

# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

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May 24, 2012

Beth Carrigg  
205 E Main St Ste 146  
Lexington SC 29072-3557

## REMITTITUR

Re Hook Point, LLC v Branch Banking  
Lower Court Case No 2010CP3205481  
Appellate Case No 2011-185386

Dear Ms Carrigg

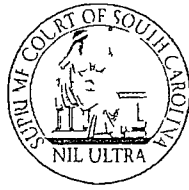
The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

CHIEF DEPUTY CLERK

cc Frederick A. Gertz  
Wilson W. McDonald  
Frank Rogers Ellerbe, III  
Thornwell F. Sowell, III

David Cochran Dick, Jr  
S Jahue Moore, Sr



# The Supreme Court of South Carolina

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May 24, 2012

1

Frederick A. Gertz  
PO Box 456  
Columbia SC 29202

Thornwell F. Sowell, III  
David C. Dick  
PO Box 11449  
Columbia SC 29211

Re Hook Point, LLC v Branch Banking  
Appellate Case No 2011-185386

Dear Counsel

The following order has been endorsed on your Petition for Rehearing in the above matter:

“Petition for Rehearing is denied.”

s/ Jean H. Toal \_\_\_\_\_ C J

s/ Costa M. Pleicones \_\_\_\_\_ J

s/ Donald W. Beatty \_\_\_\_\_ J

s/ Kaye G. Hearn \_\_\_\_\_ J

Acting Justice James E. Moore, not participating

May 24, 2012 "

The remittitur in this matter is today being forwarded to the Circuit Court

Very truly yours,

A handwritten signature in cursive script that reads "Brenda J. Stealy".

CHIEF DEPUTY CLERK

cc Wilson W McDonald  
Frank Rogers Ellerbe, III  
David Cochran Dick, Jr  
S Jahue Moore

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

William P Keesley, Circuit Court Judge

---

Case No 2010-CP-32-05481

---

**RECEIVED**

APR 26 2012

**SC 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

---

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

---

Thornwell F Sowell  
David C Dick  
SOWELL GRAY STEPP & LAFFITTE, L L C  
Post Office Box 11449  
Columbia, South Carolina 29211  
(803) 929-1400

and

Frederick A Gertz  
GERTZ & MOORE  
Post Office Box 456  
Columbia, South Carolina 29202  
(803) 252-1524

**Attorneys for Respondent**

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,



Thornwell F Sowell  
David C Dick  
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and

Frederick A Gertz  
GERTZ & MOORE  
Post Office Box 456  
Columbia, South Carolina 29202

Attorneys for the Respondent

April 26, 2012

Petition for rehearing is denied!

~~Scott Lee~~ CJ

~~Al. Jones~~ J

~~Donald W. Sealy~~ J

~~Henry H. Hutto~~ J  
~~Kaye L. Jean~~

Acting Justice James L. Moore, not participating

May 24, 2012

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

**RECEIVED**

APR 26 2012

**SC Supreme Court**

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Case No 2010-CP-32-05481

---

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

---

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  
Robinson, McFadden & Moore, P C  
Post Office Box 944  
Columbia, South Carolina 29202

S Jahue Moore, Esquire  
MOORE, TAYLOR & THOMAS, P A  
Post Office Box 5709  
West Columbia, South Carolina 29171

A handwritten signature in black ink, appearing to read "Thornwell F. Sowell". The signature is written in a cursive style with a large initial "T" and "F".

---

Thornwell F Sowell  
David C Dick  
SOWELL GRAY STEPP & LAFFITTE,  
L L C  
Post Office Box 11449  
Columbia, South Carolina 29211  
(803) 929-1400

April 26, 2012

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

William P Keesley, Circuit Court Judge

Case No 2010-CP-32-05481

RECEIVED

APR 27 2012

S C Supreme Court

Hook Point, LLC,

Respondent

v

Branch Banking and Trust Company, First  
Reliance Bank, and Allan R1singer,

Defendants,

Of Whom Branch Banking and Trust  
Company is,

Appellant

**RETURN TO PETITION FOR REHEARING**

Pursuant to Rules 221 and 240 of the South Carolina Rules of Appellate Procedure, appellant Branch Banking and Trust Company (“BB&T”) submits this return to the Petition for Rehearing (“Petition”) filed by respondent Hook Point, LLC (“Hook Point”) The Petition fails to show that the court’s decision overlooked or misapprehended any matters relevant to its ruling In fact, the points argued in the Petition either mischaracterize the record, rehash matters addressed by the court or misstate the applicable law

**The Petition for Rehearing Mischaracterizes the Letter of Credit**

The first argument presented in the Petition is that the court overlooked the fact that BB&T committed fraud when it submitted a draw for \$1,500,000 instead of the \$70,000 in

interest that was due at the time the draw was requested Petition, pp 3-4 The argument asserts that the request was fraudulent because the letter of credit was only available for overdue interest

Apparently recognizing that the “interest-only” argument was explicitly rejected by the court’s opinion, Hook Point offers a convoluted analysis suggesting that BB&T’s draw request should be governed by the “Loan Documents,” a term that Hook Point argues includes the commitment letter <sup>1</sup> That argument fails, among other reasons, because of the plain terms of the letter of credit The letter of credit requires that draw requests be supported by a sworn statement from BB&T that “[t]he Borrower has failed to perform its obligations to the Beneficiary under the Loan Agreement and Promissory Note dated November 16, 2007” and that the “amount of the draft does not exceed the amount due under the obligations ” ROA p 48 (emphasis added) The letter of credit makes no reference to the term “Loan Documents ” The validity of the draft is to be determined by whether Hook Point failed to meet its obligations under two specific documents both signed on November 16, 2007 As described in the court’s opinion, it is undisputed that Hook Point violated various obligations under those documents and that BB&T had the right to accelerate the loan Hook Point’s interest-only argument based on the term “Loan Documents” provides no basis for the court to rehear this case

**There Was Substantial Evidence In the Record Showing That the Letter of Credit  
Was Not Restricted to Interest**

The Petition makes the curious argument that the only evidence before the lower court was that the letter of credit could only be used to cover interest Petition, pp 5-6 Hook Point cites the after-the-fact statements of two of its principals and suggests that this evidence was undisputed The problem with this argument is that it ignores the fact that the letter of credit

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<sup>1</sup> Even if the term “Loan Documents” was relevant, it is clear from the Commitment Letter itself that it is not included in that term Numbered paragraph 24 of the Commitment Letter states that if there is any conflict between it and the Loan Documents then the Loan Documents take priority ROA P 31

itself was in evidence as was the Loan Agreement and other loan documents BB&T relied on the contractual documents signed by the parties and submitted to the lower court in connection with the injunction hearing In South Carolina it is well established that the first place a court will look to determine the force and effect of a contract is the written document itself and that only where the contract is ambiguous will other evidence even be considered Alexander's Land Company, LLC v M&M&K Corporation et al, 390 SC 582, 703 S E 2d 207 (2010), McGill v Moore, 381 SC 179, 672 S E 2d 571 (2009) There is no ambiguity in the letter of credit, and the document itself is ample evidence to support this court's conclusion that BB&T's draw request for the full \$1 5 million was not fraudulent Hook Point's argument that no evidence was submitted on that point is wrong and provides no basis for a rehearing

**Hook Point's Argument on the Application of the Independence Principle  
Misconstrues the Law**

In its Petition Hook Point argues that the independence principle does not apply to its argument that BB&T submitted a fraudulent draw request because it requested payment of the entire \$1 5 million instead of the \$70,000 in overdue interest This argument misconstrues the independence principle as it applies to the material fraud provision of S C Code Section 36-5-109(b) As the court's opinion explains, the independence principle is fundamental to all aspects of the law of letters of credit With respect to the material fraud exception that allows payments to be enjoined, it is the independence principle that requires the exception to be applied narrowly That requirement applies without regard to the type of fraud that is alleged Hook Point's attempt to differentiate between fraud claims simply finds no support in logic or in any legal authority The only case cited by Hook Point in the argument on the independence principle is Intraworld Industries, Inc v Girard Trust Bank, 336 A 2d 316 (Pa 1975) That case strongly endorses the independence principle in a way that is completely consistent with this

court's opinion in this case. It certainly provides no basis for an argument that the independence principle does not apply to certain of the claims of Hook Point.

**Conclusion**

The Petition should be denied. Hook Point has failed to show that this court misapprehended or overlooked any relevant aspect of this case. The case was properly decided and there is no need for a rehearing.



---

Frank R. Ellerbe, III  
Wilson W. McDonald  
ROBINSON, MCFADDEN & MOORE, P.C.  
Post Office Box 944  
Columbia, SC 29202  
(803) 779-8900  
Attorneys for Appellant

April 27, 2012

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

William P Keesley, Circuit Court Judge

Case No 2010-CP-32-05481

RECEIVED

APR 27 2012

SC 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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CERTIFICATE OF SERVICE

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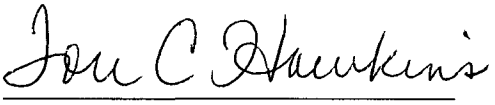
This is to certify that I, Tom Hawkins, paralegal with the law firm of Robinson, McFadden & Moore, P C , have this day caused to be served upon the person(s) named below the **Return to Petition for Rehearing** in the foregoing matter as follows

Thornwell F Sowell, Esquire  
(VIA HAND DELIVERY)  
Sowell Gray Stepp & Laffitte, LLC  
1310 Gadsden Street  
Columbia, SC 29201

Frederick A Gertz, Esquire  
(VIA US MAIL)  
Gertz & Moore  
P O Box 456  
Columbia, SC 29202

S Jahue Moore, Esquire  
(VIA US MAIL)  
Moore, Taylor & Thomas, P A  
Post Office Box 5709  
West Columbia, SC 29171

Dated at Columbia, South Carolina, this 27<sup>th</sup> day of April, 2012

---

Toni C Hawkins

# The Supreme Court of South Carolina

Hook Point, LLC, Respondent,

v

Branch Banking and Trust Company, First Reliance  
Bank, and Allan Risinger, Defendants,

Of which Branch Banking and Trust Company is,  
Appellant

Appellate Case No 2011-185386

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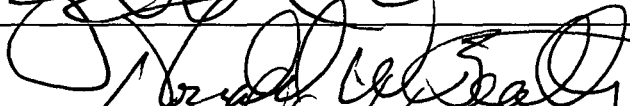
## ORDER

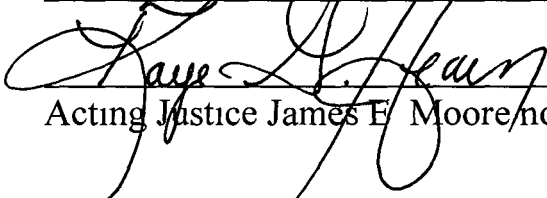
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Appellant (BB&T) moves to have this Court clarify its opinion in this matter. No return has been filed to this motion.

The demand by BB&T for full payment under the 2007 letter of credit was made prior to the expiration date of that letter of credit. Further, the opinion of this Court held that injunctive relief was improperly issued preventing the demand for payment from being honored. Accordingly, we clarify the opinion to specifically state that, upon the issuance of the remittitur in this appeal, First Reliance Bank must honor the demand made by BB&T by paying the balance remaining to be paid under the 2007 letter of credit.

  
\_\_\_\_\_ C J

  
\_\_\_\_\_ J

  
\_\_\_\_\_ J  
Acting Justice James E. Moore, not participating

I would not clarify the opinion to determine whether Reliance Bank is now obligated to honor the 2007 letter of credit. This issue is not properly before this Court in this appeal since it has neither been raised to nor ruled on by circuit court.



---

J

Columbia, South Carolina

May 24, 2012

cc

Frederick A. Gertz

Wilson W. McDonald

Frank Rogers Ellerbe, III

Thornwell F. Sowell, III

David Cochran Dick, Jr

S. Jahue Moore

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

William P Keesley, Circuit Court Judge

Case No 2010-CP-32-05481

RECEIVED

APR 23 2012

SC 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

**Motion for Clarification**

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the Appellant, Branch Banking and Trust Company, ("BB&T") moves the court for an order clarifying the impact of its April 11 decision and thereby resolving a dispute between BB&T and defendant First Reliance Bank concerning the effect of the decision

**Background**

The action giving rise to the appeal arose from a real estate development loan made by BB&T to respondent Hook Point, LLC ("Hook Point") that closed in November 2007 (ROA, pp 81-118) Among the documents required for the closing of the loan was a letter of credit in the amount of \$1,500,000 issued by defendant First Reliance Bank to Hook Point in favor of

BB&T (ROA, pp 98-99) In December 2010 BB&T submitted a demand to First Reliance for the full amount of the letter of credit (ROA, p 100-102) Hook Point then filed the underlying action (ROA, pp 18-27) and obtained a preliminary injunction preventing payment of the full amount of the letter of credit (ROA, pp 8-17) BB&T appealed the order granting the preliminary injunction and on April 11, 2012 this court issued its decision reversing the lower court order granting the preliminary injunction

On April 12, 2012, the day after this court's decision was filed, BB&T wrote First Reliance renewing its demand for payment under the letter of credit Exhibit A The demand specifically requested payment of the remaining balance of the letter of credit<sup>1</sup> By letter dated April 19, 2012 First Reliance has refused the BB&T draft and declared that it has no further obligation on the letter of credit Exhibit B

### **Argument and Request for Relief**

In its April 11 decision this court held that as a matter of law the preliminary injunction should never have been issued The decision recognized that there are circumstances when payment of a letter of credit should be enjoined - the "fraud in the transaction" exception – but stressed that the exception must be very narrowly construed or the purposes of letters of credit would be frustrated The holding was crystal clear First Reliance should have paid the letter of credit in December 2010 when BB&T made its initial demand

By its April 19 letter refusing to pay the balance remaining on the letter of credit First Reliance seeks to take advantage again of the preliminary injunction even after it has been resoundingly rejected by this court The "reasoning" of the April 19 letter is that BB&T somehow waived its rights under the letter of credit by drawing the interest payments as

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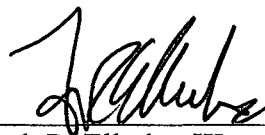
<sup>1</sup> The order that granted the injunction had allowed BB&T to submit draw requests for interest and BB&T has been paid \$531,832.58 through a series of requests for interest during the pendency of the appeal The remaining balance is \$968,167.42

permitted by the injunction That waiver argument is made despite the fact that the letter of credit itself allows partial draws (ROA p 48) and despite that fact that BB&T appealed the order granting the preliminary injunction and argued consistently that it should have been paid in full in December 2010

The position taken by First Reliance is especially disturbing given the fact that the issue was discussed during oral argument in the context of questions regarding the effect of the expiration date of the letter of credit having passed during the appeal The discussion during the argument was that BB&T's rights were fixed at the time it made its initial demand for payment, and that the fact that the injunction prevented payment before the expiration date did not affect those rights Under these circumstances the refusal by First Reliance to honor its obligations goes well beyond advocacy of a disputed legal position and approaches disrespect for the authority of this court

### **Conclusion**

BB&T is aware that it is seeking extraordinary relief in this motion, but it believes that such relief is justified In its April 11 opinion this court strongly vindicated the crucial role of letters of credit to commerce and emphasized the importance of certainty and speed of payment if letters of credit are to perform that role The dishonor by First Reliance flies in the face of the opinion and its rationale We respectfully submit that BB&T should not have to wait even longer to obtain the payment that should have been made sixteen months ago



---

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Post Office Box 944  
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Attorneys for Appellant

April 23, 2012



April 12, 2012

309 Columbia Avenue  
Lexington SC 29072  
(803) 359-5111  
Fax (803) 359-6683

**BY HAND DELIVERY**

Mr Richard McIntyre  
Market President- Lexington  
First Reliance Bank  
801 North Lake Drive  
Lexington, SC 29072

**Re First Reliance Irrevocable Letter of Credit No 970001231**

Dear Richard

Enclosed please find the following documents to substantiate the sight draw and demand by Branch Banking and Trust Company ("BB&T") on First Reliance Bank for the remaining balance under your Irrevocable Letter of Credit No 970001231 (the "Letter of Credit")

- 1 Copies of the Sight Draw, the First Reliance Letter of Credit dated as of November 6, 2007 (the "11/06/2007 Letter of Credit") and notarized statement from a BB&T officer at that time delivered to you as of December 21, 2010 (collectively the "Original Draw Request"),
- 2 A copy of your acknowledgement of receipt of the Original Draw Request dated as December 22, 2010,
- 3 The original of the Letter of Credit, and
- 4 A copy of the South Carolina Supreme Court's Opinion No 27115 in which the Court reversed Judge Keesley's Order Granting Preliminary Injunction dated January 7, 2011 and entered January 12, 2011 (the "Injunction")

The Original Draw Request was timely made prior to the expiry date of the 11/06/2007 Letter of Credit and met all the specific requirements for a draw as set forth therein. As such, the Original Draw Request would have been honored by First Reliance Bank but for the Injunction. The South Carolina Supreme Court has now reversed the order granting the Injunction as being granted in error. Therefore, BB&T demands payment by First Reliance of the remaining balance of the Letter of Credit in accordance with its terms. We appreciate your attention to this matter.

Sincerely,  


J Allan Risinger  
Senior Vice President

April 12 2012  
Page 2

cc S Jahue Moore, Esquire  
William P Walker, Jr , Esquire  
Frank R Eilerbe, III, Esquire

309 Columbia Avenue  
Lexington, SC 29072  
(803) 359-5111  
Fax (803) 359-6883

December 21, 2010

**BY HAND DELIVERY**

Mr Richard McIntyre  
Market President- Lexington  
First Reliance Bank  
801 North Lake Drive  
Lexington, SC 29072

**Re: First Reliance Irrevocable Letter of Credit No 970001231**

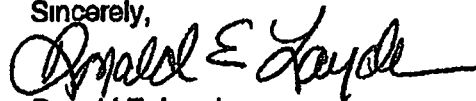
Dear Richard

Enclosed please find the following documents to substantiate the sight draw and immediate demand by Branch Banking and Trust Company ("BB&T") on First Reliance Bank for \$1,500,000 00 evidenced by your Irrevocable Letter of Credit No 970001231 ("Letter of Credit")

- 1 The Sight Draw as required by the Letter of Credit;
- 2 The original Letter of Credit, and
- 3 A notarized statement from a BB&T officer that (a) Hook Point, LLC ("Borrower") has failed to perform its obligations under the Loan Agreement and Promissory Note dated November 16, 2007, (b) the draw amount does not exceed the obligations of Borrower to BB&T and (c) as signor, I have authority to act for BB&T as it relates to the Letter of Credit

As these documents meet the specific requirements of the Letter of Credit, BB&T expects immediate payment by First Reliance in accordance with the Letter of Credit. We appreciate your prompt and immediate attention to this matter

Sincerely,



Donald E Layden  
Senior Vice President  
Area Executive

cc Mr Ronald J Vaughn  
R William Metzger, Jr, Esquire

**BB&T**

**Branch Banking and Trust Company**

**DRAWN UNDER First Reliance Bank**  
**IRREVOCABLE LETTER OF CREDIT No 970001231**  
**DATED 11-16-2007**

309 Columbia Avenue  
Lexington, SC 29072  
Tel (803) 359-5111  
Fax (803) 359-6688

Date December 21, 2010

At sight

Attention Mr Richard McIntyre  
Market President- Lexington  
First Reliance Bank  
801 North Lake Drive  
Lexington, SC 29072

YOU, FIRST RELAINCE BANK, are directed to pay to the order of BRANCH BANKING AND TRUST COMPANY, a North Carolina Bank Corporation, 309 Columbia Avenue, Lexington, SC 29072 the sum of ONE MILLION FIVE HUNDRED THOUSAND AND NO/100ths DOLLARS (\$1,500,000 00) FOR VALUE RECEIVED AND CHARGE TO ACCOUNT OF IRREVOCABLE LETTER OF CREDIT NO 970001231

WIRE DRAFT DIRECTLY TO BRANCH BANKING AND TRUST COMPANY ACCOUNT #0005221067241 ABA #05320 1607 ON OR BEFORE DECEMBER 21, 2010

BRANCH BANKING AND TRUST  
COMPANY, a North Carolina  
Bank Corporation

By   
[Authorized Officer]

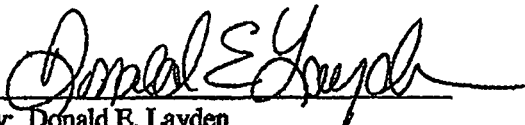
STATEMENT OF AUTHORIZED OFFICER OF  
BRANCH BANKING & TRUST COMPANY,  
A North Carolina Bank Corporation

PERSONALLY appeared before me, Donald E. Layden, who, being duly sworn, says


1 That Donald E. Layden is an officer of Branch Banking & Trust Company, a North Carolina Bank Corporation (the "Beneficiary") having authority to act for the Beneficiary with regard to the First Reliance Bank Irrevocable Letter of Credit No 970001231 dated 11-16-2007 (the "Letter of Credit")

2 That Hook Point, LLC 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 and Trust Company as Lender (the "Obligations")

3 That the amount of the draft on the Letter of Credit does not exceed the amount due the Beneficiary under the Obligations

  
By Donald E. Layden  
Title Senior Vice President  
of Branch Banking & Trust Company

SWORN TO and subscribed before me  
this 27<sup>th</sup> day of December, 2010

  
Notary Public for  
My Commission Expires 6/11/19



\*00000000870001231%1470%11162007%00000000H000629\*

**FIRST RELIANCE BANK**  
**IRREVOCABLE LETTER OF CREDIT**

**Borrower** Hook Point LLC  
111 East Main St B  
Lexington SC 29072

**Lender** First Reliance Bank  
Lexington  
801 N Lake Drive  
Lexington, SC 29072

**Beneficiary** Branch Banking & Trust Company a North Carolina Bank Corporation  
309 Columbia Avenue  
Lexington, SC 29072

**NO. 970001231**

**EXPIRATION DATE.** This letter of credit shall expire upon the earlier of the close of business on 02-13-2011 and all drafts and accompanying statements or documents must be presented to Lender on or before that time, or the day that Lender honors a draw under which the full amount of this Letter of Credit has been drawn (the "Expiration Date").

**AMOUNT OF CREDIT** Lender hereby establishes at the request and for the account of Borrower, an Irrevocable Letter of Credit in favor of Beneficiary for a sum of One Million Five Hundred Thousand & 00/100 Dollars (\$1,500,000.00) (the "Letter of Credit"). These funds shall be made available to Beneficiary upon Lender's receipt from Beneficiary of eight drafts drawn on Lender at Lender's address indicated above (or other such address that Lender may provide Beneficiary in writing) during regular business hours and accompanied by the signed written statements or documents indicated below.

**WARNING TO BENEFICIARY PLEASE EXAMINE THIS LETTER OF CREDIT AT ONCE. IF YOU FEEL UNABLE TO MEET ANY OF ITS REQUIREMENTS EITHER SINGLY OR TOGETHER, YOU SHOULD CONTACT BORROWER IMMEDIATELY TO SEE IF THE LETTER OF CREDIT CAN BE AMENDED. OTHERWISE, YOU WILL RISK LOSING PAYMENT UNDER THIS LETTER OF CREDIT FOR FAILURE TO COMPLY STRICTLY WITH ITS TERMS AS WRITTEN.**

**DRAFT TERMS AND CONDITIONS.** Lender shall honor drafts submitted by Beneficiary under the following terms and conditions: **DRAFT MUST BE 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 this draft does not exceed the amount due to the Beneficiary under the obligations; and, c) The signer has the authority to act for the Beneficiary with regard to the Letter of Credit. All drafts must be wired directly into the Beneficiary's account at BB&T into account #0006221067241 ABA #063201607

Upon Lender's honor of such drafts, Lender shall be fully discharged of Lender's obligations under this Letter of Credit and shall not be obligated to make any further payments under this Letter of Credit once the full amount of credit available under this Letter of Credit has been drawn.

Beneficiary shall have no recourse against Lender for any amount paid under this Letter of Credit once Lender has honored any draft or other document which complies strictly with this Letter of Credit, and which on its face appears otherwise in order but which is signed, issued, or presented by a party or under the name of a party purporting to act for Beneficiary purporting to claim through Beneficiary or posing as Beneficiary without Beneficiary's authorization. By paying an amount demanded in accordance with this Letter of Credit, Lender makes no representation as to the correctness of the amount demanded and Lender shall not be liable to Beneficiary or any other person, for any amount paid or disbursed for any reason whatsoever including without limitation, any nonapplication or misapplication by Beneficiary of the proceeds of such payment. By presenting upon Lender or a confirming bank, Beneficiary certifies that Beneficiary has not and will not present upon the other unless and until Beneficiary meets with dishonor. Beneficiary promises to return to Lender any funds received by Beneficiary in excess of the Letter of Credit's maximum drawing amount.

**USE RESTRICTIONS.** All drafts must be marked "DRAWN UNDER First Reliance Bank IRREVOCABLE LETTER OF CREDIT NO. 970001231 DATED 11-16-2007" and the amount of each draft shall be marked on the draft. Only Beneficiary or Beneficiary's transferee may complete a draft and accompanying statements or documents required by this Letter of Credit and make a draw under this Letter of Credit. This original Letter of Credit must accompany any draft drawn hereunder.

Partial draws are permitted under this Letter of Credit. Lender's honor of a partial draw shall correspondingly reduce the amount of credit available under this Letter of Credit. Following a partial draw, Lender shall return the original Letter of Credit to Beneficiary with the partial draw noted hereon; in the alternative, and in its sole discretion, Lender may issue a substitute Letter of Credit to Beneficiary in the amount shown above, less any partial draw(s).

**PERMITTED TRANSFEREES.** This Letter of Credit may be transferred by Beneficiary upon prior written notice to Lender of the transfer. The transferee shall be deemed the new Beneficiary of this Letter of Credit and the documents of the transferee including drafts required under this Letter of Credit, will be processed by Lender (or any intermediary) without the original Beneficiary's intervention and without any further obligation of Lender to the original Beneficiary.

**TRANSFEREES REQUIRED DOCUMENTS.** When the presenter is a permitted transferee under the "Permitted Transferees" paragraph above (the "Permitted Transferee"), the documents required for a draw shall include all documents required elsewhere in this Letter of Credit, except that such documents may be in the name of and executed by either the original Beneficiary or the presenter permitted by the "Permitted Transferees" paragraph above.

**COMPLIANCE BURDEN.** Lender is not responsible for any impossibility or other difficulty in achieving strict compliance with the requirements of this Letter of Credit precisely as written. Beneficiary understands and acknowledges: (i) that unless and until the present wording of this Letter of Credit is amended with Lender's prior written consent, the burden of complying strictly with such wording remains solely upon Beneficiary and (ii) that Lender is relying upon the lack of such amendment as constituting Beneficiary's initial and continued approval of such wording.

**NON-SEVERABILITY.** If any aspect of this Letter of Credit is ever declared unenforceable for any reason by any court or governmental body having jurisdiction, Lender's entire engagement under this Letter of Credit shall be deemed null and void ab initio, and both Lender and Beneficiary shall be restored to the position each would have occupied with all rights available as though this Letter of Credit had never occurred. This non-severability provision shall override all other provisions in this Letter of Credit, no matter where such provision appears within this Letter of Credit.

**GOVERNING LAW.** This Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law the laws of the State of South Carolina without regard to its conflicts of law provisions, and except to the extent such laws are inconsistent with the 2000 Revision of the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce, ICC Publication No. 600. This Agreement has been accepted by Lender in the State of South Carolina.

**EXPIRATION.** Lender hereby agrees with Beneficiary that drafts drawn under and in compliance with the terms of this Letter of Credit will be duly honored if presented to Lender on or before the Expiration Date unless otherwise provided for above.

Dated: November 16 2007

**LENDER:**

**FIRST RELIANCE BANK**  
(Note: In order to be valid, this Letter of Credit requires dual officer signatures, one of which at the SVP level or higher)

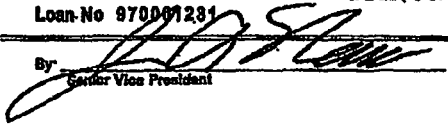
By   
Lending Officer



Loan No 970001231

**IRREVOCABLE LETTER OF CREDIT**  
(Continued)

Page 2

By   
Senior Vice President

**ENDORSEMENT OF DRAFTS DRAWN:**

Date	Negotiated By	Amount in Words	Amount in Figures
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December 22, 2010

**BY HAND DELIVERY**

Mr Donald E Layden  
Senior Vice President, Area Executive  
Branch Banking and Trust Company  
309 Columbia Avenue  
Lexington, SC 29072

**Re First Reliance Irrevocable Letter of Credit No. 97001231**

Dear Don

I acknowledge the receipt of the Site Draft from BB&T in regards to the Irrevocable Letter of Credit No 970001231. First Reliance Bank, as provided by code, will take the appropriate time allowed, up to five business days, to review and verify these documents presented and shall act in the appropriate manner

Sincerely

A handwritten signature in black ink that reads "Richard N. McIntyre".

Richard N McIntyre  
Senior Vice President

cc: S. Jahue Moore  
Albert J Dooley, Jr  
Thomas H Wingard  
Clifford C. Wingard  
Ronald J Vaughn





IRREVOCABLE LETTER OF CREDIT

Borrower Hook Point LLC
PO Box 1594
Lexington SC 29071 1594

Lender First Reliance Bank
Lexington
801 N Lake Drive
Lexington SC 29072

Beneficiary Branch Banking & Trust Company
309 Columbia Ave
Lexington, SC 29072

NO 970001231

EXPIRATION DATE This letter of credit shall expire upon the earlier of the close of business on 02 13-2012 and all drafts and accompanying statements or documents must be presented to Lender on or before that time or the day that Lender honors a draw under which the full amount of this Letter of Credit has been drawn (the Expiration Date )

AMOUNT OF CREDIT Lender hereby establishes at the request and for the account of Borrower an Irrevocable Letter of Credit in favor of Beneficiary for a sum of One Million Four Hundred Thirty Thousand & 00/100 Dollars (\$1 430 000 00) (the Letter of Credit ) These funds shall be made available to Beneficiary upon Lender's receipt from Beneficiary of eight drafts drawn on Lender at Lender s address indicated above for other such address that Lender may provide Beneficiary in writing during regular business hours and accompanied by the signed written statements or documents indicated below

WARNING TO BENEFICIARY PLEASE EXAMINE THIS LETTER OF CREDIT AT ONCE IF YOU FEEL UNABLE TO MEET ANY OF ITS REQUIREMENTS EITHER SINGLY OR TOGETHER YOU SHOULD CONTACT BORROWER IMMEDIATELY TO SEE IF THE LETTER OF CREDIT CAN BE AMENDED OTHERWISE YOU WILL RISK LOSING PAYMENT UNDER THIS LETTER OF CREDIT FOR FAILURE TO COMPLY STRICTLY WITH ITS TERMS AS WRITTEN

DRAFT TERMS AND CONDITIONS Lender shall honor drafts submitted by Beneficiary under the following terms and conditions DRAFT MUST BE 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 obligations and c) The signer has the authority to act for the Beneficiary with regard to the Letter of Credit All drafts must be wired directly into the Beneficiary s account at BB&T into account #0005221067241 ABA #053201607

Upon Lender's honor of such drafts Lender shall be fully discharged of Lender's obligations under this Letter of Credit and shall not be obligated to make any further payments under this Letter of Credit once the full amount of credit available under this Letter of Credit has been drawn

Beneficiary shall have no recourse against Lender for any amount paid under this Letter of Credit once Lender has honored any draft or other document which complies strictly with this Letter of Credit, and which on its face appears otherwise in order but which is signed issued or presented by a party or under the name of a party purporting to act for Beneficiary purporting to claim through Beneficiary or posing as Beneficiary without Beneficiary s authorization By paying an amount demanded in accordance with this Letter of Credit, Lender makes no representation as to the correctness of the amount demanded and Lender shall not be liable to Beneficiary or any other person for any amount paid or disbursed for any reason whatsoever including without limitation any nonapplication or misapplication by Beneficiary of the proceeds of such payment By presenting upon Lender or a confirming bank, Beneficiary certifies that Beneficiary has not and will not present upon the other unless and until Beneficiary meets with dishonor Beneficiary promises to return to Lender any funds received by Beneficiary in excess of the Letter of Credit s maximum drawing amount

USE RESTRICTIONS All drafts must be marked DRAWN UNDER First Reliance Bank IRREVOCABLE LETTER OF CREDIT NO 970001231 DATED 02 11 2011 and the amount of each draft shall be marked on the draft Only Beneficiary or Beneficiary s transferee may complete a draft and accompanying statements or documents required by this Letter of Credit and make a draw under this Letter of Credit This original Letter of Credit must accompany any draft drawn hereunder

Partial draws are permitted under this Letter of Credit Lender s honor of a partial draw shall correspondingly reduce the amount of credit available under this Letter of Credit. Following a partial draw Lender shall return this original Letter of Credit to Beneficiary with the partial draw noted hereon in the alternative and in its sole discretion Lender may issue a substitute Letter of Credit to Beneficiary in the amount shown above less any partial draw(s)

PERMITTED TRANSFEREES This Letter of Credit may be transferred by Beneficiary upon prior written notice to Lender of the transfer The transferee shall be deemed the new Beneficiary of this Letter of Credit and the documents of the transferee including drafts required under this Letter of Credit, will be processed by Lender (or any intermediary) without the original Beneficiary s intervention and without any further obligation of Lender to the original Beneficiary

TRANSFEREES REQUIRED DOCUMENTS When the presenter is a permitted transferee under the Permitted Transferees paragraph above (the Permitted Transferee ) the documents required for a draw shall include all documents required elsewhere in this Letter of Credit except that such documents may be in the name of and executed by either the original Beneficiary or the presenter permitted by the Permitted Transferees paragraph above.

COMPLIANCE BURDEN Lender is not responsible for any impossibility or other difficulty in achieving strict compliance with the requirements of this Letter of Credit precisely as written. Beneficiary understands and acknowledges (i) that unless and until the present wording of this Letter of Credit is amended with Lender's prior written consent, the burden of complying strictly with such wording remains solely upon Beneficiary and (ii) that Lender is relying upon the lack of such amendment as constituting Beneficiary's initial and continued approval of such wording

NON-SEVERABILITY If any aspect of this Letter of Credit is ever declared unenforceable for any reason by any court or governmental body having jurisdiction Lender's entire engagement under this Letter of Credit shall be deemed null and void ab initio and both Lender and Beneficiary shall be restored to the position each would have occupied with all rights available as though this Letter of Credit had never occurred This non-severability provision shall override all other provisions in this Letter of Credit, no matter where such provision appears within this Letter of Credit.

GOVERNING LAW This Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law the laws of the State of South Carolina without regard to its conflicts of law provisions and except to the extent such laws are inconsistent with the 2007 Revision of the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce ICC Publication No 600 This Agreement has been accepted by Lender in the State of South Carolina

EXPIRATION Lender hereby agrees with Beneficiary that drafts drawn under and in compliance with the terms of this Letter of Credit will be duly honored if presented to Lender on or before the Expiration Date unless otherwise provided for above

Dated February 11 2011

LENDER

FIRST RELIANCE BANK

(Note. In order to be valid this Letter of Credit requires dual officer signatures one of which at the SVP level or higher)

By [Signature]
Lending Officer

By [Signature]
Senior Vice President

ENDORSEMENT OF DRAFTS DRAWN

Date	Negotiated By	Amount In Words	Amount In Figures
2-18-11	BB&T	Fifty Six Thousand Two Hundred Thirty-Four $\frac{68}{100}$	\$ 56,234.68
3-23-11	BB&T	Thirty Two Thousand Three Hundred Fourteen $\frac{17}{100}$	\$ 32,314.12
4-20-11	BB&T	Thirty Four Thousand Five Hundred Forty Two $\frac{68}{100}$	34,542.6
5-20-11	BB&T	Thirty Three Thousand Four Hundred Twenty Eight $\frac{40}{100}$	33,428.4
6-21-11	BB&T	Thirty Four Thousand Five Hundred Forty two $\frac{68}{100}$	34,542.6
7-21-11	BB&T	Thirty Three Thousand Four Hundred Twenty Eight $\frac{40}{100}$	33,428.4
8-20-11	BB&T	Thirty Four Thousand Five Hundred Forty - Two $\frac{68}{100}$	34,542.6
9-20-11	BB&T	Thirty Four Thousand Five Hundred Forty - Two $\frac{68}{100}$	34,542.6
10-24-11	BB&T	Thirty Three Thousand Four Hundred Twenty - Eight $\frac{40}{100}$	33,428.4
11-21-11	BB&T	Thirty Four Thousand Five Hundred Forty Two $\frac{68}{100}$	34,542.6
12-21-11	BB&T	Thirty Three Thousand Four Hundred Twenty - Eight $\frac{40}{100}$	33,428.4
1-23-12	BB&T	Thirty Six Thousand Seven Hundred Seventy ONE $\frac{24}{100}$	36,771
2-17-12	BB&T	Thirty Thousand Eighty Five AND $\frac{50}{100}$	30,085.5

LASER PRO Lending, W/ 8.00.002 Corp. Harford Financial Solutions, Inc. 897 201 All Rights Reserved. SC LSCNPLFCALOC.FC W-10344 P9-28

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

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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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Appeal from Lexington County  
William P Keesley, Circuit Court Judge

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Opinion No 27115  
Heard March 21, 2012 – Filed April 11, 2012

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**REVERSED**

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Frank R Ellerbe, III, and Wilson W  
McDonald, both of Robinson, McFadden &  
Moore, of Columbia, for Appellant

Frederick A Gertz, of Gertz & Moore, of  
Columbia, Thornwell F Sowell and David C  
Dick, both of Sowell, Gray, Stepp & Laffitte,  
of Columbia, for Respondent

---

**JUSTICE PLEICONES** Respondent Hook Point, LLC (Hook Point) was granted a preliminary injunction preventing Appellant Branch Banking and Trust Company (BB&T) from drawing on, and defendant First Reliance Bank (First Reliance) from honoring, a \$1 5 million letter of credit BB&T appeals We reverse

## FACTS

In late 2007, Hook Point sought a loan from BB&T for the purpose of developing a subdivision on property Hook Point owned on Lake Murray called Panama Pointe. BB&T issued a commitment letter to Hook Point in September 2007 indicating that it would loan the company \$5.1 million and establish a \$2 million line of credit to enable Hook Point to develop the subdivision. Security for the loan included a first mortgage on the Panama Pointe property, personal guarantees of Hook Point's four principals, and a \$1.5 million standby letter of credit issued by First Reliance in favor of BB&T.

Hook Point applied to and obtained a letter of credit (LC) from First Reliance that named BB&T as beneficiary [1]. The LC was secured by a cash deposit at First Reliance of approximately \$310,000, several real properties owned by a Hook Point affiliate, and personal guarantees of the Hook Point principals. Under the terms of the LC, BB&T was permitted to make draws upon presentation of 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 and BB&T].
  - b) The amount of the draft does not exceed the amount due to the Beneficiary under the obligations, and, [sic]
  - c) The signer has the authority to act for the Beneficiary with regard to the Letter of Credit.

The loan from BB&T to Hook Point was finalized in a loan agreement on the same day the LC was issued. Hook Point proceeded to complete infrastructure work in the development and began construction on the first home before determining that market conditions had become unfavorable to the project as originally contemplated. Hook Point defaulted on the Loan Agreement and related notes and loan documents by, among other things, failing to pay property taxes, to make interest payments due under the notes, or to pay the principal due under one note. BB&T gave Hook Point notice of default in September 2010 and accelerated the loans under the terms of the Loan Agreement on December 21, 2010. On the same day, BB&T tendered a demand letter to First Reliance, seeking to draw the full amount of the LC.

On December 23, Hook Point filed suit alleging several causes of action against BB&T, including for fraudulent misrepresentation by which BB&T induced Hook Point to enter the loan agreement. Hook Point admitted to being \$70,000 in arrears on interest but argued that the terms of the agreement did not permit BB&T to draw the full amount of the LC if that exceeded the amount of interest due. It also sought an ex parte temporary restraining order preventing First Reliance from honoring a draft on the LC by BB&T, which the court granted. After a hearing, the court also granted a preliminary injunction against drafts on or honor of the LC beyond amounts of accrued interest, requiring extension of the LC for one year, and requiring Hook Point to post a \$50,000 bond with the court. This appeal followed, and the case was transferred to this Court pursuant to Rule 204(b), SCACR.

## ISSUE

Did the circuit court err when it granted a preliminary injunction?

## STANDARD OF REVIEW

The grant of an injunction is reviewed for abuse of discretion. Strategic Resources Co v BCS Life Ins Co, 367 S C 540, 544, 627 S E 2d 687, 689 (2006) “An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law.” Peek v Spartanburg Reg'l Healthcare Sys, 367 S C 450, 454, 626 S E 2d 34, 36 (Ct App 2005)

## DISCUSSION

BB&T contends that the circuit court erred when it granted the preliminary injunction. We agree.

“A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law.” Poynter Investments, Inc v Century Builders of Piedmont, Inc., 387 S C 583, 586-87, 694 S E 2d 15, 17 (2010)

On the second element, likelihood of success on the merits, BB&T argues that the grounds for refusing to honor a letter of credit are exceedingly narrow and that Hook Point has failed to show it is likely to succeed on the merits under that standard. Thus, BB&T argues that the circuit court erred when it found that Hook Point had sufficiently established this element. We agree.

A letter of credit is a financial instrument designed to reduce the need for counterparties in a transaction to trust one another by adding an intermediary bank to the transaction. This intermediary bank extends credit to one party (typically the buyer in a sales transaction<sup>[2]</sup>) so that the other need not do so. In a sales transaction, the letter of credit typically requires a seller to represent that he has shipped goods under a sales contract and to document this representation with a bill of lading in order to draw on the LC provided by the buyer. This arrangement entails risk to the buyer, who is vulnerable to loss should the seller present fraudulent documents or deliberately ship nonconforming goods. Nevertheless, the usefulness of a letter of credit depends on its being the virtual equivalent of cash. The judicial doctrine that has developed around letters of credit reflects courts' understanding of this background and the importance to commerce of respecting the terms of this financial instrument so that it remains available as a reliable means of shifting financial risk.

Specifically, this understanding is embodied in the independence principle, under which courts recognize that the obligations created in the letter of credit are independent of the obligations of the underlying contract. See, e.g., Intraworld Industries, Inc v Girard Trust Bank, 461 Pa 343, 357, 336 A 2d 316, 323 (Pa 1975) (“The primary purpose of a letter of credit is to provide assurance to the seller of goods of prompt payment upon presentation of documents. A seller who would otherwise have only the solvency and good faith of his buyer as assurance of payment may, with a letter of credit, rely on the full responsibility of a bank. Promptness is assured by the engagement of the bank to honor drafts upon the presentation of documents. 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. Long-standing case law has established that, unless otherwise

agreed, the issuer deals only in documents. 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”), Itek Corp v First Nat’l Bank of Boston, 730 F 2d 19 (1st Cir 1984) (Breyer, J) (“Parties to a contract may use a letter of credit in order to make certain that contractual disputes wend their way towards resolution with money in the beneficiary’s pocket rather than in the pocket of the contracting party. Thus, courts typically have asserted that such letters of credit are ‘independent’ of the underlying contract. And they have recognized that examining the rights and wrongs of a contract dispute to determine whether a letter of credit should be paid risks depriving its beneficiary of the very advantage for which he bargained, namely that the dispute would be resolved while he is in possession of the money.” (citations omitted)), Roger J Johns and Mark S Blodgett, Fairness at the Expense of Commercial Certainty: The International Emergence of Unconscionability and Illegality As Exceptions to the Independence Principle of Letters of Credit and Bank Guarantees, 31 N Ill U L Rev 297, 309 (2011) (“[T]he common concern among all stakeholders is that as the ease with which letters of credit can be enjoined increases their commercial utility decreases.”)

Nevertheless, courts have carved out a very narrow exception to the independence principle. Aside from permitting the intermediary bank to refuse to honor forged documents presented in order to draw on the letter of credit, courts enjoin the payment of LCs for “fraud in the transaction” when “the beneficiary’s conduct has so vitiated the entire transaction that the legitimate purposes of the independence of the issuer’s obligation would no longer be served.” Itek, 730 F 2d at 25 (internal quotation marks and citations omitted)

Put simply, the cases in which the “fraud in the transaction” exception has been applied are those in which the underlying transaction or the demand for payment is clearly a sham, and it is apparent that rigid adherence to the independence principle would facilitate what amounts to a scheme to defraud. In the case that established the fraud in the transaction exception, the beneficiary made an actual shipment so that the shipping documents were real, but substituted “rubbish” in place of salable bristles. Sztejn v J Henry Schroder Banking Corp, 177 Misc 719, 31 N Y S 2d 631 (Sup Ct 1941). In another leading case, the beneficiary was not permitted to collect on the LC because the fall of the Iranian government so altered conditions that the contract for military equipment could not be completed, and thus there was no possibility that the original purpose of the transaction of which the LC was a part could be accomplished. In addition, no other legal recourse was available to the applicant, and the applicant had cancelled the underlying contract in compliance with its force majeure provisions, which called for cancellation of the LC upon cancellation of the underlying contract. Itek, *supra*.

Several other cases also illustrate the narrowness of the fraud in the transaction exception. See Intraworld Industries, Inc v Girard Trust Bank, 461 Pa 343, 357, 336 A 2d 316, 361 (Pa 1975) (“We conclude that, if the documents presented by [the beneficiary of the LC] are genuine in the sense of having some basis in fact, an injunction must be refused. [N]either the trial court nor this Court may attempt to determine [the beneficiary’s] actual entitlement to payment under the lease”), see also Roman Ceramics Corp v Peoples Nat Bank, 714 F 2d 1207, 1209 (3d Cir 1983) (permitting issuing bank to dishonor LC when it knew underlying invoice had been paid and that contrary certification was false), Dynamics Corp of Am v Citizens & S Nat Bank, 356 F Supp

991, 999 (D C Ga 1973) (describing court's role as limited to ensuring that the defendant could not "run off with plaintiff's money on a *pro forma* declaration which has absolutely no basis in fact"), Mid-America Tire, Inc v PTZ Trading Ltd , 95 Ohio 367, 392, 768 N E 2d 619, 641 (Ohio 2002) (affirming injunction against honor of LC where defendants repeatedly lied to and misled plaintiffs about the tires available for sale in order to pressure them into making the LC available before they "could discover the truth")

The Uniform Commercial Code (UCC) incorporated this judicially developed doctrine into Article 5, the UCC formulation of the law governing letters of credit. Thus, South Carolina's adoption of the UCC incorporated into South Carolina law the same independence principle and narrow exception limiting the enjoinder of payment of LCs to instances of egregious fraud that operates to vitiate the entire transaction. In particular, UCC Article 5, S C Code §§ 36-5-101 through -119, governs letters of credit. S C Code Ann § 36-5-109(b) (2003) sets forth the conditions under which a court may enjoin honor of a letter of credit as follows, in relevant part

If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that

(3) all of the conditions to entitle a person to the relief under the law of this State have been met, and

(4) on the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud

For purposes of a preliminary injunction, subsection (3) effectively incorporates the requirements of the common law related to injunctions generally that the movant show that irreparable harm will result and that no adequate remedy at law exists if the court refuses the injunction. Poynter Investments, supra

Subsection (4) codifies not only the general common law requirement that the movant show a likelihood of success on the merits but also the special rule for letters of credit allowing only a narrow exception for fraud in the transaction, as discussed above. The Official Comment makes this codification explicit [3]

In the present case, Hook Point argues that BB&T is not entitled to draw on the LC because the commitment letter described the LC as "to be used as last resort for interest carry." Hook Point also seeks to construe as fraudulent BB&T's demand on the LC. The LC, however, by its terms requires only that BB&T represent that "[t]he Borrower has failed to perform its obligations under the Loan Agreement and Promissory Note" and that "[t]he amount of the draft does not exceed the amount due to the Beneficiary under the obligation." Thus, contrary to Hook Point's arguments, the plain language of the LC permitted BB&T to use it if Hook Point defaulted under any obligation of the loan agreement and note, including an acceleration clause. Furthermore, no term in the loan

agreement or note to which the LC 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.

If there is any validity to Hook Point's argument that the commitment letter limited the utilization of the LC exclusively to interest, that is an ordinary contract dispute that raises no implication of fraud by BB&T sufficient to trigger the narrow fraud exception. Dynamics Corp, supra. In fact, \$500,000 had been reserved by BB&T from the original \$5.1 million loan for the purpose of drawing down interest carry. A more plausible explanation for the "last resort" language in the commitment letter is that it was intended merely as an accommodation to the principals that BB&T would not seek to draw on the LC for interest until the reserve had been exhausted. That language, whatever it meant, is a red herring in this case as the draw on the LC was sought not only to recoup interest but as a result of multiple defaults that caused BB&T to invoke the acceleration of the entire debt.

Indeed, Hook Point's admission that BB&T was entitled to any draw on the LC for past due interest was conclusive as to the issue whether honor of the LC should be enjoined, since BB&T's entitlement to past due interest is alone some basis in fact on which BB&T could demand payment under the LC. Moreover, the strict standard required under § 36-5-109(b)(4) is that the alleged fraud vitiate the entire transaction, that is, it deprives Hook Point of any benefit from the transaction. In this case, there is no dispute that Hook Point received \$5.1 million from BB&T. These facts hardly parallel the receipt of "rubbish" instead of bargained-for salable bristles. See Sztejn v. J. Henry Schroder Banking Corp., supra.

Thus, there is no evidence Hook Point is more likely than not to succeed on a claim of material fraud so egregious as to vitiate the entire transaction as required under § 36-5-109(b)(4), and the circuit court failed to evaluate the evidence under the strict standard required for injunctions against the honor of LCs. Under the proper standard, it is clear that BB&T had a sufficient basis in fact upon which to demand payment under the LC. Thus, the circuit court's finding was based upon an error of law.

Because this issue is dispositive of the case, we need not address BB&T's remaining issues. Rule 220(b), SCACR, e.g., Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

## CONCLUSION

The standard under which a fraud in the transaction claim must be measured when deciding whether to enjoin honor of a letter of credit requires that the beneficiary have no colorable claim or basis in fact for asserting its rights under the letter of credit. In this case BB&T has, in our view, not only a colorable claim but an undeniable basis in fact for asserting its rights under the letter of credit. Therefore, the circuit court erred when it granted the preliminary injunction. **REVERSED**

**TOAL, C. J., BEATTY, HEARN, JJ., and Acting Justice James E. Moore, concur**

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[1] A person who applies for a letter of credit is the applicant (in this case, Hook Point)

The bank that issues the LC on behalf of the applicant is the issuer (First Reliance Bank)  
The entity that has the right to draw on the LC is the beneficiary (BB&T)

**[2]** Courts do not distinguish between types of LCs for purposes of analyzing whether a court should grant an injunction against honoring them. See New York Life Ins. Co. v. Hartford Nat'l Bank & Trust Co., 173 Conn. 492, 499-500, 378 A.2d 562, 566 (Conn. 1977)

**[3]** The Official Comment states

Material fraud by the beneficiary occurs only when the beneficiary has no colorable right to expect honor and where there is no basis in fact to support such a right to honor. The section indorses articulations such as those stated in *Intraworld Indus. v. Girard Trust Bank*, 336 A.2d 316 (Pa. 1975), *Roman Ceramics Corp. v. People's Nat. Bank*, 714 F.2d 1207 (3d Cir. 1983), and similar decisions and embraces certain decisions under Section 5-114 that relied upon the phrase "fraud in the transaction." Some of these decisions have been summarized as follows in *Ground Air Transfer v. Westate's Airlines*, 899 F.2d 1269, 1272-73 (1st Cir. 1990)

We have said throughout that courts may not "normally" issue an injunction because of an important exception to the general "no injunction" rule. The exception, as we also explained in *Itek*, 730 F.2d at 24-25, concerns "fraud" so serious as to make it obviously pointless and unjust to permit the beneficiary to obtain the money. Where the circumstances "plainly" show that the underlying contract forbids the beneficiary to call a letter of credit, *Itek*, 730 F.2d at 24, where they show that the contract deprives the beneficiary of even a "colorable" right to do so, *id.*, at 25, where the contract and circumstances reveal that the beneficiary's demand for payment has "absolutely no basis in fact," *id.*, see *Dynamics Corp. of America*, 356 F. Supp. at 999, where the beneficiary's conduct has "so vitiated the entire transaction that the legitimate purposes of the independence of the issuer's obligation would no longer be served," *Itek*, 730 F.2d at 25 (quoting *Roman Ceramics Corp. v. Peoples National Bank*, 714 F.2d 1207, 1212 N.2d, 1215 (3d Cir. 1983) (quoting *Intraworld Indus.*, 336 A.2d at 324-25)), then a court may enjoin payment.

# FIRST RELIANCE<sup>®</sup> BANK

April 19, 2012

**BY HAND DELIVERY**

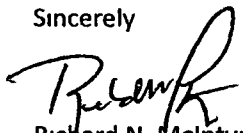
Mr J Allan Risinger  
Senior Vice President, Area Executive  
Branch Banking and Trust Company  
309 Columbia Avenue  
Lexington SC 29072

**Re First Reliance Irrevocable Letter of Credit No 97001231**

Dear Allan

The request for sight draft of the Irrevocable Letter of Credit is denied. While First Reliance understands the South Carolina Supreme Court ruling, First Reliance has met its obligations under the Letter of Credit until its expiration. It is our opinion that upon BB&T's request and acceptance of the monthly interest payments through partial draws after the Injunction was an amendment of that initial request and acknowledgment of the conditions of BB&T's commitment letter to the principals of Hook Point that the Letter of Credit was for Interest Reserve. All sight drafts submitted by BB&T for the monthly interest were paid within the terms and until it expired.

Sincerely

  
Richard N. McIntyre  
Senior Vice President

cc S Jahue Moore  
Hook Point, LLC



THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

William P Keesley, Circuit Court Judge

Case No 2010-CP-32-05481

RECEIVED

APR 23 2012

SC 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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CERTIFICATE OF SERVICE

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This is to certify that I, Tom Hawkins, paralegal with the law firm of Robinson, McFadden & Moore, P C , have this day caused to be served upon the person(s) named below the **Motion for Clarification** in the foregoing matter by placing copies of same in the United States Mail, postage prepaid, in envelopes addressed as

Thornwell F Sowell, Esquire  
David C Dick, Esquire  
Sowell Gray Stepp & Laffitte, LLC  
1310 Gadsden Street  
Post Office Box 11449  
Columbia, SC 29211

Frederick A Gertz, Esquire  
Gertz & Moore  
1416 Laurel Street  
P O Box 456  
Columbia, SC 29202

S Jahue Moore, Esquire  
Moore, Taylor & Thomas, P A  
Post Office Box 5709  
West Columbia, SC 29171

Dated at Columbia, South Carolina, this 23<sup>rd</sup> day of April, 2012

  
\_\_\_\_\_  
Toni C Hawkins

**THE STATE OF SOUTH CAROLINA**

**In The Court of Appeals**

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**APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas**

**William P Keesley, Circuit Court Judge**

**RECEIVED**  
APR 06 2011

**SC Court of Appeals**

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**Case No 2010-CP-32-05481**

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**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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**INITIAL BRIEF OF APPELLANT**

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**Frank R Ellerbe, III  
Wilson W McDonald  
ROBINSON, MCFADDEN & MOORE, P C  
Post Office Box 944  
Columbia, SC 29202  
(803) 779-8900**

**Attorneys for Appellant**

**TABLE OF CONTENTS**

Table of Authorities	ii
Statement of Issue on Appeal	1
Statement of the Case	2
Statement of the Facts	3
Argument	7
Conclusion	16

**TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE NO</u></b>
<i>Airline Reporting Corp v First National Bank of Holly Hill,</i> 832 F2d 828 (4 <sup>th</sup> Cir 1987)	13, 14
<i>Amwest Surety Insurance Company v Republic National Bank,</i> 977 F 2d 122 (4 <sup>th</sup> Cir 1992)	10
<i>Itek Corporation v First Bank of Boston,</i> 730 F2d 19 (1 <sup>st</sup> Cir 1984)	12, 13
<i>Milliken &amp; Co v Morin,</i> 386 S C 1, 685 S E 2d 828 (Ct App 2009)	14
<i>Poynter Investments, Inc v Century Builders,</i> 387 S C 583, 694 S E 2d 15 (2010)	7
<i>Roman Ceramics Corp v Peoples National Bank,</i> 714 F2d 1207 (3 <sup>rd</sup> Cir 1983)	13
<i>Scratch Golf v Dunes West,</i> 361 S C 117, 121, 603 S E 2d 905 (2004)	7, 14
 <b>STATUTES</b>	
S C Code § 36-5-109	7, 9, 11, 12, 14, 16
 <b>OTHER AUTHORITIES</b>	
3 White & Summers, Uniform Commercial Code § 26-2 (5 <sup>th</sup> ed ), 3WS-UCC §26-5	10

## **STATEMENT OF ISSUE ON APPEAL**

Did the circuit court commit error by issuing a temporary injunction where plaintiff failed to show (1) that it would be irreparably harmed if the injunction was not granted, (2) that it was likely to be successful on the merits of its claims, and (3) that it did not have an adequate remedy at law?

## STATEMENT OF THE CASE

This is an appeal from an order of the circuit court entered January 14, 2011 (ROA p \_\_\_\_ ) granting plaintiff Hook Point, LLC (“Hook Point”) a temporary injunction preventing defendant First Reliance Bank (“First Reliance”) from honoring a draft presented by defendant Branch Banking and Trust Company (“BB&T”) for \$15 million from a standby letter of credit issued by First Reliance. The action was commenced by the filing of a summons and complaint on December 23, 2010 (ROA p \_\_\_\_ ). The summons and complaint alleges seven causes of action relating to a real estate project owned by Hook Point and financed by BB&T. On the same day that the action was filed Hook Point obtained an *ex parte* temporary restraining order pursuant to Rule 65 (b) of the South Carolina Rules of Civil Procedure.

The motion of Hook Point for a temporary injunction was heard by the Honorable William P. Keesley on January 4, 2011. Hook Point submitted affidavits, exhibits and testimony in support of its motion, BB&T submitted an affidavit and exhibits in opposition. Judge Keesley notified the parties of his ruling on January 4<sup>th</sup> and signed the order under appeal on January 7<sup>th</sup>. The order was entered and sent to the parties on January 14, 2011. BB&T filed and served its notice of appeal on February 11, 2011 (ROA p \_\_\_\_ ).

## STATEMENT OF THE FACTS

### **Panama Pointe and the Loan Agreement**

This action arises out of a failed real estate development near Lake Murray in Lexington County. The development is called "Panama Pointe" and is owned by Hook Point. It was financed by BB&T pursuant to a Loan Agreement dated November 16, 2007 ("Loan Agreement") (Complaint, Ex B (ROA p \_\_\_\_)). Under the terms of the Loan Agreement BB&T made an initial development loan to Hook Point in the amount of \$5.1 million. The note ("Note 1") associated with that loan was executed on November 16, 2007 at the same time as the Loan Agreement. Layden affidavit ¶3 (ROA p \_\_\_\_). The Loan Agreement also provided for a line of credit of up to \$2 million to fund the construction of homes. In August 2008 funds were extended by BB&T under the line of credit and a separate note was executed by Hook Point ("Note 2"). Layden affidavit ¶3 (ROA p \_\_\_\_).

The Loan Agreement is secured by a first mortgage on the property, guarantees of the four principals of Hook Point and a \$1.5 million standby letter of credit issued by First Reliance to Hook Point with BB&T named as the beneficiary. The Loan Agreement was preceded by a commitment letter dated September 6, 2007 that set out the general terms of the arrangement subsequently detailed in the November 2007 Loan Agreement and related documents.

The Panama Pointe project has been recently appraised for BB&T at a value of \$1.8 million. Layden affidavit ¶6 (ROA, p\_\_\_\_). The four principals of Hook Point are Albert Dooley, Ron Vaughn, Clifford Wingard and Tom Wingard. Each executed an

unconditional personal guarantee by which they jointly and severally secured all amounts owed by Hook Point to BB&T Layden affidavit, Exhibits F, G, H and I (ROA, pp \_\_\_)

### **Default by Hook Point**

Hook Point has not sold any homes or lots in Panama Pointe Layden affidavit ¶6 (ROA, p \_\_\_) According to Hook Point's complaint "After completion of the infrastructure work, Hook Point began construction on the first home During the construction, it became apparent that the market for large upscale homes had evaporated" Complaint ¶11 (emphasis added) (ROA, p \_\_\_\_\_)

Hook Point has committed numerous acts of default as defined in the Loan Agreement, including failing to pay 2009 real estate taxes and failure to make required payments under Notes 1 and 2 Layden affidavit ¶¶3 and 4 (ROA, p \_\_\_\_\_) BB&T gave notice of default to Hook Point on September 29, 2010 and again on December 21, 2010 Layden affidavit ¶4, Exhibits C and D (ROA, p \_\_\_) At the hearing on January 4<sup>th</sup> counsel for Hook Point acknowledged that Hook Point was in default Transcript pp 10, 11 (interest in "arrears" in the amount of \$70,000) (ROA, p \_\_\_, lines \_\_\_) The Loan Agreement has a standard acceleration provision that allows BB&T to declare the entire amount of the loans due upon default Loan Agreement, Exhibit A to Layden affidavit, §9 01 (ROA, p \_\_\_) BB&T exercised its rights to accelerate the loans on December 21, 2010 See Exhibit C to Layden affidavit (ROA, p \_\_\_) Thus it is undisputed that Hook Point is in default and currently owes BB&T approximately \$5 1 million

### **The First Reliance Letter of Credit**

As required under the Loan Agreement, Hook Point applied to First Reliance for an irrevocable letter of credit in favor of BB&T Exhibit D to Layden affidavit (ROA, p \_\_\_\_). Although BB&T as the beneficiary had the right to approve the letter of credit (see Section 1, p 2 of Loan Agreement, Exhibit A to Layden affidavit (ROA, p \_\_\_\_)), Hook Point applied for the letter of credit (Hook Point is referred to as “Borrower” in the letter of credit) and it was issued by First Reliance Exhibit D to Layden affidavit (ROA, p \_\_\_\_). The \$1.5 million letter of credit obligated First Reliance to honor a draft from BB&T that included this language:

**DRAFT TERMS AND CONDITIONS** Lender shall honor drafts submitted by Beneficiary under the following terms and conditions: **DRAFT MUST BE 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 and Trust Company as Lender; b) The amount of the draft does not exceed the amount due to the Beneficiary under the obligations; and c) The signer has the authority to act for the Beneficiary with regard to the Letter of Credit. All drafts must be wired directly into the Beneficiary’s account at BB&T into account #0005221067241 ABA #053201607.

Exhibit D to Layden affidavit (ROA, p \_\_\_\_).

On December 21, 2010, after declaring the loans in default and exercising its rights under the acceleration provision, BB&T delivered the required documents to First Reliance with a draft for \$1.5 million Layden affidavit ¶5 (ROA, p \_\_\_\_.) and Exhibit 5 to Layden affidavit (ROA, p \_\_\_\_). On December 23, 2010 Hook Point filed this action and obtained an ex parte TRO preventing First Reliance from honoring the draft.

Subsequently, on January 4, 2011 Judge Keesley determined to keep the injunction in place and then issued the order under appeal

## ARGUMENT

**THE ORDER GRANTING HOOK POINT'S MOTION FOR A TEMPORARY INJUNCTION MUST BE REVERSED BECAUSE (1) HOOK POINT FAILED TO SHOW THAT IT WOULD SUFFER IRREPARABLE HARM WITHOUT THE INJUNCTION, (2) HOOK POINT FAILED TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIMS, AND (3) HOOK POINT HAS AN ADEQUATE REMEDY AT LAW**

### Introduction

In Poynter Investments, Inc v Century Builders, 387 S C 583, 694 S E 2d 15 (2010) the Supreme Court clarified that preliminary injunctive relief should be granted “ only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law ”<sup>1</sup> Poynter, 387 S C at 586-587, 694 S E 2d at 17 The Court has emphasized that a preliminary injunction is a “drastic remedy” and that a failure of the moving party to show any of the three required elements means that the injunction should not be issued See Scratch Golf v Dunes West, 361 S C 117, 121, 603 S E 2d 905, 907-908 (2004) In this case Hook Point failed to make the required showing on any of the three elements

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<sup>1</sup> The order under appeal analyzes the motion for injunction under Section 36-5-109(b) of the South Carolina Code of Laws See Order at 4 5 Section 36 5-109(b) provides for injunctive relief relating to letters of credit but in subsection (b)(3) it requires that an injunction against payment of a letter of credit may only issue if “all of the conditions to entitle a person to the relief under the law of this State have been met Accordingly, §36-5 109(b) does not relieve Hook Point from having to show irreparable harm likelihood of success and the absence of an adequate remedy at law

## **1 Hook Point Failed to Show That It Would Suffer Irreparable Injury Without the Temporary Injunction**

In support of its motion for temporary injunction preventing payment of the letter of credit, on December 23, 2010, Hook Point submitted the affidavit of managing member Thomas Wingard (“Wingard affidavit 1”) (ROA, p \_\_\_\_). That affidavit states the following about irreparable harm: “Any payment by First Reliance in excess of \$70,000 will cause Hook Point, and Dooley, Vaughn, Wingard and Wingard irreparable harm, for which it has no adequate remedy at law.” Wingard affidavit 1 ¶10 (ROA, p \_\_\_\_). Apparently recognizing the weakness of its initial showing of irreparable harm, Hook Point filed, on the eve of the January 4<sup>th</sup> hearing, a supplemental affidavit signed by Wingard (“Wingard affidavit 2”) (ROA, p \_\_\_\_). The thrust of the argument presented in the second affidavit is that Hook Point will be harmed if First Reliance honors the \$1.5 million letter of credit because then Hook Point will owe First Reliance \$1.5 million. See Wingard affidavit 2 ¶2(b) and (c) (ROA, p \_\_\_\_). The affidavit also discusses the fact that the principals of Hook Point are guarantors of the obligation to First Reliance and that they will suffer harm along with their company. Wingard affidavit 2, ¶2(c) and (d) (ROA, p \_\_\_\_).

The fundamental problem with the analysis presented by Hook Point to try to meet its burden of showing irreparable injury is a math problem. As described in the Statement of Facts, because Hook Point is in default and because BB&T has accelerated the amounts due under the Loan Agreement, Hook Point today owes BB&T approximately \$5.1 million. If the injunction is dissolved and First Reliance is allowed to honor the letter of credit by paying BB&T \$1.5 million then Hook Point will owe BB&T \$3.6 million and First Reliance \$1.5 million. Hook Point will owe exactly the same

amount, it will just owe two banks instead of one. In other words, if BB&T is allowed to recover on the letter of credit according to its terms Hook Point will not suffer any irreparable injury and in fact will be in the same financial position as before the letter of credit is paid.

It is the obligation of Hook Point to demonstrate that it – the LLC – will suffer irreparable injury without the injunction. The argument advanced in the Wingard affidavit about harm to the Hook Point principals because they are guarantors of the debt to First Reliance is really irrelevant to the question of whether the injunction should have been issued. Nevertheless, it is clear that, like Hook Point, the guarantors' financial position would not change if the letter of credit were honored. The same people have guaranteed both loans. The only difference is to which bank they are going to owe money, payment of the full amount of the letter of credit will not affect the amount they owe.

## **2 Hook Point Has Failed to Show a Likelihood of Success on the Merits**

It is significant that the relief sought by Hook Point is to prevent payment by First Reliance of an irrevocable letter of credit issued in favor of BB&T. Under the law governing letters of credit the grounds for refusing to honor a letter of credit are exceedingly narrow and Hook Point has not alleged any ground that would provide a basis for First Reliance to dishonor the letter of credit.

The statutory law governing letters of credit in South Carolina is Chapter 5 of the Uniform Commercial Code as codified in Chapter 5 of Title 36 of the South Carolina Code of Laws. The application of those provisions was considered by the Fourth Circuit

Court of Appeals in Amwest Surety Insurance Company v Republic National Bank, 977 F 2d 122 (4<sup>th</sup> Cir 1992)

Letters of credit have long been used to facilitate the financing of commercial transactions between buyers and sellers by providing a certain and reliable means to ensure payment for goods delivered or services rendered. As elsewhere, in South Carolina, whose law governs this diversity case, a letter of credit is a tripartite arrangement under which one party establishes a credit, usually at a bank, on which it authorizes a third party to draw, provided certain conditions are met. The bank, as a mere stakeholder of the credit, issues a letter to the third party (known as the beneficiary) confirming the credit and stating the conditions for any draw to be made against it. In essence, the bank's promise to pay the beneficiary upon the beneficiary's timely presentation to the bank of documents conforming to the conditions delimited in the letter replaces the promise of the party which established the credit.

The virtues of letters of credit are their simplicity, reliability, and predictability, all of which depend upon the limitation of the issuer's duties to the ministerial application of a letter's terms. Thus under the Uniform Commercial Code, which South Carolina has adopted, in addition to the ordinary duties of a bank, an issuer is only obliged (1) to examine carefully documents presented by the beneficiary for compliance with the terms of the letter of credit and, absent a facial defect, (2) **to honor the draft if the documents do comply-regardless of whether the underlying contract between beneficiary and customer has, in fact, been performed,** and without assuming any liability if the documents wrongly assert that it has.

Amwest Surety Company v Republic National Bank, 977 F 2d at 125-126 (internal citations omitted) (emphasis supplied) <sup>2</sup>

This discussion makes it clear that the law of South Carolina on letters of credit, like that of other jurisdictions, makes payment dependent only on the presentation of specified documents and not on the facts and circumstances of the underlying transaction. First Reliance must pay according to the written terms of the letter of credit alone and

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<sup>2</sup> The White and Summers treatise on the UCC puts it this way: "Bankers sometimes make the same point by describing the transaction between the bank and the beneficiary as a 'paper transaction.' By that they mean the issuer's agent should be able to sit in a business suit at a desk in a bank, and by looking at papers that are presented determine whether the bank is obliged to make payment or not. She is not obliged and indeed, is foreclosed from putting on overalls and going into the field to determine whether the underlying contract has been performed." 3 White & Summers, Uniform Commercial Code § 26-2 (5<sup>th</sup> ed), 3WS UCC §26-5

without reference to any dispute between Hook Point and BB&T. None of the causes of action alleged in the Hook Point complaint raise any issue with regard to BB&T's compliance with the written terms of the letter of credit. Layden's affidavit and Exhibits E and F to the affidavit make it clear that BB&T has met its obligations under the letter of credit. Layden affidavit ¶ 5 (ROA, p\_\_\_\_) Accordingly, Hook Point has no likelihood of success on the merits with respect to preventing payment on the letter of credit.

Although Hook Point's original motion for a temporary injunction presented no argument under the U C C , at the hearing on its motion Hook Point made an argument based on S C Code § 36-5-109 and it was this provision that was principally relied upon by the circuit court in granting the injunction. Hook Point relies on subsection (b) of §36-5-109

(b) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons

The argument made by Hook Point is that BB&T is attempting to use the letter of credit to "facilitate a material fraud" because in the September 2007 commitment letter BB&T allegedly agreed to a condition being placed on the letter of credit that was not actually incorporated in the letter of credit. More specifically Hook Point bases its argument on the fact that the commitment letter included a provision that states "Letter of credit to be used as last resort for interest carry ." See Exhibit A to Complaint, ROA, p \_\_\_\_ No such provision was included in the letter of credit itself as discussed above, it requires only a showing that Hook Point is in default on the November 16, 2007 Loan

Agreement – there is no mention of an “interest carry ” In addition, the Loan Agreement has no provision limiting the letter of credit to payment of interest

Accordingly, in order to show that it is likely to succeed on the merits of its claim asserted under the §36-5-109(b) material fraud provision, Hook Point must show that somehow BB&T caused the letter of credit – applied for by Hook Point and issued by First Reliance - to be issued missing a material term This fraud theory is a stretch under any circumstance but it fails miserably when evaluated in the context of cases applying this provision of the U C C In Itek Corporation v First Bank of Boston, 730 F2d 19 (1<sup>st</sup> Circuit 1984) Judge (now Justice) Breyer had occasion to consider the application of an earlier (but not substantively different) version of the “material fraud” provision of §36-5-109 The opinion notes the strong need to interpret the fraud provision narrowly

We answer this question fully aware of the need to interpret the “fraud” provision narrowly The very object of a letter of credit is to provide a near foolproof method of placing money in its beneficiary's hands when he complies with the terms contained in the letter itself-when he presents, for example, a shipping document that the letter calls for or (as here) a simple written demand for payment Parties to a contract may use a letter of credit in order to make certain that contractual disputes wend their way towards resolution with money in the beneficiary's pocket rather than in the pocket of the contracting party Thus, courts typically have asserted that such letters of credit are “independent” of the underlying contract And they have recognized that examining the rights and wrongs of a contract dispute to determine whether a letter of credit should be paid risks depriving its beneficiary of the very advantage for which he bargained, namely that the dispute would be resolved while he is in possession of the money

Itek Corporation v First National Bank of Boston, 730 F2d at 24 (internal citations omitted) The opinion goes on to acknowledge that there is a need for the fraud exception to address those occasions when strict application of the terms of a letter of credit is not appropriate

Despite these reasons for hesitating to enjoin payment of a letter of credit, the need for an exception is apparent. Suppose the document for which a letter calls has been forged. Or suppose that the beneficiary has knowingly failed to comply with an important term contained in the underlying contract—a term that the parties intended as a precondition for the beneficiary's exercise of his right to call the letter. Courts have not hesitated to examine the documents that the letter calls for to see if they show fraud. And courts have also enjoined payment where there was relevant fraud in the underlying transaction. Thus, in a leading case, a seller, contractually committed to ship bristles to a buyer, shipped rubbish instead. The court refused to allow the seller to call the letter, put the money in his pocket, and let the buyer sue him, for in the court's view, the seller did not even have a colorable claim that he had done what the contract called for as a precondition to obtaining the money, namely, ship the bristles.

Itek Corporation v First National Bank of Boston, 730 F2d at 24 (internal citations omitted). In the Itek case the First Circuit applied the fraud exception where the party calling the letter of credit knew that the underlying contract – to ship high tech, defense-related goods to Iran after the 1979 overthrow of the Shah – would never be performed.

In Airline Reporting Corp v First National Bank of Holly Hill, (4<sup>th</sup> Cir 1987) the Fourth Circuit Court of Appeals took a similar approach to the fraud exception in a case applying South Carolina law. The Airline Reporting case cites the Itek case approvingly and states that the fraud “exception is construed narrowly and applies only in circumstances so egregious in nature as to vitiate the entire underlying transaction so that the ‘legitimate purposes of the independence of the issuer’s obligation would no longer be served.’” Airline Reporting Corp v First National Bank of Holly Hill, 832 F2d at 828, citing Roman Ceramics Corp v Peoples National Bank, 714 F2d 1207 (3<sup>rd</sup> Cir 1983). In applying the fraud exception in the Airline Reporting case the court noted that there was a significant dispute between the parties to the underlying transaction but found that dispute did not involve intentional misrepresentation so egregious as to vitiate the

entire underlying transaction See Airline Reporting v First National Bank of Holly Hill, 832 F2d at 829-830 It therefore enforced the payment of the letter of credit

Applying the approach of these cases to the material fraud exception of §36-5-109(b) is straightforward There is no dispute regarding these facts

- BB&T loaned Hook Point \$5.1 million,
- Hook Point is in default on the Loan Agreement and it owes BB&T the \$5.1 million,
- The letter of credit was issued by First Reliance and by its terms it only requires an affirmation that Hook Point is in default on the November 16, 2007 Loan Agreement,
- The letter of credit includes no reference to being limited to the payment of interest,
- BB&T made a proper presentation of all documents required by the letter of credit

On these facts there is absolutely no basis for finding that Hook Point is likely to succeed on the merits of its claim that payment of the full amount of the First Reliance letter of credit would “facilitate a material fraud ”

### **3 Hook Point has an Adequate Remedy at Law**

In addition to showing irreparable injury and likelihood of success on the merits Hook Point must show that it doesn't have an adequate remedy at law for its claims Hook Point can make no such showing because, even if it is successful on its claims, it has an adequate remedy at law in the form of money damages See Milliken & Co v Morin, 386 S C 1, 685 S E 2d 828 (Ct App 2009) (jury award of damages adequate remedy precluding grant of injunctive relief), Scratch Golf v Dunes West Residential Golf Properties, Inc., 361 S C 117, 603 S E 2d 905 (2004) (preliminary injunction inappropriate where the legal remedy of attachment was available)

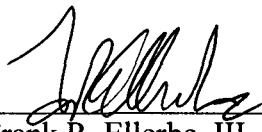
In the present case Hook Point's causes of action allege claims for lost profits that it would have received if its development was successful Putting aside the factual

difficulties facing such claims with respect to a development for a market that has “evaporated,” it is clear that a claim for lost profits is a claim for money damages. To the extent that Hook Point can prove some type of claim for damages against BB&T those damages will be set off against the \$5.1 million that Hook Point owes BB&T. This analysis underscores the fact that this case is about money and is a completely inappropriate case for injunctive relief. Because Hook Point’s claims are the type that result in money damages, Hook Point has not stated a claim for injunctive relief and it has not made the required showing to obtain injunctive relief.

**CONCLUSION**

The order granting Hook Point's motion for a temporary injunction should be reversed. Hook Point failed to make the showing necessary to support preliminary injunctive relief. (1) Hook Point will not suffer irreparable harm if the letter of credit is paid in full; the additional debt it will have to First Reliance will be directly set off by the reduction in what it owes BB&T, (2) Hook Point has not made a showing that it is likely to be successful on its claim to rewrite the letter of credit; its argument under the material fraud provision of §36-5-109(b) conflicts with the correct interpretation of that provision, and (3) Hook Point's claims are for money damages and it therefore has an adequate remedy at law and is not eligible for injunctive relief.

Dated this 6th day of April, 2011

By  \_\_\_\_\_  
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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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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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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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INITIAL BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

<b>Table of Authorities</b>	<b>iii</b>
<b>Statement of Issues</b>	<b>iv</b>
<b>Statement of the Case</b>	<b>1</b>
<b>1    Procedural history</b>	<b>1</b>
<b>2    Facts</b>	<b>2</b>
<b>Standard of Review</b>	<b>6</b>
<b>Argument</b>	<b>7</b>
<b>1    Hook Point Properly Demonstrated That It Would Suffer Irreparable Harm Without the Temporary Injunction</b>	<b>9</b>
<b>2    Hook Point Has Demonstrated a Likelihood of Success on the Merits</b>	<b>11</b>
<b>3    Hook Point Does Not Have an Adequate Remedy at Law</b>	<b>13</b>
<b>Conclusion</b>	<b>15</b>

## TABLE OF AUTHORITIES

### Cases

<i>AJG Holdings LLC v Dunn</i> , 382 S C 43, 674 S E 2d 505 (Ct App 2009)	6
<i>Bethel M E Church v City of Greenville</i> , 211 S C 442, 45 S E 2d 841 (1947)	9
<i>City of Columbia v Pic-A-Flick Video Inc</i> , 340 S C 278, 531 S E 2d 518 (2000)	6
<i>County of Richland v Simpkins</i> , 348 S C 664, 560 S E 2d 902 (Ct App 2002)	6
<i>Helsel v City of N Myrtle Beach</i> , 307 S C 29, 413 S E 2d 824 (1992)	11
<i>Johnson v Phillips</i> , 315 S C 407, 433 S E 2d 895 (Ct App 1993)	9
<i>Kirk v Clark</i> , 191 S C 205, 4 S E 2d 13 (1939)	9
<i>MailSource LLC v M A Bailey &amp; Associates</i> , 356 S C 363, 588 S E 2d 635 (Ct App 2003)	11, 13
<i>Mid-Am Tire Inc v PTZ Trading Ltd</i> , 768 N E 2d 619 (Ohio 2002)	12
<i>Peek v Spartanburg Reg'l Healthcare Sys</i> , 367 S C 450, 626 S E 2d 34 (Ct App 2005)	6, 8, 9, 11, 13
<i>Scratch Golf Co v Dunes W Residential Golf Properties Inc</i> , 361 S C 117, 603 S E 2d 905 (2004)	8, 11, 13
<i>Williams v Jones</i> , 92 S C 342, 75 S E 705 (1912)	11
 <b><u>Statutes</u></b>	
S C Code Ann § 36-5-109(b) (1976)	7, 8
 <b><u>Other Authorities</u></b>	
Flanagan, James F , <i>South Carolina Civil Procedure</i> , 508 (2 <sup>nd</sup> ed 1996)	9

## **STATEMENT OF ISSUES ON APPEAL**

- I Did the circuit court abuse its discretion by issuing a temporary injunction where it found evidence that (1) there would be irreparable harm to the plaintiff if the injunction was not granted, (2) the plaintiff was likely to be successful on the merits of its claims, and (3) the plaintiff did not have an adequate remedy at law?

## STATEMENT OF THE CASE

### **1 Procedural history**

This action arises from the development of a residential subdivision on Lake Murray and loans issued to finance that project. This action was commenced by a summons and complaint filed by Hook Point, LLC (“Hook Point”) on December 23, 2010 with seven causes of action alleging typical lender liability claims. Compl (ROA p \_\_\_\_). On the same day Plaintiff Hook Point sought and obtained a temporary restraining order pursuant to the Order of the Hon R Knox McMahon, which prevented the Defendant Branch Banking and Trust (“BB&T”) from drawing on a letter of credit (the “Letter of Credit”) issued by First Reliance Bank (“First Reliance”). Order Granting TRO (ROA p \_\_\_\_). The Order also provided, *inter alia*, for a hearing on Hook Point’s motion for a preliminary injunction on Friday, December 31, 2010, which was continued until Tuesday, January 4, 2011 by agreement of the parties. Order Granting TRO (ROA p \_\_\_\_). On Tuesday, January 4, 2011, the Hon William P Keesley heard the Hook Point’s motion for a preliminary injunction. Order Granting Preliminary Injunction (ROA p \_\_\_\_). Judge Keesley accepted affidavits and briefs from Hook Point and BB&T, and heard oral testimony from Hook Point member Albert J Dooley, Jr. Order Granting Preliminary Injunction (ROA p \_\_\_\_). After extensive review, Judge Keesley issued an order granting Hook Point’s motion. Order Granting Preliminary Injunction (ROA p \_\_\_\_).

The order also provided that Hook Point and First Reliance allow BB&T a \$70,000 draw on the Letter of Credit for the interest due as of the date of the order, that the Letter of Credit be extended for one year, and that Hook Point post a bond for

\$50,000 Order Granting Preliminary Injunction (ROA p \_\_\_\_ ) Subsequent to receiving the order, the Letter of Credit has been extended an additional year, BB&T has collected at least two draws amounting to over \$70,000 on the Letter of Credit, and Hook Point has posted a \$50,000 cash bond with the court (ROA p \_\_\_\_ ) BB&T now appeals the circuit court's order granting the preliminary injunction (ROA p \_\_\_\_ )

## **2 Facts**

Hook Point is operated for the purpose of establishing a residential subdivision Compl ¶ 5 (ROA p \_\_\_\_ ) Hook Point is the developer of a single residential subdivision located on approximately nineteen acres fronting on Lake Murray and S C Highway #378 known as "Panama Pointe " Compl ¶ 5 (ROA p \_\_\_\_ ) In order to finance the required subdivision improvements and to retire a prior acquisition loan, Hook Point sought a loan from BB&T Compl ¶ 6 (ROA p \_\_\_\_ ) On or about September 6, 2007, BB&T issued a Commitment Letter to Hook Point Compl ¶ 6 (ROA p \_\_\_\_ ) The Commitment Letter agreed to lend Hook Point \$5,100,000 for the completion of "development and residential lots at Panama Pointe" and to provide a line of credit in the amount of \$2,000,000 for the construction of houses upon certain terms and conditions Compl ¶¶ 6 & 10 (ROA p \_\_\_\_ ) The Commitment Letter listed the collateral for the loan as

*3 Collateral The Loan will be secured by a first lien mortgage (the Mortgage ) on Panama Pointe with all lots and improvements near Lexington South Carolina and an assignment of all architectural/engineering documents and construction contracts (the Collateral )*

Compl Ex A (ROA p \_\_\_\_ )

In addition, the Commitment Letter required a \$1,500,000 letter of credit approved by BB&T as follows

*23 Covenants The Borrower shall adhere to the following covenants which shall be included along with other covenants in a loan agreement to be executed by the Bank and the Borrower at or prior to the Loan closing*

*(A) Other Collateral/Interest Reserve Option*

*Presales of 50% \$750 000 L/C Presales of 40% \$900 000 L/C Presales of 30% \$1 050 000 L/C Presales of 20% \$1 200 000 L/C \$1 500 000 L/C with less than 20% presales 10% deposit required on all pre sales*

*Letter of Credit approved by BB&T and issuing bank with unconditional draws Maturity of letter to extend 90 days after loan maturity Letter of credit to be used as last resort for interest carry*

Compl Ex A (ROA p \_\_\_) (emphasis added) Subsequently, on November 16, 2007, Hook Point and BB&T entered into a formal loan agreement (the “Loan Agreement”) Compl ¶ 7 (ROA p \_\_\_) On the same day, First Reliance Bank issued the Letter of Credit which is the subject of this action (the “Letter of Credit”) Compl Ex C (ROA p \_\_\_) The Letter of Credit allows draws and partial draws on presentation of 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*

Compl Ex C (ROA p \_\_\_) The Letter of Credit is secured by a deposit of roughly \$310,000 in cash on deposit with First Reliance, and several real properties owned by an affiliate of Hook Point Hook Point Supplemental Aff ¶ 2 (ROA p \_\_\_) In the event of a draw on the Letter of Credit, First Reliance has the right to foreclose on these properties and take the cash deposit Hook Point Supplemental Aff ¶ 2 (ROA p \_\_\_)

On December 21, 2010, BB&T delivered to First Reliance a demand letter seeking to draw the full amount of the Letter of Credit, i.e. \$1,500,000 Compl ¶ 14 (ROA p \_\_\_\_). The demand states that its presentment is accompanied by

- 1 *The Sight Draw as required by the Letter of Credit*
- 2 *The original Letter of Credit and*
- 3 *A notarized statement from BB&T officer that (a) Hook Point LLC ( Borrower ) has failed to perform its obligations under the Loan Agreement and Promissory Note dated November 16 2007 (b) the draw amount does not exceed the obligations of Borrower to BB&T and (c) as signor I have authority to act for BB&T as it relates to the Letter of Credit*

Compl Ex C (ROA p \_\_\_\_). The Letter of Credit expires, by its terms, on February 13, 2011 Compl Ex C (ROA p \_\_\_\_). But First Reliance has now extended the Letter of Credit until February 13, 2012 (ROA p \_\_\_\_).

At the time of the preliminary injunction hearing, Hook Point and BB&T differed in numerous respects as to their relative culpability and the status of the Loan, however, they agreed that there was approximately \$70,000 in interest due and owing under the terms of the Loan Documents Order Granting Preliminary Injunction (ROA p \_\_\_\_). BB&T has now received at least two draws amounting to over \$70,000 on the Letter of Credit pursuant to the order of the circuit court (ROA p \_\_\_\_).

According to the affidavit of Hook Point, it will be irreparably harmed if the injunction is not issued because (1) The Letter of Credit is secured by certain cash, real property, and other collateral, and if BB&T draws upon the Letter of Credit, in excess of the approximately \$70,000 of interest owed, the collateral referenced above will be taken by First Reliance Bank, thereby effectively putting Hook Point, LLC out of business and bankrupting the limited liability company, (2) if Hook Point, LLC is put out of business and/or bankrupted by a \$1,500,000 draw on the Letter of Credit, as stated heretofore, it

will cost Hook Point, LLC and its members an equity investment of approximately \$1,600,000, (3) payment of the Letter of Credit will have a negative domino effect on the guarantors, likely causing other lenders to refuse to renew loans and lines of credit with the result that the undersigned's other businesses will be required to lay-off several employees and face other significant financial difficulties, and (4) if BB&T is permitted to draw upon the Letter of Credit, as it claims it is entitled to do, Hook Point, LLC will be financially ruined, will not be able to continue as a going concern, and will likely face bankruptcy Hook Point Supplemental Aff ¶ 2 (ROA p \_\_\_\_)

At the hearing on Tuesday, January 4, 2011, Hook Point member Albert J Dooley, Jr ("Mr Dooley") testified that the Letter of Credit was always intended to be used as a last resort for interest Tr pp 55-56, line 3 (ROA p \_\_, lines \_\_\_\_). Mr Dooley testified that during negotiations with BB&T, the letter of credit was a substantial issue that was discussed at length Tr pp 53-55 (ROA p \_\_, lines \_\_\_\_). Hook Point was led to believe, and the commitment letter stated, that the Letter of Credit was to be used only as a last resort for interest Tr pp 54-55 (ROA p \_\_, lines \_\_\_\_). This was a material fact that induced Hook Point into entering the loan and obtaining the Letter of Credit Compl ¶¶ 33-36 (ROA p \_\_\_\_). It was not until 2010 that Hook Point became aware that BB&T intended to draw on the Letter of Credit for more than just interest Tr p 55, lines 5-18 (ROA p \_\_, lines \_\_\_\_).

### **Standard of Review**

“The grant of an injunction is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion” *AJG Holdings LLC v Dunn*, 382 S C 43, 49, 674 S E 2d 505, 507 (Ct App 2009) (citing *City of Columbia v Pic-A-Flick Video Inc*, 340 S C 278, 282, 531 S E 2d 518, 520-21 (2000), *Peek v Spartanburg Reg'l Healthcare Sys*, 367 S C 450, 454, 626 S E 2d 34, 36 (Ct App 2005)), *holding modified by Poynter Invs Inc v Century Builders of Piedmont, Inc*, 387 S C 583, 694 S E 2d 15 (2010)) “An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law” *Id* (quoting *Peek* 367 S C at 454, 626 S E 2d at 36, *County of Richland v Simpkins* 348 S C 664, 668, 560 S E 2d 902, 904 (Ct App 2002)), *holding modified by Poynter Invs Inc v Century Builders of Piedmont Inc*, 387 S C 583, 694 S E 2d 15 (2010)) When this standard is applied to the facts of this case, it is clear that the trial court did not abuse its discretion in issuing the preliminary injunction

## ARGUMENT

**THE ORDER GRANTING HOOK POINT'S MOTION FOR A TEMPORARY INJUNCTION SHOULD BE UPHeld BECAUSE THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN FINDING EVIDENCE THAT (1) HOOK POINT WOULD SUFFER IRREPARABLE HARM WITHOUT THE INJUNCTION, (2) HOOK POINT SHOWED A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIMS, AND (3) HOOK POINT DOES NOT HAVE AN ADEQUATE REMEDY AT LAW**

### Introduction

Injunctive relief dealing with a letter of credit is governed by S C Code Ann § 36-5-109(b) (1976), which provides

If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that

(1) the relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer,

(2) a beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted,

(3) all of the conditions to entitle a person to the relief under the law of this State have been met, and

(4) on the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under subsection (a)(1)

S C Code Ann § 36-5-109(b) provides that a court may issue an injunction when an applicant makes a claim of fraud and certain criteria are met. In this case, Hook Point has alleged fraud in both its complaint and its affidavits

Hook Point sought a preliminary injunction to prevent BB&T from drawing on the Letter of Credit, and from First Reliance paying on the Letter of Credit, in excess of the outstanding interest Mot Preliminary Injunction (ROA p \_\_\_\_). On appeal, BB&T only challenges the circuit court's ruling on the third element of S C Code Ann § 36-5-109(b) Initial Br Appellant (ROA p \_\_\_\_).

The third element of 36-5-109(b) requires that all of the conditions necessary for injunctive relief have been met under state laws. In South Carolina, an injunction is a remedy that is issued in the court's discretion to prevent irreparable harm to the plaintiff. See *Scratch Golf Co v Dunes W Residential Golf Properties Inc*, 361 S C 117, 121, 603 S E 2d 905, 907 (2004). "To establish a cause of action for injunction, the plaintiff must show '(1) it would suffer irreparable harm if the injunction is not granted, (2) it will likely succeed on the merits of the litigation, and (3) there is an inadequate remedy at law.'" *Peek*, 367 S C at 454-55, 626 S E 2d at 36 (quoting *Scratch Golf*, 361 S C at 121, 603 S E 2d at 908).

Therefore, the sole issue on appeal is whether the circuit court abused its discretion in granting Hook Point preliminary injunctive relief until the merits of its case could be heard. In its appeal, BB&T has only challenged the circuit court's ruling on the three South Carolina common law elements required for injunctive relief. Initial Br Appellant (ROA p \_\_\_\_). Appellant contends that Hook Point has not met the requirements of these elements. Initial Br Appellant (ROA p \_\_\_\_). However, Hook Point properly demonstrated all of these elements, and the circuit court did not abuse its discretion in finding evidence of each of these elements.

**1 Hook Point Properly Demonstrated That It Would Suffer Irreparable Harm Without the Temporary Injunction**

Irreparable harm means that the injunction is reasonably necessary to protect the rights of the plaintiff pending the litigation *Johnson v Phillips*, 315 S C 407, 433 S E 2d 895 (Ct App 1993) *aff'd in part rev'd in part sub nom Smith v Phillips*, 318 S C 453, 458 S E 2d 427 (1995) It does not mean that the injury is beyond the possibility of compensation in damages Flanagan, James F , *South Carolina Civil Procedure*, 508 (2<sup>nd</sup> ed 1996) (citing *Bethel M E Church v City of Greenville*, 211 S C 442, 45 S E 2d 841 (1947)) “Whether ‘a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules ’” *Peek*, 367 S C at 455, 626 S E 2d at 36 (quoting *Kirk v Clark*, 191 S C 205, 211, 4 S E 2d 13, 16 (1939))

In this case, the circuit court correctly found that Hook Point would be significantly and irreparably harmed if the injunction was not granted The Letter of Credit with First Reliance is secured by certain cash and real property If the Letter of Credit is fully drawn upon, First Reliance will foreclose on the properties securing the Letter of Credit Once the properties are foreclosed on and/or sold, those properties are lost to Hook Point Additionally, Hook Point will lose any money or other deposits it has with First Reliance

The affidavit provided by Hook Point also provides testimony that the individual members of Hook Point will suffer irreparable harm if the injunction is not granted Hook Point Supplemental Aff ¶ 2 (ROA p \_\_\_\_ ) The success of several other businesses and

entities are tied to the Letter of Credit and the viability of Hook Point, and if the injunction is not granted they will also face irreparable harm

On the other hand, BB&T has failed to show any harm from the granting of the injunction. As previously stated, First Reliance has extended the Letter of Credit for one year (ROA p \_\_\_\_). This effectively removes all risk to BB&T. With the Letter of Credit still in place, BB&T remains as secure as it was prior to any injunction. In fact, BB&T is now more secure than it was prior to the issuance of the injunction as Hook Point has now posted an additional \$50,000 cash bond with the court (ROA p \_\_\_\_). BB&T suffers no harm and can still collect on the \$1,500,000 Letter of Credit should it prevail on the merits.

In its brief, BB&T argues that the question of irreparable harm is simply a math problem. Initial Br Appellant p 8 (ROA p \_\_\_\_). BB&T argues that a debt due to First Reliance is the same as a debt due to BB&T. Initial Br Appellant pp 8-9 (ROA p \_\_\_\_). However, BB&T is mixing apples and oranges. BB&T fails to recognize that while Hook Point has significant defenses to the debt due to it, as well as significant lender liability claims stated in its complaint against BB&T, Hook Point probably has no defenses to the debt due to First Reliance under the Letter of Credit.

Hook Point initiated this action against BB&T because it claimed there were significant fraud and other lender liability theories related to the debt owed to BB&T and the handling of that debt. This action presents several issues of fact that must be determined by a court. On the other hand, if the Letter of Credit is fully drawn upon, Hook Point probably has no defenses and will be forced to pay the debt to First Reliance causing financial ruin and otherwise to Hook Point, its members, and its related entities.

BB&T is essentially asking the court to convert a disputed debt into an undisputed debt. This so-called “math problem” is simply a tactic to circumvent the current litigation and cause the exact irreparable harm which the circuit court sought to enjoin. The circuit court did not abuse its discretion in finding evidence that Hook Point would be irreparably harmed if the injunction was not granted, and thus the injunction should be upheld.

## **2 Hook Point Has Demonstrated a Likelihood of Success on the Merits**

The second element required for an injunction provides that a plaintiff must show a likelihood of success on the merits. *Scratch Golf*, 361 S.C. at 121, 603 S.E.2d at 908. “When seeking a preliminary injunction, the plaintiff need not prove an absolute legal right, the plaintiff need only present ‘a fair question to raise as to the existence of such a right.’” *Peek*, 367 S.C. at 456, 626 S.E.2d at 37 (quoting *Williams v Jones*, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912)). “The determination of whether to grant an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made.” *Id.* (citing *MailSource LLC v MA Bailey & Assocs.*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct App 2003) holding modified by *Poynter Invs. Inc. v Century Builders of Piedmont Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010)). “Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.” *Id.* (quoting *Helsel v City of North Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992)).

In this case, Hook Point has a document signed by the bank which contains the express condition that the Plaintiff alleges fraudulently induced them into the transaction.

Compl Ex A (ROA p \_\_\_) This is not a mere allegation, but is in black and white, in a document drafted by the bank that was used to induce the Plaintiff into the Loan Agreement. The commitment letter expressly provided that “Letter of credit to be used as last resort for interest carry.”

Additionally, Mr. Dooley provided testimony at the hearing that this language was included in the commitment letter specifically as a last resort for interest. Tr pp 55-56 lines 3 (ROA p \_\_, lines \_\_\_). During their negotiations, Hook Point and BB&T talked at length about the Letter of Credit and its use for interest only. Tr pp 53-55 (ROA p \_\_, lines \_\_\_). As such, this was a material provision of the commitment letter that induced Hook Point into entering the loan and having the Letter of Credit issued. Compl ¶¶ 33-36 (ROA p \_\_\_). Indeed, courts have held that “fraud in the inducement of the issuance of a letter of credit is grounds for a court to grant injunctive relief against the payment of such letter of credit to the beneficiary who perpetrated such fraud.” *Mid-America Tire, Inc v PTZ Trading Ltd*, 768 N.E.2d 619, 628 (Ohio 2002). This fraudulent inducement is directly related to the entire loan transaction, including any documents related to the Letter of Credit. Accordingly, any documents presented to First Reliance were tainted by fraud.

Additionally, there was fraud in the underlying transaction which would also warrant an injunction against a payment on the Letter of Credit. The Letter of Credit provides that BB&T must confirm that “[t]he amount of the draft does not exceed the amount due to the Beneficiary under the obligations.” Compl Ex C (ROA p \_\_\_). BB&T provided a fraudulent affidavit that incorrectly confirmed the amount of the draft did not exceed the amount due under the obligations, despite the commitment letter

which specifically provides that the Letter of Credit will only be used as a last resort for interest payments. Thus, the presentation of the Letter of Credit was fraudulent and Hook Point is likely to succeed on the merits. The circuit court did not abuse its discretion in finding that there was evidence that Hook Point had a likelihood of success on the merits.

### **3 Hook Point Does Not Have an Adequate Remedy at Law**

As a third element for an injunction, a plaintiff must show that it does not have an adequate remedy at law. *Scratch Golf*, 361 S.C. at 121, 603 S.E.2d at 908. The purpose of an injunction is to preserve the status quo. *Peek*, 367 S.C. at 457, 626 S.E.2d at 37, *MailSource*, 356 S.C. at 368, 588 S.E.2d at 638. “A temporary injunction is used to preserve the subject of controversy in the condition which it is at the time of the [o]rder until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation.” *MailSource*, 356 S.C. at 368, 588 S.E.2d at 638.

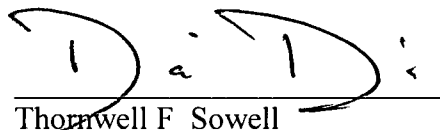
As discussed above and supported by the affidavit of Hook Point, Hook Point, its members, and its related entities face financial ruin, bankruptcy, and the inability to continue as a going concern should BB&T be allowed to fully draw on the letter of credit. Hook Point Supplemental Aff ¶ 2 (ROA p. \_\_\_). BB&T contends that these are all monetary damages for which Hook Point can be compensated. Initial Br. Appellant p. 15 (ROA p. \_\_\_). However, it is clear that the destruction of an LLC, its members, and related entities cannot be fully compensated for with money. If Hook Point can no longer operate as a going concern, it has lost far more than simply the money related to this action and these loans. In fact, the circuit court correctly found that the inability to continue business showed that there was no adequate remedy at law.

The purpose of the injunction was to prevent the damages that are likely to occur if it was not issued. The injunction preserved the status quo between the parties and allowed them to proceed to a trial court to determine the merits of their claims. The circuit court did not abuse its discretion in finding that Hook Point did not have an adequate remedy at law, and the injunction should be affirmed.

## CONCLUSION

The Order granting Hook Point's motion for temporary injunction should be affirmed. The circuit court did not abuse its discretion in finding evidence to support the elements of a preliminary injunction. Hook Point has properly demonstrated all of the required elements to support injunctive relief: (1) Hook Point will suffer irreparable harm if the injunction is dissolved; Hook Point probably has no defenses to the Letter of Credit and the claims by First Reliance while it does have several defenses to the debt claimed by BB&T; (2) Hook Point has demonstrated a likelihood of success on the merits. Hook Point has evidence in writing and the Testimony of Albert Dooley which directly supports its theory that the Letter of Credit was to be used for interest only, and (3) the injury caused to Hook Point and its members goes beyond financial compensation, as evidenced by the affidavit of Hook Point, and therefore Hook Point does not have an adequate remedy at law.

Respectfully submitted,



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June 6, 2011

**THE STATE OF SOUTH CAROLINA**

**In The Court of Appeals**

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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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**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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**APPELLANT'S REPLY BRIEF**

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**JUN 16 2011**

**SC Court of Appeals**

## **TABLE OF CONTENTS**

Table of Authorities	11
Introduction	1
Argument	3
Hook Point Cannot Show Irreparable Injury	3
Hook Point Has Failed to Make a Sufficient Showing of Likelihood of Success	5
Conclusion	7

**TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE NO</u></b>
<i>Amwest Surety Insurance Company v Republic National Bank,</i> 977 F 2d 122 (4 <sup>th</sup> Cir 1992)	4
<i>Cambridge Sporting Goods,</i> 41 N Y 2d 254, 392 N Y S 2d 265, 360 N E 2d 943	5
<i>Mid-America Tire, Inc v PTZ Trading Ltd ,</i> 768 N E 2d 619 (Ohio 2002)	5, 6
<i>NMC Ent , Inc ,</i> 14 U C C Rep Serv 1427	5
<i>Poynter Investments Inc v Century Builders,</i> 387 S C 583, 694 S E 2d 15 (2010)	3, 4
<i>Sztejn,</i> 177 Misc 719, 31 N Y S 2d 631,	5

## I INTRODUCTION

Appellant Branch Banking and Trust Company (“BB&T”) has appealed from an order granting a temporary injunction preventing it from recovering \$1.5 million on a standby letter of credit. The injunction was obtained by Respondent Hook Point, LLC (“Hook Point”) the entity that borrowed \$5.1 million from BB&T secured in part by the letter of credit. In its appellant’s brief BB&T argued that the injunction should not have been issued because Hook Point (1) failed to show irreparable injury, (2) failed to show a likelihood of success on the merits, and (3) failed to show that it did not have an adequate remedy at law. Hook Point has now filed its respondent’s brief and BB&T files this reply to address arguments made by Hook Point regarding irreparable injury and likelihood of success on the merits.

In its brief Hook Point fails to acknowledge or address the true situation presented in this case:

- This is not a dispute over \$70,000 in interest due on a loan as suggested by the Hook Point brief at page 4. Hook Point is in default and owes BB&T the amount of \$5.1 million. That amount has been due and payable since BB&T made demand for it in December 2010.
- Hook Point has never contested the facts that its development has failed and that it is in default on its loan.

- Hook Point's primary argument is that the \$1.5 million letter of credit only covers interest but it bases that argument wholly on one ambiguous sentence in a preliminary commitment letter and never addresses the fact that the formal loan documents – including the letter of credit itself – contain no language that limits the letter of credit to the payment of interest

## II Argument

### **Hook Point Cannot Show Irreparable Injury**

In its brief Hook Point offers three arguments to meet its burden of showing that it would suffer irreparable injury without the injunction. None of the three meet the standard necessary to justify the drastic remedy of a temporary injunction. See Poynter Investments, Inc v Century Builders, 387 S C 583, 694 S E 2d 15 (2010)

The first argument that Hook Point advances is that it will be put out of business if the letter of credit is enforced according to its terms. However, Hook Point never explains how it plans to stay in business given the fact that it is in default on a \$5.1 million loan and hasn't sold a single lot or home in its development. See Layden affidavit ¶¶ 4 and 6. Instead Hook Point argues that it would be put out of business without explaining how it will deal with the default or what business it intends to try to continue. This argument fails as a matter of law to show irreparable harm.

The second argument Hook Point makes is that if BB&T is allowed to enforce the letter of credit according to its terms then First Reliance will proceed against collateral owned by other people, specifically the principals of Hook Point who individually guaranteed the First Reliance letter of credit. See Hook Point brief pp 9-10. In the first place those same individuals are guarantors of the \$5.1 million debt to BB&T. See Layden affidavit ¶ 8. They either owe one bank or both. More fundamentally, it is Hook Point's burden to show irreparable injury to it, not to individuals who are not parties to the litigation. Hook Point's second argument also fails as a matter of law.

The third argument advanced in the Hook Point brief is that BB&T failed to show how it would be harmed by the granting of the temporary injunction. See Hook Point brief p 10. In making that argument Hook Point is taking the approach specifically rejected by the Supreme Court in Poynter. In that case the Court held that South Carolina has not adopted the “balancing of harms” test that includes consideration of harm to the non-moving party in deciding whether to grant a temporary injunction. See Poynter v Century Builders, 387 S C at 587, 694 S E 2d at 17. There is no balancing of equities in South Carolina and Hook Point’s argument is misplaced and irrelevant. That argument also ignores the fact that, in making the loan to Hook Point, BB&T bargained for the security of a letter of credit, which is intended to provide swift, certain and secure recovery in the event of default. See Amwest Surety Insurance Company v Republic National Bank, 977 F 2d 122 (4<sup>th</sup> Cir 1992) (applying South Carolina law). The temporary injunction preventing BB&T from exercising its rights under the letter of credit robs BB&T of the benefit of its bargain and undercuts the value of letters of credit generally.

### **Hook Point Has Failed to Make a Sufficient Showing of Likelihood of Success**

In its brief Hook Point's argument on the likelihood of success issue is confined to its contention that BB&T can only use the letter of credit for interest owed by Hook Point. Hook Point cites one case in its brief to support its argument that an injunction was appropriate to stop payment of the letter of credit. That case is Mid-America Tire, Inc. v. PTZ Trading Ltd., 768 N.E.2d 619 (Ohio 2002) and it provides a helpful comparison with the case before this Court. The Mid-America Tire opinion reviews the cases in which various courts have issued injunctions to prevent letters of credit from being used to perpetuate fraud and notes that the fraud in such situations has been egregious "[t]hus we hold that the 'material fraud' under R.C. 1305.08(B) means fraud that has so vitiated the entire transaction that the legitimate purposes of the independence of the issuer's obligation can no longer be served." Mid-America Tire Inc. v. PTZ Trading, 768 N.E.2d at 640. In affirming the grant of an injunction the Mid-America decision found that the party seeking payment under the letter of credit had deliberately shipped non-conforming goods and sought payment for them from a letter of credit, bringing that case directly in line with the small group of cases in which the fraud is so outrageous that an injunction is appropriate to prevent payment of a letter of credit.

Under these facts, it can truly be said that the LC in this case was being used by PTZ as a vehicle for fraud and that PTZ's actions effectively deprived appellants of any benefit in the underlying arrangement. In this sense, PTZ's conduct is comparable to the shipment of cow hair in Sztejn, 177 Misc. 719, 31 N.Y.S.2d 631, the shipment of old, ripped, and mildewed boxing gloves in Cambridge Sporting Goods, 41 N.Y.2d 254, 392 N.Y.S.2d 265, 360 N.E.2d 943, and the failure to disclose nonconforming performance specifications for the stereo receivers in NMC Ent., Inc. 14 U.C.C. Rep. Serv. 1427.

Mid-America Tire Inc v PTZ Trading, Ltd , 768 N E 2d at 642 <sup>1</sup>

The case before this Court clearly fails to approach the type of fraud that will support an injunction. First, and most importantly, the letter of credit that Hook Point obtained from First Reliance makes no mention of being limited to interest. By its express terms it only required a showing that Hook Point was in default on the loan agreement dated November 17, 2007. As discussed above, Hook Point is clearly in default and owes BB&T far more than the \$1.5 million represented by the letter of credit.

Hook Point faces another insurmountable obstacle to showing that it should be able to enjoin payment of the letter of credit. Its argument is that the letter of credit was inconsistent with a preliminary commitment letter from BB&T and therefore wording of the letter of credit represents fraud by BB&T. The problem is that Hook Point itself obtained the letter of credit from First Reliance pursuant to a complex loan transaction by which the principals of Hook Point put up sufficient collateral to persuade First Reliance to issue the letter of credit. See Hook Point Supplemental Affidavit, ¶ 2(a). Hook Point has no basis for a claim against BB&T for fraud in the issuance of the letter of credit and it certainly has not made the showing of likelihood of success necessary to justify an injunction preventing payment according to the plain terms of the letter.

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<sup>1</sup> Like the Mid-America Tire, case the cases cited by it all recognize that the “material fraud” provision for stopping payment of a letter of credit should be rarely used. This issue was discussed at some length in BB&T’s appellants’ brief.

### III CONCLUSION

The temporary injunction that was issued in this case should not have been issued. BB&T lent Hook Point \$5.1 million so that Hook Point could engage in a speculative real estate development. In order to induce BB&T to make the loan, Hook Point provided certain collateral including obtaining an irrevocable, standby letter of credit in the amount of \$1.5 million. The development has failed. Hook Point owes BB&T \$5.1 million. BB&T has every right to collect on the letter of credit according to its terms and the order granting the injunction should be reversed.

Dated this 16th day of June, 2011

By \_\_\_\_\_



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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
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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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CERTIFICATE OF SERVICE

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**SC Court of Appeals**

This is to certify that I, Leslie L. Allen, legal assistant with the law firm of Robinson, McFadden & Moore, P C , have this day caused to be served upon the person(s) named below the **Appellant's Reply Brief** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as

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Dated at Columbia, South Carolina, this 16<sup>th</sup> day of June, 2011

A handwritten signature in cursive script that reads "Leslie Allen". The signature is written in black ink and is positioned above a horizontal line.

Leslie L. Allen