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SC Court of Appeals

The South Carolina Court of Appeals

Bank of Newington, Appellant-Respondent,

v.

LHSC, Inc., Williamsburg County Development Corporation,
Viking Fire Protection, Inc. of the Southeast, and HBC, Inc., Defendants,

of which Williamsburg County Development Corporation
and HBC, Inc. are the Respondents-Appellants,

AND

HBC, Inc., Cross-Claimant, Respondent-Appellant,

v.

LHSC, Inc., Cross-Claim Defendant,

AND

HBC, Inc., 3rd Party Plaintiff, Respondent-Appellant,

v.

Louis Hornick, II, and Blake Fickling, 3rd Party Defendants,

AND

Williamsburg County Development Corporation, CrossClaimant,
Respondent-Appellant,

v.

LHSC, Inc., Cross-Claim Defendant,

AND

Williamsburg County Development Corporation, 3rd Party Plaintiff,
Respondent-Appellant,

v.

Louis Hornick, II, and Blake Fickling, 3rd Party Defendants.

Appellate Case No. 2023-001087

The Honorable R. Ferrell Cothran, Jr.
Williamsburg County
Trial Court Case No. 2018CP4500258

INITIAL RESPONDENT BRIEF OF RESPONDENT-APPELLANT
WILLIAMSBURG COUNTY DEVELOPMENT CORPORATION

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STATEMENT OF ISSUES ON APPEAL

1. Did BON's Rule 59 motion fail to preserve its issues on appeal?
2. Did the trial court properly find and conclude that WCDC is an intended third-party beneficiary of the USDA Conditional Commitment and Guarantee?
3. Did BON fail to preserve its contention that the trial court found and held that BON "had a duty to WCDC and HBC to regulate and control its borrower"?
4. Did the trial court act within its discretion, as a court in equity, when it subordinated BON's claims to those of WCDC?
5. Are WCDC's claims timely?
6. Did the trial court act within its discretion in denying BON's motion to stay?

STATEMENT OF THE CASE

Following several years of discovery disputes and COVID-related continuances in these consolidated cases, Bank of Newington ("BON") settled with Viking Fire Protection, Inc. of the Southeast ("Viking"), paying Viking \$181,500 directly; and all remaining issues and claims of Williamsburg County Development Corporation ("WCDC"), HBC, Inc. ("HBC") and BON, were tried without a jury by Hon. R. Ferrell Cothran, Jr., Chief Administrative Judge for the Third Judicial Circuit, January 23-25, 2023. (3/13/2023 and 6/2/2023 Orders, pp. 1-4). The court entered its Order in favor of WCDC and HBC on March 13, 2023. (3/13/2023 Order). BON then filed three post-trial motions. The first, filed on March 13, 2023 to stay *enforcement* of the order, pending its other motions, was granted without objection by Order entered March 22, 2023. (3/13/2023 BON 1st motion for stay; 3/22/2023 Order). Also, on March 13, 2023 BON filed its motion stay *execution and interest*, pending motions and its expected appeal. (3/13/2023 BON 2nd

motion for stay). Then, on March 22, 2023 BON filed its motion to amend, for new trial, and/or to reconsider the March 13 Order. (3/22/2023 BON motion). This motion was argued May 12, 2023. (Tr. 5/12/2023). On June 2, 2023, the court entered its amended order. (6/2/2023 Order). BON filed no motions related to the June 2, 2023 Order.

On June 12, 2023 WCDC filed its motion to alter or amend the June 2, 2023 order (6/12/2023 WCDC motion), which was argued June 29, 2023 along with BON's motion to stay enforcement of the (moot) March 13, 2023 order. (Tr. 6/29/2023). The court entered its order denying both motions and vacated the temporary stay July 25, 2023. (7/25/2023 Order). HBC filed its motion to alter the July 25, 2023 Order on August 2, 2023. (8/2/2023 HBC motion). This motion was not heard or decided. Meanwhile, BON filed its notice of appeal June 29, 2023; WCDC and HBC filed notices of cross appeal July 26, 2023; and BON amended its notice of appeal August 23, 2023. (6/29/2023 BON NOA; 7/26/2023 WCDC NOA; 7/26/2023 HBC NOA; and 8/23/2023 BON amended NOA).

STATEMENT OF THE FACTS

On February 1, 2017, the USDA issued a Conditional Commitment (“**Commitment**”) to guarantee 90% of a start-up loan of \$3,535,535.00, to be made by BON to LHSC, stating the purpose of the Loan as: “to provide long-term financing for the start-up of a curtain/drapery manufacturing business at a commercial property [in Williamsburg County] to be used as a manufacturing facility;” and it listed detailed loan servicing requirements imposed on BON, which would continue throughout the life of the Loan if BON accepted the Guarantee¹. (BON Ex. 6,

¹ (The financing and construction of the facility are referenced generally as the “**Project**;” all documents related to the BON loan are referenced as the “**Loan**;” and the Commitment and Guarantee are referenced generally as the “**Guarantee**” in the court’s orders and sometimes herein

VIKING v BON 000467; and 469; 3/13/2023 and 6/2/2023 Orders, FOF 3, p. 5).

The Commitment required that all Project funds be used in specific amounts for specific purposes and that local government (of which WCDC is a representative) contribute Project funds in the form of grants totaling \$350,000:

Funds will be used for real estate acquisition (\$250,000), real estate improvements (\$1,250,000), machinery & equipment (\$805,050), inventory (\$223,535), working capital & contingency (\$637,530) and fees & costs associated with this loan (\$369,420). These funds are to be matched with grant contributions from Williamsburg County of approximately \$100,000, South Carolina Department of Department Commerce of approximately \$150,000 and Palmetto Development Group of approximately \$100,000. Upon final disbursement of loan funds, a copy of the lender's detailed loan settlement must be provided to Rural Development as evidence that all funds were disbursed in amounts and for purposes outlined above.

(BON Ex. 6, VIKING v. BON 000469; 3/13/2023 and 6/2/2023 Orders, FOF 3, p. 5).

Williamsburg County is one of the poorest in the State. (Tr. 1/25/2023, p. 599, lines 23-25).

The Loan is a USDA Business & Industry (“**B & I**”) loan. (BON Ex. 6, VIKING v BON000467 & 469). The USDA B & I Loan Guarantee Program, administered through the USDA Department of Rural Development, is a federal program whose beneficial purpose is codified:

Purpose. The purpose of the B&I Guaranteed Loan Program is to improve, develop, or finance business, industry, and employment and improve the economic and environmental climate in rural communities. This purpose is achieved by bolstering the existing private credit structure through the guarantee of quality loans that will provide lasting community benefits.

7 C.F.R. § 4279.101(b).

BON'S ADMISSIONS

At trial, BON President, Tripp Sheppard admitted that the Guarantee would not have existed without the USDA's purpose of bringing a manufacturing plant to Williamsburg County to benefit its citizens, with WCDC's deep investment in the Project. (Tr. 1/23/2023, p. 14, line 21

for the sake of brevity).

– p. 15, line 6; p. 28, line 17 – p. 31, line 1; p. 33, line 5 – p. 35, line 6; p. 147, line 1 - p. 151, line 22; p. 159, line 21 – p. 160, line 2). BON admitted that everything involved in the Project was for the benefit of the County, and that benefiting the local community is the primary reason for the existence of the USDA loan program. (Tr. 1/23/2023, p. 150, line 7 – p. 151, line 1; Tr. 1/24/2023, p. 317, line 20 – p. 318, line 4). BON made many other admissions at trial, including:

BON had to comply with the Loan servicing conditions in the Commitment and inform USDA whenever it was not in compliance. (Tr. 1/24/2023, p. 349, lines 15-24);

BON disbursed hundreds of thousands of dollars other than as required by the Commitment. (Tr. 1/23/2023, p. 159, lines 9-20);

The categories prescribed by the Commitment (real estate \$250,000, improvements \$1,250,000, machinery/equipment \$805,050, inventory \$223,535, working capital & contingency \$637,530, and fees/costs of the Loan \$369,420) were overdrawn by several hundred thousand dollars for a period of months while the Project was ongoing, and those categories remain overdrawn. (Tr. 1/24/2023, p. 545, line 11 – p. 546, line 1);

Letting these categories become overdrawn violated the Commitment and Guarantee (Tr. 1/24/2023, p. 543, line 1 – p. 544, lines 1-20), but BON’s loan department administrator took no action whatsoever. (Tr. 1/24/2023, p. 544, lines 1-12);

BON knew that Hornick had withheld \$103,000 from Diversified only two weeks into the Project. (Tr. 1/23/2023, p. 61, line 12 – p. 62, line 17; p. 241, lines 5-11 and 16-22);

The Commitment required BON to “expeditiously report” all Loan problems to its contact at Rural Development, at the number listed (BON Ex. 6, VIKING v BON000475); but BON did not report the many problems it had with disbursements; and, in November 2017 BON knew that

Viking had not been paid and was threatening to file liens, but, on December 1, 2017, instead of informing USDA, BON emailed USDA that “everything was pretty much finished up with the Project and that it was about ready for the equipment to be delivered and installed.” (Tr. 1/24/2023, p. 475, line 21 – p. 476, line 25);

BON received no receipts of any kind for Hornick’s many thousands of dollars in travel reimbursements. (Tr. 1/23/2023, p. 243, lines 2-22);

BON reimbursed Hornick, without receipts or invoices, for hundreds of thousands of dollars purportedly spent by Hornick on fabric, swatch books and other inventory.² (Tr. 1/23/2023, p. 271, line 1 – p. 273, line 3);

A reasonable course of action would have been to request receipts for all of Hornick’s reimbursement requests. (Tr. 1/23/2023, p. 176, lines 14-24);

BON does not know if these vendors ever got paid, but it could have verified every disbursement. (Tr. 1/23/2023 p. 284, lines 6-10; p. 284, line 22 – p. 285, line 3);

BON was required to comply with the following, per the Commitment:

Prior to each disbursement, lender shall be in receipt of satisfactory evidence that there has been no unremedied adverse change in the financial or any other condition of the Borrower since the date of the application or since any preceding disbursements which would warrant withholding or not making further disbursements.

(VIKING v BON 000475) (Tr. 1/23/2023, p. 174, lines 15-21; p. 175, lines 4-9; p. 175, lines 17-24; p. 195, line 5 – p. 196, line 12);

² (April 4, 2017, Fabric, \$54,433.75; May 9, 2017, Asmara Home Products \$80,315.18; May 22, 2017, Asmara Inventory \$68,000.00; June 29, 2017, Firefend Inventory \$18,225.00; July 13, 2017, Working Capital \$26,000.00; August 3, 2017, New Product Inventory \$31,050.00; December 7, 2017, 10% Equipment Cost \$80,505.00; March 5, 2018, Firefend Material \$34,950.00; March 29, 2018, Fill Sales Order 31,000.00; April 6, 2018, 50% of Swatch Book Invoice \$32,202.00; April 19, 2018, Swatch Books Completed and JoAnne Fabrics \$43,618.58) (WCDC Ex.s 33-35).

BON never received any justification for the exorbitant \$16,666.67 monthly salary, that Hornick requested and received for seven months when the business was not up and running and before it had any employees. (Tr. p. 284, lines 6-10);

\$637,000 of the BON Loan was required to go to startup capital, *after* the business was up and running. (Tr. 1/23/2023, p. 166, line 4 -p. 167, line 2);

The Project stopped (and the business never got up and running) when BON failed to pay HBC's final invoice, despite the unreasonableness of Hornick's demand that HBC accept substantially less than its contract amount for work already performed. (Tr. 1/23/2023, p. 247, line 5 – p. 248, line 241);

BON continued to pay itself interest on the Loan, totaling more than \$132,000, after it refused to pay HBC's December 2017 invoice, until only 85,632.20 remained in Project funds when BON finally placed the Loan into default in June 2018. (Tr. 1/23/2023, p. 91, line 22 – p. 92, line 4; p. 95, lines 11-23; Tr. 1/24/2023, p. 292, line 21 – p. 293, line 4; p. 530, lines 22-23);

BON had to complete the Project with available funds; it had complete control over the nearly \$4,000,000 in Project funds; and it had authority to override the borrower as to disbursements. (Tr. 1/23/2023, p. 169, line 16 – p. 170, line 2);

“Every single dime” of Project funds, from every source, went into the LHSC Project account and was disbursed by BON. (Tr. 1/23/2023 p. 131, line 25 -p. 132, line 3);

BON paid someone believed to be a pole dancer \$30,000 for “engineering” services, without seeking verification of the expense. (Tr. 1/23/2023 p. 160, line 24 - p. 161, line 7; p. 181 lines 8-25; p. 218, line 20 - p. 219, line 12; p. 235, lines 14-20; p. 237, line 25 - p. 238, line 19);

BON received the WCDC/LHSC real estate closing documents and knew that the purchase

price was \$500,000, of which \$250,000 was paid from the BON Loan, and the other \$250,000 was represented by an LHSC stock purchase agreement, but BON was unaware of the specific payment “*structure*” to redeem the LHSC stock. (Tr. 1/23/2023, p. 127 line 18 – p. 128, line 19);

WCDC’s expectation of repayment of the \$250,000 from LHSC, via the stock purchase agreement, had been reasonable at the time. (Tr. 1/23/2023, p. 155, line 22 -p. 156, line 16);

BON was aware of the State of South Carolina Department of Commerce (“SCDOC”) analysis of the Project (showing LHSC’s assets as the \$3,000,000 Loan, estimating the likelihood of success of the business, projecting that LHSC would generate revenues to provide 105 job and sustain an annual payroll of \$3,810,000 in its first year in business, and projecting \$88,000,000 in benefits to the County through jobs and revenue over 10 years) (WCDC Ex. 19). (Tr. 1/23/2023, p. 126, line 5 – p. 127, line 8; Tr. 1/24/2023, p. 309, line 23 – p. 310, line 10); and,

The Project could have been completed within the available funds of \$3,965,535. (Tr. 1/23/2023, p. 196, lines 3-9).

THE COMMITMENT

The Commitment required BON to oversee Project disbursements through completion and startup of the manufacturing plant, by complying with numerous other conditions³:

The lender will also ensure that the project will be completed with available funds and, once completed, will be used for its intended purpose and produce products in the quality and quantity proposed in the completed application approved by the Agency.

³ A major contention in BON’s appeal is that the conditions in the Commitment were fulfilled *before* the Guarantee was issued and before the Loan was made, and that it was impossible for the Commitment to have been breached after the Guarantee was issued. (BON Initial Brief, pp. 13-27). This complex and fact-intensive case involved many thousands of pages of discovery and nearly 5 years of litigation. Many of BON’s factual representations in its brief are unaccompanied by references to the Record, and many of its references to the Record appear to be objectively incorrect. (BON Initial Brief, *passim*). Due to page limitations, WCDC cannot address them all in this brief. As a result, WCDC craves the Court’s most careful scrutiny of all parties’ references to the Record.

(BON Ex. 6, VIKING v. BON 000472) (3/13/2023 and 6/2/2023 Orders, FOF 14, p. 8).

The lender must ensure that all project facilities are designed, and costs estimated, by an independent professional utilizing accepted architectural, engineering and design practices and conform to applicable Federal, State, and local codes and to approved plans, specifications, and contract documents.

(BON Ex. 6, VIKING v. BON 000472) (3/13/2023 and 6/2/2023 Orders, FOF 8, p. 6).

CONSTRUCTION

...

Prior to disbursement of construction funds, [BON] must have: ... Contingencies in place to handle unforeseen cost overruns without seeking additional guaranteed assistance. These are to be agreed to by the borrower.

(BON Ex. 6, VIKING v. BON 000472-473) (3/13/2023 and 6/2/2023 Orders, FOF 11, p. 7).

The lender must have a construction-monitoring plan acceptable to the Agency and undertake the added responsibilities set forth in this paragraph. The lender will monitor the progress of construction and undertake the reviews and inspections necessary to ensure that construction conforms to applicable Federal, State, and local code requirements; proceeds are used in accordance with the approved plans, specifications, and contract documents; and that funds are used for eligible project costs. The lender must expeditiously report any problems in project development to the Agency.

(BON Ex. 6, VIKING v. BON 000473) (3/13/2023 and 6/2/2023 Orders, FOF 22, p. 10).

Prior to disbursement of construction funds, the lender must have: ... (ii) A detailed timetable for the project with a corresponding budget of costs, setting forth the parties responsible for payment.

(BON Ex. 6, VIKING v. BON 000473) (3/13/2023 and 6/2/2023 Orders, FOF 25, p. 11).

By signing⁴ this Conditional Commitment, the lender and borrower certify that they understand and accept the conditions outlined herein. No provision stated herein shall be amended or waived without the prior written consent of the lender and Rural Development.

(BON Ex. 6, VIKING v. BON 000475) (3/13/2023 and 6/2/2023 Orders, FOF 27, pp. 11-12).

The Loan Note Guarantee constitutes an obligation supported by the full faith and credit of

⁴ BON Ex. 6 is not signed by BON, but BON never denied that it accepted the Commitment and was obliged to conform to its terms.

the United States and is incontestable except for fraud or misrepresentation of which Lender or any Holder has actual knowledge ... or which Lender or any Holder participates in or condones. The Loan Note Guarantee will be unenforceable to the extent that any loss is occasioned by ... use of loan proceeds for unauthorized purposes, ... [or] negligent Loan servicing. ... Any losses occasioned will be unenforceable to the extent that loan funds are used for purposes other than those specifically approved by USDA in its Conditional Commitment or amendment thereof. Negligent loan origination/negligent loan servicing is the failure to perform those services which a reasonably prudent lender would perform in processing or servicing ... its own portfolio of loans that are not guaranteed. The term includes not only the concept of a failure to act but also not acting in a timely manner or acting in a manner contrary to the manner in which a reasonably prudent lender would act[.]

(BON Ex. 6, VIKING v BON 000477) (3/13/2023 and 6/2/2023 Orders, FOF 29, p. 12).

Dividend payments and compensation of officers and owners will be limited to an amount that, when taken, will not adversely affect the repayment ability of the borrower.

(BON Ex. 6; VIKING v BON 000471) (3/13/2023 and 6/2/2023 Orders, FOF 32, p. 13) (emphasis added).

THE PROJECT

The USDA issued its Guarantee and the Loan closed on February 25, 2017. (VIKING v BON 000483). WCDC sold the Project property to LHSC for \$500,000, of which \$250,000 came from BON's Loan, and the other \$250,000 was represented by LHSC's pledge of 250 shares of its stock, which it valued at \$1,000 per share. (Tr. 1/25/2023, p. 39, line 22 - p. 41, line 25). LHSC agreed to pay the \$250,000 balance within 5 years. (Tr. 1/25/2023, p. 623, line 8 – p. 624, line 17; p. 625, line 5 – p. 626, line 6).

WCDC contributed County grant funds of \$200,000.00 for “infrastructure and construction” and “upfit” of the existing building (WCDC Ex.s ⁵ 10; 23; & Ex. HBC-1), and it

⁵ At trial, the court advised the parties that it would consider all Exhibits. “[I]f I take it with me, I'm going to consider it.” (Tr. 1/25/2023, p. 745, lines 14-15). And at the end of trial, the court advised: “[Y]ou can give me anything you want to.” (Tr. 1/25/2023, p. 893, lines 15-16). It now appears that witnesses testified about, and the court considered WCDC Exhibits, which,

facilitated additional grant funds from the State of South Carolina in the amount of \$150,000.00. (3/13/2023 Order, FOF 16, p. 8).

HBC was hired as the general contractor to upfit the building and reach substantial completion in 6 months. (BON Ex. 11) HBC's contract does not define "substantial completion." (BON Ex. 11). LHSC made repeated requests to change the construction plans; HBC submitted change orders in March 2017 to conform to his requests; but Hornick refused to sign them or make a final decision until June 8, 2023, leaving less than 1 month until the substantial completion deadline. (Tr. 1/25/2023, p. 813, line 7 – p. 814, line 14).

Once the change orders were signed, HBC had to bring all the subcontractors back to the site, to construct a room for the water pump (for fire suppression), including framers, sheetrockers, insulators, and trim installers. (Tr. 1/25/2023, p. 855, line 23 – p. 856, line 3). A conditional certificate of occupancy ("CO") was issued on November 9, 2017, noting that furniture and equipment could be installed. (BON Ex.s 18, 19, 19a). WCDC contends that this meets the ordinary meaning of "substantial completion." But, because BON refused to pay HBC, it could not pay its subcontractor Viking to complete the fire suppression system. Thus, *final* completion was delayed, but not by HBC, and this evidence supports the court's Finding: "No evidence suggested that ... HBC failed to comply with any of their contractual obligations, and I find that they fully complied with their obligations."⁶ (3/13/2023 and 6/2/2023 orders, FOF 38, p. 15).

inadvertently, may not have been formally introduced into evidence during trial. (See, 3/13/2023 and 6/2/2023 Orders, pp. 3, 7-8, and 17) (discussing WCDC Ex.s 10, 12, 23, 25-30, and 33). But WCDC did submit its list of Exhibits numbered 1-37 prior to trial.) (1/19/2023 WCDC Exhibits list). And BON offered no objection to any WCDC Exhibit testified to at trial. As a result, WCDC contends that all Exhibits about which witnesses testified without objection, were submitted to the trial court and are, thus, properly made a part of the Record on appeal, per Rule 210(c) SCACR.

⁶ BON states that HBC "misrepresented" and "lied" about the certificate of occupancy. (BON

On February 7, 2018, construction and “upfit” were complete but for the fire suppression system, for which Project funds were no longer available, due to BON’s gross mismanagement of disbursements, failure to preserve funds required to be set aside for construction and contingencies, and refusal to pay HBC’s final invoice, so, LHSC sought additional funds from WCDC (which was not privy to disbursement information), and WCDC then lent LHSC an additional \$80,000⁷ to pay for the fire suppression system. (HBC Ex. 10; WCDC Ex.s 26, 27, and 28). But BON did not disburse the \$80,000 to pay Viking for its fire suppression system, nor to pay HBC, which had hired Viking. (Tr. 1/23/2023, p. 120, line 17 – p. 121, line 15).

WCDC facilitated the \$150,000 SCDOC grant, but did not pursue it as damages at trial. (Tr. 1/25/2023, p. 628, lines 2-22). The SCDOC grant, WCDC’s \$200,000 grant, and WCDC’s \$80,000 loan totaled \$430,000.00; and all of these public funds were included in Project funds administered by BON, pursuant to the USDA Guarantee. (3/13/2023 and 6/2/2023 Orders, FOF 16, p. 8).

Initial Brief, pp. 10, 23). But the December 2017 Partner report states only that “A Certificate of Occupancy copy was not provided for review. The site contact said the CO is now complete with municipality.” (BON Ex. 20, VIKING v. BON00060). BON did not call anyone from Partner to testify about this report. And the November 9, 2017 conditional CO instructed that the owner could bring in equipment, etc. (BON Ex. 19). The trial court, who was in the best position to determine credibility (*Matter of Est. of Kay*, 423 S.C. at 480, 816 S.E.2d at 544-45), clearly did not take this to be evidence of a “lie” or “misrepresentation.”

⁷ BON states that WCDC made the \$80,000 loan “with no underwriting or even a vote by its board.” (BON Initial Brief, p. 11). This is not supported by the evidence. Frieson testified that WCDC’s Board approved the loan (Tr. 1/25/2023, p. 638, lines 10-12; p. 731, lines 9-10); that he could not remember (years later) whether he had located minutes of the Board’s vote on the loan, but he had provided all the minutes he could find, and he’d have to look through them (Tr. 1/25/2023, p. 731, lines 1-13); he did not have documentation of underwriting, and did not know what his predecessor (Moore) did (Tr. 1/25/2023, p. 731, lines 17-18; p. 732, lines 5-6; p. 741, lines 10-14); Moore had been let go in May 2019 and when Frieson arrived to take his place in August 2019, files were in disarray and some were missing. (Tr. 1/25/2023, p. 605, line 10 – p. 606, line 12).

As part of its required “construction-monitoring plan acceptable to the Agency” (BON Ex. 6, VIKING v BON000473), BON hired an independent professional engineering firm, Partner Engineering and Science, Inc. (“**Partner**”) to oversee the construction of the Project. (BON Ex. 20) (3/13/2023 and 6/2/2023 Orders, FOF 9, p. 6). But, during construction, Hornick sought and received disbursement of \$30,000 to Alexia Cortez, identified as manager of “Maritime Communications, LLC;” but no rationale for pay for engineering services other than from Partner was never requested or documented, nor were any other details about this payment. (WCDC Ex. 35, VIKING v. BON 000588 to 590) (3/13/2023 and 6/2/2023 Orders, FOF 34, p. 14). Sheppard had been shown Instagram photos of Ms. Cortez showing that she was an exotic “pole” dancer. (Tr. 1/23/2023 p. 237, line 25 – p. 238, line 19). No evidence showed that Maritime Communications, LLC was an engineering firm. And at trial the court noted that the name itself was suspicious: “The Court: That's not normal---that's not normally a name of an engineering firm.” (Tr. 1/25/2023 p. 342, lines 19-21). But, despite the obvious red flags of a high dollar amount and incongruous vendor name, as with every other disbursement request from Hornick, BON paid it without seeking verification. (Tr. 1/23/2023 p. 160, line 24 – p. 161, line 7; p. 181 lines 8-25; p. 218, line 20 – p. 219, line 12; p. 235, lines 14-20).

The first year of the Loan was an interest-only period. (Tr. 1/23/2023, p. 51, lines 12-16). During the life of the Project, BON disbursed to itself 13 monthly interest payments on the Loan totaling \$406,332.48, including several months after the Project had shut down due to BON’s refusal to make HBC’s December 2017 final payment. (Tr. 1/23/2023, p. 91, line 22 – p. 92, line 4; p. 95, lines 11-23; Tr. 1/24/2023, p. 292, line 21 – p. 293, line 4; p. 530, lines 22-23) (WCDC Ex.s 33, 34 and 35) (HBC Ex.s 7 and 10) (3/13/2023 and 6/2/2023 Orders, FOF 40, pp. 15-16).

BON states that it was *required* to make these disbursements by its Loan. (BON Initial Brief, p. 16). But this is misleading. BON supports this statement only by citing “Guarantee ¶ 1,” which only requires BON to *service* the Loan.⁸ BON does not cite to its Loan to show any such requirement exists. (BON Initial Brief, p. 16). Moreover, that same page of the Guarantee includes the following:

5. Payments. Lender will receive all payments of principal or interest, on account of the entire loan and will promptly remit to Holder its pro rata share thereof[.]

(BON Ex. 6, VIKING v BON000477).

This does not require the Lender’s loan to *require* monthly interest payments in the interest-only period; it requires the lender to *receive* whatever interest payments BON’s Loan calls for. And the C.F.R. controlling USDA guaranteed loans also does not *require monthly* interest, or any interest, until the end of the first year:

In cases where there is an interest-only period, interest will be paid at least **annually from the date of the note.**

7 C.F.R. § 4279.126 (emphasis added). Thus, if there was any obligation to collect monthly interest, BON imposed that duty on itself by putting that onerous term in its Loan.

After BON refused to pay HBC in December 2017, the Project stopped. (Tr. 1/23/2023, p. 247, line 5 – p. 248, line 241). Various liens and lawsuits ensued; and BON eventually sued to foreclose on the property and declare the subordinate positions of WCDC’s and HBC’s liens. (4/4/2019 Complaint in 2019-CP-45-00193, *passim*). Nearly four years later, the court granted

⁸ “1. Loan Servicing. Lender is responsible for servicing the entire loan, and Lender will remain mortgagee and secured party of record notwithstanding the fact that another party may hold a portion of the loan. When multiple notes are used to evidence a loan, Lender will structure repayments as provided in the loan agreement.” (BON Ex. 6, VIKING v BON000477).

legal and equitable relief to WCDC, concluding that WCDC is entitled to damages as follows:

12. WCDC is a prevailing party entitled to recover from the foreclosure sale proceeds a total of \$621,404.66 in damages. This figure represents \$99,842.82 for payment of the outstanding mortgage balance owed by LHSC to WCDC with interest as of January 9, 2023; \$200,000.00 for WCDC grant funds provided to LHSC and included in Project funds disbursed by BON; **and \$250,000.00 for payment of the balance owed for the real property purchase, currently represented by worthless LHSC stock**; and \$71,561.84 for payment of WCDC attorney fees and costs incurred in the prosecution of their claim as of January 25, 2023.

(3/13/2023 Order, COL 12, p. 21) (emphasis added). BON moved to amend this order, and on June 2, 2023, the court amended the above Conclusion of Law by editing out the language emphasized above⁹. (6/2/2023 Order, COL 12, p. 23).

The original order included dozens of detailed Findings of Fact supporting the excised damages award to WCDC. (3/13/2023 Order, FOF 1-48, pp. 4-17). It directed that judgment be entered for WCDC on its causes of action and it equitably subordinated BON's lien on the foreclosure proceeds from the sale of the Project property, held in escrow with the court, such that WCDC was to be paid its damages of \$621,404.66, plus statutory interest beginning March 13, 2023, from those proceeds before BON was paid. (3/13/2023 Order, Decree ¶¶ 1-4, p. 22).

The June 2, 2023 Order included all of these same Findings and decretal terms, but for the damages awarded to WCDC, which were reduced by \$250,000 to \$371,404.66 plus statutory interest from the date of the order. (6/2/2023 Order, Decree ¶¶ 1-4, pp. 23-23).

WCDC objected to BON's Rule 59(e) motion because it lacked specificity and did not directly or clearly challenge many Findings nor any of the Conclusions. (5/10/2023 WCDC/HBC joint return, pp. 1-54). WCDC argued that it was prejudiced by this lack of specificity because it

⁹The only other amendment was made with the agreement of WCDC and HBC. It made additions to the Findings regarding attorneys' fees only.

had to guess what the alleged errors were. (Tr. 5/12/2023, p. 45, lines 11-20).

The June 2, 2023 Order stated no basis for the change in the damages award, and, because all other Findings and Conclusions in that order support the original award and remain identical to the original Order, and because BON's motion misstated facts and raised inapt legal arguments, WCDC took the damages change to be a scrivener's error. On June 12, 2023, WCDC moved to amend the June 2, 2023 Order as a scrivener's error. (6/12/2023 WCDC motion). This motion was heard on June 29, 2023, at which time the court announced that it had amended the damages award after rethinking BON's argument and objections, and it had changed its mind and concluded that the \$250,000 award for the balance of the real estate purchase was "speculation." (Tr. 6/29/2023, p. 6, line 10 – p. 7, line 25).

The Court then entered its order denying WCDC's motion on July 25, 2023 and this and cross-appeals followed.

ARGUMENT

I. BON'S RULE 59 MOTION FAILED TO PRESERVE ITS ISSUES ON APPEAL.

(A) STANDARD OF REVIEW

Appellate courts "employ a highly deferential standard of review when considering the trial judge's ruling on each of the grounds for a new trial." *Burke v. AnMed Health*, 393 S.C. 48, 57, 710 S.E.2d 84, 89 (Ct. App. 2011). "In exercising this deference, we recognize the unique position of the trial judge to hear the evidence firsthand, evaluate the credibility of the witnesses, and assess the impact of the wrongful conduct on the plaintiff in terms of damages." *Id.*

(B) BON'S RULE 59 MOTION WAS FATALY DEFECTIVE.

BON's issues are not preserved for review because it did not raise them with adequate specificity in its Rule 59(e), SCRCF motion. *See Patricia Grand Hotel, LLC v. MacGuire Enters.*,

Inc., 372 S.C. 634, 639, 643 S.E.2d 692, 695 (Ct.App.2007) (holding an issue not raised in a motion to reconsider or ruled upon by the circuit court is not preserved for appellate review).

WCDC briefly reasserts, through the summary below, the arguments in its appellant's brief filed in this Court on November 6, 2023. WCDC begs the Court's attention to that brief for the full argument, due to page limits in this brief.

BON's motion was inadequate to preserve its issues on appeal because it was prejudicially vague and unspecific, leaving WCDC to guess what Findings or Conclusions in the March 13, 2023 Order were being challenged. (3/22/2023 BON motion, *passim*). It did not even *mention* many of the 50 detailed Findings of Fact nor any of the 13 detailed Conclusions of Law. (*Id.*). Failure to challenge a ruling "is an abandonment of the issue." *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct.App.1997). "The unchallenged ruling, right or wrong, is the law of the case and requires affirmance." *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998). See, also, *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160–61, 177 S.E.2d 544 (1970) ("[A]ppellant excepted to the court's first conclusion, but has not excepted to its second ... Therefore, the finding...is the law of this case and requires affirmance.").

BON argued there is no "formal" particularity requirement, and that the "very liberal notice requirement" was met because the court got the "gist" of BON's asserted errors. (Tr. 5/12/2023, p. 5, line 9 – p. 6, line 1).

The particularity requirement is to be read flexibly in recognition of the peculiar circumstances of the case. By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly. Therefore, when a motion is challenged for a lack of particularity, the court should ask whether any party is prejudiced by a lack of particularity or whether the court can comprehend the basis for the motion and deal with it fairly.

Camp v. Camp, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (citation omitted).

While this court reviews cases in equity (such as BON's foreclosure action and WCDC's claim for equitable lien subordination, constructive trust and unjust enrichment) by finding facts in accordance with its own view of the preponderance of the evidence, it "still affords a degree of deference to the trial court because it was in the best position to judge the witnesses' credibility." *Matter of Est. of Kay*, 423 S.C. 476, 480, 816 S.E.2d 542, 544-45 (2018). But WCDC's breach of contract and tortious interference with contract actions are actions at law, and interpretation of the contracts in evidence is an issue of law. "An action to construe a contract is an action at law." *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 622 (Ct. App. 2012). "In an action at law, on appeal of a case tried without a jury, the judge's findings will not be disturbed unless they are without evidentiary support." *Id.*

The court granted BON's (defective) Rule 59 motion on the grounds that the award for the balance owed on the real estate purchase was "speculation." (Tr. 6/29/2023, p. 6, line 10 – p. 7, line 25). But BON's motion did not raise speculativeness as grounds for relief and BON did not raise any related argument or objection at trial. *See, e.g., Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not. Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier. Issues which could have been presented to the court for consideration previously, but which were not, are not the proper subject of Rule 59(e) relief; the issues are waived.") *Id.* at 456, 392 S.E.2d at 482 (citations and punctuation omitted). *Accord, Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); *First Citizens Bank & Tr. Co., Inc. v. Taylor*, 431 S.C. 149,

847 S.E.2d 249 (Ct. App. 2020). “A party cannot sit back at trial without offering proof, then come to this court complaining of the insufficiency of the evidence to support the ... findings.” *Brown v. Odom*, 425 S.C. 420, 432, 823 S.E.2d 183, 189 (Ct. App. 2019) (citation omitted) (brackets omitted).

BON presented no evidentiary basis for reducing WCDC’s damages, and no cogent argument or legal authorities to justify it. (3/22/2023 BON motion, *passim*). See e.g., *Johnson v. Lloyd*, 407 S.C. 610, 757 S.E.2d 705, (2014) (reversing because the State’s Rule 59(e) motion did not raise the specific issue at hand). And see, *State v. Stahlnecker*, 386 S.C. 609, 690 S.E.2d 565 (2010) (“For an issue to be properly preserved it has to be raised and ruled on by the trial court “An issue not properly preserved cannot be raised for the first time on appeal.” *Id.* (quoting *State v. Hoffman*, 312 S.C. 386, 440 S.E.2d 869 (1994)).

In Rule 59 motions, the movant must be sufficiently clear in framing his objection so as to draw the court's attention to the precise nature of the alleged error. *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). “Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue. Nonetheless, the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.” *Id.* (citations omitted). “Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to **grope in the dark** to ascertain the precise point at issue.” *Id.*, at 466, 719 S.E.2d at 643 (citation omitted) (emphasis added).

WCDC also should not be left to grope in the dark. Parties are entitled to *meaningful* notice of the alleged error, and a *meaningful* opportunity to be heard on it. See, e.g., Rule 7, requiring

that all motions other than those made in open court “shall state with particularity the grounds therefor, and shall set forth the relief or order sought.” SCRCP 7(b)(1). “By requiring notice to the court and the opposing party of the basis for the motion, Rule 7(b)(1) advances the policies of reducing prejudice to either party[.]” *Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (citation omitted). “Therefore, when a motion is challenged for a lack of particularity, the court should ask whether any party is prejudiced by a lack of particularity[.]” *Id.* (citation omitted).

II. THE TRIAL COURT PROPERLY FOUND AND CONCLUDED THAT WCDC IS AN INTENDED THIRD-PARTY BENEFICIARY OF THE CONDITIONAL COMMITMENT AND GUARANTEE.

(A) STANDARD OF REVIEW

“A case with legal and equitable issues presents a divided scope of review. When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal.” *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 589, 538 S.E.2d 15, 20 (Ct. App. 2000) (citations omitted).

A foreclosure action is an action in equity. *Historic Charleston Holdings, LLC v. Mallon*, 365 S.C. 524, 533, 617 S.E.2d 388, 392 (Ct. App. 2005). “Ordinarily, an appellate court reviews cases in equity by finding facts in accordance with its own view of the preponderance of the evidence. However, an appellate court still affords a degree of deference to the trial court because it was in the best position to judge the witnesses' credibility.” *Matter of Estate of Kay*, 423 S.C. at 480, 816 S.E.2d at 544–45.

“An action to construe a contract is an action at law.” *Byrd v. Livingston*, 398 S.C. at 241, 727 S.E.2d at 622 (Ct. App. 2012). “When an action at law is tried without a jury, the standard of review extends only to the correction of errors of law.” *J&H Grading & Paving, Inc. v. Clayton Constr. Co., Inc.*, 441 S.C. 272, 277, 892 S.E.2d 558, 561 (Ct. App. 2023), *reh'g denied* (Oct. 11,

2023). In an action at law “the trial judge's findings of fact will be upheld unless without evidentiary support.” *Kuznik v. Bees Ferry Associates*, 342 S.C. at 589, 538 S.E.2d at 20.

(B) THE COMMITMENT/GUARANTEE PROVIDE DIRECT BENEFITS TO WCDC AND HBC.

The leading case on this issue is *Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 429 S.C. 502, 508, 839 S.E.2d 468, 471 (Ct. App. 2020), *aff'd*, 435 S.C. 594, 869 S.E.2d 812 (2022). There, the Court recognized that non-parties to a contract may sue to enforce that contract when the contract provides direct benefits to non-parties: “Where one person makes a **promise for the benefit of a third person**, that person may maintain an action on such promise.” *Id* at 601, 869 S.E.2d at 816 (citations omitted) (emphasis added). BON contends that, if *Beverly* changed the law, it cannot apply to the USDA contracts which precede it. (BON Initial Brief, p. 18, note 11). But BON offers no authority for this argument. As a result, the Court should disregard that as abandoned on appeal. *See, e.g., Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (“South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.”).

BON admitted that everything involved in the Project was for the benefit of the County, and benefiting the community is the primary reason for the USDA program. (Tr. 1/23/2023, p. 150, line 7 – p. 151, line 1; Tr. 1/24/2023, p. 317, line 20 – p. 318, line 4). It admitted the Guarantee would not have existed without the USDA’s purpose of bringing a manufacturing plant to the County to benefit County citizens, with WCDC’s deep investment in the Project. (Tr. 1/23/2023, p. 14, line 21 – p. 15, line 6; p. 28, line 17 – p. 31, line 1; p. 33, line 5 – p. 35, line 6; p. 147, line 1 – p. 151, line 22; p. 159, line 21 – p. 160, line 2). And the C.F.R. make it clear that benefitting

the local community is the USDA loan guarantee program's entire purpose:

Purpose. The purpose of the B&I Guaranteed Loan Program is to **improve, develop, or finance business, industry, and employment** and **improve the economic and environmental climate in rural communities**. This purpose is achieved by bolstering the existing private credit structure through the guarantee of **quality loans that will provide lasting community benefits**.

7 C.F.R. § 4279.101(b) (emphasis added).

This Court's 2020 decision in *Beverly* (affirmed by the Supreme Court in 2022) emphasized that a contract may create direct benefits to persons not named in the contract at all:

Under South Carolina law, it is well settled that a nonparty may enforce contractual terms that intentionally provide her direct benefits. We have held in numerous cases that a contract between two persons, for the benefit of a third, even though such third party be not named therein, can be enforced by such third party. ... The presumption that [a] contract is not enforceable by [a nonparty] may be overcome by showing he was intended to be the direct beneficiary of the contract."

Beverly v. Grand Strand Reg'l Med. Ctr., LLC, 429 S.C. at 508, 839 S.E.2d at 471 (citations omitted).

The Commitment/Guarantee provides such benefits to WCDC/County¹⁰ without naming it. BON emphasizes that WCDC is not a party to the USDA contract, but that is the first element of a third-party beneficiary claim. *Id.*, 435 S.C. at 601, 869 S.E.2d at 816. (If WCDC were a party to the USDA guarantee, it would have sued as such.)

By accepting¹¹ the Commitment/Guarantee, BON made many promises that provide direct benefits to WCDC/County, whose grant, loan, and PSA stock pledge contracts all depended on BON's fulfillment of those promises. The Commitment/Guarantee demonstrates USDA's

¹⁰ WCDC refers to itself and Williamsburg County interchangeably as "WCDC/County" because WCDC is an agent of the County, charged with oversight of County development projects such as this Project. (12/12/2022 WCDC Am. Answer, p. 2, ¶ 6). And BON offers no evidence or authority to the contrary. (BON Initial Brief, *passim*).

¹¹ (BON Ex. 6, VIKING V BON000475, ¶19).

awareness of this interdependence and its intent to protect non-parties by requiring the Lender to ensure compliance with applicable contracts (such as WCDC's and HBC's contract, without which the Project could not exist). "The lender must ensure that all project facilities ... conform to applicable ... contract documents." (BON Ex. 6, VIKING v BON000472). It demonstrates that the parties to it (Bank, Hornick and USDA) intended to provide direct benefits to WCDC/County in 4 ways: (1) Payment under the County's PSA; (2) Compliance with County codes; (3) Project completion within available funds; and (4) fulfilling the stated purpose:

(1) PAYMENT OF \$250,000.00 UNDER THE PURCHASE AGREEMENT

The Guarantee mandates: "Funds will be used for real estate acquisition (\$250,000)". (BON Ex. 6, VIKING v BON000469). This is a specific requirement that BON must pay WCDC pursuant to its PSA, from Loan funds. The reference is indirect, because WCDC is not named, but the intended benefit is very direct. By accepting the Commitment/Guarantee, BON promised to provide this substantial, direct benefit to WCDC, for the property whose address is stated in the "purpose" section of the Commitment. (BON Ex. 6, VIKING v BON000469). This alone is sufficient to make WCDC an intended third-party beneficiary. But there are 3 more:

(2) COMPLIANCE WITH COUNTY CODES

The Commitment requires BON to ensure that project facilities comply with local codes:

12. This project involves construction. The lender must ensure that all project facilities are designed, and costs estimated, by an independent professional utilizing accepted architectural, engineering and design practices and conform to applicable Federal, State, and local codes and to approved plans, specifications, and contract documents.

(BON Ex. 6, VIKING v BON000472). This is a public safety promise, directly benefiting the County. It is again expressed in more detail in terms of code-related additional actions BON promised:

The lender will monitor the progress of construction and undertake the reviews and inspections necessary to ensure that construction conforms to applicable Federal, State, and local code requirements; proceeds are used in accordance with the approved plans, specifications, and contract documents; and that funds are used for eligible project costs.

...

(BON Ex. 6, VIKING v BON000473). Promising to ensure the Project was up to County code directly and substantially benefits the County. No evidence was presented to suggest otherwise.

(3) PROJECT COMPLETION WITHIN AVAILABLE FUNDS

BON promised to ensure that the Project was completed within available funds, and the business got up and running:

The lender will also ensure that the project will be completed with available funds and, once completed, will be used for its intended purpose and produce products in the quality and quantity proposed in the completed application approved by the Agency.

(BON Ex. 6, VIKING v BON000472). Had BON fulfilled this promise, the benefits to the County would likely have been astounding. SCDOC projected over \$88,000,000 in benefits to the County through jobs and revenue over the course of 10 years. (WCDC Ex. 19; Tr. 1/23/2023, p. 126, line 5 – p. 127, line 8; Tr. 1/24/2023, p. 309, line 23 – p. 310, line 10).

The “available funds” included “grant contributions from Williamsburg County [Development Corporation]” as stated in the Conditional Commitment:

These funds are to be matched with grant contributions from Williamsburg County of approximately \$100,000, South Carolina Department of Department Commerce of approximately \$150,000 and Palmetto Development Group of approximately \$100,000.

(BON Ex. 6, VIKING v BON000469). The Palmetto grant fell through, so WCDC provided \$200,000 to make up the difference. (Tr. 1/25/2023, p. 628, line 23 – p. 629, line 16).

BON asserts that the \$200,000 grant did not come from WCDC. It does this by tracing the source of WCDC’s funds back to Santee Electric and/or the County itself. (BON Initial Brief, pp. 8, 28, 31). As support, BON cites excerpts from the deposition of WCDC’s former Executive

Director, Jim Moore. (BON Initial Brief, pp. 11, 25, 31). But no part of Moore's deposition was ever submitted to the trial court. A search of the 3-volume trial transcript shows no mention of Jim Moore's deposition; and a search of undersigned's emails from counsel revealed no service of an excerpt of that deposition from BON as a proposed trial exhibit. (Email is the method by which BON served its notice of the Viking deposition excerpt referenced by BON (BON Initial Brief, p. 9, note 5) and obliquely referenced at trial.) (Tr. 1/24/2023, p 580 line 14 – p. 581, line 2). Thus, no part of Moore's deposition should be included in the Record or considered by this Court. "The Record shall not, however, include matter which was not presented to the lower court or tribunal." SCACR 210(c).

WCDC's current Executive Director, Gilleon Frieson, testified that he had no documentation of a transaction from which to confirm that the grant funds had come to WCDC through Santee Electric as BON contends; many file documents were missing when Frieson replaced Moore at WCDC; and his only source of information on the subject was an email from Moore referencing Santee in this context; but Frieson did confirm that WCDC had received a U.T.C. grant and thereafter WCDC made the \$200,000 grant in this case by depositing that amount directly into BON's Project control account. (Tr. 1/25/2023, p. 605, line 23 – p. 606, line 12; 686, lines 1-12; p. 648, line 10 – p. 650, line 21. (See also WCDC Ex. 8).

BON presents no authority showing the *relevance* of the source of WCDC's money. BON provides no argument or authority that the source of the money WCDC used to fund the Project could change the outcome here. Thus, BON's argument on this point should be disregarded as abandoned on appeal. *See, e.g., Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. at 81, 557 S.E.2d at 691 ("South Carolina law clearly states that short, conclusory statements made without

supporting authority are deemed abandoned on appeal and therefore not presented for review.”).

BON’s promise to ensure Project completion within available funds (including WCDC grant and loan funds), thus, explicitly promised a direct and substantial benefit to WCDC/County - it was a promise the Project would be completed, and the business would get up and running. It was not the promise to guarantee LHSC’s “success,” as BON puts it¹². This intended direct benefit to the County is further detailed in additional requirements to “ensure” WCDC/County grant funds did not go to waste:

- (a) **Prior to disbursement of construction funds, the lender must have: ...**
- (ii) **A detailed timetable for the project with a corresponding budget of costs, setting forth the parties responsible for payment. ...**
- ...
- (vi) **Contingencies in place to handle unforeseen cost overruns** without seeking additional guaranteed assistance. ...

(BON Ex. 6, VIKING v BON000473 (emphasis added). As this case proves, cost overruns can ruin a project. The requirement for contingencies in place to handle them is another expression of the USDA’s primary purpose of intent to benefit the local community.

(4) INTENDED PURPOSE

The USDA shows its beneficial intent in its purpose statement as to the Loan:

The purpose of the loan is to provide long-term financing for the start-up of a curtain/drapery manufacturing business at a commercial property located at 77 Commerce Dr., Kingstree, SC 29556, to be used as a manufacturing facility. Funds will be used for real estate acquisition (\$250,000), real estate improvements (\$1,250,000), machinery & equipment (\$805,050), inventory (\$223,535), working capital

¹² “The Order assumes that had the Bank of Newington not improperly disbursed the funds to LHSC, LHSC **would have** operated a successful business that would benefit Williamsburg County.” (BON Initial Brief, p. 12) (emphasis added). But see the Orders: “This litigation could have been avoided, and the drapery manufacturing plant **could have** been up and running today, to the substantial benefit of Williamsburg County and its citizens. Notably, Gilleon Frieson, WCDC Executive Director, testified that it was reasonable to expect that LHSC would have been able to pay the \$250,000.00 balance owed on the real property purchase price, if LHSC had opened its facility.” (3/13/2023 and 6/2/2023 Orders, FOF 46, p. 17) (emphasis added).

& contingency (\$637,530) and fees & costs associated with this loan (\$369,420). **These funds are to be matched with grant contributions from Williamsburg County [and others].** ... Upon final disbursement of loan funds, a copy of the lender's detailed loan settlement must be provided to Rural Development as evidence that all funds were disbursed in amounts and for purposes outlined above.

(BON Ex. 6, VIKING v BON000469) (emphasis added).

The lender will also ensure that the project will be completed with available funds and, once completed, will be used for its intended purpose and produce products in the quality and quantity proposed in the completed application approved by the Agency.

(BON Ex. 6, VIKING v BON000472 (emphasis added). BON, thus, promised to disburse WCDC/County grant funds for the purposes stated above, in the amounts stated above, in order to get a new curtain/drapery manufacturing plant up and running in the County at the Kingtree location that WCDC sold to LHSC. The Guarantee was not required to state the intended benefits in any single term or clause, or in any particular way, for the factfinder to determine that the parties intended to provide direct benefits to WCDC and HBC. Instead, the parties' intent is "derived from the Agreement's language taken as a whole." *Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 429 S.C. at 509, 839 S.E.2d at 472.

And, because the C.F.R. plainly states the USDA's *raison d'être* is "to improve, develop, or finance ... employment and improve the economic and environmental climate in rural communities ... through the guarantee of quality loans that will provide lasting community benefits" (7 C.F.R. § 4279.101(b), BON cannot claim it was unaware of this intended benefit to WCDC/County. Nor did BON make such a claim. BON admitted these direct and substantial benefits to WCDC/County. (Tr. 1/23/2023, p. 14, line 21 – p. 15, line 6; p. 28, line 17 – p. 31, line 1; p. 33, line 5 – p. 35, line 6; p. 147, line 1 - p. 151, line 22; p. 159, line 21 – p. 160, line 2; Tr. 1/24/2023, p. 317, line 20 – p. 318, line 4).

The only purpose for the existence of the USDA loan guarantee program is to provide these direct benefits to rural communities, including Williamsburg County.

Purpose. The purpose of the B&I Guaranteed Loan Program is to improve, develop, or finance business, industry, and employment and improve the economic and environmental climate in rural communities. This purpose is achieved by bolstering the existing private credit structure through the guarantee of quality loans that will provide lasting community benefits.

7 C.F.R. § 4279.101(b) (emphasis added).

A borrower must be engaged in or proposing to engage in a business. A business may include manufacturing, wholesaling, retailing, providing services, or other activities that will provide employment and improve the economic or environmental climate.

7 C.F.R. § 4279.108(a) (emphasis added).

“[W]hen the parties to a contract clearly intend to provide a third party a direct benefit, the legal conclusion that flows from their intent is that the third party achieves the status of third-party beneficiary.” *Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 435 S.C. at 603, 869 S.E.2d at 817 (citation omitted).

In *Beverly*, the hospital contracted with BCBS of South Carolina to become a “preferred provider” in the insurer’s program and in exchange the contract required the hospital to bill BCBS directly for certain medical services delivered to its insureds, at a discount. Beverly was an insured, and, when she was injured in an automobile accident, she was treated at the hospital’s emergency room. The hospital billed Beverly \$8,000.00 and she sued for breach of the BCBS/hospital contract as a third-party beneficiary. The trial court dismissed, finding that she was not an intended third-party beneficiary. *Id.*, at 505–06, 839 S.E.2d at 469–70.

This Court reversed (despite that the contract contained an explicit third-party beneficiary exclusion or disclaimer, which is not present in the USDA Commitment/Guarantee), because the

hospital contract was “**structured to provide direct benefits to members.**” *Id.* at 507, 839 S.E.2d at 470 (emphasis added) and “**the remaining twenty pages of the Agreement impose requirements on [the hospital] specifically intended to benefit Beverly and other Members.**” *Id.*, at 509, 839 S.E.2d at 472 (emphasis added). In *Beverly*, the “members” were not identified by name, just as the WCDC/County are not identified by name in the Guarantee. And, just as in *Beverly*, the Guarantee is “structured to provide direct benefits” to the local community by “impos[ing] requirements on” BON (*Id.* at 507, 839 S.E.2d at 470); and this is precisely what the C.F.R. purpose statement publicly declares as USDA’s purpose. (“The purpose ... is to improve ... employment and ... economic ... climate in rural communities. This purpose is achieved ... through the guarantee of quality loans that will provide lasting community benefits.”) 7 C.F.R. § 4279.101(b).

In *Beverly*, this Court explained that “the parties’ intent must be derived from the Agreement’s language taken as a whole” *Id.*, at 509, 839 S.E.2d at 472, that the very first responsibility the hospital undertook “was to provide Covered Services to any Member” and, that Members were “also direct beneficiaries of Grand Strand’s promise to accept the negotiated [discount] from BCBS as well as promise to bill BCBS, not Member, for covered services.” *Id.* at 509–10, 839 S.E.2d at 472.

This Court found evidence that the contract was intended to benefit Beverly because the hospital gained access to BCBS’s expansive membership along with guaranteed reimbursements from BCBS in exchange for accepting both reduced payments as well as the responsibility of submitting Members’ claims to BCBS. BCBS gained greater cost control in exchange for promising prompt payment for Grand Strand’s services and touting Grand Strand’s PPO provider

status to Members. Beverly's allegations that Grand Strand's failure to submit Beverly's bill to BCBS and refusal to bill her at the reduced reimbursement rate stated a claim that Grand Strand breached its contract by denying Beverly benefits arising from the Agreement. *Id.* 429 S.C. at 513, 839 S.E.2d at 473.

These factors are echoed in the USDA guarantee. The hospital's gaining access to massive benefits under its contract with BCBS is much like BON gaining the security provided by a 90% loan guarantee. But, in return, BON promised to comply with the Commitment loan servicing requirements, which were designed to ensure payment to the County under its PSA; to ensure Project completion with available funds (including County grant funds); and to ensure that the Project got up and running as a (County) code-compliant manufacturing plant here, within those available (County grant) funds, on the County real estate, sold for this purpose, and providing \$88,000,000 in economic benefits to the County over 10 years. (Tr. 1/23/2023, p. 126, line 5 – p. 127, line 8; Tr. 1/24/2023, p. 309, line 23 – p. 310, line 10); This Court explained:

Under South Carolina law, it is well settled that a nonparty may enforce contractual terms that intentionally provide her direct benefits. We have held in numerous cases that a contract between two persons, for the benefit of a third, even though such third party be not named therein, can be enforced by such third party.... [C]ontracts between two persons for the benefit of a third can be enforced by the third person even though she is not named therein. The presumption that a contract is not enforceable by a nonparty may be overcome by showing he was intended to be the direct beneficiary of the contract.

Beverly v. Grand Strand Reg'l Med. Ctr., LLC, 429 S.C. at 507–08, 839 S.E.2d at 470–71 (citations and punctuation deleted).

Our Supreme Court affirmed, explaining that “the clear language of [the hospital’s] promises” and, “other terms in the Institutional Agreement indicate a mutual intent on the part of BCBS and Grand Strand to directly benefit BCBS Members.” *Beverly v. Grand Strand Reg'l Med.*

Ctr., LLC, 435 S.C. 594, 600, 869 S.E.2d 812, 816 (2022). (Here, that “mutual intent” is evidenced by BON’s acceptance of the Guarantee, under the terms imposed by the Conditional Commitment.) (“Our law provides that when the parties to a contract clearly intend to provide a third party a direct benefit, the legal conclusion that flows from their intent is that the third party achieves the status of third-party beneficiary.” *Id.* at 603, 869 S.E.2d at 817.

III. BON FAILED TO PRESERVE ANY ERROR AS TO A PURPORTED FINDING OR HOLDING THAT BON HAD A DUTY TO HBC AND WCDC TO REGULATE AND CONTROL ITS BORROWER.

(A) STANDARD OF REVIEW

“An action to construe a contract is an action at law.” *Byrd v. Livingston*, 398 S.C. at 241, 727 S.E.2d 620, 622 (Ct. App. 2012). “When an action at law is tried without a jury, the standard of review extends only to the correction of errors of law.” *J&H Grading & Paving, Inc. v. Clayton Constr. Co., Inc.*, 441 S.C. at 277, 892 S.E.2d at 561. In an action at law “the trial judge’s findings of fact will be upheld unless without evidentiary support.” *Kuznik v. Bees Ferry Associates*, 342 S.C. at 589, 538 S.E.2d at 20.

(B) BON FAILED TO SHOW THE PURPORTED FINDING/HOLDING EXISTS.

BON asserts that the court erred by finding and holding that BON owed a duty to WCDC “to regulate and control its borrower.” (BON Initial Brief, p. 26). But none of the orders appealed from includes such a finding or holding. (3/13/2023, 6/2/2023, and 7/25/2023 Orders, *passim*). BON’s argument does not cite any such holding or even identify which Order contains it. (BON Initial Brief, pp. 26-27).

Instead, BON offers legal authorities on the bank-customer relationship, which are not relevant here. (*Id.* p. 26). No party claims that WCDC and HBC are BON customers. (2018-CP-45-00258 and 2019-CP-45-00193 Complaints; 6/3/2019 HBC Answer, Countercl., Crosscl. & 3rd-

party Compl.; 12/12/2022 WCDC Am. Answer, Countercl., Crosscl. & 3rd-party Compl., *passim*). HBC and WCDC claim contractual rights under the terms of the Guarantee and their own contracts. (*Id.*) And every duty, responsibility and obligation referenced in the Orders granting relief on WCDC's claims is a contractual duty, not a relationship duty. (3/13/2023 and 6/2/2023 Orders, *passim*).

Typically, such conclusory arguments, without context and citations to authority, are deemed abandoned. *Hoyler v. State*, 428 S.C. 279, 309, 833 S.E.2d 845, 861 (2019) (finding issue to be unpreserved as to post-trial motions because supporting materials were conclusory and cited no authority) (citing *S.C. Dep't of Soc. Servs. v. Mother ex rel. Minor Child*, 375 S.C. 276, 283, 651 S.E.2d 622, 626 (Ct. App. 2007) (issue was abandoned where appellant made a conclusory argument without citation of any authority to support her claim). *See also*, *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) ("An issue is deemed abandoned if the argument in the brief is only conclusory."); *State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned), *aff'd as modified on other grounds*, 337 S.C. 622, 525 S.E.2d 246 (2000)). *See also*, *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. at 81, 557 S.E.2d at 691 ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). The Court should disregard BON's argument.

Even if this issue were considered, the March and June 2023 orders show that the court construed the USDA contracts as imposing duties on BON to control itself, by servicing the Loan and disbursing Project funds according to the Commitment and Guarantee – all of which BON

admitted at trial. (Tr. 1/24/2023, p. 349, lines 15-24).

IV. THE TRIAL COURT ACTED WITHIN ITS EQUITABLE DISCRETION WHEN IT SUBORDINATED BON'S LIEN

(A) STANDARD OF REVIEW

“A case with legal and equitable issues presents a divided scope of review. When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal.” *Kuznik v. Bees Ferry Associates*, 342 S.C. at 589, 538 S.E.2d at 20 (citations omitted). “Ordinarily, an appellate court reviews cases in equity by finding facts in accordance with its own view of the preponderance of the evidence. However, an appellate court still affords a degree of deference to the trial court because it was in the best position to judge the witnesses' credibility.” *Matter of Estate of Kay*, 423 S.C. at 480, 816 S.E.2d at 544–45. “When an action at law is tried without a jury, the standard of review extends only to the correction of errors of law.” *J&H Grading & Paving, Inc. v. Clayton Constr. Co., Inc.*, 441 S.C. at 277, 892 S.E.2d at 561. In an action at law “the trial judge's findings of fact will be upheld unless without evidentiary support.” *Kuznik v. Bees Ferry Associates*, 342 S.C. at 589, 538 S.E.2d at 20 (Ct. App. 2000).

(B) THE COURT PROPERLY GRANTED EQUITABLE RELIEF TO WCDC.

BON acknowledges that its foreclosure action is in equity. (BON Initial Brief, p. 13). It does not deny that WCDC's claims for lien subordination, constructive trust, and unjust enrichment are also claims in equity. Its argument on this issue does not deny that these equitable claims are recognized in South Carolina, nor does it claim that WCDC failed to prove any element of these equitable claims.

Instead, BON claims that the equitable relief granted by the court improperly overrode its primary lien status, under S.C. Code § 30-7-10. (*Id.* p. 28). In support of this argument, it offers

contradictory statements, to the effect that the court granted equitable liens to WCDC and HBC, then that it did *not* grant such liens. (BON Initial Brief, pp. 27-28, 35).

WCDC did not seek equitable liens; WCDC sought equitable lien *subordination*, a constructive trust on the foreclosure proceeds held in escrow, equitable relief for unjust enrichment, damages for breach of the USDA contract and for tortious interference with WCDC's contracts, and subordination of BON's claims to those of WCDC (and it incorporated every fact into every cause of action). (12/12/2022 WCDC Am. Answer, Countercl., Crosscl. & 3rd-party Compl., *passim*).

Nor did the court grant equitable liens. (3/13/2023 and 6/2/2023 Orders, *passim*). It equitably *subordinated* BON's lien to WCDC's and HBC's liens, and equitably subordinated BON's *claims* to WCDC's *claims*, in essence, holding foreclosure proceeds in a constructive trust¹³, and ordering that WCDC's and HBC's damages be paid from those funds first, before BON received the balance for its lien on the real property. (*Id.*, pp. 22, 24).

“Where a court of equity has assumed jurisdiction of a cause it will retain such jurisdiction to dispose of all issues within the scope of the pleadings, including the granting of **whatever relief may be required to render the judgment of the court effective.**” *Bramlett v. Young*, 229 S.C. 519, 535, 93 S.E.2d 873, 881 (1956) (citations omitted) (emphasis added). “Courts have the inherent power to do **all things reasonably necessary to ensure that just results are reached to the fullest extent possible.**” *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 252, 715

¹³ “[N]ot all situations require a detailed order[.] ...[T]here is no blanket requirement that the trial court set forth a separate explanation on all of its rulings.” *Porter v. Labor Depot*, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007) (citations omitted).

S.E.2d 348, 354 (2011) (citations omitted) (emphasis added). Subordinating BON's lien to allow for direct payment of WCDC's and HBC's damages ensured they would be paid almost immediately. BON makes no argument that it was prejudiced by this relief. Nor could it, because it would have had to pay the damages awarded even without this relief.

A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust. It arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it. ... [T]he doctrine of constructive trust as a creature of equity jurisprudence, raised without regard to intention to prevent unjust enrichment. A constructive trust does not arise because of a manifestation of an intention to create it, but it is imposed as a *remedy* to prevent unjust enrichment. A constructive trust is a flexible equitable remedy whose enforcement is subject to the equitable discretion of the trial court.

Hale v. Finn, 388 S.C. 79, 89–90, 694 S.E.2d 51, 57 (Ct. App. 2010) (citations and punctuation omitted). “There is no incongruity [] in using an equitable measure to determine [WCDC's] recovery on a constructive trust theory.” *Id.*, at 90, 694 S.E.2d at 58. “Regardless of whether the award ... is damages for interference with contractual relations, the discretion that must be accorded to the special referee compels us to affirm the award as appropriate recompense for misconduct necessitating the imposition of a constructive trust.” *Id.* “[E]quity is less than demanding and quite flexible in prescribing the elements essential to a constructive trust.” *Whitmire v. Adams*, 273 S.C. 453, 458, 257 S.E.2d 160, 163 (1979).

(C) BON FAILS TO SHOW WCDC AND HBC HAD UNCLEAR HANDS.

BON claims WCDC was not an innocent party because it lent LHSC \$80,000 knowing that there was a “construction dispute” between HBC and Viking, and knowing its lien was subordinate to BON's lien. (BON Initial Brief, p. 33). But it fails to offer *relevant* authority, because none of its cases hold that lending money under these circumstances gives the lender unclean hands. A “construction dispute” is not evidence the borrower is “financially unstable,” nor is WCDC

asserting ownership of the real property as BON implies.

BON claims that WCDC conferred no benefit on BON, subject to a claim for unjust enrichment. (BON Initial Brief, p. 33). This ignores BON's admission that the Guarantee would not have existed without WCDC's sale of the real property and its grant. (Tr. 1/23/2023, p. 14, line 21 – p. 15, line 6; p. 28, line 17 – p. 31, line 1; p. 33, line 5 – p. 35, line 6; p. 147, line 1 - p. 151, line 22; p. 159, line 21 – p. 160, line 2).

Thus, this issue should be deemed to be abandoned on appeal, per *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, at 557 S.E.2d at 691.

(D) BON FAILS TO SHOW WCDC HAD AN ADEQUATE LEGAL REMEDY.

BON claims WCDC could have had an adequate legal remedy if it had sued LHSC/Hornick. (BON Initial Brief, p. 34). This mischaracterizes the evidence and the law. BON itself sued Hornick and obtained an uncollectible default judgment against him for the full amount owed to BON *before* it tried the present consolidated cases. (9/25/2019 Default Judgment in 2019-CP-45-00325).

WCDC Executive Director Frieson testified did not know whether his predecessor, Moore, tried to collect from LHSC and that many WCDC files were missing when Frieson arrived on the job. (Tr. 1/25/2023, p. 604, line 4 – p. 606, line 12). But LHSC is uncollectible. Its sole asset was the Project (Tr. 1/25/2023, p. 612, line 24 – p. 613, line 4) on which it defaulted, and after which it had no assets (Tr. 1/24/2023 p. 579, lines 5-23). For WCDC to have an adequate legal remedy, it must have a remedy “as certain, practical, complete and efficient to attain the ends of justice ... as the remedy in equity.” *Milliken & Co. v. Morin*, 386 S.C. 1, 8, 685 S.E.2d 828, (Ct. App. 2009), *aff'd as modified*, 399 S.C. 23, 731 S.E.2d 288 (2012). BON offers no argument or authority for its contention that a lawsuit against uncollectible defendants would meet this requirement, thus,

the Court should disregard BON'S argument on this point, as abandoned on appeal, per *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. at 81, 557 S.E.2d at 691

V. WCDC'S CLAIMS ARE TIMELY.

(A) STANDARD OF REVIEW

"Statutory interpretation is a question of law subject to de novo review." *Barton v. S.C. Dep't of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 414, 745 S.E.2d 110, 120 (2013).

(B) BON FAILS TO SHOW THAT WCDC'S CLAIMS ARE TIME-BARRED.

BON contends that "WCDC *waited* to file its claims against BON of Newington and Blake Fickling until December 12, 2022. (BON Initial Brief, p. 37). This is quite misleading inasmuch as BON withheld thousands of pages of documents and information crucial to WCDC's discovery of the existence of its claims until October 2022¹⁴; and it withheld the updated spreadsheet, showing BON's last disbursements and overdrawn Loan categories until December 1, 2022¹⁵. It also misleads because, on the strength of the October document dump, WCDC promptly moved to amend its pleadings to add the claims on November 21, 2022.

BON contends that the 3-year statute of limitations applies to WCDC's claims, based upon WCDC's \$80,000 loan documents, providing that LHSC's first payment was due May 1, 2018. (BON Ex. 52, WCDC655). But it offers no argument or authority for its implication that this loan is determinative of the limitations periods for BON's claims relative to the \$200,000 grant agreement, or the LHSC stock agreement (which was part of WCDC's sale of the real property).

Such conclusory arguments, without context and citations to authority, are deemed abandoned. *S.C. Dep't of Soc. Servs. v. Mother ex rel. Minor Child*, 375 S.C. at 283, 651 S.E.2d at

¹⁴ (See, 3/13/2023 and 6/2/2023 Orders, p. 3).

¹⁵ (See, Tr. 1/23/2023, p. 119, line 8 – p. 120, line 1; Tr. 1/24/2023 p. 312, lines 6-19).

626 (issue was abandoned where appellant made a conclusory argument without citation of any authority to support her claim). *See also, R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. at 437, 540 S.E.2d at 120 (“An issue is deemed abandoned if the argument in the brief is only conclusory.”); *State v. Colf*, 332 S.C. at 322, 504 S.E.2d at 364 (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned); and, *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, at 557 S.E.2d at 691 (“South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.”).

Even if it were considered, WCDC’s \$80,000 loan agreement is deemed to have been executed under seal, because it was “**SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF** [witnesses and a notary].” (*Id.*) (Emphasis and capitals original). (BON Ex. 52, WCDC656).

Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto.

S.C. Code Ann. § 19-1-160.

This Court recognizes that “Signed, Sealed and Delivered” can manifest the parties' intent to create a sealed instrument. *See, e.g., Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 173, 609 S.E.2d 548, 551 (Ct. App. 2005). The limitations period for an action on a sealed instrument is 20 years. S.C. Code Ann. § 15-3-520(b). And the same period applies because this loan is secured by a mortgage on the real property. S.C. Code Ann. § 15-3-520(a). (WCDC Ex. 8; Tr. 1/25/2023, p. 638, line 13 – p. 639, p. 640, line 5).

As to the stock agreement, the evidence showed that it was executed February 24, 2017,

and it obliged LHSC to repurchase the stock in 5 years. (Tr. 1/25/2023 p. 623, lines 8-23; p. 629, lines 5-9; WCDC Ex. 4). Default under that contract would, thus, not have occurred until 5 years thereafter, on February 24, 2022. Thus, the 3-year limitations period for the stock agreement does not end until 3 years after February 24, 2022, on February 24, 2025, per S.C. Code Ann. § 15-3-530, and it has not yet run.

BON contends WCDC's claims are time-barred per Judge Curtis' Order denying HBC's jury demand: "Judge Curtis held in her Order dated August 18, 2022, that the claims against the Bank of Newington by HBC **and by extension the similar claims by WCDC** are separate occurrences. Consequently, WCDC is not entitled to the benefit of the relation back rule, and its claims are barred by the statute of limitations." (BON Initial Brief, p. 38) (emphasis added).

The Order denying HBC's jury demand is an interlocutory procedural order which did not apply to WCDC:

HBC is not a party to [BON's] note ... and it cannot challenge the enforceability of the note against LHSC. There is no logical relationship between HBC's claims ... and the enforceability of the note against LHSC. Consequently, HBC's counterclaims are permissive, and it is not entitled to a jury trial.

(11/18/2022 Order). On its face, this order does not pertain to WCDC's later-filed claims, and it is, thus, not the law of the case.

The law of the case does not generally apply to an interlocutory order deciding "some point or matter essential to the progress of the cause, collateral to the issues in the case." *S.C. Pub. Interest Found. v. Wilson*, 437 S.C. 334, 340, 878 S.E.2d 891, 894 (2022) (citations and punctuation omitted). "[P]reliminary **findings on interlocutory motions bind neither the parties nor the court at the trial on the merits.**" *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989) (emphasis added).

BON offers no argument or legal authority for its contention that Judge Curtis' ruling against HBC can be extended to bar WCDC, who had no motion before that court, and who was not addressed by the court's determination. BON offers only its opinion that HBC's and WCDC's claims are "similar." Thus, its argument should be disregarded as unpreserved and abandoned on appeal. *See, e.g., Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. at 81, 557 S.E.2d at 691.

BON next argues that the limitations period is not tolled because the period begins to run when a party *could have* discovered its claim through the exercise of *reasonable diligence*, and that "Frierson [sic] testified that they knew the project was *in trouble* when they made the loan in February 2018." (BON Initial Brief, p. 38) (emphasis added).

Frierson did not testify WCDC knew the "Project," writ large, was "*in trouble*," as BON states. He testified WCDC knew "there was *a problem*" when LHSC asked for the loan "on the *shortfall*." (Tr. 1/25/2023, p. 759, lines 17-19). The court, as factfinder, could reasonably have understood this to mean WCDC knew the project had cost overruns (anticipated in the USDA documents¹⁶ to which WCDC was not privy), not that WCDC knew facts from which WCDC could have discovered the existence of any cause of action. Knowledge of "a problem" about "a shortfall" cannot conclusively be held to put WCDC on notice that it might have some claim. What construction project does not have "a problem" at some point? The court's factual determinations (implied from its order allowing amendment) are not to be reversed unless they lack evidentiary support. *Kuznik v. Bees Ferry Associates*, 342 S.C. at 589, 538 S.E.2d at 20.

And no amount of diligence would have uncovered the existence of WCDC's claims

¹⁶ "Prior to disbursement of construction funds, [BON] must have: ... Contingencies in place to handle unforeseen cost overruns without seeking additional guaranteed assistance." (BON Ex.6, VIKING v BON000472-473).

because BON withheld discovery until October and December 2022 on crucial information. BON states that it produced a disbursement sheet outlining Loan disbursements in May 2019 (referring to its Exhibit 56). (BON Initial Brief, p. 39). This “outline” does not show the overdrawn USDA categories, nor does it reveal that BON moved funds from one category to another to accommodate Hornick’s demands for unverified reimbursements. But that is *precisely* what the December 1, 2022 discovery shows – this is the spreadsheet BON worked from during the Project, updating it on a day-to-day basis. (WCDC Ex. 33; Tr. 1/24/2023, p. 541, lines 14-21). And BON admitted it withheld this until December 1, 2022. (Tr. 1/24/2023, p. 559, line 9 – p. 560, line 14).

BON states that WCDC did not seek discovery (BON Initial Brief, p. 39), and WCDC agrees that HBC took the lead in discovery. But that is irrelevant, because all discovery must be provided to all parties. Rule 5(a) SCRCF. WCDC had the same right to receive this document that HBC had. And BON admitted that the updated spreadsheet of disbursements was only produced at its Rule 30(b)(6) deposition in December 2022. (Tr. 1/23/2023, p. 119, line 8 – p. 120, line 1; Tr. 1/24/2023 p. 312, lines 6-19). HBC fought for two years for BON’s Loan files, an *immense* number of which BON withheld until October 2022, with the final document being withheld until December 1, 2022:

The parties engaged in discovery, and BON and HBC moved to compel discovery from each other. The Court ordered them both to respond and produce documents and/or information November 19, 2020. **BON failed to comply with this order, which resulted in HBC’s second motion to compel**, and the Court’s September 22, 2022 order compelling BON to comply. This resulted in production of voluminous documents and information from BON on October 7, 2022, consisting of **978 MB of data and more than 5,600 pages** of documents.

Discovery disputes continued, and **BON subsequently produced an updated version of its loan disbursements, including amounts disbursed through September 9, 2019. BON created this version in the middle of its December 1, 2022 Rule 30(b)(6) deposition.** (HBC Ex. 10; WCDC Ex. 33).

(3/13/2023 and 6/2/2023 Orders, p. 3) (emphasis added).

[T]he limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. ...Therefore, the statutory period of limitations begins to run when a person *could or should have known*, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor[.]

Allwin v. Russ Cooper Associates, Inc., 426 S.C. 1, 13, 825 S.E.2d 707, 713 (Ct. App. 2019)
(citations and punctuation omitted) (italics original).

WCDC *could not have known* an action might exist until October 2022 when BON finally produced “978 MB of data and more than 5,600 pages of documents.” (3/13/2023 and 6/2/Orders, p. 3). Up until that time, WCDC knew or should have known only that Viking had a payment dispute with HBC, the Project had been underfunded, and LHSC had defaulted on its obligations.

Until October 2022, WCDC *could not have discovered* it had been injured by BON’s negligence with *any* amount of diligence, because BON withheld the information. But a few weeks into its study of the October document dump, WCDC promptly moved to amend to add its claims. (11/21/2022 WCDC motion). A motion to amend before then would have violated Rule 11, because it would have been without “good ground to support it.” Rule 11(a) SCRPC.

What constitutes reasonable diligence is determined on a case-by-case basis. See, e.g., *Florentine Corp. v. PEDA, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985). BON cites to no evidence that it would have provided the crucial discovery any sooner if WCDC had taken any different action, nor that WCDC could have learned of BON’s negligent Loan servicing any other way. And this Court may affirm the March and June 2023 orders on “any ground(s) appearing in the Record on Appeal.” SCACR 220(c).

BON could have raised the statute of limitations in its opposition to WCDC’s motion to

amend at the December 5, 2022 hearing. (12/9/2022 Order, p. 1). But BON offers no authority for overruling the trial court's determination (reasonably inferred from its order allowing amendment) that WCDC's motion to amend met the diligence requirement, having been filed promptly following the October document dump. "We have interpreted the exercise of reasonable diligence to mean that the injured party must act with *some promptness* where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363–64, 468 S.E.2d 645, 647 (1996).

"Conflicting evidence as to the application of the discovery rule and the date a statute of limitations began to run present questions of fact." *Allwin v. Russ Cooper Assocs.*, 426 S.C. 1, 13, 825 S.E.2d 707, 713 (Ct. App. 2019). "The burden of establishing the bar of the statute of limitations rests upon the one interposing it[.]" *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). In an action at law "the trial judge's findings of fact will be upheld unless without evidentiary support." *Kuznik v. Bees Ferry Associates*, 342 S.C. at 589, 538 S.E.2d at 20. The evidence described above supports the Court's order granting WCDC leave to amend.

Moreover, WCDC's claims arise out of the same Loan transactions from which BON derives its foreclosure action – the Conditional Commitment for the Loan and its continuing and very specific Loan servicing duties, which were *designed* to provide benefits and safeguards to "ensure" compliance with "applicable... contracts" (including WCDC's contracts) (BON Ex. 6, VIKING v BON000472), and the USDA loan guarantee program's codified purpose statement. 7 C.F.R. § 4279.101(b). "Whenever the claim ... in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the

amendment relates back to the date of the original pleading.” SCRPC 15(c).

“It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice.” *Brown v. James*, 389 S.C. 41, 59–60, 697 S.E.2d 604, 614 (Ct. App. 2010) (citation omitted). BON can claim no prejudice, because the Order granting amendment simultaneously continued the trial date. (12/9/2022 Order, p. 1). And, because BON claims HBC’s June 2019 claims were “similar”, BON was on notice it would have to defend them ever since that filing. (6/3/2019 HBC Answer, Countercl., Crosscl. & 3rd-party Compl.).

“Courts have wide latitude in amending pleadings and [w]hile this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal.” *Id.* “The trial judge’s finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred.” *Id.*

BON failed to preserve this issue, and failed to prove that WCDC’s claims are time-barred.

VI. THE COURT WAS WITHIN ITS DISCRETION IN DENYING BON’S MOTION TO STAY.

(A) STANDARD OF REVIEW

“Statutory interpretation is a question of law subject to de novo review.” *Barton v. S.C. Dep’t of Prob. Parole & Pardon Servs.*, 404 S.C. at 414, 745 S.E.2d at 120.

(B) BON WITHDREW ITS MOTION TO STAY EXECUTION.

BON’s motion to stay execution of the March 13, 2023 Order, and to stay accrual of post-judgment interest on that order, asserted entitlement to stay pursuant to Rule 241(a) SCACR and *Russo v. Sutton*, 317 S.C. 441, 422 S.E.2d 750 (1995). (BON 3/13/2023 motion to stay enforcement, p. 2).

The March 13, 2023 order was amended by an Order entered on June 2, 2023, thereby mooting the March 13, 2023 Order and, presumably, BON's March 13, 2023 motion to stay execution and interest. (6/2/2023 order, p. 1). BON did not file a motion to stay execution and interest on the June 2, 2023 amended order. The Court heard BON's motion to stay on June 29, 2023, (Tr. 6/29/2023), and the court entered its order denying that motion and vacating the temporary stay on July 25, 2023. (7/25/2023 Order, p. 2). Mootness was not addressed.

At the hearing, BON withdrew its request to stay *execution*:

[Mr. Wilcox] ... We're not objecting to all that money being disbursed to all three parties. What we do object to is assigning all of the post judgment interest to us after that June 2 order because there are other challenges to the amount. So, you know, Your Honor, we're still going to appeal it and if we wouldn't appeal, we would still be trying to go after that money, but we want the money -- we want our money as well.

So our position is (indiscernible) speaking on the motion to stay is that the bank is entitled to get the amount that's left over after the county gets the 371 and some change and HBC [gets] the 362 and change from the escrow.

...

... but as far as the stay goes in, if we can get our money all at the same time, we would withdraw that motion.

(Tr. 6/29, 2023, p. 11, line 23 – p. 12, line 12).

(C) S.C. CODE ANN. § 18-9-130(A)(1) APPLIES TO THE REMAINING QUESTION OF STAY OF INTEREST.

S.C. Code Ann. § 18-9-130(A)(1) applies to the remaining question of stay of interest because the March 13 and June 2, 2023 orders directed payment of money. (3/13/2023 and 6/2/2023 orders, pp. 22 and 24, respectively). “A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution.” S.C. Code Ann. § 18-9-130(A)(1). The presiding judge denied the motion for stay (7/25/2023 Order, p. 2), thus, stay is not automatic in this case.

BON argues that S.C. Code Ann. § 18-9-170 applies because the funds in escrow were the “property”. (BON Initial Brief, p. 39). “If the judgment appealed from direct[s] the sale or delivery of possession of real property, the execution of the judgment shall not be stayed unless a written undertaking be executed on the part of the appellant, with two sureties...” S.C. Code Ann. § 18-9-170. The orders appealed from do not direct the sale or delivery of possession of real property. The order directing the sale of the real property was the Foreclosure Decree, entered March 10, 2022, which was not appealed. Thus, S.C. Code Ann. § 18-9-170 does not apply in this case.

(D) BON HAS NOT SHOWN PREJUDICE

Despite having withdrawn its motion for stay of execution, BON argues it is entitled to stay of execution because it will be prejudiced if the orders are reversed or new trial is granted, because BON *might* have to attempt to recover the funds from WCDC or HBC. (BON Initial Brief, p. 40). BON is not entitled to make this argument because it withdrew its motion to stay execution at the hearing, as quoted in (B), above.

Applying the prejudice argument to stay of interest is also improper, because BON offers no legal authority for its implication that *potentially* having to seek recovery of interest accrued over the short period of time between entry of the March or June 2023 order and the payout from escrow (which its Statement of the Case¹⁷ asserts occurred on August 9, 2023) constitutes prejudice. Nor does it offer legal authority mandating a stay of interest under S.C. Code Ann. § 18-9-130(A)(1), which applies to the orders appealed from because they direct the payment of money. Thus, BON’s prejudice argument is conclusory and should be disregarded as abandoned on appeal, per *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. at 81, 557 S.E.2d at 691.

¹⁷ Appellant is bound to its Statement of the Case. Rule 208(b)(1)(C) SCACR.

The Order calculated the amounts due to each party from the funds in escrow, and included the per diem interest to be paid to WCDC and HBC, together with additional costs for that motion, and it provided the total amounts to be paid to each party as of July 11, 2023. (7/29/2023 Order, p. 2). BON offers no argument or authority addressing the court's calculations of the amounts or rate of interest awarded, and appeal of those issues should also be considered abandoned on appeal, per *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. at 81, 557 S.E.2d at 691.

(E) RUSSO V. SUTTON IS INAPPOSITE

BON argues that *Russo v. Sutton*, 317 S.C. 441, 422 S.E.2d 750 (1995) deprives WCDC and HBC of additional interest and costs because the funds held in escrow pursuant to the Foreclosure Decree “stops the accrual of interest.” (BON Initial Brief, p. 40). But *Russo* held: “Sutton failed to give notice to Russo that the funds were being deposited, and failed to obtain leave of the circuit court prior to depositing the funds. Accordingly, we hold Sutton's unilateral deposit of the funds insufficient to stop accrual of the interest[.]” *Russo v. Sutton*, 317 S.C. 441, 444–45, 454 S.E.2d 895, 897 (1995). BON likewise did not give notice that it was depositing funds to cover the orders, nor did the court grant leave to make such a deposit – nor did BON make any deposit with the court. The funds in escrow are the proceeds of the foreclosure sale, and it is not BON's money:

[Mr. Few] ...This is not the bank's money. This was the government's money and the bank has been using it interest-free since August 2018 when the USDA, by virtue of their apparent knee-jerk reaction, paid the guarantee and has apparently done nothing to investigate the facts of how the bank handled this matter.

(Tr. 6/29/2023, p. 18, lines 1-6). *Russo* did not hold that funds already on deposit as the result of a prior order would mandate a stay of execution, and no reading of that decision reasonably supports extension of that holding to apply in the present situation, where BON is obliged to repay the

Guarantee from any foreclosure proceeds it receives.

(F) WCDC IS A PREVAILING PARTY.

BON claims that WCDC is not entitled to benefit from the “delay in disbursement” due to BON’s post-trial motions, because BON was the prevailing party. (BON Initial Brief, p. 40). But that is hardly the case. BON did not prevail on its motion to stay execution; it withdrew that motion. (Tr. 6/p. 11, line 23 – p. 12, line 12; 7/25/2023 Order, p. 2). And BON was only *partially* successful on its motion to alter or amend. In it, BON sought multiple forms of relief that it did not receive:

Bank of Newington requests that the Court amend its Order and find and hold that the [1] Bank of Newington is entitled to recover all of the escrow proceeds, dismiss the counterclaims against it and the third party claims against Blake Fickling. The Bank of Newington is entitled to collect its [2] reasonable attorneys' fees of \$222,718.28 from HBC pursuant to S.C. Code§ 29-5-10(a) and the assignment from Viking. [3] Costs from the action should be taxed against HBC and WCDC and payable to the Bank of Newington. In the alternative, the Order should be amended to reduce the amounts awarded to [4] WCDC and [5] HBC as explained above. Also in the alternative, the Court should [6] order a new trial pursuant to Rule 59(a), SCRCP or [7] open the trial to take additional testimony and evidence.

(3/22/2023 BON motion, p. 17) (emphasis and brackets added).

Of the seven forms of relief it sought (bracketed above), BON succeeded in obtaining *partial* success on only one – reduction in the amount awarded to WCDC. That request also had multiple parts on which BON was unsuccessful: BON asked the court to reduce WCDC’s award by: (1) deducting pre-judgment interest from WCDC’s damages award; (2) reducing WCDC’s damages award by \$450,000 (\$200,000 representing WCDC’s grant, plus \$250,000 representing the LHSC stock); and (3) reducing WCDC’s attorney’s fees award of \$71,561.84 to \$0. (3/22/2023 BON motion, pp. 9-11). BON’s requested reductions total \$521,561.84 (plus prejudgment interest on WCDC’s \$80,000 loan).

The court’s amended order reduced WCDC’s award only by the amount of the LHSC stock

(\$250,000), thereby reducing WCDC's award from \$621,404.66 to \$371,404.66; but it nevertheless concluded: "WCDC is a prevailing party" and cited its authority to provide "whatever relief may be required to render the judgment of the court effective" (citing *Bramlett v. Young*, 229 S.C. at 535, 93 S.E.2d at 881 (1956) (citations omitted)) and to "do all things reasonably necessary to ensure that just results are reached to the fullest extent possible" *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 252, 715 S.E.2d 348, 354 (2011) (citations omitted)). (6/2/2023 Order, COL 10, 12, pp. 22-23).

[A] prevailing party is one who successfully prosecutes an action or successfully defends against it, prevailing on the main issue, **even though not to the extent of the original contention** and is the one in whose favor the decision or verdict is rendered and judgment entered.

Sloan v. Friends of Hunley, Inc., 393 S.C. 152, 156, 711 S.E.2d 895, 897 (2011) (citation and quotation marks omitted) (emphasis added). WCDC undoubtedly prevailed at trial, because it was awarded every penny of its requested damages against BON. At the close of trial, the court requested that each party submit its damages statement. WCDC's damages statement included the exact same amounts that the court awarded on March 13, 2023. (1/30/2023 WCDC Statement of Damages, p. 4; 3/13/2023 Order, COL 12, p. 21). And all but the \$250,000 remains in the June 2, 2023 award. (6/2/2023 Order, COL 12, p. 23).

Thus, WCDC successfully prosecuted and successfully defended "on the main issue, even though not to the extent of the original contention" and WCDC "is the one in whose favor the decision or verdict is rendered and judgment entered." *Sloan v. Friends of Hunley, Inc.*, 393 S.C. at 156, 711 S.E.2d at 897. WCDC, as a prevailing party, is entitled to attorney's fees and costs incurred in protecting its award. See *Faucette v. 6303 Carmel Road, LLC*, 242 N.C.App. 267, 775 S.E.2d 316, 326 (2015) (indicating a trial court may award attorney's fees for posttrial or appellate

work by a prevailing party when the work was done in an effort to protect the judgment). *See also Cotton v. Stanley*, 94 N.C.App. 367, 380 S.E.2d 419, 422 (1989) (“Fees are authorized for the prevailing party and may be awarded for all time, including appeal, reasonably expended in obtaining or sustaining the status of prevailing party.”).

For these reasons, BON is not entitled to stay of execution or stay of accrual of interest and costs of post-trial motions.

CONCLUSION

Based on all of the above, WCDC respectfully asks the Court to dismiss BON’s appeal and affirm the trial court’s March 13, 2023 Order, reverse the June 2, 2023 Order as to Conclusion of Law 12, order the court to reinstate the award of \$250,000 to WCDC for the balance owed on the real estate purchase, and reverse the July 25, 2023 Order as to WCDC’s Rule 59 motion.

Respectfully submitted,

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