THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY
In the Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Judge

Case No. 2011-CP-11-0722

Branch Banking and Trust Company.....Respondent

v.

Papa Oil Co., LLC, a/k/a Papa Oil, LLC, Anjay R. Patel, Devang Amin, and Gupteshwar Pathak.....Defendants

Of whom Papa Oil Co., LLC, a/k/a Papa Oil, LLC, Devang Amin, and Gupteshwar Pathak are .....Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

Respondent, Branch Banking and Trust Company, commenced this Action on October 27, 2011 seeking the balance alleged to be due on a Promissory Note from Papa Oil, LLC (hereinafter, "Papa Oil") and from Anjay Patel, Devang Amin (hereinafter, "Amin"), and Gupteshwar Pathak (hereinafter, "Pathak"), pursuant to separate Guaranties of the Note. Papa Oil and Amin filed their Answer denying liability for the debt and alleging that Respondent had breached the agreements and that Respondent was estopped from recovering from these Defendants. Papa Oil and Amin also asserted a Third Party Complaint against Kristopher Moorhead (hereinafter, "Moorhead") alleging negligent misrepresentation, breach of contract, and conversion. Pathak filed his Answer to the Complaint denying liability for the debt and alleging that Respondent had failed to comply with the terms of the agreements and that its conduct operated to bar any recovery. Moorhead filed his Answer and Counterclaim to the Third Party Complaint, to which Counterclaim Papa Oil and Amin filed their Reply. Prior to the trial of this case, the Third Party Complaint and the Counterclaim of Moorhead thereto was dismissed by Stipulation of all parties, filed with the Court.

The matter was called to trial in the Court of Common Pleas for Cherokee County, during a non-jury term of court, before the Honorable R. Keith Kelly, Circuit Judge on February 24, 2015. Judge Kelly issued his Order dated March 12, 2015, finding in favor of the Respondent and awarding Respondent judgment against Papa Oil, Amin, and Pathak, jointly and severally, in the sum of $99,062.14 plus attorneys fees of $14,859.32 and costs of $1,575.62, for a total of $115,497.08. Counsel for Papa Oil and Amin received a copy of the Order dated March 12, 2015 on April 6, 2015. Counsel for

Pathak received a copy of the Order dated March 12, 2015 on April 6, 2015. Papa Oil, Amin, and Pathak timely filed their Motion to Reconsider, Alter and Amend the Order on April 10, 2015. The trial Judge denied the motion by his Order dated May 27, 2015. Counsel for Papa Oil and Amin received a copy of the Order dated May 27, 2015 on June 1, 2015. Counsel for Pathak received a copy of the Order dated May 27, 2015 on June 1, 2015. On June 23, 2015, Papa Oil and Amin timely filed their Notice of Appeal. On June 30, 2015, Pathak timely filed his Notice of Appeal. The appeals were consolidated.

FACTS

Papa Oil, LLC (hereinafter "Papa Oil") executed a Promissory Note to Respondent dated October 25, 2004 for the sum of $500,000.00. Plaintiff's Exhibit 1. This was a note payable upon demand, and was given to support a letter of credit issued by Respondent. Plaintiff's Exhibit 1; Transcript p. 10, line 24 – p. 11, line 3; p. 20, line 23 – p. 21, line 3. Interest on the debt was to accrue at the rate of prime plus one percent. Plaintiff's Exhibit 1; Transcript p. 21, line 25 – p. 22, line 2. In the event of default, i.e. failure to pay upon demand, the default interest rate accruing on the Note would be prime plus five percent. Plaintiff's Exhibit 1; Transcript p. 15, line 8 – 11; p. 23, line 2 – 7. The Note further provided that if it was placed with an attorney for collection Respondent could recover reasonable attorneys' fees equal to 15% of the principal and interest outstanding at the time of acceleration or other action to collect the sums due thereunder. Plaintiff's Exhibit 1. The Note specifically referenced a Security Agreement dated the same date, granting a security interest to Respondent in certain collateral to secure the Note. Plaintiff's Exhibit 1. The Note specifically made the terms and conditions of the Security Agreement a part of the Note. Plaintiff's Exhibit 1; Transcript p. 31, line 15 – 22; p. 62, line 10 – 18.

The Security Agreement dated October 25, 2004 was executed and delivered to Respondent, granting to Respondent a security interest in three certificates of deposit (hereinafter, "CDs") totaling $500,000.00. Defendants' Exhibit 5; Transcript p. 32, line 23 – 25. The Security Agreement specifically provided that it contained "the entire agreement of the Debtor and Secured Party concerning its subject matter." Defendants' Exhibit 5. The Security Agreement further specifically provided that "[a]ny modification to this Security

Agreement must be made in writing and signed by the party adversely affected." Defendants' Exhibit 5.

Guaranty agreements were executed by Devang Amin (hereinafter, "Amin") and Gupteshwar Pathak (hereinafter, "Pathak"), as well as others. Plaintiff's Exhibits 2, 3, and 4; Defendants' Exhibit 8; Transcript p. 11, line 19 – p. 12, line 4. Under the Guaranty agreements, Amin and Pathek guarantied

> payment of any and all notes, drafts, debts, obligations and liabilities, primary or secondary (whether by way of endorsement or otherwise), of Borrower [Papa Oil], at any time, now or hereafter, incurred with or held by Bank [Respondent], together with interest, as and when the same become due and payable, whether by acceleration or otherwise, in accordance with the terms of any such notes, drafts, debts, obligations or liabilities or agreements evidencing any such indebtedness, obligation or liability including all renewals, extensions and modifications thereof.

Plaintiff's Exhibits 3 and 4. The Guaranties further provided for the recovery of reasonable attorneys fees equal to 15% of the principal and interest outstanding at the time of action or attempts to collect or enforce the Guaranty. Plaintiff's Exhibits 3 and 4.

Only one written modification was signed by Papa Oil, dated September 14, 2007. Defendants' Exhibit 12; Transcript p. 50, line 3 – 5. This modification was specifically for the addition of further collateral to secure the Note. Defendants' Exhibit 12; Transcript p. 51, line 16 – p. 52, line 1. The signed modification stated that "[a]ll of the terms, covenants and conditions of the Agreements remain in full force and effect . . .". Defendants' Exhibit 12. The modification further provided that "[T]his execution and delivery of this Note shall in no way impair the security now held for the indebtedness evidenced by the Original Note, and all such security, including the Agreements, shall secure payment of this Note to the same extent as the Original Note." Defendants' Exhibit 12. The written modification form contained a section where collateral released from the

security interest would be identified, however no collateral was identified as being released in this signed modification. Defendants' Exhibit 12; Transcript p. 50, line 6 – 16. At the time of the signed modification, Respondent had in fact already released two CDs totaling $100,000.00 and owned by Kristopher Moorhead (hereinafter, "Moorhead") from the security interest granted by the Security Agreement. Defendants' Exhibit 11; Transcript p. 48, line 11 – p. 49, line 10. No notice of this release was given to Appellants either at the time of the release, or at the time of this one signed modification. Transcript p. 107, line 19 – p. 108, line 15. Furthermore, Respondent admitted that the release of the collateral was a modification of the Security Agreement that adversely affected Papa Oil and that no written modification was ever signed by Papa Oil for such release. Transcript p. 32, line 7 – 15; p. 62, line 23 – p. 63, line 1; p. 65, line 22 – p. 66, line 6; p. 83, line 6 - 9. In addition, Respondent made an agreement with Moorhead to release the "additional collateral" referred to in the one signed modification on a pre-arranged future schedule, and this arrangement was not disclosed to Appellants. Defendants' Exhibit13; Transcript p. 52, line 20 – p. 53, line 15. The additional collateral was then later released from the lien of the security interest prior to the pre-arranged times and without notice to Appellants or further signed modifications. Transcript p. 54, line 4 – 23; p. 56, line 25 – p. 57, line 8; p. 83, line 10 – 16; p. 111, line 11 – 18.

Appellants knew at the time that the Note, Guaranties, and Security Agreement were signed that the Note was fully secured by $500,000.00 in pledged CDs. Transcript p. 103, line 2 – 18. Respondent also intended for the Note to be fully secured. Transcript p. 60, line 20 – 22. At the time of the one signed modification, Respondent did not inform Appellants of the fact that $100,000.00 in CDs of the original collateral had

already been released. Transcript p. 49, line 20 – p. 50, line 8; p. 52, line 2 – 7; p. 107, line 19 – p. 108, line 15. Accordingly, Appellants believed the Note remained fully secured at all times. Transcript p. 103, line 14 – 18; p. 111, line 19 – 22; p. 113, line 2 – 4. Relying upon their belief that the Note was fully secured, Appellants negotiated an agreement with the beneficiary of the letter of credit that allowed the beneficiary to draw $500,000.00 under the letter of credit. Transcript p. 103, line 14 – 18; p. 111, line 19 – p. 113, line 7; p. 114, line 13 – 25. The draw on the letter of credit was covered by a disbursement on the Note, both of which occurred on May 2, 2011. Transcript p. 22, line 3 – 22. The collateral then remaining under the Security Agreement was then liquidated and applied to payment of the Note disbursement. Transcript p. 22, line 11 – 22. These transactions left a balance outstanding on the Note. Transcript p. 14, line 6 – 15. Respondent admitted that if it had not released that collateral from the security interest, it would have applied the same to extinguish the balance of the debt for which this action was brought. Transcript p. 60, line 20 – p. 61, line 7; p. 86, line 15 – 18. Demand was made on the Appellants on August 26, 2011 for payment of the balance outstanding on the Note. Plaintiff's Exhibit 5; Transcript p. 21, line 4 – 15. Appellants were never advised of any reduction in the collateral prior to receiving the demand for payment in August 2011. Transcript p. 114, line 4 – 12.

ARGUMENTS

I. RESPONDENT'S DAMAGES WERE CAUSED BY ITS OWN BREACHES OF THE PROMISSORY NOTE, AND ACCORDINGLY RESPONDENT IS ENTITLED TO NO RECOVERY FROM APPELLANTS.

Construction of an unambiguous contract is a matter of law for the courts. Lee v. Univ. of South Carolina, 407 S.C. 512, 757 S.E.2d 394 (2014).

> In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties. ... Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions. ... If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect.

Id., 757 S.E.2d at 397. Furthermore, absent contrary definitions in the contract, the language used in the contract should be given its plain and ordinary meaning. Bardsley v. Government Employees Insurance Co., 405 S.C. 68, 747 S.E.2d 436 (2013). "Courts 'are without authority to alter an unambiguous contract by construction or to make new contracts for the parties.' " Lee, 757 S.E.2d at 397 (quoting S.C. Dept. of Transportation v. M & T Enterprises of Mt. Pleasant, 379 S.C. 645, 667 S.E.2d 7 (Ct.App. 2008). "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Davis v. K.B. Home of South Carolina, Inc., 394 S.C. 116, 713 S.E.2d 799, 805 (Ct.App. 2011).

"In an action at law tried without a jury, the trial judge's findings have the force and effect of a jury verdict upon the issues and are conclusive on appeal when supported by competent evidence." Mathis v. Brown & Brown of South Carolina, Inc., 389 S.C. 299, 698 S.E.2d 773, 777 (2010). "Accordingly, [the appellate court's] scope of

review is limited to determining whether the findings are supported by competent evidence and correcting errors of law." Id., 698 S.E. 2d at 777.

The trial court made no finding of ambiguity in the integrated contract between the parties. See Order for Judgment. See also Bardsley. All of the relevant documents were drafted and prepared by Respondent. Transcript p. 20, line 19 - 22; p. 49, line 20 - p. 50, line 2; p. 88, line 1 - 2. The Note incorporated the terms and conditions of the Security Agreement into it. Plaintiff's Exhibit 1; Transcript p. 31, line 15 – 22; p. 62, line 10 – 18. The Security Agreement provided the terms and conditions for the security interest given in the specified collateral consisting of three Certificates of Deposit totaling $500,000.00 to secure the obligations on the Note. Defendants' Exhibit 5; Transcript p. 32, line 23 – 25. The Security Agreement provided that it was the entire agreement regarding the collateral and the security interest. Defendants' Exhibit 5; Transcript p. 32, line 19 – 25; p. 62, line 19-22. The plain language of the Security Agreement required that any modification of the agreement regarding the collateral must be in writing and signed by the party adversely affected. Defendants' Exhibit 5; Transcript p. 33, line 1 – 4; p. 85, line 10 – 12. It was admitted by Respondent that releases of collateral from the security interest are modifications to the contract and that these modifications adversely affected Papa Oil. Transcript p. 32, line 7 – 15; p. 62, line 23 – p. 63, line 1; p. 65, line 22 – p. 66, line 6; p. 83, line 6 – 9. However, contrary to its duties and obligations under the agreement, Respondent released collateral to Moorhead without written modification from Papa Oil. Transcript p. 32, line 10 – 15; p. 45, line 16 – 18; p. 47, line 18 – 22; p. 83, line 10 – 16. These actions constituted a default and breach of the agreements by Respondent. If the Moorhead CDs had not been released

from the Security Agreement by Respondent, it is admitted that the full amount of the Note would have been paid through liquidation of the collateral. Transcript p. 60, line 20 – p. 61, line 7; p. 86, line 9 – 18. Accordingly, the deficiency balance claimed by Respondent is the direct result of Respondent's improper and unilateral modification of the agreement, and not from Papa Oil's failure to pay the Note upon demand.

Papa Oil was Respondent's customer as regards to this transaction. Transcript p. 25, line 17 – 23. However, Respondent also had other business relationships with Moorhead. Transcript p. 37, line 23 – p. 38, line 24. Respondent admittedly dealt secretly and favorably with Moorhead in releasing his two CDs from the collateral of this Note. Defendants' Exhibits 7, 12, and 14; Transcript p. 37, line 23 – p. 38, line 4; p. 39, line 14 – 16; p. 46, line 17 – p. 47, line 17; p. 48, line 21 – p. 53, line 15; p. 55, line 2 – 4; p. 56, line 8 – p. 57, line 17. These dealings and the releases of the collateral to Moorhead were without notice to or written modification by Papa Oil as required by the agreement. Transcript p. 32, line 13 – 15; p. 43, line 6 – 14; p. 46, line 17 – p. 47, line 22; p. 49, line 8 – 10; p. 83, line 10 – 16. The clandestine releases were deliberately hidden from Papa Oil as evidenced by the one written modification to the agreement in September 2007. Defendants' Exhibit 12; Transcript p. 50, line 6 – p. 51, line 15. The two Moorhead CDs that were part of original collateral for the agreement had already been released from the Note and Security Agreement some time prior to July 2007 based upon arrangements made solely between Respondent and Moorhead. Defendants' Exhibit 11; Transcript p. 48, line 11 – p. 49, line 10. The written modification prepared by Respondent was presented to Papa Oil for signature in September 2007. Defendants' Exhibit 12; Transcript p. 50, line 3 – 5. However, this written modification failed to

disclose that any collateral had been released. Transcript p. 50, line 6 – 16; p. 52, line 2 – 7. Instead this written modification document provided that the only modification to the Note was that it was to be "additionally secured" with further collateral. Defendants' Exhibit 12; Transcript p. 51, line 16 – p. 52, line 1. The modification emphasized that "[a]ll of the terms, covenants and conditions of the Agreements [specifically including the Security Agreement] remain in full force and effect . . ." and that the "execution and delivery of this Note shall in no way impair the security now held for the indebtedness evidenced by the Original Note, and all such security, including the Agreements, shall secure payment of this Note to the same extent as the Original Note." Defendants' Exhibit 12; Transcript p. 51, line 1 – 15. In addition, there was a secret agreement between Respondent and Moorhead to release the additional collateral, which agreement was documented by the letter from Respondent to Moorhead dated September 17, 2007. Defendants' Exhibit 13; Transcript p. 52, line 20 – p. 53, line 15. The written modification did not contain this pre-arranged release schedule, and the letter was not sent to Papa Oil. Transcript p. 53, line 10 – 15. Accordingly, Papa Oil was unaware of this pre-arranged release schedule. Transcript p. 109, line 6 – p. 110, line 21.

The actions of Respondent in dealing secretly with Moorhead to the detriment of Papa Oil reflect Respondent's failure of good faith and fair dealing with their customer. Every contract includes an implied covenant of good faith and fair dealing. Williams v. Reidman, 339 S.C. 251, 529 S.E.2d 28 (Ct.App. 2000). Respondent knew they owed Papa Oil this duty. Transcript p. 27, line 3 – 6. Papa Oil, not Moorhead, was Respondent's customer on this transaction, and the party to the Note and Security Agreement. Plaintiff's Exhibit 1; Defendants' Exhibit 5; Transcript p. 25,

line 17 – 23. Respondent's breach of this covenant of good faith and fair dealing with its customer directly resulted in the deficiency claim which Respondent now seeks to recover from Appellants. Transcript p. 60, line 20 – p. 61, line 7; p. 86, line 9 – 18. Admittedly, if Respondent had not released the collateral to Moorhead, that collateral would have been liquidated and applied toward payment of the Note balance in May 2011. Transcript p. 60, line 20 – p. 61, line 7; p 86, line 15 – 18. In that event there would have been no deficiency balance remaining. Put another way, Respondent's breaches of the Note caused damage to Papa Oil in the amount of the released collateral, which damage offsets and obliterates the deficiency balance claimed by Respondent.

Respondent's arguments at trial ignored its admitted breaches of the Note and Security Agreement outlined above. Such a position is inconsistent with the plain language of the agreement. It is important to note that the trial judge made no finding of any ambiguity in the agreement. The Security Agreement contains the terms and conditions regarding the security interest in the collateral and provides that it is "the entire agreement of the [parties] concerning its subject matter". Defendants' Exhibit 5. It further required any modification of its terms to be in writing, signed by the party adversely affected. Defendants' Exhibit 5. Its terms included a security interest in the three CDs totaling $500,000.00. Defendants' Exhibit 5. Admittedly the release of $100,000.00 of this collateral from the Security Agreement was a modification and required be in writing. Transcript p. 32, line 7 – 12; p. 62, line 23 – p. 63, line 1. There was no such written modification according to Respondent's sole witness, the executive responsible for corporate banking for Respondent in South Carolina. Transcript p. 8, line 24 – p. 9, line 14; p. 32, line 10 – 15; p. 45, line 16 – 18; p. 47, line 18 – 22; p. 83, line 10

– 16. Therefore, even if the agreement had been ambiguous on this point, construing any ambiguity against the Respondent (who drafted the documents and could have made them clearer), and considering the testimony of Respondent's witness, the plain language in the Security Agreement requires a finding that Respondent defaulted under the agreement by failing to obtain a written modification from Papa Oil to release the Moorhead CDs from the collateral. See Mathis.

Accordingly, it was error not to find Respondent in breach of the Note and Security Agreement and to rule that it could not recover judgment against Appellants on the breached agreements.

II. RESPONDENT IS ESTOPPED FROM RECOVERING THE DEFICIENCY BALANCE RESULTING FROM RESPONDENT'S ACTIONS IN MODIFYING THE SECURITY AGREEMENTAND RELEASING COLLATERAL WITHOUT WRITTEN MODIFICATION AND NOTICE TO PAPA OIL.

"Estoppel is an equitable doctrine, essentially flexible, and therefore should be applied or denied as the equities between the parties made preponderate." Pitts v. New York Life Insurance Co., 247 S.C. 545, 148 S.E.2d 369, 372 (1966). "The doctrine of estoppel applies if a person, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury." Rushing v. McKinney, 370 S.C. 280, 633 S.E.2d 917, 924 (Ct.App. 2006).

> The essential elements of estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. [cite omitted.] As related to the party claiming the estoppel, the essential elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position. [cite omitted.]

Southern Development Land & Golf Co. v. S. C. Public Service Authority, 311 S.C. 29, 426 S.E.2d 748, 750 (1993). All of these elements are present in this case. Respondent was aware that $100,000.00 of the original collateral was put up by Moorhead and the remaining $400,000.00 had been put up by Papa Oil. Transcript p. 26, line 10 – 17; p. 27, line 7 – 10. Respondent was required by the Note and Security Agreement to get a written modification agreement from Papa Oil if releasing collateral. Defendants' Exhibit 5; Transcript p. 32, line 7 – 12; p. 62, line 23 – p. 63, line 1; p. 65, line 22 – p. 66, line 6. It failed to do so. Transcript p. 32, line 13 -15; p. 45, line 16 – 18; p. 47, line 18 – 22; p.

83, line 10 – 16. Instead, regarding the collateral releases, it dealt solely with Moorhead, who was neither Respondent's customer on this transaction nor a signer of the Note or Security Agreement. Plaintiff's Exhibit 1; Defendants' Exhibit 5; Transcript p. 25, line 17 – 23.

Furthermore, when Respondent had a perfect opportunity to advise Papa Oil of the collateral releases, it deliberately hid that fact from Papa Oil. Defendants' Exhibit 12; Transcript p. 37, line 23 – p. 38, line 4; p. 39, line 14 – 16; p. 46, line 17 – p. 47, line 17; p. 48, line 21 – p. 53, line 15; p. 55, line 2 – 4; p. 56, line 8 – p. 57, line 17. The collateral supplied by Moorhead had been released by Respondent prior to July 2007. Defendants' Exhibit 11; Transcript p. 48, line 11 – p. 49, line 10. In September 2007 Respondent prepared a written modification of the Note and Security Agreement for Papa Oil's signature. Defendants' Exhibit 12; Transcript p. 50, line 3 – 5. However, that document stated that the modification being effected was the pledging of "additional collateral" to secure the Note. Defendants' Exhibit 12; Transcript p. 51, line 16 – p. 52, line 1. Not only did the modification document fail to list any collateral released from the Note and Security Agreement, but it went even further to verify that:

> The Original Note may have been executed in connection with a loan agreement, deed of trust, mortgage, security agreement, assignment of leases and rents, and/or other documents evidencing a lien or security interest (together with all amendments, extensions and substitutions thereof, the "Agreements"). All of the terms, covenants and conditions of the Agreements remain in full force and effect . . . . This execution and delivery of this Note shall in no way impair the security now held for the indebtedness evidenced by the Original Note, and all such security, including the Agreements, shall secure payment of this Note to the same extent as the Original Note.

Defendants' Exhibit 12; see also Transcript p. 50, line 6 – 16; p. 52, line 2 – 7. Not only did the terms of this modification document hide the then existing collateral release from

Papa Oil, but at the same time Respondent entered into a side agreement with Moorhead which pre-arranged future releases of the "additional collateral" referred to in the modification document. Defendants' Exhibit 13; Transcript p. 52, line 20 – p. 53, line 15. The pre-arranged future release schedule was set forth in a letter from Respondent to Moorhead, but was not sent or disclosed to Papa Oil. Defendants' Exhibit 13; Transcript p. 53, line 13-15. Even further, this "additional collateral" was then released (once again) from the Note and Security Agreement even prior to the pre-arranged release times secretly agreed upon between Respondent and Moorhead. Transcript p. 54, line 4 – 22. At no time was Papa Oil advised of the release of any of the original collateral, much less any release of, or plan to release, the "additional collateral." Transcript p. 104, line 5 – 11; p. 105, line 10 – 24; p. 107, line 19 – p. 108, line 18; p. 109, line 14 – p. 110, line 1; p. 111, line 9 -18. Instead Papa Oil believed that the Note and Security Agreement was fully secured, up until it received notice of the deficiency. Transcript p. 103, line 14 – 18; p. 107, line 19 – 21; p. 108, line 12 – 18; p. 109, line 6 – 9; p. 111, line 19 – 22.

Therefore the evidence is clear that as to Respondent, false representations were made and material facts were concealed which gave Papa Oil the impression and belief that the Note remained fully secured in the amount of $500,000.00, as it was originally. Intention or expectation that the conduct be acted upon is apparent from Respondent's deliberate omissions and misrepresentations in the one signed modification document and the secret pre-arranged release schedule for the "additional collateral".

Respondent ignored its duty to obtain a written modification from Papa Oil to release the Moorhead CDs. See Defendants' Exhibit 5. Appellants were entitled to rely on the fact that no change in the amount of collateral under the Security

Agreement had been made (other than the addition of more collateral to secure the obligation as set forth in the one signed modification.) See Defendants' Exhibit 5. "Negligence will take the place of the intent to deceive when there is a duty to disclose." Southern Development Land & Golf Co., 426 S.E.2d at 751. In Southern Development Land & Golf Co., the court held the Public Service Authority ("Santee Cooper") equitably estopped from condemning part of Southern Development's land for construction of a high voltage electric line. Prior to purchasing the property and investing in the project, Southern Development had contacted Santee Cooper about existing overhead power lines on the property and their need to avoid exposed lines in the project. The parties agreed that the smaller lines would be buried at Santee Cooper's expense, and that the two of them would share the cost of burying the existing major power lines on the property. However, Santee Cooper did not tell Southern Development that they had already finalized plans to construct overhead high voltage towers and lines in place of the existing lines on the property. Southern Development first learned of those plans several months later, after having closed on the purchase of the property and beginning development. The Court summarized:

> It is undisputed Santee Cooper's plans were established at the time [Southern Development's agent] sought assurances regarding the burial of the existing electric lines from [Santee Cooper's agent]. [Santee Cooper's agent] had ready access to this information. We find these facts sufficient to estop Santee Cooper.

Id., 426 S.E.2d at 751.

Even if Respondent had not been required to get a written modification signed by Papa Oil for the releases, Respondent owed Appellants a duty to inform them of the collateral releases under the circumstances of this case. Respondent knew that

Moorhead had put up $100,000.00 of the original collateral and that the arrangement to release Moorhead's CDs was made only between him and Respondent. Defendants' Exhibit 11; Transcript p. 27, line 7 – 10; p. 48, line 11 – p. 49, line 10. Respondent released the collateral to Moorhead at only Moorhead's request, despite no agreement with Papa Oil. Transcript p. 49, line 8 – 17. Respondent's utter failure to advise Papa Oil of the collateral's release to Moorhead, and the pre-arranged future release schedule for the "additional collateral", begs for the application of estoppel in this case.

> Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in an erroneous state of facts. [cite omitted.] Silence when it is intended or when it has the effect of misleading a party, may operate as equitable estoppel.

Id., 426 S.E.2d at 751. Furthermore, Respondent clearly had actual knowledge of the unilateral release of the original Moorhead CDs (see Defendants' Exhibit 11) and of the pre-arranged release schedule and subsequent releases (see Defendants' Exhibit 13).

As to the Appellants, they had no knowledge of the real facts regarding the releases of the collateral. Respondent held the CDs that were the collateral for the Note. Transcript p. 88, line 3 – 4. The Papa Oil's agreement with Respondent required written modification by Papa Oil to change the terms of the Security Agreement by releasing any of the collateral pledged. Without that written modification, Appellants had no way of knowing that any collateral had been released. Furthermore, Appellants relied on the existing state of facts they had been led to believe: that nothing had happened to reduce the amount or extent of the security for the Note. See Defendants' Exhibit 12. They received no disclosure from Respondent changing these facts. In reliance upon their induced belief, they negotiated with their third party lender to allow that lender to draw

the full amount of the letter of credit, which would trigger a disbursement under the Note, believing that the collateral held by Respondent would cover 100% of the Note disbursement.

Appellants changed their position prejudicially in reliance upon these facts they had been led to believe. By agreeing to allow the third party lender to draw the full amount of the letter of credit, the advancement on the Note was under-secured. The deficiency balance was left when the remaining collateral was seized immediately upon the Note disbursement and applied toward payment of the Note. By the time Appellants were notified of the resulting deficiency, it was too late for Appellants to undo the transaction or renegotiate with their third party lender for a lower draw down on the letter of credit. Transcript p. 114, line 13 – 25.

Appellants' prejudicial change of position is not unlike that suffered by the Plaintiff in Mazloom v. Mazloom, 382 S.C. 307, 675 S.E.2d 746 (Ct.App. 2009). In finding that the elements of equitable estoppel had been met in that case, the Court of Appeals stated:

> [B]y signing the document, the brothers represented to [Plaintiff] that he held an undisputed 25% ownership interest in AMA. The brothers made this representation with knowledge that [Plaintiff] would rely on it and, therefore, not seek the help of an attorney to secure his interest in the business.

Id., 675 S.E.2d at 752. Similarly, in Pitts v. New York Life Insurance Co. the beneficiary of a life insurance policy brought suit for double indemnity benefits for accidental death. The policy plainly provided that when the insured reached 65, the double indemnity coverage would end and his premium would be reduced to reflect the credit for the lack of double indemnity benefit. However, the insurance company continued to bill the

insured for the double indemnity portion of the premium after he reached 65. The insured continued to pay the full premium billed, including that portion for the double indemnity benefit. Upon the insured's death by accident, the company realized the error, denied the claim for double indemnity, and offered to refund the erroneous portion of the premiums paid. The Court held that the beneficiary had shown a prejudicial change of position because, not only had the insured paid the premium as billed for sixteen years, but the company's recognition of the error and its claim for relief from the benefit obligation came too late - after the death of the insured. Here, Appellants' first notice that a portion of the collateral had been released came when demand was made for payment of the deficiency balance, after the third party lender had already drawn the full amount of the Letter of Credit pursuant to its negotiations with Appellants, i.e. too late. Transcript p. 114, line 4 – 6.

Furthermore, Respondent has already used the benefits granted to it under the Security Agreement to seize and liquidate the collateral provided by Papa Oil and apply the same toward the Note in May 2011. Now Respondent seeks to avoid the duties under that same Security Agreement to obtain written modifications as it releases collateral. It is inequitable for Respondent to claim the benefits of a contract while simultaneously avoiding the obligations thereof. See Pearson v. Hilton Head Hospital, 400 S.C. 281, 733 S.E.2d 597 (2012).

Accordingly, the doctrine of equitable estoppel should apply to prevent any recovery by Respondent on the deficiency balance that resulted from its misleading and inequitable conduct.

III. THE IMPROPER AND UNILATERAL MODIFICATION OF THE UNDERLYING CONTRACT RELEASED THE GUARANTORS FROM LIABILITY THEREON.

A material alteration in the principal contract made after execution of the guaranty and without the guarantor's consent, discharges the guarantor. 38 Am. Jur. 2d Guaranty §82 (1999). In Florentine Corp. v. PEDA I, Inc., 287 S.C. 382, 339 S.E.2d 112 (1985), the guarantors argued that they were discharged from their guaranties of a real estate lease because they had not signed a subsequent lease modification agreement in their personal capacities. The modification agreement simply changed the store's location to a larger nearby space for the same amount of rent. The guaranty in Florentine Corp. provided that the guarantors consented to all modifications of the lease. In finding that the guarantors had consented to the modification, the Court stated "a guarantor is not released by a change in the underlying contract *where it is made in accordance with a provision of the guaranty.*" Id., 339 S.E.2d at 114 (emphasis added.). Of course, this pre-supposes that the modification was not itself a breach of the underlying contract.

The guaranties signed by Appellants Amin and Pathak provide that they, jointly and severally, guarantee payment of all "notes, drafts, debts, obligations and liabilities" of Papa Oil to Respondent "as and when the same become due and payable, by acceleration or otherwise, in accordance the terms of any such notes, drafts, obligations or liabilities or agreements evidencing any such indebtedness, obligation or liability including all renewals, extensions and modifications thereof." Plaintiff's Exhibits 3 and 4. However, as has previously been set forth, the underlying contract had not been properly modified. Respondent failed to get a written modification of the Note and Security Agreement signed by Papa Oil for the release of the Moorhead CDs. Transcript

p. 32, line 10 – 15; p. 45, line 16 – 18; p. 47, line 18 – 22; p. 83, line 10 - 16. Accordingly, the attempted modification of the Agreement by the release of the Moorhead CDs was instead a breach of the contract and an improper unilateral alteration of the underlying agreement to which the guarantors did not agree. The language in the guaranties would bind the guarantors to a proper modification of the underlying agreement. However, an improper and unilateral alteration of the principal contract would not be so authorized by the language of the guaranties. See Florentine Corp.

The modification was material because it resulted in the Note becoming under-secured to the tune of $100,000.00. Although the principal amount of the Note was not changed, the terms of the Note as fully secured (by incorporation of the terms of the Security Agreement) were substantially altered. This alteration increased the guarantors' risk above what was assumed in the original agreement. After the alteration, the Note to which their guaranties applied was now under-secured, exposing them to a potential $100,000.00 deficiency. If no collateral had been released by Respondent, even if the collateral were not seized by Respondent and applied to the Note debt, the collateral would still have existed, providing a fund from which the guarantors could readily pay the full balance under the Note. Furthermore, Appellants Amin and Pathak received no benefit from the alteration of the underlying contract, and in fact shouldered all of the detriment.

Since the underlying agreement was not modified in accordance with its terms, and that improper alteration resulted in the deficiency balance now claimed, the guarantors, Appellants Amin and Pathak, are discharged from the obligations of their guaranties. See Florentine Corp.

IV. BECAUSE DEMAND FOR PAYMENT ON THE NOTE WAS NOT MADE UNTIL AUGUST 26, 2011 AT THE EARLIEST, THE BALANCE DUE AND DAMAGES AWARDED TO RESPONDENT WERE INCORRECTLY CALCULATED.

Payment of the Note was due upon demand. Plaintiff's Exhibit 1; Transcript p. 20, line 23 – p. 21, line 3. Interest on the unpaid balance of the Note would accrue at the rate of prime + 1% per annum. Plaintiff's Exhibit 1; Transcript p. 21, line 25 – p. 22, line 2. After default on the Note, interest would accrue at the rate of prime + 5%. Plaintiff's Exhibit 1; Transcript p.15, line 8 – 13; p. 23, line 2 – 7. The Letter of Credit was drawn upon on May 2, 2011. Transcript p. 22, line 16 – 22. The Note proceeds were disbursed and paid toward the Letter of Credit on May 2, 2011. Transcript p. 22, line 16 – 22. There is no evidence of any notice to Papa Oil of this disbursement under the Note or any demand for payment upon Papa Oil on May 2, 2011. Therefore, the debt evidenced by the Note did not become due and payable upon the disbursement of its proceeds on May 2, 2011. Accordingly, under the terms of the Note, interest would run from May 2, 2011 only at the rate of prime + 1% per annum until demand is made for payment. See Plaintiff's Exhibit 1. Only after demand has been made would interest begin to run at the default rate of prime + 5% per annum. See Plaintiff's Exhibit 1.

The only evidence of any demand for payment of the Note was Respondent's letter to Papa Oil dated August 26, 2011. Defendants' Exhibit 1. Therefore, interest would have accrued on the Note debt from May 2, 2011 to August 26, 2011 at the rate of prime + 1%, not prime +5%. However, it is admitted that Respondent charged interest at the default rate of prime + 5% from May 2, 2011. Transcript p. 15, line 6 – 12; p. 23, line 2 – 7. This was error, and resulted in the incorrect calculation of any balance due under the Note. The trial court found that Papa Oil's default arose from

the failure to make payments when due. See Order dated March 12, 2015. Since under the plain terms of the Note, payment was not due until demand was made, there is no evidence of any default prior to August 26, 2011. Accordingly, there is no reasonable evidence supporting the calculations of interest claimed by Respondent in this action. Therefore, the award of the interest claimed by Respondent in the amount of $22,181.63 is in error, and should be reversed.

V. BECAUSE THE NOTE AND GUARANTIES PROVIDED FOR REASONABLE ATTORNEYS FEES OF 15% OF THE BALANCE DUE AT THE TIME OF ACCELERATION OR OTHER ACTION TO ENFORCE PAYMENT, THE ATTORNEYS FEES AWARD WAS INCORRECTLY CALCULATED.

Under the plain terms of the Note, Papa Oil had agreed to pay reasonable attorneys fees (in the event of successful enforcement of the Note by Respondent) in an amount "equal to 15% of the principal and interest outstanding at the time of acceleration or other action by [Respondent] to collect the sums due" under the Note. Plaintiff's Exhibit 1. "When a note provides for attorneys fees at a specified rate in the event collection becomes necessary, the amount of attorneys fees is governed by the contract." West v. Gladney, 341 S.C. 127, 533 S.E.2d 334 (Ct.App. 2000). Similarly, the Guaranties provided for the recovery of reasonable attorneys fees, which were also agreed to be equal to 15% of the principal and interest outstanding at the time of action or attempts to collect or enforce the Guaranty. Plaintiff's Exhibits 3 and 4. Demand was made for payment on the Note and Guaranties on August 26, 2011. Plaintiff's Exhibit 5. The demand letter to Papa Oil also advised that the debt had been accelerated. Plaintiff's Exhibit 5. This action was commenced by filing of the Summons and Complaint on October 27, 2011. See Complaint.

Accordingly, under the plain terms of the Note and Guaranties, any award of attorneys fees to Respondent was limited to the agreed amount, 15% of the principal and interest outstanding at acceleration or commencement of this action. The trial court awarded Respondent attorneys fees equal to 15% of the total balance due as of the day of trial. Furthermore, there is neither evidence nor findings supporting the amount of attorneys fees awarded to Respondent in this action. Therefore, the award of attorneys fees in the amount of $14,859.32 is in error, and should be reversed.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the trial court.

Respectfully submitted,

August 20, 2015

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY
In the Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Judge

Case No. 2011-CP-11-0722

Branch Banking and Trust Company.....Respondent

v.

Papa Oil Co., LLC, a/k/a Papa Oil, LLC, Anjay R. Patel, Devang Amin, and Gupteshwar Pathak.....Defendants

Of whom Papa Oil Co., LLC, a/k/a Papa Oil, LLC, Devang Amin, and Gupteshwar Pathak are .....Appellants.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants and Appellants' Designation of Matter to be Included in the Record on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on August 20, 2015, addressed to Respondents' attorney of record:

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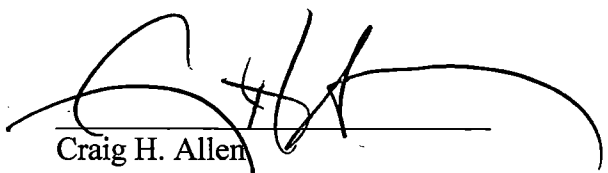

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