

**BROWN &
VARNADO** LLC
ATTORNEYS AT LAW

103 CHURCH STREET (29464)
POST OFFICE BOX 1127
MT. PLEASANT, SC 29465
OFFICE: (843) 737-7300
FACSIMILE: (843) 654-5109

ROBERT B. VARNADO
DIRECT: (843) 737-7301
EMAIL: rvarnado@brown-varnado.com

December 8, 2020

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SC Court of Appeals

VIA EMAIL AND US MAIL

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re: *Mary Lou Cercopely et al v. NCP Pilgrim, LLC*
Motion to Transfer Case, Rule 204, SCACR & Petition for Writ of Mandamus
Appellate Case No.: 2020-001574 (Supreme Court)
Appellate Case No.: 2020-001168 (Court of Appeals)
Our File No. 6305

Dear Mr. Shearouse:

I am writing with regard to the Letter of December 3, 2020 e-mailed by Ms. Debbie Hopkins of your office, in which you state that the transfer petition in 2020-001574 will be treated under Rule 204(b), SCARC and that the Petition for Writ of Mandamus will be construed as a request for relief under Rule 245, SCACR.

As a threshold matter, the transfer of the case to the Supreme Court is governed by both S.C. Code Ann. § 14-8-200(b)(3) and Rule 204(a) SCACR. According to the United States Supreme Court, the federal question (i.e., whether 12 U.S.C. 1821(d)(13)(D)(i) pre-empts state court jurisdiction over the Respondent's action), raised by the Appellants before the Dorchester County Master in Equity and here to the Supreme Court, is *always* constitutional issue. *Longshoremen v. Davis*, 476 U.S. 380, 388 (1985) ("Pre-emption, the practical manifestation of the Supremacy Clause, is always a federal question.").

Consequently, pursuant to S.C. Code Ann. § 14-8-200(b)(3), the appeal lies within the original jurisdiction of the Supreme Court. See S.C. Code Ann. § 14-8-200(b)(3), ("Jurisdiction of the [Court of Appeals] does not extend to appeals of the following, *the appeal from which lies of right directly to the Supreme Court*:

(3) *a final judgment involving a challenge on state or federal grounds, to the constitutionality of a state law or county or municipal ordinance where the principal issue is one of the constitutionality of the law or ordinance; however, in a case where the*

Supreme Court finds that the constitutional question raised is not a significant one, the Supreme Court may transfer the case to the court for final judgment.” (emphasis added)).

Similarly, transfer of the case is required under Rule 204(a) SCACR, entitled “Improperly Filed Cases,” which states: “[i]n the event that the notice of appeal is filed in the wrong appellate court, the appellate court in which the matter is filed shall issue an order transferring the case to the appropriate appellate court.”).

Appellants therefore submit that Rule 204(b) SCACR is inapplicable. Any motion to certify would therefore be unnecessary because Rule 204(a)’s use of the term “shall” indicates the transfer of the appeal is a mandatory rule. *See, e.g., South Carolina Police Officers Retirement Sys. v. Spartanburg*, 301 S.C. 188, 391 S.E.2d 239 (1990) (“shall” is considered mandatory under principles of statutory interpretation); *South Carolina Dep’t of Highways & Pub. Transp. v. Dickinson*, 288 S.C. 189, 191, 341 S.E.2d 134, 135 (“Ordinarily the use of the word ‘shall’ in a statute means that the action referred to is mandatory.”).

Rule 245, SCACR does appear to govern relief requested, but according to the United States Supreme Court, “[t]he States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land.” *Kalbfleiter v. Seibert*, 308 U.S. 433, 439 (1940).

The Appellants’ position is that a separate appellate process would be in direct conflict with *Ake v. Oklahoma*, 470 U.S. 68 (1985), which forbids any finding the Master’s authority to grant Supersedeas, and the Master’s power of sale is independent from the constitutional question, whether he had jurisdiction in the first place. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (“When resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court’s holding is not independent of federal law, and our jurisdiction is not precluded. . . . In such a case, the federal-law holding is integral to the state court’s disposition of the matter, and our ruling on the issue is in no respect advisory.”) (emphasis added).

Moreover, construing the Motion to Transfer as a motion to certify the appeal under Rule 204(b), SCACR would not be considered an independent or adequate state ground. To constitute an “independent” state bar, such a bar must rest on a purely state law ground. *See e.g. Michigan v. Long*, 463 U.S. 1032 (1983); *Ake v. Oklahoma*, 470 U.S. 68 (1985). A state procedural rule is “adequate” if it is “firmly established” and “regularly followed.” *Beard v. Kindler*, 558 U.S. 53, 60 (2009) (quoting *Lee v. Kemna*, 534 U.S. 362, 375 (2002)). That determination, itself a federal question, must be addressed on the merits by our Supreme Court, subject to review by the United States Supreme Court. *See Michigan v. Long*, 463 U.S. at 1038-1040 (1983).

Therefore, in conclusion, Appellants’ position is the transfer is governed under both S.C. Code Ann. § 14-8-200(b)(3) and Rule 204(a) SCACR and the relief requested in the form of transfer and injunction or voiding the sale cannot be a separate appellate case.

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With best regards, I remain

Very truly yours,

BROWN AND VARNADO LLC

/s Robert B. Varnado

Robert B. Varnado

RBV

cc: (via email only)
Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals
Russell P. Patterson, Esquire
Lauren P. Williams, Esquire

Brown & Varnado, LLC
P.O. Box 1127
Mt. Pleasant, SC 29465

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1220 Senate Street
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