EDWARD S. BALLARD — PLAINTIFF/APPELLANT

VS.

COMMERCIAL BANK OF DEKALB — DEFENDANT/APPELLEE

Civil Appeal from Chancery Court
of Chickasaw County, Mississippi
Civil Action No. 2004-0058-2-B
Honorable Kenneth M. Burns, Chancellor

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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EDWARD S. BALLARD **PLAINTIFF/APPELLANT**

VS.

COMMERCIAL BANK OF DEKALB **DEFENDANT/APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss.R.App. 28(a)(1), the undersigned counsel of record for appellee, Commercial Bank of Dekalb, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Estate of Edward Stinson Ballard, Sr., Plaintiff/Appellee, Substituted for Edward S. Ballard, Deceased, by an order entered on February 12, 2007

2. Commercial Bank of Dekalb
   Defendant/Appellee

3. Kiley Moody, oldest grandson of Edward S. Ballard and principal obligor of underlying indebtedness secured by deeds of trust in issue executed by Edward S. Ballard

4. Moody Land & Timber Company, Inc., Kiley Moody's business and principal obligor of underlying indebtedness secured by deeds of trust in issue executed by Edward S. Ballard

5. Richard P. Ballard, Attorney at Law, The Taylor Group, Louisville, Mississippi; son of Edward S. and Ruby Ballard, uncle of Kiley Moody and father of Dane Ballard; Executor of the will of Edward Stinson Ballard, Sr., deceased, and brother of Terri Lynn and Karen Lee

6. Dane Ballard, son of Richard P. Ballard, first cousin of Kiley Moody, and grandson of Edward S. and Ruby Ballard

7. Donald Tucker and Roy Tucker, Lessees of the property subject to the deeds of trust in issue in this case

Edward S. and Ruby Ballard and aunt of Dane Ballard and Kiley Moody

10. Ruby Ballard of Pickersville, Alabama, widow of Edward S. Ballard, mother of Terri Lynn, Karen Lee and Richard Ballard, and grandmother of Dane Ballard and Kiley Moody

11. Ballard Properties, business in which certain Ballard family members have or at relevant times had an interest; at certain times a creditor and/or benefactor of Kiley Moody and/or Moody Land & Timber

12. Wes W. Peters, Attorney at Law, Barfield & Associates, Jackson, Mississippi, counsel of record for Plaintiff/Appellant

13. Keith R. Raulston, Attorney at Law, Watkins Ludlam Winter & Stennis, PA, Jackson, MS, counsel of record for Defendant/Appellee

14. Charles E. Smith, Attorney at Law, Meridian, Mississippi, counsel for Defendant/ Appellee at certain times potentially relevant

Respectfully submitted,
COMMERCIAL BANK OF DEKALB

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The sole issue on this appeal is whether the Chancellor was manifestly wrong in rejecting Ballard's contention "that two deeds of trust he signed before notaries at two different times, both pledging the Chickasaw County land for the admitted purpose of securing [his oldest grandchild] Kiley's Land & Timber debts were, quite simply, nullities."

II. STATEMENT OF THE CASE

A. Nature of the Case

The Chancellor correctly summarized the nature of this case in his Final Judgment, saying, "Mr. Ballard wants the Court to declare that the two deeds of trust he executed in favor of Commercial Bank of Dekalb ('Bank') are void, invalid and unenforceable . . . ." (R. 453, RE, 10).[1] The Chancellor correctly found as fact that "[n]o one coerced Mr. Ballard to sign the documents and no one prevented him from reading either." (R. 457, RE 14.) The Chancellor correctly found as fact that "Mr. Ballard's initials are contained on each page of [each of the two deeds of trust in issue]," and "[t]he debt he secures for Kylie [Moody], his grandson, president of Moody Land & Timber Company, is clearly described in [the second deed of trust]." The Chancellor correctly found as fact that Ballard admittedly "signed [the deed of trust] at [another] bank in Alabama near [his] home." The Chancellor correctly found as fact that at the time Ballard signed, "[t]he Bank did not consider Kylie's loans in default," while Ballard himself thought his grandson Kiley was then "in the hole" to the tune of hundreds of thousands of dollars in "debt to the bank in timber loans. ..." (R. 455, 459, RE 12, 16.) The Chancellor correctly found as fact "that Mr. Ballard knew the purpose of both deeds of trust was to secure loans made

[1] Throughout this brief, references to the numbered pages of the record other than the trial transcript are designated "R," and references to the trial transcript are designated "Tr."

would be contacted for prior approval for advances." (R. 461, RE 18.) The Chancellor also correctly found as fact that "Mr. Ballard has judicially admitted the purpose of the first deed of trust was to provide a twenty percent equity cushion as additional security for the bank's financing of Kylie's timber deals." (R. 462, RE 20.)

The Chancellor's ultimate findings of fact, all of which are supported not only by *substantial evidence* but by *overwhelming evidence,* appear in the following passage of his well-reasoned, eighteen-page Final Judgment (R. 453-462H, RE 10-26):

> What Mr. Ballard would now have this Court do is to hold, as a matter of law, that the two deeds of trust he signed before notaries at two different times, both pledging the Chickasaw County land for the admitted purpose of securing Kylie's Land & Timber debts, were, quite simply, nullities. [Citation omitted.]
>
> This the Court cannot do. The law and the facts are clear: The Bank has a valid, enforceable security interest in the Chickasaw County land to secure Kylie's timber deals, and it is undisputed that the secured debt substantially exceeds the value of the land.

(R. 462 C-D; RE 22-23.)

Tellingly, Ballard says nothing in his brief about the standard of review applicable to this appeal from a Chancellor's findings of fact after a full trial on the merits. He fails to tell us that, unlike the nature of the case in the trial court, the nature of the case on appeal does notconcern whether his factual assertions are worthy of belief because the Chancellor explicitly found them unworthy of belief following full trial on the merits. Ballard fails to tell us that the controlling question on appeal is whether the Chancellor's findings of fact are "manifestly wrong," not whether "this Court might have found otherwise as an original matter." *Dew v. Langford,* 666 So. 2d 739, 742 (Miss. 1995); *see also In re Conservator for Demoville,* 856 So. 2d 607 (¶5) (Miss. App. 2003) (*findings of Chancellor to be reviewed in light most favorable to appellee*).

be notified before the farm could be used as collateral," and misleadingly states he "never . . . agreed to any of the loans in dispute." These misleading statements directly conflict with the well-supported fact findings of the Chancellor. Ballard simply seeks improperly to retry the facts on appeal and to ignore substantial evidence in the record and well-supported findings of the Chancellor.

The facts of this case have been established by the findings below. They cannot be altered by Ballard's zeal to convert his bankrupt grandson's secured debt into unsecured debt, nor can they be altered by his executor's zeal to shift the benefit of the so-called "farm" from Ballard's grandson Kiley to Ballard's executor's son, Dane.

Ballard again distorts the evidence in the record and ignores the fact findings of the Chancellor when he contends (brief, p. 2) "it was clear that [his] grandson could not repay the loans" when "the Bank drafted a new deed of trust" and told [his] grandson, if he could get [Ballard] to sign it, the Bank would continue to loan him more money." These demonstrably false statements also directly conflict with the Chancellor's well-supported, explicit findings that:

> It was not until months *after* Mr. Ballard signed the second deed of trust that the Bank first had reason to believe that Kiley's loans were in danger of not being paid, much less reason to believe Kiley was selling timber out of trust. Michael Dudley so testified, and the Court finds his testimony to be credible.

(R. 462G at ¶52; RE 25) (emphasis in original). Michael Dudley explicitly denied promising future loans if Kiley Moody would, as Ballard puts it (brief, p. 2), "get his grandfather to sign" the second deed of trust. (R. 105, 376.)

The Chancellor, also with good reason, found that Ballard's grandson Kiley "was not the Bank's agent" and correctly found "no evidence that Mr. Ballard ever requested an explanation

Chancellor entered an Order denying Ballard's motion for partial summary judgment. (R. 382.)

Trial of this case commenced at the Oktibbeha County Courthouse in Starkville, Mississippi on May 10-11, 2007, and concluded at the Chickasaw County Courthouse in Okolona, Mississippi on June 7, 2007. (R. Vols. 5-7.) The Chancellor on July 5, 2007 entered his eighteen-page Final Judgment containing his findings of fact and conclusions of law. (R. 453-462 H, RE 10-26.) The Final Judgment directed "that Mr. Ballard's Complaint be . . . dismissed with prejudice," and "authorized [the Bank] to proceed with foreclosure on either or both of Mr. Ballard's deeds of trust."

C. Facts

Edward Ballard, the plaintiff/appellant, was 68-years old when he signed the first deed of trust on June 29, 2001, and 71 when he signed the second deed of trust on November 28, 2003. (Ballard Depo., p. 73.)[5] He had heart problems but no mental impairment. (Id. at p. 3.) At his Alabama home, he still used a fax machine to transact business "every day" and a computer for internet access and on-line trading at the time of his deposition in 2006. (Id. at pp. 27, 41.)

At trial, Edward Ballard's wife (Ruby Ballard) and his son (Richard Ballard, an attorney) disputed the deposition testimony of Edward Ballard about his business acumen in November of 2003. (Ballard died on January 20, 2007, between the time he gave his deposition in this case and the time of trial.) Ruby Ballard and her son, Richard, nevertheless conceded that Edward Ballard acted competently when he signed a bill of sale for a $20,000 Lexus on November 20, 2003; when he directed his wife to sign a $7,500 check to Moody on November 26, 2003; when he signed a deed in 2004 conveying a remainder interest in the Chickasaw County land to

[5] The Ballard deposition appears in the record as Exhibit P-24.

bank's interrogatories on June 27, 2005; and when he gave his deposition in this case on June 7, 2006. He was never under a conservatorship, and no steps were ever taken to place him under a conservatorship. (Tr. 192, 283-84, 288, 298-301.)

There is no evidence of any change in Edward Ballard's medications or mental competency between the time he signed the 11/20/03 bill of sale and the time he signed the 11/28/03 deed of trust. (R. 197-98.) The Chancellor accordingly found that Ballard was legally competent and literate when, on November 28, 2003, he signed the second deed of trust before a notary at a bank in Alabama. (R. 456, RE 13, ¶10.)[6]

Ballard received a B.S. degree in Accounting from MSU in 1956. He worked for a CPA firm as an auditor in Tupelo, then for a tobacco company as an auditor in Kentucky, then for the United States Public Health Service as an infectious disease control officer at UT Medical School in Memphis and in New York City, and then for the Mississippi Employment Service as an unemployment tax collector before he went into the construction business in 1962. (Edward Ballard depo., pp. 76–82.) He then became the sole owner of Ballard Properties, which "had several hundred apartments at one time" and "other commercial rental properties," including "shopping center[s]." (Id. at pp. 81–82.)

After he "retired" from active management of Ballard Properties in 1990, Ballard retained a 4% ownership interest in the company with the balance held by his three children,

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[6] *See Wilson v. Planters Bank of Tunica,* 383 So. 2d 1089 (Miss. 1980) (antecedent consideration legally sufficient; "[t]here is no question that Shelby C. Wilson was aged and suffered a distressing array of physical maladies on January 16 when he endorsed this substantial obligation to accommodate his son. The record also convinces us of this much, but it also confirms that the Chancellor was on firm footing in the facts when he wrote ... 'Mr. Wilson was in bad health and his vision was very poor, but he clearly was competent.' ... We think the complete medical details of Shelby's physical condition before his demise would be unenlightening.").

to his son's (Richard Ballard's) trial testimony, his approximate net worth in 1993 exceeded $2 million. (Tr. 286.) In retirement, he continued to be involved in the business on a daily basis although his son, Richard Ballard, a corporate attorney, assumed primary management responsibilities. (Id. at pp. 27, 81.) Ballard's son Richard and other business attorneys have always been available to him to provide legal advice as needed. (Id. at pp. 23–24, 84.)

A sophisticated businessman, Ballard was no stranger to commercial loan transactions. By his own account, he had "borrowed millions, and millions, and millions" from other commercial lenders over the years. (Id. at p. 40.) He had considerable experience with lines of credit in general and with a "[g]ood many deeds of trust" in particular long before he first had any contact with the bank in the spring of 2001. (Id. at pp. 31, 83.)

Ballard had no special relationship with the bank. *See Wise v. Valley Bank,* 861 So. 2d 1029, 1033, ¶11 (Miss. 2003) (relationship between bank and customer generally not fiduciary one); *Hopewell Enter., Inc. v. Trustmark National Bank,* 680 So. 2d 812, 816 (Miss. 1996) (as general rule, "a mortgage-mortagagor relationship is not a fiduciary one as a matter of law"); *Wilson v. Ameriquest Mortgage Company,* 2006 WL 2594522 at p. 3 (S.D. Miss. 2006) (same; granting summary judgment for lender). Although he had had extensive experience with many multi-million dollar commercial loan transactions in the past, Ballard had never had any business with the bank before the Moody business in dispute. The only business he ever had with the bank was the Moody business in dispute. (Id. at pp. 32–33, 83–84.) As a matter of law, the bank owed Ballard no fiduciary duty. *Wise,* 861 So. 2d at 1033, ¶11. Nor did Moody have any special relationship with the bank. (Tr. 367.) The evidence is undisputed that the bank's sole relationship with Moody was a debtor – creditor and not a fiduciary relationship.

brought him there to introduce him to Moody's loan officer, Greg McMahon, in the spring of 2001. Ballard was not, however, a stranger to Moody. Moody was his oldest grandchild. (Tr. 222, 296.) They were "always close because [Moody's] mother divorced when [Moody] was ten years old, so [Ed and Ruby Ballard, Moody's maternal grandparents] had to help her with the kids." (R. 304, Ruby Ballard Depo., p. 23.) When Moody was a teenager, his grandfather Ballard told him he would "get the farm [*i.e.*, the Chickasaw County land] one day." (Moody Depo.[7], p. 15.)

As early as 1997, Ballard gave Moody $8,000 – $10,000 worth of timber, which Moody cut off the Chickasaw County land. (Id. at pp. 12–13.) On June 28, 2001, Moody wrote a check for $30,000 to Ballard Properties for a "down payment" for a "house."[8] The very next day, Ballard signed the first deed of trust. On October 24 and November 5, 2003, Moody wrote two checks, each for $5,000, payable to Ed Ballard. The second of these two checks bounced. (Tr. 190-92.) As noted above, on November 20, 2003, Moody "bought" a $20,000 Lexus from his grandparents and at the same time Moody, as "President" of "Moody Land and Timber Company, Inc.," gave his uncle, Richard Ballard, a special power of attorney. See Exhibit D-10. Moody's grandparents then "loaned" $7,500 to Moody six days later, on November 26, 2003[9]; and they were never repaid for the $7,500 "loan" or for the $20,000 Lexus. (Tr. 186, 195-96, 274.) Two days after Moody received the $7,500 "loan" from his grandparents, his grandfather signed the second deed of trust before a notary at an Alabama bank.

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[7] See Exhibit P-25.

[8] See Exhibit P-26.

[9] See Exhibit D-8.

had been made because she writes the checks. When confronted at trial with the $7,500 check, however, she admitted signing it and claimed her memory failed her in her deposition. (Tr. 194-95.)

Ballard "financed" Moody's purchase of the Lexus, but he then gave Moody his down payment back when Moody was "short on money" and "needed to pay on equipment ... for [his] logging business." (Moody depo. at pp. 62–64.) The undisputed evidence about Ballard/Moody financial dealings between November 20 and 28, 2003, contrasts with Richard Ballard's testimony that he thought Moody was doing "absolutely great" financially until some time in 2004. (Tr. 276.)

The evidence is clear and convincing, indeed undisputed, that no one coerced Ballard to sign and that no one prevented him from reading either deed of trust. *See, e.g., Oaks v. Sellers,* 953 So. 2d 1077, ¶17 (Miss. 2007) ("'[i]n Mississippi, a person is charged with knowing the contents of any document that he executes'"; " '[a] person cannot avoid a written contract which he has entered into on the ground that he did not read it or have it read to him'"; "'a person is under no obligation to read a contract before signing it, and will not as a general rule be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading the contract'"); *Bailey v. Estate of Kemp,* 955 So. 2d 777, ¶22 (Miss. 2007) (same; rejecting duress claim); *Carter v Citigroup, Inc.,* 938 So. 2d 809, ¶41 (Miss. 2006) (same); *MS Credit Center v. Horton,* 926 So. 2d 167, ¶32 (Miss. 2006) ("Duties to disclose or to act affirmatively, such as explaining the terms of a contract, do not arise in arm's length transactions under an ordinary standard of care. Rather, they arise only in fiduciary or confidential relationships"); *Equifirst Corp. v. Jackson,* 920 So. 2d 458, ¶19 (Miss. 2006) ("inability of borrowers to read did

signed," citing with approval *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 264–65 [5th Cir. 2004]); *Turner v. Torry*, 799 So. 2d 25, 36 (Miss. 2001) ("parties to an arms-length transaction are charged with a duty to read what they sign; failure to do so constitutes negligence"); *Alliance Trust Co., Ltd. v. Armstrong*, 185 Miss. 148, 186 So. 633, 635 (Miss. 1939) ("To permit a party when sued on a written contract to admit he signed it but to deny that it expresses the agreement he made or to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts."). The Chancellor correctly held (R. 458, RE, 15) that these authorities render irrelevant Ballard's rhetorical question (depo., p. 23), "... [W]ho reads all the fine print and all that junk? Nobody. I never did."

Moody lived in his grandparents' Alabama home, and they paid his living expenses for "about two years" beginning early in 2004. (R. 303, Ruby Ballard Depo., p. 17; Edward Ballard Depo., pp. 69–70; Moody Depo., pp. 4–5.) Moody was a member of the Ballard household when Ballard filed this suit in 2004, when Moody gave his bankruptcy deposition in 2005, when Moody gave his deposition in this case in 2006,[10] and when trial took place in 2007, by which time his widowed grandmother, Ruby, was supporting him as the only other member of her household. (Tr. 168, 173-74, 185-86.) His grandfather Ballard let Moody use his truck and paid for his gas when Moody came to Jackson for his bankruptcy deposition on March 28, 2005. (Edward Ballard Depo., pp. 55, 69.) Moody rode with his grandparents to Jackson for Moody's

[10] After back surgery and prolonged hospitalizations, Moody moved back into his grandparents' Alabama home in September of 2006. (Moody Depo., pp. 4–10.)

him a Ford Bronco in February of 2005. (R. 186, Moody Bankruptcy Depo., p. 42.)

Moody found laughable Ballard's allegation that fear of "incur[ing] [his] well known violent wrath" prompted his grandfather to sign the second deed of trust. He testified:

> Q. Well, do ya'll [Moody and his grandparents] watch TV in the same TV room?
>
> A. Sometimes.
>
> Q. Do you know of any reason why either of your grandparents would ever be in fear of physical violence from you?
>
> A. Me? No.
>
> Q. You're laughing. Do you find that notion laughable?
>
> A. Yeah, I find that funny. It's funny. I respect them. I wouldn't hurt them.
>
> Q. Have you read the complaint in this case?
>
> A. No.
>
> Q. Have you been told that the complaint in this case alleges that your grandfather was physically intimidated by you and didn't want to incur your well-known wrath?
>
> A. No, I didn't know that.
>
> Q. What do you think about that?
>
> A. I think it's a lie. I don't think Granddaddy thinks that.
>
> Q. In other words, you wouldn't intimidate or physically threaten them? Never have and never will.
>
> A. No.

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[11] Moody's grandparents went along for the ride, obviously unconcerned about his allegedly "violent wrath." They had already been deposed at their son Richard's Louisville office months earlier. Moody heard his grandparents "talk about their depositions." They told him he was "a sorry son of a bitch... for losing the [Chickasaw County land]." (Moody Depo., p. 10.)

A. True.

(Moody Depo., pp. 11–12.)

Moody's grandparents were also at a loss to explain the allegations of duress in Ballard's complaint. (Tr. 170-71, R. 304-05, Ruby Ballard depo., pp. 23–24; Edward Ballard Depo., pp. 68–69.) When asked whether she "ever felt physically threatened by [Moody]," Moody's grandmother replied, "Not me. I think it would be vice-versa." (Id.) She and her husband admittedly trusted Moody and assumed Moody "would have told his granddaddy" anything he should know. (Tr. 183, R. 307, Ruby Ballard, Depo. p. 36, Tr. 280) The duress allegations in the complaint are unworthy of belief and conflict with both the testimony of Edward Ballard in his deposition and Ruby Ballard in her deposition and at trial, and the Chancellor correctly so found.

No family member lives on the Chickasaw County land, which was in Edward Ballard's name. For many years the land has been leased to a large commercial farming operation. (Edward Ballard Depo., p. 89.) There is no evidence that the Ballards were dependent upon lease revenue to maintain their lifestyles. Mrs. Ballard testified at trial that she had not visited the Chickasaw County property in many years and that no family member had lived on the property for many decades. (Tr. 220-21.) There are no houses or other structures on the property, which generates only $3,800 in annual lease revenue. (Tr. 285, 312, 319.) Mrs. Ballard has for many years lived in a large riverfront house in an Alabama subdivision. (Tr. 302, 03.) She and her grandson, Moody, were the only residents of that house at the time of trial. (Tr. 185.)

for Moody's timber business and maintained the company records at his Louisville law office. (Moody Depo., p. 60.) Richard Ballard, at Moody's request, but with the bank as his client, did title work on some of Moody's timber deals in Winston County in 2002, between the time the first and second deeds of trust were signed. (Tr. 259-60.) He also did title work on Winston County property, which was collateral for Moody timber loans, in November of 2003. (Id.) The evidence is undisputed that the bank provided all the information necessary for him to do his title work and neither misrepresented anything to him nor withheld any material information requested by him. (Tr. 313-14.) There is no evidence that the bank was, at any time prior to the spring of 2004, even aware that Richard Ballard held a power of attorney for Edward Ballard. (Tr. 266.)

Richard Ballard and his father, Edward Ballard, during 2001 and 2002 discussed Moody and his timber business, and in particular Moody's desire to get them involved in it. (Tr. 254-60.) In July of 2002, Ballard Properties made Moody a $40,000 loan on a tract in Winston County. (Id.) Richard Ballard knew all along that his nephew was in the business of "buying and harvesting timber" and that "[h]e was borrowing from the bank using the timber and/or land for collateral." (Id.) On a fishing trip in the fall of 2001, Edward mentioned to Richard the "line of credit" he had set up for Moody. (Id.) There is no evidence that Richard questioned his father about this or followed up. (Id.) Apparently, Richard Ballard did not find this information surprising or alarming.

As noted above, Richard Ballard also received a special power of attorney from Moody as "President" of "Moody Land & Timber, Inc." on November 20, 2003, only eight days before Edward Ballard signed the second deed of trust on the Chickasaw County land. (See Exhibit D-

not a corporation in good standing is irrelevant. There is no evidence that the bank knew or had reason to know of any failure on Moody's part to observe corporate formalities, the allegations in paragraphs 14 and 37 of the complaint notwithstanding. Richard Ballard admitted to having substantial input into the formulation of the complaint, and he admittedly prepared the "Moody Land and Timber Company, Inc." power of attorney which Moody as "President" signed at his request on November 20, 2003, eight days before his father signed the second deed of trust before an Alabama notary. (Tr. 307, Exhibit D-10.) Richard Ballard was at all times in a better position than the bank to determine the corporate status of his nephew's business, and the bank in any event had no duty to Edward Ballard to determine its status.

As early as the spring of 2001, Ballard wanted to help his grandson along in the timber business and he did. Moody showed Ballard "a couple of tracts" and took him to the bank in Dekalb sometime in the spring of 2001 to meet Moody's "banker," Greg McMahon. (Edward Ballard Depo. p. 14.) Ballard and his wife, on May 22, 2001, pledged 1,000 shares of Union Planters stock, along with 150 shares they had given Moody, to secure a $34,770 loan for "Moody Land and Timber." (McMahon Depo., pp. 8–9; Edward Ballard Depo., pp. 6–7)[12]. These undisputed facts belie his allegations (Complaint, ¶¶13–14) that before he signed the June 29, 2001 deed of trust, neither he, nor Moody nor Moody Land & Timber received "any loans" from the bank, and belie Ballard's allegations (*id.*) that no one ever "apprised [him] of any need for financing for [Moody's timber] business."

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[12] McMahon explained that the stock pledge was simply an interim measure to provide security until the title work on the Chickasaw County land could be completed to provide a sufficient equity cushion for ongoing and expanded Moody timber transactions.

grandson's timber business, then admittedly signed the June 29, 2001 deed of trust, admittedly for the specific purpose of pledging the Chickasaw County land to provide a 20% equity cushion for the bank in Moody's ongoing timber deals. (Ballard Depo., pp. 4, 6.)[13] Moody, like Ballard, also clearly understood that his grandfather pledged the Chickasaw County land as additional security for future advances by the bank to Moody for Moody's timber business. Moody in his bankruptcy deposition (see p. 154) testified his grandfather "put up [the Chickasaw County land] for collateral," "to help [Moody] out" because they had "always been pretty close." (R. 203.) In his deposition in this case, Moody testified similarly, affirming the accuracy of his bankruptcy deposition testimony on the point:

> Q. And at what point did you ever approach your grandfather about doing anything to help with your business.
>
> A. I probably would have been in business a year or so —
>
> Q. Pretty early on in other words?
>
> A. Probably.
>
> ****
>
> Q. All right. Now, do you recall that soon after his transaction in which this stock was pledged for a timber deal in 2001, your grandfather signed a deed of trust on the Chickasaw County land?
>
> A. Yes.
>
> Q. And why did he do that?

[13] Contrary to Ballard's contention that the 20% cushion was merely a "side deal" the bank had with Moody, Ballard let slip that he understood this from the outset. (Ballard, Depo., pp. 4, 6, 23, 33–39). The Chickasaw County land, which had an estimated value of at least $1,000 per acre, fit the equity cushion bill. Its value exceeded the $150,000 necessary to support Moody's $750,000 line of credit. ($150,000 equals 20% of $750,000, not coincidentally the "maximum obligation limit" specified in paragraph 3 of the first deed of trust. The intended purpose of the transaction was documented substantially contemporaneously in a memorandum prepared by McMahon and in board minutes prepared by the bank's recording secretary. See Exhibits D-2 and D-5.

Q. Why did he do that?

A. In case I ever had something I wanted to buy, *I was supposed to be able to borrow against it*, I believe.

****

Q. Let me read you a portion of your deposition from the bankruptcy. Just bear with me, and I'm going to read it. And tell me if I read it accurately and if this is true. I'm reading from page 142.

'My question: Did you ever approach your grandfather or your uncle or anybody about putting up any money terms of capital formation for the business: Answer: Yes. Question: Who was that? Answer: My grandfather. Question: And that's Edward Ballard? What about your uncle, mother or anybody else? Answer: I'm sure I said something to my uncle before, but he never did. The only thing he ever said was if you've got a tract of timber that's a $100,000, we pay a hundred for it, and it's worth 200, we'll buy it. Other than that, no, he wanted the pie in the sky. Question: How much did your grandfather put up? Answer: I think he put up some stock. I put some stock, and he put up some stock one time for a loan. And then he got that back. Question: 'Got it back,' being came and got it? *Answer: After we paid off the loan, and then he came and put up the place in Chickasaw County — put it up — 200 something acres, 200 acres, 250, whatever — we put it up.* Question: But that was just pledging property. It wasn't a direct cash infusion, was it? Answer: No. *Question: That was just to secure money lent by the bank; is that right? Answer: Right.* Question: Is that the property you and he co-owned? Answer: No, he owns it.'

Is that accurate?

A. Yes, sir. That's accurate.

Q. And you'll stand by that testimony.

A. Yes, sir.

****

A. *Correct.*

Q. *For your benefit? You knew that?*

A. *Correct.*

Q. You wouldn't have lead him to believe —

A. No, I wouldn't. I know what you're going to ask. Go ahead and ask me.

Q. Well, since you know what I was going to ask, why don't you tell me?

A. Lead him to believe something different? Is that what you were going to ask?

Q. That's what I was going to ask.

A. No.

(Moody Depo., pp. 20, 23–26, 50–51; emphasis added.)

Moody's banker, Greg McMahon[14], also clearly understood the purpose of the June 29, 2001 deed of trust. He testified:

Q. Does [Exhibit 3] accurately state what the basic purpose and intent of the transaction was that was reflected by the deed of trust?

A. Yes, sir.

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[14] A former bank examiner, McMahon worked as a loan officer for the bank for seven years until September of 2002, when he voluntarily left to assume a position with Union Planters. By the time of his deposition in this case on August 3, 2006, he was disabled and terminally ill secondary to a "rare form of leukemia" which was diagnosed in 2004 and which required life-threatening bone marrow transplants and chemotherapy. (McMahon Depo., pp. 4–12). By the time of trial, McMahon had passed away. The Chancellor found credible McMahon's testimony about the substance of his conversation with Ballard about the June 29, 2001 deed of trust and found unreliable the plaintiff's contention that McMahon orally promised to contact Ballard for prior approval of future advances for Moody's timber business pursuant to the deed of trust. The Chancellor found that contention of the plaintiff as unworthy of belief as the allegations in the complaint that Ballard was not involved in financing any prior Moody deals or the allegations that fear of Moody's "well known violent wrath" coerced him into signing the second deed of trust over two years later.

June 29, 2001, and signed that very day by McMahon, explicitly documents for the bank's loan committee that the "land in Chickasaw County valued at $150,000" (20%) was to support a "Moody Land & Timber line of credit" of $750,000 (100%) based upon "timber deeds totaling $600,000" (80%).[15] McMahon, a terminally ill cancer patient and a disinterested witness who had no connection with the bank for over four years, testified he had "no doubt" that Ballard understood and intended exactly that when he signed the first deed of trust in this office on June 29, 2001. (McMahon Depo., p. 75.)

The only Moody notes outstanding when Ballard signed the first deed of trust on June 29, 2001, were fully secured by land deeds of trust, not timber deeds of trust, and required no 20% equity cushion supplement from the Chickasaw County land, as Michael Dudley, the bank's president explained at trial. Therefore, according to Ballard's, Moody's and the bank's stated intentions, those notes, numbers 24879 and 25037, were never intended to have been secured by the Chickasaw County land and were listed in the second deed of trust as a result of a clerical error.[16] (Id.)

Moody, contrary to Ballard's allegations (Complaint, ¶¶35, 45–46), was not "already in default" when he signed the second deed of trust at Moody's request and in Moody's presence before an Alabama notary at a bank in Aliceville on November 28, 2003. *Indeed, the bank on November 25, 2003, made him a new loan of $11,534, with an 11/25/05 maturity date, for the*

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[15] See Exhibit D-2.

[16] This clerical error is immaterial. *See, e.g., Mullins v. Merchandise Sales Co.*, 192 So. 2d 700 (Miss. 1966) (evidence supported chancellor's finding that parties did not intend to include certain 100 acres of land in deed of trust given as security for note). It is ironic that Ballard would complain about this clerical error. It would be to his, not the bank's, advantage to fix it.

bank. (See Exhibit D-3, the August 2003 credit report, which Michael Dudley referred to in his trial testimony at Tr. 365.) Moody testified that all but at most $15,000 of timber proceeds subject to timber deeds of trust were properly deposited. (Moody Depo., p. 39.) Ballard's contention (brief, pp. 7, 17) that Moody simply renewed all of his notes without any principal or interest payments is unsupported by the record. (Tr. 55, 365.) Ballard's contention (brief, p. 10) that the bank "never made an effort to obtain [a] . . . title opinion or anything on the property until over two years later" is unsupported by the record. (Tr. 106, R. 327.) Ballard's contention (brief, p. 11) that the bank should have had some sort of "line of credit agreement" and "running ledger" for transactions of this type is also unsupported by the record. (Tr. 10-11.)

As Dudley explained at trial, the bank did not regard Moody as "in default" when Ballard signed the second deed of trust. (Tr. 19, 93, 340, 343, 365-76.) As Dudley credibly testified, he believed at the time that standing timber subject to timber deeds but not yet harvested secured Moody Land & Timber debts. (Id.) He had no reason to believe and did not believe at the time that there had been any sales out of trust, and he renewed the Moody notes and applied proceeds to prior notes based upon Moody's oral representations about where he stood on harvesting timber on various tracts. (Id.) When he had the second deed of trust prepared, Dudley did not know that the first deed of trust did not reference Moody Land & Timber. (Tr. 106.) He was in no sense seeking to "reform" the first deed of trust with the second, much less seeking to do so unilaterally.

Dudley also credibly testified that in November of 2003, he did not know Richard Ballard held his father's general power of attorney. (Tr. 14, 372.) The evidence, including the testimony of Richard Ballard, reflects that the bank did not "avoid" contacting Richard Ballard or Edward

title opinions for the bank outside of Winston County where he and his nephew, Moody, had their offices, and Moody took the second deed of trust for his grandfather to sign as an accommodation to his grandfather, not for any collusive or otherwise sinister purpose, as Ballard or his lawyers have in this case falsely contended in their effort to evade Ballard's obligations. (Tr. 260, 364, 367, 370, 374-76, R. 462C, RE 22 at ¶22.)

The only relationship the bank had with Moody was a debtor-creditor relationship. (Tr. 367.) Moody was not the bank's agent, and the Chancellor correctly so found. (Tr. 364, R. 462D, RE 23.)

No one disputes that Ballard signed the November 28, 2003, deed of trust, and no one disputes that he unambiguously pledged the Chickasaw County land for Moody's debts. Moody and his grandfather merely disagree about whether his grandfather handed the document back to him or put it in the console of his truck. (Moody Depo., pp. 42–50; Ballard Depo., pp. 49–56, Tr. 370.)

According to Moody, his grandfather knew he had hundreds of thousands of dollars in outstanding timber loans to the bank at the time and expressed surprise the bank had "loaned [him] that much money," but he signed the second deed of trust anyway, even though Moody told him he was already "in the hole." (Moody Depo. at 49.) The evidence is also clear that by the time he signed the 2003 deed of trust, Moody's grandfather knew Moody had recently bounced a check for his Lexus down payment, had recently asked for return of his down payment so he could pay notes to another bank on logging equipment, and had recently requested and obtained a $7,500 "loan" from his grandparents, a loan which Ruby Ballard at trial admitted she erroneously denied in her deposition having made, and which came to the bank's attention

payment was made on the $7,500 "loan." (Id.)

The evidence is clear that Ballard had no reason to assume that his grandson was in sound financial condition when he signed the second deed of trust on November 28, 2003, and the evidence is also clear that the bank did not assume, and had no reason to assume, that Ballard was materially ignorant of his grandson's financial affairs. Indeed, when Richard Ballard called Michael Dudley in the spring of 2004, Richard Ballard disclosed otherwise private information about Moody which was previously unknown to Dudley. (Tr. 373-75.) It is not surprising that Ballard family members knew more about Moody than the bank. (Tr. 266.) It only is surprising that Ballard would contend that it somehow should have been the other way around.

Ballard did not want to admit the truth to his own son. Early in 2004, when Richard Ballard first learned that the bank claimed the Chickasaw County land as security for Moody debts, Ballard lied to his son, claiming that he "hadn't signed anything." (Richard Ballard Depo., p. 15; Tr. 305.) Only when confronted with the deed of trust, which Richard obtained from the chancery land records, did Edward admit that he had signed it. (Id. at 15–16.)[17]

Richard Ballard took this news hard. It dashed his assumption of many years that his father had deeded a remainder interest in the land to his son Dane, whom Richard thought more worthy of largess than Dane's cousin Moody, the oldest of the ten Ballard grandchildren and the natural inheritor of the so-called "family farm" if primogeniture within his generation were to

[17] The complaint (¶44) paints a different picture than any of Ballard's witnesses at trial about how and from whom Ballard learned the Chickasaw County land might be in danger of foreclosure. Ballard testified he learned this first from a telephone call from Michael Dudley in late November or early December of 2003, at the latest. (Ballard depo., pp. 61-63.) Richard Ballard testified his father learned it from a call he received from Dudley in late March of 2004. (Tr. 303-304.) Neither, however, supported the allegation in the complaint (¶44) that Ballard learned it when "Moody actually began to brag." Here again, we find a fact-specific allegation in the complaint that, disturbingly, is directly contradicted by Ballard's own witnesses.

promised Moody the land, and he did not know that his father, after recovering from a life-threatening illness in the 1990's that prompted Richard Ballard to have him sign a supposed death-bed deed, chose not to deliver and record it. Moody said his previously "close" Uncle Richard stopped speaking to him over all of this. (Id., see also Moody Depo., p. 15.) It became clear at trial that Richard Ballard, not Edward Ballard, was the driving force behind this lawsuit and that intra-family rivalry over money, not the sentimental value of a so-called "family farm," is the real core of the dispute. (Id.)

It also became clear at trial that Edward Ballard deliberately chose not to tell his lawyer-son, Richard, everything Richard would have liked to have known about Richard's nephew's (Moody's) dealings with Richard's father (Moody's grandfather). Edward Ballard did not tell Richard that he promised the Chickasaw County land to Moody, his oldest grandchild. He did not tell Richard that, when he recovered from his life-threatening illness in the 1990's, he chose not to deliver and record the deed Richard had prepared for him to sign on his supposed deathbed to convey a remainder interest in the Chickasaw County land to Richard's middle son, Dane. He did not tell Richard that he and his wife traveled from their Alabama home to DeKalb, Mississippi and pledged 1,000 shares of Union Planters stock in May of 2001 to secure a Moody timber deal. He did not tell Richard that in June of 2001, he again traveled to DeKalb, this time to sign a deed of trust on the Chickasaw County land to provide a 20% equity cushion on an overall $750,000 line of credit for Moody timber deals. He did not tell Richard about the $7,500 "loan" to Moody on November 26, 2003; and not until the spring of 2004 did he tell Richard about the deed of trust he signed before a notary, on November 28, 2003, over four months earlier. (Id., see also Tr. 257-58, 272-84.)

tell his son Richard anything. He was free to play favorites among his grandchildren. That he obviously did and by doing so incurred the ire of his attorney-son, Richard, who naturally favored his own son, Dane, is noteworthy simply to understand the motives involved when Edward Ballard dissembled as he did when confronted by his irate attorney-son. Edward wanted Moody to have the land. Richard wanted Dane to have it. Neither wanted the bank to have it, and Edward trusted his oldest grandchild to keep that from happening, like any hopeful pledgor trusts a principal obligor for whom he provides security for a debt as an accommodation. Sureties always hope the chicken won't come home to roost, and they're never happy when they do.

III. SUMMARY OF ARGUMENT

The Chancellor was not manifestly wrong in rejecting Ballard's contention "that two deeds of trust he signed before notaries at two different times, both pledging the Chickasaw County land for the admitted purpose of securing [his oldest grandchild's] Kiley's Moody Land & Timber debts were, quite simply, nullities." (R. 462C-D; RE 22-23.) Both Ballard and his oldest grandchild Kiley admitted the purpose of the first deed of trust was to secure a $750,000 line of credit *for Kiley's timber business*, not for Ballard. Kiley drew on that line of credit. Without dispute, Kiley's draws were evidenced by notes specified in the second deed of trust which Ballard admittedly signed, and the purpose and effect of which the Chancellor with good reason found Ballard fully understood.

The deeds of trust must be construed together as a part of a single transaction, but even standing alone the second deed of trust unambiguously secured Kiley's timber debt in dispute. The bank's extension of credit to Kiley constituted legally sufficient consideration for both deeds

deed of trust, but in any event the bank's renewals or extensions of Kiley's secured notes provided new and legally sufficient consideration even apart from the legally sufficient antecedent consideration.

The Chancellor entered his well-reasoned, eighteen-page Final Judgment following full trial on the merits. That decision is not manifestly wrong. It is clearly right on both the facts and the law and should be affirmed.

IV. ARGUMENT

A. Ballard, not the Bank, had the "reformation" burden of proof.

Ballard's discussion (brief, pp. 19-23) of the standards of proof for reformation ignores the fact that it is not the bank which seeks reformation; it is Ballard. He cannot dispute that, if enforced as written, the second deed of trust would secure hundreds of thousands of dollars in Moody loans which are now in default. We agree with Ballard that, in order to undo a deed of trust as he now seeks to do, he would have a very heavy burden indeed. *See, e.g., Brown v. Chapman,* 809 So. 2d 772 (Miss. App. 2002); *Dunn v. Dunn,* 786 So. 2d 1045 (Miss. 2001); *Progressive Bank of Summit v. McGehee,* 142 Miss. 655, 107 So. 876 (Miss. 1926). It is a burden he failed to sustain at trial.

B. The Chancellor did not Misapply the Rules of Construction and did not Misallocate the Burden of Proof.

Ballard seeks to avoid the first deed of trust by disregarding extrinsic evidence of the parties' intent. He argues the first deed of trust, unambiguous on its face, allows no room for extrinsic evidence. He cites *Cooper v. Crabb,* 587 So. 2d 236 (Miss. 1991), *Matter of Estate of Anderson,* 541 So. 2d 423 (Miss. 1989), and *Ford v. Hegwood,* 485 So. 2d 1044 (Miss. 1986).

survivorship clause. In *Estate of Anderson,* the Court held a decedent's testamentary intent should be enforced to avoid unintended consequences. In *Ford,* the Court held that whether a deed was a will required no extrinsic evidence.

It is certainly true that one well-established rule of construction directs that "the intent of the parties be gathered from the plain and unambiguous language contained [in the instrument they signed]." *Rogers v. Morgan,* 250 Miss. 9, 21, 164 So. 2d 480, 484 (Miss. 1964). However, another directs that "'[w]here several instruments are made a part of a single transaction they will all be read and construed together as evidencing the intention of the parties in regard to the single transaction. This is true even though the instruments were executed at different times and do not in terms refer to each other.'" *Phillips Petroleum Co. v. Stack,* 231 So. 2d 475, 481 (Miss. 1969), quoting with approval *Rocks v. Brosius,* 241 Md. 612, 637, 217 A.2d 531, 545 (Md. 1966); *see also Security Mut. Finance Corp. v. Willis,* 439 So. 2d 1278 (Miss. 1983) (supplemental contract may be entered to explain or supplement existing contract); *Wilson Industries, Inc. v. Newton County Bank,* 245 So. 2d 27 (Miss. 1971) (construction must be placed on each of documents or agreements entered as part of overall transaction which will be consistent with dominant purpose of parties).

The Chancellor correctly held that "Ballard's argument conflicts with these rules of construction." (R. 460 at ¶29, RE 17.) He correctly held:

> Ballard argues that each of the two deeds of trust should be construed without reference to the other. He contends the first deed of trust should be construed *without* reference to extrinsic evidence, while the second should be construed *with* reference to extrinsic evidence.

> The law does not permit him to have it both ways. To the extent that he relies upon extrinsic evidence to invalidate the second, he ignores the very rules of construction upon which he relies to invalidate the first.

Cite: (R. 460-61 at ¶¶29.)

The Chancellor also correctly found that "Ballard knew the purpose of both deeds of trust was to secure loans made by the bank to Moody's timber business and that Ballard had no reasonable expectation that he would be contacted for prior approval of advances." (Id. at ¶31.) Ballard's contentions to the contrary are no more worthy of belief than his false allegations in his complaint that he had no dealings with the bank before June 29, 2001, his false contention that McMahon told him in 2001 that he had already been diagnosed, his false denial of a $7,500 loan on November 26, 2003, or his false allegation of duress ("well-known violent wrath").

The Chancellor with good reason did not believe that Ballard did not know the nature and purpose of the deeds of trust he signed. Moreover, even if Ballard had (and he did not) show that some material misrepresentation induced him to sign the deeds of trust, he would nevertheless be bound as a matter of law by what he signed, as the many Mississippi cases cited above make so abundantly clear. Even consumer debtors alleging fraud have failed as a matter of law to escape their obligations despite claims of fraudulent inducement. An essential element of any claim of fraud or misrepresentation is *reasonable reliance. Franklin v. Lovitt Equipment Co., Inc.*, 420 So. 2d 1370, 1373 (Miss. 1982). As a matter of law, one may not reasonably rely on oral representations, whether negligently or fraudulently made by the lender, which contradict the plain language of the documents. As this Court has explained:

> A person is under an obligation to read a contract before signing it, and will not as a general rule be heard to complain of an oral mis-

Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co. Inc., 584 So. 2d 1254, 1257 (Miss. 1981).

Ballard cannot dispute the simple fact that the second deed of trust unambiguously secures specified Moody debts. He admits he signed it in the presence of his grandson and a notary at a bank in Alabama.[18] Ruby Ballard did not question her husband's competency to sign the deed of trust. She admitted that after her husband returned from signing the second deed of trust before a notary at a bank in Aliceville on November 28, 2003, she asked him what Moody wanted. She testified that her husband told her that he "had to renew the papers at the bank so Kylie could continue to borrow money." She did not claim to have been alarmed by this news or to have questioned her husband's competence to transact such business. The conversation was so unremarkable to her, she testified, that it did not even interrupt her ironing. (Tr. 201-02.)

A plaintiff's reliance on allegedly fraudulent representation, concealment or non-disclosure is not reasonable as a matter of law if the representation is contradicted by the written terms of a written contract he signed. *Rankin v. Brokman,* 502 So. 2d 644, 646 (Miss. 1987); *McCubbins v. Morgan,* 199 Miss. 153, 23 So. 2d 926 (Miss. 1945); *see also Watson v. First Commonwealth Life Ins. Co.,* 686 F. Supp. 153 (S.D. Miss. 1988). This holds true even for illiterate borrowers. *See Republic Finance v. Cauthen*, 343 F. Supp.2d 529 (N.D. Miss. 2004). *See also Oaks v. Sellers,* 953 So. 2d 1077, ¶17 (Miss. 2007) ("'[i]n Mississippi, a person is

[18] Ballard Depo., pp. 22–23, 25, 35; Moody Depo., pp. 44–45. Whether the notary's acknowledgement is in recordable form is immaterial, just as whether Moody Land & Timber Co., Inc. was in good standing with the Secretary of State is irrelevant. *See, e.g., Carson v. McNeal,* 375 F. Supp. 2d 509 (S.D. Miss. 2005) (defective notary acknowledgement immaterial to determination of obligations of parties to instrument); *see also In re Hardin's Estate,* 218 So. 2d 889 (Miss. 1969) (legality of existence of *de facto* corporation may only be questioned by state). That Ballard has contended otherwise only underscores that Ballard is grasping at straws in ¶¶ 14, 23, 38, 43 of his complaint. (R. 7, 9, 13, 14.)

avoid a written contract which he has entered into on the ground that he did not read it or have it read to him'"; "'a person is under on obligation to read a contract before signing it, and will not as a general rule be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading the contract'"); *Bailey v. Estate of Kemp,* 955 So. 2d 777, ¶22 (Miss. 2007) (same; rejecting duress claim); *Carter v Citigroup, Inc.,* 938 So. 2d 809, ¶41 (Miss. 2006) (same); *MS Credit Center v. Horton,* 926 So. 2d 167, ¶32 (Miss. 2006) ("Duties to disclose or to act affirmatively, such as explaining the terms of a contract, do not arise in arm's length transactions under an ordinary standard of care. Rather, they arise only in fiduciary or confidential relationships"); *Equifirst Corp. v. Jackson,* 920 So. 2d 458, ¶19 (Miss. 2006) ("inability of borrowers to read did not render them incapable of possessing adequate knowledge of the arbitration agreement they signed," citing with approval *Wash. Mut. Fin. Group, LLC v. Bailey,* 364 F.3d 260, 264–65 [5th Cir. 2004]); *Turner v. Torry,* 799 So. 2d 25, 36 (Miss. 2001) ("parties to an arms-length transaction are charged with a duty to read what they sign; failure to do so constitutes negligence"); *Alliance Trust Co., Ltd. v. Armstrong*, 185 Miss. 148, 186 So. 633, 635 (Miss. 1939) ("To permit a party when sued on a written contract to admit he signed it but to deny that it expresses the agreement he made or to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts."). The Chancellor correctly held that these authorities render irrelevant Ballard's rhetorical question (depo., p. 23), "... [W]ho reads all the fine print and all that junk? Nobody. I never did." Ballard, of course, was not illiterate. Like anyone else, he is charged by law with knowing the contents of what he signed. *See Massey v. Tingle,* 867 So. 2d 235 (Miss. 2004).

upon which a party may predicate any demand for relief must relate to past or presently existing facts, as facts, and cannot [consist] of promises, except in some cases when a contractual promise is made with the present undisclosed intention of not performing it.'" *Credit Indus. Co. v. Adams County Lumber & Supply Co.,* 215 Miss. 282 60 So. 2d 790, 794 (Miss. 1952), quoting *McArthur v. Fillingane,* 184 Miss. 869, 186 So. 828, 829 (Miss. 1939).

> 'It is a general rule that fraud cannot be predicated upon statements which are promissory in their nature when made and which related to future actions or conduct, upon the mere failure to perform and promise — nonperformance of a contractual obligation — or upon failure to fulfill an agreement to do something at a future time ...'
>
> The reasons for the rule, as stated by the court in *Salitan v. Horn,* [55 So. 2d 444, 446 (Miss. 1951)], are 'that 'a mere promise to perform an act in the future is not, in a legal sense, a representation, and that a mere failure to perform it does not change its character'.' 23 Am. Jur. p. 801.

Id.

In *Patton v. State Bank & Trust Co .,* 936 So. 2d 391 (Miss. App. 2006), the plaintiff sued the lender for breach of contract, fraud and fraud in the inducement, among other things, alleging the bank not only agreed to finance the purchase of a building but also orally agreed to finance the renovations to the building. The Court held such representations about future loans could not, as a matter of law, support a claim of fraud in the inducement. *Id.* at ¶13.

Here, Ballard has judicially admitted the purpose of the first deed of trust was to provide a 20% equity cushion as additional security for the Bank's financing of Moody's timber deals.[19] He does not contend that the Bank did not finance the deals. He simply complains that the Bank

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[19] Ballard Depo., pp. 4, 6, 23, 33–39.

Alleged oral promises of future conduct cannot support a fraud claim. This rule also dispatches Moody's contention[21] that he expected more loans but got none after his grandfather signed the second deed of trust. Moreover, according to Moody, his grandfather knew Moody had received advances totaling hundreds of thousands of dollars, yet he signed the second deed of trust anyway, commenting only that he was surprised that the bank had loaned him that much money. (Moody depo. at 49.)

The Chancellor found Michael Dudley's testimony credible. Dudley testified that he did not promise anything with a present intention not to perform. (Tr. 105, 376.) He testified he told Moody that before any further advances would be made, Moody would have to both provide a more detailed accounting than Moody previously had provided verbally of where he stood on cutting various tracts *and* return the signed second deed of trust. Dudley did not misrepresent anything, and Moody was not the bank's agent. Moody returned the signed deed of trust, but he did not provide the requested accounting. Having failed to fulfill *both* conditions to receiving further advances, Moody received no further advances.

Ballard's burden on his claims of fraud and misrepresentation is a heavy one. One seeking to invalidate a deed of trust must produce clear and convincing evidence. *See, e.g., Haygood v. First Nat. Bank of New Albany,* 517 So. 2d 553 (Miss. 1987), *Haynes v. Avco Sec. Corp.,* 299 So. 2d 198 (Miss. 1974); *see also Thomas v. B. Rosenberg & Sons,* 153 Miss. 314, 120 So. 732 (Miss. 1929) (deeds of trust are presumed valid; cancellation of deeds of trust for

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[20] *Id.* at 4. McMahon denied making any such representation. (McMahon Depo., pp. 11–12.) *See Iuka Guar. Bank v. Beard,* 658 So. 2d 1367 (Miss. 1995) (for default clause in deed of trust to be enforceable, there is no requirement that co-tenants have knowledge of each others' creation of debt or antecedent lien on property).

[21] See Moody Depo., pp. 55–56.

45 So. 425 (Miss. 1908) (mortgages duly executed and acknowledged ought not to be set aside for fraud, except on the most clear and convincing proof of their fraudulent character).

Ballard's "self help" argument is not only meritless, it is frivolous. It was not "self help" by the bank for Ballard to sign a deed of trust. When he signed, it was bilateral, not unilateral.

Ballard's reliance in the Court below (see his proposed findings of fact and conclusions of law at R. 421 *et seq.*) on *Courtney v. Merchants & Mfrs. Bank*, 680 So. 2d 866 (Miss. 1996) is misplaced, to put it mildly. The creditor in *Courtney*, to be sure, engaged in "self help" because, without seeking any signature from the borrower on any document at all, it *unilaterally altered the original document* by adding a back hoe not originally listed as security. The debtor denied that he intended to grant a security interest in the back hoe. The Court noted that *"[i]t would have been a simple matter for the Bank to request that Courtney initial the correction to the note* and, failing such consent, the Bank could have taken other steps to protects its rights, such as a suit for reformation." 680 So. 2d at 868 (emphasis added).

In sharp contrast, Ballard admittedly made in-person visits to the bank in 2001, all to help his grandson finance his timber business. According to Moody, Ballard knew full well before he signed the second deed of trust in November of 2003, that it too served that purpose. According to Moody, Ballard knew full well that the Chickasaw County land secured Moody's outstanding timber loans and knew full well that those loans totaled hundreds of thousands, well in excess of the value of the land. Ballard knew when he signed that he stood to lose the Chickasaw County land if Moody failed to repay those loans. According to Moody, he even knew that Moody was "in the hole" at the time. (Moody depo. at 49.)

repeatedly argues (see Brief, pp. 5, 7, 16, 30) that the bank "undertook a massive restructuring of the notes, *so that none would appear to be in default"* (emphasis added). The testimony of Michael Dudley is clear and convincing that the bank did not renew the Moody notes and list them as it did in the second deed of trust in 2003 "so that none would appear to be in default." The Chancellor correctly found that these things were done in the ordinary course of business, with no intent to mislead anyone, all in perfect conformity with the original intent of the first deed of trust in 2001, and all at a time when the bank did not regard Moody as "in default." According to Moody, Ballard knew Moody was "in the hole" when he signed the second deed of trust; Moody never misled his grandfather about anything; and Moody took the deed of trust to Alabama to be signed only as an accommodation to his grandfather. (Moody Depo., pp. 42–50, Tr. 105, 161-62, 340, 368, 376.)

The fact that the bank, at the time the second deed of trust, was reviewing loan files, including Moody's, in anticipation of an upcoming FDIC examination is not material. As Dudley explained, the entire history of Moody loan renewals was visible to the FDIC, and there is no indication that Ballard ever contacted or attempted to contact the bank about any aspect of that history before he signed the second deed of trust. (Tr. 95-96.)

Like most hopeful pledgors, Ballard simply hoped that unforeseen contingencies would not force Moody into bankruptcy. As Ballard put it in his deposition, he thought his worst-case exposure on a 20% equity cushion for Moody's deals "wouldn't hurt [him] too bad." (Ballard Depo., p. 25.) He was right about that. Neither he nor his wife was financially dependant upon the land; but for the bank's security interest, the land would have gone to one of his grandsons at his death. Whether that grandson would have been Kiley Moody or Dane Ballard is unclear and

time as well as upon Richard's powers of persuasion for the benefit of his own son, Dane.

The Chancellor got it right:

> What Ballard would now have this Court do is to hold, as a matter of law, that the two deeds of trust he signed before notaries at two different times, both pledging the Chickasaw County land for the admitted purpose of securing Moody Land & Timber debts, were, quite simply, nullities. *See Hardy v. First Nat. Bank of Vicksburg,* 505 So. 2d 1021, 1023 (Miss. 1987) (construction rendering instrument nullity to be avoided). This the Court cannot do. The law and the facts are clear: The bank has a valid, enforceable security interest in the Chickasaw County land to secure Moody's timber deals, and it is undisputed that the secured debt substantially exceeds the value of the land.

As we have seen, Ballard has been so zealous in his effort to defeat the bank's security interest that he lied to his son, denying that he signed the second deed of trust, and lied in his complaint, denying that he ever pledged the Union Planters stock and claiming that he signed only because his grandson threatened violence.

Ballard's argument that Ballard could not have done what he admittedly did because there was nothing in it for him presupposes, without any supporting evidence whatever, that his own grandson colluded with the bank to defraud him. Ballard in his deposition never contended there was anything in it for him. Admittedly, Ballard merely intended to help his grandson, precisely the same intention he had when he gave him the Lexus, gave him the Bronco, gave him the Union Planters stock, gave him the $7,500 "loan," gave him a place to live, gave him gas money, and gave him living expenses. Ballard even promised Moody the Chickasaw County land, and he knowingly gave the bank a security interest in that very land, admittedly and voluntarily to help his grandson, not himself.

EquiFirst Corp. v. Jackson, 920 So. 2d 458, 463, ¶16 (Miss. 2006) (loan documents not unconscionable; "nothing indicates that anyone prevented [the borrowers] from reading the documents or asking any questions," rejecting contention that lender's closing attorney "had an obligation to explain the contracts to them.") The bank had no duty to explain things to Ballard or to protect him from his own grandson, who was not the bank's agent. There is in any event no evidence that Ballard ever requested an explanation from the bank.

If Ballard felt he needed an explanation before he signed he could readily have obtained one. Ballard's contention that the bank "avoided" him finds no credible support in the trial record. Moreover, his belated contention that Moody prematurely and without his consent took the signed deed of trust to the bank conflicts with Moody's account and is absent from the complaint. An obvious afterthought, Ballard concocted this contention during this litigation. It has no semblance to the truth.

Dudley did not call Ballard until late March or early April of 2004[22], and Richard Ballard did not call Dudley until late March or early April of 2004. Neither Richard Ballard's nor Michael Dudley's accounts in this respect can be squared with Edward Ballard's claim that he first learned of the bank's claim, and found the executed second deed of trust "missing" from the console of his pickup, in, at the latest, late November or early December of 2003, and also conflicts with the remarkable allegation in paragraph 44 of the complaint that Moody's "brag" alerted him. *It also makes no sense that Ballard would have been alarmed about the deed of*

[22] The purpose of the call, as Dudley explained, was simply to locate Moody, not to threaten foreclosure. (Tr. 103-04.)

until he gave prior approval of specific further advances on a deal-by-deal basis.

C. The second (November 28, 2003) Deed of Trust need not, but as a matter of law can, stand on its own.

It has long been the rule in Mississippi, as elsewhere, that an extension of time to pay an existing note is sufficient consideration for a subsequent deed of trust.[23] *See, e.g., Jones Supply Co. v. Ishee,* 249 Miss. 515, 163 So. 2d 470 (Miss. 1964). It is also well-settled in Mississippi, as elsewhere, that it is presumed that valuable consideration passed for a deed of trust. *See, e.g., Thomas v. B. Rosenberg & Sons,* 153 Miss. 314, 120 So. 732, (Miss. 1929). "Dragnet clauses" have also long been enforced as written in Mississippi, as elsewhere. *See, e.g., Whiteway Finance Co., Inc. v. Green,* 434 So. 2d 1351 (Miss. 1983).

Nor can anyone question that an antecedent debt, even that of someone other than the grantor, provides sufficient consideration. The RESTATEMENT (THIRD) OF PROPERTY MORTGAGES makes this clear, stating:

> § 1.2 No Consideration Required
>
> **(a) Consideration is not necessary to the enforceability of a mortgage.**
>
> **(b) A mortgage securing an obligation undertaken as a gift is enforceable in the absence of undue influence, duress, fraud, or mistake, notwithstanding the unenforceability of the obligation standing alone.**
>
> **(c) A mortgage that secures a performance of a pre-existing legal obligation is enforceable.**
>
> ****
>
> Chapter 1. Creation of Mortgages

[23] For this reason it is both ironic and self-defeating for Ballard to place so much stress upon the bank's "restructure [ing] of Moody's notes" (brief, pp. 5, 7, 8, 13, 14, 16, 17, 19, 23, 26, 29, 30, 31, 35) in November of 2003.

An obligation whose performance is secured by a mortgage may be that of the mortgagor or of some other person.[24]

The Mississippi Supreme Court has quoted the RESTATEMENT with approval in determining mortgagors' obligations under deeds of trust. *See Shutze v. Credithrift of America, Inc.,* 607 So. 2d 55, n.2 and n.16 (Miss. 1992). The Court has also looked to the Uniform Commercial Code for guidance in addressing real estate mortgages. *See Shutze,* 607 So. 2d at notes 17–19 and accompanying text; *see also Wansley v. First Nat. Bank of Vicksburg, Vicksburg, Miss.,* 566 So. 2d 1218, 1224–25 (Miss. 1990); *Hughes v. Tyler,* 485 So. 2d 1026, 1029, 1033–34 (Miss. 1986). The Mississippi Uniform Commercial Code for decades has explicitly provided that "*[a]n instrument is issued or transferred for value if ... [it] is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due ....*" Miss. Code Ann. §75-3-303(a) (emphasis added). Thus, there can be no room for argument on the point: The second deed of trust was supported by legally sufficient consideration. *See Wilson v. Planters Bank of Tunica*, 383 So. 2d 1089 (Miss. 1980); *First Nat. Bank of Jackson v. Carver,* 375 So. 2d 1198 (Miss. 1979); *see also Premier Farm Credit, PCA v. W-Cattle, LLC,* 155 P.3d 504, 520 (Col. App. 2006) ("Defendant's antecedent debt to Premier [the April 11, 2003 promissory note] served as valid consideration for the November 2003 deeds of trust."); *Brault v. Grayton,* 2006 WL 1738257, 59 UCC Rep. Serv. 2d 1181, 41 Conn. L. Rptr. 425 (Conn. Super. 2006) ("'a mortgage to secure an antecedent debt is perfectly valid between the parties'"). For Ballard to argue otherwise is to ignore controlling legal authority. Richard Ballard, upon questioning by the Chancellor at trial, finally agreed that Ballard is not now

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[24] Emphasis in original text (current through 2006).

316.) That concession came more than a day late and a dollar short. Ballard argued the exact opposite, contrary to the law, in his complaint and in his motion for partial summary judgment.

Ballard argues that Moody would never supply the information the bank requested. This argument distorts the truth. Moody claimed he was a sloppy but honest record keeper. It is true that in November of 2003, the bank asked Moody for a current year tax return and asked him to come up with an accounting of where he stood on his individual tracts. Moody did not refuse. He provided some information verbally at that time. It was not until months *after* Ballard signed the second deed of trust that the bank first had reason to believe that Moody's loans were in danger of not being paid, much less reason to believe Moody was selling timber out of trust. Michael Dudley so testified, and the Chancellor found his testimony to be credible.

Ballard also complains that, after Moody defaulted and Ballard repudiated his obligation to the bank, the bank did not promptly produce Moody's account documents to Richard Ballard, in response to a phone call from Richard Ballard in 2004 shortly before he filed this suit. He fails to explain the relevance of this complaint or why he did not pursue any allegedly unresolved discovery issues prior to trial. (Tr. 13-16.) Nor did he seek an accounting in his complaint. His aim obviously was to avoid the bank's security interest altogether, not to explore in good faith the amount of Moody's debt secured by that interest.

The bank merely requested Moody's authorization to produce Moody's records. As Ballard, contrary to his complaint (see ¶14), has now finally admitted, Moody's account documents were not limited to documents related to Ballard's deeds of trusts. It was entirely reasonable for the bank to have asked Ballard to provide Moody's consent to release Moody's records. When, during trial, the plaintiff finally produced an authorization from Moody, the bank

account documents (Exhibit P-26) show not only substantial Moody transactions involving various Ballard family members, including Richard and Dane Ballard, but also show over $200,000 in deposits to Moody's account in October of 2003, as well as substantial payments on Moody timber loans, contrary to Ballard's unsupported suggestions throughout this case that there were no substantial payments. Moreover, the tax returns, which were unavailable to the bank in 2003, showed Moody's timber business was actually profitable that year. (Tr. 367 et seq.)

Ballard's reliance upon *Baker v. Citizens State Bank,* 349 N.W.2d 552 (Minn. 1984) is misplaced for several reasons. The Minnesota Supreme Court's analysis in that case is out of step with the RESTATEMENT OF MORTGAGES, and it is also distinguishable on its facts. The lender in that case offered forbearance on an existing debt, *admittedly not then in default*, for a mortgage on a farm. When it got the mortgage, it then initiated foreclosure *within a week* – far from the facts in this case.

Here, in contrast, Ballard himself has consistently contended that the Moody loans *were* "in default" when Ballard signed the second deed of trust. However, the evidence shows, and the Chancellor correctly found, that they were not actually "in default," as the bank viewed them, because Moody at that time was in contact with the bank on a regular basis and renewed the notes as requested. Renewal in itself, which constitutes an extension of time to pay, provides valid consideration, even assuming any "new" as opposed to antecedent consideration was required.

Even in Minnesota, it has long been well-settled that "a preexisting debt [is] sufficient consideration for a guarantee because the note by its terms extended the time of payment for a

Land Co., 196 N.W. 963 (Minn. 1924). It is therefore ironic that Ballard would rely upon Minnesota authority for the proposition that there was no consideration to support the second deed of trust in this case, when at the same time it is he who contends that Moody was "in default" at the time, and it is he who contends that the bank "made it appear" otherwise by renewing notes and providing maturity dates months after the date the second deed of trust was executed. There can be no contention, and there is no evidence whatsoever to suggest, that the bank declared any notes in default and attempted foreclosure prior to any maturity date of any note secured by the Chickasaw County property. *See also Westbrook State Bank v. Anderson Land & Cattle Co.*, 364 N.W.2d 416, 419 (Minn. App. 1985) ("As to the second mortgage, the evidence indicated Westbrook's security on an earlier promissory note was jeopardized. Westbrook agreed to forebear its legal right to call the note, and the second mortgage was replacement collateral. The trial court's finding that there was adequate consideration for the two mortgages was supported by the evidence and was not clearly erroneous.").

Ballard misplaces reliance (brief, p. 27) upon an antebellum case, *Catlett v. Bacon,* 33 Miss. 269 (1857). In *Catlett,* the Court merely held that because the grantor of a deed of trust had no title to convey he conveyed none and could not enforce his own deed of trust, which was not signed by the grantee or trustee, against subsequent purchasers of the subject property. Ballard, in contrast, had title to convey.

Ballard also misplaces reliance upon *Jackson v. Holt,* 192 Miss. 702, 6 So. 2d 915 (1942). In *Jackson,* the Court merely held that when a vendor had no title to the land he purportedly sold, he conveyed nothing of value to the purchaser, such that the purchase money deed of trust executed in favor of the title-less vendor lacked supporting consideration. Ballard's

to the deed of trust, and his grandson, the principal obligor, indisputably received the intended "consideration" in the form of hundreds of thousands of dollars in secured loans from the bank to support his timber business, precisely as both Ballard and Moody intended. There was nothing "*nudum*" about Ballard's "*pactum.*"

D. Equity requires that the deeds of trust be enforced, not voided.

It is clear from the evidence adduced at trial that Richard Ballard received less information from his father and Dane Ballard received less property from his grandfather than they hoped and expected they would receive, but these failed hopes and expectations do not justify Edward Ballard's defensive revision of the true facts. Richard Ballard testified he was unaware that his father signed the Union Planters stock pledge, the first deed of trust or the second deed of trust, and unaware of the November 26, 2003 "loan." He was unaware that his father decided not to deliver and record the deed he prepared for him to convey a remainder interest to his son, Dane, years earlier; but admittedly, his father deliberately chose a different course than his strong-willed lawyer-son would have had him choose. His father, when confronted by his lawyer-son Richard about the deeds of trust to the bank, initially dissembled and denied that he had signed anything. The evidence shows that if anyone was fearful of anyone else's "wrath," it was Edward Ballard who was fearful of Richard Ballard. The members of the Ballard family apparently could not agree upon many things, but they apparently were willing to band together when the question became not whether Dane or Kiley would get the property, but whether the bank would get it[25].

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[25] Moody testified (depo., p. 16), "Man, if you knew what all was said in my family, you'd understand that you can only take in about half of what you hear. . . . [b]etween all the arguing and bickering all the time." This testimony

now to argue that "equity requires" his father's deeds of trust to "be voided" hardly merits further comment in view of the overwhelming evidence to the contrary summarized above. It should suffice here to correct Ballard's misrepresentation (see Brief, p. 32) that *Memphis Hardwood Company v. Daniel,* 771 So. 2d 924 (Miss. 2000) involved "facts distinctly similar to the facts of the case before this Court."

In *Memphis Hardwood,* distinctly unlike this case, the Chancellor found fraud vitiated two timber deeds which had been procured from a woman named Daniel, an 85-year old retired school teacher, by a man named Easley, the vice president and secretary of a company called Northern, the grantee of the two deeds. Prior to trial, Easley and Northern's president, a man named Heppler, pleaded guilty to the crime of embezzlement from Daniel and agreed to make restitution to her for $250,000.

The Chancellor in *Memphis Hardwood* found that Easley had a fiduciary relationship with Daniel and found that, unknown to her, Easley on behalf of Northern colluded with Memphis Hardwood to inveigle her into signing the two timber deeds while each deed was "folded over to its back page where she was to sign," at a time when *Easley knew* that neither deed reflected Daniel's intentions about what was being conveyed and to whom it was being conveyed, and at a time when Easley fraudulently misrepresented to Daniel that the deeds said what she intended them to say. 771 So. 2d at 932 (¶24). Unknown to Daniel, at the very time that Easley made these fraudulent misrepresentations and procured Daniel's signatures by sleight

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result-oriented emotional display calculated to evade a valid and enforceable obligation to the bank. That such tactics may have enabled Edward Ballard to retire a multi-millionaire in his 50's, well before the normal retirement age for most folks, does not make it right.

conspirator, Memphis Hardwood, to pay Easley $410,000 the same day for the same timber.

In *Memphis Hardwood,* Easley was clearly an agent of Northern, the grantee, and Northern, which colluded with Memphis Hardwood, the some-day grantee of Northern. In our case, in contrast, Moody was not the Bank's agent, and the Bank did not collude with anyone.

In *Memphis Hardwood,* the grantor had a fiduciary relationship with Easley, her grantee's (Northern's) vice president. In our case, the Bank did not have a fiduciary relationship with Ballard or, for that matter, with Moody, Ballard's oldest grandchild and houseguest.

In *Memphis Hardwood,* Easley *knew* the timber deeds materially conflicted with Daniel's intentions and *knew* the deeds materially conflicted with his representation to her about what they contained. In our case, in contrast, the deeds of trust comported with Ballard's intentions, and the Bank did not misrepresent anything to anyone.

In *Memphis Hardwood,* Easley and Hebbler, executive officers of Northern, the grantee, pleaded guilty to embezzling at least $250,000 from Daniel, the grantor. In our case, in contrast, the Bank did not commit any offense, whether civil or criminal, against anyone.

In *Memphis Hardwood,* the Chancellor found clear and convincing evidence that the defendants defrauded Ms. Daniel, an 85-year-old, retired school teacher who had a fiduciary relationship with their agent and co-conspirator, Easley. In our case, in contrast, the Chancellor found the Bank's witnesses' testimonies to be credible and explicitly rejected the allegations of Ballard, an astute, multi-millionaire businessman who had by his own account signed many commercial deeds of trust in the past in the course of his "millions, and millions, and millions" of dollars worth of transactions with many lenders over many years.

Ballard admittedly lied to his son, to the bank and to the Court in his complaint. The Bank's witnesses told the truth.

In short, Ballard's representation (Brief, p. 32) that the facts of *Memphis Hardwood* are "distinctly similar to the facts of the case before this court" is as unworthy of belief as Ballard's other arguments. Unfortunately, disregard for the truth has characterized Ballard's position from the time he filed his complaint in this case falsely alleging that fear of his grandson's "well-known violent wrath" coerced him to sign the second deed of trust and falsely alleging he had no dealings with the Bank before he signed the first deed of trust.

Ballard misplaces reliance (brief, p. 32) upon *Prudential Credit Services v. Hill*, 10 B.R. 34 (S.D. Miss. 1981). In *Prudential Credit,* distinctly unlike this case, the question was whether the fact findings in the Court below in favor of the illiterate debtor whose homestead was threatened with foreclosure by a loan company over a $2,895.45 debt and who did not intend to give a second deed of trust on her home at the time she signed the deed of trust were "arbitrary and capricious" according to bankruptcy standards. (14 B.R. at 251.) Ballard's case is quite different. There was nothing either "arbitrary" or "capricious" about the Chancellor's finding that the literate, sophisticated Ballard, an experienced millionaire Alabama businessman, intended to and did grant the bank a security interest in his non-homestead, commercially leased Mississippi "farm" to secure loans to his oldest grandchild to help finance a timber business.

E. The Trial Court properly rejected Ballard's claims of fraud and misrepresentation.

Ballard incorrectly states (brief, p. 34) that "the Trial Court summarily dismissed [his] claim of fraud or misrepresentation . . . because it concluded that a party could not premise a claim of fraud or misrepresentation upon a claimed oral promise which was contrary to the terms

claims. Rather, the Chancellor, based upon very detailed and clearly supportable fact findings, rejected Ballard's claims after a full trial on the merits in which the evidence abundantly supported these ultimate conclusions (R. 461-62, 462B, 462G, RE 18, 19, 21 and 25 at ¶¶ 32, 33, 38 and 53):

> The Court does not believe that Mr. Ballard did not know the nature and purpose of the deeds of trust he signed.
>
> ***
>
> Mr. Ballard cannot dispute the simple fact that the second deed of trust unambiguously secures specified [Kiley Moody] debts. He admits he signed it in the presence of a notary at a bank in Alabama.
>
> ***
>
> Mr. Ballard's burden on his claims of fraud and misrepresentation is a heavy one. One seeking to invalidate a deed of trust must present clear and convincing evidence.
>
> ***
>
> The bottom line is that everything Ballard need[ed] to know about Kiley's debt to the Bank is contained in the second deed of trust. Mr. Ballard's failure to know the deed of trust terms is not the Bank's fault. Mr. Ballard could simply have declined to sign Exhibit P2. If Ballard was mislead it was by Kiley and not [the] Bank.

The Chancellor found as fact that the bank did not misrepresent anything. The Chancellor accordingly correctly rejected Ballard's fraud and misrepresentation claims on the merits, not "summarily" as Ballard erroneously contends.

Ballard misplaces reliance upon *Holman v. Howard Wilson Chrysler Jeep, Inc.*, 972 So. 2d. 564 (Miss. 2008). In *Howard Wilson,* a car dealer failed to disclose to the purchasers that a demonstrator vehicle had been damaged in an accident. The Court simply held that a material

summary judgment for the dealer. 972 So. 2d at 568, ¶7. Ballard's case presents no issue of this kind. Here, the Chancellor correctly found the bank did not fail to disclose any material information that it should have disclosed under the circumstances.

V. CONCLUSION

For the reasons explained above, the Chancellor's decision below should be affirmed. Costs should be taxed to Ballard.

Respectfully submitted,

COMMERCIAL BANK OF DEKALB

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I, Keith R. Raulston, hereby certify that I have this day mailed, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

This, the 29th day of April, 2008.

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