IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 180678

RADIANCE CAPITAL RECEIVABLES FOURTEEN, LLC,
as assignee of New South Federal Savings Bank,

Appellant,

v.

ROBERT D. FOSTER and JAMES M. WILSON,

Appellees.

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

On February 21, 2006, Foster & Wilson Building, LLC, a Virginia limited liability company (the "Company"), acting through its members, Appellees Robert Foster and James Wilson, executed a Promissory Note (the "Note") in favor of New South Federal Savings Bank (the "Bank"). (App. 5-6.) On March 2, 2006, Mr. Foster and Mr. Wilson (collectively, the "Guarantors") executed a Continuing Guaranty (the "Guaranty") by which they guaranteed and promised to pay to the Bank all of the Company's indebtedness. (App. 7-9.) The Guaranty contained a provision by which the Guarantors purported to "waive[] the benefit of any statute of limitations or other defenses affecting the . . . Guarantors' liability" under the Guaranty. (App. 7.) On December 16, 2008, the Company, acting through Mr. Foster and Mr. Wilson, executed an Amended and Restated Promissory Note (the "Restated Note") in favor of the Bank. (App. 10-12.) By its terms, the Restated Note was delivered to the Bank as a replacement of, and in substitution for, the Note. (App. 11.)

Appellant Radiance Capital Receivables Fourteen, LLC ("Radiance"), as assignee of the Bank, brought suit against Mr. Foster

and Mr. Wilson as Guarantors of the Company's indebtedness on November 23, 2015 (App. 1-4), more than five years after demand for payment was made on the Guarantors (App. 46, 51, 81). The Circuit Court of Gloucester County, the Honorable Charles Maxfield presiding, sustained the Guarantors' plea of the statute of limitations and dismissed this action with prejudice. (App. 81-82.) The circuit court held that the Guarantors' purported waiver of the statute of limitations was not valid and enforceable in accordance with Code § 8.01-232(A). (App. 82.) Radiance now seeks review of the circuit court's holding in that regard.

STATEMENT OF THE FACTS

At trial, the facts relating to Radiance's claim were not in dispute. As proffered to the circuit court in the statements of counsel and exhibits, the parties agreed that the Guarantors signed the Note dated February 21, 2006 (App. 5-6, 39, 46); that they signed the Guaranty dated March 2, 2006 (App. 7-8, 40, 46, 81); that they signed the Restated Note dated December 16, 2008 (App. 10-12, 40, 46); that a

Notice of Default was sent on August 27, 2010 (App. 46, 51, 81); and that Radiance filed suit on November 23, 2015 (App. 1-4).

The parties further agreed that Virginia law supplies the applicable statute of limitations and that there is a five-year statute of limitations on a personal guaranty. (App. 51.) The question to be decided by the circuit court based on the undisputed facts was the effect of Code § 8.01-232 as to the waiver of the statute of limitations set forth in the Guaranty.

SUMMARY OF THE ARGUMENT

Code § 8.01-232(A) invalidates any promise not to plead the statute of limitations as a defense except under certain conditions, such as that the failure to enforce the promise would operate as a fraud on the promisee. The parties agree that none of the statutory conditions is satisfied in this case. Radiance's appeal thus depends on drawing a false distinction between a promise not to plead the statute of limitations, to which Code § 8.01-232(A) clearly applies, and a waiver of the statute of limitations, which would not be covered under Radiance's interpretation of the statute. But there is no principled difference

between the two, each of which requires the promisor to take the same action, whether that action is identified as a "waiver" of or a "promise not to plead" the statute of limitations. In addition, accepting the premise of Radiance's appeal would undercut the entire purpose of Code § 8.01-232(A), which is to limit the circumstances in which such a waiver/promise may be used to avoid the statute of limitations to those specifically delineated in the statute. Because none of those circumstances is present here, the circuit court did not err in dismissing Radiance's time-barred action under the authority of Code § 8.01-232(A). Therefore, this Court should affirm the circuit court's Order sustaining the Guarantors' plea of the statute of limitations and dismissing this action with prejudice.

ARGUMENT

THE CIRCUIT COURT CORRECTLY HELD THAT THIS ACTION IS TIME-BARRED

A. Standard Of Review

Radiance assigns three errors to the circuit court's decision dismissing this action, but all three boil down to one issue on appeal,

that is, whether the Guarantors' contractual waiver of any statute-of-limitations defense is valid and enforceable under Code § 8.01-232(A). (*See* Appellant's Br. 6.) Appeal of a decision on a plea in bar of the statute of limitations involves a question of law that is reviewed de novo by this Court. *See Van Dam v. Gay*, 280 Va. 457, 460, 699 S.E.2d 480, 481 (2010). The interpretation of a statute is likewise a question of law subject to de novo review. *See, e.g.*, *Woolford v. Va. Dep't of Tax'n*, 294 Va. 377, 386, 806 S.E.2d 398, 402 (2017).

B. The Circuit Court Correctly Held That The Guarantors' Waiver Of The Statute Of Limitations Is Not Enforceable Under Code § 8.01-232(A)

1. None of the Circumstances Set Forth in Code § 8.01-232(A) Permitting a Limited Exception to the Statute of Limitations Is Present Here

The circuit court and the parties all agreed that the statute of limitations applicable to Radiance's action on the Guaranty is five years. *See* Va. Code Ann. § 8.01-246(2); *McDonald v. Nat'l Enters., Inc.*, 262 Va. 184, 191, 547 S.E.2d 204, 208 (2001); (App. 51). Everyone also agreed that the five-year limitations period began to run on August 27, 2010, when demand was made on the Guarantors. (App. 51.) Radiance

did not file this action until November 23, 2015. (App. 1-4.) Therefore, this action is time-barred unless the Guarantors' purported contractual waiver of the statute of limitations is given effect.

The requirements for a "valid written waiver of the statute of limitations" are set forth in Code § 8.01-232(A), "which is the Virginia statute that limits and defines the circumstances under which agreements not to assert the statute of limitations can be enforced." *Slaey v. Harrington (In re Slaey)*, 539 B.R. 500, 503 (E.D. Va. 2015), *aff'd on opinion below*, 671 F. App'x 126 (4th Cir. 2016). The statute provides, in relevant part, as follows:

> Whenever the failure to enforce a promise, written or unwritten, not to plead the statute of limitations would operate as a fraud on the promisee, the promisor shall be estopped to plead the statute. In all other cases, an unwritten promise not to plead the statute shall be void, and a written promise not to plead such statute shall be valid when (i) it is made to avoid or defer litigation pending settlement of any case, (ii) it is not made contemporaneously with any other contract, and (iii) it is made for an additional term not longer than the applicable limitations period.

Va. Code Ann. § 8.01-232(A). District Judge Ellis painstakingly described the operation of the statute in *Slaey*:

> [C]arefully read, the governing language of Va. Code § 8.01-232(A) may be viewed as consisting of essentially three parts,

> with two of those parts setting forth general rules regarding the validity and enforceability of (i) unwritten and (ii) written promises not to plead the statute of limitations, and the third part setting forth (iii) a limited exception to those general rules. Specifically, Part I provides that, with one limited exception set forth in Part III, *unwritten* promises not to plead the statute of limitations are generally void and unenforceable in Virginia. Part II of the statute provides that, again, with one limited exception set forth in Part III, a *written* promise not to plead the statute is generally valid and enforceable only if three specified requirements are met, namely, if the written promise (i) is made to avoid or defer litigation pending settlement of a case, (ii) is not made contemporaneously with any other contract, *and* (iii) is made for an additional term not longer than the applicable limitations period. Va. Code § 8.01-232(A). Finally, Part III of the statute—and the part at issue in the instant appeal—provides a limited exception to the general rules set forth in Parts I and II. That limited exception specifically provides that "[w]henever the failure to enforce a promise, written or unwritten, not to plead the statute of limitations would operate as a fraud on the promisee, the promisor shall be estopped to plead the statute." Va. Code § 8.01-232(A).

539 B.R. at 505 (court's emphasis).

Like *Slaey*, this case does not involve Parts I and II of the statute. Part I does not apply because the Guaranty contains a written waiver of any statute-of-limitations defense. Even though the waiver is in writing, Part II does not apply because the Guaranty does not meet all three requirements for a written promise not to plead the statute of limitations. In particular, the promise was not given to avoid or defer

litigation pending settlement of a case, and it was for an indefinite period, not for an additional term not longer than the applicable five-year limitations period. *Id.* at 505 n.5. As such, the Guarantors' promise is unenforceable unless the limited exception in Part III of the statute applies, that is, if it "would operate as a fraud on the promisee" if their promise to waive the benefit of the statute of limitations is not enforced. Va. Code Ann. § 8.01-232(A).

Code § 8.01-232 was first enacted in 1977, then amended in 2006 to add what Judge Ellis referred to as Part II of the statute. But the limited exception in Part III has been around for nearly a century. As originally adopted in 1919, the statute read as follows:

> Whenever the failure to enforce a promise, written or unwritten, not to plead the statute of limitations would operate a fraud on the promisee, the promisor shall be estopped to plead the statute. In all other cases an unwritten promise not to plead the statute shall be void, and a written promise not to plead it shall have the effect of a promise to pay the debt or discharge the liability.

Soble v. Herman, 175 Va. 489, 494, 9 S.E.2d 459, 461 (1940) (quoting Va. Code § 5821 (repealed)).[1] The first sentence of Code § 8.01-232(A) is

[1]Section 5821 was later enacted, verbatim, as Code § 8-27, before that statute was repealed and replaced by Code § 8.01-232.

identical to the first sentence of § 5821, except for the insertion of the inconsequential word "as" in the phrase "would operate as a fraud on the promisee." This Court provided the definitive and still controlling construction of that phrase in *Soble*.

In that case, when Mr. Herman died in 1931, his widow was named the sole beneficiary and executrix of his estate. At the time of his death, Mr. Herman owed $2,500 to the plaintiff, Mr. Soble, as evidenced by a note due 90 days from July 14, 1931. Mr. Soble did not file suit on the note within the five-year statute of limitations because he relied on Mrs. Herman's statement to him that "she would never see [Mr. Soble] lose anything and would never plead the statute of limitations against said note, and that she would pay it." *Id.* at 493, 9 S.E.2d at 461. Mr. Soble eventually filed suit against Mrs. Herman's estate after she too died before the note had been paid.

On those facts, the "only question presented" in *Soble* was

> whether an oral promise not to plead the statute of limitations, made by the executrix and sole beneficiary of an estate, is sufficient to remove the bar of the statute in a suit filed by the creditor to subject real estate of which decedent died seized and possessed to the payment of a debt due by decedent.

Id. at 494, 9 S.E.2d at 461. Mr. Soble argued that his claim on the note should be allowed to proceed despite the expiration of the statute of limitations because a failure to enforce Mrs. Herman's promise "not to plead the statute 'would operate a fraud on' him" within the meaning of Code § 5821. *Id.* at 500, 9 S.E.2d at 464.

This Court flatly rejected Mr. Soble's allegation of fraud, which consisted of nothing more than Mrs. Herman's "broken promise not to plead the statute of limitations." *Id.* In so doing, the Court relied on the well-established rule that "fraud must relate to a present or a pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events." *Id.* In other words, the Court specifically held that the word "'fraud'—as used in the phrase, 'will operate a fraud upon the promisee'—must relate to a present or a pre-existing fact and cannot be established by allegation or proof of a non-fulfilled, naked, oral promise." *Id.* at 501, 9 S.E.2d at 464; *accord Slaey*, 539 B.R. at 508. The Court's reading of the phrase was consistent with the reasons supporting the settled rule, namely "that a mere promise to perform an act in the future is not, in a legal sense, a representation, and a failure to perform it does not change its

character." *Soble*, 175 Va. at 500, 9 S.E.2d at 464. Indeed, "[t]he very nature of a promise to do something in the future is such that its truth or falsity, as a general rule, cannot be determined at the time it is made." *Id.*

As Judge Ellis pointed out in *Slaey*, Virginia has recognized an exception to the general rule "where an action for fraud and deceit is predicated on promises which are made with a *present* intention not to perform them, or on promises made without any intention to perform them." 539 B.R. at 509 (court's emphasis) (quoting *Patrick v. Summers*, 235 Va. 452, 454, 369 S.E.2d 162, 164 (1988)). In that circumstance, "if a defendant makes a promise that, *when made*, he has no intention of performing, that promise is considered a misrepresentation of *present* fact and may form the basis for a claim of actual fraud." *Id.* (court's emphasis) (quoting *Supervalu, Inc. v. Johnson*, 276 Va. 356, 368, 666 S.E.2d 335, 342 (2008)). "Thus, in cases falling within this exception to the general rule, '[t]he gist of fraud . . . is not the breach of the agreement to perform, but the fraudulent intent' present in the promisor's mind at the time the promise is made." *Id.* (quoting *Patrick*, 235 Va. at 455, 369 S.E.2d at 164). As with all fraud claims, "such

fraudulent intent must be established by clear and convincing evidence." *Id.* ("[C]lear, cogent, and convincing proof [is] required to establish an action for fraud and deceit." (citing *Patrick*, 235 Va. at 455-56, 369 S.E.2d at 164)).

No such clear and convincing evidence was presented by the lender in *Slaey*. Instead, the record demonstrated "merely an unfulfilled written promise on [the borrower's] part not to assert a statute of limitations defense in a future suit brought by" the lender. *Id.* But "[s]uch a naked, unfulfilled promise is precisely what the *Soble* court made clear would not satisfy the limited fraud exception set forth in Va. Code § 8.01-232(A)." *Id.* Therefore, Judge Ellis reversed the bankruptcy court's allowance of the lender's time-barred claim on the note given by the borrower because the lender had not proven that failure to enforce the borrower's promise not to assert a statute-of-limitations defense "would 'operate as a fraud' within the meaning of the Virginia statute[.]" *Id.*

Oddly, Radiance posits that *Soble* and *Slaey* result in the "nonsensical legal paradox" that a written waiver of a statute of limitations is invalid and unenforceable if made by "an honest person

with the honest intention" to be bound by the waiver, while the same waiver is valid and enforceable if made by "a dishonest person, without the intent to perform" his promise not to plead the statute of limitations. (Appellant's Br. 15.) But there is no paradox, as that is clearly and sensibly the result that Part III of Code § 8.01-232(A) is, and always has been, intended to produce.

The waiver by the honest person is not enforced in view of giving effect to the "important and salutary purpose" served by statutes of limitations. *Burns v. Bd. of Sup'rs of Stafford County*, 227 Va. 354, 359, 315 S.E.2d 856, 859 (1984). The primary purpose is "to compel the exercise of a right of action within a reasonable time" in order to prevent "stale claims from being asserted after a great lapse of time, to the surprise of the parties, when the evidence may have been lost, the facts may have become obscure because of defective memory, or the witnesses have died or disappeared." *Street v. Consumers Mining Corp.*, 185 Va. 561, 575, 39 S.E.2d 271, 277 (1946); *accord Truman v. Spivey*, 225 Va. 274, 279, 302 S.E.2d 517, 519 (1983). Statutes of limitations also shelter from liability defendants who might otherwise "find themselves at the mercy of unscrupulous plaintiffs who hoard evidence

that supports their position while waiting for their prospective opponents to discard evidence that would help make a defense." *Burns*, 227 Va. at 359, 315 S.E.2d at 859. In light of the strong public policy surrounding statutes of limitations, this Court has cautioned that "[w]here there exists any doubt, it should be resolved in favor of the operation of the statute of limitations." *Id.*

By contrast, enforcing a dishonest person's promise not to plead the statute of limitations, which is identical to the honest person's promise but made without the present intention to perform, gives effect to the different policy goal of preventing a fraud on the promisee. In that particular circumstance, the General Assembly has determined that it is worth recognizing a narrow exception to the statute of limitations in Code § 8.01-232(A), which otherwise supports the beneficial purpose of statutes of limitations by greatly limiting the circumstances in which they can be voluntarily waived.

Under *Soble*, the Guarantors' waiver of any statute-of-limitations defense would be enforceable under Virginia law only if Radiance had shown, by clear and convincing evidence, that the Guarantors fraudulently signed the Guaranty without any present intention not to

plead the statute of limitations as a defense when the time came. Radiance offered no such proof at trial, much less clear and convincing evidence. Instead, Radiance argued only that the Guarantors' "fail[ure] to abide" by the waiver "operate[d] as a fraud" on Radiance. (App. 55.) As this Court held in *Soble*, however, the Guarantors' naked, unfulfilled promise would not "operate as a fraud" on Radiance within the meaning of Code § 8.01-232(A). 175 Va. at 501, 9 S.E.2d at 464; *accord Slaey*, 539 B.R. at 508. Because none of the circumstances, including fraud, set forth in Code § 8.01-232(A) permitting a limited exception to the statute of limitations is present here, the circuit court correctly held that the Guarantors' waiver of the statute of limitations is not enforceable under Code § 8.01-232(A).

2. There Is No Difference Between a "Waiver" of and a "Promise Not to Plead" the Statute of Limitations

Having failed to show fraud or any other circumstance justifying relief under the statute, Radiance's appeal necessarily rests entirely on distinguishing between a "waiver" of the statute of limitations, which Radiance claims is not governed by Code § 8.01-232(A), and a "promise

not to plead" the statute of limitations, which is obviously subject to the statutory requirements.

In support of its appeal, Radiance relies primarily on this Court's decision in *Hensel Phelps Construction Co. v. Thompson Masonry Contractor, Inc.*, 292 Va. 695, 791 S.E.2d 734 (2016). Radiance reads *Hensel Phelps* as "inferr[ing] that had there been an express waiver by the subcontractor of the limitations period, the subcontractor would [have been] bound by the express waiver of the statute of limitations." (Appellant's Br. 10.) But the Court's decision in that case was limited, in relevant part, to holding that none of the various contractual phrases identified by the prime contractor demonstrated a sufficient intent by the subcontractors to expressly waive the statute of limitations. *Hensel Phelps*, 292 Va. at 702-03, 791 S.E.2d at 737-38. As such, there was no need for the Court to take the next step and determine whether such an express waiver (had one actually been made) would have been enforceable under Code § 8.01-232(A). Given what was actually decided by the Court, it is not surprising that Code § 8.01-232(A) was not even cited in *Hensel Phelps*, which thus has no bearing on the question presented in this matter.

More to the point, the distinction Radiance apparently seeks to draw is one without a difference. Judge Ellis certainly thought so in *Slaey*, in which the language in question provided that the borrower agreed "that she will not raise the defense of the statute of limitations in any legal proceeding that relates to [the] funds borrowed." 539 B.R. at 503. Even if that was an "executory promise[] for future performance," as Radiance would have it (Appellant's Br. 9), Judge Ellis referred to the promise throughout his very thorough opinion as the "2008 SOL Waiver," *Slaey*, 539 B.R. at 502. In fact, the central point addressed in the opinion was the promisor's challenge to "the validity of the 2008 SOL Waiver," which she argued

> could not operate to save Harrington's time-barred claim because it did not meet the statutory requirements of a valid written *waiver* of the statute of limitations pursuant to Virginia Code § 8.01-232, which is the Virginia statute that limits and defines the circumstances under which agreements not to assert the statute of limitations can be enforced.

Id. at 503 (emphasis added). Thus, Judge Ellis clearly (and correctly) equated a "waiver" of the statute of limitations with an agreement (a promise) not to assert the statute of limitations. *See also id.* at 506 n.6 (the most notable distinction between the former and present versions

of Code § 8.01-232 "is in the addition of the three enumerated requirements that written *waivers* must now meet to be valid and enforceable under § 8.01-232(A)" (emphasis added)). In short, the borrower's promise to "not raise the defense of the statute of limitations in any [future] legal proceeding that relates to [the] funds borrowed" was a "written waiver" of her statute-of-limitations defense subject to the requirements of Code § 8.01-232(A), just like the Guarantors' written waiver/promise in this case.

Radiance's reading of Code § 8.01-232(A) is a last-ditch effort to salvage its untimely claim, but it does not pass muster. Radiance cites the correct definition of a "waiver," that is, "the intentional relinquishment of a known right, with both knowledge of its existence and an intention to relinquish it." *Hensel Phelps*, 292 Va. at 702, 791 S.E.2d at 737 (quoting *May v. Martin*, 205 Va. 397, 404, 137 S.E.2d 860, 865 (1964)).[2] But that, of course, is precisely what a written promise not

[2]Radiance also points out that the Court has "long recognized that a party may enter into an agreement which waives a significant legal right." (Appellant's Br. 12.) That is all well and good as a general proposition, but this case involves application of a statute that specifically limits a party's ability to agree to waive one particular legal right, that is, the right to assert a statute-of-limitations defense. It is

to assert a statute-of-limitations defense is—an intentional relinquishment of the promisor's known right to plead a statute-of-limitations defense once the promisee gets around to filing suit. As such, there is no principled way to distinguish between an executory promise not to plead the statute of limitations and a "completed" waiver of the statute of limitations, because they are functionally one and the same.

In the end, accepting Radiance's position would constitute a significant assault on the purpose of statutes of limitations in general and Code § 8.01-232(A) in particular. As noted, the important purpose underlying all statutes of limitations is "to compel the exercise of a right of action within a reasonable time" so as to prevent "stale claims from being asserted after a great lapse of time." *Street*, 185 Va. at 575, 39 S.E.2d at 277. Section 8.01-232(A) furthers that beneficial purpose by ensuring that parties may not voluntarily agree to extend the statute of limitations except in the very limited circumstances in the statute.

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therefore irrelevant whether the Guarantors validly agreed in the Guaranty to waive a number of their other legal rights. (*See id.* at 11-12.)

But under Radiance's interpretation of Code § 8.01-232(A), the statute of limitations can be extended in perpetuity simply by obtaining a written waiver to that effect in a note, guaranty, or any other agreement between contracting parties, whether or not the statutory conditions are satisfied. *See* 4 *Williston on Contracts* § 8:44 (3d ed. Westlaw updated through May 2018) ("If a promise not to plead the statute [of limitations], made at the inception of the contract, were treated as valid, . . . the creditor would acquire a perpetual cause of action."). If that reading is accepted, the statute of limitations will disappear in a huge number of commercial and other cases, allowing suit to be brought no matter how stale the plaintiff's claim. *Cf. Haggerty v. Williams*, 84 Conn. App. 675, 681-82, 855 A.2d 264, 269 (2004) (refusing to enforce waivers of the statute of limitations made at the inception of a contract because, otherwise, such a waiver would be inserted in every promissory note and similar instrument as a matter of routine, thereby annihilating the statute of limitations).

Here, for example, Radiance could have brought suit 10 or 20 or more years after demand had first been made on the Guarantors, and the action still would not have been time-barred if their written waiver

of the statute of limitations were enforceable. Given the nature of its business, Radiance may welcome that result, but such a sweeping change to Virginia law should be made by the General Assembly, and not by this Court, which should instead apply Code § 8.01-232(A) as it has been in existence in some form in Virginia for nearly a century. *See Burns*, 227 Va. at 359, 315 S.E.2d at 859 ("In light of the policy that surrounds statutes of limitation, the bar of such statutes should not be lifted unless the legislature makes unmistakably clear that such is to occur in a given case.").

Other states have considered head-on the validity of a waiver of the statute of limitations made at the inception of a contract, and the "vast majority" of those jurisdictions have held that such contracts are void and unenforceable as contrary to the public policy underlying statutes of limitations, including the prevention of stale claims. 4 *Williston on Contracts* § 8:44; *see also Haggerty*, 84 Conn. App. at 680-81, 855 A.2d at 268-69 (collecting cases from many states); *First Nat'l Bank of E. Ark. v. Ark. Dev. Fin. Auth.*, 44 Ark. App. 143, 146-47, 870 S.W.2d 400, 402-03 (1994) (same). In choosing to adopt the majority position, the court in *Haggerty* noted two problems, in particular, with this type of

waiver of the statute of limitations made at the inception of a contract. First, upholding the validity of such waiver in the original contract would lead commercial lenders to insert a waiver "in every promissory note and similar instrument as a matter of routine," which would open the door to the "very abuses the statute was designed to prevent, and the result would be the annihilation of the statute" of limitations. 84 Conn. App. at 681-82, 855 A.2d at 269 (quoting *Hirtler v. Hirtler*, 566 P.2d 1231, 1231-32 (Utah 1977)). Second, when a waiver of the statute is included as part of the initial contract or obligation, there is a greater likelihood that the waiver was given as "the result of ignorance, improvidence, an unequal bargaining position or was simply unintended," contrary to the requirement that a waiver be intentionally made. *Id.* at 682, 855 A.2d at 269 (quoting *John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 551, 389 N.E.2d 99, 103 (1979)).

But regardless of what other states have done, that judgment as to the validity of any waiver of the statute of limitations has already been made in Virginia by the General Assembly. Because the waiver contained in the Guaranty does not fall within any of the exceptions set

forth in Code § 8.01-232(A), the waiver is void and unenforceable, as the circuit court correctly concluded.

CONCLUSION

For the foregoing reasons, the Court should affirm the circuit court's Order sustaining the Guarantors' plea of the statute of limitations and dismissing this action with prejudice.

Respectfully submitted,

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CERTIFICATE

I hereby certify that Rule 5:26 of the Supreme Court of Virginia has been complied with. Pursuant to Rule 5:26(e), an electronic version of this brief in PDF format has been filed through VACES, and three printed copies have been filed in the office of the Clerk of the Court. An electronic version of this brief in PDF format was served on opposing counsel on this 28th day of November 2018 at the following email addresses:

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