

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM MARION COUNTY
Court Of Common Pleas

SC Court of Appeals

The Honorable W. Haigh Porter, Special Referee

Case No: 2015-CP-33-280
Appellate Case No.: 2016-000956

PARTNERS 95, LLC and HSGCHG Investments, LLC Respondents,

v.

Riverdale Funding, LLC and Woodbridge
Mortgage Investment Fund 3, LLC Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE SPECIAL REFEREE ABUSE HIS DISCRETION BY COMMITTING AN ERROR OF LAW AND MAKING FACTUAL FINDINGS WITHOUT EVIDENTIARY SUPPORT DUE TO PARTNERS 95'S *PRIMA FACIE* FAILURE TO PLEAD OR PROVE ACTUAL DAMAGES?
- II. UNDER SOUTH CAROLINA LAW, DID PARTNERS 95 FAIL TO PLEAD OR PROVE PUNITIVE DAMAGES, AND DID THE SPECIAL REFEREE ERR BY FAILING TO REQUIRE THE PROOF REQUIREMENTS MANDATED BY *MITCHELL, JR. V. FORTIS INS. CO.*?
- III. DOES THE PUNITIVE DAMAGES AWARD OF THE JUDGMENT VIOLATE LENDERS' 14TH AMENDMENT RIGHTS?
- IV. DID THE SPECIAL REFEREE ERR BY FAILING TO APPORTION THE PUNITIVE DAMAGES AWARD BETWEEN RIVERDALE AND WOODBRIDGE IN VIOLATION OF SECTION 3 OF THE SOUTH CAROLINA CONSTITUTION?

STATEMENT OF CASE

This matter arises out of a claim by Partners 95, LLC and HSGCHG Investments, LLC (collectively, "Partners 95") that they were damaged when lenders Riverdale Funding, LLC ("Riverdale") and Woodbridge Mortgage Investment Fund 3, LLC ("Woodbridge")(collectively, "Lenders") did not fund a proposed loan set forth in a loan commitment letter between Partners 95 and Lenders. Partners 95 claim that they were forced to seek other funding and thus incurred damages in the course of preparing for the closing on the property they ultimately purchased for less cost with the help of a subsequent lender. Partners 95 brought a Complaint with the following causes of action¹: 1) Breach of Contract, 2) Breach of Contract Accompanied by a Fraudulent Act, 3) Failure to Honor a Promise to Lend, 4) Fraud, and 5) Violation of South Carolina Unfair Trade Practices Act (the "Complaint").

The Complaint was filed on March 17, 2015 in Marion County and subsequently referred on August 6, 2015 to The Honorable W. Haigh Porter as Special Referee for Marion County, South Carolina. On May 6, 2015, Partners 95 filed an Affidavit of Default against Lenders. On October 29, 2015, Lenders filed a Motion to Set Aside the Default Pursuant to Rule 55(c), SCRCP. The Special Referee held a hearing on Lenders' Motion but ultimately upheld the Default in an Order signed on December 22, 2015.

On February 8, 2016, the Special Referee held a hearing to determine the amount of damages to be awarded, if any. Because Lenders were in default, they were prohibited from presenting evidence and were limited to cross-examining and objecting to the evidence put forth by Partners 95, who provided only two witnesses: Michael W. Tighe,

¹ Partners 95 did not specifically name their causes of action in the Complaint, but based on the allegations, Lenders have surmised that these are the intended causes of action.

Partners 95's closing attorney, and Robert D. Hartmann, the majority owner of Partners 95. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241-42, 246 S.E.2d 880, 882 (1978). Shortly thereafter, at the Special Referee's request, Partners 95 submitted a summary of the amount and category of damages sought, and the parties exchanged memoranda addressing the damages and arguments presented by Partners 95. On April 7, 2016, the Special Referee entered a Form 4 Order, accompanied by a written Order (ending action), awarding Partners 95 actual damages in the amount of \$38,184.20 and punitive damages in the amount of \$35,000.00 for a total judgment of \$73,184.20 (the "Judgment Order"). The Judgment Order, dated April 7, 2016, was received by Partners 95 on April 11, 2016.

On April 20, 2016, Lenders timely filed an Emergency Motion For Stay Pursuant to SCRCP 62 and for Alternate Forms of Relief Pursuant to SCRCP 52, 59, and 60 requesting that the Special Referee alter, amend, reconsider, vacate, or set aside the Judgment Order and relieve Lenders from the actual and punitive damages adjudged and decreed therein. Lenders also moved, pursuant to Rule 62(b), SCRCP, for an emergency stay of the execution of, or any proceedings to enforce, the Judgment Order. By Order dated April 26, 2016 and filed May 2, 2016, the Special Referee denied Lenders' post-judgment motions. On May 3, 2016, Lenders received written notice of entry of the order denying their post-judgment motions, and timely filed a Notice of Appeal on May 6, 2016. This appeal follows.

STATEMENT OF FACTS

As stated above, this matter arises from a proposed lending relationship between Partners 95 and Lenders. Because Lenders were held in default, Partners 95 are bound by the facts as pled in the Complaint for purposes of determining damages. *Mutual Sav. & Loan Asso. v. McKenzie*, 274 S.C. 630, 632-33, 266 S.E.2d 423, 424-425 (1980). As a result, Lenders, in setting forth the Statement of Facts, will distinguish between facts pled in the Complaint and those submitted as evidence at the damages hearing before Special Referee Porter.

Facts Pled in the Complaint

Partners 95 and HSGCHG Investments, LLC are both limited liability companies who, as potential borrowers, were engaged in a contractual relationship that was to culminate in a loan transaction to be performed in and secured by real property. (Complaint ¶ 5). Riverdale agreed in a Loan Commitment Letter dated December 9, 2014 (“Commitment”) to lend Partners 95 the sum of \$1,900,000 at a rate of 12% per annum for the acquisition of a particular piece of property located in Marion County, South Carolina (“Property”) and the loan would be secured by a mortgage on the Property. (Complaint ¶¶ 7, 8, 10). As a part of this Commitment, Partners 95 would pay a commitment fee of \$114,000, of which \$19,000 was paid in advance. (Complaint ¶ 9). The Commitment was not executed. (Complaint ¶ 12). Although the Commitment included in its terms that the loan would close on or before January 12, 2015, the parties knew at the time of the Commitment that Partners 95 had to close the Loan and Purchase the Property no later than December 31, 2014 to avoid a significant price increase. (Complaint ¶ 11).

Prior to closing, Riverdale transferred and assigned the Commitment to Woodbridge, which was to be the owner and holder of the promissory note, mortgage and other loan documents. (Complaint ¶ 14). The Complaint alleges that upon information and belief, Woodbridge is a related entity of Riverdale and shares common ownership. (Complaint ¶ 15). Lenders, by and through their counsel, refused to allow Partners 95 to sign the documents via an e-mail dated December 30, 2014 at 12:07pm. (Complaint ¶ 19). Partners 95 allege response was received when Partners 95's counsel inquired as to why the closing was canceled. (Complaint ¶¶ 20, 21).

Partners 95 allege that even though they ultimately found another source of funding to purchase the Property, they have suffered damages as a result of Lenders' unexplained and bad faith refusal to fund the Loan and honor the Commitment including, but not limited to, fees related to brokers price opinions, appraisal costs, attorneys' fees, liability insurance premiums and further expense related to signage that was time dependent on the closing of the transaction. (Complaint ¶ 23). Partners 95 further allege that they are "informed and believe" that Lenders had a fraudulent intent in breaching the Commitment based on the Lenders' behavior leading up to the breach including "negotiation of the terms in loan documents, correspondence between counsel, and [Lenders'] failure to communicate with Partners 95's counsel after 12:07 on the day of Closing." (Complaint ¶ 31). Partners 95 also allege that "upon information and belief" Lenders made false representations that they would loan Partners 95 funds for the acquisition and development of the Property, and that they are "informed and believe" there were no outstanding contingencies for the Commitment. (Complaint ¶¶ 32, 41, and 43).

Facts Submitted for the First Time at the Damages Hearing

Partners 95 hoped to purchase the Property from the seller Wells Fargo for \$1,000,000, but in order to honor this price, Wells Fargo insisted that the property be purchased by December 31, 2014. (2/8/16 Tr. p. 5, lines 11-18). Partners 95 claimed that the purchase price would increase \$300,000 if not closed by December 31, 2014. (2/8/16 Tr. p. 5, lines 19-21). However, ultimately, Partners 95 were able to purchase the Property for the original \$1,000,000 purchase price by acquiring a loan from another lender, Avatar, and negotiating an additional 30 days to close the deal. (2/8/16 Tr. p. 12, lines 2-7, pp. 31-32, 73).

Although the Commitment was not attached to the Complaint or initially offered into evidence, it was ultimately offered by Partners 95 as Exhibit 13 at the hearing. The Commitment contained numerous instances where Lenders in their “sole discretion” could determine if the information provided by Partners 95 was sufficient to lend the requested funds. (2/8/16 Hearing Ex. 13).

One of the many contingencies listed in the Commitment, which was required by Lenders to lend the money to Partners 95, included the specific contingency that the “Borrower accept[] this Commitment on or before December 12, 2014 by signing and returning the enclosed copy of this letter to Lender with the applicable fees.” (2/8/16 Hearing Ex. 13).

Partners 95 claim that they paid an additional \$10,000 in legal fees for the legal work to prepare for the original closing to be funded by Woodbridge. (2/8/16 Tr. p. 13, lines 9-24). Partners 95 claimed there were other fees that they had to pay, such as ordering appraisals for the loan with Lenders that were not required by their ultimate

lender Avatar (2/8/16 Tr. pp. 15-16), and insurance required by Lenders but not by Avatar (2/8/16 Tr. p. 17, lines 8-14).

Additionally, Partners 95 claimed there were expenses incurred that were required by Avatar that were not required by Lenders such as title abstract work for a piece of collateral property required by Avatar. (2/8/16 Tr. p. 17).

Partners 95 also introduced evidence relating to the sign, for which they claimed to have paid more because they were not able to close the loan with Lenders. (2/8/16 Tr. pp. 49-50, p. 51 lines 1-14). However, Partners 95 admitted that they used a different sign company at a higher price in order to meet their own internal deadline. (2/8/16 Tr. pp. 71-72). Further, there was no evidence presented as to what the original sign price would have been if Partners 95 had used new poles for the sign, as was ultimately required by an engineer's report. (2/8/16 Tr. Exhibit 10, p. 78, lines 15-21; pp. 80-81. Some portion of the sign was down at the time of the hearing. *Id.* Finally, there was no evidence presented that this sign situation was made known to Lenders.

Through testimony, though, it became evident that Partners 95 ultimately received a more favorable loan to purchase the subject property than they would have received from Lenders. The Avatar Loan was in the amount of \$2,000,000 with an interest rate of 8.99% for the first six months and 9.99% thereafter. (2/8/16 Tr. p. 31, line 3; p. 32, line 4; p. 73).

ARGUMENT

I. THE SPECIAL REFEREE ABUSED HIS DISCRETION BY COMMITTING AN ERROR OF LAW AND MAKING FACTUAL FINDINGS WITHOUT EVIDENTIARY SUPPORT DUE TO PARTNERS 95'S *PRIMA FACIE* FAILURE TO PLEAD OR PROVE ACTUAL DAMAGES.

A. Standard of Review

“An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” *Roberson v. S. Fin. of S. Carolina, Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005) (vacating a default judgment on the ground of improper service) (quoting *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)). “The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge.” *Id.*² When reviewing the lower court’s damages award, this Court’s “task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award.” *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 310-11, 594 S.E.2d 867, 873 (Ct. App. 2004). If the Special Referee’s decision was controlled by an error of law or there is no evidentiary basis for his factual conclusions, the Special Referee abused his discretion, and this Court should reverse.

² The Special Referee’s Judgment Order has the same effect as an order rendered by the circuit court, and he has authority to address post-judgment motions like the ones filed in this case. *Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 427, 535 S.E.2d 128, 129 (2000) (“The proper construction of the order of reference is that it gives the master jurisdiction over the case and all matters arising from it until the master has performed all the duties assigned to him Moreover, it makes common sense to permit the judge in whose court the matter is pending to decide the merits of any Rule 60 motion.”). Orders issued by the Special Referee can be appealed directly to this Court without returning to the circuit court. *See Order of Reference*; S.C. Code Ann. § 14-11-85 (Supp. 2014); Rule 53, SCRPC.

B. Partners 95 Failed To Plead Entitlement To Actual Damages.

A defaulting defendant has not “concede[d] the [a]mount of liability” simply because the issue of liability has been settled. *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct. App. 2012) (holding while a defaulting defendant has conceded liability, he “does not concede the [a]mount of liability” (alteration by court) (quoting *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978))); *Ammons v. Hood*, 288 S.C. 278, 282, 341 S.E.2d 816, 818 (Ct. App. 1986) (“In a default action, the default judgment settles the issue of liability.”). See also *St. Stephen*, No. 2016-UP-254, 2016 S.C. App. Unpub. LEXIS 310, at *1 (citing *Solley and Ammons* when considering “whether or not the record contains evidentiary support for an award of damages against [a defaulting party].”).

A party seeking a default judgment is entitled only to such relief as is framed by its pleading, and then only to the extent requested therein. *McKenzie*, 274 S.C. 630, 632-33, 266 S.E.2d 423, 424-25 (1980)(referencing cases collected in 12 West's South Carolina Digest, Judgment, at Key Number 117 and § 15-35-70, Code of Laws of South Carolina (1976)). “It follows that if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error.” *Id.* (citing *Gadsden v. Home Fertilizer and Chemical Co.*, 89 S.C. 483, 72 S.E. 15 (1911) & *Williams v. American Ry. Express Co.*, 118 S.C. 121, 110 S.E. 125 (1921)).

Default, therefore, does not preclude a defendant from challenging the sufficiency of the complaint allegations as a basis for the judgment entered in this case, *id.*, because “[a]n objection that the complaint does not state facts sufficient to constitute a cause of

action is not waived by a default.” *Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 254, 321 S.E.2d 194, 196 (Ct. App. 1984). A default is not an admission that the facts pled are sufficient to constitute a cause of action. *Gadsden*, 89 S.C. 483, 72 S.W. 15 (1911). Similarly, a default does not admit an allegation that is a mere conclusion of law. *Id.* Indeed, even “[a] defendant who is in default for failure to answer has the right to assume that the judgment will be limited to the cause of action stated in the complaint[, and if] the complaint states facts which entitled the plaintiff only to a certain kind of relief, or to relief only to a certain extent, a judgment by default giving a different kind of relief, or relief to a greater extent, is without authority of law and cannot be sustained.” *Blakely v. Wright*, 269 S.C. 6, 11-12, 235 S.E.2d 803, 806 (1977).

As outlined below, the Judgment Order must be reversed because the Special Referee’s award of actual damages exceeds the relief supported by Partners 95’s Complaint, which was filed on March 17, 2015 and never amended.

i. The Special Referee awarded actual damages only on one of Partners 95’s causes of action – breach of contract accompanied by a fraudulent act.

As an initial matter, it is important to note that the Special Referee awarded actual damages on only *one* of the five causes of action pled by Partners 95 in their Complaint: Breach of Contract Accompanied by a Fraudulent Act. (Judgment Order, at 9, Section II (“Plaintiff’s Damages on Breach of Contract Accompanied by a Fraudulent Act”)). Partners 95 did not challenge, request clarification regarding, nor raise objection to the Special Referee’s decision to award actual damages on only this one claim, and it is the law of the case. *Erickson v. Jones St. Publr’s, LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006)(“We do not revisit the issue in this case because no party objected to use of

the negligence standard; therefore, it is the law of the case”); *Charleston Lumber Co. v. Miller Housing Corp.*, 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (unappealed ruling, right or wrong, is the law of the case and requires affirmance).

The salient question, therefore, is whether Partners 95’s Complaint stated a breach of contract accompanied by a fraudulent act claim upon which relief could be granted. As outlined below, it did not, and the Special Referee’s “rendering of a default judgment thereon is without authority of law and therefore reversible error.” *McKenzie*, 274 S.C. at 632-33, 266 S.E.2d at 424-25.

ii. Partners 95 failed to state a claim for breach of contract accompanied by a fraudulent act because the Complaint alleges the Commitment was not signed.

A cognizable claim for breach of contract accompanied by a fraudulent act requires, at a minimum, the following allegations: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 53-54, 336 S.E.2d 502, 503-04 (Ct. App. 1985). It is axiomatic that the very foundation of this cause of action is *a contract* that could be breached in the first instance.

The law is clear that under both the South Carolina common law statute of frauds and the Lender Liability Statute of Frauds, a promise to make a loan must be signed in writing. See S.C. Code Ann. § 37-10-107(1)(a)-(c)(providing in relevant part that no person may maintain an action to lend or borrow money or for failure to perform an alleged promise or agreement to loan money in excess of \$50,000 unless the party bringing the action “has received a writing from the party to be charged containing the

material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing”); *see also Sea Cove Dev., LLC v. Harbourside Cmty. Bank*, 387 S.C. 95, 105, 691 S.E.2d 158, 163 (2010)(discussing the writing requirement of 37-10-107, which “is essentially a statute of frauds”). Yet, the Complaint clearly admits that the only alleged binding contract between the parties, the Commitment, was not executed. (*Compare* Complaint, ¶ 12 (“with the exception of the execution of the Commitment which the parties agreed would be done at Closing”) *with* Complaint, ¶ 30 (“As set forth more fully above, Defendants breached the terms of the Commitment by failing to close the transaction contemplated”) *and* ¶ 25 (“The Commitment constituted a binding contract”). This fundamental deficiency in the allegations pled by Partners 95 is fatal to their breach of contract accompanied by a fraudulent act claim – the only claim for which actual damages were awarded.

Partners 95 do not appear to dispute the need for the Commitment to be signed, despite pleading to the contrary. Indeed, they introduced evidence at the damages hearing – for the first time – of a signed Commitment. (2/8/16 Tr. p. 74, lines 5-24; Ex. 13). Although Partners 95 initially requested amendment of their Complaint to conform to that evidence, (2/8/16 Tr. p. 80, lines 1-4), they quickly withdrew their request to amend once Lenders argued that an amendment to the substance of Partners 95’s allegations would trigger Lenders’ right to answer, (2/8/16 Tr. p. 80, lines 5-11).

But Partners 95 cannot have their cake and eat it too. Either the Special Referee was without authority of law to award damages because the Commitment was unexecuted as pled in Paragraph 12 of the Complaint (and therefore no binding contract between the

parties existed), *or* the Judgment Order must be vacated because Partners 95 must amend their Complaint to state a valid cause of action and permit Lenders the opportunity to answer.³

Further, the testimony regarding the executed Commitment was unclear at best. Mr. Hartman, when asked if he executed the Commitment letter, was uncertain. “So I did sign something. Whether that was a full-blown commitment, I’m not sure what we’re talking about.” (2/8/16 Tr. p. 65, line 10 – p. 66, line 11). Also, a review of the Commitment Letter shows a printed date at the top of the signature page of December 12, 2014, but the handwritten date beside Mr. Hartman’s signature is December 9, 2014. The discrepancy in dates is one more item that makes it unclear whether or not Mr. Hartman did-in fact-sign the commitment letter in a timely fashion and provide the same to Riverdale.

It should also be noted that Lenders argued, as a meritorious defense at the Hearing on the Entry of Default on November 4, 2015, that the statement in the Complaint that the Commitment was unexecuted violated the Lenders Statute of Frauds. (11/4/2015 Tr. p. 16, lines 4-20; pp. 19-20, lines 20-3. There was no rebuttal or mention from Partners 95’s attorney that the Commitment was in fact executed.

The record is clear: The allegations as pled in the Complaint did not state a claim for breach of contract accompanied by a fraudulent act upon which relief could be granted because Partners 95 admitted the Commitment was not signed and, by operation of law and the clear terms of the Commitment itself, no binding contract existed. The

³ Although the case law is clear that a defaulting party has admitted liability for the cognizable claims stated in the Complaint, *see Solley supra*, that does not give the plaintiff *carte blanche* to amend its claims during the damages hearing to state valid claims where none existed in the first instance. The scope of liability admitted by default is the Complaint as it exists at the time of entry of default.

Special Referee's actual damages award constituted an error of law and, thus, an abuse of discretion. Respectfully, this Court should reverse the Judgment Order awarding actual damages for this reason alone.

iii. Partners 95's fraudulent breach of contract allegations also fail to state a claim upon which relief can be granted because no fraudulent act or intent was alleged, much less alleged with particularity as required by Rule 9(b), SCRPC.

In a default setting, "[t]he complaint must allege facts which would afford a basis upon which a jury could properly find support for each of the elements [of the cause of action], and if the complaint fails to allege facts to support any one of the elements of fraud and deceit, then the complaint is fatally defective." *McKenzie*, 274 S.C. at 632-33, 266 S.E.2d at 424-25. "Although the cases involving breach of contract accompanied by a fraudulent act do not present an easy formula for defining a 'fraudulent act,' it is clear that the fraudulent act alleged must be an act done with the intent to deceive." *Save Charleston Found. v. Murray*, 286 S.C. 170, 181, 333 S.E.2d 60, 67 (Ct. App. 1985). The fraudulent act must be separate and distinct from the act constituting the breach of contract. *Floyd*, 287 S.C. at 53-54, 336 S.E.2d at 503-04. Moreover, these allegations must all be pled with particularity under the requirements of Rule 9(b), SCRPC. Partners 95's allegations are deficient in several respects.

First, while the Complaint allegations describe Lenders' conduct in a conclusory fashion as "fraudulent", there are no substantive allegations of *actual* fraudulent activity. Indeed, when the language of Partners 95's Complaint is stripped of that adjective, the conduct alleged is nothing more than a failure to consummate a loan transaction: first "negotiation" and "correspondence", then a "failure to communicate", a contract with "no contingencies", and "Plaintiffs [] ready, willing, and able to close." (Complaint, ¶ 31).

Adding the word “fraudulent” to modify these actions does not transform an alleged breach of contract into a fraudulent act pled with particularity. *Ray v. Pilgrim Health & Life Ins. Co.*, 206 S.C. 344, 349, 34 S.E.2d 218, 219-20 (1945)(“It is well established in this State that in order to recover punitive damages for breach of contract, it must be shown that the breach ‘was accomplished with a fraudulent intention, and was accompanied by a fraudulent act’ There is no evidence in this case of fraud or fraudulent acts on the part of the appellant.”). No fraudulent motivation or conduct evidencing deceit was alleged – just a mere lack of communication and a failure to close the loan. This is simply not enough to rise to the level of particularity required to state a claim for breach with a fraudulent act.

Second, no actual fraudulent act is alleged separate and apart from the breach itself. Indeed, the term “fraudulent act” is not found anywhere in Partners 95’s Second Cause of Action for breach of contract accompanied by a fraudulent act. Rather, the Complaint insufficiently alleges that Partners 95 “are further informed and believe that Defendants fraudulently breached the Commitment.” (Complaint, ¶ 32). Neither nonfeasance nor a mere statement without more constitutes a fraudulent act that sufficiently meets this element of the cause of action. *Foxfire Village, Inc. v. Black & Veatch, Inc.*, 304 S.C. 366, 404 S.E.2d 912, 918 (Ct. App. 1991). The standard of proof for the fraudulent act is clear and convincing evidence, which clearly cannot be met when no specific act is alleged in the first place. *Osborn v. Univ. Med. Assocs. Of the Med. Univ. of S.C.*, 278 F.Supp. 2d 720 (D.S.C. 2003).

Third, Partners 95’s allegations of fraud are pled “upon information and belief” without any factual knowledge. In *Dawkins v. Fields*, the South Carolina Supreme Court

determined that even in a verified complaint, a non-conclusory statement—an allegation made “upon information and belief”—could not form the basis of a summary judgment argument. 354 S.C. 58, 67-68, 580 S.E.2d 433, 438 (2003). This pleading threshold is even more applicable to an entry of default because the defaulting defendant is prohibited from defending against liability and the pleading allegations establish the defaulting defendant’s liability. The Complaint reveals that two of the essential elements of Partners 95’s claim – alleged fraudulent intent and the alleged fraudulent breach – were pled with the qualifier “Plaintiffs are informed and believe.” (Complaint, ¶¶ 31, 32). As a matter of law, these non-conclusory allegations fail to state a claim for relief and warrant reversal of the Special Referee’s actual damages award.

For these reasons, Partners 95 failed to adequately plead a breach of contract accompanied by a fraudulent act. Thus, Partners 95 is not entitled to an award of damages on this cause of action, which is the only cause of action the Special Referee referenced in the Judgment Order awarding damages.

C. Partners 95 Failed To *Prove* Entitlement To Actual Damages In Any Amount.

The Special Referee erred by awarding any damages to Partners 95 because they failed to show by a preponderance of the evidence that they are entitled to damages. The law is clear that “[i]n a default case, the plaintiff must prove . . . the amount of his damages, and such proof must be by a preponderance of the evidence.” *Solley*, 397 S.C. at 204, 723 S.E.2d at 603 (citation omitted). This is because the fact of Lenders’ default is not an admission regarding damages, *id.*, 603, and Partners 95 could not rely on a prayer for relief as proof of their damages. Proof by competent evidence is required – by a preponderance of the evidence. *Howard*, 271 S.C. at 240, 246 S.E.2d at 881. “The fact

of damages is proved by showing 1) that the plaintiff realized an actual loss he would not have incurred but for the defendant's breach of contract and 2) the loss was a natural consequence of the breach which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made." *South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Company, Inc.*, 303 S.C. 74, 77, 399 S.E.2d 8, 11 (Ct. App. 1990). Partners 95, who sought special damages, were required to show that Lenders were warned of the probable existence of unusual circumstances or that because of the Lenders' own education, training or information, they had reason to foresee the probable existence of such circumstances. *Stern & Stern v. Timmons*, 310 S.C. 250, 251, 423 S.E.2d 124, 125 (1992). Partners 95 failed to meet its burden of proof to show it was entitled to damages.

i. The replacement loan Partners 95 obtained was actually more beneficial for them.

As a threshold matter, Partners 95 cannot show that they have been damaged in any way because they ultimately received a loan with more favorable terms than the loan proposed between Partners 95 and Lenders. The Commitment, which Partners 95 submitted at the hearing, describes a loan in the amount of \$1,900,000 with a fixed rate per annum equal to 12% with a term of one year with the option to extend the maturity date by an additional period of one year if the loan remained sufficient in the commercially reasonable discretion of the Lender. (2/8/16 Tr., Ex. 13). By comparison, the loan that Partners 95 ultimately received in order to purchase the subject property from another lender, Avatar Loan, was in the amount of \$2,000,000 with an interest rate of 8.99% for the first six months and 9.99% thereafter. (2/8/16 Tr. p. 31, line 3 - p. 32, line 4, p. 73). Certainly, 8.99 % or 9.99% is a better interest rate than 12% - resulting in a

significant reduction in interest paid.⁴ Partners 95's closing attorney admitted during the hearing that an interest rate of 9.99% is a more favorable rate than the 12% offered in the Commitment. (2/8/16 Tr. p. 32, lines 1-4). Notably, Partners 95 failed to enter the terms of the Avatar Loan into evidence – despite testimony by their closing attorney that an assessment of the specific fee structure and interest rate of the Avatar Loan was required to assess Partners 95's claim. (2/8/16 Tr. p. 31, lines 3-25).

The only Avatar Loan evidence presented by Partners 95 at the damages hearing – the closing document, (2/8/16 Tr., Ex. 4) – demonstrates that the Avatar Loan *benefitted* Partners 95 more than the terms of Lenders' proposed loan:

- Attorney's Fees: Under Lenders' proposed loan, Partners 95 would have been required to pay all of Lenders' attorney's fees, which totaled \$17,500 compared with \$12,500 for counsel for the Avatar Loan. (2/8/16 Tr., Ex. 4 and 13).
- Guarantee: Mr. Robert Hartman was required to guarantee Lenders' proposed loan whereas there is no evidence that a guarantee was required for the Avatar Loan. *Id.*
- Commitment/Origination Fee: Lenders charged a commitment fee of \$114,000 as compared with the \$60,000 origination fee listed on the Borrower's statement for the Avatar Loan. *Id.*

⁴ Assuming the interest is only compounded on an annual basis, the interest for the 12% loan on \$1,900,000 from Defendants is \$228,000 versus \$189,800 in interest for the Avatar Loan of \$2,000,000 with 8.99% for the first six months and 9.99% for the remaining six months. This assumes that the ultimate loan Partners 95 received had a one year maturity date similar to the proposed terms of Lenders' proposed loan. Certainly, the ultimate loan would have had at least a one year period since the interest rate testified to by Partners 95's closing attorney was 8.99% for the first six months and 9.99% thereafter. (Tr. p. 31, line 3 – p. 32, line 4).

- Loan Amount: Lenders were only lending \$1,900,000 whereas Avatar ultimately lent \$2,000,000 to Partners 95. *Id.*

The evidence demonstrates that the Avatar Loan was ultimately a better loan with more favorable terms for Partners 95.

Partners 95 failed to present any evidence that they were damaged by the fact that Lenders did not ultimately close their loan with Partners 95. Rather, Partners 95 *ultimately benefitted* from the circumstances. The difference between the interest rates alone equals a savings to Partners 95 of \$38,200.00. Coincidentally, this benefit almost exactly cancels out the \$38,184.20 in actual damages that Partners 95 sought and were awarded by the Special Referee. Because Partners 95 ultimately received a better deal with the Avatar Loan than they would have with Lenders, they cannot claim they are damaged by Lenders supposed failure to lend the money. For this reason, any award of damages was in error.

ii. Partners 95 did not prove the specific amounts they sought as damages by a preponderance of the evidence.

The Special Referee awarded twelve (12) different line items of damages, totaling \$38,184.20. (Judgment Order, Conclusion of Fact ¶ 37, (a) - (l); Conclusion of Law ¶ J). Partners 95, however, failed to prove all but three (3) of those line items by a preponderance of the evidence, as outlined below:

- Broker's Price Opinion on Connecticut Property -- \$500:

This amount was incurred for possible collateral required by the Lenders. However, by the terms of the Commitment, Lenders at their sole discretion could determine whether or not the broker's price opinion was adequate. (2/8/16 Tr., Ex. 13). Thus, Partners 95 were not guaranteed to receive a loan based on the acquisition of this

appraisal and therefore cannot claim it as damages.

- Appraisal on Connecticut Property -- \$2,000:

This amount was incurred on an appraisal of possible collateral required by the Lenders. However, by the terms of the Commitment, Lenders at their sole discretion could determine whether or not the appraisal was adequate. (2/8/16 Tr., Ex. 13). Thus, Partners 95 were not guaranteed to receive a loan based on the acquisition of this appraisal and therefore cannot claim it as damages.

- Broker's Price Opinion on Marion County Property -- \$750:

This amount was incurred for possible collateral required by the Lenders. However, by the terms of the Commitment, Lenders at their sole discretion could determine whether or not the broker's price opinion was adequate. (2/8/16 Tr., Ex. 13). Thus, Partners 95 were not guaranteed to receive a loan based on the acquisition of this appraisal and therefore cannot claim it as damages.

- Appraisal on Marion County Property - \$2,500:

This amount was incurred on an appraisal of possible collateral required by the Lenders. However, by the terms of the Commitment, Lenders at their sole discretion could determine whether or not the appraisal was adequate. (2/8/16 Tr., Ex. 13). Thus, Partners 95 were not guaranteed to receive a loan based on the acquisition of this appraisal and therefore cannot claim it as damages.

- Callison Tighe Fees Related to Woodbridge/Riverdale Loan -- \$10,000:

Mr. Tighe testified that some of his work for the Woodbridge Loan was used in the Avatar Loan, yet he did not distinguish exactly which portion of the \$10,000 worth of work related solely to Lenders' proposed loan. (2/8/16 Tr. p. 27, lines 3-29). Partners 95

provided no itemized list of legal services or an engagement letter for Mr. Tighe. Thus, it is impossible to show that the services claimed are solely related to the Woodbridge loan, especially when Mr. Tighe testified that his fee is simply an estimate based on the “amount of responsibility, the time generally required, and the kind of documentation required to produce the transaction.” (2/8/16 Tr. p. 18, lines 19-22). Mr. Tighe further testified that there were some items that he prepared for Lenders’ proposed loan that he ultimately used in the Avatar Loan, yet he did not distinguish exactly what these items were or what different legal requirements existed between the two loans. (2/8/16 Tr. p. 27, line 4 – p. 29, line 3). When asked if he had any itemization for the fees incurred on the Avatar Loan, Mr. Tighe confirmed he had no such documentation for either loan. (2/8/16 Tr. p. 32, lines 5-8). Finally, some of the legal documents prepared were for the stock purchase of one of Partners 95’s owners to purchase the stock of another owner, something that was unrelated to the potential borrowing of funds from Lenders. (2/8/16 Tr. p. 27, lines 4-25; p. 28, lines 1-8). Mr. Tighe testified that Mr. Hartman had to buy out two of his sons in the transaction in order to obtain their concurrence. (2/8/16 Tr. p. 28, lines 1-15). It is not clear whether the preparation of these buyout documents was included in the \$10,000 attorney’s fees sought as damages in this case. Also, it should be noted that the legal fees charged for the closing on the Avatar loan, \$8,500, are less than the \$10,000 claimed as damages for the loan with Lenders that did not close. (2/8/16 Tr. Ex. 4).

When Mr. Hartman was asked about his written engagement letter for Mr. Tighe, he testified that he did not have one. (2/8/16 Tr. pp. 60-61) He also testified that he did not ask Mr. Tighe what his fee would be prior to retaining him. *Id.* In fact, Mr. Hartman

testified that he had an open engagement with Mr. Tighe whereby Mr. Tighe's firm would represent Mr. Hartman's company in anything they did in South Carolina. *Id.*

Finally, the Commitment makes it clear that all attorney's fees incurred by Partners 95 were solely the responsibility of Partners 95 regardless of whether the loan closed or not. (2/8/16 Hearing Ex. 13).

Partners 95 failed to show that the \$10,000 in claimed fees were truly legal fees incurred solely in relation to the potential loan with Lenders.

- Loan Broker Commission Increase -- \$2,000:

This amount relates to the fact that Partners 95 borrowed an additional \$100,000 with the Avatar Loan as opposed to the \$1,900,000 they sought to borrow from Lenders. Partners 95 received the advantage of the additional \$100,000. Based on the Borrower's Statement, (2/8/16 Tr., Ex. 4), it appears that Partners 95 used the \$100,000 in some manner, including buying out two of the members of Partners 95. Certainly, Partners 95 got the benefit of access to an additional \$100,000, and the cost of this benefit is not an item of damage.

- Additional Title Examination on Connecticut Property -- \$1,645.50:

This amount was incurred for title work on a third piece of property that Avatar required for collateral. This cost pertains to a separate loan and thus is not an item of damage related to Partners 95's allegations against Lenders.

- Difference in Contracts for Advantage Sign and Tyson Sign -- \$15,803:

This alleged damage is based on a claim that Partners 95 had to pay more for their sign because the Property did not close by December 30, 2014. However, Partners 95's

desire to engage a more expensive sign company was wholly related to their self-imposed desire to have the sign installed by early May. (2/8/16 Tr. p. 71, line 25 – p. 72, line 5; p. 72, lines 23-25). Hartman testified he wanted the sign up before their unveiling event. *Id.* The original sign company could not meet Hartman's desired time deadline due to the date Partners 95 was able to close on the property. As a result, Partners 95 hired a different company to put up the sign. (Tr. 2/8/16 p. 49, line 15 – p. 50, line 11). This was a desire separate and apart from any actions of Lenders and was not a necessity for Partners 95. Further, Hartman testified that a portion of the sign is currently down; a fact that shows the sign was simply something extra - - not a requirement. (2/8/16 Tr. p. 77, line 23 - p. 78, line 21).

The alleged damage associated with the sign also is not a valid item of damage because it appears that the proposed contract was an estimate based on the use of the current poles. (2/8/16 Tr., Ex. 10). In fact, Partners 95 now knows that the original poles should not have been used and new poles were necessary. Hartman testified that Partners 95 has had to replace a portion of the sign because the company they ultimately used did not use new poles, but rather attempted to use the poles that were already located on the site. (2/8/16 Tr. p. 77, line 23 – p. 78, line 21; Ex. 10). When Partners 95 had an independent engineer prepare a report, the engineer determined that new poles were required. (2/8/16 Tr. p. 78, lines 10-21; p. 82, line 19 – p. 83, line 3). Interestingly, the proposal from the original sign company noted that the quote was based on the assumption that the old sign poles could be used. (2/8/16, Ex. 10). There was no evidence submitted as to how much more the original sign quote would have been if new poles were required, which should have been a necessary element of that contract based

on the engineer's report. Thus, it is impossible to determine whether Partners 95 did, in fact, pay more for the sign than they would have had they been able to install a sign pursuant to the original sign quote. The original quote was based on the use of the old poles.

Because there is no evidence – much less a preponderance of the evidence – supporting the vast majority of the damages claimed by Partners 95, the Special Referee's damages award must be reversed. Although Lenders were in default, Partners 95's "right to recover was not unlimited and was circumscribed by the complaint he drafted." *Wiggins*, 296 S.C. at 435-36, 373 S.E.2d at 705-06 (citing cases holding that a defendant in default as to liability has a right to expect the judgment will be in keeping not only with the allegations and prayer for relief but also the proof). Partners 95 has not proven that it is entitled to an award of damages and for this reason, the damage award should be reversed.

iii. Partners 95 presented no evidence that the \$15,803.00 sign contract difference was foreseeable.

An additional reason warrants reduction of the Special Referee's actual damages award by \$15,803.00 for the "Sign Contract Difference": This expense was not foreseeable to Lenders. *The record is devoid of any evidence that Lenders should have foreseen this expense as a natural consequence of the breach.* Partners 95 offered no evidence on this point.

While it is true that Lenders need not foresee the exact dollar amount of the damage (but must only know or have reason to know the special circumstances so as to be able to judge the degree of probability that damage will result from delayed performance), there are no allegations in the Complaint - and no evidence was

presented at the damages hearing – to show that Partners 95 made Lenders aware of this sign contract *at all, much less the time-sensitive demand Partners 95 placed upon it.* Nor is it logical that Lenders should have foreseen that failing to close a loan would cause Partners 95 to suffer a loss due to a self-imposed, time-sensitive sign installation quote completely unrelated to the terms of closing. The Special Referee’s award of actual damages must be reduced by \$15,803.00 for unforeseeable damages that were not a natural consequence of the breach.

II. UNDER SOUTH CAROLINA LAW, PARTNERS 95 FAILED TO PLEAD OR PROVE PUNITIVE DAMAGES, AND THE SPECIAL REFEREE FAILED TO REQUIRE THE PROOF REQUIREMENTS MANDATED BY *MITCHELL, JR. V. FORTIS INS. CO.*

A. Standard of Review

The \$35,000.00 in punitive damages in this case, and in all South Carolina cases, may be properly awarded only if Lenders’ conduct is so outrageous and reprehensible as to warrant the imposition of sanctions to achieve the goal of punishment or deterrence. The extent of punishment must fit the gravity of the “crime.” *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 584, 686 S.E.2d 176, 183 (2009). “Reprehensible” has been defined by the South Carolina Supreme Court to embrace the following five factors: (1) physical harm, rather than economic loss; (2) tortious conduct evidencing an indifference to, or a reckless disregard for, the health or safety of others, (3) financial vulnerability of the conduct’s victim, (4) repeated or isolated conduct, (5) harm to the victim because of the wrongdoer’s intentional malice, trickery, or deceit, rather than a mere accident. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185.

To obtain a proper punitive damages award, Partners 95 had to prove their case by *clear and convincing evidence*, the highest burden of proof known to civil law,

Austin, 358 S.C. at 313, 594 S.E.2d at 875, and, as Lenders will show *infra*, it is axiomatic that Partners 95's allegations made "upon information and belief" (as they frequently alleged in their Complaint) could not – and did not – satisfy their heavy burden of "clear and convincing" proof.

The reason why South Carolina law requires that an award of punitive damages must rest solidly on clear and convincing evidence, and why punitive damages require the highest burden of proof known to civil law, and why assertions made upon information and belief are, *ipso facto*, not clear and convincing, is because punitive damages are, "by definition 'punishing damages' or 'private fines' levied to punish a wrongdoer for reprehensible conduct and to deter its repetition in the future." *Patterson v. I.H. Services, Inc.*, 295 S.C. 300, 310, 368 S.E.2d 215, 221 (Ct. App. 1988). It is because of the potentially devastating consequences of a punitive damages award that Partners 95 carried the burden of pleading with precision how Lenders' alleged conduct was outrageous and reprehensible, and shouldered the even heavier burden of proving those essential factual elements by clear and convincing evidence. S.C. Code Ann. § 15-33-135. "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct. App. 2009).

In the instant case, Partners 95 failed to carry both their burdens of pleading and of proof. The only two causes of action (II and IV) that could support their demand for punitive damages⁵ were, as a matter of law, insufficient. In fact, the Judgment Order

⁵ Of Partners 95's five causes of action, numbers I, III, and V did not demand punitive damages, and thus warrant no discussion in this Point.

only based its damages awards on the Second Cause of Action for Breach of Contract accompanied by Fraudulent Intent, and this finding was not appealed by Partners 95. But even assuming *arguendo* that liberal construction of the Complaint might have saved this cause of action, Partners 95 failed to present *any* evidence warranting the imposition of punitive damages on any claims — let alone by clear and convincing evidence.

South Carolina law is unambiguous that Partners 95 were and are bound by what they pleaded factually and by what they did not plead—all the more because they demanded and obtained a default judgment, one awarding punitive damages no less. A party seeking a default judgment is entitled to only such relief as is framed factually and legally by his pleading, and then only to the extent expressly requested within the four corners of the Complaint. *McKenzie*, 274 S.C. at 632-33, 266 S.E.2d at 424-25.

B. Partners 95 failed to *plead* the ultimate facts to support a punitive damages award.

South Carolina is a “fact,” not “notice,” pleading state. South Carolina Rule of Civil Procedure 8 requires “a pleading which sets forth a cause of action . . . [to] contain . . . (2) a short and plain statement of the facts showing that the pleader is entitled to relief . . .” Rule 8(a)(2), SCRCP. The accompanying notes state: “This Rule 8(a) is in the same general language as the Federal Rule with the important distinction that the State practice requiring pleading of the facts (rather than a ‘statement of the claim’) is retained.” Notes to Rule 8, SCRCP.

South Carolina courts have held the Rule “requires a litigant to plead the *ultimate facts* which will be proved at trial, not the evidence which will be used to prove those facts.” *Clark v. Clark*, 293 S.C. 415, 416, 361 S.E.2d 328, 328 (1987) (citing *Stroud v.*

Riddle, 260 S.C. 99, 194 S.E. (2d) 235 (1973))(emphasis added). See also *Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (providing conclusory allegations in a complaint are insufficient to survive a judgment on the pleadings). Rule 8(f) provides that “[a]ll pleadings shall be so construed as to do substantial justice to all parties” – both Partners 95 and Lenders alike.

Measured by these provisions of South Carolina law, the pleading of Partners 95’s Breach of Contract accompanied by a Fraudulent Intent cause of action demanding punitive damages must be found deficient as a matter of law. In order to seek them, Partners 95 were required to plead ultimate facts—specifically that Lenders’ conduct was factually *willful, wanton, or reckless*. See S.C. Code Ann. § 15-32-520(D); see also the meaning of “reprehensible,” *supra*. Yet not even once in Partners 95’s causes of action II and IV is any essential pleading requirement — willful, wanton, reckless — or a synonym thereof, even implied, let alone is any of these requisite ultimate facts specifically alleged. As to each, there was a complete failure of pleading as a matter of law.

It is worth noting that Partners 95’s causes of action II and IV invoke such hedge-phrases as “plaintiffs are informed and believe,” “plaintiffs are further informed and believe,” and “upon information and belief.” Because the clear and convincing standard is the highest burden of proof known to civil law, *Austin*, 358 S.C. at 313, 594 S.E.2d at 875, it is axiomatic that allegations seeking punitive damages made “upon information and belief” can neither rise to the level of “clear and convincing” nor constitute pleading of the requisite ultimate facts of “willful, wanton, or reckless.”

C. Partners 95 failed to *prove* the ultimate facts to support a punitive damages award.

However, even assuming *arguendo* that Partners 95 did adequately *plead* the only causes of action (II and IV) which included a demand for punitive damages, they failed to *prove* what they alleged. From a proof perspective, the most fundamental defect in Partners 95's claims for punitive damages against Lenders was their failure to provide clear and convincing factual *evidence* of willful, wanton, or reckless conduct. See S.C. Code Ann. § 15-32-520(D) ("Punitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that his harm was the result of the defendant's willful, wanton, or reckless conduct."). The Special Referee's Conclusions of Fact and Law, upon which rest the punitive damages award of \$35,000.00, *prima facie* contain erroneous findings that are not supported by evidence Partners 95 adduced at the damages hearing.

There was no evidence (let alone clear and convincing) that Lenders failed to close title to the property "all while knowing the repercussions for Plaintiff if the loan failed to close on December 30, 2014." (Judgment Order, Conclusion of Law ¶ R). Importantly, though, even if such knowledge existed, that fact does not amount to clear and convincing evidence that Partners 95 were entitled to punitive damages.

Nor was there evidence that "Defendants targeted Partners 95 who Defendants knew were financially vulnerable" – whatever "targeted" means. (Judgment Order, Conclusion of Law ¶ S). Furthermore, Partners 95 failed to produce any clear and convincing evidence showing they were financially vulnerable or that Lenders had any knowledge of Partners 95's alleged vulnerability. The record is devoid also of any evidence that *when the Commitment was drafted*, Lenders were aware of Partners 95's

internal closing deadline of December 30th. There was no evidence presented by Partners 95 that they asked Lenders to amend or revise the Commitment to reflect the December 30th deadline. Much less was there evidence that if Lenders knew, or could have known, the consequences of not closing two weeks earlier than the Commitment provided (except that to do so avoided a significant price increase – a situation that did not occur). (Complaint ¶ 11). There was no evidence of other possible financial results being made known to Lenders, such as the sign costs.

Although it was Partners 95, not Lenders, who had the burden of proof, it is worth noting that there did not appear to be consideration of the possibility that Lenders may have declined to close because other contingencies as set forth in the Commitment had not been satisfied by Partners 95. Indeed, Partners 95's Complaint itself acknowledges that they had not satisfied at least one contingency, the one requiring that the Commitment be executed by Partners 95 and Lenders. (Complaint, ¶ 12). When the Commitment was finally introduced into evidence at the damages hearing, the language of the Commitment by Lender to lend the money to Partners 95 included the specific contingency that the "Borrower accept[] this Commitment on or before December 12, 2014 by signing and returning the enclosed copy of this letter to Lender with the applicable fees." (2/8/16 Hearing Ex. 13). In fact, the Commitment includes numerous contingencies that had to be met and could have been deemed by Lenders, *in their sole discretion at any time*, to have not been satisfied. (2/8/16 Tr., Ex. 13; *see also* 2/8/16 Tr. p. 65, lines 19-23, p. 67, lines 3-7). In fact, Mr. Tighe testified that one of the principles for Lenders suggested that he had a concern about the value of the Property. (2/8/16 Tr. p. 26, lines 13-16). If Lenders, in their sole discretion, could have decided not to lend to

Partners 95 pursuant to the terms of the Commitment, it is impossible to make a determination that their failure to lend warranted punitive damages.

In sum, the Special Referee's Conclusions of Fact and Law, upon which the punitive damages award of \$35,000.00 entirely rests, *prima facie* contain erroneous findings unsupported by the evidence at the damages hearing and also overlook evidence that showed Lenders acted within their rights pursuant to the Commitment. The findings of fact used to support a punitive damages award were not proven by clear and convincing evidence—or in some cases any evidence at all.

D. The Special Referee failed to follow the mandate of *Mitchell*.

The turning point in South Carolina's punitive damages jurisprudence came in *Mitchell, Jr. v. Fortis Insurance Company, supra*, a punitive damages jury case. Following the lead of the United States Supreme Court decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Supreme Court of South Carolina ruled that "*our appellate courts must conduct a de novo review when evaluating the constitutionality of a punitive damages award.*" *Mitchell, supra*, at 583 (emphasis added). After examining the history of Due Process limitations on punitive damages awards in South Carolina and United States Supreme Court decisions, the South Carolina Supreme Court acknowledged that its punitive damages "jurisprudence has largely tracked the [U.S.] Supreme Court constitutional pronouncements, beginning with our *Gamble* opinion." *Id.* at 586. In its *Gamble* opinion, the Court "identified eight considerations that trial courts should apply in conducting a post-judgment due process review of any punitive damages review." *Id.* (citing *Gamble v. Stevenson*, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991)). Those factors are:

1. The defendant's degree of culpability;
2. The duration of the conduct;
3. The defendant's awareness or concealment;
4. The existence of past similar past conduct;
5. The likelihood the award will deter the defendant or others from like conduct;
6. Whether the award is reasonably related to the harm likely to result from such conduct;
7. The defendant's ability to pay; and
8. Any other factors deemed appropriate.

Gamble, supra, at 111-12. The *Mitchell* Court then merged the *Gamble* considerations into *BMW of North America v. Gore*, 517 U.S. 559 (1996), the result of which was to establish a new three-prong "test for our [South Carolina] courts in conducting a post-judgment review of punitive damages awards." *Mitchell*, 385 S.C. at 587. Thus, *Mitchell* preempted *Gamble's* eight factors that a court should consider when reviewing a punitive damages award, boiling them down to only three: (1) reprehensibility of the alleged wrongs, (2) ratio of the amount of the punitive award to the actual damages suffered, and (3) comparison of the punitive award and civil penalties authorized or imposed in comparable cases.

Partners 95 failed to plead and prove the existence of reprehensible conduct. The unsupported findings of fact do not justify the punitive damages award. As to the reprehensible prong, the *Mitchell* Court applied the *Gamble* test to the *Mitchell* facts. In *Mitchell*, there was a finding of a threat of physical harm, defendant's indifference to and reckless disregard of Mitchell's health and safety, financial vulnerability, repeated acts, and intentional deceit. In short, the *Mitchell* court found defendant insurance company's conduct to be more than reprehensible enough to satisfy the first *Mitchell* prong. Partners 95's evidence in the instant case—essentially a contract dispute, despite their attempt to turn Lenders' decision not to close into a reprehensible tort—does not begin to present

the kind of facts present in, and responsible for, the decision in *Mitchell*. Indeed, a review of the terms of the Commitment shows the Lenders had the unilateral ability to determine that a contingency had not been met and, thus, to refuse to close the loan. Lenders should not be penalized for not lending to Partners 95 when they were permitted to unilaterally make that determination pursuant to the clear terms of the Commitment.

This Court's *de novo* review of the Judgment Order below should result in its reversal of the punitive damages award as Partners 95 failed to show reprehensible conduct by Lenders.

III. THE PUNITIVE DAMAGES AWARD OF THE DEFAULT JUDGMENT VIOLATES LENDERS' 14TH AMENDMENT RIGHTS.

A. Standard of Review

When, as here, an appellant challenges the constitutionality of the amount of punitive damages, the Court is "required to determine whether the award of punitive damages in this case is consistent with due process." *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 396, 714 S.E.2d 904, 911 (Ct. App. 2011) (citing *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006)). This review requires the Court:

to determine whether the award was reasonable in light of the following guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id. (citing *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 52, 691 S.E.2d 135, 151 (2010)).

B. The Special Referee Erred in Awarding Punitive Damages Against Both Riverdale and Woodbridge Where Partners 95 Failed to Distinguish Between the Individual Lenders.

The caption of this case unambiguously states that Partners 95 sued two separate Lender/Defendants: Riverdale and Woodbridge. However, immediately after the caption, the entire Complaint is unclear about who was whom, and which Defendant was being accused of what conduct, and when. In Paragraphs 3 and 4 of the Complaint, Riverdale and Woodbridge are referred to individually. In Paragraph 5, Partners 95 claim the “parties” (presumably all four: both plaintiffs collectively referred to herein as “Partners 95,” as well as Riverdale and Woodbridge) were engaged in a mortgage transaction. Yet, Partners 95 include specific allegations that indicate only one Lender was responsible.

For example:

- Paragraph 7 states “Riverdale [alone] issued a Loan Commitment letter.”
- Paragraph 8 states “Riverdale [alone] agreed to lend Plaintiffs . . .”
- Paragraph 13 refers to the “parties”—again, presumably all four: both plaintiffs collectively referred to herein as “Partners 95,” Riverdale, and Woodbridge—although so far Plaintiffs did not identify Woodbridge.
- Paragraph 14 names both Riverside and Woodbridge individually, the former as assignor, the latter as assignee of the Commitment, note, mortgage, and other documents. Importantly, there are no allegations that Riverdale retained any ownership interest or duties related to the Commitment.
- Paragraph 15 for the first time, refers to Riverside and Woodbridge “collectively” as “Defendants.”
- Paragraphs 17, 19, 20, 22, and 23 refer to “Defendants” jointly but fail to distinguish which Lender performed various acts that form the basis of the Complaint.

It bears emphasizing that in Paragraph 14 of the Complaint, Partners 95's acknowledged and pleaded that "Prior to Closing, Riverdale transferred and assigned the Commitment to Woodbridge who was to be the owner and holder of the promissory note, mortgage and other loan documents." Because of that assignment, whatever *Woodbridge's* obligations were to Partners 95, *Riverdale* no longer had any rights or responsibilities in connection with the transaction; not to lend, fund, or close.⁶

Building on the alleged facts pleaded in Partners 95's Complaint, their First Cause of Action asserted a breach of contract claim against "Defendants" *jointly* despite earlier having pleaded that *Riverdale* had assigned the Commitment to *Woodbridge*. (Complaint ¶¶ 25-28). Partners 95's Second Cause of Action, which sought punitive damages, again charged both "Lenders" *jointly* with breach of contract, without regard to Partners 95 having earlier pleaded the assignment, and without differentiating between the two Lenders/Defendants. (Complaint ¶¶ 30-33). Partners 95's Third Cause of Action—also for breach of contract, but with no punitive damages sought—was much like their First, again painting with the broad "Defendants" brush, without differentiating between Riverdale and Woodbridge, and thus alleging that *both* the assignor and assignee breached the contract. (Complaint ¶¶ 35-39). Partners 95's Fourth Cause of Action—also for breach of contract but which did seek punitive damages because of alleged fraud—like the Second Cause of Action again charged both "Defendants" *jointly* with breach of contract, again without regard to Partners 95 having earlier pleaded the assignment, and without differentiating between the two Lenders/Defendants. (Complaint ¶¶ 41-48). Plaintiff's Fifth (and last) Cause of Action—based on the South

⁶ Paragraph 1 of the Commitment gave Riverdale the unqualified right to assign the transaction to its "assignee(s) or affiliates." (2/8/16 Tr. Ex. 13).

Carolina Unfair Trade Practices Act, and seeking treble damages and attorney's fees—charged both “Defendants” *jointly* with “willfully and fraudulently induc[ing] Partners 95 to move forward towards Closing by issuing the Commitment and taking further steps toward closing.” (Complaint ¶¶ 50-54). Again – these allegations were without regard to Partners 95 having earlier pleaded the assignment, and without differentiating between the two Lenders/Defendants.

The ambiguity clear on the face of the Complaint makes it impossible to determine which individual Defendant was being accused of what conduct, and when. Partners 95, while bound to the allegations of the Complaint, including its ambiguities, also failed to present any evidence at the hearing to distinguish between Riverdale and Woodbridge. Indeed, the terms “Riverdale” and “Woodbridge” were used interchangeably on numerous occasions at the hearing, reflecting the same confusion manifest in Partners 95's Complaint:

THE SPECIAL REFEREE: Let me make sure I'm following you now.

The original loan was supposed to be with Woodbridge?

THE WITNESS: Woodbridge.

THE SPECIAL REFEREE: The actual closing was with somebody Avatar?

THE WITNESS: Right, exactly.

...

THE WITNESS: They did. Maybe I wasn't too clear. The original loan with Riverdale required two pieces of collateral So that we have appraisals that we paid for in connection with the Woodbridge loan.

(2/8/16 Tr. pp. 14, line 18 – p. 15, line 19). Partners 95's closing attorney, Mr. Tighe, testified that Riverdale *and* Woodbridge were going to make the loan. (2/8/16 Tr. p. 5, lines 8-13). However, the Commitment made clear, Riverdale was the original lender as there is no mention of Woodbridge in the document. (2/8/16 Tr. Ex. 13). If, in fact, the Commitment was assigned to Woodbridge as plead, then Riverdale was no longer going to make the loan. Contrary to his earlier testimony, Mr. Tighe testified that the loan was supposed to close with *Riverdale*. (2/8/16 Tr. p. 6, lines 3-4). Again, this is contrary to the assignment to Woodbridge set forth in the Complaint. Suffice it to say, the ambiguities of the Complaint continued in the hearing.

The Complaint's contradictory pleading, and the hearing's failure to identify exactly what Riverdale's and Woodbridge's individual and joint roles, if any, were in the alleged breaches of contract and consumer fraud, carried over to, and thus should result in reversal of, the Special Referee's Judgment Order and its award of punitive damages against the "Defendants." The Judgment Order began by tracking and quoting from the Complaint, and thus fell into the same prejudicial error the Partners 95 made in their pleading by not differentiating between Riverdale as assignor and Woodbridge as assignee. This failure to distinguish between the two is fatal to an award of punitive damages. The following quotes from the Judgment Order fail to distinguish Riverdale from Woodbridge and ignore the allegations in Paragraph 14 of the Complaint:

- "Defendants' unexplained and bad faith refusal to fund the Loan and honor the Commitment." (Judgment Order, ¶¶ 28, 39).
- "Defendants breached the terms of the Commitment by failing to close. . . ." (Judgment Order, ¶¶ 29, 37, R).

- “Defendants intent in breaching the Commitment. . . . (Judgment Order, ¶ 31).
- “Defendants were well aware that if the transaction failed to close. . . .” (Judgment Order, ¶ I).
- “Defendants’ breach of contract. . . .” (Judgment Order, ¶¶ J, K).
- “Defendants’ misconduct was willful, wanton or in reckless disregard. . . .” (Judgment Order, ¶ R).
- “Defendants knew their responsibilities under the Commitment.” (Judgment Order, ¶ R).
- “Defendants’ actions were reprehensible.” Id.

It is enough for reversal that the punitive award Special Referee violated South Carolina constitutional law. But the punitive award also violated federal due process as well, as the Supreme Court of the United States has made quite clear. The failure to designate which Lender is responsible for specific bad acts is a violation of federal due process. The Supreme Court has held that it is an “elementary notion of fairness enshrined in our constitutional jurisprudence” that a person receive fair notice of the conduct that will subject him to punishment. *Gore*, 517 U.S. at 575. That elementary notion has not been satisfied in this case where the Complaint is ambiguous as to exactly which Lender committed which act and the testimony at the hearing only continued the ambiguity. For this reason, the punitive damages award must be reversed.

C. The Punitive Damage Award is Excessive.

Several Supreme Court cases discuss the punitive damages problem of “excessiveness,” some at considerable length. *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408 (2003), held that the Due Process Clause of the Fourteenth Amendment

“prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” *Id.* at 416 (citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* 532 U.S. 424, 432 (2001)). In *Campbell*, the Court recognized that punitive damages serve the same ends as a state’s criminal punishments, and thus instructed lower courts to review awards by first considering the reprehensiveness of the defendant’s conduct. 532 U.S. at 418 citing *Gore*, 517 U.S. 559, 575 (1996).

A defendant's reprehensiveness is the most important factor in analyzing the excessiveness of a punitive damages award. *Id.* In order to determine the reprehensibility of a defendant’s conduct, a court must consider:

- What type of harm was caused;
- Whether it was physical or economic;
- Whether the conduct showed an indifference to, or reckless disregard of, the health or safety of others;
- Whether it involved repeated actions, or was an isolated incident; and (not “or”)
- Whether the harm resulted from intentional malice, trickery, or deceit, or mere accident.

Campbell, 538 U.S. at 419 (2003).

Applying *Campbell's* mandates to the instant case, it is clear as a matter of law that Partners 95 failed to prove (or, for that matter, even allege) that Lenders acted reprehensively, and thus equally clear that there was no evidence to support a punitive damage award. To begin with, as Lenders have noted in Section I, *supra*, Partners 95 suffered no harm because Woodbridge declined to close. In fact, Partners 95 in

mitigating their damages made a better deal with a lender different from Riverdale/Woodbridge.

“Indifference” and “reckless disregard” are tort law terms, having no real application to this breach of contract case. This is a breach of contract/consumer act case, and thus not physical but rather economic. Neither the health nor safety of anyone was at stake.

Lenders’ alleged transgression occurred only once. And there was no evidence of “intentional malice, trickery, or deceit” other than conclusory allegations set forth in the complaint, which fail to meet the standard of clear and convincing evidence necessary for an award of punitive damages. In fact, if the terms of the Commitment are examined, it is clear there are numerous instances where a contingency is merely based on the satisfaction of the lender. The Lenders were under no obligation to lend to Partners 95 given the numerous unilateral contingencies clearly set forth in the Commitment.

Because there was no pleading or proof that Lenders acted reprehensively, there was no legal justification for the Special Referee to award punitive damages against either Riverdale or Woodbridge. For this reason alone, the Special Referee violated Defendant’s Fourteenth Amendment rights.

IV. THE SPECIAL REFEREE’S FAILURE TO APPORTION THE PUNITIVE DAMAGES AWARD BETWEEN RIVERDALE AND WOODBRIDGE VIOLATED SECTION 3 OF THE CONSTITUTION OF THE STATE OF SOUTH CAROLINA BECAUSE IT DID NOT IMPOSE PUNITIVE DAMAGES ON THE BASIS OF INDIVIDUAL CULPABILITY.

A punitive award that violates South Carolina constitutional law should be reversed. *See, Mitchell, supra*. South Carolina courts analyze punitive damages in much the same manner as the Supreme Court. *Mitchell*, 385 S.C. at 586. “Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of

reprehensibility of *the* defendant's conduct.” *Gore, supra*, 517 U.S. at 575 (emphasis added). Section III, *supra*, argues *inter alia* that “(A) Plaintiffs failed to prove which Lenders’ individual conduct warranted the award of punitive damages against that Defendant.” Essentially, Lenders’ argument demonstrates factually that regarding Riverdale and Woodbridge, neither Partners 95’s Complaint, the damages hearing, nor the Special Referee’s Judgment Order awarding punitive damages identified who was whom, and which of the two Lenders/Defendants was being accused of what conduct, and when. It is the Lenders/Defendants’ contention that an award of punitive damages suffering from that factual deficiency violates a defendant’s right to procedural due process under Section 3 of the Constitution of the State of South Carolina.

Further, S.C. Code Ann. § 15-32-520(G) sets forth specifically, “[i]n an action with multiple defendants, a punitive damages award must be *specific to each defendant*, and each defendant is liable only for the amount of the award made against *that defendant*.” (emphasis added.) Clearly, this standard has not been met in this case. The punitive damage award was not made specific to either Lender and there is no assessment as to which Lender performed what acts that may subject the Lenders to punitive damages.

Under the circumstances of the instant case—Partners 95 failed to prove which Lenders’ individual conduct warranted the award of punitive damages against either Riverdale or Woodbridge—as a matter of South Carolina constitutional law and policy, and in the interests of justice, the punitive damages award should be vacated.

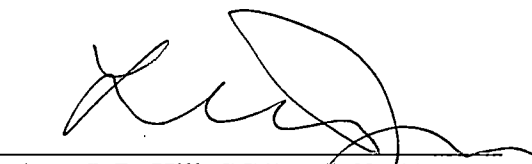
CONCLUSION

While Lenders are subject to the Entry of Default, Partners 95 has failed to prove

by a preponderance of the evidence that they are entitled to any actual damages where Partners 95 ultimately received more favorable terms than the potential loan that is the subject of this litigation or where Partners 95 simply could not prove the individual items of claimed damages. In addition, Partners 95's damages claims are barred because they failed to properly plead their breach of contract accompanied by fraudulent intent claim. Either Partners 95 had an unexecuted Commitment, which does not satisfy the Lenders Statute of Frauds, as plead in their Complaint or there is a Commitment, which includes numerous unilateral contingencies whereby Lenders were not required to fund the Loan. Finally, in conclusion, Partners 95 have utterly failed to prove by clear and convincing evidence that they are entitled to punitive damages and to award such damages would violate Lenders constitutional rights under both the Federal Constitution and the South Carolina Constitution. In sum, the damages award by the Special Referee should be reversed in total.

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