THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr.,
Circuit Court Judge



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Case No. 2013-CP-10-2624

Appellate Case No. 2015-001149

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PNC Bank, N.A., successor to RBC Bank (USA),

Respondent,

v.

Liberty Cottages, LLC; GW Dorchester, LLC; USS Clarksville, LLC; Liberty Cottages Land, LLC; Royal Beach Properties, LLC; The Brothers of SC, LLC; Deborah Rice-Marko a/k/a Deborah G. Rice-Marko; Evan R. Marko; and John E. Marko, Jr.,

Appellants.

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# FINAL BRIEF OF RESPONDENT
# PNC BANK, NATIONAL ASSOCIATION, SUCCESSOR TO RBC BANK (USA)

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## COUNTER-STATEMENT OF ISSUES ON APPEAL

I. **Did the trial court properly conclude that Appellants waived their right to a jury trial on their counterclaims in this foreclosure matter based on loan documents containing a waiver of the right to a jury trial?**

II. **Have Appellants raised legal, compulsory counterclaims entitling them to a jury trial on their counterclaims in this equitable foreclosure action?**

## COUNTER-STATEMENT OF THE CASE[1]

Collectively, Appellants have nine loans in excess of $23 million with Respondent PNC Bank, National Association, successor to RBC Bank (USA) ("Respondent"). (Complaints; R. 20-814.) The loans span more than a decade, with the earliest origination in 2000, and were repeatedly modified over the years. (*Id.*) Seven of the nine loans were cross-defaulted and cross-collateralized through modifications negotiated with Appellants' counsel in January 2009. (*Id.*) After eight of the nine loans matured in 2010, all of the loans were cross-defaulted and cross-collateralized through a Forbearance Agreement and related amendments negotiated with Appellants' counsel in July 2011. (*Id.*) Appellants' nine loans are described in more detail as follows:

(1) "Royal Beach Loan:" loan to D. Rice-Marko on May 19, 2000, in the original principal amount of $2,500,000, which was subsequently assumed by Royal Beach Properties, LLC.

This loan was originally secured by a mortgage dated May 19, 2000, on Lot 11 on Royal Beach Drive on Kiawah Island ("Kiawah Lot").

This loan was renewed and/or modified on May 18, 2001, April 14, 2002, May 11, 2004, May 19, 2005, March 23, 2006, April 17, 2007, July 18, 2007, August 26, 2008, January 26, 2009, January 26, 2010, February 19, 2010, and July 15, 2011.

This loan is guaranteed by D. Rice-Marko, E. Marko, and J. Marko.

(2) "Brothers $1.1M Loan:" loan to The Brothers of NC, LLC, on August 7, 2001, in the original principal amount of $1,100,000.

This loan was originally secured by a mortgage dated August 7, 2001, on Lot 24, Dunes Ocean Front Development in Horry County ("Horry County Lot").

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[1] Appellants improperly include contested matter in their Statement of the Case in violation of Rule 208(b)(1)(C), SCACR. Appellants' Statement of the Case contains numerous factual inaccuracies and improper conclusions and matters. In accordance with the Rules, Respondent sets forth its own Statement of the Case.

This loan was renewed and/or modified on July 18, 2002, August 11, 2003, August 9, 2004, August 22, 2005, August 30, 2006, August 28, 2007, August 26, 2008, July 29, 2009, January 29, 2010, and July 15, 2011.

Because The Brothers of NC, LLC, merged into The Brothers of SC, LLC, on August 3, 2004, subsequent renewals and/or modifications were made to The Brothers of SC, LLC.

This loan is guaranteed by E. Marko and J. Marko.

(3) "DRM Loan:" loan to D. Rice-Marko on January 13, 2005, in the original principal amount of $5,000,000.

This loan was originally secured by a Commercial Pledge Agreement dated January 13, 2005, granting a security interest in D. Rice-Marko's AG Edwards & Sons brokerage account with a value at the time of approximately $5.6M. The brokerage account generally consisted of Wachovia stock.

This loan was renewed and/or modified January 11, 2007, January 26, 2009, January 26, 2010, February 23, 2010, and July 15, 2011.

(4) "Clarksville Loan:" loan to D. Rice-Marko on January 24, 2005, in the original principal amount of $550,400, which was subsequently assumed by USS Clarksville, LLC.

As set forth in the next subsection, this loan was originally cross-collateralized with the ROA $1.763 Loan.

This loan was renewed and/or modified on August 30, 2006, March 22, 2007, February 25, 2008, January 26, 2009, January 26, 2010, February 23, 2010, and July 15, 2011.

This loan is guaranteed by D. Rice-Marko.

(5) "ROA $1.763M Loan:" loan to ROA, LLC, on June 24, 2005, in the original principal amount of $1,763,000.

This loan was originally cross-collateralized with the Clarksville Loan above. The funds from these loans were used to purchase three parcels of land in Park West in Mount Pleasant: Parcel 27-2 consisting of 12.011 acres (TMS No. 594-12-00-470); Parcel 27-3 consisting of 4.817 acres (TMS No. 594-12-00-471); and Parcel 27-4 consisting of 7.68 acres (TMS No. 594-12-00-472) (collectively, "Park West Property").

Both loans were secured by a mortgage by D. Rice-Marko dated June 24, 2005, on Parcel 27-3 and by a mortgage on behalf of ROA, LLC, dated June 24, 2005, on Parcels 27-4 and 27-2.

This loan was renewed and/or modified on August 30, 2006, February 26, 2007, March 22, 2007, February 25, 2008, January 26, 2009, January 26, 2010, February 24, 2010, and July 15, 2011.

This loan is guaranteed by D. Rice-Marko and Liberty Cottages Land, LLC.

(6) "Dorchester Loan:" loan to Evelyn D. Rice on November 18, 2005, in the original principal amount of $2,350,000, which was subsequently assumed by GW Dorchester, LLC.

This loan was originally secured by a mortgage dated November 18, 2005, on approximately 2.5 acres of land leased to Goodwill in Dorchester County ("Goodwill Property").

This loan was renewed and/or modified on December 28, 2006, January 16, 2008, February 26, 2008, July 27, 2009, January 22, 2010, and July 15, 2011.

This loan is guaranteed by D. Rice-Marko, E. Marko, and J. Marko.

(7) "Liberty Cottages Loan:" loan to Liberty Cottages, LLC, on March 22, 2007, in the original principal amount of $2,500,000.

The purpose of these funds was for the development of the Park West Property, which previously secured the ROA $1.763M loan and the Clarksville Loan as set forth above. This loan was originally secured by new mortgages dated March 22, 2007, on the Park West Property executed by both ROA and Clarksville. In other words, the ROA $1.763M Loan, the Clarksville Loan, and the Liberty Cottages Loan have all been cross-collateralized since their origination.

This loan was renewed and/or modified on February 25, 2008, January 26, 2009, January 26, 2010, February 23, 2010, and July 15, 2011.

This loan is guaranteed by D. Rice-Marko, E. Marko, and J. Marko.

(8) "ROA $3.92M Loan:" loan to ROA, LLC, on November 9, 2007, in the original principal amount of $3,920,000.

This loan was originally secured by a mortgage dated November 9, 2007, on 438 King Street in Charleston ("King Street Property").

This loan was renewed and/or modified July 15, 2011.

This loan is guaranteed by D. Rice-Marko.

(9) "Brothers $4.9M Loan:" loan to The Brothers of SC, LLC, on October 11, 2007, in the original principal amount of $4,900,000.

This loan was originally secured by a mortgage dated October 11, 2007, of property located at the intersection of West Evans Street and Cashua Drive in Florence leased to BB&T and others ("Florence Property").

This loan was renewed and/or modified on January 26, 2009, January 21, 2010, and July 15, 2011.

This loan is guaranteed by E. Marko and J. Marko.

(Complaints; R. 20-814.)

Due to the decline in the value of Rice-Marko's Wachovia stock throughout 2008, the DRM Loan became under-collateralized and did not meet the parties' agreed-upon loan-to-value ratio. (D. Rice-Marko Affidavit ¶¶ 6-12; R. 1650-52.) To remedy this issue, in January 2009, the parties, represented by their respective attorneys, entered into loan modifications which cross-collateralized six of the nine loans with the DRM Loan (the "January 2009 Modifications"): (a) the three loans on the Park West Property (which were already cross-collateralized with one another), the ROA $1.763M Loan, Clarksville Loan, and Liberty Cottages Loan; (b) the Royal Beach Loan on the Kiawah Lot; (c) The Brothers $4.9M Loan on the Florence Property; and (d) the ROA $3.92M Loan on the King Street Property. (Complaints; R. 20-814; DRM Appellants' Answers to Second Set of Interrogatories ¶ 24; R. 1716-17; Brothers Appellants' Answers to Second Set of Interrogatories ¶ 22; R. 1724-25.) As a result, seven of the nine loans were cross-collateralized in January 2009. (*Id.*)

All but one of the seven loans modified in January 2009 matured in December 2009, and these matured loans were extended through March 2010 by modifications in January 2010. (Respondent's Memorandum in Support of its Motion to Strike Appellants' Jury Demand & Refer Case to Master-in-Equity pp. 2-3; R. 1213-14.) In February 2010, these loans were again modified and extended through September 2010. (*Id.*) By September 15, 2010, eight of the nine loans had matured. Because they were not paid in full upon maturity, these eight loans were in default.

Based on the default, the parties, again represented by their respective attorneys, engaged in negotiations lasting at least ten months regarding the resolution of the outstanding debts. (DRM Appellants' Answers to Second Set of Interrogatories ¶ 26; R. 1717-18; Brothers Appellants' Answers to Second Set of Interrogatories ¶ 24; R. 1725-26.) Ultimately, the parties executed a Forbearance Agreement on July 15, 2011. (Complaints; R. 20-814.) In the Forbearance Agreement, the two loans which had not yet been cross-collateralized were added to the seven loans that had previously been cross-collateralized: (1) The Brothers $1.1M Loan on the Horry County Lot; and (2) the Dorchester Loan on the Goodwill Property. (*Id.*) As a result, all of the nine subject loans were cross-collateralized as of July 15, 2011. (*Id.*) In connection with the July 2011 Forbearance Agreement, Appellants executed Amended and Restated Notes for each of the nine loans, extending their maturity dates and reaffirming their previous loan obligations, along with Mortgage Modifications to effectuate the cross-collateralization (collectively, the "Amendments"). (*Id.*)

Throughout the parties' relationship, Appellants repeatedly negotiated and signed loan documents containing jury trial waivers, which waived their right to a jury trial in

any action or proceeding arising from or related to the subject notes, mortgages, and guarantees. (Respondent's Memorandum in Support of its Motion to Strike Appellants' Jury Demand & Refer Case to Master-in-Equity Ex. B; R. 1230-63.) Loan documents as early as 2001 contained jury trial waivers, much earlier than the January 2009 Modifications and July 2011 Forbearance Agreement and Amendments. (*Id.*) The jury trial waivers consistently appeared in loan documents in bold, underline, and/or capital lettering in a conspicuous manner. (*Id.*) Over the years, Appellants waived their jury trial rights in **at least 84 loan documents**. (*Id.*)

The Forbearance Agreement at Section 4.8 required Appellants to provide their financial information, including financial statements and tax returns, to Respondent. (Forbearance Agreement § 4.8; CR. 77.) In June of 2012, Appellants refused to provide this financial information. (Affidavit of D. Rice-Marko ¶¶ 27-30; R. 1655-56.) PNC subsequently brought three separate foreclosure actions against Appellants on all of the properties securing the nine loans: (1) a foreclosure of the Kiawah Lot, Park West Property, and King Street Property in Charleston County; (2) a foreclosure of the Goodwill Property in Dorchester County; and (3) a foreclosure of the Florence Property in Florence County. (Complaints; R. 20-814; Order to Transfer and Consolidate filed June, 11, 2014; R. 5-6.)

Appellants GW Dorchester, LLC, The Brothers of SC, LLC, E. Marko, and J. Marko (collectively, "Brothers Appellants") and Appellants Liberty Cottages, LLC, USS Clarksville, LLC, Liberty Cottages Land, LLC, ROA, LLC, Royal Beach Properties, LLC, and D. Rice-Marko (collectively, "DRM Appellants") each filed Amended Answers and Counterclaims, asserting identical counterclaims in the three separate

actions for: (1) breach of the contracts between the parties, including but not limited to, the Forbearance Agreement; (2) breach of the covenant of good faith and fair dealing implied in the contracts between the parties, including but not limited to, the Forbearance Agreement; (3) breach of the purported duty of confidentiality; (4) civil conspiracy; (5) negligence/gross negligence; and (6) negligent misrepresentation. (Amended Answers and Counterclaims; R. 815-54.) The DRM Appellants asserted an additional counterclaim for violation of South Carolina's Unfair Trade Practices Act in each case. (DRM Appellants' Amended Answer and Counterclaim; R. 815-835.) The three actions were subsequently consolidated into the Charleston County civil action number 2013-CP-10-2624. (Order to Transfer and Consolidate filed June, 11, 2014; R. 5-6.)

Appellants' counterclaims are all based on two sets of allegations. (Amended Answers and Counterclaims; R. 815-54.) First, Appellants allege PNC did not work with them in good faith on their January 2009 Modifications and July 2011 Forbearance Agreement and Amendments and, more specifically, should not have required the cross-collateralization and cross-default provisions as part of those modifications. (Amended Answers and Counterclaims; R. 815-54; Affidavit of D. Rice-Marko at ¶¶ 12-18 and ¶ 23; R. 1651-54.) Next, Appellants allege that after the July 2011 Forbearance Agreement and Amendments, PNC improperly disclosed their "confidential information" to third-parties to Appellants' detriment. (Amended Answers and Counterclaims; R. 815-54; Affidavit of D. Rice-Marko at ¶¶ 29-30 and 37-39; R. 1655-56 and 1658-59.)

Appellants demanded a jury trial on their counterclaims. (Amended Answers and Counterclaims; R. 815-54.) PNC filed a Motion to strike Appellants' jury demand and have this case referred to the Master-in-Equity for Charleston County. (Motion to Strike

Appellants' Jury Demand & Refer Case to Master-in-Equity; R. 1209-11.) A hearing was held on this matter on April 9, 2015. (Transcript of Hearing; R. 1508-1631.) In an order dated April 29, 2015, and filed May 6, 2015, the circuit court granted PNC's motion to strike Appellant's jury demand. (Order Denying Respondent's Motion for Summary Judgment, Denying Respondent's Motion to Refer Case to Master, and Granting Respondent's Motion to Strike Jury Demand at pp. 2-3; R. 14-15.) Appellants filed a motion to alter or amend the circuit court's ruling on the jury demand pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on May 1, 2015. (Appellants' Motion Pursuant to SCRCP 59(e); R. 1502-07.) On May 13, 2015, the circuit court filed its Amended Order granting PNC's motion to strike Appellant's jury demand ("Amended Order"). (Amended Order at p. 1; R. 16.)

Appellants filed their Notice of Appeal May 26, 2015, and their Initial Brief July 27, 2015. This brief follows.

## ARGUMENT[2]

### I. The circuit court correctly found that Appellants waived their right to a jury trial on their counterclaims by executing loan documents containing valid, enforceable jury trial waivers.

Appellants admit they executed numerous jury trial waivers and do not dispute that their counterclaims fall within the scope of these waivers. Nevertheless, Appellants argue that those waivers should not be enforced in this matter. Appellants' Brief pp. 17-32. Appellants argue that the only loan documents at issue are the documents which caused the loans to be cross-defaulted and cross-collateralized—namely, the January 2009 Modifications and the July 2011 Forbearance Agreement and Amendments—and that all of their other jury trial waivers cannot be considered. *Id.* at 19 ("(A)ll of the jury trial waivers signed by Appellants are not at issue in this case. Over the course of the approximately fifteen year banking relationship between the parties, Appellants signed documents that contained jury trial waivers. However, the agreements Respondent seeks to enforce through this foreclosure action are the modified, cross-collateralized, cross-defaulted agreements, the agreements Appellants contend were the result of Respondent's

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[2] As in the Statement of the Case, Appellants improperly include contested matter in the argument of their brief and spend a substantial portion of their brief discussing the merits of their counterclaims. Appellants' Brief pp. 20-30. Appellants' discussion contains numerous factual inaccuracies, improper conclusions, and matters and issues which are not before this Court. For example, Appellants assert they had "no choice" but to enter the January 2009 Modifications to cure her default in the loan-to-value requirement on the DRM Loan. Appellants' Brief p. 5. Appellants ignore the fact that Mrs. Rice-Marko had the option to pay down the loan balance or allow that loan to remain in default without entering into the January 2009 Modifications and cross-collateralizing any properties. Further, Appellants fail to mention that they were represented by counsel in connection with the January 2009 Modifications. (DRM Appellants' Answers to Second Set of Interrogatories ¶¶ 24, 26; R. 1716-18; Brothers' Appellants' Answers to Second Set of Interrogatories ¶¶ 22, 24; R. 1724-26.) Because these issues are not germane to this appeal, they are not specifically addressed any further herein. However, Respondent in no way admits the contested facts set forth by Appellants or waives its right to refute the merits of this case before the circuit court.

egregious misconduct. Those are the only agreements at issue and, as a result, the jury trial waivers contained in those documents are the only jury trial waivers at issue.").[3]

Appellants reason that their counterclaims attack the enforceability of the January 2009 Modifications and the July 2011 Forbearance Agreement and Amendments, and if they ultimately succeed on these counterclaims, these agreements and all prior loan agreements—and the jury trial waivers contained therein—would be rescinded.[4] Appellants' Brief pp. 18-32. In other words, Appellants make the unsupported argument that their obligations to repay their $23M+ loan obligations—along with their waivers of the right to a jury trial—simply vanish if these two modifications are invalidated, rather than restoring the status quo of the parties' loan relationship prior to these modifications.

The circuit court properly rejected Appellants' argument and found their attempt to invalidate the "restructured" loan documents in this litigation was not determinative of Appellants' right to a jury trial on their counterclaims. (Amended Order at pp. 3-4; R. 18-19.) The circuit court reasoned that if the January 2009 Modifications and July 2011 Forbearance Agreement and Amendments are enforceable, the jury trial waivers in these

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[3] Appellants' pleadings and Mrs. Rice-Marko's Affidavit confirm that their only challenge is to the January 2009 Modifications and the July 2011 Forbearance Agreement and Amendments. (Amended Answers and Counterclaims at ¶¶ 23; R. 823-24 and 844-45; D. Rice-Marko Affidavit ¶¶ 6-18 and 23; R. 1650-54.) Arguments made by counsel for the DRM Appellants at the hearing on PNC's Motion to Strike Appellants' Jury Demand & Refer Case to Master-in-Equity also confirm this limited challenge: "I wish we could go back. I wish we could go back before the Forbearance Agreement. And I wish they would put us back before there was cross-collateralization, and before they synced (ph) up all the maturities, and before they tied up all the equity in these properties, in the – in the set of modifications just prior to the Forbearance Agreement." (Transcript of Hearing at 15:10-17; R. 1522.)

[4] As pleaded, the only counterclaims that challenge the enforceability of any loan documents are Appellants' claims for breach of the covenant of good faith and fair dealing and breach of the purported duty of confidentiality. (Amended Answers and Counterclaims; R. 815-854.)

restructured loan documents would be valid. (*Id.*) Alternatively, the circuit court held that should Appellants prevail at trial and these restructured loan documents are rescinded, "the action would revert back to the language of the original notes and guarantees that contained valid jury trial waivers." (*Id.*) The circuit court correctly held that Appellants cannot avoid the jury trial waivers that they signed in loan documents well prior to the January 2009 Modifications and July 2011 Forbearance Agreement and Amendments of which they now complain. Appellants cannot invalidate the numerous enforceable loan documents, loans, and their jury waivers.

### A. Appellants waived their right to a jury trial in the January 2009 Modifications and July 2011 Forbearance Agreement and Amendments, and these waivers are valid and enforceable.

Appellants are sophisticated parties who were represented by their own counsel in the negotiation of the January 2009 Modifications and July 2011 Forbearance Agreement and Amendments, therefore, Appellants are bound by the jury trial waivers therein. "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 664, 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.* Although this rule is subject to the limited exception where someone is "ignorant and unwary," a party is bound by the terms of the documents

they sign where they possess "education, business experience and intelligence." *Id.* at 664, 582 S.E.2d at 440-41. Moreover, South Carolina courts routinely enforce contractual waivers where parties were represented by counsel in connection with the contract. *See Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004) (noting that the party challenging an arbitration provision was "represented by independent counsel" in connection with the agreement containing the provision and enforcing arbitration against them as a result); *Hardee v. Hardee*, 348 S.C. 84, 558 S.E.2d 264 (Ct. App. 2001) (upholding a waiver of rights to alimony and attorneys' fees partly because waiving party was represented by counsel); *see also In re Sea Turtle Cinemas, Inc.*, 440 B.R. 438, 442-43 (Bankr. D.S.C. 2010) (noting that under South Carolina law, contractual provisions are not invalidated "where borrowers are generally sophisticated and represented by counsel").

Here, Appellants have college educations, possess significant investment and business experience, and were represented by their own attorneys in connection with both the January 2009 Modifications and the July 2011 Forbearance Agreement and Amendments. (Transcript of Hearing at 6:10-24 and 10:13-11:8; R. 1513 and 1517-18; DRM Appellants' Answers to Second Set of Interrogatories ¶¶ 24, 26; R. 1716-18; Brothers' Appellants' Answers to Second Set of Interrogatories ¶¶ 22, 24; R. 1724-26.) They are, therefore, bound by those documents and the jury trial waivers contained therein.

**B. South Carolina courts enforce jury trial waivers even where they are contained in documents which have been alleged to be unenforceable.**

Moreover, the jury trial waivers in the January 2009 Modifications and July 2011 Forbearance Agreement and Amendments may be upheld even though Appellants

challenge their enforceability and seek to rescind those loan agreements. The South Carolina Supreme Court recently upheld jury trial waivers signed by a borrower and guarantor even though the borrowers asserted counterclaims which challenged the validity of the loan documents containing the jury trial waivers and sought to rescind those documents. *See Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014) (finding waivers enforceable as a matter of law). In *Blackburn*, Wachovia sought to foreclose a loan against Mr. and Mrs. Blackburn, a borrower and guarantor, respectively. *Id.* at 324-26, 755 S.E.2d at 439. Mr. and Mrs. Blackburn asserted counterclaims against Wachovia for breach of contract, civil conspiracy, negligent misrepresentation, and violation of the South Carolina Unfair Trade Practices Act—claims also brought by Appellants in this matter—in addition to counterclaims for promissory estoppel, breach of contract accompanied by a fraudulent act, breach of fiduciary duty, and fraud/fraud in the inducement. *Id.* at 326, 755 S.E.2d at 439-40. Like Appellants, Mr. and Mrs. Blackburn sought both monetary damages and rescission of their loan contracts as a remedy for their counterclaims. *Id.* at 326-27, 755 S.E.2d at 440. Mr. and Mrs. Blackburn demanded a jury trial on their counterclaims, and Wachovia moved to strike their demand based on the jury trial waivers contained in the Blackburns' note and guaranty. *Id.* at 327, 755 S.E.2d at 440. The Supreme Court ruled that the jury trial waivers—contained in the note and guaranty which the Blackburns sought to rescind—were valid and enforceable. 407 S.C. 321, 755 S.E.2d 437. The Blackburns were not entitled to a jury trial on their counterclaims as a result. *Id.* The same result was rightly reached by the circuit court here and should be affirmed.

Similarly, other decisions show South Carolina courts have rejected the argument made by Appellants in the context of enforcing arbitration agreements, which inherently encompass a waiver of the right to a jury trial. "A party cannot avoid arbitration through rescission of an entire contract when there is no independent challenge to the arbitration clause **itself**. There must be fraud in the inducement of the arbitration agreement to avoid arbitration of the contract." *Carolina Care Plan*, 361 S.C. at 550-51, 606 S.E.2d at 755 (*citing South Carolina Pub. Serv. Auth. v. Great Western Coal (Kentucky), Inc.*, 312 S.C. 559, 562-63, 437 S.E.2d 22, 24 (1993)) (emphasis added). Here, the Appellants have not challenged the validity of the jury trial waiver **itself**—they challenge the validity of the **entire** loan agreements for the January 2009 Modifications and the July 2011 Forbearance Agreement and Amendments. As *Blackburn* directly dictates, cases addressing arbitration support the conclusion that the right to a jury trial has been waived even where the entire loan is challenged.

Appellants argue that the circuit court judge may ultimately determine that the agreements containing the jury trial waivers are unenforceable and, therefore, proceeding at this point without a jury is "premature and prejudicial." Appellants' Brief at pp. 19-20. Yet this same concern was present in *Blackburn*, and the South Carolina Supreme Court enforced the jury waiver despite the fact that the judge may ultimately determine that the entire contract containing the jury waiver is unenforceable. 407 S.C. 321, 755 S.E.2d 437. This Court should not depart from the clear precedent set forth in *Blackburn.*

Other jurisdictions have likewise held that a challenge to an agreement containing a jury trial waiver will not prevent enforcement of the jury trial waiver. *See, e.g., Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 188 (2d Cir. 2007) ("We join

the Tenth Circuit in holding that unless a party alleges that its agreement to waive its right to a jury trial was itself induced by fraud, the party's contractual waiver is enforceable vis-á-vis an allegation of fraudulent inducement relating to the contract as a whole."); *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 838 (10th Cir. 1988) (enforcing a jury trial waiver when the waiver itself is not challenged); *Zaklit v. Global Linguist Solutions, LLC*, 53 F. Supp. 3d 835, 856-57 (E.D. Va. 2014) (holding that "(a) party's contractual jury trial waiver is generally enforced unless a party alleges that its agreement to waive its jury trial right 'was *itself* induced by fraud.'"); *Silver v. JTH Tax, Inc.*, No. Civ.A. 2:05CV126, 2005 WL 1668060, at *7 (E.D.Va. June 21, 2005) ("(A)lthough the plaintiffs have made allegations of fraud in the inducement with respect to the Agreement itself, they have not singled out the jury trial waiver."); *Allyn v. W. United Life Assur. Co.*, 347 F. Supp. 2d 1246, 1255 (M.D. Fla. 2004) (enforcing a jury trial waiver when the waiver itself is not challenged); *Evans v. Union Bank of Switzerland*, 2003 WL 21277125, fn. 1 (E.D. La. 2003) ("Plaintiffs also suggest, without any citation to authority, that the Court should decline to enforce the waivers because plaintiffs have asserted fraud with respect to aspects of the contracts wholly unrelated to the jury waiver provision. The Court has been unable to locate any authority that would support such a ruling. Moreover, the Court agrees with the case law holding to the contrary.").

The first of two cases relied on by Appellants to obtain a jury trial on the enforceability of the loan documents prior to all other issues, *Fed. Housecraft, Inc. v. Faria*, 216 N.Y.S.2d 113, 114 (N.Y. App. 1961), is directly contradicted by South Carolina law. In response to a suit on a contract, the *Faria* defendants asserted an

affirmative defense that they were fraudulently induced into entering the contract. 216 N.Y.S.2d at 113. The New York court found the *Faria* defendants were entitled to a jury trial on their fraud defense. *Id.* Here, Appellants have not asserted any affirmative defense or counterclaim for fraudulent inducement. Moreover, even if Appellants had asserted such an affirmative defense here, it would not present the right to a jury trial in this equitable foreclosure action. *See C&S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986) (noting that a defendant must assert legal and compulsory counterclaims to be entitled to a jury trial in an equitable foreclosure action). If Appellants had asserted a counterclaim for fraudulent inducement instead, they nevertheless would not be entitled to a jury trial on this claim based on their jury trial waivers just as the *Blackburn* defendants were not entitled to a jury trial on their counterclaims, including a claim for fraud in the inducement of the contract containing their jury trial waivers. 407 S.C. 321, 755 S.E.2d 437.

Moreover, other courts have expressly rejected the *Faria* ruling. For example, in *Chesterfield Exchange, LLC v. Sportsman's Warehouse*, 528 F. Supp. 2d 710, 715 (E.D. Mich. 2007), Sportsman's Warehouse argued that it was fraudulently induced to enter a lease containing a jury trial waiver and proposed that a jury decide at least the fraudulent inducement claim before the other issues would be decided. The court rejected this proposed procedure and found that *Faria* "fail(ed) to recognize that an agreement as to the mode of resolving a controversy may be completely unaffected by a general claim of fraud in the inducement," and "the fact that an *allegation* of fraud in the inducement should not be treated as *proof* of such fraud." 528 F. Supp. 2d at 715 (emphasis in original). The *Chesterfield Exchange* court ruled that Sportsman's Warehouse's jury

demand would be stricken because it had not made any allegation that its jury trial waiver itself had been procured by fraud. *Id.* Likewise, the Southern District of New York was "unconvinced" by the *Faria* holding. *Russell-Stanley Holdings, Inc. v. Buonanno*, 327 F. Supp. 2d 252, 257 (S.D.N.Y. 2002). In *Russell-Stanley Holdings*, the plaintiff argued that if it was "successful in rescinding the (contract) the jury waiver provision in it would also be void." *Id.* However, the plaintiff did not "contend that the jury waiver provision . . . (was) otherwise invalid." *Id.* Because the plaintiff failed to challenge the jury trial waiver itself, the court enforced the waiver. *Id.* This decision comports with *Carolina Care Plan*, 361 S.C. at 550-51, 606 S.E.2d at 755, and *Great Western Coal,* 312 S.C. at 562-63, 437 S.E.2d at 24, addressing arbitration provisions and finding the provision requiring adjudication by a method other than by jury has to be flawed in and of itself.

The other case cited by Appellants, *C&C Wholesale, Inc. v. Fusco Mgmt. Corp.*, 564 So.2d 1259, 1261 (Fl. Ct. App. 1990), also does not support their request for a jury trial on the enforceability of the loan agreements before other issues are decided. *C&C Wholesale* involved a jury trial waiver in a lease between one of the plaintiffs and one of the defendants. *Id.* The court enforced the waiver as to the claims between that plaintiff and defendant but found it did not apply to the other parties in the case who were not signatories to the lease. *Id.* The case did not involve any claim related to the enforceability of the lease or the jury trial waiver contained therein. *Id.* Moreover, Appellants do not dispute that they signed the numerous loan documents containing jury trial waivers here. Therefore, *C&C Wholesale* does not provide the support for Appellants' position as they suggest.

South Carolina courts and numerous other jurisdictions agree that because Appellants have not specifically challenged the enforceability of the jury trial waivers contained in the January 2009 Modifications and the July 2011 Forbearance Agreement and Amendments, those jury trial waivers may be enforced despite Appellants' challenge to these documents generally.

### C. Even if Appellants are successful in rescinding the January 2009 Modifications and the July 2011 Forbearance Agreement and Amendments, Appellants are still bound by the prior loan documents containing jury trial waivers.

The language in the January 2009 Modifications and July 2011 Forbearance Agreement and Amendments supports the enforcement of the jury trial waivers in the loan documents existing prior to these modifications should the modifications or any provisions therein ultimately be found to be invalid. For example, the January 2009 Modifications expressly state that "except as herein modified, the terms and provisions of the Contract (defined as the prior promissory notes and any and all other loan and security documents related to the notes) and the individual instruments, documents and agreements that make up the Contract shall remain unchanged and the Contract, as herein modified, shall continue in full force and effect as therein and herein written." (Complaint Ex. G ¶ D; R. 159.) The January 2009 Modifications further state:

> Nothing contained in this Modification Agreement shall in any way . . . waive, annul, vary or affect any provision, condition, covenant and agreement contained in the Contract (again, defined as the prior promissory notes and any and all other loan and security documents related to the notes), nor affect or impair any rights, powers and remedies under the Contract, except as herein specifically modified to do any one or more of the foregoing. If any provision in this Modification Agreement shall be interpreted or applied by a court or other tribunal with personal and subject matter jurisdiction over the parties hereto and the Contract, as modified, so as to . . . do any one or more of any of the foregoing, such provision shall be ineffective to the extent it . . . causes any of such other

> consequences, or the application thereof shall be in a manner and to an extent which does not . . . result in the occurrence of any of the other consequences.

(Complaint Ex. G § 2; R. 159.) Likewise, the Amended and Restated Notes executed in connection with the July 2011 Forbearance Agreement similarly provide that:

> This Note amends and restates the terms of the Original Note (defined as the promissory note given at origination as subsequently amended or modified). This amendment and restatement is not intended by the parties to be, nor shall it be construed as, a novation, termination, waiver, release, satisfaction, accord or accord and satisfaction of the Original Note or the indebtedness evidenced thereby. This Note is secured by all . . . rights and remedies securing the Original Note and evidences all indebtedness previously advanced and unpaid under the Original Note.
>
> . . .
>
> Each provision of this Note will be interpreted in a manner so as to be valid under applicable law, but if any provision of this Note is held invalid under such law by a court or other tribunal of competent jurisdiction, the provision will be ineffective to the extent of such invalidity without invalidating the remainder of such provision or the remaining provisions of this Note, or the application thereof will be in a manner and to an extent permissible under applicable law.

(Complaint Ex. H p. 3; R. 169.) Thus, if either the 2009 Modifications or 2011 Forbearance Agreement and Amendments are found to be invalid, the prior loan documents which also contain jury trial waivers would remain effective.

South Carolina law also requires this result. Throughout their brief, Appellants repeatedly note that they seek rescission as a remedy. Appellants' Brief pp. 1, 11-12, 15-16, 18-20, and 30-32. However, it is clear under South Carolina law that when rescission is awarded as a remedy, the relationship of the parties must be restored to the position immediately preceding the agreement being rescinded. "In the absence of fraud, rescission is appropriate only if both parties can be returned to the status quo prior to the contract." *Brazell v. Windsor*, 384 S.C. 512, 517, 682 S.E.2d 824, 826-27 (2009) (*citing*

*King v. Oxford,* 282 S.C. 307, 313, 318 S.E.2d 125, 129 (Ct.App.1984)). When rescission is granted and where the parties previously had a contractual relationship, that previous contract would be restored. *See* Restatement (Second) of Contracts § 279 cmt. b (1981) ("[T]o the extent that the substituted contract is vulnerable on such grounds as mistake, misrepresentation, duress or unconscionability, recourse may be had on the original duty. Thus, if the substituted contract is voidable, it discharges the original duty until avoidance, but on avoidance of the substituted contract the original duty is again enforceable."). Here, Appellants have made no allegations of fraud. Instead, they have challenged those two sets of agreements, the January 2009 Modifications and the July 2011 Forbearance Agreement and Amendments, which effectuated cross-collateralization. If those agreements were to be rescinded, the previous loan documents and jury trial waivers would remain enforceable as a matter of law.

Appellants have put forth no independent basis to challenge the validity or enforceability of the prior loan documents or the jury trial waivers therein. As set forth above, at least 84 loan documents contain jury trial waivers, and Appellants first waived their jury trial rights in 2001. Excluding the January 2009 Modifications and July 2011 Forbearance Agreement and Amendments, Appellants waived their right to a jury trial for each of the nine loans in 62 other loan documents. (PNC's Memorandum in Support of its Motion to Strike Jury Demand & Refer Case to Master-in-Equity Ex. B; R. 1230-63.) Thus, Appellants are still subject to loan documents containing valid jury trial waivers even if the January 2009 Modifications and July 2011 Amendments are rescinded.

For example, if the January 2009 Modifications and July 2011 Amendments were rescinded, the Royal Beach Loan would revert back to the original promissory note dated

May 19, 2000, as it had been modified from time to time prior to January 2009. (PNC's Memorandum in Support of its Motion to Strike Jury Demand & Refer Case to Master-in-Equity Ex. B at pp. 1-4; R. 1230-33; Promissory Note by Deborah Rice-Marko in the amount of $2,500,000 dated May 19, 2000; R. 415-17.) More specifically, the Modification Agreements dated March 23, 2006, August 30, 2006, July 18, 2007, August 26, 2008, the Assignment and Assumption Agreement dated August 26, 2008, and the Unconditional Guaranty Agreement dated August 26, 2008—each of which contained a waiver of the right to a jury trial in any action arising from or related to the Royal Beach promissory note and all security documents with respect to that note—would be revived. (PNC's Memorandum in Support of its Motion to Strike Jury Demand & Refer Case to Master-in-Equity Ex. B at pp. 1-4; R. 1230-33; Modification Agreement dated March 23, 2006; R. 1230; Modification Agreement dated August 30, 2006; R. 1230; Modification Agreement dated July 18, 2007; R. 1230-31; Modification Agreement dated August 26, 2008; R. 1231; Assignment and Assumption Agreement dated August 26, 2008; R. 429-434 and 1231; Unconditional Guaranty Agreement dated August 26, 2008; R. 458-68 and 1231.) The Change in Terms Agreement dated February 19, 2010 (after the January 2009 Modifications but before the July 2011 Forbearance Agreement)—which contains a waiver of the right to a jury trial in **any** action between PNC and Royal Beach Properties, LLC—would also be revived. (PNC's Memorandum in Support of its Motion to Strike Jury Demand & Refer Case to Master-in-Equity Ex. B at pp. 1-4; R. 1230-33; Change in Terms Agreement dated February 19, 2010; R. 1231-32) Likewise, all of the other eight loans would revert to the original promissory notes, as they had been modified prior to the January 2009 Modifications and/or after the January 2009 Modifications but before

the July 2011 Forbearance Agreement and Amendments. (PNC's Memorandum in Support of its Motion to Strike Jury Demand & Refer Case to Master-in-Equity Ex. B at pp. 5-34; R. 1234-63.)

Accordingly, the trial court properly held that Appellants' counterclaims do not attack the enforceability of every single one of these previous loan documents and, therefore, Appellants waived their right to a jury trial for each of the nine loans in the 62 loan documents which have not been challenged.

**D. Appellants' argument is self-serving and inconsistent.**

Appellants argue that the jury trial waivers in the parties' January 2009 Modifications and July 2011 Forbearance Agreement and Amendments will not be enforceable if they are successful on their counterclaims—yet their counterclaims seek relief for breach of those very same contracts. Appellants cannot maintain causes of action for breach of those contracts against Respondent while also seeking rescission of those very same contracts and the jury trial waivers contained therein. *See Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 160-61, 621 S.E.2d 352, 354 (2005) (noting that the court will not hold a party liable for breach of contract where a party alleged and the court agreed that the contract was void and unenforceable); *First Equity Inv. Corp. v. United Service Corp. of Anderson*, 299 S.C. 491, 497-98, 386 S.E.2d 245, 249 (1989) ("A rescission disaffirms the contract but an action for damages affirms the contract. An action on one theory must allege what an action on the other theory must deny and so is opposite to the other. . . . Accordingly, a party who has elected a remedy which abrogates the contract cannot also choose another remedy which affirms the contract."). Moreover, Appellants' position would render a jury trial waiver virtually

meaningless in any agreement because a party seeking to avoid its effect would only need to assert that the agreement is unenforceable to obtain a jury trial. This runs directly contrary to *Blackburn*.

For all of the foregoing reasons, the circuit court properly found that Appellants have waived their jury trial waivers in the subject loan documents and, therefore, are not entitled to a jury trial on their counterclaims in this matter.

## II. Even if Appellants had not expressly waived their right to a jury trial in the subject loan documents, Appellants are still not entitled to a jury trial on their counterclaims.

Appellants also argue that they have asserted compulsory, legal counterclaims that give rise to their right to a jury trial. Appellants' Brief pp. 13-17. This issue has not been preserved for appellate review, and Appellants have not asserted compulsory, legal counterclaims in this matter in any event. Moreover, even if Appellants had asserted compulsory, legal counterclaims, those claims would be subject to the valid jury trial waivers discussed at length above.

### A. Appellants' argument that they have asserted compulsory, legal counterclaims has not been preserved for appellate review.

"In order for an issue to be preserved for appellate review, with few exceptions, it must be raised **and ruled upon** by the trial judge." *Cowburn v. Leventis*, 366 S.C. 20, 41, 619 S.E.2d 437, 449 (Ct. App. 2005) (*citing Lucas v. Rawl Family Ltd. Pship.*, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004)) (emphasis added). "When a trial court makes a general ruling on an issue, but does not address the specific argument raised by a party, that party must make a Rule 59(e) motion asking the trial court to rule on the issue in order to preserve it for appeal." *Id.* (*citing Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991)).

The issue of whether Appellants have asserted compulsory, legal counterclaims entitling them to a jury trial has never been ruled upon by the circuit court. (Order Denying Respondent's Motion for Summary Judgment, Denying Respondent's Motion to Refer Case to Master, and Granting Respondent's Motion to Strike Jury Demand at pp. 2-3; R. 14-15; Amended Order at pp. 2-4; R. 17-19.) Here, the circuit court's decision was based entirely on the jury trial waivers in the loan documents. (Amended Order at pp. 3-4; R. 18-19.) The circuit court did not discuss whether the counterclaims were legal or equitable and expressly declined "to reach the issue of whether the counterclaims are compulsory or permissive." (Amended Order at p. 3; R. 18.) In fact, Appellants argued to the circuit court that it need not determine whether their counterclaims are permissive or compulsory and need only decide whether the jury trial waivers in the loan documents were sufficient. (Appellants' Memorandum in Opposition to Respondent's Motion to Strike Jury Demand and Refer to Master-in-Equity pp. 13-14; R. 1285-86.) Further, Appellants' Rule 59(e) motion related **solely** to the circuit court's determination that Appellants had executed valid, enforceable jury trial waivers —not whether Appellants had asserted compulsory, legal counterclaims. (Appellants' Motion Pursuant to SCRCP 59(e); R. 1502-07.)

Because this issue has not been ruled upon by the circuit court and Appellants did not make a Rule 59(e) motion asking for a ruling on this issue, it has not been preserved for appellate review. Therefore, this Court should decline to rule on Appellants' argument that they have asserted compulsory, legal counterclaims that give rise to their right to a jury trial in this matter.

### B. Appellants have not asserted legal, compulsory counterclaims in this matter.

To the extent this Court finds that this issue has been preserved for appellate review, Appellants have not asserted compulsory, legal counterclaims that give rise to the right to a jury trial. In an equitable foreclosure action, the counterclaims must be both legal and compulsory in order for a defendant to be entitled to a jury trial. *See C&S Real Estate Servs.*, 290 S.C. at 302, 350 S.E.2d at 193.

Appellants first argue that their counterclaims are legal because they are causes of action at law. Appellants' Brief pp. 14-15. However, Appellants then argue that their counterclaims are compulsory because they have asked for the loan documents to be declared "null and void" due to the "misconduct" alleged in each of their counterclaims. Appellants' Brief pp. 15-16. As noted above, Appellants repeatedly note that they seek rescission as a remedy throughout their brief. Appellants' Brief pp. 1, 11-12, 15-16, 18-20, and 30-32. Appellants specifically tie rescinding the loan documents to each and every one of their counterclaims: breaches of the contracts between the parties, breaches of the covenants of good faith and fair dealing contained in those contracts, civil conspiracy, negligence, and violation of the Unfair Trade Practices Act—several of which also encompass the alleged disclosure of their confidential information to third parties. Appellants' Brief p. 16. At the hearing on the Motion to Strike Appellants' Jury Demand & Refer Case to Master-in-Equity, counsel for the DRM Appellants specifically argued that " . . . all of our claims would prevent the bank from foreclosing and collecting on the note . . . " (Transcript of Hearing at 21:16-23:7; R. 1528-30.) Appellants' argument is that their jury trial waivers are not enforceable based entirely on their assertion that the subject loan documents will be rescinded if they are successful on their

counterclaims. Appellants' Brief pp. 17-32. Although Appellants have argued to the contrary, a plain reading of the pleadings reveals that Appellants' only counterclaims that challenge the enforceability of any loan documents are Appellants' claims for breach of the covenant of good faith and fair dealing and breach of the purported duty of confidentiality. (Amended Answers and Counterclaims; R. 815-54.)

To the extent Appellants seek to challenge the enforceability of the subject loan documents by asking for them to be rescinded, such claims are equitable, rather than legal. As South Carolina courts have consistently explained, whether a particular claim is legal or equitable depends on the relief sought. *See, e.g., Verenes v. Alvanos*, 387 S.C. 11, 16, 690 S.E.2d 771, 773 (2010) ("Characterization of an action 'as equitable or legal depends on the appellant's 'main purpose' in bringing the action.'") (*quoting Ins. Fin. Servs. Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978)). It is entirely clear from Appellants' arguments that the primary relief sought by their counterclaims is the equitable relief of rescinding the subject loan agreements. *See Mortgage Electronic Systems, Inc. v. White,* 384 S.C. 606, 614, 682 S.E.2d 498, 502 (Ct. App. 2009) (finding that where the primary relief sought in a counterclaim was to have a mortgage declared void, the counterclaim was equitable and, therefore, there was no right to a jury trial on the counterclaim). Because Appellants are seeking equitable relief, they are not entitled to a jury trial on their counterclaims, regardless of whether the jury trial waivers in the subject loan documents are enforceable.

Alternatively, to the extent Appellants may argue that their counterclaims are not equitable to the extent they seek monetary damages, such counterclaims would necessarily be permissive because they would not relate to the enforceability of the

subject loan agreements. *See N. C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989) (holding that counterclaim which does not relate to the enforceability of the note is permissive). In their Amended Answer and Counterclaims, Appellants seek only monetary damages for their counterclaims for breach of contract, civil conspiracy, negligence, negligent misrepresentation, and violation of South Carolina's Unfair Trade Practices Act. (Amended Answers and Counterclaims; R. 815-54.) If Appellants seek only monetary damages rather than rescinding the loan documents for any of their counterclaims, such claims cannot have any "logical relationship" to the enforceability of the subject notes and mortgages. *See Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 270-71, 449 S.E.2d 580, 582-83 (Ct. App. 1994), *aff'd in part, vacated on other grounds*, 320 S.C. 532, 466 S.E.2d 367 (1996) (holding claims seeking damages for fraud, negligence, and unfair trade practices would not be compulsory counterclaims in equitable foreclosure action because they did not affect enforceability of the note and mortgage being foreclosed). If the counterclaims are permissive, Appellants waived their right to a jury trial on those claims by asserting them in this equitable foreclosure action. *DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903.

Appellants' counterclaims are equitable in that they seek to have the subject loan agreements rescinded. Alternatively, the counterclaims are permissive in that Appellants seek monetary damages only for the causes of action for breach of contract, civil conspiracy, negligence, negligent misrepresentation, and violation of South Carolina's Unfair Trade Practices Act, and, therefore, are necessarily unrelated to the enforceability of the subject loan agreements. Therefore, Appellants are not entitled to a jury trial on any of their counterclaims.

## CONCLUSION

For the foregoing reasons, PNC Bank respectfully requests this Court affirm the circuit court's ruling that Defendants are not entitled to a jury trial on their counterclaims in this matter, based on the enforceable contractual jury trial waivers.

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December 14, 2015.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr.,
Circuit Court Judge

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DEC 16 2015
SC Court of Appeals

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Case No. 2013-CP-10-2624

Appellate Case No. 2015-001149

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PNC Bank, N.A., successor to RBC Bank (USA), ..... Respondent,

v.

Liberty Cottages, LLC; GW Dorchester, LLC; USS Clarksville, LLC; Liberty Cottages Land, LLC; ROA, LLC; Royal Beach Properties, LLC; The Brothers of SC, LLC; Deborah Rice-Marko a/k/a Deborah G. Rice-Marko; Evan R. Marko; and John E. Marko, Jr., ..... Appellants.

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CERTIFICATE OF COUNSEL

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The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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## PROOF OF SERVICE

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I, the undersigned Attorney of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for PNC Bank, N.A., successor to RBC Bank (USA), do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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