

THE STATE OF SOUTH CAROLINA
South Carolina Supreme Court
No. 2012-205647

RECEIVED

OCT 30 2013

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

S.C. Supreme Court

The Honorable Roger M. Young, Circuit Court Judge

Cases 2009-CP-10-7515, 2009-CP-10-7517,
2009-CP-10-7518, and 2010 CP-10-9959

2009-CP-10-7515

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

v.

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

2009-CP-10-7517

Ron Konersmann Appellant,

v.

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

2009-CP-10-7518

John Voytko Appellant,

v.

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

2010-CP-10-9959

Patricia Konersmann Appellant,

v.

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

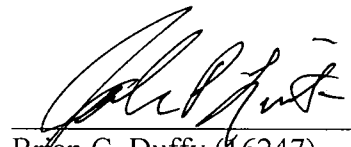
**NOTICE OF MOTION TO AMEND, OR IN THE ALTERNATIVE TO REMAND
FOR CONSIDERATION OF AMENDMENT AFTER DISPOSING OF PENDING
ISSUES ON APPEAL, AND TO SUPPLEMENT THE RECORD WITH THE
TESTIMONY OF JAMES EDAHL, AND CERTAIN EMAILS ORIGINATING
FROM BB&T AND LETTER BETWEEN COUNSEL**

Brian C. Duffy (16247)
John P. Linton (3346)
Seth W. Whitaker (77102)
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*Attorneys for Appellants Ron Konersmann
and John Voytko*

YOU WILL PLEASE TAKE NOTICE that Plaintiffs, Ron Konersman and John Voytko, move before the Supreme Court of South Carolina, or in the alternative Court of Common Pleas, County of Charleston, for an order, pursuant to S.C. R. Civ. P. 15, giving Plaintiffs, leave of court to amend their complaint in the matter captioned above. This motion is made on the basis of newly discovered evidence and the provisions of Rule 15 that amendments will be freely given when justice so requires and when there is no legal prejudice to Defendants. This motion is supported by the deposition testimony of James Edahl (Exhibit 4), three internal emails of BB&T (Exhibits 1, 2 and 3), a letter exchanged between counsel of Voytko and Konersman and counsel for BB&T and Edahl (Exhibit 5), and the proposed amended complaint (Exhibit 6). It is further supported by the general powers granted to this court to do substantial justice, and this courts long standing proclamation that cases shall be decided on their merits, SC Supreme Court Rules 212(b), and SC Supreme Court Rules 240(a).

The memorandum of law is attached to further support this motion.

Plaintiff, specifically requests that it be allowed to amend its answer as so indicated in the attached second amended complaint (Exhibit 6).



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*Attorneys for Appellants Ron Konersmann
and John Voytko*

October 30, 2013
Charleston, South Carolina

EXHIBIT 1



Branch Banking and Trust Company
INTER-BRANCH CORRESPONDENCE

January 17, 2008

From: Jim Edahl
Senior Vice President
Corporate Banking
Charleston
843-720-5152
510-01-01-00

To: Walt Denning
Regional Loan Administrator
Loan Administration
Winston-Salem
001-16-07-10

Re: Skywaves Corporation

Walt, Mike Burke from the factoring division and I met with the management team at Skywaves today to introduce Mike and get a financial update. During the course of our discussion it became apparent that we are over advanced on our factoring line by \$1,262,313.

Please see the attached listing of purchase orders we have funded to date. Thirty six "purchase orders" from General Dynamics starting with WST1117A and ending with WST1081A, each for \$53,945 are in reality 36 sites that General Dynamics has contracted with The New York State Police to deliver cell tower units for over the next 24 months, but in fact no specific order with a specific delivery have yet to be delivered to Skywaves for production. Mike and I do not know how these sites got set up as purchase orders and funded. Mike will be doing a review of the documentation in file immediately to try to determine how this happened.

What we do know is that BB&T funded \$1,262,313 against these sites, but none of the buildings for these sites have been built. This not only creates an over advance situation, but it also creates a working capital need for the company when construction of the buildings does occur later this year.

I recommend that you, Mike, and I set up a conference call to discuss this matter as soon as Mike completes his review of the backup documentation. I suggest we get together no later than the end of the day Tuesday, 1/22/08.

Cc: Frank Caple
Frank Bullard
Mike Burke

EXHIBIT 2

Edahl, James

From: Edahl, James
Sent: Tuesday, January 22, 2008 10:31 AM
To: Denning, Walter; Caple, Frank; Hennessy, Michael
Subject: FW: SkyWaves

Mike, thanks for the update. I am forwarding this information to Walt Denning, Frank Caple, and Mike Hennessy. Please copy them going forward on anything related to Skywaves.

As we discussed Friday neither you or I had any idea that the GD NYST purchase orders funded from July through October were not documented and funded exactly like the other purchase orders we had received and funded over the last two years from General Dynamics, Nextel, Verizon, etc.

As I mentioned to you verbally on Friday I communicated to Ron Konersmann, President, and John Voytko, CFO by telephone last Friday that Skywaves was in default of the factoring loan and that a written notice of default would be coming to them soon. Ron indicated that he wants to work with us on a repayment plan.

Mike Hennessy is working with our outside counsel Steve Licata to get out a default letter. Please call Mike Hennessy to get him the information he will need to get to Licata. We need to get the default letter out this week. We then need to get together internally and discuss what a repayment plan might look like.

~~Thanks for your help. Please let me know if you need additional information.~~

Jim Edahl
Senior Vice President
Charleston, SC
843-720-5152
jedahl@bbandt.com

From: Burke, Mike
Sent: Tuesday, January 22, 2008 10:13 AM
To: Allard, Philippe; Edahl, James
Subject: SkyWaves

Phil and Jim,

I went through every piece of paper I had on SkyWaves and can find no copies, either electronic or hard copies, of purchase orders or other information that we used as "collateral" to advance on for the GD NYST orders. I specifically looked for anything relating to the General Dynamics purchase orders for the NYST Police that we advanced on last summer and early this fall. All though there are references from the client during previous visits by BB&T personnel that the program was behind schedule, I can locate no hard copy of any purchase orders or contracts referencing the work.

I phoned John Voytko, CFO, Friday to ask him what we had received from them to base the advance on since Jim and I were told that no actual PO's existed on these orders since in the past they only received contracts. John stated that they submitted what he remembers to be a two page spread sheet to us showing the number of units, locations and amounts of each order. The idea was to get the advances early on to purchase items needed for these orders that would have long lead times. This way they would have the necessary inventory on hand to put the orders into production once they were finalized. John was sure they had discussed this with BB&T as part of the request for funding but again I see no evidence of this in our files. As we have been told previously and once again, the orders have been delayed but will

begin shipment in April of this year. The issue, as we have discussed, is if the orders do materialize, will they be able to come up with the cash needed to put them into production since we have already funded the orders and the company has no cash flow at this point.

Michael Burke

Vice President
BB&T Commercial Finance
950 East Paces Ferry Road, Suite 2200
Atlanta, GA 30326
404-442-5128 office
770-714-7812 cell
MTBurke@BBandT.com

EXHIBIT 3



Branch Banking and Trust Company
INTER-BRANCH CORRESPONDENCE

March 26, 2008

From: Tol Broome
President
Commercial Finance

To: File

Re: Skywaves I Corporation

This memo serves to document the file regarding my observations of the background of the Skywaves problem credit. Skywaves is in the business of manufacturing concrete shelters to be used by cellular service providers in conjunction with towers. BB&T has been providing a factoring style platform to provide funding for P.O.'s and invoices for Skywaves. The borrowing relationship originated in January, 2005. We currently have about \$2.1MM in exposure that has been placed on non-accrual.

1. **Financing Purchase Orders:** BB&T is not equipped to finance purchase orders anywhere in the bank if we are relying on the P.O.'s for repayment. The only time this should be considered is if we are willing to lend unsecured or are fully secured by other collateral. P.O.'s are too far away from cash, and our factoring system is structured to monitor and collect invoices related to A/R. And as we have seen here, when default occurs there is nothing to liquidate unless it can be converted to inventory.
2. **Start Up Nature of Business:** It is difficult to see this as a pass grade credit given the financial performance along the way. The company consistently missed projections for revenues, accumulated substantial losses and was highly leveraged. We were essentially providing venture capital.
3. **Statement Quality:** All financial statements we received were company prepared. Given the reliance on P.O.'s and A/R for repayment, we should have followed policy and required reviews at first, and audits once we exceeded \$2MM in exposure.
4. **Growth in Credit Exposure:** We started at \$1.5MM in exposure related only to factored A/R. Over time we expanded to \$3.5MM with \$2MM in P.O. financing.
5. **Lack of Verifications for the P.O.'s:** We have a system in place in factoring for verification of A/R; however, there was no effort made by Castlen to verify the P.O.'s. There certainly was a flaw in our oversight structure not to ensure that verifications were being done, particularly given the riskier nature of P.O. financing.
6. **Acceptance of General Dynamics spreadsheet as P.O.'s:** This is related to point #5 but is worth noting separately. Unfortunately, Castlen does not work here anymore so we don't know why he got comfortable counting the spreadsheet jobs in the P.O. advances. There is evidence that he was told by management that they were P.O.'s, but he should have done something to independently verify that they were. Up to July, 2007 we had received legitimate P.O.'s for

March 26, 2008

Page 2

advances and all P.O.'s had converted to invoices with A/R collected. Perhaps Castlen got too comfortable with the track record of 30 months, but the change in reporting should have been independently investigated.

7. **Diversion of Funds:** There is evidence in the file that we had occasionally received payments directly from Skywave in the past. These funds had always been forwarded to the bank. However, between mid-December, 2007 and late-January, 2008, all funds were not forwarded (about \$450K total). We have since collected some of these funds, but there are two observations. First, we should have been more vigilant in ensuring that all funds were paid directly to the bank by the customers. Second, a fraud was committed by a client with whom we had a good track record of dealings in the past.

In summary, Mike Hennessey (with assistance from Mike Burke) continues to work on collecting this problem asset. We currently have exposure of about \$2.1MM. There are several million in P.O.'s that are at various stages of completion, but the company has no working capital. It does not appear that we should have gotten into this credit to begin with given the start up nature of the business, the loss history of the client, and the poor fit for structure to finance P.O.'s. The problem was further exacerbated by major servicing deficiencies in our factoring shop around verifications and a lack of due diligence when the P.O. reporting changed, as well as by client fraud.

cc: Clarke Starnes, Steve Alexander, Frank Bullard, Walt Denning, Frank Caple, Jim Edahl, Darren Linder, Phil Allard, Mike Burke, Rick Benner, John Davis, Rick Spencer, Mike Hennessey

EXHIBIT 4

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT

SKYWAVES I CORPORATION,
Plaintiff,

ORIGINAL

vs. CASE NO. 2009-CP-10-7516

BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN
MERGER TO BRANCH BANKING AND TRUST COMPANY OF
SC, A/K/A BB&T, AND JAMES EDAHL,

Defendants.

VIDEOTAPE

DEPOSITION OF: JAMES EDAHL

DATE: September 19, 2013

TIME: 9:16 AM

LOCATION: Law Offices of
ANDREW K. EPTING, JR., LLC
46A State Street
Charleston, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: Roxanne M. Easterwood, RPR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR PLAINTIFF
3 SKYWAVES I CORPORATION:4 DUFFY & YOUNG
5 BY: JOHN P. LINTON
6 96 Broad Street
7 Charleston, SC 29401
8 (843) 720-2044
9 Jlinton@duffyandyoung.com

10 -- and --

11 GEORGE J. KEFALOS
12 46A State Street
13 Charleston, SC 29401
14 (843) 722-6612
15 George@kefaloslaw.com16 ATTORNEYS FOR DEFENDANTS
17 BRANCH BANKING AND TRUST COMPANY,
18 SUCCESSOR IN MERGER TO BRANCH BANKING
19 AND TRUST COMPANY OF SC, A/K/A BB&T:
20 AND JAMES EDAHL21 NEXSEN PRUET, LLC
22 BY: MOLLY HUGHES CHERRY
23 JULIO (RICK) E. MENDOZA, JR.
24 205 King Street, Suite 400
25 Charleston, SC 29401
(843) 577-9440
Mcherry@nexsenpruet.com

21 ALSO PRESENT:

22 Michael Hennessy, Rusty Bogue, Ron
23 Konersmann, Patty Konersmann

24 (INDEX AT REAR OF TRANSCRIPT)

1 STIPULATION

2 It is stipulated by and among Counsel
3 that this deposition is being taken in accordance
4 with the South Carolina Rules of Civil Procedure,
5 Rule 30; that all objections as to Notice of this
6 deposition are hereby waived; that all objections
7 except as to form are reserved until the time of
8 trial; and that the deponent does not waive
9 reading and signing of this deposition.

10 * * * * *

11 VIDEOGRAPHER: We are now on the
12 record. Today's date is September 19th, 2013.
13 The time is approximately 9:16 a.m. This is the
14 video deposition of James Edahl. The location is
15 46-A State Street, Charleston, South Carolina in
16 the offices of Kefalos Law Firm.

17 My name is Steven Barksdale, legal
18 videographer, representing A. William Roberts, Jr.
19 & Associates. This deposition is taken in the
20 matter of Skywaves I Corporation versus Branch
21 Banking and Trust, Et Al., case number
22 2009-CP-10-7516.

23 Counsel, please introduce yourselves
24 for the record.

25 MR. LINTON: John Linton for the

4

1 plaintiffs.

2 MR. KEFALOS: George Kefalos for
3 Skywaves.

4 MR. MENDOZA: Rick Mendoza for BB&T.

5 MS. CHERRY: Molly Cherry for BB&T and
6 Jim Edahl.

7 VIDEOGRAPHER: Would the court reporter
8 please swear in the witness.

9 JAMES EDAHL

10 being first duly sworn, testified as follows:

11 EXAMINATION

12 BY MR. LINTON:

13 Q. Mr. Edahl, we met at Mr. Konersmann's
14 deposition. I don't think we have met before
15 that. Is that your recollection?

16 A. I don't think.

17 Q. Okay. Have you ever given your
18 deposition before?

19 A. Yes.

20 Q. Okay. Was that involving a BB&T
21 matter?

22 A. No, it was not.

23 Q. What did it involve?

24 A. A client of ours, Don's Supply
25 Company. Two of their partners were in dispute

1 with each other and I was called in to be deposed
2 in that -- in their dispute.

3 Q. Well, under our rules any time you
4 need to have a break just ask and we'll give you
5 one.

6 A. Okay.

7 Q. And if you have a question because I'm
8 not asking my questions where you can understand
9 them, you can direct that to me, and I'll do my
10 best to correct it.

11 If you have any discussion with your
12 counsel other than for privileged matters, I'm
13 entitled to ask what that discussion was about.
14 So you're free to do it, but if you do so it would
15 be subject to, at the next break, after that break
16 me inquiring about that.

17 Do you have any questions that you'd
18 like to know about the deposition, form of the
19 deposition, break time, anything like that?

20 A. No.

21 Q. Okay. I understand that Nexsen Pruet
22 is representing you personally?

23 A. Yes.

24 Q. All right. Do you have a written
25 indemnity agreement with the bank for the bank to

6

1 pay any judgment that might be rendered against
2 you?

3 A. I'm not aware of one.

4 Q. Do you have any agreement with the
5 bank to pay if any judgment that might be rendered
6 against you?

7 A. I'm not aware of it.

8 Q. Have you had any discussion about your
9 personal liability in this case with -- with the
10 bank?

11 A. No.

12 VIDEOGRAPHER: Off the record at 9:19
13 a.m.

14 (A recess was taken.)

15 VIDEOGRAPHER: We are back on the
16 record at 9:21 a.m.

17 BY MR. LINTON:

18 Q. Mr. Edahl, what did you review to
19 prepare for this deposition, what documents?

20 A. Various forms and documents related to
21 our relationship with Skywaves.

22 Q. Did you make an effort to review all
23 of the emails and all of the agreements that might
24 be pertinent to your testimony?

25 A. Reviewed all of the files and -- and

1 emails that were presented, yes.

2 Q. About how much time do you -- did you
3 take to do that?

4 A. Probably eight to ten hours.

5 Q. And did you make any summary of your
6 investigation of those documents to assist you in
7 your testimony?

8 A. No.

9 Q. Okay. And I understood during Mr.
10 Konersmann's deposition that you were taking
11 notes?

12 A. Yes.

13 Q. Did you review those notes?

14 A. No.

15 Q. When you were taking those notes was
16 the purpose to note where you might disagree with
17 anything that -- that Ron was testifying to?

18 A. The purpose of the notes was just
19 notes to myself on various parts of the testimony.

20 Q. Where are those notes?

21 A. They -- they're either back at the
22 office or I threw them away last night at the
23 office.

24 Q. You said you threw the notes away that
25 you set through two days of deposition taking to

1 get rid of them before your deposition?

2 A. I threw the notes away -- I'm pretty
3 sure I threw the notes away last night at my
4 office, yes. But...

5 Q. Anybody -- did anybody suggest to you
6 that you should throw your notes away?

7 A. No.

8 Q. When you were deposed in the other
9 matter that you mentioned, did you make a summary
10 of your review of documents in that case before
11 you testified?

12 A. No.

13 Q. Did you attend any depositions in that
14 other matter?

15 A. No.

16 Q. Have you ever testified in any other
17 matter?

18 A. Back in the late '80s in a similar
19 circumstance a client was involved with -- in a
20 dispute with a vendor and -- and I was asked to --
21 or I was deposed in that.

22 Q. And that's the only time you've
23 testified?

24 A. Yes.

25 Q. So you've never been a party in a

1 litigation?

2 A. No.

3 Q. Other than this case?

4 A. That's correct.

5 Q. Okay. What is your present position?

6 A. I'm a senior vice president at BB&T.

7 Q. And do you have any plans to retire
8 any time soon?

9 A. No.

10 Q. How long have you been a senior VP?

11 A. Ten, fifteen years.

12 Q. Okay. I noticed your personnel file
13 was produced to us yesterday, and I wasn't able to
14 look through all of it. But as I recall, you
15 graduated from Chapel Hill; is that right?

16 A. Yes.

17 Q. And was on the dean's list for five
18 semesters?

19 A. Yes.

20 Q. And you've been in banking virtually
21 the whole time since graduation?

22 A. Since graduation from graduate school,
23 yes.

24 Q. From MBA school?

25 A. Yes, sir.

10

1 Q. Okay. And have you won any awards for
2 your work in banking?

3 A. Yes.

4 Q. Could you help me out on that and tell
5 me what they are?

6 A. There's a Sterling Performance Award
7 that the bank awards which I was awarded in 2003
8 and 1997 thereabouts.

9 Q. All right. And is that system wide?

10 A. Yes.

11 Q. Is -- is -- how many people are
12 selected for the Sterling A ward in any particular
13 year?

14 A. It can range from 250 to 350 people.

15 Q. Uh-huh. And how about as far as any
16 like American Banking Association or -- or, you
17 know, professional associations, have you won any
18 awards or held any positions of distinction there?

19 A. No.

20 Q. Okay. Would you consider yourself an
21 astute, savvy, sophisticated banker?

22 MS. CHERRY: Object to form.

23 You can answer.

24 THE WITNESS: I would consider myself
25 an experienced banker.

1 BY MR. LINTON:

2 Q. So you don't consider yourself astute
3 as a banker?

4 A. I consider myself that I try and do a
5 good job.

6 Q. Well, have you been told by your
7 superiors that you are astute?

8 A. No.

9 Q. Do you consider yourself a
10 sophisticated banker?

11 A. I consider myself an experienced
12 banker.

13 Q. What would you have to achieve to
14 become a sophisticated banker?

15 A. That's a good question. I don't know.

16 Q. You don't know. How -- same question:
17 To be an astute banker, would you need more
18 training or more -- seems that you have all of the
19 experience that one would require.

20 A. Yes, sir.

21 Q. Is it more training or -- or exposure
22 to sophisticated matters or...

23 MS. CHERRY: Object to the form.

24 THE WITNESS: I don't know.

25 BY MR. LINTON:

12

1 Q. Okay. Have you taught any banking
2 courses?

3 A. No.

4 Q. Are you -- have you served in a
5 supervisory role over other loan officers?

6 A. Yes.

7 Q. Okay. And for what period of time?

8 A. Probably three to four years would be
9 my guess. It was a while back.

10 Q. I noticed at least in some periods of
11 time that there's both a bonus that you can
12 qualify for and then -- and some other merit style
13 compensation. Could you explain to me how that
14 works?

15 A. Yeah, our bonus is based on a matrix
16 that involves many different categories from loan
17 gross to deposit gross to noninterest income
18 gross, the fees, the credit quality. There are
19 many measures that go into that.

20 Q. Well, taking the -- the plaintiff here
21 just as an example, how would the growth of -- of
22 the credit relationship with the plaintiff impact
23 your compensation?

24 A. It might have some impact on the loans
25 part and compensation.

1 Q. Did it, in fact, in 2006 and '7 and '8
2 have a beneficiary ben -- impact?

3 A. Had no material impact.

4 Q. Did it have any impact?

5 A. It did have some impact, sure.

6 Q. Did you have any experience with
7 handling factoring accounts?

8 A. Very little.

9 Q. When did you first have experience
10 with factoring?

11 A. One time back in 19 -- late '80s.

12 Q. Am I using the right term, is -- would
13 you consider the plaintiff to have a factoring
14 account with BB&T?

15 A. The plaintiff had a factoring
16 agreement with BB&T.

17 Q. Okay. And your only experience with
18 factoring was one time in the 1980s?

19 A. That's correct.

20 Q. How did you acquaint yourself with the
21 -- any special consideration that a factoring
22 arrangement might entail?

23 A. In this particular case, at the
24 beginning of the relationship I felt that a
25 factoring relationship would be most appropriate

14

1 at that point in time.

2 Q. And why was that?

3 A. Given the relatively early stage,
4 nature of the company, and the type of credit that
5 I thought would best suit the need at the time.

6 Q. Did BB&T own a factoring entity?

7 A. Yes.

8 Q. At the time this started was -- was
9 that factoring company owned by BB&T or was it
10 just a third party?

11 A. It was owned by BB&T.

12 Q. Did you familiarize yourself with
13 whatever the manual is that instructs you how a
14 factoring account is to be handled?

15 A. No, that wasn't...

16 Q. Wasn't what?

17 A. My role.

18 Q. That wasn't your role. Whose role was
19 it?

20 A. The factoring division's.

21 Q. Was it -- do you remember who that
22 was?

23 A. I think it was Wyn Godwin on the
24 credit side and Castlen Morris on the
25 administrative side.

1 Q. Who was on the credit side?

2 A. I believe it was Wyn Godwin.

3 Q. Wyn Godwin?

4 A. Uh-huh.

5 Q. Okay. And did he remain at BB&T
6 through say January 2008?

7 A. I'm not sure.

8 Q. What kind of interaction would you
9 have with either Wyn Godwin or whomever was
10 handling the credit side for the factoring
11 component of BB&T?

12 A. Primarily on the credit side it was
13 Wyn at first, and then the factoring group was
14 consolidated or merged into the bank, and then the
15 credit decisions after that were made through the
16 bank channel.

17 Q. So there was a change in the way that
18 the credit side was handled?

19 A. Yes.

20 Q. Could you describe for me that change?

21 A. Just the change in credit officers
22 from Wyn to Walt Denning.

23 Q. To Walt Denning?

24 A. Uh-huh.

25 Q. And did -- once Walt Denning became

16

1 the credit person for factoring he -- he
2 maintained that relationship the whole time that
3 we're talking about here; is that right?

4 A. Yes.

5 Q. Where was Walt Denning located?

6 A. Winston-Salem.

7 Q. And how did you interact with him and
8 keep up with the credit side of -- of this
9 factoring relationship?

10 A. Through telephone calls or credit
11 packages.

12 Q. Okay. Did Walt Denning have any
13 experience in factoring prior to his taking over
14 that role?

15 A. I don't know.

16 Q. Is he still with the bank?

17 A. Yes.

18 Q. Now, Castlen Morris you said was also
19 involved in the factoring?

20 A. Yes.

21 Q. And that was a joint administration
22 or...

23 A. That was on the day-to-day
24 administration of the agreement.

25 Q. Okay. And so what was your role? If

1 you had Castlen Morris doing administration and
2 you had Walt Denning doing the credit, what was
3 your role?

4 A. I was the relationship manager.

5 Q. Would -- would Denning and Castlen
6 Morris report to you?

7 A. No.

8 Q. Would you report to them?

9 A. No, not on a personnel type basis.

10 Q. Who was in charge of -- you said you
11 were the relationship manager?

12 A. Uh-huh.

13 Q. I'm trying to get a handle on who is
14 in charge of this account. Is that the
15 relationship manager?

16 A. Yes.

17 Q. Okay. So at least in theory you
18 should know more about this account than anybody
19 else?

20 MS. CHERRY: Object to form.

21 BY MR. LINTON:

22 Q. In theory should you know more about
23 this account than anybody else?

24 A. Possibly in theory.

25 Q. Okay. In practice do you know of

18

1 anybody that knew more about this account than
2 you?

3 A. Not that I'm aware of.

4 Q. Okay. Is there anybody that you would
5 say they might not have known as much as I did,
6 but they knew a whole lot and -- and would be real
7 knowledgeable about the account?

8 A. Yeah. Castlen Morris.

9 Q. And what sort of -- and I'm not really
10 concerned about pay grade except that it might
11 represent the relative position in the bank.

12 Where was Castlen Morris's rank
13 compared to either you or Walt Denning in terms of
14 compensation?

15 A. I'm not sure.

16 Q. Do you think it would be substantially
17 less?

18 A. I don't know. That's -- that was
19 confidential information, so I --

20 Q. Well, I was just thinking in terms of
21 y'all have rankings I guess, don't you?

22 A. We have salary grades.

23 Q. Right. And -- and what is your salary
24 grade, not the amount, but the -- isn't it like 21
25 or 23 or something like that?

1 A. I think right now it's at 21.

2 Q. Okay. How long has it been 21?

3 A. Six or seven years.

4 Q. Okay. And what would you need to do
5 to become eligible for 22 or 23?

6 A. That would typically be a position
7 change like from a line role to a manager role or
8 something like that.

9 Q. Who in Charleston would be ranked at a
10 -- at a higher level than you?

11 A. I'm not sure, but several
12 possibilities. I guess the regional president
13 would be one, other regional officers perhaps.

14 Q. And they're headquartered in
15 Charleston?

16 A. Yes.

17 Q. Who do you report to now?

18 A. Tom Eller. Tom Eller.

19 Q. And is he the -- what is his position?

20 A. He is the South Carolina corporate
21 banking manager.

22 Q. And where is he located?

23 A. Greenville, South Carolina.

24 Q. Okay. How did you -- let's go back to
25 the inception, your first exposure to Skywaves.

20

1 How did you become acquainted with them?

2 A. I believe it was through a referral
3 from Bob Balderson at Grandbridge Realty.

4 Q. Did you say Don Balderson?

5 A. Bob Balderson.

6 Q. Bob. All right. And did you know
7 anything about him? Was it just a referral and
8 you -- and you were going to explore this as a
9 potential new client?

10 A. That's correct.

11 Q. Okay. And what did you do to learn
12 about Skywaves?

13 A. Talked to the officers and went out
14 and visited.

15 Q. Okay. And you mentioned that you had
16 decided that one relationship that was appropriate
17 was a factoring relationship because it was a
18 startup, among -- among other things; is that --

19 A. Yes.

20 Q. Did you consider asset-based
21 financing?

22 A. That could have been a possibility at
23 that time but didn't fit.

24 Q. Okay. So you considered it and it
25 just wasn't appropriate?

1 A. Correct.

2 Q. From the bank's standpoint?

3 A. Correct.

4 Q. Is factoring considered a higher risk
5 than asset-based financing or less risk?

6 A. It -- factoring can generally handle
7 clients of -- of higher risk.

8 Q. And how do you protect the bank's
9 interest if factoring generally deals with a
10 higher risk?

11 A. It's an assignment of the -- of
12 specific receivables that the bank purchases. And
13 so payment is from the client of the -- our client
14 directly to the bank.

15 Q. All right. So normally in a factoring
16 situation the -- the bank is getting an assignment
17 of the account of a -- of a receivable?

18 A. Uh-huh.

19 Q. And payment goes directly to the bank?

20 A. Yes.

21 Q. Okay. Have you ever known a situation
22 in the bank where it was permitted to -- to let
23 payments go directly to the customer?

24 A. Not that I'm aware of.

25 Q. You're aware that payments would go

1 directly to Skywaves?

2 A. We were aware that would happen from
3 time to time.

4 Q. Well, did it happen consistently?

5 A. Not that I'm aware of.

6 Q. Did you make any effort to keep up
7 with where payments were going for receivables?

8 A. Yes. I depended on Castlen Morris to
9 monitor that.

10 Q. Okay. And you've explained the
11 relationship with Castlen Morris. But would you
12 give him instructions about how you want the
13 account to be handled?

14 A. Castlen would handle the account
15 according to the factoring agreement, yes.

16 Q. And I think y'all did audits on a
17 regular basis, didn't you?

18 A. Yes.

19 Q. All right. Who would have been
20 involved in selecting the auditor?

21 A. That would have been our audit
22 department.

23 Q. Would that be through Castlen Morris
24 or a separate -- separate department?

25 A. Separate department.

1 Q. Okay. Who would be responsible for
2 coordinating that? You're the relationship
3 management. Say I'm the debtor.

4 A. Uh-huh.

5 Q. And some auditor is going to show up.
6 Do you call me and tell me, you know, we're going
7 to have quarterly audits, or does that come from
8 Castlen Morris or from the audit team?

9 A. Yeah, typically, you know, upfront we
10 let the client know what the audit frequency would
11 be, and then the auditor typically would call the
12 client when an audit needed to be done.

13 Q. Okay. And would you get a copy of the
14 audit report?

15 A. Yes.

16 Q. Would Castlen Morris get one?

17 A. I'm pretty sure he would.

18 Q. Would -- would Walt Denning get one?

19 A. Yes.

20 Q. Does anybody else? I guess somebody
21 in the audit department would?

22 A. Yes.

23 Q. And did y'all ever have discussions
24 about any audit that was done of Skywaves?

25 A. From time to time, yes.

1 Q. Were you always satisfied with the
2 results of the audits?

3 A. No, not always.

4 Q. When were you dissatisfied?

5 A. Well, specifically when one audit in
6 January of 2008 turned up that client funds that
7 had been received by Skywaves were not remitted to
8 the bank.

9 Q. Prior to receiving that audit did you
10 have any concern with the way in which Skywaves
11 was operating and receiving funds?

12 A. We would have some concern about -- I
13 think there was one other occasion in maybe
14 September of that year where a payment had been
15 received and not immediately remitted to the bank.

16 Q. Was that taken care of to your
17 satisfaction?

18 A. It was taken care of, yes.

19 Q. To your satisfaction or not?

20 A. We received the funds, yes.

21 Q. Did you ever say anything to the
22 debtor that I'm not satisfied with what you've
23 done?

24 A. I don't recall.

25 Q. If you express your dissatisfaction to

1 a customer would you memorialize it with a memo to
2 your file?

3 A. Not necessarily.

4 Q. Do you know of any memo to the file
5 where you expressed dissatisfaction with the
6 results of an audit to the debtor?

7 A. Not that I'm aware of.

8 Q. I think there's probably several
9 different types of bankers, some bankers who are
10 sticklers to details, others who seem to identify
11 with customer needs and have a lot more
12 flexibility just in their style of being a
13 relationship manager. Have you found that to be
14 true in your years of banking?

15 A. I think different bankers have
16 different styles, just like different individuals
17 have different personalities.

18 Q. Right. What -- how would you describe
19 your style?

20 A. I would describe my style as, you
21 know, empathetic and responsive to customers'
22 needs and trying to fit those appropriately within
23 the bank.

24 Q. All right. You would consider
25 yourself a professional?

1 A. Yes.

2 Q. And that engaging and have a
3 relationship with a client to build their
4 confidence in you and vice versa?

5 A. Yes.

6 Q. And was it one of your desires to
7 expand the credit relationship with Skywaves from
8 the -- from the inception?

9 A. No. It was my desire to meet the
10 needs of Skywaves as they were presented to us.

11 Q. Well, there were a number of different
12 relationships that you had over the years with
13 them, credit relationships; is that correct?

14 A. I'm not sure what you mean.

15 Q. Well, I'm thinking about, I think it
16 was a capital loan that was made. There were
17 credit cards that were changed over from another
18 company, another bank.

19 I'm just trying to ask you if you
20 weren't trying to grow the relationship on behalf
21 of the bank and consistent with Skywaves's needs?

22 A. We were trying to be sensitive to the
23 needs of Skywaves and respond to them as they
24 presented to us, sure.

25 Q. Are you telling me that you were not

1 trying to grow the relationship between Skywaves
2 and the bank because it would be profitable to the
3 bank and that's part of your job?

4 A. My primary job is helping our clients
5 and in their requests within the format of the
6 bank.

7 Q. Okay. Do you recall in that regard
8 being able to lower interest rates on certain
9 relationships you had to -- to offer a better
10 product to Skywaves?

11 A. I'm not sure I understand the
12 question.

13 Q. All right. Did you have any concern
14 at any time that Skywaves might go with a
15 competitive bank?

16 A. Yes.

17 Q. Okay. And as part of your
18 consideration of meeting their needs you also knew
19 you were in a very competitive situation and that
20 other banks might want your business?

21 A. That's what --

22 Q. That's true all the time?

23 A. -- Skywaves told me, yes.

24 Q. Well, I gather you believed them?

25 A. Yes.

1 Q. Any reason to doubt that now?

2 A. Not that I'm aware of.

3 Q. Okay.

4 A. Other than they -- I think in March of
5 2007 when we were, you know, informed by Skywaves
6 that other banks were looking at their needs and I
7 was led to believe that there were more solid
8 commitments in place than there actually were at
9 that point in time.

10 Q. Who led you to believe that?

11 A. Ron Konersmann.

12 Q. What did he tell you?

13 A. That they had commitments from other
14 institutions, specifically Wachovia and Hunt
15 Capital, I think it was, to meet their needs.

16 Q. And you don't believe that was true?

17 A. Well, given what I saw in the
18 testimony the other week, there was a varying
19 conditional term sheet from Hunt Capital and very
20 -- essentially a letter from Wachovia that says,
21 you know, you're not ready yet.

22 Q. Did you ask him for any documentation?

23 A. No. I trusted what he was telling me.

24 Q. What difference did that make to you
25 in -- in regards to what you did as a commitment

1 by BB&T?

2 A. I'm not sure I understand the
3 question.

4 Q. You indicated Mr. Konersmann mislead
5 you into thinking that Wachovia and Hunt Capital
6 had made definite proposals to them.

7 MS. CHERRY: Object to form.

8 THE WITNESS: No. I mentioned that the
9 testimony that was present -- presented a few days
10 ago was at variance with what he told me at the
11 time. At the time I didn't believe he was
12 misrepresenting anything, in 2007.

13 BY MR. LINTON:

14 Q. I'm trying to understand if you took
15 any action on behalf of the bank based on what Mr.
16 Konersmann told you in March of 2007 regarding
17 Wachovia or Hunt Capital?

18 A. Based on the needs that Ron felt -- he
19 thought he would have going forward, we increased
20 the factoring line I think to 3-and-a-half million
21 and the fee purchase order sub limit at 2 million
22 and increased the advance rate from 60 to 65
23 percent on purchase orders. Ron said he thought
24 that would allow us to continue to be their bank.

25 Q. And you thought that was a reasonable

1 thing to do on behalf of BB&T?

2 A. At the time, yes.

3 Q. What financial analysis did you make
4 in order to come to that conclusion?

5 A. We put together a credit package at
6 the time based on the financials that were
7 provided to us at that time.

8 Q. And insofar as you know were those
9 financials accurate?

10 A. So far as I knew at the time.

11 Q. Well, I'm talking about now. Is there
12 anything now that you know that you could say the
13 financial package that you were given in March of
14 2007 or thereabouts was inaccurate?

15 A. No. It was -- as far as I know, it
16 was accurate.

17 Q. Okay. I may not have been phrasing
18 that question very well. I'm trying to
19 understand -- I understand that in 2007 you
20 thought it was accurate?

21 A. Uh-huh.

22 Q. Do you still think it was accurate
23 based on anything you know today?

24 A. Yes.

25 Q. Okay. And you were willing to expand

1 the relationship greatly?

2 A. The bank was willing to expand the
3 relationship per the terms that I just mentioned,
4 yes.

5 Q. And were you the person who made that
6 recommendation?

7 A. Yes.

8 Q. And to whom did you make it?

9 A. Walt Denning.

10 Q. Okay. And -- and was there anybody
11 else that was -- had been involved in that
12 decision to expand the credit line?

13 A. Not from a credit approval
14 perspective.

15 Q. And did -- were you and Walt Denning
16 referred to as co either authors or -- or -- whose
17 signature was required for the -- that expansion
18 approval?

19 A. Walt's.

20 Q. Okay. Now, at the time he -- you were
21 expanding that, you knew that -- that Skywaves was
22 trying to expand rapidly and that's one of the
23 reasons they needed the additional credit?

24 A. Yes.

25 Q. Okay. And you were comfortable with

1 their financials and their operation to extend 65
2 percent payment rather than 60 percent?

3 MS. CHERRY: Object to form.

4 THE WITNESS: On purchase orders,
5 that's correct.

6 BY MR. LINTON:

7 Q. Okay. What is a purchase order, as
8 you use that term?

9 A. It's an order from a client to, in
10 this case, manufacture a shelter unit.

11 Q. All right. So you -- and you were
12 going to loan 65 percent of the -- of the --

13 A. Of the amount of that purchase order.

14 Q. Okay. And how long down the road
15 would it be before a purchase order converts into
16 a receivable?

17 A. Typically in that -- in Skywaves's
18 case the purchase order would take -- and Castlen
19 could answer that question more accurately than I
20 could -- but it seems around probably take 30 to
21 60 days to construct a shelter.

22 Q. Had you ever financed purchase orders
23 before?

24 A. No.

25 Q. Factoring normally finances

1 receivables, doesn't it?

2 A. Yes.

3 Q. What did you have to do to get
4 approval to finance purchase orders?

5 A. We had to get approval from credit to
6 do that.

7 Q. That would be Walt again?

8 A. Yes.

9 Q. Do you know if he had ever financed
10 purchase orders before?

11 A. I do not.

12 Q. How do you keep track from the bank's
13 standpoint of -- of your risk when you're
14 financing purchase orders?

15 A. I'm not sure I understand the
16 question.

17 Q. How -- how do you protect yourself as
18 the bank if you're financing purchase orders?

19 A. We -- in this case the purchase order
20 would come in and Castlen had a spreadsheet that
21 he would track that on, and then as the purchase
22 order converted to an invoice he would match up
23 the invoice with the purchase order and follow it
24 through to cycle, the payment cycle that way.

25 Q. Was the bank set up to monitor the

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1 purchase orders?

2 A. Yes.

3 Q. And do you think that financing
4 purchase orders was a normal practice for the
5 factoring section of the bank?

6 A. No.

7 Q. Do you know of any other purchase
8 order financing that was done?

9 A. Not aware of one.

10 Q. Did you ever talk with Walt about is
11 this a good idea to finance purchase orders?

12 A. I'm certain it -- when that first came
13 up we discussed that and -- and felt that we could
14 in this case monitor it and structure it
15 appropriately and do that.

16 Q. So you had a lot of confidence in the
17 management as well as the customers?

18 A. Yes.

19 Q. And does anybody else handle factoring
20 at the bank, or is that all under Walt Denning?
21 I'm sure he's got people working for him.

22 A. Other people interact with the
23 factoring group.

24 Q. Uh-huh. But on something like
25 purchase -- if I wanted to find out has BB&T ever

1 financed purchase orders, I guess Walt Denning
2 would be the person to ask about that?

3 A. That would be a good place to start.

4 Q. Okay. Did you ever ask him whether he
5 ever financed purchase orders?

6 A. I don't recall.

7 Q. I'm trying to understand. If you
8 didn't have any experience financing purchase
9 orders and you don't believe Walt Denning did, how
10 do you make a recommendation let's go ahead and
11 finance purchase orders? You must have done
12 something by way of due diligence to say, yeah, we
13 can do this, the bank is set up to do this.

14 A. We felt that based on our previous
15 factoring history with the clients that we had
16 already factored that it was a logical step to
17 think about purchase -- or fact -- factoring the
18 purchase orders that generated those invoices.

19 Q. Was the factoring agreement changed in
20 writing to reflect the purchase orders would be
21 financed?

22 A. Not that I'm aware of.

23 Q. How did people in the bank know to
24 approve the payment for these purchase orders if
25 your written agreement wasn't amended to reflect

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1 the agreement that you'd struck?

2 A. Well, it was -- the amendment
3 reflected the agreement we had struck with letters
4 that we sent to the company to sign based on the
5 agreement that we had come to.

6 Q. Did you ask for the -- the debtor to
7 sign any amendment to an agreement?

8 A. Yes, I believe so.

9 Q. Now, how about this -- this was March
10 of 2007, and shortly after that I think is the
11 time period you're talking about; is that right?

12 A. Well, from inception in 2005 through
13 2007.

14 Q. When did you first start financing
15 purchase orders?

16 A. I think it was probably late 2006,
17 somewhere in there.

18 Q. All right. And then 2007 you've
19 talked about how the credit line was increased
20 fairly dramatically; is that right?

21 MS. CHERRY: Object to form.

22 THE WITNESS: It was increased, yes.

23 BY MR. LINTON:

24 Q. Do you remember what it was before it
25 was increased?

1 A. No, not at this time.

2 Q. All right. Now did you sometime in
3 the summer of 2007 meet with some potential
4 investors?

5 A. I was asked to, by Ron, to accompany
6 him to a meeting in McBee, that he was going to
7 meet with some potential investors in the company
8 with.

9 Q. And consistent with your philosophy of
10 trying to work with the customers and be engaging
11 and available to them, you did go up to McBee and
12 attend that meeting?

13 MS. CHERRY: Object to form.

14 THE WITNESS: I agreed to -- I accepted
15 Ron's invitation to attend.

16 BY MR. LINTON:

17 Q. What did you understand your purpose
18 was in going to that meeting?

19 A. To answer any questions that he might
20 have about the banking relationship.

21 Q. And -- and to -- did you answer any
22 questions that they had?

23 A. Yes.

24 Q. What questions did they have?

25 A. Just the general form of the

1 structure.

2 Q. And you would have told them that you
3 were financing purchase orders?

4 A. I would have told them that we had an
5 agreement in place to finance the company.

6 Q. Including purchase orders?

7 A. I don't recall if we talked about
8 purchase orders specifically or not.

9 Q. Would you say that -- that overall
10 that your remarks were to make sure that -- that
11 these potential investors had confidence that
12 there was a strong banking relationship between
13 BB&T and Skywaves?

14 A. Well, that was up to them to decide.
15 My purpose was to answer questions that they had
16 about the banking arrangement.

17 Q. Well, the truth is it was a strong
18 relationship, wasn't it?

19 A. At that point in time I would
20 characterize it as good relationship.

21 Q. Strong, or was it just good?

22 A. A good relationship.

23 Q. Uh-huh. Did you have any customers
24 that had a better relationship in July of 2007
25 than Skywaves?

1 A. Well, that's very subjective. I don't
2 know how you want to measure that.

3 Q. You were the one that refused to say
4 it was an excellent relationship.

5 MS. CHERRY: Object to form.

6 BY MR. LINTON:

7 Q. Do you refuse to characterize the
8 relationship between Skywaves and BB&T as
9 excellent in July of 2007?

10 A. Good, excellent, it's --

11 Q. Doesn't matter?

12 A. -- the same thing.

13 Q. Okay. You had no reservations about
14 Skywaves in July 2007?

15 MS. CHERRY: Object to the form.

16 THE WITNESS: No material reservations
17 that I can recall.

18 BY MR. LINTON:

19 Q. Okay. And I think some of these
20 things are rather obvious. You wouldn't be
21 expanding the credit relationship unless you had
22 confidence in them and their customers; isn't that
23 the way you look at it?

24 A. Sure. Yeah.

25 Q. Okay. Were you aware that the people

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1 in McBee were potential investors in Skywaves,
2 equity investors?

3 A. Yes.

4 Q. Did you discuss with Ron or anyone
5 else the potential for BB&T doing a public
6 offering?

7 A. Not at that time.

8 Q. When did you first discuss that?

9 A. I have no -- I know Ron wanted to
10 eventually, obviously, grow the company and -- and
11 into a public offering stage, and, you know, BB&T
12 had a capital markets group that could assist in
13 that possibly. And so when the -- that need was
14 identified I certainly let them know that we had
15 some capability that could meet -- possibly meet
16 that need.

17 Q. Do you recall telling him that he'd be
18 better off having the bank do it than some other
19 entity because the financial arrangement would be
20 more favorable through the bank?

21 A. No, I don't recall that specifically.
22 The bank certainly knew of the company, and so
23 we'd have more knowledge than an outside firm.

24 Q. Well, did you think that BB&T's --
25 that, what you call that, a capital group, or you

1 call that --

2 A. Capital markets.

3 Q. Capital markets, okay. Did you
4 communicate at all with anybody in the capital
5 markets group?

6 A. I had I believe one phone call early
7 on when I first heard that need just to talk about
8 the industry, the telecommunications industry and
9 what expertise we might have in that space.

10 Q. And who was that with?

11 A. I don't recall his name now.

12 Q. And so what you were trying to
13 determine is what capacity the bank had for a
14 telecommunications --

15 A. Correct.

16 Q. All right. And did you determine the
17 bank did have excellent capacity?

18 A. We had some capacity in that space.
19 It wasn't a huge space for us at that time, but we
20 had one or two folks that were familiar with the
21 space.

22 Q. Now, as a part of your just ordinary
23 approach to -- to customers and consistent with
24 the bank's policies, was it your desire to -- to
25 have the bank serve as -- in the capital markets

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1 if they did have an initial public offering?

2 A. If it ever got to that point and we
3 could assist, sure.

4 Q. Okay. So expanding the relationship
5 with a good customer is something you're always
6 trying to do?

7 A. It's always a good thing.

8 Q. And part of your compensation is based
9 on being able to grow the relationship, including
10 growing it with other departments?

11 A. Compensation is -- is based on factors
12 like that, yes.

13 Q. Okay. Did you have any direct
14 involvement with the capital markets department or
15 division?

16 A. No. Well, I'm not sure what you mean
17 by direct involvement.

18 Q. Let's say that Skywaves did go public
19 and that y'all were assisting. What role would
20 you play in that?

21 A. Simply refer the opportunity to the
22 investment bankers up there.

23 Q. And would you continue to be the
24 relationship manager?

25 A. Yes, for the company on the bank's

1 side.

2 Q. Now, Jimmy Kerr was an investor in
3 Skywaves; was he not?

4 A. Yes.

5 Q. Did you know Jimmy Kerr prior to your
6 involvement with Skywaves?

7 A. No.

8 Q. Was he a customer of the bank?

9 A. Not initially.

10 Q. How did he become a customer?

11 A. Through the interaction with Skywaves.

12 Q. And were you the relationship manager
13 for him?

14 A. Yes.

15 Q. Were there any other investors in
16 Skywaves that -- that became bank customers?

17 A. Not that I'm aware of.

18 Q. And how would you describe your
19 confidence in Jimmy Kerr?

20 A. High.

21 Q. And is that true today?

22 A. Yes.

23 Q. Is he still a customer of the bank?

24 A. Not that I'm aware of.

25 Q. Do you know why that relationship

1 terminated?

2 A. Because of the situation around
3 Skywaves in early 2008.

4 Q. And how did that become known to you?

5 A. I guess it was assumed somewhat on my
6 part in that we did have a loan request and Jimmy
7 had a loan request to us I believe on a Sherwin
8 Williams Paint store down in Beaufort in late 2007
9 and when things started to go wrong at Skywaves he
10 withdrew the request, that he was going to take it
11 to another bank.

12 Q. Do you have any interaction with him
13 at all?

14 A. I do not.

15 Q. Socially ever see him?

16 A. One time two or three years ago I saw
17 him at a Roper St. Francis gateway.

18 Q. Now, in July of 2007 after the McBee
19 meeting, tell me what discussions you had with Ron
20 about the General Dynamics contract.

21 A. We had discussions with Ron about the
22 General Dynamics contract earlier to that. I'm
23 not aware of any after that other than the fact
24 that General Dynamics under a New York State
25 Police contract kept delaying production for Ron

1 of getting the units to him to manufacture.

2 Q. Would that have been April or so 2007,
3 the discussions?

4 A. Yes.

5 Q. Okay. Tell me what you understood the
6 General Dynamics contract to be.

7 A. That Ron had a contract with General
8 Dynamics to purchase shelter units for the New
9 York State Police project up in New York I think
10 it was.

11 Q. Did you ever see the contract?

12 A. Yes.

13 Q. Would you have gotten a copy of it?

14 A. Yes.

15 Q. Studied it?

16 A. Would have read through it.

17 Q. Okay. About how long was it?

18 A. It was fairly thick, as I recall.

19 Q. Tell me what your understanding was
20 with the way that contract was going to work.

21 A. That General Dynamics had a contract
22 with the State of New York to purchase or to --to
23 deliver shelter units for their cell towers and
24 that as those towers were to come online they
25 would manufacture -- they would have Skywaves

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1 manufacture the units and -- and ship them.

2 Q. At what point would those become
3 purchase orders?

4 A. When General Dynamics would have
5 issued a purchase order.

6 Q. So under -- excuse me. Did you
7 finish?

8 A. When they would order -- issue a
9 purchase order.

10 Q. So General Dynamics had discretion as
11 to when it wanted to place a purchase order?

12 A. Yes.

13 Q. And you understood that?

14 A. Yes.

15 Q. And at some point did you start
16 financing site plans?

17 A. Ron asked us to consider financing
18 site plans in the spring of 2007, and he said that
19 he was very certain that purchase orders would be
20 forthcoming very soon. He was anxious to get
21 production started on these units and asked if we
22 could consider lending against the sites that he
23 felt would turn into purchase orders very soon and
24 -- and consuming the cycle. And in the context
25 of, he -- well, yeah.

1 Q. And because the potential purchase
2 order was somebody like General Dynamics, who had
3 this contract with the state police, you felt that
4 was a reasonable risk of the bank to take?

5 A. Yes. At the time I thought it was
6 worth considering based on Ron's representations.

7 Q. And in fact, after you considered it
8 did you approve that?

9 A. Talked to Walt Denning about that
10 concept, and Walt's response was he was okay with
11 it if we could structure it like we had the
12 purchase orders and if we could track them. And
13 -- and we talked to Castlen and he felt that we
14 could monitor that okay, and -- and so we agreed
15 to factor the site plans at that time.

16 Q. And basically what you have, from a
17 business standpoint, you considered that the money
18 will be there, it's just a matter of timing when
19 the purchase order will be based and then the
20 thing will be made?

21 A. Yes. Ron assured us that purchase
22 orders would be forthcoming soon and that he
23 really wanted to get production started on these
24 units. And so, yes, we felt that under those
25 circumstances it was reasonable to consider

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1 advancing on sites.

2 Q. Okay. And did you advance at 65
3 percent?

4 A. Yes.

5 Q. Did you ask Ron to get any
6 documentation from General Dynamics about a
7 schedule, when -- when you could expect?

8 A. Yes. Ron provided in those initial
9 discussions a site schedule from General Dynamics
10 that outlined all of the sites involved in the
11 contract and -- and provided that spreadsheet to
12 us, and that's how Castlen was to track the
13 advances on the sites.

14 Q. Was this financing of site plans, had
15 you ever done that before?

16 A. No.

17 Q. In your banking career?

18 A. No.

19 Q. Do you know if Walt Denning had ever
20 financed site plans?

21 A. Not to my knowledge.

22 Q. Was there any -- well, strike that.

23 Were these site plans being financed
24 under the fact -- under the existing factoring
25 agreement?

1 A. Yes.

2 Q. And was any written change to that
3 factoring agreement?

4 A. No.

5 Q. I -- I'm perplexed as to how people in
6 a bank who don't have any experiencing financing
7 site plans can agree to finance it and not have
8 anything in writing for an auditor to understand
9 what's being financed. So explain to me how that
10 worked.

11 A. The request from Ron came in the
12 context of the credit approval that we just
13 received in March of '07 to expand the line and
14 increase the percentage on purchase orders. We
15 had already had experience with General Dynamics
16 on purchase ordering, invoice factoring, and that
17 was a satisfactory experience.

18 We felt a high confidence level in Ron
19 and the company at that time. We felt we had good
20 experience with conversion of the POs to invoices
21 previously. We had experience with General
22 Dynamics that was good.

23 Q. So it all made perfect sense, it just
24 wasn't documented?

25 A. Well, at the time it made sense to us,

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1 yes.

2 Q. But then a lot of things in hindsight
3 that don't make sense but at the time they seem to
4 make perfect business sense?

5 A. Within the context at the time, that
6 sometimes happens.

7 Q. Did you consider that after you made
8 this agreement with Skywaves to finance site plans
9 that the bank was obligated to finance those
10 plans?

11 A. I'm sorry, I didn't understand.

12 Q. Did you feel that after you made the
13 agreement with Skywaves to finance site plans, as
14 you have testified to, that the bank was then
15 obligated to finance these plans?

16 A. Yes.

17 Q. And in fact, did the bank finance
18 those plans?

19 A. Some sites, yes.

20 Q. Were there any sites that were turned
21 down?

22 A. Not that I'm aware of.

23 Q. I want to try to understand the
24 coordination between an audit department and the
25 credit and you as the relationship manager. In a

1 matter like this that I guess you would have to
2 say is highly unusual because y'all had never done
3 it before -- would you agree with that, highly
4 unusual?

5 A. Yes.

6 Q. Okay. How does an auditor know what
7 the contract is between the bank and Skywaves when
8 they -- when they're doing their audit?

9 A. Yeah, I'm not sure how they look at
10 that.

11 Q. Well, you got the audits from them,
12 copies of it, didn't you?

13 A. Yes.

14 Q. Did you ever have any discussion with
15 the auditors?

16 A. Not about that particular issue, no.

17 Q. Prior to the January audit being
18 received by you did you have any concern about the
19 Skywaves account?

20 A. Probably beginning in September of '07
21 we were getting financial information, albeit on a
22 delayed basis, from 60 days, sometimes more, which
23 was a concern in and of itself that financial
24 reporting was becoming later, but the reporting
25 that we were getting on the financial condition of

1 the company was not -- the revenues were beginning
2 to decrease. Losses were increasing. And so that
3 started to raise some concern in my mind of what
4 was happening.

5 Q. But that concern was not a concern
6 about whether they were in default but just a
7 concern about the --

8 A. The general direction of the company,
9 correct.

10 Q. Right? You said that right?

11 A. That's correct.

12 Q. And I think in November '07 you had a
13 meeting with Ron updating you on the financials.
14 Do you remember that?

15 A. I agree. That's true. Yes.

16 Q. As I recall, there was some infusion
17 of equity at that time as well as some loans by
18 Jimmy Kerr and Crayton Walters?

19 A. That's what we were told.

20 Q. Well, those accounts were with BB&T,
21 weren't they?

22 A. Skywaves's checking account was with
23 BB&T, yes.

24 Q. Right. So when you say that's what
25 you were told, isn't, in fact, that's what

1 happened?

2 A. As far as I know.

3 Q. Okay. I didn't know if you meant
4 that, you know, now you found out that you have
5 been misled or something like that.

6 A. No, not that I'm aware of.

7 Q. Okay. Based on that infusion of
8 capital and subordinate debt, even your business
9 concerns were sort of on the backseat. You were
10 comfortable at the end of November 2007; is that a
11 fair statement?

12 A. It helped us feel better about how
13 they were addressing the operating losses.

14 Q. Right. Well, it's -- it's a pretty
15 serious effort on the part of Skywaves when they
16 get an equity infusion of whatever it was, 4 or
17 \$500,000, and two shareholders putting up \$250,000
18 or thereabouts of un-subordinate debt, that gave
19 you a lot of comfort, didn't it?

20 A. It certainly gave us some comfort that
21 they were addressing the problem.

22 Q. So between November and say the first
23 week in January, was there anything that happened
24 at Skywaves that you became aware of that gave you
25 any alarm?

1 A. No, not that I'm aware of.

2 Q. Okay. So the first thing that
3 happened that -- that startled you was when you
4 received the audit that was done in January 2008?

5 A. When I received that audit that
6 definitely startled me, yes.

7 Q. Did you have any discussion with Mr.
8 Morris about his knowledge of the financial
9 condition of the company?

10 A. No. He wasn't with us at that time.

11 Q. Well, who took his place?

12 A. Mike Burke.

13 Q. When did he come onboard?

14 A. I believe November of 2007.

15 Q. And was Mike Burke's first meeting
16 with Skywaves in -- in January of 2008?

17 A. I believe it was.

18 Q. Okay. Prior to the meeting with Mike
19 Burke did you communicate anything to him to
20 express alarm or concern about Skywaves?

21 A. No, not that I'm aware of.

22 Q. And how about Walt Denning, are you
23 aware of anything that he might have said to Mike
24 Burke?

25 A. I -- I wouldn't have been aware if he

1 talked to him, but I'm not aware of anything.

2 Q. Well, Mike Burke -- I think you made
3 the arrangements for the meeting when Mike Burke
4 came?

5 A. I think so, yes, sir.

6 Q. And did you meet with Mike Burke
7 preliminarily before you went out to see Ron?

8 A. I don't think I did, no.

9 Q. Did you share any information with
10 Mike Burke?

11 A. I'm sure I did of some type initially.
12 I don't recall exactly what that would have been.

13 Q. Where did the meeting take place
14 between you, Mike Burke, Ron, and probably Johnny?

15 A. I'm pretty sure it was at Skywaves.

16 Q. What did you believe the purpose of
17 that meeting was?

18 A. It was to introduce Mike as the new
19 factoring officer to replace Castlen.

20 Q. Did -- did Mike Burke know that the
21 bank was financing site plans?

22 A. At that time I don't think he did.

23 Q. Why do you say that?

24 A. Well, I guess the -- the correct
25 answer is I don't know if he did or didn't at that

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1 point in time.

2 Q. Why did you say you don't think he
3 did?

4 A. I'm getting --

5 Q. Because when he was told he acted like
6 he was shocked during the meeting. Does that
7 resonate with you?

8 A. No, it doesn't, not during --

9 Q. Okay.

10 A. -- the meeting.

11 Q. When do -- when do you believe he
12 first learned that the bank had committed to
13 finance site plans and, in fact, had been
14 financing since July 2007?

15 A. Probably would have been in January
16 when we were going over the purchase order list
17 and were -- and when site plans were on that
18 purchase order list and they were getting old and
19 we inquired about the status of those advances and
20 learned at that point that ad -- advances had been
21 made and there were no shelters tied to -- that no
22 shelters had been started or constructed.

23 Q. So prior to the meeting out at
24 Skywaves had you told Mike Burke that, you know,
25 we finance site plans?

1 A. No, not that I'm aware of.

2 Q. And is there anybody in the bank that
3 would have known that you financed site plans
4 other than you and Denning?

5 A. Castlen Morris.

6 Q. But he had left, though?

7 A. Yes. He left in October/November I
8 guess of '07.

9 Q. We just had his personnel file
10 produced about ten minutes before this deposition.
11 Well, 30 minutes before, because we got delayed.

12 What was the circumstances under which
13 Mr. Morris left?

14 A. I don't know.

15 Q. How did you find him to deal with?

16 A. I found him good to deal with.

17 Q. Knowledgeable?

18 A. Yes, seemed to be.

19 Q. Detail oriented?

20 A. Yes.

21 Q. You -- you may not know the answer to
22 this. But when somebody leaves the bank did he --
23 do they have a report that they, you know, provide
24 to their successor to say, you know, these are the
25 accounts I'm working on, this is sort of the

1 current situation?

2 A. Yeah I, don't know for sure. I would
3 expect so, but I don't know for sure in that case.

4 Q. In the -- in the relationship business
5 I'm sure if somebody left and they were under you
6 and as a relationship manager you would say, well,
7 I want the successor to know the status of the
8 account, it's just common sense?

9 A. Sure.

10 Q. Do you know if Castlen Morris had any
11 interview with Mike Burke and told him all of the
12 details of that list?

13 A. I don't know.

14 Q. Did Mike Burke express alarm to you
15 that we shouldn't be financing site plans?

16 A. He ex -- he expressed alarm that we
17 had these monies out and there are shelters tied
18 to them.

19 Q. Did he indicate to you that I've never
20 heard of a bank financing site plans, what are you
21 talking about?

22 A. Yeah. No, he didn't say anything like
23 that.

24 Q. And did -- did you tell me that you
25 all typically did not finance purchase orders?

1 A. Correct.

2 Q. And did he express any alarm that
3 we've got all these purchase orders we're
4 financing, too?

5 A. No.

6 Q. What is his background?

7 A. I don't know.

8 Q. But he was taking over for Castlen
9 Morris?

10 A. Yes.

11 Q. Who would Castlen Morris have reported
12 to?

13 A. I'm not sure.

14 Q. Do you know who Mike Burke reported
15 to?

16 A. I can't recall at this time, no.

17 Q. Was he more senior in experience than
18 Castlen Morris?

19 A. I don't know.

20 Q. What -- by age, do you think he's
21 older than Castlen Morris, about the same age, or
22 younger?

23 A. I don't know.

24 Q. Okay. Did he have anybody with him
25 when he came over?

1 A. No.

2 Q. Did he have other accounts that he was
3 seeing?

4 A. Not that I'm aware of in the area.

5 Q. I guess if he's the factoring side and
6 this is the only factoring account that y'all had?

7 A. No, we had other factoring accounts.
8 I don't know how many other accounts he worked
9 with.

10 Q. I see. But you didn't have any other
11 factoring account?

12 A. No.

13 Q. Okay. So do you recall, you know,
14 typically if you go out of town and you try to be
15 efficient and you say I'm going to meet with Jim
16 on one account and I'm meeting with Molly on
17 another account. Was he doing that or this was
18 just a --

19 A. I don't know. I just know we arranged
20 a meeting with Skywaves and that's what we -- we
21 did.

22 Q. Okay. After that meeting did you have
23 any further involvement with Skywaves?

24 A. Yes.

25 Q. Okay. And what was that?

1 A. Well, normal. There was certainly
2 communication about the situation --

3 Q. Well, let me ask you something
4 specifically.

5 A. -- specifically.

6 Q. Yeah, that might be easier for you.
7 Do you recall that after the meeting with Mike
8 Burke and in the audit that you were told that it
9 was going to be a default letter? Do you remember
10 that?

11 A. We were -- yes.

12 Q. Okay. Did you express any opinions
13 about whether you thought there should be a
14 default letter or not?

15 A. I don't recall.

16 Q. Well, it looks like if you're the
17 relationship manager and there's a new guy taking
18 over on the factoring side and you have agreed for
19 the bank to factor site plans and purchase orders
20 that you would at least offer an opinion about
21 whether there should be a default letter?

22 A. Yeah. Well, what was happening in
23 that timeframe very close together was the
24 realization that we had monies out there tied to
25 site plans that weren't -- that there were no

1 shelters constructed for and also the audit that
2 we'd received in very close proximity to that
3 illustrating the problems with the company not
4 turning over cash to BB&T from their clients that
5 they were supposed to per their agreement.

6 We were also I believe in that same
7 time period received financial information that
8 showed a terrific decline in revenues and, in
9 fact, that showed a loss of \$1.4 million in 2007.

10 So there were a lot of concerns going
11 on at the same time. And based on those concerns,
12 yes, we thought it was time to address those
13 concerns.

14 Q. Did you agree that a default letter
15 should be issued?

16 A. Yes.

17 Q. And what was the reason that you
18 thought a default letter should be issued?

19 A. For the reasons I just mentioned: the
20 financial information that we'd received, the fact
21 that we had advances out there and no shelters
22 constructed, the fact that money wasn't being
23 remitted to BB&T from the payments they had
24 received on invoices.

25 Q. Well, as far as money being out there

1 for the -- for the shelters, that -- that was what
2 the deal was you had made, wasn't it, that you
3 were going to advance them on site plans?

4 A. Right, to construct shelters for those
5 sites.

6 Q. Was there any requirement that when
7 they were drawing down funds on site plans that --
8 that the funds couldn't be used for general
9 operating purposes?

10 A. No. They were supposed to be used for
11 specific shelters for those specific sites.
12 That's the reason we had the spreadsheet, and that
13 was Ron's request.

14 Q. And where is that in writing?

15 A. It -- it's just evidenced by the
16 spreadsheet that Ron gave us and the verbal
17 conversations that we had.

18 Q. And are you -- you're a fairly
19 prolific memo writer, aren't you?

20 MS. CHERRY: Object to form.

21 THE WITNESS: No, I don't think so, but
22 I try and...

23 BY MR. LINTON:

24 Q. You try to document things, don't you?

25 A. Yes.

1 Q. All right. Have you ever in your
2 history with BB&T had a credit relationship that
3 was as unusual as financing up to whatever it was,
4 \$3-and-a-half million, for site plans?

5 MS. CHERRY: Objection to form.

6 BY MR. LINTON:

7 Q. Go ahead.

8 A. The factoring relationship that we had
9 with Skywaves evolved from -- into an agreement
10 that also included purchase orders and site plans.

11 Q. Tell me what that agreement was. I
12 know that 65 percent of the potential site plan
13 would be advanced by you, right?

14 A. Right.

15 Q. And when was that payment due?

16 A. When it was converted to a purchase
17 order and invoice.

18 Q. Well, do you mean before the invoice
19 is paid?

20 A. No. It -- it's -- you know, it would
21 have been due when the site plan was converted
22 into a purchase order and the purchase order to an
23 invoice.

24 Q. Are you saying that Skywaves owed you
25 that 65 percent once they got an invoice -- once

1 they sent an invoice to General Dynamics?

2 A. No. They owed it to us when we
3 advanced it.

4 Q. But it wasn't due when you advanced
5 it, was it?

6 A. No.

7 Q. I'm trying to figure out when that
8 was --

9 A. Yeah.

10 Q. -- when they were required under your
11 contract to repay you.

12 A. Yeah, the requirement --

13 MS. CHERRY: Object to form.

14 THE WITNESS: Okay. They -- they were
15 expected to pay it back once the purchase order
16 for that site was received by Skywaves and then
17 turned into an invoice and the monies from that
18 invoice would be paid out.

19 BY MR. LINTON:

20 Q. Didn't they have 60 days from the date
21 that they received payment?

22 A. No.

23 Q. Did you ever have any discussion with
24 Ron about that?

25 A. No.

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1 Q. With John?

2 A. No.

3 Q. With Castlen?

4 A. No.

5 Q. When they were financing the site
6 plans with you were checks to be made payable to
7 BB&T?

8 A. When we were financing -- if the site
9 plans had -- had turned into purchase orders and
10 the purchase orders had turned into invoices and
11 General Dynamics had sent payment, they were to
12 send it to BB&T's post office box.

13 Q. Was that done?

14 A. Not in the case of the site plans,
15 unfortunately, because I never converted it.

16 Q. But when payments were received you
17 were aware that payments were being received
18 directly by Skywaves, weren't you?

19 A. That was brought to my attention by
20 Castlen from time to time and that -- we addressed
21 that situation to try and correct that.

22 Q. How did you address it?

23 A. Primarily through Castlen's
24 interaction with John Voytko about, you know, this
25 is an unacceptable practice, we need to get the

1 cash sent to us, if it doesn't get sent to us you
2 need to remit to us immediately.

3 Q. And that component of this
4 relationship was dealt with by Castlen as opposed
5 to you?

6 A. That's correct, the monitoring of it.

7 Q. Did you ever have any discussion with
8 Ron or John where you said we cannot have these
9 checks made payable to you to Skywaves?

10 A. Not about checks made payable to
11 Skywaves, no.

12 Q. Well, when I say checks I'm talking
13 about they -- they're customers?

14 A. Uh-huh.

15 Q. Some of them would be issuing checks
16 to Skywaves. You were familiar with that?

17 A. I was made aware that checks would
18 come in to Skywaves from the customers from time
19 to time, but they needed to be remitted to us.

20 Q. Did you ever tell Ron or John that
21 it's not acceptable to have checks come directly
22 to Skywaves?

23 A. What I remember telling them is -- and
24 this is primarily through Castlen.

25 Q. I'm -- I'm asking about what you did.

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1 We'll get to him.

2 A. Yeah.

3 Q. I want -- I want to know if you ever
4 told Ron or John, you're the relationship manager,
5 do not have your customers issue checks to
6 Skywaves. Did you ever tell them that?

7 A. Not that I recall.

8 Q. You were familiar with the fact that
9 the factoring agreement requires that they be sent
10 directly to BB&T, aren't you?

11 A. Yes.

12 Q. And, but it was okay with you because
13 of the overall relationship for them to operate
14 the way they had?

15 A. No. It was okay with us for them to
16 remit payment to us as soon as they got it. If it
17 didn't come to us, it was supposed to -- and it
18 went to them, it needed to be given to us
19 immediately.

20 Q. Did they have to endorse the check or
21 could they deposit it?

22 A. I'm not sure how they would do that.

23 Q. I mean, to be acceptable to the bank.
24 If they were depositing it it was going into a
25 BB&T account?

1 A. Yeah. I would assume Castlen would
2 then debit the account.

3 Q. So he had the ability to debit
4 accounts?

5 A. Yes.

6 Q. Without any consent from -- from
7 Skywaves?

8 MS. CHERRY: Object to the form.

9 BY MR. LINTON:

10 Q. Did he have to get consent from
11 Skywaves to debit their account?

12 A. I don't know.

13 Q. Did you ever have any discussions with
14 John or Ron about having a float; that is, where
15 they deposit receipts into the BB&T account and
16 they use up those funds for up to 60 days?

17 A. No.

18 Q. Did you ever have any discussions
19 about the concept of a float?

20 A. No.

21 Q. What -- what is a float?

22 A. In my mind a float is kiting checks,
23 when you're writing checks off of funds you don't
24 have in your account.

25 MS. CHERRY: John, when you get to a

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1 stopping point.

2 MR. LINTON: Sure.

3 VIDEOGRAPHER: Off the record at 10:37
4 a.m.

5 (A recess was taken.)

6 VIDEOGRAPHER: We are back on the
7 record at 10:53 a.m.

8 BY MR. LINTON:

9 Q. Mr. Edahl, are you certain that you
10 threw your notes away?

11 A. Yes.

12 Q. And was that at your office?

13 A. Yes.

14 Q. And that was last night?

15 A. Yes.

16 Q. And has the trash been taken out?

17 A. Yes.

18 Q. What -- what time did you throw them
19 in the trash?

20 A. Probably around 5:00 o'clock.

21 Q. And was anybody with you?

22 A. No.

23 Q. Anybody ask you to throw them out?

24 A. No.

25 Q. Did you scan them?

1 A. No.

2 Q. There's no record of them?

3 A. That's correct.

4 Q. What was your purpose in doing that?

5 A. I felt they weren't relevant. And I
6 just jotted down notes to myself during the
7 deposition that I sat in on, and -- and I said,
8 well, I won't need these anymore and threw them in
9 the trash.

10 Q. Did you review them?

11 A. No.

12 Q. So after you made your notes they just
13 stayed with you, you didn't even look back over
14 them?

15 A. No. I was making notes as I went.
16 And last night I, at the office, I came across
17 them in my folder and I said, well, don't need
18 these anymore.

19 Q. Do you recall anything that you put in
20 your notes?

21 A. Frankly, not a whole lot at this point
22 because I didn't consider them relevant, so I
23 threw them away.

24 Q. Why were you taking notes if you
25 didn't consider them relevant?

1 A. I didn't -- I considered them -- I was
2 taking notes at the time because certainly wanted
3 to, you know, make notes to myself as testimony
4 was given, and then at the end of the process they
5 weren't relevant anymore, so.

6 Q. I want to move back to when Mr. Burke
7 came over here in January.

8 A. Uh-huh.

9 Q. I think it was maybe January the 19th.
10 Does that sound right?

11 A. Could be. Somewhere in that
12 timeframe. I don't recall the exact date.

13 Q. And you indicated you didn't meet with
14 him beforehand?

15 A. That's correct.

16 Q. And did not send him any information
17 beforehand that was in writing that you know of?

18 A. No, not that I remember.

19 Q. And when you had the meeting with Mr.
20 Konersmann and Mr. -- with John, it was just the
21 four of y'all?

22 A. As far as I remember.

23 Q. And did Mr. Burke express surprise
24 that I didn't know we were financing on site
25 plans?

1 A. No, not -- not that I recall.

2 Q. Well --

3 A. I think he expressed surprise -- I was
4 trying to remember from the meeting -- that we had
5 these advances outstanding and no shelters.

6 Q. Well, essentially when you were
7 advancing on the site plans this was a working
8 capital at that point, wasn't it?

9 A. A working capital that was to be used
10 for the construction of those shelters on those
11 sites.

12 Q. And where is it documented that --
13 that the funds had to be used on the shelters as
14 opposed to expansion and -- and paying salaries,
15 et cetera?

16 A. Yeah, that was just the understanding
17 that Ron and I had based on all of the other
18 advances we'd made over the last two-and-a-half
19 years, that each advance was tied into a specific
20 unit that was to be constructed, invoiced, and
21 collected.

22 Q. All right. Now, you weren't -- you
23 indicated Mr. Denning approved this?

24 A. Yes.

25 Q. So he both approved the purchase order

1 arrangement and he also approved the site plan
2 arrangement?

3 A. Yes.

4 Q. And so that I'm clear on it, the site
5 plans were designated as potential sites with no
6 specified schedule of when those orders would be
7 placed; is that right?

8 A. That's right.

9 Q. Okay. And that is a working capital
10 loan in banking terms, isn't it?

11 A. I guess could be construed that way.

12 Q. Well, didn't -- and that was the way
13 you considered it?

14 A. No. I considered it that the funds
15 would be used, again, to build specific shelters
16 for the specific sites that we were advancing.

17 Q. Well, and is there any reason to
18 believe that they were used for corporate
19 purposes? For example, payroll, expansion,
20 materials?

21 A. Yeah, I don't know what they ended up
22 being used for.

23 Q. Did you ever make any investigation?

24 A. I didn't personally, no.

25 Q. Did you ever ask Ron or John for any

1 report regarding the use of those funds that were
2 site plan funds?

3 A. No, not regarding use of funds.

4 Q. Okay. But -- but you claim that the
5 bank had restricted them to use that simply for
6 the construction of site specific facilities; is
7 that right?

8 A. That's right.

9 Q. And there's not -- not a piece of
10 paper in the whole bank file that says that, is
11 there?

12 A. Not that specific sentence, not that
13 I'm aware of.

14 Q. Well, what in -- in the bank records
15 that you have seen as the relationship manager
16 that tells Skywaves that the funds that were
17 advanced for site plans have to be used for
18 materials? Is there anything?

19 A. There is nothing now in writing that
20 I'm aware of that's a document. What is in
21 writing is the site plans, the advances against
22 those site plans, and two-and-a-half years of
23 experience of every single advance that had ever
24 been made under our factoring agreement was tied
25 to the specific shelter.

1 Now what they used those funds for, we
2 assumed they were using them to, you know, build
3 shelters.

4 Q. And do you recall lying to Mike Burke
5 about not having knowledge of the site plans?

6 A. I'm sorry?

7 Q. Do you recall lying to Mike Burke and
8 telling him you -- you didn't know that there was
9 funding on site plans, you thought it were all
10 purchase orders?

11 A. At that time when we discovered that
12 there were purchase orders, that there were
13 advances out there under our factoring agreement
14 that weren't tied to shelters, again in
15 combination with the terrible financial results
16 that were coming in, and we were in pretty much
17 crisis mode at that point in the company's future.

18 They were again losing a lot of money.
19 They were not remitting funds to the bank when
20 they received them. Their payables were way
21 behind. It -- at that point in time my -- I was
22 pretty much focussed on we got money out here and
23 no shelters tied to the financial condition of the
24 company. It was deteriorating significantly and
25 rapidly. And at that point in time, you know, I

1 couldn't -- I didn't recall the -- the detail of
2 the site plan financing.

3 Q. I'm going to ask the question again.
4 Did you lie to Mike Burke and tell him that you
5 were unaware that there was site plan financing?

6 A. No, I did not lie to Mike Burke.

7 Q. Did you tell him that you weren't
8 aware of the site plan financing?

9 A. We didn't discuss site plan financing.

10 Q. You and Mike Burke didn't discuss
11 that?

12 A. No, not at that point.

13 Q. What did -- did you ever discuss it
14 with Mike Burke?

15 A. Yeah, I'm sure I did. I don't know
16 exactly when.

17 Q. Mr. Edahl, do you recall saying that
18 to Walt Denning, Frank Capel, and Mike Hennessy
19 that neither you or I had any idea that the GD
20 NYST purchase orders funded from July through
21 October were not documented and funded exactly
22 like the other purchase orders we had received and
23 funded over the last two years?

24 A. Yes, I do recall that. And they
25 weren't because no shelters were constructed.

1 Q. Are you -- are you trying to tell me
2 that you told Mike Burke that the site plan
3 funding had been approved so there's nothing
4 unusual about the site plan funding?

5 A. No, I'm not saying that.

6 Q. Did you tell Mike Burke, look, we --
7 we got off the factoring agreement and made a new
8 agreement where we're going to finance purchase
9 orders? Did you tell him about that?

10 A. No. That was in the record.

11 Q. Where was it in the record?

12 A. Various agreements that had been made
13 and memorialized.

14 Q. Okay. Did you tell Mike Burke that
15 thereafter we decided to finance site plans?

16 A. No.

17 Q. Did you lead him to believe that you
18 had no knowledge that that there was funding of
19 site plans?

20 A. No. At that point in time I do not
21 recall that the agreement to fund site plans.
22 Again, that was -- it was so much going on at that
23 point in time, a lot of things to deal with that.

24 Q. Do you recall being involved in the
25 preparation of material for a serious -- serious

1 incident report?

2 A. I'm sorry?

3 Q. Do you recall being involved in
4 filling out the serious incident report?

5 A. I don't recall that at the moment, no.

6 Q. Do you recall any statement that you
7 made regarding the site plan financing?

8 A. There are some other memos I think or
9 as we've moved through the process about trying to
10 address the situation that we mentioned that, yes.

11 Q. Do you recall claiming that you did
12 not have knowledge of the site plan financing?

13 A. Yes, I do.

14 Q. Was that truthful?

15 A. At the time it was.

16 Q. Explain that to me, because I thought
17 you -- you had testified that you approved the
18 site plan financing and that Mr. Denning approved
19 the site plan financing; is that correct?

20 A. Yes.

21 Q. And then you've gone into testimony
22 about your understanding of what the terms of that
23 said site plan financing?

24 A. Uh-huh.

25 Q. Right?

1 A. Yeah.

2 Q. Now, in January or February of 2008
3 did you intend to convey to your superiors that
4 you didn't know about the site plan finance --
5 financing and those were supposed to be purchase
6 orders and that these were crooks?

7 A. No.

8 MS. CHERRY: Object to form.

9 THE WITNESS: Not my intentions, and I
10 didn't convey that either.

11 BY MR. LINTON:

12 Q. Okay. What were you trying to convey
13 when you were filling out information for your
14 superiors to rely on regarding the site plan
15 financing?

16 MS. CHERRY: Object to the form.

17 THE WITNESS: What I remembered, I was
18 trying to convey the situation as I remembered it
19 at that time.

20 BY MR. LINTON:

21 Q. At the time did you remember that site
22 plan financing had been approved by you and Mr.
23 Denning?

24 A. No, at the time I didn't. That
25 recollection came as we were preparing for the --

1 the deposition process and I've had a chance to
2 look at all of the information that became
3 available.

4 Q. I see. So what you're telling me is
5 that the site plan financing had been approved by
6 you and Mr. Denning and it had been administered
7 by Cast -- by Castlen Morris?

8 A. Uh-huh.

9 Q. But in January when Mr. Burke came
10 over you had forgotten about that?

11 A. That's correct.

12 Q. And later when you filled out a
13 serious incident report you still had forgotten
14 about it?

15 MS. CHERRY: Object to the form.

16 BY MR. LINTON:

17 Q. Let me go ahead and rephrase that.
18 When did you first recall, oh, my God, I've made a
19 mistake, we did approve that site plan financing?

20 A. Yeah, as Ron was giving his testimony
21 last week.

22 Q. And did you make a note about that?

23 A. I don't recall.

24 Q. Come on now. This --

25 A. I don't.

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1 Q. You don't recall whether you made a
2 note to yourself that there -- we did have site
3 plan financing?

4 A. Yeah, I know I made a mental note and
5 then -- about that and --

6 Q. So his testimony refreshed your
7 recollection?

8 A. Yes, it did.

9 Q. Okay. And you're clear as you can be
10 on it today that it had been approved?

11 A. Yes.

12 Q. At what point did you become
13 disengaged from Skywaves's account?

14 A. Probably by the time of the demand
15 letter had been issued, the account would have
16 been transferred from the bank to our asset
17 resolution group.

18 Q. Were you involved in the discussions
19 when there were proposed workouts?

20 A. A couple of them. I think I was
21 involved in a meeting that -- at Skywaves as --
22 during that process with I think Mike and some
23 others.

24 Q. When you had your recollection
25 refreshed last week, did you notify anybody at the

1 bank? Did you notify anybody at the bank, you
2 know, what he's saying is true and I may have
3 misled y'all unintentionally?

4 A. I notified Molly and -- and Molly
5 notified Mike.

6 Q. Have you had any discussions with Mike
7 about that?

8 A. Yes.

9 Q. Tell me about that.

10 MS. CHERRY: I'm going to instruct him
11 not to answer to the extent counsel was involved
12 in those communications.

13 So if you can answer the question
14 without revealing any discussions where counsel
15 was involved, you can. Otherwise...

16 MR. MENDOZA: I also would like to ask
17 for a clarification, which Mike. There are a
18 couple Mikes.

19 BY MR. LINTON:

20 Q. Good point. I'm assuming you were
21 talking about Mike Hennessy?

22 A. Yes. Well, all our -- any
23 conversation that related to that was in the
24 presence of -- of counsel. So I don't know how to
25 respond to your question.

1 Q. Have you been asked to prepare any
2 written statement by Mr. Hennessy?

3 A. No.

4 Q. Or anybody at the bank?

5 A. No.

6 Q. Have you looked at the serious
7 incident report that this bank filed?

8 A. No, I don't think I have.

9 Q. When you were discussing the Skywaves
10 situation with Mr. Burke did you tell him that you
11 knew from time to time that checks had been
12 received directly by Skywaves as opposed to being
13 to BB&T?

14 A. No, not that I recall.

15 Q. Do you recall telling him that from
16 time to time you were aware that Skywaves
17 deposited checks and would remit them and -- but
18 it may be 30 days?

19 A. No, I don't recall that at all.

20 Q. What do you recall about how you
21 introduced Mr. Burke to the situation at Skywaves?

22 A. Primarily we set up the meeting to
23 meet with them and the general parameters of the
24 credit exposure that we had and -- and give him a
25 chance to meet the management out there.

1 Q. Did you express confidence in
2 management?

3 A. I may have. I don't recall for sure.

4 Q. After that meeting do you recall
5 calling Ron Konersmann and talking with him?

6 A. Not specifically at this point in
7 time.

8 Q. Well, do you remember talking with him
9 and saying, Ron, we're going to send you a default
10 notice, but don't worry about it, it's a slap on
11 the wrist, everything will get worked out?

12 A. No, I don't recall that. What I do
13 recall is on the 18th, and I think that's in my
14 call log, I talked to Ron and John on the phone,
15 let them know that we were in a serious situation
16 and a demand letter would be coming, hopefully
17 that -- well.

18 Q. Do you remember in that conversation
19 saying something to the effect that this is really
20 a slap on the wrist, we -- we'll have everything
21 worked out?

22 A. What I remember is that --

23 Q. Do you remember that?

24 A. No, not -- not at all. My -- my
25 recollection of the phone call is that, you know,

1 it was a serious situation, that a demand letter
2 wasn't coming, we want -- we still want to work
3 with you. And in fact, we did.

4 We could have immediately demanded the
5 loan and exercised all of the rights under the
6 agreements, but all we chose to do at that point
7 was to stop funding under the agreement and give
8 them time to try and work something out.

9 Q. And in looking at your personnel file
10 which I -- which as I indicated I only did
11 briefly, I didn't see any reference in 2008's
12 review to Skywaves. Was -- was there any?

13 A. Not that I -- I don't remember. That
14 was six -- five, six years ago, and I haven't
15 reviewed that.

16 Q. Have you received any, you know, memo
17 to the file that, you know, you mishandled this
18 account?

19 A. Not that I'm aware of.

20 Q. In fact, I guess you had received a
21 bonus that year, didn't you, 2008?

22 A. If I did it would have been based on
23 2007 results. My recollection is that there was
24 no bonus the following year because of the charge
25 off that was taken.

1 Q. That was really just figuring into the
2 matrix?

3 A. Correct.

4 Q. Did anybody come to you and say, Jim,
5 we've got to have a serious conversation, the bank
6 may have lost a good bit of money because you
7 weren't tending to business? Did -- did you have
8 any conversation like that?

9 A. We had conversations of the
10 progression of the unusual nature of the credit,
11 that certainly in hindsight that may not be
12 something we do again. Obviously, took a large
13 loss on it, and we -- and tried to use it as a way
14 to, you know, how do we improve next time.

15 Those are general discussions among
16 all of the folks that were involved, as typically
17 happens when you have a large charge off.

18 Q. Are you involved in any factoring now?

19 A. No.

20 Q. All right. Is Mr. Denning?

21 A. Not that I'm aware of.

22 Q. And -- and how about Mr. Burke, is he
23 still in the factoring?

24 A. I'm not sure.

25 Q. Does he still work for the bank?

1 A. I'm not sure either on that.

2 Q. But Denning does?

3 A. Yes.

4 Q. Why don't we just go over the
5 different kinds of credit that were extended while
6 you were the relationship manager. Could -- could
7 you identify those for me?

8 A. Off the top of my head, I'll try. We,
9 of course, had the factoring agreement. That was
10 the primary credit at Skywaves. I know we had two
11 loans I think over time to KWK, LLC. Excuse me.
12 The first one was a line of credit that later was
13 converted to a term loan that was secured by real
14 estate, income-producing real estate owned by KWK,
15 and the proceeds of that income-producing property
16 serviced the debt.

17 I think it was KWK's intention to give
18 that money to Skywaves to help them in the growth
19 of their business. And I think later on we may
20 have done an equipment loan to KWK, who owned the
21 equipment, that some equipment that was used by
22 Skywaves.

23 Q. In each of those relationships did you
24 find that the debtor was forthcoming and
25 forthright?

1 A. Yes, in the KWK and -- and the fact
2 that -- yes. Uh-huh.

3 Q. Can you explain to me how you could
4 have financed so much money on these site plans
5 and had a lapse of memory that that had been
6 approved by Mr. Denning and you and -- and that
7 lapse lasted for almost five years?

8 A. Well, when you're in a crisis
9 situation like we were in January of 2008 with a
10 lot of things happening and a lot of information
11 flowing in that was negative, I mean, especially
12 the financial results and the audit, you -- you
13 know, I think -- you know, I don't think you --
14 one's memory is as clear in a crisis situation as
15 it could be when you've had a chance --

16 Q. Well, the crisis --

17 A. -- past the event to --

18 Q. The crisis abated at some point. And
19 what I'm wondering why in the last three or four
20 years it hasn't dawned on you that, wait a minute,
21 I made a mistake, we had approved all of the site
22 financing and I told my superiors something that
23 was inaccurate. I'm just trying to understand why
24 it takes hearing Mr. Konersmann's testimony last
25 week to refresh your recollection.

1 A. Yeah, because there hasn't been the --
2 there hasn't been an opportunity for my
3 recollection to be refreshed until this particular
4 point.

5 Q. Well --

6 A. Once the loan was charged off and --

7 Q. I'm guess when the lawsuit was filed
8 and you went through the complaint with Molly or
9 somebody at Nexsen Pruet that you went through
10 those allegations?

11 A. Uh-huh. Yes.

12 Q. And that didn't refresh your
13 recollection, oh, yeah, we did approve these site
14 plan financing?

15 A. No, not at that time.

16 Q. And when you -- as your preparation,
17 you said ten or twelve hours for your deposition,
18 was that after Ron's testimony?

19 A. Yes.

20 Q. Did you have any preparation prior to
21 his testimony?

22 A. No.

23 MR. LINTON: Molly, I think we can take
24 a short break and we may just request that we have
25 an early lunch and I can determine whether or not

1 there's much more that we need to ask, if that's
2 okay with y'all.

3 MS. CHERRY: Sure.

4 VIDEOGRAPHER: Off the record at 11:20
5 a.m.

6 (A recess was taken.)

7 VIDEOGRAPHER: We are back on the
8 record at 11:39 a.m.

9 BY MR. LINTON:

10 Q. Mr. Edahl, you mentioned that the bank
11 had a huge loss as a consequence of the credit
12 extended. Do you know how much that was?

13 A. Not exactly. It was between 1 and \$2
14 million I believe.

15 Q. Where did that information come from?

16 A. There's a charge-off report, I'm sure,
17 that would have the exact number on it.

18 Q. But you think that's the net loss to
19 the bank after liquidation of all of the assets?

20 A. I believe so. I don't know for sure.

21 Q. During the meeting that you had with
22 Mr. Burke, Ron, and John, do you remember
23 discussion about the site plan funding and what
24 those proceeds had been used for?

25 A. No, not specifically.

1 Q. Do you remember saying anything to
2 them that in your judgment the funds had to be
3 used for purchasing materials for the improvements
4 at a particular site?

5 A. I don't recall saying that
6 specifically one way or the other at that meeting.

7 Q. How about Mr. Burke, did he say
8 anything about that?

9 A. I don't know.

10 Q. Did -- did you thereafter ever say
11 anything to Ron about I thought the funding of the
12 site plans was simply to buy materials for the
13 particular site?

14 A. There is a -- January 17th I believe
15 Ron met with Frank Capel and myself and that
16 question was addressed, why isn't, you know, the
17 site -- money wasn't used for to build these sites
18 and Ron said, no, they were used for working
19 capital.

20 Q. Okay. And at that time did you say,
21 well, Ron, they couldn't be used for working
22 capital, it had to be used to purchase materials
23 for a particular site? Did you say that?

24 A. No. No.

25 Q. You didn't confront him about in your

1 mind there's been a misuse of the funds?

2 A. No, that wasn't discussed at that
3 meeting.

4 Q. Well let me ask you this question. In
5 your mind was that a misuse of funds, that is to
6 use it for general corporate operating capital?

7 A. Yeah. I thought that the funds needed
8 be used for construction of the sites.

9 Q. And did you ever send any memo to Ron
10 to -- to say this is part of our agreement?

11 A. Not at that time.

12 Q. Is there anything in writing that says
13 that's part of your agreement?

14 A. Not that I'm aware of.

15 Q. Okay. And you said not at that time.

16 A. Well, not at any time that I'm aware
17 of.

18 Q. Okay. I'm going to read you something
19 and ask if you recall writing this: In July 2007
20 and over the next three months BB -- BB&T factors
21 advanced \$1,262,313 against a total of 36 General
22 Dynamics purchase orders. Castlen Morris, the
23 BB&T factors officer, left BB&T in November. A
24 new BB&T factors account officer, Mike Burke, and
25 I called on Skywaves in early January. In going

1 over the AR and purchase order ledgers on that
2 call with the company we learned that there were
3 no purchase orders for the General Dynamics
4 advances mentioned above but that Castlen had
5 advanced on 36 site referenced in a General
6 Dynamics contract with the State Police of New
7 York.

8 Per the terms of the contract, General
9 Dynamics is to deliver several hundred cell tower
10 buildings constructed by Skywaves over the next 24
11 months to various sites throughout New York. Per
12 Skywaves, they were expecting General Dynamics to
13 deliver purchase orders for the sites advanced
14 again -- against in the summer but that the
15 project was delayed and Skywaves admitted using
16 the funds for purposes other than constructing
17 units for this contract.

18 Do you recall writing that?

19 A. I think so. Can I see that document?

20 MS. CHERRY: No.

21 THE WITNESS: Okay. It sounds
22 familiar.

23 BY MR. LINTON:

24 Q. Do you recall telling your superiors
25 that these funds were restricted to purchase of

1 materials for site specific?

2 A. No, not specifically.

3 Q. When this was written had you
4 undergone this lapse of memory about the site
5 plans being funded?

6 A. I don't know when that was written.

7 Q. Well, it was in, let's say it was in
8 January of 2008.

9 A. Yes, that would be consistent.

10 Q. Uh-huh. All right. Now you mentioned
11 that Frank, what's his last name?

12 A. Capel.

13 Q. Well, you did mention Frank Capel.
14 But who is the credit officer who approved the
15 site plans?

16 A. Walt Denning.

17 Q. Walt Denning. I think I saw where he
18 was executive vice president of BB&T back then?

19 A. Yes.

20 Q. Is he still executive vice president?

21 A. As far as I know.

22 Q. And how did he communicate his
23 approval of the site plan financing?

24 A. It was verbally.

25 Q. Okay. Over the phone?

1 A. Yes.

2 MR. LINTON: Molly, I've got this email
3 that -- why don't you just look at it. It's
4 short. And I just want to ask him about it, but
5 you want him to have a copy of it.

6 MS. CHERRY: Yeah, I know what email
7 that is.

8 BY MR. LINTON:

9 Q. It's an email dated January 22 from
10 you to Walt Denning, Frank Capel, and Michael
11 Hennessy. After thanking Mike for the update you
12 say that you're copying the people I just
13 identified.

14 It says: As we discussed Friday,
15 neither you or I had any idea that the GD North
16 Carolina state purchase orders funded from July
17 through October were not documented and funded
18 exactly like the other purchase orders we had
19 received and funded over the last two years from
20 General Dynamics, Nextel, Verizon, et cetera.

21 So at that time you had no
22 recollection of the funding? When you -- when --
23 when you sent this email to Mr. Denning did you
24 have any conversation with him where he said, oh,
25 yeah, I remember it or, no, I didn't remember it

1 either?

2 A. No.

3 Q. You didn't have any conversations?

4 A. No.

5 Q. How about with Capel, did you have any
6 conversation with him about?

7 A. With who?

8 Q. With Capel, about the fact that
9 neither you or Denning recall?

10 A. With whom, I'm sorry? With Frank?

11 Q. Right.

12 A. Capel.

13 Q. Capel.

14 A. No.

15 Q. With Mr. Hennessy?

16 A. No.

17 Q. Did everybody just ignore your email?

18 I mean, you -- you're sending an email to these
19 people who are now in charge of this account and
20 telling them that you and Mr. Denning have no
21 recollection of the site plan funding being
22 approved, and you're tell me that nobody called
23 you to say, oh, it was approved or -- what
24 happened?

25 A. At that time I didn't have

1 recollection and I don't know about Mr. Denning
2 and his recollection.

3 Q. But he didn't call you to say, yeah, I
4 don't remember anything about this either?

5 A. No, he didn't call me.

6 Q. \$200,000 has been advanced on it?

7 A. He didn't call me that I recall, no.

8 Q. At any time up until now have you had
9 any discussion with Mr. Denning about whether he
10 recalls approving the site plan funding?

11 A. No.

12 Q. Have you talked with Mr. Denning about
13 Skywaves?

14 A. Probably not since 2008.

15 Q. Did you go over the complaint when
16 your answer was being submitted? The complaint is
17 the lawsuit in which you're named as a defendant.

18 A. Yes. Uh-huh. Yes.

19 Q. And have you ever had separate
20 counsel?

21 A. No.

22 Q. If you were me and wanted to establish
23 that Mr. Denning gave approval to you for the
24 funding of the site plans, what documents would
25 you look at?

1 A. I'm not sure I understand the
2 question, if I were you.

3 Q. Well, you're -- you're saying in that
4 email that Mr. Denning told you that he doesn't
5 have any recollection of having approved this.

6 A. I don't think I'm saying that in -- in
7 that email.

8 Q. Okay. Maybe I'm misunderstanding.
9 You're just saying that you don't have any
10 recollection?

11 A. That's correct.

12 Q. And you never have asked Mr. Denning
13 whether he does?

14 A. Not to my knowledge.

15 MR. LINTON: Unless you have anything,
16 that's all we have.

17 MS. CHERRY: Okay. I don't have any
18 questions.

19 MR. KEFALOS: Okay. That's it

20 VIDEOGRAPHER: This concludes the
21 video deposition of James Edahl. The time is
22 approximately 11:50 a.m. We are now off the
23 record.

24 (The deposition was concluded at 11:50
25 AM.)

SIGNATURE OF DEPONENT

DEPONENT: JAMES EDAHL
DEPOSITION DATE: September 19, 2013
REPORTER: ROXANNE M. EASTERWOOD, RPR
CASE CAPTION: SKYWAVES I CORPORATION vs.
BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN
MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC,
A/K/A BB&T, AND JAMES EDAHL

(Please return both Signature of Deponent pages)

I, the undersigned, JAMES EDAHL, do hereby
certify that I have read the foregoing deposition
and find it to be a true and accurate
transcription of my testimony, with the following
corrections, if any:

PAGE	LINE	CHANGE	REASON
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SIGNATURE OF DEPONENT (CONTINUED)

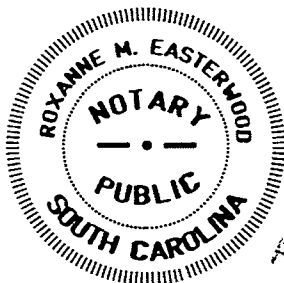
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 A/K/A BB&T, AND JAMES EDAHL

PAGE	LINE	CHANGE	REASON
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 JAMES EDAHL

 Date

I, Roxanne M. Easterwood, Notary Public for the State of South Carolina at Large, do hereby certify that the deponent was advised of his or her right to read and sign said deposition both verbally and in writing. If the deponent fails to execute and return foregoing Signature of Deponent pages within the thirty (30) days allowed pursuant to the Rules of Civil Procedure, the original transcript may be filed with the court.



Roxanne Easterwood

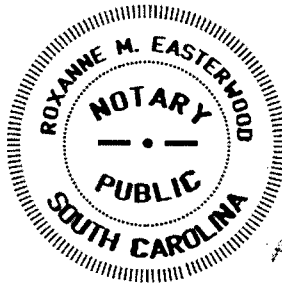
 Roxanne M. Easterwood, RPR
 My Commission expires
 February 1, 2015

1 CERTIFICATE OF REPORTER

2 I, Roxanne M. Easterwood, Registered
3 Professional Reporter and Notary Public for the
4 State of South Carolina at Large, do hereby
5 certify that the foregoing transcript, pages 1
6 through 103 is a true, accurate, and complete
7 record.

8 I further certify that I am neither
9 related to nor counsel for any party to the cause
10 pending or interested in the events thereof.

11 Witness my hand, I have hereunto
12 affixed my official seal this 19th day of
13 September 2013 at Charleston, Charleston County,
14 South Carolina.



Roxanne Easterwood

21 _____
22 Roxanne M. Easterwood, RPR
23 My Commission expires
24 February 1, 2015
25

I N D E X

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REQUESTED INFORMATION INDEX

(No Information Requested)

E X H I B I T S

(No Exhibits Proffered)

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION,

Plaintiff,

vs. CASE NO. 2009-CP-10-7516

BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN
MERGER TO BRANCH BANKING AND TRUST COMPANY OF
SC, A/K/A BB&T, AND JAMES EDAHL,

Defendants.

VIDEOTAPE

DEPOSITION OF: JAMES EDAHL

DATE: September 19, 2013

TIME: 9:16 AM

LOCATION: Law Offices of
ANDREW K. EPTING, JR., LLC
46A State Street
Charleston, SC

ORIGINAL

TAKEN BY: Counsel for the Plaintiff

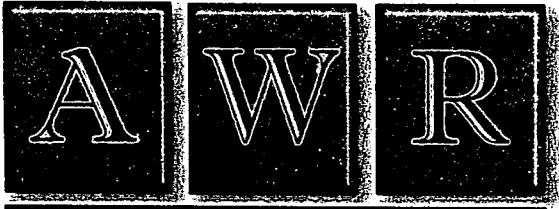
REPORTED BY: Roxanne M. Easterwood, RPR

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CERTIFICATE OF VIDEO OPERATOR

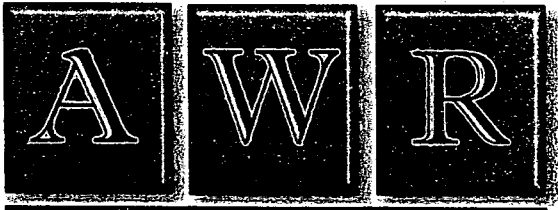
I, Steven Barksdale, certify that the deposition of James Edahl, was videotaped by me and that it consists of 1 tape(s); that it is accurate and complete and is an unedited tape of the testimony given by the witness; that I am not financially interested in this action and am neither a relative nor an employee of any of the parties.

Dated this 19th day of September, 2013 at Charleston, South Carolina.

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CERTIFICATE OF VIDEO OPERATOR PRIOR TO COMMENCEMENT

I, Steven Barksdale, hereby affirm that I am familiar with the provisions of Rule 30(h) of the South Carolina Rules of Civil Procedure pertaining to videotape depositions and will assure that the videotaping of this deposition is done in compliance with the provisions of Rule 30(h) and in an impartial manner.

Dated this 19th day of September, 2013 at Chareston, South Carolina.

A handwritten signature in black ink, appearing to read 'S. Barksdale'.

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EXHIBIT 5

DUFFY & YOUNG LLC

96 BROAD STREET, CHARLESTON SC 29401

telephone 843-720-2044 facsimile 843-720-2047

ATTORNEYS AT LAW

September 25, 2013

Molly Hughes Cherry
205 King Street
Suite 400
Charleston, SC 29401

Rick Mendoza
1230 Main Street
Suite 700
Columbia, SC 29201

Dear Rick and Molly,

After the deposition of Mr. Edell, Rick advised that you were considering amending the answer or answers. I expect that we will consent to the amendment but of course we will need to look it over first.

We would like to take the depositions of the people listed below between October 30th and December 15th. We would like to video them and will take them whenever and wherever is most convenient to you, BB&T, Mr. Edall, and the witnesses. The consequences of the sequence of taking the witnesses are subordinate to completing the depositions in a timely fashion. I expect that each witness would not take more than four hours so that we could schedule two on any given day. We would prefer a long lunch break, say an hour and a half, between witnesses if two are scheduled in a day. Someone on our side will be available throughout the suggested period, and we would like to complete them before the Christmas Holiday season is in full thrust.

I believe we have requested personnel files of each of the requested deponents and would appreciate your advising when we can expect receipt of these documents.

I assume that you will want to take John's deposition. Please send a few dates which are convenient for you and we will do our best to have him available.

If you are going to amend the answer or answers, we would request that you do so by October 4th so that we can consider your position as we review the documents and prepare for depositions.

I think we need to have a conference regarding the privilege log and redacted documents. George and I are happy to come to your office for that conference and hope that it could be sometime during the week of October 7th.

jlinton@duffyandyoung.com

WWW.DUFFYANDYOUNG.COM

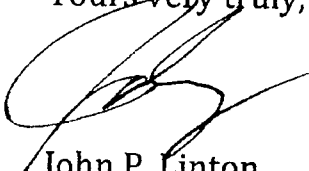
We will send you our concerns about your privilege log in advance of the meeting.

I am not going to be in the office until Monday, and may not have access to email after mid afternoon, but I imagine the others will. If there is anything we might discuss over the telephone, my mobile number is 843.343.4403.

Michael A. Sordillo, CPA
Michael Burke
Frank J. Caple
Michael Hennessey
Walter Denning
Tol Broome

With kindest regards, I am

Yours very truly,



John P. Linton

CC via email: George Kefalos, Andrew K. Epting, M. Dawes Cooke, Brian C. Duffy

EXHIBIT 6

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CA NO. 2009-CP-10-7515

JOHN VOYTKO and RON KONERSMANN,

Appellants,

v.

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

Defendants.

SECOND AMENDED COMPLAINT

Negligent Misrepresentation, Breach of
Contract, Breach of Contract Accompanied by
Fraudulent Acts, Breach of Covenant of Good
Faith and Fair Dealing, Breach of Good Faith
and Fair Dealing, Breach of Fiduciary Duty,
Promissory Estoppel, Fraud in the Inducement,
Negligence, Violation of SCUTPA, Intentional
Infliction of Emotional Distress, and by way of
reply and affirmative defense to Answer:
Unclean Hands, Equitable Estoppel, Judicial
Estoppel

The Plaintiffs, John Voytko (“Voytko”) and Ron Konersman (“Konersman”) state and
allege as follows:

1. Plaintiff John Voytko is a citizen and resident of Charleston County, South Carolina
2. Plaintiff Ron Konersman is a citizen and resident of Charleston County, South Carolina.
3. Defendant BB&T is a corporation authorized to do business in South Carolina, listed in
good standing with the South Carolina Secretary of State, and doing business in Charleston
County, South Carolina.
4. James Edahl is an officer of BB&T who does business in Charleston County and is a
citizen and resident of South Carolina.

FACTS COMMON TO ALL CAUSES OF ACTION

5. Skywaves developed an innovative product for the wireless telecommunications industry.
Its customer base included Verizon, AT&T, Sprint/Nextel, as well as federal and state
government entities.

6. On or about March 22, 2005, Skywaves and BB&T entered into a written factoring agreement, whereby BB&T purchased certain receivables of Skywaves at a discount and agreed to collect such receivables on Skywaves' behalf.
7. From 2005 through 2007, Skywaves and BB&T occasionally amended the terms of the factoring agreement via written modifications.
8. From 2005 through 2007 BB&T funded the working capital needs of Skywaves via the factoring agreement.
9. During that time period, BB&T also provided a designated relationship manager (Edahl) who assisted Skywaves in raising additional capital funds, and induced Plaintiffs to invest additional funds based on representations of Edahl, and for Plaintiffs to continue as the CEO and CFO of Skywaves as their only means of earned income. Plaintiffs did so based on reliance that the banking program to finance purchase orders and later would include future site plans.
10. Edahl had a financial incentive to mislead, defraud, or otherwise deceive Skywaves due to the bonus and incentive compensation that he received at the end of every year.
11. In early 2007, Skywaves' Board of Directors determined that it would need expanded financial commitments to provide capital infusion beyond those being currently provided by BB&T to meet the increasing number of Requests for Quotations it was receiving as a result of winning two General Dynamics contracts, one for \$12 million with the Navy/Coast Guard and the other a \$20 million multi-year homeland security initiative with the New York state SWN Police.
12. In early 2007 Skywaves solicited proposals for expanded financial commitments from various entities.
13. Skywaves received a proposal for a working capital investment from Hunt Capital.
14. Finally, Skywaves received a proposal to modify and expand the existing factoring agreement from BB&T.

15. In reasonable and foreseeable reliance upon BB&T's representations, Skywaves elected not to pursue the opportunities for capital investment or funding proposed by Wachovia or Hunt Capital.
16. In reasonable and foreseeable reliance upon BB&T's representations, Skywaves elected to use BB&T to raise additional operating capital, through modifications of the existing factoring agreement to include factoring of sites planned for which no purchase order existed.
17. Between March and December of 2007, Skywaves and BB&T exchanged a series of emails, letters and documents, which memorialized the relevant and material terms of the new and expanded factoring agreement (or a modification of the prior agreement).
18. Under this modified factoring agreement, BB&T agreed, among other things, to provide cash infusions based on invoices, purchase orders, contracts and site plans. This greatly expanded the scope of credit and was in substance an operational capital loan, particularly as it relates to future expansion of designated site plans.
19. Skywaves received numerous writings from BB&T containing the material terms and conditions of this promise, undertaking, accepted offer, commitment, or agreement. BB&T, or its duly authorized agent, signed those writings to the extent required by the law.
20. For example, BB&T sent numerous email messages confirming the relevant terms of the modifications to the existing factoring agreement.
21. On January 25, 2008 BB&T breached the terms and conditions of its factoring agreements, which was modified to include an operating capital loan, deemed as such by BB&T's Senior Vice President James Edahl, the sole relationship officer between BB&T and Skywaves, and its officers CEO and CFO, the Plaintiffs herein. BB&T breached this modified agreement with Skywaves by wrongfully asserting a SkyWaves default and by refusing to honor its further commitments to SkyWaves.
22. At that time, BB&T completely ended its business relationship with Skywaves.
23. Subsequently, BB&T continued to refuse to honor its obligations under the original factoring agreement and modifications thereto.

24. BB&T's conduct proximately caused Skywaves to submit to Bankruptcy liquidation proceedings, without the ability to reorganize and continue as an active business entity.

FOR A FIRST CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION
(Plaintiffs v. BB&T and Edahl)

25. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

26. Before and in July 2007 James Edahl, Senior Vice President and relationship manager to Skywaves, traveled to McBee South Carolina on behalf of BB&T for the purpose of making a presentation to Plaintiffs and potential investors.

27. During the presentation James Edahl told Plaintiffs that BB&T had devised a unique financing arrangement with Skywaves. This arrangement included BB&T's commitment to advance money to Skywaves based on invoices, purchase orders and site maps. While admittedly unique to Skywaves the method of operating capital was fiscally appropriate for the bank and would enable Skywaves to achieve growth potential without additional capital investors and the potential dilution of shares.

28. During the presentation James Edahl told the Plaintiffs that based on these Defendants' own comprehensive review, BB&T believed that Skywaves would grow to become a successful company and a significant infrastructure supplier to the telecommunication and military markets.

29. During the presentation James Edahl told the Plaintiffs that BB&T was fully committed to providing all of Skywaves short-term and long-term financial needs for growth; that BB&T would act as a partner in managing Skywaves growth and was seeking investors to contribute capital or loans to Skywaves.

30. Edahl told Plaintiffs that if they agreed to contribute money to Skywaves then BB&T would continue the unique funding arrangement with Skywaves.

31. Edahl told Plaintiffs that Skywaves held a strong position and were geared to take full advantage of the impending 3G build-out, which was imminent.

32. Edahl urged Plaintiffs to invest in the company before the 3G build-out took place in order to take full advantage of the impending windfall.

33. The Plaintiffs relied on all of these material representations by these Defendants when they were induced to purchase equity positions and to make loans to Skywaves.

34. The representations by these Defendants were false. The Defendants knew, or in the exercise of reasonable care should have known, they were false.

35. These Defendants owed a duty of care, including a fiduciary duty undertaken by garnering financial advice, to communicate accurate and truthful information to the Plaintiffs, and breached that duty by failing to exercise due care.

36. The Plaintiffs believed all of these representations made by the Defendants and had no reason to believe they were not true.

37. The Plaintiffs relied on all of these material representations and were induced to invest money into Skywaves.

38. These representations by these Defendants were false and fraudulent as evidenced by BB&T's abrupt failure to honor its financing commitments. The bank failed to honor its commitment and agreement when two officers, Senior Vice President James Edahl and Executive Vice President Walter Dennings, failed to advise BB&T employees Mike Burke and Michael Hennessy that the unique financing arrangement with Skywaves had been affirmatively agreed to and approved by the Bank. As a result, Hennessy and Burke distrusted Skywaves and acted unreasonably in closing Skywaves down rather than allowing a recapitalization, refinancing by a third party or sale in the ordinary course of business.

39. The Defendants, from late 2007 through January 2008, knew that the lending agreement as modified was problematic. Due to the losses sustained by Skywaves during the calendar year of 2007, Defendants choose not to move forward with funding the corporation as agreed upon. However, BB&T choose not to disclose this information to Skywaves, or its officers. Defendants breached their duty to speak or disclose by failing to articulate that they no longer thought financing the corporation was a viable option.

40. In November 2007, James Edahl met with Ron Konersman at Ron Konersman's request to discuss the losses the corporation had suffered in 2007, as well as to discuss an unsatisfactory audit received by Skywaves in October 2007. This was the first instance Konersman learned that his company had received an unsatisfactory rating from an audit, although there were others. Defendants, however, withheld this information from Ron Konersman and John Voytko. Defendants dismissed the audit to Konersman telling him not to worry about it because "[the auditor] does not understand our business."

41. Edahl misled Plaintiffs by failing to disclose the impending end to the financial lending from BB&T to Skywaves. Defendants hid this information, failed to disclose, notify the Plaintiffs, and instead fraudulently misled the Plaintiffs in the belief that capital infusions, which were subordinate to the debt, would alleviate any banking concerns.

42. Due to this failure to disclose, Plaintiffs reasonably relied upon Defendant's assertions that even though the company sustained heavy losses in 2007, BB&T was still invested to see the corporation through an IPO. Thus, Skywaves lost the ability in November, December, and early January to seek other financing prospects, and thus reduce the impact the loss of funding would create, upon themselves personally, and to the corporation collectively. Likewise, the Plaintiffs lost the ability to secure alternative financing for the company.

43. As a direct, foreseeable, and proximate result of one or more of the Defendants' negligent willful, wanton, reckless, indifferent and/or intentional acts, the Plaintiffs have suffered lost investments and suffered substantial loss of income, and suffered humiliation and injuries to personal relationships and in such ways as will be revealed during the course of discovery. The Plaintiff is entitled to actual and punitive damages together with attorneys' fees, the costs of this action, and any other available relief to be determined by the trier of fact.

FOR A SECOND CAUSE OF ACTION
BREACH OF CONTRACT
(Plaintiffs v. BB&T)

44. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

45. BB&T represented that it would continue funding on the terms it outlined if the Plaintiffs made investments into Skywaves. Plaintiffs made the requested investments.

46. BB&T became contractually obligated to continue the funding arrangement because Plaintiffs were third party beneficiaries to the Skywaves/BB&T contract, and invested and loaned funds to Skywaves in reliance on the contract between Skywaves and Defendant bank.

47. BB&T breached the contract by unilaterally terminating its funding for Skywaves.

48. As a direct and proximate result of BB&T's actions as aforesaid, the Plaintiffs have suffered damages as set forth above.

FOR A THIRD CAUSE OF ACTION
BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACTS
(Plaintiffs v. BB&T and Edahl)

49. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

50. Defendants breach of the factoring agreement, alleged above, was done with fraudulent intent.

51. The justifications advanced by Defendants were pretextual, if not outright false. Upon information and belief, BB&T's refusal to continue funding was not due to the reasons asserted in the default letter, but was because BB&T was unhappy with and sought to renegotiate the parties' modified factoring agreement.

52. Defendant owed a fiduciary duty to the Plaintiffs, through its debtor-creditor relationship, financial advisor relationship undertaken, relationship manager, venture-capitalist relationship, and/ or the legal advice given to Plaintiffs, and in such manners as may be uncovered during the course of discovery and trial of this matter.

53. Defendant James Edahl, while actively pursuing to hold the company in default, was fraudulently asserting to Plaintiffs that BB&T was not going to hold Plaintiffs in default, to merely expect a “harsh letter,” that this was merely going to be a “slap on the wrist,” that BB&T was merely seeking to renegotiate the terms of the loan agreement, among other false assertions.

54. Defendants, while actively pursuing to hold the Plaintiffs in default, lulled Plaintiffs into a false sense of comfort, and assured Plaintiffs that the factoring agreement would continue, however modified.

55. Due to these false assertions by James Edahl, and any others as may be deduced through discovery, Plaintiffs reasonably relied, and failed to use this time to pursue alternate financing to their detriment.

56. Defendants breach of contract was accompanied by fraudulent acts characterized by dishonesty in fact and unfair dealing. While SkyWaves was not in default, it was prepared to end the financial relationship with Defendants and had proposed a program that would have retired the Defendants debt in an orderly fashion, while at the same time allowing itself to secure alternate capital financing. However, Defendants would not allow for such an orderly transition. Instead, Defendants unilaterally ceased funding in such a way as to maximize the harm to Skywaves.

57. As a direct, foreseeable, and proximate result of Defendants breach of the agreement to continue the unique funding arrangement with Skywaves these plaintiffs have incurred monetary damages, including, but not limited to; loss of investment and loan to Skywaves, humiliation, pain and suffering, and loss of enjoyment of life.

58. These Plaintiffs demand actual and punitive damages as a result of the fraudulent breaches by Defendants.

FOR A FOURTH CAUSE OF ACTION
BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING
(Plaintiffs v. BB&T Contract)

59. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

60. Implied in the contract between the Plaintiffs and BB&T — described above — was a covenant of good faith and fair dealing.

61. In failing to refusing to honor the terms of the parties' agreement, Defendant BB&T breached the implied covenant of good faith and fair dealing. Moreover, the Defendants failed to communicate openly and honestly and affirmatively mislead the Plaintiffs.

62. By reason of the breach of this implied covenant, Defendant BB&T is liable to Plaintiffs for damages including, but not limited to; loss of investment, loan to Skywaves, wages, humiliation, pain and suffering, and loss of enjoyment of life.

FOR A FIFTH CAUSE OF ACTION
BREACH OF GOOD FAITH AND FAIR DEALING
(Plaintiffs v. BB&T and Edahl)

63. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

64. Implied in the agreement between Plaintiffs, as third party beneficiaries or in privity to this contract, and Defendants was the covenant of good faith and fair dealing.

65. As a direct consequence of the actions of the Defendants, the Plaintiffs have been injured and damaged in that it has lost its business, future business opportunities, expended sums of money in reliance upon the performance of the contract, and in such ways as will be revealed during discovery. The Plaintiff is entitled to the actual and punitive damages against the Defendants in an amount to be determined by the trier of fact and certain consequential damages and reasonable attorney fees.

FOR A SIXTH CAUSE OF ACTION
BREACH OF FIDUCIARY DUTY
(Plaintiffs v. BB&T &Edahl)

66. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

67. The Defendants owed the Plaintiffs a duty to act in a commercially fair and reasonable manner, including but not limited to, the administration of the factoring agreement and any modifications thereto, and the Plaintiffs relied upon the Defendants.

68. The Defendants undertook the duties associated with a financial advisor to the Plaintiffs in its actions, statements, and representations made in the August 2007 meeting in McBee South Carolina, where James Edahl gave various investment advice to all the potential investors at the meeting.

69. Due to the level of hands on control of Defendants over Skywaves, via James Edahl's exclusive control over the Skywaves account, Defendants exhibited excessive control and authority over the actions of Skywaves.

70. Defendants undertook the special duties when James Edahl and Walter Dennings agreed to factor site funding and or purchase orders of Skywaves against the underwriting principles of BB&T. This heightened fiduciary duty is evidenced by; emails, memos, and internal documentation of BB&T, and any other evidence that may be produced through discovery or trial of the matter.

71. Defendants undertook a heightened duty, a fiduciary duty, when it undertook to provide Plaintiffs with legal advice in March 2007. This advice stated that the internal records,

documents, and emails by and between Skywaves and BB&T, would operate as a sufficient contractual obligation showing the amendment of the 2005 factoring agreement and thus the Plaintiffs would not need to seek the advice or assistance of counsel.

72. The Defendants through their willful, wanton, grossly indifferent, and intentional conduct, acts and/or omissions breached their duties to the Defendants.

73. Plaintiffs as the two principal officers of Skywaves, whose earned income was solely in their capacity as officers of Skywaves, and made investments in Skywaves, upon reliance on statements, guidance, and advice of the Defendants proclaim that as a direct, foreseeable, and proximate result of one or more of the Defendants' negligent willful, wanton reckless, indifferent and/or intentional acts, the Plaintiffs have suffered loss of money in that Skywaves filed for bankruptcy, and Plaintiffs have lost investments, and suffered substantial loss of income, suffered humiliation and injury to personal relationships and in such ways as will be revealed during the course of discovery. The Plaintiff is entitled to actual and punitive damages together with attorneys' fees, the costs of this action, and any other available relief to be determined by the trier of fact.

FOR A SEVENTH CAUSE OF ACTION
PROMISSORY ESTOPPEL
(Plaintiffs v. BB&T & Edahl)

74. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

75. Defendants made unambiguous promises to Plaintiffs that it would provide financing to Skywaves, as agreed to in the modified factoring agreement, which was memorialized in writing by the parties.

76. Plaintiffs acted in reasonable reliance upon these promises.

77. These acts of reliance by Plaintiffs constituted a definite and substantial detrimental action or forbearance.

78. Such reasonable reliance by Plaintiffs was expected and foreseeable by BB&T.

79. Plaintiff sustained injury as a direct and proximate result of its reliance upon Defendant BB&T's promises.

FOR A EIGHTH CAUSE OF ACTION
FRAUD IN THE INDUCEMENT
(Plaintiffs v. BB&T and Edahl)

80. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

81. As detailed in the prior causes of action, Defendants made numerous misrepresentations to Plaintiffs.

82. Defendants made the above-referenced fraudulent misrepresentations knowing them to be untrue.

83. Defendants made these fraudulent misrepresentations with the intention that Plaintiffs would rely thereon.

84. Plaintiffs, in fact, relied upon these fraudulent misrepresentations, as set forth in detail above.

85. Such reliance was reasonable under the circumstances.

86. As a direct, foreseeable, and proximate result of its reliance upon Defendants' fraudulent negligent willful, wanton reckless, indifferent and/or intentional misrepresentations, Plaintiffs have suffered loss of money in Skwaves filed for bankruptcy, an Plaintiffs lost investments, and suffered substantial loss of income, suffered humiliation and injury to personal relationships and in such ways as will be revealed during the course of discovery. The Plaintiff is entitled to actual and punitive damages together with attorneys' fees, the costs of this action, and any other available relief to be determined by the trier of fact.

FOR A NINETH CAUSE OF ACTION
NEGLIGENCE
(Plaintiffs v. BB&T and Edahl)

87. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

88. The Defendants owed the Plaintiffs a duty to act in a commercially fair and reasonable manner, including but not limited to, the administration of the factoring agreement and any modifications thereto.

89. The Defendants undertook the duties associated with a financial advisor to the Plaintiffs in its actions, statements, and representations made in the August 2007 meeting in McBee South Carolina, where James Edahl, gave various investment advice to all the potential investors at the meeting.

90. The Defendants exercised complete control over the Skywaves accounts and failed to keep accurate, and failed to use due care to communicate their knowledge in how this would alter their previously declared policy of loan availability to Skywaves.

91. Defendants undertook the risks of a venture capitalist when it agreed to modify the factoring agreement to fund both purchase orders and site funding. Upon information and belief, this is evidenced by the fact that this type of funding is against the underwriting principles of BB&T.

92. Defendants undertook a heightened duty, a fiduciary duty, when it undertook to provide Plaintiffs with legal advice in March 2007. This advice stated that the internal records, documents, and emails by and between Skywaves and BB&T would operate as a sufficient legally binding contractual obligation showing the amendment to the 2005 factoring agreement.

Thus, Skywaves would not need to seek the advice or assistance of counsel, and Plaintiff investors relied on this same advice from the Defendants, to their detriment.

93. The Defendants through their willful, wanton, grossly indifferent, and intentional conduct, acts and/or omissions breached their duties to the Defendants by the following particulars:

- a. By failing to disclose that site funding agreement was not properly documented, and all material issues relative to the site-funding mechanism to potential investors, including but not limited to it being contrary to BB&T's underwriting principles or internal rules, and the risks associated with this lending.
- b. By failing to undertake due diligence in its assertion that internal records and emails of BB&T would work to satisfy the amendment to the 2005 factoring agreement, and thus there was no need to seek legal advice to officially modify the agreement.
- c. By violating the Plaintiffs' rights to proceed with its business relations under the terms and conditions of the contract.
- d. By failing to give proper notice of any proposed termination of the factoring agreement in accordance with the agreements terms and conditions, or any fiduciary duty demanding such disclosure.
- e. By failing to disclose any proposed termination of the factoring agreement in accordance with the agreements terms and conditions, or any fiduciary duty demanding such disclosure.

f. In such particulars as may be developed during the course of discovery and trial of this matter.

94. As a direct, foreseeable, and proximate result of one or more of the Defendants' negligent willful, wanton reckless, indifferent and/or intentional acts, the Plaintiffs have suffered loss of money in Skywaves filed for bankruptcy, and the Plaintiffs lost investments, and suffered substantial loss of income, suffered humiliation and injury to personal relationships and in such ways as will be revealed during the course of discovery. The Plaintiff's are entitled to actual and punitive damages together with attorneys' fees, the costs of this action, and any other available relief to be determined by the trier of fact.

FOR A TENTH CAUSE OF ACTION
SCUTPA
(Plaintiffs v. BB&T and Edahl)

95. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

96. The South Carolina Code, § 39-5-20 prohibits any unfair or deceptive trade practices in the conduct of any trade or commerce.

97. As detailed above, Defendants engaged in numerous misrepresentations to Plaintiffs.

98. The conduct of Defendants, as set forth above, constitutes an unfair or deceptive act or practice within the contemplation of South Carolina's Unfair Trade Practices Act.

99. Pursuant to the Code of Laws of South Carolina § 39-57-80(e), Defendants' violations of the provisions of Chapter 39-57 of the Code of Laws of South Carolina constitute an unfair trade practice actionable under the Code of Laws of South Carolina § 39-5-20.

100. The Code of Laws of South Carolina § 39-5-20 provides that any person suffering an ascertainable loss of money or property as a result of the use by another person of an unfair or deceptive method, act or practice may bring an action individually to recover actual damages.

101. The unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition.

102. Defendants' conduct in perpetrating and perpetuating unfair and deceptive acts and practices is the actual and proximate cause of damage to Plaintiffs.

103. Defendants' unfair and deceptive acts and practices were conducted willfully and knowingly as those terms are utilized in the Code of Laws of South Carolina § 39-5-140(a).

104. Defendants' conduct as alleged herein constitutes violations of South Carolina's Unfair Trade Practices Act for which Defendants are liable to Plaintiffs, and Plaintiffs are entitled to recover from Defendants actual, special, and consequential damages, such damages being trebled.

FOR A ELEVENTH CAUSE OF ACTION
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
(Plaintiffs v. BB&T and Edahl)

105. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

106. As detailed in the prior causes of actions the Defendants have intentionally and willfully mislead the Plaintiffs, secured a position of trust and lulled Plaintiffs into a false sense of security, insisting on further investments of personal money and assets into a business that the bank had no intention of lending in, procuring a wrongful default, the conspiracy of silence, and the failure of the bank in allowing the Plaintiffs to secure a buyer of the company after the default was called, among other actions as may be uncovered during the course of discovery and trial of this matter such conduct is egregious and unconscionable.

107. Because of the intentional and willful actions of the Defendants, the Plaintiffs have suffered severe emotional distress, loss of standing in the community, loss of ability to regain employment in the industry, health issues, loss of jobs, loss of personal assets and family heirlooms, loss of homes through foreclosure, and other events that have wreaked havoc and

emotional stress, strain, and suffering upon the Plaintiffs due to the wrongful actions of the Defendants.

108. Defendants' conduct in perpetrating their wrongful and deceptive actions as addressed above, is the actual and proximate cause of the Plaintiffs' injuries.

109. As a direct, foreseeable, and proximate result of on or more of the Defendants' willful, wanton, reckless, indifferent and/or intentional acts, the Plaintiffs have suffered injury, emotional trauma, stress, and damage. The Plaintiffs are entitled to actual and punitive damages together with attorneys' fees, the costs of this action, and any other available relief to be determined by the trier of fact for the tort of outrage.

FOR A REPLY AND DEFENSE TO ANSWER
UNCLEAN HANDS
(Plaintiffs v. BB&T and Edahl)

110. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

111. The Plaintiffs assert that the Defendants should be estopped from reliance upon the affirmative defense of S.C. Code § 37-10-107 (Lender Liability Statute of Frauds) specifically, and other defenses asserted, because of their wrongful and affirmative actions of deception and fraudulent behavior.

112. By and through the Defendants actions, the Plaintiffs were encouraged to rely upon the Defendants internal amended records as a modification of the contractual agreement. and not to seek legal advice concerning amending the original 2005 factoring agreement.

113. Plaintiffs relied on Defendants assertions, including but not limited to, the modifications of the factoring agreement, and the internal emails, and documentation of the amendment, would constitute a satisfactory legal record to prove the amendments to the 2005 Factoring agreement.

114. In this action, however, the Defendants now rely on their assertion that the very documentation that the Plaintiffs were assured could be relied upon as adequate documentation

to prove the contractual terms of the modified lending agreement now were not enough to satisfy the Lender Statute of Frauds.

115. The Defendants failed to perform the contract and wrongfully breached the contractual agreement.

116. In breaching the agreement Defendants acted fraudulent and dishonestly about the nature of the contractual agreement and or contents of the contractual agreement.

117. Defendants wrongfully committed a tort through their fraudulent actions and negligent misrepresentations concerning the nature of the enterprise, the contractual agreement, the oral modification of the contractual agreement, and the wrongful actions taken therein.

118. The Plaintiffs acted in reasonable reliance on the conduct and assertions of the Defendants, because they had no knowledge of the wrongful actions of the Defendants. and no means to know the wrongful actions taken therein.

119. The Plaintiffs have been damaged by the above described breaches, and accompanying fraudulent acts, in flagrant, and willful disregard of their rights and interest, and the Defendants in equity and good conscious should be estopped from asserting the statutory defense of the statute of frauds and other affirmative defenses relied upon.

FOR A REPLY TO ANSWER CAUSE OF ACTION
EQUITABLE ESTOPPEL
(Plaintiffs v. BB&T and Edahl)

120. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

121. The Plaintiffs assert that the Defendants should be estopped from reliance upon the affirmative defense of S.C. Code § 37-10-107 (Lender Liability Statute of Frauds) specifically, and other defenses asserted, because of their wrongful and affirmative actions of deception and fraudulent behavior.

122. By and through the Defendants actions, the Plaintiffs were encouraged to rely upon the Defendants internal amended records as a modification of the contractual agreement. and not to seek legal advice concerning amending the original 2005 factoring agreement.

123. Plaintiffs relied on Defendants assertions, including but not limited to, the modifications of the factoring agreement, and the internal emails, and documentation of the amendment, would constitute a satisfactory legal record to prove the amendments to the 2005 Factoring agreement.

124. In this action, however, the Defendants now rely on their assertion that the very documentation that the Plaintiffs were assured could be relied upon as adequate documentation to prove the contractual terms of the modified lending agreement now were not enough to satisfy the Lender Statute of Frauds.

125. The Defendants failed to perform the contract and wrongfully breached the contractual agreement.

126. In breaching the agreement Defendants acted fraudulent and dishonestly about the nature of the contractual agreement and or contents of the contractual agreement.

127. Defendants wrongfully committed a tort through their fraudulent actions and negligent misrepresentations concerning the nature of the enterprise, the contractual agreement, the oral modification of the contractual agreement, and the wrongful actions taken therein.

128. The Plaintiffs acted in reasonable reliance on the conduct and assertions of the Defendants, because they had no knowledge of the wrongful actions of the Defendants. and no means to know the wrongful actions taken therein.

129. The Plaintiffs have been damaged by the above described breaches, and accompanying fraudulent acts, in flagrant, and willful disregard of their rights and interest, and the Defendants in equity and good conscious should be estopped from asserting the statutory defense of the statute of frauds and other affirmative defenses relied upon.

FOR A REPLY TO ANSWER
JUDICIAL ESTOPPEL
(Plaintiffs v. BB&T and Edahl)

130. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

131. The Defendants relied upon the assertions in their answer submitted to the lower court to deny the oral modifications to the factoring agreement. This denial of the oral modifications to the parties 2005 Factoring Agreement was the centerpiece to the Defendants affirmative defense to the lower court, and the lower courts decision relied upon the affirmative defense of S.C. Code § 37-10-107 (Lender Liability Statute of Frauds) specifically.

132. The Defendants' assertion of denying the oral modification to the 2005 factoring agreement and their reliance upon the affirmative defense of S.C. Code § 37-10-107 (Lender Liability Statute of Frauds) specifically, enabled the Defendants to have a favorable outcome in the lower court, as the Plaintiffs' causes of action were all dismissed upon a 12(b)(6) motion, for failing to state a claim upon which relief may be granted.

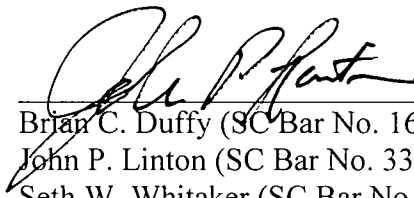
133. This false representation by the Defendants, and denial of the oral modification agreement, and the false reliance upon the affirmative defense of S.C. Code § 37-10-107 (Lender Liability Statute of Frauds) specifically, was wrongful and fraudulent and made with the intent to mislead the court.

134. The Defendants cannot come now, having now admitted under oath in a deposition that there was indeed oral amendments to the 2005 factoring agreement, and yet still argue the affirmative defense of S.C. Code § 37-10-107 (Lender Liability Statute of Frauds) applies specifically.

135. The Plaintiffs craves the Court to, in its discretion, in actions of either equity or at law, to apply the principle of judicial estoppel and prevent Defendants from insulting the integrity of the Court.

WHEREFORE, Plaintiff requests the following relief:

- a) Judgment against Defendants for actual and punitive damages;
- b) For attorney fees and costs associated with its Bankruptcy;
- c) For interest, attorney fees and costs of this action; and
- d) For such other and further relief as the Court may deem proper.



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October 30, 2013
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
South Carolina Supreme Court
No. 2012-205647

RECEIVED

OCT 30 2013

S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

Cases 2009-CP-10-7515, 2009-CP-10-7517,
2009-CP-10-7518, and 2010 CP-10-9959

2009-CP-10-7515

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

v.

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

2009-CP-10-7517

Ron Konersmann Appellant,

v.

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

2009-CP-10-7518

John Voytko Appellant,

v.

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

2010-CP-10-9959

Patricia Konersmann Appellant,

v.

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

**MEMORANDUM IN SUPPORT OF MOTION TO AMEND, OR IN THE
ALTERNATIVE TO REMAND FOR CONSIDERATION OF AMENDMENT AFTER
DISPOSING OF PENDING ISSUES ON APPEAL, AND TO SUPPLEMENT THE
RECORD WITH THE TESTIMONY OF JAMES EDAHL, AND CERTAIN EMAILS
ORIGINATING FROM BB&T AND LETTER BETWEEN COUNSEL**

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INTRODUCTION

The determination of the issues before the Court as previously briefed by the parties, the consideration of the Court of the attached motion to amend pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, the proposed amended complaint, and supplementation of the record on appeal to include the deposition testimony of James Edahl, Senior Vice President of Respondent BB&T, given by video deposition September 19, 2013, is an uncommon but not unprecedented procedural inquiry left to this Court's discretion.

MOTION TO AMEND PURSUANT RULE 15

Ordinarily, the expected procedure when a motion to amend is made while a matter is pending in the Appellate Court is for the Appellate Court to dispose of those matters on appeal, and remand to the Circuit Court for further consideration.

This Court has adopted the principles underlying the Federal Rules of Civil Procedure Rule 15 regarding sufficiency of pleadings as explained in *Forman v Davis*. See, *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962); See generally, *Higgins v. Med. Univ. of S. Carolina*, 326 S.C. 592, 604, 486 S.E.2d 269, 275 (Ct. App. 1997) (citing *Foman* and stating that where a complaint is dismissed under 12(b)(6), plaintiff should be granted leave to file an amended complaint); see also, *Spence v. Spence*, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006); *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507-08, 369 S.E.2d 156, 158 (Ct. App. 1988). If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief he ought to be afforded an opportunity to test his claim on the merits. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962) (holding an

amendment to the complaint should be granted so the case could be reached on its merits); *see also*, *Dockside Ass'n, Inc. v. Detyens, Simmons & Carlisle*, 287 S.C. 287, 288, 337 S.E.2d 887, 888 (1985); *Pool v. Pool*, 329 S.C. 324, 328, 494 S.E.2d 820, 822 (1998) (quoting *Ball v. Canadian Am. Express Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct.App.1994) (“[m]otions to amend pleadings to conform to proof may be made upon motion of any party at any time, even after judgment, and are within the sound discretion of the trial judge. Ordinarily, amendments to conform to proof should be liberally allowed.”); *Hopkins v. Shuman*, 235 S.C. 191, 195, 110 S.E.2d 713, 715 (1959) (holding “[t]he order of the lower court is reversed and the respondent may, within twenty days after remittitur filed, serve upon appellants his amended complaint in which the two causes of action, referred to hereinabove, shall be separately stated; and the appellants may plead thereto within twenty days after service upon them of the amended complaint.”); *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006).

In *Pool*, the Court concluded that allowing the pleading to be amended was proper after finding that no legal prejudice was placed upon the defendant and the amendment was necessary to achieve substantial justice and to determine the case on its merits. *See, Pool v. Pool*, 329 S.C. 324, 328, 494 S.E.2d 820, 822 (1998). The most efficient ruling, in the case at bar, would be for the Court to rule on the pending issues, and grant the motion to amend and remand.

FACTUAL BACKGROUND

The landscape of this action was altered dramatically when bank officer, James Edahl, testified by deposition in a companion case. There the corporate Plaintiff Skywaves, as authorized by the trustee in bankruptcy, seeks damages the corporation

sustained as a result of Respondent's actionable conduct. The damages sought in the present actions are for individual investors loss of their investments and personal losses resulting from negligent misrepresentations from Defendants to them.

Senior Vice President James Edahl of BB&T, and the primary relationship manager of BB&T to Skywaves, repudiated his prior statements to his superiors, and his prior answer in this case. He, and the bank, refused to admit the existence of an enforceable factoring agreement to loan against purchase orders and site plans which the bank had approved. (Answer to Amended Complaint at ¶¶ 21-22). The original factoring loan agreement called for the bank to make partial payment of an invoice upon its presentation. Later the bank expanded the arrangement to include payment against purchase orders which was not something the bank could collect upon until the purchase order was converted to an invoice. Then the bank further expanded the credit to included proposed site plans to which there was no present obligation to purchase by the Skywaves customer. These site plan loans were essentially operating capital loans, as there was no enforceable requirement for the prospective purchaser to order units from the debtor. Edahl now agrees. (*See*, Edahl Dep. at p.73 6-25 through p.74 1-11) Mr. Edahl also testified as follows:

Q: Did you feel that after you made the agreement with Skywaves to finance site plans, as you have testified to, that the bank was then obligated to finance these plans?

A: Yes.

Q: And in fact, did the bank finance those plans?

A: Some sites, yes.

Q: Were there any sites that were turned down?

A: Not that I'm aware of.

(Edahl Depo., at p. 50 12-22).

Q: Now, in January or February of 2008 did you intend to convey to your superiors that you didn't know about the site plan finance -- financing and those were supposed to be purchase orders and that these were crooks?

A: No.

MS. CHERRY: Object to form.

THE WITNESS: Not my intentions, and I didn't convey that either.

BY MR. LINTON:

Q: Okay, What were you trying to convey when you were filling out information for your superiors to rely on regarding the site plan financing?

MS. CHERRY: Object to the form.

THE WITNESS: What I remembered, I was trying to convey the situation as I remembered it at that time.

BY MR. LINTON:

Q: At the time did you remember that site plan financing had been approved by you and Mr. Denning?

A: No, at that time I didn't. That recollection came as we were preparing for the -- the deposition process and I've had a chance to look at all of the information that became available.

Q: I see. So what you're telling me is that the site plan financing had been approved by you and Mr. Denning and it had been administered by Cast – by Castlen Morris?

A: Uh-huh.

Q: But in January when Mr. Burke came over you had forgotten about that?

A: That's correct.

(Edahl Depo., at p.80 l-2 through p. 81, l-11).

Executive Vice President, Walter Dennings, was the chief credit officer for Skywaves and was located in Winston Salem, North Carolina. The third individual for the bank, critical to the administration of the loan, was Castlen Morris. He withdrew from the bank in November 2007, and was replaced by Michael Burke.

Mr. Burke came to Charleston to meet appellants, Konersman and Voytko face-to-face in January 2008. This was the initial meeting between Burke, the new loan administrator, and Appellants Konersman and Voytko. Edahl testified he did not recall discussing any information about the site financing to Burke before the visit. (Edahl Dep. p.56 11 through p. 57). In fact, when Konersman described to Burke how the site financing worked, Mike Burke claimed to have never heard of such an arrangement with any bank client. Burke reported his suspicions by email dated January 22, 2008.

From Mike Burke:
January 22, 2008 10:13 AM
Philippe Allard; James Edahl

..... I phoned John Voytko, CFO, Friday to ask him what we had received from them to base the advance on since Jim and I were told that no actual PO's existed on these orders since in the past they only received contracts.

John stated that they submitted what he remembers to be a two page spread sheet to us showing the number of units, locations and amounts of each order. The idea was to get the advances early to purchase items needed for these orders that would have long lead time. This way they would have the necessary inventory on hand to put the orders into production once they were finalized. John was sure they had discussed this with BB&T as part of the request for funding but again I see no evidence of this in our files.

(Exhibit 2).

Edahl denied prior knowledge of the site plan loans when he discussed them with Burke, and Dennings remained silent, leading to the ultimate destruction of Skywaves, the loss of Konersman and Voytko's jobs, their investment, their honor, and a rupture in private relationships with other investors as well as severe strain with their spouses.

Edahl emailed Walter Dennings on January 17, 2008, the day after Burke's initial meeting with Skywaves's CEO and CFO, stating that he had no prior knowledge of the agreement to finance site plans. (See Exhibit 1). The culmination of the investigation was a report from Tol Broome, President, Commercial Finance, BB&T.

To: FILE
From: Tol Broome

March 26, 2008

6. Acceptance of General Dynamics Spreadsheet as P.O.'s for advances and all P.O.'s had converted to invoices with A/R collected. Perhaps Castlen got too comfortable with the track record for 30 months, but the change in reporting should have been independently investigated.

(Exhibit 3).

Time will tell whether Broom was deceived by conspiracy of Edahl and Dennings, or whether he was a participant in a cover up. We expect to take his deposition the first week in December as well.

THE FIRST EPIPHANY

Until Edahl testified three weeks ago he had maintained and embraced his previous inaccurate, erroneous, and misleading statements. Hopefully at his deposition he was motivated simply to speak the truth. His epiphany at his deposition revealed the truth after five years. Mr. Edahl listened to appellant Ron Konersman's deposition testimony for two days. Mr. Konersman was a former investor and CEO of Skywaves, lost his job and his investment, and experienced extreme emotional trauma and domestic tensions as a result of Mr. Edahl's failure to speak the truth five years earlier. If Mr. Edahl genuinely had an epiphany, it was an epiphany that overcame his five year amnesia. It is certainly an anomaly that he could have approved the highly unusual site plan funding in the summer of 2007 and completely forgotten about it by January 2008. Mr. Edahl testified that the site plan financing was completely novel, and he had no previous experience in it. (Edahl Dep., p. 48, 16-18). He also testified that over \$1,200,000 had been advanced, routinely, as a result of the site plan financing agreement. (Edahl Dep., p.93, 18 through p.94, 19). Moreover, he testified that not a scrap of paper existed in the bank's system, to his knowledge, about the financing agreement. (Edahl Dep., p.75 9-13). He also testified that executive VP, Walter Dennings, had approved the financing. (Edahl Dep., p. 81 4-11).

Mike Burke thought Skywaves had concocted a fraudulent factoring financing scheme, and had bamboozled Edahl, Denning and Castlen Morris. Shortly thereafter a workout specialist, Michael Hennessey, closed Skywaves and bankruptcy ensued. All assets were liquidated and opportunities were destroyed. The honor of Ron and John was tarnished. Never has a bank obliterated an ongoing concern so completely, extinguished

an opportunity so swiftly, and buried a future so sublimely as achieved by the dishonest actions of BB&T and its senior management.

Ron Konersman explained this particular line of finding that BB&T was providing to Skywaves in the first meeting with Burke, which was also attended by Edahl. When Burke asked Edahl about the site plan financing Edahl claimed he had never heard of it. Edahl wrote the following email to Walter Denning:

From Jim Edahl

To Walt Denning:

RE: Skywaves Corporation

Walt, Mike Burke from the factoring division and I met with the management team at Skywaves today to introduce Mike and get a financial update. During the course for our discussion it became apparent that we are over advanced on our factoring line by \$1,262,313.

Please see the attached listing of purchase orders we have funded to date. Thirty-six "purchase orders" from General Dynamics starting with WST1117A and ending with WST1081A, each for \$53, 945 are in reality 36 sites that General Dynamics has contracted with The New York State Police to deliver cell tower units for over the next 24 months, but in fact no specific order with a specific delivery have yet to be delivered to Skywaves for production. Mike and I do not know how these sites got set up as purchase orders and funded Mike will be doing a review of the documentation on file immediately to try to determine how this happened.

CC: Frank Caple,
Frank Bulard,
Mike Burke

(Exhibit 1) (Emphasis added).

The Court may wish to examine this email to Edahl's Deposition.

BY MR. LINTON:

Q: Okay, What were you trying to convey when you were filling out information for your superiors to rely on regarding the site plan financing?

MS. CHERRY: Object to the form.

THE WITNESS: What I remembered, I was trying to convey the situation as I remembered it at that time.

BY MR. LINTON:

Q: At the time did you remember that site plan financing had been approved by you and Mr. Denning?

A: No, at that time I didn't. That recollection came as we were preparing for the – the deposition process and I've had a chance to look at all of the information that became available.

Q: I see. So what you're telling me is that the site plan financing had been approved by you and Mr. Denning and it had been administered by Cast – by Castlen Morris?

A: Uh-huh.

Q: But in January when Mr. Burke came over you had forgotten about that?

A: That's correct.

(Edahl Depo., 80 l.2 through p. 81 l.11).

THE SECOND EPIPHANY

An investigation ensued and neither Dennings nor Edahl corrected the false statement that they had no prior knowledge of the loan. Edahl testified he had a mental blockage because of other turmoil, perhaps referring to chaos in the banking industry. Thus, according to Edahl, this prevented him from recalling the truth throughout the investigation of the bank between January and March 2008 when it had determined to

slam shut the Skywaves doors. His traumatic amnesia continued, according to him, throughout the Skywaves bankruptcy. Again, when as an individual defendant, he answered the complaint in 2010 and denied the existence of the site plan financing. Again, when he answered the discovery request. Again, when he answered the amended complaint. Again, when his counsel argued before the Honorable Roger Young that the site financing had not been approved. Mr. Edahl's traumatic amnesia abated only when he listened intently to the testimony of Ron Konersman a week or two prior to giving his own deposition. Mr. Edahl is not the only one who did not speak the truth during the bank's investigation.

Walter Dennings, Executive Vice President, who co-approved the loan for the site plans, was copied on the email dated January 22, 2008 from Edahl. (See Exhibit 2). Apparently he did not report to his superior Tol Broome, who conducted a serious incident investigation, that he and Edahl had approved the site plan financing project – a novel project. Although this was a novel project for the bank, because Denning's felt it had such potential he approved it as the chief credit officer. At all times, Mr. Broome apparently was unaware that Edahl and Dennings approved the site plan loan. (As Broome blasted former loan administrator Castlen Morris, for failing to monitor the program.) (See Exhibit 3).

The undersigned has attempted to schedule the deposition of Mr. Dennings since right after Mr. Edahl's testimony. (See Letter Linton to Cherry and Mendonza as Sept. 25, 2013, attached as "Exhibit 4"). Edahl's deposition was scheduled in mid-August, and delayed over a month, as a courtesy to Mrs. Cherry due to scheduling conflicts. Due to opposing counsel, as well as the bank's witnesses scheduling difficulties, Mr. Dennings'

deposition is tentatively expected the first week of December. Personnel file documents requested in August have been promised and promised, and presumably will be provided in advance of Mr. Dennings's and other critical witness's depositions.

Although counsel for the respondents advised the undersigned that probably the answers would be amended in view of Mr. Edahl's deposition, inexplicably no answers to conform with the truth have been filed. Thus, the existing pleadings in both the cases constitute a fraud upon the Court. Since the appellants have had more than thirty days to amend their answers, the respondents have ratified the previously erroneous and now fraudulent statements.

APPLICATION OF THE DOCTRINE OF UNCLEAN HANDS

While "unclean hands" is asserted by a party for the protection of his own rights, ultimately it is a double first cousin of judicial estoppel. This Court has treated it as such. For example, applying the doctrine against another banking behemoth, the Court of Appeals held in *Wachovia Bank, N.A. v. Coffey* 389 S.C., 68; 698 S E.2d 244 (SC App. 2010) that as a sanction for Wachovia's "unclean hands" it was prohibited from pursuing its equitable foreclosure action and its legal causes of action as well.

This Court in *Matrix Financial Services Corporation v. Frazer* 394 S.C. 714 S.E. 2d 532 (SC 2011) applied the doctrine of unclean hands to bar the lender from legal or equitable remedies. The bank has attempted to convert a statute of frauds, designed for its protection, to a STATUTE FOR FRAUDS designed to shield it from the truth. If for some reason the Court does not consider this an assault upon the integrity of its very existence, the appellants ask that the doctrine of unclean hands be applied to protect their interest, the bank cannot assert this affirmative defense.

The purpose of the writing requirement of the statute of frauds is to protect a party from perjured evidence. However, evidence against a party is unnecessary where the party admits the facts in a judicial proceeding. *Trossbach v. Troassbach*, 185 Md. 47, 42 A.2d. 905 (1945). The statute of frauds is satisfied “by admissions in the form of sworn testimony in court or on deposition, or in an answer to a complaint.” *Barranco v. Barranco*, 91 Md. App. 415, 420, 604 A.2d 931, 934 (1992) quoting *Litzenberg v. Litzenberg*, 307 Md. 408, 415, 514 A.2d 476 (1986); see also *Robert Harmon & Bore, Inc. v. Jenkins*, 282 S.C. 189, 193, 319 S.E.2d 371, 373 (Ct. App. 1998) (an admission in a pleading, if a parole agreement that is within the statute of frauds, may constitute a sufficient writing within the statute so as to enable the court to enforce the contract). Further, the protection afforded by the statute of frauds is a personal privilege of the parties to the agreement and may be waived by them *Walker v. Preacher*, 188 S.C. 431, 199 S.E. 675, 677 (S.C.1938). James Edahl’s sworn testimony that the terms of the financing had been modified by BB&T satisfies the statute of frauds and constitutes a waiver of this defense.

JUDICIAL ESTOPPEL

Judicial estoppel is a rule of fairness as well as a rule of integrity. The rule, first adopted in *Hayne Federal Credit Union v. Bailey*, is not to protect parties from their adversary’s, but instead the principal underlying the doctrine is to ensure the integrity of the judicial process. See, *Hawkins v. Bruno Yacht Sales*, 342 S.C. 352, 536 S.E.2d 698 (Ct. App. 2000) See also, See, *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) (citing *Hawkins v. Bruno Yacht Sales*, 353 S.C. 31, 42, 577 S.E.2d 202, 208 (2003)) (“The purpose of the doctrine is to ensure the integrity of the judicial process, not

to protect the parties from allegedly dishonest conduct by their adversary.”)

Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). Thus, to argue judicial estoppel a party must show that the adversary has taken an inconsistent position in a prior proceeding and have been successful in maintaining that position. Here, the Defendants denied that in their lower court answer that there were amendments to the contract. Then, the Defendants sought and were granted a motion to dismiss for failure to state a claim upon which relief may be granted, based upon the affirmative defense of the Lender Liability Statute of Frauds. As a sanction for using the Statute of Frauds as a sword to hide the truth, instead of as a shield to protect the truth, which is the intention for the statute's use, the Defendants should be precluded from relying on the Statute due to their false assertions. Because of the revelations of Defendant Edahl's deposition, the Court should bar these Defendants from asserting a contrary and inconsistent position. The Courts should preclude these Defendants from hiding behind the Statute of Frauds.

EQUITABLE ESTOPPEL

The evidence in this case establishes that the Plaintiff is entitled to have the S.C. Code Ann. § 37-10-107 (Lender Liability Statute of Frauds) not used against them pursuant to the doctrine of equitable estoppel. The essential elements of equitable estoppel as related to the party estopped are: (1) conduct, which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those

which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially. In this case, all of the elements of equitable estoppel are present, and the Plaintiff is entitled to relief pursuant to the doctrine of equitable estoppel.

The Defendants actions in this case result in conduct by the Defendant, which, essentially, is a false representation or concealment of material facts or which at least is calculated to convey the impression that the facts are otherwise than those which the Defendant has subsequently attempted to assert.

Various additional causes of action have been added to the amended complaint and additional specifications to the previous assertion based upon Mr. Edahl's revelations, and documents recently produced by the bank. Although it may not be necessary to recite authorities in support of these claims, since the proper procedure would be to permit the amendment and allow respondents to plead how they wish. However, in abundance of precaution, we site additional authority as to some of the new claims asserted.

A. AUTHORITIES IN SUPPORT OF SPECIFIC CAUSES OF ACTION

I. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Todd v. S.C. farm Bureau Mutual Insurance Co. is one of the court's most comprehensive discussions of Outrage. *Todd v. S.C. Farm Bureau Mutual Insurance Co.*, 321 S.E.2d 602, 613 (S.C. Ct. App. 1984). The South Carolina State of Appeals

simplified the analysis of the tort of outrage to three factors.

- (1). A pre-existing legal relationship between a debtor-creditor, insured-insurer, landlord-tenant, physician-patient, or employer-employee;
- (2). A defendant's excessive help in asserting a legal right or avoiding a legal obligation, including coercive and oppressive abuse of an employee by an employer and
- (3) A defendant's calculated infliction of suffering in an attempt either to force the plaintiff to comply or to punish the plaintiff for a past action.

In a 1991 case, *McSwain v. Shei*, an employee was forced by her employer to perform exercises, which aggravated a bladder problem. *McSwain v. Shei*, 304 S.C. 25, 26, 402 S.E.2d 890 (1991) *overruled by Sabb v. S. Carolina State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002). She alleged her employer knew about her bladder problem, which caused her to lose control of her bladder during the exercises, and knew her physician had advised her not to exercise. *Id.* at 890-891. Nevertheless her employer told her she must continue to exercise or she would be fired. *Id.* The exercises took place in front of others who observed her incontinence. *Id.* Justice Toal held the jury could find this conduct, even in the workplace environment, "outrageous and intolerable in a civilized society." *Id.* at 29, 402 S.E.2d at 892.

The allegations of the second amended Complaint reveal factual allegations far more serious and unconscionable than in *McSwain*, or the seminal case *Ford v. Hutson*.

Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981); *McSwain v. Shei*, 304 S.C. 25, 26, 402 S.E.2d 890 (1991). For the foregoing reasons a motion to allege the tort of outrage, also known as Intentional Infliction of Emotional Distress should be granted.

BREACH OF FUDUCIARY DUTY

The Plaintiffs ask the Court to find a fiduciary relationship exists among and between BB&T and Plaintiffs and James Edahl and Plaintiffs deriving from James Edahl's actions taken on behalf of BB&T. South Carolina courts have consistently refused to find a fiduciary relationship exists between a bank and its customers, in a pure debtor-creditor relationship. See e.g., *National Loan And Exchange Bank v. New York Life Insurance Company*, 149 S.C. 378, 147 S.E.2d 322 (1929). In analyzing a fraud allegation against a bank the Court, in *Burwell v. S. Carolina Nat. Bank* laid out the general understanding of the fiduciary relationship that is undertaken when a bank deals with its customer. *Burwell v. S. Carolina Nat. Bank*, 288 S.C. 34, 40-41, 340 S.E.2d 786, 790 (1986). The Court stated:

The normal bank-depositor arrangement creates a creditor-debtor relationship rather than a fiduciary one. *National Loan And Exchange Bank v. New York Life Insurance Company*, 149 S.C. 378, 147 S.E. 322 (1929). In limited circumstances, not found in this case, a fiduciary relationship may be created between a bank and a customer if the bank undertakes to advise the customer as a part of the services the bank offers. Such a relationship charges the bank with a duty to disclose material facts which may affect its customers' interest.

The term fiduciary implies that one party is in a superior position to the other and that such a position enables him to exercise influence over one who reposes special trust and confidence in him. 36A C.J.S. *Fiduciary* (1961). As a general rule, mere respect for another's judgment or trust in his character is usually not sufficient to establish such a relationship. The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting

arguments is acting not in his own behalf, but in the interests of the other party. 36A C.J.S. *Fiduciary* (1961). *Burwell v. S. Carolina Nat. Bank*, 288 S.C. 34, 40-41, 340 S.E.2d 786, 790 (1986).

The Plaintiffs strongly assert that the relationship between the Plaintiffs and Defendants was not the "normal bank-depositor" relationship. *Burwell v. S. Carolina Nat. Bank*, 288 S.C. 34, 40-41, 340 S.E.2d 786, 790 (1986). James Edahl, first undertook a fiduciary duty when he went to McBee South Carolina and asserted to Plaintiffs, among others, that Skywaves was a strong company, poised and positioned to take full advantage of the large 3-G build out that was imminent. Moreover, during this meeting, he asserted assurances that BB&T was ready, willing and able to see the company all the way through to IPO. He went over financial information of Skywaves, giving assurances to those there that from the banks perspective this company would generate large profits. Importantly, Edahl knew that his role was to encourage Respondents to make new investments and to enlist new investors. To help those at the meeting understand the banks position with the company and their commitment, James Edahl stated let me tell you how invested into this company we are, "let me describe to you all the funding we have given them up to this date." Then James Edahl proceeded to explain the way that BB&T has serviced this company with various loans. Following up on this James Edahl stated that he nor the bank would have ever invested into this company to this extent without knowing that Skyways would be successful. Thus, James Edahl stepped beyond the normal arms length transaction that is the hallmark to courts not willing to find a fiduciary relationship. Instead, here James Edahl undertook the role of a financial advisor. Moreover, Tol Broom, the President of the Factoring Division of BB&T characterized the banks role as that of a venture capitalist. (See Exhibit 3). Edahl advised

the clients on what type of funding they could rely. He advised Plaintiff's that this was a safe investment. He advised clients that the profit was imminent. He advised clients that the funding mechanism was safe and secure. He expressly stated that his purpose at this meeting was to garner new investors for Skywaves. This advisory role is above and beyond any "normal" banking relationship and Plaintiffs relied upon his expertise. Thus, BB&T, by and through James Edahl's actions undertook a fiduciary duty.

Plaintiff asserts that BB&T also undertook a fiduciary duty by the giving of legal advice to the Plaintiffs. Castlen Morris, the loan administrator of BB&T to Skywaves, asserted to Skywaves that they could rely on the internal documentation of Skywaves as sufficient to prove the oral modification agreement to the factoring contract of 2005. This is evidenced by an email from Castlen Morris to John Voytko:

I did not include the new \$2,000,000 PO sub-limit or the 65% PO advance rate in the amendment as this is typically not part for BB&T's standard contract (it is something out of the ordinary for Skywaves exclusively). I didn't want to potentially expose Skywaves to any legal fees for counsel to create a document. At this point, I am comfortable letting Jim Edahl's proposal letter of March 2, 2007 function in this capacity.

(R. at 510).

However, because of this assurance of the satisfactory documentation from the various emails and the internal documentation of BB&T, Plaintiffs relied therein by making additional loans and investments to Skywaves. However, in their answer Defendants asserted there was no oral modification to the lending agreement and thus the alleged amendment violated the statute of frauds; S.C. Code Ann. § 37-10-107. This giving of legal advice rises to the level of a fiduciary duty being undertaken by and on behalf of BB&T. Thus, the "normal" banking relationship relied upon in Burwell, to defeat the creation of a fiduciary duty does not apply in the case at bar. For these reasons

we ask the court to permit the amended pleading, and the causes of action to be determined on their merits.

CONCLUSION

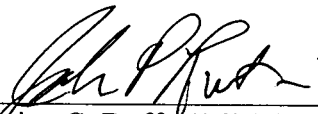
Whatever procedural mechanism the Court deems most efficient for the appellants to have this case decided on its merits is acceptable to appellants. In essence, the trial judge committed reversible error when he converted a motion to dismiss into a summary judgment by his own assumptions of facts. This was manifest error. The error, however, was compounded exponentially because the judge apparently trusted facts not included in the pleadings, but implicitly asserted by the argument of respondents.

The argument of the bank and Edahl was, in fact, entirely fraudulent. The bank shamefully relied upon the so-called banking statute of frauds not as a shield, but as a sword. In essence it turned the statute of fraud for its own protection to a STATUTE FOR FRAUDS as an immunization from its heinous fraud.

This Court has long counseled against granting the old style demurrer or now a motion to dismiss even when the facts might be clear, but inquiry into them would provide greater insight into a claim. *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003); *see Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999); *see also Baird v. Charleston Cnty.*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 340 (1991) (holding to ensure substantial justice to the parties, the pleadings must be liberally construed); *Gaskins v. S. Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct.App.2000).

The consequences of the failure to proceed cautiously when ruling upon a motion to dismiss are illuminated by the facts of this case. Fortunately, a companion case existed

that demonstrates the injustice that would result from the motion to dismiss being granted. It is a rare order granting a motion to dismiss that impinges upon the appellant's seventh amendment rights to a jury trial more than the motion to dismiss challenged here by the appellants. We ask that the Court permit the amendment, and such relief as sought by the appellants due to the respondents' wrongful assertions, and remand to the Honorable Roger Young for further proceedings consistent with your decisions.



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October 30, 2013
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
South Carolina Supreme Court
No. 2012-205647

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OCT 30 2013

S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

Cases 2009-CP-10-7515, 2009-CP-10-7517,
2009-CP-10-7518, and 2010 CP-10-9959

2009-CP-10-7515

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

v.

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

2009-CP-10-7517

Ron Konersmann Appellant,

v.

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

2009-CP-10-7518

John Voytko Appellant,

v.

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

2010-CP-10-9959

Patricia Konersmann Appellant,

v.

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

PROOF OF SERVICE

I, John P. Linton, of Duffy & Young, LLC, certify that I have served the **MOTION TO AMEND, OR IN THE ALTERNATIVE TO REMAND FOR CONSIDERATION OF AMENDMENT AFTER DISPOSING OF PENDING ISSUES ON APPEAL, AND TO SUPPLEMENT THE RECORD WITH THE TESTIMONY OF JAMES EDAHL , AND CERTAIN EMAILS ORIGINATING FROM BB&T AND LETTER BETWEEN COUNSEL AND MEMORANDUM IN SUPPORT THEREOF** on Respondents and Appellants by delivery to their attorneys of record in the following manner:

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