

STATE OF NORTH CAROLINA
COUNTY OF RUTHERFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08-CVS-1283

HERSCHEL ALLEN *et al.*,
Plaintiffs,

vs.

LAND RESOURCE GROUP OF NORTH
CAROLINA, LLC *et al.*,
Defendants.

**WACHOVIA BANK, N.A., BANK OF
AMERICA CORPORATION, AND
BRANCH BANKING AND TRUST,
COMPANY'S
REPLY TO MOTIONS IN OPPOSITION
TO NOTICE OF DESIGNATION**

COME NOW Defendants Wachovia Bank, N.A. (“Wachovia”), Bank of America Corporation (“Bank of America”), and Branch Banking and Trust Company (“BB&T”), by and through counsel, and pursuant to Rule 3.3 of the General Rules of Practice and Procedure for the North Carolina Business Court (“Business Court Rules”) respectfully submit this Reply to Motions in Opposition to Notice of Designation submitted by Plaintiffs’ and by Defendants Eddie H. Gilbert, Lynn Sessoms, and E.H.G. Appraisal Service, Inc. (collectively the “Opposing Defendants”).

On October 14, 2008, Wachovia, Bank of America, and BB&T (collectively the “Bank Defendants”) filed a Notice of Designation of the above-captioned case in accordance with N.C. Gen. Stat. § 7A-45.4 as Plaintiffs’ three hundred and ninety-three (393) paragraph Complaint involves the law governing corporations, partnerships, limited liability companies, and limited liability partnerships. Plaintiffs and the Opposing Defendants have now filed Motions in Opposition to the Notice of Designation. For the reasons set forth herein, the Bank Defendants maintain that this case is properly before the Business Court.

The Law Governing Corporations

At the heart of Plaintiffs’ Memorandum in Support of Motion in Opposition to Notice of Designation and For Remand (“Plaintiffs’ Memorandum”) is the contention that “none of the Land Resource Entities apparently believe this case is a complex business case and none have

requested such designation.” [Memo. p. 3]¹ The Land Resource Entities, however, are now represented by counsel in this matter and the Land Resource Entities counsel has indicated to counsel for Wachovia that the Land Resource Entities agree with the Business Court designation. Moreover, neither N.C. Gen. Stat. § 7A-45.4 nor the Business Court Rules require that the designating party be the party that is facing the delineated claims in N.C. Gen. Stat. § 7A-45.4. The complex corporate entity issues will have a direct impact on the Bank Defendants, even if they are not directly named in the particular claims. In addition, Plaintiffs allege that the Bank Defendants engaged in a “joint venture or common enterprise” and construction of these allegations will also involve the law governing corporations. [Compl. ¶ 114] Deciphering the complex web of relationships, principal/agency allegations, and corporate formalities is at the heart of this action and therefore the case is properly before the Business Court.

The Complaint sets forth vague and unspecified allegations against the “LRC Defendants”—a group of four distinct corporate entities: Land Resource LLC (“Land Resource”), Land Resource Development Group, LLC (“LR Development”), LR Buffalo Creek, LLC (“LR Buffalo Creek”), and Land Resource Group of North Carolina, LLC (“LR North Carolina”). [Compl. p. 2; Compl. ¶ 52] The Complaint further alleges that “LRC Realty” is a subsidiary of “Defendant LRC” [Compl. ¶ 17], however the Complaint fails to identify affirmatively “LRC Realty” as a defendant. It also alleges that “LR Development, LR Group, LR-North Carolina, Buffalo Creek, and LRC Realty were subsidiaries of, were employed by or affiliated with Defendant Land Resource and aided, abetted, and assisted Defendant Land Resource. . . .” [Compl. ¶ 51]

Specifically, with respect to Wachovia, the Complaint alleges that Wachovia “financed LRC/Buffalo Creek’s purchase of the land constituting the Grey Rock Development.” [Compl. ¶ 56] It is unclear if “LRC/Buffalo Creek” refers to the entity identified in the opening paragraph of the Complaint as “LR Buffalo Creek” or is an allegation encompassing LR Buffalo Creek and all of the other LRC Defendants.

Embedded in the corporate claims are allegations involving agency and actions taken by officers and directors. [See, e.g., Compl. ¶¶ 77 (Defendant Miller), 82 (Defendant Flaskey), 83-

¹ This assertion was made prior to any Notice of Appearance being filed by the Land Resource Entities.

85 (Defendants Ward, Flaskey, Beidel and Vacko)] The Eleventh and Twelfth Causes of Action involve claims of breach of fiduciary duties. [Compl. ¶¶ 372-78] There are claims that Defendant SHOA is a subsidiary or alter ego of Defendant Land Resource. [Compl. ¶ 92] Plaintiffs allege that Defendant Scripps was a partner of Defendant Land Resource. [Compl. ¶ 103] These all fall under the law governing corporations.

The Complaint clearly sets forth factual allegations that implicate the North Carolina Limited Liability Company Act, as set forth in Chapter 57C of the North Carolina General Statutes. Moreover, the Complaint involves the essential business entity issues of limited liability, partnership, powers of officers, directors, and agents, and parent/subsidiary relationships. As three of the four LRC entities are Georgia corporations, the Court may also need to analyze many of the claims asserted under Georgia law.

Beyond the mere pleading complexities surrounding the identities and legal relationships of the Defendants, the claims being presented also support designation in the Business Court. While Plaintiffs are correct that claims of breach of fiduciary duty and joint venture are regularly heard in Superior Court in North Carolina, these claims do not often involve: (1) four apparently-connected corporations; (2) an apparently interlocking group of principals with varying roles as officers and shareholders; (3) three large banks; and (4) an assortment of other companies and individuals, totaling over twenty-nine identified defendants. The obvious factual complexity of this case differentiates it from business disputes that are typical of the regular Superior Court docket.

Other Factors

Business Court Rule 3.2 provides that the Court may also consider additional factors such as the amount in issue, the novelty of the issues, the degree to which the interests of justice would be advanced, and any other potential impacts on the parties or the Court. These factors all weigh heavily in favor of this Court maintaining jurisdiction.

Amount in Issue. Plaintiffs allege that the entire Grey Rock Development was purchased for twelve million dollars (\$12,000,000.00). [Compl. ¶ 56] They allege that Defendant LRC has collected approximately seventy-nine million twenty-five thousand dollars

(\$79,025,000.00) from property sales as a result of fraud or fraudulent misrepresentations to prospective purchasers. [Compl. ¶ 151] In addition, Plaintiffs named in the Complaint seek a rescission of their purchase contracts, which total over four million, three hundred thousand dollars (\$4.3 million). Plaintiffs' suggestion that a case involving several million dollars of actual damages, plus punitive damages and attorneys fees, is not "complex" lacks legal or practical merit.

Novelty of the Issues. While on their face breach of contract, negligence and breach of fiduciary duty claims are not "novel," Plaintiffs are pleading them in this Complaint in a novel manner. Particularly novel—if not completely without legal foundation—is Plaintiffs' assertion that a lender bears a duty of care towards the borrower's future purchasers, as Plaintiffs allege against Wachovia in Paragraphs 345-349 of the Complaint. There appears to be no precedent in North Carolina for this assertion and, if such a duty were recognized, the decision would have ramifications with respect to all lending organizations doing business in North Carolina. It could be construed to impose liability on the holder of an automobile loan for negligent driving or repair; the construction lender for faulty construction; or the home mortgage lender for injury on the premises. *Compare Delhaize America, Inc. v. Hinton*, 07-CVS-20801 (Tennille, C.J., Order, Jan. 31, 2008) ("The decision in this case could have implications for other companies, and thus the publication of a written opinion by this Court could prove beneficial to the State and those companies."); *Cox v. Mitchell*, 06-CVS-8371 (Tennille, C.J., Order, Feb. 27, 2007) ("It is sufficient for purposes of removal to the Business Court that there are issues concerning which law applies which will have industry-wide application.").

In addition to the novel issue of lender liability noted above, Plaintiffs' Complaint invokes the Interstate Land Sales Act, 15 U.S.C. § 1701 *et seq.*, a complex statutory scheme as to which there is little North Carolina case law. Much of the authority relevant to these claims will be borrowed from federal precedents, a process with which the Business Court is quite familiar.

Interests of Justice. In a case involving so many parties, the established protocol of the Business Court and the assignment of one presiding judge will benefit all the parties involved as well as the Court system. It would be inefficient for the rotating judges of Rutherford County to learn the intricate corporate relationships, parties, and legal issues for every hearing. While it is

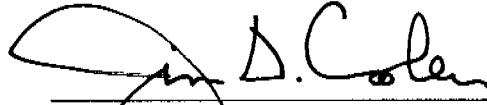
true these interests could also be served by appointment of a single Superior Court Judge pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts, the parties will benefit from electronic filing, written motions practice, a mandated case management meeting, and presumptive limits on discovery. The Business Court is the best forum for the prompt and efficient resolution of this multi-claim, multi-party matter. *See Business Court Rule 14.*

In addition to the logistical benefits of using the protocol of the Business Court to govern a complex case with numerous parties and competing interests, there is a pending case in the Middle District of Florida involving the Land Resource Entities and another group of Grey Rock property owners. This pending lawsuit involves many identical legal issues, including ILSA liability. *Goetz et al. v. Land Resources, LLC, et al.*, 6:08-cv-1471 (M.D. Fla.). To the extent that issues in the Florida case will impact this case, it will be beneficial to have one judge presiding who is familiar with the facts and legal issues. The Land Resources Entities have also filed for bankruptcy in the Middle District of Florida. *In re Land Resource LLC, et al.*, 6:08-bk-101590 (M.D. Fla.). The effect of this filing is currently unknown. Finally, pending in the Western District of North Carolina is a third lawsuit involving many of the Land Resource Entities and the Grey Rock development. *Bond Safeguard Insurance Company, v. LR Buffalo Creek, LLC, et al.*, 1:08cv434 (W.D.N.C.). The existence of multiple related cases in other jurisdictions is a further reason to bring to this case the Business Court's more advanced technology and procedure for case coordination.

* * *

In conclusion, the Bank Defendants respectfully submit that this case was properly designated to the Business Court and should remain in the Business Court for all further proceedings.

This the 1st day of December, 2008.



Jim D. Cooley, N.C. State Bar No. 5553
Sarah A. Motley, N.C. State Bar No. 34117
One Wachovia Center, Suite 3500
301 South College Street
Charlotte, NC 28202-6037
Phone: 704-331-4900

Counsel for Defendant Wachovia Bank, N.A.

OF COUNSEL:

WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
Professional Limited Liability Company
One Wachovia Center, Suite 3500
301 South College Street
Charlotte, NC 28202-6037



Jonathan E. Buchan, N.C. State Bar No. 8205
McGUIREWOODS, LLP
100 North Tryon Street, Suite 2900
Post Office Box 31247 (28231)
Charlotte, NC 28202
Telephone: 704-343-2063
Fax: 704-353-6264
Counsel for Defendant Bank of America Corporation



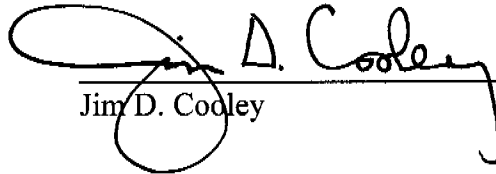
Albert L. Sneed, Jr., N.C. State Bar No. 5842
W. Carleton Metcalf, N.C. State Bar No. 24415
VAN WINKLE, BUCK, WALL, STARNES and
DAVIS, P.A.
P.O. Box 7376
Asheville, NC 28802-7376
828-258-2991
Counsel for Defendant Branch Bank & Trust Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 1st day of December, 2008, the foregoing **WACHOVIA BANK, N.A., BANK OF AMERICA CORPORATION, AND BRANCH BANKING AND TRUST COMPANY'S REPLY TO MOTIONS IN OPPOSITION TO NOTICE OF DESIGNATION** was served upon counsel by depositing a copy thereof in the United States mail, postage prepaid, first class mail and addressed as follows:

<p>W. Perry Fisher, II Perry Fisher, P.A. 1 N. Pack Square, Suite 402 Asheville, NC 28801 <i>Counsel for Plaintiffs</i></p>	<p>Jonathan E. Buchan McGuire Woods, LLP 100 N. Tryon Street, Suite 2900 Charlotte, NC 28202 <i>Counsel for Defendants Bank of America Corporation and Homefocus Services, LLC</i></p>
<p>Albert L. Sneed, Jr. W. Carleton Metcalf Van Winkle, Buck, Wall, Starnes and Davis P.A. P.O. Box 7376 Asheville, NC 28802-7376 <i>Counsel for Defendant Branch Bank & Trust Company</i></p>	<p>Anthony A. Fox Debra L. Edney Parker Poe Adams & Bernstein, LLP Three Wachovia Center, Suite 3000 401 South Tryon Street Charlotte, NC 28202 <i>Counsel for Defendant Scripps Interactive Network d/b/a HGTV</i></p>
<p>Brian W. King, Esq. King Law Offices, PLLC 215 North Main Street Rutherfordton, NC 28139 <i>Counsel for Defendants Two Day Appraisal and Randall Cochran</i></p>	<p>Shannon Lovins The Lovins Law Firm, P.A. 120 College Street Asheville, NC 28801 <i>Counsel for Defendant Susan Garren</i></p>
<p>W.O. Brazil, III Cogburn & Brazil, P.A. Post Office Box 120 Asheville, NC 28802 <i>Counsel for Defendants E.H.G. Appraisal Service, Inc., Edwin H. Gilbert, and Lynn Sessoms</i></p>	<p>Todd King Cranfill Sumner & Hartzog LLP PO Box 30787 Charlotte, NC 28230 <i>Counsel for Defendants Howard Hullett Appraisals & Realty, Inc. and Robert L. Hullett</i></p>
<p>John M. Nunnally Ragsdale Liggett, PLLC P.O. Box 31507 Raleigh, NC 27622-1507 <i>Counsel for Defendants Land Resource Group of North Carolina, LLC, Land Resource</i></p>	

Development Group, Inc., Land Resource Group, Inc., LR Buffalo Creek, LLC, Land Resource, LLC a/k/a Land Resource Companies, LLC, Southern HOA Management, John Doe Officers of Land Resource Group of North Carolina, LLC, John Doe Officers of Land Resource Development Group, Inc., John Doe Officers of Land Resource Group, Inc., John Doe Officers of LR Buffalo Creek, LLC, John Doe Officers of Land Resource, LLC a/k/a Land Resource Companies, LLC, John Doe Officers of Southern HOA Management, John Doe Directors of Land Resource Group of North Carolina, LLC, John Doe Directors of Land Resource Development Group, Inc., John Doe Directors of Land Resource Group, Inc., John Doe Directors of LR Buffalo Creek, LLC, John Doe Directors of Land Resource, LLC a/k/a Land Resource Companies, LLC, John Doe Directors of Southern HOA Management, Michael Flaskey, James Robert Ward, Paul Beidel, Robert Vacko, Mitch B. Miller, Clark Champion, Jeanette Manner-Jones, Tammy Mikesell, Marie A. Fox, and Shannon M. Glover



Jim D. Codley