

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

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Case No. 2008-CP-22-1598

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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.

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~~REPLY TO RESPONDENTS' RETURN TO PETITION FOR WRIT OF  
CERTIORARI~~

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## ARGUMENT

Certiorari should be granted in this matter to correct the misapplication of law by the Court of Appeals. Respondents seek to avoid their valid jury waivers by simultaneously arguing that Petitioner's purchase-money loan has nothing to do with Respondents' purchase *and* that Petitioner was actively involved with Respondents' purchase for the purpose of making the purchase-money loan. Respondents should not have it both ways, but – either way – the allegations fall within the clear language of the waivers included in the Note and Guaranty. Moreover, it was error for the Court of Appeals to expand a far-reaching exception based in consumer arbitration standards by removing any requirement of outrageousness and, without precedent, apply the same to a knowing and voluntary commercial jury waiver. In its holding, the Court of Appeals effectively eviscerates long-standing South Carolina law upholding the rights of parties to waive their right to a jury trial, and Petitioner respectfully requests that this Court grant certiorari of the Court of Appeals decision, reverse that decision, and affirm the Circuit Court's decision striking Respondents' jury demand.

### **I. THE PLAIN LANGUAGE OF THE JURY WAIVERS EXPRESSLY COVERS RESPONDENTS' ALLEGATIONS, AND THE COURT OF APPEALS ERRED BY HOLDING OTHERWISE.**

Regardless of the personal opinions held by Respondents' counsel, South Carolina protects the right of a party to waive its procedural right to a jury trial. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63-64, 566 S.E.2d 863, 866 (Ct. App. 2002) (citing *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992)). Moreover, South Carolina law is clear that jury waivers are enforceable according to their plain language. *See N. Charleston Joint Venture*, 307 S.C.

at 535, 416 S.E.2d at 638 (enforcing jury waiver according to its plain terms); *Beach Co.*, 351 S.C. at 63-64, 566 S.E.2d at 866 (holding that jury waivers are construed according to their “plain, ordinary and popular meaning”); *see also S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005) (holding that releases are generally enforceable according to their plain language). Respondents do not challenge the clarity of the subject jury waivers, nor did the Court of Appeals find them to be ambiguous in any way.

Despite having pled Petitioner’s involvement as motivated by and directly linked to the Note and Mortgage (R. p. 73, Second Am. Answer p. 4.), Respondents now seek to create an artificial distinction between Petitioner’s alleged actions with respect to the sale transaction and its alleged actions with respect to the loan transaction. Respondents ask this Court to ignore the obvious: Petitioner had nothing to gain from the Respondents’ purchase of the subject property unless they borrowed the money from Petitioner to do so. Thus, all of Petitioner’s actions with respect to the Respondents’ purchase were inextricably intertwined with the subject Note and Mortgage.

Whatever Respondents’ current theory of the case may be, the jury waivers encompass Respondents’ counterclaims. Although Respondents purport to identify for the Court the types of documents defined as falling within the scope of the jury waivers, they fail to acknowledge that the definition of “Loan Documents” also includes “all documents executed in connection with or related to” the loan evidenced by the Note and Guaranty. (R. p. 15, Note. p. 2.; R. p. 39, Guaranty p. 5.) The subject loan was a purchase-money loan. Despite the Court of Appeals’s contrary holding, the sales transaction is clearly “related to” the Note and Guaranty because it is the very basis for

the loan itself. Indeed, the Note states that the funds could only be used to “purchase investment property.” (R. p. 14, Note. p. 1.) The waivers, therefore, expressly include the underlying sales transaction and, therefore, Respondents’ counterclaims.

Thus, even if Respondents successfully persuade this Court to unnaturally distinguish Petitioner’s course of dealing with respect to the sales transaction from its course of dealing with respect to the loan transaction, the plain language of the jury waivers, strictly construed, is sufficiently clear and broad to encompass Respondents’ counterclaims. The Circuit Court was correct in so holding. Because the Court of Appeals created and relied on a distinction between the sales transaction and the loan transaction that appears nowhere in the pleadings and defies the clear language of the jury waivers, its reversal of the Circuit Court conflicts with *North Charleston Joint Venture* and similar cases. *Beach Co.*, 351 S.C. at 63-64, 566 S.E.2d at 866; *see also N. Charleston Joint Venture*, 307 S.C. at 535, 416 S.E.2d at 638.

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**II. CONSUMER ARBITRATION STANDARDS ARE NOT APPLICABLE TO COMMERCIAL JURY WAIVERS, AND THE COURT OF APPEALS ERRED BY HOLDING OTHERWISE.**

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Respondents argue the Court of Appeals was justified in applying consumer arbitration standards to commercial jury waivers, despite the clear procedural differences between the two. Until this case, no South Carolina court had applied the *Aiken v. World Finance Corporation of South Carolina* exception outside the scope of an arbitration agreement. 373 S.C. 144, 644 S.E.2d 705 (2007). Although Respondents believe that “the standard for invalidating jury trial waivers should be much less stringent” than the standard for invalidating arbitration provisions, Respondents ignore the substantial differences between arbitrations and bench trials. As discussed in the Petition for

Certiorari, bench trials preserve all of a party's normal procedural rights except the right to a jury, whereas arbitrations deprive parties of the right to pre-trial discovery, the application of the rules of evidence, dispositive motions practice, written findings of fact and conclusions of law, appellate review, and other procedural safeguards mandated by the Due Process Clause and the Rules of Civil Procedure.

Consumer arbitration provisions and commercial jury waivers are not fungible. Indeed, South Carolina law has already defined the standards for determining the validity and boundaries of jury waivers in a simple and concise rule: Jury waivers are enforceable according to their plain language. *See N. Charleston Joint Venture*, 307 S.C. at 535, 416 S.E.2d at 638 (enforcing jury waiver according to its plain terms); *Beach Co.*, 351 S.C. at 63-64, 566 S.E.2d at 866 (holding that jury waivers are construed according to their "plain, ordinary and popular meaning"); *see also S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19; 22 (Ct.-App. 2005) (holding that releases are generally enforceable according to their plain language). And, as discussed above, Respondents' jury trial demand is precluded by the plain language of the jury waivers they executed. The Court of Appeals's contrary decision is inconsistent with this Court's precedent and eviscerates parties' confidence in what is frequently a specifically bargained-for aspect of a transaction.

### **III. THE COURT OF APPEALS FAILED TO ADDRESS WHETHER THE CONDUCT AT ISSUE WAS "OUTRAGEOUS," AS AIKEN PLAINLY REQUIRES.**

Respondents minimize this Court's holding in *Aiken* that the exception applies only to "outrageous torts." 373 S.C. at 151, 644 S.E.2d at 709. Limiting the scope of the *Aiken* exception is of critical importance in cases like this one, where a jury waiver was

knowingly and voluntarily executed as consideration in a commercial loan transaction. The Court of Appeals failed to make a finding regarding whether Petitioner's alleged conduct was outrageous. By doing so, the Court of Appeals has not only extended consumer arbitration standards to a commercial jury waiver, it has dramatically enlarged the scope of the *Aiken* exception. As noted in the Petition for Writ of Certiorari, such an omission conflicts with *Aiken*, *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007), and *Partain v. Upstate Automotive Group*, 386 S.C. 488, 689 S.E.2d 602 (2010), and warrants granting this petition for certiorari to protect the integrity of the test set forth in those decisions.

**IV. THE COURT OF APPEALS IGNORED THIS COURT'S WARNING IN *PARTAIN* THAT CREATIVE PLEADING SHOULD NOT EXCEPT ROUTINE CLAIMS FROM OTHERWISE VALID DISPUTE RESOLUTION PROVISIONS.**

This Court has already acknowledged the danger in allowing artful pleading to defeat otherwise valid agreements about dispute resolution.—*Partain*,—386 S.C.—at 494,— 689 S.E.2d at 605. Importantly, a claim may only be subject to the *Aiken* exception when it “was clearly not within the contemplation of the parties.”—*Id.*—at 494-96,—689 S.E.2d at 605. Respondents have used an unfounded conspiracy theory to snare Petitioner into a dispute between Respondents and the Developer. Indeed, the pleadings reference only one affirmative behavior by Petitioner: the Petitioner's mere presence at a sales event. Moreover, Respondents were aware of Petitioner's presence at the sales event before they executed the jury waivers. This case presents exactly the situation whereby creative pleading risks an otherwise valid commercial jury waiver that was part of Petitioner's consideration for entering into the loan transaction. To avoid this result, this Court should grant the petition for certiorari and reverse the Court of Appeals's decision.

**CONCLUSION**

For these and the foregoing reasons, and any other reason supported by the Record, Petitioner respectfully requests that the Court grant CERTIORARI of the Court of Appeals decision, REVERSE that decision, and AFFIRM the Circuit Court's decision striking Respondents' jury demand.



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February 8, 2012

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Properties, LLC; and Waterpointe Realty, LLC, ..... Third-Party Defendants.

**PROOF OF SERVICE**

I certify that I have served the **Reply to Respondents' Return to Petition for a Writ of Certiorari** on all parties in this action by depositing a copy of it in the United States Mail, first class postage prepaid, on February 9, 2012, to the following addresses:

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