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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court
Appellate Case No. 2023-001601

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Diane Goodstein, Circuit Court Judge

Case No. 2018-CP-18-00729
Appellate Case No. 2020-000935

Portfolio Recovery Associates, LLC Assignee of
Synchrony Bank/HH Gregg, Petitioner,

v.

Jennifer Campney, Respondent,

and

Jennifer Campney, Third-party Plaintiff,

v.

Cooling & Winter, LLC, Third-party Defendant,
of whom Jennifer Campney is the Respondent.

PETITIONER PORTFOLIO RECOVERY ASSOCIATES, LLC'S REPLY TO RESPONDENT'S RETURN TO THE PETITION FOR WRIT OF CERTIORARI

Caren D. Enloe, NC State Bar No. 17394
P.O. Box 176010
Raleigh, NC 27619-6010
(919) 250-2000
cenloe@smithdebnamlaw.com
Admitted Pro Hac Vice

J. Ronald Jones, Jr., SC State Bar No. 66091
171 Church Street, Suite 120C
Charleston, South Carolina 29401
(843) 714-2535
rjones@smithdebnamlaw.com
Attorneys for Petitioner

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NOW COMES the Petitioner Portfolio Recovery Associates, LLC Assignee of Synchrony Bank/HH Gregg ("PRA") and, pursuant to Rule 242(g), SCACR, submits its Reply to the Respondent's ("Campney") Return to the Petition for Writ of Certiorari (the "Return") filed in this case.

REPLY ARGUMENT

I. The Questions Presented in the Petition Have Been Preserved for the Court's Consideration.

The issues presented to this Court for consideration in PRA's Petition for Writ of Certiorari (the "Petition") were raised in the Court of Appeals and in PRA's Petition for Rehearing. The Court of Appeals twice considered motions to strike PRA's arguments and twice denied such motions, instead allowing supplemental submissions of authority post oral argument. *See* Order Denying Motion to File Reply Brief at 1, Oct. 18, 2021; Order Denying Appellant's Motion to Strike and In Limine at 1, Apr. 19, 2023 ("After careful consideration, the Court denies Appellant's motion and it will consider what, if any, arguments are relevant in this case."). *See also* Resp'ts Submission of Suppl. Authority, May 12, 2023. Moreover, "[a] question presented will be deemed to include every subsidiary question fairly comprised therein." Rule 242(d)(2), SCACR. Accordingly, all questions presented in PRA's Petition are properly before this Court. *See, e.g.*, *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (declining to address issue raised because the "Court of Appeals did not address this issue nor did [Petitioner] petition for rehearing for the court to consider it.").

PRA presents five questions for review, each of which was before the Court of Appeals either by virtue of Campney's broad-based statement of the issues in her Final Brief (Final Br. of Appellant, p. 4) or by virtue of the amicus brief (Br. of Amicus Curiae South Carolina Department of Consumer Affairs, pp. 12-19) (the "Amicus Brief"). Those issues were appropriately

responded to by PRA[1] and again raised by PRA in its Petition for Rehearing. Appropriate citations to the record on appeal are contained within the Petition and can be tied to the briefs submitted in the Court of Appeals. Accordingly, each of PRA's five questions has been preserved for the Court's consideration.

Each of the Questions Presented was before the Court of Appeals for consideration and has been preserved for this Court's consideration, as well. Questions Presented for Review I and II in the Petition track PRA's Petition for Rehearing (pp. 2-6) and PRA's Response to the Amicus Brief (pp. 2-6) and, in turn, are in response to arguments raised in the Amicus Brief (pp. 12-19) which can likewise be traced back to PRA's Final Brief of Respondent (pp. 16-18). Notably, the Return provides no substantive argument as to the merits of PRA's arguments. Question Presented for Review III in the Petition similarly tracks PRA's Petition for Rehearing (pp.7-9) and PRA's Response to the Amicus Brief (pp. 6-10) and responds to arguments raised in the Amicus Brief (pp. 12-19) which can likewise be traced back to PRA's Final Brief of Respondent (pp. 16-18). The Return does not address the merits of this question, either. *See* Return, pp. 13-14. Question Presented for Review IV similarly tracks PRA's Petition for Rehearing (pp. 9-10) and PRA's Response to the Amicus Brief (pp. 6-10) and responds to arguments raised in the Amicus Brief (pp. 12-19). Finally, Question Presented for Review V tracks PRA's Petition for Rehearing (pp. 10-11) and PRA's Response to the Amicus Brief (p. 8, n.9) which responds to arguments raised in

[1] Campney also argues that PRA violated her procedural due process rights by filing its response to the Amicus Brief, where it purportedly raised "new arguments" on appeal. A procedural due process claim requires two elements: (1) the existence of a protected interest; and (2) the deprivation of that interest without due process of law. *See, e.g.*, *Doherty v. City of Chicago*, 75 F.3d 318, 322 (7th Cir. 1996) (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)). However, Campney has failed to identify any property or liberty interest which was denied to her without procedural due process, and at any rate, suffered no deprivation of any such interest because the Court of Appeals resolved this issue in Campney's favor.

the Amicus Brief (pp. 12-19) and can likewise be traced back to PRA's Final Brief of Respondent (pp. 16-18). The Return does not address the merits of this question, instead stating that "it is a new argument that the Court of Appeals properly chose to ignore." Return, p. 14.

II. The Court of Appeals Painted with Too Broad a Brush in its Decision.

In determining that PRA was required to provide a notice of right to cure before suing, the Court held that adopting PRA's reading of the South Carolina Consumer Protection Code, S.C. Code Ann. § 37-1-101 *et seq.* (the "SCCPC") would produce an absurd result—that "no creditor, initial or assignee, would be held liable for violation of the SCCPC's right to cure notice requirement whenever a charged off debt was assigned because an initial creditor would argue it would have no obligation once all their claims to a debtor's account were assigned and an assignee would raise the argument [Respondent] raises." *Portfolio Recovery Assocs., LLC v. Campney*, 892 S.E.2d 321, 330 (S.C. Ct. App. 2023). Not so.

Instead, the Court of Appeals and Campney go to the other extreme and overlook the role timing plays as to the obligations of an assignee, concluding that all creditors, including assignees, must send a right to cure ***regardless of the timing of when the obligation arose***. It is this overly broad based view of the SCCPC's right to cure provisions (as well as the Court of Appeals' failure to consider the other factors outlined in the Petition) that has the potential to create a dangerous and absurd result. Section 37-1-301(13) of the SCCPC defines a "creditor" as being "the person who grants credit in a consumer credit transaction or, except as otherwise provided, an assignee of a creditor's right to payment, ***but use of the term does not in itself impose on an assignee any obligation of his assignor***." (emphasis supplied). While the Court of Appeals' opinion and Campney overlook the import of this qualifying clause, the General Assembly did not—making it clear that the *timing* of when the obligation arose matters. Particularly, the comments to the SCCPC make clear that assignees are only responsible for obligations imposed on creditors which

arose "***after*** their assignment unless the SCCPC provides otherwise . . . ." Kathleen Goodpasture Smith, *The South Carolina Consumer Protection Code: Text with Comments*, p. 65, cmt. subsection 13 (4th ed. 2001) (emphasis added). In other words, timing matters.

Campney and her amicus' hypothetical set in the realm of the auto finance industry illustrates the difference timing makes. In the example presented by Campney, a consumer purchases a car from a dealership, gets approved for financing while at the dealership, and the contract is immediately assigned to the financing company. Return, pp. 8-9. Subsequently, the consumer defaults on the contract. Under that scenario, Campney suggests that PRA's interpretation of the right to cure provisions would alleviate the financing company's obligation to send a notice of right to cure upon a consumer's default because that duty would not transfer upon assignment. That is an inaccurate characterization of PRA's position. As the comments to the SCCPC make clear, assignees are only responsible for obligations imposed on creditors which arose "***after*** their assignment." Because the contract in Campney's example has already been assigned to the auto finance assignee ***before the default***, any obligation to send a notice of right to cure would have arisen ***after assignment***. Thus, the obligation to send a notice of right to cure, if any existed, would have arisen after the assignment and would have been placed squarely on the assignee/financing company. And, because the loan was susceptible to being cured without impairing a continuing contractual relationship,[2] the assignee/financing company, therefore, would be required to provide the notice of right to cure, assuming its obligation was not otherwise preempted.

The facts presented by this case and Campney's charged off credit card balance stand in stark contrast to Campney's auto finance hypothetical. Here, Synchrony Bank sent Campney no

[2] *See* S.C. Code Ann. § 37-5-109(2).

less than six (6) monthly periodic statements informing her of her past due balance and the amount necessary to restore her account to good standing.[3] (R. pp. 324–357). But for the other arguments set forth in the Petition and raised in the Court of Appeals as additional sustaining grounds, any obligation to send a notice of right to cure, therefore, would have arisen ***prior*** to assignment and been placed squarely on Synchrony Bank who would have been in a position to restore Campney's rights under the agreement. However, when Campney failed to cure her default and the account became 180 days past due, Synchrony Bank charged off the account and closed it as it was required to do under controlling federal law. (R. p. 155, lines 2–4). At that point, Synchrony Bank sold the account to PRA. When the account was sold to PRA, the account had already been charged off and closed. Thus, the possibility for Campney to cure the default and return the account to the status quo no longer existed.

Applying the Court of Appeals' holding under these facts creates an absurd result as it would require the assignee of a charged off credit card account to send a notice of right to cure where no cure is possible. Had PRA, a non-lender, sent a notice of right to cure after its purchase of the charged off account and had Campney exercised her right to cure, PRA could not have restored Campney with the rights under her revolving credit agreement. Why? Because it is not a lender or a credit card issuer and restoring Campney's rights under the revolving credit agreement would have necessarily required PRA, a non-lender, to reinstate the account and issue credit to Campney. Accordingly, under these facts, a notice of right to cure would have served no purpose

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[3] Moreover, even if Synchrony Bank was required to provide Campney a notice of right to cure, it did so through the six (6) periodic monthly statements it sent, each of which contained all of the requisite elements of information mandated by S.C. Code Ann. § 37-5-111(1). (R. pp. 324–372). These statements each provided Campney sufficient information "to understand h[er] predicament and to encourage h[er] to take appropriate steps to alleviate it." Kathleen Goodpasture Smith, *South Carolina Consumer Protection Code: Text with Comments*, p. 306, cmt. 1 (4th ed. 2001).

except to confuse and deceive the consumer because the consumer could not be restored to his or her "rights under the agreement as though the defaults had not occurred." S.C. Code Ann. § 37-5-111(1).

CONCLUSION

For the reasons set forth in its Petition and this Reply, PRA respectfully requests this Court exercise its discretion to grant the Petition. A review of these issues by this Court is critical because the Court of Appeals' Opinion is inconsistent with controlling United States Supreme Court precedent and federal law and presents numerous novel issues of significant public interest. Accordingly, this Court should grant the Petition, reverse the Court of Appeals' holding, and affirm the circuit court's dismissal of Campney's First Counterclaim.

Caren D. Enloe, NC State Bar No. 17394
P.O. Box 176010
Raleigh, NC 27619-6010
(919) 250-2000
cenloe@smithdebnamlaw.com
Admitted Pro Hac Vice

J. Ronald Jones, Jr., SC State Bar No. 66091
171 Church Street, Suite 120C
Charleston, South Carolina 29401
(843) 714-2535
rjones@smithdebnamlaw.com

Attorneys for Petitioner

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