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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Hon. Roger M. Young, Circuit Court Judge

**RECEIVED**

SEP 18 2015  
SC Court of Appeals

Appellate Case No. 2015-001809

Skywaves I Corporation, ..... Appellant/Respondent,

v.

Branch Banking and Trust Company, Successor in Merger  
to Branch Banking and Trust Company of SC,  
a/k/a BB&T, and James Edahl, ..... Defendants,

Of which Branch Banking and Trust Company,  
Successor in Merger to Branch Banking and Trust  
Company of SC, a/k/a BB&T is the ..... Respondent/Appellant,

And

Of whom James Edahl is the ..... Respondent,

**JOINT MOTION OF RESPONDENT/APPELLANT AND RESPONDENT  
TO STRIKE APPELLANT/RESPONDENT'S AMENDED  
AND SUPPLEMENTAL NOTICE OF APPEAL**

Respondent/Appellant Branch Banking and Trust Company, Successor  
in Merger to Branch Banking and Trust Company of SC, a/k/a BB&T and  
Respondent James Edahl (individually, "BB&T" and "Edahl"; collectively,  
"Movants") hereby move, pursuant to Rules 203(b) and 240, SCACR, for entry  
of an order striking the "Amended and Supplemental Notice of Appeal" filed

by Appellant/Respondent Skywaves I Corporation (“Skywaves”). In support of this motion, Movants would show as follows:

#### **BACKGROUND FACTS AND PROCEDURAL HISTORY**

A somewhat detailed recitation of this litigation’s lengthy procedural history is necessary to an understanding of the basis for this motion.

Skywaves was a start-up company that manufactured equipment shelters for placement at the bases of cell-phone towers. From 2005 to early 2008, BB&T provided financing to Skywaves to support its operations under a factoring agreement. The financing initially was in the form of factored accounts, but the factoring agreement was subsequently amended to provide for loan advances. Throughout the relationship, BB&T tried to accommodate Skywaves’ needs, but Skywaves repeatedly failed to meet its projections and its losses grew heavier. Skywaves failed to comply with its obligations under the factoring agreement, and that noncompliance, coupled with the ever-increasing risk of non-payment, led BB&T to declare Skywaves in default and to terminate further loan advances in early 2008. Several months later, Skywaves filed a Chapter 7 bankruptcy.

Skywaves’ bankruptcy trustee retained counsel to file this action on behalf of the Skywaves bankruptcy estate. Skywaves contends BB&T acted improperly in terminating the parties’ agreement. Skywaves’ First Amended Complaint, filed December 12, 2010, alleged eight causes of action: (1) breach of contract; (2) breach of contract accompanied by fraudulent acts; (3) promis-

sory estoppel; (4) breach of the covenant of good faith and fair dealing; (5) negligent misrepresentation; (6) fraudulent misrepresentation; (7) negligence; and (8) violation of the South Carolina Unfair Trade Practices Act (“SCUTPA”). Edahl moved to dismiss all claims against him (claims 5, 6, 7, and 8), while BB&T moved for partial dismissal of claims 2, 5, 6, 7, and 8.

The circuit court granted BB&T’s motion by order dated November 8, 2011, and dismissed with prejudice Skywaves’ claims for breach of contract accompanied by a fraudulent act (claim 2); negligent misrepresentation (claim 5); fraudulent misrepresentation (claim 6); negligence (claim 7); and violation of SCUTPA (claim 8). (Exhibit A) In the same order, the circuit court also granted Edahl’s motion, dismissing with prejudice all claims against him. (*Id.*) Skywaves took two actions in response to the court’s November 8, 2011 order. First, on November 18, 2011, Skywaves filed a motion for reconsideration with the circuit court. Second, on December 28, 2011 (while its motion for reconsideration was still pending), Skywaves filed a notice of appeal of the November 8 order.

On June 15, 2012, the circuit court granted, in part, Skywaves’ motion to reconsider. (Exhibit B) The court concluded that it should not have dismissed the claims for breach of contract accompanied by a fraudulent act (claim 2, against BB&T); negligent misrepresentation (claim 5, against BB&T and Edahl); and negligence (claim 7, against BB&T and Edahl), and granted Skywaves leave to proceed with those claims. The court did not change its

ruling on Skywaves' claims for fraudulent misrepresentation (claim 6) and violation of SCUTPA (claim 8). Accordingly, those claims remained dismissed with prejudice.

On July 17, 2012, Skywaves moved to withdraw its appeal of the November 8, 2011 order. (Exhibit C) Skywaves provided this Court with a copy of the June 15 order and represented to this Court that dismissal of the appeal was appropriate because the circuit court's June 15 order granting reconsideration had "rendered this appeal moot." (*Id.*) By order dated August 20, 2012, this Court granted Skywaves' motion and dismissed the appeal. (Exhibit D) On September 7, 2012, this Court remitted the case to the circuit court. (Exhibit E)

Two years later, following extensive discovery, BB&T and Edahl each moved for summary judgment on all of Skywaves' remaining claims. On the same day, BB&T and Edahl also filed motions to strike Skywaves' demand for a jury trial on the basis that the written agreements between BB&T and Skywaves all contained jury-trial waivers.

A hearing on both motions was scheduled for January 12, 2015. At Skywaves' request, both BB&T and Edahl agreed to provide memoranda in support of summary judgment in advance of the hearing so that Skywaves could prepare. The parties also agreed to a date by which Skywaves would provide its opposition, if more discovery were not necessary. BB&T and Edahl both filed extensive memoranda supporting their motions for summary judg-

ment on December 22, 2014. Skywaves immediately stated that it needed to take more depositions before submitting any opposition. Consequently, the motion for summary judgment was not heard the previously scheduled date of January 12, 2015. The January 12 hearing went forward, however, as to BB&T's motion to strike the jury demand. The circuit court granted the motion to strike by order dated February 9, 2015. (Exhibit F)

On April 13, 2015—almost four months after BB&T and Edahl filed their memoranda supporting summary judgment on all remaining claims, and two months after the circuit court ruled Skywaves had waived its right to a jury trial—Skywaves moved to amend its First Amended Complaint to reinstate its fraudulent misrepresentation claim and to plead a claim for violation of the North Carolina Unfair and Deceptive Trade Practices Act (NCUDTPA). With respect to the fraudulent misrepresentation claim, Skywaves asserted—for the first time, three years after entry of the order—that “the Court made a clerical mistake” in its June 15, 2012 order, “as Skywaves should have also been permitted to proceed on its [fraudulent misrepresentation] claim (Count 6).” (Exhibit G, at 2)

By order dated July 23, 2015 (Exhibit H), the circuit court ruled on several outstanding motions: (1) BB&T's and Edahl's motions for summary judgment; (2) Skywaves' motion for reconsideration of the court's order strik-

ing the jury demand; and (3) Skywaves' motion to amend its complaint.<sup>1</sup> In its order, the circuit court:

1. Granted summary judgment in favor of BB&T on Skywaves' claims for promissory estoppel (claim 3), breach of the implied covenant of good faith and fair dealing (claim 4), negligent misrepresentation (claim 5), and negligence (claim 7);
2. Granted summary judgment in favor of Edahl on all of Skywaves' remaining claims against him (claims 5 and 7);
3. Denied BB&T's motion for summary judgment as to Skywaves' claims for breach of contract (claim 1) and breach of contract accompanied by fraudulent acts (claim 2);
4. Denied Skywaves' motion for reconsideration of the February 9, 2015 order striking the jury demand; and
5. Denied Skywaves' motion to amend its complaint.

With respect to its denial of Skywaves' motion to amend, the circuit court noted, "Though presented as a motion to amend, Skywaves actually seeks to reinstate its cause[s] of action for fraud and violation of the statutory Unfair Trade Practices Act." (Exhibit H, at 11) The court rejected this attempt on the bases that its prior ruling on claims 6 and 8 was the law of the case; Skywaves had unduly delayed in seeking to plead these claims; and the proposed amendments would be futile. (Exhibit H, at 11-13)

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<sup>1</sup> The circuit court also ruled on Skywaves' motion to strike BB&T's answer to the First Amended Complaint; Skywaves' motion for issuance of a subpoena to depose John Allison, BB&T's former President and CEO; and BB&T's motion for a protective order precluding Allison's deposition. The circuit court's rulings on these motions are not pertinent to the present motion to strike the amended and supplemental notice of appeal, and will not be addressed further in this filing.

On August 21, 2015, Skywaves filed a timely notice of appeal as to the circuit court's July 23 order.<sup>2</sup> Three days later, Skywaves filed an "Amended and Supplemental Notice of Appeal," which purported to appeal the circuit court's orders of November 8, 2011 and June 15, 2012.

### ARGUMENT

In its Amended and Supplemental Notice of Appeal, Skywaves purports to appeal the circuit court's November 8, 2011 order granting BB&T's partial motion to dismiss, as well as the circuit court's June 15, 2012 order granting Skywaves' motion for reconsideration. There are multiple problems with this procedural tactic.

**A. Skywaves lacks standing to appeal either the November 8, 2011 order or the June 15, 2012 order.**

As noted above, Skywaves responded to the circuit court's order of November 8, 2011 by filing a notice of appeal to this court and by moving for reconsideration in the circuit court. After the circuit court granted Skywaves' motion for reconsideration, Skywaves successfully moved to withdraw its appeal on the basis that its challenge to the November 8, 2011 order was moot. These facts establish that Skywaves now lacks standing to appeal those orders.

"Only a party aggrieved by an order, judgment, sentence or decision may appeal." Rule 201(b), SCACR. Skywaves was certainly "aggrieved" by the circuit court's November 8, 2011 order, which dismissed five of the eight

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<sup>2</sup> BB&T received Skywaves' notice of appeal on August 25, 2015, and filed a timely notice of cross-appeal on August 28, 2015. *See* Rule 203(c), SCACR.

claims alleged in its First Amended Complaint. Skywaves' subsequent motion to withdraw its appeal based on the June 15, 2012 order granting reconsideration, however, established that Skywaves was no longer aggrieved by the November 8 order.

In moving to dismiss its appeal of the November 8 order, Skywaves argued that dismissal was proper because "the order subject to this appeal [*i.e.*, the November 8, 2011 order] has been reconsidered by the lower court ... rendering this appeal moot." (Exhibit C, at 1) An appeal becomes moot when the appellant has "received its requested relief." *Southeastern Housing Found. v. Smith*, 380 S.C. 621, 628 n.2, 670 S.E.2d 680, 684 n.2 (Ct. App. 2008).

By moving to withdraw its appeal as moot and submitting the June 15 order as support for its motion to withdraw, Skywaves represented to this Court that it was no longer aggrieved by the November 8 order (because the June 15 order provided the requested relief) and that it was not aggrieved by the June 15 order (because that order granted all of the relief requested). If Skywaves was aggrieved by the circuit court's failure to reinstate its fraudulent misrepresentation and SCUTPA claims, it could have, and should have, proceeded with its appeal as to those claims, rather than withdrawing the entire appeal. *See* S.C. Code Ann. § 14-3-330; *Murphy v. Owens-Corning Fiberglas Corp.*, 346 S.C. 37, 44, 550 S.E.2d 589, 593 (Ct. App. 2001) (holding an order of partial dismissal is immediately appealable even though other

claims remain pending), *overruled in part on other grounds, Farmer v. Monsanto Corp.*, 353 S.C. 553, 579 S.E.2d 325 (2003).

In view of Skywaves' representation to this Court that the circuit court's June 15, 2012 order provided the relief it had sought to obtain through its appeal of the November 8 order, Skywaves is judicially estopped from claiming to be "aggrieved" by this order. *See Quinn v. Sharon Corp.*, 343 S.C. 411, 414, 540 S.E.2d 474, 475-76 (Ct. App. 2000) ("The doctrine of judicial estoppel precludes a party from adopting a position in conflict with one previously taken in the same or related litigation.")

**B. Skywaves' Amended and Supplemental Notice of Appeal is improper under applicable South Carolina law.**

Even if it had standing to appeal, Skywaves would be barred from doing so by the South Carolina Code and Appellate Court Rules.

First, Skywaves cannot now reinstate its appeal of the November 8, 2011 order. Skywaves previously appealed the November 8 ruling, and then withdrew that appeal after entry of the June 15 order on reconsideration. The appeal was dismissed and the case was remitted to the circuit court. By filing the Amended and Supplemental Notice of Appeal, Skywaves is now attempting to reinstate its prior appeal of the November 8 order. The South Carolina Appellate Court Rules, however, preclude it from doing so.

Rule 260, SCACR, governs dismissal and reinstatement of appeals. Subdivision (a) provides that "[w]hen an appeal has been *involuntarily* dismissed, the appellant must seek reinstatement within 15 days of the order of

dismissal.” *Id.* 260(a) (emphasis added). Subdivision (c) applies to appeals that are *voluntarily* withdrawn, and it does not allow for reinstatement. See *id.* 260(c). Regardless, Skywaves never sought to reinstate its appeal of the November 8, 2011 order.

Second, to the extent the Amended Notice could be considered a new appeal of either the November 8, 2011 order or the June 15, 2012 order, it is prohibited by statute. The South Carolina Code provides for appellate jurisdiction over interlocutory orders “involving the merits.” S.C. Code Ann. § 14-3-330(1). The statute further provides that “*if no appeal be taken* until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment *not before appealed from.*” *Id.* (emphasis added). The statute thus gives a litigant the choice between immediately pursuing appeal of an interlocutory order involving the merits, or deferring any challenge to the order until after entry of final judgment. *Accord Link v. Sch. Dist. of Pickens Cnty.*, 302 SC 1, 5-6, 393 S.E.2d 176, 178-79 (1990).

By necessary implication, the “either/or” approach set forth in § 14-3-330(1) prohibits a party from taking a “both/and” approach by pursuing an immediate appeal of an interlocutory order and then appealing that order *again* after entry of final judgment. Yet, that is what Skywaves is attempting

to do with its Amended and Supplemental Notice of Appeal.<sup>3</sup> Skywaves chose to take an interlocutory appeal of the November 8 order. If Skywaves believed it was aggrieved by the June 15 order, it should have combined its challenge to that order with its then-pending appeal of the November 8 order. Alternatively, Skywaves might have requested that the dismissal of its appeal be without prejudice. Skywaves did neither. As such, the issues raised in the orders of 2011 and 2012 constitute the law of the case.

The Supreme Court rejected a similar attempt to raise the same issues in a second appeal in *Hudson ex rel. Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014). In *Hudson ex rel. Hudson*, the Supreme Court explained that “[u]nder the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, *when the party voluntarily abandons its appeal of that order.*” *Hudson ex rel. Hudson*, 407 S.C. at 119, 754 S.E.2d at 490 (emphasis added). Because Skywaves voluntarily abandoned its previous appeal, it cannot now be heard to complain on appeal about the issues decided in the circuit court in 2011 and 2012.

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<sup>3</sup> Actually, it is worse than that: Skywaves is attempting to use an appeal of an interlocutory order as a vehicle for appealing a *previous* interlocutory order. Nothing in § 14-3-330 permits this kind of jurisdictional bootstrapping.

## CONCLUSION

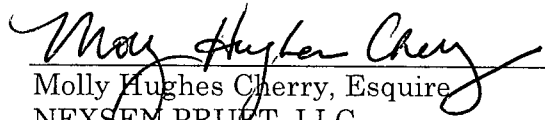
For the reasons set forth above, Movants respectfully ask the Court to strike Appellant/Respondent's Amended and Supplemental Notice of Appeal.

Respectfully submitted,



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Successor in Merger to Branch Banking  
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Charleston, South Carolina  
September 16, 2015

# EXHIBIT "A"

Appellate Case No. 2015-001809

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Skywaves I Corporation, ..... Appellant/Respondent,

v.

Branch Banking and Trust Company, Successor in Merger  
to Branch Banking and Trust Company of SC,  
a/k/a BB&T, and James Edahl, ..... Defendants,

Of which Branch Banking and Trust Company,  
Successor in Merger to Branch Banking and Trust  
Company of SC, a/k/a BB&T is the ..... Respondent/Appellant,

And

Of whom James Edahl is the ..... Respondent,

---

JOINT MOTION OF RESPONDENT/APPELLANT AND RESPONDENT TO  
STRIKE APPELLANT/RESPONDENT'S AMENDED AND SUPPLEMENTAL  
NOTICE OF APPEAL

STATE OF SOUTH CAROLINA  
 COUNTY OF CHARLESTON  
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-10-7516

SKYWAVES CORPORATION

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

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for:  Plaintiff  Defendant  
 or  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order:  ends  does not end the case.  
 Additional Information for the Clerk:

Order Granting BB&T's Partial Motion to Dismiss Amended Complaint and James Edahl's Motion to Dismiss Amended Complaint with Prejudice

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

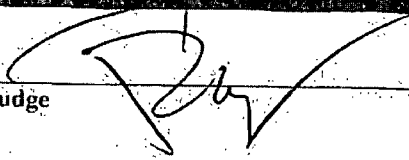
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
NA		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

FILED  
 2011 NOV - 8 PM 1:52  
 JUDGE J. ARMSTRONG  
 CLERK OF COURT

Circuit Court Judge



2134  
Judge Code

11/15/11  
Date

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this day of \_\_\_\_\_, 20\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

\_\_\_\_\_  
\_\_\_\_\_

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

\_\_\_\_\_  
\_\_\_\_\_

**ATTORNEY(S) FOR THE DEFENDANT(S)**

**CLERK OF COURT**

**Court Reporter:** Amanda Haffended

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

Civil Action No. 2009-CP-10-7516

**ORDER GRANTING BRANCH  
BANKING AND TRUST COMPANY OF  
SC, a/k/a BB&T'S PARTIAL MOTION  
TO DISMISS AMENDED COMPLAINT  
AND JAMES EDAHL'S MOTION TO  
DISMISS AMENDED COMPLAINT  
WITH PREJUDICE**

FILED  
2011 NOV 8 PM 1:52  
JUDGE J. ARMSTRONG  
CLERK OF COURT

This matter came before the Court on August 15, 2011, on the Partial Motion to Dismiss of Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("BB&T") and the Motion to Dismiss of Defendant James Edahl ("Edahl"). Plaintiff and Defendants were represented by counsel at the hearing, and the Court fully considered all evidence presented and the arguments of counsel. For the reasons that follow, the Court grants Defendant BB&T's Partial Motion to Dismiss with prejudice and Defendant Edahl's Motion to Dismiss with prejudice.

#### I. FACTS

This is a lender liability case in which Plaintiff Skywaves I Corporation ("Plaintiff" or "Skywaves") alleges that BB&T failed to fund its financing needs. Defendant BB&T is a banking institution with a branch in Charleston, South Carolina, and Defendant Edahl is one of its employees. Skywaves is a company that developed a structural product, specifically cell tower units, for use in the wireless telecommunications industry. To support the manufacture of these individual cell tower units, Skywaves entered into a written factoring agreement with

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BB&T in the Spring of 2005 whereby BB&T would purchase certain receivables of Skywaves at a discount and payment of those receivables would then be made to BB&T. Plaintiff alleges that in 2007 Defendant Edahl made certain representations to Skywaves that BB&T promised to fund Skywaves' current and future financial needs and ultimately to help the company go public. Plaintiff further alleges that its agreement with BB&T was amended via e-mails and other written correspondence to reflect changes in the operation of their financial arrangement.

In January of 2008, BB&T declared a default by Plaintiff under the factoring agreement. Plaintiff contends the default was improper for a number of reasons, including that BB&T, acting through Defendant Edahl, promised to provide capital funding for all of Skywaves' financial needs. Plaintiff claims the improper default caused it to go into bankruptcy. Plaintiff is currently in bankruptcy and received an Order from the Bankruptcy Court to file this lawsuit against Defendants.

Plaintiff has asserted four claims against BB&T and Edahl for: (1) negligent misrepresentation; (2) fraudulent misrepresentation; (3) negligence; and (4) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). Plaintiff has asserted an additional four causes of action against BB&T for: (5) breach of contract; (6) breach of contract accompanied by fraudulent acts; (7) promissory estoppel; and (8) breach of the covenant of good faith and fair dealing. Defendant Edahl moved to dismiss all of the claims against him. Defendant BB&T filed a partial motion to dismiss five of Plaintiff's claims, for negligent misrepresentation; fraudulent misrepresentation; negligence; violation of the SCUTPA and breach of contract accompanied by a fraudulent act.

## II. LEGAL ANALYSIS

South Carolina Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim for failure to state facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6); *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (2003). The question is whether the pleadings, taken in the light most favorable to the plaintiff, articulate a valid claim for relief. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). A Rule 12(b)(6) motion "must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (1997).

As demonstrated below, there is no possibility that Plaintiff can establish its four claims for negligent misrepresentation, fraudulent misrepresentation, negligence or violation of the South Carolina Unfair Trade Practices Act against BB&T or Edahl, as a matter of law. Moreover, Plaintiff has failed to plead sufficient facts to constitute a cause of action against BB&T for breach of contract accompanied by a fraudulent act:

**A. Plaintiff Fails to Allege Any Conduct on the Part of BB&T That Would Support its Claim for Breach of Contract Accompanied by a Fraudulent Act.**

Plaintiff's claim for breach of contract accompanied by a fraudulent act fails as a matter of law because Plaintiff does not allege any fraudulent act or conduct on the part of BB&T — necessary components of a claim for breach of contract accompanied by fraudulent acts. Rule 9(b) of the South Carolina Rules of Civil Procedure provides that a party alleging fraud must do so with particularity. S.C. R. Civ. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

Plaintiff makes general allegations that BB&T's actions were characterized by dishonesty in fact and unfair dealing with respect to Plaintiff's plan to transition from BB&T to another

lender and BB&T's decision to cease funding, but Plaintiff fails to plead any specific fraudulent act or conduct on the part of BB&T with regard to this claim and has not pled fraud with the particularity required by Rule 9(b). Accordingly, Plaintiff's claim against BB&T for breach of contract accompanied by a fraudulent act is dismissed.

**B. Plaintiff Cannot Sustain a Claim Against Either Defendant for Negligent Misrepresentation or Fraudulent Misrepresentation.**

Plaintiff's claims for negligent misrepresentation and fraudulent misrepresentation both fail as a matter of law because Plaintiff does not allege a legally viable false statement or any fact that would tend to create a right for Plaintiff to rely on any alleged misrepresentation by BB&T or Edahl.

**1. No False Statement**

Negligent misrepresentation is predicated upon the transmission of a negligently made false statement. *See Armstrong v. Collins*, 366 S.C. 204, 220, 621 S.E.2d 368, 376 (Ct. App. 2005); *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003); *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 349, 565 S.E.2d 309, 315 (Ct. App. 2002); *Brown v. Stewart*, 348 S.C. 33, 42, 557 S.E.2d 676, 680-81 (Ct. App. 2001); *West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000). Like negligent misrepresentation, an actionable fraudulent misrepresentation case requires there first be a false representation predicated upon misstatements of fact rather than upon expression of opinion, intent, or confidence that the deal would be satisfactory. *See Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 317 S.C. 520, 526-27, 455 S.E.2d 183, 187 (Ct. App. 1995) (finding statements by equipment seller concerning expected performance of logging system were opinions as to future performance and could not be basis for claim of fraud).

More specifically, the alleged false representation must be of a present or pre-existing fact. See *Spires v. Acceleration Nat'l Ins. Co.*, 417 F. Supp. 2d 750, 755-56 (D.S.C. 2006) (applying South Carolina law). The negligent representation cannot be based on unfulfilled promises or statements as to future events. See *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993). In addition, an integral component of this element is that the representation be false at the time it is made. See *GSM Dealer Servs., Inc. v. Chrysler Corp.*, 32 F.3d 139, 142 (4th Cir. 1994) (applying South Carolina law). With respect to fraudulent misrepresentation, "the fraudulent representation must relate to a present or pre-existing fact and it cannot ordinarily be based upon an unfulfilled promise to perform in the future or statements as to future events." *Id.* (quoting *Emerson v. Powell*, 283 S.C. 293, 296, 321 S.E.2d 629, 631 (Ct. App. 1984)).

Plaintiff has not alleged any legally-viable false representation of a present or pre-existing fact made to the Plaintiff. Plaintiff has only alluded to alleged false representations by Defendants regarding the promise of future funding which the Court finds, at best, amount to general salesmanship that does not give rise to a cause of action for negligent or fraudulent misrepresentations. The alleged representations do not relate to present or pre-existing facts and therefore cannot, as a matter of law, satisfy the requirements for a claim for negligent misrepresentation or fraudulent misrepresentation.

Plaintiff contends that a promise of future funding is actionable if Defendants had no intention of fulfilling the promise at the time it was made and only made it to induce the performance of Plaintiff. See *Parker v. Shecut*, 340 S.C. 460, 482, 531 S.E.2d 546, 558 (Ct. App. 2000), *rev'd on other grounds*, 349 S.D. 226, 562 S.E.2d 620 (2002). Although generally true, Plaintiff's own allegations and arguments are that BB&T performed under the alleged

modified agreement for some period of time, which is inconsistent with an intention not to fulfill a promise. In its Amended Complaint, Plaintiff alleges a variety of representations by Defendants in 2005, 2006 and 2007, during which time Plaintiff alleges it continued its relationship with BB&T, and that the relationship continued at least until January of 2008. Under these circumstances, the allegations of Plaintiff's Amended Complaint do not give rise to a legally actionable false statement sufficient to support a claim for negligent or fraudulent misrepresentation.

2. No Right to Rely

In addition to showing that a false representation was made, a plaintiff must also show that it had a right to rely on such representation in order to pursue a claim for either negligent misrepresentation or fraudulent misrepresentation. See *GSM Dealer Servs., Inc. v. Chrysler Corp.*, 32 F.3d 139, 142 (4th Cir. 1994) (applying South Carolina law): When there is no fiduciary relationship between the parties and the situation involves an arm's length transaction between mature, educated parties, there is no right to rely. *Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina*, C.A. No. 2:98-158-23 (S.C. Com. Pl. April 12, 1999) (citing *Florentine Corp. v. PEDA-I, Inc.*, 339 S.E.2d 112, 114 (S.C. 1985)); see also *First Savings Bank, FSB v. Capital Investors, Inc.*, 450 S.E.2d 83 (S.C. Ct. App. 1994, rev'd in part on other grounds, 459 S.E.2d 307 (S.C. 1995). Moreover, as a general rule, officers of corporations, in their capacities as such, do not owe any individual fiduciary duties to a plaintiff. See *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40-41, 340 S.E.2d 786, 790.

South Carolina law considers the normal relationship between a bank and its customer to be one of creditor-debtor and not one that is fiduciary in nature. See *Burwell*, 288 S.C. at 40, 340 S.E.2d at 790; *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 497, 220 S.E.2d 116, 119 (Ct.

App.1975); *Johnson v. Serv. Mgmt., Inc.*, 319 S.C. 165, 167-68, 459 S.E.2d 900, 902 (Ct. App.1995). Although Plaintiff has alleged a certain amount of customization that went into BB&T's product for Plaintiff, it has not alleged any specific facts that would change the standard creditor-debtor framework and create a fiduciary relationship. Accordingly, as a matter of law, Plaintiff cannot, as a sophisticated, mature party, establish that it had a right to rely on any alleged false statements by BB&T or Edahl.

C. Plaintiff Has Not Stated a Claim Against Either Defendant for Negligence.

Additionally, Plaintiff cannot establish its claim for negligence against BB&T or Edahl. To prove a claim for negligence, a plaintiff must establish a duty of care, a breach of that duty and damages proximately caused by the breach. *McKnight v. South Carolina Dept. of Corrections*, 684 S.E.2d 566, 569 (S.C.Ct.App.2009). In this case, neither Defendant had or breached any duty to Plaintiff.

Plaintiff alleges that "BB&T [had] a unique power and influence over the day to day operations of Skywaves and gave rise to a special relationship with the parties, whereby Defendants had a fiduciary duty or other duty of care to Skywaves." However, Plaintiff cannot unilaterally manufacture a duty by BB&T where none exists. "Duty is generally defined as the obligation to conform to a particular standard of conduct toward another." *Murray v. Bank of America, N.A.*, 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct. App. 2003). "Ordinarily, the common law imposes no duty on a person to act." *Id.* "An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Id.*

As noted above, South Carolina views the normal relationship between a bank and its customer as one of creditor-debtor and not one that is fiduciary in nature. See *Burwell, supra*;

*Owens, supra; Johnson, supra.* Again, Plaintiff has not alleged facts sufficient to expand the normal debtor-creditor relationship into one that was fiduciary in nature. Given the normal relationship of a bank and its customer and the lack of any other circumstance creating an affirmative duty, Plaintiff cannot show that BB&T or Edahl had any duty to breach.

**D. Plaintiff Has Not Stated a Claim Against Either Defendant for Violation of the South Carolina Unfair Trade Practices Act.**

Plaintiff has not pled sufficient allegations against Defendants to state a claim for violation of the SCUTPA. To be actionable under SCUTPA, the alleged unfair or deceptive act or practice must have an impact upon the public interest. *Noack Enterprises, Inc. v. Country Corner Interiors*, 351 S.E.2d 347 (S.C.Ct.App. 1986). Here, Plaintiff merely offers a conclusion of law that the "unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition." Absent from the Amended Complaint are any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition.

At most, the Amended Complaint alleges, in sum, that Defendants promised to but then refused to fund the financing needs of Skywaves. These allegations do not comprise "unfair or deceptive acts" that are actionable under SCUTPA because business relationships that affect only the parties to the complained-of transaction are not actionable under SCUTPA. *See Noack Enterprises, Inc.* 351 S.E.2d at 349-50.

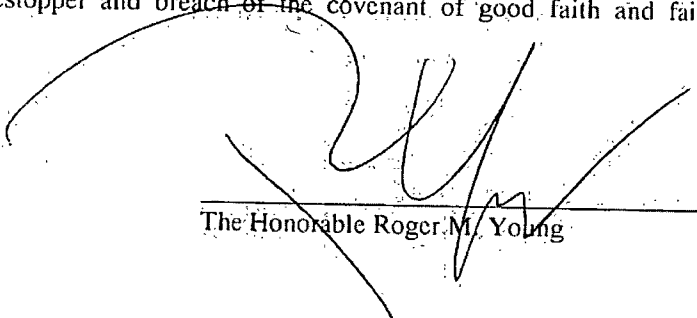
Although not delineated as a breach of contract claim, Plaintiff's claim is premised upon the breach of an alleged agreement between BB&T and Skywaves to fund the financing needs of Skywaves. However, even "[a] deliberate or intentional breach of a valid contract, without more, does not constitute a violation of SCUTPA. Otherwise, every intentional breach of a contract

within a commercial setting would constitute an unfair trade practice and thereby subject the breaching party to treble damages." *Ardis v. Cox*, 431 S.E. 2d 267, 271 (S.C. Ct.App. 1993).

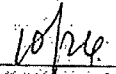
### III. CONCLUSION

For the reasons set forth herein, it is hereby ORDERED that Defendant Edahl's Motion to Dismiss is GRANTED and all claims against him are dismissed with prejudice; and it is further ORDERED that Defendant BB&T's Partial Motion to Dismiss is GRANTED with prejudice such that the only remaining claims in this case are Plaintiff's claims against BB&T for breach of contract, promissory estoppel and breach of the covenant of good faith and fair dealing.

IT IS SO ORDERED.



\_\_\_\_\_  
The Honorable Roger M. Young

  
\_\_\_\_\_, 2011  
Charleston, South Carolina

# EXHIBIT “B”

Appellate Case No. 2015-001809

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Skywaves I Corporation, ..... Appellant/Respondent,

v.

Branch Banking and Trust Company, Successor in Merger  
to Branch Banking and Trust Company of SC,  
a/k/a BB&T, and James Edahl, ..... Defendants,

Of which Branch Banking and Trust Company,  
Successor in Merger to Branch Banking and Trust  
Company of SC, a/k/a BB&T is the ..... Respondent/Appellant,

And

Of whom James Edahl is the ..... Respondent,

---

JOINT MOTION OF RESPONDENT/APPELLANT AND RESPONDENT TO  
STRIKE APPELLANT/RESPONDENT'S AMENDED AND SUPPLEMENTAL  
NOTICE OF APPEAL

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

SKYWAVES I CORPORATION,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2009-CP-10-7516

ORDER GRANTING SKYWAVES'  
MOTION TO RECONSIDER

JULIE J. ARMSTRONG  
CLERK OF COURT  
2012 JUN 15 AM 8:35

FILED

In this Order, I modify my previous ruling dated November 16, 2011 as follows:

1. **A Complaint for Breach Of Contract Accompanied By A Fraudulent Act does NOT Require Allegations of Specific Acts or Conduct under Rule 9(b)**

This Court dismissed Skywaves' cause of action for Breach of Contract Accompanied by a Fraudulent Act on the basis that the cause of action was not pled with sufficient particularity under Rule 9(b) of the South Carolina Rules of Civil Procedure.

**Plaintiff makes general allegations that BB&T's actions were characterized by dishonest in fact and unfair dealing with respect to Plaintiff's plan to transition from BB&T to another lender and BB&T's decision to cease funding, but Plaintiff fails to plead any specific fraudulent act or conduct on the part of BB&T with regard to this claim and has not plead fraud with the particularity required by Rule 9(b).**

(Order granting Motion to Dismiss, ¶ A, pgs 3-4) (emphasis added).

However, a claim for breach of contract accompanied by a fraudulent act does not require allegations of the nine elements of common law fraud. *See Harper v. Ethridge*, 290 S.C. 112, 118-19, 348 S.E.2d 374, 378 (1986). Rather, it requires allegations of fraudulent intent and a fraudulent act, which is "any act characterized by dishonesty in fact, unfair dealing or the

unlawful appropriation of another's property by design." *Id.* (holding pleadings sufficient where they included a "dishonest design" and acts to effectuate it).

Skywaves has alleged BB&T's breach of contract was accompanied by fraudulent acts characterized by dishonesty in fact and unfair dealing. In particular, Skywaves alleges BB&T made material misrepresentations in order to induce Skywaves into continuing its relationship with BB&T rather than working with Hunt Capital, Wachovia, and other lenders, by offering to modify the factoring agreement to fund based on Skywaves' invoices and purchase orders. BB&T's misrepresentations are specifically set forth in the amended complaint. (See Amended Complaint ¶ 35: "BB&T's refusal to continue funding was not due to the reasons asserted in the default letter, but was because BB&T was unhappy with and sought to renegotiate the parties' modified factoring agreement"; See also Amended Complaint ¶¶ 10-25, 36 53, 54, 56, 60).

Skywaves further alleges that after it turned down proposals for working capital investments from other lenders, BB&T sought to renegotiate the parties' modified factoring agreement. When Skywaves refused and indicated it would try to secure alternate financing, BB&T called a default citing pretextual reasons and immediately stopped funding in order to harm Skywaves. (See Amended Complaint ¶¶ 33-39). Skywaves contends BB&T's conduct is dishonest and unfair and therefore constitutes fraudulent acts giving rise to the claim sufficiently plead under *Harper v. Ethridge*.

As BB&T's motion was made pursuant to Rule 12(b)(6) SCRC, in light of the oral arguments and further considerations, at this stage of the case, Skywaves should be allowed to proceed with this claim.

A handwritten signature or set of initials in black ink, located in the bottom right corner of the page. The signature is stylized and appears to consist of a large, looped letter 'P' followed by a horizontal line and a short vertical stroke.

2. **Skywaves' Claims for Negligence and Negligent Misrepresentation Allege BB&T and Edahl Undertook to Advise It Such that Skywaves' Relationship with BB&T Became Fiduciary in Nature**

a. **Fiduciary Duty**

A "fiduciary relationship" is founded on trust and confidence reposed by one person in the integrity and fidelity of another. *Steele v. Victory Sav. Bank*, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (S.C.App.,1988). It "exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct.App.1987).

Normally, the relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature. *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (SC 1986). **However, a bank may be held to a fiduciary duty if it undertakes to advise a customer as part of services the bank offers.** *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (S.C.App. 2003) (emphasis added); *Burwell v. South Carolina National Bank*, 288 S.C. 34, 340 S.E.2d 786 (SC 1986); *Rush v. South Carolina Nat'l Bank*, 288 S.C. 560, 562, 343 S.E.2d 667, 668 (Ct.App.1986).

Skywaves' Amended Complaint includes numerous allegations of a relationship beyond mere creditor/debtor, including that BB&T and Edahl undertook to advise Skywaves, that BB&T went outside of its standard contracts and created funding agreements, including the "special" factoring agreement, specifically for Skywaves, that BB&T tailored the services it was offering specifically to Skywaves, and that BB&T and Edahl knew Skywaves placed special trust in them and was relying on their expertise.

For example, Skywaves alleges:

- a. ...BB&T also **provided a designated relationship manager who assisted Skywaves** in raising additional capital through investors (Amended Complaint ¶ 11)
- b. ...Defendant BB&T, acting primarily through Defendant Edahl...represented to Skywaves that BB&T was ready, willing and able **through the use of innovative and creative financial products to provide Skywaves with the capital needed** to become a successful manufacturer, that **Defendants understood exactly Skywaves' growth cycle**, and that BB&T was fully committed to providing the present and future banking needs of Skywaves (Amended Complaint ¶ 53)
- c. ...Defendant BB&T acting primarily through Defendant Edahl told Skywaves: (a) that it **understood the short and long term capital needs of Skywaves**; (b) that **Skywaves did not need a large bank or additional capital funding** to continue its growth; (c) that Defendants believed Skywaves was strategically positioned for success; (d) that Defendants wanted to **take Skywaves to a sale or stock IPO**; and (e) that BB&T would provide capital funding all of Skywaves' financial needs. (Amended Complaint ¶ 56)
- d. Defendant BB&T, acting primarily through Defendant Edahl, represented in writing that if Skywaves would continue its banking relationship with BB&T, BB&T would **devise a funding program tailored exclusively for Skywaves, not in keeping with their ordinary contract and course of business with other customers.** (Amended Complaint ¶ 57)
- e. Defendant BB&T, acting primarily through Defendant Edahl, offered Skywaves a series of inducements in the form of financial commitments as a token of its bona fides...and include the following:...**raise the factoring from 80% to 85% of invoices and 60% of purchase orders**...reduce the bank charges to .45% with a cap of \$3000 per month...**gratuitously advanced \$330,000 into the Skywaves bank account without Skywaves request or solicitation**...(Amended Complaint ¶ 60)
- f. Defendant Edahl traveled to MacBee, South Carolina on behalf of BB&T for the purpose of making a presentation to potential Skywaves lenders investors... Defendant Edahl told Skywaves and its potential lenders and investors:...**BB&T would act as a partner in managing Skywaves growth...BB&T's commitment to finance Skywaves' growth was unique to Skywaves, and was the equivalent of the funding offered by Wachovia or Hunt Capital**...(Amended Complaint ¶ 62)
- g. **Defendants undertook to tailor a funding program outside its ordinary course of business lending relationships and unique to Skywaves.** (Amended Complaint ¶ 79)
- h. This method of operation gave **BB&T a unique power and influence over the day to day operations of Skywaves and gave rise to a special relationship between the**

**parties**, whereby Defendants had a fiduciary duty or other duty of care to Skywaves. (Amended Complaint ¶ 81)

- i. **Skywaves relied on Defendants' financial expertise and advice.** (Amended Complaint ¶ 82)
- j. **Defendants knew that Skywaves relied on BB&T to provide sound financial advice and information and that Skywaves had entrusted its future existence and growth to BB&T's care.** (Amended Complaint ¶ 84)
- k. “[BB&T] did not include the new \$2,000,000 PO sub-limit or the 65% advance rate in the amendment as **this is typically not part of BB&T's standard contract (it is something out of the ordinary for Skywaves exclusively).**” (Ex 3 at hearing, 3/20/07 email from Morris Castlen of BB&T, referred to in Amended Complaint)

Skywaves has plead a special relationship, complete with a “special” factoring agreement, which BB&T itself claims was “out of the ordinary for Skywaves exclusively” (See Ex 3 at hearing, 3/20/07 email from Morris Castlen of BB&T, referred to in Amended Complaint).

Further, South Carolina courts have held, “To determine whether a fiduciary relationship existed between two parties, for purposes of cause of action for breach of fiduciary duty, a reviewing court must look to the particulars of the relationship between the parties.” *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005). Skywaves has not had an opportunity to develop the “particulars” of its relationship with BB&T through discovery, but has plead facts that remove its relationship with BB&T from the realm of creditor/debtor.

**b. “Future Events”**

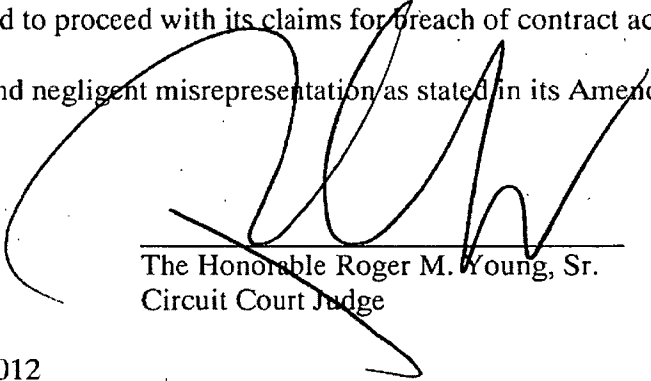
At the March 27, 2012 hearing, counsel argued that the representations of BB&T and Edahl were not future promises, but rather were representations based on existing business records, in particular the factoring agreement which, by its terms, is valid for one year and automatically renews. (See Ex 1 at hearing, factoring agreement, ¶ 19). Skywaves further argued that even if BB&T and Edahl alleged misrepresentations *were* about future events, they are actionable as they were made to induce Skywaves into making BB&T its exclusive financial

institution and rejecting the proposals of other lenders like Wachovia and Hunt Capital. (Amended Complaint ¶ 16, 64). A future promise is actionable if it is “made as part of a general scheme to induce the signing of a paper or to make one act, as he otherwise would not have acted, to his injury.” *Bishop Logging Co. v. John Deere Indus. Equipment Co.* 317 S.C. 520, 527, 455 S.E.2d 183, 187 (S.C.App.1995) citing *Coleman v. Stevens*, 124 S.C. 8, 15-16, 117 S.E. 305, 307 (1923).

At this preliminary stage, in light of oral arguments and further considerations, and viewing the facts alleged and the inferences reasonably deducible therefrom in the light most favorable to Skywaves, with every doubt resolved in its favor, Skywaves should be allowed to proceed on its claims for negligence and negligent misrepresentation as stated in its Amended Complaint.

### 3. Conclusion

For the reasons stated above, this Court’s Order of November 16, 2011 is hereby amended and Skywaves is allowed to proceed with its claims for breach of contract accompanied by a fraudulent act, negligence, and negligent misrepresentation as stated in its Amended Complaint.



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The Honorable Roger M. Young, Sr.  
Circuit Court Judge

On this 14 day of June 2012  
Charleston, SC

# EXHIBIT "C"

Appellate Case No. 2015-001809

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Skywaves I Corporation, ..... Appellant/Respondent,

v.

Branch Banking and Trust Company, Successor in Merger  
to Branch Banking and Trust Company of SC,  
a/k/a BB&T, and James Edahl, ..... Defendants,

Of which Branch Banking and Trust Company,  
Successor in Merger to Branch Banking and Trust  
Company of SC, a/k/a BB&T is the ..... Respondent/Appellant,

And

Of whom James Edahl is the ..... Respondent,

---

JOINT MOTION OF RESPONDENT/APPELLANT AND RESPONDENT TO  
STRIKE APPELLANT/RESPONDENT'S AMENDED AND SUPPLEMENTAL  
NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Circuit Court Judge

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Case No. 2009-CP-10-7516

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Skywaves I Corporation.....Appellant

v.

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

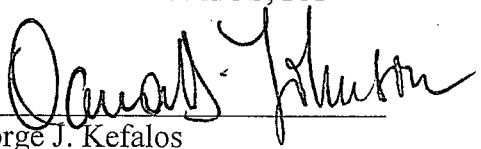
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MOTION TO WITHDRAW APPEAL

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Plaintiff/Appellant Skywaves I Corporation, pursuant to Rule 260 of the South Carolina Appellate Rules, moves this court for an order dismissing this appeal. The grounds for this request are that the order subject to this appeal has been reconsidered by the lower court and the Honorable Roger M. Young, entered a new Order dated June 14, 2012 and filed on June 15, 2012, (attached hereto as Exhibit A), rendering this appeal moot.

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

This 17 day of July, 2012  
Charleston, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

SKYWAVES I CORPORATION,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO: 2009-CP-10-7516

ORDER GRANTING SKYWAVES'  
MOTION TO RECONSIDER

CLERK OF COURT  
J. ARMSTRONG

2012 JUN 15 AM 8:35

FILED

In this Order, I modify my previous ruling dated November 16, 2011 as follows:

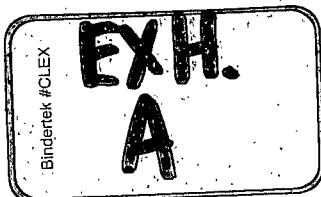
1. **A Complaint for Breach Of Contract Accompanied By A Fraudulent Act does NOT Require Allegations of Specific Acts or Conduct under Rule 9(b)**

This Court dismissed Skywaves' cause of action for Breach of Contract Accompanied by a Fraudulent Act on the basis that the cause of action was not pled with sufficient particularity under Rule 9(b) of the South Carolina Rules of Civil Procedure.

**Plaintiff makes general allegations that BB&T's actions were characterized by dishonest in fact and unfair dealing with respect to Plaintiff's plan to transition from BB&T to another lender and BB&T's decision to cease funding, but Plaintiff fails to plead any specific fraudulent act or conduct on the part of BB&T with regard to this claim and has not plead fraud with the particularity required by Rule 9(b).**

(Order granting Motion to Dismiss, ¶ A, pgs 3-4) (emphasis added).

However, a claim for breach of contract accompanied by a fraudulent act does not require allegations of the nine elements of common law fraud. *See Harper v. Ethridge*, 290 S.C. 112, 118-19, 348 S.E.2d 374, 378 (1986). Rather, it requires allegations of fraudulent intent and a fraudulent act, which is "any act characterized by dishonesty in fact, unfair dealing or the



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As BB&T's motion was made pursuant to Rule 12(b)(6) SCRCPP, in light of the oral arguments and further considerations, at this stage of the case, Skywaves should be allowed to proceed with this claim.

2. **Skywaves' Claims for Negligence and Negligent Misrepresentation Allege BB&T and Edahl Undertook to Advise It Such that Skywaves' Relationship with BB&T Became Fiduciary in Nature**

a. **Fiduciary Duty**

A "fiduciary relationship" is founded on trust and confidence reposed by one person in the integrity and fidelity of another. *Steele v. Victory Sav. Bank*, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (S.C.App.,1988). It "exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct.App.1987).

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- e. Defendant BB&T, acting primarily through Defendant Edahl, offered Skywaves a series of inducements in the form of financial commitments as a token of its bona fides...and include the following:...**raise the factoring from 80% to 85% of invoices and 60% of purchase orders**...reduce the bank charges to .45% with a cap of \$3000 per month...**gratuitously advanced \$330,000 into the Skywaves bank account without Skywaves request or solicitation**...(Amended Complaint ¶ 60)
- f. Defendant Edahl traveled to MacBee, South Carolina on behalf of BB&T for the purpose of making a presentation to potential Skywaves lenders investors... Defendant Edahl told Skywaves and its potential lenders and investors:...**BB&T would act as a partner in managing Skywaves growth...BB&T's commitment to finance Skywaves' growth was unique to Skywaves, and was the equivalent of the funding offered by Wachovia or Hunt Capital**...(Amended Complaint ¶ 62)
- g. **Defendants undertook to tailor a funding program outside its ordinary course of business lending relationships and unique to Skywaves.** (Amended Complaint ¶ 79)
- h. This method of operation gave **BB&T a unique power and influence over the day to day operations of Skywaves and gave rise to a special relationship between the**

**parties**, whereby Defendants had a fiduciary duty or other duty of care to Skywaves. (Amended Complaint ¶ 81)

- i. **Skywaves relied on Defendants' financial expertise and advice.** (Amended Complaint ¶ 82)
- j. **Defendants knew** that **Skywaves relied on BB&T** to provide sound financial advice and information and that **Skywaves had entrusted its future existence and growth to BB&T's care.** (Amended Complaint ¶ 84)
- k. “[BB&T] did not include the new \$2,000,000 PO sub-limit or the 65% advance rate in the amendment as **this is typically not part of BB&T's standard contract (it is something out of the ordinary for Skywaves exclusively).**” (Ex 3 at hearing, 3/20/07 email from Morris Castlen of BB&T, referred to in Amended Complaint)

Skywaves has plead a special relationship, complete with a “special” factoring agreement, which BB&T itself claims was “out of the ordinary for Skywaves exclusively” (See Ex 3 at hearing, 3/20/07 email from Morris Castlen of BB&T, referred to in Amended Complaint).

Further, South Carolina courts have held, “To determine whether a fiduciary relationship existed between two parties, for purposes of cause of action for breach of fiduciary duty, a reviewing court must look to the particulars of the relationship between the parties.” *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005). Skywaves has not had an opportunity to develop the “particulars” of its relationship with BB&T through discovery, but has plead facts that remove its relationship with BB&T from the realm of creditor/debtor.

**b. “Future Events”**

At the March 27, 2012 hearing, counsel argued that the representations of BB&T and Edahl were not future promises, but rather were representations based on existing business records, in particular the factoring agreement which, by its terms, is valid for one year and automatically renews. (See Ex 1 at hearing, factoring agreement, ¶ 19). Skywaves further argued that even if BB&T and Edahl alleged misrepresentations *were* about future events, they are actionable as they were made to induce Skywaves into making BB&T its exclusive financial

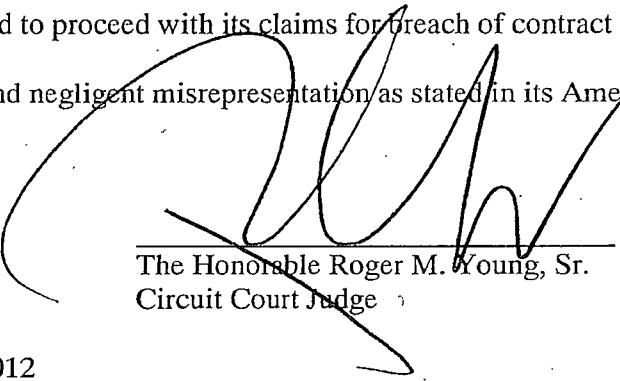
institution and rejecting the proposals of other lenders like Wachovia and Hunt Capital.

(Amended Complaint ¶ 16, 64). A future promise is actionable if it is “made as part of a general scheme to induce the signing of a paper or to make one act, as he otherwise would not have acted, to his injury.” *Bishop Logging Co. v. John Deere Indus. Equipment Co.* 317 S.C. 520, 527, 455 S.E.2d 183, 187 (S.C.App.1995) citing *Coleman v. Stevens*, 124 S.C. 8, 15-16, 117 S.E. 305, 307 (1923).

At this preliminary stage, in light of oral arguments and further considerations, and viewing the facts alleged and the inferences reasonably deducible therefrom in the light most favorable to Skywaves, with every doubt resolved in its favor, Skywaves should be allowed to proceed on its claims for negligence and negligent misrepresentation as stated in its Amended Complaint.

### 3. Conclusion

For the reasons stated above, this Court’s Order of November 16, 2011 is hereby amended and Skywaves is allowed to proceed with its claims for breach of contract accompanied by a fraudulent act, negligence, and negligent misrepresentation as stated in its Amended Complaint.



\_\_\_\_\_  
The Honorable Roger M. Young, Sr.  
Circuit Court Judge

On this 14 day of June 2012  
Charleston, SC

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7517

Ron Konersmann .....Appellant

v.

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

PROOF OF SERVICE

I certify that I have served the Motion to dismiss on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on July 17, 2012, addressed to their attorney of record, Molly Hughes Cherry, Esq., Nexsen Pruet, LLC, P.O. Box 486, Charleston, SC 29402, on July 17, 2012.

GEORGE J. KEFALOS, PA

By:   
George J. Kefalos., Esq.

Oana D. Johson, Esq.  
46 A State Street  
Charleston, SC 29401  
(843) 722-6612

*Attorneys for Skywaves I Corporation*

# EXHIBIT "D"

Appellate Case No. 2015-001809

---

Skywaves I Corporation, ..... Appellant/Respondent,

v.

Branch Banking and Trust Company, Successor in Merger  
to Branch Banking and Trust Company of SC,  
a/k/a BB&T, and James Edahl, ..... Defendants,

Of which Branch Banking and Trust Company,  
Successor in Merger to Branch Banking and Trust  
Company of SC, a/k/a BB&T is the ..... Respondent/Appellant,

And

Of whom James Edahl is the ..... Respondent,

---

JOINT MOTION OF RESPONDENT/APPELLANT AND RESPONDENT TO  
STRIKE APPELLANT/RESPONDENT'S AMENDED AND SUPPLEMENTAL  
NOTICE OF APPEAL

# The South Carolina Court of Appeals

Skywaves I Coporation, Appellant,

v.

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

Appellate Case No. 2012-205929

---

## ORDER

---

The above matter is pending on appeal in this Court. The appellant now moves to withdraw the appeal. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.

FOR THE COURT

BY

Jerry A. Kitching  
CLERK

Columbia, South Carolina

cc:

George J. Kefalos

Molly Hughes Cherry

M. Dawes Cooke, Jr.

John William Fletcher

**FILED**

8/20/12 AK

# EXHIBIT "E"

Appellate Case No. 2015-001809

---

Skywaves I Corporation, ..... Appellant/Respondent,

iv.

Branch Banking and Trust Company, Successor in Merger  
to Branch Banking and Trust Company of SC,  
a/k/a BB&T, and James Edahl, ..... Defendants,

Of which Branch Banking and Trust Company,  
Successor in Merger to Branch Banking and Trust  
Company of SC, a/k/a BB&T is the ..... Respondent/Appellant,

And

Of whom James Edahl is the ..... Respondent,

---

JOINT MOTION OF RESPONDENT/APELLANT AND RESPONDENT TO  
STRIKE APPELLANT/RESPONDENT'S AMENDED AND SUPPLEMENTAL  
NOTICE OF APPEAL



# The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1015 SUMTER STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
www.sccourts.org

September 07, 2012

The Honorable Julie J. Armstrong  
100 Broad St Ste 106  
Charleston SC 29401-2210

## REMITTITUR

Re: Skywaves I v. Branch Banking  
Lower Court Case No. 2009CP1007516  
Appellate Case No. 2012-205929

Dear Clerk of Court:

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,

*V. Claire Allen, Deputy*

CLERK

Enclosure

cc: George J. Kefalos  
Molly Hughes Cherry  
M. Dawes Cooke, Jr.  
John William Fletcher

**RECEIVED**

9/10/12

MERCEN PROCT

# The South Carolina Court of Appeals

Skywaves I Coporation, Appellant,

v.

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

Appellate Case No. 2012-205929

---

## ORDER

---

The above matter is pending on appeal in this Court. The appellant now moves to withdraw the appeal. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.

FOR THE COURT

BY

*Jerry A. Kitching*  
CLERK

Columbia, South Carolina

cc:

George J. Kefalos

Molly Hughes Cherry

M. Dawes Cooke, Jr.

John William Fletcher

**FILED**

8/20/12 *AK*

**EXHIBIT “F”**

Appellate Case No. 2015-001809

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Skywaves I Corporation, ..... Appellant/Respondent,

v.

Branch Banking and Trust Company, Successor in Merger  
to Branch Banking and Trust Company of SC,  
a/k/a BB&T, and James Edahl, ..... Defendants,

Of which Branch Banking and Trust Company,  
Successor in Merger to Branch Banking and Trust  
Company of SC, a/k/a BB&T is the ..... Respondent/Appellant,

And

Of whom James Edahl is the ..... Respondent,

---

**JOINT MOTION OF RESPONDENT/APPELLANT AND RESPONDENT TO  
STRIKE APPELLANT/RESPONDENT’S AMENDED AND SUPPLEMENTAL  
NOTICE OF APPEAL**

IN THE STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 SKYWAVES I CORPORATION, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 BRANCH BANKING AND TRUST )  
 COMPANY, Successor in merger to )  
 BRANCH BANKING AND TRUST )  
 COMPANY OF SC, a/k/a/ BB&T, and )  
 JAMES EDAHL. )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 NINTH JUDICIAL CIRCUIT

Civil Action No.: 2009-CP-10-7516

FILED  
 2015 FEB -9 PM 12:23  
 JULIE J. ARMSTRONG  
 CLERK OF COURT  
 BY \_\_\_\_\_

ORDER GRANTING DEFENDANT  
 BB&T and DEFENDANT EDHALS'  
 MOTION TO STRIKE PLAINTIFF'S  
 DEMAND FOR JURY TRIAL

Defendants Branch Banking & Trust Company ("BB&T") and James Edahl ("Edahl") filed motions to strike the Plaintiff Skywaves I Corporation ("Skywaves") demand for a trial by jury in this matter. The Defendants maintain the Plaintiff contractually waived its right to a jury trial in the Factoring and Security Agreement ("Factoring Agreement") between the parties that is the subject of this lawsuit.

**Statement of the Facts**

The Plaintiff and Defendant BB&T<sup>1</sup> entered into two promissory notes, one loan agreement, two security agreements and the Factoring Agreement. The Factoring Agreement contains the following waiver upon which BB&T relies:

[T]o the fullest extent permitted by applicable law, Client hereby knowingly, intelligently and expressly waives demand, protest, notice of protest, notice of default or dishonor, notice of payment or nonpayment, and notice of default, release, compromise, settlement, extension, or renewal of any instruments or guaranties held by BB&T on which Client may in any way liable; *trial by jury*

<sup>1</sup> Defendant James Edahl was an employee of Defendant BB&T at the time the contract was entered into and was its agent, servant and employee acting within the scope and course of his employment at all relevant times. Therefore he is entitled to enforcement of the jury trial waivers as well.

and right to trial by jury on any issue in any way pertaining to this Agreement or any transaction or occurrences arising hereunder or governed hereby (which right BB&T likewise waives); and notice of BB&T's acceptance of this agreement. (emphasis added)

### Discussion

The conflict at issue arises because North Carolina law provides, "[a]ny provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable." N.C. Gen. Stat. Ann. § 22B-10.

As a result, the Plaintiff maintains the jury waiver provision is void and is not a part of the parties' contractual agreement because such provisions are unconscionable and violates North Carolina public policy. A choice-of-law clause in a contract will not be enforced if application of foreign law results in a violation of South Carolina public policy. Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 728 (D.S.C. 2007). However, such a waiver clearly does not violate South Carolina public policy as the long-standing principle that "[a] party may waive the right to a jury trial by contract" was recently re-affirmed in Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 332, 755 S.E.2d 437, 443 (2014).

Traditional South Carolina choice of law rules dictate that "contracts are to be governed as to their nature, validity and interpretation by the law of the place where they are made, unless the contracting parties clearly appear to have had some other place in view." See Lister V. NationsBank of Del. NA., 329 S.C. 133, 144, 494 S.E.2d 449, 455 (Ct. App. 1997) (quoting Livingston v. Atlantic Coast Line RS., 176 S.C. 385, 391 180 S.E. 343, 345 (1935)); see also Witt v. American Trucking Associations, Inc., 860 F. Supp. 295 (D.S.C. 1994) (in contract actions, South Carolina courts apply substantive law of place where contract was formed as to issues concerning contract formation, interpretation, or validity; however, as to performance, law of place of performance governs).

Parties to a contract are free to include in their agreement a provision as to the applicable law; however, such an agreement would only be effective as to substantive issues, and would not be used by the forum as a reference point for determining, for instance, the applicable statute of limitations. Robert A. Brazener, Annotation, *Choice of Law as to Applicable Statute of Limitations in Contract Actions*, 78 A.L.R.3d 639, § 2[b](1977).

The general rule is that "[t]he right to a jury trial in civil cases, which is enshrined in the Seventh Amendment and similar state provisions, is only a right and not a requirement, so that such right can be waived, such as by an agreement between the parties." Jay M. Zitter, Annotation, *Contractual Jury Trial Waivers in State Civil Cases*, 42 A.L.R.5th 53 (1996).

While no South Carolina case appears on point, the Supreme Court of Kansas did decide the issue in Vanier v. Ponsoldt, 251 Kan. 88, 833 P.2d 949, 19 UCC-Rep.Serv.2d 90 (1992). That court noted the Restatement of Conflict of Laws § 594 (1934), provides: "The law of the forum determines whether an issue of fact shall be tried by the court or by a jury", and the Restatement (Second) of Conflict of Laws § 129 (1969) states: "The local law of the forum determines whether an issue shall be tried by the court or by a jury."

The Kansas Supreme Court then quoted with favor Professor Robert A. Leflar, who wrote :

[T]he method of trial of a case, that is, whether by court or jury, seems to be a matter of procedure rather than of substantive rights, and the weight of authority so holds. Even though it be entirely possible that a jury might arrive at a different conclusion than would a judge trying the same fact issue, the legal rights of the parties to the issue depend upon the facts and the law as they exist prior to the trial, whereas this possible difference in result depends upon the manner of conducting the trial.

Leflar, *American Conflicts Law* § 122, 242 (3d ed. 1977).

Professor Leflar noted some authority to the contrary of this general rule. Those cases, however, deal with contributory negligence, mode of levying execution, and other matters that

are not applicable here.

The case at hand is a lender liability case stemming from a contractual relationship between Skywaves and BB&T. The claims are all causes of action in contract, breach of contract, promissory estoppel and breach of the covenant of good faith and fair dealing (which is not a separate cause of action in South Carolina but rather implied in every contract and therefore part of the breach of contract cause of action).

The parties do not challenge that waiver of trial by jury was not voluntarily, knowingly, and intelligently waived. Presumably the parties negotiated or had the opportunity to negotiate most of the standardized provisions provided in the Factoring Agreement by Defendant BB&T. Standing alone, there is no reason the jury waiver is not enforceable against Skywaves, with every appearance being that the provision was freely negotiated by sophisticated businessmen who were equal in their bargaining positions. The waiver was conspicuously set off in all capital letters. Therefore, this Court finds that both parties voluntarily, knowingly, and intelligently waived the right to jury by trial.

As noted above, the general rule seems to be that the right to a jury trial, while a substantial right, is a procedural right. With respect to causes of action sounding in contract, it does not violate South Carolina public policy to contractually waive a right to a jury trial. The right to freedom of contract is no small part of a citizen's liberty, and this Court must enforce and maintain a contract between two experienced parties. While it appears waiver violates the public policy of North Carolina as pronounced by the North Carolina legislature, the plaintiff has chosen to bring this lawsuit in South Carolina, not North Carolina.

#### Conclusion

IT IS THEREFORE ORDERED that Defendant BB&T and Defendant Edhal's Motion to

Strike Plaintiff's Demand for Jury Trial is GRANTED.

IT IS SO ORDERED.

2/9, 2015  
Charleston, South Carolina



\_\_\_\_\_  
Roger M. Young, Sr.  
Circuit Court Judge

# EXHIBIT "G"

Appellate Case No. 2015-001809

---

Skywaves I Corporation, ..... Appellant/Respondent,

v.

Branch Banking and Trust Company, Successor in Merger  
to Branch Banking and Trust Company of SC,  
a/k/a BB&T, and James Edahl, ..... Defendants,

Of which Branch Banking and Trust Company,  
Successor in Merger to Branch Banking and Trust  
Company of SC, a/k/a BB&T is the ..... Respondent/Appellant,

And

Of whom James Edahl is the ..... Respondent,

---

JOINT MOTION OF RESPONDENT/APPELLANT AND RESPONDENT TO  
STRIKE APPELLANT/RESPONDENT'S AMENDED AND SUPPLEMENTAL  
NOTICE OF APPEAL

FILED

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

2015 APR 13 PM 4:55

SKYWAVES I CORPORATION,

JULIE J. ARMSTRONG  
CLERK OF COURT

Civil Action: 2009-CP-10-07516

Plaintiff )  
BY \_\_\_\_\_ )

vs. )

**MEMORANDUM IN SUPPORT  
OF MOTION TO AMEND  
FIRST AMENDED COMPLAINT**

BRANCH BANKING AND TRUST COMPANY, )  
Successor in merger to BRANCH BANKING AND )  
TRUST COMPANY OF SC, a/k/a BB&T, and )  
James Edahl, )

Defendants. )

AND NOW COMES Plaintiff SKYWAVES I CORPORATION ("Skywaves"), by and through its undersigned counsel, and files the following Memorandum in Support of Motion to Amend First Amended Complaint ("Motion to Amend").

**INTRODUCTION**

Plaintiff Skywaves commenced this action on December 3, 2009 against BB&T and Edahl. Defendants wrongfully removed this action to federal court, arguing that Skywaves had fraudulently joined a defendant to destroy diversity. The District Court ultimately remanded this action back to this Court and awarded Skywaves attorneys fees as a sanction for Defendants' baseless removal.

On December 12, 2010, prior to the remand of this case, Skywaves files its First Amended Complaint, asserting claims sounding in: (a) breach of contract (against BB&T); (b) breach of contract accompanied by a fraudulent act (against BB&T); (c) promissory estoppel (against BB&T); (d) breach of the covenant of good faith and fair dealing (against BB&T); (e) negligent misrepresentation (against all Defendants); (f) fraudulent misrepresentation (against all Defendants); (g) negligence (against all Defendants); and (h) violations of the South Carolina Unfair Trade Practices Act (against all Defendants).

Defendants filed Motions to Dismiss the First Amended Complaint in part, for numerous reasons. In those Motions, the Defendants argued, *inter alia*, that:

- (a) Skywaves failed to allege fraudulent conduct to support its breach of contract accompanied by a fraudulent act claim (Count 2);
- (b) Skywaves' fraud and negligent misrepresentation claims (Counts 5 and 6) failed because there was no allegation of a misrepresentation of a presently existing fact and no right to rely on same;
- (c) Skywaves' negligence claim (Count 7) failed because Defendants owed no duty of care to Skywaves;
- (d) Skywaves' South Carolina Unfair Trade Practices Act claim (Count 8) failed because the claimed conduct did not impact the public interest and was not "capable of repetition."

By orders dated November 8, 2011 and June 15, 2012, the Court granted, in part, Defendants' Motions to Dismiss. Specifically, in the November 8, 2011 Order, the Court dismissed all claims against Defendant Edahl and dismissed Skywaves' claims against BB&T, such that the only remaining claims were for breach of contract, promissory estoppel and breach of the duty of good faith and fair dealing. Skywaves moved for reconsideration arguing and, on June 15, 2012, the Court granted that motion, holding: (a) that it had erred in dismissing the breach of contract accompanied by a fraudulent act claim (Count 2); (b) that Skywaves had sufficiently pled a fiduciary duty of care; and (c) that Skywaves had sufficiently pled a misrepresentation such that it "should be allowed to proceed on its claims for negligence and negligent misrepresentation as stated in its Amended Complaint." As to the third item, it appears that the Court made a clerical mistake, as Skywaves should have also been permitted to proceed on its fraud claim (Count 6). Following those orders, the Court should have dismissed only Skywaves' claim under the South Carolina Unfair Trade Practices Act (Count 8).

Since the time of those orders, the parties have engaged in detailed discovery, which has disclosed, among other things, that Defendants BB&T and Edahl had actually lied to Skywaves about several vital issues in their relationship. In particular, BB&T and Edahl initially denied that BB&T had (through its agent Edahl) agreed to advance financing based on site plans (or

anything less than actual receivables). Edahl also initially represented that all necessary BB&T approvals for that modifications had been obtained. As it turned out, Edahl had agreed to that modification, but conveniently "forgot" in an effort to save his job when he learned that BB&T would not have approved such financing. Because of Edahl's lie, BB&T brashly accused Skywaves of engaging in fraudulent and, in fact, criminal conduct in an attempt to defraud BB&T. Of course, this was not true. As a result of Edahl's fraud, BB&T wrongfully "pulled the plug" on the parties' agreement, upon which Skywaves relied for its continued viability. Had Skywaves known earlier that BB&T would try to evade its contractual promises, Skywaves would have pursued various alternative avenues for corporate financing, which it elected to forego in reliance on BB&T's promise that it was going to adhere to the parties' modified agreement.

In the instant Motion to Amend, Plaintiff Skywaves seeks leave to file a Second Amended Complaint that amplifies the factual allegations it had previously made, corrected the Court's error in apparently dismissing the fraud claim and asserting claims under North Carolina law, which was the law selected in the parties' agreement. All of the proposed changes do not expand the factual scope of the claim beyond what was alleged in the original and First Amended Complaints. They do not inject any novel issues into the case. Rather, the proposed Second Amended Complaint alleges facts that Defendants already know are at issue in this case.

The proposed Second Amended Complaint is attached hereto as Exhibit A and includes the following changes from the First Amended Complaint:

- (a) Adding allegations regarding negligent misrepresentation;
- (b) Reinstating its fraud count with additional factual allegations;
- (c) Reinstating its statutory cause of action for unfair trade practices, but based on the North Carolina Unfair Trade Practices Act (N.C. Gen. Stat. § 75-1.1.);
- (d) Adding a cause of action expressly for breach of fiduciary duty; and

- (e) Adding or supplementing causes of action for equitable estoppel, for the wrongful manner in which BB&T terminated the parties' agreements which violated equity and good conscience, and constituted bad faith and unfair dealing, all in violation of law.

These changes are intended to clarify certain of the legal bases for Plaintiff's claims. However, none of these changes introduce novel factual claims or transactions beyond those already pleaded.

For the reasons discussed below, this Court should grant Skywaves' Motion to Amend and grant it leave to file the proposed Second Amended Complaint attached hereto as Exhibit A.

### ARGUMENTS

#### **A. Defendants Cannot Show Prejudice from the Proposed Amendment That Would Justify Denial of the Instant Motion**

---

"[A] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." *See Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry*, 403 S.C. 623, 632, 743 S.E.2d 808, 812 (2013) (quoting S.C.R. Civ. P. 15(a)).

"Courts have wide latitude in amending pleadings and '[w]hile this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal.'" *Brown v. James*, 389 S.C. 41, 59-60, 697 S.E.2d 604, 614 (Ct. App. 2010) (quoting *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997)).

"The *only time* such an amendment should not be granted is when granting it would prejudice the other party . . . ." *Ayers v. Freeman*, 2007 WL 8327949, at \*5 (Ct. App. Aug. 6, 2007) (emphasis added) (attached hereto as Ex. B) (citing *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App. 2005)). "The prejudice that Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it." *Collins Entm't, Inc. v. White*, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005) (citing *Tanner v. Florence Cty. Treasurer*, 336 S.C. 552, 558-59, 521 S.E.2d 153, 156 (1999)).

"[A] motion to amend is addressed to the circuit court's sound discretion, and the party *opposing the motion has the burden* of establishing prejudice." *Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 235, 754 S.E.2d 714, 719 (Ct. App. 2014) (emphasis added). For the reasons that follow, Defendants will not be able to carry their burden of showing prejudice warranting denial of the instant Motion to Amend.

The proposed changes in the Second Amended Complaint would not prejudice Defendants in any way. The proposed Second Amended Complaint amplifies factual allegations to include facts uncovered during discovery, seeks to rectify errors and restore the fraud cause of action that should have been restored previously when the Court granted Skywaves' Motion to Reconsider and assert causes of action under North Carolina law. These changes will not alter the nature or factual background of the claims asserted against Defendants in this case. The changes will not mandate additional burdensome discovery.

As set forth above, some of the proposed changes in the Second Amended Complaint simply involve amplifying the existing factual allegations. All of these allegations are foreseeable outcrops of the discovery conducted under the First Amended Complaint. Skywaves is not substantially changing the factual background of its claims or materially altering the case that Defendants have to litigation. While these factual amplifications will help explain the nature of Skywaves' claims, they do not alter what this case is about.

Secondly, the proposed Second Amended Complaint includes some new legal theories within the factual context of the facts that Defendants have known for years to be at issue. Among these changes is to include a count under the North Carolina Unfair and Deceptive Trade Practices Act (NCUDTPA), *see* N.C. Gen. Stat. §§ 75-11, *et seq.* The parties' factoring agreement, which forms the groundwork for Skywaves' claims, includes the following choice of law provision: "All acts, transactions, rights, and liabilities under this Agreement shall be governed in all respects by, and construed in accordance with, the internal laws of the State of North Carolina." South Carolina courts will generally enforce the parties' choice of law to govern their relationship. *See Team IA, Inc. v. Lucas*, 395 S.C. 237, 248-49, 717 S.E.2d 103,

108-09 (Ct. App. 2011). As this case has proceeded, it has become apparent to Plaintiff that the NCUOTPA should apply to govern the unfair trade practices of Defendants.

While the original and First Amended Complaint did not assert a count under the NCUOTPA, it was not required to do so. A complaint must contain "a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it." *See* S.C.R. Civ. P. 8(a). Notably, the rules do not require that the Complaint specifically plead each and every statute that might give rise to a cause of action. Instead, a plaintiff need only specially plead a statute "upon which" the jurisdiction of the Court "depends." In any event, Skywaves seeks now to clarify that it is asserting a claim under the NCUOTPA, pursuant to the parties' choice of law provision in their factoring agreement,

Finally, the proposed Second Amended Complaint seeks to ensure that Skywaves' fraud claim is restored in this matter. As set forth above, when the Court granted Skywaves' Motion to Reconsider as to the motion to dismiss, it only restored the *negligent* misrepresentation claims when the context of the Court's decision made clear that it should have also restored the fraud claim. The proposed Second Amended Complaint will correct that apparent clerical error of the Court. Even if the failure to restore the fraud cause was not the result of clerical error, discovery has since revealed facts that would support the claim for fraud.

For the reasons set forth above, Defendants cannot carry their burden to show prejudice from the Court's granting of leave to file the proposed Second Amended Complaint. Therefore, this Court should grant the instant Motion.

**B. None of the Amendments Would Face a Statute of Limitations Issue, as an Amendment Would Relate Back to the Original Filing Date**

Skywaves anticipates that Defendants may argue that the Court should deny its Motion to Amend because the claims asserted therein are time-barred. However, this argument must fail because, under the relation-back doctrine, the proposed Second Amended Complaint does not allege any claim that is time-barred.

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." See S.C.R. Civ. P. 15(c). "Rule 15(c) is based on the concept that once litigation involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading." See *Thomas v. Grayson*, 318 S.C. 82, 88, 456 S.E.2d 377, 380 (1995) (citation omitted). "[I]t has been held in cases too numerous to cite that if the amendment merely expanded and amplified what was alleged in support of the cause of action, it related back to the commencement of the action and was not affected by the intervening lapse of time." *De Loach v. Griggs*, 222 S.C. 326, 331, 72 S.E.2d 647, 649 (1952). An amendment will relate back if it does not seek to make allegations that would unfairly surprise the defendant:

"The central requirement here is that the party defending against the new claim have sufficient notice of it, i.e., 'the new claim must be 'logically related' to the matters originally pleaded so that the defendant is not prejudiced by the new claim asserted after the statute of limitations has expired.'" *Whitfield Constr. Co. v. Bank of Tokyo Trust Co.*, 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Ct. App. 1999) (quoting James F. Flanagan, South Carolina Civil Procedure 127 (2d ed. 1996)) (emphasis in original).

In federal practice, the factors to determine whether or not a claim arose out of the same conduct, transaction, or occurrence set forth in the original pleading include: (1) whether the party defending against the new claim had notice of it; (2) whether the party seeking to add the new claim will rely on the same kind of evidence offered in support of the original claim to prove the new claim; and (3) whether unfair surprise to the defending party would result if the amendment were to relate back.

*Id.* (citing James Wm. Moore, Moore's Federal Practice § 15.192 (Daniel R. Coquillete et al eds., 3d 1999)).

See *Babb v. Estate of Watson*, 2008 WL 9841508, at \*4 (Ct. App. May 2, 2008) (attached hereto as Ex. C).

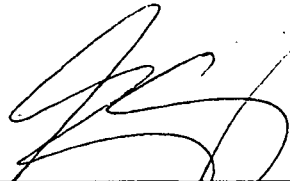
In this regard, where an amendment states claims that arise out of the same operative set of facts as the original pleading, it will relate back under Rule 15(c):

The City's argument the amendment prejudices it because the statute of limitations has passed is likewise without merit. Rule 15(c), SCRCP, states: "[w]henver the claim ... asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." Respondent's tort claims arose out of the conduct previously set forth in the original complaint. The factual circumstances of the tort claims of trespass and conversion have already been set out in the original complaint asserting a § 1983 claim. No new information is required to assert those tort claims. Therefore, under Rule 15(c), the amendment relates back to the date of the original pleading that was filed within the statute of limitations. *See also Thomas v. Grayson*, 318 S.C. 82, 456 S.E.2d 377 (1995) (purpose of Rule 15(c) is to salvage causes of action otherwise barred by statute of limitations).

*See Stanley v. Kirkpatrick*, 357 S.C. 169, 175, 592 S.E.2d 296, 298-99 (2004) (affirming Court of Appeals' decision that trial court erred in denying leave to amend).

Here, it is clear that all of the changes of the proposed Second Amended Complaint would relate back to the filing of the original complaint. Skywaves does not allege any transaction or occurrence outside of the scope of the original and First Amended Complaints. To the contrary, all of the allegations of the proposed Second Amended Complaint concern the same relationship, fraudulent conduct and injuries presently timely brought before the Court. While the proposed Second Amended Complaint amplifies some allegations and legal theories, it does not change the nature of the claims. Defendants have always had notice of the facts alleged in the proposed Second Amended Complaint and have been conducting discovery on those issues. The same evidence supporting the claims of the First Amended Complaint would also support the claims in the proposed Second Amended Complaint. There is no material change in the nature of the claims that Defendants would have to defend. Finally, there would be no undue surprise to Defendants from the relation back.

For the foregoing reasons, it is clear that the claims asserted in the proposed Second Amended Complaint are all timely under the relation back doctrine.



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On this \_\_\_ day of April, 2015  
Charleston, South Carolina

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO AMEND FIRST AMENDED COMPLAINT** has been served upon each of the

09-CP-10-7516

parties to this action by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

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**FILED**

APR 13 2015

**JULIE J. ARMSTRONG  
CLERK, C.P. & G.S.**

This 8 day of April, 2015.

  
ANGELA GROSS

# EXHIBIT "H"

Appellate Case No. 2015-001809

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Skywaves I Corporation, ..... Appellant/Respondent,

v.

Branch Banking and Trust Company, Successor in Merger  
to Branch Banking and Trust Company of SC,  
a/k/a BB&T, and James Edahl, ..... Defendants,

Of which Branch Banking and Trust Company,  
Successor in Merger to Branch Banking and Trust  
Company of SC, a/k/a BB&T is the ..... Respondent/Appellant,

And

Of whom James Edahl is the ..... Respondent,

---

JOINT MOTION OF RESPONDENT/APELLANT AND RESPONDENT TO  
STRIKE APPELLANT/RESPONDENT'S AMENDED AND SUPPLEMENTAL  
NOTICE OF APPEAL

FILED

2009-CP-10-7516

IN THE STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

JULIE J. ARMSTRONG  
CLERK OF COURT

Civil Action No.: 2009-CP-10-7516

FILED  
JULIE J. ARMSTRONG  
CLERK OF COURT  
2015 JUL 27 PM 4:21

SKYWAVES I CORPORATION,  
  
Plaintiff,

v.

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

Defendants.

ORDER GRANTING IN PART  
DEFENDANT BB&T'S MOTION FOR  
SUMMARY JUDGMENT; GRANTING  
DEFENDANT EDAHL'S MOTION  
MOTION FOR SUMMARY JUDGMENT  
DENYING PLAINTIFF'S MOTION TO  
RECONSIDER; DENYING PLAINTIFF'S  
MOTION TO AMEND THE COMPLAINT  
DENYING PLAINTIFF'S MOTION TO  
STRIKE; and DENYING PLAINTIFF'S  
MOTION FOR COMMISSION OF  
ISSUANCE OF A SUBPOENA TO  
DEPOSE JOHN ALLISON

These matters came before the Court for hearing on April 27, 2015 upon various parties' pending motions. All parties were represented by counsel. The Court has fully considered all memoranda submitted in support of and in opposition to the outstanding motions, evidence presented, and arguments of counsel. For the reasons discussed below, the Court GRANTS IN PART Defendant BB&T's Motion for Summary Judgment; GRANTS Defendant Edahl's Motion for Summary Judgment; DENIES Plaintiff's Motion to Reconsider the Order Striking the Jury Trial Demand; DENIES Plaintiff's Motion to Amend the Complaint; DENIES Plaintiff's Motion to Strike; and DENIES Plaintiff's Motion for Commission of Issuance of a Subpoena to Depose John Allison.

**I. PROCEDURAL HISTORY AND BACKGROUND**

Plaintiff Skywaves I Corporation ("Skywaves" or "Plaintiff") alleges that Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC ("BB&T") failed to honor its obligations to capitalize its needs and improperly

declared Skywaves in default of its obligations under the controlling agreements. Plaintiff asserts tort theories as well including claims that Defendants misrepresented that the parties' written agreements had been modified, as well as claims that Defendants acted in bad faith in the method and manner in which Defendants acted before and after declaring a default. Plaintiff also asserts tort theories, including claims that the Defendants made misrepresentations concerning the modification of the written agreements and that Defendants acted in bad faith before and after claiming that Plaintiff was in default. Defendant James Edahl ("Edahl") was an employee of BB&T and the relationship manager working with Skywaves.

**A. Procedural History**

Plaintiff's First Amended Complaint alleges, *inter alia*, that the justification BB&T provided for declaring Skywaves in default was "pretextual, if not outright false . . . BB&T's refusal to continue funding was not due to the reasons asserted in the default letter, but was because BB&T was unhappy with and sought to renegotiate the parties' modified factoring agreement."

Plaintiff asserted eight claims against BB&T for breach of contract; breach of contract accompanied by a fraudulent act; promissory estoppel; breach of the covenant of good faith and fair dealing; negligent misrepresentation; fraudulent misrepresentation; negligence; and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"); and asserted four claims against Edahl for negligent misrepresentation; fraudulent misrepresentation; negligence; and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").

**B. Factual Background**

Skywaves was a start-up company that developed a structural product to house electrical equipment ("shelters") at the base of cell towers for use in the wireless telecommunications

industry. In 2006, it achieved over \$6 million in revenues, with projections of substantial growth.

**1. Factoring Invoices Under the Factoring Agreement**

On March 22, 2005 Skywaves entered into written agreements with BB&T, including a Factoring and Security Agreement ("Factoring Agreement"). Under the Factoring Agreement, BB&T agreed to purchase certain accounts receivable (invoices) of Skywaves. Skywaves agreed to sell and assign the invoices to BB&T and further agreed that all of Skywaves' rights with respect to the accounts vested in BB&T. The Factoring Agreement was amended to increase the line of credit to \$3.5 million dollars and reduce the fees and interest rate.

**2. BB&T Authorizes Advances Based on Purchase Orders**

In May, 2006, BB&T agreed to modify or alter the Factoring Agreement by agreeing to advance funds based on certain purchase orders, in addition to invoices. This agreement was a departure from the existing Factoring Agreement, so much that BB&T concedes that loaning money on purchase orders was not factoring. BB&T authorized advances based on purchase orders up to \$2.0 million, within the larger \$3.5 million limit. If and when the purchase order converted to an invoice, the amount that had been advanced on the purchase order was deducted and BB&T would provide Skywaves the remaining balance available to be factored on the invoice. If no purchase order was involved and only the invoice was factored, then Skywaves received the full advance available.

In March, 2007, BB&T represented that it was committed to meeting Skywaves' capital needs. It represented that it had devised a vehicle that was unique to Skywaves and was suitable to finance Skywaves' growth. It also assured Skywaves that the bank would work with it to meet its needs. Indeed, as part of its commitment, BB&T renewed the Factoring Agreement, so that



the parties' relationship continued into 2007.

**3. BB&T Authorizes Advances Based on Site Plans**

In the summer of 2007, Skywaves experienced delays in orders from one of its largest customers, General Dynamics, which caused cash flow problems for Skywaves. Because Skywaves had been in the process of a capital expansion to increase production capacity, it experienced a cash "crunch."

As a result, Skywaves asked BB&T to consider advancing funds on site plans for General Dynamics. The site plans identified locations where General Dynamics anticipated placing cell towers under a master contract. Edahl agreed to the request and later confirmed that BB&T had agreed to the loan modification. Consistent with that agreement, BB&T advanced \$1.2 million dollars on account of site plans in 2007. Under the parties' agreement, the maximum amount that BB&T would advance on site plans was \$2 million.

**4. BB&T Terminates the Agreement**

In January 17, 2008, BB&T visited Skywaves' warehouse, where Skywaves gave a presentation to Edahl and a new BB&T employee in the relationship, Mike Burke. During that visit, Burke learned that BB&T had advanced \$1.2 million based on site plans. Burke did not know of BB&T's promise to advance money on site plans. When confronted, Edahl falsely and denied knowledge of BB&T's agreement to fund site plans. Defendant Edahl's dishonesty led BB&T to accuse Skywaves of fraud and undertake a fraud investigation; according to internal memos, Edahl also declared Skywaves in default of the Factoring Agreement because of the site plan financing.

On January 23, 2008, BB&T claims that Skywaves failed a routine quarterly audit. Plaintiff contends that the audit was a result of Skywaves' disclosure that BB&T had been

funding advances in accordance with the modified Factoring Agreement, of which Edahl denied any knowledge. Edahl has since recanted his lie and admitted that he not only knew of the modification, but also lied in his deposition to save his job. Tellingly, days before BB&T even requested the audit, Edahl expressed his belief that Skywaves was in default of the Factoring Agreement. In that regard, Edahl acted as BB&T's apparent agent with authority to bind BB&T.

On January 25, 2008, BB&T notified Skywaves that it was terminating the Factoring Agreement because of alleged defaults:

1. . . . in violation of Paragraph 8 of the Agreement, [Skywaves] has received payment of Accounts (as defined in the Agreement) and has failed to immediately turn those payments over to BB&T as required by the Agreement;
2. . . . Skywaves may not be paying its debts as they mature in the ordinary course of business (with approximately 37% of its payables over 60 days);
3. . . . BB&T has a good faith belief that the prospects of payment to it or performance of the Obligations (as defined in the Agreement) is impaired.

Although BB&T allegedly believed Skywaves improperly submitted site plans as purchase orders, it did not include that as a reasons for declaring Skywaves in default.

On January 25, 2008, BB&T ceased advancing funds to Skywaves. Skywaves asserts that Defendants made threats, including threats of criminal prosecution, for what BB&T claimed to be Skywaves' fraud. Skywaves urges that this conduct at and after the time of termination breached the duty of good faith and fair dealing and violates equity and good conscience. The parties could not reach an agreement to work out their dispute, and Skywaves filed for bankruptcy in April, 2008.

## II.

## ANALYSIS

### A. DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

#### 1. Legal Standard

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRPC. This Court is not "required to single out some one morsel of evidence" to create a genuine issue of material fact. *See Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993).

#### 2. Governing Law

The Factoring Agreement provides that "[a]ll acts, transactions, rights and liabilities under this Agreement" are to be governed by "the internal laws of the State of North Carolina." Such choice of law clauses are generally honored in South Carolina, unless application of the selected state's law would violate South Carolina public policy. *Team IA, Inc. v. Lucas*, 395 S.C. 237, 249, 717 S.E.2d 103, 108-09 (Ct. App. 2011). For purposes of the instant motion, the Court concludes that North Carolina law governs Skywaves' contractual claims.<sup>1</sup> As for the tort claims, under traditional choice of law principles, the substantive law governing such claims would be the law of the state where the injury occurred. *See Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 143, 494 S.E.2d 449, 454 (Ct. App. 1997); *accord Harco Nat. Ins. Co. v. Grant Thornton LLP*, 206 N.C. App. 687, 692, 698 S.E.2d 719, 722-23 (N.C. Ct. App. 2010).

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<sup>1</sup> South Carolina does not recognize a separate claim for breach of the implied covenant of good faith and fair dealing apart from a breach of contract claim; consequently, the Court concludes that applying North Carolina law would violate South Carolina public policy. *See RoTec Servs., Inc., v. Encompass Servs., Inc.*, 359 S.C. 467, 472-73, 597 S.E.2d 881, 883-84 (Ct. App. 2004).

3. **Substantive Claims**

a. **Skywaves Presented Sufficient Evidence to Survive Summary Judgment on Its Contract Claims**

In its breach of contract claim, Skywaves alleges, *inter alia*, that BB&T breached the modified Factoring Agreement by failing to perform its obligations and terminating that agreement without cause (or for a pretextual reason). The elements of breach of contract are: (1) the existence of a valid contract and (2) breach of the terms of the contract. *Long v. Long*, 160 N.C. App. 664, 668 (2003).

In its January 25, 2008 letter, BB&T outlined purported reasons for declaring Skywaves in default, including the failure to remit payments immediately to BB&T and to pay debts when due. Skywaves contends that the applicable provisions of the parties' agreement pertaining to these two specific issues were amended or waived by BB&T. This Court agrees that there is an issue of fact on this question. While the Factoring Agreement contains express language that no provision can be orally modified or waived absent a writing signed by BB&T, the parties can waive such a restriction by oral agreement. *See Son-Shine Grading, Inc. v. ADC Const. Co.*, 68 N.C. App. 417 315 S.E.2d 346 (1984).

Moreover, BB&T admits that, as part of the March 22, 2005 Factoring Agreement, it agreed to provide certain financing based on site plans. There is evidence that BB&T failed to fulfill its promises to Skywaves under the parties' agreement. The Court finds that Skywaves has presented at least a scintilla of evidence sufficient to survive summary judgment on its breach of contract claim.

b. **Skywaves Is Entitled to Go to a trial on Its Claim of Breach of Contract Accompanied by a Fraudulent Act**

Skywaves also asserts a claim for breach of contract accompanied by a fraudulent act. Among other things, Skywaves alleges that BB&T "pretextual[ly]" breached the Factoring Agreement. North Carolina law appears to recognize a cause of action for breach of contract

accompanied by a fraudulent act. *See Oestreicher v. Stores*, 290 N.C. 118, 136, 225 S.E.2d 797, 808-809 (1976) (ruling on plaintiff's request for punitive damages pertaining to its breach of contract claim). BB&T has not shown that it is entitled to summary judgment on this cause of action.

c. **North Carolina Does Not Recognize Claims of Promissory Estoppel**

North Carolina does not recognize affirmative promissory estoppel claims. Therefore, Skywaves' claim for promissory estoppel fails. *See Penguin Restoration, Inc. v. Nationwide Mut. Ins. Co.*, 2013 WL 4419355, at \*2 (M.D.N.C. Aug. 15, 2013).

d. **South Carolina Does Not Recognize a Cause of Action for Breach of the Covenant of Good Faith and Fair Dealing**

Skywaves asserts a claim against BB&T for breach of the implied covenant of good faith and fair dealing. *Inter alia*, Skywaves alleges that terminated the parties' agreement for "pretextual" reasons because it became unhappy with the arrangement. However, a breach of the implied covenant of good faith and fair dealing does not create an *independent* or *separate* cause of action in South Carolina and is instead subsumed by a claim for breach of contract. *RoTec Servs., Inc., v. Encompass Servs., Inc.*, 359 S.C. 467, 472-73, 597 S.E.2d 881, 883-84 (Ct. App. 2004). Therefore, BB&T is entitled to summary judgment, as a matter of law, although Skywaves may assert these allegations as part of its contractual claims.

e. **BB&T and Edahl are Entitled to Summary Judgment on Skywaves' Claims for Negligence and Negligent Misrepresentation**

i. **The Economic Loss Doctrine**

Skywaves' claims for negligent misrepresentation and negligence are barred by the economic loss doctrine, under which Skywaves may not pursue a tort claim for economic loss arising under contract. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54-55, 463 S.E.2d 85, 88 (1995) Skywaves seeks to recover for the

alleged loss of a bargained-for financing arrangement in a commercial transaction, a loss adequately protected by contract law. See *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1049 (D.S.C. 1993), *aff'd mem.*, 46 F.3d 1125 (4th Cir. 1995).

The rationale supporting the application of the economic loss rule also applies to any tort claims asserted against Edahl. See *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009) (“The purpose of the economic loss rule is to define the line between recovery in tort and recovery in contract”). I reject Skywaves’ contention that the economic loss rule does not apply to Defendant Edahl. Edahl’s counsel has presented case law from other jurisdictions illustrating the applicability of the rule to individuals acting as agents of the contracting party. See *Ben-Yishay v. Mastercraft Dev., LLC*, 553 F. Supp. 2d 1360, 1370-71 (S.D. Fla. 2008) (relying upon economic loss rule to dismiss misrepresentation claims against corporate officer who negotiated agreement, noting that alleged misrepresentations were “inseparable from the essence of the parties’ agreement”).

ii. **Elements of the Tort Claims**

Additionally, Skywaves’ cannot establish the elements of negligent misrepresentation and negligence. To establish a claim for negligent misrepresentation, Skywaves must show that: (1) BB&T made a false representation; (2) BB&T had a pecuniary interest in making the statement; (3) BB&T owed a duty of care to see that it communicated truthful information; (4) BB&T breached that duty by failing to exercise due care; (5) Skywaves justifiably relied on the representation; and (6) Skywaves suffered a pecuniary loss as the proximate result of its reliance. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003) (citation omitted). To establish a claim for negligence, Skywaves must prove: (1) a duty of care; (2) a breach of that duty of care; and (3) damage proximately resulting from the breach. *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 743 S.E.2d 109 (Ct. App. 2013).

Skywaves’ claim for negligence, which it presents as a claim for breach of “fiduciary duty,” fails for want of any duty. See *Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401

(Ct. App. 2013) (“The existence of a fiduciary duty is a question of law for the court”). “Duty is generally defined as the obligation to conform to a particular standard of conduct toward another.” *Murray v. Bank of America, N.A.*, 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct. App. 2003). Skywaves has not identified any standard of conduct required of BB&T or otherwise breached by BB&T.

Second, with regard to its negligent misrepresentation claim, Skywaves has not presented evidence of false statements of existing fact. *See Koontz v. Thomas*, 333 S.C. at 713, 511 S.E.2d at 413 (“The representation cannot ordinarily be based on unfulfilled promises or statements as to future events”). Based upon the record before the Court, Skywaves has not and cannot establish that any such statements were made with “the intent to deceive and with no intent to comply with the stated promise.” *Parker v. Shecut*, 340 S.C. 460, 482, 531 S.E.2d 546, 558 (Ct. App. 2000), *rev'd on other grds.*, 349 S.C. 226, 562 S.E. 2d 620 (2002). Skywaves forcefully asserts that Defendants misrepresented present facts, particularly facts regarding the modification of the Factoring Agreement. I reject Plaintiff's assertions. Under the theory Skywaves advances, Edahl lied later in order to save his job. There is no evidence that Edahl's statements about the loan modifications to the Skywaves officers were false at the time he made them. He lied later when confronted about knowing anything about the modifications.

Furthermore, Skywaves cannot establish justifiable reliance. The Supreme Court has, in effect, already found Skywaves' management to be of the degree of sophistication sufficient to negate any purported “right to rely.” *See Kerr*, 408 S.C. at 334 n.8, 759 S.E.2d at 727 n.8. They at least had the degree of competence to “utilize[] precaution and protection to safeguard [their] interests.” *Id.* at 334, 759 S.E.2d at 727 (*citing Thomas v. Am. Workmen*, 197 S.C. 178, 182–83, 14 S.E.2d 886, 887–88 (1941)). Skywaves claims that the BB&T relationship manager had developed a relationship upon which they were entitled to rely. I reject this argument.

f. **Skywaves' Claims for Promissory Estoppel, Negligence and Negligent Misrepresentation are Statutorily Barred Under § 37-10-107**

To the extent Skywaves' promissory estoppel, negligence and negligent misrepresentation claims are based on alleged oral promises outside the Factoring Agreement, they are statutorily barred. A South Carolina statute bars enforcement of oral lending agreements and claims based on alleged oral misrepresentations and other non-written conduct concerning such loan agreements. See S.C. Code Ann. § 37-10-107. While Skywaves has argued that the instant Factoring Agreement arrangement is not a loan, I reject that argument. Skywaves contends the statute is not applicable because North Carolina law applies to its claims. I reject that argument and conclude that South Carolina law applies and bars such claims under S.C. Code Ann § 37-10-107.

B. **PLAINTIFF'S MOTION TO RECONSIDER ORDER STRIKING JURY TRIAL DEMAND**

Having read Plaintiff's Motion to Reconsider and needing no further oral argument, I deny the Motion on the grounds stated in my original Order dated February 9, 2015. I further deny Plaintiff's Motion to Reconsider and its alternative request to empanel an advisory jury.

C. **PLAINTIFF'S MOTION TO AMEND COMPLAINT**

Leave to amend a pleading should be denied where there is (1) undue delay, (2) bad faith or dilatory motive by the movant, (3) undue prejudice to the opposing party, or (4) futility of the amended or supplemental pleading. *Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 604, 486 S.E.2d 269, 275 (Ct. App. 1997).

1. **Skywaves' Motion To Amend Is Barred By The Law Of The Case**

Though presented as Motion to Amend, Skywaves actually seeks to reinstate its cause of action for fraud and violation of the statutory Unfair Trade Practices Act.<sup>2</sup> The Court denies the Motion to Amend because the prior dismissal of those claims is the law of the case.

<sup>2</sup> Skywaves states that its proposed amendments do not expand the factual scope of its claim beyond its prior complaints. Skywaves argues that it only seeks to "clarify" that its unfair trade practices act claim should have been under North Carolina Unfair Trade Practices Act, N.C. Gen. Stat. §§ 75-1.1, *et seq.*, instead of the South Carolina statute.

Skywaves originally asserted these causes of action in its First Amended Complaint. On November 8, 2011, this Court granted Defendants' Motions to Dismiss these causes of action, *with prejudice*. Skywaves moved to reconsider the November 8, 2011 Order and filed a timely Notice of Appeal. On June 15, 2012, this Court entered a second Order re-instating some of the claims it had dismissed. However, that Order did not reinstate the fraud or UTPA claim.<sup>3</sup> Skywaves then moved to dismiss its appeal as moot, sending the Court of Appeals a copy of the Order of June 15, 2012, which it now contends contains a clerical error. The Court of Appeals dismissed the appeal and remitted the case to this Court. The Court concludes that Skywaves may not now seek to reassert the same claims that the Court dismissed with prejudice.

**2. The Amendments Are Barred Because of Undue Delay**

Though courts have wide latitude in allowing amendments, "this power should not be used indiscriminately, or to prejudice or surprise another party." *Brown v. James*, 389 S.C. 41, 59, 697 S.E.2d 604, 614 (Ct. App. 2010). Skywaves concedes that its proposed amendments relate back to facts and claims as they have been asserted in this case since 2009. Skywaves has offered no justification for the delay in seeking to amend and, as a result, the Court denies its motion.

**3. The Amendments Are Futile**

Skywaves' proposed amendments are also barred because they would be futile. See *Higgins v. Medical University of South Carolina*, 326 S.C. 592, 604-605, 486 S.E.2d 269, 275 (Ct. App. 1997). Skywaves' fraudulent misrepresentation claim fails for same the same reasons its negligent misrepresentation claim fails, as set forth above.

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<sup>3</sup> Skywaves asserts that the Court's failure to reinstate the fraud claim in its Order of June 15, 2012, was a "clerical mistake." That Order is clear that: "Skywaves is allowed to proceed with its claims for breach of contract accompanied by fraudulent act, negligence, and negligent misrepresentation as stated in its Amended Complaint."

Skywaves' proposed amendment related to the *North Carolina* Unfair Trade Practices Act is also futile because the North Carolina statute would have no applicability to Edahl, who, at all times, lived and worked in South Carolina. With regard to the proposed claims for equitable estoppel, the proposed amendment does not, and cannot, state facts sufficient to constitute a cause of action. In addition, equitable estoppel may not be invoked as an offensive cause of action. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 345, 415 S.E.2d 384, 388 (1992). Moreover, the proposed prejudgment interest claim is futile because this case does not present an obligation that is capable of being reduced to certainty. *See Smith-Hunter Constr. Co. v. Hopson*, 365 S.C. 125, 128, 616 S.E.2d 419, 421.

**D. PLAINTIFF'S MOTION TO STRIKE**

Motions to strike an answer or defense as sham are disfavored and should be granted only where the evidence demonstrates that the pleading is manifestly false and made in bad faith. *See Ins. Co. of N. Am. v. Hyatt*, 290 S.C. 159, 163, 348 S.E.2d 532, 535 (Ct. App. 1986) (citation omitted). This Court finds no evidence that Defendant's Amended Answer is manifestly false or made in bad faith. The legal authority Plaintiff cites are premised on the concept of bad faith or an intent to deceive. The Court concludes that BB&T and Edahl did not take inconsistent positions, nor has either of them engaged in any intentional effort to mislead the Court. There is no evidence that BB&T, Edahl or their counsel acted inappropriately so as to require the relief requested. Accordingly, the Court denies Plaintiff's Second Motion to Strike.

**E. PLAINTIFF'S MOTION FOR COMMISSION/BB&T'S MOTION FOR PROTECTIVE ORDER**

Plaintiff has moved for the issuance of a commission for a subpoena for the deposition of John Allison, BB&T's former CEO and President; BB&T has moved for a protective order opposing that deposition. South Carolina Rule of Civil Procedure 26(b)(1) limits discovery to matters that are "relevant to the subject matter involved in the pending action." *See Ex parte*



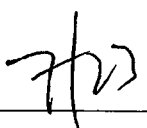
*Smith*, 407 S.C. 422, 423, 756 S.E.2d 386, 386 n.1 (2014). To be discoverable, information need not be admissible at trial, but must appear to be “reasonably calculated to lead to the discovery of admissible evidence.” *Id.* If parties seek to go outside of the bounds of Rule 26(b)(1), Rule 26(c) allows a party to seek a protective order and allows a court to “make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense.” *See Hollman v. Wolfson*, 384 S.C. 571, 578, 683 S.E.2d 495, 498 (2009).

The Court concludes that the testimony that Plaintiff seeks from Mr. Allison is not reasonably calculated to lead to the discovery of admissible evidence and would subject BB&T to undue burden and expense. Plaintiff’s Motion for Commission is denied, and BB&T’s Motion for a Protective Order is granted.

**III. CONCLUSION**

For the reasons set forth herein, it is hereby ORDERED that: (a) Defendant Edahl’s Motion for Summary Judgment is GRANTED; (b) Defendant BB&T’s Motion for Summary Judgment is DENIED as to Plaintiff’s claims for breach of contract and breach of contract accompanied by a fraudulent act but GRANTED as to Plaintiff’s other claims; (c) Plaintiff’s Motion to Reconsider, Motion to Amend, Motion to Strike and Motion for Commission all be DENIED; and (d) that BB&T’s Motion for Protective Order be GRANTED.<sup>4</sup>

IT IS SO ORDERED.

  
\_\_\_\_\_, 2015  
Charleston, South Carolina

  
\_\_\_\_\_  
The Honorable Roger M. Young

<sup>4</sup> BB&T moved to strike portions of Affidavits of Ronald Konersmann and James Kerr. Because the Court does not rely upon those Affidavits, it denies that Motion to Strike the Affidavits as moot.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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SEP 18 2015

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

SC Court of Appeals

Hon. Roger M. Young, Circuit Court Judge

Appellate Case No. 2015-001809

Skywaves I Corporation, ..... Appellant/Respondent,

v.

Branch Banking and Trust Company, Successor in Merger  
to Branch Banking and Trust Company of SC,  
a/k/a BB&T, and James Edahl, ..... Defendants,

Of which Branch Banking and Trust Company,  
Successor in Merger to Branch Banking and Trust  
Company of SC, a/k/a BB&T is the ..... Respondent/Appellant,

And

Of whom James Edahl is the ..... Respondent,

**PROOF OF SERVICE FOR JOINT MOTION OF RESPONDENT/APPELLANT AND  
RESPONDENT TO STRIKE APPELLANT/RESPONDENT'S AMENDED AND  
SUPPLEMENTAL NOTICE OF APPEAL**

I, Molly Hughes Cherry, Esquire hereby certify that on the 16<sup>th</sup> day of  
September, 2015, I service a copy of the JOINT MOTION OF  
RESPONDENT/APPELLANT AND RESPONDENT TO STRIKE  
APPELLANT/RESPONDENT'S AMENDED AND SUPPLEMENTAL  
NOTICE OF APPEAL, submitted by Respondent/Appellant Branch Banking

and Trust Company, Successor in Merger to Branch Banking and Trust Company of SC, a/k/a BB&T and Respondent James Edahl, on counsel for the Appellant/Respondent via United States Mail, postage prepaid, and addressed as follows:

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John W. Fletcher, Esquire  
BARNWELL WHALEY PATTERSON  
& HELMS, LLC  
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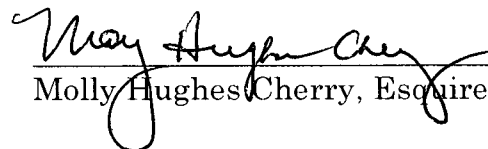
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Attorneys For Plaintiff/Appellant

  
Molly Hughes Cherry, Esquire

# NEXSEN | PRUET

**Molly Hughes Cherry**  
Member  
Admitted in SC

September 16, 2015

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, South Carolina 29211

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SEP 18 2015  
SC Court of Appeals

**Re: Skywaves I Corporation v. Branch Banking and Trust Company, et al.**  
**Appellate Case No. 2015-001809**

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the following in the above-referenced matter:

1. Joint Motion of Respondent/Appellant and Respondent to Strike Appellant/Respondent's Amended and Supplemental Notice of Appeal, along with the Proof of Service; and
2. Joint Motion of Respondent/Appellant and Respondent for Stay of Appeal Pending Resolution of the Joint Motion of Respondent/Appellant and Respondent to Strike Appellant/Respondent's Amended and Supplemental Notice of Appeal, along with the Proof of Service.

Also enclosed is the filing fee in the amount of \$50.00 .

I would appreciate your filing the original and six (6) copies of both Motions and returning a filed stamped copy to me via the enclosed stamped and self-addressed envelope.

By copy of this letter and as evidenced by the attached Proof of Service, we are serving Appellant/Respondent and counsel of record with a copy of the same.

Very truly yours,

  
Molly Hughes Cherry

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Suite 400 (29401)  
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Hilton Head  
Myrtle Beach  
Raleigh

The Honorable Jenny Abbott Kitchings  
September 16, 2015  
Page 2

MHC/ksh  
Enclosures

cc: M. Dawes Cook, Jr., Esquire  
John W. Fletcher, Esquire  
George J. Kefalos, Esquire  
Brian C. Duffy, Esquire  
John P. Linton, Esquire  
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Julio E. Mendoza, Jr., Esquire  
Kirsten E. Small, Esquire

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SOUTH CAROLINA COURT OF APPEALS  
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COLUMBIA SC 29201

**NEXSEN PRUETT**

P. O. Box 486  
Charleston SC 29402

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
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