurisdiction over "protective proceedings and guardianship proceedings," (S.C. Code Ann. § 62-1-302(a)(2)(i)), and "estates of decedents, including the contest of wills, construction of wills, determination of property in which the estate of a decedent or a protected person has an interest, and determination of heirs and successors of decedents and estates of protected persons…" (S.C. Code Ann. § 62-1-302(a)(1)). The Probate Code defines "proceedings" as "actions at law and suit in equity."

The licensure and regulation of financial businesses, however, is not a "proceeding." Nothing in the Probate Code indicates that trust business or fiduciaries are "overseen" or "regulated" by South Carolina Probate judges.[3] The Probate Court of each county addresses

[3] In fact, even in the individual proceedings over which the Probate Court holds jurisdiction, the court is expressly excused from such oversight: "Nothing herein shall require the court to oversee the plan of care [implemented by a

individual matters which are properly brought before it. Regulating trust business is an executive branch function, not a judicial one.

Likewise, BOFI has never claimed jurisdiction to preside over any probate "proceeding," "contest," "construction," or "determination." S.C. Code Ann. § 62-1-302(a). To the contrary, BOFI's authority to regulate the safety and soundness of operations of non-exempt persons conducting trust business is statewide, and is not predicated upon individual "proceedings" or "determinations," nor is its jurisdiction limited by subject matter, controversy, or by county.

Moreover, a Probate Court lacks the authority to examine or investigate any person or entity, whereas BOFI's initial licensing investigations and subsequent examinations of trust companies are rigorous and comprehensive. In the course of a regular trust company examination, BOFI assesses capability of management, adequacy of operations and internal controls, earnings and capital adequacy, compliance with laws, accepted standards of fiduciary conduct, and governing instruments and directives; and asset management. Green Aff. ¶4; see also FDIC, "Trust Examination Manual," fdic.gov/regulations/examinations/trustmanual/.

There is good reason for BOFI's regulation of trust business in this manner. In the present case, Stephen Mantell, the principal of both CDM Corporation and Guardian Fiduciary Services, LLC, has sought and accepted Probate Court appointments for numerous individuals, in the courts of multiple counties, before multiple Probate Judges, utilizing the names and corporate veils of both Defendants, as well as doing business as "Senior Helpers" (Exhibit C – Appointment of Mantell of Senior Helpers) ,[4] and potentially other corporate entities or names (Exhibit D - Mantell

guardian]." S.C. Code Ann. § 62-5-309(B). "Nothing herein shall require the court to oversee or approve the conservator's investment choices." S.C. Code Ann. § 62-5-414(B).

[4] Out of respect for the ward and parties involved in that case, BOFI has redacted significant portions of this Exhibit; however, BOFI will provide an unredacted copy for the Court if it wishes to review the original document.

Secretary of State Records). Recently, Defendants have disclosed that they have been acquired by a Michigan-based entity, WWWB Trustees, LLC.[5] (Exhibit E - Def. Resp. to Interrog.).

The totality of the operations of these various entities— across corporate names, county, judge, and matter— is simply not cognizable by the Probate Court, or by the principals, wards, or the families to whom Defendants advertise their services. However, BOFI's licensure, regulation, and examination of these entities would ensure that Defendants' fiduciary operations are undertaken with safety, soundness, propriety and fidelity.

Indeed, principals, wards, and their families are protected, and the Probate Court's work is aided, by BOFI's regulation of these entities.

Probate Courts have jurisdiction over individual proceedings or determinations related to a fiduciary, but do not have regulatory authority over trust business. The Court erred in finding that BOFI does not regulate the non-trustee fiduciary roles and does not have regulatory authority over these non-trustee fiduciaries "[b]ecause these roles are codified in the Probate Code and are regulated by the probate courts." BOFI asks this Court to amend its Order accordingly.

**b. The General Assembly gave BOFI the power to license or "qualify" non-exempt persons to serve in fiduciary roles, as a prerequisite to Probate Court appointments.**

The Banking Code is the more specific statute concerning persons serving in fiduciary roles, and the clear rules of statutory construction dictate that it must be considered an exception to or qualifier of the Probate Code. The Banking Code works hand-in-hand with the Probate Code by establishing BOFI's authority to license non-exempt persons conducting trust business as a prerequisite for Probate Court appointments.

[5] The Michigan Office of Banking has confirmed that WWWB, LLC (also known as Waterway, Wilholt, Worfel & Bronsink, LLC) is prohibited from acting as fiduciary in Michigan.

"Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." Capco of Summerville, Inc. v. J.H. Gayle Const. Co., 368 S.C. 137, 142 (2006).

The Probate Code defines a "person" broadly, to include "an individual, corporation… limited liability company… or any other legal or commercial entity." S.C. Code Ann. § 62-1-201(32). A "person" may serve as a trustee (S.C. Code Ann. § 62-7-102(a)(1)(i)), a guardian (S.C. Code Ann. § 62-5-308), a conservator (S.C. Code Ann. § 62-5-408), a personal representative of an estate (S.C. Code Ann. § 62-3-203), and an agent (S.C. Code Ann. § 62-8-102).

A "person" must be qualified to be appointed as a fiduciary. S.C. Code Ann. § 62-3-103 provides that, to serve as personal representative, a person must "be appointed by order of the court, *qualify*, and be issued letters." (emphasis added). In appointing a guardian and conservator, "the court shall consider persons who are *otherwise qualified*…" S.C. Code Ann. §§ 62-5-308(A) and 62-5-408(A) (emphasis added). These qualifications are not defined in the Probate Code; however, by referencing them, the Probate Code acknowledges that more specific statutes regarding qualifications exist elsewhere in the South Carolina Code or case law.

The Banking Code establishes some of those specific qualifications, by prohibiting non-exempt persons from "*qualifying* and acting as trustee, executor, administrator, guardian, committee or in any other fiduciary capacity," without BOFI's prior approval. S.C. Code Ann. § 34-21-10. Thus, the Banking Code addresses the qualification of non-exempt persons serving in fiduciary appointments "in a more specific and definite manner," and therefore must be "considered an exception to, or a qualifier of, the general statute and given such effect." Capco of Summerville, 368 S.C. 137, 142 (2006).

The Banking Code directly acknowledges and incorporates the Probate Court's general power of appointment, while also establishing BOFI's specific oversight of the qualifications for a trust company to serve under such a court appointment. S.C. Code § 34-15-10 provides that entities with BOFI's approval to conduct trust business must have at least $250,000 in business capital before they can qualify for appointment by the Probate Court:

> …a **banking corporation or trust company** with at least two hundred fifty thousand dollars total unimpaired capital **may be appointed executor** of a will, codicil, or writing testamentary, administrator with the will annexed, **administrator of the estate of any person**, **receiver**, **assignee**, **guardian** or **trustee** under a will or instrument creating a trust for the care and management of property, under the same circumstances, in the same manner, and subject to the same control **by the court having jurisdiction of the appointment** as a **legally qualified person**…

(emphasis added). This Section sets out the specific requirements for persons conducting BOFI-approved trust business to be "legally qualified" for appointment as personal representative, guardian, conservator (i.e. "administrator of the estate of any person"), or trustee, while also acknowledging that the Probate Court has "jurisdiction of the appointment." Id. Section 34-15-10 confirms that BOFI's licensure is intended to serve as a "qualifier of" the Probate Code's provisions regarding fiduciary appointments because the licensure "deals with the identical issue in a more specific and definite manner." Capco of Summerville, 368 S.C. 137, 142 (2006).

The General Assembly intended, and the rules of statutory construction demand, that the Banking Code's provisions regarding trust business must read as an exception to or qualifier of the Probate Code. BOFI asks this Court to amend its Order accordingly.

**c. The Court fails to articulate what specific Banking Code statutes are voided by its ruling, and further fails toapply the appropriate construction rules in determining which statute should stand.**

Even if the Banking Code and Probate Code conflicted irreconcilably, the Probate Code (including the jurisdiction of the Probate Court) and the Banking Code (including the regulatory

powers and duties of BOFI) are both equally the law of the State of South Carolina. Accordingly, the Court must identify—or demand that the Defendants identify— with specificity exactly what statutes conflict, and how they should be resolved, in accordance with the statutory construction jurisprudence of South Carolina.

## II. EVEN IF THE PROBATE COURT HAD THE AUTHORITY TO APPOINT UNQUALIFIED PERSONS TO FIDUCIARY POSITIONS, THIS COURT ERRED IN FAILING TO HOLD THAT DEFENDANTS, WHO ARE NON-EXEMPT UNLICENSED PERSONS, ARE PROHIBITED FROM ACCEPTING AND ACTING UNDER SUCH APPOINTMENTS.

Even if the Probate Court had the authority to appoint persons as fiduciaries without regard to their qualifications, S.C. Code Ann. § 34-21-10 would still prohibit non-exempt persons from accepting and acting under those fiduciary appointments without first obtaining BOFI's approval.

Much has been made regarding the authority of the Probate Courts to appoint persons to non-trustee fiduciary roles. The Court's Order inaccurately declares that "Because these [non-trustee] roles are codified in the Probate Code and are regulated by the probate courts, the Board of Financial Institutions does not control and regulate these functions." Order at p. 7. However, BOFI does not purport to regulate the Probate Court or supplant its powers. BOFI regulates the person, or more specifically, the business.

Unlicensed, non-exempt persons are prohibited from accepting fiduciary appointments, including those made by the Probate Court. "No corporation, partnership or other person shall conduct a trust business" without first "receiving written approval from the Board." S.C. Code Ann. § 34-21-10. A non-exempt person without BOFI's approval is prohibited "from qualifying and acting as trustee, executor, administrator, guardian, committee or in any other fiduciary capacity," in the same way that a person without a medical license cannot accept a Probate Court's appointment to serve as a physician to examine an alleged incapacitated person.

Nothing in the Probate Code requires or allows a non-exempt person to accept a Probate Court appointment without BOFI's prior approval to conduct trust business pursuant to S.C. Code Ann. § 34-21-10. A Probate Court cannot force a person to accept a fiduciary appointment. Acceptance of Probate Court appointments is voluntary and must be undertaken lawfully. A person must file a "statement of acceptance of the duties of office," in order to qualify for an appointment as personal representative. S.C. Code Ann. § 62-3-601. Likewise, a person must accept an appointment to serve as guardian (S.C. Code Ann. § 62-5-305) and conservator (S.C. Code Ann. § 62-5-411), and an agent (S.C. Code Ann. § 62-8-113(a)).

Even if the Probate Court had statutory authority to appoint an unqualified person, a non-exempt person violates S.C. Code Ann. § 34-21-10 by accepting and acting under such appointment without prior BOFI approval. BOFI's regulation of persons conducting "trust business," must be upheld and enforced by this Court. Thus, BOFI asks this Court to amend its Order accordingly.

## III. THE USUAL AND CUSTOMARY MEANING OF "TRUST BUSINESS," INCLUDES SERVING IN NON-TRUSTEE FIDUCIARY ROLES, AND THE INTERPRETATION APPLIED BY THE COURT RENDERS NUMEROUS PROVISIONS OF THE SOUTH CAROLINA CODE MEANINGLESS.

The usual and customary meaning of "trust business"—which BOFI is statutorily bound to license, supervise, and regulate—includes non-trustee fiduciary activities. This interpretation gives full and proper meaning to the provisions of both the Banking Code and the Probate Code, while the narrow interpretation of trust business applied in the Court's Order renders numerous clauses and provisions of the South Carolina Code ambiguous or meaningless.

"Words used in a statute should be taken in their ordinary and popular significance unless there is something in the statute requiring a different interpretation." Santee Cooper Resort v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989). "The terms must be construed

in context and their meaning determined by looking at the other terms used in the statute." Hinton v. S.C. Dep't of Prob., Parole and Pardon Servs., 357 S.C. 327, 333, 592 S.E.2d 335, 338 (Ct. App. 2004). "[T]he court should not consider the particular clause being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law." S.C. Coastal Council v. S.C. Ethics Comm'n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991).

"Trust" is a word with multiple definitions, each of which applies in different contexts. Of course, there is a specific type of legal instrument called a "trust," and the Probate Code defines it well. However, the Probate Code makes no attempt to define "trust business." The Court erroneously attempts to define "trust business" using the Probate Code's definition of "trust," despite the fact that that definition clearly purports to define a legal instrument rather a type of financial business, and furthermore serves only as a definition "in *this* Code" (i.e. the Probate Code). S.C. Code Ann. § 62-1-201 (emphasis added). It is an error to shoehorn the Probate Code's necessarily specific definition of "trust" into the term "trust business" as used in Title 34.

A more fitting definition of the "trust" in "trust business" refers to the "the obligation or responsibility imposed on a person in whom confidence or authority is placed: a position of trust." www.dictionary.com/browse/trust. In the banking and financial industry, "trust business" refers broadly to this "position of trust" – the trust relationship inherent in fiduciary arrangements. In fact, Black's Law Dictionary's definition of "trust relationship" equates a *trust* relationship with a *fiduciary* relationship: "An association based on one person's reliance on the other person's specialized training; esp., FIDUCIARY RELATIONSHIP. — Also termed fiducial relationship." Black's Law Dictionary (11th ed. 2019).

The idea that "trust business" extends beyond the administration of trust instruments alone, and includes all types of fiduciary appointments, is confirmed over and over throughout State law.

For example, S.C. Code Ann. § 34-21-10 declares no person shall conduct "trust business" without BOFI's prior approval, but then clarifies that "nothing contained in this section shall prevent a natural person… from qualifying and acting as trustee, executor, administrator, guardian, committee or in any other fiduciary capacity."[6] Clearly, the regulation of "trust business" has implications on all of the named fiduciary roles, and not just trustee. Otherwise, the General Assembly has wasted its ink by listing them.

Similarly, S.C. Code 34-21-210(1) defines "trust institution" to include "…any trust company, authorized to act in a fiduciary capacity in this State…" And that same section defines "fiduciary" to mean "a trust institution undertaking to act alone or jointly with others primarily for the benefit of another in all matters connected with its undertaking and includes trustee, executor, administrator, guardian of estates, committee of estates of persons non compos mentis, and managing agent." S.C. Code 34-21-210(2). The term trust, as used in "trust company" and "trust institution," must refer to the broader "trust relationship" (i.e. fiduciary relationship) contemplated in the Black's Law definition above. Otherwise, the definitions of Section 34-21-210 are nonsensical and confounding, if not meaningless—and the effect of this Court's decision is that those words, spoken by the General Assembly, will be voided without justification.

In fact, regardless of whether the "trust" in "trust business" broadly refers to the fiduciary relationship, or specifically to the legal instrument, when "construed in context" of the South Carolina Code provisions above, one must conclude that the trust business BOFI regulates includes serving as trustee, guardian, conservator, personal representatives, and/or other fiduciary roles. Hinton, 357 S.C. at 333 (Ct. App. 2004).

[6] This language mirrors another provision of the Banking Code, which does not use the term "trust business," but establishes identical fiduciary oversight by BOFI over state savings banks. A state savings bank may, "with prior board approval, act as a trustee, executor, board, guardian, or in another fiduciary capacity." S.C. Code Ann. § 34-30-144(A)(3).

Accordingly, BOFI asks this Court to reconsider its denial of BOFI's motion for summary judgment, and find that Defendants' "non-trustee" fiduciary activities constitute trust business which requires prior BOFI approval pursuant to S.C. Code Ann. § 34-21-10.

## IV. TO THE EXTENT THAT THE TERM "TRUST BUSINESS," AS USED IN S.C. CODE ANN. § 34-21-10, IS AMBIGUOUS, THE COURT ERRED BY FAILING TO GIVE DEFERENCE TO BOFI'S PUBLISHED GUIDANCE.

The Court's Order suggests that the statutes at issue in this case are ambiguous; yet, despite this ambiguity, the Court erroneously fails to give deference to, or even consider BOFI's Policy Statement defining trust business. (Exhibit F – BOFI Policy Statement).

If the Court concludes that the definition of "trust business" must always involve a trust instrument, but cannot explain the purpose for the inclusion of the non-trustee fiduciary roles listed in the statutes governing trust business, then the Court must logically conclude that this conflict of language renders these statutes ambiguous. See e.g. S.C. Code Ann. §§ 34-15-10; 34-21-10; 34-21-210(1) and (2). In light of this ambiguity, the Court must give deference to BOFI's interpretation of these statutes.

### a. The Court must give deference to BOFI's public decision and clearly articulated guidance.

BOFI, through its Board, has issued guidance which clearly defines "trust business" as used in S.C. Code Ann. § 34-21-10, et seq. The Court has erred by failing to give BOFI's interpretation the deference to which it is entitled.

"If the statute or regulation is silent or ambiguous with respect to the specific issue, the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." Sierra Club v. S.C. Dep't of Health & Env't Control, 426 S.C. 236, 256 (2019). South Carolina courts "defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute [or regulation].'" Kiawah Dev. Partners,

II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 34-35 (2014) (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)). "Where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason." Nucor Steel, a Div. of Nucor Corp. v. S.C. Pub. Serv. Comm'n, 310 S.C. 539, 543 (1992).

"The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Sweat, 379 S.C. at 374 (citing Buist v. Huggins, 367 S.C. 268, 276 (2006)).

Plaintiff is the agency responsible for approving entities to conduct a trust business in South Carolina, and supervising and examining those entities. S.C. Code Ann. §§ 34-21-10 and 20. Entities approved to conduct a trust business are "subject to rules and regulations promulgated by the Board." S.C. Code Ann. § 34-21-20.

On June 1, 2022, the Board issued a "Policy Statement Concerning the Conducting of Trust Business by Non-Depository Entities in South Carolina." (Exhibit F). In that guidance, the Board affirms BOFI's longstanding industry and regulatory interpretation of the phrase "trust business" as used in S.C. Code Ann. § 34-21-10:

> The Board interprets the phrase "conduct a trust business" as used in S.C. Code Ann. § 34-21-10, to include acting as trustee of a trust (as defined by S.C. Code Ann. § 62-1-201(49)), executor, administrator, or personal representative (as defined by S.C. Code Ann. § 62-1-201(33)), guardian (as defined by S.C. Code Ann. § 62-5-101(9)), conservator (as defined by S.C. Code Ann. § 62-1-201(6)), managing agent (as defined in S.C. Code Ann. § 34-21-210(7)). Additionally, serving as an agent (as defined by S.C. Code Ann. § 62-8-102(1)), also constitutes conducting a trust business.
>
> The Board further interprets the phrase "conduct a trust business" to include holding oneself out as providing or offering the act of serving in these fiduciary roles to the public in South Carolina.

The Policy Statement was reviewed and approved unanimously by the Board's eleven members, nine of whom are actively engaged in financial business, and all of whom are obligated

to "represent the best interests of the public" (S.C. Code Ann. § 34-1-20). This Policy Statement is worthy of deference, and there is no compelling reason to overturn it.

Moreover, the Policy Statement is consistent with Board actions prior to its discovery of Defendants' unauthorized trust business. For example, BOFI has entered into the Nationwide Cooperative Agreement for Supervision and Examination of Multi-State Trust Institutions, which is a compact between the states addressing the regulation of trust business by state banking regulators. This document defines the regulated "trust business" to include acting "pursuant to order of court of competent jurisdiction as executor or administrator of the estate of a deceased person or as a guardian or conservator for a minor or incapacitated person," and "administer[ing] in any other fiduciary capacity real or personal property." (Exhibit G, Section 1.1). Additionally, prior to the present litigation, on April 28, 2020, the Board executed a Consent Order in the matter of J. Earle Financial, LLC, finding that the company had conducted unauthorized trust business in violation of S.C. Code 34-21-10, et seq., by advertising that it "provides administrative services to trusts, that it serves as a fiduciary to administer assets in conservatorships and estates, and that it can serve as the managing agent to administer trusts," and by serving as trustee of a trust, and as personal representative of an estate. (Exhibit H).

**b. The Office of Comptroller of the Currency has issued guidance that is entirely consistent with BOFI's position, defining "trust business" to include fiduciary activity beyond serving as trustee.**

The Office of the Comptroller of the Currency ("OCC"), the federal regulator of financial institutions, has issued guidance stating that national banks, whether depository or not, must have "trust powers" to serve in any fiduciary capacity.

Federal law provides that the OCC may authorize a national banking corporation to serve as "trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or in any other fiduciary capacity in which State banks, trust companies, or other

corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located." 12 U.S.C. § 92a(a).

The OCC has clarified that serving in any one of these roles constitutes trust business: "A national bank that only performs one fiduciary capacity under 12 U.S.C § 92a would need trust powers." EXHIBIT I - OCC Interpretive Letter #1176, (January 2021). The OCC's interpretation of federal law is consistent with and supports BOFI's position in this case, as well as its published guidance discussed above.

**c. Every State in the United States regulates "non-trustee" fiduciary activity as trust business.**

Every state in the United States interprets "trust business" to include serving in the fiduciary roles of trustee, conservator, guardian, personal representative, and other fiduciary roles, and every regulator in the United States prohibits entities from serving in these roles without prior approval from the appropriate governing body.

The applicable statutes for all fifty states have been compiled, with appropriate terms highlighted for the Court's convenience, and attached to this Memorandum as Exhibit J. Despite a broad range of wording and formatting, all fifty states of the United States prohibit trust business without prior approval and continued oversight by the state's banking regulator, the conducting of which includes the fiduciary roles of trustee, conservator, guardian, personal representative of estates, and other fiduciary roles.

The unanimity among the states defining trust business beyond "trusteeship" is further confirmation that the BOFI Policy Statement is worthy of deference, and this Court must defer to BOFI's interpretation of the law applicable in this case.

## V. THIS COURT MUST NOT CONSIDER THE TESTIMONY OF DUNDEE W. CARTER OR JULIAN W. WALKER, JR., AS THEIR TESTIMONIES PURPORT TO BE THAT OF "LEGAL EXPERTS" AND ARE IRRELEVANT AND INADMISSIBLE.

To the extent that the Court relied upon the affidavit testimony of Dundee W. Carter or Julian W. Walker, Jr., which the Defendants submitted with their Motion for Summary Judgment, that testimony is inadmissible and should not be considered in rendering a decision in this matter.

The interpretation of a statute is a question of law for the court. State v. Sweat, 379 S.C. 367, 373 (Ct. App. 2008), aff'd as modified, 386 S.C. 339 (2010). "In general, expert testimony on issues of law is inadmissible." Dawkins v. Fields, 354 S.C. 58, 66 (2003) citing Askanase v. Fatjo, 130 F.3d 657, 673 (5th Cir.1997) (where the court disallowed a legal expert's opinion on whether corporate officers and directors breached their fiduciary duties because "[s]uch testimony is a legal opinion and inadmissible."); United States v. Sinclair, 74 F.3d 753, 758 n. 1 (7th Cir.1996) (commenting that Federal Rules of Evidence 702 and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of a case). Expert legal testimony treads on "the trial judge's role as the sole source of the law in the trial." Carter v. Bryant, 429 S.C. 298, 314 (Ct. App. 2020).

Defendants have submitted affidavits by two attorneys, Dundee W. Carter or Julian W. Walker, Jr., which Defendants apparently purport to be experts on the law of this case. Both affidavits render legal opinions that are inadmissible as a matter of law. Although neither individual's testimony is cited in the Court's Order, there are similarities between the Order and Affidavits that suggest that the Court was influenced by this inadmissible testimony.

The relevant facts of this case are uncomplicated and stipulated-to, and there is no need for "scientific, technical, or other specialized knowledge [to] assist the trier of fact to understand the

evidence or determine a fact in issue," as required for the qualification of expert witnesses pursuant to Rule 702, SCRE.

Accordingly, this Court should strike the affidavits of Carter and Walker from the record and declare them inadmissible as a matter of law.

## CONCLUSION

In conclusion, S.C. Code Ann. § 34-21-10 plainly establishes that BOFI must license and regulate non-exempt persons prior to their conducting trust business. The trust business regulated by BOFI includes non-trustee fiduciary activity. In regulating these persons, the statutory framework confirms that BOFI does not trespass upon the jurisdiction of the Probate Court, although BOFI's approval is a necessary qualification for a non-exempt person to be appointed by the Probate Court, and to accept an appointment as a fiduciary.

Respectfully submitted,

By: s/ Shawn D. Eubanks
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Attorneys for Board of Financial Institutions

November 14, 2022
Columbia, South Carolina

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE PROBATE COURT |
| | ) | |
| COUNTY OF GEORGETOWN | ) | Case No.: ~~2020~~ 2021-GC-22-00037 |
| | ) | |
| In re: Robert K. Stahlberger Revocable Trust | ) | |
| | ) | **ANSWER OF RESPONDENTS STEPHEN MANTELL and CDM CORPORATION** |
| David J. Gundling, Trustee, | ) | |
| | ) | |
| Petitioner. | ) | |
| | ) | |

Respondents Stephen Mantell (incorrectly nominated above as Steven Mantell) and CDM Corporation (collectively "Respondent"), Second Successor Trustee of the Robert K. Stahlberger Revocable Trust ("the Trust"), allege and state the following:

1. Respondent denies each and every allegation in the Petition not hereinafter expressly admitted.

2. At issue is Mr. Gundling's resignation as Successor Trustee of the Trust and CDM Corporation and Stephen Mantell's role as Second Successor Trustee.

3. Robert K. Stahlberger served as the original trustee. Upon the death of Stahlberger, David J. Gundling assumed the role as Sucessor Trustee. In the present action, David J. Gundling, now seeks a "conditional" resignation and to direct an alternate appointment of the Third Successor Trustee, skipping the Respondent, Second Successor Trustee altogether.

4. Respondent agrees with Petitioner's allegation that the terms of the Trust Agreement names CDM Corporation and Stephen Mantell as Second Successor Trustee in the event of resignation by Mr. Gundling, providing upon such resignation to wit: "then CDM Corporation, by and through its Representative Stephen P. Mantell (provided that Stephen P. Mantell, individually, is actively personally serving as administrator of the Trust) shall serve as Trustee . . . ." Article 4, Section C.

5. Respondent further responds that the Trust Agreement requires in Article 4, Section C that the Trust imposes a "requirement of posting a trustee bond or surety in the amount necessary to fully protect the Trust Estate.

6. Respondent has acquired and posted such a bond in the amount of Three Million Five Hundred Thousand and 00/100, as evidenced by the "Bond of Trustee" issued by Liberty Mutual Surety on December 8, 2021 and attached as **Exhibit A.**

7. On information and belief, Mr. Gundling's resignation from his role as Trustee is due to the temporary suspension of his law license. A copy of the December 2021 suspension is attached hereto as **Exhibit B.**

8. In response to the request for "Conditional Resignation of Successor Trustee" David J. Gundling ("Petitioner's Ex. A"), Respondent avers Mr. Gundling's resignation may not be contingent nor conditioned upon any factor created and superimposed by Mr. Gundling. To make the resignation conditional would supplant the written wishes of the settlor of the trust with those of Mr. Gundling. Further, because the terms of the Stahlberger Trust control, Stephen Mantell now serves as Trustee and Gundling's Petition herein is simply a masked attempt to remove Mantell as Trustee, subject to all the legal requirements of such action.

9. In further reference to Petitioner's Exh. A, Mr. Gundling's position as Trustee exists exclusively through the terms of the Trust Agreement. Mr. Gundling possesses no power to veto or otherwise decide who will serve as the Second Successor Trustee in his absence. The intent of the settlor, stated clearly in the Trust Agreement, directs that Stephen Mantell and/or his company CDM Corporation shall be Second Successor Trustee.

10. Upon information and belief, Respondent directs the Court to the deficient record keeping of Mr. Gundling as further evidence that his resignation should be accepted without condition. Any attempt to circumvent the settlor's intent in the appointment of the Second Successor Trustee could prevent investigation and disclosure of such shortcomings to this Court.

11. Although Respondent admits that there is a pending lawsuit in Georgetown County by the Board of Financial Institutions, that court has not determined that CDM Corporation or Stephen Mantell may not serve as Trustee in any matter. The Georgetown case presents a novel issue of law in South Carolina. In fact, the court there specifically denied the Board of Financial Institution's Motion for Summary Judgment on the issue of capacity to serve. Additionally and importantly, there is no allegation within the Georgetown case by the Board of Financial Institutions that an individual, here Mantell, may not serve as a trustee.

12. In response to counsel for Petitioner's personal reference to a previous matter in Probate Court regarding Stephen Mantell, her subjective statement is both unsubstantiated and irrelevant unless there was a dispositive ruling by the court, and there was none. No case law is cited or even suggested by reference. Further, and in affirmative response, Respondent states that the case referenced by Petitioner resulted in a voluntary resignation by Mr. Mantell by way of a settlement agreement to save litigation expenses to the trust. There was no finding of misfeasance, malfeasance, or nonfeasance on the part of Mr. Mantell.

Wherefore, having fully responded to the Petition, Respondent requests that the Petition be denied, Mr. Grundling's resignation be accepted without conditions, and that

the court confirm the installation of Stephen Mantell or CDM Corporation as the Second Successor Trustee directed by the Trust Agreement.

Respectfully submitted this 5th day of January 2022.

**WOMBLE BOND DICKINSON (US) LLP**

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(843) 722-3400

*Attorneys for Stephen Mantell and CDM Corporation*

STATE OF SOUTH CAROLINA )
) IN THE PROBATE COURT
) FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN ) CASE NO. 2011-GC-22-00012
(Conservator)

IN THE MATTER OF: )
[redacted] )
)
)
)
)
)
) ORDER APPOINTING CONSERVATOR
)
)
)
)
)
)
)
)

PROBATE COURT
2011AUG29PM4:58
GEORGETOWN SC

Date of Hearing: Friday, August 19, 2011; 10:00 a.m.
Location of Hearing: Georgetown County Judicial Center, 401 Cleland Street, Georgetown, South Carolina, Courtroom 2-C
Trial Judge: Waldo A. Maring
Attorney for Petitioner: Jason P. Boan, Esquire
Attorney for Respondent/Guardian ad Litem: Roger Giardino, Esquire
Court Reporter: Alice Nelson

A hearing in the above-captioned matter was scheduled before me on Friday, August 19, 2011, at 10:00 a.m. At the call of the case, the Petitioner, [redacted] was present along with her attorney, Jason P. Boan. The Respondent, [redacted] was present with her attorney/Guardian ad Litem, Roger Giardino. Among those present in the Courtroom were the [redacted]

The issues before the Court are set forth in a Petition for Appointment of Conservator filed on April 18, 2011. This matter was served upon all interested parties on April 20, 2011, and served upon the Respondent's Guardian ad Litem and attorney on April 21, 2011. Thereafter, this Court issued a Temporary Protective Order signed by the Honorable Waldo A. Maring on May 12, 2011, and filed with this Court on that same day.

The Respondent filed an Answer and Counterclaim to the Petition on May 23, 2011, wherein she requested that the relief sought in the Petition be denied or, in the alternative, for [redacted] to be appointed as her Conservator.

Prior to receiving any testimony in this matter, the Court addressed two issues raised by Respondent's counsel. The first included the Respondent's withdrawal of the request for [redacted] to be made Conservator and second, the Respondent's attorney addressed the inherent difficulties in serving as both the Guardian ad Litem and attorney for an alleged incapacitated individual.

After careful consideration of the pleadings in this matter, the testimony of the Petitioner, the testimony of [redacted] the testimony of the Respondent and the exhibits before this Court, including the written report of Dr. Kathleen A. O'Leary and that of Betsy Franklin, I make the following Findings of Fact:

**FINDINGS OF FACT:**

1. The Petitioner and Respondent in this matter are citizens and residents of Georgetown County, South Carolina.

2. I find that this Court has jurisdiction over the parties and subject matter in this action.

3. I find that the Petitioner has set forth in her pleadings that her priority for appointment as Conservator is based upon being the [redacted]

4. I find that the Petitioner has alleged that [redacted]

5. The Petitioner alleges that the Respondent [redacted]

6. The Petitioner showed to the Court through the Respondent's bank statements that, prior [redacted]

[redacted]

7. The Petitioner set forth that [redacted]

8. Petitioner further showed, through the introduction of the Respondent's bank accounts, [redacted]

9. Petitioner introduced into evidence [redacted]

10. The Petitioner also introduced into evidence [redacted]

11. The Respondent testified to the Court [redacted]

12. I find that the Respondent is an incapacitated person [redacted] and, further, I believe that it is in her best interest for a Conservator to be appointed.

13. I find that Stephen Mantell of Senior Helpers in Georgetown County shall be appointed Conservator for the above named Respondent.

14. I find that the Petitioner, [redacted]

15. I find that since the Petition has been granted, it would be appropriate to have the fees and costs associated with this matter be born by the Respondent.

Based upon the above-cited Findings of Fact, I make the following Conclusions of Law:

## CONCLUSIONS OF LAW:

1. The parties and subject matter are properly before this Court.

2. The Petitioner has carried her burden of proof in establishing that the Respondent is an incapacitated individual in need of a Conservator.

3. Although the Petitioner is qualified to be the Conservator [redacted]

4. It would be in the Respondent's best interests to have a Conservator and, based thereon, I nominate and appoint Stephen Mantell of Senior Helpers as Conservator for the Respondent. I find that Stephen Mantell has been previously qualified and used by this Court and that he has already established a sufficient Bond to satisfy to this Court that he is acceptable.

5. Stephen Mantell shall have all the authority of a Conservator, including inventory, management and disbursement of the Respondent's assets as a fiduciary for the Respondent.

6. The Respondent shall make no more expenditures of her funds, nor shall she allow anyone other than the Conservator to expend her funds, without permission of her Conservator.

7. This action brought by the Petitioner has brought beneficial results for the Respondent and I believe it is appropriate for the Respondent to pay the attorneys' fees and costs associated with this matter as follows: (1) Betsy Franklin, the court-appointed visitor, $225.00; (2) Kathleen A. O'Leary, court-appointed examiner, $400.00; (3) Roger P. Giardino, Guardian ad Litem/attorney, $4,562.50; (4) Jason P. Boan, Boan Law Firm, $5,400.00 in fees and $300.00 in costs. The Respondent has previously paid $2,700.00 to The Boan Law Firm leaving a total balance owed to The Boan Law Firm of $3,000.00; and (5) Prestige Court Reporting, Inc., $145.00.

Based upon the above-cited Findings of Fact and Conclusions of Law it is, therefore

ORDERED that a Conservator shall be appointed for the incapacitated Respondent;

ORDERED that Stephen Mantell of Senior Helpers is hereby nominated and appointed;

ORDERED that Stephen Mantell shall inventory, manage and disburse the Respondent's funds in a fiduciary capacity exclusively for the benefit of the Respondent;

ORDERED that the Respondent shall cease expending any monies or withdrawing monies from any account or allowing others to do so on her behalf without permission of her Conservator;

ORDERED that the fees and costs identified herein shall be paid by the Conservator for the Respondent; and

IT IS SO ORDERED.

HONORABLE WALDO MARING
PRESIDING JUDGE

August 29, 2011

Georgetown, SC

South Carolina Secretary of State

# Business Entities Online

File, Search, and Retrieve Documents Electronically



## Registered Agent Search

*Enter the full or partial name you wish to search for. The first 50 results will be displayed below. If you query has more than 50 results please contact the Secretary of State's office.*

**Search by Agent Name**

mantell

**Search Results**

***Total found: 7***

| Agent Name | Entity Name | Date of Incorporation | Entity Type |
|---|---|---|---|
| [redacted] | | | |
| **STEPHEN P. MANTELL** | CDM CORPORATION | 01/08/2009 | Corporation |
| **STEPHEN P. MANTELL** | GUARDIAN FIDUCIARY SERVICES LLC | 03/11/2011 | Limited Liability Company |
| [redacted] | | | |
| **STEPHEN P MANTELL** | MANTELL, INC. | 08/06/2003 | Corporation |
| **STEPHEN P MANTELL** | MANTELL PROPERTIES, LLC | 08/06/2003 | Limited Liability Company |
| **Stephen Mantell** | WWWB Trustees LLC | 12/10/2021 | Limited Liability Company |

For filing questions please contact us at **803-734-2158**

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF GEORGETOWN<br>South Carolina Board of Financial Institutions,<br>Plaintiff,<br>v.<br>CDM Corporation, Inc. and Guardian Fiduciary Services, LLC;<br>Defendants. | IN THE COURT OF COMMON PLEAS<br>DOCKET NO.: 2020-CP-22-0882<br>**DEFENDANTS' THIRD SUPPLEMENTAL ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES** |

Defendants CDM Corporation, Inc. ("CDM") and Guardian Fiduciary Services, LLC ("Guardian") (together, "Defendants"), hereby supplement answers to certain Interrogatories propounded by the Plaintiff South Carolina Board of Financial Institutions ("Plaintiff") pursuant to Rules 26 and 33 of the South Carolina Rules of Civil Procedure, as follows:

4. Describe the relationship between CDM Corporation and Guardian Fiduciary Services, LLC, including but not limited to the particular services each purports to provide, whether the assets of each entity are held separately or jointly, any designations for tax purposes, and the ownership status of each entity.

**ANSWER:**

**Pursuant to an agreement dated November 24, 2021, Defendants CDM Corporation and Guardian Fiduciary Services, LLC entered into a joint venture with WWWB Trustees, LLC.**

**Pursuant to an agreement dated November 24, 2021, Stephen and Candida Mantell, sole stockholders of CDM Corporation, sold 100% of the total Stock in CDM Corporation to WWWB Trustees, LLC.**

**Pursuant to an agreement dated November 24, 2021, Stephen and Candida Mantell, sole members and beneficial owners of Guardian Fiduciary Services, LLC, sold 100% of the total membership interest in Guardian Fiduciary Services, LLC to WWWB Trustees, LLC. Michael Markey is the sole member of WWWB Trustees, LLC. WWWB Trustees, LLC has not served as a trustee in the State of South Carolina.**

5. Identify and describe the roll of each principal, employee, and independent contractor of CDM Corporation and Guardian Fiduciary Services, LLC.

**ANSWER: Pursuant to the above mentioned agreements, WWWB Trustees, LLC is the sole stockholder of CDM Corporation and sole member of Guardian Fiduciary Services, LLC.**

WOMBLE BOND DICKINSON (US) LLP

s/James Myrick

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*Counsel for Defendants*

September 7, 2022

Office of the Comptroller of the Currency

Washington, DC 20219

**Interpretive Letter #1176**
**January 2021**

**OCC Chief Counsel's Interpretation on National Trust Banks**

January 11, 2021

This letter addresses the authority of the Office of the Comptroller of the Currency (OCC) to charter national banks within the scope of 12 U.S.C. § 27(a). As discussed in detail below, 12 U.S.C. § 27(a) recognizes the authority of the OCC to charter a bank that limits its operations to *those of a trust company and activities related thereto*. Activities of a trust company include activities permissible for a state trust bank or company[1] even if those state authorized activities are not necessarily considered fiduciary in nature under 12 U.S.C. § 92a and 12 C.F.R. Part 9. This letter also discusses the standards the OCC considers when assessing whether an activity is conducted in a fiduciary capacity, and the implications for chartering de novo institutions and approving the conversion of state institutions, along with the permissibility of certain activities for existing national banks that do not have fiduciary powers.

## I. General Discussion: Chartering, Fiduciary Capacity, and the Business of Banking

As noted below, the ability of national banks to engage in activities in a fiduciary capacity is governed by 12 U.S.C § 92a and 12 C.F.R. Part 9. Under these provisions, fiduciary capacity includes the enumerated activities or roles listed in the statute and regulations as well as any other capacity that the OCC authorizes pursuant to 12 U.S.C. § 92a, including those fiduciary capacities specifically recognized under state law. The provisions regarding trust banks in 12 U.S.C. § 27(a) and the fiduciary capacity authority in 12 U.S.C. § 92a are related in the sense that a national bank that limits its activities to those of a trust company typically performs at least some of its activities in a fiduciary capacity, which may include a fiduciary capacity permitted under 12 U.S.C. § 92a. Accordingly, as discussed in detail below, a national bank chartered under 12 U.S.C. § 27(a) is not limited to fiduciary activities as defined for purposes of 12 C.F.R. Part 9 and may engage in any permissible activities of a trust company.

[1] In this letter, the terms "state trust bank" and "state trust company" are used interchangeably.

*A. Chartering Authority*

The OCC's authority to charter national banks is found in the National Bank Act, 12 U.S.C. §§ 21-27. The last sentence of 12 U.S.C. § 27(a) specifically addresses the chartering of trust banks by providing that:

> A National Bank Association, to which the Comptroller of the Currency has heretofore issued or hereafter issues such certificate, is not illegally constituted solely because its operations are or have been required by the Comptroller of the Currency to be limited to *those of a trust company and activities related thereto*.

Congress added this provision to clarify and confirm that the OCC, under its general chartering authority, has the power to charter a national bank that limits its activities to those of a trust company and activities related to the same.[2] The statute does not define what constitutes a "trust company" under 12 U.S.C. § 27(a) and there is no "trust company" specifically authorized under federal law outside of 12 U.S.C. § 27(a). At the time of the enactment of 12 U.S.C. § 27(a), however, many banks had trust departments to provide customers with dedicated trust and other related services. Likewise, state law permitted the operation of state trust companies and trust banks to provide similar dedicated trust and related services.[3] In the absence of other textual and statutory guidance, the phrase "trust company" contained in 12 U.S.C. § 27(a) has been construed to refer to and include the activities of trust departments of banks as well as the activities of trust companies and trust banks authorized under the laws of the various states.

The activities of a trust company, trust bank, or trust department of a bank typically include performing fiduciary activities as defined by federal or state law, as well as other activities that are non-fiduciary in nature, such as non-fiduciary custody. Therefore, under 12 U.S.C. § 27(a), a national bank is not illegally constituted because it limits its operations to such activities.

*B. Fiduciary Capacity Authority*

Twelve U.S.C. 92a provides the authority for the OCC to permit national banks to engage in activities in which the bank will be acting in a fiduciary capacity. Specifically, 12 U.S.C. § 92a(a) provides:

> The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or in any other fiduciary capacity in

[2] *See Nat'l State Bank of Elizabeth, N. J. v. Smith*, 591 F.2d 223, 231 (3d Cir. 1979) (noting that the last sentence in 12 U.S.C. § 27(a) "validates retroactively as well as prospectively the action of the Comptroller in limiting to the business of a trust company the operation of a national banking association to which he has granted a certificate of authority to commence business").

[3] *Id.*

> which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

The OCC has implemented 12 U.S.C. § 92a in 12 C.F.R. Part 9. Twelve C.F.R. Part 9 applies to national banks that act in a "fiduciary capacity." Twelve C.F.R. § 9.2(e) defines "fiduciary capacity" to include the activities listed in 12 U.S.C. § 92a(a) along with the following additional activities:

- transfer agent (which is akin to a registrar of stock and bonds);
- custodian under a uniform gifts to minors act (which is a type of guardian of estate);
- investment adviser, if the bank receives a fee for its investment advice;
- any capacity in which the bank possesses investment discretion on behalf of another; and
- any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. § 92a.

*1. Enumerated Fiduciary Capacities*

As noted above, 12 U.S.C. § 92a and 12 C.F.R. Part 9 enumerate specific roles or functions of banks that are regarded as being performed in a fiduciary capacity. A bank that engages in any of the enumerated roles or functions is doing so in a fiduciary capacity and is subject to the requirements of 12 C.F.R. Part 9.

There is no *de minimis* rule regarding national banks' use of trust powers. A national bank that only performs one fiduciary capacity under 12 U.S.C § 92a would need trust powers. Conversely, there is also no requirement that a national trust bank chartered under 12 U.S.C. § 27(a) perform primarily in a fiduciary capacity.

*2. Fiduciary Capacity Under State Law*

As noted above, under 12 U.S.C. § 92a, fiduciary capacity may also include "any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located." This is the so-called "bootstrap" provision of 12 U.S.C. § 92a.

For the OCC to use the bootstrap provision and determine that a state fiduciary capacity—i.e., an activity, role, or function that a state's law regards as being performed in a fiduciary capacity—is a fiduciary capacity for purposes of 12 U.S.C § 92a, the OCC must determine that a national bank is engaging in the relevant activity, role, or function consistent with the parameters provided for in the relevant state law to the same extent as a state bank to qualify as a fiduciary capacity. Thus, under the bootstrap provision, a bank performing in a fiduciary capacity for purposes of state law and operating consistent with the parameters provided for in relevant state laws and regulations may be deemed to be performing in a

fiduciary capacity for purposes of 12 U.S.C. § 92a and subject to 12 C.F.R. Part 9.[4] Conversely, a bank is not engaging in a fiduciary capacity for purposes of the bootstrap provision of 12 U.S.C. § 92a or 12 C.F.R. Part 9 when the bank is engaging in an activity, role, or function inconsistent with the parameters provided for in the relevant state law for a fiduciary capacity.[5]

This is consistent both with the plain language of 12 U.S.C. § 92a, as well as the principles upon which the National Bank Act is based, which frequently turns on permissibility under the law of the state in which the national bank is located.[6]

*3. Any Other Similar Capacity the OCC authorizes pursuant to 12 U.S.C. § 92a.*

As noted above, 12 C.F.R. § 9.2(e) defines "fiduciary capacity" to include "any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. § 92a."[7]

In determining whether an activity is performed in "any other similar capacity," the OCC considers the substantive conduct of the bank in performing the activity, and whether it is analogous to the enumerated capacities in 12 U.S.C. § 92a and 12 C.F.R. Part 9.[8] Specifically, the OCC looks to the exemplar fiduciary roles of trustee and investment advisor and considers (1) whether the activity involves the exercise of discretion on behalf of a client

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[4] If the OCC recognizes a capacity that is a fiduciary capacity under applicable state law as a "fiduciary capacity" under 12 U.S.C. § 92a, then the recognized capacity will be a fiduciary capacity subject to the implementing regulations of 12 C.F.R. Part 9. The particular provisions of 12 C.F.R. Part 9 that are relevant to the activity will depend on the nature of the activity.

[5] This reasoning can be contrasted with OCC Interpretive Letter No. 265, reprinted in [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCP) ¶ 85,429 (July 14, 1983), which concluded that the OCC will only look to state law to determine whether a fiduciary capacity of national bank is permissible after the activity is determined to be "fiduciary" within the meaning of 12 U.S.C. § 92a. To the extent that Interpretive Letter No. 265 conflicts with this decision, it is superseded.

[6] There are numerous examples of this. Under 12 U.S.C. § 85, a national bank generally may charge the interest rate permitted by the state in which it is located, and under 12 U.S.C. § 36, a national bank may establish new branches to the extent that a state bank could establish a new branch under the law of that state. As a result, national banks based in different states may be subject to different interest rate caps or branching laws. The fact that a capacity may be considered fiduciary under one state's laws is not a grant of authority for banks located in a different state that does not define such a capacity as fiduciary to act in a fiduciary capacity.

[7] The language "any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. 92a" in 12 C.F.R. § 9.2(e) is a catch-all term that covers the broad grant of statutory authority given to the OCC to recognize other fiduciary capacities not specifically enumerated (e.g., only generally referred to) in the statute. *See* Fiduciary Activities of National Banks; Rules of Practice and Procedure, 60 Fed. Reg. 66163, 66164 (Dec. 21, 1995) (describing the language "any other similar capacity" as "a catch-all category").

[8] *See* "Asset Management" booklet of the *Comptroller's Handbook* 8-9 (Dec. 2000) (defining "fiduciary capacity" and noting that national banks acting in a fiduciary capacity are subject to specific standards of care and prudence); *see also* Black's Law Dictionary 235 (9th ed. 2009) (defining "capacity" as "[t]he role in which one performs an act").

or third party in a manner that would have an economic impact on the client or third party, and (2) whether, in carrying out the discretionary activities, the bank is subject to the duties or standards of behavior that are customarily associated with being a fiduciary. These fiduciary standards and duties are high standards of conduct that generally require the fiduciary to act with utmost care and in the best interest of the client.[9] A fiduciary satisfies these obligations by, for example, acting with utmost loyalty with respect to the client and the client's assets and making sure that decisions are prudently undertaken after consideration of pros and cons of the particular action.

Under 12 C.F.R. Part 9, national banks acting in a fiduciary capacity are subject to specific standards, including adopting and following appropriate policies and procedures, conducting appropriate reviews, maintaining appropriate records, and arranging for suitable audits.

*C. Business of Banking*

Under 12 U.S.C. § 24(Seventh), national banks may engage in the business of banking and activities incidental to the business of banking.[10] When determining whether an activity is part of the business of banking, the OCC considers the following factors under 12 C.F.R. § 7.5001(c)(1):

- Whether the activity is the functional equivalent to, or a logical outgrowth of, a recognized banking activity;
- Whether the activity strengthens the bank by benefiting its customers or its business;
- Whether the activity involves risks similar in nature to those already assumed by banks; and

[9] Among the common duties of a fiduciary are: duty of loyalty (acting in good faith, protecting the interest of the client, and taking no action in favor of the fiduciary that would impair the interest of the client); duty of care or prudence (exercising reasonable care, skill, and caution in performing activities); duty to segregate funds (keeping client assets distinct from other assets, including those of the fiduciary); duty to safeguard (protecting client assets from damage, loss, or destruction); duty to invest (acting as a prudent investor bearing the purpose and interest of the client mind); and duty of accounting (providing full and fair disclosure and keeping records of receipts, expenses, sales, purchases, exchanges and/or distributions to account for the fiduciary's activities on behalf of the client). *See* Restatement (Third) of Trusts §§ 76-83 (2007). *See also Bogert's The Law of Trusts and Trustees* § 543. *See also* the U.S. Securities and Exchange Commission regulation regarding the fiduciary duties of investment advisors, requiring, inter alia, the fiduciary to at "all times, serve the best interest of its client and not subordinate its client's interest to its own," and to "eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested." 17 C.F.R. Part 276, IA-5248, "Comm'n Interpretation Regarding Standard of Conduct for Inv. Advisers" (June 5, 2019) pp. 8, 23.

[10] Twelve C.F.R. § 7.5001(d) provides the OCC may find an activity is permissible because it is incidental to the business of banking if it is convenient or useful to an activity that is specifically authorized for national banks or to an activity that is otherwise part of the business of banking. *See also* OCC Interpretive Letter No. 940 (May 24, 2002).

- Whether the activity is authorized for state-chartered banks.[11]

Given this fourth factor, "Whether the activity is authorized for state-chartered banks," an activity permitted for state trust banks may be part of the business of banking under the authority of 12 U.S.C. § 24(Seventh) for national banks if the activity is authorized for state-chartered banks, and the OCC is satisfied that the remaining three factors are also sufficiently met.

## II. De Novo Chartering of National Banks that Limit Their Activities to Those of a Trust Company and Activities Related Thereto

As noted above, under 12 U.S.C. §§ 21-27, the OCC may charter a national bank that limits its activities to those of a trust company and activities related thereto. A national trust bank may be permitted to engage in any and all activities permitted under state law for a state trust company located in the same state under the plain terms of 12 U.S.C. § 27(a).

Moreover, a national trust bank may also engage in activities beyond those authorized under state law for a state trust company provided such activities are permitted for a national bank under other sources of authority such as 12 U.S.C. §§ 24(Seventh) or 92a, as discussed above.[12]

In addition to being legally permissible, the activities of a national trust bank must be conducted in a safe and sound manner and in compliance with applicable law and regulations, including those relating to the Bank Secrecy Act, anti-money laundering, Office of Foreign Assets Control requirements, and consumer protection.

## III. Charter Conversions

As discussed above, the chartering provisions in 12 U.S.C. §§ 21-27 provide the authority for all national bank charters. In the case of conversions, 12 U.S.C. § 35 provides additional provisions regarding conversions of state banks into national banks with respect to legacy activities. Typically, the legacy activities of a converting state trust bank will be permissible for a national trust bank under 12 U.S.C. § 24(Seventh), which includes activities permitted within the business of banking, 12 U.S.C. § 27(a), which includes all legacy activities that are allowed to the converting state trust company under state law, or 12 U.S.C. § 92a, which includes activities the OCC determines are conducted in a fiduciary capacity.

In the event a legacy activity of a converting state trust bank is not permissible under the foregoing statutes, however, 12 U.S.C. § 35 also recognizes that in some cases a

[11] When considering the four business of banking factors described in section 7.5001(c)(1), the OCC has the discretion to vary the weight given to each factor. *See* 12 C.F.R. § 7.5001(c)(2) ("The weight accorded each factor set out in paragraph (c)(1) of this section depends on the facts and circumstances of each case.").

[12] An activity may be permissible for a national trust bank under multiple sources of authority, and a bank need not rely on all sources of authority to engage in any one activity.

converting bank may have assets that are not permissible for national banks generally under applicable federal law and provides that in connection with such a conversion:

> The Comptroller of the Currency may, in his discretion and subject to such conditions as he may prescribe, permit such converting bank to retain and carry at a value determined by the Comptroller such of the assets of such converting bank as do not conform to the legal requirements relative to assets acquired and held by national banking associations.

The text of the statute itself does not place any temporal limits on the retention of nonconforming assets, and the OCC may exercise discretion in permitting the retention of certain nonconforming assets.[13] The OCC has typically required divestiture or conformity of non-conforming assets within a reasonable time period, typically two years.[14]

## IV. New Activities in an Existing Bank Without Fiduciary Powers

National banks without fiduciary powers may also engage in certain activities of state trust banks that are not considered fiduciary in nature under 12 U.S.C. § 92a. If the state trust bank powers are permissible for national banks under 12 U.S.C. § 24(Seventh), based on the test outlined above, and are not fiduciary for purposes of 12 U.S.C. § 92a and 12 C.F.R. Part 9, any national bank can engage in those state trust bank activities without fiduciary powers and without being subject to 12 C.F.R. Part 9.

National banks seeking guidance on whether a new activity would be subject to 12 C.F.R. Part 9 should speak with examination staff who may seek further guidance from Asset Management Policy and the Law Department.[15]

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[13] *See* Corporate Decision No. 95-55 (Nov. 15, 1995). The OCC relied on 12 U.S.C. § 35 to allow a state bank converting to a national bank to permanently retain its ownership interest in two nonconforming insurance subsidiaries. The legal basis for the decision was fully explained in OCC Interpretive Letter 757 (Apr. 1, 1996). When the OCC's decision regarding the insurance subsidiaries was challenged in *American Council of Life Insurance v. Ludwig*, 1 F. Supp. 2d 24, 29 (D.D.C. 1998) *vacated and remanded*, 194 F.3d 173 (D.C. Cir. 1999), the U.S. District Court for the District of Columbia held that the OCC correctly interpreted 12 U.S.C. § 35 when it allowed the converting bank to permanently retain the nonconforming insurance subsidiaries. While that portion of the District Court's decision was ultimately vacated and remanded on appeal by the D.C. Circuit, it was only done so on mootness grounds because the OCC ordered the divestiture of the two insurance subsidiaries when it approved a subsequent merger of the bank with and into another national bank. *See* OCC Conditional Approval No. 288 (Sept. 30, 1998).

[14] *See* "Conversions to Federal Charter" booklet of the *Comptroller's Licensing Manual* 14 (Oct. 2019) ("The OCC may give a converting depository institution a reasonable period of time, generally not to exceed two years after conversion, to divest or conform any nonconforming assets or activities, including nonconforming subsidiaries, not being permanently retained. A reasonable period is given so that the converting depository institution may take the necessary action without undue hardship.").

[15] Similarly, current national charters with fiduciary powers should continue to apply 12 C.F.R. Part 9 to their current activities as they have done in the past.

/s/

Jonathan V. Gould
Senior Deputy Comptroller & Chief Counsel

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF GEORGETOWN | )<br>)<br>) | IN THE COURT OF COMMON PLEAS<br><br>CASE NO. 2020-CP-22-0882 |
| South Carolina Board of Financial Institutions,<br><br>Plaintiff,<br>vs.<br><br>CDM Corporation, Inc. and Guardian Fiduciary Services, LLC,<br><br>Defendants. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL RECONSIDERATION** |

The Defendants, CDM Corporation, Inc. and Guardian Fiduciary Services, LLC ("Defendants"), hereby file this Memorandum of Law in Opposition to the Motion for Partial Reconsideration filed by the Plaintiff, South Carolina Board of Financial Institutions ("BOFI"). This Court issued an Order granting the parties Motion for Summary Judgment on November 3, 2022. BOFI filed a Motion for Partial Reconsideration on November 14, 2022. For the following reasons, the Court should deny BOFI's Motion

For a recitation of the facts, please see Defendants' Motion for Summary Judgment filed August 22, 2022, and the Order dated November 3, 2022.

## LEGAL STANDARD

While South Carolina Rule of Civil Procedure 59(e) allows a party to move for an order altering or amending a judgment, "[a] party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." *Anderson Memorial Hosp., Inc. v. Haden*, 313 S.C. 497, 498, 443 S.E. 2d 399, 400 (Ct. App. 1994) (citing *C.A.H. v. L.H.*, 315 S.C. 389, 434 S.E. 2d 268 (1993)); *See also Arnold v. State*, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992).

## I. BOFI's Motion makes a materially erroneous representation regarding undersigned counsel's actions.

The "Background" section of BOFI's Motion for Partial Reconsideration is accurate, except for one glaring mistake. The motion unfortunately accuses counsel for the Defendant companies of falsely representing to this Court that Defendants had withdrawn or were in the process of withdrawing from all trusteeships, citing only to the concluding paragraph of Defendants' Answer in the Stahlberger Trust matter dated December 11, 2020.

Here are the facts which refute BOFI's accusation:

1) The "wherefore" clause from the conclusion of the Stahlberger Answer, while inartfully drawn, was cited in isolation and does not include other language from the very same Answer that clearly shows Stephen Mantell was in fact already acting individually as Trustee: "Further, and because the terms of the Stahlberger Trust control, Stephen Mantell now serves as Trustee and Gundling's Petition herein is simply a masked attempt to remove Mantell as Trustee, subject to all the legal requirements of such action." Stahlberger Answer at Paragraph 8, attached as Exhibit B to BOFI's motion. Further, every statement challenged by BOFI contained in Paragraph 11 is a true statement.
2) The Stahlberger Trust by its terms required a probate bond in the name of the Trustee. The $3,500,000.00 bond, acquired one month prior to the Answer, was secured only in the name of "Stephen Mantell" and not in the name of CDM Corporation or Guardian Fiduciary Services. The bond, attached to the Answer in the Stahlberger case, was ignored in BOFI's accusation to this Court. And while the Answer in the Stahlberger case was filed as Exhibit B to BOFI's current motion, the bond naming Stephen Mantell

accompanying the original filing as Exhibit A, was not. See the Bond attached hereto as **Exhibit 1.**

3) It is accurate that the probate court in Stahlberger had a decision to make regarding the Settlor's intent. The exact language of the Trust, signed by Stahlberger himself and to be respected and evaluated by the court, appointed "CDM, by and through its representative Stephen P. Mantell (provided that Stephen P. Mantell individually is actively, personally serving as administrator of the Trust) shall serve as Trustee." It was the job of Defendants' counsel to persuade opposing counsel and the court that the intent of the Settlor was to put Stephen Mantell individually in the role of Trustee, as indicated by choice of the words "provided", "individually", "actively," and "personally serving".

4) The argument succeeded. The probate court, in its discretion and by agreement of counsel, installed Stephen Mantell individually as Trustee , just as counsel for Defendants had urged. The Order proving this, and dated May 23, 2022, is attached as **Exhibit 2** and states at Paragraph 2: "Stephen P. Mantell, in his in individual capacity shall serve as the Second Successor Trustee of the Trust." (Emphasis added).

Any allegation that counsel for Defendant companies was not doing everything possible to move all trusteeships into the individual name of Stephen Mantell (as permitted under any interpretation of the statute) or to end them is utterly wrong.

## II. BOFI's motion avoids the key issue before the court: Whether the Defendants' activities constituted "a trust business."

- Section I of BOFI's Motion raises new issues and is therefore improper for a motion to reconsider.
- BOFI's Motion for Partial Reconsideration focuses on BOFI's own interpretation of the probate court's authority. However, this lawsuit was not filed to determine the probate

court's adjudicative and regulatory authority, but rather to determine whether the Defendants' activities constituted "a trust business" under BOFI's jurisdiction.

- The Probate Code explicitly details the probate court's authority to appoint any "person" to non-trustee fiduciary roles including conservatorships, guardianships, and serving as attorney-in-fact, personal representatives or executors. Section 62-5-101 of the South Carolina Probate Code defines "person" as an "individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity." S.C. Code Ann. § 62-5-101.
- At no point does the Probate Code cede authority for administration or regulation of probate matters to BOFI. Instead, S.C. Code Section 34-21-10 merely states "[n]o corporation, partnership or other person shall conduct a trust business in this State without first making a written application to the State Board of Bank Control and receiving written approval from the Board." This section does not impact the probate court's ability to appoint any "person," but rather imposes an additional hurdle for a "a trust business" to overcome.

## III. Section II of BOFI's motion again attempts to confuse the issues. It further inaccurately construes this Court's Order.

- As referenced in Section II above, the Probate Code explicitly outlines the probate court's authority to appoint any "person" to fiduciary roles. The probate court's authority to appoint any "person" is separate and distinct from BOFI's role in regulating "a trust business" as outlined in Section 34-21-10.
- Despite BOFI's contention to the contrary, this Court's Order is clear about which fiduciary role is prohibited without prior BOFI approval. The Order states "serving as, and holding themselves out *to serve as a trustee* without prior approval from BOFI"

violates Section 34-21-10. (Emphasis added). It further states that "as a matter of law, the term 'trust business,' as contemplated by Section 34-21-10 must involve a trust."

**IV. The court correctly held that the usual and customary meaning of "a trust business" is a business involved in the administration of trusts.**

- BOFI's Motion argues that the definition of "a trust business" applied by the Court "erroneously renders numerous provisions of the South Carolina Code meaningless." In so arguing, BOFI cites to only one section of the South Carolina code– S.C. Code Section 34-21-210. However, as detailed in Defendants' Motion and Memorandum in Support for Summary Judgment, the South Carolina Attorney General already concluded "courts have defined 'trust business' or a 'trust company' according to the common and ordinary definition of those terms," and this view is "consistent with those set forth in in Title 34 of the Code. See, e.g. Sections 34-21-20 through -70; Section 34-21-210 (1) [definition of 'trust institution']; Section 34-21-220 et seq ['common trust funds']." South Carolina Attorney General Letter to the Commissioner of Banking, Louie Jacobs, 1996 WL 93998, at 2.[1] The usual and customary meaning of a trust business, as interpreted by this Court and the South Carolina Attorney General, is consistent with other sections of the South Carolina Code, including Section 34-21-210. BOFI's definition is overreaching and unnecessary.

**V. Section IV of BOFI's Motion contains a mere reiteration of its prior arguments.**

- BOFI's citation to the June 1, 2022 "Policy Statement Concerning the Conducting of Trust Businesses by Non-Depository Entities in South Carolina" is not persuasive as the policy was a last-ditch effort to write away this lawsuit through unilateral action

[1] For a full recitation of the 1996 Opinion from the Office of Attorney General, please see Defendants' Motion and Memorandum in Support for Summary Judgment.

by BOFI. Authorized well after this lawsuit began, it should be given no weight to determine this pre-existing issue.

- While BOFI specifically addresses and argues the applicability of Interpretive Letter #1176 from the Office of the Comptroller of the Currency for the first time in its Motion for Partial Reconsideration, the heart of the argument is a repeated attempt to apply 12 U.S.C. § 92a to the case at bar. However, as already addressed in Defendants' Motion and Memorandum in Support of Summary Judgment, citation to § 92a is inapplicable and irrelevant to the issues in this case. Even if § 92a and the OCC's interpretation thereof were applicable, the OCC's guidance relates only to National Trust Bank activities under federal, not South Carolina, law.
- BOFI's citation to other states' laws is an irrelevant, hyperbolic mischaracterization. This self-serving "survey" was created by BOFI's counsel and is merely argument or attorney work product- not evidence. This "survey" fails to show a complete and realistic representation of the states' laws and more importantly is irrelevant to this Court's interpretation of *South Carolina* law.

**VI. At no point in the Court's Order are the affidavits of Dundee Carter or Julian Walker referenced; BOFI's request that this testimony not be considered is moot.**

- BOFI correctly states that "neither individual's testimony is cited in the Court's Order." Accordingly, this point is moot.

## CONCLUSION

For the foregoing reasons BOFI's Motion for Reconsideration should be denied.

Respectfully Submitted,

WOMBLE BOND DICKINSON (US) LLP

*s/ James Myrick*

James D. Myrick, S.C. Bar No. 12004
P.O. BOX 999 [5 Exchange St., 29401]
Charleston, SC 29402-0999
Main: (843) 722-3400; Fax.: 843-723-7398
James.Myrick@wbd-us.com

*Counsel for Defendants CDM Corporation, Inc. and Guardian Fiduciary Services, LLC*

Dated: November 23, 2022
Charleston, South Carolina

Liberty Mutual SURETY

BOND NUMBER: 285053410

IN THE PROBATE COURT OF THE STATE OF SOUTH CAROLINA
IN AND FOR THE COUNTY OF GEORGETOWN

IN THE MATTER OF

STAHLBERGER REVOCABLE TRUST

ROBERT K. STAHLBERGER, SETTLOR

ESTATE NO. 2018-ES2200388

**BOND OF TRUSTEE**
(NON-COURT SUPERVISED)

Case No. _____

All papers and notices may be served at:
Liberty Mutual Surety
Commercial Surety
Claims 1001 4th
Avenue, Suite 1700
Seattle, WA 98

**KNOW ALL MEN BY THESE PRESENTS:**

That we, Stephen P. Mantell as Principal(s)and the The Ohio Casualty Insurance Company, as Surety, are held and firmly bound unto Estate of Robert K. Stahlberger as Obligee(s)in the sum of Three Million, Five Hundred Thousand and No/100 Dollars ($3,500,000.00) for which payment, well and truly to be made, we bind ourselves, our heirs, executors, successors, and assigns, jointly and severally, firmly by these presents.

WHEREAS, said Principal has been appointed Trustee of the Stahlberger Revocable Trust dated March 10, 2016.

NOW THEREFORE, the condition of this obligation is such that, the Principal and the Surety, agree to satisfy any final and non-appealable surcharge judgment the Obligee may obtain in a court of law against the Principal for breach of fiduciary duty, while acting as Trustee of the above-named Trust. The aggregate liability of the Surety, for all claims asserted against this bond, shall be limited to the face amount hereof regardless of the number of claims involved.

This bond may be terminated by the Surety giving thirty (30) days written notice to the Obligee, such notice to be sent by certified mail, such termination shall not affect the liability incurred under this obligation prior to the effective date of such termination. No suit may be maintained against the Surety pursuant to this bond unless filed within one year after the effective date of termination or cancellation hereof.

It being understood that the Surety company shall not be held liable for any acts or omission or commission by any Fiduciary, former or present, of the estate prior to the effective date of this bond.

**NOW, THEREFORE**, if the said Principal shall faithfully execute the duties of the trust according to law, then this obligation shall be void, otherwise to remain in full force and effect.

Signed at _____ on Dec 8, 2022

By _____
Stephen P. Mantell Principal

THE OHIO CASUALTY INSURANCE COMPANY

By _____
Todd A. Stein Attorney-in-Fact

EXHIBIT A

| | | |
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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE PROBATE COURT |
| COUNTY OF GEORGETOWN | ) | Case No. 2021-GC-22-00037 |

| | | |
|---|---|---|
| In re: ROBERT K. STAHLBERGER REVOCABLE TRUST | ) | ORDER GRANTING RESIGNATION OF TRUSTEE AND APPOINTMENT OF SUCCESSOR TRUSTEE |

This matter came before the Court upon the Petitioner David Gundling's Amended Summons and Amended Petition for Approval of Resignation of Trustee and Appointment of Successor Trustee filed February 9, 2022. Stephen P. Mantell, the named Successor Trustee of the Robert K. Stahlberger Revocable Trust UAD 3/10/2016 (the "Trust") and all the Charities set forth below were properly served with the Amended Petition and the Proofs of Service were filed with this Court. Stephen P. Mantell, through his counsel, and Father Pat's Kitchen, through its counsel, filed answers to the Amended Petition. No other Charities appeared in this action. Cliff Tall was appointed by this Court to serve as Guardian ad Litem for the Charities. Stephen P. Mantell, the Guardian ad Litem and all the Charities were properly served with the Notice of Hearing and the Proof of Delivery was filed with this Court on April 14, 2022. A hearing was held on the Petition on May 11, 2022. At the hearing Petitioner appeared Pro Se, Respondent, Stephen P. Mantell was represented by James F. McCrackin, Respondent Father Pat's Kitchen was represented by Elizabeth Attias, and Cliff Tall appeared as Guardian ad Litem for the remaining charities. No other charities appeared at the hearing.

## BACKGROUND

David Gundling has been Trustee of the Trust since the death of the settlor in 2018. The Trust is a charitable Trust providing distributions to Father Pat's Kitchen, Lowcountry Food

Bank, Guiding Eyes for the Blind, St. Labre Indian Catholic High School, Salvation Army, Smile Train and Special Olympics of South Carolina (collectively, the "Charities"). Mr. Gundling now wishes to resign as Trustee. The terms of the Trust state the Second Successor Trustee is Stephen P. Mantell who shall serve as Trustee pursuant to the terms and conditions of the Trust and shall post a trustee bond or surety in the amount necessary to fully protect the Trust. In January, 2022, Mr. Gundling signed a document attempting to appoint Miles Adler as Trust Protector. Prior to the hearing the parties reached an agreement that was put on the record. At the hearing, Mr. Gundling informed the Court that he consented to the agreement but invited the Court to inquire into the matter at the discretion of the Court.

AGREEMENT

1. David Gundling hereby resigns as Successor Trustee of the Trust.

2. Stephen P. Mantell, in his individual capacity shall serve as the Second Successor Trustee of the Trust.

3. Stephen P. Mantell as required pursuant to the terms of the Trust obtained Bond in the amount of $3,500,000.00 on December 8, 2021 which is sufficient to fully protect the Trust.

4. Stephen P. Mantell, as Trustee shall provide an annual accounting to the Charities showing the balance of the Trust, the total charitable donations for the current year, and the administrative cost of the Trust.

5. The Trust does not provide for a Trust Protector, and the attempted appointment of a Trust Protector by Petitioner dated January 19, 2022, is void and of no effect.

All parties confirmed and consented to the Agreement on the record. Cliff Tall, as Guardian ad Litem, stated that he thoroughly investigated this matter, that he discussed the

pleadings with the parties, and that he is satisfied with the Agreement and the qualifications of Mr. Mantell.

Based on the forgoing, it is hereby ordered that the Amended Petition for Approval of Resignation of Trustee and Appointment of Successor Trustee is **GRANTED**. The Resignation of David Gundling as Trustee of the Trust is hereby accepted and Stephen Mantell in his individual capacity is the Successor Trustee. Stephen P. Mantell shall be required pursuant the terms of the Trust to maintain bond while serving as Successor Trustee. Stephen P. Mantell shall provide an annual accounting to the Charities as set forth above. The attempted appointment of a Trust Protector by Petitioner is void and of no effect. The Guardian ad Litem for the Charities, Cliff Tall is hereby relieved of his duties and shall submit his bill to this Court for approval and the Trust is authorized to pay such compensation to the Guardian ad Litem.

**AND IT IS SO ORDERED.**

Leigh Powers Boan, Probate Judge
Georgetown County, South Carolina

May 23, 2022

# Georgetown County Judge of Probate

**LEIGH POWERS BOAN**

Patricia W. McCrea, *Clerk of Court*
Lisa M. Wheeler, *Deputy Clerk*
Christy L. Emry, *Deputy Clerk*
Keena Y. Cumbee, *Deputy Clerk*

*Susan L. Stewart, Court Coordinator*

June 23, 2022

James F. McCrackin, Esquire
Nelson Mullins
P.O. Box 3939
Myrtle Beach, SC 29578

Re: In the Matter of Robert K. Stahlberger Revocable Trust
Case No. 2021-GC-22-00037

Dear Mr. McCrackin:

Enclosed is a certified copy of the Order Granting Resignation of Trustee and Appointment of Successor Trustee in the above referenced matter.

Please provide a copy to all interested parties and file proof with the Court. Thank you for your assistance.

Thank you for your assistance.

Sincerely,

Susan L. Stewart
*Court Coordinator*
*sstewart@gtcounty.org*

Enclosure as stated

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF GEORGETOWN | ) | BEFORE THE MASTER IN EQUITY<br>OF GEORGETOWN COUNTY |
| South Carolina Board of Financial Institutions,<br><br>Plaintiff,<br><br>v.<br><br>CDM Corporation, Inc. and Guardian Fiduciary Services, LLC,<br><br>Defendant. | ) | CASE NO.: 2020-CP-22-00882<br><br>**PLAINTIFF'S REPLY TO IN SUPPORT OF MOTION FOR PARTIAL RECONSIDERATION ALTERATION OR AMENDMENT** |

Plaintiff Board of Financial Institutions ("BOFI") hereby submits this Reply in Response to Defendants' Memorandum in Opposition to Plaintiff's Motion for Partial Reconsideration Alteration or Amendment.

## ARGUMENT

### I. BOFI'S MOTION ADDRESSES THE FINDINGS OF THE COURT AND DOES NOT RAISE ANY "NEW" ISSUES.

BOFI's Motion raises arguments which are tied directly to, and made in response to the Court's Order in this matter. Defendants contend that Section 1 of BOFI's Motion "raises new issues" which are not appropriate for a motion made pursuant to Rule 59(e), SCRCP. The issues raised in BOFI's Motion are not "new," although BOFI does offer responses to legal and factual matters that the Court has ruled on.

In Section I of BOFI's Motion, BOFI contends that BOFI, not the Probate Court, licenses and regulates persons conducting "non-trustee" trust business. This argument is in direct response to the Court's Order, which states "Because these [non-trustee fiduciary] roles are codified in the Probate Code and are regulated by the probate courts, the Board of Financial Institutions does not control and regulate these functions." Pl. Motion, Ex. A (Summary Judgment Order).

BOFI does cite evidence that was not previously discussed in its Motion for Summary Judgment, such as Defendants' acquisition by a Michigan-based entity, WWWB Trustees, LLC, which also lacks authority to serve as a fiduciary, or the fact that Mantell has sought Probate Court appointments under various business names. BOFI brings these matters to the Court's attention in response to the Court's finding that the Probate Court "regulates" non-trustee fiduciary roles, despite the Probate Court's lack of authority or ability to do so on a statewide basis.

Pursuant to Rule 59, upon motion, a court may, in its discretion, "amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." The Rules of Civil Procedure allow BOFI to request that the Court reconsider its determinations, in light of the relevant law and evidence. This is particularly appropriate given that the Court decided the parties' summary judgment motions without oral argument, and the parties did not offer responses in real-time to questions which might have been raised by the Court.

As such, the issues in BOFI's Motion are discussed in accordance with Rule 59(e), SCRCP.

## II. CDM AND GUARDIAN'S CONDUCT UNLAWFUL TRUST BUSINESS BY SERVING AS TRUSTEE AND NON-TRUSTEE FIDUCIARY ROLES, ANY ONE OF WHICH CONSTITUTE TRUST BUSINESS.

Thought it is not necessary to respond to every point, BOFI must correct a few assertions made by Defendants in their opposing memorandum.

First, Defendants state that BOFI's motion avoids the question of whether Defendants' activities constituted a trust business. To be clear: Defendants have violated the law by serving as trustee, conservator, guardian, personal representative, and agent. Serving in any one of these roles constitutes trust business which requires BOFI's prior approval in accordance with S.C. Code Ann. § 34-21-10. No provision of the Probate Code or power of the Probate Court changes the fact that Defendants must have BOFI's prior approval before serving as or accepting appointment to serve as a trustee, conservator, guardian, personal representative, or agent.

Second, Defendants indicate that the Attorney General has opined that trust business must involve a trust instrument, by offering an incomplete quote from an Attorney General's opinion. To the contrary, the Attorney General indicates that both trustee and non-trustee fiduciary roles constitute trust business:

> In Goss and Hamlyn Howe v. State, 285 P.2d 428, 431 (Okl. 1955), the Court cited Websters New International Dictionary (2d ed. unabridged) defining a "trust company" as "any corporation found for the purpose of acting as trustee."… It is also said that a "trust company" is "a corporation formed for the purpose of taking, **executing and administering all such trusts as may be lawfully committed to it and acting as testamentary trustee, executor, guardian, etc.**"
>
> The foregoing definitions are consistent with those set forth in Title 34 of the Code. See, e.g. Sections 34-21-20 through -70; Section 34-21-210 (1) [definition of "trust institution"[1]]; Section 34-21-220 et seq ["common trust funds"].

1996 WL 93998, at *2 (S.C.A.G. Feb. 9, 1996) (emphasis added). The Attorney General's Opinion here is identical to BOFI's position. Trust business includes acting as trustee, executor, guardian, other fiduciary roles listed in S.C. Code Ann. §§ 34-21-10 and 34-21-210.

Third, BOFI's Motion argues that the definition of "a trust business" applied by the Court erroneously renders numerous provisions of the South Carolina Code ambiguous meaningless. Defendants incorrectly note that, in making this assertion, BOFI cites to only one section of the South Carolina code– S.C. Code Section 34-21-210. Frankly, rendering one section meaningless or ambiguous should be enough to give this Court justification in altering its decision; however,

[1] (1) "Trust institution" means… any trust company, authorized to act in **a fiduciary capacity** in this State, and under the supervision of the Comptroller of the Currency of the United States, or the Federal Reserve System, or the State Board of Bank Control of South Carolina;

(2) The term "fiduciary" means a trust institution undertaking to act alone or jointly with others primarily for the benefit of another in all matters connected with its undertaking and includes **trustee, executor, administrator, guardian of estates, committee of estates of persons non compos mentis, and managing agent**.

S.C. Code Ann. § 34-21-210.

BOFI contends that the following statutory provisions are rendered ambiguous or meaningless by application of the Court's Order:

> •34-21-10, which prohibits "trust business" without prior BOFI approval, but does not prevent an individual "from qualifying and acting as trustee, executor, administrator, guardian, committee or in any other fiduciary capacity."
>
> •34-21-210, which defines "trust institution" as "any trust company authorized to conduct a trust business in this State, or any trust company, authorized to act in a fiduciary capacity in this State," and defines "fiduciary" to include "trustee, executor, administrator, guardian of estates, committee of estates of persons non compos mentis, and managing agent."
>
> •34-15-10, which provides that a trust company must have at least $250,000 in capital to serve as "executor of a will, codicil, or writing testamentary, administrator with the will annexed, administrator of the estate of any person, receiver, assignee, guardian or trustee under a will or instrument creating a trust for the care and management of property."
>
> •34-15-20, which requires trust companies to file fiduciary bonds similar in "every respect to the bonds required by law of private persons acting as such fiduciaries," when appointed to "administrator, receiver, assignee, guardian or trustee."
>
> •34-1-200(B), which requires a bank's charter to set forth "any trust powers of the bank" and whether they are "full or partial trust powers," indicating that trust powers include more than simply serving as a trustee.
>
> •34-3-850, which provides that, when trust companies merge, all of the powers and duties "regarding each fiduciary capacity or other relationship transferred, whether created by will, indenture, trust, court order, agreement, or other means," shall transfer to the surviving entity.

Each of these statutes presumes that the "trust business" which BOFI licenses and regulates includes serving in non-trustee rules such as conservator, guardian, personal representative, agent, and other fiduciary roles. If serving in non-trustee roles does not constitute "trust business" or the work of a "trust company" or "trust institution," then why are these fiduciary roles repeatedly

listed, by name, and regulated in connection with such business? Defendants have yet to offer an answer to this question, and more importantly, the Court's Order fails to address it. However, BOFI's contention, consistent with with its Policy Statement, articulates a clear statutory interpretation that does not create any statutory ambiguity.

Finally, colorful though it may be, Defendants' characterization of BOFI's "Policy Statement Concerning the Conducting of Trust Businesses by Non-Depository Entities in South Carolina" as "a last-ditch effort to write away this lawsuit through unilateral action," is neither accurate, nor is it a legal justification for this Court to ignore the Board's interpretation of the law.

"If a statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 411 S.C. 16 (2014). An agency's interpretation is worthy of deference and "becomes of controlling weight unless it is plainly erroneous or inconsistent with" the statute or regulation being interpreted. Id. at fn. 7.

The Policy Statement is entirely consistent with the law of South Carolina, as has been thoroughly established in this and previous filings, and it makes no assertion that is "plainly erroneous or inconsistent" with state law. The Board is made up of eleven qualified members, ten of whom were "appointed by the Governor with the advice and consent of the Senate" and one of whom, the Treasurer, is a Constitutional officer and elected official. S.C. Code Ann. § 34-1-20. The Policy Statement represents the Board's interpretation of S.C. Code Ann. § 34-21-10, as articulated through proper Board action, taken in a duly called meeting of the Board. This well-qualified Board's voice must not be ignored.

## III. CDM'S OWN COURT FILING SPEAKS FOR ITSELF: CDM PURSUED A TRUSTEE APPOINTMENT IN JANUARY 2022, AND ARGUED THAT IT COULD LEGALLY SERVE IN SUCH CAPACITY.

As of January 5, 2022, CDM was still pursuing appointment to trustee, and representing to at least one Probate Court that it was authorized to serve in that role. Defendants protest this fact, amounting it to a false accusation against Defendants, and their counsel. However, the filing made by CDM and Stephen Mantell, collectively as "Respondent," in Georgetown Probate Court on January 5, 2022, speaks for itself:

> 11. Although Respondent admits that there is a pending lawsuit in Georgetown County by the Board of Financial Institutions, **that court has not determined that CDM Corporation or Stephen Mantell may not serve as Trustee in any matter.** The Georgetown case presents a novel issue of law in South Carolina. In fact, the court there specifically denied the Board of Financial Institution's Motion for Summary Judgment on the issue of capacity to serve. Additionally, and importantly, there is no allegation within the Georgetown case by the Board of Financial Institutions that an individual, here Mantell, may not serve as trustee.
>
> […]
>
> Wherefore, having fully responded to the Petition, Respondent requests… that the court **confirm the installation of Stephen Mantell or CDM Corporation as the Second Successor Trustee** directed by the Trust Agreement.

Pl. Motion, Ex. B (CDM Answer).

It is regrettable that Defendants' counsel interprets this fact as an accusation against him. However, CDM's January 5, 2022 representation to the Probate Court is a fact that must be taken into consideration by this Court, as the evidence directly refutes the spirit of this Court's finding. Assertions such as those above would not be made by a party who "removed all references to trusteeships from his companies' promotional material," and "retained counsel to end or move those trusteeships to his name personally." Pl. Motion, Ex. A (Summary Judgment Order).

The evidence proves that CDM continued to seek trustee appointment during this litigation, and representing to others that it could do so lawfully, and the Court's Order should be amended accordingly.

## CONCLUSION

For these reasons, along with those stated in BOFI's Motion, BOFI respectfully asks that this court reconsider, alter or amend its order to find that "trust business" which requires BOFI's approval, as referenced in S.C. Code Ann. § 34-21-10, includes serving in non-trustee fiduciary roles, and that Defendants, by serving as conservator, guardian, personal representative, and agent, have violated Section 34-21-10 by doing so without BOFI's prior approval.

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November 29, 2022
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY
Hon. Joe M. Crosby, Master-in-Equity

Case No. 2020-CP-22-00882

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Appellate Case No. 2023- 000017

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South Carolina Board of Financial Institutions, …….. Appellant,

v.

CDM Corporation, Inc. and Guardian Fiduciary Services, LLC, ……..… Respondents.

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# CERTIFICATE OF COUNSEL

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The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

June 29, 2023

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