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

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 Konersman ..... 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 Konersman ..... 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.

APPELLANTS' MEMORANDUM IN SUPPORT OF MOTION FOR CLARIFICATION OF THE ORDER ENTERED OCTOBER 31, 2013 BY CHIEF JUSTICE JEAN H. TOAL, AND FOR REHEARING OR RECONSIDERATION BY ENTIRE COURT OF THE MOTIONS FOR REMAND

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Appellants, Ron Konersman and John Voytko, filed their MOTION TO AMEND THE COMPLAINT OR TO SUPPLEMENT THE RECORD ON APPEAL OR IN THE ALTERNATIVE MOTION TO REMAND on October 30, 2013. Within approximately four business hours of filing, the Chief Justice issued an order for the court denying the motions. No reasons were stated. Appellants request from this Court clarification of the order and petition for rehearing.

REQUEST FOR CLARIFICATION FOR ORDER ENTERED OCTOBER 31, 2013

A client rightfully can expect its counsel to explain the logic behind a decision. Yet, this I cannot do. Appellants respectfully request clarification of the order to include whether the motion to amend is denied without prejudice, or should have been filed in the Court of Common Pleas. If this court were to affirm the lower court's decision, the Appellants request this court remand for consideration by the Honorable Roger Young the motion to amend and to supplement the record.

"As a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRCP, motion to dismiss. Instead, a novel issue is best decided in light of the testimony to be adduced at trial." *Evans v. State*, 344 S.C. 60, 68-69, 543 S.E.2d 547, 551 (2001). Where there is cause for doubt, or it is clear that ends of justice may be promoted by trial on merits, demurrer should be denied where novel issues are present or are involved." *Springfield v. Williams Plumbing Supply Co.*, 249 S.C. 130, 153 S.E.2d 184 (1967). *Springfield,* and its progeny have been applied numerous times to a wide variety of subjects. *Id. See e.g., Brown v. Sandwood Dev. Corp.*, 273 S.C. 31, 253 S.E.2d 514 (1979) (concluding that a demurrer was not the proper in deciding novel

question of whether plaintiffs, some of whom did not purchase their properties from the appellant, could maintain a negligence action for property damage from drainage from a pond. "In the instant case justice, not only to the litigants but to the general public, requires that the case be tried on the merits and the case be fully developed before we are called upon to decide the novel question presented."); *see also Gentry v. Yonce*, 337 S.C. 1, 9 n.9, 522 S.E.2d 137, 141 n.9 (1999)(concluding novel issue should not be decided by motion to dismiss); *Garner v. Morrison Knudsen Corp.*, 318 S.C. 223, 456 S.E.2d 907 (1995)(same); *Williams v. Streb*, 270 S.C. 650, 243 S.E.2d 926 (1978)(same); *Vaden v. College Heights Subdivision*, 261 S.C. 509, 201 S.E.2d 113 (1973)(same).

Ordinarily, when a motion to amend is made while an appeal is pending, this Court disposes of those matters on appeal, and remands 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, stating that where a complaint is dismissed under 12(b)(6), plaintiff should be granted leave to file an amended complaint. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962); s*ee also, Spence v. Spence,* 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006). Moreover, 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* at 182-83*; 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) ("[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.").

The court has overruled a dismissal of the action where the Plaintiff served the summons but failed to timely serve the complaint. *Davis v Lunceford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983). The Court held dismissal with prejudice was improper because discontinuance of the action is not adjudication on the merits, and thereby should not have been dismissed with prejudice. *Id.*

Similarly, this Court ordered the lower court to allow an amended complaint holding that "[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." *Hopkins v. Shuman*, 235 S.C. 191, 195, 110 S.E.2d 713, 715 (1959).

In *Spence* the Court stated:

> An appellate court ***should follow*** this procedure when the plaintiff presents ***additional factual allegations*** or a ***different theory of recovery*** which, taken as true in a well-pleaded complaint, ***may state a claim*** upon which relief may be granted. *Barkley v. Good Will Home Assn.,* 495 A.2d 1238 (Me.1985) (in absence of bad or dilatory motives on the part of plaintiff or undue prejudice to defendant, the trial court abused its discretion by denying the plaintiff an opportunity to amend her complaint after it was dismissed pursuant to Rule 12(b)(6)).

Supra at 881-82 (2006) (emphasis added).

If this Court affirms Judge Young's order, the case should be remanded for the lower court to consider Appellants' motion to file an amended complaint and supplement the record[1].

[1] Judge Young's Order in essence converted the 12(b)(6) motion to a motion for summary judgment. Thus, the motion to supplement the record with newly discovered evidence is appropriate.

ARGUMENT IN SUPPORT OF MOTION FOR REHARING

Introduction

Although petitioner acknowledges the infrequency with which rehearing petitions are granted, we know that this procedure exists for a reason. That is, to give the best, most well-intentioned Appellate Court the opportunity to do what every human being does many times in life, to reconsider an opinion, and see if per chance a different and better result could be reached. Or stated more profoundly by Marcus Aurelius, "If any man can convince me and bring him to me that I do not think or act aright, glad I will change; for I search after truth, by which man never yet was harmed." Bartlett, John, comp. *Familiar Quotations,* http://www.bartleby.com/100/718.html (last visited November 13, 2013).

Concededly these petitions for rehearing are usually dismissed as the anguished howls of the losing advocate. In the vernacular of the late Dizzy Dean "They get two chances – slim and none!" However, counsel here are truly convinced that a great injustice has been done and that the merits of this petition are exceptional and while a motion may be ruled upon by a single justice, the full court should consider the issues raised.

The Second Amended Complaint

Appellants assert in their first amended complaint abundant factual allegations, which create a question of fact regarding the existence of a duty undertaken by BB&T. *See,* First Amended Compl. ¶¶ 33, 35, 38, 41 and 62.

By way of comparison, the proposed second amended complaint alleged more facts - more specifically and adds numerous causes of action. For instance, the proposed

amended complaint alleged:

> 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.
>
> 52. Defendant owed a fiduciary duty to the Plaintiffs, through its debtor-creditor relationship, financial advisor relationship undertaken, relationship manger, 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.

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.

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.

Additionally, the Appellants proposed amended complaint added several causes of action including: Breach of Good Faith and Fair Dealing, Breach of Fiduciary Duty, Promissory Estoppel, and Intentional Infliction of Emotional Distress. While the Statute of Frauds is normally an affirmative defense, appellants have included Unclean Hands, Equitable Estoppel, and Judicial Estoppel in anticipation of the Defendants assertion of the statute of frauds and other defenses. The latter three affirmative defenses are discussed thoroughly, particularly judicial estoppel, in appellants' memorandum filed October 30, 2013 in support of prior motions. Additionally, *Chewning v. Ford Motor Company* 354 S.C. 72, S.E. 2nd (2003) discusses fraud on the court, and observes "whatever else it embodies, (it) requires a showing that one has acted with bad faith or an intent to deceive or defraud the court." The defendants have admitted in testimony presented to this Court that the bank agreed to loan on purchase orders and site plans. Yet, they continue with their erroneous answer in the companion case denying those allegations, and have striven to hide the truth here with the Statute of Frauds. It is a statute against frauds. The Defendants have converted it to a statute for frauds[2].

These substantial allegations remove the case from the normal lender-creditor relationship noted in *Burwell. See, Burwell v. S. Carolina Nat. Bank,* 288 S.C. 34, 340 S.E.2d 786 (1986). Here, James Edahl is an active participant in the activities of the company and he exerts substantial control over the company. James Edahl aggressively

[2] One reason the Statute should always be an affirmative defense is the defendant must deny the existence of an agreement before asserting the statute. These Defendants cannot truthfully do this.

sought investors for the company. James Edahl provided financial advice and analysis to all investors regarding the company's outlook and forecast. James Edahl, and others at BB&T, provided legal advice to Appellants. Any of these allegations standing alone, creates a fiduciary duty, and certainly satisfy the requirements for the other tort causes of action.

For example, this court recognized the existence of a duty to exercise due care in giving information when the defendant had a pecuniary interest in the transaction. *Winburn v. Insurance Company of North America,* 287 S.C. 435, 339 S.E.2d 142 (Ct.App.1985). Also, consultants may be liable in negligence to non-contracting parties who have reasonably relied upon their reports in taking action. *South Carolina State Ports Authority v. Booz-Allen & Hamilton Inc.,* 289 S.C. 373, 346 S.E.2d 324 (1986). See also *First Fed. Sav. Bank v. Knauss*, 296 S.C. 136, 140, 370 S.E.2d 906, 908 (Ct. App. 1988).

Moreover, the bank's utter failure to disclose that the lending arrangement, approved by Edahl and Denning, was prohibited by BB&T's internal underwriting policies satisfies the failure to disclose component of the *Burwell* rule. *See*, Supra. When reviewing the loan retrospectively, Tol Broome, President of Commercial Finance, BB&T stated: "BB&T is not equipped to finance purchase orders anywhere in the bank if we rely on the P.O.'s for repayment." (*See* Exhibit A). The bank gave legal advice to Appellants that documentation for modification of the factoring agreement was not required. Thereafter, it denied the modification existed. Edahl and Denning failed to disclose its site plan loan modification with banking officials, who were charged with administering the loan. As a result the bank officials acted arbitrarily, violated the duty of

good faith and fair dealing, and breached the agreement with Skywaves. Appellants made their investments based on these representations and/or forebeared from pursuing additional capital or financing. Appellants' reliance was fatal. They lost their entire investment.

Both Ron Konersman and John Voytko relied upon the assertions and representations of James Edahl before, during, and after the McBee meeting, and rightfully so. Edahl represented to Appellants that he had authority to approve the expansion of the factoring agreement to include purchase orders and site funding. Thus, even though both parties were prior investors in the corporation, as well as corporate officers, they had every right to hear, listen, and believe what their personal banker, James Edahl, asserted. Senior Vice President Edahl misrepresented that he singlehandedly controlled Skywaves funding. Appellants did not meet with others regarding their credit needs.

This Court has addressed what constitutes a fiduciary relationship between a bank and its lender customer.

> 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. 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.

Burwell v. S. Carolina Nat. Bank, 288 S.C. 34, 40-41, 340 S.E.2d 786, 790 (1986).

Accordingly, *Burwell* decreed that a fiduciary relationship can be created "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." *Id.* If this statement is to mean anything at all, there is at the very least a factual question deserving of further inquiry here considering these allegations in both the first and the second amended complaint. The Bank met with investors and they relied upon the representations their investments were lost due to the Bank's negligence and false representations.

Burwell is instructive on what types of actions rise to level of creating such a relationship. The Appellants merely need to show that the bank undertook to advise them on some of the services that it offered and that that there was a foundation for them to believe that James Edahl was acting not just on the Banks behalf, but in their interests as well. Appellants assert that both their first amended complaint adequately asserts this claim, and its proposed second amended complaint submitted to this court does so even more specifically and in greater detail, and with additional causes of actions.

In North Carolina, like South Carolina, a fiduciary duty arises when "there has been a special confidence reposed in one who in equity and good conscious is bound to act in good faith and with due regard to the interest of the one reposing confidence." Curl v. Key, 331 N.C. 259, 264 316 S.E.2d 272, 275 (1984); *compare*, *Hendricks v. Clemson Univ.*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003); *O'Shea v. Lesser,* 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); *SSI Med. Servs., Inc. v. Cox,* 301 S.C. 493, 500, 392 S.E.2d 789, 794 (1990); *Regions Bank,* 354 S.C. at 670, 582 S.E.2d at 444; *Steele v. Victory Sav. Bank,* 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct.App.1988).

Borrowers' breach of fiduciary duty claim has been found to survive a 12(b)(6) motion to dismiss against Defendant bank because the circumstances created an issue of fact whether a fiduciary relationship was formed. *WNC Holdings, LLC v. Alliance Bank & Trust Co.*, 11 CVS 9668, 2012 WL 4713722 (N.C. Super. Oct. 2, 2012).

In *WNC*, the borrowers sought a loan to purchase and develop real property. The lender served as a financial and development advisor, reviewed project documents and suggested changes, performed inspections of the property and development, and on more than one occasion prepared pro forma feasibility statements for the borrowers. *Id.*

The Court denied the Lender's motion to dismiss the breach of fiduciary duty claim. *Id.* It stated the borrowers had pled facts beyond that of the typical debtor-creditor relationship, and allowed to stand the developer's claims of negligence, fraud by misrepresentation, fraud by concealment, constructive fraud, breach of the covenant of good faith and fair dealing, unfair and deceptive trade practices, and punitive damages. *Id.*

In *Dallaire v. Bank of Am., N.A.*, 738 S.E.2d 731, 735 (N.C. Ct. App. 2012) *review allowed,* 747 S.E.2d 535 (N.C. 2013), the Court of Appeals reversed the trial court's grant of summary judgment. Specifically, the court held that a "question of fact exists as to whether or not Defendant sought to give legal advice to Plaintiffs. In either event, when a financial institution undertakes to provide a customer with a service beyond that inherent in the creditor-debtor relationship, it must do so reasonably and with due care." *Id.*

Similar to both *WNC* and *Dallaire,* Konersman and Voytko, and the other appellants, while investors in Skywaves, relied upon the assertions, oral representations,

financial advice and legal advice proffered by BB&T and James Edahl. These allegations were in both the first amended complaint and the proposed second amended complaint, submitted to this court Oct. 30th 2013.

The Second Amended Complaint: No Flood Gates Issue

At oral argument BB&T and Edahl that Appellants' claims "would open the flood gates" of litigation making banks fearful to ever lend money to another customer. As the Second Amended Complaint makes clear, the lending which transpired here was first a standard factoring agreement, but converted to a novel lending program on purchase orders and site funding. It itself is unique, and the Bank's conduct even more unique. The Bank's Senior Vice President traveled hours to convince potential investors to invest, and that the Bank's relationship was unique with the expectation that the Bank would eventually be the underwriter for an initial public offering.

South Carolina's courts, as well as the legislature, have given ample protection to our banking industry in the form of a Bankers' Statute of Frauds, which explicitly and unequivocally protects *only* the banking industry.

In BB&T and Edahl's Memorandum in Support of their SCRCP 12(b)(6) Motion, and in the oral arguments in favor of their Motion, BB&T and Edahl argued that the only controlling agreement was the written factoring agreement. Judge Young accepted the arguments advanced by BB&T and Edahl in their brief and at oral argument and concluded that Appellants were attempting to modify the factoring agreement. Based on this erroneous conclusion, Judge Young granted the Defendants 12(B)(6) Motion to Dismiss. Judge Young decided the matter on several grounds but heavily based the decision on the incorrect assertion that S.C. Code Ann. § 37-10-107, barred the Plaintiff's

claims as a matter of law. (R. p. 0397).

The Banking Statute of Frauds has never been interpreted by this court. *See,* S.C. CODE ANN. §37-10-107. Our jurisprudence regarding the historic statute of frauds has been unequivocal. "The theory underlying these decisions is that, while the oral agreement may be unenforceable under the statute, the purpose of allowing the testimony in its supports is not to establish its agreement but to prove the fraud." Schenley Distillers Corp., v. Renken 34 F. Supp. 678 E.D. (S.C. 1940).

Other states addressing similar statutes have reached disparate results, however in South Carolina the Statute of Frauds is not a defense to fraud. "There has been a sharp division of opinion concerning whether credit agreement statutes of frauds can be avoided by traditional exceptions to the statute of frauds and about whether credit agreement statutes bar various tort theories." 50 No. 10 DRI For Def. 16.

For years this bank has deceived Appellants. Edahl[3] deceived his co-workers and superiors in 2008 by wrongfully denying knowledge of the site funding financing program. The Defendants wrongfully removed this case to the United States District Court of Appeals. See, *James J. Kerr, et al. v. Branch Banking & Trust Co.,* Civil Action: 2:10-CV-00104-MBS (R. at pp.96-99). After the Defendants were sanctioned for this wrongful removal, they delayed these proceedings further by appealing to the United States Court of Appeals for the Fourth Circuit. *Id.* In order to expedite securing a trial on the merits, counsel for Appellants agreed to reduced attorneys' fees for the wrongful removal.

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[3] Walter Dennings who co-approved the site funding with James Edahl, also failed to disclose his approval of the funding or correct Edahl's wrongful denial.

In attempting to hide from the truth, the Bank denied any modification to the factoring agreement and attempted to shield itself behind the Statute of Frauds. *See,* S.C. Code Ann. § 37-10-107. Just as the traditional statute of frauds was not created to hide the truth, this statute should not be allowed to perpetuate lies, deceit and fraud itself. The "Statute of Frauds was not enacted to afford persons a means of evading just obligations; it was not intended to supply a cloak of immunity to hedging litigants lacking integrity; nor was it adopted to enable defendants to interpose the Statute as a bar to a contract fairly, it admittedly, made." 10 WILLISTON ON CONTRACTS § 29:4 (4th ed.). The reporter for the model banking statute of frauds made a significant observation. "The task force believes it unnecessary to prohibit allegations of fraud, given the standards which must generally be met to prove fraud." John L. Culhane, Jr., *Lender Liability Limitation Amendments to State Statutes of Frauds,* 45 Bus. Law. 1779, 1797 (1990).

The South Carolina Statute of Frauds is entitled a Statute For the Prevention of Frauds and Perjuries. The bank and Edahl have attempted to use the statute not as a shield but as a sword, and indeed as a spear. In doing so they attempt to perpetuate a fraud – the denial of an agreement that Edahl and Executive Vice President Dennings admit existed. After Edahl's testimony, counsel was advised the pleadings denying the existence of the purchase order and site plan financing would likely be amended. *See* Letter Linton to Cherry and Mendonza as Sept. 25, 2013, Exhibit B. When no such truthful pleading was filed, the undersigned committed many hours of research to evaluate and to address what is yet another unique aspect of this case.

An apt jurisprudential saying describes best the course of action this court should take – the truth has no fear of trial; thus, let the truth be unfolded.[4] The Order of the Honorable Roger Young should be reversed and remanded with instructions to permit the Second Amended Complaint.

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November 14, 2013
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[4] Rather than repeat the arguments of Co-Appellants we incorporate by reference their argument in support of their motion and memorandum for reconsideration.

EXHIBIT A

BB&T

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

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 B

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September 25, 2013

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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.

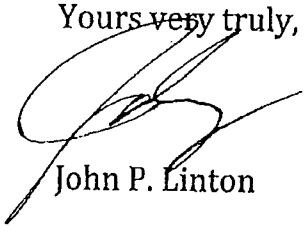
We will send you our concerns about your privilege log in advance of the meeting.

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