THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable James E. Chellis
Dorchester County Master-in-Equity

APELLATE CASE NO. 2020-001168

NCP PILIGRIM, LLC, ... Respondent,

v.

MARY LOU CERCOPELY, DAVID S. CLANCY, SOUTH CAROLINA FEDERAL CREDIIT UNION, SOUTHCOAST COMMUNITY BANK, JOAN GEANURACOS and DAVID SEAN CLANCY,

of whom MARY LOU CERCOPELY, DAVID S. CLANCY and DAVID SEAN CLANCY are the ..... Appellants.

APPELLANTS' FINAL REPLY BRIEF

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I.

The Appellants argue that whether the Dorchester County Master in Equity ("Master") had the power to adjudicate NCP Pilgrim LLC's ("Respondent" or "NCP") mortgage foreclosure action – to be repaid on a Home Equity Line of Credit ("HELOC") – is a question of statutory interpretation.

So too is an action for a deficiency judgment based on the HELOC, as well as a suit to declare that NCP (or any party for that matter) has the "authority to enforce the subject note and mortgage it was assigned by virtue of the assignment from CRE/ADC Venture 2012-1, LLC."

Appellants point directly to subsection 12 U.S.C. § 1821(d)(13)(D)(i)-(ii) of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") that provides:

> (D) Limitation on judicial review
>
> Except as otherwise provided in this subsection, 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 [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.

Appellants further demonstrated that because "[i]t is clearly within Congress' powers to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate under the Constitution" ... then any such "determination of congressional intent and of the boundaries and character of a pre-empting congressional enactment is one of federal law. Pre-emption, the practical manifestation of the Supremacy Clause, is always a federal question." *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 388 (1986).

A fundamental tenet of the Supremacy Clause of the United States Constitution provides that "[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." *Kalb v. Feuerstein,* 308 U.S. 433, 439 (1940); U.S. Const. Art. VI, Clause 2. Thus, in order for a court to overcome deciding the federal question of jurisdiction, any "asserted non-federal ground must independently and adequately support the judgment." *Abie State Bank v. Bryan,* 282 U.S. 765, 773 (1931).

To constitute an "independent" state bar, the state law basis for the decision must not be interwoven with federal law and rest purely on state law grounds. *Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983); *Harris v. Reed,* 489 U.S. 255, 265 (1989). A state law or 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)).

In their initial brief, Appellants argued that the Master did not cite a single "independent" or "adequate" state ground to support his finding that he had jurisdiction, nor did the Master supply a plain statement in his order that "the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Long,* 463 U.S. at 1041. "Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.*

Because the South Carolina Supreme Court is free to ignore the Master's conclusion and decide for itself [*Moriarty v. Garden Sanctuary Church of God,* 341 S.C. 320, 534 S.E.2d 672 (2000)], Appellants have made clear that (1) because the federal question here involved pre-

emption of a state court's adjudicatory powers, then (2) there can exist no "independent" state ground to support the Master's finding.

Moreover, Appellants have asserted (because nearly every state ground involved here, ie standing, real party in interest, subject matter jurisdiction and statutory interpretation) are not "firmly established" and "regularly followed," there also exists no adequate state ground to support a finding of state court jurisdiction. [App. Br, § III].

Thus, the Appellants argue that the resolution "begins where all such inquiries must begin: with the language of the ***statute*** itself." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (emphasis added).

In this case, it is also where the inquiry should end because "the text ... expressly limit[s] the jurisdiction that other statutes confer." *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 489 (2010); *see also, e.g., Elgin v. Department of Treasury*, 576 U.S. 1, 25 (2012) (explaining that, "[w]hen dealing with an express preclusion clause ... we determine the scope of preclusion simply by interpreting the words Congress has chosen.").

II.

Clearly undeterred by the fact that Appellants have relied almost exclusively on *United States Supreme Court* decisions rejecting each of its arguments as unconstitutional, the Respondent submitted their brief which argues, in essence, that it should be enough for any party or court to rest on a supposition (or wish) that "it must be in there somewhere."

According to the Respondent, the plain language of the jurisdictional bar found in 12 U.S.C. § 1821(d)(13)(D)(i)-(ii) "ignores the statute as a whole and instead focuses solely on the language contained in a small sliver of the extensive FIRREA sections, namely, §1821(d)(13)(D)." [Resp. Br. at 13]. Respondent asserts that the Appellants "are asking the Court to put on blinders

in its analysis of this issue. The proper method of statutory interpretation, as applied by the Trial Court, is to evaluate the language found in §1821(d)(13)(D) in light of the FIRREA statute as a whole,"[Id.], and that "a review of the entirety of 12 U.S.C. §1821(d)(3)-(13) plainly shows the Jurisdictional Bar does not apply to Respondent's foreclosure case because the case is not making a claim against the failed financial institution, Carolina Federal, or against the receiver, the FDIC." [Resp. Br. at 14].

The problem with Respondent's thinking is twofold. First Congress expressly states that aside from what is otherwise provided within 12 U.S.C. § 1821(d), "no court shall have jurisdiction over" what is expressed in subparagraphs (i) and (ii). And, second, when, a litigant (like the Respondent in this case) is unable to point "specifically to constitutional text or federal statute," then its position is not supported by the traditional tools of statutory interpretation, but instead "rests on a supposition (or wish) 'it must be in here somewhere." *Virginia Uranium, Inc. v. Warren,* 578 U.S. __, 139 S.Ct. 1894, 1901 (2019).

Respondent next asserts that "[f]ederal law may preempt state law in three distinct ways," and by failing to allege the distinct label of complete pre-emption, "[a]ppellants appear to assert the argument that the mere possibility of the application of [12 U.S.C. § 1821(d)(13)(D)] automatically divests the Trial Court from subject matter jurisdiction in this matter." [Resp. Br. at 17-18].

The United States Supreme Court, however, disagrees, stating that "these categories are not rigidly distinct." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372, n. 6 (2000) (internal quotation marks omitted). In fact, Appellants need only to point specifically "a constitutional text or a federal statute" that does the displacing or conflicts with state law. *Virginia Uranium*, 139 S.Ct. at 1901. Precedent is clear that, if federal law "imposes restrictions or confers

rights on private actors" and "a state law confers rights or imposes restrictions that conflict with the federal law," then "the federal law takes precedence and the state law is preempted." *Murphy v. National Collegiate Athletic Assn.,* 584 U. S. ___, 138 S.Ct. 1461, 1480 (2018).

To be sure, the United States Supreme Court is clear that NCP's "argument would result not in a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. With a plain, non-absurd meaning in view, we need not proceed in this way." *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (alterations adopted and quotation omitted); *see also Virginia Uranium*, 139 S.Ct. at 1900, (explaining that "in any field of statutory interpretation, it is our duty to respect not only what Congress wrote but, as importantly, what it didn't write.").

There exists no language to conclude, as Respondent asserts, "that FIRREA section 1821(d)(13)(D) requires only those persons or entities 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." [Resp. Br. 15]. As such, Respondent's foreclosure and deficiency actions are clearly an "action for payment of [CFSB] for which the [FDIC] has been appointed receiver." *Id., see also Langley v. FDIC*, 484 U.S. 86, 92 (1987), (confirming a lower court's finding that a promissory note and mortgage securing its repayment are "assets" of a depository institution at the time it is placed in receivership.").

The plain language of 12 U.S.C. § 1821(d)(13)(D)(i) reveals how misguided Respondent's argument that the issue as to whether NCP has been assigned the Note "has no connection to Appellant's lack of subject matter jurisdiction argument." [Resp. Br. at 20]. Subparagraph (i) clearly ousts jurisdiction to find that "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" [Master Order]. But Respondent knows this an attempt to argue evidence that the FDIC may have, through the CRE/ADC Venture 2012-1, LLC, acquired the HELOC and Mortgage "itself from as such receiver," as "waived."

As stated before, Respondent's attempt to circumvent the jurisdictional bar established by **Congress** is misguided. It is misguided, even if the Master understood NCP's position that "[a]ll other arguments, including the validity of loan documents, standing, referral of this case to the MIE, and the procedural history of this matter, have been explicitly waived by Appellants and can no longer be argued before the Court." [Resp. Br. at 10]. In fact, the Master elucidated that he "almost took [the] position earlier to hold the question of jurisdiction in advance and hear the case," [Resp. Br. at 10], "but decided to go ahead and rule I have jurisdiction." [*Id*.]. Clearly the Master understood as he told NCP's counsel that if Appellants' counsel "is correct and I didn't have jurisdiction, then I couldn't have heard them anyways." [Resp. Br. at 9].

To be certain, Respondent's argument that "The Trial Court Properly Concluded that Appellants' [sic] Waived All Defenses and Counterclaims, Except for Subject Matter Jurisdiction" fails on its assertion. This is because "[a] court lacking subject matter jurisdiction has no authority to act *regardless consent of the litigants* (emphasis added)." *Dove v. Gold Kist, Inc.*, 314.S.C. 235, 238, 442 S.E.2d 598, 600 (1994) (c*iting Nix v. Mercury Motor Express, Inc.*, 270 S.C. 477, 242 S.E.2d 683 (1978)).

Respondent's waiver argument, based on the cases cited[1] [Resp. Br. at 10], is in reality asking the court to invoke procedural rules in a manner different from similar claims as *Gold Kist*,

[1] *Gatewood v. Moses*, 39 S.C.L. 244, 247 (S.C. App. L. 1852); *Bodkin v. Bodkin*, 388 S.C. 203, 228, 694 S.E.2d 230, 243 (Ct. App. 2010); *C.A.N. Enterprises, Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 292 S.C. 556, 559, 357 S.E.2d 714, 715 (Ct. App. 1987), *aff'd* 296 S.C. 373, 373 S.E.2d 584 (1988)].

and *Nix v. Mercury Motor*. *See Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982) (quoting *Barr v. City of Columbia,* 378 U.S. 146, 149 (1964)).[2] ("state courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims.").

To be clear – Respondent is attempting to assert that the even if the Master's jurisdiction is pre-empted, its order of foreclosure is not! The United States Supreme Court, however, rejects any notion that "waiver" can overcome issues of standing, real party in interest, power to order supersedeas and sale "does not protect a state-court judgment from pre-emption." *Longshoremen,* 476 U.S. at 393. The "waiver" argument cannot possible be an "asserted non-federal ground must independently and adequately support the judgment." *Abie State Bank v. Bryan,* 282 U.S. 765, 773 (1931).

As outlined in their Initial Brief, Appellants are not raising new issues, but asserting the issues of waiver, standing, real party in interest or the courts power of sale and supersedeas cannot be independent of whether the Master had jurisdiction in the first place. To constitute an "independent" state bar, the state law basis for the decision must not be interwoven with federal law and rest purely on state law grounds. *Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983); *Harris v. Reed,* 489 U.S. 255, 265 (1989). And both the Master and S.C. Supreme Court recognize this fact.

In the final analysis because Respondent failed to address the argument that its asserted non-federal ground must be "independent" and "adequate" to support judgment, then Respondents' "waiver" argument is in fact waived! *Turner v. South Carolina Dep't Environ. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008) ("If [a] respondent fails to

[2] The United States Supreme Court has added no requirement of a showing of manipulative intent on the part of the state court.

respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct."); 5 Am.Jur.2d *Appellate Review* § 555, at 254 (1995).

CONCLUSION

Respondent's primary argument that "[t]he plain language of jurisdictional bar clearly indicates that Congress established two specific scenarios under which exclusive jurisdiction would lie with the FDIC… those scenarios are when an individual is (1) making claims against a failed financial institution or (2) seeking to adjudicate their rights against the failed institution. *See* 12 U.S.C. § 1821(d)(13)(D)" [Resp. Br. at 18], is a question of statutory interpretation. *Virginia Uranium*, 139 S.Ct. at 1901.

Yet, the text of the relevant subsection of FIRREA, 12 U.S.C. § 1821(d)(13)(D)(i)-(ii), provides:

> (D) Limitation on judicial review
> Except as otherwise provided in this subsection, no court shall have jurisdiction over —
> (iii) 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
> (iv) any claim relating to any act or omission of such institution or the [FDIC] as receiver.

The error is clear - the Master simply ignored the existence of the plain, unambiguous language in subparagraph (i) which extends the jurisdictional bar in clause to (1) any claim or (2) action for payment from or (3) 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. He did not, as Respondent now asserts, base his decision on state law. [R. pp. 10-26].

Clearly, Respondent's argument is thus "that it must be in here somewhere." *Virginia*

Uranium at 1901. However, *Virginia Uranium* and *Kansas v. Garcia*, 140 S.Ct. 791, 801 (2020) both operate to rid courts of any notion that pre-emption can be asserted or denied "based on a freewheeling judicial inquiry as to whether a state statute is in tension with federal objectives." *Garcia*, 140 S.Ct. at 801. The Court's rational is clear and has not changed in over two centuries:

> "The Supremacy Clause provides that the Constitution, federal statutes, and treaties constitute 'the supreme Law of the Land.' Art. VI, cl. 2. The Clause provides 'a rule of decision' for determining whether federal or state law applies in a particular situation."

Id.

That Supremacy Clause is void of any equitable consideration that the Respondent asserts – "If federal law 'imposes restrictions or confers rights on private actors' and 'a state law confers rights or imposes restrictions that conflict with the federal law,' 'the federal law takes precedence and the state law is preempted.'" *Id*. (citing *Murphy v. National Collegiate Athletic Ass'n.*, 584 U.S. ___,138 S.Ct. 1461, 1480 (2018)).

Therefore, the resolution of the matter "begins where all such inquiries must begin: with the language of the *statute* itself." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (emphasis added). In this case, it is also where the inquiry should end.

Respectfully submitted.

s Robert B. Varnado

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the ***Appellant's Final Reply Brief*** contains all material proposed to be included by any of the parties, not any other material.

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