

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

S.C. Supreme Court

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2008-CP-22-1598

Wachovia Bank, National Association,.....Petitioner,
v.

William E. Blackburn; Judith Blackburn; Tammy S. Winner;
Watson E. Felder; Gary F. Ownbey; and South Island Plantation
Association, Inc. are,.....Defendants,
Of Whom William E. Blackburn; Judith Blackburn are,.....Respondents,

v.

Winyah Bay Holdings, LLC; Source One
Properties, LLC; and Waterpointe Realty, LLC,.....Third-Party Defendants.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2008-CP-22-1598

Wachovia Bank, National Association, ... Respondent,

v.

William E. Blackburn; Judith Blackburn; Tammy S. Winner; Watson E.
Felder; Gary F. Ownbey; and South Island Plantation Association, Inc. are, ... Defendants,

Of Whom William E. Blackburn; Judith Blackburn, ... Appellants,

And of Whom Tammy S. Winner, Watson E. Felder, Gary F. Ownbey,
and South Island Plantation Association, Inc. are, ... Respondents,

v.

Winyah Bay Holdings, LLC; Source One Properties, LLC; and Waterpointe
Realty, LLC, Third Party Defendants, ... Respondents.

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STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Wachovia Bank, National Association,

Plaintiff,

vs.

William E. Blackburn; Judith Blackburn;
Tammy S. Winner; Watson E. Felder; Gary F.
Ownbey; and South Island Plantation
Association, Inc.,

Defendants

William E. and Judith Blackburn, individually
and as Assignees,

Third Party Plaintiff,

vs.

Winyah Bay Holdings, LLC; Source One
Properties, LLC; and Waterpointe Realty,
LLC,

Third Party Defendants.

IN THE CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT

Case No. 2008-CP-22-1598

**ORDER GRANTING PLAINTIFF'S
MOTION TO STRIKE JURY DEMAND
AND TO REFER**

FILED
GEORGETOWN COUNTY, S.C.
2009 DEC -7 PM 4:51
ALMA Y. WHITE
CLERK OF COURT

THIS MATTER CAME BEFORE THE COURT for hearing on June 18, 2009, on Plaintiff's Motion to Strike Jury Demand and to Refer. Present at the hearing were Robert C. Byrd, attorney for the Plaintiff, Wachovia Bank, National Association ("Wachovia"), and Glenn V. Ohanesian, attorney for defendants William E. Blackburn and Judith Blackburn. Having reviewed the applicable law, the pleadings, Wachovia's Memorandum of Law filed with the

Court, and the Affidavit submitted by the Blackburns, and having considered the arguments of counsel, the Court hereby finds and concludes that Plaintiff's Motion to Strike Jury Demand and to Refer should be granted in its entirety.

FINDINGS OF FACT AND PROCEDURAL BACKGROUND

The relevant facts are not in dispute. On or about February 14, 2006, Mr. Blackburn, for consideration, made, executed and delivered a certain promissory note (the "Note") payable to the order of Wachovia in the original principal sum of \$463,967.00, together with interest as provided therein. The Note contains the following provision:

WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF BORROWER BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS NOTE, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS NOTE, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS NOTE

(Note at p. 5, Exh. A to Wachovia's Memorandum of Law).

The Note is secured by a Mortgage covering certain property located in Georgetown County. The Note is also secured by unconditional guaranties dated February 14, 2006 (collectively the "Guaranties"), executed by Mrs. Blackburn and the other individual defendants, whereby they absolutely, unconditionally and irrevocably guaranteed to Wachovia the prompt and full payment of all sums when and as due under the Note. Each of the Guaranties contains the following provision:

WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF GUARANTOR BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR

ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS GUARANTY, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS GUARANTY, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS GUARANTY

(Blackburn Guaranty at p. 6, Exh. B to Wachovia's Memorandum of Law).

The Blackburns do not dispute the execution of the Note and Guaranty, copies of which were attached as exhibits to the Complaint.

Wachovia commenced this foreclosure action on November 13, 2008, asserting that the obligations under the terms and conditions of the Note are in default for failure to make payments when and as due. In response, the Blackburns filed an initial Answer, then subsequently filed an Amended Answer, Counterclaim, Cross-Claim, and Third Party Complaint on February 12, 2009 (the "Amended Answer"), in which they assert claims against Wachovia, other defendants and several third-party defendants for negligent misrepresentation, unfair trade practices, promissory estoppel, breach of contract, breach of contract accompanied by a fraudulent act, breach of fiduciary duty, fraud in the inducement, negligence, and civil conspiracy. The Blackburns demanded a jury trial in their Amended Answer.

CONCLUSIONS OF LAW

Wachovia submits that the Blackburns are not entitled to a jury trial because the parties waived their right to a jury trial in the loan documents, specifically the Note and Guaranty. The Blackburns argue that the jury trial waivers do not apply to their counterclaims and that they should not be bound by the waivers because, they contend, they were not aware that the loan documents contained the waivers.

The law in South Carolina is well settled that a party may waive its right to a jury trial by contract. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63-64, 566 S.E.2d 863, 866 (Ct. App. 2003); *North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992). The terms of such a waiver "must be construed using their plain, ordinary and popular meaning." *Beach Co.*, 351 S.C. at 63-64, 566 S.E.2d at 866 (finding that a provision contained in a commercial lease stating that the parties "waived any all right to a trial by jury" was a valid waiver of the tenant's right to a jury trial); *North Charleston Joint Venture*, 307 S.C. 533 at 535, 416 S.E.2d 637 at 638 (enforcing a jury waiver clause providing that "landlord and tenant hereby waive all right to trial by jury in any claim, action, proceeding or counterclaim by either landlord or tenant").

This Court finds that the jury trial waivers contained in Wachovia's loan documents are clear and unambiguous. This Court further finds that the Blackburns' counterclaims fall squarely within the scope of the jury trial waivers at issue. The gist of all the claims asserted by the Blackburns is that Wachovia allegedly participated in making certain misrepresentations relating to the mortgaged property, all of which induced the Blackburns to purchase the property and enter into the purchase-money loan with Wachovia. (Amended Answer at ¶¶ 22, 29 30, 61-62). This Court finds that the Blackburn's allegations bear a significant relationship to the loan documents and, therefore, are subject to the jury trial waiver provisions. *Cf. Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001) (holding that broadly worded arbitration clauses apply to any claims that have a "significant relationship" with the contract containing the clause). *See also, Efficient Solutions, Inc. v. Meiner's Country Mart, Inc.*, 56 F. Supp. 2d 982, 984 (W.D. Tenn. 1999) (applying contractual jury trial waiver to fraud and negligent misrepresentation claims because they concern the contract); *Joy A. McElroy, M.D., Inc. v. Maryl Group, Inc.*, 114 P.3d 929, 936-37 (Haw. Ct. App. 2005) (applying contractual jury

trial waiver to unfair trade practices claim based on alleged misrepresentations related to the contract); *Bill Heard Chevrolet Corp. Orlando v. Wilson*, 877 So.2d 15, 18 (Fla. Dist. Ct. App. 2004) (applying contractual arbitration clause to unfair trade practices claim based on misrepresentations related to the contract); *Riverside Portable Storage, Inc. v. Pods, Inc.*, No. 08-1771, 2009 WL 804666, at *3 (M.D. Fla. Mar. 27, 2009) (applying contractual jury trial waiver to promissory estoppel and breach of contract claims based on alleged promises related to the contract).

The Affidavit submitted by the Blackburns at the hearing does not alter this Court's analysis and conclusions. In their Affidavit, the Blackburns claimed that they "did not knowingly, voluntarily, or intentionally waive [their] right to a jury trial at any time" and that they were "not aware of any jury waiver clause" (Affidavit of the Blackburns at ¶ 1.) They also stated that: (1) they were not given any consideration for the jury trial waiver; (2) to their knowledge, they had no right to negotiate the jury trial demand provision; and (3) Wachovia stood in a superior bargaining position to them with regard to the loan documents. (Affidavit of the Blackburns at ¶¶ 2, 3 and 4.)

Under South Carolina law, a person who signs a contract or other written document cannot avoid the effect of the document by claiming he or she did not read it. *Regions Bank v. Schmauch*, 354 S.C. 648, 664, 582 S.E.2d 432, 440 (Ct. App. 2003). Rather, a person signing a document has the duty to exercise reasonable care to protect himself and is responsible for reading the document and making sure of its contents. *Id.*

In this case, the Blackburns do not dispute they executed the loan documents containing the jury trial waivers. Furthermore, there is no evidence, or even a suggestion, that the Blackburns are ignorant and unwary so as to excuse their failure to read completely the loan documents. The jury trial waivers at issue are conspicuous and printed in all capital letters, with

the heading "WAIVER OF JURY TRIAL" in bold font. The Blackburns are charged with having read the contents of the loans documents and were on notice of the jury trial waivers.

The fact that the waiver may not have been specifically and separately negotiated by the parties is of no consequence. Each jury trial waiver states that it "IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS NOTE [or GUARANTY]."

Finally, the Blackburns argument that Rule 38, SCRCP allows the Court to ignore the parties' contractual waiver is without merit. First, Rule 38 expressly recognizes that the right to jury trial may be waived by the parties. *See* Rule 38(d), SCRCP. Moreover, none of the cases in which a court has allowed a party to amend their pleadings to demand a jury trial were cases in which the parties had contractually waived their right to jury trial. To the contrary, the terms of such a waiver "must be construed using their plain, ordinary and popular meaning." *Beach Co.*, 351 S.C. at 63-64, 566 S.E.2d at 866.

Accordingly, it is appropriate to refer this case, in its entirety, to the Master-in-Equity for Georgetown County. Rule 53, SCRCP, clearly contemplates the reference of non-jury cases to the Master-in-Equity. *See* Rule 53, SCRCP, Notes ("References in Federal Courts are rare, but absolutely necessary in State Courts, particularly to handle a large volume of State litigation such as foreclosures, partitions, and other equity matters"). Foreclosures and other non-jury collection cases are routinely referred to a Master-in-Equity to ease the overcrowded Circuit Court docket, to promote judicial economy, and to accommodate the parties and witnesses.

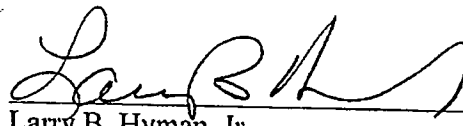
The Court notes that the Blackburns might otherwise have been entitled to a jury trial on their cross-claims and third-party claims. However, such claims are, by definition, "permissive" in nature, and having asserted them in a non-jury proceeding, the Blackburns are deemed to have waived any right to jury trial as to those claims as well. *See North Carolina Fed. Sav. and Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905-06 (1989) (finding defendant

waived its right to a jury trial by asserting permissive counterclaim, cross-claims and third party claims in foreclosure action). The Blackburns have never filed a motion to sever their cross-claims and third-party claims from the foreclosure action.

Having concluded that the Blackburns are not, as a matter of law, entitled to a jury trial on their claims against Wachovia, this Court finds and concludes that it is appropriate to refer this case with finality to the Master-in-Equity for Georgetown County, to make findings of fact and conclusions of law, to dispose of any and all issues and enter a final judgment in the case, and to hear any and all matters after judgment, with any appeal from the Master being directly to the appellate courts.

CONCLUSION

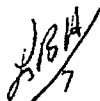
Based on the foregoing, it is ORDERED that Plaintiff's Motion to Strike and to Refer this action to the Master-in-Equity should be and is, hereby, GRANTED, in its entirety.



Larry B. Hyman, Jr.
Presiding Judge, Fifteenth Judicial Circuit

~~Dec~~
July 2, 2009

Georgetown, South Carolina



STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Wachovia Bank, National Association,
Plaintiff,

vs.

William E. Blackburn; Judith Blackburn; Tammy
S. Winner; Watson E. Felder; Gary F. Ownbey;
and South Island Plantation Association, Inc.,
Defendants.

IN THE CIRCUIT COURT

Case No. 2008-CP-22-1598

COMPLAINT

(Non-Jury)
(Mortgage Foreclosure; Guaranty)

FILED
GEORGETOWN COUNTY, S.C.
2008 NOV 13 PM 1:50
CLERK OF COURT

The plaintiff, Wachovia Bank, National Association ("Wachovia"), complaining of the defendants herein, would show unto this Court as follows:

1. Wachovia is a national banking association duly organized and existing under the laws of the United States of America and is authorized to transact business in the State of South Carolina.

2. Upon information and belief, the individual defendants are residents of Horry County, South Carolina; and defendant South Island Plantation Association, Inc. is a South Carolina corporation doing business in Georgetown County, South Carolina.

3. The property hereinafter described, which is the subject of this action, is situate and located in Georgetown County, South Carolina.

4. This Court has jurisdiction over the parties and subject matter of this action, and venue is proper in Georgetown County.

FOR A FIRST CAUSE OF ACTION
(Mortgage Foreclosure)

5. Heretofore, defendant William E. Blackburn (the "Borrower"), for consideration, made, executed and delivered a certain promissory note dated February 14, 2006 (the "Note"), payable to the order of Wachovia in the original principal sum of \$463,967.00, together with interest as provided therein. A true and correct copy of the Note is attached hereto as Exhibit "A" and incorporated herein by reference.

RIB
pg. 2
6. To secure payment of the indebtedness evidenced by the Note, in accordance with the terms and conditions thereof, the Borrower and defendants Judith Blackburn, Tammy S. Winner, and Watson E. Felder made, executed and delivered to Wachovia a certain Mortgage and Assignment of Rents dated February 14, 2006 (the "Mortgage"), covering certain property located in Georgetown County and described more fully as follows:

ALL THAT CERTAIN piece, parcel or tract of land, situate, lying and being in the City and County of Georgetown, State of South Carolina known as Lot 69, South Island Plantation Phase 1 as shown and designated on that certain plat entitled "SOUTH ISLAND PLANTATION PPD-PHASE 1 CITY OF GEORGETOWN, GEORGETOWN COUNTY, SOUTH CAROLINA FINAL PLAT" prepared for Winyah Bay Holdings, LLC, prepared by DDC Engineers dated July 14, 2005 and recorded in the RMC's Office for Georgetown County on July 21, 2005 in Plat Slide 555 at Page 1-5.

DERIVATION: This being the same property conveyed to William E. Blackburn, Judith Blackburn, Watson E. Felder and Tammy S. Winner by deed of Winyah Bay Holdings, LLC dated February 14, 2006, and recorded February 16, 2006, in the Office of the ROD for Georgetown County in Book 1782 at Page 279.

TMS No. 05-0055A-069-00-00

7. The Mortgage was recorded in the Office of the ROD for Georgetown County on February 16, 2006, in Book 2873 at Page 69, and a true and correct copy of the same is attached hereto as Exhibit "B" and incorporated herein by reference.

8. Thereafter, defendant Watson E. Felder conveyed his undivided one-fourth interest in the subject property to defendant Gary F. Ownbey by deed dated October 12, 2007, and recorded October 15, 2007, in the said ROD's Office in Book 721 at Page 89.

RWB
pg 3
9. The obligations under the terms and conditions of the Note are in default for failing to make payments when due. Specifically, the Borrower failed to make the monthly interest payment that became due on July 14, 2008, and all subsequent payments. The Borrower was duly notified, in writing, of the outstanding defaults.

10. As a result of the aforesaid defaults, Wachovia accelerated the balance of the Note, which is now due and payable in full.

11. Wachovia is entitled to foreclosure of its Mortgage.

12. There is now due and owing to Wachovia under the Note, as of October 10, 2008, exclusive of costs and attorneys fees, the sum of \$473,747.24, which consists of: (1) unpaid principal in the amount of \$463,873.83; (2) accrued and unpaid interest in the amount of \$9,502.97; and (3) late fees in the amount of \$370.44.

13. It is provided in the loan documents that the Borrower would pay all costs and expenses of collection, including but not limited to reasonable attorneys fees.

14. Therefore, Wachovia is entitled to judgment of foreclosure on its Mortgage in the amount of Four Hundred Seventy-Three Thousand Seven Hundred Forty-Seven and 24/100 Dollars (\$473,747.24), plus additional interest and other amounts properly chargeable to the aforesaid loan, including without limitation, attorneys fees and the costs of this action.

15. Wachovia is informed and believes that its Mortgage constitutes a valid first mortgage lien on the property described in Paragraph 6 hereinabove.

16. Wachovia is further informed and believes that defendant South Island Plantation Association, Inc. claims or may claim an interest in all or a portion of the subject property by virtue of that certain notice of delinquent assessments and lien filed in the said ROD's Office on June 25, 2008, in Book 44 at Page 64, but the interest of the said defendant, if any, is junior and subordinate to the lien of Wachovia's Mortgage.

17. Wachovia is entitled to judgment barring the defendants and all persons claiming by or through the defendants from any and all right, title and interest in or to the subject property, and each and every part thereof.

18. Wachovia does not waive, but expressly reserves, the right to seek a personal judgment against the Borrower for any deficiency remaining after the sale of the mortgaged property.

FOR A SECOND CAUSE OF ACTION
(Guaranty)

19. The allegations of the preceding paragraphs are reasserted and incorporated herein as if restated verbatim.

20. In order to induce the plaintiff to make of the aforesaid loan, and to further secure the same, defendants Judith Blackburn, Tammy S. Winner, and Watson E. Felder (collectively the "Guarantors"), who are affiliates of the Borrower and who benefited directly from the said loan, executed written Unconditional Guaranties dated February 14, 2006 (collectively the "Guaranties"), whereby the said defendants absolutely, unconditionally and irrevocably guaranteed to Wachovia the full and prompt payment of all sums due on the loan. True and

correct copies of the Guaranties are attached hereto collectively as Exhibit "C" and incorporated herein by reference.

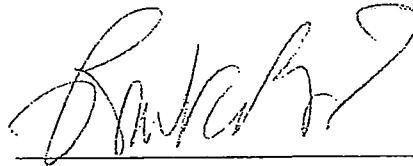
21. As stated more fully hereinabove, the obligations under the terms and conditions of the subject loan are in default, and there is now due and owing to Wachovia under the subject loan, as of October 10, 2008, exclusive of costs and attorneys fees, the sum of \$473,747.24.

RUB
p. 5
22. Therefore, plaintiff is entitled to judgment against the Guarantors, jointly and severally, in the amount of Four Hundred Seventy-Three Thousand Seven Hundred Forty-Seven and 24/100 Dollars (\$473,747.24), plus additional interest and other amounts properly chargeable to the aforesaid loans, attorneys fees and the costs of this action.

WHEREFORE, Wachovia prays:

- (a) That the amounts due under the subject loan be ascertained and determined under the direction of the Court, together with attorneys fees and the costs of this action;
- (b) For a judgment of foreclosure for the amount so found to be due and owing to Wachovia under the said loan, together with reasonable attorneys fees and the costs of this action;
- (c) That the mortgaged property be sold pursuant to Order of this Court, the equity of redemption be barred, and the proceeds of sale be first applied to the costs and expenses of this action, with the remaining proceeds being applied upon the Wachovia judgment and attorneys fees, any amount in excess to be held by the Court until further ordered;
- (d) That the defendant and all persons whomsoever claiming by or through the defendants be forever barred of all right, title and interest in and to the mortgaged property, and each and every part thereof;
- (e) For judgment against the defendant Guarantors in the amount of \$473,747.24, plus additional interest and other amounts properly chargeable to the aforesaid loans, attorneys fees and the costs of this action. property; and For the entry of judgment against the defendants for any deficiency remaining after the sale of the subject property; and
- (f) For such other and further relief as the Court may deem just and proper.

PAB
pg 6



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Attorneys for the Plaintiff
Wachovia Bank, National Association

November 12, 2008

Charleston, South Carolina

PROMISSORY NOTE

\$463,967.00

February 14, 2006

William E. Blackburn
307 63rd Avenue North
Myrtle Beach, South Carolina 29572
(Hereinafter referred to as "Borrower")

Wachovia Bank, National Association
Greenville, South Carolina 29601
(Hereinafter referred to as "Bank")

Borrower promises to pay to the order of Bank, in lawful money of the United States of America, at its office indicated above or wherever else Bank may specify, the sum of Four Hundred Sixty-Three Thousand, Nine Hundred Sixty-Seven and No/100 Dollars (\$463,967.00) or such sum as may be advanced and outstanding from time to time, with interest on the unpaid principal balance at the rate and on the terms provided in this Promissory Note (including all renewals, extensions or modifications hereof, this "Note").

USE OF PROCEEDS. Borrower shall use the proceeds of the loan(s) evidenced by this Note for the commercial purposes of Borrower, as follows: purchase investment property.

SECURITY. Borrower and Judith Blackburn, Watson E. Felder, Tammy S. Winner have granted Bank a security interest in the collateral described in the Loan Documents, including, but not limited to, real and personal property collateral described in that certain security Instrument of even date herewith.

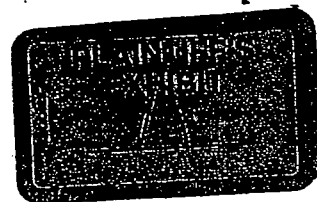
INTEREST RATE. Interest shall accrue on the unpaid principal balance of this Note from the date hereof at the rate of 6.25% ("Interest Rate").

DEFAULT RATE. In addition to all other rights contained in this Note, if a Default (as defined herein) occurs and as long as a Default continues, all outstanding Obligations, other than Obligations under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) between Borrower and Bank or its affiliates, shall bear interest at the Interest Rate plus 3% ("Default Rate"). The Default Rate shall also apply from demand until the Obligations or any judgment thereon is paid in full.

INTEREST AND FEES(S) COMPUTATION (ACTUAL/360). Interest and fees, if any, shall be computed on the basis of a 360-day year for the actual number of days in the applicable period ("Actual/360 Computation"). The Actual/360 Computation determines the annual effective yield by taking the stated (nominal) rate for a year's period and then dividing said rate by 360 to determine the daily periodic rate to be applied for each day in the applicable period. Application of the Actual/360 Computation produces an annualized effective rate exceeding the nominal rate.

PREPAYMENT ALLOWED. This Note may be prepaid in whole or in part at any time. Any prepayment shall include accrued interest and all other sums then due under any of the Loan Documents (as defined below). No partial prepayment shall affect Borrower's obligation to make any payment of principal or interest due under this Note on the date specified below in the Repayment Terms paragraph of this Note until this Note has been paid in full.

REPAYMENT TERMS. This Note shall be due and payable in consecutive monthly payments of accrued interest only, commencing on March 14, 2006, and continuing on the same day of each month thereafter



until fully paid. In any event, all principal and accrued interest shall be due and payable on February 14, 2009.

AUTOMATIC DEBIT OF CHECKING ACCOUNT FOR LOAN PAYMENT. Borrower authorizes Bank to debit demand deposit account number 1010129298821 or any other account with Bank (routing number 053207766) designated in writing by Borrower, beginning March 14, 2006 for any payments due under this Note. Borrower further certifies that Borrower holds legitimate ownership of this account and preauthorizes this periodic debit as part of its right under said ownership.

APPLICATION OF PAYMENTS. Monies received by Bank from any source for application toward payment of the Obligations shall be applied to accrued interest and then to principal. If a Default occurs, monies may be applied to the Obligations in any manner or order deemed appropriate by Bank.

If any payment received by Bank under this Note or other Loan Documents is rescinded, avoided or for any reason returned by Bank because of any adverse claim or threatened action, the returned payment shall remain payable as an obligation of all persons liable under this Note or other Loan Documents as though such payment had not been made.

DEFINITIONS. Loan Documents. The term "Loan Documents", as used in this Note and the other Loan Documents, refers to all documents executed in connection with or related to the loan evidenced by this Note and any prior notes which evidence all or any portion of the loan evidenced by this Note, and any letters of credit issued pursuant to any loan agreement to which this Note is subject, any applications for such letters of credit and any other documents executed in connection therewith or related thereto, and may include, without limitation, a commitment letter that survives closing, a loan agreement, this Note, guaranty agreements, security agreements, security instruments, financing statements, mortgage instruments, any renewals or modifications, whenever any of the foregoing are executed, but does not include swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time). **Obligations.** The term "Obligations", as used in this Note and the other Loan Documents, refers to any and all indebtedness and other obligations under this Note, all other obligations under any other Loan Document(s), and all obligations under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) between Borrower and Bank, or its affiliates, whenever executed. **Certain Other Terms.** All terms that are used but not otherwise defined in any of the Loan Documents shall have the definitions provided in the Uniform Commercial Code.

LATE CHARGE. If any payments are not timely made, Borrower shall also pay to Bank a late charge equal to 5% of each payment past due for 15 or more days. This late charge shall not apply to payments due at maturity or by acceleration hereof, unless such late payment is in an amount not greater than the highest periodic payment due hereunder.

Acceptance by Bank of any late payment without an accompanying late charge shall not be deemed a waiver of Bank's right to collect such late charge or to collect a late charge for any subsequent late payment received.

If this Note is secured by owner-occupied residential real property located outside the state in which the office of Bank first shown above is located, the late charge laws of the state where the real property is located shall apply to this Note and the late charge shall be the highest amount allowable under such laws. If no amount is stated thereunder, the late charge shall be 5% of each payment past due for 10 or more days.

ATTORNEYS' FEES AND OTHER COLLECTION COSTS. Borrower shall pay all of Bank's reasonable expenses actually incurred to enforce or collect any of the Obligations including, without limitation, reasonable arbitration, paralegals', attorneys' and experts' fees and expenses, whether incurred without the commencement of a suit, in any trial, arbitration, or administrative proceeding, or in any appellate or bankruptcy proceeding.

USURY. If at any time the effective interest rate under this Note would, but for this paragraph, exceed the maximum lawful rate, the effective interest rate under this Note shall be the maximum lawful rate, and any amount received by Bank in excess of such rate shall be applied to principal and then to fees and expenses, or, if no such amounts are owing, returned to Borrower.

DEFAULT. If any of the following occurs, a default ("Default") under this Note shall exist: **Nonpayment; Nonperformance.** The failure of timely payment or performance of the Obligations or Default under this Note or any other Loan Documents. **False Warranty.** A warranty or representation made or deemed made in the Loan Documents or furnished Bank in connection with the loan evidenced by this Note proves materially false, or if of a continuing nature, becomes materially false. **Cross Default.** At Bank's option, any default in payment or performance of any obligation under any other loans, contracts or agreements of Borrower, any Subsidiary or Affiliate of Borrower, any general partner of or the holder(s) of the majority ownership interests of Borrower with Bank or its affiliates ("Affiliate" shall have the meaning as defined in 11 U.S.C. § 101, as in effect from time to time, except that the term "Borrower" shall be substituted for the term "Debtor" therein; "Subsidiary" shall mean any business in which Borrower holds, directly or indirectly, a controlling interest). **Cessation; Bankruptcy.** The death of, appointment of a guardian for, dissolution of, termination of existence of, loss of good standing status by, appointment of a receiver for, assignment for the benefit of creditors of, or commencement of any bankruptcy or insolvency proceeding by or against Borrower, its Subsidiaries or Affiliates, if any, or any general partner of or the holder(s) of the majority ownership interests of Borrower, or any party to the Loan Documents. **Material Business Alteration.** Without prior written consent of Bank, a material alteration in the kind or type of Borrower's business. **Material Adverse Change.** Bank determines in good faith, in its sole discretion, that the prospects for payment or performance of the Obligations are impaired or there has occurred a material adverse change in the business or prospects of Borrower, financial or otherwise.

REMEDIES UPON DEFAULT. If a Default occurs under this Note or any Loan Documents, Bank may at any time thereafter, take the following actions: **Bank Lien.** Foreclose its security interest or lien against Borrower's accounts without notice. **Acceleration Upon Default.** Accelerate the maturity of this Note and, at Bank's option, any or all other Obligations, other than Obligations under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) between Borrower and Bank, or its affiliates, which shall be due in accordance with and governed by the provisions of said swap agreements; whereupon this Note and the accelerated Obligations shall be immediately due and payable; provided, however, if the Default is based upon a bankruptcy or insolvency proceeding commenced by or against Borrower or any guarantor or endorser of this Note, all Obligations (other than Obligations under any swap agreement as referenced above) shall automatically and immediately be due and payable. **Cumulative.** Exercise any rights and remedies as provided under the Note and other Loan Documents, or as provided by law or equity.

FINANCIAL AND OTHER INFORMATION. Borrower shall deliver to Bank such information as Bank may reasonably request from time to time, including without limitation, financial statements and information pertaining to Borrower's financial condition. Such information shall be true, complete, and accurate.

WAIVERS AND AMENDMENTS. No waivers, amendments or modifications of this Note and other Loan Documents shall be valid unless in writing and signed by an officer of Bank. No waiver by Bank of any Default shall operate as a waiver of any other Default or the same Default on a future occasion. Neither the failure nor any delay on the part of Bank in exercising any right, power, or remedy under this Note and other Loan Documents shall operate as a waiver thereof, nor shall a single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

Except to the extent otherwise provided by the Loan Documents or prohibited by law, each Borrower and each other person liable under this Note waives presentment, protest, notice of dishonor, demand for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, notice of sale and all other notices of any kind. Further, each agrees that Bank may (i) extend, modify or renew this Note or make a novation of the loan evidenced by this Note, and/or (ii) grant releases, compromises or indulgences with respect to any collateral securing this Note, or with respect to any Borrower or other person liable under this Note or any other Loan Documents, all without notice to or consent of each

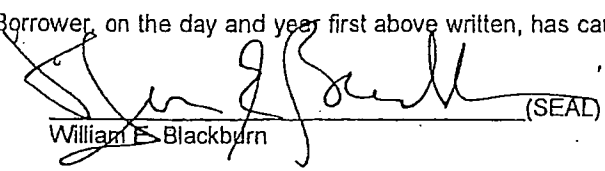
Borrower and other such person, and without affecting the liability of each Borrower and other such person; provided, Bank may not extend, modify or renew this Note or make a novation of the loan evidenced by this Note without the consent of the Borrower, or if there is more than one Borrower, without the consent of at least one Borrower; and further provided, if there is more than one Borrower, Bank may not enter into a modification of this Note which increases the burdens of a Borrower without the consent of that Borrower.

MISCELLANEOUS PROVISIONS. Assignment. This Note and the other Loan Documents shall inure to the benefit of and be binding upon the parties and their respective heirs, legal representatives, successors and assigns. Bank's interests in and rights under this Note and the other Loan Documents are freely assignable, in whole or in part, by Bank. In addition, nothing in this Note or any of the other Loan Documents shall prohibit Bank from pledging or assigning this Note or any of the other Loan Documents or any interest therein to any Federal Reserve Bank. Borrower shall not assign its rights and interest hereunder without the prior written consent of Bank, and any attempt by Borrower to assign without Bank's prior written consent is null and void. Any assignment shall not release Borrower from the Obligations. **Organization; Powers.** Borrower represents that Borrower (i) is (a) an adult individual and is sui juris, or (b) a corporation, general partnership, limited partnership, limited liability company or other legal entity, duly organized, validly existing and in good standing under the laws of its state of organization, and is authorized to do business in each other jurisdiction wherein its ownership of property or conduct of business legally requires such organization (ii) has the power and authority to own its properties and assets and to carry on its business as now being conducted and as now contemplated; and (iii) has the power and authority to execute, deliver and perform, and by all necessary action has authorized the execution, delivery and performance of, all of its obligations under this Note and any other Loan Document to which it is a party. **Compliance with Laws.** Borrower represents that Borrower and any subsidiary and affiliate of Borrower and any guarantor are in compliance in all respects with all federal, state and local laws, rules and regulations applicable to its properties, operations, business, and finances, including, without limitation, any federal or state laws relating to liquor (including 18 U.S.C. § 3617, et seq.) or narcotics (including 21 U.S.C. § 801, et seq.) and/or any commercial crimes; all applicable federal, state and local laws and regulations intended to protect the environment; and the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), if applicable. None of Borrower, or any subsidiary or affiliate of Borrower or any guarantor is a Sanctioned Person or has any of its assets in a Sanctioned Country or does business in or with, or derives any of its operating income from investments in or transactions with, Sanctioned Persons or Sanctioned Countries in violation of economic sanctions administered by OFAC. The proceeds from the Loan will not be used to fund any operations in, finance any investments or activities in, or make any payments to, a Sanctioned Person or a Sanctioned Country. "OFAC" means the U.S. Department of the Treasury's Office of Foreign Assets Control. "Sanctioned Country" means a country subject to a sanctions program identified on the list maintained by OFAC and available at <http://www.treas.gov/offices/enforcement/ofac/sanctions/>, or as otherwise published from time to time. "Sanctioned Person" means (i) a person named on the list of Specially Designated Nationals or Blocked Persons maintained by OFAC available at <http://www.treas.gov/offices/enforcement/ofac/sdn/>, or as otherwise published from time to time, or (ii) (A) an agency of the government of a Sanctioned Country, (B) an organization controlled by a Sanctioned Country, or (C) a person resident in a Sanctioned Country, to the extent subject to a sanctions program administered by OFAC. **Applicable Law; Conflict Between Documents.** This Note and, unless otherwise provided in any other Loan Document, the other Loan Documents shall be governed by and construed under the laws of the state named in Bank's address on the first page hereof without regard to that state's conflict of laws principles. If the terms of this Note should conflict with the terms of any loan agreement or any commitment letter that survives closing, the terms of this Note shall control. **Borrower's Accounts.** Except as prohibited by law, Borrower grants Bank a security interest in all of Borrower's accounts with Bank and any of its affiliates. **Swap Agreements.** All swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time), if any, between Borrower and Bank or its affiliates are independent agreements governed by the written provisions of said swap agreements, which will remain in full force and effect, unaffected by any repayment, prepayment, acceleration, reduction, increase or change in the terms of this Note, except as otherwise expressly provided in said written swap agreements, and any payoff statement from Bank relating to this Note shall not apply to said swap agreements except as otherwise expressly provided in such payoff statement. **Jurisdiction.** Borrower

irrevocably agrees to non-exclusive personal jurisdiction in the state named in Bank's address on the first page hereof. **Severability.** If any provision of this Note or of the other Loan Documents shall be prohibited or invalid under applicable law, such provision shall be ineffective but only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Note or other such document. **Notices.** Any notices to Borrower shall be sufficiently given, if in writing and mailed or delivered to the Borrower's address shown above or such other address as provided hereunder, and to Bank, if in writing and mailed or delivered to Wachovia Bank, National Association, Mail Code VA7628, P. O. Box 13327, Roanoke, VA 24040 or Wachovia Bank, National Association, Mail Code VA7628, 10 South Jefferson Street, Roanoke, VA 24011 or such other address as Bank may specify in writing from time to time. Notices to Bank must include the mail code. In the event that Borrower changes Borrower's address at any time prior to the date the Obligations are paid in full, Borrower agrees to promptly give written notice of said change of address by registered or certified mail, return receipt requested, all charges prepaid. **Plural; Captions.** All references in the Loan Documents to Borrower, guarantor, person, document or other nouns of reference mean both the singular and plural form, as the case may be, and the term "person" shall mean any individual, person or entity. The captions contained in the Loan Documents are inserted for convenience only and shall not affect the meaning or interpretation of the Loan Documents. **Advances.** Bank may, in its sole discretion, make other advances which shall be deemed to be advances under this Note, even though the stated principal amount of this Note may be exceeded as a result thereof. **Posting of Payments.** All payments received during normal banking hours after 2:00 p.m. local time at the office of Bank first shown above shall be deemed received at the opening of the next banking day. **Joint and Several Obligations.** If there is more than one Borrower, each is jointly and severally obligated. **Fees and Taxes.** Borrower shall promptly pay all documentary, intangible recordation and/or similar taxes on this transaction whether assessed at closing or arising from time to time. **LIMITATION ON LIABILITY; WAIVER OF PUNITIVE DAMAGES.** EACH OF THE PARTIES HERETO, INCLUDING BANK BY ACCEPTANCE HEREOF, AGREES THAT IN ANY JUDICIAL, MEDIATION OR ARBITRATION PROCEEDING OR ANY CLAIM OR CONTROVERSY BETWEEN OR AMONG THEM THAT MAY ARISE OUT OF OR BE IN ANY WAY CONNECTED WITH THIS AGREEMENT, THE LOAN DOCUMENTS OR ANY OTHER AGREEMENT OR DOCUMENT BETWEEN OR AMONG THEM OR THE OBLIGATIONS EVIDENCED HEREBY OR RELATED HERETO, IN NO EVENT SHALL ANY PARTY HAVE A REMEDY OF, OR BE LIABLE TO THE OTHER FOR, (1) INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES OR (2) PUNITIVE OR EXEMPLARY DAMAGES. EACH OF THE PARTIES HEREBY EXPRESSLY WAIVES ANY RIGHT OR CLAIM TO PUNITIVE OR EXEMPLARY DAMAGES THEY MAY HAVE OR WHICH MAY ARISE IN THE FUTURE IN CONNECTION WITH ANY SUCH PROCEEDING, CLAIM OR CONTROVERSY, WHETHER THE SAME IS RESOLVED BY ARBITRATION, MEDIATION, JUDICIALLY OR OTHERWISE. **Patriot Act Notice.** To help fight the funding of terrorism and money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens an account. For purposes of this section, account shall be understood to include loan accounts. **FINAL AGREEMENT.** This Note and the other Loan Documents represent the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF BORROWER BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS NOTE, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS NOTE, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS NOTE. EACH OF THE PARTIES AGREES THAT THE TERMS HEREOF SHALL SUPERSEDE AND REPLACE ANY PRIOR AGREEMENT RELATED TO ARBITRATION OF DISPUTES BETWEEN THE PARTIES CONTAINED IN ANY LOAN DOCUMENT OR ANY OTHER DOCUMENT OR AGREEMENT HERETOFORE EXECUTED IN CONNECTION WITH, RELATED TO OR BEING REPLACED, SUPPLEMENTED, EXTENDED OR MODIFIED BY, THIS NOTE.

IN WITNESS WHEREOF, Borrower, on the day and year first above written, has caused this Note to be executed under seal.



William E. Blackburn

(SEAL)

Tracking #: 1026160208
Facility ID 1026110097

41/0738887497/1639269



James T. Feldman, P.A.
5307 N. Kings Hwy
Myrtle Beach, SC 29577

4

Lot 69 Ph 1
South Island
Plantation

PREPARED BY: Carolyn Crews
RETURN TO: BCS - Post Closing, NC 6971
Wachovia Bank, National Association
One West Fourth Street.
3rd Floor, NC 6971
Winston Salem, NC 27101-3806

MORTGAGE AND ASSIGNMENT OF RENTS

This MORTGAGE AND ASSIGNMENT OF RENTS (hereafter referred to as "Mortgage") made February 14, 2006, by and between, William E. Blackburn, whose address is 307 63rd Avenue North, Myrtle Beach, South Carolina 29572, Judith Blackburn, whose address is 307 63rd Avenue North, Myrtle Beach, South Carolina 29572, Watson E. Felder, whose address is 549 Mary Lou Ave., Murrells Inlet, South Carolina 29576, and Tammy S. Winner, whose address is 120 8th Ave. North #104, Myrtle Beach, South Carolina 29575 ("Mortgagor") and Wachovia Bank, National Association, a national banking association, whose address is Greenville, South Carolina 29601 ("Bank").

WITNESSETH:

To secure payment and performance of obligations under a Promissory Note (the "Note") dated February 14, 2006, in the amount of \$463,967.00, made by William E. Blackburn (the "Borrower") payable to Bank, this Mortgage, any present or future Letters of Credit issued by Bank for the account of Borrower, other loan documents as defined in the Note (the "Loan Documents"), and swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) between Bank or any of its affiliates and Borrower, all other indebtedness of Borrower to Bank whenever borrowed or incurred, whether or not reasonably contemplated by the parties hereto as of the date hereof, and any renewals, extensions, novations, or modifications of the foregoing (collectively the "Obligations"), and in consideration of these premises and for other consideration, Mortgagor does mortgage, grant and convey unto Bank (for itself and its affiliates), its successors and assigns, all of Mortgagor's right, title and interest now owned or hereafter acquired in and to each of the following (collectively, the "Property"): (i) all those certain tracts of land in the County of Georgetown, State of South Carolina described in EXHIBIT A attached hereto and made part hereof (the "Land"); (ii) all buildings and improvements now or hereafter erected on the Land; (iii) all fixtures attached to the Land or any buildings or improvements situated thereon; and (iv) all estates, rights, tenements, hereditaments, privileges, rents, issues, profits easements, and appurtenances of any kind benefiting the Land; all means of access to and from the Land, whether public or private; and all water and mineral rights.

In the event that Mortgagor is the owner of a leasehold estate with respect to any portion of the Property and Mortgagor obtains a fee estate in such portions of the Property, then, such fee estate shall automatically, and without further action of any kind on the part of the Mortgagor, be and become subject to the security title and lien of this Agreement.

TO HAVE AND TO HOLD the Property and all the estate, right, title and interest, in law and in equity, of Mortgagor's in and to the Property unto Bank, its successors and assigns, forever.

Mortgagor WARRANTS AND REPRESENTS that Mortgagor is lawfully seized of the Property, in fee simple, absolute, that Mortgagor has the legal right to convey and encumber the same, and that the Property is free and clear of all liens and encumbrances. Mortgagor further warrants and will forever



defend all and singular the Property and title thereto to Bank and Bank's successors and assigns, against the lawful claims of all persons whomsoever.

PROVIDED ALWAYS that if (i) all the Obligations (including without limitation, all termination payments and any other amounts due under or in connection with any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) secured hereunder) are paid in full, (ii) each and every representation, warranty, agreement, covenant and condition of this Mortgage, and the other Loan Documents, are complied with and abided by, and (iii) any and all swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) secured hereunder have matured or been terminated, then this Mortgage and the estate hereby created shall cease and be null, void, and canceled of record.

To protect the security of this Mortgage, Mortgagor further represents and agrees with Bank as follows:

Payment of Obligations. That the Obligations shall be timely paid and performed.

Future Advances. This Mortgage is given to secure not only existing Obligations, but also future advances, including obligations under swap agreements to the same extent as if such future advances and obligations under swap agreements are made on the date of the execution of this Mortgage. The principal amount (including any swap agreements and future advances) that may be so secured may decrease or increase from time to time, but the total amount so secured at any one time shall not exceed \$927,934.00, plus all interest, costs, reimbursements, fees and expenses due under this Mortgage and secured hereby. Mortgagor shall not execute any document that impairs or otherwise impacts the priority of any existing or future Obligations secured by this Mortgage.

Grant of Security Interest in Personal Property. This Mortgage constitutes a security agreement under the UCC and shall be deemed to constitute a fixture financing statement. Mortgagor hereby grants a security interest in any personal property included in the Property. On request of Bank, Mortgagor will execute one or more Financing Statements in form satisfactory to Bank and will pay all costs and expenses of filing the same in all public filing offices, where filing is deemed desirable by Bank. Bank is authorized to file Financing Statements relating to the Property without Mortgagor's signature where permitted by law. Mortgagor appoints Bank as its attorney-in-fact to execute such documents necessary to perfect Bank's security interest on Mortgagor's behalf. The appointment is coupled with an interest and shall be irrevocable as long as any Obligations remain outstanding.

Nothing herein obligates Bank to provide credit in excess of the Obligations.

Leases, Subleases and Easements. Mortgagor shall maintain, enforce and cause to be performed all of the terms and conditions under any lease, sublease or easement which may constitute a portion of the Property. Mortgagor shall not, without the consent of Bank (which consent shall not be unreasonably withheld or delayed), enter into any new lease of all or any portion of the Property, agree to the cancellation or surrender under any lease of all or any portion of the Property, agree to prepayment of rents, issues or profits (other than rent paid at the signing of a lease or sublease), modify any such lease so as to shorten the term, decrease the rent, accelerate the payment of rent, or change the terms of any renewal option; and any such purported new lease, cancellation, surrender, prepayment or modification made without the consent of Bank shall be void as against Bank.

Required Insurance. Mortgagor shall maintain with respect to the Property: (i) during construction of any improvements on the Property, "all-risk" builders risk insurance which must include windstorm, hail damage, fire and vandalism (non-reporting Completed Value with Special Cause of Loss form), in an amount not less than the completed replacement value of the improvements under construction, naming Bank as mortgagee and loss payee; (ii) upon completion of construction, upon occupancy of any improvements, and at all other times, insurance against loss or damage by fire and other casualties and hazards by insurance written on an "all risks" basis, including malicious mischief coverage, in an amount not less than the replacement cost thereof, including coverage for loss of rents or business interruption if applicable, naming Bank as loss payee and mortgagee; (iii) if the Property is

required to be insured pursuant to the National Flood Reform Act of 1994, and the regulations promulgated thereunder, flood insurance is required in the amount equal to the lesser of the loan amount or maximum available under the National Flood Insurance Program, but in no event should the amount of coverage be less than the value of the improved structure, naming Bank as mortgagee and loss payee. If, after closing, the Property (or any part thereof) is remapped and if the vertical improvements are determined to be located in a special flood hazard area, Mortgagor must obtain and maintain a flood insurance policy. If, within forty-five (45) days of receipt of notification from Bank that the Property has been reclassified by FEMA as being located in a special flood hazard area, Mortgagor has not provided sufficient evidence of flood insurance, Bank is mandated under federal law to purchase flood insurance on behalf of Mortgagor, and Bank will add the associated costs to the principal balance of the Note. If the land or any portion thereof is located in a special flood hazard area, this Agreement may be terminated by Bank at its sole option; (iv) as applicable, insurance which complies with the workers' compensation and employers' liability laws of all states in which Mortgagor shall be required to maintain such insurance; and (v) liability insurance providing coverage in such amount as Bank may require but in no event less than \$1,000,000.00 combined single limit, naming Bank as an additional insured; and (vi) such other insurance as Bank may require from time to time.

All property insurance policies shall contain an endorsement or agreement by the insurer in form satisfactory to Bank that any loss shall be payable in accordance with the terms of such policy notwithstanding any act or negligence of Mortgagor and the further agreement (within both the property and liability policies) of the insurer waiving rights of subrogation against Bank, and rights of set-off, counterclaim or deductions against Mortgagor.

All insurance policies shall be in form, provide coverages, be issued by companies and be in amounts satisfactory to Bank. At least 30 days prior to the expiration of each such policy, Mortgagor shall furnish Bank with evidence satisfactory to Bank that such policy has been renewed or replaced or is no longer required hereunder. All such policies shall provide that the policy will not be canceled or materially amended without at least 30 days prior written notice to Bank. In the event Mortgagor fails to provide, maintain, keep in force, and furnish to Bank the policies of insurance required by this paragraph, Bank may procure such insurance or single-interest insurance in such amounts, at such premium, for such risks and by such means as Bank chooses, at Mortgagor's expense; provided however, Bank shall have no responsibility to obtain any insurance, but if Bank does obtain insurance, Bank shall have no responsibility to assure that the insurance obtained shall be adequate or provide any protection to Mortgagor.

Insurance Proceeds. After occurrence of any loss to any of the Property, Mortgagor shall give prompt written notice thereof to Bank.

In the event of such loss all insurance proceeds, including unearned premiums, shall be payable to Bank, and Mortgagor hereby authorizes and directs any affected insurance company to make payment of such proceeds directly to Bank and not to Bank and Mortgagor jointly. Bank is hereby authorized by Mortgagor to make proof of loss if not promptly made by Mortgagor, settle, adjust or compromise any claims for loss or damage under any policy or policies of insurance and Mortgagor appoints Bank as its attorney-in-fact to receive and endorse any insurance proceeds to Bank, which appointment is coupled with an interest and shall be irrevocable as long as any Obligations remain unsatisfied. Mortgagor shall pay the costs of collection, including attorneys' fees, of insurance proceeds payable on account of such damage or destruction. Mortgagor shall have no claim against the insurance proceeds, or be entitled to any portion thereof, and all rights to the insurance proceeds are hereby assigned to Bank as security for payment of the Obligations.

In the event of any damage to or destruction of the Property, Bank shall have the option of applying or paying all or part of the insurance proceeds to (i) the Obligations in such order as Bank may determine, (ii) restoration, replacement or repair of the Property in accordance with Bank's standard construction loan disbursement conditions and requirements, or (iii) Mortgagor. Nothing herein shall be deemed to excuse Mortgagor from restoring, repairing and maintaining the Property as required herein.

Minimum Standards. In addition to the requirements set forth in the Loan Documents, all surveys, insurance, title policies, construction documents, environmental reports, payment and performance bonds, and any other due diligence or additional documents required in connection with this Loan, shall comply with Bank's minimum standards in place from time to time for such documents, which shall be provided in writing by Bank to Borrower upon request.

Impositions; Escrow Deposit. Mortgagor will pay all taxes, levies, assessments and other fees and charges imposed upon or which may become a lien upon the Property under any law or ordinance (all of the foregoing collectively "Impositions") before they become delinquent and in any event in the same calendar year in which they first become due. Upon request of Bank, Mortgagor shall add to each periodic payment required under the Note the amount estimated by Bank to be sufficient to enable Bank to pay, as they come due, all Impositions and insurance premiums which Mortgagor is required to pay hereunder. Payments requested under this provision shall be supplemented or adjusted as required by Bank from time to time. Such funds may be commingled with the general funds of Bank and shall not earn interest. Upon the occurrence of a Default, Bank may apply such funds to pay any of the Obligations.

Use of Property. Mortgagor shall use and operate, and require its lessees or licensees to use and operate, the Property in compliance with all applicable laws (including, for example, the Americans with Disabilities Act and the Fair Housing Act) and ordinances, covenants, and restrictions, and with all applicable requirements of any lease or sublease now or hereafter affecting the Property. Mortgagor shall not permit any unlawful use of the Property or any use that may give rise to a claim of forfeiture of any of the Property. Mortgagor shall not allow changes in the stated use of Property from that disclosed to Bank at the time of execution hereof. Mortgagor shall not initiate or acquiesce to a zoning change of the Property without prior notice to, and written consent of, Bank.

Maintenance, Repairs and Alterations. Mortgagor shall keep and maintain the Property in good condition and repair and fully protected from the elements to the satisfaction of Bank. Mortgagor will not remove, demolish or structurally alter any of the buildings or other improvements on the Property (except such alterations as may be required by laws, ordinances or regulations) without the prior written consent of Bank. Mortgagor shall promptly notify Bank in writing of any material loss, damage or adverse condition affecting the Property.

Eminent Domain. Should the Property or any interest therein be taken or damaged by reason of any public use or improvement or condemnation proceeding ("Condemnation"), or should Mortgagor receive any notice or other information regarding such Condemnation, Mortgagor shall give prompt written notice thereof to Bank. Bank shall be entitled to all compensation, awards and other payments or relief granted in connection with such Condemnation and, at its option, may commence, appear in and prosecute in its own name any action or proceedings relating thereto. Bank shall be entitled to make any compromise or settlement in connection with such taking or damage. All compensation, awards, and damages awarded to Mortgagor related to any Condemnation (the "Proceeds") are hereby assigned to Bank and Mortgagor agrees to execute such further assignments of the Proceeds as Bank may require. Bank shall have the option of applying or paying the Proceeds in the same manner as insurance proceeds as provided herein. Mortgagor appoints Bank as its attorney-in-fact to receive and endorse the Proceeds to Bank, which appointment is coupled with an interest and shall be irrevocable as long as any Obligations remain unsatisfied.

Environmental Condition of Property and Indemnity. Mortgagor warrants and represents to Bank, except as reported by Mortgagor to Bank in writing, that: (i) Mortgagor has inspected and is familiar with the environmental condition of the Property; (ii) the Property and Mortgagor, and any occupants of the Property, are in compliance with and shall continue to be in compliance with all applicable federal, state and local laws and regulations intended to protect the environment and public health and safety as the same may be amended from time to time ("Environmental Laws"); (iii) the Property is not and has never been used to generate, handle, treat, store or dispose of, in any quantity, oil, petroleum products, hazardous or toxic substances, hazardous waste, regulated substances or hazardous air pollutants ("Hazardous Materials") in violation of any Environmental Laws; (iv) no

Hazardous Materials (including asbestos, mold or lead paint in any form) are located on or under the Property or emanate from the Property; (v) there are no unregistered underground storage tanks on the Property that are subject to any underground storage tank registration laws or regulations; (vi) no notice has been received with regard to any Hazardous Material on the Property; (vii) no action, investigation or proceeding is pending or to Mortgagor's knowledge threatened which seeks to enforce any right or remedy against Mortgagor or the Property under any Environmental Law; and (viii) all licenses, permits and other governmental or regulatory actions necessary for the Property to comply with Environmental Laws shall be obtained and maintained and Mortgagor shall assure compliance therewith.

Further, Mortgagor represents to Bank that no portion of the Property is a protected wetland. Mortgagor agrees to notify Bank immediately upon receipt of any citations, warnings, orders, notices, consent agreements, process or claims alleging or relating to violations of any Environmental Laws or to the environmental condition of the Property and shall conduct and complete all investigations and all cleanup actions necessary to comply with the Environmental Laws and to remove, in accordance with Environmental Laws, any Hazardous Material from the Property.

Mortgagor shall indemnify, hold harmless, and defend Bank from and against any and all damages, penalties, fines, claims, suits, liabilities, costs, judgments and expenses, including attorneys', consultants' or experts' fees of every kind and nature incurred, suffered by or asserted against Bank as a direct or indirect result of: (i) representations made by Mortgagor in this Section being or becoming untrue in any material respect; (ii) Mortgagor's violation of or failure to meet the requirements of any Environmental Laws; or (iii) Hazardous Materials which, while the Property is subject to this Mortgage, exist on the Property. Bank shall have the right to arrange for or conduct environmental inspections of the Property from time to time (including the taking of soil, water, air or material samples). The cost of such inspections made after Default or which are required by laws or regulations applicable to Bank shall be borne by Mortgagor. However, Mortgagor's indemnity shall not apply to any negligent or intentional act of Bank which takes place after foreclosure or satisfaction of this Mortgage. These indemnification obligations are in addition to General Indemnification provisions set forth hereafter. Mortgagor's Obligations under this section shall continue, survive and remain in full force and effect notwithstanding the repayment of the Obligations, a foreclosure of or exercise of power of sale under this instrument, a delivery of a deed in lieu of foreclosure, a cancellation or termination of record of this instrument and the transfer of the Property.

Appraisals. Mortgagor agrees that Bank may obtain an appraisal of the Property when required by the regulations of the Federal Reserve Board or the Office of the Comptroller of the Currency, or any other regulatory agency or at such other times as Bank may reasonably require. Such appraisals shall be performed by an independent third party appraiser selected by Bank. The cost of such appraisals shall be borne by Mortgagor. If requested by Bank, Mortgagor shall execute an engagement letter addressed to the appraiser selected by Bank. Mortgagor's failure or refusal to sign such an engagement letter, however, shall not impair Bank's right to obtain such an appraisal. Mortgagor agrees to pay the cost of such appraisal within 10 days after receiving an Invoice for such appraisal.

Inspections. Bank, or its representatives or agents, are authorized to enter at any reasonable time upon any part of the Property for the purpose of inspecting the Property and for the purpose of performing any of the acts it is authorized to perform under the terms of this Mortgage.

Liens and Subrogation. Mortgagor shall pay and promptly discharge all liens, claims and encumbrances upon the Property. Mortgagor shall have the right to contest in good faith the validity of any such lien, claim or encumbrance, provided: (i) such contest suspends the collection thereof or there is no danger of the Property being sold or forfeited while such contest is pending; (ii) Mortgagor first deposits with Bank a bond or other security satisfactory to Bank in such amounts as Bank shall reasonably require; and (iii) Mortgagor thereafter diligently proceeds to cause such lien, claim or encumbrance to be removed and discharged.

Bank shall be subrogated to any liens, claims and encumbrances against Mortgagor or the Property that are paid or discharged through payment by Bank or with loan proceeds, notwithstanding the record cancellation or satisfaction thereof.

Waiver of Mortgagor's Rights. To the fullest extent permitted by law, Mortgagor waives the benefit of all laws now existing or that hereafter may be enacted providing for (i) any appraisal before sale of any portion of the Property, (ii) in any way extending the time for the enforcement of the collection of the Note or the debt evidenced thereby or any of the other Obligations, and any rights to hearing prior to the exercise by Bank of any right, power, or remedy herein provided to Bank.

To the full extent Mortgagor may do so, Mortgagor agrees that Mortgagor will not at any time insist upon, plead, claim or seek to take the benefit or advantage of any law now or hereafter in force providing for any exemption (including homestead exemption), appraisal, valuation, stay, extension or redemption, and Mortgagor for themselves and their respective heirs, devisees, representatives, successors and assigns, and for any and all persons claiming any interest in the Property, to the extent permitted by law, hereby waive and release all rights of valuation, appraisal, redemption, stay of execution, the benefit of all exemption laws, notice of election to mature or declare due the whole of the secured indebtedness and marshalling in the event of foreclosure of the liens hereby created. Mortgagor further waives any and all notices including, without limitation, notice of intention to accelerate and of acceleration of the Obligations.

Payments by Bank. In the event of default in the timely payment or performance of any of the Obligations, Bank, at its option and without any duty on its part to determine the validity or necessity thereof, may pay the sums for which Mortgagor is obligated. Further, Bank may pay such sums as Bank deems appropriate for the protection and maintenance of the Property including, without limitation, sums to pay Impositions and other levies, assessments or liens, maintain insurance, make repairs, secure the Property, maintain utility service, intervene in any condemnation and pay attorneys' fees and other fees and costs to enforce this Mortgage or protect the lien hereof (including foreclosure) or collect the Obligations, without limitation, including those incurred in any proceeding including Bankruptcy or arbitration. Any amounts so paid shall bear interest at the default rate stated in the Note and shall be secured by this Mortgage.

Indemnification. Mortgagor shall protect, indemnify and save harmless Bank from and against all losses, liabilities, obligations, claims, damages, penalties, fines, causes of action, costs and expenses (including, without limitation, reasonable attorneys' fees and expenses) (collectively, "Damages") imposed upon, incurred by or asserted or assessed against Bank on account of or in connection with (i) the Loan Documents or any failure or alleged failure of Mortgagor to comply with any of the terms of, or the inaccuracy or breach of any representation in, the Loan Documents; (ii) the Collateral or any claim of loss or damage to the Property or any injury or claim of injury to, or death of, any person or property that may be occasioned by any cause whatsoever pertaining to the Property or the use, occupancy or operation thereof, (iii) any failure or alleged failure of Mortgagor to comply with any law, rule or regulation applicable to it or to the Property or the use, occupancy or operation of the Property (including, without limitation, the failure to pay any taxes, fees or other charges), provided that such indemnity shall be effective only to the extent of any Damages that may be sustained by Bank in excess of any net proceeds received by it from any insurance of Mortgagor (other than self-insurance) with respect to such Damages, (iv) any Damages whatsoever by reason of any alleged action, obligation or undertaking of Bank relating in any way to or any matter contemplated by the Loan Documents, (v) any claim for brokerage fees or such other commissions relating to the Property or any other Obligations, or (vi) any and all liability arising from any leases related to the Property. Nothing contained herein shall require Mortgagor to indemnify Bank for any Damages resulting from Bank's gross negligence or its willful and wrongful acts. The indemnity provided for herein shall survive payment of the Obligations and shall extend to the officers, directors, employees and duly authorized agents of Bank. In the event the Bank incurs any Damages arising out of or in any way relating to the transaction contemplated by the Loan Documents (including any of the matters referred to in this section), the amounts of such Damages shall be added to the Obligations, shall bear interest, to the extent permitted by law, at the interest rate borne by the Obligations from the date incurred until paid and shall be payable on demand.

Assignment of Rents. Mortgagor hereby absolutely assigns and transfers to Bank all the leases, rents, issues and profits of the Property (collectively "Rents"). Although this assignment is effective immediately, so long as no Default exists, Bank gives to and confers upon Mortgagor the privilege under a revocable license to collect as they become due, but not prior to accrual, the Rents and to demand, receive and enforce payment, give receipts, releases and satisfactions, and sue in the name of Mortgagor for all such Rents. Mortgagor represents there has been no prior assignment of leases or Rents, and agrees not to further assign such leases or Rents. Upon any occurrence of Default, the license granted to Mortgagor herein shall be automatically revoked without further notice to or demand upon Mortgagor, and Bank shall have the right, in its discretion, without notice, by agent or by a receiver appointed by a court, and without regard to the adequacy of any security for the Obligations, (i) to enter upon and take possession of the Property, (ii) notify tenants, subtenants and any property manager to pay Rents to Bank or its designee, and upon receipt of such notice such persons are authorized and directed to make payment as specified in the notice and disregard any contrary direction or instruction by Mortgagor, and (iii) in its own name, sue for or otherwise collect Rents, including those past due, and apply Rents, less costs and expenses of operation and collection, including attorneys' fees, to the Obligations in such order and manner as Bank may determine or as otherwise provided for herein. Bank's exercise of any one or more of the foregoing rights shall not cure or waive any Default or notice of Default hereunder.

Due on Sale or Further Encumbrance or Transfer of an Interest in Mortgagor. Without the prior written consent of Bank in each instance, Mortgagor shall not (i) sell, convey, transfer or encumber the Property, or any part thereof or interest therein, whether legal or equitable, (ii) cause or permit any transfer of the Property or any part thereof, whether voluntarily, involuntarily or by operation of law, or (iii) enter into any agreement or transaction to transfer, or accomplish in form or substance a transfer, of the Property. A "transfer" of the Property includes: (a) the direct or indirect sale, transfer or conveyance of the Property or any portion thereof or interest therein; (b) the execution of an installment sale contract or similar instrument affecting all or any portion of the Property; (c) if Mortgagor or any general partner or member of Mortgagor, is a corporation, partnership, limited liability company, trust or other business entity, the transfer (whether in one transaction or a series of transactions) of any stock, partnership, limited liability company or other ownership interests in such corporation, partnership, limited liability company or entity including, without limitation, changes in stockholders, partners, members, managers, trustees, beneficiaries, or their respective interests; (d) if Mortgagor, or any general partner or member of Mortgagor, is a corporation, the creation or issuance of new stock by which an aggregate of more than 10% of such corporation's stock shall be vested in a party or parties who are not now stockholders; and (e) an agreement by Mortgagor leasing all or a substantial part of the Property for other than actual occupancy by a space tenant thereunder or a sale, assignment or other transfer of or the grant of a security interest in and to any Leases.

Bank's consent to any conveyance or encumbrance may be conditioned upon an increase in the interest rate specified in the Note (or other Obligations), an extension or curtailment of the maturity of the Obligations, or other modification of the Note or this instrument.

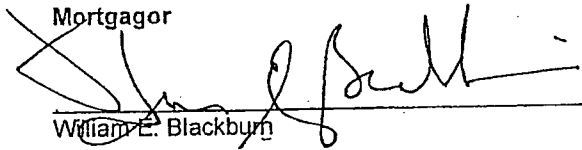
Remedies of Bank on Default. Failure of Mortgagor or any other person liable to timely pay or perform any of the Obligations is a default ("Default") under this Mortgage. Upon the occurrence of Default the following remedies are available, without limitation, to Bank: (i) Bank may exercise any or all of Bank's remedies under this Mortgage or other Loan Documents including, without limitation, acceleration of the maturity of all payments and Obligations, other than Obligations under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) with Bank or any of its affiliates, which shall be due in accordance with and governed by the provisions of said swap agreements; (ii) Bank may take immediate possession of the Property or any part thereof (which Mortgagor agrees to surrender to Bank) and manage, control or lease the same to such persons and at such rental as it may deem proper and collect and apply Rents to the payment of: (a) the Obligations, together with all costs and attorneys' fees; (b) all Impositions and any other levies, assessments or liens which may be prior in lien or payment to the Obligations, and premiums for insurance, with interest on all such items; and (c) the cost of all alterations, repairs, replacements and expenses incident to taking and retaining possession of the

Property and the management and operation thereof; all in such order or priority as Bank in its sole discretion may determine. The taking of possession shall not prevent concurrent or later proceedings for the foreclosure sale of the Property; (iii) Bank may apply to any court of competent jurisdiction for the appointment of a receiver for all purposes including, without limitation, to manage and operate the Property or any part thereof, and to apply the Rents therefrom as hereinabove provided. In the event of such application, Mortgagor consents to the appointment of a receiver, and agrees that a receiver may be appointed without notice to Mortgagor, without regard to whether Mortgagor has committed waste or permitted deterioration of the Property, without regard to the adequacy of any security for the Obligations, and without regard to the solvency of Mortgagor or any other person, firm or corporation who or which may be liable for the payment of the Obligations; (iv) Bank may exercise all the remedies of a mortgagee as provided by law and in equity including, without limitation, foreclosure upon this Mortgage and sale of the Property, or any part of the Property, at public sale conducted according to applicable law (referred to as "Sale") and conduct additional Sales as may be required until all of the Property is sold or the Obligations are satisfied; (v) With respect to any portion of the Property governed by the UCC, Bank shall have all of the rights and remedies of a secured party thereunder. Bank may elect to foreclose upon any Property that is fixtures under law applicable to foreclosure of interests in real estate or law applicable to personal property; (vi) Bank may bid at Sale and may accept, as successful bidder, credit of the bid amount against the Obligations as payment of any portion of the purchase price; and (vii) Bank shall apply the proceeds of Sale, first to any fees or attorney fees permitted Bank by law in connection with Sale, second to expenses of foreclosure, publication, and sale permitted Bank by law in connection with Sale, third to the Obligations, and any remaining proceeds as required by law.

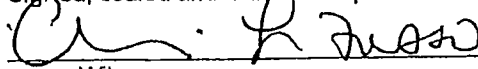
Miscellaneous Provisions. Mortgagor agrees to the following: (i) All remedies available to Bank with respect to this Mortgage or available at law or in equity shall be cumulative and may be pursued concurrently or successively. No delay by Bank in exercising any remedy shall operate as a waiver of that remedy or of any Default. Any payment by Bank or acceptance by Bank of any partial payment shall not constitute a waiver by Bank of any Default; (ii) Mortgagor represents that Mortgagor (a) is (1) an adult Individual and is sui juris, or (2) a corporation, general partnership, limited partnership, limited liability company or other legal entity, duly organized, validly existing and in good standing under the laws of its state of organization, and is authorized to do business in each other jurisdiction wherein its ownership of property or conduct of business legally requires such organization (b) has the power and authority to own its properties and assets and to carry on its business as now being conducted and as now contemplated; and (c) has the power and authority to execute, deliver and perform, and by all necessary action has authorized the execution, delivery and performance of, all of its obligations under this Mortgage and any other Loan Document to which it is a party. (iii) The provisions hereof shall be binding upon and inure to the benefit of Mortgagor, its heirs, personal representatives, successors and assigns including, without limitation, subsequent owners of the Property or any part thereof, and shall be binding upon and inure to the benefit of Bank, its successors and assigns and any future holder of the Note or other Obligations; (iv) Any notices, demands or requests shall be sufficiently given Mortgagor if in writing and mailed or delivered to the address of Mortgagor shown above or to another address as provided herein and to Bank if in writing and mailed or delivered to Wachovia Bank, National Association, Mail Code VA7628, P. O. Box 13327, Roanoke, VA 24040 or Wachovia Bank, National Association, Mail Code VA7628, 10 South Jefferson Street, Roanoke, VA 24011, or such other address as Bank may specify from time to time and in the event that Mortgagor changes Mortgagor's address at any time prior to the date the Obligations are paid in full, that party shall promptly give written notice of such change of address by registered or certified mail, return receipt requested, all charges prepaid. Notices to Bank must include the mail code. (v) This Mortgage may not be changed, terminated or modified orally or in any manner other than by an instrument in writing signed by the parties hereto; (vi) All references to "Bank" shall mean to "Bank (for itself and its affiliate)"; (vii) The captions or headings at the beginning of each paragraph hereof are for the convenience of the parties and are not a part of this Mortgage; (viii) If the lien of this Mortgage is invalid or unenforceable as to any part of the Obligations, the unsecured portion of the Obligations shall be completely paid (and all payments made shall be deemed to have first been applied to payment of the unsecured portion of the Obligations) prior to payment of the secured portion of the Obligations and if any clause, provision or obligation hereunder is determined invalid or unenforceable the remainder of this Mortgage shall be construed and enforced as if such clause, provision or obligation had not been contained herein; (ix) This Mortgage shall be governed by and

construed under the laws of the jurisdiction where this Mortgage is recorded; (x) Mortgagor by execution and Bank by acceptance of this Mortgage agree to be bound by the terms and provisions hereof). **FINAL AGREEMENT.** This Agreement and the other Loan Documents represent the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

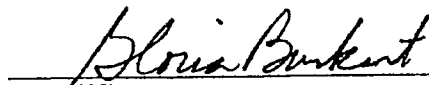
IN WITNESS WHEREOF, Mortgagor has signed and sealed this instrument as of the day and year first above written.

Mortgagor

 William E. Blackburn (SEAL)

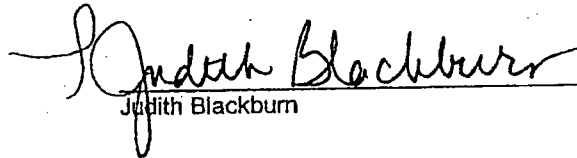
Signed, sealed and delivered in presence of:


 Witness

5307 N KINGS HWY, MYRTLE BEACH, SC 29577
 Address


 Witness

5307 N KINGS HWY, MYRTLE BEACH, SC 29577
 Address


 Judith Blackburn (SEAL)

Signed, sealed and delivered in presence of:

[Signature]
Witness

5307 N KINGS HWY MYRTLE BEACH, SC 29577
Address

[Signature]
Witness

5307 N KINGS HWY MYRTLE BEACH, SC 29577
Address

[Signature] (SEAL)
Watson E. Felder

Signed, sealed and delivered in presence of:

[Signature]
Witness

5307 N. KINGS HWY, MYRTLE BEACH, SC 29577
Address

[Signature]
Witness

5307 N KINGS HWY, MYRTLE BEACH, SC 29577
Address

[Signature] (SEAL)
Tammy S. Winner

Signed, sealed and delivered in presence of:

[Signature]
Witness

5307 N KINGS HWY, MYRTLE BEACH, SC 29577
Address

[Signature]
Witness

5307 N KINGS HWY, MYRTLE BEACH, SC 29577
Address

State of South Carolina
County of GEORGETOWN

Individual Probate

I, GLORIA BURKART, a Notary Public of said County and State, do hereby certify that William E. Blackburn personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and official seal, this 14th day of February, 2006.

[Signature]
Notary Public

My Commission Expires: 2/12/14

Notarial Seal

State of South Carolina
County of GEORGETOWN

Individual Probate

I, GLORIA BURKART, a Notary Public of said County and State, do hereby certify that Judith Blackburn personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and official seal, this 14th day of February, 2006.

Gloria Burkart
Notary Public

My Commission Expires: 2/12/14

Notarial Seal

State of South Carolina
County of GEORGETOWN

Individual Probate

I, GLORIA BURKART, a Notary Public of said County and State, do hereby certify that Watson E. Felder personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and official seal, this 14th day of February, 2006.

Gloria Burkart
Notary Public

My Commission Expires: 2/12/14

Notarial Seal

State of South Carolina
County of GEORGETOWN

Individual Probate

I, Gloria Burkett, a Notary Public of said County and State, do hereby certify that Tammy S. Winner personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and official seal, this 14th day of February, 2006.

Gloria Burkett
Notary Public

My Commission Expires: 2/12/14

Notarial Seal

Tracking #: 1026160208
Facility ID 1026110097

Exhibit A

ALL THAT CERTAIN piece, parcel or tract of land, situate, lying and being in the City and County of Georgetown, State of South Carolina known as Lot 69, South Island Plantation Phase 1 as shown and designated on that certain plat entitled "SOUTH ISLAND PLANTATION PPD-PHASE 1 CITY OF GEORGETOWN, GEORGETOWN COUNTY, SOUTH CAROLINA FINAL PLAT" prepared for Winyah Bay Holdings, LLC, prepared by DDC Engineers dated July 14, 2005 and recorded in the RMC's Office for Georgetown County on July 21, 2005 in Plat Slide 555 at Pages 1-5.

This being the identical property conveyed to the Mortgagors by Deed of Winyah Bay Holdings, LLC recorded February 16, 2006 in the Office of the Register of Deeds for Horry County, South Carolina in Deed Book 1782 at Page 279.

36596 James T.
Feldman

000003221 03:49P
RECORDED 02/16/2006
Bk:02873 Pg:00069 Pages:15
Fee:21.00 State:0.00
County:0.00
Georgetown County, SC
Register of Deeds

Wanda J. Prewitt

UNCONDITIONAL GUARANTY

February 14, 2006

William E. Blackburn
307 63rd Avenue North
Myrtle Beach, South Carolina 29572
(Hereinafter referred to as "Borrower")

Judith Blackburn
307 63rd Avenue North
Myrtle Beach, South Carolina 29572
(Hereinafter referred to as "Guarantor")

Wachovia Bank, National Association
Greenville, South Carolina 29601
(Hereinafter referred to as "Bank")

To induce Bank to make, extend or renew loans, advances, credit, or other financial accommodations to or for the benefit of Borrower, which are and will be to the direct interest and advantage of the Guarantor, and in consideration of loans, advances, credit, or other financial accommodations made, extended or renewed to or for the benefit of Borrower, which are and will be to the direct interest and advantage of the Guarantor, Guarantor hereby absolutely, irrevocably and unconditionally guarantees to Bank and its successors, assigns and affiliates the timely payment and performance of all liabilities and obligations of Borrower to Bank and its affiliates, including, but not limited to, all obligations under any notes, loan agreements, security agreements, letters of credit, instruments, accounts receivable, contracts, drafts, leases, chattel paper, indemnities, acceptances, repurchase agreements, overdrafts, and the Loan Documents, as defined below, and all obligations of Borrower to Bank or any of its affiliates under any swap agreement (as defined in 11 U.S.C. § 101, as in effect from time to time), however and whenever incurred or evidenced, whether primary, secondary, direct, indirect, absolute, contingent, due or to become due, now existing or hereafter contracted or acquired, and all modifications, extensions and renewals thereof, (collectively, the "Guaranteed Obligations").

Guarantor further covenants and agrees:

GUARANTOR'S LIABILITY. This Guaranty is a continuing and unconditional guaranty of payment and performance and not of collection. The parties to this Guaranty are jointly and severally obligated hereunder. This Guaranty does not impose any obligation on Bank to extend or continue to extend credit or otherwise deal with Borrower at any subsequent time. This Guaranty shall continue to be effective or be reinstated, as the case may be, if at any time any payment of the Guaranteed Obligations is rescinded, avoided or for any other reason must be returned by Bank, and the returned payment shall remain payable as part of the Guaranteed Obligations, all as though such payment had not been made. Except to the extent the provisions of this Guaranty give Bank additional rights, this Guaranty shall not be deemed to supersede or replace any other guaranties given to Bank by Guarantor; and the obligations guaranteed hereby shall be in addition to any other obligations guaranteed by Guarantor pursuant to any other agreement of guaranty given to Bank and other guaranties of the Guaranteed Obligations.

TERMINATION OF GUARANTY. Guarantor may terminate this Guaranty only by written notice, delivered personally to or received by certified or registered United States Mail by an authorized officer of Bank at the address for notices provided herein. Such termination shall be effective only with respect to Guaranteed Obligations arising more than 15 days after the date such written notice is received by said Bank officer. Such termination shall not be effective with respect to Guaranteed Obligations (including



any subsequent extensions, modifications or compromises of the Guaranteed Obligations) then existing, or Guaranteed Obligations arising subsequent to receipt by Bank of said notice if such Guaranteed Obligations are a result of Bank's obligation to make advances pursuant to a commitment, or are based on Borrower's obligations to make payments pursuant to any swap agreement (as defined in 11 U.S.C. § 101, as in effect from time to time), entered into prior to expiration of the 15 day notice period, or are a result of advances which are necessary for Bank to protect its collateral or otherwise preserve its interests. Termination of this Guaranty by any single Guarantor will not affect the existing and continuing obligations of any other Guarantor hereunder.

CONSENT TO MODIFICATIONS. Guarantor consents and agrees that Bank (and, with respect to swap obligations, its affiliates) may from time to time, in its sole discretion, without affecting, impairing, lessening or releasing the obligations of Guarantor hereunder: (a) extend or modify the time, manner, place or terms of payment or performance and/or otherwise change or modify the credit terms of the Guaranteed Obligations; (b) increase, renew, or enter into a novation of the Guaranteed Obligations; (c) waive or consent to the departure from terms of the Guaranteed Obligations; (d) permit any change in the business or other dealings and relations of Borrower or any other guarantor with Bank; (e) proceed against, exchange, release, realize upon, or otherwise deal with in any manner any collateral that is or may be held by Bank in connection with the Guaranteed Obligations or any liabilities or obligations of Guarantor; and (f) proceed against, settle, release, or compromise with Borrower, any insurance carrier, or any other person or entity liable as to any part of the Guaranteed Obligations, and/or subordinate the payment of any part of the Guaranteed Obligations to the payment of any other obligations, which may at any time be due or owing to Bank; all in such manner and upon such terms as Bank may deem appropriate, and without notice to or further consent from Guarantor. No invalidity, irregularity, discharge or unenforceability of, or action or omission by Bank relating to any part of the Guaranteed Obligations or any security therefor shall affect or impair this Guaranty.

WAIVERS AND ACKNOWLEDGMENTS. Guarantor waives and releases the following rights, demands, and defenses Guarantor may have with respect to Bank (and, with respect to swap obligations, its affiliates) and collection of the Guaranteed Obligations: (a) promptness and diligence in collection of any of the Guaranteed Obligations from Borrower or any other person liable thereon, and in foreclosure of any security interest and sale of any property serving as collateral for the Guaranteed Obligations; (b) any law or statute that requires that Bank (and, with respect to swap obligations, its affiliates) make demand upon, assert claims against, or collect from Borrower or other persons or entities, foreclose any security interest, sell collateral, exhaust any remedies, or take any other action against Borrower or other persons or entities prior to making demand upon, collecting from or taking action against Guarantor with respect to the Guaranteed Obligations, including any such rights Guarantor might otherwise have had under Va. Code §§ 49-25 and 49-26, *et seq.*, N.C.G.S. §§ 26-7, *et seq.*, Tenn. Code Ann. § 47-12-101, O.C.G.A. § 10-7-24, Mississippi Code Ann. Section 87-5-1, and any successor statute and any other applicable law; (c) any law or statute that requires that Borrower or any other person be joined in, notified of or made part of any action against Guarantor; (d) that Bank or its affiliates preserve, insure or perfect any security interest in collateral or sell or dispose of collateral in a particular manner or at a particular time, provided that Bank's obligation to dispose of Collateral in a commercially reasonable manner is not waived hereby; (e) notice of extensions, modifications, renewals, or novations of the Guaranteed Obligations, of any new transactions or other relationships between Bank, Borrower and/or any guarantor, and of changes in the financial condition of, ownership of, or business structure of Borrower or any other guarantor; (f) presentment, protest, notice of dishonor, notice of default, demand for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, notice of sale, and all other notices of any kind whatsoever to which Guarantor may be entitled; (g) the right to assert against Bank or its affiliates any defense (legal or equitable), set-off, counterclaim, or claim that Guarantor may have at any time against Borrower or any other party liable to Bank or its affiliates; (h) all defenses relating to invalidity, insufficiency, unenforceability, enforcement, release or impairment of Bank or its affiliates' lien on any collateral, of the Loan Documents, or of any other guaranties held by Bank; (i) any right to which Guarantor is or may become entitled to be subrogated to Bank or its affiliates' rights against Borrower or to seek contribution, reimbursement, indemnification, payment or the like, or

participation in any claim, right or remedy of Bank or its affiliates against Borrower or any security which Bank or its affiliates now has or hereafter acquires, until such time as the Guaranteed Obligations have been fully satisfied beyond the expiration of any applicable preference period; (j) any claim or defense that acceleration of maturity of the Guaranteed Obligations is stayed against Guarantor because of the stay of assertion or of acceleration of claims against any other person or entity for any reason including the bankruptcy or insolvency of that person or entity; and (k) the right to marshalling of Borrower's assets or the benefit of any exemption claimed by Guarantor. Guarantor acknowledges and represents that Guarantor has relied upon Guarantor's own due diligence in making an independent appraisal of Borrower, Borrower's business affairs and financial condition, and any collateral; Guarantor will continue to be responsible for making an independent appraisal of such matters; and Guarantor has not relied upon Bank or its affiliates for information regarding Borrower or any collateral.

FINANCIAL CONDITION. Guarantor warrants, represents and covenants to Bank and its affiliates that on and after the date hereof: (a) the fair saleable value of Guarantor's assets exceeds its liabilities, Guarantor is meeting its current liabilities as they mature, and Guarantor is and shall remain solvent; (b) all financial statements of Guarantor furnished to Bank are correct and accurately reflect the financial condition of Guarantor as of the respective dates thereof; (c) since the date of such financial statements, there has not occurred a material adverse change in the financial condition of Guarantor; (d) there are not now pending any court or administrative proceedings or undischarged judgments against Guarantor, no federal or state tax liens have been filed or threatened against Guarantor, and Guarantor is not in default or claimed default under any agreement; and (e) at such reasonable times as Bank requests, Guarantor will furnish Bank and its affiliates with such other financial information as Bank and its affiliates may reasonably request.

INTEREST AND APPLICATION OF PAYMENTS. Regardless of any other provision of this Guaranty or other Loan Documents, if for any reason the effective interest on any of the Guaranteed Obligations should exceed the maximum lawful interest, the effective interest shall be deemed reduced to and shall be such maximum lawful interest, and any sums of interest which have been collected in excess of such maximum lawful interest shall be applied as a credit against the unpaid principal balance of the Guaranteed Obligations. Monies received from any source by Bank or its affiliates for application toward payment of the Guaranteed Obligations may be applied to such Guaranteed Obligations in any manner or order deemed appropriate by Bank and its affiliates.

DEFAULT. If any of the following events occur, a default ("Default") under this Guaranty shall exist: (a) failure of timely payment or performance of the Guaranteed Obligations or a default under any Loan Document; (b) a breach of any agreement or representation contained or referred to in the Guaranty, or any of the Loan Documents, or contained in any other contract or agreement of Guarantor with Bank or its affiliates, whether now existing or hereafter arising; (c) the death of, appointment of a guardian for, dissolution of, termination of existence of, loss of good standing status by, appointment of a receiver for, assignment for the benefit of creditors of, or the commencement of any insolvency or bankruptcy proceeding by or against Guarantor or any general partner of or the holder(s) of the majority ownership interests of Guarantor; and/or (d) Bank determines in good faith, in its sole discretion, that the prospects for payment or performance of the Guaranteed Obligations are impaired or a material adverse change has occurred in the business or prospects of Borrower or Guarantor, financial or otherwise.

If a Default occurs, the Guaranteed Obligations shall be due immediately and payable without notice, other than Guaranteed Obligations under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) with Bank or its affiliates, which shall be due in accordance with and governed by the provisions of said swap agreements, and, Bank and its affiliates may exercise any rights and remedies as provided in this Guaranty and other Loan Documents, or as provided at law or equity. Guarantor shall pay interest on the Guaranteed Obligations from such Default at the highest rate of interest charged on any of the Guaranteed Obligations.

ATTORNEYS' FEES AND OTHER COSTS OF COLLECTION. Guarantor shall pay all of Bank's and its affiliates' reasonable expenses incurred to enforce or collect any of the Guaranteed Obligations, including, without limitation, reasonable arbitration, paralegals', attorneys' and experts' fees and expenses, whether incurred without the commencement of a suit, in any suit, arbitration, or administrative proceeding, or in any appellate or bankruptcy proceeding.

SUBORDINATION OF OTHER DEBTS. Guarantor agrees: (a) to subordinate the obligations now or hereafter owed by Borrower to Guarantor ("Subordinated Debt") to any and all obligations of Borrower to Bank or its affiliates now or hereafter existing while this Guaranty is in effect, provided however that Guarantor may receive regularly scheduled principal and interest payments on the Subordinated Debt so long as (i) all sums due and payable by Borrower to Bank and its affiliates have been paid in full on or prior to such date, and (ii) no event or condition which constitutes or which with notice or the lapse of time would constitute an event of default with respect to the Guaranteed Obligations shall be continuing on or as of the payment date; (b) Guarantor will either place a legend indicating such subordination on every note, ledger page or other document evidencing any part of the Subordinated Debt or deliver such documents to Bank; and (c) except as permitted by this paragraph, Guarantor will not request or accept payment of or any security for any part of the Subordinated Debt, and any proceeds of the Subordinated Debt paid to Guarantor, through error or otherwise, shall immediately be forwarded to Bank by Guarantor, properly endorsed to the order of Bank, to apply to the Guaranteed Obligations.

MISCELLANEOUS. Assignment. This Guaranty and other Loan Documents shall inure to the benefit of and be binding upon the parties and their respective heirs, legal representatives, successors and assigns. Bank's interests in and rights under this Guaranty and other Loan Documents are freely assignable, in whole or in part, by Bank. Any assignment shall not release Guarantor from the Guaranteed Obligations. **Organization; Powers.** Guarantor (i) is (a) an adult individual and is sui juris, or (b) a corporation, general partnership, limited partnership, limited liability company or other legal entity (as indicated below), duly organized, validly existing and in good standing under the laws of its state of organization, and is authorized to do business in each other jurisdiction wherein its ownership of property or conduct of business legally requires such organization, (ii) has the power and authority to own its properties and assets and to carry on its business as now being conducted and as now contemplated; and (iii) has the power and authority to execute, deliver and perform, and by all necessary action has authorized the execution, delivery and performance of, all of its obligations under this Guaranty and any other Loan Document to which it is a party. **Applicable Law; Conflict Between Documents.** This Guaranty shall be governed by and construed under the laws of the state named in Bank's address shown above without regard to that state's conflict of laws principles. If the terms of this Guaranty should conflict with the terms of any commitment letter that survives closing, the terms of this Guaranty shall control. **Guarantor's Accounts.** Except as prohibited by law, Guarantor grants Bank and its affiliates a security interest in all of Guarantor's accounts with Bank and its affiliates. **Jurisdiction.** Guarantor irrevocably agrees to non-exclusive personal jurisdiction in the state named in Bank's address shown above. **Severability.** If any provision of this Guaranty or of the other Loan Documents shall be prohibited or invalid under applicable law, such provision shall be ineffective but only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Guaranty or other Loan Documents. **Notices.** Any notices to Guarantor shall be sufficiently given if in writing and mailed or delivered to Guarantor's address shown above or such other address as provided hereunder, and to Bank, if in writing and mailed or delivered to Wachovia Bank, National Association, Mail Code VA7628, P.O. Box 13327, Roanoke, VA 24040 or Wachovia Bank, National Association, Mail Code VA7628, 10 South Jefferson Street, Roanoke, VA 24011 or such other address as Bank may specify in writing from time to time. Notices to Bank must include the mail code. In the event that Guarantor changes Guarantor's address at any time prior to the date the Guaranteed Obligations are paid in full, Guarantor agrees to promptly give written notice of said change of address to Bank by registered or certified mail, return receipt requested, all charges prepaid. **Plural; Captions.** All references in the Loan Documents to borrower, guarantor, person, document or other nouns of reference mean both the singular and plural form, as the case may be, and the term "person" shall mean any individual person or entity. The captions contained in the Loan Documents are inserted for convenience only and shall not affect the meaning or

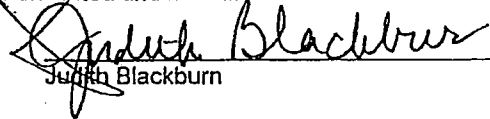
interpretation of the Loan Documents. **Binding Contract.** Guarantor by execution of and Bank by acceptance of this Guaranty agree that each party is bound to all terms and provisions of this Guaranty. **Amendments, Waivers and Remedies.** No waivers, amendments or modifications of this Guaranty and other Loan Documents shall be valid unless in writing and signed by an officer of Bank. No waiver by Bank or its affiliates of any Default shall operate as a waiver of any other Default or the same Default on a future occasion. Neither the failure nor any delay on the part of Bank or its affiliates in exercising any right, power, or privilege granted pursuant to this Guaranty and other Loan Documents shall operate as a waiver thereof, nor shall a single or partial exercise thereof preclude any other or further exercise or the exercise of any other right, power or privilege. All remedies available to Bank or its affiliates with respect to this Guaranty and other Loan Documents and remedies available at law or in equity shall be cumulative and may be pursued concurrently or successively. **Partnerships.** If Guarantor is a partnership, the obligations, liabilities and agreements on the part of Guarantor shall remain in full force and effect and fully applicable notwithstanding any changes in the individuals comprising the partnership. The term "Guarantor" includes any altered or successive partnerships, and predecessor partnership(s) and the partners shall not be released from any obligations or liabilities hereunder. **Loan Documents.** The term "Loan Documents" refers to all documents executed in connection with or related to the Guaranteed Obligations and may include, without limitation, commitment letters that survive closing, loan agreements, other guaranty agreements, security agreements, instruments, financing statements, mortgages, deeds of trust, deeds to secure debt, letters of credit and any amendments or supplements (excluding swap agreements as defined in 11 U.S.C. § 101, as in effect from time to time). **LIMITATION ON LIABILITY; WAIVER OF PUNITIVE DAMAGES.** EACH OF THE PARTIES HERETO, INCLUDING BANK BY ACCEPTANCE HEREOF, AGREES THAT IN ANY JUDICIAL, MEDIATION OR ARBITRATION PROCEEDING OR ANY CLAIM OR CONTROVERSY BETWEEN OR AMONG THEM THAT MAY ARISE OUT OF OR BE IN ANY WAY CONNECTED WITH THIS AGREEMENT, THE LOAN DOCUMENTS OR ANY OTHER AGREEMENT OR DOCUMENT BETWEEN OR AMONG THEM OR THE OBLIGATIONS EVIDENCED HEREBY OR RELATED HERETO, IN NO EVENT SHALL ANY PARTY HAVE A REMEDY OF, OR BE LIABLE TO THE OTHER FOR, (1) INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES OR (2) PUNITIVE OR EXEMPLARY DAMAGES. EACH OF THE PARTIES HEREBY EXPRESSLY WAIVES ANY RIGHT OR CLAIM TO PUNITIVE OR EXEMPLARY DAMAGES THEY MAY HAVE OR WHICH MAY ARISE IN THE FUTURE IN CONNECTION WITH ANY SUCH PROCEEDING, CLAIM OR CONTROVERSY, WHETHER THE SAME IS RESOLVED BY ARBITRATION, MEDIATION, JUDICIALLY OR OTHERWISE. **FINAL AGREEMENT.** This Agreement and the other Loan Documents represent the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

FINANCIAL AND OTHER INFORMATION. Guarantor shall deliver to Bank such information as Bank may reasonably request from time to time, including without limitation, financial statements and information pertaining to Guarantor's financial condition. Such information shall be true, complete, and accurate.

NEGATIVE COVENANTS. Guarantor agrees that from the date hereof and until final payment in full of the Guaranteed Obligations, unless Bank shall otherwise consent in writing, Guarantor will not: **Default on Other Contracts or Obligations.** Default on any material contract with or obligation when due to a third party or default in the performance of any obligation to a third party incurred for money borrowed. **Government Intervention.** Permit the assertion or making of any seizure, vesting or intervention by or under authority of any governmental entity, as a result of which the management of Guarantor or any guarantor is displaced of its authority in the conduct of its respective business or such business is curtailed or materially impaired. **Judgment Entered.** Permit the entry of any monetary judgment or the assessment against, the filing of any tax lien against, or the issuance of any writ of garnishment or attachment against any property of or debts due. **Retire or Repurchase Capital Stock.** Retire or otherwise acquire any of its capital stock.

WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF GUARANTOR BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS GUARANTY, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS GUARANTY, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS GUARANTY. EACH OF THE PARTIES AGREES THAT THE TERMS HEREOF SHALL SUPERSEDE AND REPLACE ANY PRIOR AGREEMENT RELATED TO ARBITRATION OF DISPUTES BETWEEN THE PARTIES CONTAINED IN ANY LOAN DOCUMENT OR ANY OTHER DOCUMENT OR AGREEMENT HERETOFORE EXECUTED IN CONNECTION WITH, RELATED TO OR BEING REPLACED, SUPPLEMENTED, EXTENDED OR MODIFIED BY, THIS GUARANTY.

IN WITNESS WHEREOF, Guarantor, on the day and year first written above, has caused this Unconditional Guaranty to be executed under seal.

 (SEAL)
Judith Blackburn

Tracking #: 1026160208
Facility ID 1026110097

UNCONDITIONAL GUARANTY

February 14, 2006

William E. Blackburn
307 63rd Avenue North
Myrtle Beach, South Carolina 29572
(Hereinafter referred to as "Borrower")

Watson E. Felder
549 Mary Lou Ave.
Murrells Inlet, South Carolina 29576
(Hereinafter referred to as "Guarantor")

Wachovia Bank, National Association
Greenville, South Carolina 29601
(Hereinafter referred to as "Bank")

To induce Bank to make, extend or renew loans, advances, credit, or other financial accommodations to or for the benefit of Borrower, which are and will be to the direct interest and advantage of the Guarantor, and in consideration of loans, advances, credit, or other financial accommodations made, extended or renewed to or for the benefit of Borrower, which are and will be to the direct interest and advantage of the Guarantor, Guarantor hereby absolutely, irrevocably and unconditionally guarantees to Bank and its successors, assigns and affiliates the timely payment and performance of all liabilities and obligations of Borrower to Bank and its affiliates, including, but not limited to, all obligations under any notes, loan agreements, security agreements, letters of credit, instruments, accounts receivable, contracts, drafts, leases, chattel paper, indemnities, acceptances, repurchase agreements, overdrafts, and the Loan Documents, as defined below, and all obligations of Borrower to Bank or any of its affiliates under any swap agreement (as defined in 11 U.S.C. § 101, as in effect from time to time), however and whenever incurred or evidenced, whether primary, secondary, direct, indirect, absolute, contingent, due or to become due, now existing or hereafter contracted or acquired, and all modifications, extensions and renewals thereof, (collectively, the "Guaranteed Obligations").

Guarantor further covenants and agrees:

GUARANTOR'S LIABILITY. This Guaranty is a continuing and unconditional guaranty of payment and performance and not of collection. The parties to this Guaranty are jointly and severally obligated hereunder. This Guaranty does not impose any obligation on Bank to extend or continue to extend credit or otherwise deal with Borrower at any subsequent time. This Guaranty shall continue to be effective or be reinstated, as the case may be, if at any time any payment of the Guaranteed Obligations is rescinded, avoided or for any other reason must be returned by Bank, and the returned payment shall remain payable as part of the Guaranteed Obligations, all as though such payment had not been made. Except to the extent the provisions of this Guaranty give Bank additional rights, this Guaranty shall not be deemed to supersede or replace any other guaranties given to Bank by Guarantor; and the obligations guaranteed hereby shall be in addition to any other obligations guaranteed by Guarantor pursuant to any other agreement of guaranty given to Bank and other guaranties of the Guaranteed Obligations.

TERMINATION OF GUARANTY. Guarantor may terminate this Guaranty only by written notice, delivered personally to or received by certified or registered United States Mail by an authorized officer of Bank at the address for notices provided herein. Such termination shall be effective only with respect to Guaranteed Obligations arising more than 15 days after the date such written notice is received by said Bank officer. Such termination shall not be effective with respect to Guaranteed Obligations (including

any subsequent extensions, modifications or compromises of the Guaranteed Obligations) then existing, or Guaranteed Obligations arising subsequent to receipt by Bank of said notice if such Guaranteed Obligations are a result of Bank's obligation to make advances pursuant to a commitment, or are based on Borrower's obligations to make payments pursuant to any swap agreement (as defined in 11 U.S.C. § 101, as in effect from time to time), entered into prior to expiration of the 15 day notice period, or are a result of advances which are necessary for Bank to protect its collateral or otherwise preserve its interests. Termination of this Guaranty by any single Guarantor will not affect the existing and continuing obligations of any other Guarantor hereunder.

CONSENT TO MODIFICATIONS. Guarantor consents and agrees that Bank (and, with respect to swap obligations, its affiliates) may from time to time, in its sole discretion, without affecting, impairing, lessening or releasing the obligations of Guarantor hereunder: (a) extend or modify the time, manner, place or terms of payment or performance and/or otherwise change or modify the credit terms of the Guaranteed Obligations; (b) increase, renew, or enter into a novation of the Guaranteed Obligations; (c) waive or consent to the departure from terms of the Guaranteed Obligations; (d) permit any change in the business or other dealings and relations of Borrower or any other guarantor with Bank; (e) proceed against, exchange, release, realize upon, or otherwise deal with in any manner any collateral that is or may be held by Bank in connection with the Guaranteed Obligations or any liabilities or obligations of Guarantor; and (f) proceed against, settle, release, or compromise with Borrower, any insurance carrier, or any other person or entity liable as to any part of the Guaranteed Obligations, and/or subordinate the payment of any part of the Guaranteed Obligations to the payment of any other obligations, which may at any time be due or owing to Bank; all in such manner and upon such terms as Bank may deem appropriate, and without notice to or further consent from Guarantor. No invalidity, irregularity, discharge or unenforceability of, or action or omission by Bank relating to any part of the Guaranteed Obligations or any security therefor shall affect or impair this Guaranty.

WAIVERS AND ACKNOWLEDGMENTS. Guarantor waives and releases the following rights, demands, and defenses Guarantor may have with respect to Bank (and, with respect to swap obligations, its affiliates) and collection of the Guaranteed Obligations: (a) promptness and diligence in collection of any of the Guaranteed Obligations from Borrower or any other person liable thereon, and in foreclosure of any security interest and sale of any property serving as collateral for the Guaranteed Obligations; (b) any law or statute that requires that Bank (and, with respect to swap obligations, its affiliates) make demand upon, assert claims against, or collect from Borrower or other persons or entities, foreclose any security interest, sell collateral, exhaust any remedies, or take any other action against Borrower or other persons or entities prior to making demand upon, collecting from or taking action against Guarantor with respect to the Guaranteed Obligations, including any such rights Guarantor might otherwise have had under Va. Code §§ 49-25 and 49-26, et seq., N.C.G.S. §§ 26-7, et seq., Tenn. Code Ann. § 47-12-101, O.C.G.A. § 10-7-24, Mississippi Code Ann. Section 87-5-1, and any successor statute and any other applicable law; (c) any law or statute that requires that Borrower or any other person be joined in, notified of or made part of any action against Guarantor; (d) that Bank or its affiliates preserve, insure or perfect any security interest in collateral or sell or dispose of collateral in a particular manner or at a particular time, provided that Bank's obligation to dispose of Collateral in a commercially reasonable manner is not waived hereby; (e) notice of extensions, modifications, renewals, or novations of the Guaranteed Obligations, of any new transactions or other relationships between Bank, Borrower and/or any guarantor, and of changes in the financial condition of, ownership of, or business structure of Borrower or any other guarantor; (f) presentment, protest, notice of dishonor, notice of default, demand for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, notice of sale, and all other notices of any kind whatsoever to which Guarantor may be entitled; (g) the right to assert against Bank or its affiliates any defense (legal or equitable), set-off, counterclaim, or claim that Guarantor may have at any time against Borrower or any other party liable to Bank or its affiliates; (h) all defenses relating to invalidity, insufficiency, unenforceability, enforcement, release or impairment of Bank or its affiliates' lien on any collateral, of the Loan Documents, or of any other guaranties held by Bank; (i) any right to which Guarantor is or may become entitled to be subrogated to Bank or its affiliates' rights against Borrower or to seek contribution, reimbursement, indemnification, payment or the like, or

participation in any claim, right or remedy of Bank or its affiliates against Borrower or any security which Bank or its affiliates now has or hereafter acquires, until such time as the Guaranteed Obligations have been fully satisfied beyond the expiration of any applicable preference period; (j) any claim or defense that acceleration of maturity of the Guaranteed Obligations is stayed against Guarantor because of the stay of assertion or of acceleration of claims against any other person or entity for any reason including the bankruptcy or insolvency of that person or entity; and (k) the right to marshalling of Borrower's assets or the benefit of any exemption claimed by Guarantor. Guarantor acknowledges and represents that Guarantor has relied upon Guarantor's own due diligence in making an independent appraisal of Borrower, Borrower's business affairs and financial condition, and any collateral; Guarantor will continue to be responsible for making an independent appraisal of such matters; and Guarantor has not relied upon Bank or its affiliates for information regarding Borrower or any collateral.

FINANCIAL CONDITION. Guarantor warrants, represents and covenants to Bank and its affiliates that on and after the date hereof: (a) the fair saleable value of Guarantor's assets exceeds its liabilities, Guarantor is meeting its current liabilities as they mature, and Guarantor is and shall remain solvent; (b) all financial statements of Guarantor furnished to Bank are correct and accurately reflect the financial condition of Guarantor as of the respective dates thereof; (c) since the date of such financial statements, there has not occurred a material adverse change in the financial condition of Guarantor; (d) there are not now pending any court or administrative proceedings or undischarged judgments against Guarantor, no federal or state tax liens have been filed or threatened against Guarantor, and Guarantor is not in default or claimed default under any agreement; and (e) at such reasonable times as Bank requests, Guarantor will furnish Bank and its affiliates with such other financial information as Bank and its affiliates may reasonably request.

INTEREST AND APPLICATION OF PAYMENTS. Regardless of any other provision of this Guaranty or other Loan Documents, if for any reason the effective interest on any of the Guaranteed Obligations should exceed the maximum lawful interest, the effective interest shall be deemed reduced to and shall be such maximum lawful interest, and any sums of interest which have been collected in excess of such maximum lawful interest shall be applied as a credit against the unpaid principal balance of the Guaranteed Obligations. Monies received from any source by Bank or its affiliates for application toward payment of the Guaranteed Obligations may be applied to such Guaranteed Obligations in any manner or order deemed appropriate by Bank and its affiliates.

DEFAULT. If any of the following events occur, a default ("Default") under this Guaranty shall exist: (a) failure of timely payment or performance of the Guaranteed Obligations or a default under any Loan Document; (b) a breach of any agreement or representation contained or referred to in the Guaranty, or any of the Loan Documents, or contained in any other contract or agreement of Guarantor with Bank or its affiliates, whether now existing or hereafter arising; (c) the death of, appointment of a guardian for, dissolution of, termination of existence of, loss of good standing status by, appointment of a receiver for, assignment for the benefit of creditors of, or the commencement of any insolvency or bankruptcy proceeding by or against Guarantor or any general partner of or the holder(s) of the majority ownership interests of Guarantor; and/or (d) Bank determines in good faith, in its sole discretion, that the prospects for payment or performance of the Guaranteed Obligations are impaired or a material adverse change has occurred in the business or prospects of Borrower or Guarantor, financial or otherwise.

If a Default occurs, the Guaranteed Obligations shall be due immediately and payable without notice, other than Guaranteed Obligations under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) with Bank or its affiliates, which shall be due in accordance with and governed by the provisions of said swap agreements, and, Bank and its affiliates may exercise any rights and remedies as provided in this Guaranty and other Loan Documents, or as provided at law or equity. Guarantor shall pay interest on the Guaranteed Obligations from such Default at the highest rate of interest charged on any of the Guaranteed Obligations.

ATTORNEYS' FEES AND OTHER COSTS OF COLLECTION. Guarantor shall pay all of Bank's and its affiliates' reasonable expenses incurred to enforce or collect any of the Guaranteed Obligations, including, without limitation, reasonable arbitration, paralegals', attorneys' and experts' fees and expenses, whether incurred without the commencement of a suit, in any suit, arbitration, or administrative proceeding, or in any appellate or bankruptcy proceeding.

SUBORDINATION OF OTHER DEBTS. Guarantor agrees: (a) to subordinate the obligations now or hereafter owed by Borrower to Guarantor ("Subordinated Debt") to any and all obligations of Borrower to Bank or its affiliates now or hereafter existing while this Guaranty is in effect, provided however that Guarantor may receive regularly scheduled principal and interest payments on the Subordinated Debt so long as (i) all sums due and payable by Borrower to Bank and its affiliates have been paid in full on or prior to such date, and (ii) no event or condition which constitutes or which with notice or the lapse of time would constitute an event of default with respect to the Guaranteed Obligations shall be continuing on or as of the payment date; (b) Guarantor will either place a legend indicating such subordination on every note, ledger page or other document evidencing any part of the Subordinated Debt or deliver such documents to Bank; and (c) except as permitted by this paragraph, Guarantor will not request or accept payment of or any security for any part of the Subordinated Debt, and any proceeds of the Subordinated Debt paid to Guarantor, through error or otherwise, shall immediately be forwarded to Bank by Guarantor, properly endorsed to the order of Bank, to apply to the Guaranteed Obligations.

MISCELLANEOUS. Assignment. This Guaranty and other Loan Documents shall inure to the benefit of and be binding upon the parties and their respective heirs, legal representatives, successors and assigns. Bank's interests in and rights under this Guaranty and other Loan Documents are freely assignable, in whole or in part, by Bank. Any assignment shall not release Guarantor from the Guaranteed Obligations. **Organization; Powers.** Guarantor (i) is (a) an adult individual and is sui juris, or (b) a corporation, general partnership, limited partnership, limited liability company or other legal entity (as indicated below), duly organized, validly existing and in good standing under the laws of its state of organization, and is authorized to do business in each other jurisdiction wherein its ownership of property or conduct of business legally requires such organization, (ii) has the power and authority to own its properties and assets and to carry on its business as now being conducted and as now contemplated; and (iii) has the power and authority to execute, deliver and perform, and by all necessary action has authorized the execution, delivery and performance of, all of its obligations under this Guaranty and any other Loan Document to which it is a party. **Applicable Law; Conflict Between Documents.** This Guaranty shall be governed by and construed under the laws of the state named in Bank's address shown above without regard to that state's conflict of laws principles. If the terms of this Guaranty should conflict with the terms of any commitment letter that survives closing, the terms of this Guaranty shall control. **Guarantor's Accounts.** Except as prohibited by law, Guarantor grants Bank and its affiliates a security interest in all of Guarantor's accounts with Bank and its affiliates. **Jurisdiction.** Guarantor irrevocably agrees to non-exclusive personal jurisdiction in the state named in Bank's address shown above. **Severability.** If any provision of this Guaranty or of the other Loan Documents shall be prohibited or invalid under applicable law, such provision shall be ineffective but only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Guaranty or other Loan Documents. **Notices.** Any notices to Guarantor shall be sufficiently given if in writing and mailed or delivered to Guarantor's address shown above or such other address as provided hereunder, and to Bank, if in writing and mailed or delivered to Wachovia Bank, National Association, Mail Code VA7628, P.O. Box 13327, Roanoke, VA 24040 or Wachovia Bank, National Association, Mail Code VA7628, 10 South Jefferson Street, Roanoke, VA 24011 or such other address as Bank may specify in writing from time to time. Notices to Bank must include the mail code. In the event that Guarantor changes Guarantor's address at any time prior to the date the Guaranteed Obligations are paid in full, Guarantor agrees to promptly give written notice of said change of address to Bank by registered or certified mail, return receipt requested, all charges prepaid. **Plural; Captions.** All references in the Loan Documents to borrower, guarantor, person, document or other nouns of reference mean both the singular and plural form, as the case may be, and the term "person" shall mean any individual person or entity. The captions contained in the Loan Documents are inserted for convenience only and shall not affect the meaning or

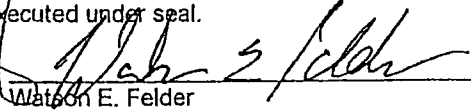
interpretation of the Loan Documents. **Binding Contract.** Guarantor by execution of and Bank by acceptance of this Guaranty agree that each party is bound to all terms and provisions of this Guaranty. **Amendments, Waivers and Remedies.** No waivers, amendments or modifications of this Guaranty and other Loan Documents shall be valid unless in writing and signed by an officer of Bank. No waiver by Bank or its affiliates of any Default shall operate as a waiver of any other Default or the same Default on a future occasion. Neither the failure nor any delay on the part of Bank or its affiliates in exercising any right, power, or privilege granted pursuant to this Guaranty and other Loan Documents shall operate as a waiver thereof, nor shall a single or partial exercise thereof preclude any other or further exercise or the exercise of any other right, power or privilege. All remedies available to Bank or its affiliates with respect to this Guaranty and other Loan Documents and remedies available at law or in equity shall be cumulative and may be pursued concurrently or successively. **Partnerships.** If Guarantor is a partnership, the obligations, liabilities and agreements on the part of Guarantor shall remain in full force and effect and fully applicable notwithstanding any changes in the individuals comprising the partnership. The term "Guarantor" includes any altered or successive partnerships, and predecessor partnership(s) and the partners shall not be released from any obligations or liabilities hereunder. **Loan Documents.** The term "Loan Documents" refers to all documents executed in connection with or related to the Guaranteed Obligations and may include, without limitation, commitment letters that survive closing, loan agreements, other guaranty agreements, security agreements, instruments, financing statements, mortgages, deeds of trust, deeds to secure debt, letters of credit and any amendments or supplements (excluding swap agreements as defined in 11 U.S.C. § 101, as in effect from time to time). **LIMITATION ON LIABILITY; WAIVER OF PUNITIVE DAMAGES.** EACH OF THE PARTIES HERETO, INCLUDING BANK BY ACCEPTANCE HEREOF, AGREES THAT IN ANY JUDICIAL, MEDIATION OR ARBITRATION PROCEEDING OR ANY CLAIM OR CONTROVERSY BETWEEN OR AMONG THEM THAT MAY ARISE OUT OF OR BE IN ANY WAY CONNECTED WITH THIS AGREEMENT, THE LOAN DOCUMENTS OR ANY OTHER AGREEMENT OR DOCUMENT BETWEEN OR AMONG THEM OR THE OBLIGATIONS EVIDENCED HEREBY OR RELATED HERETO, IN NO EVENT SHALL ANY PARTY HAVE A REMEDY OF, OR BE LIABLE TO THE OTHER FOR, (1) INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES OR (2) PUNITIVE OR EXEMPLARY DAMAGES. EACH OF THE PARTIES HEREBY EXPRESSLY WAIVES ANY RIGHT OR CLAIM TO PUNITIVE OR EXEMPLARY DAMAGES THEY MAY HAVE OR WHICH MAY ARISE IN THE FUTURE IN CONNECTION WITH ANY SUCH PROCEEDING, CLAIM OR CONTROVERSY, WHETHER THE SAME IS RESOLVED BY ARBITRATION, MEDIATION, JUDICIALLY OR OTHERWISE. **FINAL AGREEMENT.** This Agreement and the other Loan Documents represent the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

FINANCIAL AND OTHER INFORMATION. Guarantor shall deliver to Bank such information as Bank may reasonably request from time to time, including without limitation, financial statements and information pertaining to Guarantor's financial condition. Such information shall be true, complete, and accurate.

NEGATIVE COVENANTS. Guarantor agrees that from the date hereof and until final payment in full of the Guaranteed Obligations, unless Bank shall otherwise consent in writing, Guarantor will not: **Default on Other Contracts or Obligations.** Default on any material contract with or obligation when due to a third party or default in the performance of any obligation to a third party incurred for money borrowed. **Government Intervention.** Permit the assertion or making of any seizure, vesting or intervention by or under authority of any governmental entity, as a result of which the management of Guarantor or any guarantor is displaced of its authority in the conduct of its respective business or such business is curtailed or materially impaired. **Judgment Entered.** Permit the entry of any monetary judgment or the assessment against, the filing of any tax lien against, or the issuance of any writ of garnishment or attachment against any property of or debts due. **Retire or Repurchase Capital Stock.** Retire or otherwise acquire any of its capital stock.

WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF GUARANTOR BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS GUARANTY, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS GUARANTY, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS GUARANTY. EACH OF THE PARTIES AGREES THAT THE TERMS HEREOF SHALL SUPERSEDE AND REPLACE ANY PRIOR AGREEMENT RELATED TO ARBITRATION OF DISPUTES BETWEEN THE PARTIES CONTAINED IN ANY LOAN DOCUMENT OR ANY OTHER DOCUMENT OR AGREEMENT HERETOFORE EXECUTED IN CONNECTION WITH, RELATED TO OR BEING REPLACED, SUPPLEMENTED, EXTENDED OR MODIFIED BY, THIS GUARANTY.

IN WITNESS WHEREOF, Guarantor, on the day and year first written above, has caused this Unconditional Guaranty to be executed under seal.

 (SEAL)
Watson E. Felder

Tracking #: 1026160208
Facility ID 1026110097

UNCONDITIONAL GUARANTY

February 14, 2006

William E. Blackburn
307 63rd Avenue North
Myrtle Beach, South Carolina 29572
(Hereinafter referred to as "Borrower")

Tammy S. Winner
120 8th Ave. North #104
Myrtle Beach, South Carolina 29575
(Hereinafter referred to as "Guarantor")

Wachovia Bank, National Association
Greenville, South Carolina 29601
(Hereinafter referred to as "Bank")

To induce Bank to make, extend or renew loans, advances, credit, or other financial accommodations to or for the benefit of Borrower, which are and will be to the direct interest and advantage of the Guarantor, and in consideration of loans, advances, credit, or other financial accommodations made, extended or renewed to or for the benefit of Borrower, which are and will be to the direct interest and advantage of the Guarantor, Guarantor hereby absolutely, irrevocably and unconditionally guarantees to Bank and its successors, assigns and affiliates the timely payment and performance of all liabilities and obligations of Borrower to Bank and its affiliates, including, but not limited to, all obligations under any notes, loan agreements, security agreements, letters of credit, instruments, accounts receivable, contracts, drafts, leases, chattel paper, indemnities, acceptances, repurchase agreements, overdrafts, and the Loan Documents, as defined below, and all obligations of Borrower to Bank or any of its affiliates under any swap agreement (as defined in 11 U.S.C. § 101, as in effect from time to time), however and whenever incurred or evidenced, whether primary, secondary, direct, indirect, absolute, contingent, due or to become due, now existing or hereafter contracted or acquired, and all modifications, extensions and renewals thereof, (collectively, the "Guaranteed Obligations").

Guarantor further covenants and agrees:

GUARANTOR'S LIABILITY. This Guaranty is a continuing and unconditional guaranty of payment and performance and not of collection. The parties to this Guaranty are jointly and severally obligated hereunder. This Guaranty does not impose any obligation on Bank to extend or continue to extend credit or otherwise deal with Borrower at any subsequent time. This Guaranty shall continue to be effective or be reinstated, as the case may be, if at any time any payment of the Guaranteed Obligations is rescinded, avoided or for any other reason must be returned by Bank, and the returned payment shall remain payable as part of the Guaranteed Obligations, all as though such payment had not been made. Except to the extent the provisions of this Guaranty give Bank additional rights, this Guaranty shall not be deemed to supersede or replace any other guaranties given to Bank by Guarantor; and the obligations guaranteed hereby shall be in addition to any other obligations guaranteed by Guarantor pursuant to any other agreement of guaranty given to Bank and other guaranties of the Guaranteed Obligations.

TERMINATION OF GUARANTY. Guarantor may terminate this Guaranty only by written notice, delivered personally to or received by certified or registered United States Mail by an authorized officer of Bank at the address for notices provided herein. Such termination shall be effective only with respect to Guaranteed Obligations arising more than 15 days after the date such written notice is received by said Bank officer. Such termination shall not be effective with respect to Guaranteed Obligations (including

any subsequent extensions, modifications or compromises of the Guaranteed Obligations) then existing, or Guaranteed Obligations arising subsequent to receipt by Bank of said notice if such Guaranteed Obligations are a result of Bank's obligation to make advances pursuant to a commitment, or are based on Borrower's obligations to make payments pursuant to any swap agreement (as defined in 11 U.S.C. § 101, as in effect from time to time), entered into prior to expiration of the 15 day notice period, or are a result of advances which are necessary for Bank to protect its collateral or otherwise preserve its interests. Termination of this Guaranty by any single Guarantor will not affect the existing and continuing obligations of any other Guarantor hereunder.

CONSENT TO MODIFICATIONS. Guarantor consents and agrees that Bank (and, with respect to swap obligations, its affiliates) may from time to time, in its sole discretion, without affecting, impairing, lessening or releasing the obligations of Guarantor hereunder: (a) extend or modify the time, manner, place or terms of payment or performance and/or otherwise change or modify the credit terms of the Guaranteed Obligations; (b) increase, renew, or enter into a novation of the Guaranteed Obligations; (c) waive or consent to the departure from terms of the Guaranteed Obligations; (d) permit any change in the business or other dealings and relations of Borrower or any other guarantor with Bank; (e) proceed against, exchange, release, realize upon, or otherwise deal with in any manner any collateral that is or may be held by Bank in connection with the Guaranteed Obligations or any liabilities or obligations of Guarantor; and (f) proceed against, settle, release, or compromise with Borrower, any insurance carrier, or any other person or entity liable as to any part of the Guaranteed Obligations, and/or subordinate the payment of any part of the Guaranteed Obligations to the payment of any other obligations, which may at any time be due or owing to Bank; all in such manner and upon such terms as Bank may deem appropriate, and without notice to or further consent from Guarantor. No invalidity, irregularity, discharge or unenforceability of, or action or omission by Bank relating to any part of the Guaranteed Obligations or any security therefor shall affect or impair this Guaranty.

WAIVERS AND ACKNOWLEDGMENTS. Guarantor waives and releases the following rights, demands, and defenses Guarantor may have with respect to Bank (and, with respect to swap obligations, its affiliates) and collection of the Guaranteed Obligations: (a) promptness and diligence in collection of any of the Guaranteed Obligations from Borrower or any other person liable thereon, and in foreclosure of any security interest and sale of any property serving as collateral for the Guaranteed Obligations; (b) any law or statute that requires that Bank (and, with respect to swap obligations, its affiliates) make demand upon, assert claims against, or collect from Borrower or other persons or entities, foreclose any security interest, sell collateral, exhaust any remedies, or take any other action against Borrower or other persons or entities prior to making demand upon, collecting from or taking action against Guarantor with respect to the Guaranteed Obligations, including any such rights Guarantor might otherwise have had under Va. Code §§ 49-25 and 49-26, *et seq.*, N.C.G.S. §§ 26-7, *et seq.*, Tenn. Code Ann. § 47-12-101, O.C.G.A. § 10-7-24, Mississippi Code Ann. Section 87-5-1, and any successor statute and any other applicable law; (c) any law or statute that requires that Borrower or any other person be joined in, notified of or made part of any action against Guarantor; (d) that Bank or its affiliates preserve, insure or perfect any security interest in collateral or sell or dispose of collateral in a particular manner or at a particular time, provided that Bank's obligation to dispose of Collateral in a commercially reasonable manner is not waived hereby; (e) notice of extensions, modifications, renewals, or novations of the Guaranteed Obligations, of any new transactions or other relationships between Bank, Borrower and/or any guarantor, and of changes in the financial condition of, ownership of, or business structure of Borrower or any other guarantor; (f) presentment, protest, notice of dishonor, notice of default, demand for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, notice of sale, and all other notices of any kind whatsoever to which Guarantor may be entitled; (g) the right to assert against Bank or its affiliates any defense (legal or equitable), set-off, counterclaim, or claim that Guarantor may have at any time against Borrower or any other party liable to Bank or its affiliates; (h) all defenses relating to invalidity, insufficiency, unenforceability, enforcement, release or impairment of Bank or its affiliates' lien on any collateral, of the Loan Documents, or of any other guaranties held by Bank; (i) any right to which Guarantor is or may become entitled to be subrogated to Bank or its affiliates' rights against Borrower or to seek contribution, reimbursement, indemnification, payment or the like, or

participation in any claim, right or remedy of Bank or its affiliates against Borrower or any security which Bank or its affiliates now has or hereafter acquires, until such time as the Guaranteed Obligations have been fully satisfied beyond the expiration of any applicable preference period; (j) any claim or defense that acceleration of maturity of the Guaranteed Obligations is stayed against Guarantor because of the stay of assertion or of acceleration of claims against any other person or entity for any reason including the bankruptcy or insolvency of that person or entity; and (k) the right to marshalling of Borrower's assets or the benefit of any exemption claimed by Guarantor. Guarantor acknowledges and represents that Guarantor has relied upon Guarantor's own due diligence in making an independent appraisal of Borrower, Borrower's business affairs and financial condition, and any collateral; Guarantor will continue to be responsible for making an independent appraisal of such matters; and Guarantor has not relied upon Bank or its affiliates for information regarding Borrower or any collateral.

FINANCIAL CONDITION. Guarantor warrants, represents and covenants to Bank and its affiliates that on and after the date hereof: (a) the fair saleable value of Guarantor's assets exceeds its liabilities, Guarantor is meeting its current liabilities as they mature, and Guarantor is and shall remain solvent; (b) all financial statements of Guarantor furnished to Bank are correct and accurately reflect the financial condition of Guarantor as of the respective dates thereof; (c) since the date of such financial statements, there has not occurred a material adverse change in the financial condition of Guarantor; (d) there are not now pending any court or administrative proceedings or undischarged judgments against Guarantor, no federal or state tax liens have been filed or threatened against Guarantor, and Guarantor is not in default or claimed default under any agreement; and (e) at such reasonable times as Bank requests, Guarantor will furnish Bank and its affiliates with such other financial information as Bank and its affiliates may reasonably request.

INTEREST AND APPLICATION OF PAYMENTS. Regardless of any other provision of this Guaranty or other Loan Documents, if for any reason the effective interest on any of the Guaranteed Obligations should exceed the maximum lawful interest, the effective interest shall be deemed reduced to and shall be such maximum lawful interest, and any sums of interest which have been collected in excess of such maximum lawful interest shall be applied as a credit against the unpaid principal balance of the Guaranteed Obligations. Monies received from any source by Bank or its affiliates for application toward payment of the Guaranteed Obligations may be applied to such Guaranteed Obligations in any manner or order deemed appropriate by Bank and its affiliates.

DEFAULT. If any of the following events occur, a default ("Default") under this Guaranty shall exist: (a) failure of timely payment or performance of the Guaranteed Obligations or a default under any Loan Document; (b) a breach of any agreement or representation contained or referred to in the Guaranty, or any of the Loan Documents, or contained in any other contract or agreement of Guarantor with Bank or its affiliates, whether now existing or hereafter arising; (c) the death of, appointment of a guardian for, dissolution of, termination of existence of, loss of good standing status by, appointment of a receiver for, assignment for the benefit of creditors of, or the commencement of any insolvency or bankruptcy proceeding by or against Guarantor or any general partner of or the holder(s) of the majority ownership interests of Guarantor; and/or (d) Bank determines in good faith, in its sole discretion, that the prospects for payment or performance of the Guaranteed Obligations are impaired or a material adverse change has occurred in the business or prospects of Borrower or Guarantor, financial or otherwise.

If a Default occurs, the Guaranteed Obligations shall be due immediately and payable without notice, other than Guaranteed Obligations under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) with Bank or its affiliates, which shall be due in accordance with and governed by the provisions of said swap agreements, and, Bank and its affiliates may exercise any rights and remedies as provided in this Guaranty and other Loan Documents, or as provided at law or equity. Guarantor shall pay interest on the Guaranteed Obligations from such Default at the highest rate of interest charged on any of the Guaranteed Obligations.

ATTORNEYS' FEES AND OTHER COSTS OF COLLECTION. Guarantor shall pay all of Bank's and its affiliates' reasonable expenses incurred to enforce or collect any of the Guaranteed Obligations, including, without limitation, reasonable arbitration, paralegals', attorneys' and experts' fees and expenses, whether incurred without the commencement of a suit, in any suit, arbitration, or administrative proceeding, or in any appellate or bankruptcy proceeding.

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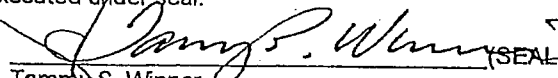
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IN WITNESS WHEREOF, Guarantor, on the day and year first written above, has caused this Unconditional Guaranty to be executed under seal.


Tammy S. Winner (SEAL)

Tracking #: 1026160208
Facility ID 1028110097

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FOR THE
FIFTEENTH JUDICIAL CIRCUIT

C/A 2008-CP-22-1598

Wachovia Bank, National Association,)
Plaintiff,)

Vs.)

William E. Blackburn; Judith Blackburn,)
Tammy S. Winner; Watson E. Felder;)
Gary F. Ownbey; and South Island)
Plantation Association, Inc.,)
Defendants.)

ANSWER
(JURY TRIAL DEMANDED)

FILED
GEORGETOWN COUNTY, S.C.
2009 JAN 30 PM 3:23
ALMA Y. WHITE
CLERK OF COURT

Now come the Defendants William E. and Judith Blackburn, through counsel, who answer the Complaint as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not hereinafter specifically admitted is denied and strict proof demanded thereof.

FOR A SECOND DEFENSE

2. Defendants are without sufficient information to admit or deny paragraph 1 and therefore demand strict proof thereof.

3. Defendants admit so much of paragraph 2 as applies to these Defendants; as to the remaining Defendants, these Defendants are without sufficient information to admit or deny the remainder of paragraph 2 and therefore demand strict proof thereof.

4. Defendants admit paragraphs 3 and 4.

5. Defendants believe the documents speak for themselves and any allegations of

paragraphs 5, 6 and 7 which are inconsistent with the referenced documents are denied.

6. Defendants are without sufficient information to admit or deny paragraph 8 and therefore demand strict proof thereof.

7. Defendants deny paragraphs 9, 10, 11 and 12 and will assert certain defenses to negate any allegations of default, acceleration, right to foreclosure, and amounts due.

8. Defendants state that the documents speak for themselves and deny any allegations of paragraph 13 inconsistent with the documents; further, that any purported right to attorney's fees has not been triggered in this matter as to these Defendants.

9. Defendants deny paragraph 14.

10. Defendants admit paragraph 15.

11. Defendants admit paragraph 16, but deny that said claim is valid or enforceable.

12. Defendants deny paragraph 17.

13. Defendants acknowledge the reservation made in paragraph 18, but deny that Plaintiff has the right to the relief sought therein.

14. Defendants reiterate herein all the other allegations of this Answer as if repeated verbatim as to paragraph 19.

15. Defendants state that the documents speak for themselves and deny any allegations of paragraph 20 inconsistent with the documents; further, Defendants deny that Plaintiff is entitled to any relief pursuant to those documents.

16. Defendants deny paragraphs 21 and 22.

17. As to all the claims in the Complaint, along with the defenses presented in this Answer and any subsequent pleadings, Defendants request that they be awarded a jury trial.

gwa
#2

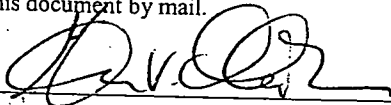
WHEREFORE, Defendants pray for the following relief from this Honorable Court:

- A. Dismissal of the Complaint with costs assessed to Plaintiff;
- B. Grant of reasonable costs to Defendants;
- C. Such other and further relief as the Court deems just and proper.

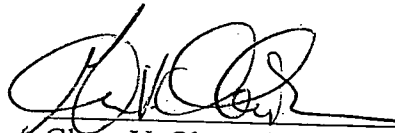
January 28, 2009

Certificate of Service

I hereby certify that on the above date, I caused to be served on counsel of record a true and accurate copy of this document by mail.



OHANESIAN & OHANESIAN



Glenn V. Ohanesian

OHANESIAN & OHANESIAN

P. O. Box 2433

Myrtle Beach, South Carolina 29578

(843) 626-7193

ATTORNEY FOR DEFENDANTS

WILLIAM E. & JUDITH BLACKBURN

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FOR THE
FIFTEENTH JUDICIAL CIRCUIT

C/A 2008-CP-22-1598

Wachovia Bank, National Association,)
)

Plaintiff,)
)

Vs.)

**AMENDED ANSWER, COUNTERCLAIM,
CROSS-CLAIM AND THIRD PARTY
COMPLAINT**

William E. Blackburn; Judith Blackburn,)
Tammy S. Winner; Watson E. Felder;)
Gary F. Ownbey; and South Island)
Plantation Association, Inc.,)
)

(JURY TRIAL DEMANDED)

Defendants.)
)

And)
)

William E. and Judith Blackburn,)
individually and as Assignees,)
)

Third Party Plaintiffs,)
)

Vs.)
)

Winyah Bay Holdings, LLC;)
Source One Properties, LLC; and)
Waterpointe Realty, LLC,)
)

Third Party Defendants.)
)

FILED
GEORGETOWN COUNTY, S.C.
2009 FEB 13 PM 4:59
ALISA Y. WHITE
CLERK OF COURT

Now come the Defendants William E. and Judith Blackburn, through counsel, who answer
the Complaint as follows:

Two
#1

FOR A FIRST DEFENSE

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FOR A SECOND DEFENSE

2. Defendants are without sufficient information to admit or deny paragraph 1 and therefore demand strict proof thereof.

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8. Defendants state that the documents speak for themselves and deny any allegations of paragraph 13 inconsistent with the documents; further, that any purported right to attorney's fees has not been triggered in this matter as to these Defendants.

9. Defendants deny paragraph 14.

10. Defendants admit paragraph 15 only to the extent the defenses and counterclaims herein are not effective to invalidate the lien.

11. Defendants admit paragraph 16, but deny that said claim is valid or enforceable.
12. Defendants deny paragraph 17.
13. Defendants acknowledge the reservation made in paragraph 18, but deny that Plaintiff has the right to the relief sought therein.
14. Defendants reiterate herein all the other allegations of this Answer as if repeated verbatim as to paragraph 19.
15. Defendants state that the documents speak for themselves and deny any allegations of paragraph 20 inconsistent with the documents; further, Defendants deny that Plaintiff is entitled to any relief pursuant to those documents.
16. Defendants deny paragraphs 21 and 22.
17. As to all the claims in the Complaint, along with the defenses, counterclaims, cross-claims, and third party claims presented in this pleading and any subsequent pleadings, Defendants request that they be awarded a jury trial.

FOR A THIRD DEFENSE

18. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.
19. At all times relevant, Plaintiff Bank was an agent of, partner of, joint venturer with, or conspirator with Third Party Defendants Waterpointe Realty, LLC, Source One Properties, LLC, and Winyah Bay Holdings, LLC. All actions of the Third Party Defendants are therefore imputed to Plaintiff Bank.
20. Plaintiff Bank is estopped from asserting its claims against Defendants Blackburn because its actions in concert with the Third Party Defendants wrongly induced the purchase of the

lot and wrongly prevented the sale of the lot, thus preventing Defendants' ability to perform under the loan.

FOR A FOURTH DEFENSE

(Equitable Estoppel/Waiver/Laches/Setoff)

21. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

22. To induce the sale of the lots in this premier development, Plaintiff Bank partnered with the Third Party Defendants to put together a massive sales event on July 23, 2005. The event was a lottery of available lot purchases, complete with golf cart tours, helicopter rides, and a full fledged lottery. At the event, Plaintiff Bank was present as part of the sales team with the Third Party Defendants. Plaintiff Bank had its own section in the promotional space and to Defendants' knowledge was the exclusive lender present. Plaintiff Bank was promoting itself through banners, promotional materials, and had a team of its own employees on site at the property location to market loans as soon as the lottery lots were distributed and sales contracts signed on the spot. The whole promotion was high pressure, on the spot sales, during which Plaintiff Bank was acting in concert with the Third Party Defendants to promote the sales event and the lot purchase transactions, all as a package deal to be completed on the spot that day. Plaintiff Bank and the Third Party Defendants all joined together to misrepresent and defraud buyers such as these Defendants. Among the misrepresentations made were promises that day docks, roads, infrastructure, pool, marsh walks, and other amenities would be in place within 18 months of the lottery (January 23, 2007). None of these things were accurate. The infrastructure and amenities were not in place until the Spring of 2008. The day docks and marsh walks are still not there as of the date of this pleading, more than three and

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half years (42 months) after the lottery. In fact, Defendants are informed and believe that the permits for same either have not yet been submitted or were not submitted within three years of the lottery, much less constructed and complete within 18 months.

23. The contracts sought to be enforced by Plaintiff are barred by the doctrines of equitable estoppel and waiver. Plaintiff failed to properly ensure that the representations made were accurate and failed to ensure the construction progress per its assurances and is therefore estopped to seek payment at this time. Further, Plaintiff's actions entitle Defendants to a setoff against any amounts which it may be determined to be owed from Defendants to Plaintiff.

24. Defendants lacked knowledge and the means of knowledge of the truth as to the facts in question. Defendants relied upon the conduct of Plaintiff and such action based on that reliance was of such a character as to change prejudicially Defendants' position.

FOR A FIFTH DEFENSE

(Assumption of Risk)

25. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

26. Plaintiff, by failing to properly ensure the construction progress of the docks, infrastructure and amenities which were part of the consideration for the subject loan, assumed the risk of construction problems and inability to repay the loans based on the construction delays/failures. Plaintiff's negligence in failing to ensure the representations were accurate and were being complied with was a deliberate choice between alternatives, and its choice to so act constitutes assumption of the risk.

FOR A SIXTH DEFENSE,
BY WAY OF A FIRST COUNTERCLAIM AGAINST PLAINTIFF, AND
AS A FIRST CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS
(Negligent Misrepresentation)

27. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein. Defendants Blackburn have received valid assignments of rights of action against the Third Party Defendants from Defendants Tammy Winner and Watson Felder and pursue the third party claims both individually and as assignees.

28. The Third Party Defendants, Winyah Bay Holdings, LLC (Seller/Developer), Source One Properties, LLC (Realtor/Marketer), and Waterpointe Realty, LLC (Realtor/Marketer), are all corporations existing and organized in the State of South Carolina, doing business in Georgetown County. At all times relevant, the Third Party Defendants were agents of, partners of, joint venturers with, or conspirators with each other and Plaintiff Bank. All actions of the Plaintiff Bank and the Third Party Defendants are therefore imputed to each other.

29. Plaintiff and Third Party Defendants falsely represented the docks, infrastructure and amenities and the intent to timely construct them, never having intended to live up to the promises. These acts constituted misrepresentations.

30. Plaintiff and Third Party Defendants had a pecuniary interest in making the representations in that it stood to make a substantial gain in these transactions from the Defendants and others; said representations were made in the course of Plaintiff's and Third Party Defendants' business.

31. Plaintiff and Third Party Defendants owed a duty of care to see that it communicated truthful information to Defendants.

32. Plaintiff and Third Party Defendants breached that duty by failing to exercise due care, in informing Defendants of representations without intent to live up to those promises.

33. Defendants justifiably relied upon the misrepresentations.

34. Defendants have suffered a pecuniary loss as the proximate result of reliance upon the misrepresentations, namely, loss of value in the property, loss of sales, taxes, insurance, mortgage, and other property and acquisition costs.

35. Plaintiff's and Third Party Defendants' actions were willful, wanton, reckless, and in absolute disregard for Defendants' rights.

36. As a result of Plaintiff's and Third Party Defendants' actions, Defendants are entitled to an appropriate award of actual, special and punitive damages. Defendants have lost not only the amounts paid to the Plaintiff, taxes, HOA fees, acquisition costs, but also have been forced to expend substantial sums to defend this foreclosure action, have suffered setbacks to their credit, and other special damages.

FOR A SEVENTH DEFENSE,

**BY WAY OF A SECOND COUNTERCLAIM AGAINST PLAINTIFF, AND
AS A SECOND CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS**

(S.C. CODE ANN. 39-5-10 ET SEQ.)

(SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT)

37. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

38. The acts of Plaintiff and Third Party Defendants constituted unfair and deceptive acts in the conduct of trade or commerce and are therefore unlawful.

39. Plaintiff's and Third Party Defendants' acts deceived and had the capacity, effect, or tendency to deceive Defendants.

40. Plaintiff's and Third Party Defendants' acts affect the public interest and have the capacity for repetition.

41. Defendants have suffered an ascertainable loss of money and property as a result of the use and employment by Plaintiff and Third Party Defendants of the unfair and deceptive methods, acts and practices described above.

42. Plaintiff's and Third Party Defendants' unfair and deceptive acts were willful and knowing violations of S.C. Code Ann. Section 39-5-20.

43. Defendants are therefore entitled to actual and special damages, treble damages, reasonable attorneys' fees, and costs.

FOR AN EIGHTH DEFENSE,

**BY WAY OF A THIRD COUNTERCLAIM AGAINST PLAINTIFF, AND
AS A THIRD CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS**

(Promissory Estoppel)

44. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

45. Plaintiff and Third Party Defendants promised Defendants that it would timely construct the docks, infrastructure, and amenities so to protect the interests both of Plaintiff and Defendants.

46. Defendants justifiably relied upon these promises and thus suffered a detrimental change in circumstances.

47. As a result, Defendants have suffered monetary losses in the form of actual and special damages which should be recovered from Plaintiff and Third Party Defendants.

**FOR A NINTH DEFENSE,
BY WAY OF A FOURTH COUNTERCLAIM AGAINST PLAINTIFF, AND
AS A FOURTH CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS
(Breach of Contract/Breach of Contract Accompanied by Fraudulent Act)**

48. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

49. Plaintiff and Third Party Defendants breached the contracts between the parties by failing to comply with its obligations outlined above, and by failing to act in good faith. Plaintiff and Third Party Defendants breached the contract with fraudulent intent, and the breach was accompanied by the fraudulent act of continuing to represent as true things which were false and were going to continue to be false.

50. The contract was supported by a valid offer, acceptance and consideration.

51. This breach resulted in nonperformance of the contract, and has caused Defendants to suffer substantial monetary loss.

52. Defendants are therefore entitled to an appropriate award of actual, special and punitive damages.

FOR A TENTH DEFENSE,
BY WAY OF A FIFTH COUNTERCLAIM AGAINST PLAINTIFF, AND
AS A FIFTH CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS
(Breach of Fiduciary Duty)

53. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

54. Plaintiff/Third Party Defendants and Defendants came into such a relation that confidence was necessarily reposed by Defendants and the influence that naturally grows out of the confidence was possessed by Plaintiff and Third Party Defendants, thus creating a confidential relationship and a fiduciary duty.

55. The confidence was abused and the influence was exerted to obtain an advantage at the expense of Defendants.

56. Plaintiff and Third Party Defendants were bound to act in good faith and with due regard to the interest of Defendants.

57. Plaintiff's and Third Party Defendants' failures to act with such regard in Defendants' interest relating to the construction promises and their actions to prevent sales have resulted in substantial monetary damages to the Defendants, and was with willful, wanton and reckless disregard for Defendants' rights.

58. Defendants are therefore entitled to an appropriate award of actual, special and punitive damages.

FOR AN ELEVENTH DEFENSE,
BY WAY OF A SIXTH COUNTERCLAIM AGAINST PLAINTIFF, AND
AS A SIXTH CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS
(Fraud/Fraud in the Inducement)

59. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

60. Plaintiff and Third Party Defendants orally, in writing and impliedly represented to Defendants as indicated above regarding the docks, infrastructure and amenities, although Plaintiff and Third Party Defendants knew the representations were false and that they never actually intended to live up to those promises.

61. With knowledge that Defendants were at a disadvantage for the necessary information possessed only by Plaintiff and Third Party Defendants, Plaintiff and Third Party Defendants coerced Defendants' execution of the contracts under false pretenses.

62. Plaintiff and Third Party Defendants made false, material representations with knowledge of falsity or reckless disregard of their truth or falsity, intending Defendants to act upon the representations; Defendants were ignorant of such falsity, had a right to rely and, in fact, did rely upon their truth, suffering proximate and consequent injury.

63. As a result, Defendants allege that the contracts are void as being procured by fraud, and that said fraud has occasioned substantial actual and special damages.

64. As a result of the above acts, Defendants are entitled to an appropriate award of actual, special and punitive damages.

FOR A TWELFTH DEFENSE,
BY WAY OF A SEVENTH COUNTERCLAIM AGAINST PLAINTIFF,
AS A SEVENTH CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS, AND
AS A FIRST CROSS-CLAIM AGAINST DEFENDANT POA

(Breach of Contract/Negligence)

65. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

66. Defendant South Island Plantation Association, Inc., the Third Party Defendants, and Plaintiff, all took steps either directly or as joint venturers, partners, or agents of each other, to hinder or prevent the sale of the property by Defendants Blackburn, individually and as assignees. Restrictions on sales marketing and signage, in addition to the failure to ensure timely construction of promised docks, infrastructure and amenities, all as occasioned by the negligence or willfulness of the above named, have prevented the performance and payment of the loan. By doing so, Plaintiff, Third Party Defendants, and Defendant POA breached the covenant of good faith and fair dealing imposed in every contractual relationship, or alternatively breached a tort duty owed to Defendants.

67. As a result, these Defendants have suffered substantial monetary losses, damage to credit, other special damages, and punitive damages.

FOR A THIRTEENTH DEFENSE,
BY WAY OF AN EIGHTH COUNTERCLAIM AGAINST PLAINTIFF, AND
AS AN EIGHTH CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS
(Breach of Contract)

68. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

69. Pursuant to the sales contract, the Seller, Defendant Winyah Bay Holdings, LLC, was as a purchase incentive to credit the Buyers with a year's worth of the interest due to Defendant Bank (paid to the bank at closing), again as part of the joint venture, partnership, or agency relationship between the Third Party Defendants and Plaintiff. However, Seller failed to pay the full amount due and the shortfall was required to be paid by Defendants Blackburn in the amount of \$1,794.65. In breach of contract, Defendant Winyah Bay Holdings, LLC (whose actions are imputed to Plaintiff and the other Third Party Defendants) failed to pay the appropriate amount despite demand, causing these Defendants to bear that loss.

FOR A FOURTEENTH DEFENSE,
BY WAY OF A NINTH COUNTERCLAIM AGAINST PLAINTIFF,
A NINTH CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS, AND
AS A SECOND CROSS-CLAIM AGAINST DEFENDANT POA
(Civil Conspiracy)

70. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

71. Plaintiff and Third Party Defendants, as alleged herein, combined together for the purpose of injuring the Defendants, causing special damages.

72. These Defendants request a jury trial on all claims and defenses for which a jury trial is authorized.

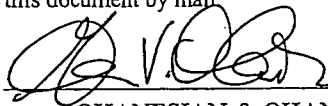
WHEREFORE, Defendants respectfully request the following relief from this Honorable Court:

1. Dismiss the Complaint in its entirety with costs and attorneys' fees.
2. Sustain all causes of action and defenses alleged by Defendants Blackburn, individually and as assignees, granting Defendants an appropriate award of actual damages, special damages, punitive damages, treble damages, attorneys' fees, prejudgment interest and costs of this action against Plaintiff, Third Party Defendants, and Defendant POA, jointly and severally.
3. Grant such other and further relief as the Court deems just and proper.

February 12, 2009

Certificate of Service

I hereby certify that on the above date, I caused to be served on counsel of record a true and accurate copy of this document by mail


OHANESIAN & OHANESIAN


Glenn V. Ohanesian
OHANESIAN & OHANESIAN
P. O. Box 2433
Myrtle Beach, South Carolina 29578
(843) 626-7193
ATTORNEY FOR DEFENDANTS
WILLIAM E. & JUDITH BLACKBURN

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FOR THE
FIFTEENTH JUDICIAL CIRCUIT

C/A 2008-CP-22-1598

Wachovia Bank, National Association,
)
)
Plaintiff,)

Vs.)

William E. Blackburn; Judith Blackburn,
)
Tammy S. Winner; Watson E. Felder;
)
Gary F. Ownbey; and South Island
)
Plantation Association, Inc.,)

Defendants.)

And)

William E. and Judith Blackburn,
)
individually and as Assignees,)

Third Party Plaintiffs,)

Vs.)

Winyah Bay Holdings, LLC;)
)
Source One Properties, LLC; and)
)
Waterpointe Realty, LLC,)

Third Party Defendants.)

SECOND
AMENDED ANSWER, COUNTERCLAIM,
CROSS-CLAIM AND THIRD PARTY
COMPLAINT
(JURY TRIAL DEMANDED)

FILED
GEORGETOWN COUNTY, S.C.
2009 DEC -8 PM 4:05
ALMA Y. WHITE
CLERK OF COURT

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FOR A FIRST DEFENSE

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FOR A SECOND DEFENSE

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4. Defendants admit paragraphs 3 and 4.

5. Defendants believe the documents speak for themselves and any allegations of paragraphs 5, 6 and 7 which are inconsistent with the referenced documents are denied.

6. Defendants are without sufficient information to admit or deny paragraph 8 and therefore demand strict proof thereof.

7. Defendants deny paragraphs 9, 10, 11 and 12 and will assert certain defenses to negate any allegations of default, acceleration, right to foreclosure, and amounts due.

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9. Defendants deny paragraph 14.

10. Defendants admit paragraph 15 only to the extent the defenses and counterclaims herein are not effective to invalidate the lien.

11. Defendants admit paragraph 16, but deny that said claim is valid or enforceable.

12. Defendants deny paragraph 17.

13. Defendants acknowledge the reservation made in paragraph 18, but deny that Plaintiff has the right to the relief sought therein.

14. Defendants reiterate herein all the other allegations of this Answer as if repeated verbatim as to paragraph 19.

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16. Defendants deny paragraphs 21 and 22.

17. As to all the claims in the Complaint, along with the defenses, counterclaims, cross-claims, and third party claims presented in this pleading and any subsequent pleadings, Defendants request that they be awarded a jury trial.

FOR A THIRD DEFENSE

18. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

19. At all times relevant, Plaintiff Bank was an agent of, partner of, joint venturer with, or conspirator with Third Party Defendants Waterpointe Realty, LLC, Source One Properties, LLC, and Winyah Bay Holdings, LLC. All actions of the Third Party Defendants are therefore imputed to Plaintiff Bank.

20. Plaintiff Bank is estopped from asserting its claims against Defendants Blackburn because its actions in concert with the Third Party Defendants wrongly induced the purchase of the

lot and wrongly prevented the sale of the lot, thus preventing Defendants' ability to perform under the loan.

FOR A FOURTH DEFENSE

(Equitable Estoppel/Waiver/Laches/Setoff)

21. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

22. To induce the sale of the lots in this premier development, Plaintiff Bank partnered with the Third Party Defendants to put together a massive sales event on July 23, 2005. The event was a lottery of available lot purchases, complete with golf cart tours, helicopter rides, and a full fledged lottery. At the event, Plaintiff Bank was present as part of the sales team with the Third Party Defendants. Plaintiff Bank had its own section in the promotional space and to Defendants' knowledge was the exclusive lender present. Plaintiff Bank was promoting itself through banners, promotional materials, and had a team of its own employees on site at the property location to market loans as soon as the lottery lots were distributed and sales contracts signed on the spot. The whole promotion was high pressure, on the spot sales, during which Plaintiff Bank was acting in concert with the Third Party Defendants to promote the sales event and the lot purchase transactions, all as a package deal to be completed on the spot that day. Plaintiff Bank and the Third Party Defendants all joined together to misrepresent and defraud buyers such as these Defendants. Among the misrepresentations made were promises that day docks, roads, infrastructure, pool, marsh walks, and other amenities would be in place within 18 months of the lottery (January 23, 2007). The property values were also artificially inflated through collusion by the parties. None of these things were accurate. The infrastructure and amenities were not in place until the Spring of 2008. The day docks

and marsh walks are still not there as of the date of this pleading, more than three and half years (42 months) after the lottery. In fact, Defendants are informed and believe that the permits for same either have not yet been submitted or were not submitted within three years of the lottery, much less constructed and complete within 18 months.

23. The contracts sought to be enforced by Plaintiff are barred by the doctrines of equitable estoppel and waiver. Plaintiff failed to properly ensure that the representations made were accurate and failed to ensure the construction progress per its assurances and is therefore estopped to seek payment at this time. Further, Plaintiff's actions entitle Defendants to a setoff against any amounts which it may be determined to be owed from Defendants to Plaintiff.

24. Defendants lacked knowledge and the means of knowledge of the truth as to the facts in question. Defendants relied upon the conduct of Plaintiff and such action based on that reliance was of such a character as to change prejudicially Defendants' position.

FOR A FIFTH DEFENSE

(Assumption of Risk)

25. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

26. Plaintiff, by failing to properly ensure the construction progress of the docks, infrastructure and amenities which were part of the consideration for the subject loan, assumed the risk of construction problems and inability to repay the loans based on the construction delays/failures. Plaintiff's negligence in failing to ensure the representations were accurate and were being complied with was a deliberate choice between alternatives, and its choice to so act constitutes assumption of the risk.

**FOR A SIXTH DEFENSE,
BY WAY OF A FIRST COUNTERCLAIM AGAINST PLAINTIFF, AND
AS A FIRST CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS
(Negligent Misrepresentation)**

27. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein. Defendants Blackburn have received valid assignments of rights of action against the Third Party Defendants from Defendants Tammy Winner and Watson Felder and pursue the third party claims both individually and as assignees.

28. The Third Party Defendants, Winyah Bay Holdings, LLC (Seller/Developer), Source One Properties, LLC (Realtor/Marketer), and Waterpointe Realty, LLC (Realtor/Marketer), are all corporations existing and organized in the State of South Carolina, doing business in Georgetown County. At all times relevant, the Third Party Defendants were agents of, partners of, joint venturers with, or conspirators with each other and Plaintiff Bank. All actions of the Plaintiff Bank and the Third Party Defendants are therefore imputed to each other.

29. Plaintiff and Third Party Defendants falsely represented the docks, infrastructure and amenities and the intent to timely construct them, never having intended to live up to the promises. They also artificially inflated the property values and presented them as true values. These acts constituted misrepresentations.

30. Plaintiff and Third Party Defendants had a pecuniary interest in making the representations in that it stood to make a substantial gain in these transactions from the Defendants and others; said representations were made in the course of Plaintiff's and Third Party Defendants' business.

31. Plaintiff and Third Party Defendants owed a duty of care to see that it communicated truthful information to Defendants.

32. Plaintiff and Third Party Defendants breached that duty by failing to exercise due care, in informing Defendants of representations without intent to live up to those promises.

33. Defendants justifiably relied upon the misrepresentations.

34. Defendants have suffered a pecuniary loss as the proximate result of reliance upon the misrepresentations, namely, loss of value in the property, loss of sales, taxes, insurance, mortgage, and other property and acquisition costs.

35. Plaintiffs and Third Party Defendants' actions were willful, wanton, reckless, and in absolute disregard for Defendants' rights.

36. As a result of Plaintiffs and Third Party Defendants' actions, Defendants are entitled to an appropriate award of actual, special and punitive damages. Defendants have lost not only the amounts paid to the Plaintiff, taxes, HOA fees, acquisition costs, but also have been forced to expend substantial sums to defend this foreclosure action, have suffered setbacks to their credit, and other special damages.

**FOR A SEVENTH DEFENSE,
BY WAY OF A SECOND COUNTERCLAIM AGAINST PLAINTIFF, AND
AS A SECOND CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS
(S.C. CODE ANN. 39-5-10 ET SEQ.)**

(SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT)

37. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

38. The acts of Plaintiff and Third Party Defendants constituted unfair and deceptive acts in the conduct of trade or commerce and are therefore unlawful.

39. Plaintiff's and Third Party Defendants' acts deceived and had the capacity, effect, or tendency to deceive Defendants.

40. Plaintiff's and Third Party Defendants' acts affect the public interest and have the capacity for repetition.

41. Defendants have suffered an ascertainable loss of money and property as a result of the use and employment by Plaintiff and Third Party Defendants of the unfair and deceptive methods, acts and practices described above.

42. Plaintiff's and Third Party Defendants' unfair and deceptive acts were willful and knowing violations of S.C. Code Ann. Section 39-5-20.

43. Defendants are therefore entitled to actual and special damages, treble damages, reasonable attorneys' fees, and costs.

FOR AN EIGHTH DEFENSE,

**BY WAY OF A THIRD COUNTERCLAIM AGAINST PLAINTIFF, AND
AS A THIRD CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS**

(Promissory Estoppel)

44. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

45. Plaintiff and Third Party Defendants promised Defendants that it would timely construct the docks, infrastructure, and amenities so to protect the interests both of Plaintiff and

Defendants. They also artificially inflated the property values and impliedly promised those values were accurate.

46. Defendants justifiably relied upon these promises and thus suffered a detrimental change in circumstances.

47. As a result, Defendants have suffered monetary losses in the form of actual and special damages which should be recovered from Plaintiff and Third Party Defendants.

**FOR A NINTH DEFENSE,
BY WAY OF A FOURTH COUNTERCLAIM AGAINST PLAINTIFF, AND
AS A FOURTH CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS
(Breach of Contract/Breach of Contract Accompanied by Fraudulent Act)**

48. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

49. Plaintiff and Third Party Defendants breached the contracts between the parties by failing to comply with its obligations outlined above, and by failing to act in good faith. Plaintiff and Third Party Defendants breached the contract with fraudulent intent, and the breach was accompanied by the fraudulent act of continuing to represent as true things which were false and were going to continue to be false.

50. The contract was supported by a valid offer, acceptance and consideration.

51. This breach resulted in nonperformance of the contract, and has caused Defendants to suffer substantial monetary loss.

52. Defendants are therefore entitled to an appropriate award of actual, special and punitive damages.

FOR A TENTH DEFENSE,
BY WAY OF A FIFTH COUNTERCLAIM AGAINST PLAINTIFF, AND
AS A FIFTH CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS
(Breach of Fiduciary Duty)

53. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

54. Plaintiff/Third Party Defendants and Defendants came into such a relation that confidence was necessarily reposed by Defendants and the influence that naturally grows out of the confidence was possessed by Plaintiff and Third Party Defendants, thus creating a confidential relationship and a fiduciary duty.

55. The confidence was abused and the influence was exerted to obtain an advantage at the expense of Defendants.

56. Plaintiff and Third Party Defendants were bound to act in good faith and with due regard to the interest of Defendants.

57. Plaintiff's and Third Party Defendants' failures to act with such regard in Defendants' interest relating to the property values, construction promises and their actions to prevent sales have resulted in substantial monetary damages to the Defendants, and was with willful, wanton and reckless disregard for Defendants' rights.

58. Defendants are therefore entitled to an appropriate award of actual, special and punitive damages.

**FOR AN ELEVENTH DEFENSE,
BY WAY OF A SIXTH COUNTERCLAIM AGAINST PLAINTIFF, AND
AS A SIXTH CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS
(Fraud/Fraud in the Inducement)**

59. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

60. Plaintiff and Third Party Defendants orally, in writing and impliedly represented to Defendants as indicated above regarding the property values, docks, infrastructure and amenities, although Plaintiff and Third Party Defendants knew the representations were false and that they never actually intended to live up to those promises.

61. With knowledge that Defendants were at a disadvantage for the necessary information possessed only by Plaintiff and Third Party Defendants, Plaintiff and Third Party Defendants coerced Defendants' execution of the contracts under false pretenses.

62. Plaintiff and Third Party Defendants made false, material representations with knowledge of falsity or reckless disregard of their truth or falsity, intending Defendants to act upon the representations; Defendants were ignorant of such falsity, had a right to rely and, in fact, did rely upon their truth, suffering proximate and consequent injury.

63. As a result, Defendants allege that the contracts are void as being procured by fraud, and that said fraud has occasioned substantial actual and special damages.

64. As a result of the above acts, Defendants are entitled to an appropriate award of actual, special and punitive damages.

**FOR A TWELFTH DEFENSE,
BY WAY OF A SEVENTH COUNTERCLAIM AGAINST PLAINTIFF,
AS A SEVENTH CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS, AND
AS A FIRST CROSS-CLAIM AGAINST DEFENDANT POA
(Breach of Contract/Negligence)**

65. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

66. Defendant South Island Plantation Association, Inc., the Third Party Defendants, and Plaintiff, all took steps either directly or as joint venturers, partners, or agents of each other, to hinder or prevent the sale of the property by Defendants Blackburn, individually and as assignees. Restrictions on sales marketing and signage, in addition to the failure to ensure timely construction of promised docks, infrastructure and amenities, all as occasioned by the negligence or willfulness of the above named, have prevented the performance and payment of the loan. By doing so, Plaintiff, Third Party Defendants, and Defendant POA breached the covenant of good faith and fair dealing imposed in every contractual relationship, or alternatively breached a tort duty owed to Defendants.

67. As a result, these Defendants have suffered substantial monetary losses, damage to credit, other special damages, and punitive damages.

**FOR A THIRTEENTH DEFENSE,
BY WAY OF AN EIGHTH COUNTERCLAIM AGAINST PLAINTIFF, AND
AS AN EIGHTH CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS
(Breach of Contract)**

68. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

69. Pursuant to the sales contract, the Seller, Defendant Winyah Bay Holdings, LLC, was as a purchase incentive to credit the Buyers with a year's worth of the interest due to Defendant Bank (paid to the bank at closing), again as part of the joint venture, partnership, or agency relationship between the Third Party Defendants and Plaintiff. However, Seller failed to pay the full amount due and the shortfall was required to be paid by Defendants Blackburn in the amount of \$1,794.65. In breach of contract, Defendant Winyah Bay Holdings, LLC (whose actions are imputed to Plaintiff and the other Third Party Defendants) failed to pay the appropriate amount despite demand, causing these Defendants to bear that loss.

**FOR A FOURTEENTH DEFENSE,
BY WAY OF A NINTH COUNTERCLAIM AGAINST PLAINTIFF,
A NINTH CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS, AND
AS A SECOND CROSS-CLAIM AGAINST DEFENDANT POA
(Civil Conspiracy)**

70. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

71. Plaintiff and Third Party Defendants, as alleged herein, combined together for the purpose of injuring the Defendants, causing special damages.

FOR A FIFTEENTH DEFENSE

BY WAY OF A TENTH COUNTERCLAIM AGAINST PLAINTIFF,

A TENTH CAUSE OF ACTION AGAINST THIRD PARTY DEFENDANTS

(Illegality of Contract)

72. All allegations made elsewhere in this pleading are reiterated as if repeated verbatim herein.

73. As alleged above, the purchase contract and therefore the loan documents were acquired by virtue of a lottery system in violation of S.C. Code Section 16-19-10. The Plaintiff and Defendants participated in and privately or publicly set up a lottery under the denomination of sales of lands or rights to purchase lands or to be eligible for loans, which had value. Balls or numbers were used, the same system as is used for the S.C. Education Lottery. As this lottery violated the law, the resulting contract of sale and loan documents are null and void as a matter of law. All funds paid under the contract and loan documents should therefore be returned to Defendants Blackburn, and the claims of Plaintiff should therefore be dismissed. Further, all damages and special damages incurred as a result of these Defendants' involvement in these transactions should be paid by Plaintiff and Third Party Defendants.

74. These Defendants request a jury trial on all claims and defenses for which a jury trial is authorized.

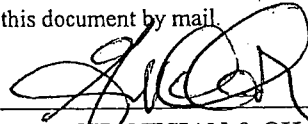
WHEREFORE, Defendants respectfully request the following relief from this Honorable Court:

1. Dismiss the Complaint in its entirety with costs and attorneys' fees.
2. Sustain all causes of action and defenses alleged by Defendants Blackburn, individually and as assignees, nullifying the sales and loan transactions, granting Defendants an appropriate award of actual damages, special damages, punitive damages, treble damages, attorneys' fees, prejudgment interest and costs of this action against Plaintiff, Third Party Defendants, and Defendant POA, jointly and severally.
3. Grant such other and further relief as the Court deems just and proper.

November 13, 2009

Certificate of Service

I hereby certify that on the above date, I caused to be served on counsel of record a true and accurate copy of this document by mail.


OHANESIAN & OHANESIAN


Glenn V. Ohanesian
OHANESIAN & OHANESIAN
P. O. Box 2433
Myrtle Beach, South Carolina 29578
(843) 626-7193
ATTORNEY FOR DEFENDANTS
WILLIAM E. & JUDITH BLACKBURN

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS	
COUNTY OF GEORGETOWN)	2008-CP-22-1598
Wachovia Bank National)	
Association,)	
Plaintiff,)	Transcript of Record
vs.)	
William E. Blackburn and)	June 18, 2009
Judith Blackburn, et al.,)	
Defendants.)	

B E F O R E :

Honorable Larry Hyman
Georgetown County Courthouse
Georgetown, South Carolina

A P P E A R A N C E S:

Robert C. Byrd, Esquire
Attorney for Plaintiffs

Glenn V. Ohanesian, Esquire
Attorney for Defendants, Blackburns

Grace L. Hurley, CVR-CM
Circuit Court Reporter

1 (There were no exhibits marked during the hearing.)
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1 (On the record, June 18, 2009.)

2 THE COURT: Wachovia National Bank Association
3 versus Blackburn. All right, this is basically a motion to
4 refer; is that correct?

5 MR. OHANESIAN: Motion to strike jury demand and to
6 refer. Glenn Ohanesian, here for the Defendants Blackburn
7 individually and as assignees of a couple of the other
8 Defendants.

9 THE COURT: That's who now?

10 MR. OHANESIAN: The Blackburns, William and Judith
11 Blackburn.

12 THE COURT: And you are?

13 MR. OHANESIAN: Glenn Ohanesian.

14 THE COURT: That's right. Okay, and you are?

15 MR. BYRD: Your Honor, I'm Bobby Byrd.

16 THE COURT: All right, Mr. Byrd.

17 MR. BYRD: I'm here on behalf of Wachovia Bank
18 and I do have a very short memorandum. It looks thick but
19 that's really because the exhibits are several loan documents.

20 THE COURT: Very well. Okay, Mr. Ohanesian, is
21 this your motion?

22 MR. OHANESIAN: It is not, Your Honor.

23 MR. BYRD: It's my motion, Your Honor.

24 THE COURT: All right, Mr. Byrd.

25 MR. BYRD: Your Honor, this matter is before the

1 Court today on Plaintiff Wachovia's motion to strike the jury
2 demand made by Mr. Ohanesian and to refer this case to the
3 Master-in-Equity. Your Honor, this case is a mortgage
4 foreclosure action. It arises out of a loan that was
5 originated back in February 2006, secured by some property
6 here in Georgetown County in a development known as South
7 Island Plantation, and it is also secured by some personal
8 guarantees of the Defendants. The sole issue before the
9 Court today is whether there's any issue in this case at all
10 to be tried by a jury or whether this all should be tried in a
11 bench trial. We believe that it should be tried by a bench
12 trial for a couple of reasons. Primarily because as you'll
13 see attached in the loan documents that are attached to the
14 memo and also in the brief we've quoted at length the
15 provision that's applicable in both the note and the
16 guarantee.

17 THE COURT: The waiver of jury trial?

18 MR. BYRD: Yes, Your Honor, it's pretty clear that
19 the parties to this loan transaction waived any right they
20 had, either of them had to a jury trial on just about any and
21 all issues that could have been raised. It's very broad that
22 the parties knowingly, voluntarily and intentionally waive any
23 right to trial by jury and with respect to any litigation
24 based upon, arising out of, under or in connection with this
25 note, the loan documents or any agreement contemplated to be

1 executed on, in connection with this note for any course of
2 conduct, course of dealings, statements, whether verbal or
3 written, or actions of any party with respect hereto, and
4 there are virtually identical provisions in both the note and
5 the guarantee.

6 THE COURT: And note that it indicates that that
7 provision is a material inducement of the bank to accept the
8 guarantee.

9 MR. BYRD: That is correct, Your Honor. We've
10 actually highlighted that provision for the Court. There's no
11 question that these types of provisions are enforceable and
12 valid in South Carolina. There's several cases we've cited in
13 our brief. I've got copies of a case.

14 THE COURT: Familiar with them.

15 MR. BYRD: I don't think that this provision
16 could be any clearer. I don't believe this provision could be
17 any broader with respect to the issues that are before the
18 Court today. I think that our jury trial waiver provision is
19 actually more clear, more conspicuous. It's in all capital
20 letters, unlike the provisions of the court, our fellow courts
21 have already upheld. I don't, we believe that they are valid,
22 enforceable and that the Blackburns are not entitled to a jury
23 trial on any issue in this case.

24 THE COURT: Mr. Ohanesian, let me hear from you.

25 MR. OHANESIAN: Thank you, Your Honor. It's

1 important, I believe, to take a look at our answer and
2 counterclaims and third-party complaints and cross-claims
3 because they drive the reasons that we believe we're entitled
4 to a jury trial. We have alleged that - this was an auction
5 of marsh-front lots at South Island Plantation down here in
6 Georgetown County and there was a lottery that was done and it
7 was a high pressure sales pitch. Everybody showed up with a
8 lottery number. This was the greatest thing since sliced
9 bread and the bank was there. Wachovia was there. Two, the
10 realtor was there. The developer was there. They had tents.
11 They were giving out food, wine, all that kind of stuff. It's
12 our position that the bank jumped in the boat with the
13 sellers, the developer, and the realtors, entered into a joint
14 venture. They were all agents of each other.

15 THE COURT: Is that why we have this third-party
16 complaint?

17 MR. OHANESIAN: Yes, sir.

18 THE COURT: Okay.

19 MR. OHANESIAN: And our position is that the bank was
20 either an agent or joint venturer with these other parties and
21 are, therefore, responsible for the misrepresentations that
22 were made during that sales process and pitch. There were
23 promises regarding docks that were going to be built. There
24 were promises regarding amenities that were going to be built.
25 Promises that were never carried through with, and as a

1 result, the properties have been unmarketable. Almost all of
2 these properties are in foreclosure now because of it. There
3 were also restrictions on sales and advertising by the
4 homeowner's association, who is also a Defendant in the case,
5 but as to the bank, we believe that, again, they're in the
6 same boat with these other parties and we have a right to
7 these legal counterclaims against them for negligent
8 misrepresentation, for unfair trade practices, for fraud,
9 promissory estoppel, breach of contract and breach of contract
10 accompanied by a fraudulent act. Those are claims which you
11 would typically be entitled to a jury trial on, even in a
12 foreclosure action. In this case, the matter, I believe, is
13 complicated because we have these other Defendants who are
14 being alleged to be joint venturers or agents with the bank.
15 If we allow the bank to avoid jury trial, the other parties
16 are still going to have a jury trial. So, the case is going
17 to have to be tried twice, once in front of a judge on these
18 legal counterclaims against the bank and the exact same issues
19 in front of a jury.

20 THE COURT: Has there been any motions to sever?

21 MR. BYRD: No, Your Honor.

22 THE COURT: Okay, go ahead, Mr. Ohanesian.

23 MR. OHANESIAN: All right, sir. With that
24 background, where I would start with is, and we didn't have
25 the memorandum until today, I wasn't exactly sure what the

1 arguments were going to be, but the starting point for waivers
2 of jury trial, they have to be clear, they have to be
3 explicit, they have to be knowing, they have to be voluntary,
4 they have to be intentional. I'm arguing in this case under
5 Rule 38, which requires that the right to jury trial be held
6 inviolate, that we've got issues with the clearness and
7 explicitness as to how this clause applies to the causes of
8 action we've got. Counsel is correct that the clause talks
9 about any actions that arise from the loan documents in the
10 course of dealing surrounding those loan documents. Well, the
11 problem we have here is the allegations that are being made
12 include not just the loan documents but the solicitation for
13 sale, the sale itself and the sales contract and it's my view
14 that even if the jury trial waiver clause is valid as to the
15 loan documents, it should not be valid as to the sale and the
16 representations made regarding the sale. Even if it's clear
17 that it should be waived as to the loan documents, our
18 counterclaims don't have to do with the loan documents.

19 THE COURT: I understand, and what do you
20 recommend? What do you think I can do if it's a valid waiver
21 of a jury trial as to the foreclosure? I mean, it appears to
22 me to be very clear. You've brought this action as a third-
23 party action. I agree with you, you have a right to a jury
24 trial in that regard. There's been no motion to sever. Kind
25 of put me in a bad position here. What do you recommend?

1 MR. OHANESIAN: Well, I believe we're entitled to a
2 jury trial. The, on - first of all, I don't believe the
3 waiver is effective as to our claims. I also believe that the
4 waiver is unconscionable, that the Blackburns had no idea it
5 was in there. They didn't know until this motion was filed
6 that the thing even existed. I want to make arguments
7 regarding that. It's buried in the note in the guarantees,
8 it's not in the mortgage, it was never discussed, never
9 negotiated. A lot of the case law talks about it being a
10 bargain for exchange. It's our position that it wasn't. They
11 had no right to negotiate it. They didn't even know it was
12 there.

13 THE COURT: I note that our Supreme Court has
14 taken, has sort of reversed its position recently on
15 arbitration on those grounds.

16 MR. OHANESIAN: Right, but - and those are the
17 positions that we're going to be taking. Again, I believe
18 that the bank should not be given a windfall and excused from
19 having to deal with a jury trial when you've got these other
20 Defendants whose claims are going to be the same. The
21 counterclaims involve jury trial requests against co-
22 defendants and in my view they should be heard together. If
23 you're going to hear the exact same claims against the bank
24 separately from the co-defendant, that's going to waste the
25 Court's resources. If you'll bear with me just a second.

1 They have the opportunity, if they get summary judgment on the
2 agency and joint venture issues, if the bank gets that, if
3 they're successful in that, they will still have the
4 opportunity at that point to have the case sent to a jury
5 trial because then the issues surrounding these counterclaims
6 won't be there. My suggestion is is we keep the jury trial
7 on the docket, if they're able to get out of the case on
8 those, they'll have the opportunity later to move to a jury
9 trial. Rule 39(B) also, in my view, gives the Court
10 discretion to order a jury trial even if a party fails to
11 avail itself of that right. It reads, "Notwithstanding the
12 failure of a party to demand a jury in an action in which such
13 a demand might have been made of right, the Court in its
14 discretion upon motion may order a trial by jury of any or all
15 issues." Even if you find that they've waived it, I believe
16 that gives you the discretion and I think based on the
17 totality of these circumstances and the claims that are made,
18 that it's the appropriate thing to keep it all together at
19 least until those factual issues are determined. I did have
20 an affidavit prepared by the Blackburns. I don't know if it's
21 relevant to you, just indicating that they didn't know the
22 waiver was there, didn't know the import of it.

23 THE COURT: What rule did you just cite?

24 MR. OHANESIAN: 39(B), and I hate arbitration clauses
25 and I hate waiver of jury trial clauses for the record.

1 THE COURT: Well, 39(B) basically says I can
2 sever these.

3 MR. OHANESIAN: If you, if you sever the cases,
4 they're still going to have to hear the legal counterclaims in
5 front of a judge and then the jury, the exact same jury
6 counterclaims are going to have to proceed against the other
7 Defendants, if you're talking about severing the Defendants.

8 THE COURT: No, I want to sever the third-party
9 complaint from the original action.

10 MR. OHANESIAN: That won't, the third-party complaint
11 is against other defendants ---

12 THE COURT: Other Defendants.

13 MR. OHANESIAN: --- but it's the exact same claim.
14 So, if you sever those, the same claims exist against the bank
15 that exist against the third-party Defendant.

16 THE COURT: But you've alleged them in the third
17 party, did you not?

18 MR. OHANESIAN: As counterclaims and third party.
19 It's by way of counterclaim against the bank and third-party
20 complaint against the third-party Defendants.

21 THE COURT: So, it's all in that, in your third-
22 party complaint; is it not?

23 MR. OHANESIAN: I'm not sure I'm following you, Your
24 Honor.

25 THE COURT: Is Wachovia a party in the third-

1 party complaint?

2 MR. OHANESIAN: Wachovia's the Plaintiff.

3 THE COURT: Okay, all right.

4 MR. OHANESIAN: And as a Defendant we answered their
5 complaint. We counterclaimed against them and we third
6 partied these others.

7 THE COURT: All right, did you - in your third
8 party, did you make Wachovia a third-party Defendant in that?

9 MR. OHANESIAN: No, Your Honor. They are the very
10 same counterclaims. They are Co-Defendants with those third-
11 party Defendants but they, the foreclosure action, our
12 counterclaims are in the foreclosure action. So, the
13 foreclosure can't occur until those legal counterclaims are
14 heard anyway, whether they're by jury or by a judge, and in my
15 view, if you split these things and make a judge hear these
16 counterclaims against the bank and a jury hear the exact same
17 counterclaims against the other Defendants, we're wasting time
18 and resources.

19 MR. BYRD: Your Honor, if I may respond briefly.
20 With regard to the scope, I don't think that there's any
21 question that the scope is broad enough to encompass these
22 counterclaims that Mr. Ohanesian has raised. The claims
23 against the bank are that, "You participated in some
24 representation that induced us to go buy this property and
25 enter into this loan with you that enabled us to buy the

1 property." It's clearly related. It's clearly in connection
2 with. It's clearly covered by this jury trial waiver
3 provision.

4 With regard to the sophistication issues, and I didn't
5 know it was in there, it's a very conspicuous provision, and
6 in, and I don't have the case with me, it's called Regions
7 Bank versus Schmauch, it was decided several years ago by our
8 Supreme Court. It says that if you sign something, you're
9 bound to know what the contents of the document you signed and
10 they can't come back saying, "Oh, gee, we didn't know it was
11 in there."

12 THE COURT: What's the position of the third-
13 party Defendants?

14 MR. BYRD: And if I could, and I've got one
15 more, I'd like to hand up a copy of the case because I think
16 it resolves this whole issue with regard to, with regard to
17 the what do you do with a third-party complaint and what do
18 you do with the cross-claims against the other Defendants.
19 This was a case that was decided back in 1989 by our Supreme
20 Court. It's called North Carolina Federal Savings and Loan
21 versus DAV Corporation. It is a mortgage foreclosure case.
22 It is a foreclosure case in which the Defendant raised third-
23 party claims and also raised cross-claims and also
24 counterclaims and what the Court said in this case is that
25 look, a mortgage foreclosure is a non-jury proceeding. If you

1 raise third-party claims and cross-claims, you waive your jury
2 trial as to those claims. They couldn't make it any clearer
3 because by nature, by definition, those claims, third-party
4 claims and cross-claims are not compulsory. They are
5 permissive. So, if you raise them, you waive your right to a
6 jury trial as to them. No motion has been made in this case
7 to waive them, maybe I'm speaking out of turn on behalf of the
8 third-party Defendants, but that would be my position. I
9 think the Supreme Court's already ruled on this.

10 MR. OHANESIAN: The problem, Your Honor, if I
11 may address that, what the case says and the cases that
12 surround it is that if you make a counterclaim, a legal
13 counterclaim that is compulsory, which we did make against the
14 bank, those have to, that does not waive your right to a jury
15 trial.

16 THE COURT: By definition a counterclaim is
17 compulsory only if it arises out of the same transaction or
18 occurrence.

19 MR. BYRD: Mr. Ohanesian can't have it both
20 ways. He's trying to say that they're separate and distinct
21 type causes of action, they don't really have anything to do
22 with this loan. Well, if they are, then they're
23 noncompulsory. They're permissive counterclaims.

24 THE COURT: Would you both submit me proposed
25 orders within the next 14 days, please?

1 MR. BYRD: Yes, sir.

2 THE COURT: Okay, thank you.

3 MR. OHANESIAN: Thank you, Your Honor.

4 THE COURT: And other copies of your authorities
5 and your briefs as well.

6 MR. OHANESIAN: Yes, sir.

7 THE COURT: Thank you.

8 (Adjourned.)

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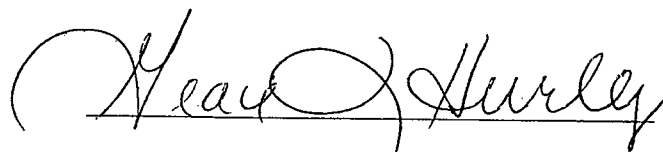
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C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Wachovia Bank National Association, et al. v. William E. Blackburn, et al, held in the Court of Common Pleas for Georgetown County, Georgetown County Courthouse, Georgetown, South Carolina, on June 18, 2009.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Grace L. Hurley, CVR-CM

Official Reporter

February 15, 2010.

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE CIRCUIT COURT

Wachovia Bank, National Association,
Plaintiff,

Case No. 2008-CP-22-1598

vs.

**MOTION TO STRIKE JURY DEMAND
AND TO REFER**

William E. Blackburn; Judith Blackburn;
Tammy S. Winner; Watson E. Felder; Gary F.
Ownbey; and South Island Plantation
Association, Inc.,

Defendants.

William E. and Judith Blackburn, individually
and as Assignees,

Third Party Plaintiff,

vs.

Winyah Bay Holdings, LLC; Source One
Properties, LLC; and Waterpointe Realty,
LLC,

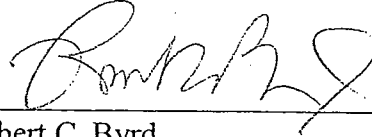
Third Party Defendants.

TO: GLENN V. OHANESIAN, ESQ., OHANESIAN & OHANESIAN, ATTORNEYS FOR
DEFENDANTS/THIRD PARTY PLAINTIFFS, WILLIAM E. AND JUDITH
BLACKBURN:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, Wachovia Bank, National
Association, hereby moves the Court, pursuant to Rules 12 and 53, SCRCF, for a Order striking
the defendants' demand for a jury trial and referring the within action to the Master-in-Equity for
Georgetown County, to make findings of fact and conclusions of law; to dispose of any and all

issues and enter a final judgment in the case; and to hear any issues after judgment. The grounds for this Motion are that the defendants waived any right to a jury trial in the loan documents they executed.

This Motion is based upon the pleadings herein, the applicable law, and such other materials as may be served upon you before or at the hearing of the Motion.



Robert C. Byrd
Sydney F. Cook
PARKER POE ADAMS & BERNSTEIN LLP
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Post Office Box 160
Charleston, SC 29402
(843) 727-2650

April 20, 2009

Charleston, South Carolina

Attorneys for the Plaintiff
Wachovia Bank, National Association

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE CIRCUIT COURT

Wachovia Bank, National Association,

Case No. 2008-CP-22-1598

Plaintiff,

vs.

William E. Blackburn; Judith Blackburn;
Tammy S. Winner; Watson E. Felder; Gary F.
Ownbey; and South Island Plantation
Association, Inc.,

MEMORANDUM OF LAW IN
SUPPORT OF WACHOVIA'S MOTION
TO STRIKE JURY DEMAND AND TO
REFER

Defendants.

William E. and Judith Blackburn, individually
and as Assignees,

Third Party Plaintiff,

vs.

Winyah Bay Holdings, LLC; Source One
Properties, LLC; and Waterpointe Realty,
LLC,

Third Party Defendants.

Plaintiff Wachovia Bank, National Association ("Wachovia") respectfully submits this Memorandum of Law in support of its Motion to Strike Jury Demand and to Refer this foreclosure action, in its entirety, to the Master-in-Equity for Georgetown County.

I. FACTS

The relevant facts are not in dispute. On or about February 14, 2006, defendant William E. Blackburn (the "Borrower"), for consideration, made, executed and delivered a certain promissory note (the "Note") payable to the order of Wachovia in the original principal sum of

\$463,967.00, together with interest as provided therein. *See* Note, attached hereto as Exh. A. The Note is secured by a Mortgage dated February 14, 2006 covering certain property in Georgetown County (the "Property"), executed by the Borrower and defendants Judith Blackburn ("Ms. Blackburn"), Tammy S. Winner ("Ms. Winner"), and Watson E. Felder ("Mr. Felder"). Further securing the Note, Ms. Blackburn, Ms. Winner and Mr. Felder executed unconditional guaranties dated February 14, 2006 in Wachovia's favor. In executing the Guaranties, Ms. Blackburn and the other Guarantors absolutely, unconditionally, irrevocably, guaranteed to Wachovia the prompt and full payment of all sums when and as due under the Note. *See* Guaranty executed by Ms. Blackburn ("Blackburn Guaranty"), attached hereto as Exh. B.¹ A complete and true copy of the loan documents, including the Note and the Blackburn Guaranty, were attached to Wachovia's Complaint and neither the Borrower nor Ms. Blackburn disputed the authenticity of the documents in their Answer.

The obligations under the terms and conditions of the Note are in default for the Borrower's failure to make payments when and as due. Specifically, the Borrower failed to make the monthly interest payment that was due on July 14, 2008, and has failed to make all subsequent payments. None of the Guarantors, including Ms. Blackburn, has made any payment on the Note. As a result of these defaults, Wachovia accelerated the balance of the Note, which is now due and payable in full against the Borrower and the Guarantors. Because the Borrower and Guarantors failed to make payment despite Wachovia's demands, Wachovia filed this foreclosure and collection action.

In response to the foreclosure action, the Borrower and Ms. Blackburn (together, the "Blackburns") filed an Amended Answer, Counterclaim, Cross-Claim, and Third Party

¹ The language and terms of the Guaranties signed by Ms. Winner and Mr. Felder are identical to those contained in the Guaranty signed by Ms. Blackburn.

Complaint on February 12, 2009 (the "Amended Answer"), in which they asserted, *inter alia*, claims against several Third-Party Defendants, including the developer and seller of the Property and the realtor for the Property, and Wachovia for negligent misrepresentation, unfair trade practices, promissory estoppel, breach of contract, breach of contract accompanied by a fraudulent act, breach of fiduciary duty, fraud in the inducement, negligence, and civil conspiracy. *See* Amended Answer, attached hereto as Exh. C. The crux of all of the claims is that the seller, developer and realtor misrepresented the Property and failed to make improvements to the Property and the development surrounding it.

Because the Blackburns have waived their right to a jury trial on each of their counterclaims against Wachovia, Wachovia now moves to strike their demand for a jury trial and to refer this action to the Master-in-Equity for Georgetown County.

II. ARGUMENT

A. The Blackburns Waived Their Right To A Jury Trial In The Loan Documents As A Matter Of Law.

Wachovia, the Borrower, and the Guarantors, including Ms. Blackburn, all expressly waived their right to a jury trial in the loan documents. Therefore, the Blackburns' demand for a jury trial should be struck, and this case should be referred to the Master-in-Equity in accordance with Rule 53, SCRCP.

The Note executed by the Borrower contains the following provision:

WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF BORROWER BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS NOTE, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS NOTE, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO.

THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS NOTE. . . .

See Note, p. 5, Exh. A. (emphasis added).

In the same vein, the Blackburn Guaranty contains the following provision:

WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF GUARANTOR BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS GUARANTY, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS GUARANTY, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS GUARANTY. . . .

See Blackburn Guaranty, p. 6, Exh. B. (emphasis added).

Under South Carolina law, a party may waive its right to a jury trial by contract. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63-64, 566 S.E.2d 863, 866 (Ct. App. 2003); *North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992). The terms of such a waiver “must be construed using their plain, ordinary and popular meaning.” *Beach Co.*, 351 S.C. at 63-64, 566 S.E.2d at 866

In *Beach Co.*, the court found that a provision contained in a commercial lease stating that the parties “waived any all right to a trial by jury” was a valid waiver of the tenant’s right to a jury trial. *Id.* Similarly, in *North Charleston Joint Venture*, 307 S.C. 533 at 535, 416 S.E.2d 637 at 638, the South Carolina Supreme Court enforced a jury waiver clause providing that “landlord and tenant hereby waive all right to trial by jury in any claim, action, proceeding or counterclaim by either landlord or tenant.” See also *GMAC Commercial Mortgage Corporation v. Roberts*, No. 2005-UP-542 (Ct. App. 2005) (unpublished) (finding that the waiver provisions in certain guaranties securing loans totaling more than \$18 million were valid).

The jury waiver provisions in the Note and Blackburn Guaranty are clearer, more detailed, and more conspicuous than the ones that the courts enforced in *Beach Co.* and *North Charleston Joint Venture*. They are, *a fortiori*, valid and enforceable. Because the parties “KNOWINGLY, VOLUNTARILY AND INTENTIONALLY” waived their right to a jury trial, the Blackburns are not entitled to a jury trial, and their demand for one should be struck as a matter of law.

B. Rule 53, SCRPC, Provides For Reference Of This Action To The Master-in-Equity.

Rule 53, SCRPC, clearly contemplates the reference of non-jury cases to the Master-in-Equity. See Rule 53, SCRPC, Notes (“References in Federal Courts are rare, but *absolutely necessary in State Courts, particularly to handle a large volume of State litigation such as foreclosures, partitions, and other equity matters.*” (emphasis added)). Foreclosures and other non-jury collection cases are routinely referred to a Master-in-Equity to ease the overcrowded Circuit Court docket, to promote judicial economy, and to accommodate the parties and witnesses. The consent of the parties is *not* required to refer non-jury matters to the Master-in-Equity. Rule 53(b), SCRPC.

Accordingly, it is appropriate to refer this case with finality to the Master-in-Equity for Georgetown County, to make findings of fact and conclusions of law, to dispose of any and all issues and enter a final judgment in the case, and to hear any and all matters after judgment, with any appeal from the Master being directly to the appellate courts.

III. CONCLUSION

Because the Blackburns waived their right to a jury trial on all of their counterclaims, this Court should GRANT Wachovia's Motion to Strike Jury Demand and REFER this action to the Master-in-Equity for Georgetown County.



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June 17, 2009

Charleston, South Carolina

Attorneys for the Plaintiff
Wachovia Bank, National Association

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT

Wachovia Bank, National Association,

Case No. 2008-CP-22-1598

Plaintiff,

vs.

William E. Blackburn; Judith Blackburn;
Tammy S. Winner; Watson E. Felder; Gary F.
Ownbey; and South Island Plantation
Association, Inc.,

Defendants

**MEMORANDUM OPPOSING
PLAINTIFF'S MOTION TO STRIKE
JURY DEMAND AND TO REFER**

William E. and Judith Blackburn, individually
and as Assignees,

Third Party Plaintiff,

vs.

Winyah Bay Holdings, LLC; Source One
Properties, LLC; and Waterpointe Realty,
LLC,

Third Party Defendants.

Defendants Blackburn, through counsel, respectfully submit that Plaintiff's Motion to Strike Jury Demand and to Refer should be denied in its entirety.

FACTUAL BACKGROUND

The following facts are not in dispute. On or about February 14, 2006, Mr. Blackburn, for consideration, made, executed and delivered a certain promissory note (the "Note") payable

) to the order of Wachovia in the original principal sum of \$463,967.00, together with interest as provided therein. The Note contains the following provisions:

LIMITATION ON LIABILITY; WAIVER OF PUNITIVE DAMAGES. EACH OF THE PARTIES HERETO, INCLUDING BANK BY ACCEPTANCE HEREOF, AGREES THAT IN ANY JUDICIAL, MEDIATION, OR ARBITRATION PROCEEDING OR ANY CLAIM OR CONTROVERSY BETWEEN OR AMONG THEM THAT MAY ARISE OUT OF OR BE IN ANY WAY CONNECTED WITH THIS AGREEMENT, THE LOAN DOCUMENTS OR ANY OTHER AGREEMENT OR DOCUMENT BETWEEN OR AMONG THEM OR THE OBLIGATIONS EVIDENCED HEREBY OR RELATED HERETO, IN NO EVENT SHALL ANY PARTY HAVE A REMEDY OF, OR BE LIABLE TO THE OTHER FOR, (1) INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES OR (2) PUNITIVE OR EXEMPLARY DAMAGES. EACH OF THE PARTIES HEREBY EXPRESSLY WAIVES ANY RIGHT OR CLAIM TO PUNITIVE OR EXEMPLARY DAMAGES THEY MAY HAVE OR WHICH MAY ARISE IN THE FUTURE IN CONNECTION WITH ANY SUCH PROCEEDING, CLAIM OR CONTROVERSY, WHETHER THE SAME IS RESOLVED BY ARBITRATION, MEDIATION, JUDICIALLY OR OTHERWISE...

WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF BORROWER BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS NOTE, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS NOTE, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS NOTE

(Note at p. 5, Exh. A to Complaint).

The Note is secured by a Mortgage covering certain property located in Georgetown County. The Note is also secured by unconditional guaranties dated February 14, 2006 (collectively the "Guaranties"), executed by Mrs. Blackburn and the other individual defendants, with similar provisions.

The Blackburns do not dispute the execution of the Note and Guaranty, copies of which were attached as exhibits to the Complaint. The only evidence in the record regarding whether the jury trial waiver provisions were knowing, voluntary or intentional is the Affidavit of the Blackburns filed with the Court. That unrefuted affidavit indicates that the Blackburns did not knowingly, voluntarily, or intentionally waive their rights to a jury trial at any time, and that they were not even aware such a clause existed. Said unrefuted Affidavit further indicates no consideration or other bargained for exchange was made for said clause, that they had no right to negotiate that clause, and that the bank was in an immensely superior bargaining position.

Wachovia commenced this foreclosure action on November 13, 2008, asserting that the obligations under the terms and conditions of the Note are in default for failure to make payments when and as due. The Blackburns claim that Wachovia became a joint venturer, partner, or agent of the seller/developer and realtors for the property in the sales process and that Wachovia is therefore responsible for misrepresentations made in the sale of the property. The Blackburns filed an initial Answer, then subsequently filed an Amended Answer, Counterclaim, Cross-Claim, and Third Party Complaint on February 12, 2009 (the "Amended Answer"), in which they assert claims against Wachovia, other defendants and several third-party defendants for negligent misrepresentation, unfair trade practices, promissory estoppel, breach of contract, breach of contract accompanied by a fraudulent act, breach of fiduciary duty, fraud in the inducement, negligence, and civil conspiracy. The Blackburns demanded a jury trial in their Amended Answer. The claims against Wachovia are in many instances identical to the claims against the co-Defendants and are inseparable, compulsory counterclaims.

ARGUMENTS

The Blackburns submit that they are entitled to a jury trial under the Seventh Amendment of the U.S. Constitution and Rules 38 and 39 of the S.C. Rules of Civil Procedure.

1. Without a knowing and voluntary waiver, the right to jury trial cannot be violated.

The Blackburns cannot be held to have waived their constitutional rights unless that waiver is found to be knowing, voluntary, and intentional. The Fourth Circuit has recognized: "The seventh amendment right of course is a fundamental one, but it is one that can be knowingly and intentionally waived by contract...Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed." Leasing Service Corp. v. Crane, 804 F.2d 828 (4th Cir. 1986). Again the only evidence on this issue is the Blackburns' Affidavit -- the consent was neither voluntary nor informed. The waiver is therefore invalid.

2. The express language of the purported waiver does not apply to the counterclaims.

Further, even if the waiver was voluntary, knowing, and informed, it would fail because by its own terms the waiver does not apply to the counterclaims made in this case. The waiver only applies to claims arising from the Note or loan documents or course of dealing with respect to the Note or loan documents. In this case, the counterclaims center around the sales process, NOT the loan documents. The Blackburns allege the bank injected itself into the marketing and sales of this property and all the other lots in the subject subdivision, and became a joint venturer or partner and is therefore equally liable for sales misrepresentations made and failures to provide infrastructure, amenities, docks, etc. These allegations, while arising out of the same occurrence as the note and mortgage for purposes of compulsory counterclaims, do NOT arise out of the loan documents as required by the express language of the waiver clause. They arise out of sales misrepresentations and failures to abide by promises to build infrastructure, amenities, docks, etc.

The case law provides that in order for claims to be subject to an agreement, those claims must bear a significant relationship to the underlying agreement. Sutton v. Hollywood Entertainment Corporation, 181 F.Supp.2d 504, 510-512 (D.Md. 2002). The cases stand for the general proposition that claims are not subject even to a broadly worded clause if the conduct at issue was beyond any reasonable foreseeability or contemplation at the time the contract was executed. Fazio v. Lehman Brothers, Inc., 2002 U.S. Dist. LEXIS 15174 (N.D. Ohio 2002). In the Sutton case cited above, the court noted the Fourth Circuit's adherence to this test, calling it the "significant relationship" test. The Sutton court concluded that a video membership rental contract including an arbitration provision could not be used to force arbitration even though the customer's claims arose from conduct which occurred while in the video store. There, the customer was falsely accused of robbing the store. The court found that allegations of false imprisonment and negligence based on those accusations were not significantly related to the underlying video rental contract and thus the arbitration clause did not apply.

That the bank would engage itself as a joint venturer or partner of the developer/seller and make false representations about the property and construction of amenities could not be considered within the contemplation of a reasonable person merely attempting to secure a loan from the bank. Neither would the video store customer in Sutton have been subjected to false accusations had he not entered into a relationship with video store. Also see Ford v. Nylcare Health Plans of Gulf Coast, Inc., 141 F.3d 243, 252 (5th Cir. 1998)(physician suit against HMO was outside arbitration provision because claims of false advertising were independent from the contract physician had with HMO); Leadertex, Inc. v. Morganton Dyeing & Fishing Corp., 67 F.3d 20, 28-29 (2nd Cir. 1995)(plaintiff seller of goods sued buyer for defaming the products sold and court concluded that while resolution of the defamation claim would necessitate examining evidence relevant to the contract claims, "the defamation claim was not subject to arbitration because such a claim was beyond the parties' reasonable expectation, and never

contemplated, at the time the contract was executed”); Hersman, Inc. v. Fleming Companies, 19 F.Supp.2d 1282, 1286-87 (M.D.Ala. 1998)(project manager’s negligence not subject to arbitration clause signed by plaintiff property owner in architect contract despite parties’ agreement to arbitrate all claims arising out of or “relating to” the contract); Telecom Italia, SPA v. Whole Telecom Corp., 248 F.3d 1109 (11th Cir. 2001)(lease of telecommunications circuit including arbitration agreement held not to require arbitration since the alleged tortious interference with contract was not the “immediate, foreseeable result of the performance of contractual duties”). The performance of duties by Wachovia and the Blackburns under the note and mortgage did not have the immediate and foreseeable result of Wachovia making false representations and breaching construction promises. That conduct was certainly not required by the note or mortgage and was not the immediate, foreseeable result of contractual performance of the note or mortgage by either party. As stated in AttorneyFirst, LLC v. Ascension Entertainment, 144 Fed. Appx. 283, 290 (4th Circuit 2005): “A waiver of the right to trial by jury will not be lightly implied...(the right of jury trial is fundamental, courts must indulge every reasonable presumption against waiver).”

Since the Blackburns could not contemplate such a claim arising, they could not give valid consent to waive a jury trial on that claim. The settled law requires that the subject claims (here, sales misrepresentations, construction delays) bear a significant relationship to the underlying contract (note and mortgage) in order for the jury trial waiver provisions to apply. Here, while they arise out of the same occurrence, they do not have such a relationship. These claims fall outside the scope of the clause and are not subject to the jury trial waiver.

3. **Under recent South Carolina case law, the purported waiver is unconscionable and therefore unenforceable.**

In Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663 (S.C. 2007), our Supreme Court found an arbitration clause, very similar to the jury trial waiver clause in the case at bar, to be

unenforceable. We quote copiously from that opinion because of its relevance hereto. In a case involving a waiver of rights in an auto sales context, very analogous to a home/property purchase context, the Court invalidated an arbitration agreement:

"A party may seek revocation of the contract under such grounds as exist at law or in equity, including...unconscionability...

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them...

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process...In determining whether a contract was tainted by an absence of meaningful choice...courts should take into account the nature of the injuries suffered...; whether...[the party]...is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." Simpson at 668-669.

The only evidence before the Court is the Blackburns' Affidavit on these issues, and as is typical in residential mortgage transactions, the Blackburns were in a substantially weaker bargaining position to the bank, not as sophisticated, and were surprised by the clause's inclusion. Further, the clause, while in capital letters, is not conspicuous. It is not included at all in the mortgage and its inclusion in the Note is the very last clause at the bottom of page 5 of a 6 page document. No initials or signatures are called for near the clause or on the same page of the clause. The letters are not larger type from the rest of the document. Such documents are handed to buyers at closing often with hundreds of other pages and with many documents to sign, and there was nothing to draw attention to the fact that a substantial Constitutional right was being waived. The Blackburns' Affidavit makes it clear they were not even aware the clause existed. The Blackburns are individuals, and are not a substantial business concern. Their injuries are substantial and worthy of being tried to a jury. This "take it or leave it" note and mortgage are an adhesion contract with terms that were non-negotiable. "...[R]egardless of the general legal presumptions that a party to a contract has read and understood its terms, we also

find it necessary to consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences.” Simpson at 670. Based on the Simpson factors, no meaningful choice existed and a failure of fundamental fairness occurred in the bargaining process.

Further, just as in Simpson, there are oppressive and one-sided terms. Just as the contract in Simpson included a prohibition of punitive and exemplary damages, so did the Note in this case. The Simpson court found such a clause to be oppressive and one-sided. “In conjunction with Simpson’s lack of meaningful choice in agreeing to arbitrate, this provision is an unconscionable waiver of...rights, and therefore, unenforceable.” Simpson at 671. The case at bar presents an almost identical situation. The jury trial waiver clause in this case is likewise unconscionable and unenforceable.

4. **Even if the Blackburns failed to properly preserve their right to a jury trial, Rule 39(b) gives the court absolute discretion to order a jury trial.**

The South Carolina Rules of Civil Procedure provide a mechanism for the Court to grant a jury trial to a party even when that party has waived that right. Rule 39(b), SCRCRCP, provides in relevant part: “[N]otwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues.” Clearly, had the Blackburns not signed the waiver clause, there would be no question of the right to a jury trial on the legal defenses and compulsory counterclaims raised. While there was no valid waiver, even if said waiver had occurred and thus the Blackburns had failed to properly demand a jury trial on these claims, Rule 39(b) gives the Court unfettered discretion to nonetheless order a jury trial. See Britt v. Knight Publishing Co., 42 F.R.D. 593, 594-595 (D.S.C. 1967), where Judge Hemphill held that “waiver occurs in these circumstances even though failure to make timely demand is done through inadvertence or through negligence...Rule 39(b) however provides that...the court in its discretion...may order a

trial by jury of any or all issues...[A]lthough some cases require special circumstances...before the judge may exercise discretion...the better rule is that there is no limitation on the judge's discretion." See also 9 ALR4th 1041, page 3, where a collection of cases finds the court has discretion even after express waiver to order a jury trial:

"Although it has been held in a few cases that after an express waiver of jury trial by the parties, the court is without authority or discretion to order a jury trial on its own motion or on motion by a party made subsequent to such express waiver, nevertheless, it has been held in a substantial number of cases that despite an express waiver of jury trial by the parties, the court may order a jury trial on its own motion. The courts have also held or recognized in a number of cases, by virtue either of judicial construction or of provisions of applicable statutory or court rules, that after a jury has been expressly waived by the parties, a court may in its discretion order a jury trial upon motion by one of the parties made subsequent to such express waiver, the courts pointing out, in some of the cases, one or more of a variety of factors, which affect either the exercise of discretion itself or the determination of the propriety of particular exercises of such discretion, such as (1) the presence or absence of prejudice to the opposing party; (2) the extent, if any, of interference with the court's orderly disposition of business, or extent of delay; and (3) the time when relief from the express waiver of jury trial was requested."

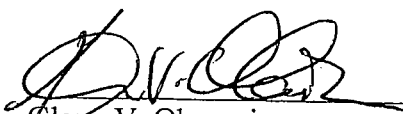
Rule 39(b) grants this Court discretion to order a jury trial, and in the exercise of that discretion, the Blackburns request that the Court order a jury trial on all the Blackburn's counterclaims, cross-claims and third party claims in this matter. Trying the exact same issues against different defendants separately, once in a jury trial and the other by the court, would be a waste of judicial resources and a waste of the parties' resources to pay to have the cases tried twice. Further, fundamental fairness militates in favor of the Blackburns to hold their right to jury trial inviolate as assured in the Constitution and in our own Rules of Civil Procedure.

Because the counterclaims in this case to be legal and compulsory under the analysis in North Carolina Federal Savings and Loan Assn. v. DAV Corp., 381 S.E.2d 903 (S.C. 1989) ("a party does not waive its right to a jury trial on a counterclaim asserted in an equity action if the counterclaim is legal and compulsory in nature"), and for the reasons above stated, the motion to strike the jury demand and to refer should be denied.

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#9

CONCLUSION

Based on the foregoing, the Defendants Blackburn respectfully request that Plaintiff's Motion to Strike and to Refer this action to the Master-in-Equity be denied in its entirety.



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ATTORNEYS FOR DEFENDANTS BLACKBURN

July 2, 2009

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FOR THE
FIFTEENTH JUDICIAL CIRCUIT

C/A 2008-CP-22-1598

Wachovia Bank, National Association,)
)
Plaintiff,)

Vs.)

William E. Blackburn; Judith Blackburn,)
Tammy S. Winner; Watson E. Felder;)
Gary F. Ownbey; and South Island)
Plantation Association, Inc.,)

Defendants.)

And)

William E. and Judith Blackburn,)
individually and as Assignees,)

Third Party Plaintiffs,)

Vs.)

Winyah Bay Holdings, LLC;)
Source One Properties, LLC; and)
Waterpointe Realty, LLC,)

Third Party Defendants.)
_____)

**AFFIDAVIT
OF WILLIAM E. BLACKBURN
AND JUDITH BLACKBURN**

FILED
GEORGETOWN COUNTY, S.C.
2009 JUL -7 PM 1:57
ALMA Y. WHITE
CLERK OF COURT

Now come the Defendants William E. Blackburn and Judith Blackburn, who depose and say:

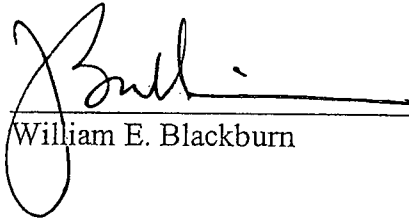
1. I did not knowingly, voluntarily, or intentionally waive my right to a jury trial at any time. I was not aware of any jury trial waiver clause until the motion to strike my request for jury trial was made by the bank.

2. I was given no consideration or other bargained for exchange for the jury trial waiver clause.

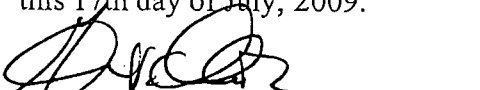
3. To my knowledge, I had no right to negotiate the clause.

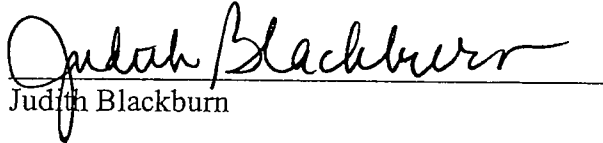
4. The bank stands in a immensely superior bargaining position on notes and mortgages to me.

5. I timely demanded a jury trial on my claims and I request this Honorable Court to honor that request.

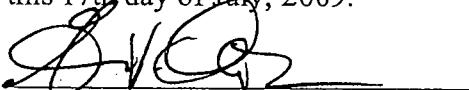

William E. Blackburn

SWORN TO BEFORE ME
this 17th day of July, 2009.


Notary Public for South Carolina
Commission Expires: _____


Judith Blackburn

SWORN TO BEFORE ME
this 17th day of July, 2009.


Notary Public for South Carolina
Commission Expires: _____

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

July 26, 2010

A handwritten signature in black ink, appearing to read 'Glenn V. Ohanesian', written over a horizontal line.

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(843) 626-7193
Attorney for Appellants

Tab 2

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2008-CP-22-1598

Wachovia Bank, National Association, ... Respondent,

v.

William E. Blackburn; Judith Blackburn; Tammy S. Winner; Watson E.
Felder; Gary F. Ownbey; and South Island Plantation Association, Inc. are, . Defendants,

Of Whom William E. Blackburn; Judith Blackburn, ... Appellants,

And of Whom Tammy S. Winner, Watson E. Felder, Gary F. Ownbey,
and South Island Plantation Association, Inc. are, ... Respondents,

v.

Winyah Bay Holdings, LLC; Source One Properties, LLC; and Waterpointe
Realty, LLC, Third Party Defendants, ... Respondents.

FINAL BRIEF OF APPELLANTS

August 12, 2010

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN CONCLUDING APPELLANTS KNOWINGLY AND VOLUNTARILY WAIVED THEIR RIGHT TO A JURY TRIAL?
2. DID THE TRIAL COURT ERR WHEN IT FOUND THAT THE LANGUAGE OF THE PURPORTED WAIVER APPLIED TO APPELLANTS' COUNTERCLAIMS?
3. DID THE TRIAL COURT ERR WHEN IT FOUND THAT THE ALLEGATIONS OF SALES MISREPRESENTATIONS IN APPELLANTS' LEGAL COUNTERCLAIMS WERE NOT ONLY RELATED, BUT SIGNIFICANTLY RELATED TO THE NOTE OR MORTGAGE?
4. DID THE TRIAL COURT ERR WHEN IT FAILED TO FIND THE PURPORTED WAIVER IS UNCONSCIONABLE AND THEREFORE UNENFORCEABLE AS A ONE-SIDED, NON-NEGOTIABLE, INCONSPICUOUS PROVISION IN A CONTRACT OF ADHESION?
5. DOES THE COURT HAVE DISCRETION TO ORDER A JURY TRIAL DESPITE THE PURPORTED WAIVER?

STATEMENT OF THE CASE

On November 13, 2008, Respondent Wachovia Bank commenced foreclosure proceedings against Appellants Blackburn and others alleging default in the payment of a note and mortgage. (Complaint, p. 3, R. p. 10) The Blackburns, individually and as assignees of two of the other mortgagors, filed counterclaims against the Bank, cross-claims against a co-Defendant, and third party claims against several third party defendants involved in the sale of the property in question. (Answer, R. pp. 53-55, Amended Answer, R. pp. 56-69, and Second Amended Answer, R. pp. 70-84) The Blackburns requested a jury trial as to all

claims and defenses for which a jury trial is authorized. (Answer, R. p. 53; Amended Answer, Counterclaim & Third Party Complaint, R. p. 56; and Second Amended Answer, Counterclaim & Third Party Complaint, R. p. 70 -- hereinafter referred to more simply as Answer, Amended Answer, and Second Amended Answer) While the complaint by the Bank for foreclosure is equitable, all but one of the counterclaims against the bank and other defendants are legal in nature. Those counterclaims, cross-claims, and third party claims are as follows: negligent misrepresentation (action at law); violation of South Carolina Unfair Trade Practices Act (law); promissory estoppel (equity); breach of contract/breach of contract accompanied by a fraudulent act (law); breach of fiduciary duty (law); fraud (law); breach of contract/negligence (law); breach of contract (law); civil conspiracy (law); illegality of contract (perhaps more appropriately a defense, but according to case law neither courts of law or equity grant remedies for illegal contracts). (Second Amended Answer, R. p. 75-84)

Plaintiff Bank moved to strike the jury trial request as to all counterclaims. The motion was heard on June 18, 2009, with Memoranda submitted thereafter. The trial court granted that motion by Order filed December 7, 2009 (R. pp. 1-7). Appellants thereafter served Notice of Appeal on December 30, 2009.

FACTS

Because no factual findings were made below other than as necessary to decide the Motion to Strike Jury Trial Request, the factual record in this case is minimal. The facts as alleged in the pleadings are what is at issue in this appeal, with the exception of the Affidavit of William and Judith Blackburn that was filed in response to the motion at issue. (Affidavit,

R. pp. 119-120). For purposes of this appeal, the facts as alleged in the Blackburns' Answer, Amended Answer, and Second Amended Answer should be taken as true to determine whether as alleged, those facts and claims would warrant a jury trial and are within the purview of the purported jury trial waiver.

Those relevant allegations are that the Bank and the Third Party Defendants (Waterpointe Realty, LLC, Source One Properties, LLC, and Winyah Bay Holdings, LLC) were agents of, partners of, joint venturers with, or conspirators with each other in the sale and marketing of the property which is the subject of the Bank's foreclosure. The allegations of the counterclaims, crossclaims and third party claims center around the following excerpt from the Second Amended Answer: "To induce the sale of the lots in this premier development, Plaintiff Bank partnered with the Third Party Defendants to put together a massive sales event on July 23, 2005. The event was a lottery of available lot purchases, complete with golf cart tours, helicopter rides, and a full fledged lottery. At the event, Plaintiff Bank was present as part of the sales team with the Third Party Defendants. Plaintiff Bank had its own section in the promotional space and to Defendants' knowledge was the exclusive lender present. Plaintiff Bank was promoting itself through banners, promotional materials, and had a team of its own employees on site at the property location to market loans as soon as the lottery lots were distributed and sales contracts signed on the spot. The whole promotion was high pressure, on the spot sales, during which Plaintiff Bank was acting in concert with the Third Party Defendants to promote the sales event and the lot purchase transactions, all as a package deal to be completed on the spot that day. Plaintiff Bank and the Third Party Defendants all joined together to misrepresent and defraud buyers

such as these Defendants. Among the misrepresentations made were promises that day docks, roads, infrastructure, pool, marsh walks, and other amenities would be in place within 18 months of the lottery (January 23, 2007). The property values were also artificially inflated through collusion by the parties. None of these things were accurate. The infrastructure and amenities were not in place until the Spring of 2008. The day docks and marsh walks are still not there as of the date of this pleading, more than three and half years (42 months) after the lottery. In fact, Defendants are informed and believe that the permits for same either have not yet been submitted or were not submitted within three years of the lottery, much less constructed and complete within 18 months.” Second Amended Answer, pp. 4-5, R. pp. 73-74. The following is a brief summary of the gravamen of each cause of action and the type of remedy requested in each:

1. Negligent Misrepresentation: That the Bank and Third Party Defendants “falsely represented the docks, infrastructure and amenities and the intent to timely construct them, never having intended to live up to the promises. They also artificially inflated the property values and presented them as true values.” *Remedy requested*: actual, special and punitive damages. Second Amended Answer, pp. 6-7, R. pp. 75-76.
2. South Carolina Unfair Trade Practices Act: That the above acts of the Bank and Third Party Defendants “constituted unfair and deceptive acts in the conduct of trade or commerce...” *Remedy requested*: actual and special damages, treble damages, reasonable attorney’s fees, and costs. Second Amended Answer, p. 8, R. p. 77.

3. Promissory Estoppel: That the Bank and Third Party Defendants' promises of timely construction of the docks, infrastructure, and amenities, along with the inflated property values, were promises justifiably relied on by the Blackburn to their detriment. *Remedy requested*: actual, special and punitive damages. Second Amended Answer, pp. 8-9, R. pp. 77-78.
4. Breach of Contract/Breach of Contract Accompanied by a Fraudulent Act: Bank and Third Party Defendants "breached the contracts by failing to comply with its obligations outlined above,...by failing to act in good faith..., breached the contract with fraudulent intent, and the breach was accompanied by the fraudulent act of continuing to represent as true things which were false and were going to continue to be false." *Remedy requested*: actual, special, and punitive damages. R. pp. 78.
5. Breach of Fiduciary Duty: That the Bank and Third Party Defendants, by virtue of their special marketing of the property came into special relation with the Blackburns and breached the duty appurtenant to that relationship by asserting inflated values and failing to act on their construction promises. *Remedy requested*: actual, special and punitive damages. Second Amended Answer, p. 10, R. p. 79.
6. Fraud: That the above representations constitute fraud and fraud in the inducement, such that the contracts are void. *Remedy requested*: actual, special and punitive damages. Second Amended Answer, p. 11, R. p. 80.
7. Breach of Contract/Negligence: That the Bank, Third Party Defendants,

and co-Defendant (South Island Plantation Association, Inc.) “all took steps...to hinder or prevent the sale of the property by Defendants Blackburn...Restrictions on sales marketing and signage, in addition to the failure to ensure timely construction of promised docks, infrastructure and amenities...breached the covenant of good faith and fair dealing imposed in every contractual relationship, or alternatively breached a tort duty owed...”

Remedy requested: “substantial monetary damages, damage to credit, other special damages, and punitive damages.” Second Amended Answer, p. 12, R. p. 81.

8. Breach of Contract: That the Bank and Third Party Defendants, all acting as sellers of the property in a joint venture, partnership or agency relationship, failed to uphold a promise made as a purchase incentive to make payment or issue credit to the Blackburns of a specific amount due (\$1,794.65) at closing from the seller. *Remedy requested:* damages of \$1,794.65. Second Amended Answer, p. 13, R. p. 82.
9. Civil Conspiracy: That the Bank and the other Defendants combined together for the purpose of injuring the Blackburns, as alleged above. *Remedy Requested:* special damages. Second Amended Answer, pp. 13-14, R. pp. 82-83.
10. Illegality of Contract: That Bank and Third Party Defendants “participated in or publicly set up a lottery of sales of lands or rights to purchase lands...As this lottery violated the law, the resulting contract of sale and loan documents

are null and void as a matter of law.” *Remedy requested:* return of funds paid, dismissal of Bank’s claims, and all damages and special damages incurred. Second Amended Answer, p. 14, R. p. 83.

These counterclaims, while largely unrelated to the loan being foreclosed, do nonetheless “arise out the transaction or occurrence that is the subject matter of the opposing party’s claim” under Rule 13(a), SCRCF. As a result, they are compulsory as defined therein. Further, as outlined above, eight of the ten counterclaims are legal in nature, one (promissory estoppel) is in equity but requests damages which are typically legal in nature, and one (illegality of contract) is probably more appropriately termed a defense, though it is not clear whether it is legal or equitable. Thus, at least 80% (and probably 90%) of the claims are legal, compulsory counterclaims for which the Blackburns would in the ordinary course of matters be entitled to a jury trial prior to the Bank’s equitable action of foreclosure moving forward. However, as to Mr. Blackburn the Bank is relying upon a clause -- at the bottom of a page, in a type not distinguishable from type used in the paragraph above it, not on a page where initials or signature are required or requested, and buried in a large stack of documents presented for signature at closing -- in an attempt to take away his otherwise inviolate right to a jury trial. Mr. Blackburn did not sign a guaranty, though Mrs. Blackburn and the Blackburns’ assignors (Tammy Winner and Watson Felder, co-purchasers of the lot in question) did. See Note, Mortgage, and Guaranties, R. pp. 14-52. The clause language in those guaranties is the same as in the note. No such clause appears in the mortgage. The Note contains the following provision:

Waiver of Jury Trial. To the extent permitted by applicable law, each of borrowers by execution hereof and bank by acceptance hereof, knowingly, voluntarily and intentionally waives any right each may have to a trial by jury in respect of any litigation based on, or arising out of, under or in connection with this note, the loan documents or any agreement contemplated to be executed in connection with this note, or any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party with respect hereto. This provision is a material inducement to bank to accept this note

(Note at p. 5, Exh. A to Complaint, R. p. 18).

Counsel would refer the Court to the Note, attached to the Complaint for reference.

The heading of the clause is in the same exact type and boldness of every single clause (and there are 20) in the six page document. (R. pp. 14-19) Indeed, the print of that Note and the clause are both substantially smaller (and single spaced) than the print of this brief. The clause itself is capitalized but so is another clause on the same page, but again the type size and boldness is identical to the rest of the entire document. (Just as in the guaranties). No signature or initials appear on that page, nor is it requested. (R. p. 18) Not so much as a required initial appears next to this clause which purports to remove the Blackburns' constitutionally protected right to trial by jury.

To nullify the Blackburns' request for jury trial, the Bank claims, and the trial court agreed, that a knowing and voluntary waiver of the right occurred. This conclusion was made despite the fact that the only evidence (other than a signature by Mr. Blackburn on a page where the clause did not appear) of knowledge or voluntariness was the Blackburns' Affidavit which clearly indicated no such knowing or voluntary waiver occurred:

"I did not knowingly, voluntarily, or intentionally waive my right to a jury trial at any time. I was not aware of any jury trial waiver clause until the

motion to strike my request for jury trial was made by the bank....

I was given no consideration or other bargained for exchange for the jury trial waiver clause...

...I had no right to negotiate the clause...

The bank stands in a [sic] immensely superior bargaining position on notes and mortgages to me.” Affidavit of William E. Blackburn and Judith Blackburn, R. pp. 119-120.

The Bank nor any of the other Defendants presented anything to the trial court to contradict this Affidavit or otherwise shed light on the knowledge or voluntariness of the Blackburns’ purported waiver of jury trial. Despite this, the trial court found the waiver valid, and struck the Blackburns’ request for a jury trial on all its counterclaims, cross-claims, and third party claims. It is this Order from which the Blackburns appeal.

Thus, the only facts relevant to this appeal are the factual allegations of the counterclaims as outlined above; the note, mortgage, and guaranties; and the facts listed above from the Blackburns’ Affidavit.

ARGUMENT

I. WITHOUT A KNOWING AND VOLUNTARY WAIVER, THE RIGHT TO JURY TRIAL CANNOT BE VIOLATED.

The Seventh Amendment to the United States Constitution provides:

“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a

jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” 7th Amendment, US Constitution (emphasis added).

The Declaration of Rights in the Constitution of the State of South Carolina provides:

“The right of trial by jury shall be preserved inviolate.” Article I, Section 14, SC Constitution.

The bank and the trial court seem to start from the premise that a purported waiver buried in a loan document are the starting point for discussion in this case. Counsel believes it is of paramount importance to start from the real foundation of this case, and indeed of the rule of law in this country and state -- that is, the constitutional right to jury trial, which according to the state constitution shall be preserved inviolate. What the bank seeks to do is violate the very right the constitutions say should never be violated.

It is clear that the Blackburns are seeking a jury trial and have been since the beginning of their claims. The Answer, Amended Answer and Second Amended Answer all demand a jury trial. The Affidavit quoted above makes it clear that they did not even know the clause existed prior to the motion to strike jury trial being filed. The Affidavit also makes it clear that any purported waiver was not knowing, voluntary, or intentional. See Affidavit (R. pp. 119-120).

The Blackburns cannot be held to have waived their constitutional rights unless that waiver is found to be knowing, voluntary, and intentional. The Fourth Circuit has recognized: “The seventh amendment right of course is a fundamental one, but it is one that can be knowingly and intentionally waived by contract...Where waiver is claimed under a

contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed.” Leasing Service Corp. v. Crane, 804 F.2d 828 (4th Cir. 1986). Again the only evidence on this issue is the Blackburns’ Affidavit -- the consent was neither voluntary nor informed. The waiver is therefore invalid. The Fourth Circuit in making its finding in the Crane case cited to the following case out of the Second Circuit, which because of its relevance is quoted copiously here:

“NER first claims that it was reversible error for the trial court to have granted Hendrix’s demand for a trial by jury, basing its contention on a provision literally buried in the eleventh paragraph of a fine print, sixteen clause agreement. Embedded there are the crucial words: “Lessee hereby waives a trial by jury”

It is elementary that the *Seventh Amendment* right to a jury is fundamental and that its protection can only be relinquished knowingly and intentionally. *Johnson v. Zerbst*, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938); *Heyman v. Kline*, 456 F.2d 123, 129 (2d Cir. 1972), cert. denied, 409 U.S. 847, 34 L. Ed. 2d 88, 93 S. Ct. 53 (1972). **Indeed, a presumption exists against its waiver.** *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393, 81 L. Ed. 1177, 57 S. Ct. 809 (1937). There is little doubt that the provision relied on by NER fails to overcome this presumption. The waiver clause was set deeply and inconspicuously in the contract, and Justice Black, dissenting in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 332-3, 11 L. Ed. 2d 354, 84 S. Ct. 411 (1964) aptly characterized the nature of NER’s form agreements:

this printed form provision buried in a multitude of words is too weak an imitation of a genuine agreement to be treated as a waiver of so important a constitutional safeguard . . . it exhausts credulity to think that they or any other layman reading these legalistic words would have known or even suspected that they amounted to [such] an agreement. . . .¹

Moreover, it is clear that Hendrix did not have any choice but to accept the NER contract as written if he was to get badly needed funds. This gross inequality in bargaining power suggests, too, that the asserted waiver was neither knowing nor intentional. See *Fuentes v. Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972).

1 In *Szukhent*, the Supreme Court, by a 5-4 vote, upheld a provision in a similar contract providing that service of process could be made on an agent designated in the document. The right to a jury trial, however, is far more fundamental than the right to personal service, and cannot be waived absent a showing that its

relinquishment is knowing and intentional. *Fuentes v. Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1971) provides a compelling analogy. **There, the Court refused to uphold a contractual provision waiving due process rights, noting that there was "no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights." *Id.* at 95. No such showing has been made here."** National Equipment Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2nd Cir. 1977).

Just as in the above case cited, the factors such as conspicuousness, whether the clause is buried in a long document, and the bargaining position of the parties all militate in favor of the Blackburns' position in this case. And again, the only evidence on these issues is the Affidavit of the Blackburns and the document itself. There is no evidence whatsoever that suggests the Blackburns knew the clause was there, knew the import of the clause, and voluntarily or intentionally were giving up their right to a jury trial. While it is true that in most contracts you are deemed to have read and understood and agreed to what you signed, this general rule does not apply without limitation to jury trial waivers, as indicated in the case law above. Again, as the above case stated, there was "no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights." Since the only evidence on the key issues of knowing and voluntary waiver is the Affidavit, counsel believes the only factual inference that can reasonably be made is that no such waiver occurred.

In that regard, no deference is due to the trial court's decision. In Verenes v. Alvanos, Op. No. 26780 (S.C.Sup.Ct. filed March 1, 2010)(Adv.Sh. No. 8 at 38), the South Carolina Supreme Court held as follows when discussing the standard of review in a case involving the right to jury trial: "Whether a party is entitled to a jury trial is a question of

law...An appellate court may decide questions of law with no particular deference to the trial court.” Ibid. at 41.

II. THE EXPRESS LANGUAGE OF THE PURPORTED WAIVER DOES NOT APPLY TO APPELLANTS’ COUNTERCLAIMS.

Further, even if the waiver was voluntary, knowing, and informed, it would fail because by its own terms the waiver does not apply to the counterclaims made in this case. The waiver only applies to claims arising from the Note or loan documents or course of dealing with respect to the Note or loan documents. (R. p. 18) In this case, the counterclaims center around the sales process, not the loan documents. The Blackburns allege the bank injected itself into the marketing and sale of this property and all the other lots in the subject subdivision, became a joint venturer or partner, and is therefore equally liable for sales misrepresentations made and failures to provide infrastructure, amenities, docks, etc. These allegations, while arising out of the same occurrence as the note and mortgage for purposes of compulsory counterclaims, do not arise out of the loan documents as required by the express language of the waiver clause. They arise out of sales misrepresentations and failures to abide by promises to build infrastructure, amenities, docks, etc.

As stated in AttorneyFirst, LLC v. Ascension Entertainment, 144 Fed. Appx. 283, 290 (4th Circuit 2005): “A waiver of the right to trial by jury will not be lightly implied...(the right of jury trial is fundamental, courts must indulge every reasonable

presumption against waiver).” Further, as stated in the case of Beach Company v. Twillman, 351 S.C. 56, 566 S.E.2d 863, 866 (Ct.App. 2002), **“Such a waiver must be strictly construed as the right to trial by jury is a substantial right.”** Citing N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 416 S.E.2d 637, 638 (1992). Thus, while the Bank cited those cases and the trial court used them to establish the principle that a party may waive their right to jury and that contracts are to be construed in their plain meaning, they omitted the most crucial part of the discussion. Strict construction of the clause is required. In this case, it takes a liberal construction of “arising out of” the loan documents to conclude that sales representations that preceded the loan by months and promises of docks and amenities by a seller are contemplated by a borrower signing a typical bank note at closing. It is important to note that the clause in question purports to apply only to any litigation “arising out of, under or in connection with this note, the loan documents, or any agreement contemplated to be executed in connection with this note, or any course of conduct, course of dealing, statements or actions of any party with respect hereto.” (Note, p. 5, R. p. 18) All of that language is tied to the loan documents and the last clause is tied specifically to the note. The term “loan documents” is actually defined in the Note on page 2:

“The term “Loan Documents”, as used in this Note...refers to all documents executed in connection with or related to the loan evidenced by this Note..., such letters of credit issued..., any applications for such letters of credit..., and may include, without limitation, a commitment letter that survives closing, security instruments, financing statements, mortgage instruments, any renewals or modifications...”
Note, p. 2, R. p. 15.

Clearly, what is contemplated in the Note for purposes of jury trial waiver is any claim which arises from the loan documents. In its own list, loan documents do not include sales contracts, deeds, promotional literature from the developer/seller, lottery procedure, promises regarding docks and amenities and infrastructure. (R. p. 15) The counterclaims of the Blackburns do not arise from the note, or mortgage, or loan application, or financing statements, or letters of credit, or any of the loan documents as defined above. They arise from pre-purchase conduct and promises that are unrelated to the loan and the loan documents. The clause, by its own express wording, should not apply to thwart the Blackburns' jury trial request. A strict construction as opposed to a liberal construction is called for here, as required by the South Carolina case law.

III. THE ALLEGATIONS OF SALES MISREPRESENTATIONS IN APPELLANTS' LEGAL COUNTERCLAIMS ARE UNRELATED TO THE NOTE OR MORTGAGE AND THUS ARE NOT SUBJECT TO THE PURPORTED WAIVER INCLUDED IN THE NOTE.

The case law provides that in order for claims to be subject to an agreement, those claims must bear a significant relationship to the underlying agreement. Sutton v. Hollywood Entertainment Corporation, 181 F.Supp.2d 504, 510-512 (D.Md. 2002). The cases stand for the general proposition that claims are not subject even to a broadly worded clause if the conduct at issue was beyond any reasonable foreseeability or contemplation at the time the contract was executed. Fazio v. Lehman Brothers, Inc., 2002 U.S. Dist. LEXIS 15174 (N.D. Ohio 2002). In the Sutton case cited above, the court noted the Fourth Circuit's

adherence to this test, calling it the “significant relationship” test. The Sutton court concluded that a video membership rental contract including an arbitration provision could not be used to force arbitration even though the customer’s claims arose from conduct which occurred while in the video store. There, the customer was falsely accused of robbing the store. The court found that allegations of false imprisonment and negligence based on those accusations were not significantly related to the underlying video rental contract and thus the arbitration clause did not apply.

This significant relationship test has likewise been adopted by the South Carolina Supreme Court when dealing with arbitration clauses. Aiken v. World Finance Corporation, 373 S.C. 144, 644 S.E.2d 705 (2007). In Aiken, the Court held:

“...[C]ourts generally hold that broadly-worded arbitration agreements apply to disputes in which a “significant relationship” exists between the asserted claims and the contract in which the arbitration clause is contained...

Courts typically characterize arbitration agreements purporting to govern disputes “arising out of or related to” the underlying contract between the parties as “broad” arbitration clauses...

Applying what amounts to a “but-for” causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties’ agreement to arbitrate claims between them. Such a result is illogical and unconscionable... ‘The mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one ‘arising out of or relating to’ the agreement...

[T]ort claims were within the scope of the arbitration when “the particular tort claim is so interwoven with the contract that it could not stand alone”...

[W]e pronounce a...definitive rule for determining whether a significant relationship exists between a dispute between parties to a contract and the underlying contract...Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings...

...Aiken could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct.” Aiken, 644 S.E.2nd at 708-709.

The Aiken case was further followed in Partain v. Upstate Automotive Group, Op. No. 26768, (S.C.Sup.Ct. filed February 8, 2010)(Adv.Sh. No. 6 at 28), where a customer claimed fraud in a “bait and switch” case under the South Carolina Unfair Trade Practices Act. In that case, the South Carolina Supreme Court found that “even if his claim is encompassed by the language of the arbitration clause, the clause does not apply because the alleged actions...constitute ‘illegal and outrageous acts’ unforeseeable to a reasonable consumer in the context of normal business dealings...**Partain cannot be held to have contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct.”** Ibid. at 33. Similarly, the Blackburns cannot be held to have contemplated that, in signing the note and guaranty, they were agreeing to waive jury trial claims arising from allegedly fraudulent conduct.

That the bank would engage itself as a joint venturer or partner of the developer/seller and make false representations about the property and construction of amenities could not be considered within the contemplation of a reasonable person merely attempting to secure a loan from the bank. Neither could the video store customer in Sutton have foreseen the false accusations that were ultimately made against him by the video store. In truth, the Blackburns could maintain most, if not all, of the counterclaims against the Bank even if they had not gotten a loan from the bank. This lack of a significant relationship is fatal to the Bank’s attempt to attach the jury trial waiver to these claims unrelated to the loan documents. Also see Ford v. Nylcare Health Plans of Gulf Coast, Inc., 141 F.3d 243, 252 (5th Cir.

1998)(physician suit against HMO was outside arbitration provision because claims of false advertising were independent from the contract physician had with HMO); Leadertex, Inc. v. Morganton Dyeing & Fishing Corp., 67 F.3d 20, 28-29 (2nd Cir. 1995)(plaintiff seller of goods sued buyer for defaming the products sold and court concluded that while resolution of the defamation claim would necessitate examining evidence relevant to the contract claims, “the defamation claim was not subject to arbitration because such a claim was beyond the parties’ reasonable expectation, and never contemplated, at the time the contract was executed”); Hersman, Inc. v. Fleming Companies, 19 F.Supp.2d 1282, 1286-87 (M.D.Ala. 1998)(project manager’s negligence not subject to arbitration clause signed by plaintiff property owner in architect contract despite parties’ agreement to arbitrate all claims arising out of or “relating to” the contract); Telecom Italia, SPA v. Whole Telecom Corp., 248 F.3d 1109 (11th Cir. 2001)(lease of telecommunications circuit including arbitration agreement held not to require arbitration since the alleged tortious interference with contract was not the “immediate, foreseeable result of the performance of contractual duties”). The performance of duties by Wachovia and the Blackburns under the note and mortgage did not have the immediate and foreseeable result of Wachovia making false representations and breaching construction promises. That conduct was certainly not required by the note or mortgage and was not the immediate, foreseeable result of contractual performance of the note or mortgage by either party.

Since the Blackburns could not contemplate such a claim arising, they could not give valid consent to waive a jury trial on that claim. The settled law requires that the subject claims (here, sales misrepresentations, construction delays) bear a significant relationship to

the underlying contract (note and mortgage) in order for the jury trial waiver provisions to apply. Here, they do not have such a relationship. These claims fall outside the scope of the clause and are not subject to the jury trial waiver.

**IV. THE PURPORTED WAIVER IS UNCONSCIONABLE AND
THEREFORE UNENFORCEABLE AS A ONE-SIDED, NON-
NEGOTIABLE, INCONSPICUOUS PROVISION IN A CONTRACT
OF ADHESION.**

As stated above in the Aiken case, our Supreme Court has already found that allowing an arbitration clause to be open-ended is illogical and unconscionable. (“Applying what amounts to a “but-for” causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties’ agreement to arbitrate claims between them. **Such a result is illogical and unconscionable.**” Aiken at 708. Indeed the Aiken court invited this discussion of unconscionability in a later footnote: “Because the parties do not raise the issue of whether any arbitration agreement purporting to apply to such outrageous and unforeseen tortious acts is unconscionable, we leave this determination for another day.” Aiken at 709, fn 4.

In Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663 (S.C. 2007), our Supreme Court found an arbitration clause, very similar to the jury trial waiver clause in the case at bar, to be unenforceable. We quote copiously from that opinion because of its relevance hereto. In a case involving a waiver of rights in an auto sales context, very analogous to a home/property purchase context, the Court invalidated an arbitration agreement:

“A party may seek revocation of the contract under such grounds as exist at law or in equity, including...unconscionability...

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them...

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process...**In determining whether a contract was tainted by an absence of meaningful choice...courts should take into account the nature of the injuries suffered...; whether...[the party]...is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.”**
Simpson at 668-669.

The only evidence before the Court is the Blackburns' Affidavit on these issues, and as is typical in residential mortgage transactions, the Blackburns were in a substantially weaker bargaining position to the bank, not as sophisticated, and were surprised by the clause's inclusion. (R. pp. 119-120) Further, the clause, while in capital letters, is not conspicuous. It is not included at all in the mortgage and its inclusion in the Note is the very last clause at the bottom of page 5 of a 6 page document. (R. p. 18) No initials or signatures are called for near the clause or on the same page of the clause. The letters are not larger type from the rest of the document. Such documents are handed to buyers at closing often with hundreds of other pages and with many documents to sign, and there was nothing to draw attention to the fact that a substantial Constitutional right was being waived. The Blackburns' Affidavit makes it clear they were not even aware the clause existed. The Blackburns are individuals, and are not a substantial business concern. Their injuries are substantial and worthy of being tried to a jury. This “take it or leave it” note and mortgage

are an adhesion contract with terms that were non-negotiable. “...[R]egardless of the general legal presumptions that a party to a contract has read and understood its terms, we also find it necessary to consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences.” Simpson at 670. Based on the Simpson factors, no meaningful choice existed and a failure of fundamental fairness occurred in the bargaining process. Also see Knox v. Joe Gibson’s Autoworld, 2008 U.S. Dist. LEXIS 37677 (D.S.C.), which followed Simpson and denied the enforcement of an arbitration clause with the following language: “In light of the South Carolina Supreme Court’s admonition that adhesion contracts between a consumer and an automobile retailer requiring arbitration...should be analyzed “with considerable skepticism,” the court finds that the Agreement is unconscionable and unenforceable...”

Further, just as in Simpson, there are oppressive and one-sided terms in the case at bar. Just as the contract in Simpson included a prohibition of punitive and exemplary damages, so did the Note in this case. The Simpson court found such a clause to be oppressive and one-sided. “In conjunction with Simpson’s lack of meaningful choice in agreeing to arbitrate, this provision is an unconscionable waiver of...rights, and therefore, unenforceable.” Simpson at 671. The case at bar presents an almost identical situation. The jury trial waiver clause in this case is likewise unconscionable and unenforceable.

**V. THE COURT HAS DISCRETION TO ORDER A JURY TRIAL
DESPITE THE PURPORTED WAIVER.**

The trial court declined in its Order to make use of its discretion under Rule 39, SCRPC, to order a jury trial despite the purported waiver. The South Carolina Rules of Civil

Procedure provide a mechanism for the Court to grant a jury trial to a party even when that party has waived that right. Rule 39(b), SCRCP, provides in relevant part: “[N]otwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues.” Clearly, had the Blackburns not signed the waiver clause, there would be no question of the right to a jury trial on the legal defenses and compulsory counterclaims raised. While there was no valid waiver, even if said waiver had occurred and thus the Blackburns had failed to properly demand a jury trial on these claims, Rule 39(b) gives the Court unfettered discretion to nonetheless order a jury trial. See Britt v. Knight Publishing Co., 42 F.R.D. 593, 594-595 (D.S.C. 1967), where Judge Hemphill held that “waiver occurs in these circumstances even though failure to make timely demand is done through inadvertence or through negligence...Rule 39(b) however provides that...the court in its discretion...may order a trial by jury of any or all issues...[A]lthough some cases require special circumstances...before the judge may exercise discretion...the better rule is that there is no limitation on the judge’s discretion.” This principle has been well settled law in South Carolina for many years. See Meier v. Kornahrens, 113 S.C. 270, 102 S.E. 285 (1920), where the South Carolina Supreme Court ruled that the Court has “...the power of its own motion, or at the suggestion of a party, after the lapse of the time prescribed by the rule, to refer the issues of fact to a jury.” See also 9 ALR4th 1041, page 3, where a collection of cases finds the court has discretion even after express waiver to order a jury trial:

“Although it has been held in a few cases that after an express waiver of jury trial by the parties, the court is without authority or discretion to order a jury trial on its own motion or on motion by a party made subsequent to such

express waiver, nevertheless, it has been held in a substantial number of cases that despite an express waiver of jury trial by the parties, the court may order a jury trial on its own motion. The courts have also held or recognized in a number of cases, by virtue either of judicial construction or of provisions of applicable statutory or court rules, that after a jury has been expressly waived by the parties, a court may in its discretion order a jury trial upon motion by one of the parties made subsequent to such express waiver, the courts pointing out, in some of the cases, one or more of a variety of factors, which affect either the exercise of discretion itself or the determination of the propriety of particular exercises of such discretion, such as (1) the presence or absence of prejudice to the opposing party; (2) the extent, if any, of interference with the court's orderly disposition of business, or extent of delay; and (3) the time when relief from the express waiver of jury trial was requested."

A review of these relevant factors favors the right to jury being granted in this case. There is no prejudice to the Bank in the granting of a jury trial; it has been on notice since the Blackburns' first appearance in this case that a jury trial was being requested. A jury trial would not interfere with the court's orderly disposition of business. Indeed it would assist that orderly disposition by eliminating the possibility of two separate trials, one by jury and one nonjury. And as to the third factor, again the time of the initial request was as soon as the Blackburns appeared in the action.

Rule 39(b) grants this Court discretion, in this de novo review, to order a jury trial, and in the exercise of that discretion, the Blackburns request that the Court order a jury trial on all the Blackburn's counterclaims, cross-claims and third party claims in this matter. The Blackburns will likely move to sever the claims against the Third Party Defendants from the counterclaims against the Bank if the jury trial is not granted on the claims against the Bank. Trying the exact same issues against different defendants separately, once in a jury trial and the other by the court, would be a waste of judicial resources and a waste of the parties'

resources to pay to have the cases tried twice. Further, fundamental fairness militates in favor of the Blackburns to hold their right to jury trial inviolate as assured in the Constitution and in our own Rules of Civil Procedure.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court, order jury trials on all counterclaims, cross-claims, and third party claims, and remand the case for further proceedings. Such a decision would necessarily also reverse the trial court's decision to refer the case to the Master in Equity since the Master has no jurisdiction to hold jury trials.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Glenn V. Ohanesian', written over a horizontal line.

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August 12, 2010

Tab 3

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2008-CP-22-1598

Wachovia Bank, National Association, ... Respondent,

v.

William E. Blackburn, Judith Blackburn, Tammy S. Winner,
Watson E. Felder, Gary F. Ownbey, and South Island Plantation
Association, Inc. are, ... Defendants,
Of Whom William E. Blackburn, Judith Blackburn, ... Appellants,
And Of Whom Tammy S. Winner, Watson E. Felder, Gary F. Ownbey,
and South Island Plantation Association, Inc. are, ... Respondents,

v.

Winyah Bay Holdings, LLC, Source One
Properties, LLC, and Waterpointe Realty, LLC,
Third Party Defendants, ... Respondents.

FINAL BRIEF OF THE RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT PROPERLY HELD THAT THE BLACKBURNS MAY NOT AVOID THE EFFECTS OF COMMERCIAL LOAN DOCUMENTS THEY SIGNED BY CLAIMING THAT THEY DID NOT READ THEM.
2. WHETHER THE CIRCUIT COURT PROPERLY CONCLUDED THAT A CONSPICUOUS, BILATERAL CONTRACT PROVISION WAIVING THE PARTIES' RIGHT TO A JURY TRIAL IS NOT UNCONSCIONABLE.
3. WHETHER THE CIRCUIT COURT PROPERLY CONCLUDED THAT THE BLACKBURNS' COUNTERCLAIMS, WHICH FOCUS ON WACHOVIA'S ACTIONS LEADING UP TO THE CONSUMMATION OF A LOAN TRANSACTION, INVOLVE WACHOVIA'S "COURSE OF CONDUCT," "COURSE OF DEALING," "ACTIONS," OR "STATEMENTS" WITH RESPECT TO THE LOAN.
4. WHETHER THE CIRCUIT COURT PROPERLY HELD THAT A ROUTINE DISPUTE REGARDING THE TIMING OF CONSTRUCTION AT A PLANNED DEVELOPMENT IS FORESEEABLE IN THE CONTEXT OF NORMAL BUSINESS DEALINGS.
5. WHETHER THE CIRCUIT COURT PROPERLY CONCLUDED THAT IT WAS NOT PERMISSIBLE TO OVERRULE THE PARTIES' CONTRACTUAL JURY TRIAL WAIVERS UNDER RULE 39(B), SCRCP.

STATEMENT OF THE CASE

This is a commercial mortgage foreclosure action that arises out of the failure of William Blackburn and his guarantors, including Judith Blackburn, to make payments on a purchase-money loan from Wachovia Bank, National Association ("Wachovia") that is secured by investment property in a Georgetown County development known as South Island Plantation.

Wachovia filed its foreclosure complaint on November 13, 2008. (R. p. 8, Compl. p. 1.) In a series of answers and amended answers, William Blackburn, the

borrower, and Judith Blackburn, a guarantor, filed numerous counterclaims, all of which involve the basic allegation that Wachovia is somehow responsible for the property developer's alleged failure to build certain promised amenities at the development.¹ (*See, e.g.*, R. pp. 59-60, Amended Answer pp. 4-5; R. pp. 73-74, Second Amended Answer pp. 4-5.)

Because William Blackburn's promissory note (the "Note") and Judith Blackburn's personal guaranty (the "Guaranty") both contain provisions that expressly waive the parties' right to a jury trial, Wachovia moved to strike the Blackburns' jury demand.² The Circuit Court heard argument on the motion on June 18, 2009, and granted the motion by Order filed December 7, 2009 – dated December 2, 2009. (R. p. 87, line 1, Transcript of Hearing p. 3, line 1; R. p. 7, Order of December 7, 2009, p. 7.) This appeal followed.

STATEMENT OF FACTS

On July 23, 2005, the Blackburns, along with Tammy Winner and Watson Felder,³ contracted with Winyah Bay Holdings, LLC, to purchase a piece of investment property in South Island Plantation, a Georgetown County planned development, for \$515,519.00. On February 14, 2006, a closing was held on the real estate purchase,

¹ The Blackburns filed similar third-party claims against a variety of entities, including the developer and real estate brokers. (*See, e.g.*, R. pp. 58-59, Amended Answer pp. 3-4; R. pp. 72-73, Second Amended Answer pp. 3-4.) The third-party defendants are not parties to this appeal, and the claims against them do not appear to be pertinent to the issues on appeal.

² William and Judith Blackburn are represented by the same counsel and have filed consolidated pleadings in this litigation. Accordingly, Wachovia refers to them collectively as "the Blackburns" throughout this Brief.

³ Felder later conveyed his one-fourth (1/4) interest in the subject property to Gary Ownbey. (R. p. 10, Compl. p. 3.)

which was financed through a loan from Wachovia in the amount of \$463,967.00. (R. p. 14, Note p. 1.) This was a commercial transaction, and the Note expressly stated that the loan proceeds would be used to “purchase investment property.” (*Id.*) All four investors personally guaranteed the loan—William Blackburn by signing the Promissory Note in his individual capacity, and the others, including Judith Blackburn, by signing personal guaranties. (R. p. 19, Note p. 6; R. p. 40, Guaranty p. 6; R. p. 52, Guaranty of Tammy Winner p. 6; R. p. 46, Guaranty of Watson Felder p. 6.) The loan was also secured by a mortgage on the acquired property. (R. pp. 20-34, Mortgage pp. 1-13 & Ex. A.)

The Note, which was signed by William Blackburn, contains the following jury trial waiver:

WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF BORROWER BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS NOTE, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS NOTE, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS NOTE. . . .

(R. p. 18, Note p. 5 (emphasis in original).)⁴

Similarly, the Guaranty, which was signed by Judith Blackburn, contains the following jury trial waiver:

WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF GUARANTOR BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND

⁴ Because the conspicuousness of the jury waiver is important to resolving this appeal, Wachovia reproduces it here in the same font, size, and lettering as it appears in the Note. The quotation of this provision in the Blackburns’ Brief is less helpful—indeed, potentially misleading—because it does not reproduce the bold lettering and capital letters from the title of the provision, the capital letters from the text of the provision, or the sans-serif font. (Blackburns’ Br. pp. 7-8.)

INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS GUARANTY, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS GUARANTY, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS GUARANTY. . . .

(R. p. 40, Guaranty p. 6 (emphasis in original).) Felder and Winner also signed guaranties containing this jury waiver. (R. p. 46, Felder Guaranty p. 6; R. p. 52, Winner Guaranty p. 6.)

William Blackburn failed to make the loan payment that came due on July 14, 2008, and he has failed to make any subsequent payments. (R. p. 10, Compl. p. 3.) Wachovia notified Mr. Blackburn of the defaults, but he did not tender payment. (*Id.*) Thus, Wachovia accelerated the balance of the loan, made a final demand for payment, and, when no payment was received, commenced this foreclosure action against Mr. Blackburn and the three guarantors. (*Id.*)

In response, the Blackburns asserted various defenses and counterclaims. (R. pp. 75-83, Second Amended Answer pp. 6-14.) The gist of the Blackburns' allegations is that Wachovia was a joint venturer with the property developer and real estate brokers (collectively, the "Developers") to sell South Island Plantation lots and to make loans by misrepresenting the schedule on which amenities would be built at the development. (R. pp. 72-73, Second Amended Answer pp. 3-4.) Apparently recognizing that a lender would not normally be liable for a developer or real estate broker's alleged misrepresentations with respect to the property, the Blackburns claim that all of these parties were "partner[s]" or "joint venturer[s]" and that, as such, liability may be imputed to Wachovia for the Developers' purported misdeeds. (R. p. 72, Second Amended Answer p. 3.)

Specifically, the Blackburns allege ten (10) counterclaims against Wachovia: (1) negligent misrepresentation, (2) unfair trade practices, (3) promissory estoppel, (4) breach of contract / breach of contract accompanied by a fraudulent act, (5) breach of fiduciary duty, (6) fraud / fraud in the inducement, (7) breach of contract / negligence, (8) breach of contract, (9) civil conspiracy, and (10) illegality of contract. (R. pp. 75-83, Second Amended Answer pp. 6-14.) In pleading these counterclaims, the Blackburns do not distinguish between Wachovia and the Developers, nor do they distinguish between the contracts for the sale of the subject property and the loan agreement. Instead, they broadly allege that this action involves *all* of the contracts among the parties, that *all* such contracts were breached, and that *all* such contracts were induced by Wachovia and the Developers' purported misrepresentations. (*See, e.g.*, R. pp. 78-81, Second Amended Answer pp. 9-12.)

Based on the jury waivers quoted above, Wachovia moved to strike the Blackburns' jury demand, and the Circuit Court granted that motion. (R. pp. 101-02, Wachovia's Motion to Strike Jury Demand and to Refer pp. 1-2; R. p. 7, Order Granting Plaintiff's Motion to Strike Jury Demand and to Refer of December 7, 2009, p. 7.) The Blackburns appealed.

STANDARD OF REVIEW

Whether a party is entitled to a jury trial is a question of law that is reviewed *de novo*. *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010). In resolving that question, however, the Circuit Court may make factual findings, and those findings "will not be reversed on appeal if any evidence reasonably supports [them]." *See Herron v. Century BMW*, Op. No. 26805 (S.C. Sup. Ct. filed Apr. 19, 2010) (Shearouse Adv. Sh. No. 15 at 17) (noting that Circuit Court may make factual findings in the context of

resolving a motion to compel arbitration, and that such findings are entitled to deference on appeal).

ARGUMENTS

“A party may waive the right to jury trial by contract.” *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63-64, 566 S.E.2d 863, 866 (Ct. App. 2002) (citing *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992)).⁵ Here, the parties agree that William Blackburn signed the Note, that Judith Blackburn signed the Guaranty, and that both documents contain an express waiver of the parties’ right to a jury trial. Thus, the jury waivers are presumptively enforceable.

Nonetheless, the Blackburns try to avoid the effect of those waivers by arguing that: (1) the waivers were not knowing or voluntary; (2) the waivers are unconscionable; (3) their counterclaims somehow fall outside the scope of the waivers; (4) the waivers should not apply under a limited exception developed in the consumer arbitration context (and never applied to a commercial jury trial waiver); and (5) Rule 39(b), SCRPC, somehow grants the Circuit Court the authority to disregard valid, contractual jury waivers. For the reasons that follow, all of these arguments fail.

⁵ Throughout their Brief, the Blackburns shift between citing to South Carolina law and citing to federal law without any discussion as to which applies. For the sake of clarity, it is important to note that the parties’ right to a jury trial in state court is governed exclusively by state law. *Pelfrey v. Bank of Greer*, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978) (holding that the Seventh Amendment to the Constitution of the United States does not apply against the states and determining right to jury trial based solely on South Carolina law). While federal cases and cases applying other states’ law may be helpful, only South Carolina cases control.

I. THE BLACKBURNS CANNOT AVOID THE JURY WAIVERS BY CLAIMING THAT THEY DID NOT READ THE NOTE AND GUARANTY.

At the hearing on Wachovia's motion to strike the Blackburns' jury demand, the Blackburns' primary argument in opposition was that they "had no idea" the waiver provisions were in the Note and Guaranty, even though they signed those documents. (R. p. 93, lines 4-5, Tr. p. 9, lines 4-5.) As the Circuit Court held, this argument is legally and factually defective because a party cannot, as a matter of law, avoid the effects of a contract he signed by claiming that he did not read it, and because the Circuit Court found, as a matter of fact, that the Blackburns knowingly and voluntarily waived their right to a jury trial. (R. pp. 5-6, Order of December 7, 2009, pp. 5-6.)

A. The Blackburns' Argument that They Failed To Read the Loan Documents Fails as a Matter of Law.

The parties agree that William Blackburn signed the Note and that Judith Blackburn signed the Guaranty. They further agree that these documents contain identical provisions entitled "**WAIVER OF JURY TRIAL.**" Under South Carolina law, the Blackburns are deemed to have read these documents and cannot avoid their effects by arguing otherwise. *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. A person signing a document is responsible for reading the document and making sure of its contents." (internal citations omitted)); *see also Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986) ("As early as 1924, this Court recognized that every contracting party owes a duty to the other party to the contract and to the public to learn the contents of the document before he signs it.").

The Blackburns, however, seek to impose on Wachovia some additional duty to ensure that they read and understood the loan documents before signing them. This duty appears nowhere in the relevant case law. To the contrary, our Supreme Court has expressly rejected a similar argument, holding that a guarantor could not avoid the terms of his guaranty by arguing that he was not made aware of them, stating that: “[t]he law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document.” *Citizens & S. Nat’l Bank of S.C. v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994).

The Fourth Circuit has held the same in the context of an arbitration clause:

[The appellees] do not dispute that they signed a document that clearly stated that they knowingly and voluntarily waived the right to a jury trial. Instead, they assert that the defendants had a duty to ensure that [they] fully informed themselves of the arbitration agreement and waiver of a jury trial. However, an elementary principle of contract law is that a party signing a written contract has a duty to inform himself of its contents before executing it, and in the absence of fraud or overreaching he will not be allowed to impeach the effect of the instrument by showing that he was ignorant of its contents or failed to read it. That the appellees did not make themselves aware of the arbitration clause and disclosure is irrelevant.

Sydnor v. Conesco Fin. Serv. Corp., 252 F.3d 302, 306 (4th Cir. 2001) (internal citations and quotation marks omitted).

The Blackburns’ reliance on *National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255 (2d Cir. 1977), a case applying federal law, is misplaced. The Second Circuit in *Hendrix* did not address the duty to read, which has been a bedrock principle of South Carolina contract law since at least 1924. *Burwell*, 288 S.C. at 39, 340 S.E.2d at 789. Moreover, the *Hendrix* Court refused to enforce a jury waiver because the waiver was not conspicuous. 565 F.2d at 258. Here, however, the jury waivers were highly conspicuous.

Thus, even if *Hendrix* were consistent with South Carolina law (and it is not), the Blackburns' jury waivers would still be enforceable.

As a matter of law, the Blackburns cannot avoid the jury waivers on the grounds that they did not knowingly or voluntarily sign them. *Burwell*, 288 S.C. at 39, 340 S.E.2d at 789; *Lanford*, 313 S.C. at 545, 443 S.E.2d at 551.

B. The Record Supports the Circuit Court's Finding that the Blackburns Knowingly and Voluntarily Waived Any Right to a Jury Trial.

Even if the Blackburns could, *in theory*, avoid the consequences of their jury waivers by arguing that they did not knowingly and voluntarily enter into them, the Circuit Court's findings of fact foreclose any such argument *on this record*. Whether a waiver is knowing and voluntary is an issue of fact, and the Circuit Court's findings of fact must be affirmed if there is any "evidence which reasonably supports the Court's findings." *Eldridge v. City of Greenwood*, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998); *see also Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986) (affirming trial court's finding of fact that party's jury trial waiver was knowing and voluntary).

Here, as in *Leasing Service Corp.*, the record evidence suggests that the waivers were knowing and voluntary because: (1) the Blackburns admit to signing the Note and Guaranty; (2) the waivers in each are conspicuously titled in bold, all capital letters and printed in all capital letters; (3) the Note and Guaranty are not lengthy documents; and (4) there is no evidence suggesting that the Blackburns were anything but sophisticated investors. 804 F.2d at 833 (relying on similar evidence to affirm finding that jury trial waiver was knowing and voluntary). This evidence is more than enough to justify the Circuit Court's finding that the waivers were knowing and voluntary. *Id.*

Moreover, the record contains none of the evidence that one would expect a party to offer to show otherwise. For example, there is no evidence that Wachovia attempted to conceal the waivers from the Blackburns (to the contrary, the waivers are conspicuous); no evidence that the Blackburns were under duress when they signed the Note and Guaranty; no evidence that the Blackburns were given insufficient time to review the documents; and no evidence that the Blackburns are unsophisticated or otherwise incapable of understanding the documents. To the contrary, the transaction at issue is a more than \$500,000 purchase of investment property, which suggests that the Blackburns and their fellow investors were sophisticated. Instead, the only evidence supporting the Blackburns' position is a self-serving affidavit that states in conclusory fashion that they "did not knowingly, voluntarily or intentionally waive [their] right to a jury trial" without any supporting or explanatory details. (R. p. 119, Blackburn Affidavit p. 1.)

At most, the Circuit Court was confronted with conflicting evidence: on the one hand, the signed loan documents with their conspicuous waiver provisions suggested that the waivers were knowing and voluntary; on the other hand, the Blackburns' barebones, self-serving affidavit stated otherwise. The Circuit Court resolved that conflict by finding, as a matter of fact, that the waiver was knowing and voluntary. (R. pp. 5-6, Order of December 7, 2009, pp. 5-6.) Because there is evidence—indeed, substantial and persuasive evidence—in the record supporting this finding, it may not be overturned on appeal. *Eldridge*, 331 S.C. at 416; 503 S.E.2d at 200.

II. THE LOAN DOCUMENTS ARE NOT UNCONSCIONABLE.

The Blackburns also claim that the waivers are somehow unconscionable. Unconscionability is an affirmative defense that must be pleaded and proved by the party

asserting it. *See Zabinski v. Bright Acre Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001) (referring to unconscionability as a “general contract defense”); *Coble v. Coble*, 292 S.C. 233, 234, 355 S.E.2d 863, 863 (Ct. App. 1987) (“A party challenging a separation agreement as unconscionable or unfair has the burden of proof.”), *rev’d on other grounds*, 293 S.C. 434, 361 S.E.2d 339 (1987); *S.C. Farm Bureau Mut. Ins. Co. v. Kelly*, 345 S.C. 232, 239, 547 S.E.2d 871, 875 (Ct. App. 2001) (noting that affirmative defenses “must be pleaded and proved” by the party asserting them); *see also Tillman v. Comm. Credit Loans, Inc.*, 655 S.E.2d 362, 369 (N.C. 2008) (“[U]nconscionability is an affirmative defense, and the party asserting it has the burden of proof.”). Here, the Blackburns did not plead the defense in any of their three (3) Answers, including the one filed *after* Wachovia moved to strike their jury demand. (*See generally* R. pp. 53-55, Ans.; R. pp. 56-69, First Am. Ans.; R. pp. 70-84, Second Am. Ans.) Thus, the issue is waived.

If the Court considers the Blackburns’ unconscionability argument, South Carolina courts apply a two-pronged test to determine whether a contract is unconscionable; a contract is unconscionable if: (1) one party lacks “meaningful choice . . . due to one-sided contract provisions,” and (2) the terms of the contract “are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). As the Circuit Court concluded, the jury waivers at issue here satisfy neither prong.

A. Nothing in the Record Demonstrates that the Blackburns Lacked Meaningful Choice.

For purposes of determining whether a contract is unconscionable, a party only lacks meaningful choice when the agreement at issue is an adhesion contract, meaning that it is “presented on a take-it-or-leave-it basis.” *Herron*, Op. No. 26805 (Shearouse Adv. Sh. No. 15 at 18). Here, there is no evidence that the Note or Guaranty is an adhesion contract.

At most, the Blackburns state in their affidavit that, “[t]o [their] knowledge,” they had no right to negotiate the waiver clauses, but there is no evidence that they attempted to do so, nor is there evidence that anyone from Wachovia told them that any portion of the Note or Guaranty was non-negotiable. (R. p. 120, Blackburn Aff. p. 2.) Without that or similar evidence, a court cannot conclude that a contract is an adhesion contract. *See, e.g., Leeman v. Cook’s Pest Control*, 902 So.2d 641, 648 (Ala. 2004) (holding that party cannot demonstrate that contract is one of adhesion where party “did not attempt to negotiate any of the terms”); *Union Bank v. Ross*, 54 Cal. App. 3d 290, 296, 126 Cal. Rptr. 646, 650 (Cal. Ct. App. 1976) (holding that person who neither read nor attempted to negotiate a contract will not be heard to argue after the fact that it was a contract of adhesion); *Dresser v. Cradle of Hope Adoption Ctr.*, 358 F. Supp. 2d 620, 638 (E.D. Mich. 2005) (same); *M/V Am. Queen v. San Diego Marine Const. Corp.*, 708-09 F.2d 1483, 1489 (9th Cir. 1983) (same). Thus, the Blackburns have not built a record sufficient to show the existence of an adhesion contract, and their unconscionability claim fails as a matter of law. *Herron*, Op. No. 26805 (Shearouse Adv. Sh. No. 15 at 17).

Even if the Note and Guaranty were adhesion contracts, which they are not, the Blackburns still had meaningful choice. The mere fact that a contract is an adhesion

contract does not mean that it is unconscionable; rather, “[f]inding a contract to be one of adhesion is merely the beginning point in the analysis of whether the contract is unconscionable.” *Id.* Indeed, this Court has noted that the standardization of contracts is “a rational and economically efficient response to the rapidity of market transactions and the high cost of negotiations.” *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998) (internal citation and quotation marks omitted). To determine whether a party lacked meaningful choice, courts consider: “the relative disparity in the parties’ bargaining power; the parties’ relative sophistication; the nature of the injuries suffered by the [claimant]; whether the [claimant] is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.” *Herron*, Op. No. 26805 (Shearouse Adv. Sh. No. 15 at 18-19).

These factors militate against finding that the Blackburns lacked meaningful choice. *First*, the Blackburns’ injuries, if any, are purely commercial, as they do not allege any personal injuries. This is significant because, while South Carolina courts are skeptical of provisions that affect personal injury damages, no such doctrine applies to purely commercial damages. *Cf. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1047 (D.S.C. 1993) (holding that exclusion of consequential damages was not unconscionable because all relevant damages were commercial). *Second*, the Blackburns have failed to produce any evidence regarding their business activities, any purported disparity in the parties’ bargaining power or the parties’ relative sophistication. All that is apparent from this record is that the Blackburns were commercial investors, not consumers, who purchased a piece of investment property for more than \$500,000.

(R. p. 14, Note p. 1.) As commercial investors taking part in a commercial transaction, the Blackburns are presumed to be sophisticated and capable of bargaining for an acceptable deal. *See, e.g., Chrysler Credit Corp. v. Kosal*, 518 N.Y.S.2d 162, 164 (N.Y. App. Div. 1987) (noting that commercial transactions are presumed not to be unconscionable); *see also Herron*, Op. No. 26805 (Shearouse Adv. Sh. No. 15 at 19 & n.3) (drawing distinction between consumer and commercial transactions). *Third*, the Blackburns cannot claim surprise at the jury waivers because, as noted above, the waivers were conspicuous. *See, e.g., Smalls v. Advance Am.*, No. 07-3240, 2008 WL 4177297, at *16 (D.S.C. Sep. 5, 2008) (holding that arbitration agreement was not unconscionable because, *inter alia*, it was in all capital letters); *Myrtle Beach Pipeline Corp.*, 843 F. Supp. at 1048 (holding that disclaimer was conspicuous even though only a small portion of it was in all capital letters); *see also Leasing Serv. Corp.*, 804 F.2d at 833 (enforcing jury waiver even though it was not conspicuous). As noted above, the titles of the provisions were in bold, all capital letters, and the provisions themselves were in all capital letters. (R. p. 18, Note p. 5; R. p. 40, Guaranty p. 6.) Even if the Blackburns had glanced through the Note and Guaranty in cursory fashion, the waiver provisions would have stood out. Under these circumstances, there is no basis for holding that the Blackburns lacked meaningful choice. *Herron*, Op. No. 26805 (Shearouse Adv. Sh. No. 15, 18-19). Thus, the jury waivers are not unconscionable. *Id.*

B. The Jury Trial Waivers are Neither Unfair nor Oppressive.

Finally, and perhaps most importantly, the jury waivers are neither unfair nor oppressive. According to the South Carolina Supreme Court, the key issue in determining substantive unconscionability is whether the waiver provision “is geared towards achieving an unbiased decision by a neutral decision-maker.” *Simpson v. MSA*

of *Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007) (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)). Here, there is no question but that a bench trial meets this standard. It favors neither side. Moreover, all parties are accorded even more procedural safeguards than arbitration, which is a favored dispute resolution method. *Id.* at 24, 644 S.E.2d at 668. For example, the discovery process, evidentiary rules, the requirement of written findings of fact and conclusions of law, and appellate review are all preserved in a bench trial, unlike in arbitration. Finally, the waivers themselves are not one-sided in that they apply equally to both sides.

As the Court is no doubt aware, parties to commercial contracts regularly select dispute resolution methods other than jury trial because of the cost and time savings that those methods provide. *See Lackey*, 330 S.C. at 396; 498 S.E.2d at 902-03 (recognizing that parties often choose alternative dispute resolution for efficiency benefits). There is nothing about the parties' jury waiver that is unfair or oppressive.⁶

The cases cited by the Blackburns are inapposite because they involve consumer contracts with automobile retailers, which are subject to heightened scrutiny. Under these cases, courts will analyze "contract[s] between a consumer and automobile retailer with 'considerable skepticism.'" *Simpson*, 373 S.C. at 27, 644 S.E.2d at 570 (quoting

⁶ The Blackburns argue that the jury waivers are unconscionable based on a footnote in *Aiken v. World Finance Corp.*, 373 S.C. 144, 644 S.E.2d 705 (2007), which suggests that an arbitration agreement that purported to bring in "every dispute imaginable between the parties" might be unconscionable. *Id.* at 150-51 & n.4; 644 S.E.2d at 708 & n.4. As discussed in more detail in the next section, the jury waivers at issue here do not purport to have that broad a scope, nor does Wachovia advocate interpreting them as such. Rather the Blackburns' counterclaims fall easily within the plain text of their jury waivers, so the *Aiken* footnote is inapplicable. Moreover, *Aiken* is also inapposite because the *Aiken* Court expressly reserved decision on the issue of unconscionability. 373 S.C. at 151 n.4, 644 S.E.2d at 709 n.4.

Williams v. Aetna Fin. Co., 700 N.E.2d 859, 866 (Ohio 1998)); *Knox v. Joe Gibson Autoworld, Inc.*, No. 07-4020, 2008 WL 20777361, at *3 (D.S.C. May 8, 2008) (emphasizing “the South Carolina Supreme Court’s admonition that adhesion contracts between a consumer and an automobile retailer requiring arbitration . . . should be analyzed ‘with considerable skepticism’”). This is because such contracts generally involve a “vehicle intended for use as [the consumer’s] primary transportation, which is critically important in modern day society.” *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. However, the transaction at issue here is a commercial loan between sophisticated business parties, not a consumer purchasing a car. The Blackburns cite no law suggesting that investment property transactions raise the same critical consumer protection issues as consumer automobile transactions, or that such transactions should be viewed with the same level of skepticism.

Simpson and *Knox* are also distinguishable on other grounds. First, unlike the waiver at issue here, *Simpson* and *Knox* involved arbitration provisions that were not conspicuous, being printed in normal type, not in bold or all capital letters. *Simpson*, 373 S.C. at 27-28, 644 S.E.2d at 670 (noting that arbitration clause, unlike other provisions of contract, was printed in regular type); *Knox*, 2008 WL 2077361, at *1 (reproducing regular-type arbitration agreement). Furthermore, the *Simpson* and *Knox* courts focused on damage-limitation clauses that are not at issue here.⁷ *Simpson*, 373 S.C. at 30, 644

⁷ In *Knox*, for example, the arbitration agreement gave the defendant self-help remedies that could effectively defeat the plaintiff’s claim before the arbitrator rendered a decision. 2008 WL 2077361, at *3. In *Simpson*, the arbitration agreement precluded the arbitrator from awarding “double and treble damages,” which could have prevented the plaintiff from obtaining statutory damages under the Dealers’ Act and South Carolina Unfair Trade Practices Act. 373 S.C. at 29-30; 644 S.E.2d at 671. Here, the Note and Guaranty do not contain similar provisions. While they do limit the availability of punitive and

S.E.2d at 671; *Knox*, 2008 WL 2077361, at *3. Finally, *Simpson* involved a unilateral arbitration provision that allowed the defendant to select either arbitration or trial, but bound the plaintiff to arbitration. 373 S.C. at 20, 644 S.E.2d at 666. Here, the jury waivers apply equally to all parties. (R. p. 19, Note p. 5; R. p. 40, Guaranty p. 6.)

A more instructive case than *Simpson* or *Knox* is *Herron*, which held, even in the context of a consumer automobile transaction, that an arbitration clause was enforceable because it was conspicuous and fair. *Herron*, Op. No. 26805 (Shearouse Adv. Sh. No. 15 at 20-21). The jury waivers at issue here are likewise conspicuous and fair, and, therefore, they are not unconscionable. *Id.*

III. THE JURY WAIVERS COVER ALL OF THE BLACKBURNS' COUNTERCLAIMS.

The Blackburns argue that the jury waivers somehow fail to encompass their counterclaims. The waivers at issue, however, could hardly be phrased more clearly. They apply to:

ANY LITIGATION BASED ON, OR ARISING OUT OF,
UNDER OR IN CONNECTION WITH THIS NOTE [or
GUARANTY], THE LOAN DOCUMENTS OR ANY
AGREEMENT CONTEMPLATED TO BE EXECUTED
IN CONNECTION WITH THIS NOTE [or GUARANTY],
OR ANY COURSE OF CONDUCT, COURSE OF
DEALING, STATEMENTS (WHETHER VERBAL OR

exemplary damages, the Supreme Court has held that whether such a provision is permissible is an open question that need not be decided until and unless the claimant actually proves that he qualifies for such damages. *Carolina Care Plan, Inc.*, 361 S.C. at 557, 606 S.E.2d at 759 (2004). Thus, the propriety of that exclusion is not yet ripe for disposition. *Id.* Moreover, even if it were unconscionable (and it is not), the proper remedy would be to sever it based on the Note's and Guaranty's severability provisions, not to invalidate the jury waivers, which are in entirely different sections of the documents. *Herron*, Op. No. 26805 (Shearouse Adv. Sh. No. 15, at 23-24) (holding that unconscionable waiver of class action rights is severable unless the party defending the contract prefers otherwise).

WRITTEN) OR ACTIONS OF ANY PARTY WITH
RESPECT HERETO.

(R. p. 19, Note p. 5; R. p. 40, Guaranty p. 6.)

The Blackburns' counterclaims fall easily within the scope of these provisions because their entire case is about Wachovia's alleged "course of conduct," "course of dealing," "actions," and "statements," with respect to the loan transaction. Indeed, their key allegation is that Wachovia, as part of its course of dealing, partnered with the Developers to market lots in, and loans for, the South Island Plantation development. (R. pp. 73-74, Second Am. Ans. pp. 4-5; R. p. 96, line 4 to p. 97, line 19, Tr. p. 6, line 4 to p. 7, line 19.) As part of this alleged scheme, Wachovia and the Developers made certain purported misstatements with respect to the development's amenities, all so that they could sell South Island Plantation lots and make Wachovia loans. (R. pp. 73-74, Second Am. Ans. pp. 4-5; R. p. 96, line 4 to p. 97, line 19, Tr. p. 6, line 4 to p. 7, line 19.) Because these allegations center on Wachovia's "course of conduct," "course of dealing," "actions," and "statements," there is little question but that the parties' jury waivers cover them.

Moreover, the waivers broadly cover any action "based on, arising out of, under or in connection with this Note [or Guaranty] or any agreement contemplated to be executed in connection with this Note [or Guaranty]." (R. P. 19, Note p. 5; R. p. 40, Guaranty p. 5.) The counterclaims arise out of the Note and Guaranty because the Blackburns allege that Wachovia's purpose in taking the actions at issue was to induce them to enter into a loan. The counterclaims also arise out of the property sales contract, which is an "agreement contemplated to be executed in connection with" the Note and Guaranty. Indeed, the Note states that the funds could only be used to "purchase

investment property.” (R. p. 19, Note. p. 1.) Thus, the plain language of the waivers cover the Blackburns’ counterclaims. *Beach Co.*, 351 S.C. at 63-64, 566 S.E.2d at 866 (holding that jury waivers are construed according to their “plain, ordinary and popular meaning”); *see also S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005) (holding that releases are generally enforceable according to their plain language).

Were there any doubt that the jury waivers cover the Blackburns’ counterclaims (and there is not), it is worth noting that courts in other jurisdictions have regularly held that counterclaims like the Blackburns’ are covered by a contractual jury waiver. *See, e.g., Efficient Solutions, Inc. v. Meiner’s Country Mart, Inc.*, 56 F. Supp. 2d 982, 984 (W.D. Tenn. 1999) (applying contractual jury trial waiver to fraud and negligent misrepresentation claims because they concern the contract); *Joy A. McElroy, M.D., Inc. v. Maryl Group, Inc.*, 114 P.3d 929, 936-38 (Haw. Ct. App. 2005) (applying contractual jury trial waiver to unfair trade practices claim based on alleged misrepresentations related to the contract); *Bill Heard Chevrolet Corp., Orlando v. Wilson*, 877 So.2d 15, 18 (Fla. Dist. Ct. App. 2004) (applying contractual arbitration clause to unfair trade practices claim based on misrepresentations related to the contract); *Riverside Portable Storage, Inc. v. Pods, Inc.*, No. 08-1771, 2009 WL 804666, at *3 (M.D. Fla. Mar. 27, 2009) (applying contractual jury trial waiver to promissory estoppel and breach of contract claims based on alleged promises related to the contract).

The Blackburns argue, however, that their allegations relate only to the property sale transaction, whereas the jury waivers relate only to the loan transaction. (Blackburns’ Br. pp. 14-15, R. p. 92, Ins. 8-18, Tr. p. 8, lines 8-18.) This argument is

surprising given that it depends on a distinction between the sale and loan transactions that the Blackburns themselves deny. Their theory of the case is that Wachovia and the Developers were in league to sell lots and make loans as a package deal to purchasers like them and their co-investors. (R. p. 73, Second Am. Ans. p. 4 (“Plaintiff Bank was promoting itself through banners, promotional materials, and had a team of its own employees on site at the property location *to market loans as soon as the lottery lots were distributed and sales contracts signed on the spot.*” (emphasis added))).) In other words, according to the Blackburns, Wachovia and the Developers made promises regarding the amenities to induce them to buy the subject property from the Developers *and secure a loan from Wachovia.* (R. pp. 73-83, Second Am. Ans. pp. 4-14.) It is the Blackburns themselves who allege that the marketing of the property, the sale of the lots, and the provision of Wachovia loans were all part of a single transaction orchestrated by a partnership between Wachovia and the Developers. (See, e.g., R. pp. 73-83, Second Am. Ans. pp. 4-14.) The Blackburns cannot have it both ways.

Furthermore, broadly worded contractual waiver clauses like the one at issue here cover any claims that have a “significant relationship” with the underlying contract, no matter how the claims are labeled. *Zabinski.*, 346 S.C. at 597-98, 553 S.E.2d at 117-18 (holding that “significant relationship” test applies to arbitration clause that covered any claims “arising out of” the parties’ agreement); *Timmons v. Starkey*, 380 S.C. 590, 596, 671 S.E.2d 101, 105 (Ct. App. 2008) (same); *Hinson v. Jusco Co.*, 868 F. Supp. 145, 149-50 (D.S.C. 1994) (same). Here, though the plain text of the waiver provisions amply demonstrates that the Blackburns’ claims fall within their scope, it is worth noting that there is little question but that the Blackburns’ claims regarding Wachovia’s alleged pre-

loan conduct are significantly related to the loan transaction. Indeed, according to the Blackburns, the very purpose of the alleged pre-loan conduct was to induce the Blackburns to enter into the loan. (R. pp. 73-83, Second Am. Ans. ¶¶ 22, 30, 45, 49, 60-63, 73.) It is well settled in South Carolina that claims arising out of promises allegedly made to induce one party to enter into a contract are subject to, and within the scope of, a broad waiver provision in that contract. *See, e.g., Carolina Care Plan, Inc.*, 361 S.C. at 553-54; 606 S.E.2d at 757 (holding that allegations of fraud in the inducement were subject to broadly worded arbitration clause and must be submitted to arbitration).

The Blackburns cite several out-of-state decisions for the proposition that their counterclaims lack a significant relationship with the Note and Guaranty, but all of them involved vastly different facts. For example, *Sutton v. Hollywood Intm't, Corp.*, 181 F. Supp. 2d 504 (D. Md. 2002), involved claims of false imprisonment and malicious prosecution after a video store employee wrongfully accused a customer of stealing. Plainly, those claims had nothing whatsoever to do with the customer's rental contract with the video store, which contained a broadly worded arbitration clause, and the Court so held. *Id.* at 511.

Similarly, in *Ford v. Nylcare Health Plans of the Gulf Coast, Inc.*, 141 F.3d 243 (5th Cir. 1998), the plaintiff physician sued the defendant HMO for competitive injuries allegedly resulting from the HMO stealing his customers through false advertising. That the physician and HMO also had a contractual relationship (whereby the physician was paid reduced rates for HMO patients) was immaterial to the case; thus, the arbitration clause in that contract did not apply. *Id.* at 252.

Likewise, in *Hersman, Inc. v. Fleming Cos.*, 19 F. Supp. 2d 1282 (M.D. Ala. 1998), the plaintiff and defendant—as co-developers of a commercial development project—had entered into an architectural services contract with a third-party architect. Not surprisingly, the Court held that the arbitration clause in this contract was unrelated to a dispute between the plaintiff and the defendant over the defendant’s management of project as a whole. *Id.* at 1286.

In the same vein, *Leadertex, Inc. v. Morgantown Dyeing & Finishing Corp.*, 67 F.3d 20 (2d Cir. 1995), involved allegations that one party to a warehousing agreement defamed the other by spreading rumors that it was dishonest in its business practices, incapable of supplying good product, in the business of selling defective goods, and guilty of attempting to defraud a third party. Because these alleged defamatory statements were well outside the scope of the parties’ contractual agreement (i.e., the allegedly defamed party was accused of much more than failing to comply with the parties’ contract), the parties’ arbitration agreement did not cover them. *Id.* at 28-29.

Finally, in *Telecom Italia, SpA v. Wholesale Telecom Corp.*, 248 F.3d 1109 (11th Cir. 2001), the Court held that an arbitration provision in a circuit lease did not cover a tortious interference with contract claim that had nothing to do with the parties’ lease or contractual relationship. *Id.* at 1116-17.

In short, all of these cases involved claims well outside the scope of the parties’ agreement, whereas this case presents claims that center on promises allegedly made in and around the parties’ contract. Moreover, none of these cases involved conduct covered by the express language of the arbitration agreement at issue, whereas this case focuses on Wachovia’s “course of conduct,” “course of dealing,” “actions,” and

“statements” with respect to the loan. Accordingly, the out-of-state cases cited by the Blackburns are inapposite.

Because they cannot succeed on a plain-text argument, the Blackburns urge the Court to construe the jury waivers strictly. (Blackburns’ Br. p. 13.) Under South Carolina law, strict construction “should not be applied so as to defeat the plain and obvious purpose of the instrument.” *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998). To the contrary, as this Court has held in the context of a jury waiver, waiver provisions should be given their “plain, ordinary and popular meaning.” *Beach Co.*, 351 S.C. at 63-64, 566 S.E.2d at 866; *see also N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992) (enforcing jury waiver according to its plain terms). That the terms of the waiver are broad is of no consequence because South Carolina courts recognize that a provision may be both broad and clear. *Abu-Shawareb v. S.C. State Univ.*, 364 S.C. 358, 363, 613 S.E.2d 757, 760 (Ct. App. 2005) (“Although the release is broad, it is not ambiguous.”). Here, the Blackburns’ counterclaims easily fit within the plain language of the waiver provisions at issue, and no plea for strict construction can alter that result. *Id.* Hence, this Court should hold that the jury waivers apply to all of the Blackburns’ counterclaims.

IV. THE BLACKBURNS HAVE ALLEGED A ROUTINE DISAGREEMENT OVER THE TIMING OF CONSTRUCTION, NOT ANY OUTRAGEOUS OR UNFORESEEABLE MISCONDUCT.

The Blackburns argue that the jury waivers should not apply even if the counterclaims fall within their scope because the counterclaims allege outrageous and unforeseeable acts. This argument derives from three arbitration cases—*Aiken v. World Finance Corp.*, 373 S.C. 144, 644 S.E.2d 705 (2007); *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007); and *Partain v. Upstate Automotive Group*,

386 S.C. 488, 689 S.E.2d 602 (2010)—in which the South Carolina Supreme Court held that it would except certain consumer claims from arbitration clauses that would otherwise cover them. The Blackburns’ argument has three key problems: (1) this exception has not been, and should not be, applied outside the context of arbitration agreements; (2) this exception applies only to consumer transactions; and (3) most fundamentally, the Blackburns’ counterclaims do not allege anything like the kinds of outrageous acts that were excepted in *Aiken*, *Chassereau*, and *Partain*.

In *Aiken*, the Supreme Court first held that it would except claims otherwise covered by a broadly worded arbitration provision if those claims alleged “outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.” 373 S.C. at 151, 644 S.E.2d at 709. No South Carolina court has applied this exception outside the scope of an arbitration agreement. As discussed, a bench trial preserves substantially more procedural rights than arbitration, such as full discovery under the Rules of Civil Procedure, evidentiary rules, written findings of fact and conclusions of law, and appellate review of the merits of the decision.

Even if the *Aiken* exception were to apply to jury waivers, it is limited by its own terms to cases involving consumer transactions. Indeed, in *Aiken*, which involved a loan transaction between a consumer and a finance company, the Court phrased the exception in terms of conduct that is “unforeseeable to a reasonable *consumer*.” 373 S.C. at 151, 644 S.E.2d 709 (emphasis added). Similarly, in *Chassereau*, the Court applied the *Aiken* exception to a case involving a consumer purchase of a swimming pool, 373 S.C. at 172, 644 S.E.2d at 720, and, in *Partain*, the Court applied the exception to a case involving a consumer purchase of an automobile, 386 S.C. at 490, 689 S.E.2d at 603. In short, the

Aiken exception has never been applied to a commercial contract like the one at issue here, and nothing in South Carolina law suggests that it should be extended beyond the consumer-protection arena in which it was developed. This distinction between consumer and commercial transactions is ubiquitous in South Carolina law. *See, e.g., Sapp v. Ford Motor Co.*, 386 S.C. 143, 149-50, 687 S.E.2d 47, 50-51 (2009) (recognizing exception to the economic loss rule that applies only in consumer housing transactions); *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670 (noting that transactions between consumers and automobile dealers are analyzed with “considerable skepticism”); *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 504 n.3, 229 S.E.2d 728, 731 n.3 (1976) (noting that South Carolina is “in the vanguard of consumer protection”).

Finally, the Blackburns’ counterclaims are a far cry from the kinds of “outrageous” and “unforeseeable” acts involved in *Aiken*, *Chassereau* and *Partain*. In *Aiken*, the plaintiff alleged that employees of the defendant finance company used their access to his personal information to steal his identity, obtain sham loans, and embezzle the proceeds. 373 S.C. at 147; 644 S.E.2d at 707. Though the plaintiff and the finance company had a loan agreement with a broad arbitration clause, the Court held that it did not apply because the employees’ alleged misconduct was both outrageous and unforeseeable to the plaintiff. *Id.* at 151, 644 S.E.2d at 709.

Similarly, in *Chassereau*, the key allegation was that an employee of the defendant above-ground pool merchant revealed the plaintiff’s private information to third parties and defamed her, all in an attempt to collect money the plaintiff owed on her pool. 373 S.C. at 170; 644 S.E.2d at 719. Again, the Court held that this conduct was

outrageous and outside the scope of foreseeable behavior in a consumer above-ground pool transaction. *Id.* at 172-73, 644 S.E.2d at 720.

Finally, in *Partain*, the plaintiff alleged that the defendant automobile dealer pulled a bait-and-switch maneuver by fraudulently replacing the vehicle he purchased with a different vehicle at the time of pick-up. The Court held that such conduct was outrageous and unforeseeable in the context of normal business dealings between a consumer and automobile retailer. 386 S.C. at 494, 689 S.E.2d at 605.

The running theme in these cases is that they involve conduct well outside the scope of a typical business dispute. Here, on the other hand, the Blackburns contend that Wachovia and the Developers “breached construction promises” by not completing the amenities at the subject planned development on the schedule that was provided.⁸ (Blackburns’ Br. p. 18.) Few disputes are more prosaic than those involving the timing of construction. Indeed, the leading construction law treatises devote full chapters to the issue of timing because it is so often litigated. *See* Philip L. Bruner & Patrick J. O’Connor, Jr., 5 BRUNNER & O’CONNOR ON CONSTRUCTION LAW § 15:1, *et seq.* (explaining legal issues involved in disputes over construction delays); *see also* James Acret & Annette Davis Perrochet, CONSTRUCTION LITIGATION HANDBOOK 2d § 7:1 (same). Unlike identity theft, embezzlement, defamation, invasion of privacy, and bait-

⁸ The Blackburns have also alleged that Wachovia and the Developers “artificially inflated” the value of the subject property. (R. pp. 73-74, Second Am. Ans. pp. 4-5.) The meaning of this allegation is far from clear. To the extent that the Blackburns allege that Wachovia or the Developers expressed an inaccurate opinion as to the value of the property, it is well-settled that a seller’s opinions as to the value or quality of the items sold are not actionable. *See Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 317 S.C. 520, 527-28, 455 S.E.2d 183, 187-88 (Ct. App. 1995) (holding that seller’s opinions as to how piece of equipment would perform were not actionable as a matter of law). Thus, any alleged “artificial inflat[ion]” of the property values cannot serve as the basis of a tort at all—much less of an outrageous and unforeseeable tort. *See id.*

and-switch sales tactics, there is nothing unusual or unforeseeable in an investment property transaction about construction not being completed on time. To be sure, the conduct alleged may be actionable, but it is a far cry from the kind of outrageous conduct that should be excepted from a valid jury waiver. Indeed, if a claimant can avoid his jury waiver by alleging something as commonplace as a dispute about a construction schedule, then the *Aiken* exception will swallow the rule that jury waivers are generally valid and enforceable under South Carolina law. To avoid this result, the Court should affirm the Circuit Court's holding that the *Aiken* exception does not apply here.

V. THE CIRCUIT COURT CORRECTLY HELD THAT IT LACKED AUTHORITY TO OVERRIDE THE PARTIES' VALID JURY TRIAL WAIVER.

As an afterthought, the Blackburns argue that the Circuit Court had discretion under Rule 39(b), SCRCP, to order a jury trial notwithstanding the parties' contractual waiver. This interpretation of Rule 39(b) is incorrect. The Rule provides, in relevant part:

[N]otwithstanding the failure of a party to demand a jury in an action in which such demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues.

Rule 39(b), SCRCP. By its terms, the Rule only applies when: (1) a party has "fail[ed] . . . to demand a jury"; and (2) the action is one "in which such demand might have been made of right." *Id.* Neither prong is satisfied here because the Blackburns *did* demand a jury trial, but they have no *right* to a jury trial because of their contractual waiver.

In keeping with the plain text of the Rule, South Carolina courts have only applied it in situations where a party otherwise entitled to a jury trial neglected to make a timely demand. *See, e.g., Patterson v. McNeill-Patterson & Assocs., Inc.*, 312 S.C. 471,

472, 441 S.E.2d 328, 329 (Ct. App. 1994) (affirming decision to allow jury trial when party made untimely demand). There are no reported cases interpreting the Rule to give the Circuit Courts discretion to order a jury trial despite the parties' valid contractual waiver.

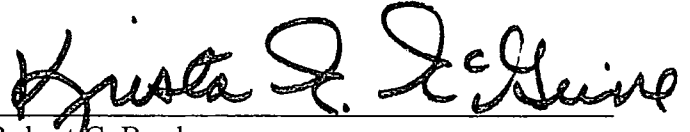
To compensate for the lack of South Carolina case law supporting their position, the Blackburns cite an ALR article stating that some jurisdictions allow courts to order a jury trial despite a waiver by the parties. However, none of the cases cited in that article appear to involve valid contractual jury waivers. At most, some states allow their trial courts, for good cause shown, to override a prior stipulation executed by counsel that waived the right to a jury trial. *See, e.g., Hackin v. Pioneer Plumbing Supply Co.*, 457 P.2d 312 (1969) (allowing party to move for relief from counsel's stipulation waiving right to jury trial). Even courts that follow this rule hold that it does not extend to pre-litigation contractual jury waivers. *See, e.g., Vista Centre Venture v. Unlike Anything, Inc.*, 603 So.2d 576, 578 (Fla. Dist. Ct. App. 1992) (holding that rule "does not apply to the situation where both parties have contracted for a non-jury trial on issues arising out of the contract. Waivers of the right to trial jury trial by contract are enforceable and will be upheld").

Thus, this Court should not adopt a strained interpretation of Rule 39(b) and should follow the Rule's plain language.

CONCLUSION

This case presents jury waivers in commercial contracts that are clear, conspicuous, and fair. The parties agree that the waivers were signed. Accordingly, the Blackburns should not be permitted to avoid them. If they are permitted to do so, then artful pleading or creative argumentation will avoid contractual jury waivers in virtually

every case, and it will no longer be true that contractual jury waivers are generally valid in South Carolina. For these and the foregoing reasons, and any other reason supported by the Record, Wachovia respectfully requests that the Circuit Court's order striking the Blackburns' jury demand be AFFIRMED.



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August 11, 2010

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2008-CP-22-1598

Wachovia Bank, National Association, ... Respondent,

v.

William E. Blackburn; Judith Blackburn; Tammy S. Winner;
Watson E. Felder; Gary F. Ownbey; and South Island Plantation
Association, Inc. are, ... Defendants,
Of Whom William E. Blackburn; Judith Blackburn, ... Appellants,
And Of Whom Tammy S. Winner; Watson E. Felder; Gary F. Ownbey;
and South Island Plantation Association, Inc. are, ... Respondents,

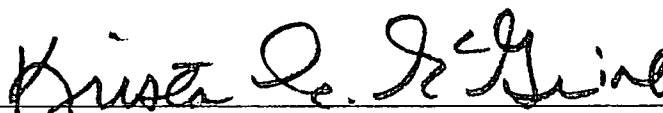
v.

Winyah Bay Holdings, LLC; Source One
Properties, LLC; and Waterpointe Realty, LLC,
Third Party Defendants, ... Respondents.

CERTIFICATE OF COMPLIANCE

On behalf of Respondent, Wachovia Bank, National Association, the undersigned
certifies that the **Final Brief of the Respondent** complies with Rule 211(b), SCACR.

[SIGNATURE BLOCK ON FOLLOWING PAGE]



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Of Whom William E. Blackburn; Judith Blackburn, ... Appellants,
And Of Whom Tammy S. Winner; Watson E. Felder; Gary F. Ownbey;
and South Island Plantation Association, Inc. are, ... Respondents,

v.

Winyah Bay Holdings, LLC; Source One
Properties, LLC; and Waterpointe Realty, LLC,
Third Party Defendants, ... Respondents.

PROOF OF SERVICE

I certify that I have served the **Final Brief of the Respondent** on all parties in this action by depositing a copy of it in the United States Mail, first class postage prepaid, on August 11, 2010, to the following addresses:

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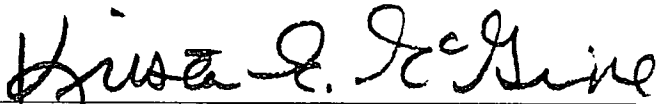
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Tab 4

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In The Court of Appeals

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And of Whom Tammy S. Winner, Watson E. Felder, Gary F. Ownbey,
and South Island Plantation Association, Inc. are, ... Respondents,

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Realty, LLC, Third Party Defendants, ... Respondents.

FINAL REPLY BRIEF OF APPELLANTS

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equipment for use in that business) who “held both a dealer’s and a salesmen’s license for the purchase and the sale of equipment”, Crane 804 F.2d at 833. There is no such showing as to the Blackburns; indeed the Note is the only evidence of any such transactions ever entered into by the Blackburns. The Crane court also found that the circumstances surrounding the lease negotiations in fact revealed the Cranes’ general business acumen AND their specific understanding of the agreement. “The Cranes engaged in protracted negotiations with Nesbit at the Cranes’ shop, while a Nesbit competitor waited outside in the event the Cranes did not obtain a favorable agreement”. Crane 804 F.2d at 833. So not only were they in the business of this equipment, they had multiple suitors and actually appear to have been in a superior, not inferior, bargaining position by virtue of their readily available competitor. Further, the Cranes reviewed the agreement close enough to locate, object to, and line out a provision regarding some of the security. Crane 804 F.2d at 833. Finally, the Cranes insisted on signing the handwritten agreement which protected their rights in the event of a default. The court there found that indicated “their understanding” of the lease and their interests. Crane 804 F.2d at 833. None of those types of facts exist in the present case, though the Bank argues that here, as in Crane, the record evidence suggests the waiver was knowing and voluntary because: (1) the Blackburns admit to signing the Note/Guaranty (true) ; (2) the waivers are conspicuous (not accurate); (3) the Note/Guaranty are not lengthy (the Note is three times as long as the lease in Crane and was accompanied by many other documents to be signed unlike in Crane); (4) no evidence to suggest the Blackburns were anything but sophisticated (their Affidavit suggests otherwise, as does the reality they made a poor investment whose value does not equal what they paid for it as evidenced by the Bank

seeking deficiency -- and there is no evidence in the record to indicate they were somehow “sophisticated”). If anything, these factors considered by the Crane court weigh in the Blackburns’ favor, not against them.

D. Resolution of whether the Blackburns are entitled to a jury trial is a question of law, and no deference is due the trial court’s finding in that regard.

The Bank acknowledges that the appropriate standard of review regarding the jury trial waiver is de novo review under the Verenes case, but then attempts to “backdoor” that standard by referring to other types of cases and arbitration cases to require an “any evidence to support” standard. Verenes is clear: **“Whether a party is entitled to a jury trial is a question of law...An appellate court may decide questions of law with no particular deference to the trial court.”** Verenes v. Alvanos, Op. No. 26780 (S.C.Sup.Ct. Filed March 1, 2010)(Adv.Sh.No. 8 at 38). In this case, the trial court actually upheld the enforcement of the waiver based on the presumption of validity discussed above applicable to typical contracts. The court did not find an actual, knowing waiver - it merely found that the Blackburns were “charged with having read the contents of the loan documents and were on notice of the jury trial waivers.” (Order, page 6, R. p. 6) This is a misapplication of the law because there is no presumption of notice when it comes to jury trial waivers. The review by this Court need not address any factual findings of the trial court, as this Court is free to make its own de novo review of what it deems to be the applicable law and facts. Ibid. In any event, the only evidence whatsoever on the issue of knowing waiver is the Blackburns’ Affidavit. (R. pp. 119-120)

**ISSUE II. THE BANK IGNORES THE LANGUAGE OF THE PURPORTED
WAIVER TO ATTEMPT TO ARGUE IT APPLIES TO THE
BLACKBURNS' CLAIMS.**

A. The required strict construction of the clause limits its application.

The Bank's argument on this issue is based on an excerpt of relevant language, not the clause in its entirety. By ignoring the most important, qualifying clause, the Bank applies a much broader meaning to it than the plain language. The Bank's argument about "course of conduct" and "course of dealing" omits any reference to the end of that sentence which states that the only course of dealing or conduct applicable is "with respect hereto". (Note, page 5, R. p. 18). That clearly refers only to the Note, not the entire sales transaction. (It doesn't say with respect to the sales transaction, it says "with respect hereto", the hereto being the Note.) Most of the Blackburns' claims do not arise from the course of dealing with respect to the Note -- they arise from the course of dealing with respect to the sales misrepresentations, illegal lottery, and fraudulent promises which are unrelated to the Note. Again, the plain language of the clause applies only to the Note, and the Bank's attempt to apply it by liberal interpretation is simply not what the clause says. And it certainly is not a "strict construction" of the clause as required by South Carolina law: **"Such a waiver must be strictly construed as the right to trial by jury is a substantial right."** Beach Company v. Twillman, 351 S.C. 56, 566 S.E.2d 863, 866 (Ct.App. 2002).

The Bank also argues on page 18 of its brief that the sales contract and other agreements are agreements "contemplated to be executed in connection with the note". It is noted the sales contract is not executed in connection with the note, it actually pre-dates

the note by several months. That phrase in the clause actually says “the loan documents or any agreements contemplated to be executed in connection with this note”. (Note, page 5, R. p. 18) As discussed in our primary brief, the Note and “Loan Documents” are specifically defined in the note and do not include sales documents, only loan documents. The exhaustive list of included documents is quoted in our primary brief at page 14. As argued there, loan documents and documents executed in connection with the Note do not include sales contracts, deeds, promotional literature from the developer/seller, lottery procedure, promises regarding docks and amenities and infrastructure. These are the documents and statements from which most of the Blackburns’ claims arise, not the Note or the Loan Documents. And those documents and statements were not done “in connection” with the Note as required by the clause.

B. The case law cited by the Bank on this issue is inapposite.

The Bank further argues beginning on page 18 by citing a string of cases for the proposition that the counterclaims are subject to the waiver clause. But none of them involve a loan transaction with counterclaims for sales misrepresentations and construction failures. Indeed, the first case cited specifically distinguishes itself from a case that does just that. The Efficient case notes that the National Acceptance case is distinguishable. Efficient Solutions, Inc. v. Meiner’s Country Mart, Inc., 56 F.Supp.2d 982 (W.D.Tenn. 1999). National Acceptance Company v. MYCA Products, Inc., 381 F.Supp. 269 (W.D.Penn 1974) involved a loan and security agreement which the lender sued on, just like the case at bar. And the counterclaim had to do with a prior oral agreement between the parties, again similar to our case. The court found that even though the purported waiver included “any action in which

Lender and Borrower are parties”, that a reasonable construction was to limit that to any action “arising out of the loan and security agreement”. And the court concluded that the prior oral agreement did not arise out of the loan and security agreement. National Acceptance, 381 F.Supp. at 270-271. Similarly, the counterclaims in our case do not arise out of the loan or mortgage. They arise out of pre-loan sales misrepresentations and construction failures or other illegal fraudulent behavior, none of which is addressed in any way in the notes, mortgage, or any of the loan documents to which the waiver, by its own terms, is limited.

In Efficient, the first case cited by the Bank on this issue, there was a service agreement being sued upon, the defense raising breach of contract and fraudulent inducement of the contract. Efficient, 56 F.Supp.2d at 982-983. Obviously, if the dispute centers on the contract that contains the waiver clause, it will be related. Our case is not that way. The disputed counterclaims have no significant relationship to the loan contract. Indeed, that Court held: “despite the broadness of the language, it is implicit that the waiver only applies to a dispute between the parties relating to the subject matter of the contract or arising out of the contract.” Efficient at 984.

Joy A. McElroy, MD, Inc. v. Maryl Group, Inc., 114 P.3d 929 (Haw.Ct.App. 2005), the next case cited by the Bank, involved a negligent misrepresentation claim regarding the amount of a CAM fee charged under a lease and the waiver provision was in the lease. Obviously if the CAM fees required by the lease are the basis of the counterclaim, that is significantly related. Not so in the case at bar.

The next case cited by the Bank is Bill Heard Chevrolet Corp. Orlando v. Wilson, 877 So.2d 15 (Fla.Dist.Ct.App. 2004). That case involved unfair trade practices in the sale of an automobile and the arbitration clause specifically listed the causes of action covered. There certainly is no listing in the agreement at bar of tort claims, unfair trade practices, breach of fiduciary duty, civil conspiracy, promissory estoppel, etc.

Thus, all of the cases cited by the Bank involved claims that were significantly related to the underlying contract. Predictably, those cases find the waiver applies. Again, our case presents a different scenario.

C. The Bank may not rely on a “but for” argument to force application of the waiver.

On page 19 of its brief, the Bank essentially argues that because the sales misrepresentations ultimately resulted in a loan being made to the Blackburns that the sales misrepresentations arise out of the loan. If anything, the loan arises out of the sale, but not the other way around. It is merely a “but for” argument they are making that the courts have universally rejected. The video store customer would not have been falsely arrested for stealing from the video store had he not entered into contract with the video store to rent videos in the Sutton case referenced in our primary brief. Sutton v. Hollywood Entertainment Corporation, 181 F.Supp.2d 504, 510-512 (D.Md. 2002). That did not mean the false accusations “arose from” or were “related to” the contract. Similarly, it is true that without the sales misrepresentations, the Blackburns would not have entered into the sales contract and ultimately would have had no need for a loan from the Bank to pay for the

property. But that does not lead to the inference that the sales contract and the pre-sale and pre-loan misrepresentations somehow arose out of the loan. They did not.

D. The Bank's discussion of the issue as one question that the Blackburns are trying to answer two ways is misleading.

The Blackburns do not want it both ways, as suggested by the Bank. But there are two questions, not one as implied by the Bank's argument. One, are the counterclaims *related* to the *foreclosure* for purposes of including them in the same lawsuit? Yes. Two, are the counterclaims *significantly related* to the *loan documents* as required for a valid waiver of jury trial? No. While they sound like similar questions, they are fundamentally different and they require different answers. On this issue, we will close with the precept we started with: that jury trial waivers must be strictly construed. Strict construction is what the law requires, not just what the "Blackburns urge" as implied in the Bank's brief (page 22). The case law is clear: "Such a waiver must be strictly construed..." Beach Company v. Twillman, 351 S.C. 56, 566 S.E.2d 863, 866 (Ct.App. 2002). The Blackburns are not arguing against the plain language, they are simply arguing that the plain language should be strictly construed, not broadly.

**ISSUE III. EVEN IF THE LANGUAGE IS DEEMED TO APPLY TO THE
BLACKBURNS' CLAIMS WITH A STRICT CONSTRUCTION, THE
CLAUSE IS UNENFORCEABLE AS TO UNFORESEEABLE TORTS
UNDER CLEAR SOUTH CAROLINA CASE LAW.**

Despite the heading of the Bank's argument to the contrary, the Blackburns' primary brief did not argue that the Bank's conduct was outrageous (though the argument could be

made). It was simply argued, under clear South Carolina precedent, that allegedly fraudulent conduct, or wholly unexpected tortious conduct, has been held by the Supreme Court to not be covered by even broadly worded arbitration agreements. See Aiken v. World Finance Corporation, 373 S.C. 144, 644 S.E.2d 705 (2007), and Partain v. Upstate Automotive Group, 386 S.C. 488, 689 S.E.2d 602 (2010).

The Bank points out that no South Carolina court has applied the “unforeseeability of the tort” defense except in arbitration agreements. However, the rule should apply even greater to a jury trial waiver that is not entitled to the same presumption of validity as an arbitration agreement. We would ask the court to make the natural extension of the rule to purported jury trial waivers.

The Bank also argues that the Blackburns do not allege the kind of things alleged in Aiken, Partain, and Chassereau v. Global Sun Pools, LLC, 373 S.C. 168, 644 S.E.2d 718 (2007). We did not cite Chassereau, but as to Aiken and Partain, they have the same causes of action as the Blackburns. Indeed, Aiken involved loan transactions where the borrower asserted claims, among other things, for unfair trade practices and negligence in misusing Aiken’s personal information (the Blackburns counterclaims also include unfair trade practices and negligence against a lender). Partain involved a truck sale where after the sale, the dealer provided a different truck. Again, the claim was for Unfair Trade Practices, one of the counterclaims in the case at bar. While the court found that conduct to be outrageous, that was not central to its finding. The main crux of the finding was based on the unforeseeability of the conduct. The court held: “**Partain cannot be held to have foreseen that Upstate Auto, after completing a sale, would substitute an entirely different vehicle in**

place of the truck he had agreed to purchase. Moreover, **Partain, cannot be held to have contemplated** that, in signing the arbitration clause, he was agreeing to arbitrate **claims arising from allegedly fraudulent conduct.”** Partain, 689 S.E.2d at 605. Again, it is fraudulent conduct, in the nature of an illegal lottery used in conjunction with false sales promises and construction promises that were never intended to be fulfilled, that is at issue in this case. In our view, this is the same kind of fraudulent conduct that the Supreme Court has indicated is not foreseeable and therefore not covered by such a clause, even if broadly worded. People should not be expected to foresee false promises, use of an illegal lottery, and fraudulent conduct. The Supreme Court recognized that in Partain, Aiken and Chassereau. Even Chassereau has some application here because it involved unforeseeable tortious acts of a company trying to collect on a loan attendant to the sale of a pool. “Specifically, Chassereau alleges that Darwin repeatedly phoned her at her workplace; disclosed private information to Chassereau's friends, relatives, and co-workers; and also made false and defamatory statements about Chassereau to these same people.” Chassereau, 644 S.E.2d at 719. What is it about these allegations that the Bank asserts are so different from what the bank did in the case at bar? They involve lies and use of illegal means to induce action by the victim and to gain an economic advantage. The Blackburns’ claims also involve lies and use of illegal means (the lottery) to induce a purchase by the Blackburns. They are not just “timing of construction” claims as argued by the Bank. The allegations include illegal sales tactics, intentional false representations, promises regarding construction with no intent to fulfill them, artificially inflating land prices, unfair trade practices, fraud, breach of fiduciary duty, and conspiracy. That is not a “routine

disagreement over the timing of construction” as characterized in the Bank’s brief. As such, the Bank’s conduct was not foreseeable. Under Partain and Aiken, the waiver clause should not be held applicable to such unforeseeable torts.

**ISSUE IV. THE BLACKBURNS ARE INDIVIDUALS WHO PURCHASED A
PIECE OF UNIMPROVED RESIDENTIAL REAL ESTATE, AND
SHOULD BE ENTITLED TO THE SAME PROTECTIONS FROM
UNCONSCIONABILITY AS OTHERS IN COMMERCIAL
CONSUMER TRANSACTIONS.**

The bulk of the arguments made by the Bank in its brief center around the assertion that the Blackburns are sophisticated commercial investors, and that the loan involved was commercial and therefore not entitled to the “consumer protection” afforded in other cases. This premise is the one from which almost all the Bank’s arguments originate, but it is supported by no evidence at all. The Bank attempts to distinguish the Blackburns from other parties in the case law who supposedly would be entitled to more protection than the Blackburns because they are somehow individual consumers while the Blackburns are supposedly commercial investors. The Uniform Commercial Code has been relied upon by our Courts for use in determining unconscionability in other consumer cases, thus not precluding “commercial” transactions from protection from unconscionability.

It is helpful to start with a definition of these terms. “Commercial” is defined as: “Relating to or connected with trade and traffic or commerce in general.” Black’s Law Dictionary, Revised Fourth Edition. “Commerce” is defined as “the exchange of goods, productions, or property of any kind.” Ibid. Though the Bank attempts to cite cases with

transactions somehow distinguishable (for sales of cars, trucks, pools, loans, etc.), they are all “commercial”. The Bank further implies that the Blackburns are not “consumers”. Black’s defines consumer as “one who uses economic goods...” The Blackburns by purchasing the land and acquiring the loan were consumers of the land and consumers of the proceeds of the loan. The mere size of the sale is all the Bank can point to for support of its characterization of the Blackburns as sophisticated, commercial investors. They borrowed less than \$500,000.00 to purchase one piece of property, split among four owners (a pro-rata share of less than \$125,000.00 each). That does not make them sophisticated, commercial investors. It makes them individual purchasers of residential property. They did not purchase the property as a company, as a corporation, as a limited liability company -- they purchased it as individuals. Further, even if the purchase of residential property for investment purposes is considered a luxury, that does not impact on whether they are entitled to protection from unconscionability just like other individuals. The case cited throughout the Bank’s brief makes this clear. In Herron v. Century BMW, Op.No. 26805 (S.C.Sup.Ct. Filed Apr. 19, 2010)(Shearouse Adv. Sh. No. 15 at 17), the Supreme Court dealt with a car purchase, namely a BMW worth over \$30,000.00. The dealership argued that the fact this was a luxury vehicle and the purchaser was highly educated somehow took this case out of the typical consumer/business disparity of bargaining power. The Court gave short shrift to this argument, stating “We...recognize that there was an inherent disparity in bargaining power between the parties, and this was a transaction between a consumer and a commercial entity...Contrary to Century’s assertion, we find no significance in the fact that this was a luxury vehicle or that Christine Watts was ‘highly educated.’ These factors do not change

the 'consumer/business' nature of the transaction." Herron at 19. Similarly, the Blackburns are individual consumers, not a commercial entity like the national bank they were dealing with in Wachovia. If they were on equal bargaining footing with the Bank, they would have had no need to borrow money from the Bank. The Bank's argument that they are sophisticated commercial investors has no basis in the record. There is simply no evidence to suggest that. The only evidence in the record in that regard is the Affidavit of the Blackburns where they make it clear they were not able to bargain with the bank because of their immense disparity in bargaining power as to the Bank. (See Affidavit, R. pp. 119-120) That statement is uncontradicted and the Bank produced no evidence at all to attempt to contradict it.

The Bank also attempts to cloud the issue by citing cases for the proposition that "commercial losses" or "economic losses" are not to be considered for purposes of determining unconscionability because they are not "personal injuries". The discussion about "commercial loss" is irrelevant -- the cases cited are discussing whether consequential damages can be limited which has nothing to do with jury trial waiver. The relevant factor is the nature of the Blackburns' losses, which of course are monetary. They are not commercial, if that is even relevant -- they are residential and personal losses. The Blackburns are not a business, which leads to the second factor about being a "substantial business concern". By definition they are individuals and signed the note as such. For purposes of this case, they are not a business and there is no evidence of that. Each of the relevant factors is discussed in detail on pages 20-21 of our primary brief.

The Banks also attempts to argue the waiver is not unfair or oppressive, but this

ignores reality. The bank can seek the forum of its choice in the foreclosure setting (non-jury), but the borrower cannot seek the forum of their choice -- a jury. That's like saying to an American League baseball team that they have to play the entire World Series with their pitchers batting. Yes, it applies equally to both the American and National Leagues, but it is still unfair because the National League pitchers hit throughout the season and are better prepared to do so. Just because it "applies equally to both sides" as the Bank argues, does not make it fair.

The Bank, using terms like "commercial" and "sophisticated" and "investor" to sidetrack the Court, ignores the totality of factors which make up the determination of absence of meaningful choice in an unconscionability case. The factors, again as outlined in the case law, are (1) the relative disparity in the parties' bargaining power (surely the bank is not arguing these four individuals were equal in bargaining power to a large, national bank -- and the Affidavit in the record makes it clear they were not in equal bargaining position); (2) the parties' relative sophistication (again, four individuals purchasing one unimproved piece of residential real estate versus a national bank which makes thousands of such loans and presumably millions of dollars in assets); (3) the nature of the injuries suffered (they stand to lose their life savings and their primary home if the deficiency judgment sought by the Bank is obtained -- these are not economic injuries to a business, they are potentially the loss of a home to a couple nearing retirement age); (4) whether they are a substantial business concern (clearly the Blackburns are not, they are merely individuals who purchased one piece of investment property); (5) whether there is the element of surprise in the inclusion of the challenged clause (again, the evidence is uncontradicted through their

Affidavit that they did not know the clause was there); and (6) the conspicuousness of the clause (buried on the last page in print indistinguishable from the previous section on the page and in print size equivalent to the rest of the document, no initials or signatures required on the page in question, given as one document among many to sign at a real estate closing). The Bank attempts to convince the Court that the “commercial” nature of the loan somehow exempts it from the rules of fairness. If that were true, all of the cases cited involved “commercial” transactions and none of them would have rules to protect people like the Blackburns.

To further address the conspicuousness, the Bank’s brief asserts that the font size and style in its brief is identical to that of the Note. The only Note in the record counsel is aware of is the one attached to the Complaint, and we would refer the Court to that Note and invite the Court to place the Note behind the Bank’s brief and determine for itself whether it is the same size. Unless some copy of the Note is in the record other than what has been previously attached to the Complaint, by our estimation the print of the clause in the Bank’s brief is substantially larger (by at least one-third) than the Note. Even if true, it would be of no avail to the Bank because the fact is that print of the jury waiver clause is the exact same boldness, size and type style as the previous paragraph of the Note and essentially indistinguishable from the print in the rest of the six page Note (other than capitalization, but again, the previous paragraph is also capitalized in the same type and boldness). We would simply refer the Court to the Note itself as attached to the Complaint and included in the record, not to the reproductions of the clause in the briefs. (R. pp. 14-19)

The Bank relies heavily on the Herron case regarding unconscionability and opines

that it is an “instructive case”. The Blackburns would agree, but for different reasons. We believe the facts in Herron dictated the conclusion that there was not absence of meaningful choice or one-sided provisions. Because those facts do not exist in the case at bar, the negative inference is that in our case, there was absence of meaningful choice and the presence of one-sided provisions. In Herron: (1) the arbitration agreement was a separate one-page agreement (not buried in a six page note as in our case); (2) the separate agreement was clearly labeled at the top of the document in bold, capital, underlined font (there are no such indications in the case at bar on any top of any page, much less on the front page); (3) the Herron Court recognized a different result would be appropriate, as in the Simpson case, when an arbitration agreement is “buried in the sales contract, on the opposite page from the customer’s signature, in paragraph “10” of sixteen other paragraphs...[a]dditionally, the contract was “hastily presented for her signature”; and (4) nothing in the Herron agreement prevents punitive damages (in the case at bar, the Note attempts to limit punitives). The Herron case is instructive, in the sense that it shows what types of facts militate against a finding of unconscionability. Fortunately for the Blackburns, those facts do not exist here. Indeed, the opposite facts exist on the points above. Herron at 19-20.

On the punitive damages issue, the Bank attempts to sidestep that prohibition in the note by saying it is not “ripe” for determination. This ignores the extensive jurisprudence in Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663 (S.C. 2007), where the Court spent much time discussing the relevance of a punitive damage prohibition to the determination of the presence of oppressive and one-sided terms. See primary brief, p. 21. Further, we disagree with the assertion in the Bank’s brief (p. 16, fn 7) that the punitive prohibition is in

“entirely different sections of the documents.” Indeed, the punitive prohibition in the Note is right above the jury trial waiver, on the same page, in the preceding paragraph. (See Note, p. 5, R. p.18) Finally on this issue, the damage limit clauses should be struck like the jury trial waiver. Many of the causes of action set forth by the Blackburns do implicate punitive and exemplary damages -- they are most definitely at issue in this case.

As a last ditch effort to sidestep the issue of unconscionability, the Bank also claims unconscionability is not available as a defense because it was not pled as an affirmative defense. This ignores several realities: (1) unconscionability is not listed as an affirmative defense in Rule 8(c), SCRCP (and the only case law cited to that effect is a single North Carolina case); (2) it is not a defense to the factual allegations in the complaint, it is merely an argument being made in opposition to the Bank’s motion to strike the Blackburns’ jury demand; (3) it is not an “avoidance” as discussed in Rule 8 -- it only affects the mode of trial, and is not an avoidance of the merits of the Bank’s claim. Thus, it is entirely appropriate for the Court to consider unconscionability as it was clearly raised below and in the Blackburns’ primary brief.

ISSUE V. UNLESS GIVEN A TORTURED MEANING, RULE 39(b), SCRCP GIVES THE COURT DISCRETION TO ORDER A JURY TRIAL DESPITE A WAIVER.

The rule speaks for itself. The Bank argues that the rule treats differently a party who fails to demand a jury trial during litigation from one who waives it prior to litigation. Both situations have the same result -- “the failure of a party to demand a jury in an action in

which such a demand might have been made of right". Rule 39(b), SCRCPP. If the rule applies to a party who has waived his right to a jury trial by his actions *during* the litigation (by stipulating to a nonjury trial or failing to timely or properly ask for a jury), why would it not apply equally to a party who has waived his right to a jury trial by his actions *prior* to litigation (by signing an inconspicuous waiver)? If anything, the waiver made during the litigation is with the obvious knowledge litigation exists and should theoretically be harder to avoid than the pre-litigation waiver. But the Bank argues that the rule cannot help a pre-litigation waiver. If the court can save one who has stipulated during litigation from its "failure to demand" a jury trial, why would a court not be able to save one who made such a stipulation prior to litigation?

And contrary to the Bank's brief, this argument was not an afterthought -- it was made by memorandum to the trial court and raised in our primary brief in the Statement of Issues on Appeal along with argument. It was also raised in oral argument at the initial hearing. (Transcript, p.10, R. p. 94)

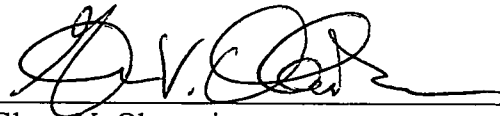
CONCLUSION

The Court is requested to refer to the primary brief for a more comprehensive treatment of the issues, as this was intended merely to briefly respond to the myriad of assertions and arguments in the Bank's brief.

For the reasons stated herein and more specifically in the primary Brief, this Court should reverse the judgment of the circuit court, order jury trials on all counterclaims, cross-

claims, and third party claims, and remand the case for further proceedings. Such a decision would necessarily also reverse the trial court's decision to refer the case to the Master in Equity since the Master has no jurisdiction to hold jury trials.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "G. V. Ohanesian", written over a horizontal line.

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August 12, 2010

Tab 5

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wachovia Bank, National
Association, Respondent,

v.

William E. Blackburn,
Judith Blackburn, Tammy S.
Winner, Watson E. Felder,
Gary F. Ownbey, and South
Island Plantation
Association, Inc., Defendants,

Of Whom William E.
Blackburn and Judith
Blackburn are, Appellants.

Appeal From Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 4874
Heard April 5, 2011 – Filed August 24, 2011

AFFIRMED IN PART AND REVERSED IN PART

Glenn V. Ohanesian, of Myrtle Beach, for Appellant.

Robert C. Byrd and Krista McGuire, both of Charleston, for Respondent.

LOCKEMY, J.: In this mortgage foreclosure action, William and Judith Blackburn appeal the circuit court's order granting Wachovia's motion to strike their jury trial demand. We affirm in part and reverse in part.

FACTS/PROCEDURAL BACKGROUND

On February 14, 2006, William Blackburn delivered a promissory note (the note) to Wachovia in the amount of \$463,967 to finance the purchase of "investment property" (the property) in South Island Plantation, a Georgetown County planned development. The note was secured by a mortgage on the property executed by William Blackburn, Judith Blackburn, Tammy Winner, and Watson Felder. Judith Blackburn, Winner, and Felder also executed personal guaranties to secure the note.¹ The note and each of the guaranties contained waiver of jury trial provisions. The note signed by William Blackburn contained the following jury trial provision:

WAVIER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF BORROWER BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS NOTE, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS NOTE, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR

¹ On October 12, 2007, Felder conveyed his interest in the property to Gary Ownbey.

ACTIONS OF ANY PARTY WITH RESPECT
HERETO. THIS PROVISION IS A MATERIAL
INDUCEMENT TO BANK TO ACCEPT THIS
NOTE

(bold and capitalization in original, font size not to scale). The guaranty signed by Judith Blackburn contained the following jury trial provision:

WAIVER OF JURY TRIAL. TO THE EXTENT
PERMITTED BY APPLICABLE LAW, EACH OF
GUARANTOR BY EXECUTION HEREOF AND
BANK BY ACCEPTANCE HEREOF,
KNOWINGLY, VOLUNTARILY AND
INTENTIONALLY WAIVES ANY RIGHT EACH
MAY HAVE TO A TRIAL BY JURY IN RESPECT
OF ANY LITIGATION BASED ON, OR ARISING
OUT OF, UNDER OR IN CONNECTION WITH
THIS GUARANTY, THE LOAN DOCUMENTS
OR ANY AGREEMENT CONTEMPLATED TO
BE EXECUTED IN CONNECTION WITH THIS
GUARANTY, OR ANY COURSE OF CONDUCT,
COURSE OF DEALING, STATEMENTS
(WHETHER VERBAL OR WRITTEN) OR
ACTIONS OF ANY PARTY WITH RESPECT
HERETO. THIS PROVISION IS A MATERIAL
INDUCEMENT TO ACCEPT THIS GUARANTY..

..

(bold and capitalization in original, font size not to scale).

On November 13, 2008, Wachovia filed this foreclosure action against the Blackburns, Winner, and Felder, asserting the note was in default and it was entitled to a judgment against the defendants in the amount of \$473,747.24. In response, the Blackburns filed a second amended answer, counterclaim, cross-claim, and third-party complaint in which they asserted

claims against Wachovia and several third-party defendants.² The Blackburns asserted the following counterclaims against Wachovia: (1) negligent misrepresentation, (2) unfair trade practices, (3) promissory estoppel, (4) breach of contract/breach of contract accompanied by a fraudulent act, (5) breach of fiduciary duty, (6) fraud/fraud in the inducement, (7) breach of contract/negligence, (8) breach of contract, (9) civil conspiracy, and (10) illegality of contract. The Blackburns alleged Wachovia partnered with the third-party defendants³ to promote and sell the property at a "high pressure" sales event which included a lottery. According to the Blackburns, Wachovia and the third-party defendants defrauded buyers by artificially inflating property values and making misrepresentations regarding the construction of amenities in the development. The Blackburns demanded a jury trial.

On June 18, 2009, Wachovia filed a motion to strike the Blackburns' jury trial demand and refer the case to the master-in-equity. Wachovia argued the Blackburns waived their right to a jury trial in the note and guaranty. In a memorandum opposing Wachovia's motion to strike, the Blackburns alleged (1) there was not a knowing and voluntary waiver, (2) the language of the waivers did not apply to their counterclaims, (3) the waivers were unconscionable, and (4) the circuit court could order a jury trial in its discretion pursuant to Rule 39(b), SCRCF. In a December 7, 2009 order, the circuit court granted Wachovia's motion, finding the jury trial waivers in the note and guaranty were clear and unambiguous and the Blackburns' counterclaims were within the scope of the waivers. The circuit court held the Blackburns were charged with having read the contents of the note and guaranty and were on notice of the jury trial waivers. The circuit court found the Blackburns' Rule 39(b), SCRCF, argument was without merit, and referred the action to the master. This appeal followed.

² The Blackburns filed their original answer on February 2, 2009, and amended answer, counterclaim, cross-claim, and third party complaint on February 13, 2009 .

³ The third-party defendants included Winyah Bay Holdings, LLC; Source One Properties, LLC; and Waterpointe Realty, LLC.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." U.S. Bank Trust Nat. Ass'n v. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009). "In an appeal from an action in equity, tried by a judge alone, we may find facts in accordance with our own view of the preponderance of the evidence." Id. "Whether a party is entitled to a jury trial is a question of law." Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference to the [circuit] court." Id. at 15, 690 S.E.2d at 772-73.

LAW/ANALYSIS

I. Knowing and Voluntary Waiver

The Blackburns argue they did not knowingly and voluntarily waive their right to a jury trial. We disagree.

The Blackburns contend there is no evidence in the record they had actual knowledge of the waivers. They maintain the only evidence regarding whether they knowingly and voluntarily waived their right to a jury trial is their affidavit. In their affidavit, the Blackburns asserted they did not knowingly, voluntarily, or intentionally waive their right to a jury trial and were "not aware of any jury trial waiver" until Wachovia's motion to strike jury demand. In their brief, the Blackburns rely on Leasing Corp. v. Crane, 804 F.2d 828 (4th Cir. 1986) to support their contention that a party seeking the enforcement of a waiver must prove that consent was both voluntary and informed. The Blackburns note the Crane court cited National Equipment Rental Ltd. v. Hendrix, 565 F.2d 255 (2d Cir. 1977), wherein the Second Circuit affirmed a finding that a provision whereby a lessee waived a jury trial buried in the eleventh paragraph of a fine print, 16-clause agreement did not constitute a knowing and intelligent waiver of the lessee's right to a jury trial.

Wachovia argues that by signing the note and guaranty, the Blackburns are deemed to have read the documents and cannot avoid their effects by arguing otherwise. Wachovia maintains it did not have a duty to ensure the

Blackburns had read and understood the terms of the note and guaranty. Wachovia further contends the waivers are conspicuous, the note and guaranty are not lengthy documents, and there is no evidence the Blackburns are unsophisticated or were incapable of understanding the note and guaranty.

We agree with Wachovia. First, we note that while the Blackburns rely on federal case law in their brief, a parties' right to a jury trial in South Carolina is governed by state law. See Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978) (holding the Seventh Amendment to the United State Constitution is not applicable to the States).

We do not believe the Blackburns can avoid the waivers in the note and guaranty by arguing they were not knowing and voluntary. "A party may waive the right to a jury trial by contract." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002). "Such a waiver must be strictly construed as the right to trial by jury is a substantial right." Id. at 64, 566 S.E.2d at 866. "When a contract is unambiguous a court must construe its provisions according to the terms the parties used, understood in their plain, ordinary, and popular sense." S.C. Farm Bureau Mut. Ins. Co. v. Oates, 356 S.C. 378, 381, 588 S.E.2d 643, 645 (Ct. App. 2003). "A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it." Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003). "A person signing a document is responsible for reading the document and making sure of its contents." Id. "Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it." Id. "One who signs a written instrument has the duty to exercise reasonable care to protect himself." Id. at 665, 582 S.E.2d at 440. "The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document." Id.

Here, the waivers are conspicuous and unambiguous. They are printed in all capital letters with the bold heading, "**WAIVER OF JURY TRIAL.**" Furthermore, the note and guaranty are not lengthy documents and the waivers contained therein are not buried within the language of other provisions. Rather, the waivers are contained in separate paragraphs located just above the signature lines. By signing the note and guaranty, the

Blackburns are charged with having read their contents, and therefore, they cannot avoid their effects by arguing they were unaware of the inclusion of the waivers. See Regions Bank, 354 S.C. at 663, 582 S.E.2d at 440 ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it."); see also Id. ("Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it."). Accordingly, we find the jury trial waivers are enforceable.

II. Applicability

The Blackburns argue the jury trial waivers in the note and guaranty do not apply to their counterclaims. We agree.

Pursuant to the note and guaranty, the waivers at issue apply to

any litigation based on, or arising out of, under or in connection with this note [or guaranty], the loan documents or any agreement contemplated to be executed in connection with this note [or guaranty], or any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party with respect hereto.

The Blackburns allege that while their counterclaims arise out of the same occurrence as the note, they do not arise out of the loan documents as required by the waivers. Pursuant to the note, "loan documents"

refers to all documents executed in connection with or related to the loan evidenced by this Note and any prior notes which evidence all or any portion of the loan evidenced by this Note, and any letters of credit issued pursuant to any loan agreement to which this Note is subject, any applications for such letters of credit and any other documents executed in connection therewith or related thereto, and may include, without limitation, a commitment letter that

survives closing, a loan agreement, this Note, guaranty agreements, security agreements, security instruments, financing statements, mortgage instruments, any renewals or modifications, whenever any of the foregoing are executed, but does not include swap agreements.

The Blackburns contend their counterclaims arise from Wachovia's sales misrepresentations and failure to abide by promises to build infrastructure, amenities, and docks, and do not arise from the loan documents.⁴ They maintain the definition of "loan documents" does not include sales contracts, deeds, promotional literature from the developer/seller, lottery procedure, or promises regarding docks and amenities and infrastructure. They also assert their counterclaims do not arise from the note, mortgage, loan application, financing statements, letters of credit, or any of the loan documents defined above. The Blackburns further argue the allegations of sales misrepresentations in their counterclaims are unrelated to the note, and thus, not subject to the waivers. The Blackburns rely heavily on Aiken v. World Finance Corp. of South Carolina, 373 S.C. 144, 644 S.E.2d 705 (2007) and Partain v. Upstate Automotive Group, 386 S.C. 488, 689 S.E.2d 602 (2010), two supreme court cases involving arbitration agreements, to support their argument.

Aiken involved a tort action based on the theft of Aiken's personal information by employees of World Finance. 373 S.C. at 146, 644 S.E.2d at 706. In Aiken, World Finance sought to enforce an arbitration clause to which Aiken had agreed in applying for a loan. Id. at 147, 644 S.E.2d at 707. The Aiken court found that "even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law," and therefore, the court "will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer

⁴ The Blackburns maintain Wachovia "injected itself into the marketing and sale of [the] property . . . , became a joint venturer or partner, and is therefore equally liable for sales misrepresentations made and failures to provide infrastructure, amenities, docks, etc."

in the context of normal business dealings." Id. at 151, 644 S.E.2d at 709. The court provided that it did not seek to exclude all intentional torts from the scope of arbitration, but only "those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties." Id. at 152, 644 S.E.2d at 709. The Aiken court found the theft of Aiken's personal information by World Finance employees to be unanticipated and unforeseeable tortious conduct that was not within the scope of the arbitration agreement. Id. at 151, 644 S.E.2d at 709.

In Partain, Partain alleged Upstate Auto fraudulently replaced the truck he purchased with a different truck at the time of pick-up. 386 S.C. at 490, 689 S.E.2d at 603. Partain filed suit against Upstate Auto alleging he was the victim of a "bait and switch" in violation of the South Carolina Unfair Trade Practices Act. Id. Based on an arbitration agreement, Upstate Auto moved to dismiss Partain's claim. Id. The Partain court found Aiken was controlling and concluded the arbitration clause did not apply because "the alleged actions of Upstate Auto constituted 'illegal and outrageous acts' unforeseeable to a reasonable consumer in the context of normal business dealings." Partain, 386 S.C. at 493, 689 S.E.2d at 604-05. Our supreme court noted Partain could not be held to have foreseen that Upstate Auto, after completing a sale, would substitute an entirely different vehicle in place of the truck he had agreed to purchase. Id. at 494, 689 S.E.2d at 605. Moreover, the court found Partain could not have "contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct." Id.

Similarly, the Blackburns argue they cannot be held to have contemplated that, in signing the note and guaranty, they were agreeing to waive jury trial claims arising from allegedly fraudulent conduct. They contend that a reasonable person attempting to secure a loan from a bank could not foresee that the bank would partner with the developer/seller and make misrepresentations about the property and the construction of amenities.

Wachovia asserts the Blackburns' counterclaims are within the scope of the waivers because their claims concern Wachovia's "course of conduct,"

"course of dealing," "actions," and "statements" with respect to the loan transaction. Wachovia maintains the counterclaims arise out of the note because the Blackburns allege Wachovia, as part of its course of dealing, made misrepresentations to induce them to enter into the loan. Wachovia notes the Blackburns allege the marketing of the property, the sale of the lots, and the provision of Wachovia loans were all part of a single transaction orchestrated by a partnership between Wachovia and the developers. Wachovia also alleges the Blackburns' counterclaims arise out of the property sales contract, which is an "agreement contemplated to be executed in connection with the note" and guaranty. Wachovia maintains our supreme court's holdings in Aiken and Partain (1) do not apply outside of the context of arbitration agreements, (2) apply only to consumer transactions, and (3) the Blackburns have not alleged any "outrageous" conduct like that which was excepted in Aiken and Partain.

We do not believe the allegations of sales misrepresentations and pre-purchase fraud by the Blackburns are sufficiently related to the note, and thus, we do not believe they are subject to the waivers. Jury trial waivers are a substantial right and must be strictly construed. Beach Co., 351 S.C. at 64, 566 S.E.2d at 866. Pursuant to the note and guaranty, the waivers apply to "any litigation based on, or arising out of, under or in connection with [the] note, the loan documents or any agreement contemplated to be executed in connection with [the] note." First, we find the Blackburns' counterclaims are not based on nor do they arise out of the note. The Blackburns' claims are based on the sales contract, the promotional literature regarding the development, the lottery procedure, and the promises made regarding amenities. Second, we find the Blackburns' claims are not based on or arise out of the loan documents. The definition of "loan documents" does not include sales documents, and the sales documents were not "executed in connection with or related to the loan" as required by the definition. Third, we find the sales contract was not an "agreement contemplated to be executed in connection with [the] note," as it was executed months prior to the note. Finally, we find the waivers do not apply to "any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party with respect [to the note]." We note this clause refers to conduct and actions with respect to the note and does not refer to the sales transaction.

Furthermore, the Blackburns could not have contemplated that in signing the note and guaranty, they were waiving their right to a jury trial on claims arising from allegedly fraudulent conduct. See Aiken, 373 S.C. at 151, 644 S.E.2d at 709 (holding the theft of Aiken's personal information by World Finance employees was unanticipated and unforeseeable tortious conduct that was not within the scope of the arbitration agreement); see also Partain, 386 S.C. at 494, 689 S.E.2d at 605 (holding Partain could not have contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct).⁵ We find a reasonable buyer would not contemplate that a bank would partner with a developer/seller and make misrepresentations about a property and the construction of amenities. The Blackburns' counterclaims arise out of the alleged pre-sale misrepresentations and fraud of Wachovia, and not out of the note. Although the waivers are enforceable with regard to claims arising from the note, we find the Blackburns' allegations of sales misrepresentations and pre-purchase fraud are not within the scope of the waivers. Accordingly, applying a strict construction of the language of the waivers, we find they are unenforceable with regard to the Blackburns' counterclaims.⁶

CONCLUSION

We affirm the circuit court's determination that the Blackburns knowingly and voluntarily waived their right to a jury trial. However, we reverse the circuit court's determination that the Blackburns' counterclaims were within the scope of the waivers.⁷

⁵ While Aiken and Partain involve arbitration agreements and not jury trial waivers, we believe they are instructive.

⁶ We note this opinion does not preclude the circuit court, after appropriate discovery and/or testimony, from striking any or all of these counterclaims as insufficient and, if appropriate, referring any remaining equitable matters to the master-in-equity.

⁷ Based upon our reversal of the circuit court's order granting Wachovia's motion to strike jury demand, we need not address the remaining issues on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review

AFFIRMED IN PART AND REVERSED IN PART.

WILLIAMS and GEATHERS, JJ., concur.

remaining issues when its determination of a prior issue is dispositive of the appeal).

Tab 6

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2008-CP-22-1598

Wachovia Bank, National Association, ... Respondent,

v.

William E. Blackburn; Judith Blackburn; Tammy S. Winner;
Watson E. Felder; Gary F. Ownbey; and South Island Plantation
Association, Inc. are, ... Defendants,
Of Whom William E. Blackburn; Judith Blackburn are, ... Appellants,
And Of Whom Tammy S. Winner; Watson E. Felder; Gary F. Ownbey;
and South Island Plantation Association, Inc. are, ... Respondents,

v.

Winyah Bay Holdings, LLC; Source One
Properties, LLC; and Waterpointe Realty, LLC,
Third Party Defendants, ... Respondents.

RESPONDENT'S PETITION FOR REHEARING

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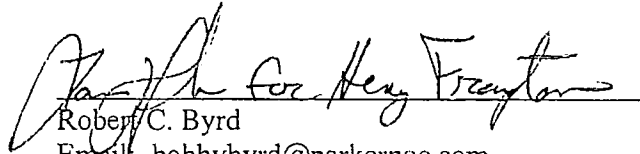
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SC Court of Appeals

Pursuant to Rule 221, SCACR, Respondent Wachovia Bank, National Association (“Wachovia”) hereby petitions the Court for rehearing of the panel decision filed on August 24, 2011, in the above-captioned case. Wachovia contends that the panel overlooked or misapprehended the following issues:

1. The jury waivers at issue apply because the Blackburns’ counterclaims focus on Wachovia’s “course of conduct,” “course of dealing,” “actions,” and “statements” with respect to the Note, loan documents, and transactions;
2. The “outrageous” and “unforeseeable” inquiry applicable to consumer arbitration claims does not apply in the context of jury waivers signed in a commercial transaction; and
3. A routine dispute regarding the timing of construction at a planned development based on representations made before the loan documents were signed is neither outrageous nor unforeseeable in the context of normal business dealings, and the panel improperly failed to make a finding as to outrageousness.

These grounds are more fully explained in Wachovia’s Memorandum in Support of its Petition for Rehearing. For the foregoing reasons, the reasons set forth in Wachovia’s Memorandum, and any other reason supported by the Record, Wachovia respectfully requests that the Court grant REHEARING of the panel decision, REVERSE the panel decision, and AFFIRM the Circuit Court’s decision striking the Blackburns’ jury demand.



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September 8, 2011

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2008-CP-22-1598

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v.

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Of Whom William E. Blackburn; Judith Blackburn are, ... Appellants,
And Of Whom Tammy S. Winner; Watson E. Felder; Gary F. Ownbey;
and South Island Plantation Association, Inc. are, ... Respondents,

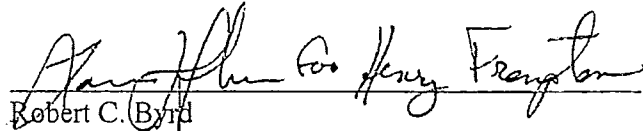
v.

Winyah Bay Holdings, LLC; Source One
Properties, LLC; and Waterpointe Realty, LLC,
Third Party Defendants, ... Respondents.

CERTIFICATE OF COMPLIANCE

On behalf of Respondent, Wachovia Bank, National Association, the undersigned
certifies that the **Respondent's Petition for Rehearing** complies with Rule 211(b),
SCACR.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

A handwritten signature in cursive script, appearing to read "Robert C. Byrd", is written over a horizontal line.

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In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
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Larry B. Hyman, Jr., Circuit Court Judge

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and South Island Plantation Association, Inc. are, ... Respondents,

v.

Winyah Bay Holdings, LLC; Source One
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Third Party Defendants, ... Respondents.

PROOF OF SERVICE

I certify that I have served the **Respondent's Petition for Rehearing** on all parties in this action by depositing a copy of it in the United States Mail, first class postage prepaid, on September 8, 2011, to the following addresses:

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MEMORANDUM IN SUPPORT OF RESPONDENT'S
PETITION FOR REHEARING

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ISSUES OVERLOOKED OR MISAPPREHENDED BY THE COURT

1. THE JURY WAIVERS APPLY BECAUSE THE BLACKBURNS' COUNTERCLAIMS FOCUS ON WACHOVIA'S "COURSE OF CONDUCT," "COURSE OF DEALING," "ACTIONS," AND "STATEMENTS" WITH RESPECT TO THE LOAN.
2. THE "OUTRAGEOUS AND UNFORESEEABLE" INQUIRY APPLICABLE TO CONSUMER ARBITRATION CLAIMS DOES NOT APPLY IN THE CONTEXT OF JURY WAIVERS SIGNED IN A COMMERCIAL TRANSACTION.
3. A ROUTINE DISPUTE REGARDING THE TIMING OF CONSTRUCTION AT A PLANNED DEVELOPMENT IS NEITHER OUTRAGEOUS NOR UNFORESEEABLE IN THE CONTEXT OF NORMAL BUSINESS DEALINGS, AND THE PANEL DID NOT EVEN MAKE A FINDING OF OUTRAGEOUSNESS.

BACKGROUND

This is a commercial mortgage foreclosure action that arises out of the failure of William Blackburn and his guarantors, including Judith Blackburn, to make payments on a purchase-money loan from Wachovia Bank, National Association ("Wachovia") that is secured by investment property in a Georgetown County development known as South Island Plantation.

The Blackburns allege that they attended a lottery sales event on July 23, 2005 at South Island Plantation, during which the property developer and real estate broker (together, the "Developers") made certain misrepresentations with regard to the timing of the construction of amenities at the development. (R. p. 73, Second Amended Answer p. 4.) They further allege that Wachovia employees attended so that they could market loans as soon as lots were distributed to purchasers. (R. p. 73, Second Amended Answer p. 4.) The Blackburns claim that Wachovia was a "partner" or "joint venturer" with the Developers in an integrated partnership by which the Developers and Wachovia worked

together to sell lots and make loans in South Island Plantation. (R. p. 73-74, Second Amended Answer p. 4-5.)

At the July 23, 2005 event, the Blackburns, along with Tammy Winner and Watson Felder,¹ contracted with Winyah Bay Holdings, LLC, to purchase a piece of investment property in South Island Plantation for \$515,519.00. On February 14, 2006, a closing was held on the real estate purchase, which was financed through a loan from Wachovia in the amount of \$463,967.00. (R. p. 14, Note p. 1.) This was a commercial transaction, and the Note expressly stated that the loan proceeds would be used to “purchase investment property.” (*Id.*) All four investors personally guaranteed the loan—William Blackburn by signing the Promissory Note in his individual capacity, and the others, including Judith Blackburn, by signing personal guaranties. (R. p. 19, Note p. 6; R. p. 40, Guaranty p. 6; R. p. 52, Guaranty of Tammy Winner p. 6; R. p. 46, Guaranty of Watson Felder p. 6.) The loan was also secured by a mortgage on the acquired property. (R. pp. 20-34, Mortgage pp. 1-13 & Ex. A.)

The Note, which was signed by William Blackburn, contains the following jury trial waiver:

WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF BORROWER BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS NOTE, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS NOTE, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS NOTE. . . .

(R. p. 18, Note p. 5 (emphasis in original).)

¹ Felder later conveyed his one-fourth (¼) interest in the subject property to Gary Ownbey. (R. p. 10, Compl. p. 3.)

Similarly, the Guaranty, which was signed by Judith Blackburn, contains the following jury trial waiver:

WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF GUARANTOR BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS GUARANTY, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS GUARANTY, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS GUARANTY. . . .

(R. p. 40, Guaranty p. 6 (emphasis in original).) Felder and Winner also signed guaranties containing this jury waiver. (R. p. 46, Felder Guaranty p. 6; R. p. 52, Winner Guaranty p. 6.)

William Blackburn failed to make the loan payment that came due on July 14, 2008, and he has failed to make any subsequent payments. (R. p. 10, Compl. p. 3.) Wachovia notified Mr. Blackburn of the defaults, but he did not tender payment. (*Id.*) Thus, Wachovia accelerated the balance of the loan, made a final demand for payment, and, when no payment was received, commenced this foreclosure action against Mr. Blackburn and the three guarantors. (*Id.*)

In response, the Blackburns asserted various defenses and counterclaims, all of which revolve around their contention that Wachovia and the Developers conspired to induce them to purchase South Island Plantation property and take out a Wachovia loan by misrepresenting the schedule on which amenities would be constructed. (R. pp. 75-83, Second Amended Answer pp. 6-14.) The counterclaims do not distinguish between Wachovia and the Developers, nor do they distinguish between the contracts for the sale of the subject property and the loan agreement. Instead, they broadly allege that *all* of the

contracts between the parties – including the promissory note and other loan documents – were induced by Wachovia and the Developers’ purported misrepresentations. (*See, e.g.*, R. pp. 78-81, Second Amended Answer pp. 9-12.)

Based on the jury waivers quoted above, Wachovia moved to strike the Blackburns’ jury demand, and the Circuit Court granted that motion. (R. pp. 101-02, Wachovia’s Motion to Strike Jury Demand and to Refer pp. 1-2; R. p. 7, Order Granting Plaintiff’s Motion to Strike Jury Demand and to Refer of December 7, 2009, p. 7.) This appeal followed.

THE PANEL OPINION

On August 24, 2011, a panel of the Court of Appeals filed an opinion affirming that the Blackburns knowingly and voluntarily entered into the jury waivers at issue, but reversing the Circuit Court’s conclusion that the waivers were applicable to the Blackburns’ Counterclaims. (Shearouse Adv. Sheet No. 29, August 29, 2011, at 81-92.) The panel made three ruling that are relevant to this Petition.

First, the panel held that the jury waivers do not apply because they are addressed to the claims arising out of the loan transaction, whereas the Blackburns’ claims arise out of the property sale transaction, even though the Blackburns’ pleadings make no such distinction and the premise of the Blackburns’ claims is that these transactions were not separate but rather part of a *single* joint venture to sell lots and make loans.

Second, the panel held that the standards for enforcing a consumer arbitration agreement apply to commercial jury waivers, despite the marked differences between consumer and commercial transactions, and similarly important differences between the procedural safeguards applicable to arbitration proceeding and bench trials.

Third, applying the consumer arbitration case law, the panel held that the jury waivers are not enforceable because disagreements regarding the timing of construction are so unforeseeable that they should not be subject to jury waivers. The panel did not address the other prong of the consumer arbitration test: whether the alleged conduct is sufficiently outrageous to justify invalidating the parties' agreement.

Each of these holdings overlooked or misapprehended applicable law and is erroneous for the reasons that follow.

ARGUMENTS

"A party may waive the right to jury trial by contract." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63-64, 566 S.E.2d 863, 866 (Ct. App. 2002) (citing *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992)). The panel properly held that the Blackburns knowingly and voluntarily waived their right to a jury trial. (Slip Op. at 85-87.²) Thus, the jury waivers are presumptively enforceable.

Nonetheless, the panel held that the jury waivers did not apply to the Blackburns' counterclaims because they did not arise out of the loan transaction. The panel also held that the conduct alleged – disagreements regarding the timing of construction – were so unforeseeable that a jury waiver could not be enforced. For the reasons that follow, these holdings misapprehend the applicable law and should be reheard and overturned by the full Court.

² References to the Slip Opinion cite to the relevant page of Shearouse Adv. Sheet No. 29, August 29, 2011.

I. THE JURY WAIVERS EXPRESSLY COVER ALL OF THE BLACKBURNS' COUNTERCLAIMS.

The panel held that the jury waivers somehow fail to encompass the Blackburns' counterclaims. The waivers at issue, however, could hardly be phrased more clearly. They apply to:

ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS NOTE [or GUARANTY], THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS NOTE [or GUARANTY], OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO.

(R. p. 19, Note p. 5; R. p. 40, Guaranty p. 6.)

The Blackburns' counterclaims fall easily within the scope of these provisions because their entire case is about Wachovia's alleged "course of conduct," "course of dealing," "actions," and "statements," with respect to the loan transaction. Indeed, their key allegation is that Wachovia, as part of its course of dealing, partnered with the Developers to market lots in, and loans for, the South Island Plantation development. (R. pp. 73-74, Second Am. Ans. pp. 4-5; R. p. 96, line 4 to p. 97, line 19, Tr. p. 6, line 4 to p. 7, line 19.) As part of this alleged scheme, Wachovia and the Developers made certain purported misstatements with respect to the construction of the development's amenities, all so that they could sell South Island Plantation lots and make Wachovia loans. (R. pp. 73-74, Second Am. Ans. pp. 4-5; R. p. 96, line 4 to p. 97, line 19, Tr. p. 6, line 4 to p. 7, line 19.) Indeed, the Blackburns have directly alleged fraud in the inducement of the Note and other loan documents. (R. p. 80, Second Am. Ans. 11.) It is difficult to imagine how the Blackburns could make allegations that more obviously concerned

Wachovia's "course of conduct," "course of dealing," "actions," and "statements," with respect to the loan transaction. Thus, there is little question but that the parties' jury waivers cover these counterclaims.

Moreover, the waivers broadly cover any action "based on, arising out of, under or in connection with this Note [or Guaranty] or any agreement contemplated to be executed in connection with this Note [or Guaranty]." (R. p. 19, Note p. 5; R. p. 40, Guaranty p. 5.) The counterclaims arise out of the Note and Guaranty because the Blackburns allege that Wachovia's purpose in taking the actions at issue was to induce them to enter into a loan. (R. p. 73, Second Amended Answer p. 4.) The counterclaims also arise out of the property sales contract, which is an "agreement contemplated to be executed in connection with" the Note and Guaranty. Indeed, the Note states that the funds could only be used to "purchase investment property." (R. p. 19, Note. p. 1.) Thus, the plain language of the waivers covers the Blackburns' counterclaims. *Beach Co.*, 351 S.C. at 63-64, 566 S.E.2d at 866 (holding that jury waivers are construed according to their "plain, ordinary and popular meaning"); *see also S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005) (holding that releases are generally enforceable according to their plain language).

Were there any doubt that the jury waivers cover the Blackburns' counterclaims (and there is not), it is worth noting that courts in other jurisdictions have regularly held that counterclaims like the Blackburns' are covered by a contractual jury waiver. *See, e.g., Efficient Solutions, Inc. v. Meiner's Country Mart, Inc.*, 56 F. Supp. 2d 982, 984 (W.D. Tenn. 1999) (applying contractual jury trial waiver to fraud and negligent misrepresentation claims because they concern the contract); *Joy A. McElroy, M.D., Inc.*

v. Maryl Group, Inc., 114 P.3d 929, 936-38 (Haw. Ct. App. 2005) (applying contractual jury trial waiver to unfair trade practices claim based on alleged misrepresentations related to the contract); *Bill Heard Chevrolet Corp., Orlando v. Wilson*, 877 So.2d 15, 18 (Fla. Dist. Ct. App. 2004) (applying contractual arbitration clause to unfair trade practices claim based on misrepresentations related to the contract); *Riverside Portable Storage, Inc. v. Pods, Inc.*, No. 08-1771, 2009 WL 804666, at *3 (M.D. Fla. Mar. 27, 2009) (applying contractual jury trial waiver to promissory estoppel and breach of contract claims based on alleged promises related to the contract).

The panel held, however, that “the allegations of sales misrepresentations and pre-purchase fraud” are not “sufficiently related” to the loan for the jury waivers to apply. (Slip Op. at 90.) In particular, the panel believed that the counterclaims arise out of the sales transaction only and do not arise out of the loan transaction. (*Id.*) This holding is erroneous because it disagrees with the Blackburns’ own allegations and theory of the case.

According to the Blackburns, Wachovia “was promoting itself through banners, promotional materials, and had a team of its own employees on site at the property location to market loans as soon as the lottery lots were distributed and sales contracts signed on the spot.” (R. p. 73, Second Am. Ans. p. 4 (emphasis added).) In other words, according to the Blackburns, Wachovia and the Developers made promises regarding the amenities to induce them to buy the subject property from the Developers and secure a loan from Wachovia. (R. pp. 73-83, Second Am. Ans. pp. 4-14.) It is the Blackburns themselves who allege fraud in the inducement of the loan documents. (R. p. 80, Second Am. Ans. p. 11.) Under South Carolina law, claims arising out of promises allegedly

made to induce one party to enter into a contract are subject to, and within the scope of, a broad waiver provision in that contract. *See, e.g., Carolina Care Plan, Inc.*, 361 S.C. at 553-54; 606 S.E.2d at 757 (holding that allegations of fraud in the inducement were subject to broadly worded arbitration clause and must be submitted to arbitration).

Lest there be any question regarding the relationship between the Blackburns' counterclaims and the loan transaction, the Blackburns directly allege that "the contracts sought to be enforced by [Wachovia] are barred" because Wachovia "failed to properly ensure that the representations made were accurate" (R. p. 74, Second Am. Ans. p. 5.) The only contracts that Wachovia seeks to enforce in this foreclosure action are the Note, Mortgage, and other loan documents. According to the Blackburns, those contracts – *i.e.*, the loan transaction documents – are not enforceable because of their relationship to the alleged pre-purchase misrepresentations. Thus, the Blackburns themselves allege a sufficient relationship between the loan transaction and the purported misconduct for the jury waivers to apply.

In denying a sufficient connection between the counterclaims and the loan documents, the panel invoked the rule of strict construction. However, strict construction "should not be applied so as to defeat the plain and obvious purpose of the instrument." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998). To the contrary, as this Court has held in the context of a jury waiver, waiver provisions should be given their "plain, ordinary and popular meaning." *Beach Co.*, 351 S.C. at 63-64, 566 S.E.2d at 866; *see also N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992) (enforcing jury waiver according to its plain terms). That the terms of the waiver are broad is of no consequence because South

Carolina courts recognize that a provision may be both broad and clear. *Abu-Shawareb v. S.C. State Univ.*, 364 S.C. 358, 363, 613 S.E.2d 757, 760 (Ct. App. 2005) (“Although the release is broad, it is not ambiguous.”). Here, the Blackburns’ counterclaims easily fit within the plain language of the waiver provisions at issue, and no plea for strict construction can alter that result. *Id.* Hence, the panel erred in using the rule of strict construction to defeat the plain language of the jury waivers.

In sum, the panel erred in allowing the Blackburns to have it both ways. If the Blackburns claim that the loan documents were fraudulently induced by Wachovia’s course of conduct (and, according to their pleadings, that is their claim), then it must also be the case that the Blackburns’ claims arise out of the loan transaction as covered by the jury waivers. Any other result effectively ignores the Blackburns’ own allegations and the plain language of the jury waivers.

II. THE PANEL ERRED BY IMPORTING THE “OUTRAGEOUS AND UNFORESEEABLE” INQUIRY APPLICABLE IN CONSUMER ARBITRATION CASES TO THIS COMMERCIAL JURY WAIVER.

The panel held that the jury waivers would not apply even if the counterclaims fell within their scope because the counterclaims allege unforeseeable acts. (Slip Op. at 91.) This argument derives from three arbitration cases—*Aiken v. World Finance Corp.*, 373 S.C. 144, 644 S.E.2d 705 (2007); *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007); and *Partain v. Upstate Automotive Group*, 386 S.C. 488, 689 S.E.2d 602 (2010)—in which the South Carolina Supreme Court held that it would except certain consumer claims from arbitration clauses that would otherwise cover them.

Importing the “outrageous and unforeseeable” inquiry was incorrect, as that standard applies only to consumer arbitration agreements, not commercial jury waivers.³

In *Aiken*, the Supreme Court first held that it would except claims otherwise covered by a broadly worded arbitration provision if those claims alleged “outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.” 373 S.C. at 151, 644 S.E.2d at 709 (emphasis added). Aside from the panel decision, no South Carolina court has applied this exception outside the scope of a consumer arbitration agreement.

The *Aiken* exception is limited by its own terms to cases involving consumer transactions. Indeed, in *Aiken*, which involved a loan transaction between a consumer and a finance company, the Court phrased the exception in terms of conduct that is “unforeseeable to a reasonable consumer.” 373 S.C. at 151, 644 S.E.2d 709 (emphasis added). Similarly, in *Chassereau*, the Court applied the *Aiken* exception to a case involving a consumer purchase of a swimming pool, 373 S.C. at 172, 644 S.E.2d at 720, and, in *Partain*, the Court applied the exception to a case involving a consumer purchase of an automobile, 386 S.C. at 490, 689 S.E.2d at 603. In short, the *Aiken* exception has never been applied to a commercial contract like the one at issue here, and nothing in South Carolina law suggests that it should be extended beyond the consumer-protection arena in which it was developed. This distinction between consumer and commercial transactions is ubiquitous in South Carolina law. See, e.g., *Sapp v. Ford Motor Co.*, 386 S.C. 143, 149-50, 687 S.E.2d 47, 50-51 (2009) (recognizing exception to the economic

³ Despite Wachovia’s argument to the contrary, the panel held that *Aiken*, *Chassereau*, and *Partain* are “instru ctive” as applied to commercial jury waivers without further explanation. (Slip Op. at 91 n.5.)

loss rule that applies only in consumer housing transactions); *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670 (noting that transactions between consumers and automobile dealers are analyzed with “considerable skepticism”); *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 504 n.3, 229 S.E.2d 728, 731 n.3 (1976) (noting that South Carolina is “in the vanguard of consumer protection”). The panel erred by extending the *Aiken* exception to this commercial transaction, and the Court should rehear and reverse that decision.

The *Aiken* exception is also limited to arbitration agreements and should not have been applied to this jury waiver. Bench trials are different in kind from arbitration proceedings in that arbitration proceedings substantially circumscribe a party’s procedural rights and remove them from the taxpayer-funded judicial system, whereas bench trials preserve all of a party’s normal procedural rights except the right to a jury. In arbitration, parties have no right to pre-trial discovery, the application of the rules of evidence, dispositive motions practice, written findings of fact and conclusions of law, appellate review, or other procedural safeguards mandated by the Due Process Clause and the Rules of Civil Procedure. See, e.g., *In re Fleetwood Homes of Tex., L.P.*, 257 S.W.3d 692, 695 (Tex. 2008) (“[L]imited discovery is one of arbitration’s most distinctive features.”); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 286 (4th Cir. 2007) (recognizing that “limited discovery is a consequence of perhaps every agreement to arbitrate”); *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999) (“A hallmark of arbitration - and a necessary precursor to its efficient operation - is a limited discovery process”); *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980) (holding that parties to arbitration have no right to pre-hearing discovery). By contrast, parties who have merely waived their right to a jury trial have access to full pre-trial discovery; pre-

trial motions practice; a trial conducted in accordance with the rules of evidence; written, appealable, findings of fact and conclusions of law; and full appellate review, all in strict preservation of the parties' due process rights.

Given the extent to which a consumer gives up his procedural rights by agreeing to arbitration, the *Aiken* exception is a sensible way to prevent consumer abuse. It has no application, however, in the context of a commercial jury waiver because the parties to that transaction are sophisticated and have not given up substantial procedural rights. Thus, the panel's decision to apply *Aiken* to this commercial jury waiver was in error, and the Court should rehear and reverse that decision.

III. THE PANEL DID NOT HOLD THAT THE ROUTINE DISAGREEMENT REGARDING THE TIMING OF CONSTRUCTION WAS OUTRAGEOUS, AS REQUIRED TO INVALIDATE THE JURY WAIVER, AND THE PANEL ERRED IN HOLDING THAT THE ALLEGED CONDUCT WAS UNFORESEEABLE.

The Blackburns' counterclaims are a far cry from the kinds of "outrageous" and "unforeseeable" acts involved in *Aiken*, *Chassereau* and *Partain*. As an initial matter, the panel ignored these cases' references to "outrageous" conduct and erroneously invalidated the jury waiver without ever finding that the alleged conduct was outrageous. Nothing in the case law supports this methodology. To the contrary, the Supreme Court expressly stated in *Aiken* that the exception applies only to "outrageous torts," and the Court went on to expressly find that the conduct alleged in that case was "outrageous." 373 S.C. at 151, 644 S.E.2d at 709. Similarly, in *Chassereau*, the Court expressly held that the conduct alleged was "historically associated with the common law tort of outrage." 373 S.C. at 172, 644 S.E.2d at 720. Finally, in *Partain*, the Court again held that the *Aiken* exception applies only where the alleged conduct includes "outrageous acts." 386 S.C. at 493, 689 S.E.2d at 604. In the panel decision, however, there is no

finding that the alleged conduct was outrageous. This omission alone warrants rehearing, as the panel could not properly apply the *Aiken* exception without considering whether the alleged conduct rose to the level of outrageousness required by the case law.

Even if the panel had properly addressed the issue, the conduct alleged here is neither outrageous nor unforeseeable. The running theme in *Aiken*, *Chassereau*, and *Partain* is that they involve conduct well outside the scope of a typical business dispute. In *Aiken*, the plaintiff alleged that employees of the defendant finance company used their access to his personal information to steal his identity, obtain sham loans, and embezzle the proceeds. 373 S.C. at 147; 644 S.E.2d at 707. Similarly, in *Chassereau*, the key allegation was that an employee of the defendant above-ground pool merchant revealed the plaintiff's private information to third parties and defamed her, all in an attempt to collect money the plaintiff owed on her pool. 373 S.C. at 170; 644 S.E.2d at 719. Finally, in *Partain*, the plaintiff alleged that the defendant automobile dealer pulled a bait-and-switch maneuver by fraudulently replacing the vehicle he purchased with a different vehicle at the time of pick-up. Here, by contrast, the Blackburns contend that Wachovia and the Developers merely "breached construction promises" by not completing the amenities at the subject planned development on the schedule that was provided. (Blackburns' Opening Br. p. 18; R. p. 73, Second Am. Ans. p. 4.)

According to the Blackburns, the alleged misrepresentations were made *before* the loan documents were signed. Thus, as a matter of logic and timing, these alleged misrepresentations could not have been unforeseeable. Indeed, the Blackburns were fully aware of the alleged sales-related representations before they took out a Wachovia loan. Moreover, few disputes are more prosaic than those involving the timing of construction.

Indeed, the leading construction law treatises devote full chapters to the issue of timing because it is so often litigated. See Philip L. Bruner & Patrick J. O'Connor, Jr., 5 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 15:1, *et seq.* (explaining legal issues involved in disputes over construction delays); see also James Acet & Annette Davis Perrochet, CONSTRUCTION LITIGATION HANDBOOK 2d § 7:1 (same). Unlike identity theft, embezzlement, defamation, invasion of privacy, and bait-and-switch sales tactics, there is nothing unusual or unforeseeable in an investment property transaction about construction not being completed on time. To be sure, the conduct alleged may be actionable, but it is a far cry from the kind of outrageous conduct that should be excepted from a valid jury waiver.⁴ Indeed, if a claimant can avoid his jury waiver by alleging something as commonplace as a dispute about a construction schedule, then the *Aiken* exception will swallow the rule that jury waivers are generally valid and enforceable under South Carolina law.

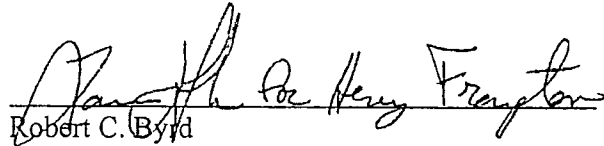
In *Partain*, the Supreme Court warned against the kind of result that the panel reached in this case. There, the Court noted that “a party may not escape its commitment [to arbitration] by alleging its claim as a tort.” 386 S.C. at 494, 689 S.E.2d at 605. Rather, a claim would only be subject to the *Aiken* exception where it “was clearly not within the contemplation of the parties.” *Id.* at 494-96, 689 S.E.2d at 605. Here, the Blackburns have attempted to re-cast a routine dispute over the timing of construction as a series of tort claims. Reasonable commercial parties in an investment property transaction – indeed, anyone who has hired a contractor before – would contemplate the possibility that construction may not be completed on schedule. If merely calling such a

⁴ In fact, until this case, such conduct had never been excepted from a valid jury waiver under South Carolina law.

routine dispute a tort transforms it into “outrageous” and “unforeseeable” conduct, then any arbitration clause or jury waiver can be defeated by creative pleading. To avoid this result, the Court should rehear and reverse the panel decision, and reinstate the rule that jury waivers are generally enforceable under South Carolina law.

CONCLUSION

The panel decision allows artful pleading and creative argumentation to avoid contractual jury waivers in virtually every case, and incorrectly equates arbitration clauses with jury trial waivers. Under the panel decision but in contravention of Supreme Court precedent, it is no longer true that contractual jury waivers are generally valid in South Carolina. For these and the foregoing reasons, and any other reason supported by the Record, Wachovia respectfully requests that the Court grant REHEARING of the panel decision, REVERSE the panel decision, and AFFIRM the Circuit Court’s decision striking the Blackburns’ jury demand.



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ASSOCIATION

September 8, 2011

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2008-CP-22-1598

Wachovia Bank, National Association, ... Respondent,

v.

William E. Blackburn; Judith Blackburn; Tammy S. Winner;
Watson E. Felder; Gary F. Ownbey; and South Island Plantation
Association, Inc. are, ... Defendants,
Of Whom William E. Blackburn; Judith Blackburn are, ... Appellants,
And Of Whom Tammy S. Winner; Watson E. Felder; Gary F. Ownbey;
and South Island Plantation Association, Inc. are, ... Respondents,

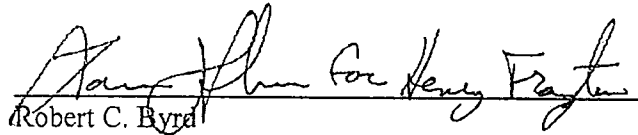
v.

Winyah Bay Holdings, LLC; Source One
Properties, LLC; and Waterpointe Realty, LLC,
Third Party Defendants, ... Respondents.

CERTIFICATE OF COMPLIANCE

On behalf of Respondent Wachovia Bank, National Association, the undersigned
certifies that the **Memorandum in Support of Respondent's Petition for Rehearing**
complies with Rule 211(b), SCACR.

[SIGNATURE BLOCK ON FOLLOWING PAGE]


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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William E. Blackburn; Judith Blackburn; Tammy S. Winner;
Watson E. Felder; Gary F. Ownbey; and South Island Plantation
Association, Inc. are, ... Defendants,
Of Whom William E. Blackburn; Judith Blackburn are, ... Appellants,
And Of Whom Tammy S. Winner; Watson E. Felder; Gary F. Ownbey;
and South Island Plantation Association, Inc. are, ... Respondents,

v.

Winyah Bay Holdings, LLC; Source One
Properties, LLC; and Waterpointe Realty, LLC,
Third Party Defendants, ... Respondents.

PROOF OF SERVICE

I certify that I have served the **Memorandum in Support of Respondent's Petition for Rehearing** on all parties in this action by depositing a copy of it in the United States Mail, first class postage prepaid, on September 8, 2011, to the following addresses:

RECEIVED
SEP 08 2011
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ATTORNEYS FOR RESPONDENT
WACHOVIA BANK, NATIONAL
ASSOCIATION

Tab 7

The South Carolina Court of Appeals

Wachovia Bank, National Association, Respondent,

v.

William E. Blackburn, Judith
Blackburn, Tammy S. Winner, Watson
E. Felder, Gary F. Ownbey, and South
Island Plantation Association, Inc., Defendants,

Of Whom William E. Blackburn and
Judith Blackburn are, Appellants.

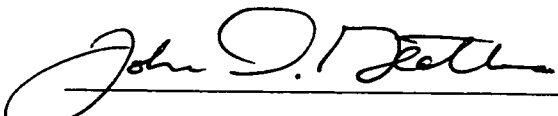
The Honorable Larry B. Hyman, Jr.
Georgetown County
Trial Court Case No. 2008-CP-22-01598

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.


_____ J.


_____ J.


_____ J.

Columbia, South Carolina

cc: Glenn V. Ohanesian, Esquire
Ellis Reed-Hill Lesemann, Esquire
Robert C. Byrd, Esquire
Krista McGuire, Esquire

FILED

October 21, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

NOV 21 2011

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

S.C. Supreme Court

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2008-CP-22-1598

Wachovia Bank, National Association,.....Petitioner,

v.

William E. Blackburn; Judith Blackburn; Tammy S. Winner;
Watson E. Felder; Gary F. Ownbey; and South Island Plantation
Association, Inc. are,.....Defendants,
Of Whom William E. Blackburn; Judith Blackburn are,.....Respondents,

v.

Winyah Bay Holdings, LLC; Source One
Properties, LLC; and Waterpointe Realty, LLC,.....Third-Party Defendants.

PROOF OF SERVICE

The undersigned certifies on November 21, 2011, she caused a copy of the foregoing

Appendix to be served on all parties of record via U.S. Mail with first-class postage prepaid

addressed as follows:

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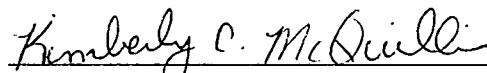
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