THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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

Case No. 2020-CP-22-00882

Appellate Case No. 2023- 000017

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

v.

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

APPELLANT'S BRIEF

July 7, 2023

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II. Did the Master-in-Equity err in failing to give deference to the Board of Financial Institutions interpretation regarding the definition of "trust business" as used in S.C. Code Ann. § 34-21-10?

III. Did the Master-in-Equity err in finding that the probate court "regulates" other fiduciaries, and that the Board of Financial Institutions cannot regulated entities serving in these capacities because the roles are "codified in the Probate Code?"

IV. In the alternative, even if the Master-in-Equity is correct that trust business must involve the administration of a trust, did the Master-in-Equity err in holding that the fiduciary roles held by Respondent did not involve the administration of a trust, and therefore constitute unlawful trust business?

STATEMENT OF THE CASE

Appellant South Carolina Board of Financial Institutions ("BOFI") initiated this action against Respondents CDM Corporation, Inc. ("CDM") and Guardian Fiduciary Services, LLC ("GFS") (collectively, "Respondents") in Circuit Court in Georgetown County on October 26, 2020. **(R. pp. 15-23)** (Complaint).

In its Complaint, BOFI alleged that Respondents were conducting unauthorized trust business in violation of S.C. Code Ann. § 34-21-10, *et seq*., by serving as trustee, conservator, guardian, personal representative, and agent, and by holding themselves out as offering these fiduciary services. Id. Respondents conceded that they had served or held themselves out as serving in all of these fiduciary roles, but counterclaimed, seeking declaratory judgment that "trust business" means serving as a trustee of a trust instrument, and that serving in other fiduciary roles did not constitute trust business, and could not be regulated by BOFI. **(R. pp. 24-35)** (Answer).

The case was referred to Hon. Joe M. Crosby, Master-in-Equity for Georgetown County, on March 11, 2022. **(R. pp. 1-3)** (Order of Reference). As the undisputed evidence proved that Respondents had served or held themselves out as serving in all of these fiduciary capacities, the parties filed opposing Motions for Summary Judgment on August 22, 2022. **(R. pp. 77-221)** (Motions for Summary Judgment).

The Master-in-Equity rendered his decision without a hearing, and issued an Order on November 3, 2022, partially granting each party's motion. **(R. pp. 4-12)** (Summary Judgment Order). The Master-in-Equity found in favor of BOFI, holding that Respondents had conducted unauthorized trust business by serving as trustee, and that they must be enjoined from continuing to do so. Id. The Master-in-Equity found in favor of Respondents by holding that the "trust business" regulated by BOFI must involve a trust, and that Respondents' serving as conservator,

guardian, personal representative, or agent did not constitute "trust business," which would require BOFI's prior written approval. Id. The Master-in-Equity further held that the "non-trustee" fiduciary roles are regulated by the probate courts and, therefore, BOFI cannot regulate entities serving in these capacities. Id.

BOFI timely filed a Motion for Partial Reconsideration, Alteration or Amendment on November 14, 2022, on the grounds that the Master-in-Equity's narrow definition of "trust business" failed to acknowledge the language and context of the statute, as well as the ordinary and popular significance of that term, and also that the probate court's jurisdiction in appointing certain fiduciaries did not contradict or negate BOFI's regulation of entities serving as conservator, guardian, personal representative, or agent. **(R. pp. 222-260)** (Rule 59 Motion). BOFI also argued that its interpretation of the law, as articulated in its "Policy Statement Concerning the Conducting of Trust Business by Non-Depository Entities in South Carolina," should have been given deference. Id.; **(R. pp. 100-102)** (Policy Statement).

In its Order dated December 20, 2022, the Master-in-Equity denied BOFI's motion without a hearing. **(R. pp. 13-14)** (Rule 59 Order). By a Notice of Appeal filed and served on January 5, 2023, BOFI appealed the Master-in-Equity's decision to this Court.

STANDARD OF REVIEW

Per S.C. Code Ann. § 14-15-85, "When some or all of the causes of action in a case are referred to a master-in-equity… an appeal from an order or judgment of the master or referee must be to the Supreme Court or the court of appeals as provided by the South Carolina Appellate Court Rules."

In the present case, the Respondents have admitted to the conduct alleged by BOFI, and there is no dispute as to the material facts. This case is purely a matter of statutory interpretation. Statutory interpretation is a question of law subject to de novo review. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "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." Dunton v. S.C. Bd. of Exam'rs In Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987).

STATEMENT OF FACTS

The Board of Financial Institutions refers to both an agency of the State of South Carolina ("Agency"), and the eleven-member regulatory board ("Board") which it serves (collectively "BOFI"). The Agency has two divisions: the Consumer Finance Division, and the Banking Division. The Banking Division, headed by the Commissioner of Banking, Kathy Bickham (formerly Richards H. Green), is tasked with the supervision of, among other types of financial institutions, "trust companies and fiduciary corporations." S.C. Code Ann. § 34-21-20.

Respondent CDM is a domestic corporation located in Georgetown, South Carolina, co-owned by Stephen Mantell and his wife, Candida Mantell. Respondent GFS is a domestic limited liability company with Mr. Mantell as the sole member, also located in Georgetown.

At all times relevant to this, action Respondents have served as trustee[1], conservator, guardian, personal representative, and agent pursuant to a power of attorney, and held themselves out as offering these trust business services to the general public in this state.

Before a non-exempt entity conducts trust business in South Carolina, that entity must seek and obtain prior approval from the Board. Thereafter, entities conducting trust business are subject to regular examinations by BOFI. It has been BOFI's longstanding position and statutory interpretation that an entity serving or offering to serve the general public as conservator, guardian, personal representative, or agent, conducts the trust business BOFI is obligated to license and regulate. **(R. p. 52)** (Green Aff. ¶ 6); see also **(R. pp. 100-102)** (Policy Statement).

[1] The undisputed evidence proves that Respondents served as trustee and held themselves out to the public as a trustee for hire; however, this activity has been properly enjoined by the trial court and is no longer at issue. The subject of this appeal is focused on Respondents' serving as conservator, guardian, personal representative, and agent.

CDM admits that it serves as conservator, guardian, personal representative, and power of attorney for individuals in South Carolina. **(R. pp. 161-169)** (Pl. Resp. to Def. Req. to Admit). GFS also admits that it currently serves as guardian in South Carolina. Id. Both Respondents also admit that they hold themselves out to the public as providing the services of conservator, guardian, personal representative of an estate, and power of attorney. **(R. pp. 161-169)** (Pl. Resp. to Def. Req. to Admit). On and before the date this action was instituted, Respondents' shared website held the companies out to the public as providing trust business, advertising the services of "power of attorney," "personal representative," "guardianship," and "conservator." **(R. p. 53)** (Green Aff., ¶ 10); see also **(R. pp. 161-169)** (Pl. Resp. to Def. Req. to Admit). The undisputed evidence and admissions in this case indicate that Respondents have conducted, and continue to conduct the following activities, any one of which constitute trust business requiring BOFI's written approval prior to its undertaking:

	GFS	CDM
Serves as Guardian	✓	✓
Held/holds itself out as Guardian	✓	✓
Serves as Conservator		✓
Held/holds itself out as Conservator	✓	✓
Serves as Personal Representative of Estates		✓
Held/holds itself out as Personal Representative of Estates	✓	✓
Serves as Attorney-in-fact pursuant to a Power of Attorney		✓
Held/holds itself out as Agent pursuant to a Power of Attorney	✓	✓

See **(R. pp. 161-169)** (Def. Resp. to Pl. Req. to Admit).

Despite conducting this extensive trust business, Respondents admit that they have never made a written application to the Board to conduct a trust business in South Carolina, nor have

they received written permission from the Board to conduct a trust business in South Carolina. **(R. pp. 161-163)** (Def. Resp. to Pl. Req. to Admit).

In light of Respondents' serving as trustee, conservator, guardian, personal representative, and agent, BOFI initiated this action to enjoin Respondents from serving in any of these capacities because Respondents' fiduciary activities constituted unlicensed and unauthorized trust business. **(R. pp. 50-54)** (Green Aff.). Pursuant to the Master-in-Equity's Summary Judgment Order, Respondents are now permanently enjoined from serving as a trustee of a trust; however, the Master-in-Equity declined to enjoin Respondents from serving as conservator, guardian, personal representative, and agent. **(R. pp. 4-12)** (Summary Judgment Order).

BOFI now seeks review from this Court to determine whether Respondents' remaining fiduciary activities of conservator, guardian, personal representative, and agent constitute unauthorized trust business, in violation of the law.

ARGUMENT

I. THE MASTER-IN-EQUITY ERRED WHEN IT DEFINED THE TERM "TRUST BUSINESS," AS REGULATED BY THE BOARD OF FINANCIAL INSTITUTIONS PURSUANT TO S.C. CODE ANN. § 34-21-10, ET SEQ., TO EXCLUDE SERVING AS CONSERVATOR, GUARDIAN, PERSONAL REPRESENTATIVE, OR AGENT, BECAUSE THE CONTEXT OF THE TERM IN STATUTE, AS WELL AS THE USUAL AND CUSTOMARY MEANING OF "TRUST BUSINESS," INCLUDES THESE FIDUCIARY ROLES.

The Master-in-Equity erred in holding that the "trust business" regulated by BOFI did not include serving as conservator, guardian, personal representative, and agent, and holding that Respondents' serving in these capacities does not constitute "trust business" requiring BOFI's prior written approval.

Pursuant to S.C. Code Ann. § 34-21-10,

> 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[2] and receiving written approval from the Board… 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.

S.C. Code Ann. § 34-21-10 prohibits all entities, other than natural persons[3] and national banks, from conducting "trust business" unless they have first obtained prior approval from BOFI's Board.

As the Master-in-Equity's Summary Judgment Order notes, the term "trust business" is not defined in statute, nor has the term been defined by South Carolina courts. However, based on the context of S.C Code Ann. § 34-21-10, *et seq*., as well as numerous other statutory provisions, and

[2] The State Board of Bank Control is now the State Board of Financial Institutions.

[3] Per the plain language of the statute, BOFI does not license or regulate individuals or "natural persons" serving in fiduciary roles. Natural persons are free to accept fiduciary appointments without any licensure or oversight from BOFI.

evidence showing the ordinary usage of the term, "trust business" refers to the undertaking of a broad range of fiduciary activities, including trustee, as well as other fiduciary roles[4] such as personal representative, guardian, conservator, and agent pursuant to a power of attorney.

The Master-in-Equity erroneously held that the "trust business" which BOFI is obligated to license and oversee, is limited to "business involved with trusts," and that BOFI does not have approval or regulatory authority over entities serving in other fiduciary roles. **(R. pp. 4-8)** (Summary Judgment Order). In defining "trust business," the Master-in-Equity incorrectly cites the definition of a "trust" as set forth in the Probate Code (Title 62)— a definition which necessarily excludes other fiduciary arrangements in order to clearly define a trust instrument— despite the fact that this 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). **(R. p. 6)** (Summary Judgment Order); see also S.C. Code Ann. § 62-1-201. In reaching this incorrect definition, the Master-in-Equity ignores ordinary and popular usage of the term "trust business," as well as the context of the term in the Banking Code (Title 34), which, as discussed more thoroughly below, repeatedly and consistently includes references to fiduciary roles beyond trustee.

The Master-in-Equity's interpretation of "trust business" fails when the rules of statutory construction are applied. Moreover, the Master-in-Equity's decision renders numerous statutory provisions ambiguous or meaningless; whereas the application of a contextual, ordinary and popular meaning of trust business gives full effect to all applicable statutes.

[4] For the sake of brevity, this brief refers to the roles of conservator, guardian, personal representative, and agent, collectively as "other fiduciary roles." However, as discussed more fully in Section IV *infra*, there is no significant practical distinction between these roles and that of trustee.

a. When construed in context, the term "trust business" includes serving as conservator, guardian, personal representative, and agent.

The statutory context of the term "trust business" confirms that BOFI-regulated trust business includes acting not just as trustee, but also as conservator, guardian, personal representative, and agent. Serving in any one of these roles without BOFI's prior written approval constitutes unauthorized and unlicensed trust business in violation of S.C. Code Ann. § 34-21-10.

A statute must receive a practical and reasonable interpretation consistent with the "design" of the legislature. Smith v. S.C. Ins. Co., 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002). "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). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." In re Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995).

When "construed in context… by looking at the other terms used in the statute," (Hinton, 357 S.C. at 333), State law confirms that BOFI-regulated "trust business" extends beyond the administration of trust instruments alone, and includes all types of fiduciary appointments.

For example, S.C. Code Ann. § 34-21-10 declares no person shall conduct "trust business" without BOFI's prior approval, but then provides an exception: this rule does not prevent a natural person or national bank "from qualifying and acting as trustee, executor, administrator, guardian, committee or in any other fiduciary capacity." The inclusion of each of these fiduciary activities, listed to establish an exception to the requirement for trust business licensure, strongly implies if

not clearly conveys, that these activities would otherwise constitute trust business, if not undertaken by an exempt person. To view otherwise would render the final clause of this Section "surplusage or superfluous." Decker, 322 S.C. at 219, 471 S.E.2d at 462 (1995).

Similarly, S.C. Code Ann. § 34-21-210, *et seq*., sets forth rules, which BOFI enforces, regarding trust institutions' administration of common trust funds. In this context, S.C. Code Ann. § 34-21-210(1) defines "trust institution" to include "…any trust company, authorized to act in a fiduciary capacity in this State… 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." That same section defines "fiduciary" to include serving as "trustee, executor, administrator, guardian of estates, committee of estates of persons non compos mentis, and managing agent." S.C. Code Ann. § 34-21-210(2). This Section echoes Section 34-21-10, confirming that trust companies must be "authorized" by BOFI to serve in the listed fiduciary roles.

Likewise, S.C. Code Ann. § 34-15-10 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." Here again, this Banking Code provision sets forth a rule regarding BOFI-regulated trust business which explicitly includes other fiduciary appointments.

Moreover, when a "trust company" is sold or merges, 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,"—not just trust instruments— shall

transfer to the buyer or surviving entity. S.C. Code Ann. § 34-3-850. Again, the context of trust business indicates that BOFI's regulation and oversight includes fiduciary roles other than trustee.

When construed in context of the South Carolina Code provisions above, one must conclude that the terms "trust business," "trust institution," and "trust company" refer to serving as conservator, guardian, personal representative, agent and/or other fiduciary roles. See Hinton, 357 S.C. at 333, 502 S.E.2d at 338 (Ct. App. 2004). Such a reading "harmonizes with its subject matter and accords with its general purpose." Id. If serving in fiduciary roles beyond trustee does not constitute "trust business" or the work of a "trust company" or "trust institution," then other fiduciary roles would not be listed repeatedly, by name, in connection with it, and the rules for serving in these roles would not be articulated in the Banking Code for BOFI to enforce.

Rather than using the definition of a trust instrument set forth in the Probate Code, a more fitting definition of the word "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 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).

Applying this definition of "trust business" to the language of Title 34 relieves the tension and contradiction created by the Master-in-Equity's narrow rendering. When "trust business" is defined as serving as a hired fiduciary, there is no longer a question of why the prohibition on unauthorized trust business in Section 34-21-10 would exempt certain persons from BOFI's

approval prior to qualifying and acting in other roles such as "executor, administrator, guardian, committee or in any other fiduciary capacity," rather than just "trustee." There is no longer a question of why a "trust institution" must be authorized by BOFI to serve as "executor, administrator, guardian of estates, committee of estates of persons non compos mentis, and managing agent," rather than just "trustee." S.C. Code Ann. § 34-21-210(1) and (2). The inclusion of business capital requirements for trust companies serving as conservator, guardian, and personal representative is no longer confounding. S.C. Code Ann. § 34-15-10.

On the other hand, limiting the trust business regulated by BOFI to business involving a trust instrument renders the language of these statutes meaningless and superfluous—and the effect of the Master-in-Equity's decision is that those words, spoken by the General Assembly, will be voided without justification.

The term "trust business," when "read in conjunction with the purpose of the whole statute and the policy of the law," includes serving as conservator, guardian, personal representative, and agent. S.C. Coastal Council, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991). Accordingly, BOFI respectfully asks this Court to find that Respondents have conducted unlawful trust business by serving in these roles, and to enjoin them from such further activity.

b. The ordinary and popular meaning of "trust business" includes serving as conservator, guardian, personal representative, and agent.

Trust business may not be explicitly defined in South Carolina law, but the ordinary and popular usage or treatment of the term, and the corresponding regulation of such business by state and federal banking regulators, includes serving in both trustee and other fiduciary roles.

"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 ordinary and popular meaning of "trust business"—which BOFI is statutorily bound to license, supervise, and regulate— includes the fiduciary roles of conservator, guardian, personal representative and agent.

The South Carolina Attorney General's office has analyzed Section 34-21-10, and indicated its opinion that a trust company is, an entity "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." and that this definition is "consistent with [the definitions] set forth in Title 34." **(R. p. 215)** Op. S.C. Att'y Gen (Feb. 9, 1996); 1996 WL 93998 (S.C.A.G).

South Carolina courts have also articulated a historical understanding that the trust business approved and regulated by BOFI includes fiduciary roles other than merely serving as a trustee. In Bowen v. Strauss, 175 S.C. 23, 23, 178 S.E. 252, 253 (1935), the court noted that the law at the time "empowered banks and trust companies to become executors, guardians, trustees, etc…"[5] See also Monteith v. Harby, 193 S.C. 349, 8 S.E.2d 629 (1940). In American Trust Co., Inc. v. S.C. State Bd. of Bank Control, 381 F. Supp. 313 (D.S.C. 1974), the Federal District Court considered a trust company's challenge to a law, enforced by BOFI, which prohibited foreign corporations from serving as "executor, administrator, or testamentary trustee" in South Carolina. In that case, the court noted that "The plaintiffs do not question the power of South Carolina to prohibit foreign corporations from serving as executors or administrators of the estates of South Carolina decedents. Nor do they challenge any South Carolina statutes governing the conduct of fiduciaries and prescribing their duties." Id. The court affirmed that "Undoubtedly, South Carolina [through BOFI] has a legitimate interest in assuring that corporate fiduciaries serve the public faithfully.

[5] Section 5727 of the 1930 South Carolina Code provided that a corporation required the approval of the Bank Examiner (now the Commissioner of Banking) prior to serving in these roles, as well as "agent or attorney in fact."

Laws prescribing the fiduciaries' financial resources, governing their conduct, and defining their responsibilities are appropriate means of controlling trust companies." Id.

As further evidence of the ordinary and popular meaning of "trust business," per the affidavit of Richards Green, prior Commissioner of Banking, during his twenty plus years serving at BOFI, "the Board and Agency have consistently interpreted the meaning of trust company operations to include serving as trustee, guardian, conservator, personal representative of an estate, and other fiduciary capacities." **(R. p. 52)** (Green Aff., ¶6). BOFI has also taken action to enforce this understanding of the term "trust business." 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 Ann. § 34-21-10 by advertising that it "serves as a fiduciary to administer assets in conservatorships and estates," and by serving as a personal representative of an estate. **(R. p. 57)** (J. Earle Financial Consent Order).

Additionally, Jamison Hinds, General Counsel for Colonial Trust Company, a South Carolina state-chartered trust company operating under BOFI's approval, confirms his understanding that Respondents serve as "trustee, conservator, guardian, personal representative of an estate, and healthcare attorney-in-fact," and that "entities conducting these fiduciary activities should be closely regulated by BOFI." **(R. p. 48)** (Hinds Aff., ¶4-5).

In addition to South Carolina's usage, the ordinary and popular meaning of "trust business" is supported by the law of every state and federal regulator in the United States.

The Office of the Comptroller of the Currency ("OCC"), the federal banking regulator, has issued guidance stating that national banks, whether depository or not, must have "trust powers" to serve in any fiduciary capacity. See **(R. pp. 253-260)** (OCC Interpretive Letter #1176). 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." **(R. p. 255)** (OCC Interpretive Letter #1176).

Likewise, 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 agent. A few of the more succinct examples are as follows:

> •Arizona: "'Trust business' means the holding out by a person to the public at large by advertising, solicitation or other means that the person is available to act as a fiduciary in this state.… 'Fiduciary' means a personal representative, administrator, guardian, conservator, trustee, agent or other person who acts in a fiduciary capacity." Ariz. Rev. Stat. Ann. § 6-851.
>
> •Massachusetts: "'Trust business'--any activity conducted by an executor of a will or codicil, an administrator with the will annexed, an administrator of the estate of any person, a guardian, a conservator, or a trustee under a will or instrument creating a trust for the care and management of property, while he is acting in such a fiduciary capacity." Mass. Gen. Laws Ann. ch. 203, § 4A (West).
>
> •New Jersey: "'For the purposes of this section, 'trust business' means holding out to the public by advertising, solicitation or other means that a person or entity is available to perform any of the services of a trustee or fiduciary in this State or another state, and includes acting as a trustee, testamentary trustee, fiduciary, executor or guardian…" N.J. Stat. Ann. § 17:9A-316 (West).
>
> •Ohio: "'Trust business' means accepting and executing trusts of property, serving as a trustee, executor, administrator, guardian, receiver, or conservator, and providing fiduciary services as a business." Ohio Rev. Code Ann. § 1111.01(I) (West).
>
> •Utah: "'Trust business' means, except as provided in Subsection (1)(c), a business in which one acts in any agency or fiduciary capacity, including that of personal representative, executor, administrator, conservator, guardian, assignee, receiver,

depositary, or trustee under appointment as trustee for any purpose permitted by law…" Utah Code Ann. § 7-5-1(b) (West).

(R. pp. 120-159) (Trust Business Definitions By State).

Additionally, as of June 19, 2018, BOFI entered into the Nationwide Cooperative Agreement for Supervision and Examination of Multi-State Trust Institutions. This Agreement serves as a compact between states for regulation of state-chartered trust business, and currently 49 states have entered into it. In the Agreement, state-regulated "trust business" includes "acting as a fiduciary," and "act as a fiduciary" includes 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." **(R. pp. 107-109)** (CSBS Cooperative Agreement, Section 1.1).

All of these materials and resources are consistent in their contemplation of the term "trust business," and they confirm that the ordinary and popular significance of the term is broader than simply serving as a trustee. To the contrary, "trust business" clearly includes serving as conservator, guardian, personal representative, and agent.

On these grounds, BOFI requests that this Court reverse the trial court's narrow and erroneous definition of trust business and find that Respondents have conducted unauthorized trust business in violation of S.C. Code Ann. § 34-21-10 by serving as conservator, guardian, personal representative, and agent, and enjoin them from continuing such unauthorized trust business.

II. THE MASTER-IN-EQUITY ERRED IN FAILING TO GIVE DEFERENCE TO THE BOARD OF FINANCIAL INSTITUTIONS' INTERPRETATION REGARDING THE DEFINITION OF "TRUST BUSINESS" AS USED IN S.C. CODE ANN. § 34-21-10.

BOFI has issued written guidance which clearly defines "trust business" as used in S.C. Code Ann. § 34-21-10 to include the fiduciary roles of conservator, guardian, personal representative, and agent. **(R. pp. 101-102)** (BOFI Policy Statement). The Master-in-Equity erred by failing to give BOFI's interpretation the deference to which it is entitled, despite finding that the law is silent or ambiguous as to the meaning of the term "trust business."

"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, 826 S.E.2d 595, 606 (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, 766 S.E.2d 707, 719 (2014) (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 2782 (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, 426 S.E.2d 319, 321 (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." Dunton v. S.C. Bd. of Exam'rs In Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987).

BOFI 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 examination" by BOFI, and "are further subject to rules and regulations promulgated by the Board." S.C. Code Ann. § 34-21-20.

On June 1, 2022, BOFI's Board formalized its interpretation by issuing a "Policy Statement Concerning the Conducting of Trust Business by Non-Depository Entities in South Carolina." **(R. pp. 101-102)**. 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).

The Policy Statement is entirely consistent with state law. Furthermore, the Policy Statement is consistent with Board action taken prior to its discovery of Respondents' unauthorized trust business, as well as the numerous state and federal resources and other materials discussed *supra*. See e.g. **(R. pp. 120-159)** (Trust Business Definitions By State), **(R. pp. 253-260)** (OCC Interpretive Letter #1176), **(R. pp. 56-61)** (J. Earle Financial Consent Order); **(R. pp. 107-109)** (CSBS Cooperative Agreement, Section 1.1). The unanimity among these sources defining trust business to include fiduciary business beyond trusteeship is confirmation that the BOFI Policy Statement is worthy of deference, and there is no compelling reason to overturn it.

On these grounds, BOFI requests that this Court give deference to BOFI's interpretation, as articulated in its Policy Statement. Applying the definition of trust business articulated in BOFI's Policy Statement, this Court should find that Respondents have conducted unauthorized trust business in violation of S.C. Code Ann. § 34-21-10 by serving as conservator, guardian, personal representative, and agent, and enjoin them from continuing such trust business.

III. THE MASTER-IN-EQUITY ERRED IN FINDING THAT THE PROBATE COURT "REGULATES" OTHER FIDUCIARIES, AND THAT THE BOARD OF FINANCIAL INSTITUTIONS CANNOT REGULATE ENTITIES SERVING IN THESE CAPACITIES BECAUSE THE ROLES ARE "CODIFIED IN THE PROBATE CODE."

The Master-in-Equity erred in finding that the probate court "regulates" so-called "non-trustee" fiduciary activity, and that such "regulation" negates or nullifies BOFI's statutory duty to regulate entities serving as conservator, guardian, personal representative, and agent. **(R. p. 10)** (Summary Judgment Order). When proper statutory construction is applied, the jurisdiction of the probate court and the regulatory authority of BOFI can, and therefore must, be reconciled, allowing the probate courts to adjudicate protective proceedings and matters of estate administration while BOFI oversees and regulates the business activities of entities serving in fiduciary capacities.

"Nowhere in Chapter 21 of Title 34, the chapter entitled 'Banks and Corporations Doing Trust Business' is there any suggestion, annotation or reference that indicates that either the Legislature or the Code Commissioner thought that the Trust Statute could not stand side by side the Probate Code." Op. S.C. Att'y Gen (Aug. 2, 1995); 1995 WL 803721.

"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, 533 S.E.2d 578, 583 (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, 496 S.E.2d 871, 874 (Ct.App.1998) quoting State v. Hood, 181 S.C. 488, 491, 188 S.E. 134, 136 (1936).

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, 712 S.E.2d 408, 412 (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, 52 S.E.2d 192 (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, 712 S.E.2d at 412 (2011).

The Master-in-Equity incorrectly asserts that the Probate Code stands alone, voiding any provision of law which may interact with the jurisdiction of the probate courts, and that the probate court "regulates" conservators, guardians, personal representatives, and agents:

> The South Carolina Probate Code specifically sets forth the requirements and regulations for, and the probate court's appointment of, non-trustee fiduciary roles including conservator, guardian, attorney-in-fact in accordance with a power of attorney, personal representative or executor.[6] Because these 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. These areas are outside BOFI's jurisdiction.

[6] The trial court's distinction between trustee and court-appointed ("non-trustee") fiduciary roles is fundamentally flawed. The trial court holds that BOFI may regulate trustees; yet, a probate court may appoint a trustee. S.C. Code Ann. 62-7-201(a)(4). The trial court also holds that BOFI may not regulate court-appointed "non-trustee" fiduciaries, but includes attorney-in-fact (i.e. agent) in that category, even though Probate Code does not contemplate the probate court's power of appointment of an agent. See S.C. Code Ann. § 62-8-102, *et seq.*

(R. p. 10) (Summary Judgment Order).

The probate court does indeed have jurisdiction to hear and preside over certain matters concerning fiduciaries, in accordance with its own statutory authority. The probate court has jurisdiction over "protective proceedings and guardianship proceedings," (S.C. Code Ann. § 62-1-302(a)(2)(i)), as well as "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)). In order to exercise authority as to any person, a probate court must have jurisdiction over the subject matter of the case or controversy pursuant to the Probate Code, and venue must be proper in the county of that probate court.

When a probate court has proper jurisdiction, it may appoint a "person"[7] to serve as conservator, guardian, and personal representative. A "person" must be qualified to be appointed as a fiduciary. To serve as personal representative, a person must "be appointed by order of the court, qualify, and be issued letters." S.C. Code Ann. § 62-3-103. 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). By referencing these "other" qualifications, the Probate Code acknowledges that more specific statutes regarding a persons' qualifications for fiduciary appointment exist elsewhere in the South Carolina Code or case law. Section 34-21-10, which

[7] 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 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).

requires non-exempt entities to obtain prior approval from BOFI to serve as a fiduciary, is one such "other" qualification.

The Banking Code works hand-in-hand with the Probate Code by establishing BOFI's approval as a prerequisite for non-exempt entities to qualify for and accept probate court appointments. Section 34-21-10 prohibits a non-exempt entity from accepting a probate court fiduciary appointment without BOFI's prior approval in the same way that a person without a medical license from the State Board of Medical Examiners cannot accept a probate court's appointment to serve as a physician to examine an alleged incapacitated person. S.C. Code Ann. § 40-47-30 ("A person may not practice medicine in this State unless the person is twenty-one years of age and has been authorized to do so pursuant to the provisions of this article.") Despite both statutory provisions existing outside the Probate Code, there is nothing about either of these statutory requirements that supplants any power of the probate court.

Even if the probate court appoints an unqualified entity to a fiduciary role, a non-exempt entity violates S.C. Code Ann. § 34-21-10 by accepting and acting under such appointment without prior BOFI approval. 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. Moreover, a probate court lacks authority to 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)).

Stated differently, the Banking Code simply establishes specific qualifications, as generally acknowledged by the Probate Code, which act as an exception to the general rule that the probate court may appoint a "person" to certain fiduciary roles, or that a "person" may accept such an appointment.

"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, 628 S.E.2d 38, 41 (2006).

The Banking Code addresses the qualification of non-exempt entities 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. at 142, 628 S.E.2d at 41 (2006). In fact, 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 Ann. § 34-15-10 provides that a

> …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…"

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") while also acknowledging that the probate court has "jurisdiction of the appointment." Id. Section 34-15-10 confirms that BOFI's oversight 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. at 142, 628 S.E.2d at 41 (2006).

Notwithstanding matters of statutory construction and interpretation, there is good reason for BOFI to regulate an entity's fiduciary business even when that entity is appointed by and under the jurisdiction of the probate court. The probate court lacks the authority to examine or investigate any person or entity. Nothing in the Probate Code indicates that fiduciaries are overseen or "regulated" by South Carolina Probate judges. In fact, the court is expressly excused from such oversight: "Nothing herein shall require the court to oversee the plan of care [implemented by a 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).

By comparison, BOFI's authority to regulate the safety and soundness of operations of non-exempt persons conducting trust business is not predicated upon individual "proceedings" or "determinations," nor is BOFI's jurisdiction limited by controversy, or by county.

In the present case, Stephen Mantell, utilizing the names and corporate veils of both CDM Corporation and Guardian Fiduciary Services, LLC, has sought and accepted fiduciary appointments by the probate court for numerous individuals, in the courts of multiple counties, before multiple probate judges, as well as doing business as "Senior Helpers." **(R. pp. 245-249)** (Appointment of Mantell of Senior Helpers). Additionally, late in the course of litigation, Respondents disclosed that they have been acquired by a Michigan-based entity, WWWB Trustees, LLC.[8] **(R. pp. 251-252)** (Def. Resp. to Interrog.).

[8] 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.

The totality of the operations of these various entities— across corporate names, county, judge, and matter— is not likely cognizable by the probate court, or by the principals, wards, or the families to whom Respondents advertise their services. BOFI's licensure, regulation, and examination of these entities would ensure that Respondents' fiduciary operations are undertaken within accepted standards of safety, financial and organizational soundness, propriety and fidelity. Principals, wards, and their families are protected, and the probate court's work is substantially aided, rather than displaced or hindered, by BOFI's regulation of these entities.

The Court erred in finding that BOFI does not regulate entities serving in so-called "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." **(R. p. 10)** (Summary Judgment Order). BOFI respectfully requests this Court to reverse this finding.

IV. IN THE ALTERNATIVE, EVEN IF THE MASTER-IN-EQUITY IS CORRECT THAT TRUST BUSINESS MUST INVOLVE THE ADMINISTRATION OF A TRUST, THE MASTER-IN-EQUITY ERRED IN HOLDING THE FIDUCIARY ROLES HELD BY RESPONDENT DID NOT INVOLVE THE ADMINISTRATION OF A TRUST, AND THEREFORE CONSTITUTE UNLAWFUL TRUST BUSINESS.

Even if the Master-in-Equity correctly defined "trust business" to include only business activity involving a trust, Respondents' activity in serving as conservator, guardian, and personal representative, and agent, by definition, involve "the administration of trusts." **(R. p. 8)** (Summary Judgment Order). Therefore, by serving in these roles, Respondents have violated S.C. Code Ann. § 34-21-10, and must be enjoined as unauthorized trust business.

Black's Law Dictionary defines a trust as "An equitable or beneficial right or title to land or other property, held for the beneficiary by another person, in whom resides the legal title or

ownership, recognized and enforced by courts of chancery." **(R. p. 8)** (Summary Judgment Order); see also https://thelawdictionary.org/trust/.

Under South Carolina law, a personal representative is a trustee: "a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate." S.C. Code Ann. § 62-3-711(a). A conservator is also a trustee: "The appointment of a conservator vests in him title as trustee to all property of the protected person." S.C. Code Ann. § 62-5-417. Because Respondents admit to serving as personal representative and conservator and holding themselves out to the public as serving in these roles without BOFI's prior approval, they have conducted unauthorized trust business as a matter of law, even by the Master-in-Equity's narrow definition of trust business.

Likewise, in the absence of a conservator, a guardian is responsible for "receiving money and tangible property deliverable to the ward," just as a trustee would, "and applying the money and property for support, care, and education of the ward." S.C. Code Ann. § 62-5-309(A)(6)(b). And, like a trustee, an agent has broad power over another's assets, and may "do any lawful act with respect to the subject and all property related to the subject" (§ 62-8-203(10)), including demanding "money or another thing of value to which the principal is… entitled, and conserve, invest, disburse, or use anything so received," (§ 62-8-203(a)), and "contract[ing] in any manner with any person" (§ 62-8-203(2)). Even applying the Master-in-Equity's narrow definition of trust business, to the extent Respondents have held property "for the beneficiary by another person, in whom resides the legal title or ownership" while serving as guardian or agent, they have conducted unauthorized trust business. **(R. p. 8)** (Summary Judgment Order).

Therefore, in the alternative to BOFI's previous requests for reversal, BOFI asks this Court to partially reverse the Master-in-Equity and hold that Respondents have conducted unauthorized trust business as a matter of law by serving as conservator and personal representative, and to remand with instructions to the Master-in-Equity that, to the extent that they have held property in trust while serving as a guardian or agent, Respondents have also conducted unauthorized trust business with respect to those activities.

CONCLUSION

For the foregoing reasons, BOFI requests that this Court reverse the Master-in-Equity's granting of Respondents' Motion for Summary Judgment, declare that trust business requiring BOFI's prior approval includes the fiduciary roles of conservator, guardian, personal representative and agent, and declare that BOFI properly licenses and regulates non-exempt entities serving in these roles.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2020-CP-22-00882

Appellate Case No. 2023- 000017

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

v.

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

CERTIFICATE OF SERVICE

This is to certify that today undersigned counsel for the served one (1) copy of the APPELLANT'S BRIEF by electronic mail delivery of same to the recipients listed, and at their Attorney Information System provided email addresses, via the attached E-mail:

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July 7, 2023

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