

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

William P. Keesley, Circuit Court Judge

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Case No. 2010-CP-32-05481

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**RECEIVED**

APR 26 2012

**S.C. Supreme Court**

Hook Point, LLC.....Respondent,

v.

Branch Banking and Trust Company, First Reliance Bank,  
and Allan Risinger, Defendants,  
of whom Branch Banking and Trust Company is.....Appellant.

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RESPONDENT'S PETITION FOR REHEARING AND MEMORANDUM IN  
SUPPORT OF PETITION FOR REHEARING

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent Hook Point, LLC (“Hook Point”) petitions this Court for a rehearing of its Opinion filed April 11, 2012, reversing the lower court’s decision to grant a preliminary injunction. Hook Point contends that the Opinion overlooked or misapprehended one particular argument with respect to the fraud committed by Appellant Branch Banking and Trust Company (“BB&T”). Specifically, Hook Point contends that the Opinion overlooked or misapprehended the fact that there was fraud in the presentment of the letter of credit at issue in this case and that BB&T failed to offer any testimony to contradict Hook Point’s allegations of fraud.

Section 36-5-109(b) of the South Carolina Code provides that a court may enjoin an issuer from honoring a presentation on a letter of credit when certain circumstances are met in three instances – (1) when the applicant of the letter of credit claims that a required document is forged, (2) when the applicant of the letter of credit claims that a required document is materially fraudulent, or (3) when the applicant claims that “honor of the presentation would facilitate a material fraud by the beneficiary. . . .” S.C. Code Ann. § 36-5-109(b). In its brief and oral argument before this Court, Hook Point argued that BB&T committed fraud not only by presenting a fraudulent draft to the issuer First Reliance Bank, but also by fraudulently inducing Hook Point into entering the loan at issue. In other words, Hook Point argued that BB&T should be enjoined from collecting on the letter of credit due to the second and third instances outlined in section 36-5-109(b) of the South Carolina Code. While this Court briefly mentioned Hook Point’s two contentions of fraud, it predominately focused on the statute’s third instance of fraud, i.e. when the applicant claims that “honor of the presentation would facilitate a material fraud

by the beneficiary . . . .” Hook Point contends that this Court overlooked or misapprehended the argument that the presentment, itself, was materially fraudulent, and therefore, the issuance of a preliminary injunction by the lower court was proper.

### ARGUMENT

#### **I. BB&T’s Presentment of the Draft from the Letter of Credit Was Fraudulent.**

This case is about BB&T’s attempted draft from a letter of credit (“Letter of Credit”) issued by First Reliance Bank to secure a loan BB&T gave to Hook Point to develop a residential subdivision on Lake Murray. Claiming that Hook Point was in default of its loan, BB&T sought to draw the full amount of the Letter of Credit, which is \$1,500,000.00. However, as dictated by the documents governing the loan, BB&T was only entitled to draw the outstanding interest owed by Hook Point, which was \$70,000. BB&T’s presentment of the \$1,500,000 draw was fraudulent because BB&T represented to First Reliance Bank that it was entitled to \$1,500,000 when it was only entitled to \$70,000 under the loan’s terms.

In its draft to First Reliance Bank, BB&T swore “the amount of the draft on the Letter of Credit does not exceed the amount due to the Beneficiary [BB&T] under the Obligations.” (ROA at 46.) The “amount due to the Beneficiary under the obligation” is determined by an analysis of the loan documents. “Loan Documents” – as defined in the loan agreement (“Loan Agreement”) entered into by BB&T, Hook Point, and the individual guarantors – “shall mean this Agreement [Loan Agreement] including any scheduled attached hereto, the Note(s), the Deed(s) of Trust, the Mortgage(s), the Security Agreement(s), the Assignment(s) of Leases and Rents, all UCC Financing Statements, the Guaranty Agreement(s), and *all other documents, certificates, and*

*instruments executed in connection therewith . . .*” (ROA at 37 (emphasis added).) BB&T’s commitment letter (“Commitment Letter”), executed by BB&T, Hook Point, and guarantor Albert Dooley, is a Loan Document because it was executed in connection with the Loan Agreement. The Commitment Letter states that the “[l]etter of credit to be used as last resort for interest carry.” (ROA at 31.) Consequently, because the Commitment Letter is a Loan Document, the use of the Letter of Credit solely for interest governs the obligation due to BB&T.<sup>1</sup>

As dictated by the Loan Documents, Hook Point obtained the Letter of Credit for the interest payments from First Reliance Bank. According to the Letter of Credit, for BB&T to draw from the Letter of Credit, it must present a draft accompanied by:

1) The original letter of credit. 2) *A notarized, sworn statement by the Beneficiary, or an officer thereof, that a) The Borrower has failed to perform its obligations to the Beneficiary under the Loan Agreement and Promissory Note dated November 16, 2007, executed by and between Hook Point, LLC as Borrower and Branch Banking & Trust Company as Lender b) The amount of the draft does not exceed the amount due to the Beneficiary under the obligation; and; c) The signer has the authority to act for the Beneficiary with regards to the Letter of Credit.*

(ROA 48-49) (emphasis added). Consequently, BB&T must swear that the amount of its draft does not exceed the amount it is due under the Loan Documents. The outstanding

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<sup>1</sup> This Court concluded that “no term in the loan agreement or note to which the LC [Letter of Credit] refers limits BB&T’s use of the LC to interest due. Thus, it is incontrovertible that BB&T had some basis in fact for the representations it made when it drew on the LC.” *Hook Point, LLC v. Branch Banking & Trust Co.*, Op. No. 27115 (S.C. Sup. Ct. filed Apr. 11, 2012) (Shearouse Adv. Sh. No. 13 at 82). However, the Loan Documents themselves provide that the Letter of Credit is, indeed, part of the terms of the Loan Documents. Therefore, the Commitment Letter’s term that it is only “to be used as last resort for interest carry” is a term in the Loan Documents that limits BB&T’s use of the Letter of Credit to interest due. Consequently, it is not “incontrovertible that BB&T had some basis in fact for the representations it made when it drew on the LC.”

interest payments due to BB&T totaled \$70,000. Therefore, under the Loan Documents, BB&T could draw only \$70,000 from the Letter of Credit.

Contrary to the Loan Documents, BB&T sought \$1,500,000 – rather than the \$70,000 owed on interest – from the Letter of Credit. When it sought the \$1,500,000 draw, BB&T stated that its draft does not exceed the amount Hook Point owed under the Loan Documents. This statement is not true, yet it was proffered to First Reliance Bank so BB&T could draw on the Letter of Credit. BB&T delivered this false material representation to First Reliance Bank, knowing that First Reliance Bank would rely on it, so it could draw \$1,500,000, not the \$70,000 to which it was entitled. In other words, BB&T submitted a fraudulent draft to draw on the Letter of Credit.

Moreover, BB&T did not produce any evidence to the contrary, while Hook Point submitted the live testimony of Hook Point member Albert J. Dooley Jr. (“Dooley”) and the affidavit of Hook Point’s managing member Thomas W. Wingard (“Wingard”), which both provided that the Letter of Credit was only to be used for interest payments. Regarding the contention that the Letter of Credit was only to be used for interest payments, Dooley testified before the lower court as follows:

A: . . . So nothing was ever mentioned to me that the purpose of this letter of credit was anything other than for interest until I sat in a meeting with Mr. Don Layden [Senior Vice President of BB&T] . . . . I don’t remember the exact date, but it was in mid 2010. And a statement was made at that point regarding, well, we can use anything we want to with a million five. My reaction, I almost fell out of my chair because the entire time this was for interest.

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Q: Until you had this meeting in the middle of 2010 with Mr. Layden, Mr. Young, Mr. Risinger, did you ever understand that BB&T was taking the position that this letter of credit was for anything other than as a last resort for interest carry?

A: No. It was always interest.

(ROA at 187-88.) Similarly, in his affidavit, Wingard testified that the Letter of Credit was only to be used for interest and that “there is currently due to BB&T approximately \$70,000 in interest. Therefore, there is no justification whatsoever for BB&T to seek a \$1,500,000 draw on the letter of credit.” (ROA at 56.) This undisputed testimony establishes that the Letter of Credit was only to be used for interest payments.

The lower court heard and admitted this testimony when considering whether to grant the preliminary injunction. BB&T failed to submit any evidence contradicting this testimony. Stated plainly, the only testimony regarding the purpose of the Letter of Credit was that it was to be used for interest payments solely. The lower court did not abuse its discretion when it granted the preliminary injunction because its decision was supported by Hook Point’s uncontroverted evidence and was not controlled by an error of law.

## **II. The Independence Principle Does Not Apply to the Presentation of a Fraudulent Draft.**

While the independence principle may apply to Hook Point’s fraud in the inducement argument, it does not apply to Hook Point’s contention that the presentment of the draft, itself, is fraudulent. The independence principle is based on the fact that the obligations created in the letter of credit are independent from those created in the underlying transaction. *Intraworld Indus. v. Girard Trust Bank*, 336 A.2d 316, 323 (Pa. 1975) (“The great utility of letters of credit flows from the independence of the issuer-bank’s engagement from the underlying contract between beneficiary and customer.”) “If the documents presented conform to the requirements of the credit, the issuer may and must honor demands for payment, regardless of whether the goods conform to the underlying contract between beneficiary and customer.” *Id.*

Here, the documents presented to First Reliance Bank do not conform to the requirements of the credit. The draft to First Reliance Bank stated that it does not exceed the amount Hook Point owed it under the Loan Documents. However, this is a misrepresentation, as established by the uncontroverted testimony of Dooley and Wingard. BB&T delivered this false material representation to First Reliance Bank, knowing that First Reliance Bank would rely on it, so it could draw \$1,500,000, not the \$70,000 to which it was entitled. Stated differently, BB&T submitted a fraudulent draft to draw on the Letter of Credit. Consequently, the documents presented to First Reliance Bank do not conform to the Letter of Credit's requirement that the proposed amount drafted does not exceed the amount owed by Hook Point. Therefore, First Reliance Bank cannot honor BB&T's demand for payment. BB&T had no basis in fact upon which to demand payment of \$1,500,000 under the Letter of Credit. The lower court did not abuse its discretion when it granted its preliminary injunction because its decision was not controlled by an error of law.

### CONCLUSION

In its Opinion, this Court briefly mentioned Hook Point's argument that BB&T's demand on the Letter of Credit was fraudulent; however, the majority of the Court's analysis was on Hook Point's fraudulent inducement argument and how the narrow exception to the independence principle did not apply to this matter. However, the independence principle does not apply to contention that the draft, itself, was fraudulent. Moreover, the record is replete with uncontroverted testimony from Hook Point that the Letter of Credit was only to be used for interest payments due. This testimony – and lack of BB&T's testimony – was before the lower court when it considered the motion for

preliminary injunction. The lower court's decision to grant the preliminary injunction was supported by evidence and was not controlled by an error of law. The lower court did not abuse its discretion. Therefore, Hook Point requests this Court to grant its petition for rehearing.

Respectfully submitted,



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Of Whom Branch Banking and Trust  
Company is, ..... Appellant.

PROOF OF SERVICE

This is to certify that on Thursday, April 26, 2012, I, Thornwell F. Sowell, attorney for Respondent, served upon the person(s) named below with a copy of Respondents' Petition for Rehearing and Memorandum in Support of Petition for Rehearing in the above-captioned matter by placing copies of same in the United States Mail, postage prepaid, addressed as follows:

Frank R. Ellerbe, III, Esquire  
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A handwritten signature in black ink, appearing to read "T F Sowell" with a stylized flourish at the end.

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April 26, 2012