

Exhibit “A”

Defendants Mary Lou Cercopely ("Cercopely"), David Sean Clancy ("Clancy"), and Southcoast Community Bank n/k/a Pinnacle Bank timely filed Answers. Specifically, Defendants Cercopely and Clancy (collectively "Defendants") filed an Amended Answer and Counterclaim on April 22, 2019. During the hearing, Defendants waived all defenses and counterclaims stated in their Amended Answer and Counterclaim and raised a new defense asserting this Court lacks subject matter jurisdiction. Specifically, Defendants asserted that exclusive jurisdiction lies with the Federal Deposit Insurance Corporation ("FDIC") pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. §1811 *et seq.*

Defendants Joan Geanuracos ("Geanuracos") and South Carolina Federal Credit Union failed to timely file Answers and are in default.

According to the affidavit filed herein, Cercopely, Clancy, and Geanuracos are not in the military service of the United States of America, as contemplated under the Soldier's & Sailors Civil Relief Act of 1940, and any amendments thereto. Additionally, according to the certification filed herein, this action is not subject to the Coronavirus Aid, Relief, and Economic Security Act.

All parties were notified of the time, date, and place of the final hearing in this matter, by the Notice of Hearing, dated January 8, 2020, on file with the Court.

LEGAL DISCUSSION

1. DEFENDANTS CERCOPELY AND CLANCY'S WAIVER OF DEFENSES AND COUNTERCLAIMS.

As stated above, during the January 28, 2020 hearing, Defendants waived all defenses and counterclaims outlined in their Amended Answer and Counterclaim, dated April 22, 2019, and any other defense or counterclaim that could be asserted, with the exception of their contention that this Court lacks subject matter jurisdiction pursuant to FIRREA. The Court finds that this waiver includes the argument first raised by Defendants in their Post-Trial Memorandum, dated February

26, 2020, that the Power of Attorney from CRE/ADC Venture 2012-1, LLC to Marshall Burchard, as Authorized Signatory of NCP Pilgrim, LLC, dated June 26, 2018 (POA) only assigned a right to enforce the FDIC's claims, but not title to the subject note and mortgage. Thus, there was no valid assignment, even if the FDIC were not involved. This argument was waived at trial and can no longer be asserted.

2. JURISDICTION.

In their Pre-Trial brief, dated January 28, 2020, Defendants raised a new defense asserting that this Court lacks subject matter jurisdiction and instead exclusive jurisdiction lies with the FDIC pursuant to FIRREA, 12 U.S.C. §1811 *et seq.* Defendants expound upon this defense in their Post-Trial Memorandum, dated February 26, 2020, arguing that NCP has brought this action “seeking a determination of rights” specifically as to what the FDIC did – or did not do – with the Note and Mortgage. Defendants further assert that they do not allege, specifically or otherwise, that NCP must submit “its foreclosure claim,” to the FDIC. The issue, Defendants argue, is that FIRREA grants the FDIC authority to transfer *or retain* any asset of the failed bank. *See* 12 U.S.C. §1821(d)(2)(G); 12 U.S.C. §1821(d)(3)(D). Defendants further argue that under FIRREA, Congress has authorized the FDIC's sweeping authority to manage the affairs of a failed bank to further the purpose of expeditious resolution of the failed bank's affairs, regardless of whether the FDIC retains assets outright or through a "structured transaction." *See McCarthy v. FDIC*, 348 F.3d 1075, 1079 (9th Cir. 2003). According to the FDIC,

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

www.fdic.gov/buying/historical/structured/index.html. Therefore, Defendants claim NCP cannot ask *any Court* to review the “structured transaction” (and thus divest the FDIC of its 60% ownership claim) because of FIRREA's 12 U.S.C. §1821(d)(13)(D) establishes a jurisdictional bar by providing “*no court shall have jurisdiction over:*

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

FIRREA was enacted in 1989 as an emergency measure to enable the FDIC to expeditiously resolve and liquidate the hundreds of failed financial institutions throughout the country. *Tillman v. Resolution Tr. Corp.*, 37 F.3d 1032, 1035 (4th Cir. 1994). Specifically, FIRREA gives the FDIC the authority to exercise all rights, titles, powers, and privileges of the insured depository institution with respect to the assets of the institution, including the power to transfer any asset or liability of the institution. 12 U.S.C. §1821(d)(2)(A)(i) & (d)(2)(G)(i)(II). Courts across the United States have repeatedly ruled the FDIC’s authority includes the power to foreclose on the property of a debtor held by the failed bank as collateral, and no court may enjoin the exercise of that power. *See e.g. Willner v. Dimon*, 849 F.3d 93, 106 (4th Cir. 2017); *Dittmer Properties, L.P. v. F.D.I.C.*, 708 F.3d 1011, 1017 (8th Cir. 2013); *Freeman v. F.D.I.C.*, 56 F.3d 1394, 1399 (D.C. Cir. 1995); *Lloyd v. F.D.I.C.*, 22 F.3d 335, 336-37; 281-300 (1st Cir. 1994); *281-300 Joint Venture v. Onion*, 938 F.2d 35, 39 (5th Cir. 1991), *cert. denied*, 502 U.S. 1057 (1992).

FIRREA sections 1821(d)(3)-(13) require persons making claims *against a failed financial institution* or seeking to adjudicate their rights *against the failed institution* to present their claims first to the FDIC through its administrative claims process. 12 U.S.C. §1821(d)(3)-(13); *See e.g. Tillman v. Resolution Tr. Corp.*, 37 F.3d 1032, 1035 (4th Cir. 1994); *Freeman* at 1399. To protect and enforce this administrative process, the statute imposes a limitation on judicial review which

encompasses (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the FDIC has been appointed receiver, including assets which the FDIC may acquire from itself as such receiver; or (ii) any claim relating to any act or omission of such institution or the FDIC as receiver. 12 U.S.C. §1821(d)(13)(D)(i)-(ii). This statutory scheme provides a dispute resolution structure that allows the FDIC initially to collect assets, determine rights, and resolve claims against the failed institution before disputes over such matters can be heard in court.

In examining the requirements of § 1821(d)(3)-(13), I find that NCP's action to foreclose on Clancy's Note and Mortgage is not a claim subject to the FDIC's administrative review process or the limitation on judicial review for the following reasons.

First and foremost, NCP is not making a claim against the failed institution, Carolina Federal, or against the receiver, the FDIC, in this action. Instead, NCP is seeking to exercise its lawful authority to enforce the subject note and mortgage it was assigned by virtue of the assignment from CRE/ADC Venture 2012-1, LLC. Thus, I find the administrative claims process and the limitation on judicial review found in §1821(d)(13)(D) are not applicable.

Second, cases throughout the United States have repeatedly held it is abundantly clear the FDIC is authorized to pursue the foreclosure of a failed bank's assets. *Dittmer* at 1011; *Freeman* at 1399; *Lloyd* at 336-37; 281-300; *Joint Venture* at 39. Courts have specifically recognized that the disposition of a failed bank's assets is one of the quintessential statutory powers of the FDIC as a receiver. *Pyramid Constr. Co. v. Wind River Petroleum, Inc.*, 866 F.Supp. 513, 517 (D. Utah 1994). These same courts have applied the universally recognized principle that an assignee has all the same rights and privileges as the assignor to hold that a third-party who purchases an asset from the FDIC also has the authority to pursue the foreclosure of the assigned asset. *Dittmer* at

1017; *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 640, 518 S.E.2d 44, 46 (Ct. App. 1999). *See also*, *Deutsche Bank Nat'l Tr. Co. v. Burke*, 902 F.3d 548, 552 (5th Cir. 2018); *Newman v. JP Morgan Chase Bank, N.A.*, 81 F. Supp. 3d 735, 745 (D. Minn. 2015); *Haynes v. JPMorgan Chase Bank, N.A.*, 466 F. App'x 763, 766 (11th Cir. 2012). Throughout the multiple cases ruling a third party could proceed with the foreclosure of an asset purchased by a third-party from the FDIC, not one case held that the third-party purchaser was subject to the FDIC's administrative claims process. *Id.* *See also* 122 A.L.R. Fed. 519. Instead, each court has repeatedly upheld the third-party's right to foreclose and did not impose a limitation on judicial review. Accordingly, I find NCP's claims of foreclosure are not subject to the administrative claims process and the limitation on judicial review found in §1821(d)(13)(D).

Third, I find that the cases relied on by Defendants do not support the argument that a third-party purchaser cannot proceed with a judicial foreclosure. The first case cited by Defendants is *Freeman v. F.D.I.C.*, which involved borrowers seeking to stop a foreclosure filed by the FDIC. *Freeman*, 56 F.3d at 1396. Ultimately, the court ruled that the borrower could not stop the foreclosure and was not entitled to a stay under FIRREA. *Id.* at 1402. Additionally, the court held that the borrower should have previously asserted its claims against the failed bank and the FDIC under the FDIC's administrative claims process found in §1821(d)(13)(D). *Id.* at 1400. Ultimately, the court allowed the FDIC's foreclosure to proceed and did not require the FDIC to participate in the administrative claims process. *Id.* at 1406. The only other case cited by Defendants is *Willner v. Dimon*, which involved a foreclosure of a loan purchased from the FDIC. *Willner*, 849 F.3d at 100. Just like in the instant case, the borrower attempted to assert claims relating to the actions of the failed bank in response to the foreclosure action. *Id.* at 101-02. The court dismissed the borrower's counterclaims as to the failed bank and the FDIC because the

claims were not timely filed under the FDIC's administrative claims review. *Id.* at 105, 109. As part of its analysis of §1821(d)(13)(D), the court did not require the third-party purchaser to engage in the FDIC's administrative claims review and allowed the foreclosure action to proceed as filed. *Id.* at 103-09. Thus, neither of these cases stand for the assertion that a third-party purchaser of a loan owned by the FDIC must participate in the FDIC's administrative claims process before foreclosing on its purchased loan. Further, neither case states that a master in equity does not have jurisdiction over a foreclosure of a loan previously held by the FDIC.

Fourth, the argument raised in Defendants' Post-Trial Memorandum, specifically, that NCP cannot ask any court to review the "structured transaction" fails for two reasons. First, Defendants' argument appears to rely on the terms of a structured transaction agreement that gives the FDIC a 60% ownership claim. However, no structured transaction agreement was entered into evidence at the January 28, 2020 trial. Thus, this alleged agreement is not properly before this Court and has no bearing on the Court's decision. Second, Defendants' argument appears to encompass a challenge to the validity of the Assignments. As discussed above, Defendants waived any defense regarding the Assignments at trial. However, assuming *arguendo* that Defendants did not waive this defense during trial, I find this defense unpersuasive because Defendants did not raise any issue with the validity of the Assignment at trial. NCP entered the Assignments into evidence through its witness, Brittany Loukus. Defendants did not object to the Assignments and did not question the validity of the Assignments during their questioning of Ms. Loukus. Defendants cannot wait until after a trial has ended to raise an issue that could have been raised at trial. *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Defendants had ample opportunity throughout the trial to raise any issue regarding the validity of the Assignments but elected not to do so. Therefore, I find this argument unpersuasive.

Thus, for the reasons outlined above, I find that the administrative process and the limitation on jurisdictional review established under FIRREA, do not apply to NCP's claims in this action. Consequently, I find this Court has the jurisdictional authority to rule on NCP's claims in this matter.

3. LOAN HISTORY.

As evidenced in Plaintiff's Exhibit 1, on or about June 10, 2004, for value received Clancy executed and delivered to Carolina Federal Savings Bank ("Carolina Federal") a note in the sum of \$258,840 together with interest thereon as reflected in the loan documents ("Original Note"). To better secure the payment of the Original Note and all renewals, in accordance with the terms and conditions thereof, and with the other documents herein referenced, Clancy's mother Barbara Ann Clancy executed and delivered to Carolina Federal a first mortgage covering the Subject Property ("Original Mortgage") as further described on Exhibit A. Thereafter the Original Mortgage was recorded in the Office of the Register of Deeds for Dorchester County ("ROD") in Book 5393 at Page 356 as evidenced by Plaintiff's Exhibit 2. The Original Mortgage constitutes a first mortgage lien on the Subject Property.

As shown by Plaintiff's Exhibit 3 and confirmed by Ms. Loukos' testimony, the Original Mortgage was re-recorded with the ROD on June 5, 2006 in Book 5393 at Page 356 ("Re-Recorded Mortgage") to add the maturity date and loan amount. Neither of these additions constitute a material change to the Original Mortgage because both pieces of information were in strict conformity with the terms of the Original Note.

The Original Note and Re-Recorded Mortgage were amended various times, with the last time being on June 24, 2010, pursuant to the Note and Mortgage Modification Agreement as evidenced by Plaintiff's Exhibits 4 and 5. (The Original Note, Original Mortgage, Re-Recorded

Mortgage, and Note and Mortgage Modification Agreement are collectively referred to as "Loan Documents.") On June 8, 2012, the FDIC took over the assets of Carolina Federal Savings Bank.

On December 11, 2012, the Loan Documents were assigned by the FDIC on behalf of Carolina Federal Savings Bank to CRE/ADC Venture 2012-1, LLC ("CRE/ADC"), as evidenced by Plaintiff's Exhibits 6 and 17. As part of this assignment, the FDIC also entered into an Omnibus Assignment with CRE/ADC Venture 2012-1, LLC assigning all Loan Documents to CRE/ADC as evidenced by Plaintiff's Exhibit 19.

Thereafter, on June 26, 2018, CRE/ADC assigned the Loan Documents to NCP as evidenced by Plaintiff's Exhibits 7 and 18. This assignment was signed by Marshall Burchard in his capacity as Power of Attorney for CRE/ADC pursuant to that certain Power of Attorney recorded with the ROD in Book RB 11512 at Page 122.

At the hearing, Ms. Loukos testified that NCP was the owner and holder of the Original Note and Original Mortgage. I find Ms. Loukos' testimony as to the ownership of the Original Note and Original Mortgage to be credible and compelling. Further, this testimony is supported by NCP's possession of the Original Note and Original Mortgage, which was produced to defense counsel on May 20, 2020 after the hearing¹. Defense counsel did not raise any objection to the authenticity to Original Note and Original Mortgage. Thus, I find that NCP is the owner and holder of the Loan Documents.

Based on a review of NCP's business records, Ms. Loukos testified that Clancy's last payment under the Loan Documents was on January 14, 2013 and that he is in default. I find Ms. Loukos' testimony as to the date of Clancy's last payment to be credible and compelling. This

¹ At the hearing, the Court authorized a post-trial review of the original note. The review was planned to occur before the court. However, the 2019 coronavirus "shut down" interceded. Thus, the Court authorized the parties to meet at their convenience with instructions that Defendant report any objection. Defendant did not report an objection.

testimony is also consistent with the January 24, 2013 Loan History Report entered into evidence as Plaintiff's Exhibit 9. Accordingly, I find that Clancy's last payment under the Loan Documents was on January 24, 2013 and Clancy is now in default.

Ms. Loukos testified that NCP placed the Loan Documents and other loan documents in the hands of the attorney herein for collection. The terms of the Loan Documents provide for the recovery of reasonable attorney fees and costs.

Ms. Loukos also testified that NCP directed its attorney to send a demand letter to Clancy on October 25, 2018 stating he was in default under the Loan Documents ("Demand Letter"). Additionally, the Demand Letter indicated that the total amount to cure was \$430,391.52. Shortly after this litigation was initiated, Ms. Loukos determined that the \$430,391.52 right to cure figure was incorrect due to a mathematical error. Specifically, Ms. Loukos testified that she inadvertently incorporated a default interest rate of 5%, which was not included in the terms of the Note. Immediately after discovering the error, NCP's counsel contacted Clancy's attorney to provide the correct payoff figure and filed an Amended Complaint. Ms. Loukos stated that this case was the first time she prepared a payoff on behalf of NCP and the mistake was not intentional. I find Ms. Loukos testimony as to the mathematical error to be credible and compelling.

Based upon a review of the Affidavit of Debt filed in this case and Ms. Loukos' testimony, I find that the actual amount of principal, interest, late fees, and all other charges, excluding attorney's fees that are due and owing under the Loan Documents as of January 28, 2020 is \$367,963.19, with interest continuing to accrue at the rate of \$35.85 per day from January 29, 2020.

IT IS THEREFORE ORDERED:

1. That at the January 28, 2020 hearing, Defendants Cercopely and Clancy waived all defenses and counterclaims except the assertion that this Court lacks subject matter jurisdiction, and instead exclusive jurisdiction lies with the Federal Deposit Insurance Corporation (“FDIC”) pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), 12 U.S.C. §1811 *et seq.* This waiver includes any argument regarding the validity of the POA and Assignments.

2. That this Court finds and concludes that it has subject matter jurisdiction in this matter and that the administrative process and limitation on judicial review established under FIRREA do not apply to NCP's claims in this action.

3. That the subject Loan Documents and all other loan documents are not owned, securitized, or guaranteed by Fannie Mae or Freddie Mac, and the current loan servicer is not currently participating in the Home Modification Program (“HMP”).

4. The Plaintiff complied with South Carolina Supreme Court Administrative Order 2011-05-02-01. Additionally, the subject property is commercial property.

5. That Plaintiff complied with the Coronavirus Aid, Relief, and Economic Security Act.

6. That NCP is the owner and holder of the Original Note and Loan Documents and is thus entitled to have the Subject Property sold a foreclosure as provided below.

7. That NCP is awarded a judgment against Defendant David S. Clancy in the sum of \$367,963.19, plus interest at \$35.85 per day from January 29, 2020, pursuant to the terms of the Loan Documents.

8. That NCP is awarded a judgement against Defendant David S. Clancy in an amount equal to NCP's reasonable attorney's fees and costs. In order for this Court to determine the amount

of this judgment, NCP must file a motion within ten (10) days of the entry to this order at which time the hearing will be scheduled for the calculation of attorneys fees. Subsequently, this Court will enter a supplemental order stating the total amount of the judgment for reasonable attorney's fees and costs awarded to NCP.

9. That the issue of attorney's fees will be decided pursuant to a future order of this Court.

10. The Subject Property shall be sold by the undersigned at public auction at the Dorchester County Courthouse in the City of St. George, on August 4, 2020, at 11:00 a.m. or on some convenient sales day hereafter (and should the regular date of judicial sales fall on a legal holiday, then and in such event, the sales day shall be on the next business day succeeding such holiday), on the following terms:

a. For cash: The Master will require a deposit of 5% on the amount of the bid (in cash or equivalent) same to be applied to purchase price if compliance is made, but in the event compliance is not made, the deposit will be forfeited without further hearing and applied first to costs of the action and then to Plaintiff's debt. Should the successful bidder at the regularly conducted sale fail or refuse to either make the required deposit at time of bid or comply with the other terms of the bid within 30 days, then the property may be re-sold on the same terms and conditions on the same or some subsequent Sales Day, but at the risk of the defaulting bidder(s). Said assets to be sold as a Single Package.

b. Interest on the balance of the bid shall be paid through the date of compliance at the rate of 10.00% per annum.

c. The sale shall be subject to taxes and assessments, existing easements and restrictions and easements and restrictions of record, and any other senior encumbrances.

- d. Purchaser to pay for any statutory commission on sale.
- e. Purchaser to pay for deed preparation, costs of recording the deed, and transfer taxes on the deed.

11. The Master will, by advertisement according to law, give notice of the time and place of such sale and the terms thereof and will execute to the purchaser, or purchasers, a deed to the premises sold. The Plaintiff, or any other party to these actions, may become a purchaser at such sale, and if, upon such sale being made, the purchaser, or purchasers, should fail to comply with the terms thereof within 30 days after date of sale, then the Master may advertise the said premises for sale on the next or some other subsequent sales day at the risk of the highest bidder and so from time to time thereafter until a full compliance shall be secured.

12. In the event an agent of Plaintiff does not appear at the time of sale, the within property shall be withdrawn from sale and sold at the next available sales date upon the same terms and conditions as set forth in this Master's Decree of Judgment of Foreclosure and Sale or such terms as may be set forth in a supplemental order.

13. If Plaintiff is the successful bidder at the sale, for a sum not exceeding the amount of costs, expenses, and the indebtedness of Plaintiff in full, Plaintiff may pay to the Master only the amount of the costs and expenses, crediting the balance of the bid on Plaintiff's indebtedness.

14. The Master will apply the proceeds of the sale as follows:

FIRST: To the payment of the amount of the costs and expenses of this action, including any Guardian Ad Litem fee or fees of attorneys appointed under Order of Court;

NEXT: To the payment to the Plaintiff or Plaintiff's attorney of the amount of Plaintiff's debt or so much thereof as the purchase money will pay on the same;

NEXT: Any surplus should be held pending further Order of this Court.

15. Personal or deficiency judgment being demanded, the bidding will close thirty (30) days after the sales date. Plaintiff reserves the right to waive the deficiency at the time of sale.

16. In the event the successful bidder is other than the Defendant(s) in possession herein, the Sheriff of Dorchester County is ordered and directed to eject and remove from the premises the occupant(s) of the property sold, together with all personal property located thereon, and put the successful bidder or his assigns in full, quiet, and peaceable possession of said premises without delay, and to keep said successful bidder or his assigns in such peaceable possession.

17. The Defendant(s) named herein, and all persons whosoever claiming under Defendant(s), are forever barred and foreclosed of all right, title, interest, equity or redemption or lien in the said mortgaged premises so sold, or any part thereof.

18. In accordance with Rule 77(d), SCRCP, the Clerk of Court shall serve a notice of entry of this Master's Decree of Foreclosure and Sale upon all parties not in default for failure to appear herein.

19. The deed of conveyance made pursuant to said sale shall contain the names of only the first-named Plaintiff and the first-named Defendant(s), and the Defendant(s) who was/were the titleholder(s) of the Subject Property at the time of the filing of the notice of pendency of the within action, and the name of the grantee; and the Register of Deeds/Clerk of Court is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

20. The undersigned will retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, the issuance of a Writ of Assistance.

James E. Chellis, Master-In-Equity

July __, 2020
Dorchester, South Carolina



Dorchester Common Pleas

Case Caption: Ncp Pilgrim, Llc VS Mary Lou Cercopely , defendant, et al
Case Number: 2018CP1802053
Type: Master/Order/Foreclosure & Sale and Form 4

So Ordered

s/James E. Chellis, Master in Equity, SCJD#3078