

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)**

CASE NO. 10-81612-CIV-HURLEY/HOPKINS

JONATHAN E. PERLMAN, Esq., as court
appointed Receiver of Creative Capital
Consortium, LLC, et al.,

Plaintiff,

v.

WELLS FARGO BANK, N.A, as
successor-in-interest to Wachovia Bank, N.A.,

Defendant.

**PLAINTIFF'S RESPONSE IN OPPOSITION TO WELLS FARGO BANK, N.A.'S
MOTION TO STRIKE JURY DEMAND AND INCORPORATED
MEMORANDUM OF LAW**

Plaintiff Jonathan E. Perlman, Esq., the court-appointed Receiver (the "Receiver") of Creative Capital Consortium, LLC, A Creative Capital Concept\$, LLC, United Investment Club, LLC, Reverse Auto Loan, LLC, Wealth Builders Circle, LLC, The Dream Makers Capital Investment, LLC, G\$ Trade Financial, Inc. and Unity Entertainment Group, Inc., (collectively referred to as the "Receivership Entities"), by and through undersigned counsel, hereby moves this Court to deny Defendant Wells Fargo Bank, N.A.'s ("Wachovia") Motion to Strike Jury Demand and Incorporated Memorandum of Law [D.E. 64] (the "Motion to Strike"), and in support thereof states as follows:

INTRODUCTION

The Receiver's claims in this case arise from allegations that Wachovia was a knowing participant in the Ponzi scheme conducted by George Theodule. More specifically, the Receiver alleges that Theodule used his corporate and personal banking relationships with Wachovia to

facilitate his fraudulent business operations. In this regard, the Receiver's Amended Complaint [D.E. 19] (the "Amended Complaint") sets forth the following four¹ separate causes of action.

(a) Count I – Aiding and Abetting Breach of Fiduciary Duty

In Count I of the Amended Complaint the Receiver alleges that Wachovia actively assisted Theodule in breaching his fiduciary duties as an officer of the Receivership Entities by participating with Theodule and others in the mishandling and misappropriation of funds of the Receivership Entities through use of Wachovia bank accounts.

(b) Count II - Aiding and Abetting Conversion

In Count II of the Amended Complaint the Receiver alleges that Theodule converted Receivership Entity funds for his personal use and that Wachovia actively assisted in the conversion of those funds by participating with Theodule and others in the mishandling and misappropriation of funds of the Receivership Entities through use of Wachovia bank accounts.

(c) Counts VI and VII - Avoidance and and Recovery of Fraudulent Transfers

In Counts VI and VII of the Amended Complaint, the Receiver, as a creditor of the Receivership Entities, alleges pursuant to the Florida Uniform Fraudulent Transfer Act at Fla. Stat. §726.101 et seq. that Wachovia was the recipient of fraudulent transfers by virtue of deposits and transfers made by the Receivership Entities into Wachovia Bank accounts.

The Amended Complaint contains a jury demand with regard to all claims asserted by the Receiver. Wachovia now contends that the Receiver has waived his right to a jury trial pursuant to a written jury trial waiver set forth in the deposit agreement allegedly signed by the Receivership Entities when their banking accounts were opened at Wachovia (the "Deposit

¹ The Amended Complaint initially contained eight causes of action. The number of claims was reduced to those four herein described by virtue of the Order Granting in Part Defendant's Motion to Dismiss and Denying Defendant's Motion to Strike in which all but Counts III, IV, V,

Agreement.'). However, Wachovia's arguments must fail because the Deposit Agreement is not a voluntary, knowing, and intentional waiver necessary for the forfeiture of the Receiver's Seventh Amendment right to jury trial. Furthermore, even if the Deposit Agreement could be construed to establish some form of jury waiver, the Receiver's tort-based aiding and abetting claims and the statutory fraudulent transfer claims, respectively, are not the type of claims contemplated by the parties as being subject to such a waiver.

For these reasons, as more fully set forth in detail below, the Defendant's Motion to Strike Jury Demand should be denied.

MEMORANDUM OF LAW

I. THE JURY WAIVER PROVISION IN WACHOVIA'S DEPOSIT AGREEMENT IS NOT ENFORCEABLE.

The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *U.S. Const. amend. VII*. In federal lawsuits, the question of whether the right to a jury trial has been waived is governed by federal law. *Ford v. Citizens and Southern Nat. Bank, Cartersville*, 928 F.2d 1118, 1121 (11th Cir. 1991.) Waivers of valid jury demands are not to be lightly inferred and should be scrutinized with utmost care. There is a strong preference within the federal courts for permitting jury trials. *Haynes v. W.C. Caye & Co., Inc.*, 52 F.3d 928, 930 (11th Cir. 1995).

To enforce a jury trial waiver executed under a contract before litigation, it must be shown that the waiver was assented to knowingly, voluntarily, and intelligently. *Allyn v. Western United Life Assur. Co.*, 347 F.Supp.2d 1246, 1251 (M.D.Fla.2004.) The burden of proving that a jury trial waiver was knowing and intentional rests with the party attempting to enforce the

purported waiver. *Ginsberg v. Silversea Cruises Ltd. (Inc.)*, No. 03-62141-CIV, 2004 WL 3656827, at *1 (S.D. Fla. 2004). Further, a presumption exists against waiving the right to a jury trial. *Id.* Thus, although the fundamental right to a jury may be waived, “courts must indulge every reasonable presumption against waiver.” *Burns v. Lawhter*, 53 F.3d 1237, 1240 (11th Cir. 1995); *Lapenna v. Suntrust Bank*, No. 3:09-cv-1213-J-25, at *1 (M.D. Fla. Aug. 24, 2010.)

The Eleventh Circuit has adopted five factors in assessing whether a jury trial waiver was entered into knowingly, voluntarily, and intelligently: (1) the conspicuousness of the provision in the contract; (2) the level of sophistication and experience of the parties entering into the contract; (3) the opportunity to negotiate terms of the contract; (4) the relative bargaining power of each party; and (5) whether the waiving party was represented by counsel. *Allyn v. Western United Life Assur. Co.*, 347 F.Supp.2d 1246, 1252 (M.D.Fla.2004.) Notably, “[a]lthough the factors play an important role in the Court's decision-making process, they are not determinative.” *Id.* In other words, “it is not whether any particular number of factors have been satisfied, but whether in light of all the circumstances, the Court finds the waiver to be unconscionable, contrary to public policy or simply unfair.” *Id.*

A. The Wachovia Jury Trial Waiver Provision Is Not Conspicuous.

In determining whether a jury waiver is conspicuous within a given contract, the Court may look to the actual location of the waiver provision within the contract. For example, in *Hancock v. Deutsche Bank National Trust Co.* 2006 WL 6319816, *2 (M.D.Fla.2006), a jury trial waiver contained just above the plaintiffs' initials and directly preceding their signatures was considered conspicuous and therefore valid. *Id.*

In contrast to the facts in *Hancock*, the corporate representatives of the Receivership Entities in this case did not even sign the document containing the Wachovia waiver provision. When opening their respective bank accounts at Wachovia, the Receivership Entities executed

only the "account signature cards." (*See Affidavit of Benita Sheffield attached to the Motion to Strike.*) The waiver provision upon which Wachovia relies is contained in the Deposit Agreement, a document *entirely separate* from the account signature cards. Moreover, Wachovia has failed to allege that the Receivership Entities ever received the Deposit Agreement at any time during their banking relationship with Wachovia. In her affidavit, Benita Sheffield merely states that certain Receivership Entities "maintained accounts at Wachovia" and signed the account signature cards. She further states (in conclusory fashion) that the accounts were governed by the Deposit Agreement, but does not indicate that the Deposit Agreements were ever delivered to the Receivership Entities. (*Sheffield Affidavit*, ¶ 4-5.)

Far from being a simple contract, the Deposit Agreement contains more than 100 paragraphs and subparagraphs replete with voluminous disclosures, obligations, and performance requirements, all set in small font fine print. The jury waiver provision is buried at paragraph 47 of the Deposit Agreement, and when juxtaposed against the remainder of the agreement can hardly be described as conspicuous. Analogously, in *National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255 (2d Cir.1977), the Second Circuit addressed an equipment lease containing a jury waiver clause located in the fine print of a mere 16–clause agreement. The Court found that this waiver clause was “set deeply and inconspicuously in the contract” and further stated that, “this printed form provision buried in a multitude of words is too weak an imitation of a genuine agreement to be treated as a waiver of so important a (C)onstitutional safeguard ...” Id². *See also Ginsberg v. Silversea Cruises, LTD, No. 03-62141, 2004 WL 3656827 (S.D. Fla. March 18, 2004)* (waiver provision not enforceable when it “is literally buried within the text of an otherwise long and detailed form ... [and the defendant] has submitted no evidence

² Quoting Justice Black's famous dissent in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 332-3, 84 S.Ct. 411, 423, 11 L.Ed.2d 354 (1964.)

that [the plaintiff's] attention was ever directed to the waiver provision, or that it indicated to ...[the plaintiff's] that they were waiving their rights to a jury trial.)

B. The Deposit Agreement Is A Non-Negotiable Contract and the Receivership Entities Were Without Any Bargaining Power.

The Deposit Agreement is a “boilerplate” agreement drafted by the bank. There was no real opportunity for Wachovia's customers to negotiate or bargain for specific terms and conditions.³ Wachovia Bank was far too large an institution to engage in the impracticality of separately bargaining with each of its customers concerning the terms of their accounts. Not surprisingly, Wachovia does not present evidence that jury waiver was negotiable. Likely, signing the account signature card and subjecting oneself to the provisions of the Deposit Agreement was a *requirement* for opening an account at Wachovia. Wachovia's failure to present evidence of negotiability in light of the "boilerplate" provisions of the Deposit Agreement is sufficient reason in and of itself to deny the Motion to Strike. *See Ginsberg v. Silversea Cruises Ltd., 2004 WL 3656827, at *2 (S.D.Fla. Mar.18, 2004)* (holding that waiver was invalid where the form included standardized language, was drafted by the defendant, and was nonnegotiable.)

II. THE JURY WAIVER PROVISION DOES NOT EXTEND TO THE RECEIVER'S TORT CLAIMS FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY AND CONVERSION.

Wachovia's jury waiver provision is ambiguous at best, and even if this Court determines that the waiver is valid, it should not be extended to the Receiver's tort-based aiding and abetting claims. The Deposit Agreement, at Paragraph 47, provides in relevant part as follows with regard to jury waiver:

To the extent permitted by law, if any dispute or claim results in a lawsuit, and neither you nor we have requested arbitration, you and we knowingly and

³ Further to this argument, and consistent with the five factors enunciated by *Allyn v. Western United Life Assur. Co.*, it is not disputed that neither of the parties was represented by counsel during the account opening transactions.

voluntarily agree that a judge without a jury will decide the case. . . . YOU UNDERSTAND AND KNOWINGLY AND VOLUNTARILY AGREE THAT YOU AND WE ARE WAIVING THE RIGHT TO A TRIAL BY JURY[.]

The Deposit Agreement simply fails in any and every respect to identify what type of "dispute" or "claim" may be subject to jury waiver. The lack of specificity renders the Deposit Agreement ambiguous, given that it is subject to more than one reasonable interpretation. *FGDI, Inc. v. Bombardier Capital Rail Inc.*, 383 *F.Supp.2d* 1350 (M.D.Fla.2005) (identifying as ambiguous a contractual jury waiver provision subject to differing interpretations.)

“Ambiguities in contracts are construed against their drafters.” *Key v. Allstate Ins. Co.*, 90 *F.3d* 1546, 1549 (11th Cir.1996) citing *Hurt v. Leatherby Ins. Co.*, 380 *So.2d* 432, 434 (Fla.1980). Similarly, errors in drafting contracts are construed against the drafter. *McGregor v. Board of Commissioners of Palm Beach County*, 956 *F.2d* 1017, 1022 (11th Cir.1992). This “construction-against-the-draftsman” rule is designed to reach beyond the words of the contract to determine the intent of the parties. When a contract provision is subject to reasonable, yet opposing, interpretations, the preferred interpretation is the one “which operates more strongly against the party from whom the words proceeded.” *Zapata Marine Service v. O/Y Finnlines, Ltd.*, 571 *F.2d* 208, 209 (5th Cir.1978). “A policy reason supporting this rule of construction is that the party against whom it operates had the possibility of drafting the language so as to avoid the dispute.” *Arriaga v. Florida Pacific Farms, LLC*, 305 *F.3d* 1228, 1246 (11th Cir.2002.)

The Wachovia jury waiver makes no specific reference to any conduct, acts or omissions of the Receivership Entities; nor does it make specific reference to actions sounding in contract, tort or otherwise. The Deposit Agreement itself concerns only the contractual depositor relationship among Wachovia and the Receivership Entities. Thus, the waiver should be

narrowly construed by this Court to concern only those contract claims and disputes directly related to the depositor relationship and the Deposit Agreement.

The Receiver's claims for aiding and abetting breach of fiduciary duty and aiding and abetting conversion are far afield of those claims arising from the Deposit Agreement. First the Receiver must prove facts that establish George Theodule's culpability as the primary wrongdoer. The Receiver must then prove that Wachovia knowingly and substantially assisted Theodule in connection with those wrongdoings. *See, In re Caribbean K Line, Ltd.*, 288 B.R. 908 (S.D. Fla. 2002) (regarding the elements of proof for aiding and abetting breach of fiduciary duty); *see also see also Bensman v. Citicorp*, 354 F. Supp. 2d 1330, 1331 (S.D. Fla. 2005) (regarding the elements of proof for aiding and abetting conversion.) The Wachovia jury waiver provision does not contemplate such claims, especially when interpreted in a manner most favorable to the Receiver. The Deposit Agreement simply lacks the necessary and specific contractual language.

III. THE JURY WAIVER PROVISION DOES NOT EXTEND TO THE RECEIVER'S FUFTA CLAIMS.

The jury trial waiver is inapplicable to the Receiver's FUFTA claims. The FUFTA claims are brought by the Receiver as a creditor of each of the Receivership Entities. As such, the Receiver is a third party not privy to the Deposit Agreement containing the jury trial waiver. *See Adelpia Recovery Trust v. Bank of America, N.A.*, No. 05-CV-9050, 2009 WL 2031855 (S.D.N.Y. July 8, 2009).

The Receiver's fraudulent transfer claims pursuant to FUFTA are unrelated to the Deposit Agreements and unrelated to any contractual relationship between the Receivership Entities and Wachovia. A jury waiver provision in a contract affects only the rights of the parties to that contract. *Oakwood Homes*, 378 B.R. at 71-72 (quoting *Hulsey v. West*, 966 F.2d 579, 581

(10th Cir. 1992)). The Receiver as a creditor of the Receivership Entities is not a party to the Deposit Agreement and Wachovia cannot invoke the jury trial waiver provision against him. *See Id.* (waiver did not apply to parties who did not sign agreement containing waiver).

CONCLUSION

For the reasons set forth above, the Receiver requests that the Motion to Strike be denied.

Dated: March 16, 2012
Miami, Florida

Respectfully submitted,

By: s/ David P. Lemoie

David P. Lemoie (FBN: 188311)

dlemoie@gjb-law.com

Carmen Contreras-Martinez (FBN 093475)

ccontreras@gjb-law.com

Genovese Joblove & Battista, P.A.

100 Southeast Second Street, 44th Floor

Miami, Florida 33131

Tel: (305) 349-2300

Fax: (305) 349-2310

*Attorneys for Receiver, Jonathan E.
Perlman, Esq.*

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2012, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the below Service List, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: David P. Lemoie
Attorney

SERVICE LIST

**Jonathan E. Perlman, Esq. v. Wells Fargo Bank, N.A.
Case No. 10-81612-CIV-HURLEY/HOPKINS
United States District Court Southern District of Florida**

David C. Cimo

dcimo@gjb-law.com

David P. Lemoie

dlemoie@gjb-law.com

Carmen Contreras-Martinez

ccontreras@gjb-law.com

Genovese Joblove & Battista, P.A.

Miami Tower, 44th Floor

100 Southeast 2nd Street

Miami, FL 33131

Telephone: (305) 349-2300

Facsimile: (305) 349-2310

*Attorneys for Plaintiff Jonathan E. Perlman, Esq.
as Court Appointed Receiver of Creative Capital
Consortium, LLC, et al.*

Served via CM/ECF

Michael R. Josephs

mrj@josephsjack.com

Josephs Jack P.A.

2699 South Bayshore Drive, 7th Floor

Miami, FL 33133

Telephone: (305) 445-3800

Facsimile: (305) 448-5800

*Co-Counsel for Plaintiff Jonathan E. Perlman, Esq.
as Court Appointed Receiver of Creative Capital
Consortium, LLC, et al.*

Served via CM/ECF

Amy S. Rubin

arubin@foxrothschild.com

Elliot Aaron Hallak

ehallak@foxrothschild.com

Fox Rothschild LLP

222 Lakeview Avenue, Suite 700

West Palm Beach, FL 33401

Telephone: (561) 835-9600

Facsimile: (561) 835-9602

Attorneys for Defendant Wells Fargo Bank, N.A.

Served via CM/ECF

