

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Branch Banking And Trust Company,

Plaintiff,

vs.

JAMES A SUMMERS, LLC, JAMES A.
SUMMERS, SUMMERS ROOFING, LLC
AND COASTAL METAL FABRICATION,
LLC

Defendants

IN THE COURT OF COMMON PLEAS
C/A No:2012-CP-22-0897

FILED
GEORGETOWN COUNTY, S.C.
2013 NOV - 1 AM 11:36
ALMA Y. WHITE
CLERK OF COURT

**ORDER STRIKING JURY TRIAL DEMAND AND REFERRING TO MASTER IN
EQUITY**

This matter is before the Court on the motion of Branch Banking and Trust Company ("BB&T") pursuant to Rules 39, 53 and 71 of the South Carolina Rules of Civil Procedure and the contractual agreement of the parties to strike the jury trial demand filed by the Defendants, Tracy Lee Butler and James A. Summers, in this matter and refer the entire case to the Master in Equity for Georgetown County for a final determination on the merits (the "Motion").

The Motion was made on the following stated grounds:

1. The Complaint in this action is one for foreclosure which, pursuant to Rule 71, SCRPC, "shall be tried by the Court and shall ordinarily be referred to a master pursuant to Rule 53." The matters raised by the Complaint are not triable as a matter of right by a jury;

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2. Any right to a jury trial on the matters raised in the counterclaims in this matter has been waived by the assertion of these counterclaims which are non-compulsory in nature in this foreclosure action;¹
3. Any right to trial by jury has been contractually waived by the answering Defendants.

FACTS RELATED TO MOTION

The following facts appear from the record in this action as established through the pleadings (and admissions therein) together with the Affidavit of Al K. Fanning filed with the Motion:

1. The Note which is the subject of this action dated January 27, 2006² and which was executed by the Defendant, James A. Summers, LLC, contains the following provision in Bold and all capitalized print:

WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS NOTE OR ANY LOAN DOCUMENT EXECUTED IN CONNECTION HERewith OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO MAKE THE LOAN EVIDENCED BY THIS NOTE. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR

¹ BB&T argues that should the Court determine that the counterclaims are sufficiently distinct from the claims made in the Complaint to find that they are outside the scope of the waivers of jury trial that are the subject of this action, that such a determination would lead to an unavoidable determination that the Counterclaims are not sufficiently related to the claims made in the Complaint to avoid being permissive counterclaims (and thus not entitled to be tried before a jury) citing C&S Real Estate Services, Inc. v. Massengale, 290 S.C. 299, 350 S.E. 2d 191 (S.C. 1986) ("Rule 13(a), SCRPC, now requires a defendant to plead as a counterclaim any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim. He is entitled to a jury trial on these compulsory counterclaim if legal in nature even though asserted in an equitable action. Rule 13(b), SCRPC, permits a defendant to plead as a counterclaim any claim not arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim. When a defendant asserts these permissive counterclaims which are legal in nature, he waives the right to a jury trial on these issues. Appellant therefore had no right to a trial by jury on her permissive counterclaims."; See, also, North Carolina Federal Savings and Loan Association v. DAV Corp. 298 S.C. 514, 381 S.E. 2d 903 (S.C. 1989).

² A copy of which is attached hereto as Exhibit A. The execution of a Note as attached hereto was admitted in the Answer and Counterclaim of the Defendants (Paragraph 5 of the Complaint; admitted in Paragraph 5 of the Answer and Counterclaim). Counsel for BB&T is in possession of the original note, a copy of which is attached hereto.

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AGENT OF BANK NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.

2. The Mortgage securing the January 27, 2006 Note described in Paragraph (a) above, also dated January 27, 2006 ³, which was executed by the Defendant, James A. Summers, LLC, contains the following provision in bold print and all capitalized print:

13. WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS MORTGAGE OR ANY LOAN DOCUMENT EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND MORTGAGEE. THIS PROVISION IS A MATERIAL INDUCEMENT FOR MORTGAGEE TO MAKE THE LOAN SECURED BY THIS MORTGAGE. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF MORTGAGEE, NOR MORTGAGEE'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE. THAT MORTGAGEE WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF MORTGAGEE, NOR MORTGAGEE'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.

3. The Modification, Renewal and Restatement of Note dated February 5, 2007⁴ and which was executed by the Defendant, James A. Summers, LLC contains the following provision in Bold and all capitalized print:

WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS NOTE OR ANY LOAN DOCUMENT EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO MAKE THE LOAN EVIDENCED BY THIS NOTE. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT

³ A copy of which is attached hereto as Exhibit B. The execution of a Mortgage was denied in the Answer and Counterclaim. Counsel for BB&T is in possession of the original Mortgage which is recorded and self-authenticating. The Mortgage bears an acknowledgment by a notary public and is self-authenticating under Rule 902(8), SCRE.

⁴ A copy of which is attached hereto as Exhibit C. The execution of a Modification, Renewal and Restatement of Note as attached hereto was admitted in the Answer and Counterclaim of the Defendants (Paragraph 8 of the Answer and Counterclaim). Counsel for BB&T is in possession of the original Modification, Renewal and Restatement of Note, a copy of which is attached hereto.



NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE. THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF BANK NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.

4. The Note Modification Agreement dated November 20, 2007⁵ and which was executed by the Defendant, James A. Summers, LLC, contains the following provision in Bold and all capitalized print:

WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS AGREEMENT, THE PROMISSORY NOTE OR ANY LOAN DOCUMENT EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO MAKE THE LOAN EVIDENCED BY THIS NOTE. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE. THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF BANK NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.

5. The Note Modification Agreement dated December 11, 2009⁶ and which was executed by the Defendants, James A. Summers, LLC and James A. Summers, contains the following provision in Bold and all capitalized print:

WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR

⁵ A copy of which is attached hereto as Exhibit D. The execution of a Note Modification Agreement as attached hereto was admitted in the Answer and Counterclaim of the Defendants (Paragraph 9 of the Answer and Counterclaim). Counsel for BB&T is in possession of the original Note Modification Agreement, a copy of which is attached hereto.

⁶ A copy of which is attached hereto as Exhibit E. The execution of a Note Modification Agreement as attached hereto was admitted in the Answer and Counterclaim of the Defendants (Paragraph 10 of the Answer and Counterclaim). Counsel for BB&T is in possession of the original Note Modification Agreement, a copy of which is attached hereto.

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CLAIMS ARISING OUT OF THIS AGREEMENT, THE PROMISSORY NOTE OR ANY LOAN DOCUMENT EXECUTED IN CONNECTION HERewith OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO MAKE THE LOAN EVIDENCED BY THIS NOTE. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE. THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF BANK NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.

6. The Note Modification Agreement dated November 24, 2010⁷ and which was executed by the Defendants, James A. Summers, LLC and James A. Summers, contains the following provision in Bold and all capitalized print:

WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS AGREEMENT, THE PROMISSORY NOTE OR ANY LOAN DOCUMENT EXECUTED IN CONNECTION HERewith OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO MAKE THE LOAN EVIDENCED BY THIS NOTE. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE. THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF BANK NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.

7. The Note Modification Agreement dated June 9, 2011⁸ and which was executed by the Defendants, James A. Summers, LLC and James A. Summers, contains the following provision in Bold and all capitalized print:

⁷ A copy of which is attached hereto as Exhibit F. The execution of a Note Modification Agreement as attached hereto was admitted in the Answer and Counterclaim of the Defendants (Paragraph 11 of the Answer and Counterclaim). Counsel for BB&T is in possession of the original Note Modification Agreement, a copy of which is

WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS AGREEMENT, THE PROMISSORY NOTE OR ANY LOAN DOCUMENT EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO MAKE THE LOAN EVIDENCED BY THIS NOTE. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE. THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF BANK NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.

8. The Guaranty Agreement dated February 5, 2007⁹ and which was executed by the Defendant, Coastal Metal Fabrication, LLC, contains the following provision in Bold and all capitalized print:

WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS GUARANTY OR THE BORROWER'S NOTE(S), AND THE RELATED LOAN DOCUMENTS EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK OR THE BORROWER AND THE BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO ACCEPT THIS GUARANTY AND TO MAKE THE LOAN(S) TO THE BORROWER. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE. THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF

attached hereto.

⁸ A copy of which is attached hereto as Exhibit G. The execution of a Note Modification Agreement as attached hereto was admitted in the Answer and Counterclaim of the Defendants (Paragraph 12 of the Answer and Counterclaim). Counsel for BB&T is in possession of the original note, a copy of which is attached hereto.

⁹ A copy of which is attached hereto as Exhibit H. Counsel for BB&T is in possession of the original Guaranty Agreement, a copy of which is attached hereto. The Guaranty Agreement bears an acknowledgment by a notary public and is self-authenticating under Rule 902(8), SCRE.

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**BANK NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE,
CONDITION OR MODIFY THIS PROVISION.**

9. The Guaranty Agreement dated February 5, 2007¹⁰ and which was executed by the Defendant, James A. Summers, contains the following provision in Bold and all capitalized print:

WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS GUARANTY OR THE BORROWER'S NOTE(S), AND THE RELATED LOAN DOCUMENTS EXECUTED IN CONNECTION HERewith OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK OR THE BORROWER AND THE BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO ACCEPT THIS GUARANTY AND TO MAKE THE LOAN(S) TO THE BORROWER. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE. THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF BANK NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.

10. The Guaranty Agreement dated February 5, 2007¹¹ and which was executed by the Defendant, Summers Roofing, LLC, contains the following provision in Bold and all capitalized print:

WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS GUARANTY OR THE BORROWER'S NOTE(S), AND THE RELATED LOAN DOCUMENTS EXECUTED IN CONNECTION HERewith OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK OR THE

¹⁰ A copy of which is attached hereto as Exhibit I. Counsel for BB&T is in possession of the original Guaranty Agreement, a copy of which is attached hereto. The Guaranty Agreement bears an acknowledgment by a notary public and is self-authenticating under Rule 902(8), SCRE.

¹¹ A copy of which is attached hereto as Exhibit J. Counsel for BB&T is in possession of the original Guaranty Agreement, a copy of which is attached hereto. The Guaranty Agreement bears an acknowledgment by a notary public and is self-authenticating under Rule 902(8), SCRE

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BORROWER AND THE BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO ACCEPT THIS GUARANTY AND TO MAKE THE LOAN(S) TO THE BORROWER. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE. THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF BANK NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.

DISCUSSION

The Defendants assert that any pre-litigation waiver of the right to jury trial is unconstitutional and against public policy relying on cases from Georgia and California followed by the statement: "no South Carolina case addresses the issue."

The Court must disagree with the Defendants. Not only have South Carolina cases addressed the issue, the propriety of pre-litigation waivers of the right to jury trial has been regularly addressed by and uniformly allowed by the Courts in every level of the South Carolina court system clearly established in the federal court system as well.

The South Carolina Supreme Court accepted the validity of pre-litigation waivers of jury trial in *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*¹² citing the similar conclusion from the 4th Circuit Court of Appeals in *Leasing Serv. Corp. v. Crane*,¹³ where the 4th Circuit stated :

"The seventh amendment right is of course 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."). The Court in *N. Charleston* clearly recognized the nature of the issue related to the waiver of jury trial as they stated: "Trial by jury is a substantial right and any waiver thereof must be strictly construed."

¹² 307 S.C. 533, 535, 416 S.E. 2d 637 (S.C. 1992) See also *Broome v Watts* 319 S.C. 337, 461 S.E. 2d 46 (S.C. 1995).

¹³ 804 F.2d 828 (4th Cir. 1986)

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In 2002, the South Carolina Court of Appeals directly addressed the issue of the enforceability or pre-litigation waivers of jury trial in *Beach Company v Tillman*¹⁴ and specifically held: "a party may waive the right to jury trial by contract." Recognizing that it was dealing with a constitutionally guaranteed right, the Court of Appeals went on to state: "Such a waiver must be strictly construed as the right to trial by jury is a substantial right."

The Court of Appeals more recently addressed the issue in *Wachovia Bank v. Blackburn*¹⁵ after discussion of the Seventh Amendment analysis in the Fourth Circuit case of *Leasing Serv. Corp. v. Crane* cited above clearly held: "A party may waive the right to a jury trial by contract."

The U.S. District Court for the District of South Carolina¹⁶ has also addressed the issue and allowed pre-litigation waivers.

The trial courts of this state, including this very court, have also addressed the issue and enforced pre-litigation waivers of the right to jury trial contained in the BB&T loan documents at issue in this case¹⁷. In fact, this Court has recently upheld and enforced the very waivers before this Court contained in loan documents of BB&T.¹⁸

There can be no question whatsoever that pre-litigation waivers of jury trial are allowed in and enforceable in South Carolina. This position is in line with the vast majority of states that have addressed the issue¹⁹ and with the universal acceptance of such waivers in the federal courts dating back to 1819.²⁰

¹⁴ 351 S.C. 56, 566 S.E. 2d 863 (S.C. App. 2002) "A party may waive the right to a jury trial by contract."

¹⁵ 394 S.C. 579; 716 S.E.2d 454 (S.C. App. 2011).

¹⁶ *Rogers International, Inc. v. Branch Banking and Trust Company* 2010 U.S. Dist. Lexis 92305 (D.S.C. 2010);

¹⁷ See, e.g. *BB&T v Cohen's Drywall Company, Inc.* Civil Action No. 2010-CP-18-3177 (May 3, 2011);

¹⁸ *BB&T v Walker Residential Construction, LLC*, Civil Action No. 2011-CP-22-244 (May 3, 2011).

¹⁹ See, e.g. *RDO Fin. Servs. Co.*, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002) addressing the Georgia decision relied on by the defendants: "Further, the Georgia Supreme Court appears to be the only state court to find that pre-litigation contractual jury trial waivers are not enforceable, and the decision has been criticized. See Edward Wood Dunham, *Enforcing Contract Terms Designed to Manage Franchisor Risk*, 19 *FRANC. L. J.* 91, 96 (2000) (characterizing Georgia's approach as "extreme and, to date, unusual position"); K. Stout, *No Prelitigation*

The Defendants have cited this Court to cases in Georgia and California to support their position that a pre-litigation waiver of jury trial is not constitutional.²¹ Those decisions, however, appear to be both isolated and, more important, determined by the content of the specific constitutional and statutory schemes which exist in those states²². Recognizing the importance of the statutory framework to the two cases on which they rely, the Defendants have tried to present Rule 38(a), SCRCF, as setting forth the equivalent to a statutory regulation of waivers of jury trial. Such an attempt is unavailing. Rule 38, SCRCF, is identical in the cited provisions to Rule 38, FRCP, which has never been cited as or formed a basis to restrict the validity of waivers of jury trial in the federal system.²³

Contractual Waiver of Jury Trial: *Bank South, N.A. v. Howard*, A Step Backward for Georgia, 12 GA. ST. U. L. REV. 929, 947-48 (1998); *L & R Realty v. Conn. Nat'l Bank*, 46 Conn. App. 432, 699 A.2d 291, 295 (Conn. 1997) (following the federal standard as persuasive authority rather than Georgia)." See, also, *L & R Realty v. Connecticut National Bank, et al.* 715 A.2d 748, 753 (Conn. 1998)

²⁰ See, e.g. *Bank of Columbia v. Olley* 17 U.S. 235, 243-244 (U.S. 1819); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828 (4th Cir. 1986); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755 (6th Cir. 1985).

²¹ See, e.g. *Bank South, N.A. v. Howard* 264 GA 339, 444 S.E. 2d 799 (Ga. 1994) and *Grafton Partners L.P. v. Superior Court* 36 Cal. 4th 944, 116 P. 3d 479 (2005). In *Bank South*, the Court citing both the constitutional protection and a statute implementing that provision explained: "Civil litigants in this state's courts are guaranteed the right to a jury trial by the Constitution of Georgia (" (a) The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party") and the Civil Practice Act. **Waiver of that right is a matter which is "carefully controlled" by statute.** *Manderson &c. v. Gore*, 193 Ga. App. 723 (5) (389 S.E.2d 251) (1989). The constitutional guarantee of the right to trial by jury refers to two circumstances in which the right may be waived: when no issuable defense is filed and when the parties fail to demand a jury trial. O.C.G.A. § 9-11-39 (a) provides for waiver by express stipulation, either written and filed in the record or made orally in open court. By their terms, both the statute and the Constitution plainly contemplate the pendency of litigation at the time of the waiver. We conclude, therefore, that pre-litigation contractual waivers of jury trial are not provided for by our Constitution or Code and are not to be enforced in cases tried under the laws of Georgia." Similarly, in *Grafton Partners*, the issue of waiver was directly addressed in the constitutional and statutory provisions relied upon: "We can find no more succinct and accurate analysis of the relevant constitutional provision than that employed by Justice Simons writing for the Court of Appeal in its decision below: "The California Constitution, as originally adopted in 1849, set out the right to a jury trial in the strongest possible terms: "[T]he right of trial by jury shall be secured to all, and remain inviolate for ever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law." ([Exline, supra,] 5 Cal. 112, 112, quoting Cal. Const. of 1849, art. I, § 3.) Soon after the Constitution's adoption, the Legislature enacted a statute that set out specific situations in which a civil jury is deemed waived and then added, "The Court may prescribe by rule what shall be deemed a waiver in other cases." ([Exline, at p. 112, quoting § 179 of the Cal. Civil Practice Act [Stats. 1851, ch. 5, § 179, p. 78].)" Having found no support in the implementing statutes for a pre-litigation waiver, the Court held that such were not enforceable.

²² Id.

²³ See, e.g. *Connecticut National Bank v. Smith* 826 F. Supp. 57, 59-60 (D.R.I. 1993) ("The Seventh Amendment to the United States Constitution guarantees the right to a trial by jury in many civil cases. Nonetheless, it is axiomatic that, if done so knowingly, intentionally, and voluntarily, parties to a contract can waive this fundamental right.

The Defendants further argue that a pre-litigation waiver of jury trial is against the public policy of this state. That argument, however, cannot prevail where the State, by legislative action, approved arbitration agreement which both waive a trial by jury and the right to a trial of any kind. S.C. Code Ann. §15-48-10 expressly provides that "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable." Such an agreement to require arbitration necessarily entails a waiver of the parties right to present that controversy to a jury.²⁴

The Defendants argue next that the waivers contained in the cited loan documents were not "knowing and voluntary" and that there "should be a presumption that a waiver contained in an un-

Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832 (4th Cir. 1986); K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 755 (6th Cir. 1985); National Equipment Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977); National Westminster Bank v. Ross, 130 Bankr. 656, 667 (S.D.N.Y. 1991), aff'd sub nom., Yaeger v. National Westminster, 962 F.2d 1 (2d Cir. 1992). As several courts have noted, contractual agreements waiving the right to trial by jury are neither [**7] illegal nor contrary to any abstract public policy. *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988), cert. denied, 490 U.S. 1021, 109 S. Ct. 1745, 104 L. Ed. 2d 182 (1989); *Okura & Co. v. Careau Group*, 783 F. Supp. 482, 488 (C.D.Cal 1991)(citing J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice*, P 38.46 (2d ed. 1985)); *Chase Commercial Corp. v. Owen*, 32 Mass. App. Ct. 248, 588 N.E.2d 705, 709 (Mass.App.Ct. 1992)(jury trial waivers, which "offer at least the potential of somewhat less costly and complicated litigation in the event of a dispute," are not unconscionable or against public policy). Further, courts have repeatedly enforced contractual jury waivers in loan agreements and loan guaranties. See, e.g., *Okura & Co.*, 783 F. Supp. at 489; *National Westminster Bank*, 130 Bankr. at 667; *Standard Wire & Cable Co. v. AmeriTrust Corp.*, 697 F. Supp. 368, 375 (C.D.Cal. 1988); *In re Reggie Packing Co.*, 671 F. Supp. 571, 574 (N.D.Ill. 1987); [**8] *Chase Commercial Corp.*, 588 N.E.2d at 709."); *Leasing Service Corp. v. Crane* 804 F. 2d 828, 832-833 (4th Cir. 1986); *K.M.C. Co. v. Irving Trust Co.*, 757 F 2d 752, 755-759 (6th Cir. 1985); *First Union National Bank v. U.S.* 164 F. Supp 2d 660, 663 ("Although the right to a jury trial is guaranteed by the Seventh Amendment to the U.S. Constitution, like all constitutional rights, [**5] it can be waived by the parties. *In Re City of Philadelphia*, supra, citing *United States v. Moore*, 340 U.S. 616, 621, 71 S. Ct. 524, 95 L. Ed. 582 (1951). See Also: *Fed.R.Civ.P.Nos. 38(a), (d); 39*. Waiver can be either express or implied and requires only that the party waiving such right do so voluntarily and knowingly based on the facts of the case. *Seaboard Lumber Company v. United States*, 903 F.2d 1560, 1563 (Fed.Cir. 1990), citing, inter alia, *Commodity Futures Trade Commission v. Schor*, 478 U.S. 833, 848, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1972) and *Brookhart v. Janis*, 384 U.S. 1, 4, 5, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966).")"

²⁴ See, e.g. 12 Chap. L. Rev. 127, 129-130: "Also, contractual jury waivers are not contrary to public policy. Rather, the FAA declares a strong public policy favoring them. A primary purpose of the FAA was to support agreements that reduce the expense and delay of litigation. Contractual jury waivers are implicit parts of arbitration agreements and serve the same interests. Also, an arbitration agreement "involves a greater compromise of procedural protections" than a contractual jury waiver. Thus, "public policy that permits parties to waive trial altogether surely does not forbid waiver of trial by jury." (citations omitted).

negotiated document that contains a waiver of jury trial is not a knowing and voluntary waiver". The Defendants, however, cite no authority for such a presumption and the Court cannot find any in the case law as it currently exists.

The record before this court clearly establishes that each of the Defendants, in connection with the initiation of the loan transaction at issue and their receipt of the funds therefrom, executed loan documents that clearly and conspicuously contained a clear and concise waiver of jury trial. The waivers were contained in a separately numbered paragraphs entitled **"WAIVER OF JURY TRIAL"** with the waiver itself in type that was distinctive from that around it (**BOLD AND ALL CAPS**). The location of the waivers was such that they would have been conspicuous to anyone bothering to read the documents (at the top of the page preceding the signature on the Note, on a page with just three paragraphs and only one bolded to set it out, and at the bottom of the page preceding the signature on the Mortgage and with only one bolded paragraph on the page).

Although the cases clearly require a "knowing and voluntary waiver" of the right to jury trial, it is clear from binding precedent in this state that the above facts establish that waiver. Specifically, it is no defense to the enforcement of the waiver of jury trial that it was not read or seen in the documents²⁵. In addressing a very similar situation, the South Carolina Court of Appeals observed:

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." "Such a waiver must be strictly construed as the right to trial by jury is a substantial right." "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." "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." "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." "The law does not impose a duty

²⁵ Mr. Summers makes these claims in his Affidavit.

on the bank to explain to an individual what he could learn from simply reading the document."

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,* ("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.²⁶

Here we have a clear waiver, set out in type designed to make it conspicuous executed by the parties. Our case law makes it clear that it is no defense that Mr. Summers elected not to read the documents (as he claims) or that the waiver provisions were not pointed out to him.

Once this Court reaches the determination that the waivers of jury trial are knowing and voluntary (as it has), it must address the scope of the waiver and the extent to which it covers the claims made in this action.

Each of the waivers contain identical provisions except for the specific reference to the loan document in question. They each state:

THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF [REFERENCE TO SPECIFIC DOCUMENT] OR ANY LOAN DOCUMENT EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO MAKE THE LOAN EVIDENCED BY THIS NOTE.²⁷

Under the above provisions, the waiver clearly applies to any action arising out of the Note and Mortgage which clearly encompasses the claims made in the Complaint. The Defendants'

²⁶ *Wachovia Bank, N.A. v Blackburn* 394 S.C. 579, 716 S.E. 2d 454 (S.C. App. 2011)(citations omitted).

²⁷ Underlining added, bold as in original.

attempt to argue that the waiver does not apply to the Counterclaims, relying on the factual determination to that effect reached in *Wachovia Bank v Blackburn* where the Court determined that certain counterclaims were not covered by the waiver found in that case. The waiver being evaluated in *Wachovia Bank v Blackburn* stated:

.... 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.

The *Wachovia* Court, in evaluating these provisions, found that they were not sufficiently broad to cover the fraud claims contained in the Counterclaims asserted in that action stating:

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.

In *Wachovia*, the scope of the waiver of jury trial was determined to be limited to actions related to the loan documents as its language stated. In the case before the court, this limitation does not exist as the jury trial waivers before this Court contain language similar to that examined in *Wachovia* and the added phrase "OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK". The Defendants cannot reasonably argue that

this language does not cover the Counterclaims made in this action. Indeed, those counterclaims are specifically based on actions arising within that relationship. The Court does not find the Defendants argument that the counterclaims arise not out of the lending transactions/relationship but out of an alleged "partnership" relationship. The latter "partnership" would not exist without the lending relationship on which this action (and the counterclaims) are based.

The Court would further note and find, if the Court were to accept the Defendants arguments that the Counterclaims made in this action did not arise "out of the conduct of the relationship between" the Defendants and BB&T, the Court would be constrained to then rule that the counterclaims are not "arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim" and, therefore, permissive counterclaims. In such event, the counterclaims would not be triable before a jury in any event.²⁸

In conclusion, there can be no question that pre-litigation waivers of jury trial are enforceable in South Carolina. Once that question is answered, the specific waivers at issue in this case were executed under such circumstances that the execution was knowing and voluntary and the scope of waivers is sufficiently broad to cover the counterclaims made in this action. As a result, the jury trial demand should be stricken and this case referred to the Master in Equity for trial or other determination.

It is, therefore, Ordered, Adjudged and Decreed as follows:

²⁸ See, e.g., C&S Real Estate Services, Inc. v. Massengale, 290 S.C. 299, 350 S.E. 2d 191 (S.C. 1986) ("Rule 13(a), SCRPC, now requires a defendant to plead as a counterclaim any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim. He is entitled to a jury trial on these compulsory counterclaim if legal in nature even though asserted in an equitable action. Rule 13(b), SCRPC, permits a defendant to plead as a counterclaim any claim not arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim. When a defendant asserts these permissive counterclaims which are legal in nature, he waives the right to a jury trial on these issues. Appellant therefore had no right to a trial by jury on her permissive counterclaims."); See, also, North Carolina Federal Savings and Loan Association v. DAV Corp. 298 S.C. 514, 381 S.E. 2d 903 (S.C. 1989) adopting the "logical relationship" test to determine compulsory v permissive counterclaims. If the counterclaims asserted by the Defendants do not arise out of the relationship of the parties to this action, they cannot possibly be logically related to the action on the Note and Mortgage.

1. The jury trial demand in this matter is stricken and this matter is to be tried non-jury;
2. As this is a foreclosure action, the reference of this case to the Master in Equity is appropriate under Rules 53 and 71, SCRCP;
3. This case is referred to the Honorable Joe M. Crosby, as Master In Equity for Georgetown County, to make findings of fact and conclusions of law; to direct entry of final judgment in this action under Rule 53(e)(1), S.C.R.Civ.P.; and to hear any issues after sale or judgment including, but not limited to, the issuance of a Writ of Assistance and the hearing of any issues involving appraisal proceedings under Section 29-3-360, et seq., of the South Carolina Code. Any appeal from the final judgment entered by the Master In Equity shall be directly to the South Carolina Court of Appeals. Any judicial sale of the property that is the subject of this action may be held on a day other than the first Monday of the month.

And it is so ordered, this 15th day of November, 2013



Benjamin H. Culbertson
Circuit Court Judge

Georgetown, South Carolina