IN THE SUPREME COURT
STATE OF GEORGIA

Supreme Court Case No. S17C1271

PEACH STATE BANK & TRUST,

Petitioner,

v.

MEDLOCK PARSONS, LLC, ET AL.,

Respondents.

On Petition for Writ of Certiorari From the Court of Appeals of Georgia
Case Nos. A16A1927 and A16A1928

RESPONSE TO PETITION FOR CERTIORARI

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I. INTRODUCTION

Certiorari review by this Court is reserved for cases presenting issues of great concern, gravity, or importance to the public. It is not a right, and it is not a commonly-granted privilege:

> The review of right (three judges) is to determine whether the trial was conducted according to law and applicable procedure—to correct errors of the trial court. It is done primarily for the benefit of the parties to the appeal. Discretionary review in the highest court should be basically for the benefit of the public, to reconcile different holdings of the panel court and to declare the law on matters of gravity and public policy—this is called institutional review which is only incidentally for the benefit of the parties litigant.

Atlanta Coca-Cola Bottling Co. v. Jones, 236 Ga. 448, 453 (1976) (Hall, J., dissenting), recognized by Todd v. Dekle, 240 Ga. 842 (1978). Certiorari review is not an opportunity for a litigant merely displeased with the legal conclusion of the Court of Appeals to seek an additional review from this Court in the hope of obtaining an outcome more to its liking.

In this case, Petitioner Peach State Bank & Trust (the "Bank") requests that this Court review the Court of Appeals' decision construing a contract between the Bank and Respondents Medlock Parsons, LLC, Jack Jamison, Phil Wilson, Neil Wilson, and RealtyLink, LLC (collectively, "Obligors"). The Bank contends that the Court of Appeals' decision to reverse a grant of partial summary judgment in its favor is of great concern to individuals and entities engaged in "sophisticated

secured transactions," but the truth is just the opposite. The Court of Appeals engaged in the well-established process of contract construction under Georgia law and determined that the trial court incorrectly construed the key requirement of the parties' agreement. The Court of Appeals properly conducted a de novo review under the correct legal standards. The fact that the Bank disagrees with that court's contract construction does not entitle it to further review in this Court.

Additionally, the Court of Appeals resolved the appeal through an unreported opinion with no precedential value for anyone outside of the parties to this case. To the extent that the Court of Appeals erred in any way in its construction of the parties' agreement (which it did not), such an error will have no effect on either Georgia law or on the cases of any other litigants. This case is simply not one of "great concern, gravity, or importance to the public," Ga. Supreme Ct. R. 40, and the Court should deny the Bank's Petition for Certiorari.

II. STATEMENT OF CASE AND RELEVANT FACTS

A. The Parties' Dispute

On September 22, 2011, Medlock Parsons, LLC ("Medlock Parsons") executed a promissory note with the Bank in the original principal amount of $4,567,023 and with a final maturity date of September 25, 2013 (the "Loan"). (R. 34.) In order to secure the Loan, Medlock Parsons offered collateral in the form of real property on Medlock Bridge Road in Johns Creek, Georgia (the "Original

Collateral"). (R. 34.) Thereafter, on or about January 25, 2013, Obligors executed a new loan agreement with the Bank (the "Loan Agreement") under which the Loan term was extended for an additional twenty-four months. (R. 34-42.)

The terms of the Loan Agreement divided the Loan into two notes, the 2012 A Note and the 2012 B Note. (R. 35.) Medlock Parsons executed the 2012 A Note in the original principal amount of $3,967,023 (the "A Note"). (R. 35.) As collateral for the A Note, in addition to the Original Collateral, Obligors offered a 2.03 acre tract in Starke, Florida (the "Florida Collateral") and a 1.34 acre tract in Burlington, North Carolina (the "North Carolina Collateral", together with the Florida Collateral, the "Additional Collateral").[1] (R. 34.) Obligors satisfied the 2012 B Note by the execution and delivery of new notes from certain Obligors to the Bank, and the 2012 B Note is not at issue in this litigation. (R. 1190.)

Medlock Parsons agreed to pay interest only on the unpaid principal for the term of the A Note, with the unpaid principal becoming due and payable on December 25, 2014. (R. 35.) Medlock Parsons met its interest payment obligations, and the parties agree that there was no default on interest payments during the term of the Loan Agreement. (R. 1191.)

Under Paragraph 8, if no default existed on the A Note during its term, the Bank's remedies at maturity were limited to the following:

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[1] The Loan Agreement refers collectively to the Original Collateral and the Additional Collateral as the "Collateral." (R. 35.)

- Deed in lieu of foreclosure on some or all of the remaining Collateral with consideration equal to *the greater of the Minimum Release Price or the then current fair market value of the Collateral*; or
- In the event that a deed in lieu of foreclosure is deemed infeasible, in the sole discretion of the Lender, foreclosure on some or all of the remaining Collateral with minimum foreclosure bid values equal to *the greater of the Minimum Release Price or the then current fair market value of the Collateral*.

(R. 380 (emphasis added).)

Paragraph 7 defines the Minimum Release Price ("MRP") for each of the six total tracts of the Collateral as follows: (1) Original Collateral Tract 1: $800,000; (2) Original Collateral Tract 2: $700,000; (3) Original Collateral Tract 3: $650,000; (4) Original Collateral Tract 4: $600,000;[2] (5) Florida Collateral: $360,000; (6) North Carolina Collateral: $400,000. (R. 380.) After obtaining the Collateral pursuant to Paragraph 8, the Loan Agreement provided that the Bank "may issue deficiency notes of an aggregate value equal to the lesser of the actual

[2] The Original Collateral was split into four separate tracts as shown on Exhibit D to the Loan Agreement, which was explicitly made a part of the document. (R. 35.) The MRPs for the tracts comprising the Original Collateral were based on a Summary Appraisal Report dated August 24, 2012, which was also incorporated by reference into the Loan Agreement. (R. 35.)

principal balance deficiency on the 2012 A Note or $600,000" to the individual Obligors. (R. 35.)

At the expiration of the term of the Loan Agreement, the Bank elected as its remedy under Paragraph 8 to take deeds to the Collateral in lieu of foreclosure. (R. 1193.) On October 5, 2015, Medlock Parsons executed a deed in lieu of foreclosure conveying all four tracts of the Original Collateral to the Bank. (R. 1193.) On December 17, 2015, the relevant owning entities executed deeds in lieu of foreclosure conveying the North Carolina Collateral and the Florida Collateral to the Bank. (R. 1193.)

B. The Trial Court Proceeding

After the Loan matured in December 2014, the parties disagreed regarding the construction of Paragraphs 7 and 8 of the Loan Agreement and the calculation of the amount of credit Obligors were to receive from the Bank in consideration for conveying the Collateral. Obligors informed the Bank that using the fair market values for the Original Collateral determined by Metro Appraisals in January 2015, there was no deficiency on the A Note pursuant to Paragraph 8 of the Loan Agreement. (R. 8.) The Bank ignored the fair market values of each tract and took the position that Obligors were entitled to credit for the Collateral only based upon the MRPs, leaving a deficiency of over $450,000. (R. 8.)

When the parties were unable to informally resolve their differences, Obligors filed suit in Hall County Superior Court, seeking a declaratory judgment regarding the parties' rights and obligations under the Loan Agreement. (R. 023-139.) The Bank timely answered the complaint and filed a counterclaim for breach of the Loan Agreement. (R. 142-335.)

The parties filed cross motions for summary judgment, and the trial court entered an order on those motions on March 31, 2016. (R. 1189-1204.) The trial court partially granted the Bank's motion for summary judgment, holding that the Original Collateral is defined in the Loan documents as a single 6.55 acre tract of land and not as four separate tracts. (R. 1204.) The trial court further held that the fair market value of the Collateral must be determined by the jury as the finder of fact. (R. 1201.) The trial court also partially granted Obligors' motion for summary judgment, holding that they had not waived their right to execute the deficiency notes provided for in the Loan Agreement and that the Bank is not entitled to attorneys' fees from the individual guarantors of the Loan. (R. 1204.) The trial court denied the parties' motions for summary judgment in all other respects. (R. 1204.) Obligors timely appealed to the Court of Appeals on April 29, 2016 (R. 1-22), and the Bank filed its Notice of Cross-Appeal on or about May 16, 2016.

C. The Court of Appeals Ruling

The Court of Appeals concluded that the trial court erroneously construed provisions of the Loan Agreement governing how much credit the Obligors should receive for transferring the Collateral to the Bank. Ga. Ct. App. Slip Op. at 2. Specifically, the court found no ambiguity on the issue of the calculation of the amount of consideration the Bank is required to credit to payment on the Loan's unpaid principal balance with respect to the deed in lieu of foreclosure the Bank took on the Original Collateral. Id. at 5, 7. The Court concluded as a matter of law that the relevant parts of the Loan Agreement unambiguously mean:

> [T]he consideration or credit the lender is required to apply to the unpaid principal balance is calculated by determining "the greater of the Minimum Release Price or the then current fair market value of the Collateral." Under this calculation, the "Minimum Release Price" refers to the separate price assigned in paragraph 7 to each of the four "Original Collateral Tracts," to the "Florida Collateral," and to the "North Carolina Collateral" – to the extent "some or all" of this "Collateral" remains as security at the maturity of the note. The calculation unambiguously requires that, to determine which is greater, the separate "Minimum Release Price" assigned to each part of the "Collateral" be compared to the fair market value of that part.

Id. at 11-12. The Court of Appeals further held that the trial court correctly determined that the fair market value of the Collateral is a jury issue, because the Loan Agreement does not control the issue, and the parties dispute the market values. Id. at 11.

The Bank filed identical motions for reconsideration in each case pending before the Court of Appeals. Obligors filed responses to the Bank's motions six days later, and the court issued orders denying the motions on the same day.

III. ARGUMENT

A. The Bank Cannot Satisfy the High Standard for This Court to Grant A Writ of Certiorari.

As this Court has recognized, the Court of Appeals is not designed to be an intermediate appellate court; rather, it should be a court of last resort. Spindel v. Jones, 227 Ga. 264, 264 (1971); see also Adair v. The Traco Division, 192 Ga. 59, 65 (1942). As such, this Court exercises with great caution its discretion to grant certiorari:

> [T]his power should not be so carelessly exercised . . . so as to burden the docket of this court with cases intended by the constitution, under ordinary circumstances to be reviewed by the Court of Appeals and to be controlled by the judgment of that court.

Spindel, 227 Ga. at 264. Rather, this Court's rule is clear that it will not grant a petition for a writ of certiorari except in cases of "great concern, gravity, or importance to the public." Ga. S. Ct. R. 40.

1. The Court of Appeals construed the parties' contract under well-settled Georgia law, and its opinion will be entirely ignored by the public.

The Bank argues that the Court of Appeals' construction of the Loan Agreement ignored the Agreement's "definition of terms and the legal description

of the original collateral incorporated as an exhibit to the agreement." (Petition for Certiorari at 1.) Thus, according to the Bank, the Court of Appeals' construction "fails to consider its transactional context," making the court's decision one "of great concern to individuals and entities engaged in sophisticated secured transactions." (Id. at 1-2.)

Even if the Court of Appeals' construction of the Loan Agreement is incorrect (and it is not), that would not transform this case into one of "great concern, gravity, or importance to the public" within the meaning of Rule 40. This case, including the appeal, is nothing more than a routine contract dispute. The Court of Appeals reviewed the trial court's grant of summary judgment to the Bank *de novo*, Tillman v. Winn-Dixie Stores, Inc., 241 Ga. App. 245, 245 (1999), and further construed the Loan Agreement as a matter of law under the *de novo* standard. D.S. Ameri Const. Corp. v. Simpson, 271 Ga. App. 825, 826 (2005). In conducting its *de novo* review, the Court of Appeals applied the well-established rules for contract construction under Georgia law. See Slip Op. at 6-7 (citing City of Baldwin v. Woodard & Curran, Inc., 293 Ga. 19, 30 (2013) and Copy Sys. Of Savannah, Inc. v. Page, 197 Ga. App. 435, 436 (1990)). The Bank does not argue that the Court of Appeals applied an incorrect legal standard or that that the standards the court applied should be overruled or modified.

The Bank merely disagrees with the Court of Appeals' construction of the contract at issue. The Bank claims that other individuals or entities engaged in sophisticated transactions will somehow be impacted by the Court of Appeals ruling, but the Bank offers no reasons how or why that could occur. The reality is that the Loan Agreement is a very atypical agreement between Obligors and the Bank specifying and limiting the Bank's remedies upon a default by Obligors under the Loan. It is quite unlikely that any similarly-situated borrowers and lenders are parties to contracts with similar provisions.[3] The issue that the Bank would have this Court review was fully briefed, considered, and decided by the Court of Appeals. The Bank received a second opportunity to convince that court of its position through the briefing and consideration of the Bank's motions for reconsideration. The Bank has pointed to no reason sufficient to grant it a third bite at the appellate review apple in this Court. The Court of Appeals has jurisdiction as the appellate court of last resort for the Bank's appeal, and the Court of Appeals' decision should stand. See Spindel, 227 Ga. at 264.

2. The Court of Appeals decision is unreported and not binding precedent upon non-parties.

Though this case is obviously of great importance to the parties involved, the Court of Appeals recognized that the appeal could be resolved in a routine fashion

[3] Indeed, the trial judge remarked during the hearing on the parties' motions for summary judgment that he had never seen a bank case involving agreements so restrictive of the lender's remedies in the event of default. (Hearing Tr. at 68-69.)

through straight-forward application of well-established Georgia contract law. First, the Court of Appeals declined to grant oral argument. Second, the Court of Appeals chose to resolve the appeal through an unreported opinion, which is "neither a physical nor binding precedent" but instead only "establishes the law of the case as provided by O.C.G.A. § 9-11-60(h)." Ga. Ct. App. R. 33(b). Simply put, the Court of Appeals opinion is of no import to anyone but the parties to this case. Even if the Court of Appeals made an error of law in its construction of the Loan Agreement, this error in no way could affect other "entities engaged in sophisticated secured transactions" or anyone else doing business in the State of Georgia.[4] This case is a routine dispute between parties to a contract over its construction and is not one of "great concern, gravity, or importance to the public," sufficient for this Court to grant certiorari review. See Atlanta Coca-Cola Bottling Co., 236 Ga. at 453.

B. The Court Of Appeals Correctly Construed the Loan Agreement.

This appeal's central issue is the construction of Paragraph 8 of the Loan Agreement, which determines what credit the Obligors get for turning in the Collateral to the Bank at the end of the Loan. This is of the utmost importance, because Paragraph 8 provides that at the maturity of the A Note, the Bank must

[4] In actuality, it is unclear how anyone aside from the parties would even know about the unreported Court of Appeals opinion, which does not appear in Westlaw's database of Georgia cases as of April 4, 2017.

limit its remedies to taking the Collateral, plus issuing deficiency notes for any remaining balance of the A Note. (R. 380.)

Paragraph 8 requires that the Obligors be given credit equal to the "greater of the Minimum Release Price or the then current fair market value of the Collateral." (R. 380.) The dispute is what subsets of the Collateral are being referred to when performing this comparison. The plain language of Paragraph 8 requires the comparison of the fair market value ("FMV") of each of the six tracts of the Collateral to the MRP of each of the six tracts. The Bank and trial court, however, would have one add up the MRPs of the four Georgia tracts and compare that number to the FMVs of the four Georgia tracts combined. They would then compare the North Carolina Collateral FMV to the North Carolina Collateral MRP and the Florida Collateral FMV to the Florida Collateral MRP. (See Pet. for Certiorari at 8-9.) Thus, the key question is which tract release prices and fair market values are being compared to establish the credit received by Obligors against the loan balance.

The trial court did not answer this question. The trial court addressed the definition of the term Original Collateral, but the trial court did *not* answer the question of how the comparison of the FMVs and MRPs called for by Paragraph 8 is to work. (R. 1201, 1204.) That question is the very reason that Appellants filed

their declaratory judgment action, and it is the question that the Court of Appeals answered as a matter of law.

The Court of Appeals properly construed Paragraph 8 to require that the MRP for each tract of the Collateral be compared to the FMV of each tract of the Collateral. This construction is required by the plain language of Paragraph 8 and the defined term MRP contained in Paragraph 7. Because Paragraph 7 provides six MRPs for which the six tracts of Collateral had to be released, the comparison of the MRPs to FMVs required by Paragraph 8 also must go tract by tract for all six.

1. The Term MRP in Paragraph 8 is defined in Paragraph 7, and the proper construction of Paragraph 8 requires looking to Paragraph 7's definition.

MRP is a defined term in Paragraph 7 of the Loan Agreement. Paragraph 7 contains six MRPs, one for each individual piece of the Collateral. (R. 380.) The Loan Agreement does not provide a minimum release price for the entirety of the Collateral. Nor does it provide a minimum release price for the four combined Georgia tracts. Instead, the Loan Agreement treats each tract comprising the Collateral separately by providing a MRP for each parcel, including the four individual Georgia tracts.

The six MRPs must be compared to the six FMVs for the six pieces of the Collateral. It is undisputed that the Collateral includes all six tracts listed in Paragraph 7 of the Loan Agreement. The MRP and FMV of the same tract must be

compared in order for the comparison to make any sense. One would not compare the MRP for the Florida Collateral to the FMV of the North Carolina Collateral. In the same way, one would not compare Tract One of the Georgia collateral to the FMV of all four of the Georgia tracts combined. Paragraph 7 gives six MRPs for the release of the Collateral. The Court of Appeals correctly held that the MRP/FMV comparison of the Collateral in Paragraph 8 also should go through the six MRPs provided in Paragraph 7.

2. Paragraph 8 must be construed to reconcile with Paragraph 7.

The Bank and the trial court's construction is based on the rationale that Paragraph 7 only sets MRPs for the Georgia tracts separately in the event of sale of one or more of them during the term of the Loan. (R. 1198-99; Pet. for Certiorari at 8.) The trial court concluded that the six MRPs contained in Paragraph 7 have no bearing on the proper construction of Paragraph 8, even though the term "Minimum Release Price" appears clearly in both paragraphs. (R. 1200-01.)

This interpretation is flawed because it fails to reconcile Paragraphs 7 and 8. See Anderson v. Anderson, 274 Ga. 224, 227 (2001) ("A contract must be construed so as to reconcile its different provisions and to reject a construction that leads to a contradiction."). Paragraph 8 provides the formula for determining how much credit Obligors receive when they convey the Collateral to the Bank upon maturity. That formula requires the comparison of the MRPs and the FMVs of the

Collateral. (R. 380.) For the formula calling for a comparison to work, and to make it possible to determine if the MRP or FMV is greater, the comparison must be between the same things. The comparison does not work properly if the comparison is between two different things.

Here, the only way to compare the same things is if MRP means what it says in Paragraph 7 and is the minimum release price for each of the six tracts comprising the Collateral. MRP is a defined term, and a MRP is provided for each of the six tracts that make up the Collateral. The only way to have a valid comparison to determine which is "greater" is to weigh the MRP of one tract of collateral on the one hand (i.e., one bushel of apples), and the fair market value of the *same* tract of collateral on the other hand (another bushel of apples) to see which comes out as more. There can be no logical comparison if one seeks to compare the MRP of *one* of the four Georgia tracts against the fair market value of the aggregate of the four Georgia tracts.

The trial court's determination that the MRPs of the four individual Georgia tracts found in Paragraph 7 do not inform the calculation called for in Paragraph 8 leads to a contradiction because the same defined term, "Minimum Release Price," is used in both paragraphs. See Anderson, 274 Ga. at 227. The intent of the parties was to apply the definition the same way in Paragraph 8 as in Paragraph 7, not to have it apply in a different way, or not at all, in the succeeding paragraph.

One cannot accept the meaning of the term MRP in Paragraph 7 and then read that term as meaningless in Paragraph 8. See Sheridan v. Crown Capital Corp., 251 Ga. App. 314, 316 (2001) ("The construction of the contract should give a reasonable, lawful and effective meaning to all manifestations of intention by the parties rather than an interpretation which leaves a part of such manifestations unreasonable or of no effect.").

Obligors' construction of Paragraph 8 is the only way for MRP to keep its meaning given in Paragraph 7, and also does not require the term "Collateral" to change. This is demonstrated because there is no MRP for the aggregate of the four Georgia tracts. The parties easily could have included this in the Loan Agreement if they wanted to do so, but they did not. Since they did not, there is nothing with which to compare the fair market value of the four combined Georgia tracts. The trial court and the Bank would very explicitly add to the contractual language found in the Loan Agreement: "The Lender having taken deeds to all the Collateral, the Minimum Release Price of the Collateral is necessarily determined by *combining the figures set forth in Paragraph 7*."[5] (R. 1199 (emphasis added); see also Pet. for Certiorari at 10.)

[5] The Bank's argument that the Court of Appeals' construction adds words to the Loan Agreement (Pet. for Certiorari at 9), is thus wholly inaccurate. The Court of Appeals' construction hews directly to the explicit language of the document.

The Bank's proposed construction of Paragraph 8 would require special interpretation for the Georgia tracts. Under this special interpretation, Obligors would be given credit for the greater of the *aggregate* of the Georgia tracts' MRPs and the then *combined* FMVs of the Georgia tracts. (Pet. for Certiorari at 8-9.) This is not what Paragraph 8 says. If the parties had wanted Obligors' credit to be based on a comparison of the aggregate of the MRPs for the Georgia tracts with the combined FMVs of all of the Georgia tracts, the parties would have said so. The Court of Appeals recognized that it may not rewrite the Parties' agreement so that it is more to the Bank's liking after the fact. See Waste Mgmt. of Metro Atlanta, Inc. v. Appalachian Waste Sys., LLC, 286 Ga. App. 476, 476 (2007) ("[I]t is the function of the court to construe the contract as written and not to make a new contract for the parties.").

3. The Court of Appeals did not need to consider facts or context outside of the Loan Agreement.

The Bank argues the Court of Appeals failed "to consider the loan transaction as a whole, including the parties' commercial context." (Pet. for Certiorari at 10.) First, the Bank points to the fact that the entirety of the Original Collateral was unsold at the maturity of the Loan and that the Bank took a deed in lieu of foreclosure to the 6.55 acres of the Original Collateral as a whole, instead of taking four security deeds for the four separate tracts comprising it. (Id. at 10-11.) Second, the Bank hypothesizes that the Court did not appreciate the supposed

significance of testimony by the parties' appraisers regarding the fair market value of the Original Collateral. (Id.) These "facts," whether considered or not, would not encourage, let alone require, a different judgment. Any such "facts" reside well outside the four corners of the governing contract.

The Court of Appeals' alleged ignorance of this "context" is simply immaterial to the court's conclusion that the trial court erred in its construction of Paragraphs 7 and 8 of the Loan Agreement. None of these "facts" impacts the construction of that contract. The Court of Appeals correctly noted that the first step of contract construction is for a court to "decide whether the language is clear and unambiguous. If it is, the court simply enforces the contract according to its clear terms; *the contract alone is looked to for its meaning*." Slip Op. at 6 (quoting City of Baldwin, 293 Ga. at 30 (emphasis added). The Court found *no ambiguity* on the issue of the calculation of the amount of consideration the Bank is required to credit to payment on the Loan's unpaid principal balance with respect to the deed in lieu of foreclosure the Bank took on the Original Collateral. Id. at 5, 7. The Court *concluded as a matter of law* that the relevant parts of the Loan Agreement mean that the calculation "unambiguously requires that, to determine which is greater, the separate 'Minimum Release Price' assigned to each part of the 'Collateral' be compared to the fair market value of that part." Id. at 7.

In other words, the Court of Appeals did not need to go beyond the plain language of the Loan Agreement in its construction of Paragraphs 7 and 8. The court did not need to reach the second and third steps of the familiar three-step contract construction process under Georgia law. Because the Loan Agreement is clear and unambiguous, it must be enforced according to its terms, and only those terms provide its meaning. See id. at 6 (quoting City of Baldwin, 293 Ga. at 30).

Simply put, the Bank's considerations of "commercial context" do not and cannot have any bearing on the construction of the Loan Agreement. The Court of Appeals' analysis began with the language of the Agreement. Because that language is clear and unambiguous, that is where the court's analysis properly ended. Id. at 6-7. Whether any of the Original Collateral remained unsold at the maturity of the Loan or what the fair market value of the Original Collateral was at the time of the deed in lieu of foreclosure or how many deeds were used to convey the Original Collateral to the Bank cannot change the clear and unambiguous requirements of the Loan Agreement. Under well-established Georgia contract construction law, the Bank's concerns about "commercial context" are wholly irrelevant. See City of Baldwin, 293 Ga. at 30.

4. The Court of Appeals correctly held that the determination of the FMV of the Collateral is a jury issue.

The Bank requests that this Court review the Court of Appeals' holding in Division 3 of its opinion that the trial court properly ruled the fair market value of

the Collateral is a jury issue. (Pet. for Certiorari at 12.) The Court of Appeals correctly determined, however, that aside from Paragraph 8, the Loan Agreement is silent as to the method for determining fair market value of the Collateral. Fair market value of the Collateral is clearly within the province of the jury. Jotin Realty Co., Inc. v. Department of Transp., 174 Ga. App. 809, 811 (1985).

The Court of Appeals also correctly determined that a dispute of fact exists regarding the fair market value of the Original Collateral, which dispute must be resolved by a jury. See Gibson v. Carter, 248 Ga. App. 280, 281 (2001) ("[T]he trial court is not authorized to weigh the evidence or decide issues of fact."). Obligors obtained an MAI appraisal providing a professional opinion of the fair market value of the Original Collateral as of the date that the Original Collateral was deeded to the Bank. (R. 984-1051.) Likewise, the Bank obtained an appraisal of the fair market value of the Original Collateral. (R. 493-603.) These appraisals returned different fair market values for the Original Collateral. The Loan Agreement does not provide a method for reconciling these differing appraisals, nor does it specify how the parties are to arrive at a fair market value determination for the Collateral. (R. 14-24.) This leaves the essence of a genuine issue of material fact.

The Bank, as it did in the Court of Appeals, mischaracterizes the testimony of Obligors' appraiser, David Griffith, in an effort to eliminate a clash of expert

opinions. The Bank contends Mr. Griffith said that the market value of the Original Collateral would not be the sum of the retail values of each of the four tracts into which it is divided. (Pet. for Certiorari at 10.) Mr. Griffith in fact testified that "[b]ased on [his] professional experience and the characteristics of the [Original Collateral], it is appropriate to value separately the four pad sites that comprise the [Original Collateral]." (R. 985.) According to Mr. Griffith, "[t]he sum of the values of the four tracts comprising the [Original Collateral] as of October 5, 2015, was $3,245,000."[6] (R. 986.) The fact that Mr. Griffith alternatively gave a bulk value conclusion for the Original Collateral does not change his affirmative testimony that it was proper to value the four tracts individually and add those numbers together. Therefore, when faced with this clear issue of fact, the trial court properly held that the issue of fair market value must be decided by a jury, and the Court of Appeals correctly affirmed that decision.

IV. CONCLUSION

For all the foregoing reasons, this Court should deny the Bank's Petition for Certiorari.

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[6] The Bank's contention that the MRPs of the Original Collateral tracts are collectively greater than Mr. Griffith's opinion of the FMV of the Original Collateral (Pet. for Certiorari at 12-13), is thus incorrect.

Respectfully submitted this 4th day of April, 2017.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for Peach State Bank & Trust with a copy of the foregoing **Response to Petition for Certiorari** by U.S. mail, postage prepaid and addressed as follows:

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