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SC Court of Appeals
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In The Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2012-CP-40-7752
Appellate Case No. 2014-000377

DRV Fontaine, LLC,.....Respondent,

v.

Fontaine Business Park, LLC, Fontaine Business Park 2, LLC,
Fontaine Business Park 3, LLC, Fontaine Business Park 4, LLC,
Fontaine Business Park 5, LLC, Fontaine Business Park 6, LLC,
Fontaine Business Park 7, LLC, Fontaine Business Park 8, LLC,
Fontaine Business Park 9, LLC, Fontaine Business Park 10, LLC,
Fontaine Business Park 11, LLC, Fontaine Business Park 12, LLC,
Fontaine Business Park 13, LLC, Fontaine Business Park 14, LLC,
Fontaine Business Park 15, LLC, Fontaine Business Park 16, LLC,
Fontaine Business Park 17, LLC, Fontaine Business Park 18, LLC,
Fontaine Business Park 19, LLC, Fontaine Business Park 20, LLC,
Fontaine Business Park 21, LLC, Fontaine Business Park 22, LLC,
Fontaine Business Park 23, LLC, Fontaine Business Park 24, LLC,
Fontaine Business Park 25, LLC, Fontaine Business Park 26, LLC,
Fontaine Business Park 27, LLC, Fontaine Business Park 28, LLC,
Fontaine Business Park 29, LLC,Fontaine Business Park 30 , LLC,
Fontaine Business Park 31, LLC, ... Appellants.

MOTION TO DISMISS

The Respondent (DRV) moves to dismiss the appeal by the Appellants (Fontaine) or in the alternative for an order of summary affirmance upon the following ground: (1) the trial court granted judgment to DRV under two independent and alternative rulings; (2) on appeal, Fontaine does not challenge one of these independent rulings; (3) an unchallenged ruling is the law of the

case and, right or wrong, requires affirmance; and (4) therefore, since this Court must affirm the appealed order, dismissal or summary affirmance at this stage of the appellate proceedings is appropriate to avoid wasting the resources of this Court or the parties.

BACKGROUND

This is a mortgage foreclosure action in which the defendant debtors (Fontaine) asserted several defenses and counterclaims. The plaintiff creditor (DRV) moved to strike Fontaine's demand for a jury trial. The trial court granted the motion on two independent grounds. First, the trial court held that Fontaine had waived the right to a jury trial under the jury trial waiver provisions in the loan documents. (Tab A at 2-6). Second, relying on the Supreme Court's opinion in *Collier v. Green*, 137 S.E.2d 277 (S.C. 1964), the trial court held that, "[e]ven without the express jury trial waivers," Fontaine had no right to a jury trial on its defenses and counterclaims, because "such claims and defenses do not change the equitable nature of the foreclosure action." (Tab A at 6-9). Fontaine timely appealed without making a motion to reconsider, alter, or amend.

On appeal, Fontaine makes only two arguments. First, it argues that the trial court erred in finding a contractual waiver of the right to a jury trial based on the waiver provisions in the loan documents. (Tab B at 16-25). Second, Fontaine argues that a prior order by Judge Lee precluded Judge Cooper from issuing the appealed order under the rule that one circuit court judge cannot overrule another. (Tab B at 25-27). Importantly, Fontaine never challenges the trial court's alternative ruling that Fontaine is not entitled to a jury trial under *Collier, supra*, because its claims and defenses do not change the equitable nature of the foreclosure action. (Tab B, *passim*). Thus, this unchallenged ruling is the law of the case and, "*right or wrong*, requires affirmance." *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970) (all emphasis added).

ARGUMENT

I. Fontaine's argument based on the general rule that one judge cannot overrule another is not preserved for appeal, and it is manifestly without merit.

It is axiomatic that an issue cannot be raised for the first time on appeal. *Pye v. Estate of Fox*, 333 S.E.2d 505, 510 (S.C. 2006). Here, Fontaine never argued to Judge Cooper that a prior order by Judge Lee precluded Judge Cooper from ruling on the question of whether Fontaine had a right to a jury trial on its defenses and counterclaims. (Tab C and Tab D, both *passim*). Thus, Fontaine's argument is not preserved for appeal. *Mann v. Walker*, 328 S.E.2d 659, 661 (S.C. App. 1985) (argument that one judge cannot overrule another not preserved for appeal because not raised to the trial court). In any event, Fontaine's argument has no merit.

In November 2012, before Fontaine filed its Answer and Counterclaim, DRV moved for an order of reference (Tab E) and for an order appointing a receiver. These motions were scheduled to be heard by Judge Lee in February 2013 and, in June 2013, Judge Lee issued an "Order Appointing Receiver." (Tab F). As to the motion for an order of reference, Judge Lee held: "This Court declined to hear [DRV's] Motion for Order of Reference pending the resolution of the legal claims asserted in this matter." (Tab F at 2). Importantly, Judge Lee did not rule on the question of whether Fontaine had a right to a jury trial on its defenses or claims.

As a general rule, one circuit court judge cannot overrule the prior order of another circuit court judge. *Mann*, 328 S.E.2d at, 661. This rule does not apply if the subsequent request for relief is based on facts or legal theories not ruled upon in the prior order by the other circuit court judge. *Id.*; *accord Salmonsen v. CGD, Inc.*, 661 S.E.2d 81, 88 (S.C. 2008); *Binkley v. Burry*, 573 S.E.2d 838, 843 (S.C. App. 2002); *Andrick Dev. Corp. v. Maccaro*, 311 S.E.2d 95, 97 (S.C. App. 1984). Here, Judge Lee did not rule on the issue of whether Fontaine had a right to a jury trial on its claims and defenses. Therefore, Fontaine's argument that Judge Lee's prior order precluded Judge

Cooper's order is manifestly without merit. And, as shown earlier, this argument also is not preserved for appeal.

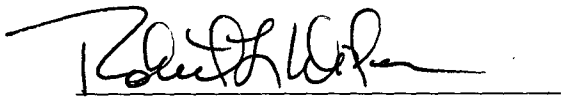
II. Judge Cooper's unchallenged ruling that Fontaine is not entitled to a jury trial on its claims and defenses because those claims and defenses did not change the equitable nature of this foreclosure action is the law of this case and *requires* affirmance.

As noted earlier, Fontaine does not challenge the trial court's alternative ruling that Fontaine is not entitled to a jury trial on its defenses and counterclaims under *Collier, supra*, because those defenses and counterclaims do not change the equitable nature of this foreclosure action. Thus, this ruling is the law of this case and "*right or wrong*, requires affirmance." *Buckner*, 177 S.E.2d at 544 (all emphasis added). Any attempt to challenge this ruling by arguing against it in a reply brief would be a futile act, because it is axiomatic that an argument for reversal cannot be made for the first time in a reply brief. *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011); *Bochette v. Bochette*, 386 S.E.2d 475, 477 (S.C. App. 1989) (issue not raised in appellant's brief cannot be raised for the first time in reply brief). Thus, this Court "must affirm" the appealed order. *Ex parte Kent*, 666 S.E.2d 921, 925 (S.C. App. 2008) (appellate court "must affirm" under the law of the case doctrine if appellant does not challenge alternative ruling of the trial court). Accordingly, dismissal of Fontaine's appeal or summary affirmance of the appealed order is appropriate here, because any further action in this appeal would be a waste of this Court's limited resources, as well as the resources of the parties.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should dismiss this appeal or, in the alternative, should issue an order affirming the appealed order.

Respectfully Submitted,



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August 14, 2014
Columbia, SC

TAB A

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CASE NO.: 2012-CP-40-7752

DRV FONTAINE, LLC,

Plaintiff,

v.

FONTAINE BUSINESS PARK, LLC;
FONTAINE BUSINESS PARK 2, LLC;
FONTAINE BUSINESS PARK 3, LLC;
FONTAINE BUSINESS PARK 4, LLC;
FONTAINE BUSINESS PARK 5, LLC;
FONTAINE BUSINESS PARK 6, LLC;
FONTAINE BUSINESS PARK 7, LLC;
FONTAINE BUSINESS PARK 8, LLC;
FONTAINE BUSINESS PARK 9, LLC;
FONTAINE BUSINESS PARK 10, LLC;
FONTAINE BUSINESS PARK 11, LLC;
FONTAINE BUSINESS PARK 12, LLC;
FONTAINE BUSINESS PARK 13, LLC;
FONTAINE BUSINESS PARK 14, LLC;
FONTAINE BUSINESS PARK 15, LLC;
FONTAINE BUSINESS PARK 16, LLC;
FONTAINE BUSINESS PARK 17, LLC;
FONTAINE BUSINESS PARK 18, LLC;
FONTAINE BUSINESS PARK 19, LLC;
FONTAINE BUSINESS PARK 20, LLC;
FONTAINE BUSINESS PARK 21, LLC;
FONTAINE BUSINESS PARK 22, LLC;
FONTAINE BUSINESS PARK 23, LLC;
FONTAINE BUSINESS PARK 24, LLC;
FONTAINE BUSINESS PARK 25, LLC;
FONTAINE BUSINESS PARK 26, LLC;
FONTAINE BUSINESS PARK 27, LLC;
FONTAINE BUSINESS PARK 28, LLC;
FONTAINE BUSINESS PARK 29, LLC;
FONTAINE BUSINESS PARK 30, LLC;
FONTAINE BUSINESS PARK 31, LLC;

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE JURY TRIAL DEMAND

This matter came before the Court upon the plaintiff, DRV Fontaine, LLC's ("DRV's"), motion to strike the defendants' demand for a jury trial. DRV seeks an order striking the jury demand, returning the case to the non-jury docket, and referring this foreclosure case to the Master in Equity for Richland County. DRV asserts that its motion should be granted because (1) the Defendants expressly waived their right to a jury trial, and (2) the Defendants' defenses and counterclaims do not, in any event, change the equitable nature of the foreclosure action. The Court agrees and grants the motion for the reasons set forth more fully below.

This is a mortgage foreclosure action. A mortgage foreclosure is an action in equity. *Hayne Fed. Credit Union v. Bailey*, 489 S.E.2d 472, 475 (S.C. S. Ct. 1997); *Collier v. Green*, 137 S.E.2d 277, 279 (S.C. 1964). There is no right to a trial by jury for equitable actions. *Mortgage Electronic Systems, Inc. v. White*, 682 S.E.2d 498, 502 (S.C. Ct. App. 2009).

Defendants expressly waived their right, if any, to a jury trial in the loan documents.

A party to a lawsuit may expressly waive their rights, if any, to a jury trial with regard to any defense or counterclaim.

> A party may waive the right to a jury trial by contract. *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992). Such a waiver must be strictly construed as the right to trial by jury is a substantial right. *Id.* However, terms in a contract provision must be construed using their plain, ordinary and popular meaning. *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994).
>
> The waiver provision in the lease plainly provides that in any claim asserted by Twillman, "trial by jury shall be waived by both parties." We find the clause is a valid waiver of Twillman's 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)

In this equitable foreclosure case, the original Borrower, Defendant Fontaine Business Park, LLC ("Original Borrower"), and the original lender signed a Loan Agreement, which is attached to the Complaint and was submitted as Exhibit A to the motion. Section 2 of the Loan

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Agreement on page 17 reflects that this was a loan for $16,300,000. The Loan Agreement contains the following language at Section 10.8:

> 10.8 **Trial by Jury.** EACH BORROWER AND LENDER HEREBY AGREE NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY AND WAIVE ANY RIGHT TO TRIAL BY JURY FULLY TO THE EXTENT THAT ANY SUCH RIGHT SHALL NOW OR HEREAFTER EXIST WITH REGARD TO THE LOAN DOCUMENTS, OR ANY CLAIM, COUNTERCLAIM OR OTHER ACTION ARISING IN CONNECTION THEREWITH. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS GIVEN KNOWINGLY AND VOLUNTARILY BY EACH BORROWER AND LENDER, AND IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE. EITHER PARTY IS HEREBY AUTHORIZED TO FILE A COPY OF THIS PARAGRAPH IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER BY THE OTHER.

The Original Borrower and the original lender also executed a Mortgage, Assignment of Leases and Rents and Security Agreement (the "Mortgage") to secure the loan. The Mortgage is attached to the Complaint and was submitted as Exhibit B to the motion. The Mortgage contains the following language at paragraph 22:

> 22. **Waiver of Jury Trial.** MORTGAGOR HEREBY AGREES NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY, AND WAIVES ANY RIGHT TO TRIAL BY JURY FULLY TO THE EXTENT THAT ANY SUCH RIGHT SHALL NOW OR HEREAFTER EXIST WITH REGARD TO THIS MORTGAGE OR ANY OTHER LOAN DOCUMENT, OR ANY CLAIM, COUNTERCLAIM OR OTHER ACTION ARISING IN CONNECTION THEREWITH. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS GIVEN KNOWINGLY AND VOLUNTARILY BY MORTGAGOR, AND IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE. MORTGAGEE IS HEREBY AUTHORIZED TO FILE A COPY OF THIS PARAGRAPH IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER BY MORTGAGOR.
>
> INITIALS: ____s/____

Twenty six of the remaining defendants, Fontaine Business Park 2-24, 26, and 28, LLC (the "First Additional Borrowers"), purchased interests in the mortgaged property and each

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agreed to assume the obligations of the Original Borrower in the loan documents jointly with the Original Borrower. The lender agreed to the purchase and assumption by the First Additional Borrowers as is reflected in the Loan Assumption Agreement, which is attached to the Complaint and was submitted as Exhibit C to the motion. Pursuant to paragraph 1 on page 2 of the Loan Assumption Agreement, each of the First Additional Borrowers agreed as follows:

> 1. Assumption of Obligations. Additional Borrower hereby assumes, on a joint and several basis with Original Borrower and any and all other tenants-in-common that have previously assumed the Loan, all of Original Borrower's obligations and agreements under the Loan Agreement, the Note, the instrument, the Lease Assignment and all of the other Loan Documents; . . . all of the recitals, terms, waivers and conditions of which are incorporated herein by this reference, to the same extent and with the same effect as if Additional Borrower were an original party to each of such Loan Documents together with Original Borrower. All references to "Borrower" or "TIC Borrower" in the Loan Agreement, the Note, the Instrument and the other Loan Documents, "Assignor" in the Lease Assignment (but again excluding the Guaranty of recourse Obligations) shall include additional Borrower.

The five remaining defendants Fontaine Business Park 25, 27 and 29-31, LLC (the "TIC Borrowers") purchased interests in the property and each agreed to assume the obligations of the Original Borrower in the loan documents jointly with the First Additional Borrowers and Original Borrower. The lender agreed to the purchase and assumption by the TIC Borrowers as is reflected in the First Amendment to Loan Assumption Agreement, which is attached to the Complaint and was submitted as Exhibit D to the motion. Pursuant to paragraph 1 on page 2 of the First Amendment to Loan Assumption Agreement, each of the TIC Borrowers agreed as follows:

> 1. Assumption of Obligations.
>
> A. Each TIC Borrower undersigned below hereby assumes, on a joint and several basis with the Original Borrower and all other Tenants-in-common that have previously assumed the Loan, all of Original Borrower's obligations and agreements under the Loan Agreement, the Note, the Instrument, the Lease Assignment and all of the other Loan Documents; . . . all of the recitals, terms, waivers and conditions of which are incorporated herein by this reference, to the

> same extent and with the same effect as if each TIC Borrower were an original party to each of such Loan Documents together with Original Borrower. All references to "Borrower" or "TIC Borrower" in the Loan Agreement, the Note, the Instrument and the other Loan Documents, "Assignor" in the Lease Assignment (but again excluding the Guaranty of recourse Obligations) shall include Each TIC Borrower.

The Additional Borrowers and the TIC Borrowers shall collectively hereinafter be referred to as the "Additional Borrowers."

As set forth above and in the loan documents, the written jury waiver clauses in the Mortgage and Loan Agreement are conspicuous and unambiguous. They are printed in all capital letters. The waivers contained in the Mortgage and the Loan Agreement are not buried within the language of other provisions. Rather, the waivers are contained in separate conspicuous paragraphs with the bold, underlined headings, "**Waiver of Jury Trial**" and "**Trial by Jury**," respectively.

By signing the Loan Agreement and Mortgage and/or by expressly assuming all waivers contained therein by signing the loan assumption agreements, each and every Defendant waived its right to a jury trial with regard to the loan documents and "ANY CLAIM, COUNTERCLAIM OR OTHER ACTION ARISING IN CONNECTION THEREWITH." Therefore, Defendants knowingly and expressly waived the right to a jury trial as to each of the defenses and counterclaims raised in their pleadings. The waiver contained in the Mortgage actually contains borrowers' initials immediately beneath the waiver – indicating their express and knowing assent to the waiver.

In any event, the Defendants cannot avoid the express waivers in the Loan Agreement, the Mortgage and the Assumption Agreements, by simply arguing they were not knowing and voluntary. By signing the loan documents, the Defendants are charged with having read their

contents, and therefore, they cannot avoid their effects by arguing they were unaware of the inclusion of the conspicuous jury waivers.

> A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct.App.2003). A person signing a document is responsible for reading the document and making sure of its contents. *Id.* Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it. *Id.* One who signs a written instrument has the duty to exercise reasonable care to protect himself. *Id.* at 665, 582 S.E.2d at 440. The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document. *Id.*

Wachovia Bank v. Blackburn, 394 S.C. 579, 585, 716 S.E.2d 454, 457-58 (Ct. App. 2011), reh'g denied (Oct. 21, 2011) (specifically addressing jury waiver clauses).

Based upon the fact that Defendants knowingly and expressly waived their rights, if any, to a jury trial as to all claims and counterclaims, DRV's motion to strike Defendants' jury demand is hereby granted.

Defendants' counterclaims do not change the equitable nature of the foreclosure action.

Even without the express jury trial waivers, Defendants would not be entitled to a jury trial in this equitable foreclosure action. *Collier v. Green*, 244 S.C. 367, 371, 137 S.E.2d 277, 280 (1964) discusses at length the effect defenses and counterclaims have on an equitable foreclosure action. In *Collier v. Green*, the South Carolina Supreme Court held:

> Nor is the nature of the action changed by reason of the fact that the defendants have, in their answers, set up defenses and counterclaims based upon alleged misrepresentations in the transaction upon which the plaintiff's note and pledge are predicated. The questions raised by these defenses and counterclaims directly affect the validity of the plaintiff's lien and the question as to the amount due upon the debt secured by the lien. Where, in actions of foreclosure, defendant sets up a defense and/or a counterclaim affecting the consideration, and arising out of the transaction in which the mortgage or lien was created, the authorities hold that the issues thus raised are equitable and are to be tried by the court upon its equity side. *Hunt v. Nolen*, 46 S.C. 551, 553, 24 S.E. 543; *McLaurin v. Hodges*, 43 S.C. 187, 20 S.E. 991; *Armour Fert. Works v. Burckhalter*, 141 S.C. 232, 237, 139 S.E. 465; *Mobley Co. v. McLucas*, 99 S.C. 99, 82 S.E. 986.

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Collier v. Green, 244 S.C. 367, 371, 137 S.E.2d 277, 280 (1964)

In the present case the defenses and counterclaims essentially allege that Plaintiff "created" an event of default and the foreclosure is, therefore, invalid. Pursuant to the holding in *Collier v. Green* and the cases discussed therein, such claims and defenses do not change the equitable nature of the foreclosure action.

At the hearing, Defendants relied heavily upon the case of *Wachovia Bank v. Blackburn*, 394 S.C. 579, 585, 716 S.E.2d 454, 457-58 (S.C. Ct. App. 2011), reh'g denied (Oct. 21, 2011) in arguing that their counterclaims are legal in nature and, therefore, create a right to a jury trial as to the counterclaims. Defendants' reliance upon the *Blackburn* case is misplaced. In the first instance, the *Blackburn* case is distinguishable from the present case in that the jury waiver in *Blackburn* did not include "counterclaims." The Court of Appeals found that the jury waivers were enforceable but emphasized the fact that "[j]ury trial waivers are a substantial right and must be strictly construed." *Id.* at 460.

The Court of Appeals ultimately held that the jury waiver clauses were not valid as to some of the defendant's counterclaims because those counterclaims were not based upon nor did they arise out of the note. *Id.* Those counterclaims alleged that the bank engaged in *pre-loan* fraud with the seller of the property that Blackburn ultimately purchased and the bank financed. As a result, the Court of Appeals held the counterclaims alleging fraud in the "sales contract" that was "executed months prior to the note" did not arise out of the note or loan documents.

In stark contrast to *Blackburn*, the Defendants' counterclaims in this foreclosure action arise directly out of the loan documents. Defendants' counterclaims allege that DRV failed to follow the proper procedures set forth in the loan documents for increasing the reserve accounts Defendants are required to maintain for the real estate collateral. Defendants admit that DRV has the right to increase the reserve account payments (See paragraphs 117 - 130 of Original

Borrower's counterclaims, and paragraphs 100 - 112 of Additional Borrowers' counterclaims; see also, sections 3.3, 3.4 and 3.5 of the Loan Agreement). However, Defendants allege that DRV essentially created an event of default by increasing the reserves unreasonably in violation of the terms of the Loan Agreement. Defendants' counterclaims clearly arise out of the loan documents and simply relate to whether there has been a default under the loan documents. As set forth in *Collier v. Green*, that type of counterclaims do not change the equitable nature of the foreclosure action.

Defendants argued that their counterclaims are not simply challenging the validity of the default alleged by DRV. As evidence of this Defendants argued that they are suing DRV and seeking significant damages. Upon closer examination, it does not appear that Defendants' counterclaims are legal in nature, nor do they seek any significant or specified damages. Original Borrower and Additional Borrowers fail to state any specific damages they seek against DRV. Each of the counterclaims asserted by Defendants seek "damages against DRV . . . in an amount to be proven at trial."

Additionally, Defendants were unable or unwilling to specify any damages they are claiming in response to DRV's discovery requests. DRV asked Original Borrower and Additional Borrowers to "set forth an itemized statement of all damages claimed to have been sustained by the parties as a result of any actions by DRV." Original Borrower responded by objecting to the request, then stated the "damages are adequately set forth in the pleadings," and that it "does not currently have an itemized statement of damages." Additional Borrowers responded in June 2013 by stating that "these Defendants are in the process of evaluating the Fontaine Business Park to determine its market value and will update this response once such analysis is done." No such update has been provided.

Defendants' counterclaims relate directly to the loan documents and the validity of DRV's claim that an event of default has occurred. Therefore, the counterclaims do not change the equitable nature of the foreclosure action, and Defendants are not entitled to a jury trial, even if they had not signed express waivers of their right to a jury trial. Therefore, DRV's motion to strike Defendants demand for a jury trial is hereby granted.

IT IS THEREFORE ORDERED that Defendants' demand for a jury trial is stricken, this case should be restored to the non-jury docket, and the case should be referred to the Master-in-Equity for Richland County pursuant to Rules 71 and 53 SCRCP.

It is so ordered this 27th day of January, 2014.

G. Thomas Cooper, Jr.
Presiding Circuit Court Judge

Columbia, South Carolina

TAB B

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Please

G. Thomas Cooper, Jr.,
Circuit Court Judge

Appellate Case No. 2014-000377

DRV FONTAINE, LLC, Appellee

v.

FONTAINE BUSINESS PARK, LLC, et al., Appellants

INITIAL BRIEF OF APPELLANTS

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7. The inexperienced Investor refused to explain or justify the increased payments to the Reserve Accounts, and threatened default if the Owners failed to comply with its demands.

8. Even though all payments of principal and interest had been timely paid by the Owners, the inexperienced Investor subsequently declared the Loan in default because the Owners would not comply with its demands.

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES ON APPEAL

I.

A defendant in a foreclosure action is entitled to a jury trial on legal counterclaims in the absence of a valid waiver. Here, the jury waivers do not apply to the Owners' non-contractual counterclaims, including those for breach of fiduciary duty, economic duress, tortious interference with contractual and business relations, and unfair trade practices. Accordingly, the trial court erred in granting the Plaintiff Investor's Motion to Strike the Defendant Owners' jury trial demand.

II.

An order from one circuit judge is the law of the case and cannot be reversed by another circuit judge. Here, Judge Lee first ordered that the Plaintiff Investor's Motion for an Order of Reference would be deferred until the legal issues in the case were adjudicated. Accordingly, Judge Cooper's subsequent Order of Reference is invalid and must be reversed.

STATEMENT OF THE CASE

Thirty-two tenants-in-common (collectively, the "Owners")[1] own Fontaine Business Park, an office complex in Columbia, South Carolina which was managed by Fontaine Management, LLC prior to this litigation.[2] The Owners are parties to a commercial loan dating to December 2007 which requires them to maintain certain Reserve Accounts for items such as taxes, insurance, and capital improvements (the "Loan"). The Plaintiff, DRV Fontaine, LLC (the "Investor"), a Maryland entity with no commercial lending expertise or experience, bought the Loan from the original lender in April 2009.[3]

After a short time, the inexperienced Investor demanded increases of 1,037% and 756% to the Owners' monthly contributions to the Capital Expense and Rollover Reserve Accounts, respectively. The Owners immediately objected that these increases were unnecessary and commercially unreasonable. The Owners also made several good faith attempts to resolve the dispute, including the tendering of a voluntary payment of $736,000.00 to supplement the existing balances in the Reserve Accounts. While the dispute over those increases continued, the Investor then demanded an increase of 630% to the Tax and Insurance Reserve Account. The Owners promptly protested that increase as well.

Although the dispute over the commercial reasonableness of the Reserve increases continued and all payments of principal and interest under the Loan had been timely, on November 20, 2012, the Investor filed suit in the Court of Common Pleas for Richland County, South Carolina seeking to foreclose on Fontaine Business Park. (*Compl.* pp. 26-27; *Motion for Order of Ref*, p. 2; *Motion for Appt. of*

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[1] The tenants-in-common (also known as "TICs") are limited liability companies with the sequentially numbered names Fontaine Business Park, LLC through Fontaine Business Park 31, LLC.

[2] Fontaine Management, LLC is a corporate affiliate of one of the Owners, Fontaine Business Park, LLC.

[3] The Investor's primary business focus is on the acquisition of troubled real estate assets. For further reference, the Owners direct the Court to the Investor's website: http://www.drv-llc.com

Receiver, p. 8). The alleged defaults include the Owners' failure to make the increased contributions to the Reserve Accounts, and a related failure to make payments under the Loan after the Investor refused the Owners' request to apply a portion of the $736,000.00 excess reserve funds toward one of their monthly payments of principal and interest. (*Compl.*, pp. 21-25, ¶¶ 95-126; *Answer*, p. 30, ¶ 147).

The Owners answered the Investor's Complaint with numerous affirmative defenses, counterclaims, and a jury trial demand. (*Answer*, pp. 24-27, ¶¶ 105-113 and pp. 27-39, ¶¶ 116-203; *Suppl. Counterclaim*, pp. 1-3, ¶¶ 1-14). The Owners also opposed the Motion for Order of Reference and Motion for Appointment of Receiver. (*Resp. in Opp. Ref.*, pp. 1-3; *Resp. in Opp. Appt. Receiver*, pp. 1-4).

On February 1, 2013, the Honorable Alison Lee heard the Motion for Order of Reference (*Notice of Motion Scheduling*, MORDRE, Jan. 4, 2013) and the Motion for Appointment of Receiver (*Notice of Motion Scheduling*, MAPREC, Jan. 4, 2013). At the end of the hearing, Judge Lee took the Motions under advisement. (*Motion Hearing Trans.*, pp. 22-23). Judge Lee then entered her order on June 3, 2013, granting the Motion for Appointment of Receiver. (*Order Appt. Rec.*, p. 9-11). The parties subsequently agreed to the appointment of CBRE Columbia as the Receiver (*Agreed Order*, pp. 1-2). In her Order Appointing Receiver, Judge Lee held that the Investor's Motion for Order of Reference should be held in abeyance pending resolution of the Owners' legal counterclaims (*Order Appt. Rec.*, p. 2).

On August 7, 2013, the Investor filed a Motion to Strike the Owners' jury demand. (*Motion to Strike*, p. 1). The Owners timely responded in opposition (*Resp. Opp. Motion to Strike*, p. 6). The Motion to Strike was heard on January 13, 2014 before the Honorable G. Thomas Cooper, Jr. (*Notice of Hearing*, MSTRIK, Dec. 18, 2013). At the conclusion of the hearing, Judge Cooper took the matter under advisement (MSTRIK *Trans.*, p. 26).

In a written Order filed on January 27, 2014, Judge Cooper granted the Investor's Motion to Strike and struck the Owners' jury demand. (*Order Granting Motion to Strike*, p 9). Judge Cooper also referred the case to the Master in Equity (*Id.*), even though the Motion for Order of Reference was not before him, and Judge Lee had previously ordered the Motion for Order of Reference to be held in abeyance. (*Notice of Hearing*, MORDRE, Jan. 4, 2013; *Order Appt. Rec.*, p 2). The Owners filed a timely Notice of Appeal, bringing these issues to this Court. (*Notice of Appeal*, Feb. 27, 2014).

STATEMENT OF THE FACTS

The Owners are the title owners of Fontaine Business Park, an office complex in Columbia, South Carolina which was managed by Fontaine Management, LLC prior to this litigation. The Owners are parties to a commercial loan dating to December 2007 which requires them to maintain certain Reserve Accounts for items such as taxes, insurance, and capital improvements (the "Loan"). The Investor, a Maryland entity with no commercial lending expertise or experience, bought the Loan from the original lender's assignee in April 2009.

After a short time, the inexperienced Investor demanded increases of 1,037% and 756% to the Owners' monthly contributions to the Capital Expense and Rollover Reserve Accounts, respectively. The Owners immediately objected that these increases were unnecessary and commercially unreasonable. The Owners also made several good faith attempts to resolve the dispute, including the tendering of a voluntary payment of $736,000.00 to supplement the existing balances in the Reserve Accounts. While the dispute over those increases continued, the Investor then demanded an increase of 630% to the Tax and Insurance Reserve Account. The Owners promptly protested that increase as well.

1. **The Defendant owners of the Fontaine Business Park property (collectively, the "Owners") had an outstanding loan with a lender with substantial experience in commercial lending (the "Loan").**

The Owners and the original lender, Greenwich Capital, entered into a loan secured by a Deed of Trust effective December 14, 2007 (the "Loan"). The parties' Loan Agreement established a Capital Reserve Account (*Compl.*, Ex. A, *Loan Agreement*, § 3.4, p. 24 ("Loan Agreement") *See also Motion to Strike*, Ex. A), a Rollover Reserve Account (*Loan Agreement*, § 3.5, p. 24), and a Tax and Insurance Account (*Loan Agreement*, § 3.3, p. 23), all of which would be funded by monthly contributions from the Owners. The original lender would hold the Reserve Account funds in trust for the Owners'

benefit for the purpose of maintaining Fontaine Business Park and paying the expenses of its operation (*Loan Agreement*, § 3, pp. 22-27).

The Capital Expense Reserve Account exists to fund the necessary capital improvements to the Business Park (*Loan Agreement*, § 3.5, p. 24). The Owners' initial monthly contribution to this Account was $5,249.00 (*Id.*). The lender could reassess and increase the amount of the monthly contribution in its "reasonable discretion" based upon its "then current underwriting standards" (*Id.*).

The Rollover Reserve Account exists to fund Approved Leasing Expenses, including real estate commissions, tenant improvements, and other actual out-of-pocket expenses associated with leasing space at the Business Park (*Loan Agreement*, § 3.5, p. 24). The Owners made an initial deposit of $750,000.00 to fund the Rollover Reserve Account, and are required to maintain a minimum balance of $250,000.00. Beginning with the thirty-eighth payment under the Loan, the Owners began making monthly payments of $21,086.50 to the Rollover Reserve Account. Under the Rollover Reserve Account provision, the lender may increase or decrease the Owners' monthly payment, if it determines "in its reasonable judgment that the funds in the Rollover Reserve Account will be insufficient to pay (or in excess of) the amounts due or to become due for Approved Leasing Expenses." (*Loan Agreement*, § 3.5, p. 24.)

The Tax and Insurance Account exists to fund the property taxes and insurance premiums for the Business Park each year (*Loan Agreement*, § 3.3, p. 23). Under the original terms of the Loan Agreement, the Owners are required to pay one-twelfth of the taxes and insurance premiums that the lender estimates will be payable during the next year. The lender may increase the Owners' monthly contribution if it "determines in its reasonable judgment" that the funds in the Account will be insufficient to pay the taxes and premiums. Likewise, the lender may decrease the Owners' monthly contribution if the funds in the Account will exceed the amount of taxes and insurance premiums due. (*Loan Agreement*, § 3.3, p. 23.)

2. **The Plaintiff (the "Investor") had no previous experience or expertise in commercial lending, yet bought the Loan from the original lender as an investment.**

Despite its lack of experience in commercial real estate lending, the Investor bought the Loan from the original lender--at a steep discount--in April 2009 (Memo. Opp. Motion to Strike, Ex. A, *Deposition of Elliott Liffman*, pp. 14-16, 52 ("Liffman Dep.")). The Investor's principal, Elliott Liffman, had no education, training, or experience as a commercial real estate lender when his company purchased the Loan. (*Liffman Dep.*, pp. 14-16). He had no education, training, or experience with underwriting reserve accounts in commercial real estate loans. (*Liffman Dep.*, pp. 14-16). He has explained that his understanding of underwriting standards was "formed by [his] experience," although he had no experience from which to draw from when his company acquired the Loan (*Liffman Dep.*, pp. 40). Moreover, Mr. Liffman has admitted that his "general interpretation" of underwriting standards is "not in the Loan Agreement" itself (*Liffman Dep.*, pp. 37-38), and that he does not refer to the terms of the Loan Agreement to gain an understanding of the applicable underwriting standards (*Liffman Dep.*, pp. 39-41). For that matter, he does not believe that he needs to be authorized by the Loan Agreement to do anything (*Liffman Dep.*, pp. 139, 146).

3. **Shortly after acquiring the Loan, the inexperienced Investor demanded a commercially unreasonable 1,037% increase to the monthly payments to be made to the Capital Expense Reserve Account.**

In July 2011, the Investor notified Fontaine Management, LLC ("Management") that it had unilaterally reassessed the Capital Reserve Account. The Loan Agreement authorizes the Investor to reassess the monthly payment to the Capital Expense Reserve Account "in its reasonable discretion (based upon its then current underwriting standards)" (*Loan Agreement*, p. 24, ¶ 3.4; *Liffman Dep.*, pp. 123-124, 127). However, the Investor reassessed the monthly payment to the Capital Reserve Account from the original amount of $5,249.00 to $54,476.34, an increase of 1,037%.

4. **Shortly after acquiring the Loan, the inexperienced Investor also demanded a commercially unreasonable 756% increase to the monthly payments to be made to the Rollover Reserve Account.**

At the same time, the Investor also notified Management that it had reassessed the monthly payment to the Rollover Reserve Account. The Loan Agreement authorizes the Investor "to increase (or decrease)" the monthly deposit to the Rollover Reserve Account "if the Lender determines in its reasonable judgment that the funds in the Rollover Reserve Account will be insufficient to pay (or in excess of) the amounts due or to become due for Approved Leasing Expenses" (*Loan Agreement*, pp. 24-25, ¶ 3.5; *Liffman Dep.*, pp. 123-124, 127). When the Investor increased the monthly payment to the Rollover Reserve Account, there were no amounts due, or to become due for Approved Leasing Expenses, and the Account balance was already over $600,000.00. (Memo. Opp. Motion to Strike, Ex. C, *Deposition of Paula Mathews*, p. 61:19-23 ("Mathews Dep.")) Nevertheless, the Investor increased the monthly payment from the original amount of $21,086.50 to $159,472.91 (*Mathews Dep.*, pp. 56:14-17). This reassessment constituted a one-time increase of 756%.

5. **Shortly after acquiring the Loan, the inexperienced Investor also demanded a commercially unreasonable 630% increase to the monthly payments to be made to the Tax and Insurance Reserve Account.**

In April 2012, the Investor notified the Owners that it was increasing the monthly payment to the Tax and Insurance Account from $722.00 to $5,272.97 (*Liffman Dep.*, pp. 103:18-123:10 and Ex. 6). This reassessment constituted a one-time increase of 630%. The Investor claimed that the increase was to correct a projected shortfall based upon its unsubstantiated belief that the Owners' insurance premium was going to increase at least 46% from the previous years' premiums (*Id.*). The Owners objected and requested actual figures from their insurance agent (*Id.*). On June 11, 2012, Ronald Guerena of Marsh Risk and Insurance Service advised the Investor that the Owners' premium would increase only slightly (*Id.*). Mr. Guerena projected that the Owners' monthly payment would be

$3,100 (*Id.*). This information was ignored by the Investor, who continued insisting upon the 630% increase. (*Id.*).

6. The Owners immediately objected to the inexperienced Investor's reassessments of these Reserve Accounts as commercially unreasonable and unnecessary.

Upon receipt of the notice from the Investor concerning the reassessments, Management immediately objected to the reassessments on behalf of the Owners. (*Liffman Dep.*, p. 165). Management also requested justification and substantiation of the reassessments under the provisions of the Loan Agreement. As Management suspected, the Investor did not reassess the monthly contribution to the Capital Expense Reserve Account based upon any underwriting standards (*Liffman Dep.*, pp. 44, 52, 127-135, 194; Memo. Opp. Motion to Strike, Ex. B, *Plaintiff's Discovery Responses*, pp. 9-10, 13-14 ("*Discovery Responses*"); *Mathews Dep.*, p. 60:22-24). Instead, the Investor based the reassessment on a three-year capital expense budget that it had requested from CBRE Columbia ("CBRE")[4], without providing notice to Management and the Owners as required under the Notice provision of the Loan Agreement. (*Loan Agreement*, pp. 54, ¶ 6.1; *Liffman Dep.*, pp. 137-146, 172). That budget was based on arbitrary and unrealistic assumptions provided by the Investor intended to maximize Reserve requirements. Consequently, the budget was excessive and hypothetical. Moreover, the budget resulted from the Investor's previous rejection of actual data provided by Management. (*Mathews Dep.*, pp. 56:14-17, 57:16-24, 60:17-18, 71:18-24, 72:10-11, 72:19-22, 73:10, 103:17-19, 104:9-11, 109:7-17, 110:7-8, 123:13-18, 125:12-16 & 19, 127:4-11, 128:5-11). Finally, the Investor did not explain to CBRE, Management, or the Owners that it intended to use the theoretical budget to maximize reassessments of the Reserve Accounts. The Investor hid its intentions behind the claim that it merely wanted to understand what might be expected in the coming years. (*Liffman Dep.*, pp. 137-146, 172).

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4 Management delegated the day-to-day operations of the Business Park to CBRE under an agreement, whereby CBRE acted under the direction of and reported to Management.

Before receiving the notice of the reassessments, the Owners and Management had no reason to believe that the information in the three-year capital budget would be used for the purpose of reassessing the Reserve Accounts. In other words, no one (other than the Investor) knew that the Investor intended for the theoretical budget to substitute for the "underwriting standards" dictated by the Loan Agreement. Notably, there is no provision in the Loan Agreement for a three-year capital budget, the Investor did not explain its true intentions, and a capital expense budget is not an underwriting standard. (*Loan Agreement*, pp. (i)-(iii) and § 1 pp. 1-17; *Liffman Dep.*, p. 137; *Mathews Dep.*, pp 103:8-13, 104:23-25, 105:10-19, 110:24-25, 188:9-11 & 16-18). In all respects, the Investor clearly was not acting in accordance with generally accepted standards in the commercial real estate lending industry. (*Mathews Dep.*, pp. 53-54, 103:8-13, 124:21-24, 140:8-14 & 18).

7. **The inexperienced Investor refused to explain or justify the increased payments to the Reserve Accounts, and threatened default if the Owners failed to comply with its demands.**

The Owners repeatedly asked the Investor to justify and substantiate the reasonableness of these reassessments, including a request for a detailed written explanation of the reassessments and the underwriting guidelines upon which the reassessments were based (*Liffman Dep.*, p. 174, Ex. 10; Ex. 3, p. 155; *Mathews Dep.*, Ex. 1, pp. 7-8). The only explanation the Investor ever provided concerned the increase to the Capital Reserve Account. The Investor explained that the reassessment to the Capital Reserve Account was based upon the three-year capital expense budget, and admitted that it was not based upon any underwriting standards. (*Liffman Dep.*, pp. 123:11-138:2; *Mathews Dep.*, p. 101, Ex. 3, p. 163, Ex. 6).

The Owners asked the Investor to reassess the Capital Expense Reserve Account based upon accurate information. The Investor refused. The Owners asked the Investor to reassess the Rollover Reserve Account based upon the lack of approved leasing expenses and the current balance of that Account. The Investor refused (*Liffman Dep.*, Ex. 10). The Owners asked the Investor to

reassess the Tax and Insurance Account based upon information from the Owners' insurance agent. The Investor refused. (*Mathews Dep.*, Ex. 1, pp. 6-7; *Liffman Dep.*, pp. 103:18-132:10 & Ex. 6.)

8. **Even though all payments of principal and interest had been timely paid by the Owners, the inexperienced Investor subsequently declared the Loan in default because the Owners would not comply with its demands.**

The Investor declared the Owners in default under the Loan Agreement, largely because the Owners did not pay the reassessed monthly contributions to the Reserve Accounts. (*Compl.*, pp. 21-23, ¶¶ 95-114; *Answer*, pp. 14-19, ¶¶ 68-84). The Investor then commenced this suit to foreclose upon the Business Park.

ARGUMENT

I. THE OWNERS ARE ENTITLED TO A JURY TRIAL ON THEIR LEGAL COUNTERCLAIMS BECAUSE THE CONTRACTUAL JURY WAIVERS DO NOT EXTEND TO THE OWNERS' COUNTERCLAIMS.

A defendant in a foreclosure action is entitled to a jury trial on legal counterclaims in the absence of a valid waiver. Here, the jury waivers do not apply to the Owners' non-contractual counterclaims, including those for breach of fiduciary duty, economic duress, tortious interference with contractual and business relations, and unfair trade practices. Accordingly, the trial court erred in granting the Plaintiff Investor's Motion to Strike the Defendant Owners' jury trial demand.

Standard of Review

"Whether a party is entitled to a jury trial is a question of law." *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014), reh'g denied (Apr. 2, 2014) (quoting *Verenes v. Abunas*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). Appellate courts may decide questions of law with no particular deference to the circuit court's findings. *Id.*

A. Legal counterclaims in an equitable action may require a jury trial.

Although a foreclosure action is an action in equity, "counterclaims—including those raised in equitable actions—may, at times, be entitled to a jury trial." *Id.* at 328-329, 755 S.E.2d at 441. As the

South Carolina Supreme Court recently explained: "If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists *that encompasses the counterclaim*." *Id.* (Italics added.) If such a waiver does not exist, the proper procedure for handling the counterclaims is as follows:

> (a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.
>
> (b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.
>
> (c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

Id. at 329-330, 755 S.E.2d at 441-442.

To be valid and enforceable, a jury waiver must be an intentional act and the intention to waive the related right must plainly appear. *Sunamerica Fin. Corp. v. Equi-Data, Inc.*, 299 S.C. 175, 179, 383 S.E.2d 8, 10 (Ct. App. 1989) (citing 47 Am.Jur.2d Jury § 81 at 696 (1969)). The right to trial by jury is a substantial right; therefore, contractual jury waiver provisions are strictly construed using their plain, ordinary, and popular meaning. *Beach Co. v. Twitman, Ltd.*, 351 S.C. 56, 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), and *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994)). "Waiver of a jury trial . . will not be implied in doubtful cases, and, in order to create a waiver by implication, unequivocal acts are necessary; further, it has been held that the waiver must of necessity be an intentional act." *Id.* (quoting 50 C.J.S. Juries § 90 at 797 (1947)); *Keels v. Pierce*, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993) (In absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed).

B. The Owners are entitled to a jury trial on their legal counterclaims that were not waived beforehand in the Loan Documents.

In their Answers, the Owners raised a litany of counterclaims that are quintessentially jury issues. Indeed, the essentia of the counterclaims fall squarely within the province of a jury. Among other things, the Owners have pleaded breach of fiduciary duty, tortious economic duress, tortious interference with contractual and business relations, and unfair trade practices. *Carolina First Bank v. BADD, LLC*, 733 S.E.2d 619 (S.C.App. Oct. 24, 2012) (A defendant in a foreclosure action is entitled to a jury trial on breach of contract claims that are separate and distinct from the foreclosure action); *Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (S.C. 2010) (An action seeking damages for breach of fiduciary duty is an action at law); *Solley v. Navy Federal Credit Union, Inc.*, 397 S.C. 192, 202, 723 S.E.2d 597, 602 (S.C.App. 2012) ("An action in tort for damages is an action at law"); *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 622 (S.C.Ct.App. 2012) ("An action to construe a contract is an action at law"); *Ahrens v. State*, 392 S.C. 340, 347-348, 709 S.E.2d 54, 58 (S.C. 2011) ("An action seeking damages for breach of contract is an action at law").

The contractual jury trial waivers in the Loan Agreement and Mortgage do not apply to the Owners' counterclaims. The limited waiver in the Loan Agreement states:

> **10.8 Trial by Jury.** Each Borrower and Lender hereby agree not to elect a trial by jury of any issue triable of right by jury, and waive any right to trial by jury fully to the extent that any such right shall now or hereafter *exist with regard to the Loan Documents, or any claim, counterclaim or other action arising in connection therewith.* This Waiver of Right to Trial by Jury is given knowingly and voluntarily by each Borrower and Lender, and is intended to encompass individually each instance and each issue as to which the right to a trial by jury would otherwise accrue.

(*Loan Agreement*, § 10.8, pp. 74-75) (All caps removed; Italics added.) The limited waiver in the Mortgage states:

> 22. **Waiver of Jury Trial.** Mortgagor hereby agrees not to elect a trial by jury of any issue triable of right by jury, and waives any right to trial by jury fully to the extent that any such right shall now or hereafter *exist with regard to this Mortgage or any other Loan Document, or any claim, counterclaim or other action arising in connection therewith.* This waiver of right to trial by jury is given knowingly and voluntarily by Mortgagor, and is

> intended to encompass individually each instance and each issue as to which the right to a trial by jury would otherwise accrue. Mortgagee is hereby authorized to file a copy of this Paragraph in any proceeding as conclusive evidence of this waiver by Mortgagor.

(Compl., Ex. C, *Mortgage*, § 22, p. 13 ("Mortgage") (All caps removed; Italics added.) Thus, by their plain terms, these waivers apply only to disputes concerning the terms of the "Loan Agreement," the "Mortgage," "any other Loan Document,"[5] and "any claim counterclaim, or other action in connection therewith."

The Owners' counterclaims for breach of fiduciary duty, economic duress, and tortious interference with contract do not exist "with regard to the Loan Agreement," the Mortgage," or "any other Loan Document" (*Answer of Owner 1*, pp. 27-39; *Answer of Owners 2-31*, pp. 27-40). Nor are they connected "therewith." Those counterclaims arise from conduct that is not governed by terms expressed within the four corners of the Loan Agreement, Mortgage, and other Loan Documents. Instead, those counterclaims relate to the Investor's conduct and dealing with the Owners under rights and obligations that arise independently of the contractual agreements between the parties. The same is true of the unfair trade practices claim. All of these counterclaims may be litigated and decided without reference to the terms of the Loan Agreement, Mortgage, and other Loan Documents; yet they have such a logical relationship to the Loan that the Owners' success would prevent the Investor from foreclosing on the Mortgage.

As previously noted, the waiver provisions must be strictly construed according to their plain language and a waiver cannot be implied if there is any doubt. Here, the plain language of the waiver provisions is specifically tied (and therefore limited) to the "Loan Agreement," "Mortgage," and "Loan Documents." They do not include any language that can be construed as waiving all legal claims

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5 In addition to the Loan Agreement and Mortgage, other "Loan Documents" include the related Promissory Note (Compl., Ex. B), an Assignment of Leases and Rents (Compl., Ex. D), an Assignment of Agreements, Licenses, Permits and Contracts (Compl., Ex. E), a Loan Assumption Agreement (Compl., Ex. F), and an Amendment to Loan Assumption Agreement (Compl., Ex. J).

arising between the parties. They do not include any language that can be construed as waiving counterclaims for breach of fiduciary duty. They do not include any language that can be construed as waiving counterclaims for economic duress. They does not include any language that can be construed as waiving counterclaims for tortious interference with contractual or business relations. And they do not include any language that can be construed as waiving counterclaims of unfair trade practices. Indeed, the Investor did not make any attempt to demonstrate that those counterclaims "exist with regard to the Loan Documents." (*Motion to Strike*, p. 1 , *MSTRIK Trans.*, pp. 1-10, 22-26).

The jury waiver at issue in *Wachovia Bank v. Blackburn* provides an insightful contrast. 407 S.C. 321, 325-326, 755 S.E.2d 437, 439 (2014). In that case, the jury waiver provided:

> **Waiver of Jury Trial.** To the extent permitted by applicable law, each of Borrower ... and Bank ... 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....

Id. (all caps removed; italics added). This jury waiver goes beyond the related "Note" and "Loan Documents" and includes, more broadly, "any course of conduct, course of dealing . . . or actions of any party with respect hereto." Relying on that language in particular, the Supreme Court concluded that the sales transaction that preceded the loan was included in the loan's jury waiver provision. *Id.* at 332, 755 S.E.2d at 443. For that reason, the Court concluded that the waiver applied to the defendants' counterclaims. *Id.* The jury waivers at issue in this case do not include language that extends the waivers beyond the terms of the written contracts between the parties. They do not make any reference to the course of conduct or course of dealing between the parties; nor do they refer to "actions of any party" with respect to the course of conduct and course of dealing. Accordingly, the jury waivers here must be construed strictly to claims for breach of the related written contracts.

C. The Investor failed to show that the Owners' counterclaims, which exist independently of the contractual relationship between the parties, are encompassed by the limited jury trial waivers.

The trial court erred in concluding that the Owners were not entitled to a jury trial on their counterclaims--presumably because the Investor was the first to file a complaint. In the trial court, the Investor argued that the Owners' "counterclaims do not change the equitable nature of the foreclosure action" (*MSTRIK Trans*, p. 4). In that regard, the Investor's understanding of the governing law was simply incorrect. In fact, the opposite is true. The equitable nature of this foreclosure action does not change the legal nature of the Owners' counterclaims. Under a plain reading of the South Carolina Supreme Court's recent decision in *Wachovia Bank v. Blackburn*, 407 S.C. at 329-330, 755 S.E 2d at 441 442, there is no escaping the conclusion that the trial court erred: "If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim."

The trial court also erred in concluding that the waiver applied to the Owners' counterclaims in the absence of any showing in that regard from the Investor. As the movant, the Investor had the burden of showing that each of the Owners' counterclaims fell squarely within the terms of the waivers. The Investor made no such showing. Although the Investor argued generally that the waivers applied to counterclaims, the Investor made no showing that the counterclaims at issue "exist with regard to the Loan Documents" or that they "exist with regard to the Mortgage or any other Loan Document" (*MSTRIK Trans.*, pp. 1-10, 22-26). The waivers here expressly apply only to counterclaims raised in connection with the Loan Agreement, Mortgage, and other Loan Documents (*Loan Agreement*, § 10.8, pp. 74-75; *Mortgage*, § 22, p. 13). They do not apply to counterclaims that arise independently of the parties contractual relationship.

D. Even if the contractual jury waivers are otherwise applicable, the Investor should be equitably estopped from enforcing them because of its outrageous conduct.

This is no ordinary foreclosure action. Although the Investor has pleaded its case in the placid verbal veneer of a routine foreclosure action, Owners have demonstrated the rough-hewn reality of this matter through their Answers, Affirmative Defenses, and Counterclaims. The following facts, which have been developed during discovery, demonstrate the Investor's outrageous conduct

(1) The Investor declared the Owners in default under the Loan Agreement, largely because the Owners did not pay the reassessed monthly contributions to the Reserve Accounts (*Complaint*, pp. 21-23, ¶¶ 95-114; *Answer*, pp. 14-19, ¶¶ 68-84).

(2) The Owners have raised various defenses that relate to the inherent invalidity of the reassessments to the Reserve Accounts (*Answer*, pp. 24-27, ¶¶ 104-114).

(3) The Owners have alleged that the Investor breached the Loan Agreement when it requested a three-year capital expense budget and when it used that budget to reassess the Capital Expense Reserve Account (*Answer*, pp. 14-19, ¶¶ 68-84 & pp. 27-36, ¶¶ 115-203).

(4) The Loan Agreement only authorizes the Investor to reassess the monthly payment to the Capital Expense Reserve Account "in its reasonable discretion (based upon its then current underwriting standards)" (*Loan Agreement*, p. 24, ¶ 3.4; *Liffman Dep.*, pp. 123-124, 127).

(5) Elliott Liffman had no education, training, or experience as a commercial real estate lender when the Investor purchased the Loan Agreement (*Liffman Dep.*, pp. 14-16).

(6) Mr. Liffman had no education, training, or experience with underwriting Reserve Accounts in commercial real estate loans when the Investor purchased the Loan Agreement (*Liffman Dep.*, pp. 14-16).

(7) Mr. Liffman's understanding of underwriting standards was "formed by [his] experience" (*Liffman Dep.*, pp. 40).

(8) Mr. Liffman's "general interpretation" of underwriting standards was "not in the Loan Agreement" (*Liffman Dep.*, pp. 37-38).

(9) Mr. Liffman did not refer to the terms of the Loan Agreement to gain an understanding of the applicable underwriting standards. (*Liffman Dep.*, pp. 39-41).

(10) Mr. Liffman does not believe that he needs to be authorized by the Loan Agreement to do anything. (*Liffman Dep.*, pp. 139, 146).

(11) The Investor did not reassess the monthly contribution to the Capital Expense Reserve Account based upon any underwriting standards. (*Liffman Dep.*, pp. 44, 52, 127-135, 194; *Discovery Responses*, pp. 9-10, 13-14; *Mathews Dep.*, p. 60:22-24).

(12) The reassessment of the Reserve Accounts was not the result of the exercise of "reasonable discretion," as required by the Loan Agreement, because they were excessive, hypothetical, and resulted from the Investor's previous rejection of actual data provided by Management. (*Mathews Dep.*, pp. 56:14-17, 57:16-24, 60:17-18, 71:18-24, 72:10-11, 72:19-22, 73:10, 103:17-19, 104:9-11, 109:7-17, 110:7-8, 123:13-18, 125:12-16 & 19, 127:4-11, 128:5-11).

(13) The Investor reassessed the monthly payment for the Capital Reserve Account from the original amount of $5,249.00 to $54,476.34. (*Liffman Dep.*, pp. 126-127, 163-164).

(14) The reassessment of the Capital Reserve Account amounted to a one-time increase of 1,037%. (*Liffman Dep.*, pp. 126-127, 163-164).

(15) The Loan Agreement authorizes the Investor "to increase (or decrease)" the monthly deposit to the Rollover Reserve Account "if the Lender determines in its reasonable judgment that the funds in the Rollover Reserve Account will be insufficient to pay (or in excess of) the amounts due or to become due for Approved Leasing Expenses" (*Loan Agreement*, pp. 24-25, ¶ 3.5; *Liffman Dep.*, pp. 123-124, 127).

(16) The Investor increased the monthly deposit to the Rollover Reserve Account from $21,086.50 to $159,472.91. (*Mathews Dep.*, pp. 56:14-17).

(17) The increase in the monthly deposit for the Rollover Reserve Account resulted in the imposition of a one-time increase of 756%. (*Mathews Dep.*, pp. 56:14-17).

(18) When the Investor increased the monthly deposit to the Rollover Reserve Account, there were no amounts due or to become due for Approved Leasing Expenses and the account balance was over $600,000.00. (*Mathews Dep.*, pp. 61:19-23).

(19) The Investor based its reassessment of the Reserve Accounts on a three-year capital expense budget that it requested from CBRE without providing notice to the Owners as required under the Notice provisions in the Loan Agreement. (*Loan Agreement*, pp. 54, ¶ 6.1; *Liffman Dep.*, pp. 137-146, 172).

(20) Mr. Liffman asked Sandra Johnson of CBRE for the three-year capital expense budget without explaining that he intended to use the budget to reassess the Reserve Accounts while hiding behind the claim that he simply wanted to understand what they expected in the coming years. (*Liffman Dep.*, pp. 137-146, 172).

(21) The Owners had no reason to believe that the information would be used to reassess the Reserve Accounts because there is no provision in the Loan Agreement for a three-year capital budget and the Investor did not explain its true intentions. (*Loan Agreement*, p. (i)-(iii) & § 1, pp. 1-17; *Liffman Dep.*, p. 137; *Mathews Dep.*, pp. 103:8-13, 104:23-25, 105:10-19, 110:24-25, 188:9-11 & 16-18).

(22) Upon receipt of the notice from the Investor concerning the reassessments, the Owners immediately objected to the reassessments because the reassessments were unreasonable and the three-year capital expense budget was not based upon the Owners' actual expectations. (*Liffman Dep.*, p. 165).

(23) When the Investor reassessed the Reserve Accounts, it was not acting in accordance with generally accepted standards in the commercial real estate lending industry. (*Mathews Dep.*, pp. 53-54, 103:8-13, 124:21-24, 140:8-14 & 18).

In these instances, the Owners have shown that the inexperienced Investor has engaged in conduct that is arbitrary, capricious, outrageous, and unconscionable. Moreover, the Investor's unconscionable conduct preceded and procured the Owners' alleged defaults under the Loan Documents. Indeed, the inexperienced Investor was the first party to breach the Loan Agreement when it required the creation of a three-year capital expense budget that was not provided for in the Loan Agreement, failed to do so in writing as required by the Loan Agreement, and used that budget—instead of any underwriting standards—to impose commercially unreasonable increases to the monthly Reserve Account payments. Under these circumstances, the Owners' demand for a jury trial on its counterclaims should be upheld.

"Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417-418 (4th Cir. 2000)). To allow a party to disregard its obligations under a contract while claiming the benefits of the contract would disregard equity. Here, Mr. Liffman, the Investor's principal, has freely admitted in discovery that his "general interpretation" of underwriting standards was "not in the Loan Agreement" (*Liffman Dep.*, pp. 37-38), that he did not refer to the terms of the Loan Agreement to gain an understanding of underwriting standards (*Liffman Dep.*, pp. 39-41), and that he does not believe that he needs to be authorized by the Loan Agreement to do anything (*Liffman Dep.*, pp. 139, 146). In other words, although the Investor is

openly flouting its obligations and essentially re-writing the Loan Documents, it seeks to hold the Owners to strict adherence to those provisions of the Loan Documents that suit the Investor.

The jury trial waivers are just one example. The outrageous increases to the Reserve Accounts is another. The Investor was only authorized to impose commercially reasonable reassessments to the Reserve Accounts. Nevertheless, the Investor imposed increases of 1,037%, 756%, 630% on thirty days' notice. Then, the Investor used the unreasonable increases to substantiate the alleged defaults that preceded this foreclosure action. The improper nature of the Investor's conduct is unprecedented in normal business relationships. Given the Investor's disregard for the terms of the contract, as a general matter, and its disregard for the duty of good faith and fair dealing, in particular, equity dictates that the jury waivers at issue should be avoided.

II. THE ORDER OF REFERENCE IS INVALID UNDER THE LAW OF THE CASE DOCTRINE BECAUSE ONE CIRCUIT JUDGE HAD ALREADY DECIDED THAT THE MOTION WOULD NOT BE HEARD UNTIL ALL LEGAL ISSUES ARE RESOLVED.

An order from one circuit judge is the law of the case and cannot be reversed by another circuit judge. Here, Judge Lee first ordered that the Plaintiff Investor's Motion for an Order of Reference would be deferred until the legal issues in the case were adjudicated. Accordingly, Judge Cooper's subsequent Order of Reference is invalid and must be reversed.

One circuit judge has no power to review, revise, or reverse the decision of another circuit judge of the same court upon the same facts. *Ex parte State*, 263 S.C. 363, 210 S.E.2d 600, 601-602 (1974); *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (1979); *Department of Social Services v. Laura D.*, 386 S.C. 382, 688 S.E.2d 130 (2009). The ruling of the first judge is binding on all parties and, when left unappealed, becomes the law of the case. *Ex parte State*, at 601; see also *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 603, 340 S.E.2d 546, 547 (1986) (finding a circuit court judge cannot deny the use of an amended complaint in light of an order of another circuit court judge that permitted use of the

amended complaint); see *Eldridge v. Eldridge*, 398 S.C. 113, 728 S.E.2d 24 (2012); *Richland County v. Palmetto Cablevision*, 261 S.C. 222, 199 S.E.2d 168 (1973) (stating an unchallenged ruling, right or wrong, is the law of the case).

Here, the Investor's Motion for Order of Reference was heard by Judge Alison Lee on February 1, 2013, and taken under advisement. (*Notice of Motion Scheduling*, MORDRE, Jan. 4, 2013; *Motion Trans.*, pp. 22-23). In the Order Appointing Receiver, Judge Lee ruled: "The Court declined to hear Plaintiff's Motion for Order of Reference pending the resolution of the legal claims asserted in this matter" (*Order Appt. Rec.*, p. 2). That aspect of Judge Lee's decision has not been challenged by any party.

Thereafter, the Investor's Motion to Strike Jury Demand was heard before Judge G. Thomas Cooper, Jr. (*Notice of Motion Scheduling*, MSTRIK, Dec. 18, 2013; MSTRIK *Trans.*, Jan. 13, 2014). Although the Motion for Order of Reference was not before Judge Cooper, in granting the Investor's Motion to Strike, Judge Cooper further ordered that "the case should be referred to the Master-in-Equity for Richland County pursuant to Rules 71 and 53, SCRCP" (*Order Granting Motion to Strike*, p. 9) Because Judge Lee had already ruled that Investor's Motion for Order of Reference would not be heard until the legal issues in the case were first resolved, Judge Cooper's order amounts to a review of the order of another circuit judge and improper reversal of that order.

The case of *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (1979) is directly on point. There, the South Carolina Supreme Court explained:

> . . . the defendant's attorney procured from Circuit Judge Klyde Robinson an order of reference to the master in equity. Upon learning of the order, counsel for the plaintiff moved before Circuit Judge Paul M. Moore to set aside the order of reference, " . . . on the ground that there are legitimate issues for determination by a jury." The motion came to be heard before Judge Moore, resulting in his order vacating the order of Judge Robinson; he then directed that the case be placed on the jury docket for trial.

Cook v. Taylor, 272 S.C. 536, 537, 252 S.E.2d 923, 924 (1979). On those facts, the Supreme Court held:

> The order of Judge Moore amounted to a review by him of the order of another circuit judge (Judge Robinson) and a reversal of the order of Judge Robinson because Judge Moore disagreed as to the proper mode of trial. Judge Moore did not have the power to set aside the order of his predecessor

Id. at 538, 252 S.E.2d at 924. Accordingly, the Supreme Court set aside Judge Moore's order. *Id.* This Court should do the same with Judge Cooper's Order of Reference, which effectively set aside Judge Lee's Order.

CONCLUSION

Premises considered, the Order Granting the Motion to Strike should be reversed, and this matter should be remanded for a jury trial. Alternatively, and in accordance with the law of the case, this matter should be remanded for a resolution of all legal issues before the Motion for Order of Reference is heard.

Date: August 1, 2014

Respectfully submitted,

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TAB C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	CASE NO.: 2012-CP-40-7752

DRV FONTAINE, LLC, *Plaintiff & Counter-Defendant,* v. FONTAINE BUSINESS PARK, LLC, *et al.* *Defendants & Counter-Plaintiffs.*	)	MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE JURY DEMAND

Defendant/Counter-Plaintiff Fontaine Business Park, LLC, ("Fontaine") submits this Response in opposition to the Motion to Strike Jury Trial Demand filed by Plaintiff/Counter-Defendant DRV Fontaine, LLC ("DRV").

DRV's Motion for to Strike Jury Demand should be denied because Fontaine has demanded a jury trial on its counterclaims, all of which are issues triable of right by a jury. Rule 71 of the South Carolina Rules of Civil Procedure provides that "[a]ctions to foreclose liens . . . shall be tried by the court, and shall *ordinarily* be referred to a master pursuant to Rule 53" (emphasis added). Likewise, Rule 53 of the South Carolina Rules of Civil Procedure provides that in "an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court." However, Rule 53 provides that "[a]ny party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court."

1. A defendant in a foreclosure action is entitled to a jury trial on breach of contract claims that are separate and distinct from the foreclosure action.

This is no ordinary foreclosure action. Although DRV has pleaded its case in the placid verbal veneer of a routine foreclosure action, Fontaine has demonstrated the rough-hewn reality of

this matter through its Answer, Affirmative Defenses, and Counterclaims. In its Answer, Fontaine raised a litany of Counterclaims that are quintessentially jury issues.

Indeed, the essentia of Fontaine's counterclaims fall squarely within the province of the jury. Among other things, Fontaine has pleaded breach of contract, breach of fiduciary duty, tortious economic duress, tortious interference with contractual and/or business or prospective contractual relations, and reformation of the instruments. *Carolina First Bank v. BADD, LLC*, 733 S.E.2d 619 (S.C.App. Oct. 24, 2012) (A defendant in a foreclosure action is entitled to a jury trial on breach of contract claims that are separate and distinct from the foreclosure action); *Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (S.C. 2010) (An action seeking damages for breach of fiduciary duty is an action at law); *Solley v. Navy Federal Credit Union, Inc.*, 397 S.C. 192, 202, 723 S.E.2d 597, 602 (S.C.App. 2012) ("An action in tort for damages is an action at law"); *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 622 (S.C.Ct.App. 2012) ("An action to construe a contract is an action at law"); *Ahrens v. State*, 392 S.C. 340, 347-348, 709 S.E.2d 54, 58 (S.C. 2011) ("An action seeking damages for breach of contract is an action at law").

In support of these claims, Fontaine relies upon the allegations in its Answer, Affirmative Defenses, and Counterclaims ("Answer") and the following facts that have been developed during discovery, including:

> (1) DRV declared Fontaine in default under the Loan Agreement, in part, because Fontaine did not pay the reassessed monthly contributions to the reserve accounts (*Complaint*, pp. 21-23, ¶¶ 95-114; *Answer*, pp. 14-19, ¶¶ 68-84).
>
> (2) Fontaine has raised various defenses that relate to the inherent invalidity of the reassessments to the reserve accounts (*Answer*, pp. 24-27, ¶¶ 104-114).
>
> (3) Fontaine has alleged that DRV breached the Loan Agreement when it requested a three-year capital expense budget and when it used that budget to reassess the Capital Expense Reserve Account (*Answer*, pp. 14-19, ¶¶ 68-84 & pp. 27-36, ¶¶ 115-203).
>
> (4) The Loan Agreement only authorized DRV to reassess the monthly payment to the Capital Expense Reserve Account "in its reasonable discretion (based upon its

then-current underwriting standards)" (Plaintiff's Exhibit A, *Loan Agreement*, p. 24, ¶ 3.4; Defendant's Ex. A, *Deposition of Elliott Liffman*, pp. 123-124, 127).

(5) Elliott Liffman had no education, training, or experience as a commercial real estate lender when Plaintiff purchased the Loan Agreement (Defendant's Ex. A, *Deposition of Elliott Liffman*, pp. 14-16).

(6) Mr. Liffman had no education, training, or experience with underwriting reserve accounts in commercial real estate loans when Plaintiff purchased the Loan Agreement (Defendant's Ex. A, *Deposition of Elliott Liffman*, pp. 14-16).

(7) Mr. Liffman's understanding of underwriting standards was "formed by [his] experience" (Defendant's Ex. A, *Deposition of Elliott Liffman*, pp. 40).

(8) Mr. Liffman's "general interpretation" of underwriting standards was "not in the loan agreement" (Defendant's Ex. A, *Deposition of Elliott Liffman*, pp. 37-38).

(9) Mr. Liffman did not refer to the terms of the Loan Agreement to gain an understanding of underwriting standards (Defendant's Ex. A, *Deposition of Elliott Liffman*, pp. 39-41).

(10) Mr. Liffman does not believe that he needs to be authorized by the Loan Agreement to do anything (Defendant's Ex. A, *Deposition of Elliott Liffman*, pp. 139, 146).

(11) DRV did not reassess the monthly contribution to the Capital Expense Reserves account based upon any underwriting standards (Defendant's Ex. A, *Deposition of Elliott Liffman*, pp. 44, 52, 127-135, 194; Defendant's Ex. B, *Plaintiff's Discovery Responses*, pp. 9-10, 13-14; Defendant's Ex. C, *Deposition of Paula Mathews*, p. 60:22-24).

(12) The reassessment of the reserve accounts was not the result of the exercise of "reasonable discretion," as required by the Loan Agreement, because they were excessive, hypothetical, and resulted from a rejection of actual numbers (Defendant's Ex. C, *Deposition of Paula Mathews*, pp. 56:14-17, 57:16-24, 60:17-18, 71:18-24, 72:10-11, 72:19-22, 73:10, 103:17-19, 104:9-11, 109:7-17, 110:7-8, 123:13-18, 125:12-16 & 19, 127:4-11, 128:5-11).

(13) DRV reassessed the monthly payment for the Capital Reserve Account from the original amount of $5,249 to $54,476.34 (Defendant's Ex. A, *Deposition of Elliott Liffman*, pp. 126-127, 163-164).

(14) The reassessment amounted to a one-time increase of 1,037% (Defendant's Ex. A, *Deposition of Elliott Liffman*, pp. 126-127, 163-164).

(15) The Loan Agreement authorized DRV "to increase (or decrease)" the monthly deposit to the Rollover Reserve Account "if the Lender determines in its reasonable judgment that the funds in the Rollover Reserve Account will be insufficient to pay (or in excess of) the amounts due or to become due for Approved Leasing

Expenses" (Plaintiff's Exhibit A, *Loan Agreement*, pp. 24-25, ¶ 3.5; Defendant's Ex. A, *Deposition of Elliott Liffman*, pp. 123-124, 127).

(16) DRV increased the monthly deposit to the Rollover Reserve account from $21,086.50 to $159,472.91 (Defendant's Ex. C, *Deposition of Paula Mathews*, pp. 56:14-17).

(17) The increase in the monthly deposit to the Rollover Reserves account resulted in the imposition of a one-time increase of 756%.

(18) When DRV increased the monthly deposit to the Rollover Reserves account, there were no amounts due or to become due for Approved Leasing Expenses and the account balance was over $600,000 (Defendant's Ex. C, *Deposition of Paula Mathews*, pp. 61:19-23).

(19) DRV based its reassessment of the reserve accounts on a three-year capital expense budget that it requested from CBRE without providing notice to the defendants as required under the Notice provision of the Loan Agreement (Plaintiff's Exhibit A, *Loan Agreement*, pp. 54, ¶ 6.1; Defendant's Ex. A, *Deposition of Elliott Liffman*, pp. 137-146, 172).

(20) Mr. Liffman asked Sandra Johnson of CBRE for the three-year capital expense budget without explaining that he intended to use the budget to reassess the reserve accounts while hiding behind the claim that he simply wanted to understand what they expected in the coming years (Defendant's Ex. A, *Deposition of Elliott Liffman*, pp. 137-146, 172).

(21) The defendants had no reason to believe that the information would be used to reassess the reserve accounts because there is no provision in the Loan Agreement for a three-year capital budget and DRV did not explain its true intentions (Plaintiff's Exhibit A, *Loan Agreement*; Defendant's Ex. A, *Deposition of Elliott Liffman*, p. 137; Defendant's Ex. C, *Deposition of Paula Mathews*, pp. 103:8-13, 104:23-25, 105:10-19, 110:24-25, 188:9-11 & 16-18).

(22) Upon receipt of the notice from DRV concerning the reassessments, Fontaine immediately objected to the reassessments because the reassessments were unreasonable and the three-year capital expense budget was not based upon Fontaine's actual expectations (Defendant's Ex. A, *Deposition of Elliott Liffman*, p. 165).

(23) When DRV reassessed the reserve accounts, it was not acting in accordance with generally accepted standards in the commercial real estate lending industry (Defendant's Ex. C, *Deposition of Paula Mathews*, pp. 53-54, 103:8-13, 124:21-24, 140:8-14 & 18).

In these instances, and others, Fontaine has alleged and shown that DRV has engaged in conduct that is arbitrary, capricious, outrageous, and unconscionable. Moreover, DRV's

unconscionable conduct preceded and procured Fontaine's alleged defaults under the Loan Agreement. Accordingly, Fontaine's demand for a jury trial should be granted.

2. Contractual jury trial waivers do not apply to claims that were not contemplated by the parties at the time the contract was entered.

DRV's reliance on contractual waivers in seeking to have this Court strike the defendants' demand for a jury trial is misplaced. As the South Carolina Court of Appeals recently explained, though a contractual jury waiver may be valid in a foreclosure action, such a waiver is not necessarily applicable to counterclaims raised in defense. *See Wachovia Bank v. Blackburn*, 716 S.E.2d 454 (S.C.App. 2011); *Partain v. Upstate Automotive Group*, 689 S.E.2d 602 (2010); *Aiken v. World Finance Corp. of South Carolina*, 644 S.E.2d 705 (S.C. 2007). Under *Blackburn*, *Partain*, and *Aiken*, contractual jury waivers do not apply to claims founded upon outrageous torts and egregious conduct that is unforeseeable to a reasonable person in the context of normal business dealings. This is so, the appellate courts have reasoned, because the aggrieved parties could not have contemplated that by signing a contract they would be waiving their right to a jury trial on claims arising from contumacious conduct.

Here, the improper nature of DRV's conduct is unprecedented in normal business relationships. Fontaine could not have conceived of such recalcitrant business dealings, much less foresee them. Fontaine could not foresee than an inexperienced party would buy the Loan Agreement and proceed to interpret the provisions of the agreement with complete disregard for the terms of the agreement, the course of performance under the agreement, and the general accepted underwriting standards for commercial real estate loans (*Supra*, pp. 2-4, ¶¶ 4-22). Otherwise, Fontaine certainly would have thought better of a jury waiver. Indeed, it would have thought better of entering into an assignable loan agreement with the Original Lender. DRV should not be permitted to wield the contractual jury waiver as a shield to protect it from a jury's evaluation of its

outrageous conduct. The facts presented here are exactly the type that justify avoidance or inapplicability of a contractual jury trial waiver.

CONCLUSION

This matter should remain in the Court of Common Pleas for a jury trial. Alternatively, if a reference for foreclosure is necessary, consistent with *Time Warner Cable v. Condo Services, Inc.*, 381 S.C 275, 282, 672 S.E.2d 816, 819 (S.C. Ct. App. 2009), Defendant/Counter-Plaintiff Fontaine's counterclaims should be tried by a jury before DRV's foreclosure action is referred to the Master-in-Equity.

Respectfully submitted,

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TAB D

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	2012-CP-40-7752
	)	
	)	
	)	
	)	
DVR Fontaine, LLC	)	)
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
Fontaine Business Park, LLC, et. al.	)	)
	)	
DEFENDANTS	)	January 13, 2014 Columbia, SC

B E F O R E:

THE HONORABLE G. THOMAS COOPER, JUDGE.

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

PAUL D. HARRILL, ESQ.
Attorney for the Plaintiff

TUCKER S. PLAYER, ESQ.
MR. FAULK, ESQ.
Attorneys for the Defendants

KESHIA REED
Official Court Reporter

I N D E X

(WHEREUPON, there were no witnesses called.)

THE COURT: Mr. Harrill, your motion?

MR. HARRILL: Yes, Your Honor.

THE COURT: You may proceed.

MR. HARRILL: Thank you, Your Honor. Your Honor, this is -- well, just by way of a little background in this case. This is a foreclosure case. It involves property. You may be familiar with this Fountaine Business Park. It's out off of I-277 when you're coming into town. It's over on the right, has kind of that brick gazebo, a little pond out there. You know, that's the subject of the property, Your Honor. I represent the plaintiff in the case. We filed the foreclosure action. Subsequently, the defendants in the case filed some defenses and eventually I think a counter claim and they have demanded a jury trial on this case.

THE COURT: Both entities?

MR. HARRILL: Yeah, there are multiple entities, Your Honor. This is an unusual deal I will get into. It's called a tenant in common property deal where the original owner buys it and then he syndicates out a bunch of interest to other owners, so all those owners are technically owners of the property. So there are about 30 owners that technically own the tenant in common interest and gave their interest by way of mortgage and so they joined in the loan. So all those entities are named as

defendants in this case.

THE COURT: They're all being treated as one as far as the legal issues in this case?

MR. HARRILL: That's correct, Your Honor. Your Honor, this is our motion to strike their jury trial demand. There really two basis for it. One is that it is an equitable action and even though they have attempted to do it bring in defenses and counter claims, those don't change the nature of the equitable action in question and I'll address that in a moment. The other is the fact that the defendants have expressly waived their right to a jury trial.

THE COURT: Show me that?

MR. HARRILL: I will, Your Honor. I've got the -- do you have the motion?

THE COURT: I got the motion and the exhibits.

MR. HARRILL: If I can show you in the motion -- I'll hand up a copy if you like, but otherwise if you look at tab A.

THE COURT: Got tab A.

MR. HARRILL: Go all the way back to page 74 to tab A.

THE COURT: Just hold on a minute. I got 74.

MR. HARRILL: Yes, sir, section 10.A.

THE COURT: 10.A, got it.

MR. HARRILL: It says in all caps each borrower and lender hereby agree not to elect a trial by jury of any issue triable by jury -- a triable of right by jury and waive any right to trial by jury fully and to the extent that any such right shall now or hereafter exist with regard to the loan documents or any claim, counter claim or other action arising in connection therewith. And I think it's important there that counter claims have been expressly included in the waiver, Your Honor. Next in section B -- the first document was the loan agreements. Next section B is the mortgage. And if you turn to page 13 section 22 of that document.

THE COURT: Page 13.

MR. HARRILL: Page 13 section 22. You have that, Your Honor?

THE COURT: I do, but there numbers on the top and numbers on the bottom.

MR. HARRILL: I'm sorry. The number on the bottom is the one I'm looking at.

THE COURT: Same language?

MR. HARRILL: Yes, sir. Essentially, maybe slightly or the same language mortgagor hereby agrees not to elect the trial by jury and it goes on and includes counter claims. And they expressly agree not to pursue a trial by jury with regard to any defenses, counter claims,

claims related. Attach C and D for the purpose of showing that the -- these are the loan assumption agreements. As I explained to you, this is a little bit of an unusual transaction, which the original borrower buys the property and gives the mortgage and then a bunch of -- then he sells off or it sells off its interest to a bunch of other entities. Then those entities then assume completely and in whole the mortgage, the loan documents and all that. And if you'll look at the loan assumption agreement at C page two and paragraph one there, it references the fact that the borrowers assume all of the documents. It includes reference to the loan agreement, the note, the instrument. The instrument is defined in this document, this assumption agreement, as the mortgage. And it goes on to say that they just assume it just as if they were the original signers of the documents.

So each of the -- each of the defendants has assumed the obligations, representations. And it include if you'll read down on paragraph one, Your Honor, it also includes any waivers. Let me just read part of it for the record, Your Honor, if that's okay. Additional borrower hereby assumes joint and several basis of the original borrower and ending all other tenants in common that have previously assumed the loan. All of original borrowers and obligations and agreements under the loan agreement,

the note, the instrument, the lease assignment and all of the other loan documents and then excludes a specific guarantee. All the assignments terms, waivers and conditions of which are incorporated here and by this reference. And so, Your Honor, and then the same thing occurs when there was a subsequent assumption. There's an amendment to the loan assumption where some additional TIC borrowers, tenant in common borrowers, did the same thing. And the same language is contained in paragraph one, which is exhibit D to our memorandum or to our motion.

Your Honor, each of those waivers pursuant to South Carolina law are enforceable. They are bold, conspicuous. They're not hidden in the language of the document. They're not -- you know, they have a very clear heading. And so again, they also referenced very specifically the waiver of a counter claim. So it's our position first and foremost that based upon the expressed waiver contained in the loan documents, that these defendants assertion of a right to a jury trial even on their counter claims in this case is improper and it's just serving to delay the case. And they don't have the right to do that.

Your Honor, the point I raised was that, you know -- and I have some case law I'll be happy to hand up, Your Honor. There's a case Collier v. Green. It's a 1964

case, but it's still good law. It's 137 Southeastern Second 277. Your Honor, if I can hand that case up?

THE COURT: Certainly. You didn't do a memorandum, did you?

MR. HARRILL: I did not, no, sir. I thought I provided enough. Your Honor, in the case of Collier v. Green, it discusses the nature of a foreclosure as an equitable action. And it goes on in great detail on the document that I've given you on page four, bottom of page four and really to the end of the case discussing the fact that just because you assert defenses and counter claim in a case, doesn't mean that it changes the nature of the equitable foreclosure action. And it specifically talks about the fact where questions are raised and defense and counter claims about validity of a loan, the priority of a loan and things like that. They don't change the characteristic of a foreclosure from an equitable to sudden illegal action.

And, Your Honor, you'll hear from the defendants in a moment. But essentially every defense they've raised and every counter claim they've raised is trying to say my client has done something horrible and, you know, terrible. But essentially at its heart what they are ultimately trying to do is argue that there is no default in the case. They're challenging whether there's been a

valid default.

THE COURT: Couldn't a master determine that?

MR. HARRILL: Absolutely, Your Honor, and that's my point is that doesn't change the equitable nature of the case. Ultimately, their counter claims are saying we did something wrong, so they're not in default. If they want to get into the facts of it, you know, they can do that and I'll be happy to retort. But ultimately their arguments on their counter claims and defenses is that my client fabricated a default, so that he could foreclose. Well, that's all stuff that Judge Strickland, the master in equity, can determine. That's all part of the underlying equitable action whether there's default, whether there's a valid mortgage, whether there's a lien priority all of that stuff as set forth in pages four and five of the Collier case.

Your Honor, also got some cases -- Your Honor, you ask me if I did a memorandum, I did not. I do have a proposed order if you like me to hand it up at this point. I can just wait until the end whichever suits you.

THE COURT: Well, I tell lawyers frequently, you want me to read it, I guess I better have it. I'm not making any decision one ---

MR. HARRILL: I understand, Your Honor. I'm hoping you'll want to read it and you want sign it later.

THE COURT: Thank you.

MR. HARRILL: Yes, sir. Your Honor, I think, you know, essentially that's our argument. I have more I can say, but I'll maybe hold some of that for rebuttal. I believe I know what they're going to argue, but we think we're entitled to have the jury demand struck based upon not only the expressed waivers, but the fact that really at their heart the defenses and counter claims raised by the defendants are just challenging our ability to declare a default and whether or not there's a valid default in this case. And that's an equitable issue that goes to the foreclosure. Thank you.

THE COURT: Thank you. Now, Mr. Faulk, you are pro hac?

MR. FAULK: Yes, Your Honor.

THE COURT: Well, I will tell you right now before we get started in that you have a friend in court in that my law clerk is from Johnson City, Tennessee.

MR. FAULK: Oh, really.

THE COURT: He told me there's some pretty good lawyers in Johnson City.

MR. FAULK: We have one or two unfortunately they couldn't be here today.

THE COURT: I think that was exactly his language one or two. I take it that you're one of the

select ones.

MR. FAULK: Yes, Your Honor.

THE COURT: Have you and Mr. Player decided how you want to proceed?

MR. FAULK: I guess, we just did since I got called on first. And first, Your Honor, I would like to thank the Court for accommodating my partner's request, Mr. Young, that I be permitted to appear here without him as he had conflicts in other matters.

Our position is -- the real issue before the Court is not whether there are jury waivers in the contract, it's whether or not they applied to the counter claims that we've raised. And Mr. Harrill relies on a case from 1964. We cited three cases Wachovia vs. Blackburn, which is a 2011 case. Partaine vs. Upstate Automotive, which is from 2010. Aiken vs. World Finance, which is from 2007. And the principle of these cases stand for is that waivers -- expressed waivers in contrast do not apply when there's outrageous tortuous conduct, egregious conduct. The types of things that are so outrageous and contumacious that they were unforeseeable at the time the contract was entered. And that's the situation that we have here and we provided for the Court it's just a brief synopsis of some of the facts that have already been developed in discovery through the

deposition.

And basically, you know, we're dealing with a circumstance where, Ms. Matthews who has testified on behalf of Fontaine Business Parkidge, the primary -- sort of the originator entity which still owns an interest in the property who we represent. She's been in this business for 40 years and she testified in her deposition that she's never seen a lender act in the way that it has acted in the way its handled these reserve accounts. As we pointed out in our motion, the capital expense reserve account was increased on very short notice 1,037 percent. And it was done was without proper justification under the loan agreements.

THE COURT: How does that affect your client?

MR. FAULK: Well, what we were dealing with is -- and I think we have the numbers quoted. You know, they budget these things on an annual basis basically dealing with the rents that come in and those things. And all of a sudden they get a notice from the lender that, you know, in two months you have to start paying 1,037 percent more than you've been paying previously. And that's a matter of going from in one case about $5,000 to -- let me see if I have it here, so make sure I don't get this incorrect $54,000 on a monthly basis and that was one of the reassessments. Another one went from 21,000 to 159,000,

that was the rollover reserve account, that's a 756 percent increase on very short notice. And what we have is Ms. Matthews and the people at DRV Fountaine been in the business for 40 years and never seen reserve accounts increase like that.

THE COURT: What is the purpose of -- the stated purpose of increase in the reserve accounts?

MR. FAULK: Well, the stated purpose was ---

THE COURT: 2008?

MR. FAULK: I'm sorry.

THE COURT: Was it in 2008?

MR. FAULK: That's when the -- when the loan agreement was purchased by DRV or made when it was originated. And the stated purpose for the capital expense reserve is you set aside money for capital expenses that may come up during the year. And so what they deal with is how much money is coming in, what tenants do we have and what prospects do we have. And based on that, you know, these reserves were set up.

THE COURT: Are you saying that this caused or precipitated the default?

MR. FAULK: That's correct, Your Honor. And not only that, one it was a breach of the contract of the loan agreement which only permits the capital expense reserve account to be reassessed based upon current -- then

existing underwriting principles. We pointed out attaching as one of our exhibits the responses to our interrogatories where they explain that they didn't have any then existing underwriting standards.

Mr. Lippman's (sic) deposition, what we took, basically what he said is if he took a budgeting process which also is not anywhere in the loan agreement, he just sort of made this up and I'm going to call ask them for originally it seems -- it appears that he wanted a five year projection of what all capital expenses were going to be for five years. Then that eventually was whittled down to three years. And some of the numbers came from the assumptions for that budget came from Mr. Lippman himself. And what we ended up with was an exorbitantly exaggerated capital expense projection. And basically what it did was -- it was -- if you rent all vacant space and fix everything that conceivable needed to be repaired, one of the things included a parking lot, which the additional parking spaces had been in contingency that had been considered if a particular tenant came in who needed additional space for that building.

And in fact, that's never even 'til this day no tenant has gone into that building required the additional parking spaces. So this thing -- it was completely imaginary. It was, you know, just fill this thing up,

rent it completely 100 percent tenant occupancy, repair everything that conceivably needed to be repaired. And it was a budget Mr. Lippman took that and then reassessed the reserve account based on that.

Now, if you look at the loan agreement, the loan agreement says you can only reassess the capital reserve account based upon then existing underwriting standards. Now, underwriting standards or guidelines -- I don't remember exactly which one it involves, but that's a term of art in the commericial real estate industry. And it doesn't mean a three year projection of capital expenditures that includes 100 percent occupancy, which is well above the market standard. There rarely any properties of this nature that stay 100 percent occupied. It called for a lot of repairs and to this day haven't been done. It was basically just what turned out to be just a wish list. And at the time he did this, first of all, the notice was never formally sent to DRV Fountaine in accordance with the loan agreement. Instead, Mr. Lippmann just made a phone call to the local property manager when in fact this notice is suppose to be in writing sent to the primary manager, so we never really got the formal notice. We got this informal request. They went along with it did their best because, you know, any debtor -- ours are no different than anybody else who

owes a lender a considerable sum of money. They just wanted to give them the information they wanted, wanted to keep them happy. There's no provision in the loan agreement that addresses this scenario at all.

Mr. Lippman acknowledged in his deposition that he never told them why he was asking for it. So they put this information together and all of sudden they get, you know, slammed with this outrageous increases that weren't based on -- they were based on leasing assumptions that in some instances were inflated as to the dollars per square foot. It was based on some repairs that were unnecessary. And I think the vast majority of those repairs to our knowledge still haven't been made because they weren't absolutely necessary then. And that's just the capital expense reserves. The rollover reserve account was increased 756 percent, that account per the loan agreement can only be reassessed if -- it will be insufficient for approved leasing expenses. At the time this account -- at the time this was reassessed, there were no approved leasing expenses. There were no expected lease expenses.

THE COURT: Okay. Let me get sort of the heart of this thing if I can. Your position is that the plaintiff forced by these various methods the foreclosure or the default?

MR. FAULK: Well, correct. Now, our position is

that there wasn't really a default at the time because ---

THE COURT: I understand that.

MR. FAULK: But that's what it whittles down to and ---

THE COURT: But they say it was a default because you couldn't meet certain obligations that they had imposed on you that are outside the loan documents or loan agreement?

MR. FAULK: That's correct. That's correct. But, you know ---

THE COURT: Maybe, you're not in default.

MR. FAULK: I beg your pardon.

THE COURT: I say maybe you are not in default.

MR. FAULK: Well, that's our argument that there's not a default, but on the counter claims, we're relying to get --

THE COURT: Wait a minute. Why do you need a jury to determine that?

MR. FAULK: Well, that's one of the things, you know, in consultation with our clients, they decided to exercise the right. And under the cases that we've cited, given the outrageous nature of the conduct involved, the fact that, you know, as we showed in the motion that under Wachovia Bank and Partaine and the Aiken cases all of which are more recent than the authority cited by Mr.

Harrill they say if it's outrageous contumacious conduct, that jury trial waivers do not apply in those situations because you could not have foreseen this series of events unfolding. And as I said, our ---

THE COURT: You seeking damages in addition to a declaration that you're not in default?

MR. FAULK: Correct. We're seeking damages on several grounds including punitive damages because of the nature -- multiple breaches. There's tortuous interference with our business relations, alleged support of economic duress. All of these things and we're asking for punitive damages and that basically goes to ---

THE COURT: Which a master cannot do?

MR. FAULK: Well, I think a master probably could do that, but in our perspective, it's a matter of we have a right to a jury trial.

THE COURT: Okay.

MR. FAULK: And we believe a waiver should not apply because of the outrageousness of the conduct.

THE COURT: Mr. Player cannot wait to get out of his chair, so I'll turn to him at this time.

MR. PLAYER: Your Honor, I think the delineation is we're not in default, that's our defense, that's our answer to the complaint. Counter claims, we're asking for money and lots of it because we think the behavior -- and

that has been the focus -- and just as context Mr. Faulk and Mr. Young represent the name at the top of the list. I represent the other 30.

THE COURT: I was wondering about that.

MR. PLAYER: Yes, Your Honor. And our counter claims did differ. I think we made a claim under the South Carolina Unfair Trade Practices Act, but the focus of our joint counter claims are the ones that mirror each other are that the actions of DRV were outside of the contract. He did not have any authority under the contract to do what he did and that is a focus Partaine and specifically the Wachovia case, which is the most fact factually similar to what we have here that was real estate transaction where the plaintiff or Wachovia was trying to foreclose and the defendants then counter claim against Wachovia because the thing that they said Wachovia did wrong and misrepresented and also did not do what they were obligated under other documents contracts between the parties other than the loan documents. And the Court said the focus of the Court is if the object or the actions claimed in the counter claims are such that it would be outside of the meeting of the minds where the contractor has the jury waiver, then the jury waiver does not apply. That's what the Court has decided is was the behavior so far outside of the contract or so contumacious or

egregious that when the parties had the meeting of the minds, which is assume since they sign the contract. If the Court determines that the conduct could not have been within that meeting of the minds, could not been within that joint understanding of the parties, then the jury waiver containment in the contract doesn't apply. Everything that we say is he did stuff that's not in the contract.

The entire theory of our counter claims are that he acted outside of the contract. We had no idea this could even happen when we sign the contract with the original lender. And thus far they could not point to any provision of the contract that allows them to do what he did.

As a matter of fact, in his deposition, the biggest number that jump -- that inflated the projections he said they didn't even ask for. He just got it from the good graces of somebody, just hadn't figured that out yet. But our counter claims are about what he did outside the contract. We said unfair trade practices and that it was a gross misrepresentation. And he did try and manufacture economic distress on the clients that eventually created the default, but that's only part of the counter claims. The part where they want the jury to decide is whether or not DRV regardless if there was a default, regardless of

whether or not our theory that we actually paid enough money to satisfy the loan servicing over time, if that's a default, okay, but what he did he still can't get away with what he did. And he would owe us money for the monetary damages that we suffered as a result of him inflating the monthly reserve accounts by a thousand percent and that's why we think a jury should decide those issues. It doesn't change the nature of the entire case. I think all the defendants agree the foreclosure is inequitable, but the legal issues in our counter claim should be decided by a jury before they are entitled to foreclosure.

THE COURT: There's been no reference in this case?

MR. HARRILL: I move for reference a year and a half ago, Your Honor. It's never been ruled upon.

THE COURT: Never been ruled upon?

MR. HARRILL: No. Judge Lee took it under advised matter or deferred it when she ruled on the receivership, which she ultimately granted. And she's never ruled on the motion, the pending motion to have it referred to Judge Strickland, which is still out there pending.

THE COURT: Is that an impediment to this motion?

MR. HARRILL: I don't think so, Your Honor. What I'm asking is if you strike the jury trial, I demand that you refer it to the master. Your Honor, a couple quick things. They've done a masterful job as usual of trying to cloud the issues and sit up here and tell long winded story about how horrible my client is, but let me tell you the other skewed facts.

There are reserved accounts in big loans like this and they are set aside -- not only do you make your monthly payment, but you set aside a reserve account and that's to pay things like new tenants up fits and commissions to realtors that have, you know, close new or renew old leases and things like that. Those reserve accounts are sitting there and must be maintained in order to meet anticipated costs going forward. My client in -- and this case has been pending for two years now, Your Honor, excuse me if I get the years wrong, but sometime I think in late 2010 began asking for a budget. He said how about show me a budget, what are your anticipating budgets going to be for the next year. They, including the Ms. Matthews that you've heard about, who initially said she had no money to put in the budget. I didn't have a single thing to do with budget. Then later when it was shown she was involved in many many e-mails about budgets said, oh, okay, well, I meant that I didn't, you know, actually do

this without -- they looked at the budget. They created the budget. They sent it to my client. And what the budget showed was my goodness we're going to have a huge shortfall in cash. So my client increased the reserves and granted they were significant increases but only for ten months. They never want to say that. Ten month increase in the reserve accounts.

And they, you know, got upset, but they paid the increase reserve accounts for four or five months and then unilaterally stopped paying. And, Your Honor, and then they stopped paying the loan payments. They've not paid loan payments forever. Now, the property is in receivership or at least we're getting a little money out of the receiver, but they quit paying the loan payments completely and haven't for months and months and months. And in here arguing about whether or not they're in default and what our guy did wrong.

I do want to hand up to Your Honor this Wachovia Blackburn case that they're so excited about, replying on so much. I want to point out what I think I differ with what they read this case to mean. They somehow say that this case stands for the fact that, oh, if it's a -- if it's somehow egregious, and tip of a hat to Mr. Faulk, I had to look up contumacious to see what that meant.

THE COURT: You obviously never read any of

Ralph King Anderson's orders.

MR. HARRILL: I did. I just didn't understand a whole lot of them, Your Honor. But any way, you know, they want you to read this case and somehow understand it that if there's an act that somehow egregious that it can't possibly still be an act of all that. Well, first of all, these acts aren't egregious as I've just explained to you. They want to tell you how egregious it is and how horrible he is and so forth. There are provisions for increasing the reserve accounts, they can't deny it. They say that he didn't technically follow what it says. But it clearly says he can increase the reserve accounts in his discretion and I say he, my client, is DRV. They keep referring to one of the principles.

Your Honor, this Blackburn case really what it said was it very clearly in the first half of the case laid out said, hey, you can waive jury trial matters, that's the first going in. You can waive jury trial rights. In fact, it found the jury trial right was waived as to everything except the counter claims. And then it went on to say in the counter claims they found in that case the express waiver of the counter claims was not enough to be a waiver in this case. And I want to point out there's a distinction in this language in the Wachovia Blackburn case, there's no mention whatsoever of counter

claims in the jury trial waiver language, none whatsoever as oppose to our records I showed you very clearly provides for waiver of jury trial for counter claim.

This also what this case really says when you get down to the holding on whether or not a counter claim would fall under the jury trial waiver. One, I think you got to show that it actually was intended to be waived and then in our case it was. And what the case says and what the Court said is when you get to this type situation that's where you have to look at jury trial waiver as a substantial right that must be strictly construed, so they're strictly construing the waiver language. And in this case, the waiver language didn't say anything about a counter claim. And therefore, I think ultimately they said, you know that's not enough, we're not going to find that the counter claim was waived. So the counter claim will go forward on a legal basis and the rest of the foreclosure is equitable.

Your Honor, that's really all I have in rebuttal. I think again none of the things they've raised can't be decided by Judge Strickland. It's all a matter of are we in default or aren't we in default. Are they in default or aren't they, that's their argument. But when it comes down to it, they're just trying to fight to say we're not in default. They're coming up with anything

they can to say we didn't default. He did something wrong. So the fact that we haven't paid for months and months and months, the fact we didn't pay the increased reserve accounts or paid every four months, that we collaterally stopped paying them. None of that is a default because he's a bad guy. And they only raise that after the foreclosure suit was filed. None of that changes the equitable nature of this case. And they've expressly agreed to waive the jury trial.

THE COURT: All right. Let me get you to submit a proposed order to me please ten days.

MR. PLAYER: Yes, Your Honor.

THE COURT: Good. Thank you very much.

MR. HARRILL: If I need to supplement mine or anything can I do that.

THE COURT: I don't know. If you're satisfied, then you don't need to supplement.

MR. HARRILL: I think I am, but I'll look at it and I'll let you know.

THE COURT: Ten days. Thank you very much.

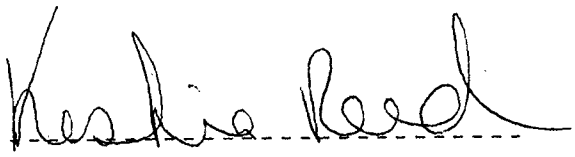
END OF REQUESTED TRANSCRIPT

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

I, Keshia Reed, Court Reporter and Notary Public in and for the State of South Carolina At Large, do hereby certify that the above-entitled cause was heard as hereinafter set out; that I was authorized to and did transcribe the said proceedings; and that the foregoing and annexed paged, numbered 1 through 27, inclusive, constitute a true and accurate transcription of my stenographic report of the said cause taken during the said hearing. In the Court of Common Pleas for Richland County, South Carolina, on the 13th day of January, 2014.

I do further certify that I am neither of kin, counsel nor interest to any party hereto. In witness whereof, I have hereunto affixed my signature this 31st day of May 2014.



Keshia Reed, Court Reporter

TAB E

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
Civil Action No. 2012-CP-40-7752

DRV FONTAINE, LLC,

Plaintiff,

v.

FONTAINE BUSINESS PARK, LLC;
FONTAINE BUSINESS PARK 2, LLC;
FONTAINE BUSINESS PARK 3, LLC;
FONTAINE BUSINESS PARK 4, LLC;
FONTAINE BUSINESS PARK 5, LLC;
FONTAINE BUSINESS PARK 6, LLC;
FONTAINE BUSINESS PARK 7, LLC;
FONTAINE BUSINESS PARK 8, LLC;
FONTAINE BUSINESS PARK 9, LLC;
FONTAINE BUSINESS PARK 10, LLC;
FONTAINE BUSINESS PARK 11, LLC;
FONTAINE BUSINESS PARK 12, LLC;
FONTAINE BUSINESS PARK 13, LLC;
FONTAINE BUSINESS PARK 14, LLC;
FONTAINE BUSINESS PARK 15, LLC;
FONTAINE BUSINESS PARK 16, LLC;
FONTAINE BUSINESS PARK 17, LLC;
FONTAINE BUSINESS PARK 18, LLC;
FONTAINE BUSINESS PARK 19, LLC;
FONTAINE BUSINESS PARK 20, LLC;
FONTAINE BUSINESS PARK 21, LLC;
FONTAINE BUSINESS PARK 22, LLC;
FONTAINE BUSINESS PARK 23, LLC;
FONTAINE BUSINESS PARK 24, LLC;
FONTAINE BUSINESS PARK 25, LLC;
FONTAINE BUSINESS PARK 26, LLC;
FONTAINE BUSINESS PARK 27, LLC;
FONTAINE BUSINESS PARK 28, LLC;
FONTAINE BUSINESS PARK 29, LLC;
FONTAINE BUSINESS PARK 30, LLC;
FONTAINE BUSINESS PARK 31, LLC;

Defendants.

PLAINTIFF'S MOTION FOR ORDER OF REFERENCE

TO: ALL DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, DRV Fontaine, LLC (hereinafter "the Plaintiff"), hereby moves, pursuant to Rules 53 and 71 of the South Carolina Rules of Civil Procedure, for the Court to issue an Order referring the above captioned foreclosure to the Honorable Joseph M. Strickland, as Master-In-Equity for Richland County, with finality, with all appeals to be pled directly to the South Carolina Court of Appeals or the Supreme Court of the State of South Carolina as provided by the South Carolina Appellate Court Rules.

Pursuant to Rule 53 of the South Carolina Rules of Civil Procedure, "[i]n an action where the parties consent, in a default case, *or* an action for foreclosure" (emphasis added) some or all causes of action "may be referred to a master or special referee by order of a circuit judge or the clerk of court." Pursuant to Rule 71 of the South Carolina Rules of Civil Procedure, "[a]ctions to foreclosure liens . . . shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53." The present case is a foreclosure action that may be properly referred to the Richland County Master in Equity, pursuant to Rules 53 and 71.

This motion is based upon the South Carolina Rules of Civil Procedure, the pleadings filed in this action, applicable statutory and common law and in the interest and furtherance of justice.

Respectfully submitted,

McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

By: _____
Paul D. Harrill (SC Bar No.: 15268)

Attorneys for the Plaintiff

November 21, 2012
Columbia, South Carolina

COLUMBIA 1095396v1

TAB F

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

DRV Fontaine, LLC,

Plaintiff,

v.

Fontaine Business Park, LLC;
Fontaine Business Park 2, LLC;
Fontaine Business Park 3, LLC;
Fontaine Business Park 4, LLC;
Fontaine Business Park 5, LLC;
Fontaine Business Park 6, LLC;
Fontaine Business Park 7, LLC;
Fontaine Business Park 8, LLC;
Fontaine Business Park 9, LLC;
Fontaine Business Park 10, LLC;
Fontaine Business Park 11, LLC;
Fontaine Business Park 12, LLC;
Fontaine Business Park 13, LLC;
Fontaine Business Park 14, LLC;
Fontaine Business Park 15, LLC;
Fontaine Business Park 16, LLC;
Fontaine Business Park 17, LLC;
Fontaine Business Park 18, LLC;
Fontaine Business Park 19, LLC;
Fontaine Business Park 20, LLC;
Fontaine Business Park 21, LLC;
Fontaine Business Park 22, LLC;
Fontaine Business Park 23, LLC;
Fontaine Business Park 24, LLC;
Fontaine Business Park 25, LLC;
Fontaine Business Park 26, LLC;
Fontaine Business Park 27, LLC;
Fontaine Business Park 28, LLC;
Fontaine Business Park 29, LLC;
Fontaine Business Park 30, LLC;
Fontaine Business Park 31, LLC;

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No: 2012-CP-40-7752

ORDER APPOINTING RECEIVER

#1

This matter came before the Court on February 1, 2013, on the Motion for Appointment of a Receiver and the Motion for Order of Reference filed by Plaintiff DRV Fontaine, LLC

("Plaintiff"). Present at the hearing were Paul Harrill, Esquire, counsel for Plaintiff; Brent Young, Esquire, and Mark Fulks, admitted *Pro Hac Vice*, counsel for Defendant Fontaine Business Park, LLC ("Fontaine Business Park"); and Tucker Player, Esquire, counsel for Defendants Fontaine Business Park 2-31, LLC ("Fontaine Business Park 2-31"), (collectively "the Defendants"). This Court declined to hear Plaintiff's Motion for Order of Reference pending the resolution of the legal claims asserted in this matter. After considering the law, the briefs filed by the parties, the arguments of counsel, and other matters submitted, Plaintiff's Motion for Appointment of a Receiver is **GRANTED.**

FACTS

On or about December 14, 2007, Defendant Fontaine Business Park borrowed $16,300,000.00 from Greenwich Capital Financial Products, Inc. ("Greenwich Capital"). The Loan was evidenced by a Loan Agreement, dated December 14, 2007, which was executed and delivered to Greenwich Capital, [its successors and assigns], by Fontaine Business Park. The Loan was secured by a document entitled "Promissory Note, Mortgage, and Assignment of Leases and Rents and Security Agreement," recorded in the land records of Richland County, South Carolina, in Book 1384 at Page 3723 (collectively the "Mortgage"). The real property encumbered by the Mortgage consists of four office buildings known as Fontaine Business Park (the "Property"). The Loan is also evidenced and secured by an Assignment of Leases and Rents, recorded in the land records of Richland County in Book 1384 at Page 3744 (the "Assignment of Leases"), and an Assignment of Agreements, Licenses, Permits and Contracts (the "Assignment of Agreements"). The Loan is the subject of a Loan Assumption Agreement, in which various tenant-in-common investors assumed all obligations under the Loan Documents, jointly and severally, along with Fontaine Business Park. This Loan Assumption Agreement was recorded in the land records of Richland County in Book 1384 at Page 3763, and its amendments are recorded in Book 1399 at Page 3207. Defendants Fontaine Business Park 2-31 are those additional obligors who assumed the obligations set forth in the Loan Assumption Agreement and its amendments. The Note, Mortgage, Assignment of Leases, Assignment of Agreements, Loan Assumption Agreement and amendments, and all other documents related to the Loan are referred to as the "Loan Documents." On May 16, 2008, Greenwich Capital assigned the Loan Documents to the Royal Bank of Scotland PLC ("RBS"). On April 2, 2009, RBS assigned the Loan Documents to Plaintiff.

Among other things, the Loan Agreement requires Defendant Fontaine Business Park to make monthly contributions to various reserve accounts that are to be held as custodial accounts by Plaintiff for the benefit of Fontaine Business Park and the Property. The reserve accounts include a Capital Expense Reserve, a Rollover Reserve, and a Tax and Insurance Account. The Loan Agreement established a monthly contribution of $5,249.00 for the Capital Reserve Account; $21,086.50 for the Rollover Reserve Account; and one-twelfth of the estimated tax and insurance expenses for the Tax and Insurance Account. Section 3.4 of the Loan Agreement authorizes Plaintiff to reassess the monthly contributions to the Capital Reserve Account "from time to time in its reasonable discretion (based upon its then current underwriting standards)." Section 3.5 of the Loan Agreement further authorizes Plaintiff to increase monthly contributions to the Rollover Reserve Account "if [Plaintiff] determines in its reasonable judgment that the funds in the Rollover Reserve Account will be insufficient to pay (or in excess of) the amounts due or to become due for Approved Leasing Expenses." Section 3.3.1 of the Loan Agreement provides that Plaintiff may increase the monthly contributions to the Tax and Insurance Account if it "determines in its reasonable judgment that the funds in the Tax and Insurance Account will be insufficient to pay (or in excess of) the Taxes or Insurance Premiums next coming due."

According to the Affidavit of Elliot M. Liffman, manager of RCC Asset Management Company, LLC, Plaintiff's manager, Plaintiff requested a projected budget (the "Capital Budget") from Defendants on multiple occasions between September 2010 and May 2011. Liffman stated that as early as December 2010, Defendants' onsite property manager, Gullane I, LLC d/b/a CBRE Columbia ("CB Richard Ellis") advised Plaintiff it had submitted the Capital Budget to Defendants for review and was awaiting their approval before releasing it to Plaintiff. In May 2011, CB Richard Ellis released the Capital Budget to Plaintiff. Defendants claim they did not approve the Capital Budget. Mr. Liffman states that the Capital Budget reflected the capital needs for three years for repairs, replacements, and construction of tenant improvements for existing and projected vacant spaces within the Property. Plaintiff claims costs in the Capital Budget were substantially greater than existing and projected balances in the reserve accounts.

On July 11, 2011, Plaintiff provided notice to Defendants' representative of an increase in the amount of monthly payments required for the reserve accounts in order to cure the alleged shortfalls projected in the Capital Budget. The reassessed amount of the monthly contribution to the Capital Reserve Account increased from $5,249.00, the amount at inception of the Loan

Documents, to $54,476.34. Plaintiff also reassessed the monthly contribution to the Rollover Reserve Account from $21,086.50 to $159,472.91. The Rollover Account is required to have a minimum balance of $250,000.00.

From September to December 2011, Defendants paid four months of increased monthly contributions into the reserve accounts, or approximately $736,000.00, while continuing to contest the reasonableness of the reassessments. In January 2012, Defendants stopped making the increased monthly payments and began making payments of $5,249.00 into the reserve accounts. Plaintiff objected to payment of the reduced amount and claimed Defendants breached the Loan Agreement. On April 1, 2012, Plaintiff advised CB Richard Ellis of an increase in the required monthly contributions into the Tax and Insurance Account from $722.00 to $5,272.97. Defendants paid the increased contributions to the Tax and Insurance Account in April, May, and June 2012. However, in July 2012, Defendants returned to paying $722.00 into the Tax and Insurance Account. Plaintiff claims the amount Defendants paid into the Tax and Insurance Account is insufficient and Defendants are not permitted to reduce their payments into the Capital Reserve Account, Rollover Reserve Account, or Tax and Insurance Account without Plaintiff's consent under the Loan Agreement.

On July 27, 2012, Plaintiff provided notice to Defendants that failure to pay the increased amount into the reserve accounts within ten days would constitute an event of default pursuant to the Loan Agreement. Defendants responded, reasserting that the amount of the increased contributions was unreasonable and unsubstantiated and that there was never a deficiency in the reserve accounts. Defendants did not make the increased payments into the reserve accounts and Plaintiff accelerated the entire debt and applied the default rate of interest to the entire unpaid debt. Plaintiff further demanded, pursuant to Section 5.12.2 of the Loan Agreement, that the current management agreement for the Property be terminated and Fontaine Management, LLC, the property manager under that agreement, be replaced with a manager acceptable to Plaintiff. Plaintiff also terminated Defendants' license to continue to collect rents and profits generated by the Property and directed that those funds be held by the onsite manager, CB Richard Ellis.

Plaintiff further alleges Defendants failed to pay the debt servicing payment for October 2012 and November 2012, which also constituted events of default. Defendants claim they notified Plaintiff they were entitled to a credit to be applied to the debt servicing payments

because Defendants previously paid increased monthly contributions to Plaintiff and Plaintiff was in possession of excess funds in the amount of $550,424.00.

On November 20, 2012, Plaintiff filed a Summons, Complaint, and Lis Pendens. On November 21, 2012, Plaintiff filed this Motion for Appointment of a Receiver. In their Motion, Plaintiff claims Defendants are in default under the Loan Agreement for failing to make increased payments into the reserve accounts and failing to make any payment on the Loan balance in the months of October 2012 and November 2012. As a result of the default, Plaintiff claims it is entitled to all rents and profits generated by and associated with the Property. Plaintiff alleges Defendants failed to comply with the termination of their right to collect rents and profits and also failed to direct CB Richard Ellis to hold the rents and profits. On December 3, 2013, Defendants filed an Answer including Affirmative Defenses and Counterclaims and disputing the existence of an event of default.

DISCUSSION

Plaintiff seeks appointment of a receiver pursuant to the provisions of the Loan Documents and S.C. Code Ann. § 15-65-10, *et seq.* for the purpose of collecting and distributing the rents, accounts receivable, and profits from the Property in accordance with the terms of the Mortgage and Assignment of Leases. Plaintiff seeks to pay the receiver's fees and costs from any rents received and collected. Plaintiff seeks receivership for the duration of the foreclosure action, ending on the date of the issuance of a foreclosure deed to the Property or a court order terminating the receivership, whichever occurs first. Plaintiff argues it is entitled to a receiver because: (1) Defendants failed to pay debt servicing payments in October 2012 and November 2012; (2) Defendants failed to pay the increased monthly payments into the Taxes and Insurance Account, Capital Expense Reserves, and Rollover Reserves; and, (3) the rents or profits from the Property are in danger of being lost or materially injured or impaired pursuant to S.C. Code Ann. § 15-65-10. This Court finds Plaintiff is entitled to a receiver on the sole basis that Defendants failed to pay debt servicing payments in October 2012 and November 2012.

1. Failure to Pay Debt Servicing Payments

Plaintiff claims Defendants are in default under the terms of the Loan Documents for failure to pay debt servicing payments in October 2012 and November 2012, and as a result of the default, Plaintiff is entitled to collect all rents and profits generated by the Property. Section 8.1 of the Loan Agreement states that an "Event of Default" occurs if "any portion of the Debt is

not paid when due." Plaintiff alleges that pursuant to the terms of the Mortgage, Fontaine Business Park consented to the appointment of a receiver in the event of default. Paragraph 10 of the Mortgage contains the following language:

> Remedies.
>
> (a) Upon the occurrence of any Event of Default, Mortgagee may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against Mortgagor and in and to the Property . . . including . . . :
>
> > (viii) apply for the appointment of a trustee, receiver, liquidator or conservator of the Property, without notice and without regard for the adequacy of security for the Debt and without regard for the solvency of the Mortgagor or of any person, firm or other entity liable for the payment of the Debt.

Defendants claim the appointment of a receiver is not appropriate because Plaintiff has not established an event of default, all payments due under the Loan Documents are current, and Defendants have otherwise complied with all obligations under the Loan Documents. "The appointment of a receiver is a drastic remedy, and should be granted only with reluctance and caution." *Midlands Utility, Inc. v. South Carolina Dept. of Health and Environmental Control*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989); *Vasiliades v. Vasiliades*, 231 S.C. 366, 98 S.E.2d 810 (1957).

This Court finds Plaintiff is entitled to the appointment of a receiver under the express language of the Loan Documents. Defendants' failure to pay the debt service payments for October 2012 and November 2012 constituted events of default, whereby Plaintiff is entitled to protect its rights in the Property by seeking the appointment of a receiver. Defendants claim they are not in default for failing to make the debt service payments because Plaintiff was in possession of excess funds as a result of the reassessments. Defendants claim they are entitled to a refund of the improper payments to the reserve accounts or to have the excess funds in the reserve accounts credited to the debt service payments. Despite Defendants' contentions that the reassessed monthly contributions were unreasonable, there is no specific provision in the Loan Agreement that would allow Defendants to apply money previously paid into the reserve accounts to a debt service payment. Therefore, Defendants' failure to make payments for

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October 2012 and November 2012 constituted events of default and Plaintiff is entitled to the appointment of a receiver pursuant to the terms of the Loan Documents.

2. **Failure to Make Increased Monthly Contributions into the Reserve Accounts**

Plaintiff further claims Defendants' failure to make increased monthly contributions into the reserve accounts constituted an event of default, entitling Plaintiff to seek the appointment of a receiver. Defendants claim they are not in default because the amount of the increased monthly contributions was unreasonable and unsubstantiated. Plaintiff is authorized to increase the monthly contributions to the Rollover Reserve Account "if [Plaintiff] determines in its reasonable judgment that the funds in the Rollover Reserve Account will be insufficient to pay (or in excess of) the amounts due or to become due for Approved Leasing Expenses." Although Plaintiff claims it increased monthly contributions to the Rollover Reserve Account based on reasonable judgment, Plaintiff has not established that failure to pay increased amounts to the Rollover Reserve Account constituted an event of default pursuant to the Loan Agreement. Therefore, Plaintiff is not entitled to appoint a receiver on the basis that Defendants failed to make increased contributions to the Rollover Reserve Account.

Plaintiff is authorized to reassess the monthly contributions to the Capital Reserve Account in its reasonable discretion "based upon its then current underwriting standards." According to testimony at the hearing, when Plaintiff received the Capital Expense Budget from the property manager CB Richard Ellis, it realized the reserve accounts would be depleted by the projected expenses. Therefore, Plaintiff increased the monthly contributions to the Capital Reserve Account. Defendants claim they requested that Plaintiff substantiate the increased contributions under the current underwriting standards. Plaintiff claims that because Defendants' property manager, CB Richard Ellis, submitted the Capital Expense Budget, all parties understood that the reassessments were based upon that Budget. There appears to be a dispute as to whether the monthly contributions to the Capital Reserve Account were actually reassessed using current underwriting standards. Plaintiff has not provided evidence that the monthly contributions to the Capital Reserve Account were reassessed under current underwriting standards or that Defendants' failure to pay the increased amounts constitutes an event of default. Therefore, Plaintiff is not entitled to a receiver on this basis.

The Loan Agreement further provides that Plaintiff may increase the monthly contributions to the Tax and Insurance Account if it "determines in its reasonable judgment that

the funds in the Tax and Insurance Account will be insufficient to pay (or in excess of) the Taxes or Insurance Premiums next coming due." On June 11, 2012, Ronald Guerena, Vice President of Marsh Risk & Insurance Services, wrote Plaintiff and stated he estimated the monthly payment for insurance on the location would be, at most, $3,100.00 per month. Plaintiff increased the monthly payment from $722.00 to $5,272.00 per month. Plaintiff has not established that Defendants' failure to pay the increased amount into the Tax and Insurance Account constituted an event of default under any provision in the Loan Documents. Therefore, Plaintiff is not entitled to a receiver on this basis.

3. **S.C. Code Ann. § 15-65-10**

Plaintiff claims it is entitled to a receiver pursuant to S.C. Code Ann. § 15-65-10, which provides in part, "[a] receiver may be appointed by a judge of the circuit court, either in or out of court: (1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and which is in the possession of an adverse party and the property, or its rents and profits, are in danger of being lost or materially injured or impaired, except in cases when judgment upon failure to answer may be had without application to the court." S.C. Code Ann. § 15-65-10. Paragraph 2 of the Mortgage provides:

> Mortgagor hereby grants and assigns to Mortgagee the right, at its option, upon revocation of the license granted herein, to enter upon the Property in person, by agent or by court-appointed receiver to collect the Rents. Any Rents collected after the revocation of such license may be applied toward payment of the Debt in such priority and proportion as Mortgagee in its sole discretion shall deem appropriate.

According to the affidavit of Elliot Liffman, Defendants continue to exercise control over the rents and profits and failed or refused to comply with the termination of their rights to collect rents and profits or to direct CB Richard Ellis to hold the rents and profits. At the hearing, Plaintiff alleged that, upon review of the cash flow statements for November 2012 and December 2012, CB Richard Ellis made at least one disbursement in December 2012 for a "Legal Expense" to an unknown source in the amount of $32,922.90, to which Plaintiff objects. Plaintiff also testified that it was doubtful that the rents and profits currently collected would meet the amount required for payments to the reserve accounts and to pay expenses. Without further evidence, it is speculative whether the rents and profits from the Property are in danger of being lost or

materially injured or impaired. For this reason, Plaintiff is not entitled to the appointment of a receiver pursuant to Section 15-65-10.

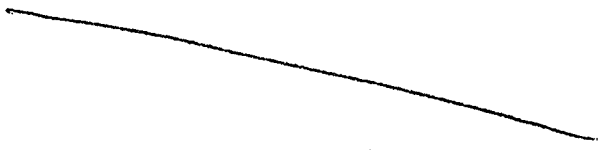
ORDER

For the reasons stated above, it is therefore **ORDERED** that Plaintiff DRV Fontaine, LLC's Motion for Appointment of a Receiver is **GRANTED.**

IT IS THEREFORE ORDERED:

1. A Receiver is hereby appointed to take possession of the Property and to perform the acts and functions that are more particularly hereinafter set forth, with such appointment to be effective upon Order of the Court. The names of three persons or entities suitable to perform the duties of Receiver shall be presented separately by the Plaintiff and Defendants to the Chief Administrative Judge within ten (10) days. The Chief Administrative Judge shall select the Receiver who shall serve pursuant to the terms of this Order, unless otherwise agreed upon by the parties.
2. The Receiver is directed to demand and take over from Fontaine Business Park and/or any agent acting for Fontaine Business Park, all funds on hand, including all rents and profits, bank accounts, and all books of account and any and all other financial records of every character relating to the rents, profits, issues, and expenses of the Property.
3. Defendant Fontaine Business Park and its agents, servants, and employees are ordered to cooperate with the Receiver and appear at such times as may be required to sign such documents as may be necessary to evidence the Receiver's rights, powers, and entitlements with regard to the Property as herein provided, and are ordered to furnish such records and other information as the Receiver may require, and execute such documents as are necessary or convenient for the continued operation of the Property.
4. The Receiver is authorized to offer for rent or lease such portions of the Property as are available for such periods of time as may be within or extend beyond the period of the Receivership, and to collect all rentals and profits, including revenues, deposits, accounts, cash, issues, charges for services rendered, and other consideration of whatever form received by or paid to or for the account or benefit of Fontaine Business Park or its agents or employees from any and all sources arising from or attributable to the Property.
5. The Receiver is authorized to disburse such funds as may be required from time to time for the management, maintenance, and upkeep of the Property.

6. The Receiver is directed to use all reasonable efforts to obtain maximum revenue for the Property and to operate the Property while protecting the assets of the Property. For this purpose, the Receiver may employ the services of management companies or agents.
7. The Receiver is authorized to employ, discharge, supervise, and pay, on behalf of the Receivership estate all brokers, attorneys, accountants, servants, managing agents, employees, or maintenance and/or service personnel considered by the Receiver to be necessary for the efficient management of the Property.
8. The Receiver is further authorized and required to perform or cause to be performed all services, in addition to the foregoing, necessary for the management of the Property, including institution of legal actions in the name of and at the expense of the Receivership estate to enforce the collection of rents, charges, and fees.
9. The Receiver is directed, on behalf of the Receivership estate, to procure or maintain, at the expense of the Receivership estate, insurance for the protection for Receiver, the owner of the Property, the Plaintiff, and any other mortgage creditors and lien claimants.
10. The Receiver shall file with the Clerk of Court and forward to counsel for the parties monthly accountings certified by the Receiver to be accurate, reflecting all receipts and disbursements made during the preceding accounting period, applicable to the management of the Property.
11. The compensation of the Receiver shall be set by the Court upon presentation of evidence to demonstrate an appropriate rate of compensation.
12. The Court finds that Plaintiff is entitled to payment of all rents and profits, and proceeds, after payment of operational expenses, including the Receiver's monthly compensation at the rate set forth by the Court. The payment of such net income realized from the Property shall be applied, in the sole discretion of Plaintiff, as a credit against the outstanding balance owed under the Note.



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13. The Receiver may apply to this Court for further and other instructions and for such further power as may be necessary to enable the Receiver to properly carry out the terms of this Order and fulfill its duties as Receiver.

AND IT IS SO ORDERED.

ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
June 3, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2014-000377
Case No. 2012-CP-40-7752

DRV Fontaine, LLC.,.....Respondent,

v.

Fontaine Business Park, LLC
Fontaine Business Park 2, LLC
Fontaine Business Park 3, LLC
Fontaine Business Park 4, LLC
Fontaine Business Park 5, LLC
Fontaine Business Park 6, LLC
Fontaine Business Park 7, LLC
Fontaine Business Park 8, LLC
Fontaine Business Park 9, LLC
Fontaine Business Park 10, LLC
Fontaine Business Park 11, LLC
Fontaine Business Park 12, LLC
Fontaine Business Park 13, LLC
Fontaine Business Park 14, LLC
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Fontaine Business Park 24, LLC
Fontaine Business Park 25, LLC
Fontaine Business Park 26, LLC
Fontaine Business Park 27, LLC
Fontaine Business Park 28, LLC

Fontaine Business Park 29, LLC
Fontaine Business Park 30, LLC
Fontaine Business Park 31, LLC, ... Appellants.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the Respondent's Motion to Dismiss, by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to counsel at the addresses shown below, on August 14, 2014:

Tucker S. Player, Esquire
PLAYER LAW FIRM, LLC
1415 Broad River Road
Columbia, SC 29210

Brent B. Young, Esquire
BAKER DONELSON BEARMAN
CALDWELL & BERKOWITZ, PC
Post Office Box 3038
Johnson City, TN 37602

Ann Shuler
Ann Shuler

August 14, 2014

Robert L. Widener
SC Bar No. 6089

rwidener@mcnair.net
T 803.799.9800
F 803.753.3278

Via Courier

Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: DRV Fontaine, LLC -v- Fontaine Business Park, LLC, et al.
Appellate Case No. 2014-000377

Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven copies of the Respondent's Motion to Dismiss, the original and one copy of the Certificate of Service, and our check in the amount of $25.00. Please file the motion in your office and return a file stamped copy to me via our courier.

By copy of this letter, we are serving counsel for the Appellants with a copy of the motion.

Respectfully yours,

McNAIR LAW FIRM, P.A.

Robert L. Widener

Robert L. Widener

RLW/as
Enclosures

cc: Brent B. Young, Esq.
Tucker S. Player, Esq.

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