

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7518

John Voytko Appellant

v.

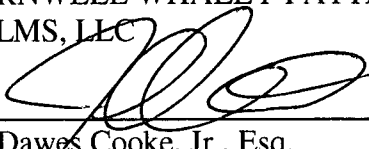
Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T,
and James Edahl..... Respondents

NOTICE OF APPEAL

Plaintiff/Appellant John Voytko appeals the Judgment of the Honorable Roger M. Young, dated October 26, 2011 and filed on November 1, 2011, granting Respondents' Motion to Dismiss (Exhibit A). Appellant received written notice of entry of this Judgment on November 9, 2011.

December 9, 2011

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: 

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John W. Fletcher, Esq.

885 Island Park Drive (29492)

P. O. Drawer H

Charleston, SC 29402

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RECEIVED

DEC 19 2011

- and -

SC Court of Appeals

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***Attorneys for Respondents Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl***

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7518

John Voytko Appellant

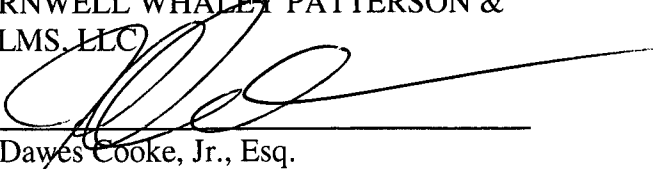
v.

Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T,
and James Edahl..... Respondents

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on December 9, 2011, addressed to their attorney of record, Molly Hughes Cherry, Esq., Nexsen Pruet, LLC, P.O. Box 486, Charleston, SC 29402, on December 9, 2011.

BARNWELL WHALEY PATTERSON &
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December 15, 2011

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

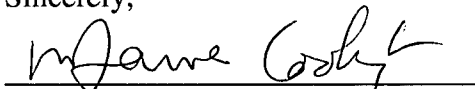
RE: Branch Banking & Trust Company, successor in merger to Branch Banking
and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents,
v. John Voytko, Appellant
Case No.: 2009-CP-10-7518

Dear Ms. Gee:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of service of notice of appeal on the Respondents.
- (2) A copy of the Order which is to be challenged on appeal
- (3) A filing fee of \$100.00.

Sincerely,



M. Dawes Cooke, Jr.
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cc: Molly Hughes Cherry, Esq.
Nexsen Pruet, LLC
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DEC 19 2011

SC Court of Appeals

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-10-7515
2009 CP-10-7517
2009 CP-10-7518

JAMES J. KERR et al
RON KONERSMANN
JOHN VOYTKO

BRANCH BANKING AND TRUST
COMPANY, Successor in merger to BRANCH
BANKING AND TRUST COMPANY OF SC,
a/k/a BB&T, and JAMES EDAHL

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

Order Defendants Motion to Dismiss Amended Complaint with Prejudice

INFORMATION FOR THE PUBLIC INDEX

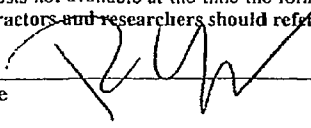
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
NA		\$
		\$
		\$

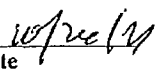
If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2134
Judge Code


Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or
placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or
to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Amanda Haffended

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

JAMES J. KERR, CRAYTON WALTERS,
and J.T. MAIN, LLC,

Civil Action No. 2009-CP-10-07515

Plaintiffs,

vs.

BRANCH BANKING AND TRUST
COMPANY, Successor in merger to
BRANCH BANKING AND TRUST
COMPANY OF SC, a/k/a BB&T, and JAMES
EDAHL,

ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS AMENDED
COMPLAINT WITH PREJUDICE

Defendants.

RON KONERSMANN,

Civil Action No. 2009-CP-10-7517

Plaintiff,

vs.

BRANCH BANKING AND TRUST
COMPANY, successor in merger to BRANCH
BANKING AND TRUST COMPANY OF SC,
a/k/a BB&T, and JAMES EDAHL,

Defendants.

JOHN VOYTKO,

Civil Action No. 2009-CP-10-7518

Plaintiffs,

vs.

BRANCH BANKING AND TRUST
COMPANY, successor in merger to BRANCH
BANKING AND TRUST COMPANY OF SC,
a/k/a BB&T, and JAMES EDAHL,

Defendants.

FILED
2011 NOV - 1 AM 10:14
JULIE J. ARMSTRONG
CLERK OF COURT

B

This matter came before the Court on August 15, 2011, on the Motions to Dismiss of Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("BB&T") and Defendant James Edahl ("Edahl"). Plaintiffs and Defendants were represented by counsel at the hearing, and the Court fully considered all evidence presented and the arguments of counsel. For the reasons that follow, the Court grants Defendants' Motions to Dismiss with prejudice.

I. FACTS

This is a lender liability case in which Plaintiffs in each of the three captioned cases allege that Defendant BB&T failed to fund the financing needs of Skywaves Corporation I ("Skywaves"), a company in which each Plaintiff was an investor. Plaintiffs John Voytko and Ron Konersmann were also officers in Skywaves.

Plaintiffs' allegations do not pertain to any alleged relationship they had with BB&T but, instead, to the relationship between BB&T and Skywaves. Defendant BB&T is a banking institution with branch offices in Charleston, South Carolina, and Defendant Edahl is one of its employees. Skywaves is a company that developed a structural product, specifically cell tower units, for use in the wireless telecommunications industry. To support the manufacture of these individual cell tower units, Skywaves entered into a certain factoring agreement with BB&T in the Spring of 2005 whereby BB&T would purchase certain receivables of Skywaves at a discount and payment of those receivables would then be made to BB&T.

In January of 2008, BB&T declared a default by Skywaves under the factoring agreement. Plaintiffs contend the default was improper, as BB&T, acting through its employee Defendant Edahl, promised that BB&T "would fund all [Skywaves'] financial needs." Plaintiffs claim the improper default caused Skywaves to go into bankruptcy and resulted in the loss of their investment in Skywaves and the loss of the salaries for Plaintiffs Voytko and Konersmann.

Plaintiffs are not customers of BB&T. BB&T did not lend any money to Plaintiffs. Plaintiffs are not debtors in this case. Plaintiffs had no direct relationship with BB&T whatsoever. All of Plaintiffs' allegations pertain to the relationship between Skywaves and BB&T, and all of Plaintiffs' alleged injuries arise out of Skywaves' bankruptcy filing. Plaintiffs have filed proofs of claim against Skywaves in the bankruptcy proceeding.

In their Amended Complaints, Plaintiffs assert four claims for: (1) negligent misrepresentation; (2) fraudulent misrepresentation; (3) negligence; and (4) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").¹ Defendants moved to dismiss all four claims pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

II. LEGAL ANALYSIS

South Carolina Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim for failure to state facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6); *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (2003). The question is whether the pleadings, taken in the light most favorable to the plaintiff, articulate a valid claim for relief. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). A Rule 12(b)(6) motion "must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (1997). The Court dismisses these cases because there is no possibility that Plaintiffs will be able to establish liability on the part of either Defendant under any of the claims as alleged in the Amended Complaints.

¹ Plaintiffs Kerr, Walters and J.T. Main, LLC have only asserted three claims for negligent misrepresentation, fraudulent inducement and negligence/lender liability.

A. Section 37-10-107 of the South Carolina Code Bars All of the Plaintiffs' Claims Against Defendants.

All of Plaintiffs' claims against Defendants are statutorily barred, as a matter of law. Many states, including South Carolina, have enacted specialized statutes concerning loan and credit agreements. These statutes bar enforcement of oral lending agreements and bar fraud and other tort claims based on alleged oral misrepresentations and other non-written conduct concerning these loan agreements. See S.C. Code § 37-10-107.

Specifically, section 37-10-107 of the South Carolina Code Annotated provides:

(1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

- (a) to lend or borrow money;
- (b) to defer or forbear in the repayment of money; or
- (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

(2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:

- (a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;
- (b) promissory or equitable estoppel;
- (c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or
- (d) negligent misrepresentation.

S.C. Code Ann. § 37-10-107.

All of Plaintiffs' claims are all based upon alleged statements, promises, or representations made by BB&T or Edahl to Skywaves that BB&T "would fund all [Skywaves'] financial needs." Each of the claims is based upon alleged representations made by Defendants to Skywaves.

Plaintiffs make general reference to representations made "in writing," but Plaintiffs have not alleged any material terms or conditions of any agreement with Defendants nor have Plaintiffs specifically alleged that any such agreement was in fact received by them. Plaintiffs have made a number of allegations regarding writings purportedly between BB&T and Skywaves, but Plaintiffs, although investors in Skywaves, cannot rely on such writings to defeat the plain wording of Section 37-10-107 which, as stated above, requires in pertinent part that "the party seeking to maintain the action or defense [receive] a writing from the party to be charged..." S.C. Code Ann. § 37-10-107(1)(c).

Because Plaintiffs have not alleged or otherwise provided anything in writing to evidence the material terms and conditions of the alleged promises or representations made to them, their claims fail as a matter of law. *See Carolina First Bank v. Lucas*, Case No. 03-CP-10-1907, 2004 WL 5208410 (S.C. Com. Pl. Jun. 14, 2004); *see also Robertson v. First Union Nat'l Bank*, Case No. 99-CP-10-288, 2000 WL 35722762 (S.C. Com. Pl. Aug. 8, 2000). Specifically, Plaintiffs have not alleged that they "received a writing from the party to be charged [*i.e.* BB&T] containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing." S.C. Code Ann. § 37-10-107(1)(c). Accordingly, as a matter of law, Plaintiffs cannot "maintain an action for legal . . . relief . . . based upon [BB&T's or Edahl's alleged]

failure to lend . . . money [to Skywaves.]” S.C. Code Ann. § 37-10-107(1)(a). Under these circumstances, Plaintiffs cannot establish their claims against Defendants, as a matter of law.

1. The Choice of Law Provision in the Security and Factoring Agreement Between Skywaves and BB&T Does Not Apply to Plaintiffs’ Claims Against Defendants.

Plaintiffs contend that S.C. Code Ann. § 37-10-107 does not apply to the tort claims they have asserted against Defendants. In support of their argument, Plaintiffs cite to a provision in the Factoring and Security Agreement (“Agreement”) between Skywaves and BB&T that the Agreement is governed by North Carolina law. Plaintiffs are not parties to the Agreement and, thus, any choice of law provisions contained therein do not apply in these cases. Moreover, the relevant provision in the Agreement pertains to claims arising “under” the Agreement. In the case at hand, Plaintiffs are contending that an agreement existed outside of the Agreement, and that certain promises were made by Defendants outside the Agreement regarding funding of Skywaves. Under the circumstances, there is no basis for Plaintiffs to rely upon a choice of law provision in a contract to which they were not parties. South Carolina law governs Plaintiffs’ claims against Defendants and dictates that the claims be dismissed, as a matter of law.

2. Plaintiffs’ Allegations and Claims Arise from an Alleged Failure to Loan Money Such that Section 37-10-107 Applies.

Plaintiffs also contend that because the relationship between BB&T and Skywaves was pursuant to a factoring agreement, it was not a “typical” loan transaction and that S.C. Code Ann. § 37-10-107 does not apply. Plaintiffs ignore, however, that the very allegations in their Amended Complaints, to wit, that the factoring agreement was modified by BB&T such that BB&T agreed to loan money to Skywaves. Specifically, Plaintiffs allege there was no “need for Skywaves to either invoice or manufacture the product. In this way, BB&T agreed to advance the costs of manufacturing.” Moreover, although Plaintiffs attempt to characterize a factoring

agreement as an atypical loan transaction, a key purpose of the statute is to protect financial institutions and other lenders from claims that are inconsistent with the written agreements outlining the terms of the transaction. Because the statutes within Title 37 should "be liberally construed and applied to promote [Title 37's] underlying purposes and policies," any question regarding the applicability of section 37-10-107 to the alleged agreement in the Amended Complaint is resolved in Defendant's favor. See S.C. Code Ann. § 37-10-102(1).

3. Section 37-10-107 Bars Fraud Claims.

Plaintiffs contend that because section 37-10-107 does not expressly exclude a claim for fraud, their fraud claims are not barred. To that end, Plaintiffs focus on subsection 2(d) of the statute, which bars any action based on "negligent misrepresentation." Plaintiffs argue that because the drafters of the statute specifically singled out actions based on "negligent misrepresentation," but not "intentional misrepresentation," an action based on fraud would not be precluded by the statute. However, South Carolina state and federal trial courts have found that fraud claims are barred by section 37-10-107. See e.g. *Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina*, C.A. No. 2:98-158-23 (S.C. Com. Pl. April 12, 1999) (citing *Derrick v. Branch Banking and Trust Company of South Carolina*, 96-CP-42-2095 (S.C.Ct.Cm. P. 9/8/98)). This Court agrees and finds that section 37-10-107 bars Plaintiffs' fraud, negligence and unfair trade practices claims.

4. Section 32-3-10(5) Does Not Apply to the Alleged Agreement in the Amended Complaint and Is Not Inconsistent with Section 37-10-107.

Section 37-10-107 provides that "in the event of a conflict between this section and any other provision of law of this State relating to the requirements of a signed writing, the provisions of the other provision of law shall control." S.C. Code § 37-10-107(4). According to Plaintiffs, S.C. Code § 32-3-10(5), which is a more general statute of frauds, "may" be applicable

to the dispute and, thus, creates a conflict with section 37-10-107 such that section 32-3-10(5) applies.

Even if section 32-3-10(5) somehow applies in this case, it is not inconsistent with section 37-10-107. The two statutes can be read and construed together. In South Carolina, "[i]f the provisions of the two statutes can be construed so that both can stand, this Court will so construe them." *In the Interest of Shaw*, 265 S.E.2d 522, 524 (S.C. 1980) (citing *City of Spartanburg v. Blalock*, 223 S.C. 252, 75 S.E.2d 361 (1953)). Further, "where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Wilder v. South Carolina Hwy. Dep't*, 90 S.E.2d 635 (S.C. 1955); see also *Ramsey v. County of McCormick*, 412 S.E.2d 408, 410 (S.C. 1991). As the more specific statute on this issue, S.C. Code § 37-10-107 is to be considered a qualifier of section 32-3-10(5).

B. Plaintiffs Fail to Allege Any Conduct on the Part of Either Defendant That Would Support Their Claims.

Notwithstanding that all of Plaintiffs' claims are barred under S.C. Code Ann. § 37-10-107, this Court alternatively dismisses the claims because Plaintiffs' allegations are insufficient to state a claim for negligent misrepresentation, fraudulent inducement, negligence or lender liability.

1. Plaintiffs cannot sustain a claim against either Defendant for negligent misrepresentation or fraudulent inducement.

Plaintiffs' claims for negligent misrepresentation and fraudulent misrepresentation both fail as a matter of law because Plaintiffs have not alleged a legally viable false statement or any fact that would tend to create a right for them to rely on any alleged misrepresentation by BB&T or Edahl.

a. No False Statement

Negligent misrepresentation is predicated upon the transmission of a negligently made false statement. See *Armstrong v. Collins*, 366 S.C. 204, 220, 621 S.E.2d 368, 376 (Ct. App. 2005); *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003); *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 349, 565 S.E.2d 309, 315 (Ct. App. 2002); *Brown v. Stewart*, 348 S.C. 33, 42, 557 S.E.2d 676, 680-81 (Ct. App. 2001); *West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000). Like negligent misrepresentation, an actionable fraudulent misrepresentation case requires there first be a false representation predicated upon misstatements of fact rather than upon expression of opinion, intent, or confidence that the deal would be satisfactory. See *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 317 S.C. 520, 526-27, 455 S.E.2d 183, 187 (Ct. App. 1995) (finding statements by equipment seller concerning expected performance of logging system were opinions as to future performance and could not be basis for claim of fraud).

More specifically, the alleged false representation must be of a present or pre-existing fact. See *Spires v. Acceleration Nat'l Ins. Co.*, 417 F. Supp. 2d 750, 755-56 (D.S.C. 2006) (applying South Carolina law). The negligent representation cannot be based on unfulfilled promises or statements as to future events. See *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993). In addition, an integral component of this element is that the representation be false at the time it is made. See *GSM Dealer Servs., Inc. v. Chrysler Corp.*, 32 F.3d 139, 142 (4th Cir. 1994) (applying South Carolina law). With respect to fraudulent misrepresentation, "the fraudulent representation must relate to a present or pre-existing fact and it cannot ordinarily be based upon an unfulfilled promise to perform in the future or statements

as to future events.” *Id.* (quoting *Emerson v. Powell*, 283 S.C. 293, 296, 321 S.E.2d 629, 631 (Cl. App. 1984)).

Plaintiffs have only alluded to alleged false representations by Defendants regarding the promise of future funding of Skywaves which the Court finds, at best, amount to general salesmanship that does not give rise to a cause of action for negligent or fraudulent misrepresentation. The alleged representations do not relate to present or pre-existing facts and therefore cannot, as a matter of law, satisfy the requirements for a claim for negligent misrepresentation or fraudulent misrepresentation.

Plaintiffs contend that a promise of future funding is actionable if Defendants had no intention of fulfilling the promise at the time it was made and only made it to induce the performance of Plaintiffs. See *Parker v. Shecut*, 340 S.C. 460, 482, 531 S.E.2d 546, 558 (Cl. App. 2000), *rev'd on other grounds*, 349 S.D. 226, 562 S.E.2d 620 (2002). Although generally true, Plaintiffs' own allegations and arguments are that BB&T performed under the alleged modified agreement with Skywaves for some period of time, which is inconsistent with an intention not to fulfill a promise. In the Amended Complaints, Plaintiffs allege a variety of representations by Defendants to Skywaves in 2005, 2006 and 2007, during which time Plaintiffs allege Skywaves continued its relationship with BB&T, and that the relationship continued at least until January of 2008. Under these circumstances, the allegations of the Amended Complaints do not give rise to a legally actionable false statement sufficient to support a claim for negligent or fraudulent misrepresentation.

2. No Right to Rely

In addition to showing that a false representation was made, a plaintiff must also show that it had a right to rely on such representation in order to pursue a claim for either negligent

misrepresentation or fraudulent misrepresentation. See *GSM Dealer Servs., Inc. v. Chrysler Corp.*, 32 F.3d 139, 142 (4th Cir. 1994) (applying South Carolina law).

Plaintiffs did not have a right to rely on any such statements because Plaintiffs did not have a fiduciary relationship with Defendants. When there is no fiduciary relationship between the parties and the situation involves an arm's length transaction between mature, educated parties, as is the case here, there is no right to rely. *Lands Inn, Inc., supra.* (citing *Florentine Corp. v. PEDA I, Inc.*, 339 S.E.2d 112, 114 (S.C. 1985)); see also *First Savings Bank, FSB v. Capital Investors, Inc.*, 450 S.E.2d 83 (Cl. App. 1994), *rev'd in part on other grounds*, 459 S.E.2d 307 (S.C. 1995).

Plaintiffs have made a general allegation as to their alleged reliance on BB&T in making their investments in Skywaves, but there are no allegations as to any fiduciary relationship between Defendants and them. Instead, as the bulk of Plaintiffs' allegations reflect, the relationship at issue is the one between BB&T and Skywaves, as creditor-debtor. Plaintiffs have not alleged any specific facts that would create a fiduciary relationship between them, BB&T or Edahl. Accordingly, Plaintiffs have not pled sufficient allegations to establish any right to rely by them, who were not customers of BB&T but, instead, investors in a customer of BB&T. Plaintiffs, as sophisticated, mature parties, have not sufficiently pled and cannot establish that any of them had a right to rely on any alleged false statements by BB&T or Edahl.

2. Plaintiffs cannot sustain a claim against either Defendant for negligence or lender liability.

Additionally, Plaintiffs cannot establish their claim for negligence or lender liability against either Defendant. To prove a claim for negligence, a plaintiff must establish a duty of care, a breach of that duty and damages proximately caused by the breach. *McKnight v. South*

Carolina Dept. of Corrections, 684 S.E.2d 566, 569 (S.C.Ct.App.2009). In this case, neither Defendant had any duty to Plaintiffs.

Plaintiffs allege that "BB&T had a unique power and influence over the day-to-day operations of Skywaves and gave rise to a special relationship with the parties. . . whereby Defendants had a fiduciary duty to Plaintiffs." Plaintiffs further contend that Defendants were in breach of "the special trust and relationship established with the Plaintiffs". However, Plaintiffs cannot manufacture an alleged duty on behalf of either Defendant. Instead, "[d]uty is generally defined as the obligation to conform to a particular standard of conduct toward another." *Murray v. Bank of America, N.A.*, 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct. App. 2003). "Ordinarily, the common law imposes no duty on a person to act." *Id.* "An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Id.* In this case, Defendants did not have any duty to Plaintiffs.

In support of their argument, Plaintiffs contend that a duty of care flows from a bank to its customer. This argument is flawed in part because the relationship between a bank and its customer is generally not fiduciary in nature. See *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986); *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 497, 220 S.E.2d 116, 119 (Ct. App.1975); *Johnson v. Serv. Mgmt., Inc.*, 319 S.C. 165, 167-68, 459 S.E.2d 900, 902 (Ct. App.1995). More importantly, however, Plaintiffs' argument is fundamentally flawed in that while Skywaves may have been a customer of Defendant BB&T, Plaintiffs were not. Defendants did not owe any duty to Plaintiffs and, therefore, Plaintiffs cannot establish their claim for negligence or lender liability.

D. Plaintiffs Cannot Sustain a Claim Against Either Defendant for Violation of the South Carolina Unfair Trade Practices Act.

Finally, Plaintiffs, as investors, have not pled sufficient allegations against Defendants to support a claim for violation of the SCUTPA. Investor claims are generally a federally regulated arena. "Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States . . ." are generally exempt from the provisions of the SCUTPA. S.C. Code Ann. § 39-5-40(a).

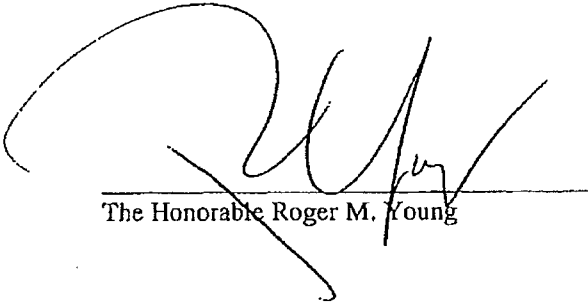
Additionally, to be actionable under the SCUTPA, the unfair or deceptive act or practice must have an impact upon the public interest. *Noack Enterprises, Inc. v. Country Corner Interiors*, 351 S.E.2d 347 (S.C.Ct.App. 1986). Here, Plaintiffs merely offer a conclusion of law that the "unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition." Absent from the Amended Complaints are any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition.

At most, the Amended Complaints allege, in sum, that Defendants promised to but then refused to fund the financing needs of Skywaves. These allegations do not comprise "unfair or deceptive acts" that are actionable under the SCUTPA because business relationships that affect only the parties to the complained-of transaction are not actionable under the SCUTPA. See *Noack Enterprises, Inc.* 351 S.E.2d at 349-50.

III. CONCLUSION

For the reasons set forth herein, it is hereby ORDERED that Defendant BB&T's and Defendant Edahl's Motions to Dismiss are GRANTED and all claims against them are dismissed with prejudice.

AND IT IS SO ORDERED.



The Honorable Roger M. Young

_____, 2011
Charleston, South Carolina

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

M. Dawes Cooke, Jr.
John W. Fletcher

December 15, 2011

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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DEC 19 2011
SC Court of Appeals

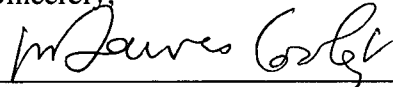
RE: Branch Banking & Trust Company, successor in merger to Branch Banking
and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents,
v. Ron Konersmann, Appellant
Case No.: 2009-CP-10-7517

Dear Ms. Gee:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of service of notice of appeal on the Respondents.
- (2) A copy of the Order which is to be challenged on appeal
- (3) A filing fee of \$100.00.

Sincerely,



M. Dawes Cooke, Jr.
John W. Fletcher
885 Island Park Drive (29492)
P.O. Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708

cc: Molly Hughes Cherry, Esq.
Nexsen Pruet, LLC
P.O. Box 486
Charleston, SC 29402

RECEIVED
DEC 19 2011
SC Court of Appeals

William C. Helms, III
M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.

Phillip S. Ferderigos
K. Michael Barfield
Ernest B. Lipscomb, III*
J. Gail Rahn

Todd M. Musheff
Craig E. Burgess
Lucinda Gardner Wichmann
John W. Fletcher

John A. Jones
Alissa DeCarlo
Barbara J. Wagner, Ph.D.
Jeremy E. Bowers

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7517

Ron Konersmann Appellant

v.

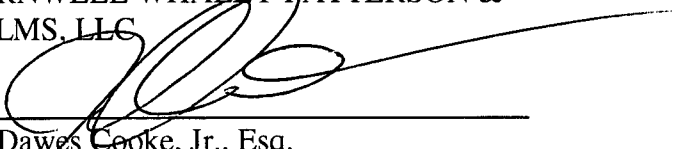
Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T,
and James Edahl..... Respondents

NOTICE OF APPEAL

Plaintiff/Appellant Ron Konersmann appeals the Judgment of the Honorable Roger M. Young, dated October 26, 2011 and filed on November 1, 2011, granting Respondents' Motion to Dismiss (Exhibit A). Appellant received written notice of entry of this Judgment on November 9, 2011.

December 9, 2011

BARNWELL WHALEY-BATTERSON &
HELMS, LLC

By: 

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DEC 19 2011

SC Court of Appeals

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SC Court of Appeals

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***Attorneys for Respondents Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl***

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7517

Ron Konersmann Appellant

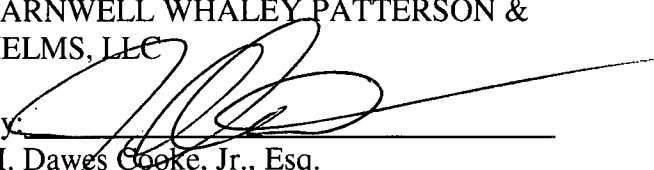
v.

Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T,
and James Edahl..... Respondents

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on December 9, 2011, addressed to their attorney of record, Molly Hughes Cherry, Esq., Nexsen Pruet, LLC, P.O. Box 486, Charleston, SC 29402, on December 9, 2011.

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: 

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- and -

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Attorneys for Appellant Ron Konersmann

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-10-7515
2009 CP-10-7517
2009 CP-10-7518

JAMES J. KERR et al

RON KONERSMANN

JOHN VOYTKO

BRANCH BANKING AND TRUST
COMPANY, Successor in merger to BRANCH
BANKING AND TRUST COMPANY OF SC
a/k/a BB&T, and JAMES EDAHL

RECEIVED
DEC 19 2011
SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41, SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

Order Defendants Motion to Dismiss Amended Complaint with Prejudice

INFORMATION FOR THE PUBLIC INDEX

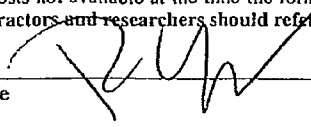
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
NA		\$
		\$
		\$

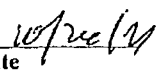
If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2134
Judge Code


Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or
placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or
to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Amanda Haffended

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

JAMES J. KERR, CRAYTON WALTERS,
and J.T. MAIN, LLC,

Civil Action No. 2009-CP-10-07515

Plaintiffs,

vs.

BRANCH BANKING AND TRUST
COMPANY, Successor in merger to
BRANCH BANKING AND TRUST
COMPANY OF SC, a/k/a BB&T, and JAMES
EDAHL,

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS AMENDED
COMPLAINT WITH PREJUDICE**

Defendants.

RON KONERSMANN,

Civil Action No. 2009-CP-10-7517

Plaintiff,

vs.

BRANCH BANKING AND TRUST
COMPANY, successor in merger to BRANCH
BANKING AND TRUST COMPANY OF SC,
a/k/a BB&T, and JAMES EDAHL,

Defendants.

JOHN VOYTKO,

Civil Action No. 2009-CP-10-7518

Plaintiffs,

vs.

BRANCH BANKING AND TRUST
COMPANY, successor in merger to BRANCH
BANKING AND TRUST COMPANY OF SC,
a/k/a BB&T, and JAMES EDAHL,

Defendants.

FILED
2011 NOV -1 AM 10:14
JULIE J. ARMSTRONG
CLERK OF COURT

B

This matter came before the Court on August 15, 2011, on the Motions to Dismiss of Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("BB&T") and Defendant James Edahl ("Edahl"). Plaintiffs and Defendants were represented by counsel at the hearing, and the Court fully considered all evidence presented and the arguments of counsel. For the reasons that follow, the Court grants Defendants' Motions to Dismiss with prejudice.

I. FACTS

This is a lender liability case in which Plaintiffs in each of the three captioned cases allege that Defendant BB&T failed to fund the financing needs of Skywaves Corporation I ("Skywaves"), a company in which each Plaintiff was an investor. Plaintiffs John Voytko and Ron Konersmann were also officers in Skywaves.

Plaintiffs' allegations do not pertain to any alleged relationship they had with BB&T but, instead, to the relationship between BB&T and Skywaves. Defendant BB&T is a banking institution with branch offices in Charleston, South Carolina, and Defendant Edahl is one of its employees. Skywaves is a company that developed a structural product, specifically cell tower units, for use in the wireless telecommunications industry. To support the manufacture of these individual cell tower units, Skywaves entered into a certain factoring agreement with BB&T in the Spring of 2005 whereby BB&T would purchase certain receivables of Skywaves at a discount and payment of those receivables would then be made to BB&T.

In January of 2008, BB&T declared a default by Skywaves under the factoring agreement. Plaintiffs contend the default was improper, as BB&T, acting through its employee Defendant Edahl, promised that BB&T "would fund all [Skywaves'] financial needs." Plaintiffs claim the improper default caused Skywaves to go into bankruptcy and resulted in the loss of their investment in Skywaves and the loss of the salaries for Plaintiffs Voytko and Konersmann.

Plaintiffs are not customers of BB&T. BB&T did not lend any money to Plaintiffs. Plaintiffs are not debtors in this case. Plaintiffs had no direct relationship with BB&T whatsoever. All of Plaintiffs' allegations pertain to the relationship between Skywaves and BB&T, and all of Plaintiffs' alleged injuries arise out of Skywaves' bankruptcy filing. Plaintiffs have filed proofs of claim against Skywaves in the bankruptcy proceeding.

In their Amended Complaints, Plaintiffs assert four claims for: (1) negligent misrepresentation; (2) fraudulent misrepresentation; (3) negligence; and (4) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").¹ Defendants moved to dismiss all four claims pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

II. LEGAL ANALYSIS

South Carolina Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim for failure to state facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6); *Fleteau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (2003). The question is whether the pleadings, taken in the light most favorable to the plaintiff, articulate a valid claim for relief. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). A Rule 12(b)(6) motion "must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (1997). The Court dismisses these cases because there is no possibility that Plaintiffs will be able to establish liability on the part of either Defendant under any of the claims as alleged in the Amended Complaints.

¹ Plaintiffs Kerr, Walters and J.T. Main, LLC have only asserted three claims for negligent misrepresentation, fraudulent inducement and negligence/lender liability.

A. Section 37-10-107 of the South Carolina Code Bars All of the Plaintiffs' Claims Against Defendants.

All of Plaintiffs' claims against Defendants are statutorily barred, as a matter of law. Many states, including South Carolina, have enacted specialized statutes concerning loan and credit agreements. These statutes bar enforcement of oral lending agreements and bar fraud and other tort claims based on alleged oral misrepresentations and other non-written conduct concerning these loan agreements. See S.C. Code § 37-10-107.

Specifically, section 37-10-107 of the South Carolina Code Annotated provides:

(1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

(a) to lend or borrow money;

(b) to defer or forbear in the repayment of money; or

(c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

(2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:

(a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;

(b) promissory or equitable estoppel;

(c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or

(d) negligent misrepresentation.

S.C. Code Ann. § 37-10-107.

All of Plaintiffs' claims are all based upon alleged statements, promises, or representations made by BB&T or Edahl to Skywaves that BB&T "would fund all [Skywaves'] financial needs." Each of the claims is based upon alleged representations made by Defendants to Skywaves.

Plaintiffs make general reference to representations made "in writing;" but Plaintiffs have not alleged any material terms or conditions of any agreement with Defendants nor have Plaintiffs specifically alleged that any such agreement was in fact received by them. Plaintiffs have made a number of allegations regarding writings purportedly between BB&T and Skywaves, but Plaintiffs, although investors in Skywaves, cannot rely on such writings to defeat the plain wording of Section 37-10-107 which, as stated above, requires in pertinent part that "the party seeking to maintain the action or defense [receive] a writing from the party to be charged..." S.C. Code Ann. § 37-10-107(1)(c).

Because Plaintiffs have not alleged or otherwise provided anything in writing to evidence the material terms and conditions of the alleged promises or representations made to them, their claims fail as a matter of law. See *Carolina First Bank v. Lucas*, Case No. 03-CP-10-1907, 2004 WL 5208410 (S.C. Com. Pl. Jun. 14, 2004); see also *Robertson v. First Union Nat'l Bank*, Case No. 99-CP-10-288, 2000 WL 35722762 (S.C. Com. Pl. Aug. 8, 2000). Specifically, Plaintiffs have not alleged that they "received a writing from the party to be charged [*i.e.* BB&T] containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing." S.C. Code Ann. § 37-10-107(1)(c). Accordingly, as a matter of law, Plaintiffs cannot "maintain an action for legal . . . relief . . . based upon [BB&T's or Edahl's alleged]

failure to lend . . . money [to Skywaves.]" S.C. Code Ann. § 37-10-107(1)(a). Under these circumstances, Plaintiffs cannot establish their claims against Defendants, as a matter of law.

1. The Choice of Law Provision in the Security and Factoring Agreement Between Skywaves and BB&T Does Not Apply to Plaintiffs' Claims Against Defendants.

Plaintiffs contend that S.C. Code Ann. § 37-10-107 does not apply to the tort claims they have asserted against Defendants. In support of their argument, Plaintiffs cite to a provision in the Factoring and Security Agreement ("Agreement") between Skywaves and BB&T that the Agreement is governed by North Carolina law. Plaintiffs are not parties to the Agreement and, thus, any choice of law provisions contained therein do not apply in these cases. Moreover, the relevant provision in the Agreement pertains to claims arising "under" the Agreement. In the case at hand, Plaintiffs are contending that an agreement existed outside of the Agreement, and that certain promises were made by Defendants outside the Agreement regarding funding of Skywaves. Under the circumstances, there is no basis for Plaintiffs to rely upon a choice of law provision in a contract to which they were not parties. South Carolina law governs Plaintiffs' claims against Defendants and dictates that the claims be dismissed, as a matter of law.

2. Plaintiffs' Allegations and Claims Arise from an Alleged Failure to Loan Money Such that Section 37-10-107 Applies.

Plaintiffs also contend that because the relationship between BB&T and Skywaves was pursuant to a factoring agreement, it was not a "typical" loan transaction and that S.C. Code Ann. § 37-10-107 does not apply. Plaintiffs ignore, however, that the very allegations in their Amended Complaints, to wit, that the factoring agreement was modified by BB&T such that BB&T agreed to loan money to Skywaves. Specifically, Plaintiffs allege there was no "need for Skywaves to either invoice or manufacture the product. In this way, BB&T agreed to advance the costs of manufacturing." Moreover, although Plaintiffs attempt to characterize a factoring

agreement as an atypical loan transaction, a key purpose of the statute is to protect financial institutions and other lenders from claims that are inconsistent with the written agreements outlining the terms of the transaction. Because the statutes within Title 37 should "be liberally construed and applied to promote [Title 37's] underlying purposes and policies," any question regarding the applicability of section 37-10-107 to the alleged agreement in the Amended Complaint is resolved in Defendant's favor. See S.C. Code Ann. § 37-10-102(1).

3. Section 37-10-107 Bars Fraud Claims.

Plaintiffs contend that because section 37-10-107 does not expressly exclude a claim for fraud, their fraud claims are not barred. To that end, Plaintiffs focus on subsection 2(d) of the statute, which bars any action based on "negligent misrepresentation." Plaintiffs argue that because the drafters of the statute specifically singled out actions based on "negligent misrepresentation," but not "intentional misrepresentation," an action based on fraud would not be precluded by the statute. However, South Carolina state and federal trial courts have found that fraud claims are barred by section 37-10-107. See e.g. *Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina*, C.A. No. 2:98-158-23 (S.C. Com. Pl. April 12, 1999) (citing *Derrick v. Branch Banking and Trust Company of South Carolina*, 96-CP-42-2095 (S.C.Ct.Cm. P. 9/8/98)). This Court agrees and finds that section 37-10-107 bars Plaintiffs' fraud, negligence and unfair trade practices claims.

4. Section 32-3-10(5) Does Not Apply to the Alleged Agreement in the Amended Complaint and Is Not Inconsistent with Section 37-10-107.

Section 37-10-107 provides that "in the event of a conflict between this section and any other provision of law of this State relating to the requirements of a signed writing, the provisions of the other provision of law shall control." S.C. Code § 37-10-107(4). According to Plaintiffs, S.C. Code § 32-3-10(5), which is a more general statute of frauds, "may" be applicable

to the dispute and, thus, creates a conflict with section 37-10-107 such that section 32-3-10(5) applies.

Even if section 32-3-10(5) somehow applies in this case, it is not inconsistent with section 37-10-107. The two statutes can be read and construed together. In South Carolina, "[i]f the provisions of the two statutes can be construed so that both can stand, this Court will so construe them." *In the Interest of Shaw*, 265 S.E.2d 522, 524 (S.C. 1980) (citing *City of Spartanburg v. Blalock*, 223 S.C. 252, 75 S.E.2d 361 (1953)). Further, "where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Wilder v. South Carolina Hwy. Dep't*, 90 S.E.2d 635 (S.C. 1955); see also *Ramsey v. County of McCormick*, 412 S.E.2d 408, 410 (S.C. 1991). As the more specific statute on this issue, S.C. Code § 37-10-107 is to be considered a qualifier of section 32-3-10(5).

B. Plaintiffs Fail to Allege Any Conduct on the Part of Either Defendant That Would Support Their Claims.

Notwithstanding that all of Plaintiffs' claims are barred under S.C. Code Ann. § 37-10-107, this Court alternatively dismisses the claims because Plaintiffs' allegations are insufficient to state a claim for negligent misrepresentation, fraudulent inducement, negligence or lender liability.

1. Plaintiffs cannot sustain a claim against either Defendant for negligent misrepresentation or fraudulent inducement.

Plaintiffs' claims for negligent misrepresentation and fraudulent misrepresentation both fail as a matter of law because Plaintiffs have not alleged a legally viable false statement or any fact that would tend to create a right for them to rely on any alleged misrepresentation by BR&T or Edahl.

a. No False Statement

Negligent misrepresentation is predicated upon the transmission of a negligently made false statement. See *Armstrong v. Collins*, 366 S.C. 204, 220, 621 S.E.2d 368, 376 (Ct. App. 2005); *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003); *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 349, 565 S.E.2d 309, 315 (Ct. App. 2002); *Brown v. Stewart*, 348 S.C. 33, 42, 557 S.E.2d 676, 680-81 (Ct. App. 2001); *West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000). Like negligent misrepresentation, an actionable fraudulent misrepresentation case requires there first be a false representation predicated upon misstatements of fact rather than upon expression of opinion, intent, or confidence that the deal would be satisfactory. See *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 317 S.C. 520, 526-27, 455 S.E.2d 183, 187 (Ct. App. 1995) (finding statements by equipment seller concerning expected performance of logging system were opinions as to future performance and could not be basis for claim of fraud).

More specifically, the alleged false representation must be of a present or pre-existing fact. See *Spires v. Acceleration Nat'l Ins. Co.*, 417 F. Supp. 2d 750, 755-56 (D.S.C. 2006) (applying South Carolina law). The negligent representation cannot be based on unfulfilled promises or statements as to future events. See *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993). In addition, an integral component of this element is that the representation be false at the time it is made. See *GSM Dealer Servs., Inc. v. Chrysler Corp.*, 32 F.3d 139, 142 (4th Cir. 1994) (applying South Carolina law). With respect to fraudulent misrepresentation, "the fraudulent representation must relate to a present or pre-existing fact and it cannot ordinarily be based upon an unfulfilled promise to perform in the future or statements

as to future events.” *Id.* (quoting *Emerson v. Powell*, 283 S.C. 293, 296, 321 S.E.2d 629, 631 (Cl. App. 1984)).

Plaintiffs have only alluded to alleged false representations by Defendants regarding the promise of future funding of Skywaves which the Court finds, at best, amount to general salesmanship that does not give rise to a cause of action for negligent or fraudulent misrepresentation. The alleged representations do not relate to present or pre-existing facts and therefore cannot, as a matter of law, satisfy the requirements for a claim for negligent misrepresentation or fraudulent misrepresentation.

Plaintiffs contend that a promise of future funding is actionable if Defendants had no intention of fulfilling the promise at the time it was made and only made it to induce the performance of Plaintiffs. *See Parker v. Shecut*, 340 S.C. 460, 482, 531 S.E.2d 546, 558 (Cl. App. 2000), *rev'd on other grounds*, 349 S.D. 226, 562 S.E.2d 620 (2002). Although generally true, Plaintiffs' own allegations and arguments are that BB&T performed under the alleged modified agreement with Skywaves for some period of time, which is inconsistent with an intention not to fulfill a promise. In the Amended Complaints, Plaintiffs allege a variety of representations by Defendants to Skywaves in 2005, 2006 and 2007, during which time Plaintiffs allege Skywaves continued its relationship with BB&T, and that the relationship continued at least until January of 2008. Under these circumstances, the allegations of the Amended Complaints do not give rise to a legally actionable false statement sufficient to support a claim for negligent or fraudulent misrepresentation.

2. No Right to Rely

In addition to showing that a false representation was made, a plaintiff must also show that it had a right to rely on such representation in order to pursue a claim for either negligent

misrepresentation or fraudulent misrepresentation. See *GSM Dealer Servs., Inc. v. Chrysler Corp.*, 32 F.3d 139, 142 (4th Cir. 1994) (applying South Carolina law).

Plaintiffs did not have a right to rely on any such statements because Plaintiffs did not have a fiduciary relationship with Defendants. When there is no fiduciary relationship between the parties and the situation involves an arm's length transaction between mature, educated parties, as is the case here, there is no right to rely. *Lands Inn, Inc., supra.* (citing *Florentine Corp. v. PEDA I., Inc.*, 339 S.E.2d 112, 114 (S.C. 1985)); see also *First Savings Bank, FSB v. Capital Investors, Inc.*, 450 S.E.2d 83 (Ct. App. 1994), *rev'd in part on other grounds*, 459 S.E.2d 307 (S.C. 1995).

Plaintiffs have made a general allegation as to their alleged reliance on BB&T in making their investments in Skywaves, but there are no allegations as to any fiduciary relationship between Defendants and them. Instead, as the bulk of Plaintiffs' allegations reflect, the relationship at issue is the one between BB&T and Skywaves, as creditor-debtor. Plaintiffs have not alleged any specific facts that would create a fiduciary relationship between them, BB&T or Edahl. Accordingly, Plaintiffs have not pled sufficient allegations to establish any right to rely by them, who were not customers of BB&T but, instead, investors in a customer of BB&T. Plaintiffs, as sophisticated, mature parties, have not sufficiently pled and cannot establish that any of them had a right to rely on any alleged false statements by BB&T or Edahl.

2. Plaintiffs cannot sustain a claim against either Defendant for negligence or lender liability.

Additionally, Plaintiffs cannot establish their claim for negligence or lender liability against either Defendant. To prove a claim for negligence, a plaintiff must establish a duty of care, a breach of that duty and damages proximately caused by the breach. *McKnight v. South*

Carolina Dept. of Corrections, 684 S.E.2d 566, 569 (S.C.Ct.App.2009). In this case, neither Defendant had any duty to Plaintiffs.

Plaintiffs allege that "BB&T had a unique power and influence over the day-to-day operations of Skywaves and gave rise to a special relationship with the parties. . . whereby Defendants had a fiduciary duty to Plaintiffs." Plaintiffs further contend that Defendants were in breach of "the special trust and relationship established with the Plaintiffs". However, Plaintiffs cannot manufacture an alleged duty on behalf of either Defendant. Instead, "[d]uty is generally defined as the obligation to conform to a particular standard of conduct toward another." *Murray v. Bank of America, N.A.*, 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct. App. 2003). "Ordinarily, the common law imposes no duty on a person to act." *Id.* "An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Id.* In this case, Defendants did not have any duty to Plaintiffs.

In support of their argument, Plaintiffs contend that a duty of care flows from a bank to its customer. This argument is flawed in part because the relationship between a bank and its customer is generally not fiduciary in nature. *See Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986); *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 497, 220 S.E.2d 116, 119 (Ct. App.1975); *Johnson v. Serv. Mgmt., Inc.*, 319 S.C. 165, 167-68, 459 S.E.2d 900, 902 (Ct. App.1995). More importantly, however, Plaintiffs' argument is fundamentally flawed in that while Skywaves may have been a customer of Defendant BB&T, Plaintiffs were not. Defendants did not owe any duty to Plaintiffs and, therefore, Plaintiffs cannot establish their claim for negligence or lender liability.

D. Plaintiffs Cannot Sustain a Claim Against Either Defendant for Violation of the South Carolina Unfair Trade Practices Act.

Finally, Plaintiffs, as investors, have not pled sufficient allegations against Defendants to support a claim for violation of the SCUTPA. Investor claims are generally a federally regulated arena. "Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States . . ." are generally exempt from the provisions of the SCUTPA. S.C. Code Ann. § 39-5-40(a).

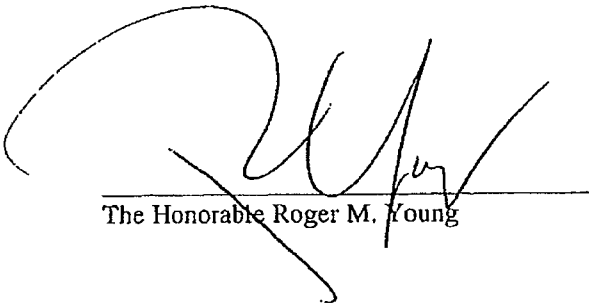
Additionally, to be actionable under the SCUTPA, the unfair or deceptive act or practice must have an impact upon the public interest. *Noack Enterprises, Inc. v. Country Corner Interiors*, 351 S.E.2d 347 (S.C.Ct.App. 1986). Here, Plaintiffs merely offer a conclusion of law that the "unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition." Absent from the Amended Complaints are any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition.

At most, the Amended Complaints allege, in sum, that Defendants promised to but then refused to fund the financing needs of Skywaves. These allegations do not comprise "unfair or deceptive acts" that are actionable under the SCUTPA because business relationships that affect only the parties to the complained-of transaction are not actionable under the SCUTPA. See *Noack Enterprises, Inc.* 351 S.E.2d at 349-50.

III. CONCLUSION

For the reasons set forth herein, it is hereby ORDERED that Defendant BB&T's and Defendant Edahl's Motions to Dismiss are GRANTED and all claims against them are dismissed with prejudice.

AND IT IS SO ORDERED.



The Honorable Roger M. Young

_____, 2011
Charleston, South Carolina

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

M. Dawes Cooke, Jr.
John W. Fletcher

December 15, 2011

RECEIVED
DEC 19 2011
SC Court of Appeals

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

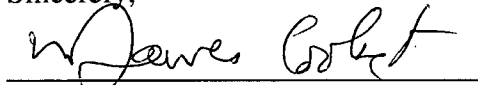
RE: Branch Banking & Trust Company, successor in merger to Branch Banking
and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents,
v. James J. Kerr, Crayton Walters, and JT Main, LLC, Appellants
Case No.: 2009-CP-10-7515

Dear Ms. Gee:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of service of notice of appeal on the Respondents.
- (2) A copy of the Order which is to be challenged on appeal
- (3) A filing fee of \$100.00.

Sincerely,



M. Dawes Cooke, Jr.
John W. Fletcher
885 Island Park Drive (29492)
P.O. Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708

RECEIVED
DEC 19 2011
SC Court of Appeals

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John A. Jones
Alissa DeCarlo
Barbara J. Wagner, Ph.D.
Jeremy E. Bowers

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7515

James J. Kerr, Crayton Walters, and JT Main, LLC..... Appellants

v.

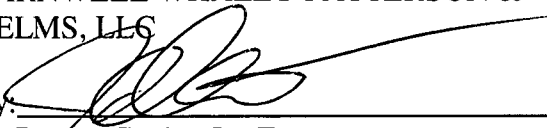
Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T,
and James Edahl..... Respondents

NOTICE OF APPEAL

Plaintiffs James J. Kerr, Crayton Walters, and JT Main, LLC appeal the Judgment of the Honorable Roger M. Young, dated October 26, 2011 and filed on November 1, 2011, granting Respondents' Motion to Dismiss (Exhibit A). Appellants received written notice of entry of this Judgment on November 9, 2011.

December 9, 2011

BARNWELL WHALEY PATTERSON &
HELMS, LLC

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- and -

RECEIVED
DEC 19 2011
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Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl***

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7515

James J. Kerr, Crayton Walters, and JT Main, LLC..... Appellants

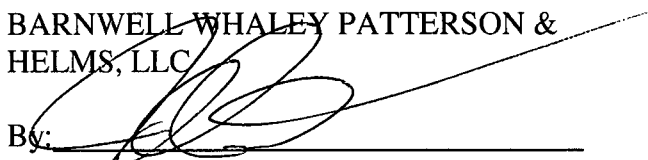
v.

Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T,
and James Edahl..... Respondents

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on December 9, 2011, addressed to their attorney of record, Molly Hughes Cherry, Esq., Nexsen Pruet, LLC, P.O. Box 486, Charleston, SC 29402, on December 9, 2011.

BARNWELL WHALEY PATTERSON &
HELMS, LLC

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-10-7515
2009 CP-10-7517
2009 CP-10-7518

JAMES J. KERR et al
RON KONERSMANN
JOHN VOYTKO

BRANCH BANKING AND TRUST
COMPANY, Successor in merger to BRANCH
BANKING AND TRUST COMPANY OF SC,
a/k/a BB&T, and JAMES EDAHL

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(c), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

Order Defendants Motion to Dismiss Amended Complaint with Prejudice

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
NA		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2134

Judge Code

Date

10/26/11

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Amanda Haffended

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

JAMES J. KERR, CRAYTON WALTERS,
and J.T. MAIN, LLC,

Civil Action No. 2009-CP-10-07515

Plaintiffs,

vs.

BRANCH BANKING AND TRUST
COMPANY, Successor in merger to
BRANCH BANKING AND TRUST
COMPANY OF SC, a/k/a BB&T, and JAMES
EDAHL,

ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS AMENDED
COMPLAINT WITH PREJUDICE

Defendants.

RON KONERSMANN,

Civil Action No. 2009-CP-10-7517

Plaintiff,

vs.

BRANCH BANKING AND TRUST
COMPANY, successor in merger to BRANCH
BANKING AND TRUST COMPANY OF SC,
a/k/a BB&T, and JAMES EDAHL,

Defendants.

JOHN VOYTKO,

Civil Action No. 2009-CP-10-7518

Plaintiffs,

vs.

BRANCH BANKING AND TRUST
COMPANY, successor in merger to BRANCH
BANKING AND TRUST COMPANY OF SC,
a/k/a BB&T, and JAMES EDAHL,

Defendants.

FILED
2011 NOV -1 AM 10:14
JULIE J. ARMSTRONG
CLERK OF COURT

B

This matter came before the Court on August 15, 2011, on the Motions to Dismiss of Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("BB&T") and Defendant James Edahl ("Edahl"). Plaintiffs and Defendants were represented by counsel at the hearing, and the Court fully considered all evidence presented and the arguments of counsel. For the reasons that follow, the Court grants Defendants' Motions to Dismiss with prejudice.

I. FACTS

This is a lender liability case in which Plaintiffs in each of the three captioned cases allege that Defendant BB&T failed to fund the financing needs of Skywaves Corporation I ("Skywaves"), a company in which each Plaintiff was an investor. Plaintiffs John Voytko and Ron Konersmann were also officers in Skywaves.

Plaintiffs' allegations do not pertain to any alleged relationship they had with BB&T but, instead, to the relationship between BB&T and Skywaves. Defendant BB&T is a banking institution with branch offices in Charleston, South Carolina, and Defendant Edahl is one of its employees. Skywaves is a company that developed a structural product, specifically cell tower units, for use in the wireless telecommunications industry. To support the manufacture of these individual cell tower units, Skywaves entered into a certain factoring agreement with BB&T in the Spring of 2005 whereby BB&T would purchase certain receivables of Skywaves at a discount and payment of those receivables would then be made to BB&T.

In January of 2008, BB&T declared a default by Skywaves under the factoring agreement. Plaintiffs contend the default was improper, as BB&T, acting through its employee Defendant Edahl, promised that BB&T "would fund all [Skywaves'] financial needs." Plaintiffs claim the improper default caused Skywaves to go into bankruptcy and resulted in the loss of their investment in Skywaves and the loss of the salaries for Plaintiffs Voytko and Konersmann.

Plaintiffs are not customers of BB&T. BB&T did not lend any money to Plaintiffs. Plaintiffs are not debtors in this case. Plaintiffs had no direct relationship with BB&T whatsoever. All of Plaintiffs' allegations pertain to the relationship between Skywaves and BB&T, and all of Plaintiffs' alleged injuries arise out of Skywaves' bankruptcy filing. Plaintiffs have filed proofs of claim against Skywaves in the bankruptcy proceeding.

In their Amended Complaints, Plaintiffs assert four claims for: (1) negligent misrepresentation; (2) fraudulent misrepresentation; (3) negligence; and (4) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").¹ Defendants moved to dismiss all four claims pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

II. LEGAL ANALYSIS

South Carolina Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim for failure to state facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6); *Fleteau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (2003). The question is whether the pleadings, taken in the light most favorable to the plaintiff, articulate a valid claim for relief. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). A Rule 12(b)(6) motion "must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (1997). The Court dismisses these cases because there is no possibility that Plaintiffs will be able to establish liability on the part of either Defendant under any of the claims as alleged in the Amended Complaints.

¹ Plaintiffs Kerr, Walters and J.T. Main, LLC have only asserted three claims for negligent misrepresentation, fraudulent inducement and negligence/lender liability.

A. Section 37-10-107 of the South Carolina Code Bars All of the Plaintiffs' Claims Against Defendants.

All of Plaintiffs' claims against Defendants are statutorily barred, as a matter of law. Many states, including South Carolina, have enacted specialized statutes concerning loan and credit agreements. These statutes bar enforcement of oral lending agreements and bar fraud and other tort claims based on alleged oral misrepresentations and other non-written conduct concerning these loan agreements. See S.C. Code § 37-10-107.

Specifically, section 37-10-107 of the South Carolina Code Annotated provides:

(1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

- (a) to lend or borrow money;
- (b) to defer or forbear in the repayment of money; or
- (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

(2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:

- (a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;
- (b) promissory or equitable estoppel;
- (c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or
- (d) negligent misrepresentation.

S.C. Code Ann. § 37-10-107.

All of Plaintiffs' claims are all based upon alleged statements, promises, or representations made by BB&T or Edahl to Skywaves that BB&T "would fund all [Skywaves'] financial needs." Each of the claims is based upon alleged representations made by Defendants to Skywaves.

Plaintiffs make general reference to representations made "in writing;" but Plaintiffs have not alleged any material terms or conditions of any agreement with Defendants nor have Plaintiffs specifically alleged that any such agreement was in fact received by them. Plaintiffs have made a number of allegations regarding writings purportedly between BB&T and Skywaves, but Plaintiffs, although investors in Skywaves, cannot rely on such writings to defeat the plain wording of Section 37-10-107 which, as stated above, requires in pertinent part that "the party seeking to maintain the action or defense [receive] a writing from the party to be charged..." S.C. Code Ann. § 37-10-107(1)(c).

Because Plaintiffs have not alleged or otherwise provided anything in writing to evidence the material terms and conditions of the alleged promises or representations made to them, their claims fail as a matter of law. See *Carolina First Bank v. Lucas*, Case No. 03-CP-10-1907, 2004 WL 5208410 (S.C. Com. Pl. Jun. 14, 2004); see also *Robertson v. First Union Nat'l Bank*, Case No. 99-CP-10-288, 2000 WL 35722762 (S.C. Com. Pl. Aug. 8, 2000). Specifically, Plaintiffs have not alleged that they "received a writing from the party to be charged [i.e. BB&T] containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing." S.C. Code Ann. § 37-10-107(1)(c). Accordingly, as a matter of law, Plaintiffs cannot "maintain an action for legal . . . relief . . . based upon [BB&T's or Edahl's alleged]

failure to lend . . . money [to Skywaves.]” S.C. Code Ann. § 37-10-107(1)(a). Under these circumstances, Plaintiffs cannot establish their claims against Defendants, as a matter of law.

1. The Choice of Law Provision in the Security and Factoring Agreement Between Skywaves and BB&T Does Not Apply to Plaintiffs’ Claims Against Defendants.

Plaintiffs contend that S.C. Code Ann. § 37-10-107 does not apply to the tort claims they have asserted against Defendants. In support of their argument, Plaintiffs cite to a provision in the Factoring and Security Agreement (“Agreement”) between Skywaves and BB&T that the Agreement is governed by North Carolina law. Plaintiffs are not parties to the Agreement and, thus, any choice of law provisions contained therein do not apply in these cases. Moreover, the relevant provision in the Agreement pertains to claims arising “under” the Agreement. In the case at hand, Plaintiffs are contending that an agreement existed outside of the Agreement, and that certain promises were made by Defendants outside the Agreement regarding funding of Skywaves. Under the circumstances, there is no basis for Plaintiffs to rely upon a choice of law provision in a contract to which they were not parties. South Carolina law governs Plaintiffs’ claims against Defendants and dictates that the claims be dismissed, as a matter of law.

2. Plaintiffs’ Allegations and Claims Arise from an Alleged Failure to Loan Money Such that Section 37-10-107 Applies.

Plaintiffs also contend that because the relationship between BB&T and Skywaves was pursuant to a factoring agreement, it was not a “typical” loan transaction and that S.C. Code Ann. § 37-10-107 does not apply. Plaintiffs ignore, however, that the very allegations in their Amended Complaints, to wit, that the factoring agreement was modified by BB&T such that BB&T agreed to loan money to Skywaves. Specifically, Plaintiffs allege there was no “need for Skywaves to either invoice or manufacture the product. In this way, BB&T agreed to advance the costs of manufacturing.” Moreover, although Plaintiffs attempt to characterize a factoring

agreement as an atypical loan transaction, a key purpose of the statute is to protect financial institutions and other lenders from claims that are inconsistent with the written agreements outlining the terms of the transaction. Because the statutes within Title 37 should "be liberally construed and applied to promote [Title 37's] underlying purposes and policies," any question regarding the applicability of section 37-10-107 to the alleged agreement in the Amended Complaint is resolved in Defendant's favor. See S.C. Code Ann. § 37-10-102(1).

3. Section 37-10-107 Bars Fraud Claims.

Plaintiffs contend that because section 37-10-107 does not expressly exclude a claim for fraud, their fraud claims are not barred. To that end, Plaintiffs focus on subsection 2(d) of the statute, which bars any action based on "negligent misrepresentation." Plaintiffs argue that because the drafters of the statute specifically singled out actions based on "negligent misrepresentation," but not "intentional misrepresentation," an action based on fraud would not be precluded by the statute. However, South Carolina state and federal trial courts have found that fraud claims are barred by section 37-10-107. See e.g. *Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina*, C.A. No. 2:98-158-23 (S.C. Com. Pl. April 12, 1999) (citing *Derrick v. Branch Banking and Trust Company of South Carolina*, 96-CP-42-2095 (S.C.Ct.Cm. P. 9/8/98)). This Court agrees and finds that section 37-10-107 bars Plaintiffs' fraud, negligence and unfair trade practices claims.

4. Section 32-3-10(5) Does Not Apply to the Alleged Agreement in the Amended Complaint and Is Not Inconsistent with Section 37-10-107.

Section 37-10-107 provides that "in the event of a conflict between this section and any other provision of law of this State relating to the requirements of a signed writing, the provisions of the other provision of law shall control." S.C. Code § 37-10-107(4). According to Plaintiffs, S.C. Code § 32-3-10(5), which is a more general statute of frauds, "may" be applicable

to the dispute and, thus, creates a conflict with section 37-10-107 such that section 32-3-10(5) applies.

Even if section 32-3-10(5) somehow applies in this case, it is not inconsistent with section 37-10-107. The two statutes can be read and construed together. In South Carolina, "[i]f the provisions of the two statutes can be construed so that both can stand, this Court will so construe them." *In the Interest of Shaw*, 265 S.E.2d 522, 524 (S.C. 1980) (citing *City of Spartanburg v. Blalock*, 223 S.C. 252, 75 S.E.2d 361 (1953)). Further, "where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Wilder v. South Carolina Hwy. Dep't*, 90 S.E.2d 635 (S.C. 1955); see also *Ramsey v. County of McCormick*, 412 S.E.2d 408, 410 (S.C. 1991). As the more specific statute on this issue, S.C. Code § 37-10-107 is to be considered a qualifier of section 32-3-10(5).

B. Plaintiffs Fail to Allege Any Conduct on the Part of Either Defendant That Would Support Their Claims.

Notwithstanding that all of Plaintiffs' claims are barred under S.C. Code Ann. § 37-10-107, this Court alternatively dismisses the claims because Plaintiffs' allegations are insufficient to state a claim for negligent misrepresentation, fraudulent inducement, negligence or lender liability.

1. Plaintiffs cannot sustain a claim against either Defendant for negligent misrepresentation or fraudulent inducement.

Plaintiffs' claims for negligent misrepresentation and fraudulent misrepresentation both fail as a matter of law because Plaintiffs have not alleged a legally viable false statement or any fact that would tend to create a right for them to rely on any alleged misrepresentation by BB&T or Edahl.

a. No False Statement

Negligent misrepresentation is predicated upon the transmission of a negligently made false statement. See *Armstrong v. Collins*, 366 S.C. 204, 220, 621 S.E.2d 368, 376 (Ct. App. 2005); *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003); *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 349, 565 S.E.2d 309, 315 (Ct. App. 2002); *Brown v. Stewart*, 348 S.C. 33, 42, 557 S.E.2d 676, 680-81 (Ct. App. 2001); *West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000). Like negligent misrepresentation, an actionable fraudulent misrepresentation case requires there first be a false representation predicated upon misstatements of fact rather than upon expression of opinion, intent, or confidence that the deal would be satisfactory. See *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 317 S.C. 520, 526-27, 455 S.E.2d 183, 187 (Ct. App. 1995) (finding statements by equipment seller concerning expected performance of logging system were opinions as to future performance and could not be basis for claim of fraud).

More specifically, the alleged false representation must be of a present or pre-existing fact. See *Spires v. Acceleration Nat'l Ins. Co.*, 417 F. Supp. 2d 750, 755-56 (D.S.C. 2006) (applying South Carolina law). The negligent representation cannot be based on unfulfilled promises or statements as to future events. See *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993). In addition, an integral component of this element is that the representation be false at the time it is made. See *GSM Dealer Servs., Inc. v. Chrysler Corp.*, 32 F.3d 139, 142 (4th Cir. 1994) (applying South Carolina law). With respect to fraudulent misrepresentation, "the fraudulent representation must relate to a present or pre-existing fact and it cannot ordinarily be based upon an unfulfilled promise to perform in the future or statements

as to future events.” *Id.* (quoting *Emerson v. Powell*, 283 S.C. 293, 296, 321 S.E.2d 629, 631 (Cl. App. 1984)).

Plaintiffs have only alluded to alleged false representations by Defendants regarding the promise of future funding of Skywaves which the Court finds, at best, amount to general salesmanship that does not give rise to a cause of action for negligent or fraudulent misrepresentation. The alleged representations do not relate to present or pre-existing facts and therefore cannot, as a matter of law, satisfy the requirements for a claim for negligent misrepresentation or fraudulent misrepresentation.

Plaintiffs contend that a promise of future funding is actionable if Defendants had no intention of fulfilling the promise at the time it was made and only made it to induce the performance of Plaintiffs. *See Parker v. Shecut*, 340 S.C. 460, 482, 531 S.E.2d 546, 558 (Cl. App. 2000), *rev'd on other grounds*, 349 S.D. 226, 562 S.E.2d 620 (2002). Although generally true, Plaintiffs' own allegations and arguments are that BB&T performed under the alleged modified agreement with Skywaves for some period of time, which is inconsistent with an intention not to fulfill a promise. In the Amended Complaints, Plaintiffs allege a variety of representations by Defendants to Skywaves in 2005, 2006 and 2007, during which time Plaintiffs allege Skywaves continued its relationship with BB&T, and that the relationship continued at least until January of 2008. Under these circumstances, the allegations of the Amended Complaints do not give rise to a legally actionable false statement sufficient to support a claim for negligent or fraudulent misrepresentation.

2. No Right to Rely

In addition to showing that a false representation was made, a plaintiff must also show that it had a right to rely on such representation in order to pursue a claim for either negligent

misrepresentation or fraudulent misrepresentation. See *GSM Dealer Servs., Inc. v. Chrysler Corp.*, 32 F.3d 139, 142 (4th Cir. 1994) (applying South Carolina law).

Plaintiffs did not have a right to rely on any such statements because Plaintiffs did not have a fiduciary relationship with Defendants. When there is no fiduciary relationship between the parties and the situation involves an arm's length transaction between mature, educated parties, as is the case here, there is no right to rely. *Lands Inn, Inc., supra.* (citing *Florentine Corp. v. PEDA I., Inc.*, 339 S.E.2d 112, 114 (S.C. 1985)); see also *First Savings Bank, FSB v. Capital Investors, Inc.*, 450 S.E.2d 83 (Ct. App. 1994), *rev'd in part on other grounds*, 459 S.E.2d 307 (S.C. 1995).

Plaintiffs have made a general allegation as to their alleged reliance on BB&T in making their investments in Skywaves, but there are no allegations as to any fiduciary relationship between Defendants and them. Instead, as the bulk of Plaintiffs' allegations reflect, the relationship at issue is the one between BB&T and Skywaves, as creditor-debtor. Plaintiffs have not alleged any specific facts that would create a fiduciary relationship between them, BB&T or Edahl. Accordingly, Plaintiffs have not pled sufficient allegations to establish any right to rely by them, who were not customers of BB&T but, instead, investors in a customer of BB&T. Plaintiffs, as sophisticated, mature parties, have not sufficiently pled and cannot establish that any of them had a right to rely on any alleged false statements by BB&T or Edahl.

2. Plaintiffs cannot sustain a claim against either Defendant for negligence or lender liability.

Additionally, Plaintiffs cannot establish their claim for negligence or lender liability against either Defendant. To prove a claim for negligence, a plaintiff must establish a duty of care, a breach of that duty and damages proximately caused by the breach. *McKnight v. South*

Carolina Dept. of Corrections, 684 S.E.2d 566, 569 (S.C.Ct.App.2009). In this case, neither Defendant had any duty to Plaintiffs.

Plaintiffs allege that "BB&T had a unique power and influence over the day-to-day operations of Skywaves and gave rise to a special relationship with the parties. . . whereby Defendants had a fiduciary duty to Plaintiffs." Plaintiffs further contend that Defendants were in breach of "the special trust and relationship established with the Plaintiffs". However, Plaintiffs cannot manufacture an alleged duty on behalf of either Defendant. Instead, "[d]uty is generally defined as the obligation to conform to a particular standard of conduct toward another." *Murray v. Bank of America, N.A.*, 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct. App. 2003). "Ordinarily, the common law imposes no duty on a person to act." *Id.* "An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Id.* In this case, Defendants did not have any duty to Plaintiffs.

In support of their argument, Plaintiffs contend that a duty of care flows from a bank to its customer. This argument is flawed in part because the relationship between a bank and its customer is generally not fiduciary in nature. See *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986); *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 497, 220 S.E.2d 116, 119 (Ct. App.1975); *Johnson v. Serv. Mgmt., Inc.*, 319 S.C. 165, 167-68, 459 S.E.2d 900, 902 (Ct. App.1995). More importantly, however, Plaintiffs' argument is fundamentally flawed in that while Skywaves may have been a customer of Defendant BB&T, Plaintiffs were not. Defendants did not owe any duty to Plaintiffs and, therefore, Plaintiffs cannot establish their claim for negligence or lender liability.

D. Plaintiffs Cannot Sustain a Claim Against Either Defendant for Violation of the South Carolina Unfair Trade Practices Act.

Finally, Plaintiffs, as investors, have not pled sufficient allegations against Defendants to support a claim for violation of the SCUTPA. Investor claims are generally a federally regulated arena. "Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States . . ." are generally exempt from the provisions of the SCUTPA. S.C. Code Ann. § 39-5-40(a).

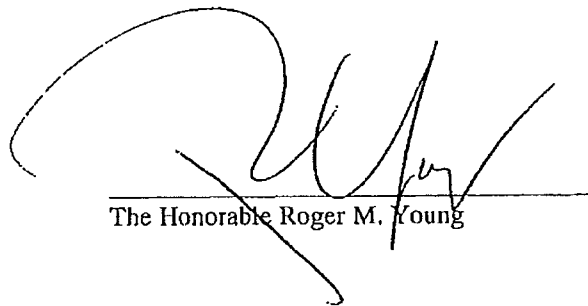
Additionally, to be actionable under the SCUTPA, the unfair or deceptive act or practice must have an impact upon the public interest. *Noack Enterprises, Inc. v. Country Corner Interiors*, 351 S.E.2d 347 (S.C.Ct.App. 1986). Here, Plaintiffs merely offer a conclusion of law that the "unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition." Absent from the Amended Complaints are any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition.

At most, the Amended Complaints allege, in sum, that Defendants promised to but then refused to fund the financing needs of Skywaves. These allegations do not comprise "unfair or deceptive acts" that are actionable under the SCUTPA because business relationships that affect only the parties to the complained-of transaction are not actionable under the SCUTPA. See *Noack Enterprises, Inc.* 351 S.E.2d at 349-50.

III. CONCLUSION

For the reasons set forth herein, it is hereby ORDERED that Defendant BB&T's and Defendant Edahl's Motions to Dismiss are GRANTED and all claims against them are dismissed with prejudice.

AND IT IS SO ORDERED.



The Honorable Roger M. Young

W/ru, 2011
Charleston, South Carolina

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

M. Dawes Cooke, Jr.
mdc@Barnwell-Whaley.com

December 19, 2011

RECEIVED
DEC 21 2011
SC Court of Appeals

Amanda K. Haffenden
Post Office Box 424
Summerville, SC 29484

Re: James J. Kerr, Crayton Walters, and J. T. Main, LLC vs. Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Civil Action No. 2009-CP-10-7515 (Charleston County)

Skywaves I Corporation vs. Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Civil Action No. 2009-CP-10-7516 (Charleston County)

Ron Konersmann vs. Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Civil Action No. 2009-CP-10-7517 (Charleston County)

John Voytko vs. Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Civil Action No. 2009-CP-10-7518 (Charleston County)

Dear Ms. Haffenden:

On August 15, 2011, a hearing was conducted in the above-captioned cases before the Honorable Roger M. Young, Circuit Judge, in Charleston County. Our records indicate that you were the court reporter for that hearing.

I request that you provide me with a transcript of the proceedings. Please transcribe the entire record from that date.

I agree to pay the per page charge for this transcript as provided by Rule 607, SCACR.

William C. Helms, III
M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.

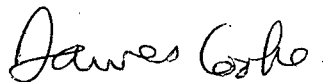
Phillip S. Federigos
K. Michael Barfield
Ernest B. Lipscomb, III*
J. Gail Rahn

Todd M. Musheff
Craig E. Burgess
Lucinda Gardner Wichmann
John W. Fletcher

John A. Jones
Alissa DeCarlo
Barbara J. Wagner, Ph.D.
Jeremy E. Bowers

Amanda K. Haffenden
December 19, 2011
Page 2

Sincerely,

A handwritten signature in cursive script, appearing to read "Dawes Cooke".

M. Dawes Cooke, Jr.

MDCjr/klj

c: S.C. Court Administration
✓ Honorable Tanya Gee, Clerk, S.C. Court of Appeals
Molly Hughes Cherry, Esquire
Andrew K. Epting, Jr., Esquire
George J. Kefalos, Esquire
Brian C. Duffy, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
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V. CLAIRE ALLEN
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January 24, 2012

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Duffy & Young, LLC
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Charleston, SC 29401

Re: Kerr, James v. BB&T
2009-CP-10-07515
Konersmann, Ron v. BB&T
2009-CP-10-07517
Voytko, John v. BB&T
2009-CP-10-07518

Dear Counsel:

We have received the Notice of Appeal in each of the above cases. We intend to consolidate the 3 appeals if we do not receive an objection within fifteen days of the date of this letter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: Molly Hughes Cherry, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
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Re: Kerr, James v. BB&T
2009-CP-10-07515
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2009-CP-10-07518

Dear Counsel:

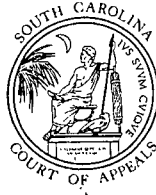
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Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: Molly Hughes Cherry, Esquire



The South Carolina Court of Appeals

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Re: Kerr, James v. BB&T
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Voytko, John v. BB&T
2009-CP-10-07518

Dear Counsel:

We have received the Notice of Appeal in each of the above cases. We intend to consolidate the 3 appeals if we do not receive an objection within fifteen days of the date of this letter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: Molly Hughes Cherry, Esquire



The South Carolina Court of Appeals

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February 22, 2012

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John W. Fletcher, Esquire
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Charleston, SC 29402

Re: Kerr, James v. BB&T
Case Tracking #: **2012205647**
2009-CP-10-07515
2009-CP-10-07517
2009-CP-10-07518

Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. Failure to file in the proper court may result in the dismissal of your appeal. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the bar number and firm name of any counsel shown must be included in his or her address.

Upon review, the caption should read as follows:

2009-CP-10-07515

James J. Kerr, Crayton Walters, and J.T. Main, LLC,

Appellant,

v.

Branch Banking and Trust Company,

Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents.

2009-CP-10-07517

Ron Konersmann,

Appellant,

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents.

2009-CP-10-07518

John Voytko,

Appellant,

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents.

Any future filings by any party to this appeal must feature the above caption.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

I further wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

T. Claire Allen, Deputy

Tanya A. Gee
CLERK

TAG/laf

cc: Molly Hughes Cherry, Esquire

The Supreme Court of South Carolina

RE: Interim Guidance Regarding Personal Data Identifiers and
Other Sensitive Information in Appellate Court Filings

ORDER

Under the Federal Constitution, our State Constitution, and our common law, court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991). Therefore, with some few exceptions, 1 documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts.

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court:2

1. Social Security Numbers. If a social security number must be included, only the last four digits of that number should be used.
2. Names of Minor Children. If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e., John S.) should be used.
3. Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.
4. Home Addresses. If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file. The sealed unredacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall be the same as that required for the brief, record on appeal, motion or other filing that includes the redacted documents.

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e., In the Interest of John S., a Juvenile.)

A party seeking to seal material beyond those personal identifiers listed above, must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings, supra, must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 13, 2007

¹ See, e.g., Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR; Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502, SCACR; Rule 402(n), SCACR; and Rule 403(l), SCACR.

² This restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402, SCACR, requires many of these personal identifiers to be disclosed.



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
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February 22, 2012

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M. Dawes Cooke, Jr., Esquire
John W. Fletcher, Esquire
Barnwell Whaley Patterson
& Helms, LLC
P O Drawer H
Charleston, SC 29402

Re: Kerr, James v. BB&T
Case Tracking #: **2012205647**
2009-CP-10-07515
2009-CP-10-07517
2009-CP-10-07518

Dear Counsel:

Please be advised that the Notices of Appeal filed on behalf of appellants James J. Kerr, Crayton Walters and J.T. Main, LLC, Ron Konersmann, and John Voytko, filed from the written order of the Honorable Roger M. Young dated October 24, 2011, have been combined.

Please notify the court when the transcript has been received.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: Molly Hughes Cherry, Esquire

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

M. Dawes Cooke, Jr.
mdc@Barnwell-Whaley.com

February 24, 2012

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

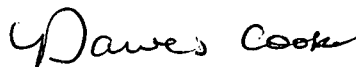
RECEIVED
FEB 27 2012
SC Court of Appeals

Re: Kerr, James v. BB&T
Case Tracking #: 2012205647
2009-CP-10-07515
2009-CP-10-07517
2009-CP-10-07518

Dear Ms. Gee:

This is to advise the Court that we received the transcript in the above matter from the court reporter, Amanda Haffenden, on February 23. Opposing counsel has been provided a copy.

Sincerely,



M. Dawes Cooke, Jr.

MDCjrk/lj

c: S.C. Court Administration
Molly Hughes Cherry, Esquire
Andrew K. Epting, Jr., Esquire
George J. Kefalos, Esquire
Brian C. Duffy, Esquire

William C. Helms, III
M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.

Phillip S. Ferderigos
K. Michael Barfield
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John W. Fletcher

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Alissa D. Fleming
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* Registered patent attorney

ANDREW K. EPTING, JR.

ATTORNEY AT LAW

March 13, 2012

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Re: Kerr, James v. BB&T
Case Tracking #: 2012205647
2009-CP-10-07515
2009-CP-10-07517
2009-CP-10-07518

Dear Ms. Gee:

Our office received the transcript of record on February 23, 2012, making the Appellants' consolidated brief due March 26, 2012. Appellants respectfully request a 30-day extension, until April 25, 2012, to file the Consolidated Initial Brief and Designation of Matter. I am enclosing our check in the amount of \$25.00 for the filing fee.

By copy of this to all counsel of record I am serving them with our request for an extension.

ANDREW K. EPTING, JR., LLC


Andrew K. Epting, Jr.

AKE, Jr./agg

Enclosures as stated

cc: George J. Kefalos, Esquire
Brian C. Duffy, Esquire
M. Dawes Cooke, Esquire
Molly Cherry, Esquire

RECEIVED

MAR 14 2012

SC Court of Appeals

ANDREW K. EPTING, JR., LLC

3 STATE STREET - CHARLESTON, SC - 29401

PHONE: (843) 377-1871 - FAX: (843) 377-1310 - E-MAIL: AKE@EPTING-LAW.COM

ANDREW K. EPTING, JR.

ATTORNEY AT LAW

March 14, 2012

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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Re: Re: Kerr, James v. BB&T
Case Tracking #: 2012205647
2009-CP-10-07515, 2009-CP-10-07517, 2009-CP-10-07518

Dear Ms. Gee:

Yesterday, Appellants requested a 30-day extension, until April 25, 2012, to file the Consolidated Initial Brief and Designation of Matter as the lower court is to hear the Appellants' Motions to Reconsider on March 27, 2012 as well as two motions to dismiss filed by Respondent BB&T in two other Skywaves investors lawsuits that are essentially the same as those appealed from. My office spoke with Lori, the case manager for this consolidated appeal, this morning. Lori indicated that the extension would likely be granted, but that should we seek a further stay of this appeal while the lower court makes its ruling on the motions to reconsider and the motions to dismiss the two other investor's cases, Appellants should file a motion to stay. Lori suggested the Motion to Stay be filed closer to the hearing date to allow more time for the lower court to make its rulings. Lori's suggestion makes practical sense, so Appellants will file a motion for a further stay, should it be necessary depending on the lower court's decisions. Thank you for your time and assistance with this matter.

With kindest regards,

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr.

AKE/agg

Enclosures

cc: George J. Kefalos, Esquire
Brian C. Duffy, Esquire
M. Dawes Cooke, Esquire
Molly Cherry, Esquire

RECEIVED
MAR 15 2012
SC Court of Appeals

ANDREW K. EPTING, JR., LLC

3 STATE STREET - CHARLESTON, SC - 29401

PHONE: (843) 377-1871 - FAX: (843) 377-1310 - E-MAIL: AKE@EPTING-LAW.COM

ANDREW K. EPTING, JR.

ATTORNEY AT LAW

March 22, 2012

VIA FACSIMILE: 803-734-1496

Jenny Abbott Kitchings
Clerk of Court SC Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: Re: Kerr, James v. BB&T
Case Tracking #: 2012205647
2009-CP-10-07515
2009-CP-10-07517
2009-CP-10-07518
Skywaves v. BB&T
Case Tracking #: 2012205929

Dear Ms. Kitchings,

This is to confirm that Molly Cherry, counsel for Respondents, consents to the Appellants' request for an extension of time within which to file their initial briefs and designation of matter in light of the motions pending in the lower court on March 27, 2012.

With kindest regards,

ANDREW K. EPTING, JR., LLC


Andrew K. Epting, Jr.

AKE:agg
Enclosures

cc: Molly Cherry, Esquire
Dawes Cooke, Esquire
George J. Kefalos, Esquire
Brian Duffy, Esquire

ANDREW K. EPTING, JR., LLC

3 STATE STREET -- CHARLESTON, SC -- 29401

PHONE: (843) 377-1871 -- FAX: (843) 377-1310 - E-MAIL: AKE@EPTING-LAW.COM

Dear Ms. Kitchings:

Attached please find Mr. Epting's letter of March 22, 2012 concerning the above-referenced matter.

Angela Gross

Legal Assistant to Andrew K. Epting, Jr., Esquire
and Michelle N. Endemann, Esquire

ANDREW K. EPTING, JR., LLC

3 State Street

Charleston, SC 29401

Telephone: 843.377.1871

Facsimile: 843.377.1310

agg@epting-law.com

The South Carolina Court of Appeals

2009-CP-10-07515

James J. Kerr, Crayton Walters, and
J.T.Main, LLC,

Appellants,

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking
and Trust Company of SC, a/k/a
BB&T, and James Edahl,

Respondents,

2009-CP-10-07517

Ron Konersmann,

Appellant,

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking
and Trust Company of SC, a/k/a
BB&T, and James Edahl,

Respondents,

2009-CP-10-07518

John Voytko,

Appellant,

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking
and Trust Company of SC, a/k/a
BB&T, and James Edahl,

Respondents.

The Honorable Roger M. Young
Charleston County
Trial Court Case No. 2009-CP-10-07515
2009-CP-10-07517
2009-CP-10-07518

ORDER

For good cause having been shown, the time for the Appellants' Initial Brief and Designation of Matter to be served and filed in the above entitled matter is hereby extended until April 25, 2012.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc: Andrew K. Epting, Jr, Esquire
M. Dawes Cooke, Jr., Esquire
John W. Fletcher, Esquire
Molly Hughes Cherry, Esquire

FILED
3/27/12 LAF

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

2009-CP-10-07515

James J. Kerr, Crayton Walters, and J.T.Main, LLC,

Appellants,

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James Edahl,

Respondents.

2009-CP-10-07517

Ron Konersmann,

Appellant,

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James Edahl,

Respondents.

2009-CP-10-07518

John Voytko,

Appellant,

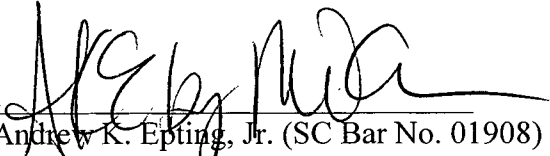
v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James Edahl,

Respondents.

PROOF OF SERVICE

I certify that I have served Appellants' Motion for Extension of Time to file the Initial Consolidated Brief and Designation of Matters on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on April 17, 2012, addressed to their attorney of record, Molly H. Cherry, Esquire, Nexsen Pruet, 205 King Street, Suite 400, Charleston, SC 29401



Andrew K. Epting, Jr. (SC Bar No. 01908)

Andrew K. Epting, Jr., LLC

3 State Street, Charleston, SC 29401

P: (843) 377-1871

F: (843) 377-1310

ake@epting-law.com

Counsel for Appellants J.T. Main, James Kerr, &
Crayton Walters

M. Dawes Cooke, Jr. (SC Bar No. 01376)

Barnwell Whaley Patterson & Helms, LLC

885 Island Park Drive

Charleston, SC 29492

P: (843) 577-7700

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mdc@barnwell-whaley.com

Counsel for Appellants

Brian C. Duffy (SC Bar No. 16247)

Duffy & Young, LLC

96 Broad Street

Charleston, SC 29401

P: (843) 720-2044

F: (843) 720-2047

bduffy@duffyandyoung.com

Counsel for Appellants Ron Konersmann & John
Voytko

On this 17 day of April 2012
Charleston, SC

ANDREW K. EPTING, JR.

ATTORNEY AT LAW

April 17, 2012

VIA FACSIMILE & REGULAR U.S. MAIL

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Re: Kerr, James v. BB&T
Case Tracking #: 2012205647
2009-CP-10-07515, 2009-CP-10-07517, 2009-CP-10-07518

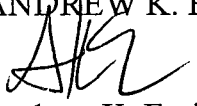
Dear Ms. Kitchings:

Enclosed please find Appellants' Motion for an Extension of time to file their Consolidated Initial Brief and Designation of Matters pending decision from the Honorable Roger M. Young on Appellants' Motions to Reconsider. The Motions to Reconsider were heard by Judge Young on March 27, 2012 together with two motions to dismiss filed by Respondents BB&T in two other Skywaves investors' lawsuits that are essentially the same as those appealed from. Also heard on March 27, 2012 was Skywaves' Motion to Reconsider. Judge Young has indicated written orders on all these motions are forthcoming.

I would greatly appreciate your filing the original Motion and returning a file-stamped copy to me in the self-addressed, stamped envelope provided. Enclosed also is the \$25.00 motion fee.

With kindest regards,

ANDREW K. EPTING, JR., LLC


Andrew K. Epting, Jr.

AKE/agg

Enclosures

cc: George J. Kefalos, Esquire
Brian C. Duffy, Esquire
M. Dawes Cooke, Esquire
Molly Cherry, Esquire
The Honorable Roger M. Young

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APR 19 2012
SC Court of Appeals

ANDREW K. EPTING, JR., LLC

3 STATE STREET, CHARLESTON, SC 29401

PHONE: (843) 377-1871 - FAX: (843) 377-1310 - E-MAIL: AKE@EPTING-LAW.COM

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

2009-CP-10-07515

James J. Kerr, Crayton Walters, and J.T.Main, LLC,

Appellants,

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James Edahl,

Respondents.

2009-CP-10-07517

Ron Konersmann,

Appellant,

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James Edahl,

Respondents.

2009-CP-10-07518

John Voytko,

Appellant,

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James Edahl,

Respondents.

**Appellants' Motion for Extension of Time to file the
Initial Consolidated Brief and Designation of Matters**

Appellants, Ron Konersmann, John Voytko, James Kerr, Crayton Walters and J.T. Main respectfully move for an extension of time within which to file their Initial Consolidated Brief and Designation of Matters on Appeal pending receipt of the Order of the Honorable Roger M. Young involving the claims of two other investors in Skywaves with similar claims to those of

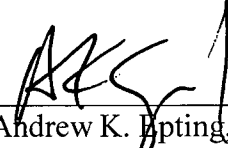
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SC Court of Appeals

the Appellants. Appellants anticipate this Court may desire to consolidate these additional investors' claims with this appeal. Further, Judge Young heard Appellants' Motions to Reconsider on March 27, 2012 and has indicated written orders will follow.

Appellants have consulted with all counsel of record, and all counsel consent to Appellants' extension request.

Respectfully Submitted By:



Andrew K. Epting, Jr. (SC Bar No. 01908)
Andrew K. Epting, Jr., LLC
3 State Street, Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310
ake@epting-law.com

Counsel for Appellants J.T. Main, James Kerr, &
Crayton Walters

M. Dawes Cooke, Jr. (SC Bar No. 01376)
Barnwell Whaley Patterson & Helms, LLC
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P: (843) 577-7700
F: (843) 577-7708
mdc@barnwell-whaley.com

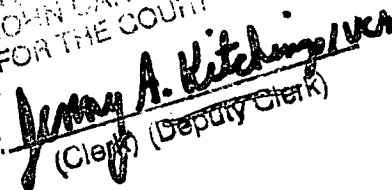
Counsel for Appellants

Brian C. Duffy (SC Bar No. 16247)
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
P: (843) 720-2044
F: (843) 720-2047
bduffy@duffyandyoung.com

Counsel for Appellants Ron Konersmann & John
Voytko

On this 17 day of April 2012
Charleston, SC

GRANTED
JOHN CANNON FEW, C.J.
FOR THE COURT

By: 
(Clerk) (Deputy Clerk)



The South Carolina Court of Appeals

JENNY ABBOTT
KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

May 07, 2012

Mr. Andrew K. Epting, Jr.
3 State St.
Charleston SC 29401

Re: Kerr, James v. BB&T
Appellate Case No. 2012-205647

Dear Counsel:

The following order has been endorsed on the Appellants' Motion for Extension of Time to file the Initial Consolidated Brief and Designation of Matters in the above matter.

"Granted.

By s/ Jenny Abbott Kitchings, Clerk
For the Court

May 7, 2012."

Please be advised that the Appellants' Initial Brief and Designation of Matter must be served and filed no later than May 25, 2012.

Very truly yours,

V. Claire Allen, Deputy
CLERK

cc: John William Fletcher
M. Dawes Cooke, Jr.
Molly Hughes Cherry

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

M. Dawes Cooke, Jr.
mdc@Barnwell-Whaley.com

May 18, 2012

VIA FEDERAL EXPRESS

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Kerr, James v. BB&T
Case Tracking #: 2012205647

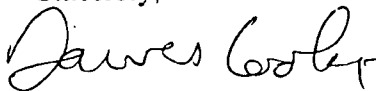
Skywaves I v. Branch Banking and Trust Company of SC
Case Tracking #: 2012205929

Dear Ms. Kitchings:

Enclosed for filing are the original and seven copies of the Appellant's Motion for Extension of Time to file Initial Brief and Designation of Matters in each of the above cases. Also enclosed is our firm check in the amount of \$50.00 for the filing fee for these motions. Please return a clocked copy of each Motion in the enclosed envelope.

By copy of this letter, I am serving the same upon counsel of record. Thank you for your assistance in this matter.

Sincerely,



M. Dawes Cooke, Jr.

MDCjr/klj
Enclosures

c: Molly Hughes Cherry, Esquire
Andrew K. Epting, Jr., Esquire
George J. Kefalos, Esquire
Brian C. Duffy, Esquire

William C. Helms, III
M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.

Phillip S. Ferderigos
K. Michael Barfield
Ernest B. Lipscomb, III*
J. Gail Rahn

Todd M. Musheff
Craig E. Burgess
Lucinda D. Gardner
John W. Fletcher

John A. Jones
Alissa D. Fleming
Barbara J. Wagner, Ph.D.
Jeremy E. Bowers

885 Island Park Drive, Charleston, SC 29492 Mail: P.O. Drawer H, Charleston, SC 29402 P 843.577.7700 F 843.577.7708 www.barnwell-whaley.com

* Registered patent attorney

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SC COURT OF APPEALS

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

2009-CP-10-07515

James J. Kerr, Crayton Walters, and J.T. Main, LLC,

Appellants,

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James Edahl,

Respondents.

2009-CP-10-07517

Ron Konersmann,

Appellant,

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James Edahl,

Respondents.

2009-CP-10-07518

John Voytko,

Appellant,

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James Edahl,

Respondents.

**Appellants' Motion for Extension of Time to file the
Initial Consolidated Brief and Designation of Matters**

3rd

For the reasons set forth below, Appellants, Ron Konersmann, John Voytko, James Kerr, Crayton Walters and J.T. Main, respectfully move for an extension of time within which to file their Initial Consolidated Brief and Designation of Matters for Inclusion in the Record on Appeal:

SC Court of Appeals
MAY 21 2012

1. By Order of this Court, Appellants' Consolidated Initial Brief and Designation of Matters for Inclusion in the Record are due to be filed on or before May 25, 2012.

2. In the underlying cases from which these appeals arise, Plaintiffs have filed Motions to Reconsider the orders presently on appeal.

3. Those Motions have been briefed and argued and are awaiting decision by the Honorable Roger M. Young.

4. Specifically, at the hearing on March 27, 2012 on those matters, Judge Young indicated that a written order will follow.

5. The outcome of those motions may determine the scope of the matters at issue in these appeals.

6. In addition, Appellants believe that the Honorable Roger M. Young will soon issue orders in two additional lawsuits involving the claims of two other investors in Skywaves with similar claims to those of the Appellants.

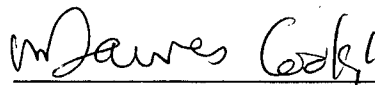
7. Appellants anticipate this Court may desire to consolidate these additional investors' claims with this appeal.

8. Appellants need an extension of time to properly prepare their Initial Brief and to determine the contents of the Record on Appeal.

9. Appellants have consulted with all counsel of record, and all counsel consent to Appellants' extension request.

Therefore, for the foregoing reasons, Appellants respectfully request that this Court grant them an extension of time to file their Initial Consolidated Brief and Designation of Matters for Inclusion in the Record on Appeal until the trial court rules upon the pending motions. In the alternative, Appellants request an extension of thirty (30) days (until June 25, 2012).

Respectfully Submitted By:



M. Dawes Cooke, Jr. (SC Bar No. 01376)
Barnwell Whaley Patterson & Helms, LLC
885 Island Park Drive
Charleston, SC 29492
P: (843) 577-7700
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mdc@barnwell-whaley.com
Counsel for Appellants

Andrew K. Epting, Jr. (SC Bar No. 01908)
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P: (843) 377-1871
F: (843) 377-1310
ake@epting-law.com
Counsel for Appellants J.T. Main, James
Kerr, & Crayton Walters

Brian C. Duffy (SC Bar No. 16247)
Duffy & Young, LLC

96 Broad Street
Charleston, SC 29401
P: (843) 720-2044
F: (843) 720-2047
bduffy@duffyandyoung.com
Counsel for Appellants Ron Konersmann &
John Voytko

Dated: May 16, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

2009-CP-10-07515

James J. Kerr, Crayton Walters, and J.T. Main, LLC,

Appellants,

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James Edahl,

Respondents.

2009-CP-10-07517

Ron Konersmann,

Appellant,

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James Edahl,

Respondents.

2009-CP-10-07518

John Voytko,

Appellant,

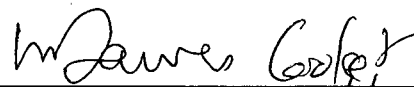
v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James Edahl,

Respondents.

PROOF OF SERVICE

I certify that I have served Appellants' Motion for Extension of Time to file the Initial Consolidated Brief and Designation of Matters for Inclusion in Record on Appeal on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on May 18, 2012, addressed to their attorney of record, Molly H. Cherry, Esquire, Nexsen Pruet, 205 King Street, Suite 400, Charleston, SC 29401.



M. Dawes Cooke, Jr. (SC Bar No. 01376)
Barnwell Whaley Patterson & Helms, LLC
885 Island Park Drive
Charleston, SC 29492
P: (843) 577-7700
F: (843) 577-7708
mdc@barnwell-whaley.com
Counsel for Appellants

Andrew K. Epting, Jr. (SC Bar No. 01908)
Andrew K. Epting, Jr., LLC
3 State Street, Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310
ake@epting-law.com
Counsel for Appellants J.T. Main, James
Kerr, & Crayton Walters

Brian C. Duffy (SC Bar No. 16247)
Duffy & Young, LLC

96 Broad Street
Charleston, SC 29401
P: (843) 720-2044
F: (843) 720-2047
bduffy@duffyandyoung.com
Counsel for Appellants Ron Konersmann &
John Voytko

Dated: May 16, 2012
Charleston, South Carolina

The South Carolina Court of Appeals

2009-CP-10-07515

James J. Kerr, Crayton Walters, and J.T.Main, LLC,
Appellants,

v.

Branch Banking and Trust Company, Successor in
merger to Branch Banking and Trust Company of SC,
a/k/a BB&T, and James Edahl, Respondents,

2009-CP-10-07517

Ron Konersmann, Appellant,

v.

Branch Banking and Trust Company, Successor in
merger to Branch Banking and Trust Company of SC,
a/k/a BB&T, and James Edahl, Respondents,

2009-CP-10-07518

John Voytko, Appellant,

v.

Branch Banking and Trust Company, Successor in
merger to Branch Banking and Trust Company of SC,
a/k/a BB&T, and James Edahl, Respondents.

Appellate Case No. 2012-205647

The Honorable Roger M. Young
Charleston County

ORDER

The time for serving and filing the appellants' initial brief and designation of matter is hereby extended until June 27, 2012.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:

Andrew K. Epting, Jr.
John William Fletcher
M. Dawes Cooke, Jr.
Molly Hughes Cherry

FILED

6-14-12 LAP

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

M. Dawes Cooke, Jr.
mdc@Barnwell-Whaley.com

June 28, 2012

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Kerr, James v. BB&T
Case Tracking #: 2012205647

Skywaves I v. Branch Banking and Trust Company of SC
Case Tracking #: 2012205929

RECEIVED

JUN 29 2012

SC Court of Appeals

Dear Ms. Kitchings:

On May 29, 2012, the Court of Appeals entered an order in Appellate Case No. 2012-205929 (Skywaves I Corporation appeal) holding that appeal in abeyance pending the resolution of motions to reconsider below. The Court further instructed Appellant to provide updates to the Court every 30 days. The Court of Appeals' case manager has indicated that a similar order will follow in Appellate Case No. 2012-205647 (a related appeal consolidating the appeals from three lawsuits below). The following is intended to provide an update to the Court regarding the status of the motions to reconsider pending in these four cases.

On or about June 25, 2012, we received notice from the Court of Common Pleas of Charleston County that orders had been entered upon the Motions for Reconsideration in these cases. These orders either granted, in part, the motions or amended the original orders. The appellants intend to file new notices of appeal from those orders, as appropriate and to move to consolidate those appeals with the pending appeals.

William C. Helms, III
M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.

Phillip S. Ferdigios
K. Michael Barfield
Ernest B. Lipscomb, III*
J. Gail Rahn

Todd M. Musheff
Craig E. Burgess
Lucinda D. Gardner
John W. Fletcher

John A. Jones
Alissa D. Fleming
Barbara J. Wagner, Ph.D.
Jeremy E. Bowers
D. Summers Clarke, II

Sincerely,

A handwritten signature in black ink, appearing to read "Dawes Cooke". The script is fluid and cursive, with the first name "Dawes" and last name "Cooke" clearly distinguishable.

M. Dawes Cooke, Jr.

MDCjr/klj

c: Molly Hughes Cherry, Esquire
Andrew K. Epting, Jr., Esquire
George J. Kefalos, Esquire
Brian C. Duffy, Esquire

ANDREW K. EPTING, JR., L.L.C.
ATTORNEYS AT LAW

July 16, 2012

Amanda K. Haffenden
Post Office Box 424
Summerville, SC 29484

Re: Patricia Konersmann, Appellant v. Branch Banking and Trust Company,
Successor in merger to Branch Banking and Trust Company of SC a/k/a BB&T,
and James Edahl, Respondents
CA No.: 2010-CP-10-9959

Dear Ms. Haffenden,

A hearing was conducted on March 27, 2012 in the above-captioned cases before the Honorable Roger M. Young, Circuit Judge in Charleston County. Our records indicate that you were the court reporter for that hearing.

I request that you provide me with a transcript of the entire proceedings. Please transcribe the entire record from that date.

I agree to pay the per page charge for this transcript as provided by Rule 607, SCACR

With kind regards,

ANDREW K. EPTING, JR., LLC



Michelle N. Endemann
MNE/agg

cc: S. C. Court Administration
Hon. Jenny Abbott Kitchings, Clerk SC Court of Appeals
Molly Hughes Cherry, Esquire

RECEIVED

JUL 18 2012

SC Court of Appeals

64895

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Circuit Court Judge

Case No.: 2010-CP-10-9959

Patricia Konersmann,.....Appellant

v.

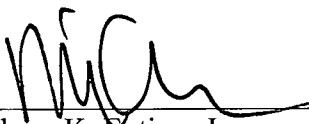
Branch Banking and Trust Company,
Successor in merger to Branch Banking
And Trust Company of SC, a/a BB&T,
And James Edahl..... Respondents

NOTICE OF APPEAL

Plaintiff Patricia Konersmann appeals the Judgment of the Honorable
Roger M. Young dated June 14, 2012 and filed on June 15, 2012 (Exhibit A).
Appellants received written notice of entry of this Judgment on June 28, 2012.

July 16, 2012

ANDREW K. EPTING, JR., LLC

By 
Andrew K. Epting, Jr.
Michelle N. Endemann
46A State Street, Charleston, SC 29401
843-377-1871; Fax: 843-377-1310

Attorneys For Appellant Patricia Konersmann

Counsel of Record for Respondents:

Molly Hughes Cherry, Esquire
Nexsen Pruet, LLC
PO Box 486, Charleston, SC 29402
843-720-1724; 843-414-8209

SC Court of Appeals

JUL 18 2012

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Circuit Court Judge

Case No.: 2010-CP-10-9959

Patricia Konersmann,.....Appellant

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking
And Trust Company of SC, a/a BB&T,
And James Edahl..... Respondents

PROOF OF SERVICE

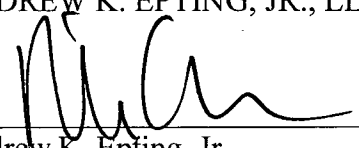
I certify that I have served the Notice of Appeal on all Respondents by
depositing a copy of it in the United States Mail, Postage prepaid, on July 16,
2012, addressed to their attorney of record as follows:

Molly Hughes Cherry, Esquire
Nexsen Pruet, LLC
PO Box 486
Charleston, SC 29402

July 16, 2012

ANDREW K. EPTING, JR., LLC

By


Andrew K. Epting, Jr.
Michelle N. Endemann
46A State Street
Charleston, SC 29401
843-377-1871; Fax: 843-377-1310

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SC Court of Appeals

Attorneys For Appellant Patricia Konersmann

ANDREW K. EPTING, JR., L.L.C.
ATTORNEYS AT LAW

July 16, 2012

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

Re: Patricia Konersmann, Appellant v. Branch Banking and Trust Company,
Successor in merger to Branch Banking and Trust Company of SC a/k/a BB&T,
and James Edahl, Respondents
CA No.: 2010-CP-10-9959

Dear Kitchings:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of service of the Notice of Appeal on the Respondents;
- (2) A copy of the Order which is being challenged on appeal;
- (3) A check in the amount of \$100.00 in payment of the filing fee.

With kind regards,

ANDREW K. EPTING, JR., LLC



Michelle N. Endemann

MNE/agg

Enclosures -- as stated

cc: S. C. Court Administration
Hon. Julie Armstrong, Clerk of Court, Charleston County
Molly Hughes-Cherry, Esquire

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JUL 18 2012
SC Court of Appeals

Andrew K. Epting, Jr. · ake@epting-law.com
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The Honorable Jenny Abbott Kitchings
Clerk Of Court, South Carolina Court Of
P.O. Box 11629
Columbia SC 29211-1629

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Franz X. Meier,

Plaintiff,

vs.

Branch Banking and Trust Company,
Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James
Edahl,

Defendants.

Civil Action No. 2010-CP-10-9926

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS WITH
PREJUDICE**

FILED
JUL 15 AM 8:35
CLERK OF COURT

Patricia Konersmann,

Plaintiff,

vs.

Branch Banking And Trust Company,
Successor in merger to Branch Banking And
Trust Company of SC, a/k/a BB&T, and James
Edahl,

Defendants.

Civil Action No. 2010-CP-10-9959

RECEIVED

JUL 18 2012

SC Court of Appeals

This matter came before the Court on March 27, 2012, on the Motions to Dismiss of Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("BB&T") and Defendant James Edahl ("Edahl"). Plaintiffs and Defendants were represented by counsel at the hearing, and the Court fully considered all evidence presented and the arguments of counsel. For the reasons that follow, the Court grants Defendants' Motions to Dismiss with prejudice.

R

FACTS

This is a lender liability case in which Plaintiffs in both of the cases allege that Defendant BB&T failed to fund the financing needs of Skywaves Corporation I ("Skywaves"), a company in which Plaintiffs were investors and shareholders.

Plaintiffs' allegations do not pertain to any alleged relationship they had with BB&T but, instead, to the relationship between BB&T and Skywaves. Defendant BB&T is a banking institution with branch offices in Charleston, South Carolina, and Defendant Edahl is one of its employees. Skywaves is a company that developed a structural product, specifically cell tower units, for use in the wireless telecommunications industry. To support the manufacture of these individual cell tower units, Skywaves entered into a certain factoring agreement with BB&T in the Spring of 2005 whereby BB&T would purchase certain receivables of Skywaves at a discount and payment of those receivables would then be made to BB&T.

BB&T declared a default by Skywaves under the factoring agreement and stopped the factoring arrangement. Plaintiffs contend the default was improper, as BB&T, acting through its employee Defendant Edahl, promised that BB&T was fully committed to provide all of Skywaves' short-term and long term financial needs for growth. Plaintiffs claim Skywaves went into bankruptcy, resulting in the loss of their investment in Skywaves.

Plaintiffs are not customers of BB&T. BB&T did not lend any money to Plaintiffs. Plaintiffs are not debtors in this case. Plaintiffs had no direct relationship with BB&T whatsoever. All of Plaintiffs' allegations pertain to the relationship between Skywaves and BB&T, and all of Plaintiffs' alleged injuries arise out of Skywaves' bankruptcy filing.

In their Complaints, Plaintiffs assert four claims for: (1) negligent misrepresentation; (2) fraudulent misrepresentation; (3) lender liability/negligence; and (4) violation of the South

Carolina Unfair Trade Practices Act ("SCUTPA").¹ Defendants moved to dismiss all claims pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

LEGAL ANALYSIS

South Carolina Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim for failure to state facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6); *Fleteau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (2003). The question is whether the pleadings, taken in the light most favorable to the plaintiff, articulate a valid claim for relief. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). A Rule 12(b)(6) motion "must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (1997). The Court dismisses these cases because there is no possibility that Plaintiffs will be able to establish liability on the part of either Defendant under any of the claims as alleged in the Complaints.

A. **Section 37-10-107 of the South Carolina Code Bars All of the Plaintiffs' Claims Against Defendants.**

All of Plaintiffs' claims against Defendants are statutorily barred, as a matter of law. Many states, including South Carolina, have enacted specialized statutes concerning loan and credit agreements. These statutes bar enforcement of oral lending agreements and bar fraud and other tort claims based on alleged oral misrepresentations and other non-written conduct concerning these loan agreements. See S.C. Code § 37-10-107.

Specifically, section 37-10-107 of the South Carolina Code Annotated provides:

- (1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

¹ Plaintiff Patricia Konersmann has only asserted three claims for misrepresentation, fraud and negligence/lender liability.

- (a) to lend or borrow money;
 - (b) to defer or forbear in the repayment of money; or
 - (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.
- (2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:
- (a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;
 - (b) promissory or equitable estoppel;
 - (c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or
 - (d) negligent misrepresentation.

S.C. Code Ann. § 37-10-107.

All of Plaintiffs' claims are all based upon alleged statements, promises, or representations made by BB&T or Edahl to Skywaves that BB&T would fund Skywaves' financial needs. Each of the claims is based upon alleged representations made by Defendants to Skywaves.

Plaintiffs have not alleged any material terms or conditions of any agreement with Defendants, nor have Plaintiffs specifically alleged that any such agreement was in fact received by them. Moreover, Plaintiffs have not made any allegations regarding writings purportedly between either of them and either Defendant. The plain wording of Section 37-10-107 requires in pertinent part that "the party seeking to maintain the action or defense [receive] a writing from the party to be charged..." S.C. Code Ann. § 37-10-107(1)(c).

Because Plaintiffs have not alleged or otherwise provided anything in writing to evidence the material terms and conditions of the alleged promises or representations made to them, their claims fail as a matter of law. *See Carolina First Bank v. Lucas*, Case No. 03-CP-10-1907, 2004 WL 5208410 (S.C. Com. Pl. Jun. 14, 2004); *see also Robertson v. First Union Nat'l Bank*, Case No. 99-CP-10-288, 2000 WL 35722762 (S.C. Com. Pl. Aug. 8, 2000). Specifically, Plaintiffs have not alleged that they “received a writing from the party to be charged [*i.e.* BB&T] containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.” S.C. Code Ann. § 37-10-107(1)(c). Accordingly, as a matter of law, Plaintiffs cannot “maintain an action for legal . . . relief . . . based upon [BB&T’s or Edahl’s alleged] failure to lend . . . money [to Skywaves.]” S.C. Code Ann. § 37-10-107(1)(a). Under these circumstances, Plaintiffs cannot establish their claims against Defendants, as a matter of law.

1. The Choice of Law Provision in the Security and Factoring Agreement Between Skywaves and BB&T Does Not Apply to Plaintiffs’ Claims Against Defendants.

Plaintiffs contend that S.C. Code Ann. § 37-10-107 does not apply to the tort claims they have asserted against Defendants. In support of their argument, they cite to a provision in the Factoring and Security Agreement (“Agreement”) between Skywaves and BB&T that the Agreement is governed by North Carolina law. Plaintiffs are not parties to the Agreement and, thus, any choice of law provisions contained therein do not apply in this case. Moreover, the relevant provision in the Agreement pertains to claims arising “under” the Agreement. In the case at hand, Plaintiffs are contending that an agreement existed outside of the Agreement, and that certain promises were made by Defendants outside the Agreement regarding funding of Skywaves. Under the circumstances, there is no basis for Plaintiffs to rely upon a choice of law

provision in a contract to which they were not parties. South Carolina law governs Plaintiffs' claims against Defendants and dictates that the claims be dismissed, as a matter of law.

2. Plaintiffs' Allegations and Claims Arise from an Alleged Failure to Loan Money Such that Section 37-10-107 Applies.

Plaintiffs also contend that because the relationship between BB&T and Skywaves was pursuant to a factoring agreement, it was not a "typical" loan transaction and that S.C. Code Ann. § 37-10-107 does not apply. Plaintiffs ignore, however, that the very allegations in their Complaints, to wit, that the factoring agreement was modified by BB&T such that BB&T agreed to loan money to Skywaves. Moreover, although Plaintiffs attempt to characterize a factoring agreement as an atypical loan transaction, a key purpose of the statute is to protect financial institutions and other lenders from claims that are inconsistent with the written agreements outlining the terms of the transaction. Because the statutes within Title 37 should "be liberally construed and applied to promote [Title 37's] underlying purposes and policies," any question regarding the applicability of section 37-10-107 to the alleged agreement in the Complaints is resolved in Defendants' favor. *See* S.C. Code Ann. § 37-10-102(1).

3. Section 37-10-107 Bars Fraud Claims.

Plaintiffs contend that because section 37-10-107 does not expressly exclude a claim for fraud, her fraud claims are not barred. To that end, Plaintiffs focus on subsection 2(d) of the statute, which bars any action based on "negligent misrepresentation." Plaintiffs argue that because the drafters of the statute specifically singled out actions based on "negligent misrepresentation," but not "intentional misrepresentation," an action based on fraud would not be precluded by the statute. However, South Carolina state and federal trial courts have found that fraud claims are barred by section 37-10-107. *See e.g. Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina*, C.A. No. 2:98-158-23 (S.C. Com. Pl. April 12, 1999)

(citing *Derrick v. Branch Banking and Trust Company of South Carolina*, 96-CP-42-2095 (S.C.Ct.Cm. P. 9/8/98)). This Court agrees and finds that section 37-10-107 bars Plaintiffs' fraud, negligence and unfair trade practices claims.

4. Section 32-3-10(5) Does Not Apply to the Alleged Agreement in the Amended Complaint and Is Not Inconsistent with Section 37-10-107.

Section 37-10-107 provides that "in the event of a conflict between this section and any other provision of law of this State relating to the requirements of a signed writing, the provisions of the other provision of law shall control." S.C. Code § 37-10-107(4). According to Plaintiffs, S.C. Code § 32-3-10(5), which is a more general statute of frauds, "may" be applicable to the dispute and, thus, creates a conflict with section 37-10-107 such that section 32-3-10(5) applies.

Even if section 32-3-10(5) somehow applies in this case, it is not inconsistent with section 37-10-107. The two statutes can be read and construed together. In South Carolina, "[i]f the provisions of the two statutes can be construed so that both can stand, this Court will so construe them." *In the Interest of Shaw*, 265 S.E.2d 522, 524 (S.C. 1980) (citing *City of Spartanburg v. Blalock*, 223 S.C. 252, 75 S.E.2d 361 (1953)). Further, "where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Wilder v. South Carolina Hwy. Dep't*, 90 S.E.2d 635 (S.C. 1955); *see also Ramsey v. County of McCormick*, 412 S.E.2d 408, 410 (S.C. 1991). As the more specific statute on this issue, S.C. Code § 37-10-107 is to be considered a qualifier of section 32-3-10(5).

B. Plaintiffs Fail to Allege Any Conduct on the Part of Either Defendant That Would Support Their Claims.

Notwithstanding that all of Plaintiffs' claims are barred under S.C. Code Ann. § 37-10-107, this Court alternatively dismisses the claims because while Skywaves may have been a customer of Defendant BB&T, Plaintiffs were not. Defendants did not owe any duty to Plaintiffs and, therefore, Plaintiffs cannot establish their claim for negligence or lender liability.

C. Plaintiffs Cannot Sustain a Claim Against Either Defendant for Violation of the South Carolina Unfair Trade Practices Act.

Finally, Plaintiff Meier, as an investor, has not pled sufficient allegations against Defendants to support a claim for violation of the SCUTPA. Investor claims are generally a federally regulated arena: "Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States . . . " are generally exempt from the provisions of the SCUTPA. S.C. Code Ann. § 39-5-40(a).

Additionally, to be actionable under the SCUTPA, the unfair or deceptive act or practice must have an impact upon the public interest. *Noack Enterprises, Inc. v. Country Corner Interiors*, 351 S.E.2d 347 (S.C.Ct.App. 1986). Here, Plaintiff Meier merely offers a conclusion of law that the unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition. Absent from the Complaint are any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition.

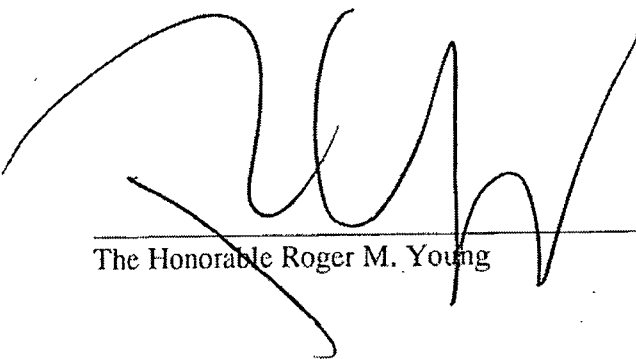
At most, the Complaint alleges, in sum, that Defendants promised to but then refused to fund the financing needs of Skywaves. These allegations do not comprise "unfair or deceptive acts" that are actionable under the SCUTPA because business relationships that affect only the parties to the complained-of transaction are not actionable under the SCUTPA. See *Noack Enterprises, Inc.* 351 S.E.2d at 349-50.

III. CONCLUSION

For the reasons set forth herein, it is hereby ORDERED that Defendant BB&T's and Defendant Edahl's Motions to Dismiss are GRANTED and all claims against them are dismissed with prejudice.

AND IT IS SO ORDERED.

6/14, 2012
Charleston, South Carolina



The Honorable Roger M. Young

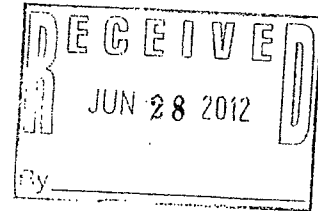
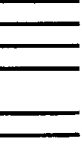
JULIE J. ARMSTRONG

CLERK OF COURT, C.P. & G.S.
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www3.charlestoncounty.org



Andrew K. Epting Jr
Andrew K. Epting, LLC
3 State St.
Charleston, SC 29401

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order/granting defnts' motions to dismiss with prej

CASE NO: 2010CP1009959

**Patricia Konersmann VS Branch Banking And Trust Company As Successor In Merger Etal,
defendant, et a**

This judgment was entered on the 15th day of June, 2012, and a copy mailed first class on Tuesday, June 19, 2012, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at www3.charlestoncounty.org.

Re-served 6-26-12



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29201
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August 22, 2012

Mr. Andrew K. Epting, Jr.
46 A State Street
Charleston SC 29401

Mr. John William Fletcher
Mr. M. Dawes Cooke, Jr.
PO Drawer H
Charleston SC 29402-0197

Re: Kerr, James v. BB&T
Appellate Case No. 2012-205647
Lower Court Case No. 2009-CP-10-07515
2009-CP-10-07517
2009-CP-10-07518

Dear Counsel:

This Court has received multiple notices of appeal in this matter. These appeals will be consolidated for consideration by the Court under the South Carolina Appellate Court Rules (SCACR), and we anticipate receiving one record on appeal. The times for perfecting this appeal will run from the service of the last notice of appeal.

Within ten days of the date of this letter, the appellant must order the transcript. Copies of all correspondence regarding the transcript must be provided to the Court and all parties.

Very truly yours,
V. Claire Allen, Deputy
CLERK

cc: Molly Hughes Cherry

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

M. Dawes Cooke, Jr.
mdc@Barnwell-Whaley.com

July 27, 2012

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SC Court of Appeals

VIA FACSIMILE

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: **Kerr, James v. BB&T**
Case Tracking #: 2012205647

Skywaves I v. Branch Banking and Trust Company of SC
Case Tracking #: 2012205929

Dear Ms. Kitchings:

On May 29, 2012, the Court of Appeals entered an order in Appellate Case No. 2012-205929 (Skywaves I Corporation appeal) holding that appeal in abeyance pending the resolution of Rule 59 motions to reconsider in the trial court. The Court further instructed Appellant to provide updates to the Court every 30 days. The Court of Appeals' case manager had indicated that a similar order will follow in Appellate Case No. 2012-205647 (a related appeal consolidating the appeals from three lawsuits below). The following is intended to provide an update to the Court regarding the status of the motions to reconsider pending in these four cases.

On or about June 25, 2012, we received notice from the Court of Common Pleas of Charleston County that orders had been entered upon the Motions for Reconsideration in these cases. These orders either granted, in part, the motions or amended the original orders. The appellants intend to file new notices of appeal from those orders, as appropriate and to move to consolidate those appeals with the pending appeals.

In light of the trial court's recent orders, the Appellants are moving to withdraw the appeal in Appellate Case No. 2012-205929 (Skywaves I Corporation appeal).

William C. Helms, III
M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.

Phillip S. Federigos
K. Michael Barfield
Ernest B. Lipscomb, III*
J. Gail Rahn

Todd M. Musheff
Craig E. Burgess
Lucinda D. Gardner
John W. Fletcher

John A. Jones
Alissa D. Fleming
Barbara J. Wagner, Ph.D.
Jeremy E. Bowers
D. Summers Clarke, II

As to the three trial court cases comprising consolidated Appellate Case No. 2012-205647 — 2009-CP-10-7515 (James J. Kerr, *et al.*), 2009-CP-10-7517 (Ron Konersmann), and 2009-CP-10-7518 (John Voytko) — the Appellants have filed and served notices of appeal from the trial court's recent amended orders. In addition, a notice of appeal was filed in a fourth related case on behalf of Patricia Konersmann (Case No. 2010-CP-10-9959). These appellants have ordered the transcript of proceedings as required by the Rule of Appellate Procedure. The appellants in those lawsuits will be moving this Court to consolidate all appeals (including the prior pending appeal) into a single appeal.

Sincerely,

A handwritten signature in black ink, appearing to read "Dawes", with a stylized flourish at the end.

M. Dawes Cooke, Jr.

MDCjr/klj

c: Molly Hughes Cherry, Esquire
Andrew K. Epting, Jr., Esquire
George J. Kefalos, Esquire
Brian C. Duffy, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7515

James J. Kerr, Crayton Walters, and JT Main, LLC..... Appellants

v.

Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T,
and James Edahl..... Respondents

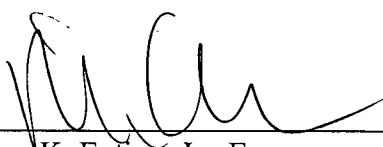
NOTICE OF APPEAL

Plaintiffs James J. Kerr, Crayton Walters, and JT Main, LLC appeal the Judgment of the Honorable Roger M. Young, dated June 14, 2012 and filed on June 15, 2012, granting Respondents' Motion to Dismiss, in the form of an Order Amending Order Granting Defendants' Motion to Dismiss Amended Complaint with Prejudice Dated November 16, 2011 (attached hereto as Exhibit A). Plaintiffs/Appellants received written notice of entry of this Judgment on June 25, 2012 (mailed on June 19, 2012). Plaintiffs/Appellants previously filed an appeal from the Court's November 16, 2011 Order, which was amended by the Order at issue in this Notice of Appeal, following a Rule 59(e) motion to alter or amend. That appeal is pending in the South Carolina Court of Appeals at Appellate Case No. 2012-205647.

July 10 2012

SC Court of Appeals
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ANDREW K. EPTING, JR., LLC

By: 
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M. Dawes Cooke, Jr., Esq.
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Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708

***Attorneys for Appellants James J. Kerr,
Crayton Walters, and JT Main, LLC***

Other Counsel of Record:
Molly Hughes Cherry, Esq.
Nexsen Pruet, LLC
P.O. Box 486
Charleston, SC 29402
(843) 720-1724 Fax: (843) 414-8209
MCherry@NexsenPruet.com

***Attorneys for Respondents Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl***

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7515

James J. Kerr, Crayton Walters, and JT Main, LLC..... Appellants

v.

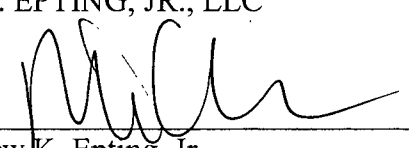
Branch Banking & Trust Company, successor in merger to
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and James Edahl..... Respondents

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on July 16, 2012, addressed to their attorney of record, Molly Hughes Cherry, Esq., Nexsen Pruet, LLC, P.O. Box 486, Charleston, SC 29402.

July 16, 2012

ANDREW K. EPTING, JR., LLC

By 

Andrew K. Epting, Jr.

Michelle N. Endemann

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843-377-1871; Fax: 843-377-1310

ATTORNEYS FOR APPELLANTS

speedy 10-18-12

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QIA 10-18-12

ANDREW K. EPTING, JR., L.L.C.
ATTORNEYS AT LAW

July 16, 2012

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

Re: James J. Kerr, CRaytonWalters, and J.T. Main, Appellants v. Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC a/k/a BB&T, and James Edahl, Respondents
CA No.: 2009-CP-10-07515

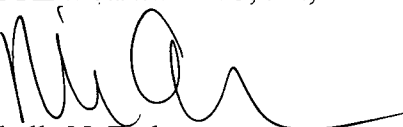
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- (1) Proof of service of the Notice of Appeal on the Respondents;
- (2) A copy of the Order which is being challenged on appeal;
- (3) A check in the amount of \$100.00 in payment of the filing fee.

With kind regards,

ANDREW K. EPTING, JR., LLC


Michelle N. Endemann

MNE/agg

Enclosures – as stated

cc: S. C. Court Administration
Hon. Julie Armstrong, Clerk of Court, Charleston County
Molly Hughes Cherry, Esquire

SC Court of Appeals
JUL 18 2012
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The Honorable Jenny Abbott Kitchings
Clerk Of Court, South Carolina Court Of
P.O. Box 11629
Columbia SC 29211-1629

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

JAMES J. KERR, CRAYTON WALTERS,
and J.T. MAIN, LLC,

Civil Action No. 2009-CP-10-07515

Plaintiffs,

vs.

BRANCH BANKING AND TRUST
COMPANY, Successor in merger to
BRANCH BANKING AND TRUST
COMPANY OF SC, a/k/a BB&T, and JAMES
EDAHL,

**ORDER AMENDING ORDER
GRANTING DEFENDANTS' MOTIONS
TO DISMISS AMENDED COMPLAINT
WITH PREJUDICE
DATED NOVEMBER 16, 2011**

Defendants.

RON KONERSMANN,

Civil Action No. 2009-CP-10-7515

Plaintiff,

vs.

BRANCH BANKING AND TRUST
COMPANY, successor in merger to BRANCH
BANKING AND TRUST COMPANY OF SC,
a/k/a BB&T, and JAMES EDAHL,

Defendants.

JOHN VOYTKO,

Civil Action No. 2009-CP-10-7518

Plaintiffs,

vs.

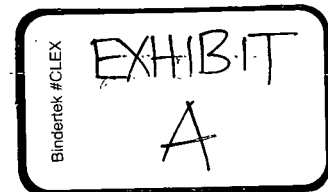
BRANCH BANKING AND TRUST
COMPANY, successor in merger to BRANCH
BANKING AND TRUST COMPANY OF SC,
a/k/a BB&T, and JAMES EDAHL,

Defendants.

FILED

JUN 15 AM 8:35
JULIE J. ARMSTRONG
CLERK OF COURT

RECEIVED
JUL 18 2012
SC Court of Appeals



Handwritten signature or initials.

In this Order, I modify my previous ruling dated November 16, 2011 as follows:

I. FACTS

This is a lender liability case in which Plaintiffs in each of the three captioned cases allege that Defendant BB&T failed to fund the financing needs of Skywaves Corporation I. ("Skywaves"), a company in which each Plaintiff was an investor. Plaintiffs John Voytko and Ron Konersmann were also officers in Skywaves.

Plaintiffs' allegations do not pertain to any alleged relationship they had with BB&T but, instead, to the relationship between BB&T and Skywaves. Defendant BB&T is a banking institution with branch offices in Charleston, South Carolina, and Defendant Edahl is one of its employees. Skywaves is a company that developed a structural product, specifically cell tower units, for use in the wireless telecommunications industry. To support the manufacture of these individual cell tower units, Skywaves entered into a certain factoring agreement with BB&T in the Spring of 2005 whereby BB&T would purchase certain receivables of Skywaves at a discount and payment of those receivables would then be made to BB&T.

In January of 2008, BB&T declared a default by Skywaves under the factoring agreement. Plaintiffs contend the default was improper, as BB&T, acting through its employee Defendant Edahl, promised that BB&T "would fund all [Skywaves'] financial needs." Plaintiffs claim the improper default caused Skywaves to go into bankruptcy and resulted in the loss of their investment in Skywaves and the loss of the salaries for Plaintiffs Voytko and Konersmann.

Plaintiffs are not customers of BB&T. BB&T did not lend any money to Plaintiffs. Plaintiffs are not debtors in this case. Plaintiffs had no direct relationship with BB&T whatsoever. All of Plaintiffs' allegations pertain to the relationship between Skywaves and BB&T, and all of Plaintiffs' alleged injuries arise out of Skywaves' bankruptcy filing. Plaintiffs have filed proofs of claim against Skywaves in the bankruptcy proceeding.

In their Amended Complaints, Plaintiffs assert four claims for: (1) negligent misrepresentation; (2) fraudulent misrepresentation; (3) negligence; and (4) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").¹ Defendants moved to dismiss all four claims pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

II. LEGAL ANALYSIS

South Carolina Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim for failure to state facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6); *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (2003). The question is whether the pleadings, taken in the light most favorable to the plaintiff, articulate a valid claim for relief. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). A Rule 12(b)(6) motion "must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (1997). The Court dismisses these cases because there is no possibility that Plaintiffs will be able to establish liability on the part of either Defendant under any of the claims as alleged in the Amended Complaints.

A. Section 37-10-107 of the South Carolina Code Bars All of the Plaintiffs' Claims Against Defendants.

All of Plaintiffs' claims against Defendants are statutorily barred, as a matter of law. Many states, including South Carolina, have enacted specialized statutes concerning loan and credit agreements. These statutes bar enforcement of oral lending agreements and bar fraud and other tort claims based on alleged oral misrepresentations and other non-written conduct concerning these loan agreements. See S.C. Code § 37-10-107.

Specifically, section 37-10-107 of the South Carolina Code Annotated provides:

¹ Plaintiffs Kerr, Walters and J.T. Main, LLC have only asserted three claims for negligent misrepresentation, fraudulent inducement and negligence/lender liability.

(1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

(a) to lend or borrow money;

(b) to defer or forbear in the repayment of money; or

(c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

(2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:

(a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;

(b) promissory or equitable estoppel;

(c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or

(d) negligent misrepresentation.

S.C. Code Ann. § 37-10-107.

All of Plaintiffs' claims are all based upon alleged statements, promises, or representations made by BB&T or Edahl to Skywaves that BB&T "would fund all [Skywaves'] financial needs." Each of the claims is based upon alleged representations made by Defendants to Skywaves.

Plaintiffs make general reference to representations made "in writing;" but Plaintiffs have not alleged any material terms or conditions of any agreement with Defendants nor have Plaintiffs specifically alleged that any such agreement was in fact received by them. Plaintiffs have made a number of allegations regarding writings purportedly between BB&T and Skywaves, but Plaintiffs, although investors in Skywaves, cannot rely on such writings to defeat

the plain wording of Section 37-10-107 which, as stated above, requires in pertinent part that “the party seeking to maintain the action or defense [receive] a writing from the party to be charged...” S.C. Code Ann. § 37-10-107(1)(c).

Because Plaintiffs have not alleged or otherwise provided anything in writing to evidence the material terms and conditions of the alleged promises or representations made to them, their claims fail as a matter of law. *See Carolina First Bank v. Lucas*, Case No. 03-CP-10-1907, 2004 WL 5208410 (S.C. Com. Pl. Jun. 14, 2004); *see also Robertson v. First Union Nat’l Bank*, Case No. 99-CP-10-288, 2000 WL 35722762 (S.C. Com. Pl. Aug. 8, 2000). Specifically, Plaintiffs have not alleged that they “received a writing from the party to be charged [*i.e.* BB&T] containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.” S.C. Code Ann. § 37-10-107(1)(c). Accordingly, as a matter of law, Plaintiffs cannot “maintain an action for legal . . . relief . . . based upon [BB&T’s or Edahl’s alleged] failure to lend . . . money [to Skywaves.]” S.C. Code Ann. § 37-10-107(1)(a). Under these circumstances, Plaintiffs cannot establish their claims against Defendants, as a matter of law.

1. The Choice of Law Provision in the Security and Factoring Agreement Between Skywaves and BB&T Does Not Apply to Plaintiffs’ Claims Against Defendants.

Plaintiffs contend that S.C. Code Ann. § 37-10-107 does not apply to the tort claims they have asserted against Defendants. In support of their argument, Plaintiffs cite to a provision in the Factoring and Security Agreement (“Agreement”) between Skywaves and BB&T that the Agreement is governed by North Carolina law. Plaintiffs are not parties to the Agreement and, thus, any choice of law provisions contained therein do not apply in these cases. Moreover, the relevant provision in the Agreement pertains to claims arising “under” the Agreement. In the

case at hand, Plaintiffs are contending that an agreement existed outside of the Agreement, and that certain promises were made by Defendants outside the Agreement regarding funding of Skywaves. Under the circumstances, there is no basis for Plaintiffs to rely upon a choice of law provision in a contract to which they were not parties. South Carolina law governs Plaintiffs' claims against Defendants and dictates that the claims be dismissed, as a matter of law.

2. Plaintiffs' Allegations and Claims Arise from an Alleged Failure to Loan Money Such that Section 37-10-107 Applies.

Plaintiffs also contend that because the relationship between BB&T and Skywaves was pursuant to a factoring agreement, it was not a "typical" loan transaction and that S.C. Code Ann. § 37-10-107 does not apply. Plaintiffs ignore, however, that the very allegations in their Amended Complaints, to wit, that the factoring agreement was modified by BB&T such that BB&T agreed to loan money to Skywaves. Specifically, Plaintiffs allege there was no "need for Skywaves to either invoice or manufacture the product. In this way, BB&T agreed to advance the costs of manufacturing." Moreover, although Plaintiffs attempt to characterize a factoring agreement as an atypical loan transaction, a key purpose of the statute is to protect financial institutions and other lenders from claims that are inconsistent with the written agreements outlining the terms of the transaction. Because the statutes within Title 37 should "be liberally construed and applied to promote [Title 37's] underlying purposes and policies," any question regarding the applicability of section 37-10-107 to the alleged agreement in the Amended Complaint is resolved in Defendant's favor. See S.C. Code Ann. § 37-10-102(1).

3. Section 37-10-107 Bars Fraud Claims.

Plaintiffs contend that because section 37-10-107 does not expressly exclude a claim for fraud, their fraud claims are not barred. To that end, Plaintiffs focus on subsection 2(d) of the statute, which bars any action based on "negligent misrepresentation." Plaintiffs argue that

because the drafters of the statute specifically singled out actions based on “negligent misrepresentation,” but not “intentional misrepresentation,” an action based on fraud would not be precluded by the statute. However, South Carolina state and federal trial courts have found that fraud claims are barred by section 37-10-107. *See e.g. Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina*, C.A. No. 2:98-158-23 (S.C. Com. Pl. April 12, 1999) (citing *Derrick v. Branch Banking and Trust Company of South Carolina*, 96-CP-42-2095 (S.C.Ct.Cm. P. 9/8/98)). This Court agrees and finds that section 37-10-107 bars Plaintiffs’ fraud, negligence and unfair trade practices claims.

4. Section 32-3-10(5) Does Not Apply to the Alleged Agreement in the Amended Complaint and Is Not Inconsistent with Section 37-10-107.

Section 37-10-107 provides that “in the event of a conflict between this section and any other provision of law of this State relating to the requirements of a signed writing, the provisions of the other provision of law shall control.” S.C. Code § 37-10-107(4). According to Plaintiffs, S.C. Code § 32-3-10(5), which is a more general statute of frauds, “may” be applicable to the dispute and, thus, creates a conflict with section 37-10-107 such that section 32-3-10(5) applies.

Even if section 32-3-10(5) somehow applies in this case, it is not inconsistent with section 37-10-107. The two statutes can be read and construed together. In South Carolina, “[i]f the provisions of the two statutes can be construed so that both can stand, this Court will so construe them.” *In the Interest of Shaw*, 265 S.E.2d 522, 524 (S.C. 1980) (citing *City of Spartanburg v. Blalock*, 223 S.C. 252, 75 S.E.2d 361 (1953)). Further, “where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.” *Wilder v. South Carolina Hwy.*

Dep't, 90 S.E.2d 635 (S.C. 1955); *see also Ramsey v. County of McCormick*, 412 S.E.2d 408, 410 (S.C. 1991). As the more specific statute on this issue, S.C. Code § 37-10-107 is to be considered a qualifier of section 32-3-10(5).

B. Plaintiffs Fail to Allege Any Conduct on the Part of Either Defendant That Would Support Their Claims.

Notwithstanding that all of Plaintiffs' claims are barred under S.C. Code Ann. § 37-10-107, this Court alternatively dismisses the claims because while Skywaves may have been a customer of Defendant BB&T, Plaintiffs were not. Defendants did not owe any duty to Plaintiffs and, therefore, Plaintiffs cannot establish their claim for negligence or lender liability.

C. Plaintiffs Cannot Sustain a Claim Against Either Defendant for Violation of the South Carolina Unfair Trade Practices Act.

Finally, Plaintiffs, as investors, have not pled sufficient allegations against Defendants to support a claim for violation of the SCUTPA. Investor claims are generally a federally regulated arena. "Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States" are generally exempt from the provisions of the SCUTPA. S.C. Code Ann. § 39-5-40(a).

Additionally, to be actionable under the SCUTPA, the unfair or deceptive act or practice must have an impact upon the public interest. *Noack Enterprises, Inc. v. Country Corner Interiors*, 351 S.E.2d 347 (S.C.Ct.App. 1986). Here, Plaintiffs merely offer a conclusion of law that the "unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition." Absent from the Amended Complaints are any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition.

At most, the Amended Complaints allege, in sum, that Defendants promised to but then refused to fund the financing needs of Skywaves. These allegations do not comprise "unfair or

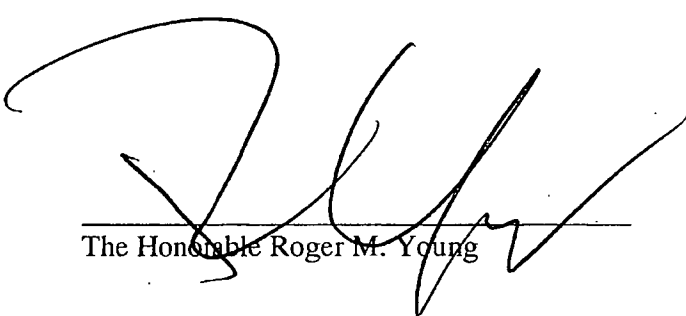
deceptive acts” that are actionable under the SCUTPA because business relationships that affect only the parties to the complained-of transaction are not actionable under the SCUTPA. *See Noack Enterprises, Inc.* 351 S.E.2d at 349–50.

III. CONCLUSION

For the reasons set forth herein, it is hereby ORDERED that Defendant BB&T’s and Defendant Edahl’s Motions to Dismiss are GRANTED and all claims against them are dismissed with prejudice.

AND IT IS SO ORDERED.

6/14, 2011
Charleston, South Carolina



The Honorable Roger M. Young

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7517

RECEIVED
JUL 18 2012
SC Court of Appeals

Ron Konersmann Appellant

v.

Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T,
and James Edahl..... Respondents

NOTICE OF APPEAL

Plaintiff/Appellant Ron Konersmann appeals the Judgment of the Honorable Roger M. Young, dated June 14, 2012 and filed on June 15, 2012, granting Respondents' Motion to Dismiss, in the form of an Order Amending Order Granting Defendants' Motion to Dismiss Amended Complaint with Prejudice Dated November 16, 2011 (attached hereto as Exhibit A). Plaintiff/Appellant received written notice of entry of this Judgment on June 25, 2012 (mailed on June 19, 2012). Plaintiff/Appellant previously filed an appeal from the Court's November 16, 2011 Order, which was amended by the Order at issue in this Notice of Appeal, following a Rule 59(e) motion to alter or amend. That appeal is pending in the South Carolina Court of Appeals at Appellate Case No. 2012-205647.

BARNWELL WHALEY
PATTERSON & HELMS, LLC

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Attorneys for Appellant Ron Konersmann

July 16, 2012

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***Attorneys for Respondents Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl***

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on July 16, 2012, addressed to their attorney of record, Molly Hughes Cherry, Esq., Nexsen Pruet, LLC, P.O. Box 486, Charleston, SC 29402.

BARNWELL WHALEY
PATTERSON & HELMS, LLC

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since 1938

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July 16, 2012

RECEIVED
JUL 18 2012
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Ron Konersmann v. Branch Banking & Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl
Case No.: 2009-CP-10-7517

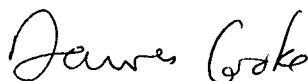
Dear Ms. Kitchings:

Enclosed for filing are the following:

- (1) Notice of Appeal with attached Proof of Service;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) A filing fee of \$100.00.

Please return the clocked copy in the enclosed envelope. By copy of this letter, I am serving the same upon counsel of record.

Sincerely,



M. Dawes Cooke, Jr.

MDCjr/klj

Enclosure

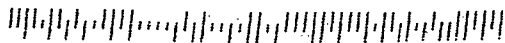
c: Molly Hughes Cherry, Esq.
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B.C. Killough*
Randell C. Stoney, Jr.

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Todd M. Musheff
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Lucinda D. Gardner
John W. Fletcher

John A. Jones
Alissa D. Fleming
Barbara J. Wagner, Ph.D.
Jeremy E. Bowers
D. Summers Clarke, II



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professionals
since 1938

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3496.001

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

JAMES J. KERR, CRAYTON WALTERS,
and J.T. MAIN, LLC,

Civil Action No. 2009-CP-10-07515

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**ORDER AMENDING ORDER
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TO DISMISS AMENDED COMPLAINT
WITH PREJUDICE
DATED NOVEMBER 16, 2011**

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case at hand, Plaintiffs are contending that an agreement existed outside of the Agreement, and that certain promises were made by Defendants outside the Agreement regarding funding of Skywaves. Under the circumstances, there is no basis for Plaintiffs to rely upon a choice of law provision in a contract to which they were not parties. South Carolina law governs Plaintiffs' claims against Defendants and dictates that the claims be dismissed, as a matter of law.

2. Plaintiffs' Allegations and Claims Arise from an Alleged Failure to Loan Money Such that Section 37-10-107 Applies.

Plaintiffs also contend that because the relationship between BB&T and Skywaves was pursuant to a factoring agreement, it was not a "typical" loan transaction and that S.C. Code Ann. § 37-10-107 does not apply. Plaintiffs ignore, however, that the very allegations in their Amended Complaints, to wit, that the factoring agreement was modified by BB&T such that BB&T agreed to loan money to Skywaves. Specifically, Plaintiffs allege there was no "need for Skywaves to either invoice or manufacture the product. In this way, BB&T agreed to advance the costs of manufacturing." Moreover, although Plaintiffs attempt to characterize a factoring agreement as an atypical loan transaction, a key purpose of the statute is to protect financial institutions and other lenders from claims that are inconsistent with the written agreements outlining the terms of the transaction. Because the statutes within Title 37 should "be liberally construed and applied to promote [Title 37's] underlying purposes and policies," any question regarding the applicability of section 37-10-107 to the alleged agreement in the Amended Complaint is resolved in Defendant's favor. See S.C. Code Ann. § 37-10-102(1).

3. Section 37-10-107 Bars Fraud Claims.

Plaintiffs contend that because section 37-10-107 does not expressly exclude a claim for fraud, their fraud claims are not barred. To that end, Plaintiffs focus on subsection 2(d) of the statute, which bars any action based on "negligent misrepresentation." Plaintiffs argue that

because the drafters of the statute specifically singled out actions based on “negligent misrepresentation,” but not “intentional misrepresentation,” an action based on fraud would not be precluded by the statute. However, South Carolina state and federal trial courts have found that fraud claims are barred by section 37-10-107. See e.g. *Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina*, C.A. No. 2:98-158-23 (S.C. Com. Pl. April 12, 1999) (citing *Derrick v. Branch Banking and Trust Company of South Carolina*, 96-CP-42-2095 (S.C.Ct.Cm. P. 9/8/98)). This Court agrees and finds that section 37-10-107 bars Plaintiffs’ fraud, negligence and unfair trade practices claims.

4. Section 32-3-10(5) Does Not Apply to the Alleged Agreement in the Amended Complaint and Is Not Inconsistent with Section 37-10-107.

Section 37-10-107 provides that “in the event of a conflict between this section and any other provision of law of this State relating to the requirements of a signed writing, the provisions of the other provision of law shall control.” S.C. Code § 37-10-107(4). According to Plaintiffs, S.C. Code § 32-3-10(5), which is a more general statute of frauds, “may” be applicable to the dispute and, thus, creates a conflict with section 37-10-107 such that section 32-3-10(5) applies.

Even if section 32-3-10(5) somehow applies in this case, it is not inconsistent with section 37-10-107. The two statutes can be read and construed together. In South Carolina, “[i]f the provisions of the two statutes can be construed so that both can stand, this Court will so construe them.” *In the Interest of Shaw*, 265 S.E.2d 522, 524 (S.C. 1980) (citing *City of Spartanburg v. Blalock*, 223 S.C. 252, 75 S.E.2d 361 (1953)). Further, “where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.” *Wilder v. South Carolina Hwy.*

Dep't, 90 S.E.2d 635 (S.C. 1955); *see also Ramsey v. County of McCormick*, 412 S.E.2d 408, 410 (S.C. 1991). As the more specific statute on this issue, S.C. Code § 37-10-107 is to be considered a qualifier of section 32-3-10(5).

B. Plaintiffs Fail to Allege Any Conduct on the Part of Either Defendant That Would Support Their Claims.

Notwithstanding that all of Plaintiffs' claims are barred under S.C. Code Ann. § 37-10-107, this Court alternatively dismisses the claims because while Skywaves may have been a customer of Defendant BB&T, Plaintiffs were not. Defendants did not owe any duty to Plaintiffs and, therefore, Plaintiffs cannot establish their claim for negligence or lender liability.

C. Plaintiffs Cannot Sustain a Claim Against Either Defendant for Violation of the South Carolina Unfair Trade Practices Act.

Finally, Plaintiffs, as investors, have not pled sufficient allegations against Defendants to support a claim for violation of the SCUTPA. Investor claims are generally a federally regulated arena. "Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States . . ." are generally exempt from the provisions of the SCUTPA. S.C. Code Ann. § 39-5-40(a).

Additionally, to be actionable under the SCUTPA, the unfair or deceptive act or practice must have an impact upon the public interest. *Noack Enterprises, Inc. v. Country Corner Interiors*, 351 S.E.2d 347 (S.C.Ct.App. 1986). Here, Plaintiffs merely offer a conclusion of law that the "unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition." Absent from the Amended Complaints are any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition.

At most, the Amended Complaints allege, in sum, that Defendants promised to but then refused to fund the financing needs of Skywaves. These allegations do not comprise "unfair or

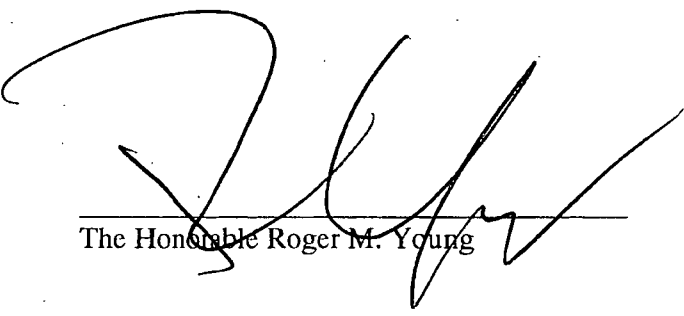
deceptive acts” that are actionable under the SCUTPA because business relationships that affect only the parties to the complained-of transaction are not actionable under the SCUTPA. *See Noack Enterprises, Inc.* 351 S.E.2d at 349–50.

III. CONCLUSION

For the reasons set forth herein, it is hereby ORDERED that Defendant BB&T’s and Defendant Edahl’s Motions to Dismiss are GRANTED and all claims against them are dismissed with prejudice.

AND IT IS SO ORDERED.

6/14, 2011
Charleston, South Carolina



The Honorable Roger M. Young

64908

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

M. Dawes Cooke, Jr.
mdc@barnwell-whaley.com

July 16, 2012

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: John Voytko v. Branch Banking & Trust Company, successor in merger to Branch Banking
and Trust Company of SC, a/k/a BB&T, and James Edahl
Case No.: 2009-CP-10-7518

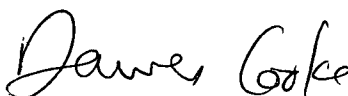
Dear Ms. Kitchings:

Enclosed for filing are the following:

- (1) Notice of Appeal with attached Proof of Service;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) A filing fee of \$100.00.

Please return the clocked copy in the enclosed envelope. By copy of this letter, I am serving the same upon counsel of record.

Sincerely,



M. Dawes Cooke, Jr.

MDCjr/klj

Enclosure

c: Molly Hughes Cherry, Esq.
John P. Linton, Esq.
Brian C. Duffy, Esq.

RECEIVED
JUL 18 2012
SC Court of Appeals

William C. Helms, III
M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.

Phillip S. Ferderigos
K. Michael Barfield
Ernest B. Lipscomb, III*
J. Gail Rahn

Todd M. Musheff
Craig E. Burgess
Lucinda D. Gardner
John W. Fletcher

John A. Jones
Alissa D. Fleming
Barbara J. Wagner, Ph.D.
Jeremy E. Bowers
D. Summers Clarke, II

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7518

RECEIVED

JUL 18 2012

SC Court of Appeals

John Voytko Appellant

v.

Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T,
and James Edahl Respondents

NOTICE OF APPEAL

Plaintiff/Appellant John Voytko appeals the Judgment of the Honorable Roger M. Young, dated June 14, 2012 and filed on June 15, 2012, granting Respondents' Motion to Dismiss, in the form of an Order Amending Order Granting Defendants' Motion to Dismiss Amended Complaint with Prejudice Dated November 16, 2011 (attached hereto as Exhibit A). Plaintiff/Appellant received written notice of entry of this Judgment on June 25, 2012 (mailed on June 19, 2012). Plaintiff/Appellant previously filed an appeal from the Court's November 16, 2011 Order, which was amended by the Order at issue in this Notice of Appeal, following a Rule 59(e) motion to alter or amend. That appeal is pending in the South Carolina Court of Appeals at Appellate Case No. 2012-205647.

BARNWELL WHALEY
PATTERSON & HELMS, LLC

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Attorneys for Appellant John Voytko

July 16, 2012

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***Attorneys for Respondents Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl***

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

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Case No. 2009-CP-10-7518

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JUL 18 2012

SC Court of Appeals

John Voytko Appellant

v.

Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T,
and James Edahl..... Respondents

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on July 16, 2012, addressed to their attorney of record, Molly Hughes Cherry, Esq., Nexsen Pruet, LLC, P.O. Box 486, Charleston, SC 29402.

BARNWELL WHALEY
PATTERSON & HELMS, LLC

By: M. Dawes Cooke, Jr.

M. Dawes Cooke, Jr., Esq.

John W. Fletcher, Esq.

885 Island Park Drive (29492)

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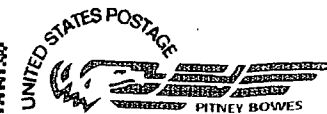
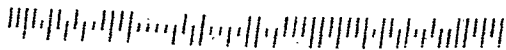
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PATTERSON & HELMS LLC

Attorneys for
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since 1938

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3496.001

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

JAMES J. KERR, CRAYTON WALTERS,
and J.T. MAIN, LLC,

Civil Action No. 2009-CP-10-07515

Plaintiffs,

vs.

BRANCH BANKING AND TRUST
COMPANY, Successor in merger to
BRANCH BANKING AND TRUST
COMPANY OF SC, a/k/a BB&T, and JAMES
EDAHL,

**ORDER AMENDING ORDER
GRANTING DEFENDANTS' MOTIONS
TO DISMISS AMENDED COMPLAINT
WITH PREJUDICE
DATED NOVEMBER 16, 2011**

Defendants.

RON KONERSMANN,

Civil Action No. 2009-CP-10-7518

Plaintiff,

vs.

BRANCH BANKING AND TRUST
COMPANY, successor in merger to BRANCH
BANKING AND TRUST COMPANY OF SC,
a/k/a BB&T, and JAMES EDAHL,

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JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Defendants.

SC Court of Appeals

JOHN VOYTKO,

Civil Action No. 2009-CP-10-7518

Plaintiffs,

vs.

BRANCH BANKING AND TRUST
COMPANY, successor in merger to BRANCH
BANKING AND TRUST COMPANY OF SC,
a/k/a BB&T, and JAMES EDAHL,

Defendants.

R

In this Order, I modify my previous ruling dated November 16, 2011 as follows:

I. FACTS

This is a lender liability case in which Plaintiffs in each of the three captioned cases allege that Defendant BB&T failed to fund the financing needs of Skywaves Corporation I. (“Skywaves”), a company in which each Plaintiff was an investor. Plaintiffs John Voytko and Ron Konersmann were also officers in Skywaves.

Plaintiffs’ allegations do not pertain to any alleged relationship they had with BB&T but, instead, to the relationship between BB&T and Skywaves. Defendant BB&T is a banking institution with branch offices in Charleston, South Carolina, and Defendant Edahl is one of its employees. Skywaves is a company that developed a structural product, specifically cell tower units, for use in the wireless telecommunications industry. To support the manufacture of these individual cell tower units, Skywaves entered into a certain factoring agreement with BB&T in the Spring of 2005 whereby BB&T would purchase certain receivables of Skywaves at a discount and payment of those receivables would then be made to BB&T.

In January of 2008, BB&T declared a default by Skywaves under the factoring agreement. Plaintiffs contend the default was improper, as BB&T, acting through its employee Defendant Edahl, promised that BB&T “would fund all [Skywaves’] financial needs.” Plaintiffs claim the improper default caused Skywaves to go into bankruptcy and resulted in the loss of their investment in Skywaves and the loss of the salaries for Plaintiffs Voytko and Konersmann.

Plaintiffs are not customers of BB&T. BB&T did not lend any money to Plaintiffs. Plaintiffs are not debtors in this case. Plaintiffs had no direct relationship with BB&T whatsoever. All of Plaintiffs’ allegations pertain to the relationship between Skywaves and BB&T, and all of Plaintiffs’ alleged injuries arise out of Skywaves’ bankruptcy filing. Plaintiffs have filed proofs of claim against Skywaves in the bankruptcy proceeding.

In their Amended Complaints, Plaintiffs assert four claims for: (1) negligent misrepresentation; (2) fraudulent misrepresentation; (3) negligence; and (4) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").¹ Defendants moved to dismiss all four claims pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

II. LEGAL ANALYSIS

South Carolina Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim for failure to state facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6); *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (2003). The question is whether the pleadings, taken in the light most favorable to the plaintiff, articulate a valid claim for relief. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). A Rule 12(b)(6) motion "must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (1997). The Court dismisses these cases because there is no possibility that Plaintiffs will be able to establish liability on the part of either Defendant under any of the claims as alleged in the Amended Complaints.

A. Section 37-10-107 of the South Carolina Code Bars All of the Plaintiffs' Claims Against Defendants.

All of Plaintiffs' claims against Defendants are statutorily barred, as a matter of law. Many states, including South Carolina, have enacted specialized statutes concerning loan and credit agreements. These statutes bar enforcement of oral lending agreements and bar fraud and other tort claims based on alleged oral misrepresentations and other non-written conduct concerning these loan agreements. *See* S.C. Code § 37-10-107.

Specifically, section 37-10-107 of the South Carolina Code Annotated provides:

¹ Plaintiffs Kerr, Walters and J.T. Main, LLC have only asserted three claims for negligent misrepresentation, fraudulent inducement and negligence/lender liability.

(1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

- (a) to lend or borrow money;
- (b) to defer or forbear in the repayment of money; or
- (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

(2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:

- (a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;
- (b) promissory or equitable estoppel;
- (c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or
- (d) negligent misrepresentation.

S.C. Code Ann. § 37-10-107.

All of Plaintiffs' claims are all based upon alleged statements, promises, or representations made by BB&T or Edahl to Skywaves that BB&T "would fund all [Skywaves'] financial needs." Each of the claims is based upon alleged representations made by Defendants to Skywaves.

Plaintiffs make general reference to representations made "in writing;" but Plaintiffs have not alleged any material terms or conditions of any agreement with Defendants nor have Plaintiffs specifically alleged that any such agreement was in fact received by them. Plaintiffs have made a number of allegations regarding writings purportedly between BB&T and Skywaves, but Plaintiffs, although investors in Skywaves, cannot rely on such writings to defeat

the plain wording of Section 37-10-107 which, as stated above, requires in pertinent part that “the party seeking to maintain the action or defense [receive] a writing from the party to be charged...” S.C. Code Ann. § 37-10-107(1)(c).

Because Plaintiffs have not alleged or otherwise provided anything in writing to evidence the material terms and conditions of the alleged promises or representations made to them, their claims fail as a matter of law. *See Carolina First Bank v. Lucas*, Case No. 03-CP-10-1907, 2004 WL 5208410 (S.C. Com. Pl. Jun. 14, 2004); *see also Robertson v. First Union Nat’l Bank*, Case No. 99-CP-10-288, 2000 WL 35722762 (S.C. Com. Pl. Aug. 8, 2000). Specifically, Plaintiffs have not alleged that they “received a writing from the party to be charged [*i.e.* BB&T] containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.” S.C. Code Ann. § 37-10-107(1)(c). Accordingly, as a matter of law, Plaintiffs cannot “maintain an action for legal . . . relief . . . based upon [BB&T’s or Edahl’s alleged] failure to lend . . . money [to Skywaves.]” S.C. Code Ann. § 37-10-107(1)(a). Under these circumstances, Plaintiffs cannot establish their claims against Defendants, as a matter of law.

1. The Choice of Law Provision in the Security and Factoring Agreement Between Skywaves and BB&T Does Not Apply to Plaintiffs’ Claims Against Defendants.

Plaintiffs contend that S.C. Code Ann. § 37-10-107 does not apply to the tort claims they have asserted against Defendants. In support of their argument, Plaintiffs cite to a provision in the Factoring and Security Agreement (“Agreement”) between Skywaves and BB&T that the Agreement is governed by North Carolina law. Plaintiffs are not parties to the Agreement and, thus, any choice of law provisions contained therein do not apply in these cases. Moreover, the relevant provision in the Agreement pertains to claims arising “under” the Agreement. In the

case at hand, Plaintiffs are contending that an agreement existed outside of the Agreement, and that certain promises were made by Defendants outside the Agreement regarding funding of Skywaves. Under the circumstances, there is no basis for Plaintiffs to rely upon a choice of law provision in a contract to which they were not parties. South Carolina law governs Plaintiffs' claims against Defendants and dictates that the claims be dismissed, as a matter of law.

2. Plaintiffs' Allegations and Claims Arise from an Alleged Failure to Loan Money Such that Section 37-10-107 Applies.

Plaintiffs also contend that because the relationship between BB&T and Skywaves was pursuant to a factoring agreement, it was not a "typical" loan transaction and that S.C. Code Ann. § 37-10-107 does not apply. Plaintiffs ignore, however, that the very allegations in their Amended Complaints, to wit, that the factoring agreement was modified by BB&T such that BB&T agreed to loan money to Skywaves. Specifically, Plaintiffs allege there was no "need for Skywaves to either invoice or manufacture the product. In this way, BB&T agreed to advance the costs of manufacturing." Moreover, although Plaintiffs attempt to characterize a factoring agreement as an atypical loan transaction, a key purpose of the statute is to protect financial institutions and other lenders from claims that are inconsistent with the written agreements outlining the terms of the transaction. Because the statutes within Title 37 should "be liberally construed and applied to promote [Title 37's] underlying purposes and policies," any question regarding the applicability of section 37-10-107 to the alleged agreement in the Amended Complaint is resolved in Defendant's favor. See S.C. Code Ann. § 37-10-102(1).

3. Section 37-10-107 Bars Fraud Claims.

Plaintiffs contend that because section 37-10-107 does not expressly exclude a claim for fraud, their fraud claims are not barred. To that end, Plaintiffs focus on subsection 2(d) of the statute, which bars any action based on "negligent misrepresentation." Plaintiffs argue that

because the drafters of the statute specifically singled out actions based on “negligent misrepresentation,” but not “intentional misrepresentation,” an action based on fraud would not be precluded by the statute. However, South Carolina state and federal trial courts have found that fraud claims are barred by section 37-10-107. *See e.g. Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina*, C.A. No. 2:98-158-23 (S.C. Com. Pl. April 12, 1999) (citing *Derrick v. Branch Banking and Trust Company of South Carolina*, 96-CP-42-2095 (S.C.Ct.Cm. P. 9/8/98)). This Court agrees and finds that section 37-10-107 bars Plaintiffs’ fraud, negligence and unfair trade practices claims.

4. Section 32-3-10(5) Does Not Apply to the Alleged Agreement in the Amended Complaint and Is Not Inconsistent with Section 37-10-107.

Section 37-10-107 provides that “in the event of a conflict between this section and any other provision of law of this State relating to the requirements of a signed writing, the provisions of the other provision of law shall control.” S.C. Code § 37-10-107(4). According to Plaintiffs, S.C. Code § 32-3-10(5), which is a more general statute of frauds, “may” be applicable to the dispute and, thus, creates a conflict with section 37-10-107 such that section 32-3-10(5) applies.

Even if section 32-3-10(5) somehow applies in this case, it is not inconsistent with section 37-10-107. The two statutes can be read and construed together. In South Carolina, “[i]f the provisions of the two statutes can be construed so that both can stand, this Court will so construe them.” *In the Interest of Shaw*, 265 S.E.2d 522, 524 (S.C. 1980) (citing *City of Spartanburg v. Blalock*, 223 S.C. 252, 75 S.E.2d 361 (1953)). Further, “where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.” *Wilder v. South Carolina Hwy.*

Dep't, 90 S.E.2d 635 (S.C. 1955); *see also Ramsey v. County of McCormick*, 412 S.E.2d 408, 410 (S.C. 1991). As the more specific statute on this issue, S.C. Code § 37-10-107 is to be considered a qualifier of section 32-3-10(5).

B. Plaintiffs Fail to Allege Any Conduct on the Part of Either Defendant That Would Support Their Claims.

Notwithstanding that all of Plaintiffs' claims are barred under S.C. Code Ann. § 37-10-107, this Court alternatively dismisses the claims because while Skywaves may have been a customer of Defendant BB&T, Plaintiffs were not. Defendants did not owe any duty to Plaintiffs and, therefore, Plaintiffs cannot establish their claim for negligence or lender liability.

C. Plaintiffs Cannot Sustain a Claim Against Either Defendant for Violation of the South Carolina Unfair Trade Practices Act.

Finally, Plaintiffs, as investors, have not pled sufficient allegations against Defendants to support a claim for violation of the SCUTPA. Investor claims are generally a federally regulated arena. "Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States . . ." are generally exempt from the provisions of the SCUTPA. S.C. Code Ann. § 39-5-40(a).

Additionally, to be actionable under the SCUTPA, the unfair or deceptive act or practice must have an impact upon the public interest. *Noack Enterprises, Inc. v. Country Corner Interiors*, 351 S.E.2d 347 (S.C.Ct.App. 1986). Here, Plaintiffs merely offer a conclusion of law that the "unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition." Absent from the Amended Complaints are any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition.

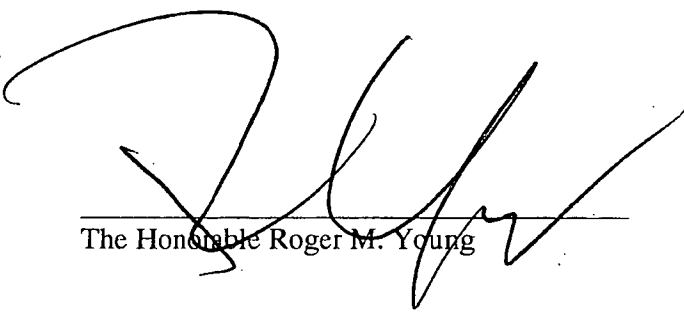
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deceptive acts” that are actionable under the SCUTPA because business relationships that affect only the parties to the complained-of transaction are not actionable under the SCUTPA. *See Noack Enterprises, Inc.* 351 S.E.2d at 349–50.

III. CONCLUSION

For the reasons set forth herein, it is hereby ORDERED that Defendant BB&T’s and Defendant Edahl’s Motions to Dismiss are GRANTED and all claims against them are dismissed with prejudice.

AND IT IS SO ORDERED.



The Honorable Roger M. Young

6/14, 2011
Charleston, South Carolina



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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August 20, 2012

Mr. Andrew K. Epting, Jr.
46 A State Street
Charleston SC 29401

Re: Patricia Konersmann v. BB&T
Appellate Case No. 2012-212514

Dear Counsel:

This Court has received your notice of appeal, and the case has been assigned the appellate case number that appears above. Please use this number on all future correspondence relating to this matter.

All parties to this matter are advised that all filings must comply with the requirements of Rule 267 of the South Carolina Appellate Court Rules (SCACR). The SCACR are available online at www.sccourts.org/courtreg. Additionally, any filings submitted by counsel admitted in South Carolina must include counsel's bar number.

The attention of the parties is directed to the order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. The order can be found at www.sccourts.org/courtOrders/HTMLFiles/2007-08-13-02.htm. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will *not* review filings for redaction or to determine if materials should be sealed.

Very truly yours,


CLERK

cc: Molly Hughes Cherry

65655
25
105635
25

ANDREW K. EPTING, JR., L.L.C.
ATTORNEYS AT LAW

September 17, 2012

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

Re: Patricia Konersmann, Appellant v. Branch Banking and Trust Company,
Successor in merger to Branch Banking and Trust Company of SC a/k/a BB&T,
and James Edahl, Respondents
CA No.: 2010-CP-10-9959
Appellate Case No.: 2012-212514

Dear Kitchings:

Enclosed for filing is Appellant's Motion for Consolidation in the above case. Also enclosed are the following:

- (1) Proof of service of the Motion on the Respondents; and
- (2) A check in the amount of \$100.00 in payment of the filing fee.

With kind regards,

ANDREW K. EPTING, JR., LLC

s/ Michelle

Michelle N. Endemann

MNE/agg

Enclosures – as stated

cc: S. C. Court Administration
Molly Hughes Cherry, Esquire

RECEIVED
SEP 24 2012
SC Court of Appeals

Andrew K. Epting, Jr. · ake@epting-law.com
Michelle N. Endemann · mne@epting-law.com
46A State Street · Charleston · South Carolina · 29401
Phone: (843) 377-1871 · Fax: (843) 377-1310

65650

ANDREW K. EPTING, JR., L.L.C.
ATTORNEYS AT LAW

September 17, 2012

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

Re: Patricia Konersmann, Appellant v. Branch Banking and Trust Company,
Successor in merger to Branch Banking and Trust Company of SC a/k/a BB&T,
and James Edahl, Respondents
CA No.: 2010-CP-10-9959
Appellate Case No.: 2012-212514

Dear Kitchings:

Enclosed for filing is Appellant's Motion for Consolidation in the above case. Also enclosed are the following:

- (1) Proof of service of the Motion on the Respondents; and
- (2) A check in the amount of \$25.00 in payment of the filing fee.

With kind regards,

ANDREW K. EPTING, JR., LLC

s/ Michelle

Michelle N. Endemann

MNE/agg

Enclosures – as stated

cc: S. C. Court Administration
Molly Hughes Cherry, Esquire

TO WHOM IT MAY
CONCERN:
ENCLOSED IS THE
\$25 MOTION FEE
WHICH WAS OMITTED
FROM MY ORIGINAL
MOTION!

RECEIVED

SEP 24 2012

SC Court of Appeals

Andrew K. Epting, Jr. · ake@epting-law.com
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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SEP 24 2012

SC Court of Appeals

The Honorable Roger M. Young, Circuit Court Judge
Appellate Case No. 2012-212514

Patricia Konersmann,

Appellant,

v.

Branch Banking and Trust Company,
Successor in merger to Branch Banking and
Trust Company of SC, a/k/a BB&T, and James Edahl,

Respondents.

Appellant's Motion for Consolidation

On October 26, 2011 the Honorable Roger M. Young granted Respondents Branch Banking and Trust Co. of South Carolina ("BB&T") and James Edahl's motion to dismiss the complaints of Appellants, Ron Konersmann, John Voytko, James Kerr, Crayton Walters, J.T. Main. Appellants appealed and this Court, on its own initiative, consolidated these appeals into Consolidated Appeal No. 2012-205647.

Consolidated Appellants filed motions to reconsider in the lower court, and the Consolidated Appeal was stayed pending the outcome of the motions to reconsider. Judge Young denied the motions to reconsider in an order dated June 14, 2012, and the Consolidated Appellants filed appeals of the denial of the motions to reconsider which have now been consolidated by the Court, on its own initiative, into the present Consolidated Appeal.

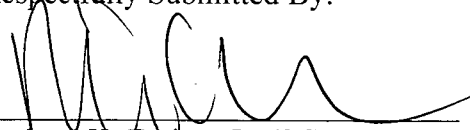
Judge Young also heard and granted BB&T and Edahl's motion to dismiss the complaint of another Skywaves' investor, Patricia Konersmann. Mrs. Konersmann filed an

appeal of Judge Young's Order on July 16, 2012 which has been assigned Appellate Case No. 2012-212514.

Patricia Konersmann respectfully requests her appeal, no. 2012-212514 be consolidated with Case No. 2012-205647 as Mrs. Konersmann and Consolidated Appellants are all investors of Skywaves I Corporation ("Skywaves") and the cases arise from a common set of facts and law.

Appellants have consulted with all counsel of record, and all counsel, including counsel for the Respondents, consent to Appellants' request to consolidate these cases for appeal.

Respectfully Submitted By:



Andrew K. Epting, Jr. (SC Bar No. 01908)
Michelle N. Endemann (SC Bar No. 79894)
Andrew K. Epting, Jr., LLC
3 State Street, Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310
ake@epting-law.com

On this 11 day of September 2012
Charleston, SC

GRANTED
JOHN CANNON FEW, C.J.
FOR THE COURT

By: V. Claire Allen
() (Deputy Clerk)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SEP 24 2012

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

SC Court of Appeals

Roger M. Young, Circuit Court Judge

Appellate Case No.: 2012-212514

Patricia Konersmann, ...Appellant

v.

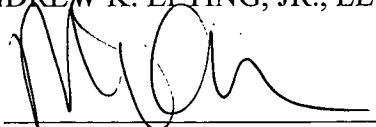
Branch Banking and Trust Company,
Successor in merger to Branch Banking
And Trust Company of SC, a/a BB&T,
And James Edahl..... Respondents

PROOF OF SERVICE

I certify that I have served Appellant's Motion for Consolidation on all Respondents by depositing a copy of it in the United States Mail, Postage prepaid, on September 17, 2012, addressed to their attorney of record as follows:

Molly Hughes Cherry, Esquire
Nexsen Pruet, LLC
PO Box 486
Charleston, SC 29402

ANDREW K. EPTING, JR., LLC

By 

Andrew K. Epting, Jr.
Michelle N. Endemann
46A State Street
Charleston, SC 29401
843-377-1871; Fax: 843-377-1310

Attorneys For Appellant Patricia Konersmann



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

September 28, 2012

Mr. Andrew K. Epting, Jr.
46 A State Street
Charleston SC 29401

Mr. John William Fletcher
PO Drawer H
Charleston SC 29402-0197

Re: Kerr, James v. BB&T
Appellate Case No. 2012-205647
2009-CP-10-07515
2009-CP-10-07517
2009-CP-10-07518
2010-CP-10-09959

Dear Counsel:

The following order has been endorsed on your motion for consolidation in the above matter.

"Granted.

FOR THE COURT

By s/ V. CLAIRE ALLEN
DEPUTY CLERK

September 28, 2012."

Please be advised the caption will now show as follows:

2009-CP-10-07515

James J. Kerr, Crayton Walters, and J.T. Main, LLC, Appellants,

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents,

2009-CP-10-07517

Ron Konersmann, Appellant,

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents,

2009-CP-10-07518

John Voytko, Appellant,

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents.

2010-CP-10-09959

Patricia Konersmann, Appellant,

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents.

Please notify the court when the transcripts have been received.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: M. Dawes Cooke, Jr.
Molly Hughes Cherry
Michelle Nicole Endemann
John P. Linton
Brian C Duffy

ANDREW K. EPTING, JR., L.L.C.
ATTORNEYS AT LAW

October 12, 2012

Jenny Abbott Kitchings
South Carolina Court of Appeals
Clerk of Court
P.O. Box 11629
Columbia, SC 29211

Re: Kerr, James v. BB&T
Appellate Case No. 2012-205647
2009-CP-1 0-07515
2009-CP-10-07517
2009-CP-1 0-07 518
201 0-CP-1 0-09959

Dear Ms. Kitchings:

This is to advise that we have received the transcript from the Court Reporter on October 12, 2012 making the Appellant's brief due November 12, 2012.

With kindest regards,

ANDREW K. EPTING, JR., LLC

/s/ Drew

Andrew K. Epting
AKE/

cc: S. C. Court Administration
Molly Hughes Cherry, Esquire
M. Dawes Cooke, Jr., Esquire
Brian C. Duffy, Esquire
John P. Linton, Esquire
John W. Fletcher

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OCT 15 2012

SC Court of Appeals

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Phone: (843) 377-1871 · Fax: (843) 377-1310

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

M. Dawes Cooke, Jr.
mdc@Barnwell-Whaley.com

November 13, 2012

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Kerr, James v. BB&T
Appellate Case No.: 2012-205647

RECEIVED

NOV 14 2012

SC Court of Appeals

Dear Ms. Kitchings:

Enclosed for filing are the following:

- 1) Original and one copy of the Appellants' Consolidated Initial Brief, and Proof of Service for same;
- 2) Original and one copy of the Designation of Matter for Inclusion in the Record, and Proof of Service for same; and
- 3) Original and one copy of Rule 209(c) Certification.

Please return the clocked copies to me in the enclosed envelope. By copy of this letter, I am serving copies on counsel of record.

Sincerely,



M. Dawes Cooke, Jr.

MDCjr/klj

Enclosures

c: Molly Hughes Cherry, Esquire
Andrew K. Epting, Jr., Esquire
Brian C. Duffy, Esquire

William C. Helms, III
M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.

Phillip S. Ferderigos
K. Michael Barfield
Ernest B. Lipscomb, III*
J. Gail Rahn

Todd M. Musheff
Craig E. Burgess
Lucinda D. Gardner
John W. Fletcher

John A. Jones
Alissa D. Fleming
Barbara J. Wagner, Ph.D.
Jeremy E. Bowers
D. Summers Clarke, II

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
No. 2012-205647

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

Roger M. Young, Circuit Court Judge

Cases 2009-CP-10-07515, 2009-CP-10-07517,
2009-CP-10-07518 and 2010-CP-10-09959

RECEIVED
NOV 14 2012
SC Court of Appeals

2009-CP-10-07515

James J. Kerr, Crayton Walters, and J.T. Main, LLC, ... Appellants,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

2009-CP-10-07517

Ron Konersmann, ... Appellant,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

2009-CP-10-07518

John Voytko, ... Appellant,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

2010-CP-10-09959

Patricia Konersmann, ... Appellant,

v.

Branch Banking & Trust Company, Successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

DESIGNATION OF MATTER FOR INCLUSION IN THE RECORD

M. Dawes Cooke, Jr., Esq.
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John Voytko***

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***Attorneys for Appellants Patricia Konersmann,
James J. Kerr, Crayton Walters, and JT Main,
LLC***

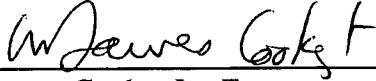
In accordance with the SCRAP, Rule 209, Appellants propose that the following be included in the Record on Appeal:

1. December 3, 2009 Initial Complaint in *James J. Kerr, et al. v. Branch Banking & Trust Co, et al.*
2. December 3, 2009 Initial Complaint in *Ron Konersmann v. Branch Banking & Trust Co., et al.*
3. December 3, 2009 Initial Complaint in *John Voytko v. Branch Banking & Trust Co., et al.*
4. February 12, 2010 Amended Complaint in *James J. Kerr, et al. v. Branch Banking & Trust Co, et al.*
5. February 12, 2010 Amended Complaint in *Ron Konersmann v. Branch Banking & Trust Co., et al.*
6. February 12, 2010 Amended Complaint in *John Voytko v. Branch Banking & Trust Co., et al.*
7. February 26, 2010 Motions to Dismiss Amended Complaint in *James J. Kerr, et al. v. Branch Banking & Trust Co, et al.* (Federal Docket Entries ## 17-18)
8. February 26, 2010 Motions to Dismiss Amended Complaint in *Ron Konersmann v. Branch Banking & Trust Co., et al.* (Federal Docket Entries ## 17-18)
9. February 26, 2010 Motions to Dismiss Amended Complaint in *John Voytko v. Branch Banking & Trust Co., et al.* (Federal Docket Entries ## 17-18)
10. June 21, 2010 Order Remanding *Ron Konersmann, Kerr and Voytko* Cases
11. December 3, 2010 Initial Complaint in *Patricia Konersmann v. Branch Banking & Trust Co., et al.*
12. January 5, 2011 Motion to Dismiss in *Patricia Konersmann v. Branch Banking & Trust Co., et al.*
13. August 11, 2011 Omnibus Memorandum in Opposition to Motions to Dismiss Amended Complaints — Exhibit C: Factoring and Security Agreement

14. August 11, 2011 Omnibus Memorandum in Opposition to Motions to Dismiss Amended Complaints — Exhibit D: March 2, 2007 Letter from James Edahl
15. August 11, 2011 Omnibus Memorandum in Opposition to Motions to Dismiss Amended Complaints — Exhibit E: March 20, 2007 E-mail from Morris Castlen
16. Transcript of August 15, 2011 Hearing, at pp. 25-41
17. November 1, 2011 Order Granting Defendants' Motions to Dismiss in *Ron Konersmann, Kerr and Voytko* Cases
18. November 18, 2011 Motion to Reconsider in *James J. Kerr, et al. v. Branch Banking & Trust Co, et al.*
19. November 18, 2011 Motion to Reconsider in *Ron Konersmann v. Branch Banking & Trust Co., et al.*
20. November 18, 2011 Motion to Reconsider in *John Voytko v. Branch Banking & Trust Co., et al.*
21. December, 2011 Initial Notice of Appeal in *James J. Kerr, et al. v. Branch Banking & Trust Co, et al.*
22. December, 2011 Initial Notice of Appeal in *Ron Konersmann v. Branch Banking & Trust Co., et al.*
23. December, 2011 Initial Notice of Appeal in *John Voytko v. Branch Banking & Trust Co., et al.*
24. June 15, 2012 Order Amending Order Granting Defendants' Motions to Dismiss the Amended Complaint with Prejudice Dated November 16, 2011 (sic) in *Ron Konersmann, Kerr and Voytko* Cases
25. June 15, 2012 Order Granting Defendants' Motion to Dismiss with Prejudice in *Patricia Konersmann v. Branch Banking & Trust Co., et al.*
26. July 17, 2012 Notice of Appeal in *James J. Kerr, et al. v. Branch Banking & Trust Co, et al.*
27. July 17, 2012 Notice of Appeal in *Ron Konersmann v. Branch Banking & Trust Co., et al.*
28. July 17, 2012 Notice of Appeal in *John Voytko v. Branch Banking & Trust Co., et al.*

29. July 17, 2012 Notice of Appeal in *Patricia Konersmann v. Branch Banking & Trust Co., et al.*

BARNWELL WHALEY PATTERSON
& HELMS, LLC

By: 

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***Attorneys for Appellants Patricia Konersmann,
James J. Kerr, Crayton Walters, and JT Main,
LLC***

Date: November 13, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
No. 2012-205647

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

Roger M. Young, Circuit Court Judge

Cases 2009-CP-10-07515, 2009-CP-10-07517,
2009-CP-10-07518 and 2010-CP-10-09959

2009-CP-10-07515

James J. Kerr, Crayton Walters, and J.T. Main, LLC, ... Appellants,

v.

Branch Banking & Trust Company, Successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

2009-CP-10-07517

Ron Konersmann, ... Appellant,

v.

Branch Banking & Trust Company, Successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

2009-CP-10-07518

John Voytko, ... Appellant,

v.

Branch Banking & Trust Company, Successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

2010-CP-10-09959

Patricia Konersmann, ... Appellant,

v.

Branch Banking & Trust Company, Successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

RULE 209(c) CERTIFICATION

RECEIVED

NOV 14 2012

Court of Appeals

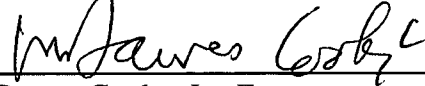
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John Voytko***

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AKE@Epting-Law.com
***Attorneys for Appellants Patricia Konersmann,
James J. Kerr, Crayton Walters, and JT Main,
LLC***

In accordance with the SCRAP, Rule 209(c), the undersigned does hereby certify that the materials Appellants have designated for inclusion in the record on appeal contain no matter that is irrelevant to the appeal.

BARNWELL WHALEY PATTERSON
& HELMS, LLC

By: 

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***Attorneys for Appellants Patricia Konersmann,
James J. Kerr, Crayton Walters, and JT Main,
LLC***

Date: November 13, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
No. 2012-205647

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

Roger M. Young, Circuit Court Judge

Cases 2009-CP-10-07515, 2009-CP-10-07517,
2009-CP-10-07518 and 2010-CP-10-09959

2009-CP-10-07515

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v.

Branch Banking & Trust Company, successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

2009-CP-10-07517

Ron Konersmann, ... Appellant,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

2009-CP-10-07518

John Voytko, ... Appellant,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

2010-CP-10-09959

Patricia Konersmann, ... Appellant,

v.

Branch Banking & Trust Company, Successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

PROOF OF SERVICE

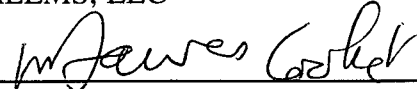
RECEIVED

NOV 14 2012

SC Court of Appeals

I certify that I have served the Designation of Matter for Inclusion in the Record on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on November 13, 2012, addressed to their attorney of record, Molly Hughes Cherry, Esq., Nexsen Pruet, LLC, P.O. Box 486, Charleston, SC 29402.

BARNWELL WHALEY PATTERSON
& HELMS, LLC

By: 

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John W. Fletcher, Esq.
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***Attorneys for Appellants Ron Konersmann and
John Voytko***

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***Attorneys for Appellants Patricia Konersmann,
James J. Kerr, Crayton Walters, and JT Main,
LLC***

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
No. 2012-205647

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

Roger M. Young, Circuit Court Judge

Cases 2009-CP-10-07515, 2009-CP-10-07517,
2009-CP-10-07518 and 2010-CP-10-09959

RECEIVED
NOV 14 2012
SC Court of Appeals

2009-CP-10-07515

James J. Kerr, Crayton Walters, and J.T. Main, LLC, ... Appellants,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

2009-CP-10-07517

Ron Konersmann, ... Appellant,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

2009-CP-10-07518

John Voytko, ... Appellant,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

2010-CP-10-09959

Patricia Konersmann, ... Appellant,

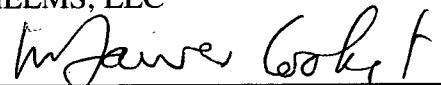
v.

Branch Banking & Trust Company, Successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

PROOF OF SERVICE

I certify that I have served the Appellants' Consolidated Initial Brief on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on November 13, 2012, addressed to their attorney of record, Molly Hughes Cherry, Esq., Nexsen Pruet, LLC, P.O. Box 486, Charleston, SC 29402.

BARNWELL WHALEY PATTERSON
& HELMS, LLC

By: 

M. Dawes Cooke, Jr., Esq.
John W. Fletcher, Esq.
288 Meeting Street, Suite 200 (29401)
P. O. Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708
mdc@barnwell-whaley.com
jfletcher@barwnwell-whaley.com
Attorneys for Appellants

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96 Broad Street
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***Attorneys for Appellants Ron Konersmann and
John Voytko***

Andrew K. Epting, Jr., Esq.
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401
(843) 377-1871 Fax: (843) 377-1310
AKE@Epting-Law.com
***Attorneys for Appellants Patricia Konersmann,
James J. Kerr, Crayton Walters, and JT Main,
LLC***

Tanya A. Gee
Special Counsel

December 7, 2012

66501

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Kerr, James v. BB&T
Appellate Case Tracking # 2012-205647
Lower Court # 2009-CP-10-07515, 2009-CP-10-07517, 2009-CP-10-07518, 2010-CP-10-09959

Dear Ms. Kitchings:

I am representing the Respondents in the above-named matter along with my colleagues, Molly Hughes Cherry and Rick Mendoza. Currently, the Respondents' Initial Brief is due on December 13, 2012. We need additional time to prepare this brief, and by this letter, we are requesting a thirty-day extension. This is our first extension request, and I have enclosed a \$25 filing fee. I have also contacted opposing counsel regarding this request, who has kindly consented to this request.

Very truly yours,

Tanya A. Gee

cc: M. Dawes Cooke
Brian C. Duffy
Andrew K. Epting
John P. Linton
John W. Fletcher

1st
12/13
1/14

The South Carolina Court of Appeals

James J. Kerr, Crayton Walters, and J.T.Main, LLC,
Appellants,

v.

Branch Banking and Trust Company, Successor in
merger to Branch Banking and Trust Company of SC,
a/k/a BB&T, and James Edahl, Respondents,

Ron Konersmann, Appellant,

v.

Branch Banking and Trust Company, Successor in
merger to Branch Banking and Trust Company of SC,
a/k/a BB&T, and James Edahl, Respondents,

John Voytko, Appellant,

v.

Branch Banking and Trust Company, Successor in
merger to Branch Banking and Trust Company of SC,
a/k/a BB&T, and James Edahl, Respondents.

Patricia Konersmann, Appellant,

v.

Branch Banking and Trust Company, Successor in
merger to Branch Banking and Trust Company of SC,
a/k/a BB&T, and James Edahl, Respondents.

Appellate Case No. 2012-205647

The Honorable Roger M. Young

Charleston County
Trial Court Case No. 2009CP1007515, 2009CP1007517,
2009CP1007518, 2010CP1009959

ORDER

The time for serving and filing the respondents' initial brief and designation of matter is hereby extended until January 14, 2013.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina
cc:

Andrew K. Epting, Jr.
John William Fletcher
M. Dawes Cooke, Jr.
Molly Hughes Cherry
Michelle Nicole Endemann
John P. Linton, Sr.
Brian C. Duffy
Tanya Amber Gee
Julio E. Mendoza, Jr.

FILED

12-12-12 Lb7

Tanya A. Gee
Special Counsel

January 14, 2013

The Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: Kerr, James v. BB&T
Appellate Case Tracking # 2012-205647

Dear Ms. Kitchings:

Enclosed are the Respondents' Initial Brief and Designation of Matter. Please file the originals and return the clocked-in copies to me via our courier. I have also enclosed the Proof of Service reflecting that counsel of record has been served with copies of the same.

Charleston

Charlotte

Columbia

Greensboro

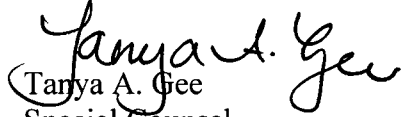
Greenville

Hilton Head

Myrtle Beach

Raleigh

Very truly yours,


Tanya A. Gee
Special Counsel

Enclosures

cc: M. Dawes Cooke
Brian C. Duffy
Andrew K. Epting
John P. Linton
John W. Fletcher

RECEIVED
JAN 14 2013

SC Court of Appeals

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

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F 803.727.1453
E TGee@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas
Roger M. Young, Circuit Court Judge

Lower Court Case Nos. 2009-CP-10-07515, -07517; 07518; and 2010-CP-10-09959
Appellate Court Case No. 2012-205647

James J. Kerr, Crayton Walters, and J.T. Main, LLC, Appellants

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust
Company of SC, a/k/a BB&T, and James Edahl, Respondents,

Ron Konersmann, Appellant,

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust
Company of SC, a/k/a BB&T, and James Edahl, Respondents,

John Voytko, Appellant,

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust
Company of SC, a/k/a BB&T, and James Edahl, Respondents,

Patricia Konersmann, Appellant,

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust
Company of SC, a/k/a BB&T, and James Edahl, Respondents.

RESPONDENTS' DESIGNATION OF MATTER

RECEIVED

JAN 14 2013

SC Court of Appeals



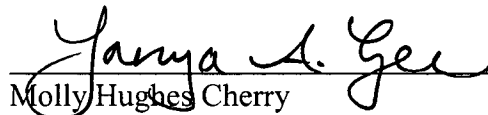
Pursuant to Rule 209(a) of the South Carolina Appellate Court Rules, the Respondents hereby submit this Designation of Matter to be Included in the Record on Appeal. In addition to those matters previously identified by the Appellants, the Respondent identifies these additional items to be included in the Record on Appeal:

1. Entire transcript of August 15, 2011 Hearing
2. Defendant BB&T's Memorandum in Support of Motion to Dismiss Amended Complaint in Civil Action No. 2009-CP-10-07515
3. Defendant Edahl's Memorandum in Support of Motion to Dismiss Amended Complaint in Civil Action No. 2009-CP-10-07515
4. Defendant BB&T's Memorandum in Support of Motion to Dismiss Amended Complaint in Civil Action No. 2009-CP-10-07517
5. Defendant Edahl's Memorandum in Support of Motion to Dismiss Amended Complaint in Civil Action No. 2009-CP-10-07517
6. Defendant BB&T's Memorandum in Support of Motion to Dismiss Amended Complaint in Civil Action No. 2009-CP-10-07518
7. Defendant Edahl's Memorandum in Support of Motion to Dismiss Amended Complaint in Civil Action No. 2009-CP-10-07518
8. Defendant BB&T's Memorandum in Support of Motion to Dismiss Amended Complaint in Civil Action No. 2009-CP-10-09959
9. Defendant Edahl's Memorandum in Support of Motion to Dismiss Amended Complaint in Civil Action No. 2009-CP-10-09959

I certify that this designation contains no matter which is irrelevant to this appeal.

[Signature block on following page]

Respectfully submitted,



Molly Hughes Cherry
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, South Carolina 29402
843.577.9440 (t) 843.414.8209 (f)
mcherry@nexsenpruet.com

Julio E. Mendoza, Jr.
Tanya A. Gee
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803.771.8900 (t) 803.253.8277 (f)
rmendoza@nexsenpruet.com
tgee@nexsenpruet.com

ATTORNEYS FOR RESPONDENTS
BRANCH BANKING AND TRUST COMPANY,
SUCCESSOR IN MERGER TO BRANCH
BANKING AND TRUST COMPANY OF SC,
A/K/A BB&T, AND JAMES EDAHL

January 14, 2013
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas
Roger M. Young, Circuit Court Judge

Lower Court Case Nos. 2009-CP-10-07515, -07517; 07518; and 2010-CP-10-09959
Appellate Court Case No. 2012-205647

James J. Kerr, Crayton Walters, and J.T. Main, LLC, Appellants

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents,

Ron Konersmann, Appellant,

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents,

John Voytko, Appellant,

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents,

Patricia Konersmann, Appellant,

v.

Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents.

PROOF OF SERVICE

RECEIVED
JAN 14 2013

SC Court of Appeals

I, Sharon A. Werdenie, hereby certify that a copy of the Initial Brief and Designation of Matter of Respondents Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl has been served upon counsel of record by depositing a copy of the same, first-class postage prepaid, in the United States Mail, on the 14th day of January 2013 to the addresses shown below:

M. Dawes Cooke, Jr., Esquire
John W. Fletcher, Esquire
Barnwell Whaley Patterson & Helms, LLC
P.O. Drawer H
Charleston, SC 29402

John P. Linton, Esquire
Brian C. Duffy, Esquire
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401

Andrew K. Epting, Jr., Esquire
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Charleston, SC 29401



Sharon A. Werdenie
Legal Assistant to Tanya A. Gee
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Columbia, South Carolina 29202
(803) 771-8900

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

M. Dawes Cooke, Jr.
mdc@Barnwell-Whaley.com

66980

January 22, 2013

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Kerr, James v. BB&T
Appellate Tracking # 2012-205647

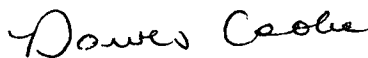
Dear Ms. Kitchings:

I represent the Petitioners in the above-named matters. Petitioners' Initial Reply Brief is due on January 24, 2013. Petitioners will require additional time to prepare their Reply. Therefore, by this letter, Petitioners request a ten-day extension to file their Initial Reply Brief in this matter until **February 4, 2013**.

This is Petitioners' first extension request with respect to this Initial Reply Brief.

I have enclosed a check in the amount of \$25 for the filing fee for this request. Opposing counsel has kindly consented to this request.

Sincerely,



M. Dawes Cooke, Jr.

MDCjr:clj
Enclosures

c: Molly Hughes Cherry, Esquire
Tanya A. Gee, Esquire
Andrew K. Epting, Jr., Esquire
Brian C. Duffy, Esquire

RECEIVED

JAN 23 2013

SC Court of Appeals

William C. Helms, III
M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.

Phillip S. Ferderigos
K. Michael Barfield
Ernest B. Lipscomb, III*
J. Gail Rahn

Todd M. Musheff
Craig E. Burgess
Lucinda D. Gardner
John W. Fletcher

John A. Jones
Alissa D. Fleming
Barbara J. Wagner, Ph.D.
Jeremy E. Bowers
D. Summers Clarke, II

288 Meeting St., Ste 200, Charleston, SC 29401 Mail: P.O. Drawer H, Charleston, SC 29402 P. 843.577.7700 F 843.577.7708

www.barnwell-whaley.com

* Registered patent attorney

The South Carolina Court of Appeals

James J. Kerr, Crayton Walters, and J.T. Main, LLC,
Appellants,

v.

Branch Banking and Trust Company, Successor in
merger to Branch Banking and Trust Company of SC,
a/k/a BB&T, and James Edahl, Respondents,

Ron Konersmann, Appellant,

v.

Branch Banking and Trust Company, Successor in
merger to Branch Banking and Trust Company of SC,
a/k/a BB&T, and James Edahl, Respondents,

John Voytko, Appellant,

v.

Branch Banking and Trust Company, Successor in
merger to Branch Banking and Trust Company of SC,
a/k/a BB&T, and James Edahl, Respondents.

Patricia Konersmann, Appellant,

v.

Branch Banking and Trust Company, Successor in
merger to Branch Banking and Trust Company of SC,
a/k/a BB&T, and James Edahl, Respondents.

Appellate Case No. 2012-205647

The Honorable Roger M. Young, Sr.

Charleston County
Trial Court Case No. 2009CP1007515, 2009CP1007517,
2009CP1007518, 2010CP1009959

ORDER

The time for serving and filing the Appellants' Initial Reply Brief is hereby extended until February 11, 2013.

FOR THE COURT

BY

V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

FILED

HC 2-4-13

cc:

Andrew K. Epting, Jr.
John William Fletcher
M. Dawes Cooke, Jr.
Molly Hughes Cherry
Michelle Nicole Endemann
John P. Linton, Sr.
Brian C Duffy
Tanya Amber Gee
Julio E. Mendoza, Jr.

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

M. Dawes Cooke, Jr.
mdc@Barnwell-Whaley.com

February 4, 2013

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

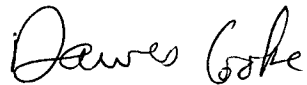
RECEIVED
FEB 06 2013
SC Court of Appeals

Re: Kerr, James v. BB&T
Appellate Case No.: 2012-205647

Dear Ms. Kitchings:

Enclosed for filing are the original and one copy of the Appellants' Consolidated Initial Reply Brief and Proof of Service for same. Please return the clocked copies to me in the enclosed envelope. By copy of this letter, I am serving copies on counsel of record.

Sincerely,



M. Dawes Cooke, Jr.

MDCjr/klj
Enclosures

c: Molly Hughes Cherry, Esquire
Andrew K. Epting, Jr., Esquire
Brian C. Duffy, Esquire
John P. Linton, Esquire

William C. Helms, III
M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.

Phillip S. Ferderigos
K. Michael Barfield
Ernest B. Lipscomb, III*
J. Gail Rahn

Todd M. Musheff
Craig E. Burgess
Lucinda D. Gardner
John W. Fletcher

John A. Jones
Alissa D. Fleming
Barbara J. Wagner, Ph.D.
Jeremy E. Bowers
D. Summers Clarke, II

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
No. 2012-205647

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

Roger M. Young, Circuit Court Judge

Cases 2009-CP-10-07515, 2009-CP-10-07517,
2009-CP-10-07518 and 2010-CP-10-09959

RECEIVED

FEB 06 2013

RECEIVED

FEB 06 2013

SC Court of Appeals

2009-CP-10-07515

James J. Kerr, Crayton Walters, and J.T. Main, LLC, ... Appellants,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

2009-CP-10-07517

Ron Konersmann, ... Appellant,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

2009-CP-10-07518

John Voytko, ... Appellant,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

2010-CP-10-09959

Patricia Konersmann, ... Appellant,

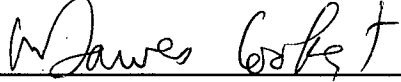
v.

Branch Banking & Trust Company, Successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, ... Respondents.

PROOF OF SERVICE

I certify that I have served the Appellants' Consolidated Initial Reply Brief on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on February 4, 2013, addressed to their attorney of record, Molly Hughes Cherry, Esq., Nexsen Pruet, LLC, P.O. Box 486, Charleston, SC 29402.

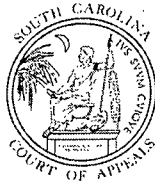
BARNWELL WHALEY PATTERSON
& HELMS, LLC

By: 

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John W. Fletcher, Esq.
288 Meeting Street, Suite 200 (29401)
P. O. Drawer H
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mdc@barnwell-whaley.com
jfletcher@barwnwell-whaley.com
Attorneys for Appellants

John P. Linton, Esq.
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Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
(843) 720-2044 Fax: (843) 720-2047
JLinton@DuffyAndYoung.com
BDuffy@DuffyAndYoung.com
Attorneys for Appellants Ron Konersmann and John Voytko

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(843) 377-1871 Fax: (843) 377-1310
AKE@Epting-Law.com
Attorneys for Appellants Patricia Konersmann, James J. Kerr, Crayton Walters, and JT Main, LLC



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
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FAX: (803) 734-1839
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February 21, 2013

Mr. Andrew K. Epting, Jr.
46 A State Street
Charleston SC 29401

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Mr. M. Dawes Cooke, Jr.
PO Drawer H
Charleston SC 29402-0197

Ms. Molly Hughes Cherry
PO Box 486
Charleston SC 29402

Ms. Michelle Nicole Endemann
46 A State Street
Charleston SC 29401

Mr. John P. Linton, Sr.
96 Broad St.
Charleston SC 29401

Mr. Brian C Duffy
96 Broad St.
Charleston SC 29401

Ms. Tanya Amber Gee
PO Drawer 2426
Columbia SC 29202

Mr. Julio E. Mendoza, Jr.
PO Drawer 2426
Columbia SC 29202-2426

Re: Kerr, James v. BB&T
Appellate Case No. 2012-205647

Dear Counsel:

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1205 Pendleton Street, Columbia, S.C. 29201. Thank you for your attention to this.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V. Claude Allen, Deputy

CLERK

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

M. Dawes Cooke, Jr.
mdc@Barnwell-Whaley.com

March 6, 2013

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Kerr, James v. BB&T
Appellate Case No.: 2012-205647

Dear Ms. Kitchings:

Enclosed for filing are the original and one copy of the Proof of Service for the Record on Appeal in the above matter. Please date stamp and return the enclosed copy to me in the envelope provided herein.

Sincerely,



M. Dawes Cooke, Jr.

MDCjr/klj
Enclosures

c: Molly Hughes Cherry, Esquire
Andrew K. Epting, Jr., Esquire
Brian C. Duffy, Esquire
John P. Linton, Esquire

RECEIVED
MAR 07 2013
SC Court of Appeals

William C. Helms, III
M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.

Phillip S. Ferderigos
K. Michael Barfield
Ernest B. Lipscomb, III*
J. Gail Rahn

Todd M. Musheff
Craig E. Burgess
Lucinda D. Gardner
John W. Fletcher

John A. Jones
Alissa D. Fleming
Barbara J. Wagner, Ph.D.
Jeremy E. Bowers
D. Summers Clarke, II

Molly Hughes Cherry
Member
Admitted in SC

March 25, 2013

The Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Kerr, James v. BB&T*
Appellate Case Tracking # 2012-205647

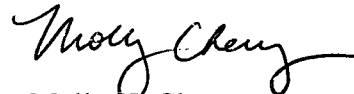
Dear Ms. Kitchings:

Enclosed for filing are the following documents:

1. The original and 15 copies of the Final Brief of Respondents Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl; and
2. The original and one copy of the Proof of Service for the Final Brief of the Respondents.

I would appreciate your filing the documents and returning one clocked-in copy of each to my attention in the enclosed self-addressed stamped envelope. Please note that the original version of the Respondents' Final Brief has been left unbound and is contained in a separate white envelope marked as such.

Very truly yours,


Molly H. Cherry

MHC/dal

Enclosures

cc: M. Dawes Cooke, Esquire
Brian C. Duffy, Esquire
John P. Linton, Esquire

RECEIVED
MAR 27 2013
SC COURT OF APPEALS

The Honorable Jenny Abbott Kitchings
March 25, 2013
Page 2

Andrew K. Epting, Esquire