

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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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SEP 26 2013

S.C. Supreme Court

On *Certiorari* to the Court of Appeals of South Carolina
Opinion No. 4874 (S.C.Ct.App. filed Aug. 24, 2011)

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.

BRIEF OF RESPONDENTS

September 23, 2013

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STATEMENT OF ISSUES ON APPEAL

1. SHOULD THE COURT OF APPEALS BE AFFIRMED WHEN IT PROPERLY FOUND THAT THE PURPORTED JURY TRIAL WAIVER IN THIS CASE WAS LIMITED BY ITS OWN TERMS?
2. SHOULD THE COURT OF APPEALS BE AFFIRMED WHEN IT PROPERLY REJECTED THE BANK'S ARGUMENT THAT THIS RESIDENTIAL PROPERTY PURCHASE BY INDIVIDUALS WAS SOMEHOW SUBJECT TO A DIFFERENT "COMMERCIAL" STANDARD?
3. SHOULD THE COURT OF APPEALS BE AFFIRMED WHEN IT PROPERLY CONCLUDED THAT FRAUDULENT AND ILLEGAL CONDUCT WAS NOT THE TYPE OF FORESEEABLE CONDUCT CONTEMPLATED BY THE WAIVER?
4. SHOULD THE COURT OF APPEALS BE AFFIRMED ON THE ADDITIONAL SUSTAINING GROUND THAT THERE IS NO EVIDENCE OF A KNOWING WAIVER IN THIS CASE?
5. SHOULD THE COURT OF APPEALS BE AFFIRMED ON THE ADDITIONAL SUSTAINING GROUND THAT THE RELEVANT COUNTERCLAIMS FOR PRE-SALE ILLEGAL AND FRAUDULENT CONDUCT ARE NOT SIGNIFICANTLY RELATED TO THE NOTE?
6. SHOULD THE COURT OF APPEALS BE AFFIRMED ON THE ADDITIONAL SUSTAINING GROUND THAT THE PURPORTED WAIVER IS UNCONSCIONABLE?
7. SHOULD THE COURT OF APPEALS BE AFFIRMED ON THE ADDITIONAL SUSTAINING GROUND THAT THE COURT HAS 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. The Court of Appeals heard oral argument on April 5, 2011 and filed its opinion on August 24, 2011. The Order

Denying Petition for Rehearing was filed October 21, 2011. An Order granting the petition for a writ of certiorari was issued July 25, 2013.

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), SCRPC. 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, and 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 that a knowing and voluntary waiver of the right occurred. This conclusion was made despite the fact that the only true evidence 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. There was no proof from the Bank that the Blackburns read the documents, that they were read to the Blackburns, or that they were ever told that a waiver of jury trial even existed in the documents. 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 appealed.

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. THE COURT OF APPEALS PROPERLY FOUND THAT THE PURPORTED WAIVER WAS LIMITED BY ITS OWN TERMS.

As the Court of Appeals found, the waiver fails 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 the illegal lottery, 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 the illegal lottery and sales misrepresentations and complete failures to abide by promises to build infrastructure, amenities, docks, etc. This is not a mere dispute over a "construction schedule" as the Bank attempts to characterize it – fraud and illegality are not typical "construction schedule" disputes.

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 an illegal lottery and 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. The wrongful conduct preceded the Note and loan documents – it certainly did not arise out of them. 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 bulk of the Blackburns’ counterclaims 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 and as determined by the Court of Appeals.

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 sale or even loan 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 8 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 above, the Note and "Loan Documents" are specifically defined in the note and do not include sales documents, only loan documents. These sales documents and representations 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.

The Bank further argues beginning on page 8 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.

The Bank also focuses on Carolina Care Plan, Inc. v. United HealthCare Services, Inc., 361 S.C. 544, 606 S.E.2d 752 (2004). However, that case did not deal with fraud as to any matters other than the contract involved. Here that would be the Note, and the bulk of the fraud and illegal conduct alleged is not significantly related to the Note but to pre-sale conduct many months earlier. As to the Taylor case cited by the Bank, it deals with a restrictive covenant, not the waiver of a constitutional right. Even in that context this Court recognized that the least restrictive interpretation of the language was appropriate. Taylor v. Lindsey, 332 S.C. 1, 498 S.E.2d 862, 864 (1998). The Abu-Shawareb case cited by the Bank is likewise inapplicable since it dealt with a contractual release, not the waiver of a jury trial. (And in that case the Plaintiff conceded that his claim arose out of his employment, which was what the terms of the release covered.) Abu-Shawareb v. S.C. State University, 364 S.C. 358, 613 S.E.2d 757, 760

(Ct.App. 2005). Finally, the North Charleston Joint Venture case cited by the Bank actually found the jury trial waiver did not apply, reinforcing that “[t]rial by jury is a substantial right and any waiver thereof must be strictly construed.” North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, 307 S.C. 533, 416 S.E.2d 637, 638 (1992).

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.

On pages 9-10 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. In Sutton v. Hollywood Entertainment Corporation, 181 F.Supp.2d 504, 510-512 (D.Md. 2002), 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. 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.

Indeed, the Bank continues this argument by stating that the Bank had nothing to gain from the Blackburns' purchase unless the Blackburns borrowed from the Bank (and thus, the argument goes, everything was inextricably intertwined with the mortgage). This ignores the gravamen of the counterclaims and defenses that the Bank partnered with the developer and others such that the Bank would benefit from the Blackburns' purchase even if they did not borrow from the Bank. This also emphasizes the lack of relationship between the purchase and the loan. The purchase and many of the allegations about the purchase can stand on their own without reference to the Note or the loan – indeed, the allegations would remain even if the Blackburns had purchased without financing or had borrowed from a different lender.

Further, while the Bank correctly states that the only contract it seeks to enforce are the loan documents, it ignores the reality that the bulk of the Blackburns' claims are not based on the loan documents but on illegal conduct and fraud significantly unrelated to the loan documents.

The Bank also implies that the Blackburns are trying to answer this question two ways. 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. 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.

Despite the Bank's argument to the contrary, the Court of Appeals decision does not conflict with any prior South Carolina case law. It merely makes application of the well settled law regarding jury trial waivers to the facts of this case. The Court of Appeals should therefore be affirmed on this issue.

II. THE COURT OF APPEALS SHOULD BE AFFIRMED SINCE IT PROPERLY REJECTED THE BANK'S ARGUMENT THAT THIS RESIDENTIAL PROPERTY PURCHASE BY INDIVIDUALS WAS SOMEHOW SUBJECT TO A DIFFERENT "COMMERCIAL" STANDARD.

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 Court of Appeals brief makes this clear. In Herron v. Century BMW, 387 S.C. 525, 693 S.E. 2d 394 (2010), 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 398. 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 attempted to cloud the issue in its Court of Appeals brief 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 refutes the

argument of them as 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.

The Bank 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 individual borrowers 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 argued, 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, 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.

Finally, the Bank argues that an arbitration clause (regulated by Congress’ legislation in the form of the Federal Arbitration Act) is subject to greater scrutiny than a jury trial waiver clause. In comparing the two, the Bank refers on page 14 of its brief to “...parties who have merely waived their right to a jury trial...” It is this type of cavalier reference to one of our nation’s most basic constitutional rights that pervades the Bank’s argument that waiver of a jury trial is no big deal. The Bank seems to argue that signing away your constitutional right to a jury is a trivial matter that demands no scrutiny from the Court. The Blackburns are thankful the Court of Appeals recognized this is not the proper perspective and respectfully request that this Honorable Court do the same.

III. THE COURT OF APPEALS SHOULD BE AFFIRMED SINCE IT PROPERLY CONCLUDED THAT FRAUDULENT AND ILLEGAL CONDUCT WAS NOT THE TYPE OF FORESEEABLE CONDUCT CONTEMPLATED BY THE WAIVER.

In addition to the arguments above regarding the nature of most of the defenses and counterclaims in this case not being covered by the specific, plain language of the clause, the Court of Appeals also found that the Bank's alleged fraudulent and illegal conduct was unforeseeable and thus not subject to the waiver. For this, the Court of Appeals recognized the Aiken and Partain cases to be instructive and concluded that "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."

The Bank, on the other hand, argues that because the Court of Appeals did not make an express finding of outrageous conduct that its opinion should be reversed. The Blackburns did not argue that the Bank's conduct was outrageous, though it may very well rise to that level since it was both illegal and fraudulent. 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 pointed out that no South Carolina court has applied the "unforeseeability of the tort" defense except in arbitration agreements (at least until the Court of Appeals in this case). 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 just as the Court of Appeals did.

The Bank also argues that because the loan came after the alleged illegal and fraudulent conduct, “as a matter of logic and timing, these alleged misrepresentations could not have been unforeseeable.” Bank Brief, p. 16. The nature of this fraud and the illegal conduct was such that the truth was concealed by the wrongdoers (as is most often the case when dealing with fraud and illegality), and the truth had not come to light at the time the Note was signed and was therefore not foreseeable. The Bank’s use of this red herring argument should therefore fail.

The Bank further 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). Aiken and Partain 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.” 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 with no intent to comply, use of an illegal lottery, and fraudulent conduct. The Supreme Court recognized that in Partain, Aiken and Chassereau. 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 even outside a specific

finding of outrageousness, as the focus of those Court rulings were on the unforeseeability of the torts. And, it is instructive to note that Partain did not make a specific finding of outrageousness. Indeed, without saying the conduct was outrageous, the Court there stated:

...Partain cannot be held to have contemplated that...he was agreeing to arbitrate claims arising from allegedly fraudulent conduct...

Only where the claim presented was clearly not within the contemplation of the parties will a court decline to enforce..."
Partain at 605.

Thus, this Court found allegedly fraudulent conduct not within the contemplation of the parties sufficient to satisfy the Aiken standard without a specific finding of outrageousness. Again, though, even if such a finding were necessary, the conduct in this case rises to that level.

IV. THE COURT OF APPEALS SHOULD BE AFFIRMED ON THE ADDITIONAL SUSTAINING GROUND THAT THERE IS NO EVIDENCE OF A KNOWING WAIVER IN THIS CASE.

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 seems to start from the premise that a purported waiver buried in a loan document is 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 (1972) 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.

None of the case law cited by the Bank to the Court of Appeals -- regarding the presumption of reading and understanding a signed contract -- involve jury trial waivers. Citizens & S. Bank of S.C. v. Lanford, 313 S.C. 540, 443 S.E.2d 549 (1994), Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct.App. 2003), and Burwell v. S.C. National Bank, 288 S.C. 34, 340 S.E.2d 786 (1986), cited by the Bank, all have to do with a borrower not understanding the extent of their guaranty responsibility, and have nothing to do with jury trial waivers whatsoever. The only case the Bank cites on this issue that is remotely relevant is Sydnor v. Conesco Financial Services Corp., 252 F.3d 302 (4th Cir. 2001). That case involves an arbitration clause, but it too is distinguishable. Sydnor (a

federal case out of Virginia) was decided under the Federal Arbitration Act and therefore subject to the case law applicable to arbitration agreements that presumes validity of such agreements. No such presumption is due to jury trial waivers which are not part of an arbitration agreement. And Sydnor makes no discussion of the “knowing” requirement discussed in Leasing Serv. Corp. v. Crane, 804 F.2d 828 (4th Cir.1986).

The Bank incorrectly presumes that the mere existence of the clause results in a presumption of validity. In doing so, it fails to provide any proof that waiver of a jury trial was knowing and voluntary. Of interest in reviewing the Note is the reference to definitions to be used in construing the Note’s terms, namely that all terms used but not defined in the loan documents shall have the definitions of the Uniform Commercial Code. (See note, page 2, R. p. 15). Since the Note itself uses the term “knowingly” in the purported waiver (and that term is not defined in the Loan Documents), we must refer to the UCC definition found in S.C.Code Ann. Section 36-1-201(25), which provides: **“A person “knows” or has “knowledge” of a fact when he has actual knowledge of it.”** There is no evidence the Blackburns had actual knowledge of the jury trial waiver, and therefore by the Note’s own terms, the jury trial waiver is ineffective because it is indeed required to be a knowing, voluntary waiver. It does not say (as the Bank argues) the Blackburns are considered to know something just because it is somewhere in the Note; it says they only “know” it if they have actual knowledge of it. Thus, as defined by reference in the Note itself, there was no knowing waiver because there is no proof the Blackburns actually knew about it. Indeed, the only evidence is their Affidavit, which again is uncontradicted, and states clearly they did not know about it. (R. P. 119) This

seems elemental, but the Bank ignores it in their argument which presumes constructive knowledge simply because it was in the document. Indeed, actual knowledge should be required in a jury trial waiver, not constructive or presumed knowledge as the Bank argues. Again, none of the cases cited by the Bank in support of this proposition involve jury trial waivers. Conversely, the Crane case cited by both parties clearly provides: **“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.”** Crane at 833. In other words, the mere fact that there is a written contract purporting to waive the right to trial by jury does not raise a presumption that they read it and understood it -- the party seeking to enforce it must prove those facts. That presumption applies to most contracts, but does not apply to jury trial waivers, as indicated in the National Equipment case relied on by the Fourth Circuit in Crane: **“Indeed, a presumption exists against its waiver.”** National Equipment Rental, Ltd. v. Hendrix, 565 F.2d 255, 258.

It is interesting that the Bank ignored the Crane presumption against jury trial waivers but relied on Crane heavily in its argument that sufficient evidence exists to find a valid waiver. That reliance is misplaced, however, because the facts in Crane used to validate that waiver do not exist in the case at bar. In Crane, the court found that the lease agreement in question was only two pages (not six, and not part of dozens if not hundreds of other pages of closing documents). It also found the parties were not manifestly unequal in bargaining positions (unlike our case). It specifically found the Cranes to be “manifestly shrewd businessmen...in a...successful drilling business

for sixteen years” (the lease involved 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.

The Bank acknowledges that the appropriate standard of review regarding the jury trial waiver is de novo review under the Verenes case, but argued to the Court of Appeals an attempt 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, 387 S.C. 11, 690 S.E. 2d 771 (2010). 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)

In summary, we would ask that the Court affirm the requirement of a “knowing” waiver. While a signature on most contracts binds the signer, that does not apply to a jury trial waiver unless additional evidence indicating it was a knowing waiver is adduced. No such evidence exists in this case and therefore the Court has no basis upon which to find a knowing waiver.

V. THE COURT OF APPEALS SHOULD BE AFFIRMED ON THE ADDITIONAL SUSTAINING GROUND THAT THE RELEVANT COUNTERCLAIMS FOR PRE-SALE ILLEGAL AND FRAUDULENT CONDUCT ARE NOT SIGNIFICANTLY RELATED TO 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.2d at 708-709.

The Aiken case was further followed in Partain v. Upstate Automotive Group, 386 S.C. 488, 689 S.E.2d 602 (2010), where a customer claimed fraud in a “bait and

switch” case under the South Carolina Unfair Trade Practices Act. In that case, this Court found that “...**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 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, illegal lottery, construction fraud) 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 and are not subject to the jury trial waiver.

VI. THE COURT OF APPEALS SHOULD BE AFFIRMED ON THE ADDITIONAL SUSTAINING GROUND THAT THE PURPORTED WAIVER IS UNCONSCIONABLE.

As stated above in the Aiken case, this 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), this 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. Additional one-sided or oppressive terms in the Note include: (1) prohibition of special damages; (2) prohibition of consequential damages; (3) Bank can freely assign, but not borrower; (4) borrower is required to comply with laws and regulations, no such provision for the Bank; and (5) Borrower has to pay attorney's fees and collection costs, but not the Bank. See the Note (and many, if not all, of the provisions also are applicable to the Guaranty).

The Bank relied heavily on the Herron case before the Court of Appeals regarding unconscionability and opined 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 a meaningful choice. 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 397-398.

On the punitive damages issue before the Court of Appeals, the Bank attempted 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. Further, we disagree with the assertion in the Bank’s Court of Appeals 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 claimed 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), SCRPC (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 this appeal:

Based on all of the above, unconscionability is an additional sustaining ground.

VII. THE COURT OF APPEALS SHOULD BE AFFIRMED ON THE ADDITIONAL SUSTAINING GROUND THAT 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), SCRPC, 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 (if 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 affirm the Court of Appeals, 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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September 23, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas, Fifteenth Judicial Circuit

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, ... Respondents,

v.

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

PROOF OF SERVICE

I certify that I have served one (1) copy of the Brief of Respondents on each other party, by depositing copies of same in the United States Mail, postage prepaid, on September 23, 2013, addressed at the addresses set forth on the attached page.

September 23, 2013



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