

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

Appellate Case No. 2015-001809

RECEIVED

AUG 16 2016

SC Court of Appeals

Skywaves I Corporation.....Appellant/Respondent

v.

Branch Banking & 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 & 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

RECORD ON APPEAL – VOLUME III OF III

M. Dawes Cooke, Jr., Esq.
John W. Fletcher, Esq.
Barnwell, Whaley, Patterson & Helms, LLC
288 Meeting Street (29401)
P. O. Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708
mdc@barnwell-whaley.com
jfletcher@barnwell-whaley.com
Attorneys for Appellants/Respondents

(continued on next page)

John P. Linton, Esq.
Brian C. Duffy, Esq.
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
(843) 720-2044 Fax: (843) 720-2047
JLinton@DuffyAndYoung.com
BDuffy@DuffyAndYoung.com
Attorneys for Appellants/Respondents

Andrew K. Epting, Jr., Esq.
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401
(843) 377-1871 Fax: (843) 377-1310
AKE@Epting-Law.com
Attorneys for Appellants/Respondents

George J. Kefalos, Esq.
George J. Kefalos, PA
46A State Street
Charleston, SC 29401
(843) 722-6612 Fax: (843) 377-1310
Attorneys for Appellants/Respondents

(continued on next page)

Other Counsel of Record:

Molly Hughes Cherry, Esq.
Nexsen Pruet, LLC
P.O. Box 486
Charleston, SC 29402
(843) 720-1724 Fax: (843) 414-8209
MCherry@NexsenPruet.com

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

Julio E. Mendoza, Esq.
Nexsen Pruet, LLC
1230 Main St., Suite 700 (29201)
Columbia, SC 29202
***Attorneys for Respondent/Appellant Branch
Banking & Trust Company, successor in
merger to Branch Banking and Trust Company
of SC, a/k/a BB&T***

Kirsten E. Small, Esq.
Nexsen Pruet, LLC
55 E. Camperdown Way, Suite 400
Greenville, SC 29601
Post Office Box 10648 (29603)
(864) 282-1112
***Attorneys for Respondent/Appellant Branch
Banking & Trust Company, successor in
merger to Branch Banking and Trust Company
of SC, a/k/a BB&T***

J.W. Nelson Chandler, Esq.
Chandler & Dudgeon LLC
P.O. Box 547
Charleston, SC 29402
(843) 577-5410
Attorneys for Respondent James Edahl

INDEX

VOLUME I

Orders

6/21/10 Order Remanding Case to State Court.....	10
8/16/10 Order Granting Attorneys' Fees in Removed Case.....	20
3/28/11 Order Granting Attorneys' Fees in Removed Case.....	26
10/26/11 (filed 11/8/11) 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.....	33
6/14/12 (filed 6/15/12) ORDER GRANTING SKYWAVES MOTION TO RECONSIDER	44
8/20/12 Order of South Carolina Court of Appeals	50
3/13/14 (filed 3/17/14) ORDER denying Plaintiff's Motion to Strike and granting Defendants' Motion to Amend Answers.....	51
2/9/15 ORDER GRANTING DEFENDANT BB&T AND DEFENDANT EDHAL'S (sic) MOTION TO STRIKE PLAINTIFF'S DEMAND FOR JURY TRIAL.....	53
7/23/15 ORDER GRANTING IN PART DEFENDANT BB&T'S MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANT EDAHLS MOTION MOTION (sic) FOR SUMMARY JUDGMENT[;] DENYING PLAINTIFF'S MOTION TO RECONSIDER; DENYING PLAINTIFF'S MOTION TO AMEND THE COMPLAINT; AND DENYING PLAINTIFF'S MOTION FOR COMMISSION OF (sic) ISSUANCE OF A SUBPOENA TO DEPOSE JOHN ALLISON	58

Pleadings

12/3/09 Complaint	72
2/12/10 First Amended Complaint	86
2/26/10 BB&T Answer to First Amended Complaint.....	100
8/10/11 Edahl Memorandum of Law in Support of His Motion to Dismiss Amended Complaint.....	108

Exhibit B	Affidavit of James Edahl	116
11/18/11 Skywaves' Motion to Reconsider, Alter or Amend Dismissal or for Relief from Judgment.....		120
12/21/11 Edahl and BB&T Memorandum in Support of Motion to Dismiss (originally filed in federal court 2/26/10)		125
Exhibit B	Affidavit of James Edahl	138
12/21/11 Edahl Motion to Dismiss (originally filed in federal court 2/26/10).....		142
12/28/11 Notice of Appeal.....		144
Exhibit 1	10/26/11 (filed 11/8/11) 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.....	147
7/6/12 Edahl Answer to First Amended Complaint (filed in federal court, later filed in state court)		161
7/17/12 (filed 7/19/12) Skywaves Motion to Withdraw Appeal		171
1/17/14 Plaintiff's Motion to Strike		180
Exhibit A	Memorandum in Support	183
2/11/14 Affidavit of Edahl		191
2/25/14 BB&T Motion to Amend Answer		193
Exhibit A	Proposed Amended Answer.....	198
3/3/14 Edahl Motion to Amend Answer		209
Exhibit A	Proposed Amended Answer.....	212
3/12/14 (filed 3/13/14) Edahl's Response to Plaintiff's Motion to Strike Answers.....		224
Exhibit A	9/19/13 Deposition of James Edahl Excerpt.....	230
3/21/14 Edahl Amended Answer.....		234
7/24/14 Defendant BB&T's Notice of Motion and Motion to Strike Demand for Jury Trial.....		245

7/24/14 Defendant BB&T's Notice of Motion and Motion for Summary Judgment.....	250
7/28/14 Defendant Edahl's Notice of Motion and Motion to Strike Demand for Jury Trial.....	256
7/28/14 Defendant Edahl's Notice of Motion and Motion for Summary Judgment.....	260
12/2/14 Amended Answer of Defendant BB&T	265
12/22/14 Defendant Edahl's Memorandum in Support of Motion for Summary Judgment	274
12/22/14 Defendant BB&T's Memorandum in Support of Its Motion for Summary Judgment	287
Exhibit A 9/12/13 Deposition of Ronald Konersmann (Excerpts).....	324
Exhibit B 2/28/14 Deposition of John Voytko (Excerpts)	367
Exhibit C 3/22/05 Factoring and Security Agreement	403
Exhibit C-1 6/1/05 Letter from Morris to Konersmann and Voytko.....	418
Exhibit C-2 5/11/06 Amendment to Factoring and Security Agreement	420
Exhibit C-3 3/2/07 Letter from Edahl to Voytko.....	422
Exhibit C-4 3/14/07 Letter from Edahl to Voytko.....	424
Exhibit C-5 2007 Amendment to Factoring and Security Agreement	426
Exhibit D 2/15/06 Email from Morris to Voytko; 6/5/06 Email from Morris to Edahl and 2/14/07 Email from Morris to Voytko	429
Exhibit E 3/25/06 Email from Voytko to Morris.....	434
Exhibit F 3/20/07 Email from Morris to Voytko	437
Exhibit G-1 5/8/07 Letter from Voytko to Edahl.....	442
Exhibit G-2 9/17/07 Email from Voytko to Edahl.....	444
Exhibit G-3 2007 Year-End Financial Statements.....	446
Exhibit H September 2007 Notes	448
Exhibit I 12/14/07 Email from Burke to Voytko	450

Exhibit J	1/25/08 Letter from Hennessy to Skywaves	453
Exhibit K	2/8/08 Email from Hewlette to Hennessy	456
Exhibit L	1/31/08 Memorandum.....	465
Exhibit M	2/11/08 Letter from Licata to Konersmann	467

VOLUME II

Exhibit N	Caselaw	472
Exhibit O	Caselaw	476
Exhibit P	Resume of Ron Konersmann	482
Exhibit Q	2005 Loan Agreement.....	484
Exhibit R:	2005 Promissory Note.....	493
Exhibit S	2005 Security Agreement	498
Exhibit T	2007 Promissory Note.....	505
Exhibit U	2007 Security Agreement	510
Exhibit V-1	2007 Projected Financials (CONFIDENTIAL) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)	
Exhibit V-2	Actual Financials Q1 2007 (CONFIDENTIAL) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)	
Exhibit V-3	Revised 2007 Forecast (CONFIDENTIAL) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)	
Exhibit V-4	2008 Financials (CONFIDENTIAL) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)	
12/22/14 BB&T's Memorandum in Support of Motion to Strike Plaintiff's Demand for Jury Trial.....		520
12/22/14 Edahl's Memorandum in Support of Motion to Strike Plaintiff's Demand for Jury Trial.....		538

1/12/15 Skywaves' Memorandum in Opposition to Motions to Strike Jury Trial Demand	541
Exhibit A First Amended Complaint.....	546
Exhibit B Amended Answer of BB&T	560
Exhibit C Proof of Claim.....	569
Exhibit D Affidavit of Konersmann	604
1/12/15 BB&T's Reply to Plaintiff's Memorandum in Opposition to Motions to Strike Demand for Jury Trial.....	607
Exhibit <i>Abikhaled</i> Case.....	613
1/12/15 Edahl's Reply to Plaintiff's Memorandum in Opposition to Motions to Strike Jury Demand	621
1/13/15 Skywaves' Letter Brief to the Trial Court in further opposition to Motion to Strike Jury Trial Demand.....	627
1/15/15 Defendants' Letter Brief to the Trial Court in further support of Motion to Strike Jury Trial Demand.....	629
2/18/15 Skywaves' Motion to Reconsider and Memorandum	632
4/13/15 Skywaves' Motion to Amend First Amended Complaint.....	640
4/13/15 Skywaves' Memorandum in Support of Motion to Amend First Amended Complaint	659
4/16/15 Skywaves' Motion to Strike Answers of Defendant Based on Fraud Upon the Court and Unclean Hands and Violation of Rule 37 and Rule 11-and Incorporated Memorandum in Support	668
Exhibit A 4/7/15 Affidavit of James Kerr	681
Exhibit B Excerpt from 3/26/15 Deposition of Richard C.F. Spencer.....	687
Exhibit C Excerpt from 1/6/15 Deposition of BB&T	694
Exhibit D Excerpt from 9/19/13 Deposition of James Edahl	705
Exhibit E 1/15/15 Letter from Mendoza to Judge Young.....	709
Exhibit F (None)	
Exhibit G 9/25/13 Letter from Linton to Cherry and Mendoza	714

Exhibit H	1/18/08 Email from Edahl to Hennessy (CONFIDENTIAL) (SL/EM-000001) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)	
Exhibit I	Excerpt from 11/21/14 Deposition of James Edahl	717
Exhibit J	Edahl Termination Document (CONFIDENTIAL) (BB&T/PA_003833) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)	
	4/23/2015 Skywaves' Memorandum in Opposition to Motions for Summary Judgment (Revised and Annotated to Identify the Exhibits)	721
	4/24/15 Edahl's Response in Opposition to Plaintiff's Motion to Reconsider the Order Striking Plaintiff's Jury Demand.....	792
	4/24/15 Edahl's Response to Plaintiff's Motion to Amend First Amended Complaint.....	797
	4/24/15 BB&T's Reply in Support of Motion for Summary Judgment.....	813
	4/24/15 Edahl's Reply in Support of Motion for Summary Judgment	837
	4/24/15 BB&T's Memorandum in Opposition to Plaintiff's Motion to Strike.....	850
Exhibit 1	1/22/08 CF Field Examiner's Internal Comments.....	859
Exhibit 2	2/8/08 Email from Hewlette to Hennessy	862
Exhibit 3	2/11/08 Letter from Licata to Konersmann	865
Exhibit 4:	BB&T's 3/23/15 Answers to Plaintiff's Supplemental Set of Interrogatories.....	870
	4/25/15 Edahl's Memorandum in Opposition to Plaintiff's Motion to Strike Answers.....	880
Exhibit A:	3/17/14 Order	884
Exhibit B	2/11/14 Affidavit of James Edahl	886
	4/27/15 BB&T's Memorandum in Opposition to Plaintiff's Motion to Reconsider Jury Trial Order.....	888

VOLUME III

4/29/15 Plaintiff's Notice of Filing of Exhibits to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment (NOTE: EXHIBITS HAVE BEEN EXCERPTED).....	895
Exhibit 1: 3/22/05 Factoring and Security Agreement	897
Exhibit 2: 2/27/15 Deposition of J. Frank Bullard, III Pages 8, 16	912
Exhibit 3 Bullard Deposition Exhibit 1 – "More Insight. More Integration. More Bottom-Line Focus"	916
Exhibit 4: 12/19/13 Deposition of Walter Denning Pages 15, 21, 26- 27.....	918
Exhibit 5: 12/19/13 Deposition of Tol Broome Pages 21-22, 35, 37	924
Exhibit 6: 9/19/13 Deposition of James Edahl Pages 27, 29, 46-50, 52, 74, 78-81	930
Exhibit 7: 11/21/14 Deposition of James Edahl Pages 29, 32, 40, 47, 51, 62-63, 72-74, 91	939
Exhibit 8: 9/7/07 Email from Denning to Edahl (CONFIDENTIAL) (BB&T/FC_000558) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)	
Exhibit 9: 9/12/13 Deposition of Ronald D. Konersmann and 9/13/13 Deposition of Ronald D. Konersmann Pages 22-23, 27-44, 51, 63, 110-11, 122-25, 132, 138, 152, 169-70, 191-92, 221, 250-51, 260, 267, 276-83, 301-04, 310, 316, 337, 342- 43, 345.....	949
Exhibit 10: 2/28/14 Deposition of John Voytko Pages 25-26, 32, 36-37, 55, 59, 63-66, 68-69, 81-83, 86, 98-100, 103-04, 115, 118, 150-51, 169-70, 173, 175-76, 187-88, 194-95, 206-07.....	980
Exhibit 11 3/27/06 Email from Voytko to Morris.....	1005
Exhibit 12 3/20/07 Email from Voytko to Morris.....	1008
Exhibit 13 2/11/08 Letter from Licata to Konersmann (CONFIDENTIAL) (BB&T/FC_001131-1134) (Not included in this version of Record on Appeal; filed as part	

of Sealed Supplement to Record on Appeal Pursuant to
Court Order)

Exhibit 14:	1/6/15 Deposition of BB&T Pursuant to Rule 30(b)(6) (Michael Hennessy) Pages 26-27, 31, 39-40, 64-65, 107-08, 110, 144.....	1012
Exhibit 17:	Affidavit of Ron Konersmann (and Ex. 1, Hunt Capital Term Sheet).....	1024
Exhibit 19	9/20/07 BB&T Memo from Edahl to Denning (CONFIDENTIAL) (BB&T/FC_000523-524) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)	
Exhibit 20	11/12/07 BB&T Memo from Edahl to Denning (CONFIDENTIAL) (BB&T/FC_002378-2379) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)	
Exhibit 21:	11/18/13 Deposition of Michael Burke Pages 21-27, 32-34, 50-51, 60, 62, 66, 78-80, 97-98.....	1036
Exhibit 22:	5/6/14 Deposition of Castlen Morris Pages 31-32, 34-35, 42-44, 57-58, 64-67, 71-72, 87, 89	1051
Exhibit 23	12/2/13 Deposition of Frank Caple Pages 16, 39, 77-80	1063
Exhibit 24	12/19/13 Deposition of Tol Broome Pages 22, 35-40	1069
Exhibit 27	1/18/08 Email from Hennessy to Licata	1074
Exhibit 29	12/18/13 Deposition of Michael Hennessy Pages 10, 23, 28-29, 52-53	1076
Exhibit 32	1/25/08 Letter from Hennessy to Skywaves	1083
Exhibit 35	1/24/08 BB&T Memo from Burke to Allard (CONFIDENTIAL) (BB&T/FC_001252-1253) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)	
Exhibit 37	4/21/15 Affidavit of Ronald Konersmann	1086
Skywaves' Notice of Appeal		1090

Skywaves' Amended and Supplemental Notice of Appeal (Exhibits not included as they are already reproduced in this Record on Appeal).....1099

BB&T's Notice of Cross-Appeal 1104

Transcripts

8/15/11 Transcript of Argument 1123

1/12/15 Transcript.....1182

Exhibits

The BB&T Philosophy 1218

August 12, 2016

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: 

M. Dawes Cooke, Jr., Esq.
John W. Fletcher, Esq.
288 Meeting Street, Ste 200
Charleston, SC 29401
(843) 577-7700 Fax: (843) 577-7708

George J. Kefalos, Esq.
George J. Kefalos, PA
46A State Street
Charleston, SC 29401
(843) 722-6612 Fax: (843) 377-1310

Brian C. Duffy, Esq.
John P. Linton, Esq.
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
(843) 720-2044 Fax: (843) 720-2047

Andrew K. Epting, Jr., Esq.
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401
(843) 377-1871 Fax: (843) 377-1310

2009-CP-10-7516

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

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.

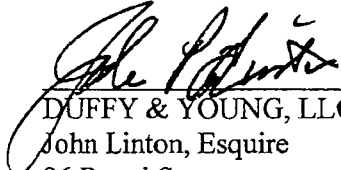
Civil Action: 2009-CP-10-7516

2012 APR 29 PM 1:49
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

**PLAINTIFF'S NOTICE OF FILING EXHIBITS TO PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT**

Please take notice that the undersigned, as attorneys for Plaintiff, SKYWAVES I CORPORATION ("Skywaves"), files the exhibits referenced in Plaintiff's Memorandum in Opposition to Defendants' Motions for Summary Judgment.


DUFFY & YOUNG, LLC

John Linton, Esquire

96 Broad Street

Charleston, SC 29401

Phone 843.720.2044 | Fax 843.720.2047

jlinton@duffyandyoung.com

George J. Kefalos

GEORGE J. KEFALOS, PA

46A State Street

Charleston, SC 29401

BARNWELL, WHALEY PATTERSON &
HELMS, LLC

M. Dawes Cooke, Jr., Esquire

PO Drawer H

Charleston, SC 29402

MDC@barnwell-whaley.com

895

ANDREW K. EPTING, JR., LLC
Andrew K. Epting, Jr., Esquire
46A State Street
Charleston, SC 29401
843-377-1871; Fax: 843-377-1310
ake@epting-law.com

On this 21st day of April, 2015
Charleston, South Carolina

1

FACTORING AND SECURITY AGREEMENT

THIS FACTORING AND SECURITY AGREEMENT is made and entered into this 22 day of March, 2005, between Skywaves I Corporation, a Delaware Corporation, having its principal place of business at 4280 Pace Street, North Charleston, SC 29405 ("Client"), and BB&T FACTORS CORPORATION, a North Carolina corporation having its principal place of business at Market Street Tower, 317 West High Street, High Point, North Carolina 27260 ("BB&T").

1. Definitions and Rules of Construction.

a. As used in this Factoring and Security Agreement, the following terms shall have the following meanings (terms defined in the singular to have the same meaning when used in the plural, and vice versa):

"Account" shall have the meaning given to "account" in the UCC and shall include any right of Client to payment for Goods sold or leased or for services rendered which is not evidenced by an Instrument or Chattel Paper, whether or not it has been earned by performance.

"Account Debtor" shall mean any Person who is or becomes indebted to Client for Goods sold or services rendered.

"Advance" shall have the meaning ascribed to it in paragraph 5.

"Advance Percentage" shall mean Eighty percent (80.00 %), but BB&T may, in its sole discretion, at any time or times by notice to Client, decrease the Advance Percentage for any reason BB&T shall deem necessary without establishing a custom, and each such decrease shall become effective immediately.

"Affiliate" shall mean a Person who directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, a Person; which beneficially owns or holds 10% or more of any class of the capital stock or other equity securities of such Person; or 10% or more of the capital stock or other equity securities of which is beneficially owned or held by such Person or a subsidiary of such Person.

"Bank" shall mean Branch Banking and Trust Company and its successors and assigns.

"Business Day" shall mean a day that is not a Saturday, Sunday, legal holiday under the laws of the State of North Carolina or a day on which banking institutions located in such state are authorized or required to be closed.

"Client's Regular Credit Terms" shall mean payment terms of Net 60 days on each Account.

"Collateral" shall have the meaning ascribed to it in paragraph 9.

"Contract Year" shall mean a period commencing each calendar year on the same month and day as the date of this Factoring and Security Agreement and ending on the same month and day in the immediately succeeding calendar year, with the first such period (i.e., the first Contract Year) to commence on the date of this Factoring and Security Agreement.

"Dollars" and the sign "\$" shall mean lawful money of the United States of America.

"Electronic Transmission" shall mean the transmission of information through electronic data interchange acceptable to BB&T or through any proprietary system of BB&T.

"Eligible Account" shall mean an Account which BB&T, in its sole discretion, deems to be an Eligible Account. Without limiting the generality of the foregoing, no Account owing by any Account Debtor shall be an Eligible Account unless it satisfies all of the following criteria on the date that it arises and continues to meet such criteria until it is paid in full: (a) it is due and payable in Dollars in accordance with Client's Regular Credit Terms and is not unpaid for more than 60 days after the original due date; (b) it is a valid and legally enforceable indebtedness of the Account Debtor and arose from a *bona fide* outright sale of Goods by Client or from the rendition of services by Client, in each case in the Ordinary Course of Business, and, if the Account arises from the sale of Goods, Client has possession of or has delivered to BB&T shipping receipts evidencing the shipment of the Goods, and, if the Account arises from the rendition of services, the services have been fully performed in full compliance with any agreement between Client and the Account Debtor; (c) it is not subject to any dispute or claim by the Account Debtor as to price, terms, quality, quantity, delay in shipment, material, workmanship or performance or any other defense of any kind or character, regardless of whether any such dispute, claim or defense is or ultimately proves to be valid or without merit; (d) the Account Debtor is not a creditor or supplier of Client, and has not made any claim (real or imaginary) with respect to such Account for a credit, setoff, allowance, adjustment, counterclaim, contra account or to any special terms of payment which are not shown on the face of the invoice evidencing such Account; (e) the Account Debtor has not returned, rejected or refused to accept or retain any of the Goods from the sale from which the Account arose; (e) it is not subject to any assignment, claim or Lien of any character, except the security interest in favor of BB&T, and Client has neither made any other sale or assignment thereof nor created or suffered any further Lien therein nor permitted Client's rights therein to be reached by attachment, levy, garnishment or other judicial process; (f) it does not represent a sale or delivery of Goods upon consignment, "guaranteed sale," "sale or return," "payment on reorder," "pack, bill and hold," or similar terms; (g) the invoice for the Account accurately reflects the types and quantities of Goods sold or services rendered and terms of payment of the Account; (h) it is not evidenced by any Document, Instrument, or Chattel Paper and has not been reduced to judgment; (i) it is owing by an Account Debtor located in a Qualified Jurisdiction and whose creditworthiness is acceptable in all respects to BB&T in its sole discretion; (j) Client's right to receive payment is not absolute and is not contingent upon the fulfillment of any condition whatsoever, and Client is able to bring suit or otherwise enforce its remedies against the Account Debtor through judicial process; (k) the Account Debtor is not an Affiliate of Client; (l) it is not assigned to BB&T within two (2) weeks of the original invoice date; (m) no more than 25% of the total amount of the Accounts owing by such Account Debtor are not deemed Eligible Accounts hereunder for any reason; (n) no covenant, representation or warranty contained in this Agreement with respect to such Account has been breached; (o) if the customer is the United States of America or any department, agency or instrumentality thereof, Client has assigned its right to payment of such Account to BB&T, in a manner satisfactory to BB&T, so as to comply with the Assignment of Claims Act of 1940 (31 U.S.C. §203 *et seq.*, as amended); (p) the aggregate amount of the Accounts owing by such Account Debtor do not exceed any limit established by BB&T for such Account Debtor, in its discretion, to the extent of such excess; and (q) the Account is not for freight, samples, or a miscellaneous sale (including the sale of Goods or quantities not regularly sold by Client in the Ordinary Course of Business).

"Event of Default" shall mean the occurrence of any event or condition described in paragraph 12.

"Funds Employed" shall have the meaning ascribed to it in paragraph 11.

"GAAP" shall mean, as of any date of determination, accounting principles referenced as "generally accepted" in then currently effective Statements of the Auditing Standards Board of the American Institute of Certified Public Accountants, or if such Statements are not then in effect, accounting principles that are then approved by a significant segment of the accounting profession in the United States of America. The term "consistently applied," as used in connection therewith, means that the accounting principles are consistent in all material respects with those applied at prior dates or for prior periods.

"Goods" shall mean all items of Inventory that are held for sale by Client in the Ordinary Course of Business, including all merchandise, supplies, materials and wares manufactured by Client or held by Client for sale to others.

"Ledger Debt" shall mean any and all amounts now or hereafter owing by Client on any accounts factored or financed by BB&T for other clients.

"Letter-of-Credit Right" shall mean a right to payment or performance under a letter of credit, whether or not the beneficiary has demanded or is at the time entitled to demand payment or performance.

"Lien" shall mean any interest in property securing an obligation owed to, or a claim by, a Person other than the owner of the property, whether such interest is based upon common law, statute, or contract.

"Maximum Credit Amount" shall mean the sum of One Million Five Hundred Thousand dollars (\$ 1,500,000.00).

"Net Amount of the Account" shall mean, for any Account, the gross amount of such Account less the sum of (i) all returns, discounts, deductions, credits, and allowances of any nature at any time issued, owing, granted or outstanding; (ii) any portion of such Account that represents sales, excise or other taxes; and (iii) any portion of such Account that represents interest, finance charges or late payment fees.

"Obligations" shall mean all loans, indebtedness, liabilities, debit balances, covenants, and duties at any time owed by Client to BB&T or to an Affiliate of BB&T (whether or not evidenced by any note or other Instrument and whether or not for the payment of money), direct or indirect, absolute or contingent, joint or several, now existing or hereafter arising, whether arising under this Agreement, or otherwise, including all Ledger Debt; all interest, commissions, fees, charges, expenses and attorneys' fees for which Client is or hereafter becomes liable to pay or reimburse to BB&T under this Agreement or any other agreement or by law; and any liability Client may at any time have to BB&T as guarantor or surety of the debts of any other Person.

"Ordinary Course of Business" shall mean, with respect to Client, the ordinary course of Client's business as presently conducted on the date of this Agreement.

"Permitted Liens" shall mean (a) Liens at any time granted in favor of BB&T; (b) statutory liens arising in the Ordinary Course of Business of Client, but only if and for so long as (i) payment in respect of any such Lien is not at the time required or the indebtedness secured by such Lien is being actively contested by Client in good faith and by appropriate and lawful proceedings, (ii) such Liens do not materially detract from the value of the property of Client and do not materially impair the use thereof in the operation of Client's business and (iii) such Liens are at all times subordinate in priority to any Liens in favor of BB&T with respect to the same property; and (c) Liens consented to in writing by BB&T in its discretion, but only to the extent and on the conditions expressly set forth in such writing. It hereby acknowledged that there will be a subordinate lien in accounts receivable and inventory granted to Branch Bank and Trust of South Carolina.

"Person" shall mean an individual, partnership, corporation, limited liability company, joint stock company, trust, unincorporated organization, or a government or a department, agency, or political subdivision thereof.

"Prime Rate" shall mean the per annum rate of interest from time to time publicly announced or quoted by Bank as its prime rate of interest, which rate may or may not be the lowest per annum rate of interest charged by Bank. If Bank should cease to exist or to publish or quote a prime rate, then the variable index rate subsequently published or quoted by it in lieu of a prime rate, by whatever name called, shall be used for purposes of defining the Prime Rate hereunder, or, at its sole option, BB&T may select a variable index rate published or quoted by any financial institution having an office in the State of North Carolina for purposes hereof.

"Qualified Jurisdiction" shall mean the United States and any other jurisdiction hereafter approved in writing by BB&T in its discretion.

"Reserve Account" shall have the meaning ascribed to it in paragraph 4.

"Rider" shall mean a Rider at any time executed by Client and BB&T with reference to this Agreement.

"Subsidiary" shall mean any corporation, limited liability company or other entity of which a Person owns, directly or indirectly through one or more intermediaries, more than 50% of the ownership interests at the time of determination.

"Supporting Obligation" shall mean a Letter-of-Credit Right or secondary obligation that supports payment of an Account, Chattel Paper, a Document, a General Intangible, an Instrument, or Investment Property.

"UCC" shall mean the Uniform Commercial Code (or any successor statute) as adopted and in force in the State of North Carolina or, when the laws of any other state or jurisdiction govern the method or manner of the creation or perfection of any security interest in any of the Collateral, the Uniform Commercial Code (or any successor statute) as adopted and in force in such state or jurisdiction.

b. The terms "Chattel Paper," "Instrument," "General Intangible," "Document," "Inventory," "Investment Property," and "Deposit Account" shall have the meaning ascribed to those terms in the UCC.

c. The words "this Agreement" shall mean this Factoring and Security Agreement and each Rider. The terms "herein," "hereof," and "hereunder" and other words of similar import refer to this Factoring and Security Agreement as a whole and not to any particular paragraph or subdivision. Any pronoun used shall be deemed to cover all genders. All references in this Agreement to (i) state or federal statutes and related regulations shall include any amendments of same after the date hereof and any successor statutes and regulations; (ii) any instrument or agreement (including this Agreement) shall include all amendments thereto and all restatements, extensions or renewals thereof; (iii) any Person shall mean and include the heirs, successors and permitted assigns of such Person; (iv) BB&T's "discretion" shall mean its sole and absolute discretion; (v) "including" and "include" shall be understood to mean "including, without limitation" and "include, without limitation," respectively; or (vi) "final payment" of the Obligations or any Account shall be understood to mean the full and final payment of the Obligations or such Account, in Dollars, by transfer of cash or immediately available funds or by check or other item of payment that is duly honored by the drawee bank. An Event of Default shall be deemed to exist at all times during the period commencing on the date that such Event of Default occurs to the date on which such Event of Default is waived in writing by BB&T in its discretion or cured to the satisfaction of BB&T. An Account Debtor shall be deemed to be "located" in a Qualified Jurisdiction only if such Account Debtor has its principal office, principal assets, residence and place of organization in such Qualified Jurisdiction.

2. **Appointment of BB&T as Factor.** Client hereby appoints BB&T as its sole factor with respect to sales of Goods and rendition of services by Client to Account Debtors located in a Qualified Jurisdiction, and hereby agrees to sell and assign only to BB&T, as absolute owner, all Accounts arising from such sales and services. The sale and assignment of Accounts to BB&T shall vest in BB&T all of Client's rights, securities and guaranties with respect to each Account, including all Supporting Obligations, all rights of stoppage in transit, replevin, reclamation, and all other rights and interests in any Goods sold. After BB&T's purchase of an Account, a discount, credit, unidentifiable payment or allowance may be claimed solely by the Account Debtor, and if not so claimed, such discount, credit, payment or allowance shall be the property of BB&T. After the sale of an Account by Client to BB&T, Client will not thereafter issue or grant any discounts, credits or allowances to an Account Debtor without BB&T's prior written consent.

3. **Purchase of Accounts; Risk of Loss.** BB&T agrees to act as Client's factor and purchase, upon the terms set forth in this Agreement, all Accounts of Client. BB&T's purchase of Accounts hereunder shall be with full recourse to Client, and Client assumes the risk of loss from the failure of an Account Debtor to pay at maturity, irrespective of the reason or cause of such nonpayment.

4. **Client's Reserve Account.** BB&T shall establish an account or accounts ("Reserve Account") on its books in Client's name, which BB&T shall credit with the gross amount of each Account purchased by it from Client and which BB&T may debit with all Advances; BB&T's factoring commission; all credits, deductions and discounts allowed to Account Debtors; all sales or other taxes reflected in the invoices for such Account; any or all of the Obligations, including any Ledger Debt (whether or not then due or payable); and any interest, commissions, fees, or charges payable to BB&T hereunder or any Rider hereto or any other agreement between Client and BB&T. BB&T may at any time charge back to Client's Reserve Account the purchase price of any Account that for any reason is no longer an Eligible Account. BB&T may also charge back to the Reserve Account any payments on Accounts received by BB&T which BB&T is required at any time or for any reason to turnover or return (including, without limitation, payments made by BB&T in connection with preference claims asserted in a bankruptcy or other insolvency proceeding). Such reimbursement obligation shall survive the termination of this Agreement. Any chargeback of an Account to the Reserve

Account shall not be deemed in and of itself to be a reassignment thereof, and Client shall not have the right to demand a reassignment of any Account until final payment of all Obligations. Client shall pay to BB&T any debit balance in the Reserve Account **on demand**. Any payments received on account of the Obligations, from whatever source, may be credited by BB&T to such of the Obligations as BB&T in its discretion from time to time elects. No interest shall be payable by BB&T on any amounts credited to the Reserve Account.

5. **Purchase Price of Accounts; Advances.** The purchase price of each Account purchased by BB&T shall be the Net Amount of the Account calculated on the most favorable terms given to the Account Debtor. With respect to any Account, BB&T shall not be required to pay the purchase price thereof unless and until BB&T receives final payment from the Account Debtor of the full amount of such Account. In no event, however, shall BB&T be required to pay the purchase price of any Account if, at the time such payment would otherwise be due, an Event of Default exists under this Agreement or the Reserve Account does not have a credit balance equal to or greater than the purchase price of such Account; and BB&T is authorized, in its discretion, to deduct and withhold from any amount due Client hereunder the amount that BB&T is entitled to debit to the Reserve Account. In accordance with the terms of this Agreement, BB&T may, in its sole discretion, from time to time upon Client's request, make advances (each, an "Advance" and, collectively, the "Advances") to Client against the purchase price of Accounts purchased by BB&T hereunder, with the aggregate amount of such advances outstanding at any date not to exceed the lesser of (a) the Maximum Credit Amount or (b) the sum of: (i) the sum obtained by multiplying the Advance Percentage times the aggregate amount of those Accounts outstanding at such time which constitute Eligible Accounts, less: (ii) any charges, fees and expenses, actual or estimated, that are chargeable to the Reserve Account; and (iii) reserves with respect to such matters, events, conditions or contingencies as to which BB&T, in its discretion, determines reserves should be established from time to time. Any excess Advances outstanding at any time shall be repayable upon BB&T's demand. For any Advances made by BB&T to Client hereunder, Client shall pay to BB&T interest at the per annum rate set forth in and computed in accordance with paragraph 11. In making Advances to Client, BB&T shall be entitled to rely upon Client's continuing warranty and representation that no Advance will be requested if Client contemplates filing any petition for relief under the Bankruptcy Code or any other insolvency law.

6. **Factoring Commission.** BB&T shall be entitled to charge the Reserve Account with a factoring commission for each Account factored hereunder, which shall be chargeable on the date that the Account is purchased by BB&T hereunder and which shall be in an amount equal to (a) Ninety Five One Hundredths of One percent (0.95 %) of the Net Amount of the Account as of the date of purchase for Account Debtors located in the United States; and (b) Two percent (2.00 %) of the Net Amount of the Account as of the date of purchase for Account Debtors located in any Qualified Jurisdiction other than the United States. In no event shall Client be entitled to any reduction, credit or offset to the factoring commission payable in respect of any Account purchased by reason of any credit memo issued by Client or other action resulting in any reduction in the Net Amount of the Account or by reason of any chargeback of the Account to Client's Reserve Account. If Client's Regular Credit Terms shall be extended, whether with or without BB&T's approval, then the rate of BB&T's factoring commission shall be adjusted to include an additional rate of one-quarter of one percent (.25%) for each extension of 30 days or portion thereof. Client agrees that all charges computed under this paragraph will be at least Two Thousand Five Hundred Dollars (\$ 2,500.00) per calendar month through June 30, 2005, and Five Thousand Dollars (\$ 5,000.00) per calendar month beginning July 1, 2005 and continuing during the term of this Agreement and that Client will pay any deficiency **on demand**, but in no event shall the amount charged hereunder exceed the maximum amount that may be charged under applicable law.

7. **Representations, Covenants and Warranties of Client.** To induce BB&T to serve as Client's factor, Client hereby represents, covenants and warrants that: (a) Client is and

shall remain located at the address first above written, and Client will promptly notify BB&T in writing (including by way of Electronic Transmission) at least 30 days prior to any change of address; (b) Client is able to pay, does pay and will continue to pay its debts as they mature in the Ordinary Course of Business; (c) the financial statement last provided BB&T accurately states Client's financial condition and there has not been any material adverse change in the financial condition or business prospects of Client since the date of such financial statement; (d) Client has never carried on business under or used any name other than (if none, so state): None; (e) there are no actions, suits or legal proceedings of any kind or nature (whether civil or criminal) now pending (or, to Client's knowledge, threatened) against Client, the adverse result of which would in any material respect affect the property or financial condition, or threaten the continued operations, of Client; (f) Client shall not create or suffer to exist any Lien, other than a Permitted Lien, upon any of the Collateral or any of its Inventory, whether or not constituting Collateral; (g) Client shall immediately notify BB&T of any disputes or claims concerning any Account and of any returns, repossessions or rejections of Goods sold by Client; (h) Client shall not reroute or reassign any Goods covered by any Account nor demand the return of any such Goods, nor impede the delivery of such Goods or stop same in transit; (i) Client shall set aside, mark as the property of BB&T and hold in trust for the benefit of BB&T any returned, repossessed or rejected Goods, and shall at its own cost and expense handle, store, repair, repack, resell and reship any or all of such Goods as BB&T in its discretion shall elect and direct; (j) Client shall comply with all applicable laws in the conduct of its business and in the use, ownership and maintenance of its properties, including all environmental laws and regulations; (k) Client shall qualify to do business and maintain its good standing in the state of its formation and in each other state in which the ownership of its assets or the conduct of its business requires it to be qualified to do business; (l) Client shall not dissolve or cease doing business, or merge or consolidate with any other Person, or acquire all or substantially all of the assets of any other business; and (m) Client shall execute such instruments, agreements and other documents that BB&T may deem necessary or desirable from time to time to perfect or continue the perfection of any security interest of BB&T in any of the Collateral or to give effect to the terms and conditions of this Agreement. Each of the foregoing representations, covenants and warranties shall be deemed continuing and to be reaffirmed on each date that Client assigns any Accounts to BB&T.

8. **Remittances.** If any remittance is made directly to Client in payment of an Account, then Client, as trustee of an express trust created for BB&T's benefit, shall hold such remittances as the property of BB&T, without commingling any such remittance with any funds or property of Client, and shall immediately turn over to BB&T the identical checks, monies, notes, money orders, drafts, acceptances or other forms of remittance received.

9. **Collateral; Offset Rights.** As security for the prompt payment and performance of all Obligations, Client hereby grants to BB&T a continuing security interest in all of the following types and items of property of Client, whether now owned or existing or hereafter created or acquired, and wherever located, and in all cash and non-cash proceeds and products of such property (collectively, the "Collateral"): all Accounts, regardless of how such Accounts shall arise or be acquired; all Documents, Instruments, Chattel Paper, General Intangibles (including tax refund claims, patents, trademarks, copyrights, software, and other intellectual property and rights to receive any payment or other distribution from BB&T pursuant to this or any other agreement), Deposit Accounts, Investment Property, Letter-of-Credit Rights, and Supporting Obligations; all returned, rejected or repossessed Goods the sale of which by Client gave rise to an Account; all reserves, funds, monies, sums or other like property at any time in the possession of BB&T in which Client has or obtains any interest whatsoever; all unpaid seller's and lienor's rights, including all rights of stoppage in transit, replevin, reclamation, and claims of Lien; all Liens held by Client on personal property as a mechanic, contractor, subcontractor, repairman, materialman, landlord, artisan, or similar Person; all monies and other property of Client at any time in the possession of BB&T; any and all property of Client in which a security interest is at any time granted by Client pursuant to any present or future Rider to

this Factoring and Security Agreement; and all of the following described property (if none, so state): None. Any and all sums at any time owed by BB&T to Client or deposited with BB&T by Client shall at all times constitute security for all of the Obligations, and BB&T may apply or set off such sums against any of the Obligations, whether or not such Obligations are then due or payable. In no event shall recourse to any Collateral be required, and Client shall at all times remain liable for the payment, **on demand**, of all debits to the Reserve Account. Client shall cause all tangible items of the Collateral to be fully insured against loss, damage or theft on such terms and with such insurers as shall be acceptable to BB&T, and each such policy of insurance shall name BB&T as sole loss payee pursuant to a loss payable endorsement satisfactory to BB&T.

10. **Invoicing and Assignment.** Client shall provide BB&T with a manually signed assignment satisfactory to BB&T of each Account purchased by BB&T, together with copies of each invoice in respect of all sales or services and evidence of shipment and such other documents and proof of delivery as BB&T shall at any time require. Client may transmit to BB&T by Electronic Transmission information concerning the Accounts (other than an assignment) in a format acceptable to BB&T and, if so requested by BB&T, deliver to BB&T copies of invoices, acceptable evidence of shipment and such other documents and proof of delivery as BB&T may require relating to the Accounts so transmitted. Each invoice to an Account Debtor shall state plainly on the face thereof that the Account represented by such invoice has been assigned and sold to, is owned by and is payable to BB&T only. BB&T reserves the right to mail original invoices to Account Debtors; but the issuance of such invoices by whomsoever done shall in and of itself operate as an assignment to BB&T of the Accounts represented thereby, whether or not Client executes any other specific instrument of assignment.

11. **Interest; Expenses.** Client agrees to pay BB&T interest upon the actual daily sum of Funds Employed at the close of business each day at a variable rate per annum equal to the Prime Rate in effect at the close of business on such day plus One percent (1.00 %). The Prime Rate in effect on the date hereof is Five and One Half percent (5.50 %). As used herein, the term "Funds Employed" shall mean the gross amount of all Accounts outstanding on the books of BB&T less any Reserve Account balance outstanding to the credit of Client. Interest shall be computed on a daily basis (calculated on the actual number of days elapsed in a year of 360 days), commencing on the date hereof, and shall be payable monthly on the last day of each month, commencing on the last day of the month subsequent to the date of this Agreement. In computing interest hereunder, all checks or other items of payment received by BB&T in payment of Accounts or any of the Obligations shall be credited after allowing 5 Calendar Days for collection from the date of deposit or receipt. Notwithstanding anything to the contrary set forth in this Agreement, in no event shall the rate or amount of interest (including any fees, commissions, and other charges that, under applicable law, may be deemed interest) charged or collected under this Agreement exceed the maximum rate or amount chargeable under applicable law (it being the intent hereof that BB&T not contract for or receive interest in excess of the maximum authorized by applicable law); and, if a court of competent jurisdiction determines that BB&T has charged or collected interest in excess of the highest lawful rate, BB&T shall promptly refund such excess to Client and shall not otherwise be penalized. All interest shall be payable by Client without presentation of a bill and BB&T is authorized to charge same against the Reserve Account. From and after the occurrence of any Event of Default, interest shall accrue on the actual daily sum of Funds Employed at the close of business each day at a variable rate per annum that is equal to the Prime Rate in effect on the close of business on such day plus 3.00 %. Client shall reimburse BB&T for any expense that BB&T may incur in the performance of this Agreement or may pay on Client's behalf, including legal fees in the administration or enforcement of this Agreement, expenses of mailing and envelopes in sending any invoices to Account Debtors, insurance premiums with respect to any Collateral, amounts paid to discharge any Liens upon the Collateral, wire transfer charges, bank analysis charges or charges for returned items, and any taxes or other governmental charges assessed

against any Collateral or payable by Client in connection with any Account; but in no event shall BB&T be obligated to incur or pay any amounts on behalf of Client.

12. Events of Default. An Event of Default shall be deemed to have occurred under this Agreement, and BB&T shall be entitled to take such action as is elsewhere provided herein, if any one or more of the following events or conditions exist or occur: (a) Client shall fail to pay any of the Obligations when due and payable; (b) there shall occur any breach, violation or default in the performance of any covenant, warranty or undertaking in this Agreement or in any other agreement between BB&T and Client (whether or not such breach, violation or default is caused or occasioned by Client, an Account Debtor or others); (c) any representation made by Client in this Agreement or in any instrument, assignment, or other document delivered to BB&T pursuant to the terms hereof shall be false or misleading in any material respect when made; (d) any petition for an order for relief shall be filed by or against Client or any guarantor of the Obligations under any chapter or provision of the federal bankruptcy laws; (e) Client shall suspend its business, make an assignment for the benefit of its creditors or make an offer of settlement, extension or composition to its creditors generally; (f) any receiver, trustee or other custodian shall be appointed for Client or any of its property; (g) any guarantor of the Obligations shall die, dissolve or cease to have legal existence or shall attempt to revoke such guarantor's guarantee unless, in the case of the death of guarantor, Client furnishes to BB&T a satisfactory substitute guarantor or other security suitable to BB&T, in its discretion, within 30 days following such death; (h) any judgment shall be entered against Client, and the amount thereof shall not be paid within 10 days thereafter or a stay of execution in respect of such judgment shall not be in effect; (i) any of the Collateral, or any other property of Client that is material to its operations in the Ordinary Course of Business, shall be the subject of any attachment, levy, or garnishment; (j) Client shall be in default in the payment or performance of any liability or obligation now or hereunder due or owing from time to time by Client to Bank or to any Affiliate of Bank; (k) an event of default shall occur or exist under any factoring or security agreement between BB&T and any Person who is an Affiliate of Client; or (l) BB&T shall for any other reason deem itself insecure or the Collateral impaired. All rights and remedies hereunder are cumulative and not alternative or mutually exclusive.

13. Remedies Upon Default. Upon and after the occurrence of any Event of Default, (a) BB&T may, at its option and without notice or demand of any kind (all of which are hereby expressly waived by Client), declare all of the Obligations to be, and the same shall thereupon become, immediately due and payable (provided that the Obligations shall automatically become due and payable upon the occurrence of an Event of Default described in paragraph 12(d)), (b) BB&T shall be authorized to terminate further performance by it under this Agreement, and (c) BB&T shall have and may exercise from time to time all remedies provided for under this Agreement and all rights and remedies afforded to a secured party under the UCC or otherwise available to BB&T under any other applicable law. Without limiting the generality of the foregoing, BB&T may enforce its security interest in any or all of the Collateral in accordance with the UCC and any other applicable law and/or sue Client and/or any guarantor for the payment of the Obligations. BB&T is hereby granted a perpetual non-exclusive license or other right to use, without charge, Client's labels, patents, copyrights, software, name, trade secrets, trade names, trademarks, packaging materials, brochures, and advertising matter, or any similar property, in completing the production of, advertising or selling any Collateral, and Client's rights under all licenses and all franchise agreements shall inure to BB&T's benefit for such purposes. All remedies available at any time to BB&T shall be cumulative and may be exercised concurrently or on separate occasions. Time is of the essence of this Agreement. All costs and expenses, including attorneys' fees, incurred by BB&T in exercising any right, remedy, power, or privilege under this Agreement or in prosecuting or defending any action, suit or proceeding arising out of or in connection with this Agreement or relating to any Collateral shall become a part of the principal amount of the Obligations and shall be repayable on demand.

14. **Power of Attorney.** Client hereby irrevocably makes, constitutes and appoints any officer or agent of BB&T as Client's true and lawful attorney-in-fact, with full power of substitution, in the name of Client or in the name of BB&T, for the use and benefit of BB&T, without notice to Client or any of its representatives, to do or perform at any time, and from time to time, in its discretion any or all of the following: (a) to receive, open and dispose of all mail addressed to Client and, at any time that an Event of Default exists, to cause all mail to be diverted from any post office box of Client to a post office box or other address designated by BB&T; (b) to endorse Client's name on any notes, acceptances, checks, drafts, money orders and other forms of payment may come into BB&T's possession with respect to any Accounts, Instruments, Chattel Paper, or other Collateral and to deposit same and apply them to such of the Obligations as BB&T elects in its discretion; (c) to demand, sue for, collect, and receive monies due or to become due on any and all Accounts, Instruments, Chattel Paper, or other Collateral and to settle, compound, compromise, or extend the time of payment of any Account or other Collateral upon such terms and conditions as BB&T in its discretion deems advisable without in any way affecting or releasing any liability of Client to BB&T; (d) to execute, on behalf of Client, any UCC financing statement or amendment thereto naming Client as debtor and BB&T as secured party to perfect any security interest at any time granted by Client in favor of BB&T and any schedules, assignments, documents, and financing statements which Client is obligated to give BB&T hereunder or which are necessary to perfect, preserve or exercise any right or remedy of BB&T under this Agreement; and (e) to do such other and further acts and deeds in the name of Client which BB&T may deem necessary and desirable to enforce any of the terms of this Agreement or to collect any Account or other Collateral. This power, being coupled with an interest, is irrevocable so long as any of the Obligations shall remain unpaid. Client hereby ratifies and approves any and all acts of BB&T taken pursuant to the foregoing power and hereby agrees that neither the exercise by BB&T nor the failure of BB&T to exercise any of the foregoing powers shall in any way affect Client's liability to BB&T hereunder.

15. **Statement of Account.** At least once each month BB&T shall render to Client a statement of account in the form of a "Client Ledger," which statement shall be deemed correct and accepted by Client and conclusively binding upon Client unless Client takes exception to the statement and so notifies BB&T in writing within 30 days after the date on which BB&T deposits said statement in the United States Mail for delivery to Client.

16. **Examination of Financial Records and Inventory.** BB&T and its agents shall have the right at any time or times, during normal business hours and at Client's premises, to inspect, audit, examine, verify and check any or all tangible items of the Collateral and any or all of Client's books, files, records, accounts, original correspondence, shipping documents, and all other papers that BB&T deems relevant to Client's obligations under this Agreement. BB&T shall have the right to make copies of or extracts from any such documents or papers, and Client shall, promptly after BB&T's request therefor, make such documents or papers available to BB&T for such purposes. Client authorizes BB&T, in its discretion, to dispose of any documents, schedules, invoices, assignments or other papers delivered to BB&T in connection with this Agreement at any time after 6 months following the date on which they are delivered to BB&T. Client shall reimburse BB&T for all out of pocket expenses incurred by BB&T from time to time in connection with all audits, field examinations and collateral examinations conducted by BB&T or its agents.

17. **Indemnity.** Client hereby agrees to indemnify and defend BB&T and to hold BB&T harmless from and against any claim, demand, loss, action, cause of action or damages (including legal fees and court costs) ever suffered or incurred by BB&T arising out of or related to this Agreement, the performance by BB&T of its duties or the exercise by it of its rights or remedies under this Agreement, or Client's failure to observe, perform or discharge any of Client's duties under this Agreement except to the extent such losses or damages are caused by

the gross negligence or willful misconduct of BB&T. If any taxes (excluding taxes imposed upon or measured solely by the net income of BB&T, but including any intangibles tax, stamp tax, recording tax or franchise tax) shall be payable by BB&T on account of the execution, delivery, or performance of this Agreement, or the execution, delivery, issuance or recording of any other document (including any UCC financing statement or amendment thereto) or the creation or repayment of any Obligations, Client will pay (or will promptly reimburse BB&T for the payment of) all such taxes, including any interest and penalties thereon. If BB&T for any reason ceases to act as Client's factor, Client shall furnish BB&T with indemnity satisfactory to BB&T against any items or claims that could be charged to Client under the terms of this Agreement, and until Client has furnished such indemnity BB&T shall retain its security interest in any and all Collateral and any balance standing to Client's credit may be held by BB&T without interest until a final accounting is rendered. The foregoing indemnities shall survive any termination of this Agreement and final payment of the Obligations.

18. No Contract Assumption. Notwithstanding anything to the contrary contained herein, BB&T is not assuming any obligations of Client under any contract from which any Account arises and shall have no duty to perform any obligation of Client under nor any liability with respect to any contract to which Client is a party, the performance of each of which contracts shall remain the sole responsibility of Client.

19. Term and Termination. This Agreement shall take effect on the date it is signed by BB&T, shall continue in effect for a period ending on the same day in the following year and shall automatically renew itself from year to year thereafter unless terminated by either party hereto as provided below. Client may terminate this Agreement effective on (but not prior to) the first Contract Year by giving BB&T not less than 60 days prior written notice, and Client may terminate this Agreement after the first Contract Year at any time upon 60 days prior written notice to BB&T. BB&T may terminate this Agreement at any time by giving Client not less than 60 days prior written notice; provided, however, that BB&T may terminate this Agreement forthwith and without notice upon or after the occurrence of any Event of Default, and this Agreement shall automatically terminate upon the commencement by or against Client of any petition for relief under any chapter of the federal bankruptcy laws. Any notice of termination shall be sent in accordance with paragraph 20, but shall not be deemed to have been given or received until actually presented at the noticed party's address. All of the Obligations shall become immediately due and payable upon the effective date of any termination hereof. Until final payment of the Obligations, termination of this Agreement shall not release or abrogate BB&T's security interest in any of the Collateral, and the duties, covenants and liabilities of Client and the rights and remedies of BB&T under this Agreement shall survive any such termination and shall continue to be fully operative. If, after termination of this Agreement, BB&T is or becomes legally obligated to repay to any Account Debtor or such Account Debtor's legal representatives, successors or assigns any sum of money paid by such Account Debtor to BB&T prior to such termination with respect to an Account (including, without limitation, payments made by BB&T in connection with preference claims asserted in a bankruptcy or other insolvency proceeding), then, notwithstanding termination of this Agreement, Client shall immediately **on demand** reimburse BB&T for the full amount of such repayment by BB&T as well as for all costs and expenses (including attorneys' fees) incurred by BB&T in connection with such repayment.

20. Notices. All notices, requests and demands to or upon a party hereto shall be in writing and shall be sent by certified or registered mail, return receipt requested, personal delivery against receipt, by telecopier or other facsimile transmission, or by email, and (except as otherwise provided in paragraph 19) shall be deemed to have been validly served, given or delivered when delivered against receipt or 3 Business Days after deposit in the U.S. mail, certified mail with postage prepaid, or, in the case of facsimile transmission or email, when received (if on a Business Day and, if not received on a Business Day, then on the next Business

Day after receipt) at the office where the noticed party's telecopier is located, in each case addressed to the noticed party as set forth below:

- (a) If to Client: Skywaves I Corporation
4280 Pace Street
North Charleston, SC 29405
Attention: President
Facsimile No.: (843) 308-9767
email: _____
- (b) If to BB&T: BB&T Factors Corporation
317 West High Street
High Point, North Carolina 27260
Attention: President
Facsimile No.: (336) 889-9917

Any addressee may alter the address to which communications are to be sent by giving notice of such change of address in conformity with the provisions of this paragraph for the giving of notice. Any written notice, request or demand that is not sent in conformity with the provisions of this paragraph shall nevertheless be effective on the date that such notice is actually received by the noticed party.

21. Financial Reporting. Client shall keep adequate records and books of account with respect to its business activities in which proper entries are made in accordance with GAAP, reflecting all of its financial transactions. Client shall cause to be prepared and furnished to BB&T the following (all to be prepared in accordance with GAAP consistently applied):

- a. as soon as available, and in any event within 120 days the close of each fiscal year of Client, reviewed financial statements of Client and its Subsidiaries as of the end of such fiscal year, on a consolidated and consolidating basis, certified without material qualification by a firm of independent certified public accountants of recognized standing selected by Client but reasonably acceptable to BB&T; and
- b. as soon as available, and in any event within 30 days after the end of each month hereafter (but within 30 days after the last month in a fiscal year), including the last month of Client's fiscal year, unaudited interim financial statements of Client and its Subsidiaries as of the end of such month and of the portion of Client's fiscal year then elapsed, on a consolidated and consolidating basis, certified by the principal financial officer of Client as prepared in accordance with GAAP and fairly presenting the consolidated financial position and results of operation of Client and its Subsidiaries for such month, subject only to changes from audit and year-end adjustments.

22. Sharing Information. Client authorizes BB&T to share with Bank or any of Bank's Affiliates any information about Client, and authorizes Bank and any of Bank's Affiliates to share with BB&T any information about Client, whether or not in either case such information would otherwise be deemed confidential.

23. Indulgences Not Waivers. Neither the failure nor any delay on the part of BB&T to exercise any right, remedy, power or privilege hereunder shall operate as a waiver thereof or give rise to any estoppel, nor be construed as an agreement to modify the terms of this Agreement, nor shall any single or partial exercise of any right, remedy, power or privilege with respect to any occurrence be construed as a waiver of such right, remedy, power or privilege with respect to any other occurrence. No waiver by a party hereunder shall be effective unless it is in

writing and signed by the party making such waiver, and then only to the extent specifically stated in such writing.

24. **Entire Agreement; Amendments; Riders.** This Agreement, together with any exhibits or supplements hereto and all assignment schedules executed in connection herewith, constitutes and expresses the entire understanding between the parties hereto with respect to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings, inducements and conditions, whether express or implied, oral or written. The express terms of this Agreement control and supersede any course of performance and/or usage of the trade inconsistent with any of the terms hereof. Neither this Agreement nor any portion or provision hereof may be changed, altered, waived, canceled, terminated or amended orally or in any manner other than by an agreement in writing signed by the parties hereto. If any Rider is executed by the parties hereto with reference to this Agreement, such Rider shall be deemed incorporated into and made a part of this Agreement, unless the terms of such Rider expressly otherwise provide.

25. **Applicable Law.** This Agreement shall not become effective until accepted by BB&T in High Point, North Carolina. 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.

26. **Severability.** The provisions of this Agreement are independent of and separate from each other. If any provision hereof shall for any reason be held invalid or unenforceable, it is the intent of the parties that such invalidity or unenforceability shall not affect the validity or unenforceability of any other provision hereof and that this Agreement shall be construed as if such invalid or unenforceable provision had never been contained herein.

27. **Successors and Assigns.** The rights, remedies, powers and privileges of BB&T hereunder shall inure to the benefit of the successors and assigns of BB&T, and the duties and Obligations of Client hereunder shall be binding upon the successors and assigns of Client, provided that Client may not delegate its duties or assign its rights hereunder without the prior written consent of BB&T.

28. **Consent to Forum.** Client hereby consents and agrees that the state or federal courts located in High Point or Greensboro, North Carolina, shall have jurisdiction to hear and determine any claims or disputes between BB&T and Client pertaining to this Agreement or to any matter arising out of or related to this Agreement, and Client expressly submits and consents in advance to such venue and jurisdiction in any action or suit commenced in any such court, hereby waiving any objection Client may have based upon lack of personal jurisdiction, improper venue or inconvenient forum. **Notwithstanding the foregoing consent to venue and jurisdiction, BB&T shall be authorized to commence any action, suit or other proceeding in any other forum for the purpose of, whether to enforce a judgment obtained in another forum, enforce BB&T's security interest in any of the Collateral, or otherwise sue upon or recover any of the Obligations.**

29. **Waivers.** To 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 be liable; trial by jury and the right to trial by jury on any issue in any way pertaining to this Agreement or any transactions or occurrences arising hereunder or governed hereby (which right BB&T likewise waives); and notice of BB&T's acceptance of this Agreement.

IN WITNESS WHEREOF, Client has signed, sealed and delivered this Factoring and Security Agreement on the date first written above.

ATTEST:

SKYWAVES I CORPORATION
("Client")

[Signature]
Secretary

(CORPORATE SEAL)



By: *[Signature]*
Title: CEO

Accepted in High Point, North Carolina, this 22 day of MARCH, 2005.

BB&T FACTORS CORPORATION
("BB&T")

By: *[Signature]*
Title: SVP

2

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF CHARLESTON
4 SKYWAVES I CORPORATION,
5 Plaintiff,
6 vs. CASE NO. 2009-CP-10-7516
7 BRANCH BANKING and TRUST COMPANY, successor in
8 merger to BRANCH BANKING and TRUST COMPANY OF SC
9 a/k/a BB&T and JAMES ED AHL,
10 Defendants.
11
12 VIDEOTAPE
13 DEPOSITION OF: J. FRANK BULLARD, III
14 DATE: February 27, 2015
15 TIME: 10:04 a.m.
16 LOCATION: Nexsen Pruet
17 205 King Street
18 Charleston, SC
19 TAKEN BY: Counsel for the Plaintiff
20 REPORTED BY: Patricia L. Thompson,
21 Registered Professional Reporter
22
23 A. WILLIAM ROBERTS, JR., & ASSOCIATES
24 Fast, Accurate & Friendly
25
26 Charleston, SC Hilton Head, SC Myrtle Beach, SC
27 (843) 722-8414 (843) 785-1263 (843) 839-3376
28
29 Columbia, SC Greenville, SC Charlotte, NC
30 (803) 731-5224 (864) 234-7030 (704) 573-3919

AWR

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

Page 1

Skywaves I Corporation v
Branch Banking and Trust, et al J. Frank Bullard, III
February 27, 2015
1 ALSO PRESENT:
2 Ron Konersmann
3 Mike Hennessey, Senior Vice President,
4 Asset Resolution Group, BB&T
5
6
7
8
9
10
11 (INDEX AT REAR OF TRANSCRIPT)
12
13
14
15
16
17
18
19
20
21
22
23
24
25

AWR

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

Page 3

Skywaves I Corporation v
Branch Banking and Trust, et al J. Frank Bullard, III
February 27, 2015
1 APPEARANCES OF COUNSEL:
2
3 ATTORNEYS FOR THE PLAINTIFF
4 SKYWAVES I CORPORATION:
5
6 DUFFY & YOUNG, LLC
7 BY: JOHN P. LINTON
8 96 Broad Street
9 Charleston, SC 29401
10 (843) 720-2044
11 jlinton@duffyandyoung.com
12
13 and
14
15 GEORGE J. KEFALOS, P.A.
16 BY: GEORGE J. KEFALOS
17 46A State Street
18 Charleston, SC 29401
19 (843) 722-6612
20 gjk@kefaloslaw.com
21
22 ATTORNEYS FOR THE DEFENDANT
23 BRANCH BANKING and TRUST COMPANY,
24 successor in merger to BRANCH BANKING
25 and TRUST COMPANY OF SC a/k/a BB&T:
26
27 NEXSEN PRUET, LLC
28 BY: MOLLY HUGHES CHERRY
29 205 King Street
30 Charleston, SC 29401
31 (843) 577-9440
32 mcherry@nexsenpruet.com
33
34 ATTORNEYS FOR THE DEFENDANT
35 JAMES ED AHL:
36
37 CORRIGAN & CHANDLER, LLC
38 BY: J.W. NELSON CHANDLER
39 16 Charlotte Street, Suite B
40 Charleston, SC 29403
41 (843) 577-5430
42 Nelson@corriganchandler.com

AWR

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

Page 2

Skywaves I Corporation v
Branch Banking and Trust, et al J. Frank Bullard, III
February 27, 2015
1 STIPULATION
2
3 It is stipulated by and among Counsel
4 that this deposition is being taken in accordance
5 with the South Carolina Rules of Civil Procedure,
6 Rule 30; that all objections as to Notice of this
7 deposition are hereby waived; that all objections
8 except as to form are reserved until the time of
9 trial; and that the deponent does not waive reading
10 and signing of this deposition.
11 * * * * *
12 THE VIDEOTAPE SPECIALIST: We are now
13 on the record. Today's date is February 27th,
14 2015. The time is 10:04 a.m. This is the video
15 deposition of Frank Bullard taken by counsel for
16 the plaintiff. The location is 205 King Street,
17 Charleston, South Carolina.
18 This deposition is taken in the matter
19 of Skywaves I Corporation versus Branch Bank &
20 Trust Company, et al, Case No. 2009-CP-10-7516.
21 Counsel, please introduce yourselves
22 for the record.
23 MR. LINTON: John Linton, Duffy &
24 Young, for the plaintiff, Skywaves.
25 MR. KEFALOS: George Kefalos for
26 Skywaves.

AWR

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

Page 4

918

1 MR. CHANDLER: Nelson Chandler for Jim
2 Edahl.
3 MS. CHERRY: Molly Cherry for BB&T.
4 J. FRANK BULLARD, III
5 being first duly sworn, testified as follows:
6 EXAMINATION
7 BY MR. LINTON:
8 Q. Mr. Bullard, my name is John Linton.
9 I'm going to be asking you some questions. If you
10 don't understand any question that I ask you, if
11 you'll just let me know and I'll try to rephrase it
12 so we're communicating accurately with each other.
13 All right?
14 A. Yes.
15 Q. Have you given a deposition before?
16 A. Yes.
17 Q. For the bank?
18 A. For the bank.
19 Q. On how many occasions?
20 A. Twice. This will be my third.
21 Q. What is your present position with the
22 bank?
23 A. Market president for BB&T here in
24 Charleston, South Carolina.
25 Q. And what was your position in 2006,

A W R

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

Page 5

1 that BB&T uses?
2 A. Yes. It's more of a generic title.
3 There are specific functional titles and also
4 titles that's more of a generic title.
5 Q. So you were in charge of supervising
6 Mr. Edahl?
7 A. Yes.
8 Q. As a relationship manager what was his
9 goal?
10 A. His goal was to oversee his portfolio
11 loans. And he had other sales responsibilities to
12 produce revenue, but overall he was responsible for
13 the growth and the profitability of his portfolio.
14 Q. Have you ever been a relationship
15 manager?
16 A. Yes.
17 Q. For what period of time?
18 A. From 1981 to 1999.
19 Q. Since 1999 has the role of relationship
20 manager changed substantially?
21 A. I would say the role has not changed,
22 but a lot of the processes have changed as far as
23 loans and collecting payments and different
24 responsibilities that they have.
25 Q. Is one of the goals of a relationship

A W R

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

Page 7

1 seven and eight?
2 A. Regional president for the coastal
3 region, BB&T.
4 Q. So that area would include --
5 A. Florence, Charleston, Myrtle Beach,
6 Hilton Head, Hampton County. Coastal South
7 Carolina.
8 Q. What were your duties in 2007, 2008?
9 A. To oversee the road profitability,
10 service quality, and quality of the coastal region.
11 Q. Did you ever become involved with the
12 loan to Skywaves?
13 A. No.
14 Q. Was there a reason for that?
15 A. No, other than it was the
16 responsibility of the relationship manager.
17 Q. And who was the relationship manager?
18 A. Jimmy Edahl.
19 Q. I understand that you were his
20 supervisor; is that correct?
21 A. Yes.
22 Q. Was Mr. Edahl's title Senior
23 Vice-President?
24 A. Yes.
25 Q. And is "relationship manager" a term

A W R

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

Page 6

1 manager to develop confidence and trust in your
2 customers?
3 A. Yes.
4 Q. And to be able to render value advice
5 to the customer?
6 A. Yes.
7 Q. That is the goal of a relationship
8 manager?
9 A. That's one of the responsibilities.
10 Q. How do you go about achieving that
11 responsibility or that objective of developing
12 confidence and trust in your customers and
13 rendering advice to your customers?
14 A. Well, part of it's the relationship
15 that's built over time and positive feedback on how
16 the relationship is going.
17 Q. When you served in the role as a
18 relationship manager, what did you do to make sure
19 that the customer reposed confidence and trust in
20 you?
21 A. I tried to carry out the duties in a
22 way that would promote a feeling of honesty between
23 me and the client.
24 Q. Would you render advice to the client?
25 A. Yes.

A W R

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

Page 8

914

1 Q. When you were supervising Mr. Edahl --
2 why don't you describe for me what that consisted
3 of.

4 A. Generally being a sounding board for an
5 employee; monitoring the employee's performance;
6 looking at stated goals and objectives that are set
7 each year; making sure that they are coached
8 towards hitting those goals and accomplishing their
9 objectives that they set for their own professional
10 development.

11 Q. Were you involved at all in the
12 decision to have a default declared in the Skywaves
13 account?

14 A. No.

15 Q. Were you aware that Mr. Edahl had
16 traveled from Charleston, South Carolina to McBee,
17 South Carolina -- which is about as far as you can
18 go and still stay in the state of South Carolina --
19 to attend a presentation being made to an equity
20 investor in Skywaves?

21 A. No.

22 Q. I asked you a little bit about this
23 earlier, but would it be abnormal to attend
24 presentations being made by management to investors
25 and participating in that meeting as a lender?

AWR

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

Page 13

1 MS. CHERRY: Object to the form.

2 Q. (Continued) Being the liaison with a
3 potential investor and manager.

4 MS. CHERRY: Object to the form.

5 MR. CHANDLER: Same objection.

6 A. They could go. I mean, they could go,
7 yeah.

8 Q. So you see no problem with --

9 A. No.

10 Q. And it would be within the normal
11 function of a relationship manager to discuss the
12 bank's role with the client with that potential
13 investor?

14 MS. CHERRY: Object to the form.

15 A. Would you restate that?

16 (The court reporter read the pending
17 question.)

18 A. (Continued) I would not say the normal
19 role.

20 Q. If it's not the normal role, I would
21 ask you is that an abnormal role?

22 A. I would say it was an unusual request.

23 Q. Are you aware of any time anyone other
24 than Mr. Edahl as a relationship manager has
25 attended a customer's presentation to a potential

AWR

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

Page 15

1 MS. CHERRY: Object to the form.

2 MR. CHANDLER: Same objection.

3 A. Do I have to answer that question?

4 Q. Yes.

5 A. Would you restate it?

6 Q. Would it be abnormal for a relationship
7 manager such as Mr. Edahl to travel for several
8 hours and attend a presentation being made by a
9 customer to a potential investor and participating
10 in that meeting and discussing the bank's role with
11 the investor?

12 MS. CHERRY: Object to the form.

13 MR. CHANDLER: Same objection.

14 A. I wouldn't say that it was abnormal,
15 but I think it would depend on the circumstances of
16 whether or not they were asked to go, whether they
17 received approval to go.

18 Q. Well, we know if they weren't asked to
19 go they couldn't possibly attend --

20 MS. CHERRY: Object to the form.

21 Q. -- unless they were going to be an
22 intruder.

23 So assume that they were asked to go.
24 Is that a role that the relationship manager would
25 serve?

AWR

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

Page 14

1 investor?

2 MS. CHERRY: Object to the form.

3 A. I don't recall a time when that
4 happened.

5 Q. We've covered earlier that one of the
6 roles of a relationship manager is to build trust
7 and confidence in the client relationship; is that
8 right?

9 A. Right.

10 Q. And part of the way you do that is have
11 an ongoing relationship with the client knowing the
12 client's business; is that right?

13 A. Right.

14 Q. And making recommendations on what you
15 think is in the client's best interest?

16 MS. CHERRY: Object to the form.

17 MR. CHANDLER: Same objection.

18 A. That's correct.

19 Q. And have you done that yourself as a
20 relationship manager?

21 A. Yes.

22 Q. Do you feel like when you were a
23 relationship manager that your customers trusted
24 you and reposed confidence in your recommendations?

25 A. Yes.

AWR

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

Page 16

915

3

3



More insight. More integration. More bottom-line focus.

You know from your own client experiences the importance of bringing extra value to a relationship.

It starts with exceptional quality in your core strengths, with a level of expertise that earns the client's attention and loyalty.

It deepens as you are able to apply industry knowledge and perspective to your client's current situation and future opportunities, becoming a trusted – and not easily replaced – source of advice and insight.

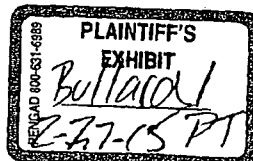
What you can expect from BB&T:

- A designated relationship manager who serves as your primary contact, providing continuity and leadership to your entire BB&T relationship team.
- A level of personalized attention with decisiveness and flexibility that will change your level of expectations – for good.
- Bankers who know their own specialties and have access to a full spectrum of related financial services.
- A commitment to put those resources to work for you, always with a focus on your bottom line.

Count on us to advise in ways that build trust, keeping in mind the full range of your financial needs.

Our focus is long range,

so is our staying power.



4

4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF MECKLENBURG NINTH JUDICIAL CIRCUIT
2009-CP-10-7516

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.

VIDEO
DEPOSITION OF: WALTER DENNING
DATE: December 19, 2013
TIME: 9:13 a.m.
LOCATION: Nexsen Pruet
 701 Green Valley Road
 Greensboro, NC
TAKEN BY: Counsel for the Plaintiff
REPORTED BY: LISA A. WHEELER, RPR, CRR

A. WILLIAM ROBERTS, JR. & ASSOCIATES
Fast, Accurate & Friendly

Charleston, SC	Hilton Head, SC	Myrtle Beach, SC
(843) 722-8414	(843) 785-3263	(864) 234-7030
Columbia, SC	Greenville, SC	Charlotte, NC
(803) 731-5224	(864) 234-7030	(704) 573-3919

Page 2

1 APPEARANCES OF COUNSEL:
2 ATTORNEYS FOR THE PLAINTIFF
3 SKYWAVES I CORPORATION:
4 GEORGE J. KEFALOS, PA
5 BY: GEORGE J. KEFALOS
6 46A State Street
7 Charleston, SC 29401
8 (843) 722-6612
9 gjk@kefaloslaw.com
10
11 DUFFY & YOUNG
12 BY: JOHN P. LINTON
13 96 Broad Street
14 Charleston, SC 29401
15 (843) 720-2044
16 jlinton@duffyandyoung.com
17
18 ATTORNEYS FOR THE DEFENDANTS
19 BRANCH BANKING AND TRUST COMPANY,
20 Successor in merger to BRANCH BANKING
21 AND TRUST COMPANY OF SC, a/k/a BB&T,
22 and JAMES EDAHL:
23 NEXSEN PRUET
24 BY: MOLLY CHERRY
25 205 King Street, Suite 400
Charleston, SC 29401
(843) 577-9440
mcherry@naxsenpruet.com

26 NEXSEN PRUET
27 BY: JULIO E. MENDOZA, JR.
28 1230 Main Street, Suite 700
29 Columbia, SC 29201
30 (803) 540-2026
31 rmendoza@naxsenpruet.com
32
33 ALSO PRESENT: Russell Bogue
34 Michael Hennessy
35
36 THE VIDEOGRAPHER: John Girdler
37
38 (INDEX AT REAR OF TRANSCRIPT)

Page 3

1 (Commencing at approximately 9:13 a.m.)
2 * * * * *
3 STIPULATION
4 It is stipulated by and between Counsel
5 that this deposition is being taken in accordance
6 with the South Carolina Rules of Civil Procedure,
7 Rule 30; that all objections as to Notice of this
8 deposition are hereby waived; that all objections
9 except as to form are reserved until the time of
10 trial; and that the deponent does not waive reading
11 and signing of this deposition.
12 * * * * *
13 THE VIDEOGRAPHER: We're going on the
14 record. The time on the monitor is 9:13 a.m. This
15 is the video deposition of Walt Denning taken by
16 the Plaintiff in the matter of SkyWaves I
17 Corporation, Plaintiff, versus Branch Banking &
18 Trust Company, et al, Defendants, under the
19 jurisdiction of the Circuit Court of -- of -- the
20 Court of Common Pleas for the Ninth Judicial
21 Circuit, County of Charleston, Case Number
22 2009-CP-10-7516.
23 This deposition is being held at Nexsen
24 Pruet, 701 Green Valley Road, Suite 100,
25 Greensboro, North Carolina, on Thursday, December

Page 4

1 19th, 2013. My name is John Girdler. I'm the
2 video specialist. The court reporter is Lisa
3 Wheeler. We're from A. William Roberts, Jr. &
4 Associates.
5 Counsel will now state their
6 appearances for the record and the court reporter
7 will swear in the witness.
8 MR. KEFALOS: This is George Kefalos on
9 behalf of SkyWaves.
10 MR. LINTON: Johnny Linton on behalf of
11 SkyWaves.
12 MS. CHERRY: Molly Cherry. I'm here
13 for Defendants BB&T and Jim Edahl.
14 MR. MENDOZA: Rick Mendoza on behalf of
15 Defendants BB&T and Jim Edahl.
16 WALTER DENNING
17 being first duly sworn, testified as follows:
18 EXAMINATION
19 BY MR. KEFALOS:
20 Q. Mr. Denning, I'm George Kefalos and
21 we've just met. I'm one of the lawyers that
22 represent SkyWaves and I want to ask you some
23 questions about what you might know about this
24 case. Do you feel well enough to answer my
25 questions today?

Page 5

1 A. Yeah, I do.
2 Q. Will you give me full and complete
3 answers to my questions today?
4 A. Yes.
5 Q. And if you don't understand a question,
6 will you stop me and ask me to explain it before
7 you answer?
8 A. Okay.
9 Q. Good. Tell me a little bit about
10 yourself. Where do you live?
11 A. I live in Kernersville, North Carolina.
12 Q. How long have you been there?
13 A. I've been there since 1983.
14 Q. Long time. Where are you from
15 originally?
16 A. I grew up in New York City.
17 Q. What brought you south?
18 A. Work. I moved south with First Union
19 National Bank.
20 Q. When was that, in '83?
21 A. In '78.
22 Q. Are you married?
23 A. I am.
24 Q. Tell me about your education. Where --
25 where did you go to school?

920

Page 14

1 A. That would be correct.
2 Q. Do you think that a customer should be
3 able to trust his relationship manager?
4 A. I do.
5 Q. Do you think that the relationship
6 manager should be honest with his customer?
7 A. Yes. I mean, it works both ways.
8 Q. Certainly. And would you agree that a
9 relationship manager should never intentionally
10 cause unnecessary harm to his customer?
11 A. Yes.
12 Q. And would you agree that the
13 relationship manager should never mislead his
14 customer or mislead his regional loan
15 administrator?
16 A. Yes.
17 Q. Would you agree that when a
18 relationship manager speaks to a customer the
19 customer is justified in believing that the
20 relationship manager is speaking on behalf of the
21 bank?
22 MS. CHERRY: Object to the form.
23 MR. LINTON: I don't think the court
24 reporter's got a -- got an answer.
25 BY MR. KEFALOS:

Page 15

1 Q. You can -- you can answer that.
2 A. Yes.
3 Q. And do you believe that the customer
4 should be entitled to believe that what the
5 relationship manager says on behalf of the bank is
6 true?
7 MS. CHERRY: Object to the form.
8 A. Yes.
9 Q. Do you think that a relationship
10 manager should know his customer's business needs?
11 A. Yes.
12 Q. And do you think the relationship
13 manager should never recommend a loan that's not
14 suitable for the customer's business leads --
15 needs?
16 A. Based on their understanding of the
17 customer's needs.
18 Q. When did you first have involvement
19 in -- with the SkyWaves account?
20 A. I made a call with Jim Edahl and I
21 can't tell you when but I was in Charleston on
22 other bank business and he asked if I would
23 accompany him on a call with the client and that
24 was the precursor to the loan request.
25 Q. Well, I think the original loan request

Page 16

1 came in in 2005. Would it -- would that have been
2 2005 or would it have been after that?
3 A. It probably would have been later, I
4 think.
5 Q. Okay. Who did -- did you replace
6 anybody? Who -- who -- who had your position
7 before you?
8 A. I can't remember.
9 Q. You talked about the loan request. At
10 some point you were involved in a decision to
11 approve a loan for --
12 A. Correct.
13 Q. -- SkyWaves?
14 A. That's correct. Yeah.
15 Q. Were -- and you had -- called on
16 SkyWaves preliminary to their -- to its -- its loan
17 request?
18 A. Correct.
19 Q. So you were aware of some of the
20 efforts that were made to get SkyWaves as a
21 customer of BB&T?
22 A. I think they were already a customer if
23 I recall.
24 Q. Did you know that BB&T had -- well,
25 tell you what, let me --

Page 17

1 MR. KEFALOS: Are those exhibits --
2 MR. MENDOZA: They're on the table.
3 MR. KEFALOS: Would you mark that as
4 Exhibit 1? And would you -- could you pass this
5 down to Molly?
6 MS. CHERRY: She'll mark it and give it
7 to you.
8 (DENNING EXHIBIT 1, Memorandum from Jim
9 Edahl to Steve May, December 3, 2004, Re: Skywaves
10 Corporation, was marked for identification.)
11 BY MR. KEFALOS:
12 Q. I'm going to hand you what's been
13 marked Exhibit Number 1 and ask you -- it is a --
14 looks like it's a memo from Jim Edahl to Steve May
15 December -- December 3, 2004. Have you ever seen
16 this before?
17 A. No, I don't think so.
18 Q. Was Jim May (sic) your predecessor?
19 A. No.
20 Q. Or, I'm sorry, Steve May your
21 predecessor?
22 A. No. Looks like he was in the factoring
23 division.
24 Q. I see. Did you know that Jim Edahl had
25 been calling on SkyWaves for about 18 months in

921

1 order to try to get them as a customer?
2 A. I don't remember those details.
3 Q. You talked earlier about other loans
4 that were added to the SkyWaves loans in order to
5 bring it up to your threshold. I'm going to hand
6 you what we'll mark as Exhibit Number 2. And would
7 you pass one on to Molly.
8 (DENNING EXHIBIT 2, E-mail String,
9 January 14, 2005, Subject: SkyWaves I Corp, was
10 marked for identification.)
11 BY MR. KEFALOS:
12 Q. This is a memo from Steve May to looks
13 like Wyn Godwin and Scott Wilson dated January 14,
14 2005. Have you ever seen this before?
15 A. I don't believe I have.
16 Q. Did you know that there were other
17 incentives to BB&T to signing SkyWaves up as a
18 customer?
19 A. What do you mean by incentives?
20 Q. Well, there was an opportunity to bring
21 in Jimmy Kerr, the biggest potential catch for us,
22 identified in this memo?
23 MS. CHERRY: Object to the form.
24 A. I was aware that there were other loans
25 to the related parties that were involved in --

1 A. I -- I can't remember specifically.
2 about any of that.
3 Q. Do you remember if there was -- or do
4 you know whether there was any competition at the
5 time for the SkyWaves account?
6 A. I don't know.
7 Q. Now at -- at -- do you know anything
8 about the beginning of the SkyWaves arrangement?
9 Let me ask it like this: Do you know what sort of
10 funding SkyWaves sought from BB&T?
11 A. I remember there being a factoring
12 relationship and then they needed additional
13 funding so we put together an arrangement to -- to
14 lend them working capital funds against their
15 purchase orders.
16 Q. Let me ask -- let me hand you what's
17 been marked Exhibit 3.
18 (DENNING EXHIBIT 3, History Record
19 Report, was marked for identification.)
20 BY MR. KEFALOS:
21 Q. This is a history report at the bottom
22 dated 12/27/04. Have you ever seen this before?
23 A. No, I haven't.
24 Q. Did you know that SkyWaves was seeking
25 a standard bank line of credit from BB&T and not

1 Q. Yeah.
2 A. -- SkyWaves. I'm not -- I'm not sure
3 what you mean by incentives.
4 Q. Well, when SkyWaves -- when BB&T was
5 courting SkyWaves as a customer did you know that
6 there was also the possibility of bringing in Jimmy
7 Kerr and Creighton Walters as bank customers if
8 BB&T secured the SkyWaves account?
9 MS. CHERRY: Object to the form.
10 A. Not specifically. I thought they
11 already were or, like I said earlier, I thought
12 there was enough of a relationship outside of
13 SkyWaves that caused the total credit exposure to
14 come to Winston-Salem.
15 Q. Well, according to this note Jimmy Kerr
16 had been with SouthTrust before --
17 A. Okay.
18 Q. -- and once you secured the SkyWaves
19 account you were successful in bringing Jimmy Kerr
20 into the BB&T family.
21 A. Yeah.
22 MS. CHERRY: Object to the form.
23 George, could you speak up just a little bit? I'm
24 sorry.
25 MR. KEFALOS: I'll try to do that.

1 interested in the factoring arrangement?
2 MS. CHERRY: Object to the form.
3 A. No.
4 Q. It was BB&T -- did you know that it was
5 BB&T who suggested financing SkyWaves through a
6 factoring arrangement?
7 A. No.
8 Q. Looking back did you find that the
9 traditional factoring arrangement that BB&T had in
10 place did not fit the SkyWaves business model?
11 MS. CHERRY: Object to the form.
12 A. It fit to the extent they had invoices.
13 Q. And once they did not have invoices the
14 traditional factoring arrangement did not fit
15 the --
16 A. Well, traditional factoring would be
17 to -- to purchase invoices.
18 Q. Yeah. Well, you were aware that the
19 factoring arrangement that BB&T proposed for
20 SkyWaves was a great departure from the typical
21 client?
22 A. Yes.
23 Q. And you were aware that BB&T had
24 developed a very unusual borrowing base with
25 SkyWaves?

Page 26

1 a -- had a growing need, you know, so you wonder if
2 their plan's going to work, if their projections
3 are going to pan out.
4 Q. Now here Mr. Edahl says that the -- the
5 factoring agreement comes up for review in March.
6 Were you planning at this time to use March as the
7 opportunity to review your continued relationship?
8 MS. CHERRY: Object to the form.
9 A. I -- I can't remember.
10 Q. Did you have any contingency plans at
11 this time to cut off credit based on the
12 information that you had at this time?
13 A. I remember having a conversation at one
14 time. Whether or not it was here or not I can't
15 remember.
16 Q. Who did you have the conversation with?
17 A. It was probably Jim Edahl.
18 Q. You know, we've been talking the past
19 couple days about site plans. You -- you are
20 familiar with the difference between funding
21 purchase orders and funding site plans?
22 A. No. Un-huh.
23 Q. You are not?
24 A. Un-huh.
25 Q. Did you approve the loan -- loaning

Page 27

1 money on site plans?
2 A. No.
3 Q. Did -- did you read Mr. Edahl's
4 deposition?
5 A. Not in its entirety.
6 Q. Did you read the part where he talked
7 about you having given him authority to approve the
8 funding for site plans?
9 A. I did.
10 Q. All right. Did you do that?
11 A. No.
12 Q. Did you ever have a conversation with
13 Mr. Edahl about July or so of 2007 about changing
14 the nature of the funding for SkyWaves?
15 A. Not that I recall.
16 Q. Did you know that Mr. Edahl was
17 proposing to loan money to SkyWaves on the basis of
18 sites identified in a General Dynamics proposal?
19 A. No. Loaning money based on their
20 purchase orders is -- is all I remember.
21 Q. All right. So when Mr. Edahl says he
22 talked to you about getting approval from you for
23 funding the site plans, that's not correct?
24 A. That's right.
25 Q. It's not --

Page 28

1 A. It's not correct.
2 Q. Okay. You never talked to him about
3 it?
4 A. No.
5 Q. Would you have approved funding for
6 site plans?
7 A. I had trouble doing the purchase orders
8 so I seriously don't think I would have done
9 anything that adds even more risk or takes us a
10 step further away from confirming a sale.
11 Q. What was the problem with funding
12 purchase orders?
13 A. Well, you're unsecured is the main
14 risk.
15 Q. You mean -- when -- what do you mean
16 when you say unsecured?
17 A. There are no receivables at that point
18 in time. There's no inventory at that point in
19 time which is where we would traditionally want to
20 be. So you're dependent on performance in that the
21 inventory has to be created. It has to be shipped.
22 It has to be invoiced before we have a document
23 that we could go after their client if you will to
24 collect.
25 Q. I see. And without -- with a purchase

Page 29

1 order you don't have that?
2 A. You just have a promise to buy that's
3 not enforceable in my opinion.
4 Q. Did you ever talk with any
5 representative of SkyWaves after the January 17th
6 plant inspection?
7 A. I met with SkyWaves early on so I'm
8 thinking the answer is no.
9 Q. This would have been January 17th,
10 2008.
11 A. I don't believe I did.
12 Q. Did you ever talk with their -- any
13 representative of SkyWaves after the default was
14 called?
15 A. No.
16 Q. Did you ever have anyone inquire what
17 SkyWaves' position was on the terms of the loan?
18 A. Not that I recall.
19 Q. We talked earlier about those memos
20 regarding the way BB&T was changing the factoring
21 agreement for SkyWaves, how it was tweaked and how
22 it contained language that wasn't part of the
23 standard agreement.
24 A. You're talking about the factoring
25 agreement?

923

5

5

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
COUNTY OF MECKLENBURG 2009-CP-10-7516

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.

VIDEO

DEPOSITION OF: TOL BROOME
DATE: December 19, 2013
TIME: 11:20 a.m.
LOCATION: Nexsen Pruet
701 Green Valley Road
Greensboro, NC
TAKEN BY: Counsel for the Plaintiff
REPORTED BY: LISA A. WHEELER, RPR, CRR

A. WILLIAM ROBERTS, JR. & ASSOCIATES

Fast, Accurate & Friendly

Charleston, SC Hilton Head, SC Myrtle Beach, SC
(843) 722-8414 (843) 785-3263 (864) 234-7030

Columbia, SC Greenville, SC Charlotte, NC
(803) 731-5224 (864) 234-7030 (704) 573-3919

Page 2	Page 4
1 APPEARANCES OF COUNSEL: 2 ATTORNEYS FOR THE PLAINTIFF 3 SKYWAVES I CORPORATION: 4 5 GEORGE J. KEFALOS, PA 6 BY: GEORGE J. KEFALOS 7 46A State Street 8 Charleston, SC 29401 9 (843) 722-6612 10 gjk@kefaloslaw.com 11 12 DUFFY & YOUNG 13 BY: JOHN P. LINTON 14 96 Broad Street 15 Charleston, SC 29401 16 (843) 720-2044 17 jlinton@duffyandyoung.com 18 19 ATTORNEYS FOR THE DEFENDANTS 20 BRANCH BANKING AND TRUST COMPANY, 21 successor in merger to BRANCH BANKING 22 AND TRUST COMPANY OF SC, a/k/a BB&T, 23 and JAMES EDAHL: 24 25 NEXSEN PRUET BY: MOLLY CHERRY 205 King Street, Suite 400 Charleston, SC 29401 (843) 577-9440 mcherry@nexsenpruet.com NEXSEN PRUET BY: JULIO E. MENDOZA, JR. 1230 Main Street, Suite 700 Columbia, SC 29201 (803) 540-2026 rmendoza@nexsenpruet.com ALSO PRESENT: Russell Bogue Michael Hennessy THE VIDEOGRAPHER: John Girdler (INDEX AT REAR OF TRANSCRIPT)	1 video specialist. The court reporter is Lisa 2 Wheeler. We're from A. William Roberts, Jr. & 3 Associates. 4 Counsel will now state their 5 appearances for the record and the court reporter 6 will swear in the witness. 7 MR. LINTON: Johnny Linton for the 8 Plaintiff. 9 MR. KEFALOS: George Kefalos for 10 SkyWaves. 11 MS. CHERRY: Molly Cherry for 12 Defendants BB&T and Jim Edahl. 13 MR. MENDOZA: Rick Mendoza for 14 Defendants BB&T and Jim Edahl. 15 TOL BROOME 16 being first duly sworn, testified as follows: 17 EXAMINATION 18 BY MR. LINTON: 19 Q. Mr. Broome, Johnny Linton and I'm going 20 to be asking you some questions. If I don't phrase 21 my question where it's clear, please ask me to 22 rephrase it so that we're communicating accurately 23 with each other. 24 A. Okay. 25 Q. And will you give me complete answers
Page 3	Page 5
1 (Commencing at approximately 11:20 a.m.) 2 * * * * * 3 STIPULATION 4 It is stipulated by and between Counsel 5 that this deposition is being taken in accordance 6 with the South Carolina Rules of Civil Procedure, 7 Rule 30; that all objections as to Notice of this 8 deposition are hereby waived; that all objections 9 except as to form are reserved until the time of 10 trial; and that the deponent does not waive reading 11 and signing of this deposition. 12 * * * * * 13 THE VIDEOGRAPHER: We're going on the 14 record. The time on the monitor is 11:20 a.m. 15 This is the video deposition of Tol Broome taken by 16 the Plaintiff in the matter of SkyWaves I 17 Corporation, Plaintiff, versus Branch Banking & 18 Trust Company, et al, Defendants, under the 19 jurisdiction of the Court of Common Pleas for the 20 Ninth Judicial Circuit, County of Charleston, Case 21 Number 2009-CP-10-7516. 22 This deposition is being held at Nexsen 23 Pruet, 701 Green Valley Road, Suite 100, 24 Greensboro, North Carolina, on Thursday, December 25 19th, 2013. My name is John Girdler. I'm the	1 to the questions? 2 A. Sure. 3 Q. Have you been deposed before? 4 A. Yes. 5 Q. Approximately how many times? 6 A. Probably half a dozen or so. 7 Q. In connection with BB&T matters? 8 A. Yes, or other banks. 9 Q. Other banks. All right. And in 2007 10 what was your position with BB&T? 11 A. I was the president of BB&T Commercial 12 Finance. 13 Q. All right. And what documents have you 14 reviewed in preparation for this deposition? 15 A. Various file documents related to 16 commitments that were made, written commitment 17 letters and then some follow-up documentation -- 18 the default letter that was sent and follow-up 19 documentation including a memo that I had put 20 together in March of 2008. 21 Q. Have you reviewed any of Mr. Edahl's 22 testimony? 23 A. Yes. 24 Q. What portions of it or the entire 25 deposition?

Page 18

1 Q. All right, sir. Now this goes on to
 2 have a mission statement, various other --
 3 A. Uh-huh.
 4 Q. -- objectives. How is the message in
 5 this 2007 corporate plan for the commercial finance
 6 area communicated to the sales execs, somebody like
 7 Mr. Edahl?
 8 A. The sales execs for commercial finance
 9 or for the bank?
 10 Q. For commercial finance.
 11 A. Mr. Edahl was not a sales executive for
 12 commercial finance.
 13 Q. Okay.
 14 A. So the -- the commercial finance sales
 15 executives we would have had -- first I would have
 16 met with my direct managers -- well, before that
 17 we -- I would have gotten them involved in putting
 18 together the corporate plan.
 19 Q. Of course.
 20 A. Then I would have met with them and
 21 said, okay, this has been approved. Here's what
 22 we're going to do this year. Then they would have
 23 gone and met with their reports to talk about what
 24 we were going to do.
 25 Q. Is there anybody in commercial finance

Page 19

1 who would have been involved with SkyWaves' credit?
 2 A. Yes.
 3 Q. Who is that prior -- prior to December
 4 of 2007?
 5 A. Well, Castlen was the account
 6 executive, Castlen Morris.
 7 Q. Okay. And how about on the bank side,
 8 would that be beyond your jurisdiction?
 9 A. It was at the time, yes.
 10 Q. But is -- now it is under your
 11 jurisdiction?
 12 A. From a sales management perspective,
 13 yes.
 14 Q. Okay. What is your current position?
 15 A. Director of regional corporate banking
 16 sales and service.
 17 Q. And so would -- what would that involve
 18 on the bank side? Like Mr. Dennings, would --
 19 would he be involved under you now?
 20 A. No. He's on the credit -- in the
 21 credit department.
 22 Q. Would he have been involved in 2007
 23 under you?
 24 A. No.
 25 Q. How did you happen to be doing the

Page 20

1 report of March of 2008 that you've referred to?
 2 A. In late February of 2008 the -- the
 3 chief credit officer and the head of specialized
 4 lending, Ken Chalk and Clarke Starnes, asked me to
 5 prepare a lessons learned memo on what happened
 6 with the SkyWaves credit.
 7 Q. Okay. I've seen their names but tell
 8 me what their positions were and --
 9 A. Ken Chalk was the chief credit officer
 10 at the time and Clarke Starnes was the specialized
 11 lending group manager. Clarke was my direct boss.
 12 Q. All right. Is specialized lending
 13 referring to problem loans or --
 14 A. No. It actually referred to about
 15 eight different specialized lending businesses and
 16 the sales organizations for those businesses. Some
 17 of the other ones were equipment finance,
 18 governmental finance, et cetera. Commercial
 19 finance was one of those.
 20 Q. Okay. And I'm sorry that I'm having
 21 trouble with the --
 22 A. Yeah. It's lingo.
 23 Q. -- hierarchy of the bank --
 24 A. Right.
 25 Q. -- but -- so Clarke was over

Page 21

1 specialized lending?
 2 A. That's right.
 3 Q. Okay. And was SkyWaves a specialized
 4 lending customer?
 5 A. Yes.
 6 Q. Okay.
 7 A. Commercial finance was a part of
 8 specialized lending.
 9 Q. Okay. Did you have anything to do with
 10 this 2007 commercial finance corporate plan?
 11 A. Yes.
 12 Q. You were the architect of it?
 13 A. Yes.
 14 Q. Okay. Did it differ in any material
 15 substance from the 2006 plan?
 16 A. I couldn't answer that without seeing
 17 the 2006 plan.
 18 Q. Okay. Well, let's go to the -- Page 2,
 19 the mission statement. And I can give you a chance
 20 to read that if you --
 21 A. Okay. Okay.
 22 Q. Now what is the purpose of this mission
 23 statement?
 24 A. To reinforce the bank's overall focus
 25 on putting our clients first and then to state how

Page 22	Page 24
1 we would in a specialized environment like 2 commercial finance execute on that mission. 3 Q. I notice in here it refers to the fact 4 that you're providing professional sales and risk 5 management direction to your customers. 6 A. Yes. 7 Q. Is that equivalent to saying that 8 you're giving advice to your customers? 9 A. Yes. 10 Q. All right. And who in commercial 11 finance would have been giving advice to SkyWaves 12 in 2007? 13 A. 2007? 14 Q. Right. 15 A. That primarily would have come through 16 the account executive, Castlen Morris. 17 Q. Okay. Who did he report to? 18 A. I believe he reported to Phil Allard if 19 I -- my memory's correct. 20 Q. All right. Do you know the 21 circumstances under Mr. Morris's departure from the 22 bank in around November of 2007? 23 A. He took a position with another 24 factoring company. 25 Q. Do you know if that was entirely	1 Q. Did that prevent you from talking to 2 him? 3 A. In a confidential collection matter, 4 yes. 5 Q. So you think it would have been 6 improper for anybody from the bank to talk to him 7 regarding -- 8 A. It would have been -- 9 Q. -- this matter? 10 A. -- improper for -- for me with what I 11 had been charged to do to talk to him. 12 Q. Well, would it be improper for anybody 13 who was being requested by you to collect the facts 14 to talk to him? 15 MS. CHERRY: Object to the form. 16 BY MR. LINTON: 17 Q. Go ahead. 18 A. Yeah, I would say so. I mean, it was 19 a -- it was a confidential bank matter that -- that 20 needed to be within the bank. 21 Q. Okay. Did you ask to receive a copy of 22 Mr. Morris's file so that you could review what he 23 had? 24 A. The credit file? 25 Q. Any file on SkyWaves. As you were
Page 23	Page 25
1 voluntary? 2 A. As far as I know he just left. 3 Q. In your review of the -- of the file 4 that you were asked to conduct did you ever 5 interview Mr. Morris? 6 A. No. 7 Q. Now he had left the bank? 8 A. That's right. 9 Q. So far as you know he left on good 10 terms? 11 A. Yes. 12 Q. And he had been with the bank for many 13 years? 14 A. I'm not sure how many but I -- 15 Q. Some number of years? 16 A. Right. 17 Q. Okay. And he was the manager who at 18 least from the commercial finance standpoint would 19 have had the -- the closest relationship with 20 SkyWaves, is that -- 21 A. Yes. 22 Q. And is there a reason that you wouldn't 23 have interviewed him to find out what he knew 24 and -- and when he knew it? 25 A. He was no longer with the bank.	1 trying to conduct your investigation to determine 2 what went wrong here and how do we avoid this from 3 happening again -- I think that was basically what 4 your assignment was, wasn't it? 5 MS. CHERRY: Object to the form. 6 BY MR. LINTON: 7 Q. Wasn't your assignment to determine 8 what the facts were and how we avoid any future 9 losses, what lessons can be learned? 10 A. Yes. 11 MS. CHERRY: Object to the form. You 12 can answer. 13 A. Yes. 14 Q. What was -- 15 A. It was a less -- it -- the purpose of 16 the memo was to -- to write a lessons learned 17 memo -- 18 Q. Okay. 19 A. -- after the fact. 20 Q. All right. And as part of that 21 investigation was Mr. Morris's file as the manager 22 for commercial finance available to you if you 23 requested? 24 A. Yes. 25 Q. Okay. Why didn't you request it?

1 A. That's right.
2 Q. All right. And the mission statement
3 says that -- that they're to provide professional
4 sales and risk management direction, which I
5 believe you've testified means that they're giving
6 advice to the -- to the client about how the
7 products that you are offering could benefit the
8 client, is that right?
9 MS. CHERRY: Object to -- object to the
10 form. You can answer.
11 BY MR. LINTON:
12 Q. How did you see Mr. Morris's role with
13 SkyWaves? What advice was he supposed to be giving
14 them and -- and feedback to them?
15 MS. CHERRY: Object to the form.
16 BY MR. LINTON:
17 Q. Was Mr. Morris supposed to be giving
18 any advice to SkyWaves?
19 A. Yes, to the extent that he would be
20 asked questions about financial services that may
21 help the company, he -- he would be giving --
22 potentially giving advice. He also -- the -- the
23 mission statement also refers to providing sales
24 and risk management internally at -- at the bank.
25 Q. Of course, internally at the bank

1 wouldn't be something that was feedback to
2 SkyWaves.
3 A. That's right.
4 Q. Is there anybody else under the
5 community -- excuse me, the commercial finance
6 aspect of the bank that was having any dealings
7 with SkyWaves that you know of prior to Mr. Burke
8 taking over?
9 A. I don't know.
10 Q. Would it be normal when you have
11 someone like Mr. Morris who leaves the bank from
12 your testimony apparently upon good terms to review
13 each of his major accounts to go over what the
14 status is and orient with his replacement to those
15 accounts?
16 A. It depends. Oftentimes because of the
17 confidential nature of the information -- I don't
18 know what the circumstances were here, but there
19 may be a fairly abrupt departure so -- but I don't
20 know what the circumstances were here.
21 Q. Did you regard the SkyWaves account as
22 being sort of a unique situation in that it didn't
23 fit the -- the mold for factoring that was the
24 normal protocol?
25 MS. CHERRY: Object to the form. You

1 can answer.
2 A. Yes, based on the memo that I wrote as
3 I uncovered the background of it I did see it as
4 unusual.
5 Q. All right. Let me go -- let me find
6 just one document and we'll ask you some questions
7 about it. Let's see. This is going to be the memo
8 of March the 26th. She's going to put a stamp on
9 it.
10 (BROOME EXHIBIT 2, Memorandum from Tol
11 Broome to File, March 26, 2008, Re: Skywaves I
12 Corporation, was marked for identification.)
13 BY MR. LINTON:
14 Q. You've got in front of you what's
15 marked as Exhibit 2 which is a document dated March
16 the 26th, 2008 which you authored, is that correct?
17 A. Yes.
18 Q. And you've told us what the purpose of
19 this memo was but so that it's -- we've got the
20 testimony in connection with the discussion of the
21 memo, tell me again what -- why you wrote this.
22 A. I wrote this because I was asked by my
23 supervisors to put together a lessons learned memo
24 based on what had happened historically with the
25 SkyWaves account.

1 Q. All right. In Number 1 your conclusion
2 was that BB&T is not equipped to finance purchase
3 orders anywhere in the bank if we are relying upon
4 purchase orders for repayment, is that correct?
5 A. Can you show me where that's --
6 Q. Under Number 1.
7 A. Oh, yes.
8 Q. Okay. Were you relying upon purchase
9 orders for repayment in the SkyWaves account?
10 A. We thought we were.
11 Q. Okay. So your conclusion is that the
12 financing mechanism of using purchase order
13 financing for a factoring platform was an
14 inappropriate financing mechanism --
15 MS. CHERRY: Object to the form. You
16 can answer.
17 BY MR. LINTON:
18 Q. -- is that correct?
19 A. Yes.
20 Q. And I'll just rephrase it. Was it an
21 appropriate financing mechanism for SkyWaves?
22 A. I -- I did not believe that it was.
23 Q. Okay. Do you know why Mr. Edahl would
24 have recommended it and Mr. Dennings would have
25 approved it?

6

6

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION,

Plaintiff,

vs. CASE NO. 2009-CP-10-7516

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.

DEPOSITION OF: JAMES EDAHL

DATE: September 19, 2013

TIME: 9:16 AM

LOCATION: Law Offices of
ANDREW K. EPTING, JR., LLC
46A State Street
Charleston, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: Roxanne M. Easterwood, RPR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

Fast, Accurate & Friendly

Charleston, SC Hilton Head, SC Myrtle Beach, SC
(843) 722-8414 (843) 785-3263 (843) 839-3376

Columbia, SC Greenville, SC Charlotte, NC
(803) 731-5224 (864) 234-7030 (704) 573-3919

STIPULATION

It is stipulated by and among Counsel
that this deposition is being taken in accordance
with the South Carolina Rules of Civil Procedure,
Rule 30; that all objections as to Notice of this
deposition are hereby waived; that all objections
except as to form are reserved until the time of
trial; and that the deponent does not waive
reading and signing of this deposition.

* * * * *

VIDEOGRAPHER: We are now on the
record. Today's date is September 19th, 2013.
The time is approximately 9:16 a.m. This is the
video deposition of James Edahl. The location is
46-A State Street, Charleston, South Carolina in
the offices of Kefalos Law Firm.

My name is Steven Barksdale, legal
videographer, representing A. William Roberts, Jr.
& Associates. This deposition is taken in the
matter of Skywaves I Corporation versus Branch
Banking and Trust, Et Al., case number
2009-CP-10-7516.

Counsel, please introduce yourselves
for the record.

MR. LINTON: John Linton for the

1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR PLAINTIFF
3 SKYWAVES I CORPORATION:

4 DUFFY & YOUNG

BY: JOHN P. LINTON

96 Broad Street

Charleston, SC 29401

(843) 720-2044

Jlinton@duffyandyoung.com

7 -- and --

8 GEORGE J. KEFALOS

46A State Street

Charleston, SC 29401

(843) 722-6612

George@kefaloslaw.com

11 ATTORNEYS FOR DEFENDANTS

13 BRANCH BANKING AND TRUST COMPANY,
14 SUCCESSOR IN MERGER TO BRANCH BANKING
AND TRUST COMPANY OF SC, A/K/A BB&T;
AND JAMES EDAHL

15 NEXSEN PRUET, LLC

BY: MOLLY HUGHES CHERRY

JULIO (RICK) E. MENDOZA, JR.

205 King Street, Suite 400

Charleston, SC 29401

(843) 577-9440

Mcherry@nexsenpruet.com

21 ALSO PRESENT:

22 Michael Hennessy, Rusty Bogue, Ron

23 Konersmann, Patty Konersmann

24 (INDEX AT REAR OF TRANSCRIPT)

1 plaintiffs.

2 MR. KEFALOS: George Kefalos for
3 Skywaves.

4 MR. MENDOZA: Rick Mendoza for BB&T.
5 MS. CHERRY: Molly Cherry for BB&T and
6 Jim Edahl.

7 VIDEOGRAPHER: Would the court reporter
8 please swear in the witness.

9 JAMES EDAHL
10 being first duly sworn, testified as follows:

EXAMINATION

12 BY MR. LINTON:

13 Q. Mr. Edahl, we met at Mr. Konersmann's
14 deposition. I don't think we have met before
15 that. Is that your recollection?

16 A. I don't think.

17 Q. Okay. Have you ever given your
18 deposition before?

19 A. Yes.

20 Q. Okay. Was that involving a BB&T
21 matter?

22 A. No, it was not.

23 Q. What did it involve?

24 A. A client of ours, Don's Supply
25 Company. Two of their partners were in dispute

1 a customer would you memorialize it with a memo to
 2 your file?
 3 A. Not necessarily.
 4 Q. Do you know of any memo to the file
 5 where you expressed dissatisfaction with the
 6 results of an audit to the debtor?
 7 A. Not that I'm aware of.
 8 Q. I think there's probably several
 9 different types of bankers, some bankers who are
 10 sticklers to details, others who seem to identify
 11 with customer needs and have a lot more
 12 flexibility just in their style of being a
 13 relationship manager. Have you found that to be
 14 true in your years of banking?
 15 A. I think different bankers have
 16 different styles, just like different individuals
 17 have different personalities.
 18 Q. Right. What -- how would you describe
 19 your style?
 20 A. I would describe my style as, you
 21 know, empathetic and responsive to customers'
 22 needs and trying to fit those appropriately within
 23 the bank.
 24 Q. All right. You would consider
 25 yourself a professional?

1 A. Yes.
 2 Q. And that engaging and have a
 3 relationship with a client to build their
 4 confidence in you and vice versa?
 5 A. Yes.
 6 Q. And was it one of your desires to
 7 expand the credit relationship with Skywaves from
 8 the -- from the inception?
 9 A. No. It was my desire to meet the
 10 needs of Skywaves as they were presented to us.
 11 Q. Well, there were a number of different
 12 relationships that you had over the years with
 13 them, credit relationships; is that correct?
 14 A. I'm not sure what you mean.
 15 Q. Well, I'm thinking about, I think it
 16 was a capital loan that was made. There were
 17 credit cards that were changed over from another
 18 company, another bank.
 19 I'm just trying to ask you if you
 20 weren't trying to grow the relationship on behalf
 21 of the bank and consistent with Skywaves's needs?
 22 A. We were trying to be sensitive to the
 23 needs of Skywaves and respond to them as they
 24 presented to us, sure.
 25 Q. Are you telling me that you were not

1 trying to grow the relationship between Skywaves
 2 and the bank because it would be profitable to the
 3 bank and that's part of your job?
 4 A. My primary job is helping our clients
 5 and in their requests within the format of the
 6 bank.
 7 Q. Okay. Do you recall in that regard
 8 being able to lower interest rates on certain
 9 relationships you had to -- to offer a better
 10 product to Skywaves?
 11 A. I'm not sure I understand the
 12 question.
 13 Q. All right. Did you have any concern
 14 at any time that Skywaves might go with a
 15 competitive bank?
 16 A. Yes.
 17 Q. Okay. And as part of your
 18 consideration of meeting their needs you also knew
 19 you were in a very competitive situation and that
 20 other banks might want your business?
 21 A. That's what --
 22 Q. That's true all the time?
 23 A. -- Skywaves told me, yes.
 24 Q. Well, I gather you believed them?
 25 A. Yes.

1 Q. Any reason to doubt that now?
 2 A. Not that I'm aware of.
 3 Q. Okay.
 4 A. Other than they -- I think in March of
 5 2007 when we were, you know, informed by Skywaves
 6 that other banks were looking at their needs and I
 7 was led to believe that there were more solid
 8 commitments in place than there actually were at
 9 that point in time.
 10 Q. Who led you to believe that?
 11 A. Ron Konersmann.
 12 Q. What did he tell you?
 13 A. That they had commitments from other
 14 institutions, specifically Wachovia and Hunt
 15 Capital, I think it was, to meet their needs.
 16 Q. And you don't believe that was true?
 17 A. Well, given what I saw in the
 18 testimony the other week, there was a varying
 19 conditional term sheet from Hunt Capital and very
 20 -- essentially a letter from Wachovia that says,
 21 you know, you're not ready yet.
 22 Q. Did you ask him for any documentation?
 23 A. No. I trusted what he was telling me.
 24 Q. What difference did that make to you
 25 in -- in regards to what you did as a commitment

1 by BB&T?

2 A. I'm not sure I understand the
3 question.

4 Q. You indicated Mr. Konersmann mislead
5 you into thinking that Wachovia and Hunt Capital
6 had made definite proposals to them.

7 MS. CHERRY: Object to form.

8 THE WITNESS: No. I mentioned that the
9 testimony that was present -- presented a few days
10 ago was at variance with what he told me at the
11 time. At the time I didn't believe he was
12 misrepresenting anything, in 2007.

13 BY MR. LINTON:

14 Q. I'm trying to understand if you took
15 any action on behalf of the bank based on what Mr.
16 Konersmann told you in March of 2007 regarding
17 Wachovia or Hunt Capital?

18 A. Based on the needs that Ron felt -- he
19 thought he would have going forward, we increased
20 the factoring line I think to 3-and-a-half million
21 and the fee purchase order sub limit at 2 million
22 and increased the advance rate from 60 to 65
23 percent on purchase orders. Ron said he thought
24 that would allow us to continue to be their bank.

25 Q. And you thought that was a reasonable

1 the relationship greatly?

2 A. The bank was willing to expand the
3 relationship per the terms that I just mentioned,
4 yes.

5 Q. And were you the person who made that
6 recommendation?

7 A. Yes.

8 Q. And to whom did you make it?

9 A. Walt Denning.

10 Q. Okay. And -- and was there anybody
11 else that was -- had been involved in that
12 decision to expand the credit line?

13 A. Not from a credit approval
14 perspective.

15 Q. And did -- were you and Walt Denning
16 referred to as co either authors or -- or -- whose
17 signature was required for the -- that expansion
18 approval?

19 A. Walt's.

20 Q. Okay. Now, at the time he -- you were
21 expanding that, you knew that -- that Skywaves was
22 trying to expand rapidly and that's one of the
23 reasons they needed the additional credit?

24 A. Yes.

25 Q. Okay. And you were comfortable with

1 thing to do on behalf of BB&T?

2 A. At the time, yes.

3 Q. What financial analysis did you make
4 in order to come to that conclusion?

5 A. We put together a credit package at
6 the time based on the financials that were
7 provided to us at that time.

8 Q. And insofar as you know were those
9 financials accurate?

10 A. So far as I knew at the time.

11 Q. Well, I'm talking about now. Is there
12 anything now that you know that you could say the
13 financial package that you were given in March of
14 2007 or thereabouts was inaccurate?

15 A. No. It was -- as far as I know, it
16 was accurate.

17 Q. Okay. I may not have been phrasing
18 that question very well. I'm trying to
19 understand -- I understand that in 2007 you
20 thought it was accurate?

21 A. Uh-huh.

22 Q. Do you still think it was accurate
23 based on anything you know today?

24 A. Yes.

25 Q. Okay. And you were willing to expand

1 their financials and their operation to extend 65
2 percent payment rather than 60 percent?

3 MS. CHERRY: Object to form.

4 THE WITNESS: On purchase orders,
5 that's correct.

6 BY MR. LINTON:

7 Q. Okay. What is a purchase order, as
8 you use that term?

9 A. It's an order from a client to, in
10 this case, manufacture a shelter unit.

11 Q. All right. So you -- and you were
12 going to loan 65 percent of the -- of the --

13 A. Of the amount of that purchase order.

14 Q. Okay. And how long down the road
15 would it be before a purchase order converts into
16 a receivable?

17 A. Typically in that -- in Skywaves's
18 case the purchase order would take -- and Castlen
19 could answer that question more accurately than I
20 could -- but it seems around probably take 30 to
21 60 days to construct a shelter.

22 Q. Had you ever financed purchase orders
23 before?

24 A. No.

25 Q. Factoring normally finances

1 of getting the units to him to manufacture.

2 Q. Would that have been April or so 2007,
3 the discussions?

4 A. Yes.

5 Q. Okay. Tell me what you understood the
6 General Dynamics contract to be.

7 A. That Ron had a contract with General
8 Dynamics to purchase shelter units for the New
9 York State Police project up in New York I think
10 it was.

11 Q. Did you ever see the contract?

12 A. Yes.

13 Q. Would you have gotten a copy of it?

14 A. Yes.

15 Q. Studied it?

16 A. Would have read through it.

17 Q. Okay. About how long was it?

18 A. It was fairly thick, as I recall.

19 Q. Tell me what your understanding was
20 with the way that contract was going to work.

21 A. That General Dynamics had a contract
22 with the State of New York to purchase or to --to
23 deliver shelter units for their cell towers and
24 that as those towers were to come online they
25 would manufacture -- they would have Skywaves

1 manufacture the units and -- and ship them.

2 Q. At what point would those become
3 purchase orders?

4 A. When General Dynamics would have
5 issued a purchase order.

6 Q. So under -- excuse me. Did you
7 finish?

8 A. When they would order -- issue a
9 purchase order.

10 Q. So General Dynamics had discretion as
11 to when it wanted to place a purchase order?

12 A. Yes.

13 Q. And you understood that?

14 A. Yes.

15 Q. And at some point did you start
16 financing site plans?

17 A. Ron asked us to consider financing
18 site plans in the spring of 2007, and he said that
19 he was very certain that purchase orders would be
20 forthcoming very soon. He was anxious to get
21 production started on these units and asked if we
22 could consider lending against the sites that he
23 felt would turn into purchase orders very soon and
24 -- and consuming the cycle. And in the context
25 of, he -- well, yeah.

1 Q. And because the potential purchase
2 order was somebody like General Dynamics, who had
3 this contract with the state police, you felt that
4 was a reasonable risk of the bank to take?

5 A. Yes. At the time I thought it was
6 worth considering based on Ron's representations.

7 Q. And in fact, after you considered it
8 did you approve that?

9 A. Talked to Walt Denning about that
10 concept, and Walt's response was he was okay with
11 it if we could structure it like we had the
12 purchase orders and if we could track them. And
13 -- and we talked to Castlen and he felt that we
14 could monitor that okay, and -- and so we agreed
15 to factor the site plans at that time.

16 Q. And basically what you have, from a
17 business standpoint, you considered that the money
18 will be there, it's just a matter of timing when
19 the purchase order will be based and then the
20 thing will be made?

21 A. Yes. Ron assured us that purchase
22 orders would be forthcoming soon and that he
23 really wanted to get production started on these
24 units. And so, yes, we felt that under those
25 circumstances it was reasonable to consider

1 advancing on sites.

2 Q. Okay. And did you advance at 65
3 percent?

4 A. Yes.

5 Q. Did you ask Ron to get any
6 documentation from General Dynamics about a
7 schedule, when -- when you could expect?

8 A. Yes. Ron provided in those initial
9 discussions a site schedule from General Dynamics
10 that outlined all of the sites involved in the
11 contract and -- and provided that spreadsheet to
12 us, and that's how Castlen was to track the
13 advances on the sites.

14 Q. Was this financing of site plans, had
15 you ever done that before?

16 A. No.

17 Q. In your banking career?

18 A. No.

19 Q. Do you know if Walt Denning had ever
20 financed site plans?

21 A. Not to my knowledge.

22 Q. Was there any -- well, strike that.

23 Were these site plans being financed
24 under the fact -- under the existing factoring
25 agreement?

1 A. Yes.

2 Q. And was any written change to that
3 factoring agreement?

4 A. No.

5 Q. I -- I'm perplexed as to how people in
6 a bank who don't have any experiencing financing
7 site plans can agree to finance it and not have
8 anything in writing for an auditor to understand
9 what's being financed. So explain to me how that
10 worked.

11 A. The request from Ron came in the
12 context of the credit approval that we just
13 received in March of '07 to expand the line and
14 increase the percentage on purchase orders. We
15 had already had experience with General Dynamics
16 on purchase ordering, invoice factoring, and that
17 was a satisfactory experience.

18 We felt a high confidence level in Ron
19 and the company at that time. We felt we had good
20 experience with conversion of the POs to invoices
21 previously. We had experience with General
22 Dynamics that was good.

23 Q. So it all made perfect sense, it just
24 wasn't documented?

25 A. Well, at the time it made sense to us,

1 yes.

2 Q. But then a lot of things in hindsight
3 that don't make sense but at the time they seem to
4 make perfect business sense?

5 A. Within the context at the time, that
6 sometimes happens.

7 Q. Did you consider that after you made
8 this agreement with Skywaves to finance site plans
9 that the bank was obligated to finance those
10 plans?

11 A. I'm sorry, I didn't understand.

12 Q. Did you feel that after you made the
13 agreement with Skywaves to finance site plans, as
14 you have testified to, that the bank was then
15 obligated to finance these plans?

16 A. Yes.

17 Q. And in fact, did the bank finance
18 those plans?

19 A. Some sites, yes.

20 Q. Were there any sites that were turned
21 down?

22 A. Not that I'm aware of.

23 Q. I want to try to understand the
24 coordination between an audit department and the
25 credit and you as the relationship manager. In a

1 matter like this that I guess you would have to
2 say is highly unusual because y'all had never done
3 it before -- would you agree with that, highly
4 unusual?

5 A. Yes.

6 Q. Okay. How does an auditor know what
7 the contract is between the bank and Skywaves when
8 they -- when they're doing their audit?

9 A. Yeah, I'm not sure how they look at
10 that.

11 Q. Well, you got the audits from them,
12 copies of it, didn't you?

13 A. Yes.

14 Q. Did you ever have any discussion with
15 the auditors?

16 A. Not about that particular issue, no.

17 Q. Prior to the January audit being
18 received by you did you have any concern about the
19 Skywaves account?

20 A. Probably beginning in September of '07
21 we were getting financial information, albeit on a
22 delayed basis, from 60 days, sometimes more, which
23 was a concern in and of itself that financial
24 reporting was becoming later, but the reporting
25 that we were getting on the financial condition of

1 the company was not -- the revenues were beginning
2 to decrease. Losses were increasing. And so that
3 started to raise some concern in my mind of what
4 was happening.

5 Q. But that concern was not a concern
6 about whether they were in default but just a
7 concern about the --

8 A. The general direction of the company,
9 correct.

10 Q. Right? You said that right?

11 A. That's correct.

12 Q. And I think in November '07 you had a
13 meeting with Ron updating you on the financials.
14 Do you remember that?

15 A. I agree. That's true. Yes.

16 Q. As I recall, there was some infusion
17 of equity at that time as well as some loans by
18 Jimmy Kerr and Crayton Walters?

19 A. That's what we were told.

20 Q. Well, those accounts were with BB&T,
21 weren't they?

22 A. Skywaves's checking account was with
23 BB&T, yes.

24 Q. Right. So when you say that's what
25 you were told, isn't, in fact, that's what

1 A. No, not -- not that I recall.
 2 Q. Well --
 3 A. I think he expressed surprise -- I was
 4 trying to remember from the meeting -- that we had
 5 these advances outstanding and no shelters.
 6 Q. Well, essentially when you were
 7 advancing on the site plans this was a working
 8 capital at that point, wasn't it?
 9 A. A working capital that was to be used
 10 for the construction of those shelters on those
 11 sites.
 12 Q. And where is it documented that --
 13 that the funds had to be used on the shelters as
 14 opposed to expansion and -- and paying salaries,
 15 et cetera?
 16 A. Yeah, that was just the understanding
 17 that Ron and I had based on all of the other
 18 advances we'd made over the last two-and-a-half
 19 years, that each advance was tied into a specific
 20 unit that was to be constructed, invoiced, and
 21 collected.
 22 Q. All right. Now, you weren't -- you
 23 indicated Mr. Denning approved this?
 24 A. Yes.
 25 Q. So he both approved the purchase order

1 arrangement and he also approved the site plan
 2 arrangement?
 3 A. Yes.
 4 Q. And so that I'm clear on it, the site
 5 plans were designated as potential sites with no
 6 specified schedule of when those orders would be
 7 placed; is that right?
 8 A. That's right.
 9 Q. Okay. And that is a working capital
 10 loan in banking terms, isn't it?
 11 A. I guess could be construed that way.
 12 Q. Well, didn't -- and that was the way
 13 you considered it?
 14 A. No. I considered it that the funds
 15 would be used, again, to build specific shelters
 16 for the specific sites that we were advancing.
 17 Q. Well, and is there any reason to
 18 believe that they were used for corporate
 19 purposes? For example, payroll, expansion,
 20 materials?
 21 A. Yeah, I don't know what they ended up
 22 being used for.
 23 Q. Did you ever make any investigation?
 24 A. I didn't personally, no.
 25 Q. Did you ever ask Ron or John for any

1 report regarding the use of those funds that were
 2 site plan funds?
 3 A. No, not regarding use of funds.
 4 Q. Okay. But -- but you claim that the
 5 bank had restricted them to use that simply for
 6 the construction of site specific facilities; is
 7 that right?
 8 A. That's right.
 9 Q. And there's not -- not a piece of
 10 paper in the whole bank file that says that, is
 11 there?
 12 A. Not that specific sentence, not that
 13 I'm aware of.
 14 Q. Well, what in -- in the bank records
 15 that you have seen as the relationship manager
 16 that tells Skywaves that the funds that were
 17 advanced for site plans have to be used for
 18 materials? Is there anything?
 19 A. There is nothing now in writing that
 20 I'm aware of that's a document. What is in
 21 writing is the site plans, the advances against
 22 those site plans, and two-and-a-half years of
 23 experience of every single advance that had ever
 24 been made under our factoring agreement was tied
 25 to the specific shelter.

1 Now what they used those funds for, we
 2 assumed they were using them to, you know, build
 3 shelters.
 4 Q. And do you recall lying to Mike Burke
 5 about not having knowledge of the site plans?
 6 A. I'm sorry?
 7 Q. Do you recall lying to Mike Burke and
 8 telling him you -- you didn't know that there was
 9 funding on site plans, you thought it were all
 10 purchase orders?
 11 A. At that time when we discovered that
 12 there were purchase orders, that there were
 13 advances out there under our factoring agreement
 14 that weren't tied to shelters, again in
 15 combination with the terrible financial results
 16 that were coming in, and we were in pretty much
 17 crisis mode at that point in the company's future.
 18 They were again losing a lot of money.
 19 They were not remitting funds to the bank when
 20 they received them. Their payables were way
 21 behind. It -- at that point in time my -- I was
 22 pretty much focussed on we got money out here and
 23 no shelters tied to the financial condition of the
 24 company. It was deteriorating significantly and
 25 rapidly. And at that point in time, you know, I

1 couldn't -- I didn't recall the -- the detail of
2 the site plan financing.

3 Q. I'm going to ask the question again.
4 Did you lie to Mike Burke and tell him that you
5 were unaware that there was site plan financing?

6 A. No, I did not lie to Mike Burke.

7 Q. Did you tell him that you weren't
8 aware of the site plan financing?

9 A. We didn't discuss site plan financing.

10 Q. You and Mike Burke didn't discuss
11 that?

12 A. No, not at that point.

13 Q. What did -- did you ever discuss it
14 with Mike Burke?

15 A. Yeah, I'm sure I did. I don't know
16 exactly when.

17 Q. Mr. Edahl, do you recall saying that
18 to Walt Denning, Frank Capel, and Mike Hennessy
19 that neither you or I had any idea that the GD
20 NYST purchase orders funded from July through
21 October were not documented and funded exactly
22 like the other purchase orders we had received and
23 funded over the last two years?

24 A. Yes, I do recall that. And they
25 weren't because no shelters were constructed.

1 Q. Are you -- are you trying to tell me
2 that you told Mike Burke that the site plan
3 funding had been approved so there's nothing
4 unusual about the site plan funding?

5 A. No, I'm not saying that.

6 Q. Did you tell Mike Burke, look, we --
7 we got off the factoring agreement and made a new
8 agreement where we're going to finance purchase
9 orders? Did you tell him about that?

10 A. No. That was in the record.

11 Q. Where was it in the record?

12 A. Various agreements that had been made
13 and memorialized.

14 Q. Okay. Did you tell Mike Burke that
15 thereafter we decided to finance site plans?

16 A. No.

17 Q. Did you lead him to believe that you
18 had no knowledge that that there was funding of
19 site plans?

20 A. No. At that point in time I do not
21 recall that the agreement to fund site plans.
22 Again, that was -- it was so much going on at that
23 point in time, a lot of things to deal with that.

24 Q. Do you recall being involved in the
25 preparation of material for a serious -- serious

1 incident report?

2 A. I'm sorry?

3 Q. Do you recall being involved in
4 filling out the serious incident report?

5 A. I don't recall that at the moment, no.

6 Q. Do you recall any statement that you
7 made regarding the site plan financing?

8 A. There are some other memos I think or
9 as we've moved through the process about trying to
10 address the situation that we mentioned that, yes.

11 Q. Do you recall claiming that you did
12 not have knowledge of the site plan financing?

13 A. Yes, I do.

14 Q. Was that truthful?

15 A. At the time it was.

16 Q. Explain that to me, because I thought
17 you -- you had testified that you approved the
18 site plan financing and that Mr. Denning approved
19 the site plan financing; is that correct?

20 A. Yes.

21 Q. And then you've gone into testimony
22 about your understanding of what the terms of that
23 said site plan financing?

24 A. Uh-huh.

25 Q. Right?

1 A. Yeah.

2 Q. Now, in January or February of 2008
3 did you intend to convey to your superiors that
4 you didn't know about the site plan finance --
5 financing and those were supposed to be purchase
6 orders and that these were crooks?

7 A. No.

8 MS. CHERRY: Object to form.

9 THE WITNESS: Not my intentions, and I
10 didn't convey that either.

11 BY MR. LINTON:

12 Q. Okay. What were you trying to convey
13 when you were filling out information for your
14 superiors to rely on regarding the site plan
15 financing?

16 MS. CHERRY: Object to the form.

17 THE WITNESS: What I remembered, I was
18 trying to convey the situation as I remembered it
19 at that time.

20 BY MR. LINTON:

21 Q. At the time did you remember that site
22 plan financing had been approved by you and Mr.
23 Denning?

24 A. No, at the time I didn't. That
25 recollection came as we were preparing for the --

1 the deposition process and I've had a chance to
2 look at all of the information that became
3 available.

4 Q. I see. So what you're telling me is
5 that the site plan financing had been approved by
6 you and Mr. Denning and it had been administered
7 by Cast -- by Castlen Morris?

8 A. Uh-huh.

9 Q. But in January when Mr. Burke came
10 over you had forgotten about that?

11 A. That's correct.

12 Q. And later when you filled out a
13 serious incident report you still had forgotten
14 about it?

15 MS. CHERRY: Object to the form.
16 BY MR. LINTON:

17 Q. Let me go ahead and rephrase that.
18 When did you first recall, oh, my God, I've made a
19 mistake, we did approve that site plan financing?

20 A. Yeah, as Ron was giving his testimony
21 last week.

22 Q. And did you make a note about that?

23 A. I don't recall.

24 Q. Come on now. This --

25 A. I don't.

1 Q. You don't recall whether you made a
2 note to yourself that there -- we did have site
3 plan financing?

4 A. Yeah, I know I made a mental note and
5 then -- about that and --

6 Q. So his testimony refreshed your
7 recollection?

8 A. Yes, it did.

9 Q. Okay. And you're clear as you can be
10 on it today that it had been approved?

11 A. Yes.

12 Q. At what point did you become
13 disengaged from Skywaves's account?

14 A. Probably by the time of the demand
15 letter had been issued, the account would have
16 been transferred from the bank to our asset
17 resolution group.

18 Q. Were you involved in the discussions
19 when there were proposed workouts?

20 A. A couple of them. I think I was
21 involved in a meeting that -- at Skywaves as --
22 during that process with I think Mike and some
23 others.

24 Q. When you had your recollection
25 refreshed last week, did you notify anybody at the

1 bank? Did you notify anybody at the bank, you
2 know, what he's saying is true and I may have
3 misled y'all unintentionally?

4 A. I notified Molly and -- and Molly
5 notified Mike.

6 Q. Have you had any discussions with Mike
7 about that?

8 A. Yes.

9 Q. Tell me about that.

10 MS. CHERRY: I'm going to instruct him
11 not to answer to the extent counsel was involved
12 in those communications.

13 So if you can answer the question
14 without revealing any discussions where counsel
15 was involved, you can. Otherwise...

16 MR. MENDOZA: I also would like to ask
17 for a clarification, which Mike. There are a
18 couple Mikes.

19 BY MR. LINTON:

20 Q. Good point. I'm assuming you were
21 talking about Mike Hennessy?

22 A. Yes. Well, all our -- any
23 conversation that related to that was in the
24 presence of -- of counsel. So I don't know how to
25 respond to your question.

1 Q. Have you been asked to prepare any
2 written statement by Mr. Hennessy?

3 A. No.

4 Q. Or anybody at the bank?

5 A. No.

6 Q. Have you looked at the serious
7 incident report that this bank filed?

8 A. No, I don't think I have.

9 Q. When you were discussing the Skywaves
10 situation with Mr. Burke did you tell him that you
11 knew from time to time that checks had been
12 received directly by Skywaves as opposed to being
13 to BB&T?

14 A. No, not that I recall.

15 Q. Do you recall telling him that from
16 time to time you were aware that Skywaves
17 deposited checks and would remit them and -- but
18 it may be 30 days?

19 A. No, I don't recall that at all.

20 Q. What do you recall about how you
21 introduced Mr. Burke to the situation at Skywaves?

22 A. Primarily we set up the meeting to
23 meet with them and the general parameters of the
24 credit exposure that we had and -- and give him a
25 chance to meet the management out there.

7

7

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
SKYWAVES I CORPORATION,
Plaintiff,

vs. CASE NO. 2009-CP-10-7516
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.

VIDEOTAPED
DEPOSITION OF: JAMES J. EDAHL

DATE: NOVEMBER 21, 2014

TIME: 9:17 AM

LOCATION: DUFFY & YOUNG
96 Broad Street
Charleston, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: Laura J. Bash, RPR

A. WILLIAM ROBERTS, JR., & ASSOCIATES
Fast, Accurate & Friendly

Charleston, SC Hilton Head, SC Myrtle Beach, SC
(843) 722-8414 (843) 785-3263 (843) 839-3376
Columbia, SC Greenville, SC Charlotte, NC
(803) 731-5224 (864) 234-7030 (704) 573-3919

THE VIDEOGRAPHER: We are now on the
record. Today's date is November 21st, 2014, and
the time is approximately 9:17 a.m. This is the
video deposition of James J. Edahl, taken by
counsel for the plaintiff. The location is
96 Broad Street, Charleston, South Carolina, in the
office of Duffy & Young.

My name is Steven Barksdale, legal
videographer, representing A. William Roberts, Jr.
& Associates.

This deposition is taken in the matter
of SkyWaves I Corporation versus Branch Banking and
Trust, et al; Case Number 2009-CP-10-7516.

Could all counsel present please
introduce yourselves for the record.

MR. LINTON: John Linton, Duffy &
Young, representing the plaintiff.

MR. KEFALOS: And George Kefalos on
behalf of SkyWaves.

MR. CHANDLER: Nelson Chandler for Jim
Edahl.

MS. CHERRY: Molly Cherry for BB&T.

THE VIDEOGRAPHER: Would the court
reporter please swear in the witness.

(Whereupon, the witness was placed

APPEARANCES OF COUNSEL:
ATTORNEYS FOR PLAINTIFF
SKYWAVES I CORPORATION:

DUFFY & YOUNG
BY: JOHN P. LINTON
96 Broad Street
Charleston, SC 29401
(843) 720-2044
jlinton@duffyandyoung.com

and

GEORGE J. KEFALOS
46-A State Street
Charleston, SC 29401
(843) 722-6612
george@kefaloslaw.com

ATTORNEYS FOR DEFENDANT
BRANCH BANKING AND TRUST COMPANY,
Successor in merger to BRANCH BANKING
AND TRUST COMPANY OF SC, a/k/a BB&T:
NEXSEN PRUET, LLC
BY: MOLLY HUGHES CHERRY
205 King Street, Suite 400
Charleston, SC 29401
(843) 577-9440
mcherry@nexsenpruet.com

ATTORNEYS FOR THE DEFENDANT
JAMES J. EDAHL:
CORRIGAN & CHANDLER, LLC
BY: J. W. NELSON CHANDLER
16 Charlotte Street, Suite B
Charleston, SC 29401
(843) 577-5430
nelson@corriganhandler.com

ALSO PRESENT:
Mike Hennessy
Ron Konersmann
Steven Barksdale, legal videographer

under oath by the court reporter.)

JAMES J. EDAHL,
being first duly sworn, and responding, "I do,"
testified as follows:

EXAMINATION

BY MR. LINTON:

Q. Mr. Edahl, what documents have you
reviewed in preparation for this deposition?

A. My original deposition and the
affidavit that was filed in February.

Q. Okay. Have you reviewed any of the
testimony that's been given in this case, other
than your own?

A. I reviewed excerpts from Walt Denning's
testimony and Castlen Morris' testimony.

Q. When did you review them?

A. Um. Yesterday.

Q. Okay. Was that in preparation for --

A. Yes, sir.

Q. Okay. What did you review about
Mr. Denning's testimony?

A. It was revolving around the site plan
financing.

Q. And did you recall that he testified
that he had not approved the site plan financing?

1 Q. Why did you give that untruthful
2 testimony in your deposition?

3 A. I think out of fear of losing my job,
4 at that point.

5 Q. That was the same reason that you had
6 failed to alert the bank that you had approved the
7 site fund planning when the bank was closing the
8 doors on SkyWaves?

9 A. Correct.

10 Q. Was there something about the bank
11 culture that would have made you afraid that they
12 were going to terminate you, when you had been a
13 senior vice president, if you had just, in January
14 of 2008, told the truth?

15 A. No.

16 Q. Why did you feel it necessary to lie in
17 January 2008, if Mr. Denning had approved this
18 financing?

19 A. The pressure that I was feeling was
20 that they probably -- twofold. When I found out in
21 January of 2008 that the site plan advances had not
22 turned into purchase orders quickly, and, in fact,
23 that no units had been constructed at all, and I
24 was very concerned about the situation that that
25 put the bank and me in at that point.

1 Q. But if Mr. Denning had approved it and
2 Castlen Morris was the administrator, you had done
3 everything that you were supposed to do, why would
4 you be afraid?

5 MS. CHERRY: Object to the form.

6 THE WITNESS: I think at -- at the
7 time, I was just very surprised and shocked that no
8 units had been constructed and that the site plans
9 hadn't converted to purchase orders, and so that
10 caused a great bit of concern on my part.

11 BY MR. LIPTON:

12 Q. Mr. Edahl, you were -- you testified
13 you went to SkyWaves maybe every other month to do
14 a site visit, right?

15 A. Well, I would talk with management --

16 Q. Talk with management --

17 A. -- about various issues.

18 Q. Right. But you would physically be on
19 the property.

20 A. Uh-huh.

21 Q. The shelters that SkyWaves were
22 building were fairly large, weren't they?

23 A. Uh-huh.

24 Q. And typically when you had a visit out
25 there, would you sort of walk around to look at

1 what was in inventory? I don't mean conducting
2 inventory, but look at what was in inventory and
3 look at what shelters were being built?

4 A. I would certainly note what was around
5 the plan, and production lines going.

6 Q. All right, sir. So you were there in
7 November and December, weren't you, of 2007?

8 A. I'd have to check on that. I assume I
9 was, but I don't know that for a fact.

10 Q. Did you make note at any time that
11 there's -- these shelters are not works in progress
12 in late 2007?

13 A. No.

14 Q. Did you ask anybody at SkyWaves about,
15 you know, guys, I was hoping these things would
16 convert into purchase orders, we've advanced
17 \$1,200,000, you know, where are the shelters?

18 Did you ask anything like that?

19 A. No.

20 Q. And there was really no written
21 requirement that the advances for the site plans be
22 spent on specific shelters, were there?

23 A. There was no written agreement to that.

24 Q. All right. You've probably managed
25 construction loans from time to time, haven't you?

1 A. Yes.

2 Q. And if I was to come to you to get a
3 construction loan and, typically, there might be
4 percentage payments or draws; is there right?

5 A. Yes.

6 Q. And when you have that kind of
7 limitation on the use of the proceeds, the bank, in
8 a written document, tells you what the percentage
9 of draw will be, doesn't it?

10 A. Correct.

11 Q. Was there anything like that in this
12 verbal agreement?

13 A. Just the 65 percent initial advance.

14 Q. But in terms of the use of those
15 proceeds, there was nothing at all that was agreed
16 to in writing; is that correct?

17 A. Not in writing.

18 Q. Was there anything that you
19 specifically can tell me that Ron Konersmann or
20 John Voytko, or anybody from SkyWaves said, we
21 agree that when we are getting these funds it's
22 specifically to build this particular shelter?

23 A. Yes. Well, that was the understanding,
24 because --

25 Q. I'm not asking you about your

1 investigator said to you that made you feel like,
2 oh, gosh, I gave untruthful testimony?

3 A. Yeah. When I was talking with her
4 about my testimony, I wanted to correct that part
5 of the testimony.

6 Q. Just so I don't have to answer -- ask
7 you the question several times, every time you use
8 the word "correct the testimony," I'm going to ask
9 you if you're talking about -- acknowledged that it
10 was untruthful testimony.

11 A. Okay..

12 Q. And I do that because there's a
13 difference between correcting an error and
14 correcting false testimony.

15 You understand that?

16 A. Yes.

17 Q. Okay. Now, I'm going to hand you an
18 errata sheet and your signature to it. And this
19 looks like it's dated September the 27th, and the
20 deposition was September 19th.

21 Now, let's mark that as Exhibit 3.

22 (PLF. EXH. 3, Signature of Deponent
23 sheets from the deposition of James Edahl, was
24 marked for identification.)

25 BY MR. LIPTON:

1 A. No.

2 Q. Who did?

3 A. I believe Molly drafted it and I
4 reviewed it.

5 Q. Were there any earlier drafts that you
6 struck things out of?

7 A. No.

8 Q. Did you -- did you make any changes to
9 the draft after it had been submitted to you?

10 A. Not that I recall.

11 Q. And you say in here about your prior
12 testimony -- or recall the detail of loan advances
13 made upon site plans.

14 You want to look at your affidavit and
15 see that?

16 A. I'm sorry. Where is it?

17 Q. Right at the top of the second page,
18 (indicating).

19 A. Okay.

20 Q. Mr. Edahl, we're looking at Paragraph 3
21 of your affidavit. This is Exhibit 1. And I've
22 called your attention to language used: Or recall
23 the detail of loan advances made upon the site
24 plans.

25 Do you see that?

1 Q. You made a number of corrections to
2 your testimony that you gave in that deposition.

3 Do you see them there?

4 A. Yes.

5 Q. And just looking at the extent of those
6 corrections, you must have read your deposition
7 pretty carefully. Is that correct?

8 A. Yes. Yes.

9 Q. And you had over a week after your
10 deposition to reflect on the fact that you had
11 given false testimony. And when you read through
12 it, it didn't dawn on you that you had given false
13 testimony?

14 A. No.

15 Q. Okay. I'm assuming that you never have
16 given false testimony before.

17 That is, knowingly given false
18 testimony; is that correct?

19 A. No, that's correct.

20 Q. I think we have covered these things in
21 your affidavit. You said that the reason you
22 didn't speak truthfully was out of fear and panic;
23 is that correct?

24 A. That's correct.

25 Q. Did you write this affidavit?

1 A. I'm sorry. Yes. Uh-huh.

2 Q. Okay. What do you recall about the
3 detail of loan advances made upon the site plans?

4 A. What I do recall was that SkyWaves
5 supplied the bank with a spreadsheet of the various
6 site plans related to the New York contract, the
7 General Dynamics' contract, and that we had agreed
8 to advance up to 65 percent of the cost of the
9 shelters for each of those units. And that we
10 expected those advances to turn into purchase
11 orders quickly.

12 Q. But no specific timetable; is that
13 correct?

14 A. Correct.

15 Q. Did you ever caution SkyWaves that the
16 purchase orders were not turning into invoices or
17 receipts quickly enough?

18 A. I remember expressing concerns about
19 delays in general, but I don't remember anything
20 specifically.

21 Q. I'm going to turn to your amended
22 answer. And on Page 3 -- this answer was filed in
23 March 2014 -- and I just want to ask you about one
24 or two provisions in it.

25 Look at Paragraph 13 and 14, on Page 3.

1 Q. But that letter doesn't include all of
2 the details of the commitment letter, does it?

3 MS. CHERRY: Object to the form.

4 BY MR. LINTON:

5 Q. Does that letter contain all the
6 details that a normal commitment letter would
7 include?

8 A. A commitment -- it outlined the
9 agreement, in a general way, with the company
10 regarding that credit facility at the time.

11 Q. How long have you worked with
12 commitment letters in your banking career?

13 A. As long as I've been in banking, about
14 30 years.

15 Q. Okay. And you and I have just
16 discussed the kind of terms and detail that
17 normally are contained in a commitment letter,
18 haven't we?

19 A. Yes.

20 Q. Did the March letter from you contain
21 all of the terms and conditions that you expect in
22 a commitment letter?

23 A. It was a modification of our existing
24 commitment. So it would be a slightly different
25 format from a standard commitment letter.

1 Q. And there simply was no commitment
2 letter regarding the site plan funding.

3 A. Correct.

4 MS. CHERRY: Object to the form.

5 BY MR. LINTON:

6 Q. And did you know that at the time you
7 signed this affidavit and had it filed with the
8 United States District Court?

9 A. Yes.

10 Q. So this affidavit was false, then.

11 MR. CHANDLER: Object to the form.

12 MS. CHERRY: Object to the form.

13 BY MR. LIPTON:

14 Q. Was the affidavit false?

15 A. No, I don't think the affidavit is
16 false. That particular sentence...

17 Q. Fair enough.

18 Is Paragraph 10 false?

19 A. Yes.

20 Q. Okay. Did you know it was false when
21 you signed the affidavit?

22 A. No, not consciously.

23 Q. Well, you knew there wasn't a site plan
24 commitment letter, didn't you?

25 A. Yes.

1 Q. And you knew you had made a commitment
2 for the site plan funding, didn't you?

3 A. Yes.

4 Q. So to that extent, you knew that
5 Paragraph 10 was misleading.

6 A. Yes.

7 Q. And false.

8 MR. CHANDLER: Object to the form.

9 BY MR. LINTON:

10 Q. And false.

11 A. Yes.

12 MR. LINTON: I think the court reporter
13 wants a break. I thought she was saying 4.

14 THE REPORTER: Did you want to mark
15 that as 4?

16 MR. LINTON: Oh. Excuse me. We'll
17 take a five-minute break.

18 (PLF. EXH. 4, Affidavit of James J.
19 Edahl, was marked for identification.)

20 THE VIDEOGRAPHER: Off the record at
21 approximately 10:10 a.m.

22 (A recess transpired.)

23 THE VIDEOGRAPHER: We are back on the
24 record at approximately 10:17 a.m.

25 BY MR. LINTON:

1 Q. Mr. Edahl, I believe you've testified
2 that it was probably early July 2007 when you
3 authorized funding of site plans; that is, the
4 release of funds for SkyWaves; is that right?

5 A. Yes.

6 Q. Okay. And prior to that time, had you
7 met with Mr. Konersmann, the president of SkyWaves,
8 to understand the cash needs that the company would
9 have?

10 A. I assume I did, but I can't recall
11 specifically.

12 Q. You were aware that the -- as you've
13 testified to, that the General Dynamics and other
14 contracts had been delayed in 2007.

15 A. Yes.

16 Q. And you knew that SkyWaves was pursuing
17 an expansion.

18 A. Yes.

19 Q. A substantial expansion; is that right?

20 A. Yes.

21 Q. And as a banker, that would obviously
22 mean to you that they were going to need to have
23 cash, whether it be equity investment or the
24 ability to secure financing, right?

25 A. Yes.

1 Q. At that time was BB&T providing all of
2 the financing for SkyWaves?

3 A. We're the only bank financing in the
4 credit, that I'm aware of.

5 Q. Right. And actually, you had requested
6 that SkyWaves convert some of its other loans with
7 other institutions to you, prior to 2007?

8 A. We had been given the opportunity to
9 look at some equipment financing through a related
10 company. I think it was KWK.

11 Q. And how about as far as a new capital
12 equipment loan? That had been made in 2007, hadn't
13 it?

14 A. I think that was the loan to KWK for
15 some equipment. It might have been earlier.

16 Q. In any event, you knew in July, when
17 Mr. Konersmann was needing to secure financing with
18 the site plan funding, that the company would need
19 cash. Right?

20 A. Yes. Well, in general.

21 Q. And you knew that he was going to rely
22 upon the commitment that you had made about the
23 General Dynamics contract.

24 MS. CHERRY: Object to the form.

25 THE WITNESS: I certainly knew he was

1 A. Occasionally, we'd just talk about the
2 general levels of advances that were out there,
3 compared to our limits that we had in place, the
4 \$3.5 million total limit and the \$2 million
5 supplement for PO financing.

6 Q. And do you recall in the spring of 2007
7 Mr. Konersmann coming to you and saying we're going
8 to need to access more cash and you said something
9 along the lines of, well, what security can you
10 give me? Do you remember any --

11 A. No, I don't remember the details of
12 that.

13 Q. Do you remember when he gave you the
14 site plans, that you knew that those were not
15 purchase orders?

16 A. Yes.

17 Q. Did you consider that you had gone
18 beyond your loan authority to approve the site plan
19 funding?

20 A. No, because I thought I had approval.

21 Q. From Mr. Denning?

22 A. Yes.

23 Q. How long was your discussion with
24 Mr. Denning about the site plan funding?

25 A. It was probably 10, 15 minutes on the

1 dependent on BB&T for the financing, at the time.

2 BY MR. LIPTON:

3 Q. Well, there certainly wasn't any doubt
4 in your mind, when he came to you and gave you the
5 General Dynamics' spreadsheet and asked you, would
6 this work for site plan funding, and you told him
7 yes, that he was relying upon your word.

8 A. Yes.

9 Q. Okay. And you were aware that he might
10 be looking for up to 36 shelters, for financing?

11 A. I didn't know how many at the time.

12 Q. When did you become aware that the bank
13 would be financing 36 General Dynamics's proposed
14 shelters?

15 A. Became aware that we had 36 advances on
16 site plans out in January of 2008.

17 Q. What did you do between August of 2007
18 and January of 2008, as the relationship manager
19 and bank representative, to determine the number of
20 site plans that were being funded?

21 A. I was depending on Castlen to keep
22 track of it.

23 Q. When you say "depending on," did you
24 get any reports or check with him about the extent
25 of site plan funding?

1 telephone.

2 Q. And that would have been around March
3 of 2007?

4 A. Around April, probably.

5 Q. Okay. So it would be after the
6 \$3.5 million credit line had been established?

7 A. Yes.

8 Q. Did Mr. Denning have any reservation
9 about the site plan funding, that he expressed to
10 you?

11 A. What he expressed to me was if we could
12 track it and monitor it like we had the purchase
13 orders, he would be open to looking at that.

14 Q. Open to looking at that?

15 A. Uh-huh.

16 Q. Does that mean, I agree with you, it's
17 approved? Or that, send me something and I'll
18 consider it?

19 A. Yeah. No. It means he would be open
20 to looking at it.

21 Q. Uh-huh. So that's the only time you
22 talked with him about it?

23 A. No. After that, I checked with
24 Castlen, and talked with Castlen about the request
25 regarding the site plan financing and if he thought

1 A. Yes.
 2 Q. And there's almost six years later that
 3 you corrected it with your affidavit.
 4 A. Yes.
 5 Q. Might the way the bank handled this
 6 matter in January of 2008 been different if you'd
 7 been truthful?
 8 MR. CHANDLER: Object to the form.
 9 MS. CHERRY: Object to the form.
 10 THE WITNESS: I don't think so. I
 11 can't speak for the bank.
 12 BY MR. LIPTON:
 13 Q. Well, you know Mr. Hennessy has
 14 testified that it might have been different.
 15 MS. CHERRY: Object to the form.
 16 BY MR. LINTON:
 17 Q. A 180-degree difference.
 18 MR. CHANDLER: Object to the form.
 19 MS. CHERRY: Object to the form.
 20 BY MR. LINTON:
 21 Q. Were you aware of that testimony?
 22 A. I'm aware of Mike's testimony.
 23 Q. Uh-huh. Well, maybe I misconstrued it.
 24 Are you aware that he testified that if
 25 he had known the truth, that he would have done a

1 180 degrees, his approach would have been different
 2 and it might have made a difference?
 3 MS. CHERRY: Object to the form.
 4 THE WITNESS: I can't speak to that
 5 because --
 6 BY MR. LINTON:
 7 Q. You're not familiar with that
 8 testimony?
 9 A. No.
 10 Q. Have you read his deposition?
 11 A. I've read parts of it. I don't recall
 12 specifically the...
 13 Q. Okay. I didn't recall you testifying
 14 earlier this morning that you had read his
 15 deposition.
 16 A. I didn't read it in preparation for
 17 this deposition.
 18 Q. What did you read it for?
 19 A. It was -- I think when I first engaged
 20 counsel back in February, I had been provided with
 21 copies of most of the depositions that had occurred
 22 after my deposition, so I was getting copies of
 23 those.
 24 Q. Let's mark the next exhibit,
 25 January 22nd.

1 (PLF. EXH. 6, 1/22/2008 E-mail from
 2 James Edahl to Walter Denning; Frank Caple; Michael
 3 Hennessy, BB&T/FC_000627 through 000628, was marked
 4 for identification.)
 5 BY MR. LINTON:
 6 Q. This Exhibit 6 is an e-mail that you
 7 sent to Mr. Denning and Mr. Hennessy and Mr. Caple;
 8 is that correct?
 9 A. Yes.
 10 Q. In the second paragraph, you say: As
 11 we discussed Friday, neither you or I had any idea
 12 that the GD NYST purchase orders funded from July
 13 through October were not documented and funded
 14 exactly like the other purchase orders we had
 15 received and funded over the last two years from
 16 General Dynamics, Nextel, Verizon, et cetera.
 17 Is that correct?
 18 A. Correct.
 19 Q. If Mr. Denning had approved site plan
 20 funding, as you've testified to, do you have any
 21 explanation why he wouldn't have gotten in touch
 22 with you when you're telling him that you have no
 23 idea?
 24 A. No, I don't have an explanation for
 25 that.

1 Q. All right. Exhibit 7, BB&T business
 2 loan offer.
 3 (PLF. EXH. 7, BB&T Business Loan
 4 Charge-Off Request (COR), BB&T/FC_001194 through
 5 001198, was marked for identification.)
 6 BY MR. LINTON:
 7 Q. Exhibit 7, if you'll turn to the last
 8 page, Mr. Edahl.
 9 Is that your signature?
 10 A. Yes.
 11 Q. Okay. And is that dated March 18th?
 12 A. Yes.
 13 Q. And so you participated in the
 14 preparation of all or a portion of this business
 15 loan document, Exhibit 7. Is that right?
 16 A. Yes.
 17 Q. Now, it says that the original loan
 18 risk was 5B.
 19 Do you see that?
 20 A. Uh-huh.
 21 Q. What is 5B?
 22 A. That's our lowest acceptable credit
 23 grade at the time, numbering system, I believe,
 24 from 1 to 10.
 25 Q. And had it been 5B throughout 2007 or

1 Q. Okay. Maybe. And continued on in
2 August, right?

3 A. Uh-huh.

4 Q. Mr. Denning is telling you that "we
5 discussed our exposure to this company,
6 particularly lending against purchase orders."

7 You see that?

8 A. Uh-huh.

9 Q. And he goes on to say: I do want to
10 stress our position is not to increase our exposure
11 against purchase orders.

12 You see that?

13 A. Uh-huh.

14 Q. "The company must understand that any
15 additional needs should be funded through
16 additional equity investment or other sources."
17 Right?

18 A. Correct.

19 Q. Now, when you received that e-mail, you
20 knew that the site plan funding had been released,
21 as you call it, in July and throughout August and
22 September, didn't you?

23 A. Yes.

24 Q. And you knew the plan was to be
25 financing a number of them, whether it was 30 or

1 36, but a large number. Right?

2 A. A number of them, yes.

3 Q. Okay. And you generally were aware
4 that that might be better than a million dollars of
5 a loan?

6 A. Yes.

7 Q. Okay. When you got this e-mail that
8 Mr. Denning is sort of saying, we're real leery of
9 purchase order financing, did it occur to you, I
10 better talk to him and say I've already authorized
11 site plan funding, which we know is a lot more
12 risky than the purchase order?

13 Did it occur to you to contact him
14 about that?

15 A. No, it didn't.

16 Q. Okay. Did you consider the site plan
17 funding is more risky than purchase order?

18 A. Only to the -- no, not really, because
19 I thought they were going to be converting to
20 purchase orders very quickly.

21 Q. Certainly got to be more risk when you
22 don't have a purchase order?

23 A. Yes.

24 Q. Okay. Now what did you do to explain
25 to the company that the bank wanted them to

1 understand it was leery about purchase order
2 financing and if the company needed more cash, it
3 needed to line up investors or some other lender?

4 Did you talk with the company about
5 that?

6 A. No. I don't recall discussing with the
7 company, at the time, the comments from the loan
8 review.

9 Q. When you read Mr. Denning's deposition,
10 do you recall him saying that he expected you to
11 communicate that to the company?

12 A. No, I didn't read that part of the
13 deposition.

14 Q. Why didn't you have a heart-to-heart
15 discussion with him, that the bank might be on thin
16 ice with purchase order financing and certainly
17 with the site plans?

18 A. It didn't occur to me that -- to do
19 that at the time.

20 Q. In retrospect, do you think you should
21 have?

22 A. In retrospect, yes.

23 Q. When did you first come to that
24 conclusion?

25 A. What, in the retrospect?

1 Q. Right. When did you first, in
2 retrospect --

3 A. Now.

4 Q. Well, I know now, but this has been
5 going on for six years. Did you ever think about,
6 you know, Denning told me to get with them and
7 maybe they would have, you know, developed a
8 different financing plan?

9 A. No, that didn't occur to me.

10 Q. Okay. You knew that SkyWaves was
11 relying upon the plan you had designed, that is the
12 purchase order and the site plan funding, right?

13 A. I knew they were relying on bank
14 financing to fund their needs, yes.

15 Q. And that was predominantly a certain
16 component of the purchase orders and site plans?

17 A. Correct.

18 Q. \$2 million.

19 A. Correct.

20 Q. Up to \$2 million.

21 A. Yes.

22 Q. And you actually did design that
23 program for them.

24 A. No.

25 Q. Who did?

1 A. That was at -- we designed that program
 2 in response to their request that --
 3 Q. To access more cash?
 4 A. -- to do purchase order financing. And
 5 then site plan financing after that.
 6 Q. Did you think the purchase order
 7 financing was an appropriate method of financing
 8 this start-up company?
 9 A. At the time that the request was
 10 presented, we felt it was something we could look
 11 at, yes.
 12 Q. Well, you approved it, so I'm assuming
 13 that you thought it was an appropriate method of
 14 financing the operation of the company.
 15 A. Yeah. The bank approved the purchase
 16 order financing.
 17 Q. Okay. I don't know if you have
 18 reviewed some of the testimony of the bank
 19 officials who say that the purchase money finance
 20 should -- purchase order financing was never an
 21 appropriate way to finance this company.
 22 MS. CHERRY: Objection.
 23 THE WITNESS: No, I haven't seen that.
 24 BY MR. LINTON:
 25 Q. You remember Tom Brune, president of

1 the bank -- the commercial division?
 2 A. Yeah.
 3 Q. Did you ever review the sort of memo
 4 that he wrote about lessons to be learned?
 5 A. I reviewed that.
 6 Q. Years ago?
 7 A. Years ago.
 8 Q. Okay. Do you think SkyWaves relied
 9 upon your recommendation to fund this growth for
 10 purchase order financing?
 11 A. Yes.
 12 Q. Okay. The same thing with site plans?
 13 A. Yes.
 14 Q. Do you have a memo dated September 20th
 15 in front of you?
 16 A. No.
 17 Q. Okay.
 18 (PLF. EXH. 9, 9/20/2007 Edahl to Walt
 19 Denning letter, BB&T/FC-000523 through 000524, was
 20 marked for identification.)
 21 BY MR. LINTON:
 22 Q. Exhibit 9 is a response from you to
 23 Mr. Denning's memo of September 7th. Is that
 24 correct?
 25 A. I don't know if it's a response to his

1 memo or not. I'm not sure what memo you're
 2 referring to from Walt.
 3 Q. One -- the previous memo, it was dated
 4 September 7th from him to you?
 5 A. No, it's not a response to that.
 6 Q. It's not?
 7 A. Huh-uh.
 8 Q. Did you respond to the memo of
 9 September 7th?
 10 A. Not that I recall.
 11 Q. Okay. Down in the last paragraph on
 12 the first page, you tell Mr. Denning: While this
 13 goal has been delayed, it appears that just with
 14 the contract work in hand with General Dynamics,
 15 that we will be able to accomplish this goal in
 16 2008.
 17 Do you see that?
 18 A. Uh-huh.
 19 Q. And the goal you're referring to is to
 20 convert from factoring and purchase order site plan
 21 financing to asset-based lending. Is that right?
 22 A. Correct.
 23 Q. And did you discuss with SkyWaves, in
 24 the fall of 2007, that you thought converting to
 25 asset-based lending would be likely moving forward?

1 A. I don't recall, specifically.
 2 Q. Do you recall discussing asset-based
 3 lending?
 4 A. Yes.
 5 Q. Would you consider that asset-based
 6 learning is a bump up from factoring?
 7 A. Yes.
 8 Q. Okay. Did you discuss with them, in
 9 the fall, the possibility of having an initial
 10 public offer?
 11 A. No, not that I recall.
 12 Q. Do you remember, in December of 2007,
 13 SkyWaves had presented a -- a plan for growth for
 14 the future?
 15 A. That's possible. I don't remember
 16 that, specifically.
 17 Q. A business plan?
 18 You remember that plan contemplated
 19 that there could be three factories with three
 20 sites?
 21 A. That sounds familiar.
 22 Q. Okay. And do you remember suggesting
 23 to them to get that plan together so that when the
 24 General Dynamics orders started coming in you would
 25 be in a position to take it to the capital market

1 about the future of SkyWaves?

2 A. Not that I recall.

3 Q. I mean, you knew he was either going to
4 borrow money or invest additional money, six
5 figures?

6 A. That's what he told me.

7 Q. Right. Did he ask you anything about,
8 well, Jim, before I commit to additional funding, I
9 want to make sure that the relationship with the
10 bank is solid, I understand you may not be
11 increasing your lines?

12 Was there any discussion like that?

13 A. Not that I recall.

14 Q. Okay. Towards the end of 2007, and
15 this probably would have been in connection with
16 the business plan that you've testified to, you
17 remembered was a three manufacturing plant facility
18 plan. Do you remember that?

19 A. Uh-huh.

20 Q. Do you remember comparing the 2006 and
21 2007 balance sheets at that time --

22 A. No.

23 Q. -- and saying, well, based on the
24 equity investment and subordination debt that y'all
25 have brought in in 2007, you're just as well off

1 now, or better, than you were in 2006?

2 A. I don't recall that conversation, no.

3 Q. Do you recall studying the balance
4 sheets towards the end of 2007?

5 A. I don't. I know when financial
6 statements came in, we would certainly study them,
7 but I don't remember specifically what sheets I was
8 looking at in 2007, if any.

9 Q. Uh-huh.

10 A. Because financial reporting had been
11 delayed at that point as well.

12 Q. And I think you've already testified
13 that prior to January 17th, 2008, there was nothing
14 that you had said to SkyWaves that would have
15 alerted them the bank might call a default or
16 withdraw from financing?

17 A. Yeah. Not that I'm aware of.

18 Q. Prior to that date, was it your
19 expectation that the \$3.5 million credit line that
20 expired at the end of March would be renewed?

21 A. I hadn't thought about renewal yet.

22 Q. Did you have any reason to think that
23 it would not be renewed as of January 16th, 2008?

24 A. Again, I didn't think about it.

25 Renewal wasn't on my mind at that point in time.

1 Q. Were you satisfied with the
2 relationship with SkyWaves as of January the 16th,
3 2008?

4 A. It was getting riskier from my
5 perspective, but generally, yeah.

6 Q. And you would have wanted to go forward
7 with them?

8 A. Assuming the credit -- assuming the
9 credit profile would allow us to do that, sure.

10 Q. I mean, based on what you knew
11 January 16th, 2008, would you have expected to
12 continue the credit with SkyWaves?

13 A. Yeah, hopefully so.

14 Q. I have asked you about Mr. Denning's
15 memo to you of September 7, 2007 in which he asked
16 you to make sure the bank -- excuse me -- SkyWaves
17 understood the bank's position.

18 Do you recall that memo?

19 A. I don't think I saw that.

20 Is this the one you're talking about
21 (indicating)?

22 Q. Yes. In this memo, which is Exhibit 8,
23 Mr. Denning says: The company continues to improve
24 but has not reached profitability based on the most
25 recent year-to-date numbers. I do want to stress,

1 our position is not to increase our exposure
2 against purchase orders. The company must
3 understand that any additional needs should be
4 funded through additional equity investment or
5 other sources.

6 That is September 7th.

7 A. Uh-huh.

8 Q. Between September 7th and January
9 the 16th, 2008, did you ever have any discussion
10 with SkyWaves regarding Mr. Denning's statement to
11 you, I have just read?

12 A. Not that I can remember.

13 Q. And why was that?

14 A. I mean, I literally -- just because
15 I -- I could have -- certainly, without going back
16 and looking at my notes, I -- I don't recall if I
17 had specific conversations about that with...

18 Q. So it wasn't that you were
19 intentionally not going to follow his --

20 A. Right. I just don't recall when the
21 discussion occurred.

22 Q. Excuse me.

23 Did you consider that a directive for
24 you to affirmatively sit down with SkyWaves and
25 explain exactly what the bank's concerns were?

9

9

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON

SKYWAVES I CORPORATION,
Plaintiff,

vs. CASE NO. 2009-CP-10-7516
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.

DEPOSITION OF: RONALD D. KONERSMANN - VOLUME I
DATE: September 12, 2013
TIME: 9:17 AM

LOCATION: Law Offices of
Nexsen Pruet, LLC
205 King Street, Suite 400
Charleston, SC

TAKEN BY: Counsel for the Defendants
REPORTED BY: TERRI L. BRUSSEAU, RPR,
CERTIFIED REALTIME REPORTER

A. WILLIAM ROBERTS, JR., & ASSOCIATES
Fast, Accurate & Friendly
Charleston, SC Hilton Head, SC Myrtle Beach, SC
(843) 722-8414 (843) 785-3263 (843) 839-3376
Columbia, SC Greenville, SC Charlotte, NC
(803) 731-5224 (864) 234-7030 (704) 573-3919

STIPULATION

It is stipulated by and among Counsel
that this deposition is being taken in accordance
with the South Carolina Rules of Civil Procedure,
Rule 30; that all objections as to Notice of this
deposition are hereby waived; that all objections
except as to form are reserved until the time of
trial; and that the deponent does not waive reading
and signing of this deposition.

* * * * *

RONALD D. KONERSMANN

being first duly sworn, testified as follows:

EXAMINATION

BY MS. CHERRY:

Q. Good morning, Mr. Konersmann.

A. Morning.

Q. My name is Molly Cherry and I know that
we have met before. I am here representing BB&T
and Jim Edahl in a lawsuit that SkyWaves has filed
against the company. Do you understand that we are
taking your deposition today in that lawsuit?

A. Yes, I do.

Q. Okay. I actually know that you've been
deposed once before.

A. Yes.

APPEARANCES OF COUNSEL:
ATTORNEYS FOR THE PLAINTIFF:
SKYWAVES I CORPORATION:

GEORGE J. KEFALOS
46-A State Street
Charleston, SC 29401
(843) 722-6612
george@kefaloslaw.com

and

DUFFY & YOUNG, LLC
BY: JOHN P. LINTON
96 Broad Street
Charleston, SC 29401
(843) 720-2044
jlinton@duffyandyoung.com

ATTORNEYS FOR THE DEFENDANTS
BRANCH BANKING AND TRUST COMPANY,
Successor in merger to BRANCH BANKING
AND TRUST COMPANY OF SC, a/k/a BB&T,
and JAMES EDAHL:
NEXSEN PRUET, LLC
BY: MOLLY HUGHES CHERRY
205 King Street, Suite 400
Charleston, SC 29401
(843) 577-9440
mcherry@nexsenpruet.com

and

NEXSEN PRUET, LLC
BY: JULIO E. MENDOZA, JR.
1230 Main Street, Suite 700
Columbia, SC 29201
(803) 799-9800
jmendoza@nexsenpruet.com

ALSO PRESENT:

James J. Edahl
Mike Hennessy
John Voytko

(INDEX AT REAR OF TRANSCRIPT)

Q. Because I was present at that
deposition. But other than the deposition in the
FXM case, have you ever been deposed before?

A. Yes.

Q. Can you tell me approximately how many
times?

A. Approximately -- probably two.

Q. Okay. Can you tell me about each of
those instances, were they as part of a lawsuit?

A. Yes. One was a lawsuit about -- gosh.
Probably mid '80s.

Q. Okay. What was the lawsuit about?

A. It was about -- there was a claim that
the company that I was with had trade secrets and
that the company was using those trade secrets.

Q. Do you remember who the plaintiff was
in that lawsuit?

A. Fibrebond Corporation.

Q. Okay. And who was the defendant?

A. Well, the company and I was.

Q. Okay. And what was the -- what was the
company that you were with?

A. Kontek, K-O-N-T-E-K.

Q. And so Kontek was your employer?

A. Well, yes. I was the majority

950

1 Q. What's his first name?
 2 A. John.
 3 Q. Okay. And then how about Patricia
 4 Real, does she have any family in Charleston
 5 County?
 6 A. No.
 7 Q. Where do you live?
 8 A. We live in 1122 Snapdragon Court, Mount
 9 Pleasant.
 10 Q. And how long have you lived there?
 11 A. About two weeks.
 12 Q. Okay. Did you live in Charleston
 13 County prior to that?
 14 A. We lived -- well, yes, we lived at --
 15 up in Brickyard. I think that's Charleston County.
 16 Q. How long did you live there?
 17 A. Two and a half, three years.
 18 Q. When did you move to Charleston?
 19 A. Moved to Charleston in about 2000,
 20 2001.
 21 Q. And where did you live before that?
 22 A. Daniel Island.
 23 Q. How long did you live on Daniel Island?
 24 A. From -- well, from -- you know, let's
 25 see. Well, when we moved here, we moved to Daniel

1 Island and then we left there in I think '09.
 2 Q. Where were you before you first moved
 3 to South Carolina?
 4 A. We were in Falcon Ridge in Great Falls,
 5 Virginia. Been awhile.
 6 Q. Are you currently an owner of any
 7 business?
 8 A. No.
 9 Q. Other than perhaps through a mutual
 10 fund, an investment portfolio, are you currently an
 11 investor in any business?
 12 A. No.
 13 Q. Other than SkyWaves, have you ever had
 14 an ownership interest in any other business?
 15 A. Ever?
 16 Q. Yes.
 17 A. Yes.
 18 Q. Okay. Tell me what businesses you've
 19 had ownership interest in.
 20 A. Kontek, Fibrebond, SkyWaves, of course.
 21 I think that's all.
 22 Q. Are you currently employed?
 23 A. I am not.
 24 Q. Since SkyWaves' bankruptcy filing have
 25 you been employed anywhere?

1 A. No.
 2 Q. Are you currently serving as a
 3 consultant?
 4 A. I'm working in trying to develop a
 5 business but it is prefunding.
 6 Q. What business are you trying to
 7 develop?
 8 A. Football Ventures.
 9 Q. What is Football Ventures?
 10 A. It is in the soccer investment
 11 business, a developer of apps for soccer, and we'll
 12 implement schools for grassroots training.
 13 Q. You said you're trying to develop this
 14 business. Tell me what that means.
 15 A. Pre -- prefunding, simple as that.
 16 Q. Well, I'm not sure I understand what
 17 prefunding means.
 18 A. Well, it's not funded. Developmental.
 19 Q. So does -- do your efforts at trying to
 20 develop that business include obtaining funding or
 21 trying to obtain funding?
 22 A. Yes.
 23 Q. Okay. Have you engaged in any efforts
 24 to try to obtain funding for this business?
 25 A. I'm more into advisor.

1 Q. So is anyone trying to obtain funding
 2 for Football Ventures?
 3 A. Yes.
 4 Q. Who is that?
 5 A. Michael Smith.
 6 Q. Who is he?
 7 A. He lives here in Plantation Point, I
 8 guess. Planters Pointe. Planters Pointe, yeah. I
 9 mean, he's been involved in soccer for 15 years or
 10 so.
 11 Q. How did you come to try to develop the
 12 soccer investment business?
 13 A. Michael has been involved in that
 14 for -- heavily for about four years and since I
 15 wasn't working, you know, I could -- I could help
 16 him with his presentations and that sort of thing.
 17 When we get funded, you know, I'll be the chairman
 18 of the board and basically work on the board side
 19 of it.
 20 Q. What type of entity -- well, is
 21 Football Ventures an entity?
 22 A. Yes, it is.
 23 Q. What type of entity?
 24 A. It's a corporation.
 25 Q. When was it formed?

1 A. Probably two years ago. I'm not sure.
 2 Q. Okay. Who are the owners of Football
 3 Ventures?
 4 A. Basically it's the -- it's a family
 5 trust for Michael Smith.
 6 Q. Do you have any ownership interest in
 7 Football Ventures?
 8 A. Not yet.
 9 Q. Since SkyWaves' bankruptcy filing, have
 10 you had any source of income?
 11 A. No. You mean outside source? I'm
 12 sorry.
 13 Q. Well, we'll start with that, outside
 14 source.
 15 A. No.
 16 Q. Have you had any outside source?
 17 A. No.
 18 Q. Have you had any inside source of
 19 income?
 20 A. Savings, selling assets and borrowing
 21 money from my kids.
 22 Q. What assets have you sold?
 23 A. We sold our house, we've sold our
 24 belongings, our furniture, we've -- we have a
 25 double-wide trailer in Mississippi that we're in

1 the process of selling and we have 30 acres up in
 2 North Carolina that's for sale.
 3 Q. Anything else?
 4 A. Not that I can think of right now.
 5 Q. Do you still have any ownership
 6 interest in Kontek?
 7 A. No.
 8 Q. How about in Fibrebond?
 9 A. No.
 10 Q. You mentioned that you would become the
 11 chairman of the board for Football Ventures.
 12 A. Um-hum.
 13 Q. So do you envision having a Board of
 14 Directors for Football Ventures?
 15 A. Yes.
 16 Q. Okay. Do you know what the
 17 responsibilities are for directors?
 18 A. Yes.
 19 Q. What are they?
 20 A. Well, it's to control the -- to make
 21 sure that the company is in compliance with its
 22 charter, with its -- you know, the strategic
 23 business plan, to make sure that, you know, if
 24 it's -- if it's -- all the paperwork for running it
 25 as a corporation is met, to make decisions about

1 new direction, audit the books, make sure that it
 2 can -- that the books are reliable and can be
 3 explained and verified to its investors.
 4 Q. Mr. Konersmann, I want to ask you a
 5 little bit about your education and work background
 6 and I'm going to make it easier because I think I
 7 have a resume --
 8 A. Okay.
 9 Q. -- with some dates on it.
 10 A. Okay.
 11 Q. And I'm going to hand you what we've
 12 marked as Exhibit Number 1.
 13 (DFT. EXH. 1, Curriculum Vitae of Ron
 14 Konersmann, BB&T/JE_000381, was marked for
 15 identification.)
 16 BY MS. CHERRY:
 17 Q. That looks like it may have been a
 18 resume at one point that I believe was submitted to
 19 BB&T but I want to ask you if you recognize this
 20 document.
 21 A. Okay. Yes.
 22 Q. And is everything on this document
 23 accurate up to your time with SkyWaves?
 24 A. To my belief, yes.
 25 Q. Okay.

1 A. Should be.
 2 Q. Other than your BS from Memphis State
 3 and MBA from Notre Dame, do you have any other
 4 formal education?
 5 A. No.
 6 Q. Do you have any certifications?
 7 A. No.
 8 Q. Any licenses?
 9 A. No.
 10 Q. At the bottom of this list you've got
 11 Owens-Illinois listed as one of your employers,
 12 looks like from 1970 to '82. Do you see that?
 13 A. Um-hum.
 14 Q. What is Owens-Illinois?
 15 A. It's a packaging company.
 16 Q. Are they still -- do they still exist?
 17 A. They've been broken apart and there's a
 18 piece, a glass piece of it, but the package, it had
 19 a series of packages -- packaging materials and
 20 they've sold off over the years.
 21 Q. Okay. And tell me -- and I know you've
 22 got your position listed on your resume but tell me
 23 what you did for Owens-Illinois.
 24 A. Well, I started out after MBA school in
 25 the -- working for the CFO, the president, started 959

1 their corporate planning group, went out, sold in
2 the paper industry and then moved down to Newberry,
3 South Carolina as a sales manager for the packaging
4 plant and then moved to Benton, Louisiana to build
5 and run a packaging factory.

6 Q. When you were at Owens-Illinois, did
7 you ever serve on the Board of Directors?

8 A. No.

9 Q. Did you ever have any ownership
10 interest in Owens-Illinois?

11 A. No.

12 Q. Why did you leave Owens-Illinois?

13 A. They -- they wanted me to come back to
14 Toledo, Ohio. I moved several times back and forth
15 and I was -- Minden, Louisiana is right by
16 Shreveport so I had business in Texas and was
17 watching the AT&T breakup develop and had a friend
18 in town and we started Fibrebond Corporation to get
19 into the telecommunications business and not move
20 back to Toledo.

21 Q. Who was the friend in town?

22 A. Claude Walker.

23 Q. So as I understand it, you and
24 Mr. Walker formed Fibrebond?

25 A. Yes.

1 Q. And what type of entity was Fibrebond?

2 A. Corporation.

3 Q. When you and Mr. Walker formed
4 Fibrebond, who were the shareholders that you may
5 recall?

6 A. He and I.

7 Q. And as I understand it, you were the
8 president and CEO of Fibrebond?

9 A. Um-hum.

10 Q. Did Mr. Walker have a role?

11 A. Well, he did and I think he was the
12 CEO. He was the board chairman and I think he was
13 CEO, I was the president. I was -- well, I have
14 CEO here. I think I developed into the CEO
15 position later when we first started so I think he
16 was CEO.

17 Q. Okay. What's the difference between a
18 president and a CEO if there is one?

19 A. It's -- depends on the company, the
20 responsibilities.

21 Q. What were your responsibilities as
22 president?

23 A. Well, basically my responsibility as
24 president/CEO was to run the company. He was board
25 chairman of -- Claude was board chairman and he was

1 a manufacturing guy so he also ran the factory.

2 Q. And is Fibrebond still in business?

3 A. Yes, they are.

4 Q. Did you also serve on the Board of
5 Directors there?

6 A. Yes.

7 Q. Why did you leave Fibrebond?

8 A. I was fired.

9 Q. By whom?

10 A. By Claude.

11 Q. Why?

12 A. Well, the basic issue was I had
13 responsibility for, you know, managing the company
14 and keep getting the funds for our gross -- our
15 growth company and we were doing very well, very
16 profitable and we wanted -- I wanted to reduce the
17 debt the next year with the money we were making
18 and there were some expenditures that I was against
19 and he thought that he wanted to take it a
20 different direction and let it go.

21 Q. What expenditures were you against?

22 A. Well, the primary one was we were being
23 able to ship our buildings for a dollar a mile with
24 the truckers. The trucking business was very
25 depressed and so we were -- we had very cheap

1 trucking cost and he wanted to buy a trucking
2 company so we could have our own trucking company
3 so we could put the logo of our company on it so
4 when the building was set in the morning they could
5 drive up and be a Fibrebond building. That would
6 cost us \$2.50 a mile. And we shipped these things
7 all over the country so a tremendous amount of cost
8 involved. And my position was that, you know, we
9 could take a placard and stick it on the truck
10 probably for a nominal fee.

11 Q. Okay. And you said you were getting
12 funds for growth the company or maybe the growth of
13 the company, I wasn't sure I completely heard you.

14 A. Um-hum.

15 Q. So how were you getting funds for the
16 growth of the company?

17 A. Banks. I don't remember everyone
18 involved but, you know, just doing the typical
19 banking investment portion of it.

20 Q. Did you invest in Fibrebond?

21 A. Yes.

22 Q. How did you invest in Fibrebond?

23 A. We just put some start-up money in to
24 get started.

25 Q. Were you issued shares in return for

1 your start-up money?
 2 A. Yes.
 3 Q. How many shares -- well, what
 4 percentage interest did you have in --
 5 A. I think it was between 40 and 50
 6 percent. I'm not sure.
 7 Q. So did Mr. Walker have the majority
 8 ownership in the entity?
 9 A. Yes, he did.
 10 Q. And when Mr. Walker terminated your
 11 employment, did he buy out your shares?
 12 A. Yes, he did.
 13 Q. Did Fibrebond have a CFO?
 14 A. Yes.
 15 Q. Do you remember who that was?
 16 A. I can't.
 17 Q. And you said you wanted to reduce the
 18 debt. Why did you want to reduce the debt?
 19 A. Well, in a start-up mode you're -- you
 20 know, you're growing so you have, you know, a
 21 continuous need for cash and return profitable. I
 22 wanted to reduce the debt to reduce our costs,
 23 improve the balance sheet.
 24 Q. I know you said in terms of the
 25 responsibilities of a CEO depends on the business

1 but are there general responsibilities for a CEO of
 2 any business?
 3 A. I'm sure there are.
 4 Q. Do you know what they are?
 5 A. No.
 6 Q. Did you have an employment agreement
 7 with Fibrebond?
 8 A. Yes.
 9 Q. Did you have a restrictive -- did you
 10 have a covenant not to compete with Fibrebond?
 11 A. I think so, yes. I think so.
 12 Q. Did you have a confidentiality
 13 agreement?
 14 A. Right.
 15 Q. Or nondisclosure agreement with
 16 Fibrebond?
 17 A. I did have that.
 18 Q. Do you recall whether those agreements,
 19 the covenant not to compete and nondisclosure,
 20 whether those were at issue in the lawsuit that you
 21 mentioned?
 22 A. Yes.
 23 Q. They were?
 24 A. I think so.
 25 Q. And then you mentioned Kontek

1 Industries earlier. Tell me what Kontek is.
 2 A. Well, after I left Fibrebond, I -- we
 3 moved to the Bootheel, Missouri, New Madrid,
 4 Missouri and started a shelter company there.
 5 Q. And why did you move to -- why that
 6 area?
 7 A. Central to the United States.
 8 Q. And you said we started a shelter
 9 corporation. Who is we?
 10 A. We is my wife and I.
 11 Q. It looks like that was in '86 so was
 12 that your first wife?
 13 A. Yes.
 14 Q. And I say '86, I'm sorry, I was looking
 15 at Exhibit 1.
 16 A. Right.
 17 Q. So were you and your wife the owners of
 18 Kontek?
 19 A. Yes.
 20 Q. What type of entity was Kontek?
 21 A. It was a corporation.
 22 Q. Were there any other owners in Kontek?
 23 A. There were but I don't remember who was
 24 involved.
 25 Q. Did you serve on its Board of

1 Directors?
 2 A. I don't know if we had a Board of
 3 Directors as such.
 4 Q. What did you do for Kontek?
 5 A. Ran the company.
 6 Q. But was your wife employed by Kontek?
 7 A. No.
 8 Q. What did running the company entail?
 9 A. Running the company was going out and
 10 getting the order and coming back and producing the
 11 order and shipping the order and going out and
 12 getting some more orders.
 13 Q. Did Kontek have a CFO?
 14 A. Yes.
 15 Q. Do you remember who that was?
 16 A. I don't.
 17 Q. Is Kontek still in existence?
 18 A. I don't know.
 19 Q. Why did you leave Kontek?
 20 A. Because -- well, the lawsuit was an
 21 issue from a financial standpoint with Fibrebond.
 22 Q. Okay.
 23 A. And so I was able to sell the company
 24 and basically what they did was they came in and
 25 supported it and then I left.

1 Q. Okay. Who did you sell the company to?
2 A. A group out of -- investment group out
3 of Cleveland, Ohio.

4 Q. Do you have copies of those closing
5 documents pertaining to the sale?

6 A. No.

7 Q. Do you recall any of the terms of the
8 sale?

9 A. No.

10 Q. Do you remember the name of the
11 investment group out of Cleveland, Ohio?

12 A. I don't.

13 Q. And it looks like after that you went
14 to Andrew Corporation, is that correct?

15 A. Yes.

16 Q. Tell me what Andrew Corporation is.

17 A. They were in the wireless products
18 business selling wireless products to the wireless
19 industry.

20 Q. What did you do for them? I know it's
21 got your title there but tell me what you did.

22 A. They were -- they had been in the
23 business of selling shelters for a long time but
24 their effort, they weren't a large player in the
25 market so I was hired to come in and evaluate the

1 shelter business and the tower business. Evaluate
2 and run it, basically.

3 Q. Did you own any stock in Andrew
4 Corporation?

5 A. Yes.

6 Q. Do you still?

7 A. No.

8 Q. How did you come to own that stock, was
9 it through an employee stock ownership?

10 A. The same, right.

11 Q. Were you ever a board member of Andrew
12 Corporation?

13 A. No.

14 Q. Why did you leave Andrew Corporation?

15 A. The board basically -- what was
16 happening is that the board was making a decision
17 that all products -- they built a lot of products.
18 They were a -- they were a manufacturer of several
19 product lines but 70 percent of what they did they
20 purchased and over time they were purchasing more
21 and more of these products in either Mexico or
22 China and the board made a decision that all
23 products would be -- that they did not manufacture
24 themselves would go to China or to Mexico and if
25 you couldn't have a manufactured or supplied, then

1 they would be dropped. So I knew that, you know,
2 concrete shelters weren't going to come out of
3 China.

4 Q. Okay.

5 A. So they got -- they got out of
6 business.

7 Q. So does Andrew Corporation currently --
8 is Andrew Corporation currently in the concrete
9 shelter business?

10 A. I don't know.

11 Q. Did you have any restrictive covenants
12 with Andrew Corporation, like a noncompete or
13 nondisclosure?

14 A. I don't remember.

15 Q. How did -- well, it looks like you next
16 went to GlobalNet, Incorporated. What is
17 GlobalNet?

18 A. GlobalNet is a wireless company that
19 basically the business I've been in is mobile
20 wireless and this is fixed wireless, meaning you
21 have a site and you plug a phone into your house
22 and you can pick up a wireline phone but it has --
23 you know, it's not wired, it's wireless, but it's
24 not mobile.

25 Q. How did you come to work at GlobalNet?

1 A. They had a nationwide search,
2 headhunter, looking for somebody to run the company
3 and I -- I got it that way.

4 Q. But you didn't start that company?

5 A. No.

6 Q. Did you own stock in that company?

7 A. An investment group owned it and I
8 don't think there was stock involved but I don't
9 remember, to be honest with you.

10 Q. Okay. Why did you leave GlobalNet?

11 A. I resigned from GlobalNet. The
12 investment company had a series of a couple dozen
13 companies, most of which were not profitable, and
14 they were using some of the cash flow as fees that
15 was concerning to me because those fees were then
16 used to prop up some of the other companies so I
17 got uncomfortable with that.

18 Q. Why were you uncomfortable with that?
19 I'm not sure I'm following you.

20 A. Well, moving money around between
21 companies and, you know, I didn't think that was
22 ethical.

23 Q. Why not?

24 A. Well, GlobalNet was restricted in what
25 it could do if it was being drained, the cash it

1 had. What's the point?

2 Q. What do you mean when you say, what's
3 the point?

4 A. Well, if you can't -- if you're trying
5 to run a company and your cash is being pulled out,
6 what's the point of -- what are you going to -- you
7 know, how are you going to proceed as a company and
8 how are you going to -- you know, to take advantage
9 of the market, you know, if you're restricted in
10 the cash that you could use.

11 Q. And they were restricted in the cash
12 because the fees were being used to prop up other
13 companies?

14 A. Right. And the fees were go -- were
15 getting bigger. They called them fees but I didn't
16 think they were fees. Fees are for services
17 rendered. They were just moving it around.

18 Q. I wanted to ask, there wasn't on this
19 resume but I thought I saw on LinkedIn that you
20 were with a company called localsports.com?

21 A. Yes.

22 Q. Tell me what that -- what I saw was '99
23 to '01. Are those dates correct?

24 A. Yeah, about that.

25 Q. Okay. And what is localsports.com?

1 A. That was going to be an Internet
2 company and I was again assisting Mike, Michael
3 Smith, to put together a sports Internet company
4 during that time.

5 Q. Okay. Now, is that company still in
6 existence?

7 A. It's in existence but I think it's a
8 shell.

9 Q. Okay. What kind of entity was that?

10 A. I think it was an LLC.

11 Q. Were you employed by localsports.com?

12 A. I was advising them.

13 Q. Were you paid any consulting fee or
14 advising fee?

15 A. I might have but it wasn't significant.
16 I actually -- the part that's missing too is that
17 for a year or so after GlobalNet I was working with
18 a company, Gateway Partners out of San Diego, to
19 consolidate the wireless business. And when that
20 effort stopped, I made the decision to come to
21 Charleston to develop a different kind of structure
22 and open a shelter business. And while I was doing
23 that, I was also assisting with Michael for the
24 sports -- the local sports company.

25 Q. Now, Gateway Partners, you said when

1 that effort stopped.

2 A. Right.

3 Q. Why did that effort stop?

4 A. Well, they had just been involved with
5 taking a -- consolidating the wireline business.
6 The wireline business was decreasing in scope and
7 they pulled together a consolidation of the
8 industry and doing that they were doing the market
9 research and they were -- they were noticing that,
10 you know, the wireline business was huge but the
11 wireless business was more profitable and growing
12 so.

13 When they finished the wireline
14 business piece of it, they found me and wanted my
15 help in looking at consolidating the wireless
16 business and that -- I think I worked with that for
17 about a year. They -- they quite frankly got
18 the -- putting the wireline business together was
19 more complex than they had thought so they put it
20 on hold in the effort to go -- to do the same in
21 the wireless business.

22 Q. So what impact did that have on your
23 role?

24 A. Well, I couldn't wait on them to put
25 that together, you know, if they weren't going to

1 get it done so that's when I decided to get back
2 into the shelter business myself.

3 Q. Well, when you say you couldn't wait on
4 them, were you --

5 A. I wasn't waiting on them.

6 Q. Okay. So when you left GlobalNet --

7 A. Um-hum.

8 Q. -- and before you started SkyWaves --

9 A. Um-hum.

10 Q. -- was there a period of time when you
11 were not employed? I'm looking from a timeline.

12 A. Well, I'm looking at -- yeah, 2002.
13 That would probably -- that's off a little bit.

14 Q. So for that time period when you were
15 the -- you said I think about a year with the
16 Gateway Partners?

17 A. About -- yeah, about a year, um-hum.

18 Q. Okay. Were you employed anywhere
19 during that time period?

20 A. No.

21 Q. Did you have a source of income during
22 that time period?

23 A. No.

24 Q. Any other companies other than
25 Fibrebond and Kontek and SkyWaves that you've

1 financials and that sort of thing.

2 Q. Okay.

3 A. But basically the plan was my plan.

4 Q. Okay. And I guess that -- so the --
5 and I understand you said the 50,000 foot view.

6 A. Um-hum.

7 Q. And that was more my question. So if
8 there were amendments, I'm not talking about the
9 physical preparing the slide or --

10 A. Got you.

11 Q. But conceptually the amendments to the
12 plan, would those come from you?

13 A. Well, I would, of course, talk to --
14 you know, I had a management team throughout my,
15 you know -- throughout all of this history and so
16 certainly, you know, we would -- we would talk
17 about it as a management team but as far as setting
18 the direction and scope of what we were trying to
19 do, those were my decisions.

20 Q. Were those your responsibilities?

21 A. Um-hum.

22 Q. You've mentioned a management team.
23 Who was on the -- not necessarily names, but
24 positions. Who was on the management team?

25 A. At?

1 Q. At SkyWaves.

2 A. At SkyWaves? Myself, John Voytko, Jim
3 Phillips, Jeff Ward. That's probably it.

4 Q. As I understand it, Mr. Voytko was the
5 CFO?

6 A. Yes.

7 Q. Was he the CFO the entire time of
8 SkyWaves' operation?

9 A. No, he was not.

10 Q. Was there ever another CFO?

11 A. No, not a CFO.

12 Q. Okay. When did Mr. Voytko come on
13 board?

14 A. I don't remember exactly. I think it
15 was late '04 but I could be wrong, when we started
16 doing business.

17 Q. And what about Mr. Phillips, what was
18 his role?

19 A. He was first a sales manager
20 responsible for sales and then at some point he was
21 president.

22 Q. And how about Jeff Ward?

23 A. He was vice-president of technology of
24 engineering.

25 MS. CHERRY: I'm going to ask you a

1 little more about the formation of SkyWaves but why
2 don't we take a little break before we get into
3 that. I think this may be a good stopping point.

4 THE WITNESS: Yeah, sure.

5 (A recess transpired.)

6 BY MS. CHERRY:

7 Q. Mr. Konersmann, I wanted to ask you --
8 tell me what SkyWaves Corporation is or was.

9 A. SkyWaves Corporation was in the
10 business of selling telecommunication huts to the
11 wireless industry with shelters and providing all
12 the electrical, mechanical services to be able to
13 send out a plug-and-play unit to a site that had
14 all the radios and technology in and tested.

15 Q. When was the company formed?

16 A. The company was formed around 2001,
17 2002.

18 (DFT. EXH. 2, First Amendment To
19 Operating Agreement Of SkyWaves, LLC, with attached
20 Exhibit A, was marked for identification.)

21 BY MS. CHERRY:

22 Q. I'm going to hand you what we've marked
23 as Exhibit Number 2, Mr. Konersmann, and ask you --
24 these are some documents that have been produced by
25 SkyWaves in the lawsuit and so I wanted to ask you

1 about some of them.

2 A. Okay.

3 Q. Tell me what this Exhibit 2 is.

4 A. This looks like the first document
5 where SkyWaves was an LLC initially out of
6 Virginia.

7 Q. Okay. And based on this, it looks like
8 as of October 15th of 2001 you and Patricia
9 Konersmann were the members in this LLC, is that
10 correct?

11 A. Yes.

12 Q. And does this Exhibit A accurately
13 reflect the membership units that each of you held
14 on the second page of this document?

15 A. Oh, okay. Yes.

16 Q. How did you come to hold 2,550,000
17 membership units in SkyWaves, LLC? Did you
18 purchase them?

19 A. Yes.

20 Q. Okay. How much did you pay for them?

21 A. I don't remember.

22 Q. How about Patricia Konersmann, do you
23 know whether she purchased her membership units?

24 A. I don't know. I don't remember.

25 Q. And this document says that it's a

1 Q. Where is the engineering file?
 2 A. That would -- that would be back into
 3 the -- you know, the file, the company files.
 4 Q. Okay. And who has possession of the
 5 company files?
 6 A. To the extent we had them when we were
 7 shut down, I don't have all of them but I have some
 8 of them.
 9 Q. Okay. And are those kept at your home?
 10 A. I have them, you know, stored.
 11 Q. Okay. Where are they stored?
 12 A. At my daughter's house.
 13 Q. Since the bankruptcy was filed, have
 14 you thrown away or gotten rid of any corporate
 15 documents?
 16 A. No.
 17 Q. Have you destroyed any corporate
 18 documents?
 19 A. No.
 20 (DFT. EXH. 4, Third Amendment To
 21 Operating Agreement Of SkyWaves, LLC, with attached
 22 Exhibit A, was marked for identification.)
 23 BY MS. CHERRY:
 24 Q. I'm going to hand you what we've marked
 25 as Exhibit Number 4, Mr. Konersmann, and ask you if

1 you recognize this document.
 2 A. Yes.
 3 Q. What is this document?
 4 A. This I assume is to add Jim Phillips on
 5 this as a stockholder.
 6 Q. If we look at Exhibit A, that looks to
 7 be the case, Mr. Phillips has been added?
 8 A. Yes.
 9 Q. Tell me -- and I know you told me that
 10 Mr. Phillips was a sales manager and then president
 11 of SkyWaves.
 12 A. Right.
 13 Q. At this point in time, in April of
 14 2002, was Mr. Phillips employed by SkyWaves?
 15 A. I think that was part of his
 16 employment, was the stock.
 17 Q. Did Mr. Phillips pay any money for
 18 these membership units?
 19 A. I don't believe so.
 20 Q. How was it determined the amount of
 21 membership units Mr. Phillips would get?
 22 A. It was based on what his experience,
 23 background was worth to the company to bring him
 24 in, entice him to come to SkyWaves.
 25 Q. Did you know Mr. Phillips?

1 A. Yes.
 2 Q. How did you know Mr. Phillips?
 3 A. Jim was -- had worked for Andrew
 4 Corporation. I think that's -- that's the first
 5 time I met him.
 6 Q. Had you worked with -- did you work
 7 with him at Andrew Corporation?
 8 A. Let me see here. Yeah, Andrew
 9 Corporation. Yes, he was a salesman.
 10 Q. But did you work with him? I mean,
 11 other than just knowing him from --
 12 A. Well, no -- yeah, I worked with him, he
 13 was in shelters.
 14 Q. And was he still with Andrew
 15 Corporation when he came to SkyWaves?
 16 A. I believe he was.
 17 Q. Okay.
 18 A. But I'm not sure. I believe he was.
 19 Q. And who did the calculation in terms of
 20 or who made the determination that 300 membership
 21 units were what would be given to Mr. Phillips?
 22 A. Well, I made a determination but then I
 23 reviewed it with the other stockholders to get them
 24 to accept it.
 25 Q. Was there a meeting to discuss that, do

1 you know?
 2 A. I don't know, don't remember.
 3 Q. Do you know if there were any
 4 minutes -- were there regular meetings of the
 5 members in SkyWaves, LLC?
 6 A. Not regular members, no. Not regular
 7 meetings.
 8 Q. Were there any regular meetings for the
 9 members of SkyWaves, LLC?
 10 A. Yes.
 11 Q. Were there minutes taken of those
 12 meetings?
 13 A. Not formal minutes probably.
 14 Q. How about informal?
 15 A. Well, I mean, there might be some notes
 16 and things like that, e-mail back and forth but...
 17 Q. Where would those be kept?
 18 A. I mean, this again was very early on
 19 so, you know, I don't -- I don't know if they're in
 20 our files or not.
 21 Q. And when you say our files, you mean --
 22 A. My files, the stuff that I have.
 23 Q. Okay.
 24 (DFT. EXH. 5, Fourth Amendment To
 25 Operating Agreement Of SkyWaves, LLC, with attached

1 Q. Was this note ever converted to stock?
 2 A. Again, I don't know. We did some of
 3 that but I'm not sure what was affected.
 4 Q. And from where did the money come --
 5 A. From me.
 6 Q. -- for this loan?
 7 A. From me.
 8 (DFT. EXH. 25, Convertible Promissory
 9 Note dated 12/1/05, was marked for identification.)
 10 BY MS. CHERRY:
 11 Q. We've marked as Exhibit 25 a
 12 convertible promissory note to you from SkyWaves
 13 dated December 1st of 2005. This is in the amount
 14 of 82,430 dollars, Mr. Konersmann. Did you loan
 15 82,430 dollars to SkyWaves?
 16 A. Yes.
 17 Q. Were you ever repaid on this note?
 18 A. No.
 19 Q. Was this ever converted to stock?
 20 A. Not to my knowledge. I mean, again,
 21 notes going to shares, possibly all of these, some
 22 or all, I'm not sure, but again it's a converting,
 23 you know, a debt to equity and we were asked to do
 24 that at times and I think some of these are
 25 involved in that but I'm not sure which ones.

1 Q. At the time SkyWaves filed bankruptcy,
 2 how many shares in the company did you own?
 3 A. Percentage-wise it was around 44
 4 percent.
 5 Q. Do you know how many numbers of shares
 6 that represented?
 7 A. Not offhand.
 8 (DFT. EXH. 26, SkyWaves Corporation
 9 Debt Schedule March 2005, was marked for
 10 identification.)
 11 BY MS. CHERRY:
 12 Q. Mr. Konersmann, I'm going to hand you
 13 what we've marked as Exhibit 26 and this is titled
 14 a debt schedule for SkyWaves as of March 2005. Do
 15 you know who prepared this document?
 16 A. I assume it's John Voytko.
 17 Q. I was going to ask you, would he likely
 18 have been the person who had prepared that?
 19 A. Likely, yeah.
 20 Q. Okay.
 21 (DFT. EXH. 27, SkyWaves I Corporation
 22 Stock Ledger, was marked for identification.)
 23 BY MS. CHERRY:
 24 Q. I hand you what we've marked as Exhibit
 25 27, Mr. Konersmann, and this is a stock ledger for

1 SkyWaves?
 2 A. Um-hum.
 3 Q. Do you know who prepared this document?
 4 A. I do not. What's the date on this?
 5 Q. It doesn't have a date on it. The last
 6 ownership record is dated October 10th of 2007 if
 7 you look at the third page.
 8 A. Okay. Again, probably John Voytko.
 9 MS. CHERRY: I just glanced at my watch
 10 and realized we've been going for a couple of
 11 hours. Do you want to take a break?
 12 MR. KEFALOS: Sure.
 13 (A luncheon recess transpired.)
 14 BY MS. CHERRY:
 15 Q. Mr. Konersmann, I want to make sure I
 16 understand. What's your position with SkyWaves?
 17 Were you CEO?
 18 A. Chairman of the board, president and
 19 CEO.
 20 Q. And then you had mentioned at one point
 21 that -- was it Jim Phillips was president?
 22 A. Yes.
 23 Q. Okay. So was there a period of time
 24 when you were only CEO and Jim was president?
 25 A. Yeah.

1 Q. Okay. Do you remember when that was?
 2 A. In the -- no, I don't. '06, '07.
 3 Q. Okay. So other than that time period
 4 when Jim Phillips was president, have you been the
 5 president of SkyWaves?
 6 A. Yes.
 7 Q. I just want -- there was no other
 8 president of SkyWaves?
 9 A. No. Well, let me just clarify that.
 10 There was a fellow that we were hiring when the
 11 company closed and so we didn't really have an
 12 opportunity to put him as president but he was
 13 going to be the next one.
 14 Q. And who was that?
 15 A. I can't remember his name, quite
 16 frankly.
 17 Q. I think I might have something with his
 18 name on it.
 19 A. Yeah. Jim seems familiar to me but I'm
 20 not sure.
 21 Q. What was your responsibilities as CEO
 22 of SkyWaves?
 23 A. To run the company.
 24 Q. So would you agree with me as CEO you
 25 had overall responsibility for the company?

1 Q. Do you recall whether you got any other
2 resumes or inquiries about the CFO position?

3 A. I think we had some.

4 Q. Do you recall who any of those
5 candidates may have been?

6 A. They were more like accountants, local
7 people working in accounting departments, that sort
8 of thing. I think John was -- you know, by far had
9 more credentials, you know, than the other people
10 we were looking at.

11 Q. And when you say more credentials, what
12 do you mean?

13 A. Well, his experience as CFO in the past
14 working for a telecommunication company in the
15 past.

16 Q. Do you remember who the
17 telecommunications company was?

18 A. No. Out of Charlotte.

19 (DFT. EXH. 30, Factoring And Security
20 Agreement, was marked for identification.)

21 BY MS. CHERRY:

22 Q. I hand you what we've marked as Exhibit
23 number 30, Mr. Konersmann, and ask you if you
24 recognize this document.

25 A. Yes.

1 Q. I'm sorry, the bank of?

2 A. New Madrid, M-A-D-R-I-D.

3 Q. I had it in my head as Madrid.

4 A. We had a sale a couple weeks ago and
5 this woman was walking out with a picture of New
6 Madrid and we stopped her and said, do you know
7 somebody in Bootheel, Missouri? And she said,
8 absolutely not, but I've got a daughter in Italy.
9 She gave it back. Can't make that up.

10 Q. Truth is stranger than fiction.

11 A. No kidding.

12 Q. So with the factoring agreement that
13 Fibrebond had, do you recall whether you were the
14 signatory on that agreement?

15 A. I would have been, yes.

16 Q. So as you said, you likely would have
17 been the signatory on the factoring agreement?

18 A. Um-hum.

19 Q. And then how about for Kontek?

20 A. I'm pretty sure we had a factoring
21 agreement but I'm not totally sure about that one
22 but we had a factoring agreement with Fibrebond.

23 Q. Okay. So tell me what your
24 understanding of a factoring agreement is. I'm not
25 asking specifics about this document.

1 Q. And is that your signature on the last
2 page?

3 A. Yes, it is.

4 Q. As CEO of SkyWaves?

5 A. Yes.

6 Q. And tell me what this document is.

7 A. It's our agreement for factoring and
8 security for the terms and conditions it listed to
9 factor our invoices.

10 Q. Prior to this March 22nd, '05 agreement
11 with BB&T Factors Corporation, had you on behalf of
12 the company or entity ever entered into a factoring
13 agreement before?

14 A. Yes.

15 Q. Okay. Tell me when. The context.

16 A. Fibrebond and I believe Kontek.

17 Q. And do you recall what entities -- what
18 financial institution Fibrebond had a factoring
19 agreement with?

20 A. No. I don't remember.

21 Q. Do you recall what financial
22 institution Kontek had a factoring agreement with?

23 A. I'm pretty sure we had a factoring
24 agreement at Kontek and that would have been the
25 bank of New Madrid.

1 A. When we have an invoice to our
2 customer, we presented the invoice to the bank and
3 then they would give us a certain percentage of
4 that face value at that time.

5 Q. Under a factoring agreement then if you
6 give the invoice from the customer to the bank and
7 they give a percentage of the face value?

8 A. Right.

9 Q. Does the bank at some point get paid
10 back?

11 A. Yes.

12 Q. Okay. How is the bank paid?

13 A. Well, the -- the agreement we had
14 that -- get into the agreement, we would have an
15 invoice and we would -- we would take it to the
16 bank and then they would loan against it and then
17 we had a customer due date and then we had 60 days,
18 within 60 days of the customer due date to pay the
19 bank back.

20 Q. Now, is that your general understanding
21 of a factoring agreement? I'm going to ask you
22 some specifics about what I've marked as --

23 A. Well, that's what we had at BB&T,
24 that's the way it worked. And the reason for that
25 is that this is a construction company and so you

1 have a customer due date like AT&T but you also had
2 a construction situation where you had paperwork
3 coming from corporate and you had the construction
4 and there was various reasons for that work to be
5 done to where they would pay us. So in order to
6 avoid the bank having to chase down, you know,
7 orders or -- orders that were -- that were due but
8 not paid yet, they gave us a grace period to allow
9 us to get that done and as long as we paid them
10 within that 60 days, then it was current.

11 Q. Let me ask you, Mr. Konersmann, so the
12 factoring agreement that you mentioned that
13 Fibrebond entered into when you were there, is that
14 how a factoring agreement at Fibrebond worked?

15 A. I don't know. I mean...

16 Q. How about the factoring agreement at
17 Kontek?

18 A. I'm not sure we even had one there but
19 I think we did.

20 Q. Okay. And what I'm trying to
21 understand, is that your general understanding as
22 to how factoring agreements worked?

23 A. Well, for this factoring agreement, I
24 think factoring, you know, that's the -- that's the
25 agreement that we had with the bank.

1 Q. Okay.

2 A. I don't know if it's general rule or
3 whatever but that's what we had.

4 Q. Okay. Can you looking at Exhibit 30
5 show me in that agreement where it provides what
6 you're talking about, the 60-day grace period to
7 pay the bank back?

8 A. I don't think it's in here. When we
9 got started with the factory, the agreement that I
10 had with Jim Edahl was designed, you know, by GM to
11 allow us to use the factoring agreement effectively
12 for our particular business so, you know, we would
13 explain to each customer what the situation was and
14 then we would get approval to use the factoring
15 line.

16 And like I say, because we were a
17 construction company, you know, we had the
18 opportunity to get the money back from the customer
19 regardless of the customer due date. We had that
20 60-day window to make sure the money was in so we
21 could pay them. If it went to 60 days, the bank's
22 position, Jim Edahl's position was, well, we'll
23 give you 60 days and at the end of 60 days if you
24 haven't paid us then we're going to consider that
25 there's something wrong or there's something that

1 you're not being able to control.

2 So what we would do there is then they
3 would take say if the building was 50,000 dollars
4 and we had a million and a half dollar line, they
5 would look at it and take that particular one line
6 item off of the approval list and then we would
7 have to pay them for that whether we were paid or
8 not from the customer.

9 Q. And as I understand it, you're telling
10 me that was your agreement with Jim Edahl?

11 A. Yes.

12 Q. Is that agreement reflected anywhere in
13 writing?

14 A. There might be -- there might be
15 some -- I mean, I don't know. There may be some
16 written discussion about it but I don't -- I don't
17 know. That's the agreement we had.

18 Q. And who on behalf of SkyWaves had that
19 agreement with Mr. Edahl?

20 A. I did. I worked directly with
21 Mr. Edahl. BB&T Bank has one representative who
22 handles everything for the bank and Jim was very
23 good, you know, about looking at our business and
24 going back, you know, to the bank and coming back
25 and explaining what we could do to provide us, you

1 know, the monies from the factoring agreement. And
2 so, you know, our business isn't like a factory
3 that produces something and ships it, it's a
4 halfway construction company so there were issues
5 with that.

6 What Jim didn't want to do is get the
7 bank -- we have on our side it's impossible to have
8 a customer due date with AT&T say and then have
9 bank people calling them and asking them -- or
10 telling them that they're behind on their
11 commitment. It usually is just because of the
12 flow, a large company, but that would require the
13 bank to get involved and he was trying to make a
14 very simple way that we could utilize the line and
15 not get into all that. And if you get 60 days
16 grace, we looked at it and 99 percent of the time,
17 you know, that would take care of the problem so it
18 really allowed the bank to keep a very simple
19 strategy on the line. And it was designed for our
20 need, which was, you know, the agreement we had to
21 facilitate our growth of the company through the
22 factoring.

23 Q. So is it my understanding when this
24 factoring agreement was entered into in March of
25 '05 that was the agreement that you've just

1 described to me?

2 A. Well, we talked about the problem of
3 the -- of the bank calling on these key customers
4 when their due dates hit. Normally their due
5 dates, after that it would be -- it would be in
6 arrears or it would be due, payable. So we wanted
7 to avoid, you know, that so we got 60 days that
8 way.

9 The other issue we talked about early
10 on, it was continuing through the process, was the
11 idea that, you know, the customer would send the
12 checks to the bank direct because these companies
13 had a policy that if -- because they're so large
14 again because if you have -- if they have a
15 contractor like us or anybody else who provided a
16 product, no matter what the circumstances were,
17 they would only pay back to that -- to that
18 contractor.

19 In other words, if somebody else said
20 we had claim to that, you know, we want you to send
21 the check to us, they never would do that for their
22 legal purposes, they always sent it to wherever
23 they ordered the product from. So those were
24 issues we had about how do we make this factoring
25 line work for our company. And it worked for our

1 company, you know.

2 Q. Who else at SkyWaves -- let's say you
3 fell ill and were unable to communicate, who else
4 at SkyWaves knew the terms of the factoring
5 agreement as you've just described them to me?

6 A. John Voytko.

7 Q. Anybody else at SkyWaves other than you
8 and John Voytko?

9 A. That's probably it.

10 Q. Okay. And was your and John Voytko's
11 understanding of the factoring agreement as you've
12 just described it to me in writing anywhere either
13 by the two of you, I mean documented anywhere, was
14 there anything documenting this?

15 A. There might be but, you know, it was a
16 process, you know, it wasn't -- you know, we looked
17 at how can we work together to make this effective
18 for our company and we would talk about a lot of
19 things. And then Jim would say, okay, let me take
20 this back to the bank and we'll look at it and then
21 I'll call you or whatever, a couple days later he'd
22 say, okay, Ron, we're going to do this.

23 So we were operating under the system
24 of BB&T Bank is you have one representative, you
25 don't go anywhere else, it's effective cost-wise

1 and it's effective to support our company, which I
2 totally believe in and believed in. So as we
3 worked through these different corporations and --
4 different -- different corporations being different
5 customers, we would sit down with Jim and go over
6 each one of them and tell him, you know, what their
7 requirements were and how could we fit that in and
8 then he would say, well, in this situation, you
9 know, we'll do this, that and the other. So we
10 were really working through our customer base and
11 new customers and, you know, working with Jim to
12 make sure that we qualified for the factoring piece
13 of this thing.

14 Q. So --

15 A. I mean, there may be, like I say, some
16 documentation of e-mails, something like that, but
17 I don't think there was a -- you know, an agreement
18 per se.

19 Q. Okay. So let me ask you this. So
20 you've said that you would sit down with Mr. Edahl
21 when there was a customer to address the customer
22 needs or issues.

23 A. Um-hum.

24 Q. So how would that work? Who were the
25 customers of SkyWaves?

1 A. AT&T.

2 Q. Okay.

3 A. Verizon, General Dynamics. In the past
4 there was another half a dozen, you know, similar
5 type companies, Nextel, Sprint, et cetera. And so
6 they all had different terms and conditions and
7 they had different situations.

8 Q. Okay. Well, so let's -- let me start
9 with AT&T. Tell me what the process was for the
10 factoring agreement as you've described it to me
11 for AT&T.

12 A. Well, the way it worked was pretty much
13 the same for all of them, that is, we have 30, 60,
14 90-day terms with various of these accounts. So
15 the one -- the one defining point was when was
16 the -- when was the invoice due. So the customer
17 due date was the date for AT&T. It might be a
18 30-day term situation, Nextel might be a 60-day
19 term but the due date was when it met the terms and
20 conditions of the invoice, of the customer invoice,
21 whether we were given 30, 60, 90 days. So it was
22 when it was due based on the terms of that account.

23 Q. Okay. So let's -- just walk me through
24 this. Let's just assume AT&T's terms were 30 days.

25 A. Okay.

1 paperwork didn't match up with their production --
 2 with the shipping and all that sort of thing so
 3 there would be issues if we were to go to AT&T and
 4 say you owe us money on their due date, it would
 5 be -- they'd always pay but they wouldn't be too
 6 happy with us because they can't control that
 7 finely but they do pay them within that time
 8 period, in that area.

9 When we looked at it, the thought was
 10 or the strategy was that if we had 60 days past
 11 that due date and we got the money in, we could
 12 then, you know, as long as we paid -- as long as we
 13 paid for that factored material, factored money,
 14 then it would be in compliance. If it went over 60
 15 days, then it would be something we'd look at and
 16 theoretically they would take that off of our line
 17 of credit. We had a million and a half dollars,
 18 we'd go down by 50,000 dollars. Sometimes it got
 19 out to that area of 60 days and came in at that
 20 time and sometimes it went over but we knew it was
 21 coming in two or three days later and we'd go ahead
 22 and, you know, get that paid to the bank.

23 Q. You said as long as you paid within 60
 24 days you were in compliance.

25 A. Right.

1 Q. Would you agree with me then if you
 2 didn't pay within that 60-day time period you were
 3 not in compliance with this agreement that you've
 4 described to me?

5 A. If it went past 60 days then we
 6 wouldn't be in compliance. The penalty for that
 7 would be that we would have to pay them that amount
 8 that we owed them for that particular site at that
 9 time and then that would come off our line of
 10 credit.

11 Q. What if you didn't pay them?

12 A. They would take it -- that's what I'm
 13 saying, if we didn't -- if we didn't pay them --
 14 well, if we didn't pay them -- well, we always did.

15 Q. You always paid the bank within that
 16 60-day window?

17 A. No, I didn't say that. If we went past
 18 the 60 days I thought you said.

19 Q. Yeah. I'm asking you.

20 A. Then they would say it was not in
 21 compliance and they would want to be paid for that
 22 so we would pay for that.

23 Q. Did the bank have any other recourse if
 24 you didn't pay within that 60-day window other than
 25 this penalty that you've just described?

1 A. No, that was basically the agreement.

2 Q. Under the agreement that you've
 3 described for me, Mr. Konersmann, is there any
 4 circumstance under which BB&T could have called
 5 SkyWaves in default?

6 A. Well, this is the way we were
 7 operating. Of course BB&T has lots of paperwork
 8 and I'm sure, you know, they can -- they can do
 9 about anything they want, you know, they closed the
 10 company and I'm not sure why but I'm just talking
 11 about how we operated the line, the factoring line.

12 Q. Sure. And that's what I'm trying to
 13 understand. You've described this agreement to me.

14 A. Um-hum.

15 Q. And you've used repeatedly that it was
 16 designed for SkyWaves to be effective for SkyWaves'
 17 business.

18 A. Right.

19 Q. So you're describing to me what
 20 SkyWaves is getting under this agreement.

21 A. Right.

22 Q. And what I'm trying to understand, were
 23 there any terms for, if you will, BB&T?

24 A. Well, I mean -- well, yeah, I'm
 25 describing, you know, the factoring agreement that

1 I had with BB&T. They -- they had lots of paper
 2 about all the assets, all the, you know, personal
 3 guarantees and et cetera, et cetera, so, I mean,
 4 there's a lot of paper behind all that but in terms
 5 of operating using a line of credit, that's what
 6 I'm explaining to you. BB&T came in unilaterally
 7 and closed the business and in my view closed it
 8 before the local bank and Jim Edahl realized that
 9 they had made that decision. He is -- he was our
 10 representative and did a great job and I don't know
 11 exactly why the bank made the decision they made,
 12 quite frankly.

13 Q. And I'm curious about that.

14 A. But they certainly can do what they
 15 want to do.

16 Q. Okay. And I'm curious about your
 17 statement when you say you don't know why. When
 18 you say you don't know why, did BB&T ever provide
 19 information to SkyWaves as to why it was calling
 20 the factoring agreement in default?

21 A. Yes.

22 Q. And so when you say you don't know why,
 23 do you mean you don't understand --

24 A. I don't understand.

25 Q. -- the reasons that BB&T gave?

1 A. Right.
 2 Q. I understand that the contract may
 3 designate SkyWaves as the supplier.
 4 A. Right.
 5 Q. What I'm trying to understand is when
 6 SkyWaves actually gets a purchase order --
 7 A. Right.
 8 Q. -- that SkyWaves knows there is a
 9 product to be built?
 10 A. Yes.
 11 Q. So it's the purchase order as I
 12 understand it that triggers SkyWaves to begin
 13 constructing something?
 14 A. Absolutely, yes.
 15 Q. Okay. When the purchase order comes
 16 in, does SkyWaves get any money from General
 17 Dynamics to use them specifically?
 18 A. No.
 19 Q. Okay. At what point does SkyWaves
 20 actually get money from its customers, from General
 21 Dynamics?
 22 A. After we invoiced, we get the invoice.
 23 When the invoice is paid.
 24 Q. Let's look at Exhibit 30,
 25 Mr. Konersmann, and I wanted to ask you about

1 Paragraph 3. I believe you told me that BB&T owned
 2 SkyWaves' accounts receivable that had been
 3 factored and I want to ask you, if you look at
 4 Paragraph 3, that indicates that BB&T in fact is
 5 purchasing those accounts in the factoring
 6 agreement. Did you understand that that was what
 7 was occurring?
 8 A. Yes.
 9 Q. And if you look, Mr. Konersmann, at
 10 Paragraph 10 of this agreement where it says
 11 invoicing and assignment, do you see that?
 12 A. Um-hum.
 13 Q. And it indicates client, which I
 14 understand is SkyWaves, shall provide BB&T with a
 15 manually signed assignment for each account
 16 purchased by BB&T. Did SkyWaves do that?
 17 A. I'm not sure I understand what that
 18 means.
 19 Q. Who would have handled the financial
 20 aspects of the factoring agreement, would that have
 21 been Mr. Voytko?
 22 A. When you say assignment, manually
 23 assigned assignment, what does that mean?
 24 Q. Well, Mr. Konersmann, what I'm trying
 25 to understand is who on behalf of SkyWaves would

1 know what SkyWaves' obligations were under
 2 Paragraph 10 and whether they were complied with?
 3 A. I'm not sure what this says.
 4 Q. Okay. Let me ask it another way. Who
 5 was responsible at SkyWaves for invoicing to
 6 SkyWaves' customers?
 7 A. John Voytko.
 8 Q. Okay. Was there anybody else at
 9 SkyWaves who was responsible for invoicing of
 10 customers?
 11 A. No.
 12 Q. Who was the primary person at SkyWaves
 13 in terms of the details of the factoring agreement?
 14 A. John Voytko.
 15 Q. Okay. Let me ask you to look at
 16 Paragraph Number 8, Mr. Konersmann. It's titled
 17 remittances.
 18 A. Yes.
 19 Q. Do you see that?
 20 A. Um-hum.
 21 Q. Take a minute and read Paragraph 8 and
 22 I want to ask you if you understand what that
 23 means.
 24 A. Okay.
 25 Q. Do you understand what Paragraph 8

1 means?
 2 A. Yes.
 3 Q. Tell me what you understand Paragraph 8
 4 to mean.
 5 A. What this says is that the trustee
 6 is -- or the client is a trustee for the bank's
 7 benefit and shall hold the remittance as property
 8 of BB&T, meaning the money, but without commingling
 9 with other monies, I would assume, any such
 10 remittance, property client -- property of client,
 11 shall immediately turn over to BB&T the identical
 12 check, money, notes, money orders, drafts
 13 acceptance or other forms of remittance received.
 14 I am very familiar with Number 8.
 15 Q. Okay.
 16 A. Because when we were going to sign
 17 this, I said, we can't sign this, this won't work
 18 for our company.
 19 Q. Okay. And who did you say that to,
 20 Mr. Konersmann?
 21 A. Jim Edahl.
 22 Q. And as I understand it, you said that
 23 to Jim Edahl before you signed this agreement?
 24 A. Yes. We talked about it before I
 25 signed it.

1 And where he -- we agree -- or where I
2 explained what I needed, he would say, Ron, let me
3 go back and talk, get approval and come back. And
4 I truly believe that Jim Edahl did nothing on his
5 own, he was a good manager and he managed through
6 this and we came up with this system that later
7 became alive and well but it -- it does not -- like
8 I say, that one there I remembered because you
9 can't do business with these big companies with
10 Number 8. We wouldn't have -- we couldn't have
11 gone forward with this agreement.

12 Q. Anything else that you remember in
13 Exhibit 30 that was amended or modified?

14 A. I probably have to go through this.

15 Q. Sure. Take your time. Let's take a
16 break. Take your time and review that.

17 A. Yeah, you guys take a break and let me
18 read this thing.

19 MS. CHERRY: Sure.

20 (A recess transpired.)

21 BY MS. CHERRY:

22 Q. Have you had an opportunity to look
23 through Exhibit 30?

24 A. Yes, I have. I looked through it. I'm
25 not a lawyer but, you know, a lot of it is

1 protecting the bank, which is fine, you know, it's
2 their money and we're borrowing it so if anything
3 happens, they should be the person to try to, you
4 know, get all of their money back.

5 You know, one of my personal pet peeves
6 in running these businesses in the past through
7 good times and bad is that everybody gets paid,
8 mostly the vendor side so, I mean, I have no
9 problem with that. Like I said, I remember that
10 only because it's so not -- it could not possibly
11 be implemented with this company, it just doesn't
12 work for these lawyers, telecommunication
13 companies.

14 And the only other thing I'd say about
15 is given this is a lot of protection to the bank
16 but, you know, it says here in default, and I
17 really don't need to get into all this but in the
18 event default shall be deemed to have occurred
19 under this agreement at BB&T, shall be entitled to
20 take such action as is elsewhere provided herein if
21 any one or more of the following events and
22 conditions exist.

23 All I can say about that is we were --
24 we paid all our bills, we paid all the interest, we
25 were in good standing to BB&T when the decision was

1 made for the company to succeed -- secede or to be
2 shut down I'll say. I personally don't believe
3 that the local bankers were aware of that, they --
4 they thought that we were going to be in a
5 situation where that the bank may raise the terms
6 and conditions, which I didn't have a big problem
7 with.

8 And the letter of default talking about
9 the four buildings being 45 days, you know, past
10 the due date would not be under my -- the agreement
11 I had with BB&T would not be a reason for a default
12 so this document does protect the bank. I accept
13 that and the rate was unworkable and I personally
14 don't understand, you know, why the company all of
15 a sudden became in default. I just don't get it.
16 But that's for me and I'm sure all this will work
17 out in the future but I just wanted to give you
18 that feedback.

19 Q. Okay. And you were -- when you were
20 talking about events of default, you were referring
21 to Paragraph 12 --

22 A. Yes.

23 Q. -- is that correct? Okay. You made a
24 comment, Mr. Konersmann, that you're not a lawyer.
25 Did SkyWaves have counsel when it entered into this

1 factoring agreement?

2 A. You know, I just can't remember if we
3 had a lawyer with us. I just -- I really can't
4 remember.

5 Q. Did SkyWaves have any outside counsel
6 that it used regularly or more often than someone
7 else?

8 A. Mostly Holland & Knight for corporate
9 papers and that sort of thing.

10 Q. I know, Mr. Konersmann, you focused on
11 Paragraph 8 --

12 A. Yes.

13 Q. -- of the factoring agreement. Is
14 there any reason when you signed this agreement
15 that you didn't strike through that paragraph?

16 A. I wanted to and Jim told me this was a
17 standard bank document, could not have been
18 modified and that we would -- a strategy, we would
19 have a formula or, you know, we would have an
20 agreement. I don't know what you call those things
21 but, like I said, it was really getting started and
22 then looking at our needs. And in Jim's mind, he
23 felt that we could work through and qualify for
24 factoring for businesses that we had and that we
25 would just take it as we go so it wasn't like just

1 this but, you know, again, we weren't a large
2 corporation and we had half a dozen people involved
3 so we didn't do formal minutes and stuff but the
4 backlog would be that backlog at that time period
5 and we would have backlog reports, maybe not
6 coincide directly but we kept, you know, the
7 backlog, we have a history of the backlog.

8 Q. And so backlog of what, orders that
9 need to be filled?

10 A. Right. What we have ready to produce.
11 Or what we have to produce.

12 Q. Okay. Meaning what you're obligated to
13 produce when you say what we have --

14 A. The backlog would be those buildings
15 that had purchase orders.

16 Q. Okay. That had not been fulfilled yet?

17 A. Right.

18 Q. And there's a paragraph that says
19 conversion of long-term debt.

20 A. Um-hum.

21 Q. Who at SkyWaves managed the company's
22 long-term debt?

23 A. I'm not sure what that refers to.

24 Q. Okay. And there's a reference to this
25 Lloyd Bordon, the West Coast opportunity. I know

1 we talked about that earlier. Did anything ever
2 come to fruition with the West Coast opportunity?

3 A. He invested I believe a hundred
4 thousand dollars into that but it never -- it never
5 developed.

6 Q. Okay. How did the factoring process
7 work with Nextel, the purchase orders that SkyWaves
8 would get for Nextel?

9 A. I would assume just like we've talked
10 about in terms of the agreement.

11 (DFT. EXH. 46, E-mail dated 3/25/06 to
12 John from Castlen Morris, BB&T/JE_001728, was
13 marked for identification.)

14 BY MS. CHERRY:

15 Q. Mr. Konersmann, I'm going to hand you
16 what I've marked as Exhibit 46 and this is an
17 e-mail from Castlen Morris to John at
18 skywavescorp.com. And I want to ask if you've ever
19 seen this e-mail before.

20 MR. LINTON: What's the date on that,
21 Molly?

22 MS. CHERRY: March 25th, '06.

23 THE WITNESS: Yeah, I'm not aware of
24 this, this e-mail.

25 BY MS. CHERRY:

1 Q. Okay. Did you have any discussions
2 with Mr. Voytko about BB&T contacting Nextel or any
3 of Skyways' customers regarding payment on
4 invoices?

5 A. I mean, I don't recall Nextel. I
6 believe some of the customers knew that we had a
7 factoring agreement but that's -- we converted a
8 couple customers to pay direct. Where they would
9 do that, we would do that.

10 Q. Okay.

11 A. I don't remember this particular
12 situation here.

13 Q. Did SkyWaves have any obligation to
14 notify its customers of the factoring arrangement
15 with BB&T?

16 A. No.

17 Q. How about on invoices, did SkyWaves
18 have any obligations to identify BB&T factors on
19 any invoices?

20 A. No. No, like I said, in this industry
21 their rule is to pay the vendor who they have a
22 contract with or who they have sent appeal to and
23 so they're very reluctant to send it anywhere else
24 and that was a problem. That's one of the things
25 that we got, you know, that the bank understood and

1 worked with us on so we were not out, you know,
2 explaining all that to them.

3 Q. Why would -- well, let me ask you. Did
4 SkyWaves put on its invoices where payment was to
5 be made?

6 A. Yeah, to SkyWaves Corporation.

7 Q. Okay. Why would a customer -- you keep
8 saying customers were very reluctant to send
9 payment somewhere else.

10 A. Yeah, for legal reasons. When we talk
11 to the purchasing agents, their law firm -- their
12 lawyers took a position almost industry-wide
13 because what would happen is if a company built a
14 shelter say for the company and they diverted it to
15 a bank or converted it to someone who had some
16 financial position with them, then maybe the vendor
17 would come back and say we should have sent it over
18 there.

19 So their basic policy was, you know, we
20 didn't order from a company, we're going to get
21 that product, we're going to send it back to them,
22 then they deal with their own finances and all, we
23 don't all that so they were reluctant to do that.
24 Some we got to convert and didn't have a problem
25 trying. We tried, you know. But the ones we

1 a customer for 100 homes down here in Virginia who
2 would like to see the plant 11:00 AM. He did -- he
3 did a lot of tours and that's relating to his
4 business.

5 Q. Sure.

6 A. So again, I'm not sure. And, I'm
7 sorry, your question was?

8 Q. Sure. My question was so you believe
9 there may have been a note to Mr. Meier or his
10 company? My question was about debt to Mr. Meier's
11 company.

12 A. I don't remember any direct debt but he
13 may have -- well, he lent money at the last
14 company -- he did loan some money personally to the
15 company.

16 Q. Okay.

17 A. So that would be -- that would be one.

18 Q. Okay. And then as I understand it
19 Mr. Meier's company was a vendor to SkyWaves?

20 A. Yes. That was a primary relationship,
21 business relationship we had.

22 Q. Okay. So if there were any monies due
23 and owing to a vendor such as Mr. Meier's company,
24 that would be reflected in financial statements,
25 correct?

1 A. This is going to be one of several.

2 Q. Sure.

3 A. He was a major investor in SkyWaves but
4 he always wanted to merge the two companies. And
5 my general point to him was that down the road, you
6 know, once we became a much larger company, we may
7 want to consider that and it probably would make
8 some sense absorbing a key part of how we made our
9 buildings. These panels were unique so, you know,
10 it made some sense but it didn't -- it didn't make
11 any business sense to us because we weren't in the
12 home building business. So this looks like one
13 proposal that he had at that time but this would
14 run verbally and everything else continuously, you
15 know, trying to push the company together.

16 Q. Okay. Let me ask you just about this
17 particular correspondence. In Paragraph A he
18 mentions strengthening SkyWaves financially. Do
19 you see that?

20 A. Um-hum.

21 Q. Did SkyWaves need to be strengthened
22 financially?

23 A. Well, any time you get more money into
24 a start-up, it strengthens it. You have more money
25 to do more with.

1 A. Yes, um-hum.

2 Q. Okay. So if you flip to the last page
3 of this, there's a bullet point, offer from Franz
4 Meier.

5 A. Um-hum.

6 Q. And when he references reducing company
7 debt to FXM, you don't have any specific knowledge
8 about SkyWaves' debt to FXM, do you?

9 A. Where does that say that?

10 Q. If you look at the first bullet point.

11 A. Oh, I see. I'm sorry. I don't
12 remember that.

13 Q. Okay.

14 (DFT. EXH. 51, Memo dated 3/25/06 to
15 Ron Konersmann and John Voytko from Franz, was
16 marked for identification.)

17 BY MS. CHERRY:

18 Q. I'll hand you what we've marked as
19 Exhibit 51, Mr. Konersmann. This appears to be
20 another communication from Mr. Meier to you and
21 John Voytko. Do you recognize -- I know you've
22 indicated that Mr. Meier made several proposals.

23 A. Yes.

24 Q. Do you recognize this correspondence
25 from Mr. Meier?

1 Q. Okay. And he says, and gives it the
2 cash to assure transition to profitability. Do you
3 see that?

4 A. Um-hum.

5 Q. Was SkyWaves profitable at this point
6 in time?

7 A. In '06, I do not believe so.

8 Q. Now, if you go down to Paragraph Number
9 2 in his correspondence to you, he's referencing
10 selling shares to acquire cash, converting current
11 debt to PK, which I believe is Patricia Konersmann?

12 A. Um-hum.

13 Q. And FXM, which is his business, into
14 shares and pay off high-interest loans to private
15 investors. Do you see that?

16 A. Um-hum.

17 Q. Do you know anything about the
18 high-interest loans to private investors?

19 A. That he's referring to?

20 Q. Yes.

21 A. I do not.

22 Q. Then in the next sentence he says, the
23 stated goals are to preserve Ron and Patty's
24 majority position. Do you see that?

25 A. Um-hum.

1 Q. Okay. Where did the million dollars
2 come from?

3 A. I just looked at our -- where we were
4 and how much money we would need to -- you know, to
5 move further along with the business.

6 Q. What did you look at? When you say
7 looked at --

8 A. Our firm financials and then if we
9 assumed we were going to expand out to the West
10 Coast, how much would that cost us to expand to the
11 West Coast, you know, that sort of thing.

12 Q. Do you have any notes or projections
13 or -- in terms of how you came to that one million
14 dollar figure? Was this something you just did in
15 your head or did you do a calculation?

16 A. Yeah, we did calculations on our
17 company and what we wanted to do -- like I say, the
18 best example would be if you want to expand to the
19 midwest, you know, we would have to put more
20 salesmen out there, we would have to, you know,
21 probably put an office out there, et cetera, so we
22 were always long-term going to expand and be a
23 national company.

24 Q. Okay.

25 A. So -- and we had a three plant strategy

1 from day one so, you know, we're -- when we have
2 these opportunities, we have a substantial investor
3 with great connections, then if someone asked
4 you -- if Franz was saying, you know, how much
5 would you need to expand, then we would look at
6 where we were, add up how we would expand, what
7 expansion are we talking about, the northeast,
8 midwest, and then we would look at the cost of
9 doing all that and then we would come up with a
10 projection and might say that we needed 700,000
11 dollars to do this so I probably mentioned one
12 million dollars to cover the expansion we were
13 talking about.

14 Q. Okay.

15 A. Or thinking about I should say.

16 Q. Sure. And I guess what I'm trying to
17 understand, if Mr. Meier had said this investor's
18 interested, he wants to see where the million
19 dollar figure came from --

20 A. Right.

21 Q. -- what information would you give that
22 investor to --

23 A. We would give them -- we would give
24 them a -- and we have lots of them. We would give
25 them a slide presentation.

1 Q. Okay.

2 A. That we'd go over the company in terms
3 of the product, our experience, how we build the
4 building, take them through a plant tour, of
5 course, where we were at that time financially and
6 what we would -- you know, how we would expand, why
7 would expansion be relevant and explain what we
8 were going to spend the money on.

9 Q. Okay. What would you -- what would you
10 show them to show where SkyWaves was financially?

11 A. A financial package.

12 Q. What would be included in that
13 financial package?

14 A. It depended on how strong -- how far
15 along. You know, if we had a substantial investor
16 who we did not know with great connections of which
17 we did not know what connections he has, we
18 probably wouldn't have shown him financials at that
19 time but I think your question was, you know, how
20 would you tie all that together. So we would
21 customize the presentation to the viewer depending
22 on how much we knew about him, et cetera. And
23 sometimes we asked for confidentiality agreements
24 and that sort of thing. Sometimes we didn't ask
25 for them because, you know, what we're giving him,

1 you know, was not confidential, more of a sales
2 marketing tool.

3 Q. And if you were comfortable sharing
4 financial information with a potential investor,
5 what financial information would you share with
6 them?

7 A. Historical balance sheet, income
8 statement balance sheet, cash flow.

9 Q. Then you indicated you would show how
10 SkyWaves was going to expand.

11 A. Right.

12 Q. What -- in terms of explaining how the
13 company was going to expand, did that include
14 financial information or logistical information or
15 conceptual?

16 A. All of the above.

17 Q. Okay. And who would prepare that
18 information for a potential investor?

19 A. That would probably start out as kind
20 of a team event where it would be, you know, myself
21 and Jeff Ward and John Voytko, Jim Phillips. We'd
22 get together and look at the possible opportunity,
23 then everyone would give their input based on, you
24 know, their thoughts about it and then we would
25 start putting together a presentation.

1 have no recollection. I don't think he would be a
2 guy that we would be going through this detail
3 with.

4 Q. Okay. There's a reference that says
5 please call me at. Is that your telephone number?

6 A. That's my cell phone number.

7 Q. Okay. Was that your cell phone number
8 in December of 2006?

9 A. Yes, it was.

10 Q. Any reason to believe you didn't write
11 this letter?

12 A. I don't have any reason, I just don't
13 remember it.

14 Q. Okay. I want to ask you about this,
15 some of the paragraphs in this letter. In
16 Paragraph Number 2, there's a reference that during
17 the first quarter of 2006 Nextel partners made the
18 decision to integrate their shelters at the site
19 locations --

20 A. Right.

21 Q. -- which had a negative impact on our
22 margins.

23 A. Right.

24 Q. What does that mean?

25 A. What that means is, you know, we would

1 sell -- we would -- most of -- we would sell empty
2 buildings and we started out that way, then we were
3 integrating all the equipment and the customers,
4 you know, the regional managers, et cetera. Most
5 of them would have us do a turn-key plug and play
6 where everything is together, everything is tested
7 and we go out and plug it in but for various
8 reasons, be it equipment or preference, whatever,
9 they would -- they would buy just a shell and then
10 they would go ahead and put the equipment in.

11 During this time, of course, there's a
12 lot of technology changing and so some managers of
13 these customers were -- didn't want guys like us to
14 know what they put in because they thought it was
15 special, you know, and they didn't want us to -- we
16 wouldn't, but they didn't want us to put the
17 special equipment in and then show it to another --
18 their competitor.

19 So they would say, okay, we're going to
20 buy your shelters but we're not going to have you
21 integrate our work. That took -- that reduced
22 obviously dollars and the margins on the building
23 are good but the integration dollars, you know,
24 is -- there's more profit in that part so that's
25 what I'm referring to I believe here is that they

1 were going to not -- do the buildings but not do
2 the integration, which would reduce the amount of
3 money we got for that site.

4 Q. Okay. Do you know what SkyWaves'
5 margins were on shelters at that point in time?

6 A. I do not.

7 Q. In Paragraph 3 there's a reference to
8 in 2007 our product mix includes a greater
9 percentage of business from General Dynamics and
10 Verizon. Do you see that?

11 A. Yes, I do.

12 Q. From where does that information come?

13 A. From our backlog.

14 Q. Okay. Backlog of what?

15 A. Of the shelters that -- you know, both
16 the shelters we're producing and the shelters we're
17 going to produce. What it means in that snapshot
18 of time, we had more General Dynamics than Verizon
19 say versus AT&T.

20 Q. Okay. More General Dynamics than
21 Verizon what?

22 A. Orders.

23 Q. So as of December 7th, 2006, SkyWaves
24 had orders from General Dynamics and Verizon?

25 A. Yes.

1 Q. Okay. Where would those orders be
2 located?

3 A. The order file.

4 Q. Okay. Paragraph 4 says, see attached
5 breakdown of operating expenses.

6 A. Um-hum.

7 Q. Do you see that?

8 A. Um-hum.

9 Q. There was no attachment to this letter.

10 A. Um-humm.

11 Q. Would -- how would SkyWaves go about
12 getting a breakdown of operating expenses for
13 December of 2006?

14 A. That would be information we'd keep and
15 that would be provided by John Voytko.

16 Q. In Paragraph 5 there's a reference to
17 SkyWaves centrally considering '06 to be a
18 break-even year.

19 A. Um-hum.

20 Q. Do you see that?

21 A. Um-hum.

22 Q. Was 2006 a break-even year?

23 A. It was not.

24 Q. Did you know that in December of 2006?

25 A. Well, I'm not sure where we were at the 969

1 2007 SkyWaves' Board of Directors determined that
2 it would need an expanded financial commitment to
3 provide capital infusion beyond those being
4 currently provided by BB&T.

5 A. Um-hum.

6 Q. Do you see that?

7 A. Yes, I do.

8 Q. Then it goes on to say, to meet the
9 increasing number of requests for quotations it was
10 receiving as a result of winning two General
11 Dynamics contracts, one for 12 million with the
12 Navy/Coast Guard and the other a 20 million
13 multi-year Homeland Security initiative with New
14 York State SWN Police. Do you see that?

15 A. Yes, I do.

16 Q. So this determination in early 2007,
17 was that for the 400,000 dollars we've just seen or
18 is that something else?

19 A. That would be for something else.

20 Q. Okay. So are there any Board of
21 Directors meeting minutes or documentations that
22 indicate how much financial commitment was needed?

23 A. Well, back in December of '06 we were
24 looking forward into '07 and we had some -- you
25 know, the 3G build-up was being delayed and we --

1 everyone knew that when -- because we had the
2 national contracts that we would be a major player
3 in that build-out so -- but we didn't know when
4 they were going to, you know, start producing and
5 shipping these. They have to be budgeted with the
6 customers and there's a rollout, you know, and we
7 were working -- we had a good idea as to what
8 amount of business we were going to do and with
9 whom and it was going to be a major increase in our
10 backlog, it was going to easily double our business
11 when it hit but we didn't know when it was going to
12 hit.

13 And at that time we were, you know,
14 using, you know, the factoring but the bank also
15 had, you know -- through the documents had control
16 of all of our assets, et cetera, and I had, you
17 know, and my wife together had 51 percent, we had
18 control but it was a time when in order to meet the
19 needs of when the business was ready and we were
20 going to get the orders, we needed to expand the
21 plant and make some major capital changes so I
22 didn't -- my position was that we needed to, you
23 know, go out and check the market to see what it
24 would cost us to bring in, you know, some
25 substantial investment at that time.

1 Q. So what you're telling me is that's in
2 addition to this 400,000 dollars we've just been
3 talking about?

4 A. Yes.

5 Q. Okay. So tell me what changed, if you
6 will, from December of '06 and -- this is December
7 of '06, these requests and indications for
8 expansion of production --

9 A. Right.

10 Q. -- the 400,000 dollars, to early 2007
11 in the complaint.

12 A. Well, the 400,000 was related to
13 equipment. We were not addressing -- at that time,
14 you know, we knew that we were not going to -- the
15 3G build-out was not going to be, you know, within
16 the next 90 days but I knew it was coming up. And
17 when we looked at what we were going to get in
18 terms of the future business, it was substantially
19 more than what we were doing.

20 So in order to be able to produce and
21 gear up to run literally one building a day to
22 seven, eight buildings a day, we would arrange to
23 do that. And so this was more of a forward
24 thinking, you know, we had to structurally bring in
25 a different level of investment, a bigger

1 investment to get ready for this build-out.

2 Q. When did SkyWaves win -- well, this
3 says two General Dynamics contracts. When did
4 SkyWaves win the Navy/Coast Guard contract?

5 A. I'm not sure but we did win the
6 Navy/Coast Guard contract and we -- I don't
7 remember the dates.

8 Q. Okay. When -- where could I find that
9 information out, when SkyWaves won the General
10 Dynamics -- the two contracts, the Navy/Coast Guard
11 and the New York State SWN Police?

12 A. I don't know if it's in the files we
13 have or not. The person who would know more about
14 that would be Jeff Ward.

15 Q. And how about this increasing number of
16 requests for quotations? What's a request for a
17 quotation?

18 A. The company's contacting our company to
19 quote their business and instead of quoting five
20 sites, they were coming in and quoting 100 sites,
21 200 sites, I mean, just a massive amount of work
22 that's going to happen when -- two things, when
23 they were budgeted to do the 3G and when the 3G
24 equipment was going to be sent to them so they
25 could have it produced.

Page 274

1 were using with --

2 A. No. No, we were -- our normal

3 financials of 2007 would be our projections as we

4 were and we did -- like I said, we didn't know when

5 the 3G build-out would happen so we were basically

6 on -- you know, looking at other -- looking at

7 alternative financing, looking at whenever this

8 would happen that we would have the plant ready and

9 that we would have the money to absorb, you know, a

10 backlog of seven, eight million dollars versus two

11 or three. You know, you're talking about a factor

12 of three or four times so it was a major need for

13 money to fund that.

14 Q. When you say 3G build-out, are you

15 talking about with General Dynamics or are you

16 talking about in the industry as a whole?

17 A. In the industry as a whole, right.

18 Q. And when you're talking about industry

19 as a whole, is that what gives rise to the request

20 for quotations because of this build-out in the

21 industry?

22 A. No -- well, you always are getting a

23 request for quotations, that's how it comes in and

24 then you go to that but -- and at the time in early

25 '07 we were just -- you know, we were just doing

Page 275

1 the business that we were doing but what we were

2 planning for and the reason to go out and look for,

3 you know, what we -- you know, BB&T was doing

4 everything for us, they always met our needs so we

5 didn't have a problem with BB&T but I just thought

6 that given the size of this thing, you know, from a

7 diligence part from me I needed to see if -- what

8 the value of our company would be to others as to

9 what they would invest to meet the needs.

10 And what we basically -- what we would

11 review with them would be this -- the general

12 contracts we have which, you know, they would come

13 in and review the contracts like we talked about

14 before and look at the -- their own data from what

15 they think the industry is going to do. And when

16 you have, you know, a company that has a contract

17 with AT&T and they have three national contract --

18 three national shelter suppliers, they look at what

19 that kind of build-out will be. You know, you're

20 not guaranteed a third of it but if you're a part

21 of it, just by the sheer amount of business, it's

22 going to -- you're going to get a lot of business.

23 The industry -- the industry, you know, through

24 that time period is very clear about, you know, the

25 fact that it's not if 3G, it's going to be when 3G.

Page 276

1 Q. So now you mentioned expanded financial

2 commitments and actually in the complaint you've

3 identified or SkyWaves has identified a couple of

4 institutions but can you tell me if you recall

5 where SkyWaves sought financial commitments?

6 A. Well, I mean, I'm not -- you know, we

7 didn't -- you know, we put an inquiry into

8 financial institutions and invest in

9 telecommunications, we might have sent it -- or

10 talked to people who we have known before. We

11 didn't have any financial institutions involved

12 with the company yet so we didn't have business

13 with them but, you know, we were just looking for

14 people who would be interested in looking at our

15 situation.

16 Q. And there's a reference in the

17 complaint to Hunt Growth Capital and Wachovia and I

18 want to ask you about them but do you recall anyone

19 else from whom SkyWaves sought financial

20 commitments in early 2007?

21 A. No. I think we were generally, you

22 know, looking but these were the three -- the two

23 respondents that we focused on.

24 Q. Hunt Growth Capital and Wachovia?

25 A. Right. But we had talked to other

Page 277

1 people but, you know, we didn't get into a

2 negotiation or anything. We didn't get into

3 negotiation with -- we didn't get a response, a

4 proposal from anyone else.

5 Q. Anyone else other than Hunt Growth

6 Capital and Wachovia?

7 A. Right.

8 (DFT. EXH. 66, E-mail chain dated

9 3/27/07 to John Voytko from Ron Konersmann, was

10 marked for identification.)

11 BY MS. CHERRY:

12 Q. I'm going to ask you -- I'll mark as

13 Exhibit 66 what was produced by SkyWaves and it

14 appears to be the proposal from Hunt Growth Capital

15 in March of 2007.

16 A. Yes.

17 Q. Do you recognize this e-mail exchange

18 that's actually an e-mail from Bob Kosian --

19 A. Yes.

20 Q. -- to you and it looks like it has a

21 luminary nonbinding term sheet attached. Do you

22 see that?

23 A. Yes.

24 Q. And it is signed by Michael Bierman, I

25 believe, if you look on Page 7. And then on Page 8

1 it has a signature line for SkyWaves, do you see
2 that?
3 A. Yes.
4 Q. Did SkyWaves enter into this term sheet
5 with Hunt Growth Capital?
6 A. No.
7 Q. Okay. Do you have -- this is all I've
8 seen. Was any information provided to Hunt Growth
9 Capital that led to this term sheet?
10 A. Yes, there would be.
11 Q. Okay. Who provided information to Hunt
12 Growth Capital that led to this term sheet?
13 A. We provided information to Bob Kosian
14 and then he was talking to them.
15 Q. Okay. And who is we?
16 A. The company.
17 Q. Okay. Who on behalf of the company
18 provided the information?
19 A. Well, that would be something we would
20 put together. Bob Kosian lives here so he came
21 over to the plant and we went over so it would be
22 myself and probably John Voytko.
23 Q. Was this term sheet presented to
24 SkyWaves' Board of Directors?
25 A. Yes.

1 Q. Okay. When was that done?
2 A. When we received it.
3 Q. Do you have anything documenting that
4 this was sent to SkyWaves' directors?
5 A. Well, we probably gave them a copy of
6 it.
7 Q. Did the Board of Directors have any
8 discussions about this term sheet?
9 A. We talked about it.
10 Q. Okay. Tell me what you recall about
11 this term sheet.
12 A. Well, you know, this is -- this is the
13 term -- the term sheet was presented to us. We had
14 requested Wachovia, you know, to look at, you know,
15 how they could fund this business that we're coming
16 into and Hunt presented this and we didn't -- we
17 didn't start getting into negotiating the details
18 of it because, quite frankly, I wanted to -- I
19 mean, we were talking to them but we -- we sat down
20 with Jim Edahl and talked about how does BB&T
21 handle this bump in increasing our capacity and
22 providing the working capital to run this 3G
23 business.
24 And we had a close relationship with
25 the bank and we had -- we had assurances from Jim

1 that, you know, the factoring has worked so far, we
2 get to this point and these purchase orders come
3 in, that they'll be able to step up and provide the
4 money we need to run the business. So, you know,
5 we didn't -- you know, we didn't -- we didn't
6 negotiate a final deal with these guys.
7 Q. These guys being Hunt?
8 A. Hunt.
9 Q. And Hunt Capital was under their term
10 sheets going to invest a total of four million
11 payable in cash at closing, correct?
12 A. Um-hum, yes.
13 Q. Do you recall any discussions that
14 SkyWaves' Board of Directors had about a four
15 million dollar cash investment?
16 A. Well, they thought that that was a good
17 offer, that would -- that would take care of what
18 our needs would be when 3G happened and, you know,
19 something that we should pursue if we felt that
20 BB&T couldn't handle the business.
21 Q. Did SkyWaves ask BB&T for a four
22 million dollar cash investment?
23 A. Well, we asked them -- well, we told
24 them about the four million dollar offer and, you
25 know, the position of the bank was, you know, we've

1 taken care of your needs so far and, you know,
2 we'll -- you know, we'll take care of them in the
3 future and when this comes in, when your purchase
4 orders, you know, grow like they're looking like
5 they're going to, we'll be there for you, you know,
6 we'll take care of it.
7 Q. Now, on the proposal for -- well, are
8 there any meeting minutes or any documentations
9 about discussions the board members may have had
10 about the Hunt Growth Capital proposal?
11 A. I don't remember any.
12 Q. Okay. And under this proposal I think
13 I saw where the Board of Directors would change.
14 Let's see. I want to ask you about that.
15 A. Okay.
16 Q. Who would have the majority of the
17 stock ownership under the proposal by Hunt Growth
18 Capital?
19 A. Who would have the most shares?
20 Q. Yes.
21 A. I would.
22 Q. There, under management of the company,
23 if you look on Page 2 there's a reference to the
24 Board of Directors. And this has some individuals,
25 Michael Bierman and Matthew Golden, who look like

1 they're with Hunt Growth Capital so they would be
 2 on the board also, correct, under this proposal?
 3 A. Where is that at?
 4 Q. On Page 2.
 5 A. ??
 6 Q. If you look --
 7 A. Oh, right here. Yes.
 8 Q. Now, did SkyWaves respond in any way to
 9 this term sheet from Hunt Growth Capital?
 10 A. Well, they came into town and we
 11 reviewed -- we reviewed the offer and we told them
 12 that we would get back to them once we decided what
 13 we were going to do.
 14 Q. And my question, Mr. Konersmann, simply
 15 is in the documents that SkyWaves produced, I asked
 16 for documents relating to Hunt Growth Capital
 17 proposal. This is all we got so there's no e-mail
 18 correspondence other than this term sheet and so
 19 what I'm trying to understand is how communications
 20 occurred.
 21 A. You know, the problem -- the tough part
 22 is that, you know, the company was shut down. We
 23 were not in control and so we had what we have but
 24 we don't have, you know, everything. And I don't
 25 know what's missing. I mean, I really don't. So,

1 you know, where we were with them was that they
 2 gave us an offer that we can take a hard look at,
 3 it was a good offer, Hunt Capital can put this
 4 amount of money in and obviously, you know, what
 5 was really good about this is that they were going
 6 to take a minority position, which they never do,
 7 but because of the industry we were in they had
 8 high confidence that we were going to do well.
 9 But the other side of it is if we went
 10 with them, then that was a company who could put
 11 any amount of money they wanted into a business
 12 opportunity. So with our goal of going to an IPO
 13 and going nationwide, et cetera, they could have
 14 made that happen for us financially and they have a
 15 long record of doing that. So, you know, putting
 16 two people on the board changed the board,
 17 putting -- or giving them 30 percent of the company
 18 took me out of control from a stock standpoint but,
 19 you know, it would be a strategic decision for us
 20 and I worked with the board to make sure that, you
 21 know, we understood all of this and, you know, like
 22 I say, we have what we have and we -- that's all we
 23 have to work with.
 24 (DFT. EXH. 67, Letter dated 3/19/07 to
 25 Mr. Ron Konersmann from Jeffrey S. Spicer, was

1 marked for identification.)
 2 BY MS. CHERRY:
 3 Q. I'm going to hand you what we've marked
 4 as Exhibit 67 which is from Wachovia and that is a
 5 letter to you from Jeff Spicer and I know you
 6 indicated Jeff was SkyWaves' contact at Wachovia.
 7 A. Yes.
 8 Q. In the first paragraph, Mr. Spicer
 9 references the purpose of the letter is to follow
 10 up on your recent conversations about establishing
 11 a working capital line of credit with Wachovia.
 12 A. Um-hum.
 13 Q. Do you see that?
 14 A. Um-hum.
 15 Q. Tell me what a working capital line of
 16 credit is.
 17 A. Well, it's a line of credit that the
 18 bank will give you so that you can use that monies
 19 to use for your business.
 20 Q. And it looks like at the bottom of this
 21 first paragraph Jeff says, although it still may be
 22 too early to enter into this credit facility today,
 23 our goal is to share with you what our solution
 24 might look like when profitability targets are met.
 25 Do you see that?

1 A. Yes, I do.
 2 Q. So did Wachovia ever present a proposal
 3 to SkyWaves?
 4 A. Well, we had that need for about 4 to
 5 500,000 dollars worth of equipment. And what they
 6 said was we could -- you know, to stay a part of
 7 this, we could give you a asset-based line of
 8 credit to pay for the equipment you need but they
 9 couldn't give us the working capital line.
 10 Q. Okay. So it's your testimony that
 11 Wachovia was willing to loan SkyWaves 4 to 500,000
 12 dollars, that 400,000 dollar need we talked about
 13 at the end of '06?
 14 A. I think it's the same number, yes.
 15 Q. Okay. Is there -- is that what you're
 16 interpreting this March 19, 2000 letter to mean?
 17 A. No, I think what he's saying is that we
 18 had the assets, we had something to back up, you
 19 know, the business like we have, you know, we have
 20 the orders in hand, et cetera, then, you know, he
 21 could do something in the five million dollar range
 22 is what I'm reading here and they could structure
 23 something but on an asset-based scenario. Just
 24 going through here, typical collateral package
 25 would generally have these kinds of things. So

1 you know, we know these guys, we know there's
2 position for this, you know, and we had just come
3 off of sorting through whether we were going to
4 stay with BB&T or not and that decision was made so
5 he was assuring them that BB&T, you know, was going
6 to be there for SkyWaves.

7 Q. What I'm hearing you say, and correct
8 me if I'm wrong, Mr. Konersmann, but up to that
9 point BB&T had done everything that they said they
10 were going to do in terms of the equipment loan,
11 increasing the factoring line?

12 A. Absolutely.

13 Q. At that point in time everything's been
14 done?

15 A. Yeah, absolutely. We could -- you
16 know, they have been very important to us and very
17 professional and, you know, he was going down there
18 to -- you know, to give them those assurances, you
19 know, that the bank was solidly behind our company.

20 Q. Okay. Mr. Konersmann, as a result of
21 that, I mean, I know you've indicated that you
22 considered BB&T a partner. Would you consider it
23 important for SkyWaves to be truthful to BB&T?

24 A. Of course.

25 Q. Now, there's a reference in Paragraph D

1 that says BB&T's commitment to finance SkyWaves'
2 growth was unique to SkyWaves and was the
3 equivalent of the funding offered by Wachovia or
4 Hunt Capital. Do you see that?

5 A. Yes.

6 Q. What funding had been offered by
7 Wachovia as of July of 2007?

8 A. Wachovia, as it says, they were
9 declining the build-out funding but would provide
10 us with the equipment funding.

11 Q. Okay. And that statement is based on
12 the March 19th, 2007 letter we just looked at from
13 Wachovia to you?

14 A. Yes.

15 Q. And then the Hunt Capital funding, is
16 that reference in Subparagraph D to the March 2007
17 commitment sheet --

18 A. Yes.

19 Q. -- we saw from Hunt Capital?

20 A. Yes.

21 Q. Now, there's a reference in Paragraph E
22 that says that BB&T would commit to funding
23 SkyWaves' growth based on invoices, purchase
24 orders, contracts and site plans.

25 A. Yes.

1 Q. Do you see that?

2 A. Um-hum.

3 Q. Tell me about that presentation by
4 Mr. Edahl to these investors.

5 A. Well, you know, the global concept was
6 that Jim was assuring them that there would be no
7 surprises and that the bank was going to be there
8 for us as we transitioned through. You know, you
9 can't -- you know, you don't know what the future
10 is but, you know, the point is the commitment that
11 BB&T made in April was that, you know, we want to
12 take you as we started, you know, they wanted to be
13 our bank and they want to meet our needs and they
14 did so and that, you know, they'll -- they will be
15 there to fund this growth.

16 Q. Do you have anything documenting that
17 Mr. Edahl made the representation you've got --
18 SkyWaves has listed here in Paragraph E?

19 A. There was a discussion about the things
20 that the bank, you know, how they were -- how they
21 were funding this and stuff, you know, and the
22 kinds of funding, et cetera. And there was a long
23 discussion because these guys really drove down on,
24 you know, how committed is the bank. That's what
25 their concern was and so there was a discussion

1 about that.

2 Q. Did these individual investors or any
3 investors ask to see the bank documents?

4 A. They came over to the plant a couple
5 times and I think they were looking at our
6 contracts more than the bank documents and they may
7 have seen some but I don't remember that.

8 Q. Okay. Did Mr. Edahl ever say to you
9 that BB&T would commit to funding SkyWaves' growth
10 based on invoices, purchase orders, contracts and
11 site plans?

12 A. Oh, absolutely.

13 Q. When did he say that?

14 A. Well, it was all reiterated in that
15 March/April time frame when we were talking about
16 how do we move forward and fund this growth. The
17 thing that isn't there is that -- because this was
18 important, you know, to me. You know, the bank had
19 been great, Hunt is in that business of taking a
20 company at our -- at that level and funding it
21 completely and taking it all the way as far as they
22 want to take it.

23 And it was important to me that, you
24 know, the bank was going to be there so, you know,
25 I asked them about various things, you know, if we

1 have a big bump in the road where we're going to
2 increase the business, you know, how are you going
3 to do that. You have all of our assets right now,
4 we don't have any more so how does that work?

5 And he said, well, I'd invite you to
6 come to our corporate office and meet with our --
7 the people who do the IPO work and they'll present
8 what they do and, you know, they'll explain how
9 that will work but basically we can do several
10 things but -- he said, one of which is we can
11 assign a block of stock over as collateral and then
12 we -- when we go to an IPO, we'll do the deal,
13 we'll make money on the transaction and then we
14 turn over your stock back to you and then you do
15 with what you want.

16 So in my mind the bank had a strategy
17 knowing who we were and what we were going to need,
18 had the means to give me -- you know, to provide
19 whatever financial need, you know, we had. And
20 when we were -- the last part of our discussions,
21 Jim said, Ron, I know you're evaluating these
22 things, I know you're going to the board, would you
23 please make sure you tell Jimmy Kerr that if you
24 take the bank's deal that you won't have to dilute
25 yourselves by 30 percent and you can -- you know,

1 you'll be able to keep your stock which, of course,
2 as we said throughout the two days, you know, stock
3 positioning is important because that's how you
4 make the money and you want to keep your stock
5 position as high as you can and not dilute it. And
6 in the other part of -- that we considered was in
7 Hunt Capital we would be diluting our stock, which
8 means we would have less.

9 So we talked about specifically this
10 is -- you know, I talked about General Dynamics
11 back in December/January and this big project up in
12 New York. You know, Jim and I talked about that
13 work up there as with the government and the
14 government has a lot of rules as well and there's
15 going to be quite a bit of business for us and
16 we -- we talked about it, you know, how are we
17 going to do that.

18 And again, you know, he said -- and --
19 we talked about it in general and talked about the
20 sites and the shelters and the amount of work, et
21 cetera. But in negotiating I said -- when he said
22 do you have anything else that we could use as
23 collateral, I said, well, what we have is we have
24 the site plans for the government work and, you
25 know, it has -- you know, General Dynamics has the

1 contract, you know, we've got the vendor contract
2 and, you know, this shows you all the sites and you
3 can look down here, it will show which sites have
4 shelters on them and so can we use that?

5 He said, well, let's say we'll consider
6 it, I don't want to commit to it today, I'd have to
7 get approval but, you know, if we need it again for
8 this window between March/April and December
9 because I was fairly sure based on my experience
10 that this would -- this would really kick off for
11 sure in January, hopefully sooner, but if it
12 didn't, this was something we could look at.

13 And so in July we talked about, you
14 know, where we were. And I said, you know, Jim, I
15 would like to have you consider using the site
16 plans to factor and so he looked it over and he
17 said, well, let me get back to you. And he took it
18 and came back and said, you know, we'll -- we
19 understand it and, you know, we'll do that. And so
20 we started factoring site plans.

21 So when I got to, you know -- that was
22 my gap filler between, you know, April 12 and
23 December and then if we're figuring that we're
24 going to double/triple our business, our backlog
25 going from two or three million to seven, eight,

1 ten million dollars, that was so huge, I said, you
2 know, how do you do that? And he said, well,
3 that's where we would bring in the -- we would
4 bring in the guys from corporate, they would work
5 that out. And I said, well, you guys are
6 asset-based lenders, you know, we don't have any
7 assets. And he said, well, at that point we could
8 maybe -- as a possibility maybe use your stock as
9 an asset.

10 Well, to me it made sense, you know,
11 and the bank had did everything for us, it was a
12 great relationship so, you know, I had -- I had
13 comfort in all of that. And that's why, you know,
14 when we -- we negotiated through that. And Jimmy
15 Kerr, you know, is an astute businessman, he
16 appreciated and understood what -- you know, what
17 BB&T was doing for us so, I mean, we were all very
18 positive about it, happy about it and then we had
19 an opportunity to sell some shares. Jim, you know,
20 said, well, let me come down and give him those
21 same assurances. Because I told Jim that these
22 guys had -- they had some kind of an issue with
23 BB&T ten years ago or so and they're concerned that
24 maybe the bank would surprise us, you know. He
25 said, well, let me come down and talk to them.

1 General Dynamics laying out the site plans and
 2 where the shelters would go. I went to them and
 3 said, look, you know, this is great, we're going to
 4 get the business but I would like to -- and Jim and
 5 I talked about it, you know. I said, I'm going to
 6 see if I can get these converted to purchase
 7 orders. And I tried and the people up there were
 8 very -- were very happy having us and had a good
 9 relationship with them but what they finally came
 10 down and said is, by the government, Homeland
 11 Security rule, they couldn't at that time give us a
 12 PO but, you know, they give us -- so we could see
 13 what the anticipated work would be, they gave us --
 14 they shared the site plans with us, okay? So
 15 that's where the site plan started.

16 And like I said, when we were talking
 17 about -- you know, when we were discussing how is
 18 the bank going to close this gap, you know, I -- I
 19 brought that back up, we reviewed it, I showed him,
 20 you know, how it worked, we had a contract over it
 21 so it wasn't like it was just a piece of paper, an
 22 arbitrary piece of paper, you know, it was backed
 23 by our contract with General Dynamics.

24 And he looked at it and he said, we'll
 25 consider it and, you know, we may not need it and

1 if we do, come back to me but I can't commit to it
 2 today. Well, again, in good faith with everything
 3 else that was going on, you know, I thought that
 4 was a fair position to take, you know, you have to
 5 get approval of it and you get it or you don't get
 6 it and if we don't get it, we have to go get it
 7 somewhere else, that's the way we grow a business.

8 Q. And I just want to understand. I get
 9 that you're telling me Mr. Edahl said he would
 10 consider it.

11 A. Right.

12 Q. So did you ever go back to Mr. Edahl
 13 and ask him to consider it?

14 A. No, I -- no, in around July time frame
 15 Jim -- you know, Jim and I got together and talked
 16 about the spreadsheet, you know, which he'd seen
 17 before. And, you know, I said, Jim, I think we
 18 need to factor this, you know. And he knew the
 19 story, knew the -- you know, knew what it was. I
 20 went back through it again with him to acquaint him
 21 with it again and that's when he said, you know,
 22 let me go back and I'll let you know. So I
 23 reviewed it at that time, you know, can we do the
 24 factoring with these.

25 Q. Did he come back and let you know?

1 A. Yes, he did.

2 Q. Okay. When did he come back to you and
 3 let you know?

4 A. I think it was a few days later and he
 5 said he was going to get with I think Voytko and
 6 Castlen and going to set it up as approved.

7 Q. Did he tell you who had approved it?

8 A. No.

9 Q. Did you get anything in writing from
 10 him documenting this?

11 A. No. No. I mean, our whole
 12 relationship with BB&T is -- in the way it's
 13 structured is you have one person who can make
 14 decisions quickly and it allows, you know, the bank
 15 to be very efficient and they can get -- you know,
 16 these guys can get to the right people to get the
 17 decisions. And, quite frankly, I was a proponent
 18 and I was out there selling the bank when I had
 19 people saying, you know, which bank do you use,
 20 well, you know, BB&T was not bogged down in a lot
 21 of layers of communication, you know, you had one
 22 guy.

23 At one point somewhere through there, I
 24 don't know when, Jim called me and said, hey, I got
 25 my boss here, can you come by and look at the

1 plant. And he came out, nice guy, and, you know,
 2 after we had toured the plant and all that sort of
 3 thing, I said, normally in my career I usually do a
 4 stewardship report. Once a year I'll come to the
 5 corporate bank, we'll do a presentation and tell
 6 you what's going on.

7 And he said, you know, Ron, that's
 8 great. He said, we're very much aware of you guys,
 9 we're excited about you guys but we don't work that
 10 way, you know, Jim can get you everything you need.
 11 And so, I mean, I had full confidence that -- I
 12 believed that Jim without a step would always do
 13 whatever he needed to do to do his job to get these
 14 commitments in place and, you know, it was just a
 15 great relationship.

16 MS. CHERRY: Let's take a break.

17 (A luncheon recess transpired.)

18 (DFT. EXH. 78, Letter dated 9/1/07 to

19 Ron, was marked for identification.)

20 BY MS. CHERRY:

21 Q. Mr. Konersmann, I wanted to ask you
 22 about -- these are some notes from SkyWaves'
 23 production that I've marked as Exhibit 78 and this
 24 document, it's got two dates on it, at the top,
 25 September 1st of '07, and then in the middle,

1 September 17th of '07. Do you see those dates?

2 A. Yes, I do.

3 Q. And in both instances it looks like
4 it's addressed to you -- or Ron. I'm assuming
5 that's you.

6 A. Right. Yes.

7 Q. If you would take a moment -- I read
8 through this and it looks like something that
9 Mr. Voytko perhaps sent to you but I'm not sure.

10 A. Yes.

11 Q. Do you recall these notes?

12 A. I do not.

13 Q. Okay. Let me take them one -- the top
14 that's dated September 1st of '07.

15 A. Right.

16 Q. On or about September 1st of '07 did
17 you have any conversation with Mr. Voytko about his
18 discussion with Castlen, who I believe is Castlen
19 Morris, at BB&T regarding the Verizon payment?

20 A. From time to time -- you know, Voytko
21 and Castlen worked day to day and time to time, you
22 know, if they had conversations, you know, share
23 what the conversations were about if I needed to be
24 involved in it. This looks like that he was
25 telling me some of their conversations around that

1 time.

2 Q. Okay. Do you recall having any
3 discussion with Mr. Voytko about the Verizon
4 payment being sent to the bank?

5 A. No.

6 Q. Do you recall around September 1st of
7 2007 having any conversation with Mr. Voytko about
8 Mr. Morris' statement that this payment issue could
9 be viewed as a violation of the factoring
10 agreement?

11 A. No, I do not recall.

12 Q. Do you recall having any conversations
13 with Mr. Voytko in September of 2007 about any
14 activity by SkyWaves that could be viewed as a
15 violation of the factoring agreement?

16 A. The only -- the only thing, I think we
17 talked about this yesterday, that I remember is the
18 audit, whenever that was, it was in this time
19 period, the auditor put the word default in it.
20 And when I saw that, I asked John about it and he
21 said, well, that was one building and he said that
22 that was not a big deal. And so I also then talked
23 to Jim Edahl about it and he said that the auditor
24 does not know what our -- doesn't understand our
25 agreement and that that doesn't constitute a

1 default from the bank.

2 Q. Let me ask you, in the third paragraph
3 of this first entry from September 1st of '07, it
4 looks like Mr. Voytko is indicating that he held on
5 to the Verizon payment longer than he usually did
6 and there's a reference to six weeks, suggesting
7 that holding on to a check for six weeks is longer
8 than Mr. Voytko usually did. Do you know why
9 Mr. Voytko would be holding on to a check from a
10 SkyWaves customer?

11 A. Well, the way we operate it from start
12 to finish was that -- and been to stay away from
13 this whole concept of the customer due date, we had
14 60 days to pay. As long as the bank was paid
15 inside that 60 days, then, you know, that was fine,
16 there was no follow-up with it, but after 60 days,
17 it went past 60 days, of course then that would --
18 that would fall out of that timeline and then, you
19 know, that would -- that would have to be
20 rectified.

21 Q. Okay.

22 A. So I don't know if that -- holding it
23 six weeks, I don't know if came out of the 60-day
24 period or what.

25 Q. If you look down at September 17th of

1 '07, the second entry on this page, it looks like
2 Mr. Voytko is informing you of another conversation
3 he had with Castlen Morris. Do you see that?

4 A. Yes.

5 Q. He says about sending remittances to
6 the bank for outstanding invoices.

7 A. Are you talking about the second
8 paragraph?

9 Q. Yes, the second. Do you see that?

10 A. Just a second.

11 Q. Okay.

12 A. The next paragraph.

13 Q. Sure. I'm going to move down to the
14 next paragraph so I want to make sure we're looking
15 at the same entry. And Mr. Voytko states, he,
16 meaning Castlen, reiterated that the payments
17 received cannot be held and it could result in a
18 cancellation of the contract. Do you see that?

19 A. I do.

20 Q. Do you remember having any conversation
21 with Mr. Voytko about that cancellation of the
22 contract from holding payments received in
23 September of '07?

24 A. I do not but I do know that as payments
25 would come close to the 60-day period, then there

1 I also felt like in our conversations he was still
2 trying to figure out how we could come up to push
3 the two companies together so that we would have,
4 you know, a bigger presence and because we were
5 pushed together, that would make us more valuable
6 and then we would be able to go out and raise more
7 money, et cetera.

8 Just because we owned the panel machine
9 and could have -- could produce our own panels,
10 there was a cost savings to that but I didn't think
11 it would make any difference in terms of the
12 company owning or not owning the panels that we
13 used. And of course his -- he wanted to get this
14 done because once we started producing six to
15 eight, ten buildings a day, the cash flow would
16 break even around 12, 14 million dollars, would
17 very quickly go away and we'd be profitable and we
18 could go ahead and straighten this out.

19 Q. I was asking you about --

20 A. So that's why we went our own way is
21 what I'm trying to get at.

22 Q. Sure. Okay. When he says own plan, he
23 indicates Deb and I are trying to find investors
24 for your plan anyway.

25 A. Um-hum.

1 Q. So what were investors needed for?

2 A. Well, what he was saying is if I didn't
3 like his options, that they would continue because
4 he was, you know, truly a -- you know, a supporter
5 of SkyWaves that, you know, if he found some other
6 way to make investments, you know, to grow the
7 company, then they were -- even if we went our own
8 way, that they were willing to do that.

9 Q. If you look at the seventh paragraph,
10 there's a reference to SkyWaves soon being three
11 months behind in rent. Do you see that?

12 A. Where is that?

13 Q. Next paragraph.

14 A. I got you, right.

15 Q. And was SkyWaves behind in rent to FXM
16 in November of 2007?

17 A. We were behind in rent, which was okay,
18 and then, you know, when we got to be three months,
19 you know, we talked about it. When we -- when we
20 went into a lease with Franz, he wanted a large
21 security deposit and that security deposit was for
22 400,000 dollars, I believe, which is fairly a large
23 amount of money, you know, that you would put up.
24 But we put that up and in that agreement it said
25 that if we became in arrears with any of our rent

1 or whatever, that he could -- he could deduct that
2 off the 400,000 dollar deposit.

3 And so what we recommended to him, that
4 we would take it as a reduction in our 400,000
5 dollar deposit, which was going to come due the end
6 of '08 with a five-year agreement. So at the end
7 of '08 he was going to give us back 400,000 dollars
8 and, you know, we said, you know, we could handle
9 it that way.

10 Q. And he makes a reference to
11 accumulating approximately 200,000 dollars in
12 receivables. What can you tell me about that? Did
13 SkyWaves owe any money to StructureTech?

14 A. Yes. The agreement was the
15 reduction -- the formula for the reduction of the
16 panels and price and we had, you know, two
17 different sets of numbers, if you will, as to what
18 we owed but we were -- we were, you know, behind on
19 general payment.

20 (DFT. EXH. 84, SkyWaves Corporation
21 Presentation for Jim Edahl & Mike Burke, Branch
22 Banking & Trust Co. 1/17/08, BB&T/JE_002799 to
23 002823, was marked for identification.)

24 BY MS. CHERRY:

25 Q. Let me hand you what we've marked as

1 Exhibit 84, Mr. Konersmann. This appears to be
2 another SkyWaves PowerPoint presentation. This one
3 is dated January 17th of 2008. It says it's for
4 Jim Edahl and Mike Burke at BB&T.

5 A. Yes.

6 Q. Did you prepare this presentation?

7 A. This is a presentation we put together
8 for them.

9 Q. And what was the purpose of this
10 presentation?

11 A. Mike Burke -- Jim called me and said
12 that Mike Burke said they were moving the factoring
13 from North Carolina down to Atlanta and that Mike
14 Burke was going to come in and take over the
15 factoring agreement and he was stopping by, he was
16 in town, and we set up a meeting, January 17th.

17 Q. If you flip over, I don't -- maybe
18 midway -- there's a number in the bottom right-hand
19 corner that says 002809. This slide says 2007
20 volume issue and there's a reference to Jim
21 Phillips on the slide. Bullet Number 2 under Jim
22 Phillips says, slow rolled his efforts to open up
23 regions. What does that mean?

24 A. What we found out after the fact was
25 that -- Jim was responsible for a large part of --

1 Number 1 and dispute that reason?

2 A. Well, I mean, I'm not sure what the
3 paperwork was with the lawyers but, yeah, that was
4 simply not true. And, you know, when I explained
5 how we operated in the meeting with Burke, you
6 know, Burke said he was not happy with our -- you
7 know, not with our account but just not happy that
8 the bank would have this sort of agreement. And
9 Jim Edahl was there and -- but I don't -- I'm
10 sure -- I mean, I'm not sure. I don't know what we
11 responded to at that point. We were -- basically
12 our accounts were pulled almost immediately so we
13 were out of business, you know, right at that time
14 frame, within a week or two, so I don't know what
15 correspondence. I know lawyers were talking.

16 Q. So Paragraph Number 2, were 37 percent
17 of SkyWaves' payables over 60 days due, is that
18 accurate?

19 A. Well, we had already explained to the
20 bank about our payables, that a lot of that -- a
21 significant portion was the payables that we were
22 late technically with Franz Meier and StructureTech
23 but Franz Meier was okay with that. You know, he
24 was working hard, diligent, you know, trying to,
25 you know, not impact the company. If we needed to

1 extend that, you know, he was okay with that. We
2 redid the numbers and as I remember sent an
3 analysis or small analysis out showing that the
4 impact of this -- of the payables were not over 60
5 days when you take out Franz Meier and
6 StructureTech's piece of it.

7 Q. Let me -- let's go back and look at
8 Exhibits 82 and 83.

9 A. Um-hum.

10 Q. Do you have anything in writing from
11 Mr. Meier -- 82 and 83 are what I've seen in
12 November of 2007.

13 A. Right.

14 Q. Do you have anything in writing from
15 him indicating that he was okay with, as you put
16 it, SkyWaves' debt to him and his company?

17 A. Well, he certainly was concerned about
18 it but what we had talked about with him was that
19 he would use that 400,000 dollar security deposit
20 to catch himself up if he wanted to so, sure, you
21 know, he'd rather be paid than not paid. I'm not
22 suggesting that. But, you know, he wasn't taking
23 any action at that time and he had an option of
24 taking it out of the 400,000 dollar security
25 deposit and the security deposit was supposed to be

1 in cash somewhere so it was money that he could
2 pull and use so he could pay himself. And we
3 were -- we had no problem with that.

4 Q. Sure. And so I understand it, it's
5 your testimony that the lease agreement with
6 Mr. Meier's company provided that he could use that
7 400,000 dollar deposit --

8 A. For --

9 Q. -- for rent payments that SkyWaves was
10 in arrears for?

11 A. Or for his panel payments.

12 Q. If I -- and I've got the lease
13 agreement in my office and I'll go get it. If I
14 get it, can you show me in the lease agreement
15 where it says that?

16 A. Probably -- I would have to take some
17 time to do that. What's the year for the lease
18 agreement?

19 Q. When we take a break I'll go get it and
20 you can show me that. Okay. And in Paragraph 3,
21 BB&T determined that the prospects of being paid
22 under the factoring agreement or agreements with
23 SkyWaves is impaired?

24 A. Um-hum.

25 Q. Do you disagree with that statement in

1 Paragraph 3?

2 A. Yes, I do.

3 Q. Tell me why you disagree with that.

4 A. Well, because we were bringing in two
5 or three -- at that time two or three million
6 dollars of work, our purchase orders were going up
7 and that would allow the cash flow to catch up on
8 some of this. You know, we had been waiting and we
9 had been dealing with the cash flow in '07 to get
10 to the -- you know, the position where we were --
11 you know, situated to get these orders. The orders
12 were coming in and so, you know, very quickly the
13 way that works is, you know, that cash would come
14 in and we could, you know, improve those areas.

15 Q. How long was that going to take?

16 A. Well, it would take as long as you --
17 it takes -- it would take you as long as you took
18 the money coming in and took a portion of it to
19 catch up so that was a managerial type decision,
20 you could focus on it, get it caught up quickly or
21 you could focus on it and say we're going to -- you
22 know, we're going to have a schedule, we're going
23 to provide what's due plus 20 percent or 30
24 percent, whatever, and catch it up over a six-month
25 period, et cetera. When we -- after the bank

10

10

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION,

Plaintiff,

vs.

CASE NO. 2009-CP-10-7516

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.

DEPOSITION OF: JOHN VOYTKO

DATE: February 28, 2014

TIME: 8:41 a.m.

LOCATION: Law Offices of
Nexsen Pruet, LLC
205 King Street, Suite 400
Charleston, SC

TAKEN BY: Counsel for the Defendant

REPORTED BY: Ann P. Harris, NCRA Merit Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

Fast, Accurate & Friendly

Charleston, SC	Hilton Head, SC	Myrtle Beach, SC
(843) 722-8414	(843) 785-3263	(843) 839-3376

Columbia, SC	Greenville, SC	Charlotte, NC
(803) 731-5224	(864) 234-7030	(704) 573-3919

1 APPEARANCES OF COUNSEL:
2 ATTORNEYS FOR THE PLAINTIFF
3 SKYWAVES I CORPORATION:

4 GEORGE J. KEFALOS, PA
5 BY: GEORGE J. KEFALOS
6 46-A State Street
7 Charleston, SC 29401
8 (843) 722-6612
9 george@kefaloslaw.com
10 DUFFY & YOUNG, LLC
11 BY: JOHN P. LINTON
12 96 Broad Street
13 Charleston, SC 29401
14 (843) 720-2044
15 jlinton@duffyandyoung.com

16 ATTORNEYS FOR THE DEFENDANT
17 BRANCH BANKING AND TRUST COMPANY:

18 NEXSEN PRUET, LLC
19 BY: MOLLY HUGHES CHERRY
20 205 King Street, Suite 400
21 Charleston, SC 29401
22 (843) 577-9440
23 mcherry@nexsenpruet.com
24 NEXSEN PRUET, LLC
25 BY: JULIO E. MENDOZA, JR.
1230 Main Street, Suite 700
Columbia, SC 29201
(803) 540-2026
jmendoza@nexsenpruet.com

26 ATTORNEYS FOR THE DEFENDANT
27 JAMES ED AHL:

28 CORRIGAN & CHANDLER, LLC
29 BY: J. W. NELSON CHANDLER
30 16 Charlotte Street, Suite B
31 Charleston, SC 29403
32 (843) 577-5430
33 nelson@corriganhandler.com

34 ALSO PRESENT:
35 Ron Konersmann
36 Rusty Bogue
37 Mike Hennessey
38 James Edahl

39 (INDEX AT REAR OF TRANSCRIPT)

1 STIPULATION

2 It is stipulated by and among Counsel
3 that this deposition is being taken in accordance
4 with the South Carolina Rules of Civil Procedure,
5 Rule 30; that all objections as to Notice of this
6 deposition are hereby waived; that all objections
7 except as to form are reserved until the time of
8 trial; and that the deponent waives reading and
9 signing of this deposition.

10 * * * * *

11 JOHN VOYTKO,

12 being first duly sworn, testified as follows:

13 EXAMINATION

14 BY MS. CHERRY:

15 Q. Good morning, Mr. Voytko.

16 A. Good morning.

17 Q. My name is Molly Cherry, and I am here
18 representing BB&T in a lawsuit that SkyWaves has
19 filed against the bank and Jim Edahl. Are you
20 aware that you have been identified as a witness in
21 this case?

22 A. Yes.

23 Q. Okay. And have you ever been deposed
24 before?

25 A. Yes.

1 Q. Approximately how many times?

2 A. Twice.

3 Q. Tell me about those occasions and tell
4 me a little bit about why you were deposed.

5 A. Okay. The first was back in the early
6 2000s, I was with a company, SunCom, and after I
7 left them, also I think at that time a former
8 employee brought a suit against the company
9 claiming that she lost her child as a result of
10 pressures at work and everything, and because I was
11 her supervisor, I was deposed in that case, and it
12 ended up being resolved in favor of the company.

13 Q. Okay. Were you a named defendant in
14 that lawsuit?

15 A. No.

16 And then the second time involved also
17 a former employer who was a local businessman. He
18 sold his company to a Venture Capital firm, and he
19 was asked to hold a million-dollar note. I think
20 this would have been just a note to the company, a
21 loan, if you would, to the company, and then
22 through some legal maneuvering, they tried to avoid
23 having to pay him that loan, and so I was their
24 chief financial officer, and as part of the
25 proceeding. I don't know how it ended. They

1 our customers within the next 30 to, say, 180 days.

2 Q. Okay. But backlog of purchase orders?

3 A. Uh-huh.

4 Q. Okay. So as I understand it, you
5 didn't review any documents that you haven't
6 already produced in this lawsuit?

7 A. That would be correct.

8 Q. Okay. Mr. Konersmann indicated in his
9 deposition that you had his laptop that he used
10 while he was at SkyWaves.

11 A. I do not have his laptop that he used.

12 Q. Did you at any point in time have the
13 laptop that he used while he was at SkyWaves?

14 A. No.

15 Q. Only because I asked him where it was,
16 and he said you had it. Do you have any idea where
17 his laptop is that he used when he was at SkyWaves?

18 A. I do not.

19 Q. Mr. Konersmann also indicated that you
20 had more files than he did at SkyWaves, and I just
21 want to make sure I understand this. I realize
22 that you have produced electronically information
23 that you had, but Mr. Konersmann has produced
24 14 boxes of things from his garage. Do you have
25 hard files, paper copies, cardboard boxes? Do you

1 have hard files of anything pertaining to SkyWaves
2 at home, in your office, anywhere in your
3 possession?

4 A. I do not.

5 Q. Okay. How about electronic files
6 pertaining to SkyWaves that you have not produced
7 to counsel?

8 A. No.

9 Q. Mr. Konersmann also indicated that you
10 were responsible for keeping corporate records for
11 SkyWaves?

12 A. Yes.

13 Q. Where did you keep those when you were
14 with SkyWaves?

15 A. Those would have been in my office at
16 SkyWaves.

17 Q. Hard copies or electronic copies?

18 A. Hard copies.

19 Q. What did you do with those hard copies?

20 A. Those were left behind as we were asked
21 to leave the building.

22 Q. Okay. So you did not take any hard
23 copies of corporate records with you when you left
24 SkyWaves?

25 A. That's right.

1 Q. Did you have backup electronic copies
2 of the hard copies?

3 A. I had backups to my hard drive on my
4 computer.

5 Q. And have you produced those backups in
6 this lawsuit?

7 A. I did not produce the backups, but I
8 produced my hard drive, which was not compromised
9 during the five years.

10 Q. Okay. Did you speak with Earl Hewlette
11 prior to your deposition?

12 A. No.

13 Q. Okay. Did you review his deposition
14 transcript?

15 A. Yes, I did. I am sorry about that.

16 Q. That's okay. Why did you review Earl
17 Hewlette's deposition transcript?

18 A. Because I was not present for it, and
19 Earl was instrumental in trying to help us resolve
20 the situation with the bank in '08.

21 Q. I asked you earlier, I understand
22 Annmarie is your wife; is that correct?

23 A. Yes.

24 Q. What's her maiden name?

25 A. Walton, W-A-L-T-O-N.

1 Q. Have you ever been married to anyone
2 other than Annmarie?

3 A. No.

4 Q. Do you all have any children over the
5 age of 17?

6 A. Yes.

7 Q. Okay. Do they reside in Charleston
8 County?

9 A. Two do, one does not, and I say that
10 because I have a daughter in college at Clemson.
11 So she is officially here but lives elsewhere.

12 Q. Okay. And her last name is Voytko?

13 A. Yes.

14 Q. And then what about the other over the
15 age of 17?

16 A. She lives in New York.

17 Q. And what is her last name?

18 A. Voytko too.

19 Q. Do you or your wife have any family
20 members, other than your children, who live in
21 Charleston County?

22 A. No.

23 Q. Okay. Where did you go to college?

24 A. University of Toledo.

25 Q. And what was your degree in?

1 A. Accounting.
 2 Q. When did you get it?
 3 A. In 1980.
 4 Q. Do you have any other formal education?
 5 A. No.
 6 Q. You hesitated.
 7 A. No, because -- well, I say no, but I
 8 did take and pass the CPA exam, so I prepared for
 9 that, and I have done professional education
 10 courses throughout my career.
 11 Q. Okay. So are you a licensed CPA?
 12 A. I am licensed, but it is inactive.
 13 Q. Okay.
 14 A. In the state of Ohio.
 15 Q. Okay. And just so I understand the
 16 nomenclature, the public records say it is
 17 suspended. Does that mean inactive for purposes --
 18 A. Yes, yes.
 19 Q. Okay. Have you ever had your license
 20 revoked?
 21 A. No.
 22 Q. Okay. Have you ever had it suspended
 23 for any reason other than being inactive?
 24 A. No.
 25 Q. Okay. Were you ever licensed in South

1 Carolina?
 2 A. No.
 3 Q. Were you ever licensed in North
 4 Carolina?
 5 A. No.
 6 Q. As of what date was your license
 7 inactive in Ohio?
 8 A. I don't know.
 9 Q. Okay. Were you a licensed CPA at the
 10 time you were working at SkyWaves?
 11 A. No.
 12 Q. I know you talked a little bit about
 13 SunCom and NBT International, but can you walk me
 14 through generally your employment history prior to
 15 SkyWaves?
 16 A. Do you want me to start at the
 17 beginning?
 18 Q. Sure, and you know what? I have your
 19 LinkedIn profile. I'll hand it to you and just ask
 20 if that is accurate rather than test your memory.
 21 A. The only thing I can add to that is
 22 prior to working with Alltel, I worked for a
 23 department store retail in Cleveland, Ohio, as --
 24 my last position with them was director of internal
 25 audit, and then prior to that, I was an auditor

1 with K-Mart Corporation.
 2 Q. So that would have been between '80 and
 3 '88?
 4 A. Yes.
 5 Q. Okay. Let's just mark this as
 6 Exhibit 3.
 7 (DFT. EXH. 3, MR. VOYTKO'S LINKEDIN
 8 PROFILE, was marked for identification.)
 9 Q. Okay. Let me ask you, Mr. Voytko,
 10 Alltel has you as the area director?
 11 A. Yes.
 12 Q. Tell me why you left Alltel.
 13 A. I left Alltel because they were going
 14 through -- throughout my career with them, they
 15 went through a series of consolidations where
 16 regions were consolidated and accounting operations
 17 were removed to their corporate headquarters in
 18 Little Rock, Arkansas, and a long story short, I
 19 was given three opportunities to move to Little
 20 Rock, and I chose not to move to Little Rock, and I
 21 left them at that time.
 22 Q. Okay. And then I see you were at -- it
 23 says Trident PCS. That is SunCom?
 24 A. Yes.
 25 Q. Where were they located?

1 A. Trident PCS was located in
 2 Pennsylvania, outside of Philadelphia.
 3 Q. And I may be mistaken, but I was
 4 thinking that you had said the SunCom lawsuit where
 5 you testified was was here.
 6 A. Yes, because they had two regions. One
 7 was in Richmond, and the other was here in
 8 Charleston. So I was a regional employee.
 9 Q. Okay. And you were there for a year;
 10 is that correct?
 11 A. A little over a year, yes.
 12 Q. And why did you leave them?
 13 A. They were going through more
 14 consolidation. That was on the horizon, and I did
 15 not want to relocate and to seek additional growth
 16 in my career, so we left. We parted ways.
 17 Q. Okay. Voluntarily?
 18 A. Yes.
 19 Q. Okay. And that didn't have anything to
 20 do with the lawsuit that you told me about?
 21 A. No, no.
 22 Q. Okay. And then you have got MBT
 23 International. Was that your first position as a
 24 CFO?
 25 A. Yes.

1 Q. And why did you leave them?

2 A. There was a -- the company was being
3 positioned to be sold, and the situations leading
4 up to that were that I had experienced a kidney
5 failure in '99, and in 2004 I received a transplant
6 and missed significant time, and in the interim,
7 they hired a person that was to fill in, and that
8 person had more M&A background than I did, so they
9 chose to stay with him. I came back for a short
10 period of time for transition purposes, and then
11 they packaged me out basically.

12 Q. Okay. And where were you with them?

13 A. Here in town. It was in West Ashley.

14 Q. Okay. Were you working for them at the
15 time -- did you leave them to start with SkyWaves,
16 or were you unemployed for a period of time?

17 A. I was unemployed.

18 Q. Okay. And I know we have got SkyWaves
19 next, and I will ask you about that, but let me
20 move to after SkyWaves and ask. It looks like you
21 were the controller at Hargray?

22 A. Yes.

23 Q. Were you based in Charleston, or were
24 you in Beaufort with Hargray?

25 A. They were on Hilton Head Island, and I

1 kept the house here because my one daughter was
2 finishing high school, and I had an apartment
3 there, and I would travel on weekends back.

4 Q. And why did you leave Hargray?

5 A. Because of a reorganization. The
6 company -- at the time I joined them, they were in
7 acquisition mode, and they brought on a lot of
8 really high-talented people to be able to
9 effectively add on more companies, and with the
10 downturn in the economy in '08, that acquisition
11 was -- they exercised their right to pull out of
12 it. And then as everyone is generally aware, the
13 economy was in pretty bad shape after that, so
14 there were no other acquisitions that were -- that
15 could be let's say instituted to help the company
16 grow, so they chose to do it more organically,
17 which is basically growing internally versus
18 acquisitions to grow, so they really didn't need me
19 and/or a few other people that were selectively,
20 you know, released during that time period.

21 Q. Okay. So they released you from their
22 employ?

23 A. Yes, and I had a six-month severance
24 package with them.

25 Q. Okay. And then what did you do between

1 Hargray and B2B?

2 A. Looked for a job.

3 Q. Okay.

4 A. And found it very difficult. It was
5 the first time I ever ran into discrimination, age
6 discrimination, in my opinion, and so my decision
7 was to join B2B CFO. It is a franchise opportunity
8 located in -- they are headquartered out in
9 Phoenix, Arizona, and it is a collection of about
10 200, 225 people like me that have been in corporate
11 the majority of their careers, and my business plan
12 now is to work with small- to medium-size
13 companies, generally speaking up to the 20- to
14 25-million-dollar range, and help them bring a
15 level of expertise to the company that they would
16 not otherwise be able to afford full-time.

17 Q. You referenced age discrimination. How
18 old are you, Mr. Voytko?

19 A. Fifty-six, I think.

20 Q. How old were you when you were CFO of
21 SkyWaves?

22 A. That would have been six years ago, so
23 50. At least 50.

24 Q. Have you ever worked for Football
25 Ventures Corporation?

1 A. I am currently on a retainer with them.
2 That is part of the companies that I am working for
3 under my B2B umbrella business.

4 Q. And how long have you been on retainer
5 with Football Ventures Corporation?

6 A. Since September, I think.

7 Q. Of 2013?

8 A. Yes.

9 Q. Were you affiliated in any way with
10 Football Ventures Corporation prior to that time?

11 A. I did contract work that lasted I think
12 it was about two weeks. It was a one off, and what
13 I mean by that, it was here, read these documents,
14 tell us what they mean, and then when you are
15 through with that, the assignment was over. That
16 is what I mean by one off.

17 Q. Are you aware you're listed on Football
18 Ventures' website as their CFO?

19 A. Yes, I am.

20 Q. And how did you know about Football
21 Ventures Corporation?

22 A. Well, I knew Michael Smith when I was
23 with SkyWaves, and Ron Konersmann is also involved
24 with that venture.

25 Q. Okay. Did Mr. Konersmann have anything

1 to do with your involvement with Football Ventures
2 Corporation?

3 A. Yes.

4 Q. And did you know Mr. Konersmann prior
5 to SkyWaves?

6 A. I did not.

7 Q. Okay. Would you consider Mr.
8 Konersmann a friend of yours?

9 A. I would.

10 Q. What about LV Group, Inc.? What is
11 that?

12 A. That is a small company that a friend
13 of mine from college -- we started back in the mid-
14 '90s, and it was to manufacture and sell automotive
15 parts, and we ran that at a very small level. It
16 has been dormant for approximately ten years, but I
17 keep the company -- I file the taxes, I do what I
18 need to do, so it is in good standing.

19 Q. I'm going to ask you about SkyWaves and
20 your work there, but tell me what SkyWaves
21 Corporation is.

22 A. I am sorry to be flippant, but it is
23 out of business right now.

24 Q. Sure.

25 A. SkyWaves was a company that was formed

1 to produce shelters for the telecommunications
2 industry as well as other companies that would need
3 that type of a structure to house electronic
4 equipment.

5 Q. Okay. Had you ever worked for -- do
6 you have an engineering background?

7 A. I do not.

8 Q. Okay. Do you understand how the
9 shelters were constructed?

10 A. I do.

11 Q. Okay. Did you understand the cost of
12 constructing one of the shelters?

13 A. Yes.

14 Q. How did you come to understand the cost
15 of constructing one of the shelters?

16 A. Our engineer, Jeff Ward, had a detailed
17 byproduct of how much cubic yards of cement, how
18 many pieces of like board that was needed to finish
19 the inside, based on the customer and their
20 specifications, the amount of interior upfit that
21 would be needed. It would be similar to deciding,
22 if you are buying a house, whether you want tile
23 floor or linoleum, things like that.

24 Q. Were you involved in determining the
25 pricing for the shelters that were sold to

1 customers of SkyWaves?

2 A. The pricing, I was aware of those
3 discussions, but it was usually negotiated between
4 Jeff Ward, our sales department, Mr. Konersmann,
5 and the customers.

6 Q. Okay. When did you start working for
7 SkyWaves?

8 A. In February of 2005.

9 Q. And at that point in time, as I
10 understand it, you indicated you were looking for a
11 job; is that correct?

12 A. That's correct.

13 Q. Did you have any other options other
14 than SkyWaves?

15 A. I think I was talking with one other
16 company at the time. It wasn't really that
17 serious, and this was an opportunity that I thought
18 really, because of my telecommunications
19 background, was a very timely opportunity.

20 Q. Okay. And the telecommunications
21 background was the work with Alltel and SunCom?

22 A. Yes.

23 Q. And in what capacity did you start
24 working for SkyWaves?

25 A. The capacity was the same as I finished

1 at, was the person in charge of all of the
2 financial aspects, but I believe the title changed.
3 It might have been a manager to start with and then
4 was changed to CFO as the company began to grow.

5 Q. Okay. Had you ever heard of SkyWaves
6 prior to -- did you apply for a position with
7 SkyWaves? How did you come to learn about the
8 position at SkyWaves?

9 A. I think we saw it posted somewhere, and
10 I contacted Mr. Konersmann, sent him a copy of my
11 resume, and then he asked me to come out to the
12 factory and tour the facility, meet him and other
13 people, and that's how we started.

14 Q. Okay. Prior to that, had you ever
15 heard of SkyWaves?

16 A. No.

17 Q. Okay. When you say "we saw it posted,"
18 what do you mean?

19 A. I was working with a person in the HR
20 placement business at the time. It was when I left
21 MBT, I was given some outplacement services, and it
22 was through that process.

23 Q. Who was that?

24 A. It was a company called -- I think it
25 was like Signet. The woman, she is still in

1 A. I would.

2 Q. You at SkyWaves did that?

3 A. Uh-huh.

4 Q. And in terms of complying with the
5 procedures set forth in this factoring agreement,
6 who at SkyWaves was responsible for that?

7 A. I would have been the primary person.

8 Q. Okay. Who would have been secondary?

9 A. Well, we would have been -- I would
10 think that -- I am referring to Mr. Konersmann, who
11 would be my superior in the company.

12 Q. Okay. Anyone other than you or Mr.
13 Konersmann who was responsible for complying with
14 the terms of this agreement in terms of the
15 procedures set forth in the agreement?

16 A. No.

17 Q. Okay. At the time in 2005, when you
18 were CFO, did you ever look at the factoring
19 agreement?

20 A. I looked at it when it was -- when we
21 reviewed it and signed it.

22 Q. Okay. At the time, in 2005?

23 A. Uh-huh.

24 (DFT. EXH. 9, FINANCIAL COVENANT RIDER,
25 was marked for identification.)

1 Q. I am going to hand you what we have
2 marked as Exhibit 9, Mr. Voytko. Do you recognize
3 this document?

4 A. I recognize it as part of what was
5 reviewed and signed with the original execution of
6 documents in March of '05.

7 Q. Okay. And if you look at paragraph 4
8 on page 3 of this document, do you see where it
9 says Financial Reporting? It looks to me in
10 subparagraph b, within 30 days after the end of
11 each month, SkyWaves is to provide unaudited
12 interim financial statements as of the end of each
13 month. Do you see that?

14 A. Yes.

15 Q. Did you do that?

16 A. With a few exceptions, we provided
17 financials as soon after the month-end as we could.

18 Q. How soon after month-end -- you have
19 been CFO of several companies, correct?

20 A. Uh-huh.

21 Q. And in that position, just generally as
22 CFO, were you responsible for preparing financial
23 statements for the various companies?

24 A. Yes.

25 Q. How soon after month-end would you

1 prepare financial statements?

2 A. That would be -- that would vary
3 greatly by company, depending on your capabilities
4 and systems that support you. I have closed the
5 books in as little as five days, and I have closed
6 the books in as -- consistently as much as
7 six weeks after, depending on the amount of effort
8 that would go into the process.

9 Q. Okay. So would you consider a range
10 between five days and six weeks to be a reasonable
11 time, depending on capabilities and systems, to
12 prepare month-end financial statements?

13 A. I think that is on the short end,
14 meaning quick. I have not been a part of, but I am
15 aware of companies that took longer than that to do
16 them.

17 Q. Okay. And when you say it depends on
18 the capabilities and systems, explain to me what
19 you mean by that.

20 A. Well, there is a lot that goes in to
21 preparing. According to GAAP, you have to not just
22 record the transactions, but you also have to look
23 at things like accruals that you might have to do.
24 Like, for example, if you have expenses that you
25 may not have invoices for, yet they have to be

1 included in that period, so you are matching
2 expenses with revenue. So then you would have to
3 make sure you brought everything together and did
4 it consistently so that the statements would be
5 applicable when compared throughout the months and
6 then ultimately the year.

7 Q. Are expenses -- you mentioned that. Is
8 that the biggest hang-up?

9 A. Expenses would probably be the easiest,
10 but there would be other things that -- but it
11 could involve everything from interest, calculating
12 interest, depending on how you book your revenues,
13 there again, depending on the company, and
14 calculating certain other liabilities. It can take
15 time.

16 Q. Okay. What do you mean depending on
17 how you book your revenues? Explain that.

18 A. Well, what is important, any businesses
19 that you have a revenue recognition policy, and
20 depending on how complex it is, you might render a
21 service today, but you might not record it or
22 report it as revenue -- I should say recognize it
23 as revenue until the following month, and then you
24 have things like progress-type billings that would
25 be handled differently. So it depends on the

1 business, and so I can't get into specifics of
2 every business. It would take forever. But those
3 add complexity depending upon the type of business
4 you are in.

5 Q. How about a product-based business? Is
6 there a revenue recognition complexity inherent
7 with a product-based business?

8 A. There can be if it is part of a larger
9 contract that is maybe paid for all at once but not
10 delivered throughout. So it could. It could be
11 complex.

12 Q. How about a product that the customer
13 doesn't pay for until it is delivered? Anything
14 special about how revenue is booked in that regard?

15 A. Usually it's upon their acceptance and
16 when there is a known and measurable price
17 associated with that.

18 (DFT. EXH. 10, 6/1/05 LETTER FROM
19 W. CASTLEN MORRIS, JR., was marked for
20 identification.)

21 Q. I hand you what has been marked as
22 Exhibit 10, Mr. Voytko, and ask you if you
23 recognize this document.

24 A. Yes, I do recognize it.

25 Q. Okay. And this appears to be a letter

1 there is a reference to you sending a check to
2 Castlen and a copy of the
3 P. Konersmann note, and I wanted to ask you about
4 that. Just let me know when you have finished
5 reviewing it.

6 A. (The witness reviewed the document.)
7 Okay.

8 Q. Okay. And do you recall why you were
9 sending a check to Mr. Morris, what that check was
10 for?

11 A. It looks like it says the invoice for
12 commissions. So I guess in number 2, what it is
13 basically saying is that he is telling me that they
14 got a check in for a thousand dollars, but it was
15 reported incorrectly by their application to cash
16 app department and applied it to our ledger as
17 payment, where it should have gone to pay for -- it
18 looks like he said part of this payment covers the
19 June field exam. So that would have been their
20 quarterly audit that they do. It appears to me the
21 check got mishandled on their side.

22 Q. Okay. So it wasn't for payment on an
23 invoice from SkyWaves?

24 A. No, it does not appear to be.

25 (DFT. EXH. 12, 2/15/06 E-MAIL, was

1 from Castlen Morris to you and Ron Konersmann.
2 Tell me who Castlen Morris is.

3 A. He worked for their factoring group,
4 and he was my primary contact there.

5 Q. When you say there, you mean BB&T?

6 A. BB&T, yes.

7 Q. This references that SkyWaves expects
8 to start factoring invoices in July of 2005. Do
9 you see that?

10 A. Yes, I do.

11 Q. Okay. Did SkyWaves start factoring in
12 2005?

13 A. I don't believe we did. I think it was
14 later that year.

15 Q. Okay. Later in 2005?

16 A. Uh-huh, yes.

17 (DFT. EXH. 11, 7/13/05 E-MAILS, was
18 marked for identification.)

19 Q. I hand you what is marked as
20 Exhibit 11, Mr. Konersmann. This is an e-mail
21 exchange between you and Mr. Morris, whom you have
22 identified as your primary point of contact at BB&T
23 Factors. This is from July of 2005, and I just
24 wanted to ask, at the top of your response -- and
25 by all means take a minute to review this -- but

1 marked for identification.)

2 Q. Okay. I am going to hand you what we
3 have marked as Exhibit 12. This is another e-mail
4 exchange from Mr. Morris to you in February of
5 2006. Now, at this point was BB&T factoring any
6 invoices other than Nextel, that you recall?

7 A. I think we were also doing some AT&T.
8 I am not positive, but I think so.

9 Q. Okay. And this e-mail, and I did not
10 see the attachment to this e-mail, but it
11 references a spreadsheet, and Castlen says he
12 reviewed the spreadsheet that you, meaning you,
13 Mr. Voytko, created.

14 A. Uh-huh.

15 Q. He goes on to say, "It looks to be
16 adequate for our purposes." Do you recall what you
17 were creating a spreadsheet for?

18 A. It was to track the purchase orders and
19 the invoice -- I think at this time it was mainly
20 invoices that were factored so he knew what was on
21 the production schedule and what was coming forth,
22 and ultimately that expanded into tracking the
23 purchase orders initially. This was our initial
24 attempt at tracking all of the activity.

25 Q. Okay. But it was a spreadsheet that

1 you created to do this?

2 A. Yes, uh-huh.

3 Q. Okay. And I notice in the last
4 paragraph of this e-mail, Mr. Morris is indicating
5 to you, "Going forward, make sure that BB&T's
6 notification sticker goes on each invoice to
7 Nextel." Do you see that?

8 A. Uh-huh, yes.

9 Q. "Which instructs Nextel to remit
10 payments to our Charlotte, NC lockbox." Do you see
11 that?

12 A. I see.

13 Q. Did you understand that Mr. Morris was
14 instructing you to put a notification sticker on
15 the invoice directing payment to BB&T's lockbox?

16 A. That's what the memo says, but in
17 the -- when we first entered into the agreement
18 with BB&T, and some of the procedures and
19 requirements, we made clear to them in the
20 beginning that we felt that we could not abide by
21 those. The one was to have Nextel remit all
22 payments to -- or any company to remit the
23 payments, because the way the agreement was set up,
24 we did not factor everything, and so if we were
25 to -- depending on cash-flow needs, if we didn't

1 have to use the factoring agreement, we didn't use
2 it because it's expensive. And let's say, for
3 example, we had shelter I-A shipping immediately,
4 and we knew we would get a quick turnaround on it,
5 and we were not stretched for cash, we would not
6 factor it. We would just send it in. So to do
7 this, you would have -- you would require the
8 vendor to have two separate -- remit two addresses
9 in their system, and at this time they just could
10 not accommodate that. So that was one item that we
11 objected to immediately, and we are really clear on
12 it, and in that case, at the time, Jim's response
13 to us was, you know, don't worry about it, we will
14 work it out as we go along. So that was, say, a
15 concession in terms of the initial agreement that
16 we talked about, that you walked me through the
17 pieces of, that was changed as a matter of course
18 through this whole arrangement.

19 Q. So let's go back and look at the
20 factoring agreement. So as I understand it, you
21 agree with me that SkyWaves was at least originally
22 supposed to instruct its customers for accounts
23 that had been factored to remit payment directly to
24 BB&T?

25 A. That's how the document is written.

1 Q. Okay. So you agree with me there. I
2 understand that you are saying there was an
3 accommodation made, but you agree with me --

4 A. But what I want to make clear is that
5 we objected to the form in the very beginning and
6 were told this is a formality, this is something we
7 need to get -- just get it in place, and we will
8 deal with that later.

9 Q. Okay. Did you ever deal with that in
10 writing later?

11 A. There were a couple of issues that
12 were -- I would use the term memorialized via
13 e-mails and conversations but not in a formal what
14 you would consider an addendum to the agreement.

15 Q. Okay. Do you have any e-mail that
16 specifically states SkyWaves does not have to
17 instruct customers on accounts that have been
18 factored to remit payment to BB&T?

19 A. Those would have been more verbal
20 conversations than agreements.

21 Q. So is your answer to my question no,
22 you do not have an e-mail expressly stating that?

23 A. That would be correct.

24 Q. Do you have anything in writing
25 expressly stating that SkyWaves does not have to

1 instruct customers who on accounts that have been
2 factored must remit payment directly to BB&T?

3 A. What I do have is when we agreed on --
4 I am sure you have the e-mails, but there were
5 attempts on Castlen's and my part to come up with
6 wording that would identify an invoice as being
7 factored but was something less than, or different
8 from what was stated in this agreement.

9 Q. And as I understand it, you said, "We
10 made clear we could not abide by the requirement to
11 notify customers to remit payment to BB&T"?

12 A. Yes.

13 Q. Tell me who "we" is.

14 A. It would have been Ron and myself.

15 Q. Okay. And tell me to whom you made
16 that clear.

17 A. To Jim Edahl.

18 Q. Anyone other than Jim?

19 A. To Castlen and to Steve May. He would
20 have been -- I think he had like a lead role in the
21 factoring, or maybe it was a regional guy out of
22 Charlotte.

23 Q. And as I understand it, the explanation
24 that you gave me for SkyWaves not abiding by that
25 requirement was that they, meaning SkyWaves'

1 customers, could not accommodate two addresses for
2 remitting payment in their systems?

3 A. As I understood, talking with them,
4 yes. I couldn't speak to that authoritatively
5 because I am not an employee of those companies,
6 and the other part to that was just the confusion
7 that it would create because it is not like I am
8 sending an invoice to you. You are like one
9 location. For example, all of these companies
10 are -- they're nationwide, and they have regional
11 operations. So depending on what their systems
12 were, even though you send it to one location
13 through their systems, they would be approved by
14 different areas, and you would have many people
15 involved with it.

16 Q. Okay. Well, you say understand in
17 talking with them. Tell me -- at this point, as I
18 understand it, you have told me the only customers
19 at issue were Nextel and you said you thought
20 Alltel?

21 A. ATT.

22 Q. ATT.

23 A. Or Cingular at the time. Their
24 wireless division, I think it started as Cingular,
25 went to AT&T and went back to Cingular, but it was

1 through their different reorgs.

2 Q. Tell me who -- you don't necessarily
3 have to give me a name, just give me a title --
4 tell me who at Nextel you talked with about whether
5 they could accommodate in their system two
6 different addresses for payment depending on
7 whether the invoice had been factored.

8 A. It most likely would have been an AP
9 person, accounts payable person.

10 Q. Okay. And how about at Cingular ATT?

11 A. It probably would either have been an
12 AP person -- usually the people we dealt with that
13 ordered the shelters, they didn't have any -- they
14 didn't have any control over what the finance side
15 did.

16 Q. Okay. In your career as a CFO, or in
17 any position -- it looks like you have had a number
18 of financial positions in different companies --
19 were you ever responsible for accounts payable?

20 A. Yes.

21 Q. Okay. And when you in that position
22 would pay an invoice, would you look on the invoice
23 to determine who you were supposed to pay?

24 A. The standard practice is when you set
25 up a new vendor, first of all, the vendor should be

1 approved so you know you are not paying Molly's
2 sister for something but you are paying the right
3 person for it, and then they are set up in the
4 system as -- there could easily be the same remit
5 to as the company's address, or the company's
6 address could be region northeast, but the remit to
7 would be their corporate headquarters or processing
8 center somewhere else. So, generally speaking, you
9 would have an address for a company and one remit
10 to address.

11 Q. Is it hard to look at an invoice to
12 determine where payment is to be made?

13 A. When you are a company processing
14 thousands a day with people that are just
15 instructed to enter the invoice in, then, yes, it
16 would be.

17 Q. Did SkyWaves issue thousands of
18 invoices a day?

19 A. We did not.

20 Q. So if a customer of SkyWaves remitted
21 payment directly to SkyWaves on an account that had
22 been factored, who owned that money? Who did that
23 money belong to on a factored account?

24 A. Ultimately the bank would have loaned
25 us money and ultimately would have been paid back.

1 Q. Okay. That is not my question,
2 Mr. Voytko. Who owned it? Who owned that account
3 receivable on a factored account?

4 A. BB&T would have.

5 Q. Okay. So if a customer paid SkyWaves
6 on an account owned by BB&T, what was SkyWaves
7 required to do with that money?

8 A. Okay. As you know, there was a gap
9 between March 20th of 2005, when we first started
10 using the factoring agreement, or using the
11 factoring line of credit. Part of that was because
12 of the cost, part of it was because we did not need
13 to factor it because we had adequate cash flow, and
14 in some of these correspondence, there was some
15 disappointment on BB&T's side that we did not use
16 it more frequently and with more vendors, so as we
17 started to use it, one of the things that -- an
18 agreement that we worked out with Mr. Edahl was
19 that as the money came in, we would remit it to the
20 bank, but if there was -- but the ultimate
21 agreement was, as long as it was received within
22 60 days of the customer due date, everything would
23 be fine.

24 Q. Okay. And tell me with whom this
25 agreement that you have just described, with whom

1 A. Okay.
 2 Q. He asks about getting Cingular and
 3 Nextel to electronically remit payments to BB&T.
 4 Do you see that?
 5 A. Yes.
 6 Q. Did you make any effort to determine
 7 whether Cingular and Nextel could electronically
 8 remit payments directly to BB&T?
 9 A. I did.
 10 Q. And what were the results of those
 11 efforts?
 12 A. As I recall, we were able to get AT&T
 13 to do so after a lot of work. I don't recall
 14 whether Nextel was able to accommodate that.
 15 Q. Okay. So AT&T ultimately didn't have
 16 any problem with distinguishing between a factored
 17 or nonfactored invoice in electronically remitting
 18 payments to BB&T?
 19 A. Well, this obviously was much later in
 20 the process, and I don't know when exactly I was
 21 able to get that set up, but systems were evolving
 22 at this time that made it in some cases easier to
 23 accommodate.
 24 Q. Okay. And we see on this e-mail again
 25 Mr. Morris is asking about affixing BB&T's payment

1 notification language on invoices. Do you see
 2 that?
 3 A. Yes.
 4 Q. Did you respond to his inquiry about
 5 whether the original invoices contained the
 6 notification?
 7 A. As I recall, I don't remember the exact
 8 time, but what we did do is, we agreed to, instead
 9 of affixing the stamp on it, was to put that in the
 10 body of the invoice, some language to the effect
 11 that it was a factored invoice.
 12 Q. Okay. Well, he is not asking to notify
 13 that it was a factored invoice. He is asking
 14 whether it contains payment notification.
 15 A. I would have to look at the copy of the
 16 invoice. We did not use the label, as a direct
 17 answer to your question, but we did agree to some
 18 language on the invoice that he was -- he agreed to
 19 and had accepted it.
 20 Q. Okay. And when you say label, as I
 21 understand it, is this just a sticker that SkyWaves
 22 could put on factored invoices?
 23 A. Uh-huh, yes.
 24 Q. So it wasn't an automatic invoice form?
 25 So if it was a factored invoice, you would just put

1 BB&T's payment sticker on it?
 2 A. We could, but in terms of -- you are
 3 getting back to this, you know, address and being
 4 able to remit, and I know it is hard to accept that
 5 in a payment processing, invoice processing
 6 scenario, where you have lots of high volume,
 7 people just are process and proactive driven. They
 8 are not looking at each invoice for intricacies
 9 which might require special handling.
 10 Q. Sure. And I guess that sort of begs
 11 the question then, if the customer is going to
 12 ignore the instruction, what's the problem with
 13 putting the sticker on the invoice?
 14 A. The confusion it would create, which
 15 would delay getting payment.
 16 Q. Well, if the customer is ignoring it,
 17 what confusion is that going to create?
 18 A. I can't control that. I don't know
 19 what may happen to it if I send it that way.
 20 Q. Did you ever have a customer say, "This
 21 is confusing to us, don't stick these stickers on
 22 the invoice telling me to pay BB&T"?
 23 A. Well, considering we didn't use the
 24 stickers, that probably didn't happen.
 25 Q. So as I understand it, you didn't want

1 to put the stickers on the invoices because of
 2 confusion to the customer in terms of to whom
 3 payment should be made?
 4 A. Yes.
 5 Q. Okay. Well, if that was the concern
 6 and the reason for not putting the sticker on the
 7 factored invoice, why did SkyWaves then need
 8 60 days to turn around and remit this payment that
 9 belonged to BB&T?
 10 A. Because as part of the agreement that
 11 we had with Mr. Edahl was that it allowed us to
 12 better -- or I'll use the term smooth out our
 13 cash-flow needs so that what we tried to always do
 14 was balance between cash needs and costs because
 15 with factoring came a very high cost of money, and
 16 when we had -- which is why you see a variance
 17 between the number of days that the invoice may
 18 have been held, and we used the funds for operating
 19 purposes. First of all, there was no restriction
 20 on how the funds could be used, and secondly, that
 21 in managing overall cash-flow needs of the company,
 22 we -- I would look at what our needs were and then
 23 act accordingly in terms of trying to minimize the
 24 cost of financing for the company without running
 25 into huge spikes up and down in terms of our needs

1 and availability.

2 Q. So you were using BB&T's money twice?

3 A. I don't think I would say twice. It
4 was just the first time. But I might just add to
5 that, that all during that time, the company, BB&T,
6 was earning interest on the money that we paid up
7 until the very end.

8 Q. It was their money to begin with,
9 right?

10 A. It was loaned to us, yes, and we paid
11 for the right -- for the use of those funds.

12 Q. Well, and I am trying to -- you keep
13 using the word "loan," and I just want to go back
14 to, as I understand it, BB&T was purchasing
15 something. They were purchasing SkyWaves' accounts
16 receivable, correct?

17 A. Yes, but we were paying for that money.
18 Even though you say they purchased it, it didn't
19 absolve us of paying interest on those funds while
20 they were being deployed by the bank.

21 Q. Sure, but if you had given the money to
22 the bank, they could have earned their interest on
23 it some other way. I mean, you are acting like --
24 never mind.

25 (DFT. EXH. 15, OCTOBER 2006 E-MAILS,

1 was marked for identification.)

2 Q. I am going to hand you what I marked as
3 Exhibit 15. This is another e-mail exchange
4 between you and Mr. Morris. And this appears to be
5 a communication -- if we look at the front page,
6 down at the bottom -- let's start with Mr. Morris's
7 communication to you, and this is in October of
8 2006 regarding -- subject line: Cingular payment.
9 Do you see that?

10 A. I do.

11 Q. Okay. And he references receiving
12 payment on October 10th, to be applied to one
13 invoice. Do you see that?

14 A. Yes.

15 Q. And then he asks you specifically,
16 "What information do you have on the following
17 Cingular invoices that are past due?" Do you see
18 that?

19 A. Yes.

20 Q. And it looks like he is giving due
21 dates for five different Cingular invoices.

22 A. Uh-huh. Yes.

23 Q. And then up at the top, you make
24 reference to having received one and then asking
25 about sending payment to you. Do you see your

1 response?

2 A. Yes.

3 Q. Okay. And from this exchange, is there
4 any discussion or any question about who owns the
5 accounts for these invoices?

6 A. There doesn't appear to be any
7 discussion regarding ownership, that I see, unless
8 I am missing something. Help me out.

9 Q. Sure. You don't disagree -- well, do
10 you agree with me that the amounts due on these
11 invoices belong to BB&T?

12 A. I really don't understand your
13 question.

14 Q. Okay. Castlen Morris is communicating
15 directly with you in October of 2006 asking where
16 the payment on these invoices is, isn't he?

17 A. Yes.

18 Q. Does he in here anywhere say you can
19 use this money for 60 days, but I need you to pay
20 it back to me?

21 A. Well, you know, first of all, when you
22 look at this, you are talking about invoices that
23 are well past 60 days, okay? Which, number one,
24 means I have already paid him back for the money on
25 these. If the amounts factored are not repaid

1 within 60 days of the due date, the company, being
2 SkyWaves, paid the money back to BB&T out of our
3 other operating funds. So any of these that are
4 five and six, probably even seven, by October 12ish
5 would have probably been more than 60 days past
6 due, so I would have already repurchased these from
7 him using other funds.

8 Q. Okay. Well, with that thought, let's
9 look at number 1714.

10 A. Yes.

11 Q. So he is asking about invoice number
12 1714 due on May 28th of '06.

13 A. Okay.

14 Q. And so by your explanation that you
15 have just given, as of July 28th, or thereabouts,
16 of '06, that one would have been 60 days past due,
17 correct?

18 A. Uh-huh. Yes.

19 Q. And you are telling me that SkyWaves
20 would have paid from its operating account, would
21 have paid money to BB&T such that nothing was due
22 anymore on that invoice?

23 A. Yes.

24 Q. Okay.

25 A. And by operating account, I mean the

1 same account that all of the BB&T money rotated.
2 We only had one account.

3 Q. Okay. So by that, I take it to mean
4 you did not segregate and have a separate account
5 for factored invoices?

6 A. That is correct.

7 Q. So you commingled all money that came
8 in?

9 A. Yes.

10 Q. Okay. Now, if you --

11 A. And to add to the process here, the
12 reason he wanted that money to come back to him was
13 just so he could close it out in the system and
14 show that there wasn't a write-off, which
15 ultimately if you were to analyze the history -- in
16 fact, I think if we wrote off \$10,000 in
17 three years, that was a lot. I mean, we got paid
18 for everything, and we remitted what we were
19 required to remit to the bank.

20 Q. Okay. Do you have anything in writing
21 with Castlen that says -- well, let me just use
22 this as an example. Your response to Castlen, why
23 didn't you remind him that you had already paid off
24 1714 because it was more than 60 days due?

25 A. It wasn't necessary because -- it just

1 wasn't germane to this conversation right here. I
2 mean, I am basically -- according to the way that
3 the procedure was set up, and since I already paid
4 him back, I didn't have to remit that, but he
5 wanted to do it just to complete the cycle, and I
6 acquiesced to that.

7 (A recess transpired.)

8 BY MS. CHERRY:

9 Q. Mr. Voytko, I was asking you about what
10 we have marked as Exhibit 15, and I want to make
11 sure I understand. I think you said, with regard
12 to -- I was asking about invoice number 1714.

13 A. Yes.

14 Q. And you had indicated it was already
15 60 days past due, and you had already paid it off.

16 A. Yes.

17 Q. Out of operating -- SkyWaves' operating
18 account; is that correct?

19 A. Yes.

20 Q. How did you track whether a particular
21 invoice had been paid to BB&T?

22 A. Well, when we made the assignment to
23 BB&T, there would be -- they maintained -- they
24 being the bank -- maintained like an accounts
25 receivable ledger, so that was one way that it was

1 tracked. And that was the primary way I think we
2 did it sometime from -- 2006 is probably about
3 right. From there, we had -- they put in their
4 system and you could see an aging report and
5 everything. That is where you had visibility about
6 customer, by each individual invoice.

7 Q. So then, and again based on what you
8 were explaining, that would mean invoice number
9 1705 that is indicated is also due on May 28th,
10 '06. Do you see that?

11 A. Yes.

12 Q. So is it your testimony that SkyWaves
13 as of October of 2006 would have paid on that
14 invoice as well?

15 A. Yes.

16 Q. And then also 1735-1 as well, correct?

17 A. Yes.

18 Q. And also on 1750-1, correct?

19 A. Yes.

20 Q. So then, what did you understand
21 Castlen and Morris's inquiry to be about these
22 invoices if, as you have testified, these have
23 already been paid?

24 A. He was wanting to clear those out on
25 his ledger. So what would happen is, he would --

1 if let's say when they went over the 60 days, he
2 would just debit my account. So I would not -- so
3 that is how it would be cleared off, and then it
4 would get a status in their system that said
5 something like -- and I guess I am surmising this
6 because through our conversations of how I
7 understood it to be, it would kind of designate
8 that invoice as something the client purchased
9 back. So what he wanted to do was get those
10 payments so that it could then be applied to the
11 invoice and appear as it in fact was paid by the
12 client, by our client, our customer, and if I was
13 on his side of the shop, I would view that as, you
14 know, you are tracking your customer history of
15 their paying their invoices, whether or not they
16 are paying or not.

17 (DFT. EXH. 16, 10/24/06 E-MAIL, was
18 marked for identification.)

19 Q. I hand you what we have marked as
20 Exhibit 16, Mr. Voytko, and this appears to be --
21 and this is an e-mail from you to Jim Edahl dated
22 October 24th, 2006.

23 A. Yes.

24 Q. And it references monthly balance
25 sheets and cash-flow statements that were

1 A. I agree with you, yes, there was a
2 limit, and that limit was exceeded in 2006.
3 (DFT. EXH. 18, 11/13/06 E-MAIL, was
4 marked for identification.)

5 Q. I am going to hand you what we have
6 marked as Exhibit 18, Mr. Voytko. This is an
7 e-mail from Castlen Morris to you, dated
8 November 13th, 2006. Do you see this?

9 A. Yes, I see it.

10 Q. And he makes reference to the remaining
11 Cingular invoices. Do you see that?

12 A. Yes.

13 Q. As 60 days past due, and says "which
14 means they are ineligible for borrowing."

15 A. Yes.

16 Q. What does that mean?

17 A. That means that -- this is in reference
18 to what I referred to before as buying back the
19 invoices. So they have exceeded the 60 days, and
20 now the bank would no longer borrow money -- I am
21 sorry, loan us money against those, so in order to
22 bring it back into formula, he would debit my
23 account -- credit my account for \$80,000, and he
24 would take that 80,000 and apply it to the invoices
25 in his system.

1 Q. Okay. What happens if SkyWaves doesn't
2 have \$80,000?

3 A. Well, in this situation we had \$80,000,
4 so I can't speculate on what would happen if we
5 didn't at that time.

6 Q. My question is not limiting it to that
7 point in time. What would happen if under the
8 scenario you have described, SkyWaves owed the bank
9 \$80,000 and had not paid it or didn't have the
10 money to pay it?

11 A. Okay, if that were to have happened,
12 then I would expect that we would have a
13 conversation about how and when that would be then
14 made up.

15 Q. Mr. Morris is also asking you on
16 November 13th of 2006 -- now, this is two or
17 three weeks after your October e-mail to Jim with
18 monthly balance sheets and cash-flow statements.
19 Several weeks later, Castlen Morris is asking any
20 update on the August, September, and now October
21 financials. Do you see that?

22 A. Yes.

23 Q. Okay. Did you have in November of 2006
24 the August, September, and October financials,
25 actual financials, for SkyWaves?

1 A. Well, I would not have had October's
2 because it is only two weeks after, not even
3 two weeks, and I would have responded to him with
4 an update telling him, and I can't remember what I
5 would have responded to him at that time.

6 (DFT. EXH. 19, 11/19/06 E-MAIL, was
7 marked for identification.)

8 Q. I am handing you what we have marked as
9 Exhibit 19, which I believe is your response to
10 Mr. Morris and Jim Edahl. On November 19th of 2006
11 you are sending what you have called August 2006
12 financials. Do you see that?

13 A. I see that, uh-huh.

14 Q. Now, when we look at the attachment,
15 the only attachment to this e-mail is aging A/R
16 detail as of August 31 of 2006.

17 A. Yes.

18 Q. Okay. Did you have August 2006 balance
19 sheets for SkyWaves as of November 19th of 2006?

20 A. Well, if I would have sent him this and
21 in this attachment financial package would have
22 been included -- would have been the income
23 statement, balance sheet, cash flow, and this
24 aging, because my attachment says package, then
25 yes, I would say that based on what you have shown

1 me here, that I would have had those to send to him
2 because I am also copying Ron and Jim Edahl as
3 well.

4 Q. Great. And, Mr. Voytko, this came out
5 of your document production, and this is what was
6 attached to the back of it, and so --

7 A. Okay, let me try to fill maybe that
8 gap. When I put together the spreadsheet, you can
9 put numerous tabs, and when this was printed out, I
10 don't know who printed it out and maybe they only
11 printed out one tab, so there could have been three
12 other tabs within the file that would have had the
13 information you wanted or that you are looking for.

14 Q. Sure. Where is September's? Mr.
15 Morris has asked about September and October, and
16 I realize you are telling me that as of
17 November 19th, you wouldn't have had October's, but
18 as I understand it, you likely would have had
19 September's, given your six-week window?

20 A. Yeah, that should have followed fairly
21 closely.

22 Q. I have your electronic files in the
23 office. When I take a break, I'll look and see --

24 A. I hope it is there.

25 Q. I don't think it is, but I'll look.

1 Maybe it is.

2 MR. KEFALOS: What were we looking for?
3 I've found it here.

4 MS. CHERRY: Sure. Does it have the
5 balance sheet and income statement --

6 MR. KEFALOS: Balance sheet, income
7 statement, cash-flow statement, AP aging --

8 MS. CHERRY: For August of '06?

9 MR. KEFALOS: Yes, August of '06, and
10 A/R aging for August of '06.

11 MR. MENDOZA: For the transcript, we
12 may want to note that Mr. Kefalos is looking at his
13 computer.

14 MR. KEFALOS: Off the record.

15 (Off-the-record conference.)

16 (DFT. EXH. 20, 1/11/07 E-MAIL, was
17 marked for identification.)

18 Q. Mr. Voytko, I am going to hand you what
19 we have marked as Exhibit Number 20. This is an
20 e-mail from Mr. Morris to you in January of '07,
21 and he is attaching an updated purchase order
22 spread, and I want to ask you if you will flip to
23 this attachment, is this the spreadsheet to monitor
24 purchase orders and purchase order fundings?

25 A. Yes.

1 Q. So was this the format of the document
2 that you and Mr. Morris were using in terms of
3 monitoring, if you will, when a purchase order was
4 submitted for financing?

5 A. Yes.

6 Q. And then he asks -- that he was trying
7 to follow how long a purchase order stays funded.

8 A. Yes.

9 Q. Do you have an idea of how long, in
10 terms of amount of time, it would take for a
11 purchase order to convert to an invoice?

12 A. It varied depending on the vendor and
13 the activity. It was not uncommon that a PO that
14 we might have gotten and factored let's just say in
15 July, that the customer may have had an issue with
16 the site or something else that they didn't call
17 for that particular shelter, but they went and
18 built a whole bunch more, and then what we might
19 get is another purchase order that said cancel this
20 one, replace it with this one, and then we want to
21 ship this one immediately. So then that would
22 bring this one up and ship out right away. So, I
23 mean, I have seen them on the list for six months,
24 maybe more, and then in some cases they would turn
25 within 30 days, or some, if it was a real rush,

1 they might take one that they had requested earlier
2 and just have it shipped out right away. So it
3 varied.

4 Q. So did SkyWaves have any purchase
5 orders that didn't convert to an invoice either
6 vis-a-vis a new purchase order from the same
7 customer? Just purchase orders that never resulted
8 in an invoice?

9 A. If there was, it was a very small
10 number, and by small, I mean less than five. It
11 was almost certain -- I am not going to say a
12 hundred percent, because you might find one that I
13 missed on, but they generally replaced them. If
14 they weren't going to use them, they replaced them
15 with something else.

16 Q. How did you track -- as I understand
17 it, a purchase order would be funded at a certain
18 rate?

19 A. Uh-huh.

20 Q. And then once it converted to an
21 invoice, there was additional percentage of
22 financing available?

23 A. Yes.

24 Q. Okay. So how did you track when a
25 purchase order converted to an invoice?

1 A. Well, when it did, there were two
2 ledgers set up at this time. There was ledgers
3 7702, and then I think the other one was maybe
4 7700. So what Castlen would do is he would take
5 the money from this ledger, and he would say like
6 paid off 1/12/2007. So what he is basically doing
7 is removing this money -- and you can see the zeros
8 there -- so he took this 24,665, I am thinking
9 because it's in the row of similar-type shelters,
10 and then he would move that over to the invoice
11 ledger and add on the 15 percent -- the additional
12 increase, whatever it was. In '07, latter '07, it
13 was an additional 20 percent, I think. So then
14 that money would reside over here until it was paid
15 off.

16 Q. Okay. So how would -- so invoice
17 number under Nextel, looking at the first one,
18 purchase order 429076, when an invoice was issued
19 for that purchase order, would the purchase order
20 number show up on the invoice?

21 A. Yes.

22 Q. Okay. I am trying to figure out how to
23 match the two of them up.

24 A. Uh-huh.

25 Q. So did SkyWaves have any monitoring

1 Q. And then in paragraph 3, he references
2 electronic payment remittances for invoices. Do
3 you see that?

4 A. I do.

5 Q. And he is asking when you expect to
6 have Nextel, Verizon, and General Dynamics
7 remitting electronically. Did you have discussions
8 with Mr. Morris about those three customers of
9 SkyWaves remitting payments electronically?

10 A. Yes, I did.

11 Q. Okay. What were those discussions with
12 Mr. Morris about?

13 A. Well, with respect to General Dynamics,
14 I think we were successful with getting those to
15 remit to him electronically. Verizon, we never
16 did, and Nextel -- Nextel, I can't -- I don't think
17 we did any Nextel. I can't recall that.

18 (DFT. EXH. 26, 2/20/07 E-MAIL, was
19 marked for identification.)

20 Q. I hand you what we have marked as
21 Exhibit 26, Mr. Voytko, and this is an e-mail from
22 you to Mr. Morris on February 20th of 2007, and you
23 are asking Mr. Morris to "please advance as much as
24 you can today given our limit." Do you see that?

25 A. I do.

1 Q. So in that regard you understood that
2 there were limits to what Mr. Morris may be able to
3 advance, correct?

4 A. Yes.

5 Q. Okay. And I just want to ask, if you
6 flip to the second page of this exhibit, it's the
7 first page of the attachment, and it is captioned
8 Assignment of Accounts Receivable. Do you see
9 that?

10 A. I do.

11 Q. Is that your signature on this
12 document?

13 A. Yes.

14 Q. So was this how it worked, you would
15 get assigned accounts to BB&T?

16 A. Yes.

17 Q. And then the advances would come
18 through?

19 A. Yes, the remaining advance.

20 Q. Okay. And when you say remaining
21 advance, that is based on the difference between
22 what had already been advanced under the purchase
23 order and what the advance rate was for the
24 invoice?

25 A. Yes.

1 (DFT. EXH. 27, 3/20/07 E-MAIL, was
2 marked for identification.)

3 Q. Mr. Voytko, I am going to hand you what
4 we have marked as Exhibit Number 27, and this is an
5 e-mail from Castlen Morris to you dated March 20th
6 of 2007, and he is sending you an attachment which
7 is an amendment to the factoring agreement, the
8 March 22nd, 2005, factoring agreement.

9 A. Yes.

10 Q. And it looks like he is asking you to
11 have Ron Konersmann sign it and return it to him.
12 Do you see that?

13 A. Yes.

14 Q. And in this attachment, it looks like
15 it is increasing the maximum credit amount?

16 A. Yes.

17 Q. From that two one fifty to three
18 million five. Do you see that?

19 A. I do.

20 Q. Okay. And it looks like it's changing
21 the factoring commission from a percentage to just
22 a flat dollar amount?

23 A. Yes.

24 Q. And then as I see it, the advance
25 percentage on invoices is increasing to 85 percent;

1 is that correct?

2 A. That's correct.

3 Q. Okay. Now, in this cover e-mail from
4 Castlen, it looks like he is saying he is not
5 including the purchase order sub-limit or the
6 purchase order advance rate as part of this
7 document. Then it goes on to say he was
8 comfortable letting Jim Edahl's proposal letter of
9 March 2nd of '07 function in that capacity. Do you
10 see that?

11 A. I see that.

12 Q. Did you understand that there was a
13 sub-limit to purchase order financing?

14 A. Yes.

15 (DFT. EXH. 28, 3/2/07 LETTER, was
16 marked for identification.)

17 Q. I am going to hand you what we have
18 marked as Exhibit 28, Mr. Voytko, and ask you if
19 this is the March 2, 2007, letter to you from Jim
20 that Mr. Morris is referencing in his e-mail?

21 MR. KEFALOS: What's the date of that?

22 A. March 2nd. It appears to be, yes.

23 Q. Okay. And then Exhibit 28, Mr. Edahl
24 has indicated a two-million-dollar sub-limit for
25 purchase order financing. Do you see that?

1 A. I do.

2 (DFT. EXH. 29, 3/14/07 LETTER, was
3 marked for identification.)

4 Q. I am going to hand you what we have
5 marked as Exhibit 29, Mr. Voytko, and this is a
6 March 14th, 2007, letter from Mr. Edahl to you, and
7 it looks like this is increasing the advance rate
8 on purchase orders from 60 percent to 65 percent.
9 Do you see that?

10 A. I do.

11 Q. Okay. So at this point in time, on
12 March 20th of 2007, as I understand it, the advance
13 rate on invoices is 85 percent, and the advance
14 rate on purchase orders is 65 percent?

15 A. Correct.

16 Q. And the overall limit is 3.5 million,
17 with a sub-limit of two million for purchase order
18 financing?

19 A. Yes.

20 (DFT. EXH. 30, 3/20/07 E-MAIL, was
21 marked for identification.)

22 Q. I am going to hand you what we have
23 marked as Exhibit 30, and that looks to be your
24 response to Mr. Morris on March 20th of '07,
25 returning the signed amendment to the factoring

1 him?

2 A. This was our -- the equipment that we
3 needed to ramp up for production that we were
4 expecting to come starting in late '07 and 2008 and
5 beyond, and we had also approached Jim about
6 separate equipment loans so that it would not
7 restrict and use up the factoring line, which --
8 since this was specific, and I believe that he did
9 get approval for an equipment line, of which we
10 only used a portion of.

11 Q. Okay. This pricing, where do those
12 numbers come from?

13 A. They would have come from
14 manufacturers, suppliers.

15 Q. So you would have been looking at
16 either based on conversations you had with them or
17 estimates that they sent to you in order to fill in
18 the pricing numbers?

19 A. Right. What would have happened is,
20 since, as I said before, I am not the engineer, but
21 Ron in working with the engineers and the company
22 would determine what a concrete pump system would
23 be worth, and they would contact the vendors,
24 decide what we wanted, and then that would be the
25 price that I would use.

1 agreement; is that correct?

2 A. Yes.

3 Q. I want to ask you if you will go back
4 and look at the March 2nd of '07 letter that
5 Mr. Edahl sent to you. It is Exhibit 28. At the
6 penultimate paragraph in that letter that starts
7 with, "Assuming SkyWaves' 2007 budget," do you see
8 that?

9 A. I see that.

10 Q. Was SkyWaves' 2007 budget that was
11 previously submitted to BB&T achieved?

12 A. It was not.

13 Q. Did you ever submit 2007 year-end
14 financials to BB&T?

15 A. I did.

16 Q. Okay. When did you do that?

17 A. It would have been mid-January of '08.

18 (DFT. EXH. 31, 3/23/07 E-MAIL, was
19 marked for identification.)

20 Q. I hand you what we have marked as
21 Exhibit 31, Mr. Voytko. This is an e-mail from you
22 to Jim Edahl on March 23rd of 2007, enclosing a
23 Capital Projects listing. And it mentions that you
24 discussed it with Mr. Edahl. What is this Capital
25 Projects listing? Why were you sending this to

1 (DFT. EXH. 32, 3/27/07 E-MAIL, was
2 marked for identification.)

3 Q. I hand you what we have marked as
4 Exhibit 32, Mr. Voytko. This is another e-mail
5 from Castlen Morris to you. This one is dated
6 March 27th of 2007. He is asking about a General
7 Dynamics invoice.

8 A. Yes.

9 Q. And he makes a reference, "I am not
10 aware that their contract allows for any 'bill and
11 hold' invoicing." What does that mean?

12 A. Okay. Well, a couple of our vendors
13 would -- they would give us the purchase order, we
14 would build the shelter, and then they would say,
15 "We don't need it for another couple of months, but
16 we are willing to pay you now for it, so if you
17 invoice me, I will pay it without having it shipped
18 to my location." And that's what bill and hold
19 means. It would be less expensive for them to pay
20 for it and not to have to pay for storage somewhere
21 else but remain at our plant, and then when they
22 were ready for it, a truck would come, and away it
23 goes.

24 Q. Then if you look in the second
25 paragraph, he makes reference again, "BB&T's full 997

1 it says about two days ago he sent you an e-mail
2 noting the delay between when the check was written
3 and when it was received from the bank. So this
4 would have been an e-mail to you towards the end of
5 August of '07, correct?

6 A. Yes.

7 Q. And it indicates that he asked you
8 about the delay and whether Verizon had held the
9 check. Am I reading that correctly?

10 A. You are accurate.

11 Q. And you have noted that your response
12 was that there is usually a 10-day delay between
13 the check date and when we, SkyWaves, receive and
14 deposit the payment. Then you go on to say the
15 payment is then sent to BB&T along with a check to
16 retire the receivable. Do you see that?

17 A. Yes.

18 Q. Is that what you told Castlen Morris?

19 A. I would say it is based on what I had
20 noted here.

21 Q. Okay. Then we go on to the third
22 paragraph. "In this case approximately six weeks
23 had passed before the payment was sent to the bank.
24 He asked why there was such a long delay and
25 whether we were having cash problems. I replied

1 that cash was always tight and that I held onto the
2 payment longer than I usually did." Is that what
3 you told Mr. Morris?

4 A. Yes.

5 Q. Was cash always tight at SkyWaves?

6 A. Considering we were a startup business
7 with growth and then some of the delays in the
8 programs that we have documented here, I would not
9 say always -- I mean always is a general term to
10 say in a startup business cash is going to be
11 tight. In this case, as I have noted, it was a
12 little tighter than usual.

13 Q. Okay. And you are telling Mr. Morris
14 that you held onto the payment longer than you
15 usually did?

16 A. Yes. As I mentioned when we first
17 started talking about the holding onto the payments
18 and utilizing those, this was part of the cash
19 management between -- the decision whether to hold
20 onto it longer, as you would perhaps in an asset
21 base lending situation, or turning it over so you
22 can save money on interest. So this was part of
23 that balancing strategy that we had been using for
24 the entire agreement.

25 Q. And there is nothing in here about you

1 reminding Mr. Morris that you could use the money
2 for 60 days, is there?

3 A. I haven't read the whole thing here,
4 and what you have recovered, I did not remind him
5 of that.

6 Q. Well, take your time and read it, and
7 point out to me if you do somewhere in here.

8 A. (The witness complied.)

9 I don't think I did, but in our
10 conversation on the phone, I would have mentioned
11 that to him.

12 Q. And then you have another notation down
13 here from September 17th of '07. Do you see that?

14 A. Yes.

15 Q. And it looks like you say that you had
16 a conversation with Castlen yesterday. That would
17 be September 16th, '07, correct?

18 A. Yes.

19 Q. About sending remittances to the bank
20 for outstanding invoices. What does remittance
21 mean?

22 A. That would mean a form of payment to
23 the bank. That is what a remittance would be.

24 Q. Is that word used in the factoring
25 agreement between SkyWaves and BB&T?

1 A. Actually, I don't know. I am sorry.

2 Q. All right. You go on to say, "We
3 reviewed the aging report and identified the
4 payments that have been received and need to be
5 forwarded to the bank." Is that an accurate
6 recount of your discussion with Castlen Morris on
7 September 16th of 2007?

8 A. That would be -- yes, and those would
9 be ones that would be approaching the 60-day time
10 period.

11 Q. Then you make a reference that you sent
12 an assignment and an advance on Friday that Castlen
13 held off processing until you and he had this
14 conversation, the one that you have referenced in
15 the paragraph above, correct?

16 A. Yes.

17 Q. And it indicates you made a commitment
18 to resolving those issues; is that correct?

19 A. Yes.

20 Q. Okay. And then in the third paragraph,
21 you note that Mr. Morris reiterated that the
22 payments received cannot be held, and it could
23 result in a cancellation of the contract. Do you
24 see that?

25 A. I see that.

1 Q. Then if you flip to the second page, it
2 looks like on November 27th, you forward this to
3 Mike Burke.

4 A. Okay.

5 Q. So does that refresh your memory
6 approximately when you started interacting with
7 Mr. Burke?

8 A. Well, I knew it was after Thanksgiving,
9 yeah, but you are right, because as I recall, I'm
10 not sure who I found out about Mike Burke coming on
11 board, whether it was from Jim or from the folks at
12 the office up there.

13 Q. But it looks like, in terms of working
14 with Mike, you are forwarding him the assignment of
15 the accounts, and you are asking for an advance,
16 like you did with Castlen?

17 A. Yes.

18 Q. And to the best of your knowledge, did
19 Mr. Burke process the assignment that you forwarded
20 to him?

21 A. I believe he did, yes.

22 Q. Okay.

23 (DFT. EXH. 54, 12/7/07 E-MAIL, was
24 marked for identification.)

25 Q. I am going to hand you what we have

1 marked as Exhibit 54, Mr. Voytko, and this looks
2 like you are attaching an assignment to Mr. Burke
3 and asking for advances on it. Do you see that?

4 A. Yes.

5 Q. Okay. And to the best of your
6 knowledge, did Mr. Burke process this assignment
7 and request for your advance?

8 A. As far as I know, yes.

9 Q. So at this point are you communicating
10 with Mr. Burke like you did with Mr. Morris?

11 A. Yes.

12 Q. So you send him the assignments and
13 request the advance?

14 A. Yes.

15 Q. Okay.

16 (DFT. EXH. 55, 12/14/07 E-MAIL, was
17 marked for identification.)

18 Q. I hand you what we have marked as
19 Exhibit 55, and this is another assignment, and you
20 indicate to Mr. Burke that these are straight
21 85 percent advance. And you say both shelters have
22 been invoiced, so there is nothing on the PO
23 ledger?

24 A. Yes.

25 Q. What does that mean?

1 A. It means we did not take an advance on
2 the particular purchase order for this.

3 Q. Okay. Just so I understand, if you did
4 take an advance on a purchase order, then that just
5 cut into, if you will, what was available to
6 advance on the invoice?

7 A. Yes.

8 Q. Okay.

9 A. Right, because I would have already had
10 65 percent of it.

11 Q. Okay. I just want to make sure I
12 understand how it worked. So when a purchase order
13 came into play, you got 65 percent, and when it
14 converted to an invoice, you got another
15 20 percent?

16 A. That's correct.

17 Q. And then if there was no purchase order
18 and it was a straight invoice, you got 85 percent?

19 A. Yes.

20 Q. Okay.

21 (DFT. EXH. 56, 12/14/07 E-MAILS, was
22 marked for identification.)

23 Q. I hand you Exhibit 56, and this is
24 Mr. Burke's response to you on December 14th and
25 requested the straight 85 percent advance, and he

1 indicates that he doesn't have any availability to
2 advance until the past due gets cleared or we get
3 more sales. Do you see that?

4 A. I do.

5 Q. He is telling you he didn't have any
6 availability at this point to advance you any
7 money, correct?

8 A. Yes.

9 Q. Okay. And we saw that had happened
10 before with Castlen Morris, correct?

11 A. Yes, and -- well, early '07, coming off
12 of '06, yes.

13 (DFT. EXH. 57, 1/17/08 PRESENTATION,
14 was marked for identification.)

15 Q. I am going to hand you what we have
16 marked as Exhibit 57, and ask you if you recognize
17 this, Mr. Voytko.

18 A. I do.

19 Q. Okay. And tell me what this is. I can
20 read the title. It says it is a presentation for
21 Jim Edahl and Mike Burke. Is that what this was
22 used for, to your knowledge?

23 A. Yes, this was used for a presentation
24 to both of them when they made their visit to
25 SkyWaves on the 17th, and it was the first time

1 that Mr. Burke had been at the facility.

2 Q. Okay. Were you involved in making this
3 presentation to Mr. Edahl and Mr. Burke?

4 A. Yes.

5 Q. Okay. Did you help prepare this
6 presentation to Mr. Edahl and Mr. Burke?

7 A. Yes.

8 Q. Okay. And if you look towards the back
9 of this presentation, it has a 2008 income
10 statement.

11 A. Yes.

12 Q. I am assuming that as of January 17th
13 of 2008, this is a forecast?

14 A. Yes, it is.

15 Q. Okay. Did you prepare this forecast?

16 A. I was one of many that did, yes.

17 Q. Now, as of January 17th, 2008, did you
18 have SkyWaves' year-end --

19 A. I did.

20 Q. Financials prepared?

21 A. I did.

22 Q. Okay. Did you review those in putting
23 together the 2008 income statement?

24 A. Yes.

25 Q. And tell me again what the purpose of

1 of January 8th of 2008, you were still working with
2 Mr. Burke under advances for the invoices or
3 purchase orders that you sent to him.

4 A. Yes.

5 Q. Okay.

6 A. Yes, that was a few days before this
7 presentation.

8 Q. The presentation?

9 A. Uh-huh.

10 Q. Tell me, how long did the presentation
11 to Mr. Edahl and Mr. Burke last?

12 A. If I can back up for just a second.

13 Did you have a question on this particular exhibit?

14 Q. No, other than I asked you, as of
15 January 8th of 2008, you are still communicating
16 with Mr. Burke about getting advances under the
17 agreement with BB&T.

18 A. That is correct.

19 Q. Okay. And as of January 8th, 2008,
20 what was the limit to the amount of financing?

21 A. Well, the overall limit would not have
22 changed, and the exact where we were in accordance
23 to the line, I don't recall exactly at this point.

24 Q. Okay. But the overall limit being
25 three and a half million?

1 the presentation to Mr. Burke and Mr. Edahl was
2 for.

3 A. Well, it was to orient Mr. Burke with
4 the company. He did not -- we had not any previous
5 interaction with him, and we felt it was important
6 that he understand the product, who our customers
7 were and what the company was all about, and this
8 also was an opportunity to present or look forward
9 into 2008 and beyond based upon the updates or the
10 results of the sales meeting that was just
11 completed earlier in the month when all of our
12 sales reps got together and laid out what they had
13 expected to get based on conversations with the
14 various market managers and all of the telecom
15 companies as well as General Dynamics, and I think
16 there is a list of the customer contacts in here as
17 well.

18 (DFT. EXH. 58, JANUARY '08 and DECEMBER
19 '07 E-MAILS, was marked for identification.)

20 Q. I am going to hand you Exhibit 58, just
21 going back a little bit in time. This looks like
22 it is a communication between you and Mike Burke on
23 January 8th of '08 about a missing payment. Do you
24 see that? And then you are asking about processing
25 an assignment that you sent the day before. So as

1 A. Yes.

2 Q. And what was the purchase order
3 sub-limit?

4 A. Two million, I think.

5 Q. Okay.

6 A. So you are wanting to go --

7 Q. No, I have already asked you about
8 Exhibit 57.

9 A. Okay.

10 Q. Do you remember when you provided the
11 2007 year-end actual financial statements to BB&T?

12 A. I believe it was around the time of
13 this presentation because I made, I'll say, a
14 concerted effort, I wanted to get those done, so we
15 had them not just to be able to do the forecasting
16 but also to be able to get those into everyone's
17 hands.

18 (DFT. EXH. 59, 2007 PROFIT & LOSS, was
19 marked for identification.)

20 Q. And I am going to hand you, Mr. Voytko,
21 Exhibit Number 59 and ask you if this is SkyWaves'
22 actual P&L for 2007.

23 A. Yes, I believe it is.

24 Q. And did you prepare this document?

25 A. Yes, I would have.

1 Q. Okay. And if you would, let's see, if
2 you'll take Exhibit 59, and let's look at -- I just
3 want to ask, so at the end of 2007, what was
4 SkyWaves' net income?

5 A. It was a loss of about a million four.

6 Q. Okay. And if you look in this 2008
7 projected income statement that you presented to
8 Jim Edahl and Mike Burke, what is the net income
9 that you have identified for SkyWaves for January?

10 A. 1.5 million.

11 Q. Okay.

12 A. Oh, January, I am sorry.

13 Q. For January.

14 A. January is a loss of 95,000.

15 Q. Okay. Can you help me understand how
16 you get from an actual net income of approximately
17 1.4-million-dollar loss to this figure that you use
18 in the January projected income statement?

19 A. Well, the 1.4 is for a full year, and
20 this is just one month in January. So how I get
21 there is by you look at your top line sales of
22 400,000 versus actual of 136. So, I mean, that is
23 the driver and turns this month positive, and it
24 would be more comparable to, you know, looking at a
25 month's worth of activity versus a whole year.

1 Q. Okay. How about let's look at the
2 original.

3 A. At the bottom of 43?

4 Q. Well, 44 is what I want to ask about.
5 As I understand it, you prepared 44, but you said
6 you prepared 44 without any actual numbers?

7 A. Yes.

8 Q. Okay. And in Exhibit 44, which is your
9 forecast for what SkyWaves' net income would be at
10 year-end, what did you forecast it as?

11 A. We will assume this is the very first
12 forecast. We projected an income of 1.4 million.

13 Q. Okay. Plus 1.4?

14 A. Yes, positive 1.4.

15 Q. And the actuals that I am looking at
16 here on Exhibit 59 show us that it's actually the
17 exact opposite, correct?

18 A. Yes.

19 Q. So it is a negative 1.4?

20 A. Yes.

21 Q. Okay. And just in the revised forecast
22 for '07 that you sent to Jim at BB&T in September
23 of '07, so as of September of '07, what are you
24 projecting to the bank that SkyWaves' net income
25 would be?

1 A. A negative loss of 120,000.

2 Q. Okay. So we have got three more
3 months, and we actually end up with -- well, let me
4 ask you this: You talked about material
5 differences. Would you consider a negative
6 1.4 million to be a material difference from
7 120,000 negative?

8 A. Yes, it is.

9 Q. Okay.

10 A. But just to add, the purpose of
11 forecast was to update based on new sets of facts,
12 and so that's different from when you report
13 financial information that is actual and is meant
14 to be relied on by investors. So just to clarify
15 that.

16 Q. Sure. Well, let me ask you this: In
17 this exhibit that we looked at, 43, in September of
18 '07, you are revising the forecast that you are
19 sending to the bank, correct?

20 A. Yes.

21 Q. And you identified in your notes six
22 reasons why you revised the forecast.

23 A. Yes.

24 Q. Okay. So you are looking at six
25 reasons that you think are going to require you to

1 revise your forecast of where SkyWaves is going to
2 end up at the end of the year?

3 A. Yes.

4 Q. You have this information as of
5 September of '07?

6 A. Yes.

7 Q. And as of September of '07, you had
8 given to the bank your actual numbers through June
9 of '07, correct?

10 A. Yes.

11 Q. Okay. Did you understand that at some
12 point BB&T notified SkyWaves of a default under the
13 factoring agreement?

14 A. Can you rephrase that or restate that
15 question?

16 Q. Do you understand that at some point in
17 2008 BB&T notified SkyWaves of a default under the
18 factoring agreement?

19 A. I am aware.

20 Q. Okay. Were you the one who was
21 notified?

22 A. No.

23 Q. Okay. How did you come to understand
24 that BB&T had notified SkyWaves of the default?

25 A. Mr. Konersmann had received a phone

1 the other, General Dynamics, and all of those, as
2 we would have done business, would have generated
3 cash.

4 Q. So are you suggesting that the line
5 should be restarted and the existing balance owed
6 to the bank should be ignored?

7 A. No, not at all.

8 Q. Okay. So let's just say as of
9 January 2008, you agree with me that whatever --
10 wherever SkyWaves was on its limit, that exists.
11 So if there was no more availability under
12 SkyWaves' line, why is that not a problem?

13 A. Well, first of all, there was still
14 availability under the line. The line was not
15 maxed out.

16 Q. Okay. Tell me how much availability
17 SkyWaves had in January of 2008 under its PO
18 supplement.

19 A. I don't have my numbers in front of me.
20 I can't recall the exact numbers, but in -- for
21 practical matters, in less than approximately
22 six weeks, we recovered every invoice that was
23 there, and ran through production over 1.2 million
24 dollars' worth of business that it was returned to
25 the bank. If we had done nothing else but did that

1 to continue turning the money -- I mean, that is
2 what lending and doing business is all about -- we
3 would have generated profits from that, and those
4 profits could have gone towards building that
5 shelter that was already advanced on. The only
6 time we get really in trouble is when they say, "I
7 want all of these now," then if we had that
8 problem, then we have to seek perhaps a private
9 equity company or an angel-type investor, but that
10 money is going to be expensive, and that party
11 wanted a piece of equity. That would be an
12 alternative. We never got to the point of having
13 to face that dilemma because, as you know, in the
14 end of January, our line was pulled, and we
15 basically had access to zero.

16 Q. When did the factoring agreement with
17 BB&T end by its own terms?

18 A. March.

19 Q. Of 2000?

20 A. It would have been March of 2008, yes.

21 Q. So as of January of 2008, had SkyWaves
22 entered into any discussions with other lenders?

23 A. We had not, and that's because in 2007,
24 in March, when we did the last renewal, we explored
25 other options. We had other options that were

1 viable, and the bank stood up and said, "Pick us,
2 we will see you through to the end." And we relied
3 on that.

4 Q. And was the bank obligated to renew the
5 factoring agreement when it expired in March of
6 '08?

7 A. As far as I know, they were not
8 obligated.

9 (DFT. EXH. 61, HISTORICAL & PROJECTED
10 INCOME STATEMENT 2002-2009, was marked for
11 identification.)

12 Q. Okay. Let me hand you what I am
13 marking Exhibit 61, and, Mr. Voytko, this is a
14 historical and projected income statement from '02
15 to '09 for SkyWaves, and I wanted to just ask, did
16 you prepare this document?

17 A. Yes, I would have prepared it.

18 Q. Okay. And if I take this projected
19 income statement from '02 to '09, as I understand
20 it, you were there in '05, correct? You were at
21 SkyWaves in 2005, correct?

22 A. Yes.

23 Q. And you prepared actual financial
24 statements for SkyWaves in 2005, correct?

25 A. Yes.

1 Q. And you were there in '06, correct?

2 A. Yes.

3 Q. And you prepared actual financial
4 statements for SkyWaves in '06, correct?

5 A. Yes.

6 Q. And you were there in '07, correct?

7 A. Yes.

8 Q. And you prepared actual financial
9 statements for SkyWaves in '07?

10 A. Yes.

11 Q. Okay.

12 A. I would just like to add that this was
13 probably three or four years prepared before the
14 company checked out.

15 Q. Sure.

16 A. You are accurate in the questions that
17 you asked me.

18 (DFT. EXH. 62, 1/25/08 LETTER, was
19 marked for identification.)

20 Q. I know you indicated that Mr.
21 Konersmann conveyed to you that a default was going
22 to be called under the factoring agreement. I am
23 going to hand you what we have marked as Exhibit 62
24 and ask you if you recognize this document.

25 A. Yes, I do.

1 the factoring line, how it worked.

2 Q. And tell me --

3 A. Exactly?

4 Q. Exactly what you said. Don't
5 summarize. Tell me what you told Mr. Hennessy.

6 A. We would have explained that as
7 purchase orders came in, we got advances on those.
8 As those were completed, they were turning in the
9 purchase orders. We had the 60-day rule, and we
10 would call it in formula, that had been agreed
11 upon, and we were consistent in three years in how
12 we handled that. And essentially based on the
13 information he may have had or may not have had, I
14 would think he chose to believe anything we said.

15 Q. And I am asking you to tell me
16 specifically what you told him. Anything else that
17 you recall telling Mr. Hennessy?

18 A. Well, on these other points, we would
19 have talked about the payables, the payables of
20 that approximately 37 percent, and about 25 percent
21 represented payables with an investor who was one
22 of our vendors who had agreed to give us extended
23 terms.

24 Q. And who was that?

25 A. That was Structured Tech, which was

1 owned by Franz Meier, who is a large investing
2 company.

3 Q. So you told Mr. Hennessy that
4 25 percent of the 37 percent of the payables that
5 were over 60 days were payables to a company owned
6 by Franz Meier and that he had agreed to extend the
7 repayment terms?

8 A. Yes.

9 Q. Okay.

10 A. And then the good faith belief in that
11 portion would have been a rebuttal through the
12 investors bringing more money into the company, and
13 then we asked him, here again based upon what Jim
14 had told us, me personally and through Ron, that I
15 understood that the bank was willing to work with
16 us. So we spent hours and weeks working on, you
17 know, just suggestions in trying to come up with a
18 plan that would be acceptable to the bank.

19 Q. Did you have any more discussions
20 with Mr. Hennessy after this meeting that you and
21 Mr. Konersmann had with him?

22 A. There were several. There were
23 several.

24 Q. Okay. Several meetings with Mr.
25 Hennessy in which you participated or several

1 discussions that you had with Mr. Hennessy?

2 A. Well, I never had a one-on-one with
3 Mr. Hennessy. He was involved with the Hewlette
4 presentation, which I helped prepare. There were
5 other initiatives I know where other investors
6 tried to come up with some ideas in terms of how to
7 help the company. I was involved with the proposal
8 by General Dynamics to fund their purchase orders.
9 They were willing to serve as our factoring agent,
10 but the terms that the bank had proposed to do
11 that, to give them assurances that they would get
12 their product, were just prohibitive in terms of
13 their demands in segregating product and
14 everything, and they were not able to gain
15 confidence that the bank wouldn't reverse their
16 position and take their money at the end of the
17 day.

18 I was much involved with a presentation
19 that we gave to Hunt Capital. They had asked to
20 speak with Mr. Hennessy that very weekend. We were
21 talking like Wednesday and Thursday. They wanted
22 to speak to him on Friday, Saturday. He refused to
23 take their calls. So there was some, you know,
24 efforts to do that.

25 And then the other context, I exchanged

1 some e-mails with him regarding the production and
2 payroll schedules that we were working on, trying
3 to keep the money -- or to keep the company alive
4 long enough to get alternative financing. And I am
5 sure it has been talked about, but there were --
6 let's see, I was first, Franz was second, and Patty
7 was third in terms of putting in money right after
8 the bank shut it off, otherwise the company would
9 have been out of business on January 25th, or
10 two days later, something like that, and none of
11 the 1.2 million that was recovered would have been
12 recovered. So all of that was based on good faith
13 that the bank was going to work with us. So a lot
14 of people put in a lot of personal money to try to
15 keep it going, and all of those were futile.

16 Q. Let me ask, you mentioned that you were
17 involved in a presentation to Hunt Capital.

18 A. Yes.

19 Q. Was this in 2008?

20 A. Yes.

21 Q. Okay. And you made a passing reference
22 that Mr. Hennessy refused to take phone calls from
23 Hunt Capital?

24 A. Yes.

25 Q. Were you present when Hunt Capital made

1 information would have been confidential. I don't
2 know if we would have supplied it either, like, for
3 example, some employee details, but some would have
4 been easy, and some would have been difficult. It
5 would have been very time consuming, and as I
6 recollect the time, there was 30 hours a week --
7 30 hours' worth of week to do in a day, so we had
8 to choose priorities.

9 Q. Now, as I understand it from looking at
10 Exhibit Number 4, Mr. Meier was a shareholder, was
11 he not?

12 A. He was.

13 Q. So you made reference to not giving him
14 that information because some of it was
15 confidential. Would he not have had a right to it
16 as a shareholder in the company?

17 A. Not necessarily, because they take
18 payroll information, for example. That is not
19 something that you just share with even an
20 investor. You know, to use the example, if you
21 owned a hundred shares in IBM, I doubt you would be
22 able to walk into their HR department and ask to
23 see payroll files.

24 Q. Now, you indicated in response to
25 paragraph number 2 that 25 percent of the payables

1 account at the time.

2 Q. Okay. When you say "we didn't have a
3 bank account at the time," what do you mean?

4 A. It was frozen. The bank, by pulling
5 the credit line, had pulled all of our other access
6 to accounts, and the account was for all intents
7 and purposes closed.

8 Q. Now, I am just reading your response to
9 Mr. Burke, because it looks like he is asking you
10 did you receive these directly, or are you just
11 telling me they are on the way, and your response
12 is that you received them directly, but you end
13 your e-mail by saying, "I experienced similar
14 issues when attempting to changes the remit to
15 address in the past."

16 A. That should be change.

17 Q. Sure.

18 A. I think what this is referring to is
19 Mike Burke tried to change the address to get them
20 sent to BB&T, and he was not able to, as I stated
21 before.

22 MS. CHERRY: Let's take a break for a
23 minute.

24 (A recess transpired.)

25 BY MS. CHERRY:

1 over 60 days were to Mr. Meier, correct?

2 A. Yes, uh-huh.

3 Q. What about the other 12 percent?

4 A. They would have been various vendors.

5 Q. Okay. Do you disagree that 12 percent
6 was over 60 days due and owing?

7 A. I would agree that is accurate.

8 (DFT. EXH. 65, MARCH 2008 E-MAILS, was
9 marked for identification.)

10 Q. I am going to hand you what we have
11 marked as Exhibit 65, Mr. Voytko, and this is an
12 e-mail communication between you and Mr. Burke. If
13 you look on the back page, on March 11th of 2008,
14 you are telling Mr. Burke that the following
15 Verizon payments have been mailed to your attention
16 in Atlanta, and it has got four invoice numbers.
17 Do you see that?

18 A. Yes.

19 Q. And the amount is off to the right.
20 Did SkyWaves receive those payments directly from
21 Verizon?

22 A. Yes.

23 Q. And upon receipt of those payments, did
24 you turn around and send them to Mike Burke?

25 A. I did, because we didn't have a bank

1 Q. I am going to ask you a little bit
2 more, Mr. Voytko. You were talking about the
3 balance sheet for SkyWaves as of December 31 of
4 '07. Do you have a copy of SkyWaves' balance sheet
5 as of December 31, 2007?

6 A. There is one, yes, and I am not sure if
7 it is in anything that we have, but there is one --
8 there would be in the one in the file that you
9 have.

10 Q. In terms of the documents that you
11 produced?

12 A. Yes.

13 Q. And did you ever give anyone at BB&T a
14 copy of SkyWaves' 2007 balance sheet?

15 A. I recall giving that to Jim Edahl. I
16 cannot tell you the exact date of that.

17 Q. Did you give it to Mike Hennessy?

18 A. I don't remember if I did or not.

19 Q. Okay. Now, as I understand it,
20 SkyWaves eventually filed bankruptcy; is that
21 correct?

22 A. Yes.

23 Q. Do you remember when that was?

24 A. That would have been in April, I
25 believe.

//

From: John Voytko
To: Morris, Castlen
Cc: Edahl, James; Ron Konersmann </O=SKYWAVESCOP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=Ron>
Subject: RE: Nextel Partners and Cingular
Date: Monday, March 27, 2006 12:15:00 PM



Castlen,

Today I received payment for Invoice #1671 and #1674 from Nextel Partners. Please relay this information to Bryan Watts.

Please call me Wednesday to discuss your note below.

Best regards,

John S. Voytko
Chief Financial Officer
Skywaves Corporation

john@skywavescorp.com

(843) 308-9757 Office
(843) 224-2020 Cell

From: Morris, Castlen [mailto:Castlen.Morris@BBandT.com]
Sent: Saturday, March 25, 2006 1:03 PM
To: John Voytko
Cc: Edahl, James
Subject: Nextel Partners and Cingular

John:

Jim Edahl approached me late Friday afternoon to discuss the logistics of trying to set up Cingular on a similar purchase order financing scenario as we have done for Nextel Partners. Towards that end, among other things, we discussed the collection activity concerns of which you and I spoke on Friday. I wanted to share with you what we think SkyWaves and BB&T should do, on a collaborative basis, to manage any necessary collection activity. That said, realizing your concerns, if you have not already done so, please make your appropriate contacts at Nextel aware of the factoring relationship between SkyWaves and BB&T. See if your contacts can put us together with a specific individual(s) in their corporate accounts payable area so that we can call them and only them as needed on a particular invoice. By contacting specific Nextel people who are aware of the SkyWaves/BB&T relationship and our purpose in calling, it should not be alarming/distressing/irritating to anyone in the Nextel organization. It truly hinges on your disclosure of the SkyWaves/BB&T relationship to Nextel and their understanding of it. Our inquiry to Nextel would be to find out scheduled payment date(s) on past due invoices. This would happen when invoices reach 10-15 days past due. Assuming that Nextel pays according to terms, no collection calls would be expected as we would receive their checks directly before invoices even reach 10-15 days past due.

The same process would need to occur with Cingular, assuming that Jim and I are successful in establishing a purchase order program for them.

Quite honestly, the financing program that we have put together for you on Nextel and, hopefully, Cingular, is a great departure from what we would do for a "typical" client. Attribute that to the high regard that we at BB&T hold for SkyWaves, its people, and its mission. In order for this type of

program to continue, we ask for your trust in understanding how our business model needs to function as we are trusting how your model needs to function. Direct communication with your customers does not undermine that trust but helps position us to continue to grow our relationship in ways heretofore impossible.

Please contact Jim and/or myself with any questions. Thanks.

Castlen Morris
BB&T Commercial Finance
317 W. High St.
11th Floor Market Square Tower
High Point, NC 27260
336-889-3355, x-204
336-889-9917 (fax)

12

12

1008

From: Morris, Castlen
To: John Voytko </O=SKYWAVESCORP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=JOHN>
Cc: Edahl, James
Subject: SkyWavesAmendment3.20.07.doc
Date: Tuesday, March 20, 2007 5:40:59 AM
Attachments: SkyWavesAmendment3.20.07.doc

<<SkyWavesAmendment3.20.07.doc>>

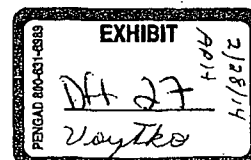
John:

Please print the attached amendment, have Ron sign, and send back to me. I will forward an original for all parties to sign.

Per our conversation this morning, no further commission charges will be assessed against SkyWaves' ledger for the balance of March. Beginning April, the charge will only be \$3,000 per month for each successive month. I did not include the new \$2,000,000 PO sub-limit or the 65% PO 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). I didn't want to potentially expose SkyWaves to any legal fees for counsel to create a document. At this point, I am comfortable letting Jim Edahl's proposal letter of March 2, 2007 function in that capacity.

Thanks.

Castlen



**Amendment to
Factoring and Security Agreement
Dated March 22, 2005
Between
Branch Banking and Trust Company
(Successor in merger to BB&T Factors Corporation)
And
SkyWaves 1 Corporation**

Certain paragraphs of the above referenced Agreement are amended as follows:

Paragraph (1)-Definitions and Rules of Construction:

Section A-"Advance Percentage"

The Advance Percentage shall increase from Eighty Percent (80%) to Eighty-Five Percent (85%).

Section A-"Maximum Credit Amount"

The Maximum Credit Amount shall be increased from Two-Million One-Hundred Fifty Thousand Dollars (\$2,150,000) to Three-Million Five-Hundred Thousand Dollars (\$3,500,000).

Paragraph (6)-Factoring Commission:

The factoring commission rate of Ninety-Five One Hundreths of One Percent (0.95%) is deleted and replaced with a monthly fixed factoring commission charge of Three Thousand Dollars (\$3,000.00).

All other terms and conditions will remain in effect.

Branch Banking and Trust Company

By: _____
W. Castlen Morris, Jr.
Asst. Vice-President

Acknowledged this _____ day of _____, 2007.

SkyWaves 1 Corporation

By: _____
Ron Konersmann
Chief Executive Officer

13

14

14

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
SKYWAVES I CORPORATION,
Plaintiff,

vs. CASE NO. 2009-CP-10-7516
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.
VIDEOTAPED 30(b)(6)
DEPOSITION OF: BRANCH BANKING AND TRUST COMPANY
BY RUSSELL S. BOGUE and
MICHAEL J. HENNESSY

DATE: January 6, 2015

TIME: 1:16 PM

LOCATION: Andrew K. Epting, Jr., LLC
46-A State Street
Charleston, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: SANDRA K. BJERKE, RDR, CRR, CBC

A. WILLIAM ROBERTS, JR. & ASSOCIATES

Fast, Accurate & Friendly

Charleston, SC Hilton Head, SC Myrtle Beach, SC
(843) 722-8414 (843) 785-3263 (843) 839-3376
Columbia, SC Greenville, SC Charlotte, NC
(803) 731-5224 (864) 234-7030 (704) 573-3919

ATTORNEYS FOR THE DEFENDANT
JAMES EDAHL:

CORRIGAN & CHANDLER LLC
BY: J.W. NELSON CHANDLER
16 Charlotte Street, Suite B
Charleston, SC 29403
(843) 577-5650
nelson@corriganhandler.com

ALSO PRESENT:

Ron Konersmann
Douglas Browne, Videographer

(INDEX AT REAR OF TRANSCRIPT)

APPEARANCES OF COUNSEL:

ATTORNEYS FOR THE PLAINTIFF
SKYWAVES I CORPORATION:

ANDREW K. EPTING, JR., LLC
BY: ANDREW K. EPTING, JR.
46-A State Street
Charleston, SC 29401
(843) 377-1871
ake@epting-law.com

DUFFY & YOUNG, LLC
BY: JOHN P. LINTON
96 Broad Street
Charleston, SC 29401
(843) 720-2044
jlinton@duffyandyoung.com

GEORGE J. KEFALOS, PA
BY: GEORGE J. KEFALOS
46-A State Street
Charleston, SC 29401
(843) 722-6612
george@kefaloslaw.com

ATTORNEYS FOR THE DEFENDANT
BRANCH BANKING AND TRUST COMPANY,
Successor in merger to BRANCH BANKING
AND TRUST COMPANY OF SC, a/k/a BB&T;
NEXSEN PRUET, LLC
BY: MOLLY HUGHES CHERRY
205 King Street, Suite 400
Charleston, SC 29401
(843) 577-9440
mcherry@nexsenpruet.com

(EXH. 1, Notice of Rule 30(b)(6))

Deposition of Defendant Branch Banking and Trust
Company dated 11-20-14, marked for identification.)

(EXH. 2, Proof of Claim by BB&T

Originally Filed 5-29-08, marked for identification

THE VIDEOGRAPHER: We are now on the
record. Today's date is January 6th, 2015. The
time is approximately 1:16 PM.

This is the video deposition of Russell
Bogue taken by counsel for the plaintiff. The
location today is 46-A State Street in Charleston,
South Carolina.

My name is Douglas Browne, legal
videographer representing A. William Roberts, Jr. &
Associates.

This deposition is taken in the matter
of SkyWaves I Corporation versus Branch Banking and
Trust, et al., Case No. 2009-CP-10-7516.

Counsel present, please introduce
yourselves for the record.

MR. EPTING: Drew Epting, counsel for
SkyWaves.

MR. LINTON: I'm John Linton, counsel
for SkyWaves.

MR. KEFALOS: George Kefalos, counsel

1 for SkyWaves.

2 MS. CHERRY: Molly Cherry, counsel for
3 BB&T.

4 MR. CHANDLER: Nelson Chandler, counsel
5 for James Edahl.

6 THE VIDEOGRAPHER: Would the court
7 reporter please swear in the witness and we may
8 begin.

9 RUSSELL S. BOGUE
10 being first duly sworn, testified as follows:

11 EXAMINATION

12 BY MR. EPTING:

13 Q. Good afternoon, Mr. Bogue. Let me show
14 you what's been marked as Exhibit 1.

15 MR. EPTING: And, Molly, there you are.

16 BY MR. EPTING:

17 Q. As I understand counsel, your counsel,
18 Mr. Bogue, you are here to answer questions only
19 with regard to subject matter 11.

20 A. That's correct.

21 Q. Is that correct?

22 A. That's correct.

23 Q. All right. And let me do this. I want
24 to now give you what is marked as Exhibit 2. And
25 let me explain what you have. This is the proof of

1 claim and the two amendments to the proof of claim
2 that were filed by BB&T in the bankruptcy.

3 I'm not asking you to agree or
4 disagree. I'm simply saying that this is the
5 series of proof of claims. It is complete. And
6 the questions that I'm going to be asking you
7 relate only to the attachment which is the
8 factoring agreement.

9 So Exhibit 2 I'm saying to you but not
10 asking you to accept is the full proof of claim
11 filed by BB&T, but my questions relate only to the
12 factoring agreement that is part of Exhibit 2,
13 okay?

14 A. (Witness moves head up and down.)

15 MR. EPTING: All right. Let me give
16 Nelson a copy of this. And, Nelson, the last two
17 pages are the two amendments to the document.

18 MR. CHANDLER: Thank you.

19 MR. EPTING: Surely.

20 BY MR. EPTING:

21 Q. Mr. Bogue, tell me a little bit about
22 yourself since I don't know who you are, anything
23 about you or why you might know the answers to
24 question No. 11.

25 A. I am associate general counsel for

1 Branch Banking and Trust Company. So as part of my
2 duties in the legal department I'm involved in
3 commercial lending matters.

4 Q. Is that your specialty, commercial
5 lending matters?

6 A. I don't know that I have a specialty
7 per se, but I spend a lot of time working on
8 commercial lending matters.

9 Q. All right. And are you on the
10 transactional side or on the litigation side?

11 A. Both.

12 Q. Both. Okay. And how long have you
13 been with the bank?

14 A. I joined the bank in February of 2008.

15 Q. Okay. So 2008. Where were you before
16 2008?

17 A. I was with several law firms in private
18 practice.

19 Q. Okay. And can you tell me what law
20 firms those were?

21 A. Yes. I started practice with Carlton
22 Fields Law Firm in Tampa, Florida. I then moved to
23 Smith Helms Mulliss & Moore in Tampa, Florida. I
24 then moved to Holland & Knight in Tampa, Florida
25 and Atlanta, Georgia. I then moved to Hunton &

1 Williams in Atlanta. And I then moved to DLA Piper
2 in Atlanta and then joined the bank.

3 Q. Okay. And in your private practice
4 life, was your field banking and commercial
5 lending?

6 A. Yes.

7 Q. Okay. Let me ask you to turn to
8 Exhibit 2. And in particular, a document called
9 Factoring and Security Agreement. Have you seen a
10 document like this before?

11 A. Yes.

12 Q. All right. Is this a standard form
13 agreement?

14 A. It appears to be, yes.

15 Q. All right. And on what do you base
16 that?

17 A. Primarily because there are blanks that
18 are filled in with information. And typically, if
19 it was a pure custom document you wouldn't see
20 underlines with amounts filled in.

21 Q. Okay. Are you familiar with this
22 particular agreement?

23 A. Not particularly familiar, no.

24 Q. But you have seen the BB&T standard
25 form factoring and security agreement at some point 1014

1 in your past.

2 A. I have, but not many of them.

3 Q. Okay. All right. I want to ask you:

4 Is it your experience that BB&T is deliberate in
5 their use of words in provisions in their standard
6 form documents?

7 A. I'm not sure I know what you mean by
8 deliberate.

9 Q. Do they choose their words in their
10 provisions carefully?

11 A. Yes.

12 Q. And do they intend to honor the
13 agreements as they are drawn?

14 MS. CHERRY: Object to the form.

15 THE WITNESS: Yes.

16 BY MR. EPTING:

17 Q. And if a provision is in this
18 agreement, would it be BB&T's intent to follow that
19 provision?

20 A. Unless it's somehow modified or
21 changed, yes.

22 Q. All right. And could I ask you to turn
23 to Page 13. And in particular, Paragraph 25.

24 A. I see it.

25 Q. All right. It says:

1 All acts, transactions, rights, and
2 liabilities under this agreement shall be governed
3 in all respects by, and construed in accordance
4 with, the internal laws of the state of North
5 Carolina.

6 Did I read that right?

7 A. Yes, you did.

8 Q. And is it BB&T's intent, as expressed
9 in that provision, that the internal laws of North
10 Carolina govern this agreement?

11 MS. CHERRY: I'm going to object to the
12 form to the extent, Drew, the -- this is what I got
13 into. As it pertains to this litigation, I'm going
14 to object to any questions specifically about this
15 litigation. The topic, as listed, is general and
16 general form documents.

17 And I just want to be mindful that I'm
18 not waiving any attorney-client privilege as to
19 this litigation, and I'm going to object to
20 specific questions about documents at issue in this
21 litigation.

22 If you want to ask about form
23 documents, that's the topic that's identified, and
24 I will allow the witness to answer in that regard.

25 BY MR. EPTING:

1 Q. In using this provision, is it your
2 intent that North Carolina law apply?

3 A. Yes, with regard to any substantive
4 issues or legal issues that would arise under the
5 agreement.

6 Q. All right. And can I ask you to
7 explain to me, if you know, what is intended by
8 internal law of the state of North Carolina?

9 A. I don't know what that means.

10 Q. Okay.

11 MR. EPTING: That's all the questions I
12 have. Thank you very much.

13 THE WITNESS: Thank you.

14 THE VIDEOGRAPHER: This concludes the
15 video deposition of Russell Bogue. The time is
16 approximating 1:25 PM. We are now off the record.

17 (The witness, after having been advised
18 of his right to read and sign this transcript,
19 waives that right.)

20 (Off-the-record conference.)

21 THE VIDEOGRAPHER: We are now on the
22 record. Today's date is January 6th, 2015. The
23 time is approximately 1:27 PM.

24 This is the video deposition of Michael
25 J. Hennessy taken by counsel for the plaintiff.

1 The location today is 46-A State Street in
2 Charleston, South Carolina.

3 My name is Douglas Browne, legal
4 videographer representing A. William Roberts, Jr. &
5 Associates.

6 This deposition is taken in the matter
7 of SkyWaves I Corporation versus Branch Banking and
8 Trust, et al., Case No. 2009-CP-10-7516.

9 Counsel present, please introduce
10 yourselves for the record.

11 MR. LINTON: John Linton, Duffy & Young
12 for the plaintiff.

13 MR. EPTING: Drew Epting, SkyWaves.

14 MR. KEFALOS: George Kefalos, SkyWaves.

15 MS. CHERRY: Molly Cherry for BB&T.

16 MR. CHANDLER: Nelson Chandler for
17 James Edahl.

18 THE VIDEOGRAPHER: Would the court
19 reporter please swear in the witness and we may
20 begin.

21 MICHAEL J. HENNESSY
22 being first duly sworn, testified as follows:

23 EXAMINATION

24 BY MR. LINTON:

25 Q. Mr. Hennessy, we obviously have met

1 have to remit funds to satisfy the terms of the
2 agreement?

3 A. It's not written on the purchase order
4 agreement because that's a subagreement under the
5 main factoring line.

6 Q. So there was no time limit.

7 MS. CHERRY: Object to the form.

8 THE WITNESS: For what? I'm confused.

9 BY MR. LINTON:

10 Q. When a purchase order was submitted and
11 the bank funded that purchase order, later that
12 same purchase order was converted to an invoice.
13 Was there any time limit upon which BB -- excuse
14 me -- SkyWaves was required to make payment to
15 BB&T?

16 A. On the invoice itself?

17 Q. Right.

18 A. Well, the invoice is now property of
19 BB&T's. So the payment is immediate to BB&T.

20 Q. Well, I was asking you --

21 A. It's not SkyWaves' invoice. It's
22 BB&T's. Payments should come directly to BB&T.

23 Q. But how long did SkyWaves have under
24 the purchase order agreement to secure funds and
25 remit them to BB&T?

1 MS. CHERRY: Object to the form.

2 THE WITNESS: I'm not understanding
3 your question. Because once a purchase order
4 converts to an invoice, it's no longer a purchase
5 order. It's an invoice. That invoice is owned by
6 BB&T, and all funds must be remitted immediately to
7 BB&T.

8 BY MR. LINTON:

9 Q. All right. But how long does the
10 customer have to pay SkyWaves, whether it's paid
11 directly to SkyWaves or it's paid directly to the
12 bank?

13 A. Oh, I would think it's net 30, but
14 there's a callback provision in the factoring
15 agreement.

16 Q. But it could be 60 on some?

17 A. I'm not sure.

18 Q. All right. So that I understand your
19 testimony, are you saying that your understanding
20 of the accommodation made by Mr. Edahl is that site
21 plans from General Dynamics could be drawn upon
22 through December 31st, 2007?

23 A. Underneath the purchase order sublimit.

24 Q. Right, of \$2 million.

25 A. Correct.

1 Q. Okay. And when were those funds
2 contractually -- excuse me. Yeah. For those loans
3 that were made on the site plans, the advances,
4 when were they due to be paid to the bank from
5 SkyWaves?

6 A. There is not a due date on them.
7 Normal course of business was they would convert
8 from purchase orders to invoices within 60 to 90
9 days, and I'm assuming that was the expectation.

10 Q. What's the basis of that assumption?

11 A. Just previous conversations during my
12 investigation with Jim Edahl.

13 Q. So it's based exclusively upon what
14 Mr. Edahl would have told you.

15 A. Correct.

16 Q. All right. For those site plan
17 advances, if there was no clear understanding,
18 certainly the obligation to refund and pay those
19 over to BB&T would have been by April 5th, 2008,
20 when the line of credit expired; is that right?

21 MS. CHERRY: Object to the form.

22 THE WITNESS: I would imagine at -- I
23 mean, I guess so, because there's nothing else in
24 writing. -

25 BY MR. LINTON:

1 Q. Okay. Now, were there any other terms
2 of the agreement for site plan funding? We've
3 covered that it was restricted to General Dynamics'
4 site plans; right?

5 A. Correct.

6 Q. We've covered that it was limited to
7 the \$2 million component of the \$3 1/2 million line
8 of credit; correct?

9 A. Right.

10 Q. We've covered that there was no time
11 limit to convert a site plan to a purchase order by
12 a contract obligation; right?

13 A. Correct.

14 Q. And we've determined that SkyWaves was
15 authorized to have advances from that site plan
16 funding through December 31st, 2007.

17 A. Correct.

18 Q. All right. Is it your contention that
19 SkyWaves violated any of the terms of that
20 agreement?

21 A. No, not now.

22 Q. Has it ever been?

23 A. I didn't know about the site plan
24 financing when I first met with SkyWaves.

25 Q. I think the simple question of has it

1 ever been could be answered yes or no.

2 A. No.

3 Q. Do you mean to tell me that the bank
4 did not assert that SkyWaves had drawn down funds
5 on the site plan funding improperly?

6 MS. CHERRY: Object to the form.

7 BY MR. LINTON:

8 Q. You weren't aware of that?

9 A. I was aware of that.

10 Q. Okay. And were you aware the bank
11 claimed fraud against SkyWaves?

12 A. In the conversation held with Ron
13 Konersmann, I was aware of that.

14 Q. I'm asking you if you were aware that
15 the bank had asserted fraud against SkyWaves for
16 breach of the site plan funding agreement.

17 MS. CHERRY: Object to the form.

18 MR. LINTON: What is objectionable
19 about that, Molly?

20 MS. CHERRY: The basis for calling
21 fraud. You said based on breach of a contract.

22 BY MR. LINTON:

23 Q. All right. Let me ask you this:
24 You're familiar with Mr. Licata's letter of
25 February 11th, 2008?

1 A. Based upon my conversation with Ron
2 Konersmann and John Voytko, that letter was written
3 where they acknowledged that they did that.

4 Q. Okay. You didn't answer my question.
5 I want to know if you're going to acknowledge that
6 this letter of February the 11th, which charged
7 these folks with fraud, SkyWaves, by the bank, was
8 known to you at that time.

9 A. That, yes, I knew about the letter.

10 Q. Okay. Did you consider that the bank
11 was charging SkyWaves with fraud in the -- securing
12 funds from the site plan?

13 A. Yes.

14 Q. Okay. Is it your testimony today that
15 based upon the accommodation that was reached by
16 Mr. Edahl that SkyWaves did not breach the site
17 plan funding at all?

18 A. Yes.

19 Q. So SkyWaves, in 2007 to 2008, was in
20 full compliance with the site plan accommodation,
21 but based on what you believe was other
22 information, the bank charged fraud.

23 A. Yes.

24 Q. Okay. What was that information other
25 than the conversation with Mr. Konersmann and

1 A. Mr. Licata's letter?

2 Q. Licata. Excuse me.

3 A. I -- not off the top of my head. I'd
4 have to see a copy of it if you have one, but...

5 Q. Well, do you recall that he had said --
6 I'll read it to you from this deposition notice.

7 MR. LINTON: Which one is it, Molly?

8 MS. CHERRY: 8.

9 BY MR. LINTON:

10 Q. That the funds obtained upon purchase
11 order from General Dynamics which did not exist
12 were funds fraudulently obtained from BB&T for
13 which SkyWaves and all of its officers and
14 employees who participated in the process would be
15 liable.

16 That was written by Mr. Licata in a
17 letter of February the 11th, 2008.

18 A. Yes.

19 Q. Okay. Were you familiar with that
20 letter at the time?

21 A. Yes.

22 Q. Okay. Do you consider that what I've
23 just read you from Mr. Licata's letter was BB&T
24 asserting that SkyWaves had committed fraud in
25 obtaining funding based on site plans?

1 anyone from SkyWaves?

2 A. That was it. I handed them the site
3 plan and asked if they had pushed those off and --
4 and gave those to the bank under the auspices that
5 they were in fact purchase orders when in fact they
6 were not purchase orders, and the answer to that
7 was yes, we did.

8 Q. Was there any other so-called fraud
9 that they admitted to at that time?

10 A. No.

11 Q. And that was your meeting of January
12 25th, 2008?

13 A. Yes.

14 Q. That was the same day as the default
15 letter?

16 A. I'm not sure the day of the default
17 letter.

18 Q. I'm going to hand you and mark this as
19 Exhibit 1, the default letter. I think you signed
20 it; is that right?

21 A. I did.

22 MR. LINTON: Okay. Could we mark that?

23 THE WITNESS: Yeah, that's the same

24 day.

25 BY MR. LINTON:

1 Q. Right.
 2 A. Yes, sir.
 3 Q. In a construction loan is there
 4 typically a requirement for certification of
 5 completion of a percentage of construction before
 6 there's an additional draw?
 7 A. Yes.
 8 Q. Okay. And that's typical.
 9 A. Typical.
 10 Q. Okay. I'm going to go ahead and be
 11 specific. Have we covered every term of the
 12 accommodation for the site plan funding that you
 13 are aware of?
 14 A. I believe so.
 15 Q. Okay. And the entirety of the
 16 understanding of the specifics of that
 17 accommodation were based on Mr. Edahl's testimony;
 18 is that right?
 19 A. I'm sorry. Say that again?
 20 Q. Okay. Is the entirety of your
 21 knowledge of the terms and conditions of the
 22 accommodation for the site plan funding that we've
 23 been talking about Mr. Edahl's testimony?
 24 A. And Ron Konersmann's deposition, yes.
 25 Q. Okay. What is it in Ron Konersmann's

1 deposition that you claim establishes part of the
 2 terms and conditions of the accommodation for the
 3 site plan funding?
 4 A. I believe he said it was short term in
 5 nature, to end in December, and he might have even
 6 said it was under the \$2 million sublimit.
 7 Q. Okay. Is there anything else?
 8 A. I'm not sure if he mentioned the
 9 General Dynamics, but I know Jim did.
 10 Q. Um-hum. Do you consider an
 11 accommodation a change to a contract?
 12 MS. CHERRY: Object to the form.
 13 THE WITNESS: No. I consider it --
 14 usually it's short term in nature. They most
 15 certainly always are. And it's done to -- knowing
 16 that it's -- at the end of the day it's to help the
 17 client but not expose the bank to any undue risk.
 18 BY MR. LINTON:
 19 Q. I believe you said you thought that
 20 this accommodation lasted from March through
 21 December 2007; is that right?
 22 A. Correct.
 23 Q. Okay. Is that what you refer to as
 24 short term?
 25 A. That's a little bit longer than a

1 normal accommodation, but...
 2 Q. Well, what is the maximum length of
 3 time, within reason, that an accommodation would be
 4 extended for circumstances like SkyWaves? A year?
 5 A. Well, three to six months, usually.
 6 Q. Well, you've already testified in this
 7 case you thought it was from March through December
 8 31st, 2007, which I think is nine months.
 9 A. That's why I thought it was a little
 10 bit long.
 11 Q. A little bit long, but not out of
 12 the -- it wouldn't cause you any angst.
 13 MS. CHERRY: Object to the form.
 14 BY MR. LINTON:
 15 Q. Would it cause you any angst?
 16 A. This accommodation causes me great
 17 angst.
 18 Q. Well, in retrospect. Would -- would it
 19 have caused you any angst if you had known about it
 20 in March of 2007 when it was made?
 21 A. I would have stopped it had I known
 22 about it in March of 2007.
 23 Q. Why?
 24 A. Because you can't factor an unsecured
 25 anything. I don't know what you're factoring.

1 Q. So --
 2 A. It's a permanent working capital loan,
 3 which is what he needed, or additional capital from
 4 investors.
 5 Q. I got you. And I think you've covered
 6 that in your own deposition.
 7 A. (Witness moves head up and down.)
 8 Q. So what you're telling me is if I was
 9 in charge I would not have agreed to the written
 10 purchase order change that was authorized in March
 11 of 2007.
 12 A. I didn't say anything about purchase
 13 orders. I was talking specifically about the site
 14 plan financing.
 15 Q. Okay. We've gone over -- well, let me
 16 confer just a second.
 17 THE WITNESS: I need a glass of water.
 18 MS. CHERRY: Sure. Can we --
 19 MR. KEFALOS: I'll get it. Anyone
 20 else?
 21 MS. CHERRY: Johnny, do you mind just a
 22 minute? George was getting some water for --
 23 MR. LINTON: Oh, yeah. Sure. Of
 24 course.
 25 THE VIDEOGRAPHER: Do we want to go off 1018

1 recommendation, or do you know?

2 A. No, it wouldn't. It would have been
3 just a general loan review.

4 Q. Why would they be having a general loan
5 review?

6 A. We have them all the time. Every --
7 every loan in the bank gets reviewed at least
8 yearly. And if you're a watch list 6 credit, which
9 this one was prior to -- if you're -- a risk rate
10 of 6 prior to the watch list, it gets reviewed
11 semiannually.

12 Q. And if you're a lower risk than 6 --

13 A. You're in my world.

14 Q. Pardon me?

15 A. Then you come into problem loan
16 administration.

17 Q. So if you're rated a 5, how often do
18 you get reviewed routinely by the bank?

19 A. Once a year.

20 Q. Once a year. When did SkyWaves get
21 reviewed for its credit rating in 2007?

22 A. It would have been the -- I think the
23 November ABL report is what triggered it when the
24 November ABL -- I think it was November. ABL
25 report came in. That would have triggered the

1 review.

2 Q. What is an ABL report?

3 A. Asset-based lending report that comes
4 from the third party.

5 Q. Well, who is the third party in this
6 case?

7 A. I don't remember her name. It's on the
8 report.

9 Q. You mean like an auditor?

10 A. Yeah, that's right.

11 Q. Okay. This wasn't an asset-based
12 lending loan, was it?

13 A. No, but factoring kind of falls under
14 asset-based lending.

15 Q. Okay. Here's what I want to try to
16 understand: I'm going to give you a little bit of
17 an overview so perhaps we can keep this as short as
18 possible. I want to try to understand what the
19 objective of a problem loan administrator is such
20 as yourself when you go on site. Not go on site.
21 When you are reviewing an account, the overall
22 objective and then how you go about achieving it.

23 MS. CHERRY: Johnny, can you tell me
24 what -- I mean, I think you're moving outside the
25 topics that we're here about.

1 MR. LINTON: It's about the course that
2 they would have taken. I think -- obviously, the
3 course they would take would depend on what their
4 policy is on how they approach these things.

5 MS. CHERRY: Not necessarily. I mean,
6 you're not going to ask the witness what the course
7 of action would have been and then go into those
8 questions? I mean, I've --

9 MR. LINTON: Okay.

10 MS. CHERRY: I'm not sure -- you're
11 asking about him in his role at the bank, and he's
12 here as the corporate representative of the bank.

13 MR. LINTON: Well, that's because y'all
14 identified the same person was involved rather than
15 somebody else.

16 MS. CHERRY: Sure. Sure. Right. And
17 so my point is: If I had identified someone else
18 who didn't have his background, they probably
19 wouldn't be able to answer that question, and I
20 still think I would have complied with the
21 obligations under No. 3. So I'm allowing some
22 leeway. I'm just saying we're moving off the
23 designated topics.

24 BY MR. LINTON:

25 Q. What is your opinion about what course

1 of action you would have taken -- you being the
2 bank. Anytime I say you I'm referring to the bank
3 because that's who you're here today for, okay?

4 A. Yes.

5 Q. All right. What is the most probable
6 course of action you would have taken if you had
7 known about the accommodation that had been made by
8 Mr. Edahl and that in fact Mr. Edahl had
9 misrepresented what actually had happened?

10 A. What's the time frame?

11 Q. Whenever you started on this account
12 until the letter of default. So about a three-week
13 period there, maybe four.

14 A. The actions wouldn't have made any
15 difference because the default is not based upon an
16 accommodation that was made. The default is based
17 upon the financial condition of SkyWaves. I don't
18 know -- a default would have been called anyway.

19 Q. You don't know or --

20 A. No. I mean, I -- a default would have
21 been called.

22 Q. Now, what do you base that on?

23 A. Because they were in default of their
24 loan agreement, so a default would have been
25 called.

1 Q. Okay. On behalf of the bank, when a
2 problem loan administrator is given an assignment,
3 what is your objective?

4 A. To try and restructure a credit, if
5 possible. And if not, perform an orderly
6 liquidation that's in the best benefit of the
7 client or the bank and then the client.

8 Q. Okay. So if you had known that the
9 site plan accommodation had been approved by
10 Mr. Edahl and administered by the bank and you were
11 given this assignment in January 2008, okay?

12 A. Yes.

13 Q. All right. Would you have considered
14 SkyWaves was in default on the site plan funding
15 program?

16 A. No.

17 Q. Okay. And I can imagine that --
18 Ms. Cherry can object if she wishes -- that part of
19 the function of the site plan -- excuse me -- of
20 the problem loan administrator is to see what
21 accommodation can be reached to the benefit of the
22 debtor that does not cause any additional risk to
23 the bank; would that be fair?

24 MS. CHERRY: Object to the form.

25 THE WITNESS: Yes.

1 Corporation from Mr. Hennessy dated 1-25-08, marked
2 for identification.)

3 (A recess transpired from 2:37 until
4 2:48.)

5 THE VIDEOGRAPHER: We are now back on
6 the record. The time is approximately 2:48 PM.

7 BY MR. LINTON:

8 Q. What is the bank's normal protocol for
9 a problem loan administrator regarding a
10 determination of the facts surrounding a problem
11 loan?

12 A. Well, every problem loan is different,
13 so that's really a hard question to answer because
14 we could be working on a construction loan one
15 minute and the operating company the next. So the
16 protocol would be different for each one.

17 Q. Well, let me ask you this then: What
18 is the bank's protocol for a loan such as SkyWaves?

19 A. Okay. So we would normally read the
20 file, speak to the account officer. This one, this
21 case, we would have also had a conversation with
22 Castlen Morris, gathered other information from
23 reading the file, reviewed the loan documents,
24 asked whatever pertinent questions.

25 At the same time it would have been

1 BY MR. LINTON:

2 Q. Okay. Well, why don't you just tell
3 us, on behalf of the bank, based on bank policy,
4 what were you trying to do when you went to
5 SkyWaves in January 2008?

6 A. I was trying to discover, one, what
7 caused the monumental losses, where the financing
8 moneys had gone to and why there were no shelters
9 built and was there any way to not take a complete
10 and total loss on this credit.

11 Q. Did you consider the fact that shelters
12 had been built, as you've just testified to, a
13 material breach of any agreement?

14 A. No.

15 Q. All right. I want to ask you, on
16 behalf of the bank --

17 MR. EPTING: Johnny, could we take a
18 break?

19 MR. LINTON: Yep.

20 MR. EPTING: I mean, is it a reasonable
21 time to?

22 MR. LINTON: If you need one it is.

23 THE VIDEOGRAPHER: We will now go off
24 the record. The time is approximately 2:37 PM.

25 (EXH. 3, Letter to SkyWaves I

1 assigned to the attorney, and the attorney would
2 have done his due diligence. And then we would
3 have set up a transition meeting with the account
4 officer.

5 Q. Was the bank more active than normal in
6 the administration of problem loans because of the
7 circumstances that were in existence in January
8 2008?

9 MS. CHERRY: Object to the form.

10 THE WITNESS: I'm -- are you saying
11 were we more busy in 2008 than we are today?

12 BY MR. LINTON:

13 Q. No. I'm asking you were the demands
14 upon problem loan administration as it may have
15 impacted the SkyWaves account greater in 2008 than
16 is normal?

17 A. The demands upon -- upon a problem loan
18 administrator?

19 Q. Right.

20 A. Sure, it was more busy in 2008 than it
21 is today.

22 Q. Okay. You've mentioned a number of
23 factors, that it's the bank's policy regarding
24 information that should be assembled and evaluated
25 as part of a problem loan.

1 form to the extent that's a question.

2 MR. LINTON: Okay.

3 BY MR. LINTON:

4 Q. As the bank administering this loan,
5 was the bank aware of the impact that its default
6 letter and Mr. Licata's letter of February the 11th
7 would have upon the realistic opportunity for
8 SkyWaves to approach another lender or equity
9 investors?

10 A. Yes.

11 Q. And would that be that they will not be
12 able to successfully approach a lender or equity
13 investor if they disclose that they're in default
14 by their existing bank and that bank has accused
15 them of fraud regarding the taking of a million
16 point two million dollars?

17 MS. CHERRY: Object to the form.

18 THE WITNESS: Well, I don't believe
19 they could have ever gone to another commercial
20 lender just based upon their financials.

21 BY MR. LINTON:

22 Q. Let's don't talk about that, all right?

23 A. But an equity --

24 Q. Let's answer the question.

25 MR. LINTON: Molly.

1 THE WITNESS: You asked me both. You
2 asked me if a commercial lender and an equity
3 investor. I'm saying --

4 BY MR. LINTON:

5 Q. I didn't ask you anything about the
6 financial condition. I asked you if, based upon a
7 disclosure that a bank has accused us of fraud,
8 that we defrauded them out of a million two hundred
9 thousand dollars and our bank has put us in
10 default, would that substantially eliminate the
11 possibility, realistic possibility of getting a
12 loan from a commercial bank or an equity investor,
13 from an arm's-length, third-party equity investor?

14 MS. CHERRY: Object to the form.

15 THE WITNESS: It would severely hinder
16 them.

17 BY MR. LINTON:

18 Q. Severely hinder them. Have you ever
19 heard of anybody doing that, any bank or any
20 sophisticated equity investor?

21 A. Okay. No bank would do it, but I don't
22 know about a sophisticated equity investor, if they
23 would pay attention to it or not.

24 Q. That's fair enough. Mr. Hennessy, if
25 the risk to the bank was about a hundred thousand

1 or less, based on this existing financial
2 arrangement with SkyWaves, and SkyWaves had paid
3 off the balance of the remits that were due and
4 paid its payables, how much additional cash would
5 you have required for them to operate, try to get
6 substitute financing and tell them that the whole
7 line will be due April 5th, when it comes up for
8 renewal this bank does not want to take the kind of
9 risks that we have assumed?

10 MS. CHERRY: Object to the form.

11 MR. LINTON: Okay.

12 BY MR. LINTON:

13 Q. Go ahead.

14 A. Okay. So back in that time frame, even
15 though he got his default letter, we continued to
16 fund different aspects of this company. That's the
17 first issue. We did not cut off funding 100
18 percent. We continued to fund.

19 In March, when there was absolutely no
20 equity injection into the company and no viable
21 plan was given to us, I had no choice but to charge
22 this loan off because I had no carrying value for
23 collateral.

24 Q. Mr. Hennessy, my question --

25 A. So you would have needed 3 to \$5

1 million like we talked about time and time again.
2 It was said in a meeting you need millions of
3 dollars of injection. We talked to Ron Hewlette
4 about millions and millions of dollars of
5 injection. This went on for months. It's not just
6 one day. This started the conversation.

7 Q. You're referring to the default letter?

8 A. Correct. And then it went on for two
9 months, as you well know.

10 Q. Prior to the default letter, it's my
11 understanding from your testimony -- so correct me
12 if I'm wrong -- at the meeting on January the 25th
13 you told Mr. Konersmann in order for us to proceed
14 with this loan you will need to get 3 1/2 to \$5
15 million cash into this SkyWaves account; is that
16 right?

17 A. I don't believe there was -- I don't
18 believe those words were ever used in order to
19 proceed with this loan. Because this loan was
20 unsecured. In order to keep the company viable, he
21 would need that money.

22 Q. Was that what was going to be needed in
23 order for a default to be averted?

24 A. That's what they were trying to raise
25 and do, yes.

1 Q. Was \$3 1/2 million to \$5 million cash
2 going to be required by BB&T in order for a default
3 letter not to be issued?

4 MS. CHERRY: Object to the form.

5 THE WITNESS: The default was going to
6 be called by me no matter what because the company
7 was in default.

8 BY MR. LINTON:

9 Q. Don't you attempt, as part of a problem
10 loan administrator, to arrive at a plan to continue
11 with the customer before you write a default
12 letter?

13 MS. CHERRY: Object to the form.

14 THE WITNESS: Not all the time, no.

15 BY MR. LINTON:

16 Q. I didn't ask you about all the time.

17 MS. CHERRY: You did.

18 MR. LINTON: Okay. Maybe I did. I
19 apologize if I did.

20 BY MR. LINTON:

21 Q. Is it BB&T's policy and practice to
22 attempt a solution to a default -- to a problem
23 loan before issuing a default letter?

24 A. No, not all the time.

25 Q. When is it?

1 about is this: When you issued the letter of
2 January the 25th, the default letter, was the bank
3 aware that that would make it exceedingly more
4 difficult for SkyWaves to approach another lender
5 and secure any takeout financing?

6 MS. CHERRY: Object to the form.

7 THE WITNESS: It would make it harder,
8 yes.

9 BY MR. LINTON:

10 Q. Much harder. Do you agree with that?

11 A. It would make it harder.

12 Q. How much harder?

13 A. I think that they had a harder problem
14 convincing a lender to lend money into a company.

15 MR. LINTON: Molly, could you ask the
16 witness to be responsive?

17 THE WITNESS: The default, it would
18 make it harder, yes.

19 MR. LINTON: Sure.

20 MS. CHERRY: Johnny, I think that the
21 witness is entitled to clarify anything he
22 disagrees with in your question and answer your
23 question.

24 MR. LINTON: Right.

25 MS. CHERRY: And so I think the witness

1 A. If a default exists, almost every
2 single problem loan administrator calls that
3 default, and then we work through the issues if we
4 can. But you don't ever waive a default until you
5 call it.

6 Q. I didn't ask you about waiving it.

7 A. I understand.

8 Q. But what you're telling me is it's the
9 policy of the BB&T problem loan administration to
10 declare a default, if one exists, before it
11 attempts a solution and a workout.

12 A. You say policy. It's not a policy.

13 Q. In practice is what I'm talking about.

14 A. Practice, that's correct.

15 Q. Once you declare a default such as the
16 one on January the 25th, have we agreed that it
17 makes it much more difficult for the debtor to go
18 to another lender to take it out?

19 A. I thought we agreed he couldn't go to
20 another lender based upon his financial condition
21 of the company.

22 Q. See, please listen to my question, and
23 maybe I --

24 A. You said lender.

25 Q. I said other lender. What I'm talking

1 is clarifying where he disagrees with your
2 question. I can continue to object to the form.
3 If you do not feel like the witness has answered
4 your question you can ask it again.

5 MR. LINTON: He -- I will say this: I
6 believe that on a number of occasions he's answered
7 the question and then he adds to his answer
8 unresponsive testimony that was not asked about but
9 was on his mind because he wants to make an
10 argument rather than answer the question.

11 MS. CHERRY: I think the witness is
12 allowed to answer the question as he sees fit. If
13 you disagree or don't like his answer, then you can
14 take it up with the court when the testimony is
15 before the court. I think that's the appropriate
16 time if you object to a portion of his answer,
17 Johnny.

18 BY MR. LINTON:

19 Q. When you declared the default, were you
20 aware of the amount of cash by equity or
21 subordinated loans that existing shareholders had
22 made to the company in 2007?

23 A. Yes.

24 Q. How much was that?

25 A. I don't recall the account number off

1 A. I gave the company almost no value at
2 all.

3 Q. Okay. When you did that, were you
4 aware that a sophisticated investor, Hunt Capital,
5 had a letter of intent to put \$4 million equity in
6 SkyWaves in March of 2007?

7 MS. CHERRY: Object to the form.

8 THE WITNESS: March of 2007?

9 BY MR. LINTON:

10 Q. Right.

11 A. I think I knew that Hunt Capital had
12 done something and Wachovia was involved, but I
13 don't -- I don't recall the exact details.

14 Q. Well, I guess I know you're speaking
15 for yourself. Was there anybody else in the bank
16 that had any knowledge that the bank relied upon
17 about the Hunt Capital investment?

18 MS. CHERRY: I'm going to allow the --
19 I think you're finishing up. I'm going to allow
20 the question.

21 THE WITNESS: I think we all knew about
22 the Hunt Capital investment, and if it -- if I
23 worked for Hunt Capital, since we're all -- I would
24 have looked at it, but it would have been based
25 upon SkyWaves' projections for 2007, which never

1 per share cost of that the company would have had a
2 \$13 million value?

3 MS. CHERRY: Object to the form.

4 THE WITNESS: No.

5 BY MR. LINTON:

6 Q. Okay. When you're assessing the value
7 of a company like SkyWaves as a problem loan, would
8 it be significant to know what value sophisticated
9 investors have put on the company within the last
10 year?

11 A. Would it be of value? It might be --
12 it might be an issue of concern, but I'm -- I would
13 still go back to the overall financial stability of
14 the company and the company's ability to make
15 money, which it really hadn't shown in several
16 years that it had the ability to make money.

17 Q. Well, that would be true in the two
18 investors that I just asked you about: one
19 entering into a letter of intent to put 4 million
20 into the company and one who actually put \$500,000
21 into the company equity. Would that make any
22 difference to you?

23 A. Oh, I would welcome the capital
24 injection because the company needed it. But, I
25 mean, in reference to me to, what, not issue a

1 materialized.

2 BY MR. LINTON:

3 Q. Okay. Was the bank aware that the Hunt
4 Capital letter of intent to invest \$4 million cash
5 valued the enterprise at \$11 1/2 million?

6 MS. CHERRY: Object to the form.

7 THE WITNESS: I don't recall that,
8 seeing that, no.

9 BY MR. LINTON:

10 Q. Okay. Was the bank aware that a
11 sophisticated investor invested \$500,000 in July of
12 2007 and that on a per share basis that would have
13 valued the company at \$13 million?

14 MS. CHERRY: Object to the form.

15 THE WITNESS: So that would have
16 been -- I think it was one of the guarantors that
17 did that.

18 BY MR. LINTON:

19 Q. No. It was a new investor.

20 A. Oh. I know there was some capital
21 contribution. I just didn't know the details
22 behind it.

23 Q. Okay. So was the bank aware that a
24 sophisticated investor in July of 2007 had invested
25 \$500,000 equity in SkyWaves and that based on the

1 default letter? In reference to me to do what?

2 Q. To determine what forbearance agreement
3 terms would be appropriate to reduce the bank's
4 risk and permit SkyWaves to secure other financing.

5 A. So not acting upon the defaults until
6 maturity? Is that what we're talking about?

7 Q. That's fine, um-hum.

8 A. We did that.

9 Q. You continued to make all advances
10 under any line of credit to the bank -- to
11 SkyWaves?

12 A. No, but we didn't act upon the events
13 of default. We didn't -- we didn't close the
14 bank -- we didn't close SkyWaves down.

15 Q. Did you advance any more moneys on
16 invoices?

17 A. No.

18 Q. Did you advance any of the remaining
19 hundred thousand dollars or up to a hundred
20 thousand dollars on the purchase order line?

21 A. I'm sorry. I misquoted. We did
22 advance money for payroll and possibly some
23 invoices to complete one or two Verizon shelters.
24 So there was some money that was advanced.

25 Q. Fairly limited?

17

17

1024

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-10-7516

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.

AFFIDAVIT OF RON KONERSMANN

I, Ron Konersmann, being first duly sworn, declare as follows:

1. I am over the age of 18, and have personal knowledge of all facts contained herein and, if called upon to testify with respect thereto, could and would competently do so.
2. I was deposed in 2013 and provide this affidavit with additional information: I am a graduate of Notre Dame and have an MBA. I served as an enlisted soldier in the United States Marine Corp.
3. At all relevant times, I was CEO of Skywaves and the major stock holder.
4. In late 2006, our Board, recognizing the growth potential of the company, requested that I raise capital investment. I was introduced to Hunt Capital. We made a presentation and Hunt conducted a due diligence. Hunt Capital presented Skywaves with an offer to purchase 30% of the company for \$4 million dollars in March 2007. The letter of intent is attached hereto as Exhibit 1.
5. I advised James Edahl of the proposal, and he advised me that accepting that offer of capital was imprudent because he could design a loan package that would provide the

equivalent liquidity and that we knew him and BB&T. In his words, why take a chance with a partner you don't know.

6. Shortly thereafter, Mr. Edahl designed a program that doubled our credit line to 3.5 million and reduced our costs of funds. I explained to him that the timing of Skywaves' cash flow was uncertain, specifically mentioning the very large potential contract with General Dynamics. He assured me that he could tweak his proposal to work for us and that BB&T was a far better partner through its capital markets division to go to an initial public offering.

7. When the delays with the General Dynamics contract persisted, Mr. Edahl confirmed by early July that Skywaves could access 2.0 million of a 3.5 million dollar loan based on potential sites General Dynamics had identified.

8. Mr. Edahl met with a potential investor in McBee, the Martin brothers, who was leery of investing with a company that was factoring, but based upon the assurances Mr. Edahl made, Mr. Martin invested \$500,000. Based on the value of all outstanding shares, the transaction valued the company at \$13 million, not including discount for minority share and lack of marketability.

9. At no time did Mr. Edahl express any dissatisfaction with Skywaves or its performance. He understood any projections that were not realized were due to delays beyond our control.

10. A comparison of Skywaves' operating costs for 2006 and 2007 reveal that \$810,000.00 more was spent in 2007 based on growth and building in capacity to handle that growth. Mr. Edahl fully encouraged that build up and was aware of the company financials.

11. In late 2007, both November and December, Mr. Edahl stated that because shareholders had put in additional capital and converted loans to equity, Skywaves was in a

stronger position at the end of 2007 than March when BB&T had doubled the credit lines because the contracts that would expand revenues immensely were on the horizon.

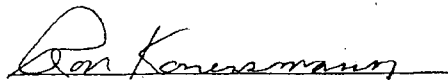
12. In late December, 2007, Mr. Edahl suggested we put together a pro forma for a three year plan that would be used as part of the effort to have an initial public offering. We put together a plan by early January, 2008 and shared it with him.

13. On January 17, 2008, I had a routine meeting with the new administrator for the bank and Mr. Edahl. The next day Mr. Edahl called to say the bank is declaring a default because of funds obtained from BB&T based on the General Dynamics site plans. I was shocked as that was an integral part of our agreement. If Mr. Edahl had told me in July, 2007 that the bank was not going to permit access to those funds, Skywaves would have pursued one of the avenues discussed in the memorandum in opposition to summary judgment.

14. Mr. Edahl was summarily removed from the account and Michael Hennessey took over. He was very accusatory, claimed Skywaves had defrauded the bank, and that he would put us in jail.

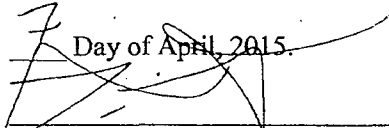
15. At no time did the bank remove the default declared by Mr. Edahl.

FURTHER AFFIANT SAYETH NOT.


Ron Konersmann

April 7, 2015
Charleston, South Carolina

SWORN BEFORE ME THIS

7 Day of April, 2015.

Notary Public of South Carolina
My Commission Expires: 11/27/22

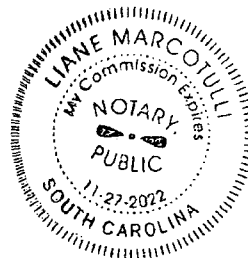


EXHIBIT 1

PRELIMINARY, NON-BINDING TERM SHEET**POSSIBLE INVESTMENT IN SKYWAVES CORPORATION**

This Term Sheet is intended as a proposal only and is not binding on Hunt Growth Capital, L.P. ("Hunt") or any of its affiliates. Neither Hunt nor any of its affiliates shall have any obligation under or in respect of this Term Sheet unless and until definitive legal documentation with respect to the transactions contemplated hereby is executed by Hunt or its affiliates.

- Company:** SkyWaves Corporation, a Delaware corporation (the "Company").
- Key Management:** Ron Konersmann, Jim Phillips, Jeff Ward, John Voyko, and Jeff Kramer (collectively the "Key Managers").
- Hunt Investor:** A special purpose affiliate of Hunt (the "Hunt Investor").
- Type of Security:** Series A Participating Preferred Stock (the "Series A Stock").
- Investment Amount:** A total of \$4,000,000 (the "Investment") payable in cash at closing.
- Use of Proceeds:** The Investment will be used as working capital for the Company and for the procurement of manufacturing-related capital equipment. No portion of the proceeds of the Investment shall be paid, directly or indirectly, to Existing Shareholders or any combination thereof.
- Closing Date:** May 31, 2006 or as soon thereafter as practicable.
- Valuation:** A pre-money enterprise value of \$11,550,000.
- Based on the current fully diluted shares outstanding of 6,500,000 plus the creation of an incentive stock option pool to compensate and incent the Key Managers (the "Incentive Stock Option Plan") representing 10% of the pro forma fully diluted outstanding shares of Common Stock after giving effect to the Investment and the current debt minus cash ("Net Debt") of \$1,387,208, this computes to a per share price of \$1.50 (the "Original Purchase Price").
- Purpose of the Company:** The purpose of the Company will continue to be to design and manufacture concrete shelters; to provide telecom-related integration services, and to engage in any and all such activities related thereto. Any change in the Company purpose shall require the written consent of the Hunt Investor.
- Management of the Company:** Subject to the limitations summarized in this term sheet, the Key Managers will generally be responsible for all management decisions affecting the Company, except for specified major

decisions and any decisions which could result in direct liability for the Hunt Investor. Major decisions will cover a variety of matters, including without limitation, (i) the purchase or sale of assets by the Company (other than in the ordinary course of business), (ii) acquisitions of other entities, (iii) the borrowing of funds or the settlement of claims by the Company in excess of a certain permitted dollar amount, (iv) the making of capital expenditures in excess of a certain permitted dollar amount, (v) taking additional capital contributions or the issuance of any additional equity interests, (vi) mergers or other business combinations, (vii) new product lines, (viii) all compensation of senior management, (ix) all transactions with related parties and (x) all other material transactions.

The size of the Company's Board of Directors shall be set at five (5) members and will be initially constituted as follows:

Two (2) directors shall be elected by the holders of Series A Preferred voting as a single class and shall initially be Michael Bierman and Matthew Golden (the "Preferred A Directors").

Two (2) directors (the "Common Directors") of whom one shall be elected by holders of Common Stock and one such person shall be the CEO.

The one (1) remaining director (the "Outside Director") shall be a person completely independent from the Company, the Key Managers and the Hunt Investor having relevant industry experience, and shall be mutually acceptable to the Common Directors, and the Preferred A Directors.

Annual Business Plans:

Each year the Key Managers will propose an annual business plan ("Annual Plan") for review and approval by the Hunt Investor.

In the event that an Annual Plan is not approved prior to the commencement of any fiscal year of the Company, the prior approved Annual Plan and the associated executive salaries shall continue as the approved Annual Plan for such fiscal year until a new Annual Plan is approved by the Hunt Investor.

Liquidation Preference:

In the event of any liquidation or winding up of the Company, the holders of the Series A Stock shall be entitled to receive one times the Original Purchase Price, plus the Series A Dividends (hereinafter defined) (the "Liquidation Amount"), in preference to the holders of Common Stock.

After the payment of the aforesaid amount, the remaining assets or property distributable upon such liquidation shall be divided pro rata among the holders of the Common Stock and the Preferred Stock.

1030

A sale, conveyance or other disposition of all or substantially all of the property or business of the Company, or a merger or consolidation with or into any other corporation (collectively, an "Acquisition" of the Company), other than (i) a consolidation with a wholly-owned subsidiary of the Company; (ii) a merger effected exclusively to change the domicile of the Company, (iii) an equity financing in which the Company is the surviving corporation, will be deemed to be a liquidation for purposes of the liquidation preference.

Employee Options: Grant of options or sale of Common Stock to employees will be pursuant to an Incentive Stock Option Plan administered by the Board of Directors. Vesting under any such plans shall provide that options or stock shall not vest until one year after grant, and shall vest thereafter on a quarterly basis over a minimum of four years.

The repurchase option shall provide that upon termination of the employment of the shareholder, with or without cause, the Company or its assignee (to the extent permissible under applicable securities law qualifications) retains the option to repurchase at cost any unvested shares held by such shareholder.

Dividends: The Series A Stock will be entitled to preferential dividends at the rate of 12% per annum of the Series A Stock Original Purchase Price per share, as adjusted, which shall be cumulative, accrue daily and compound annually, plus dividends on an as converted basis, when, as and if declared on the Common Stock (collectively, the "Series A Dividends"). Dividends on the Series A Stock shall be paid senior to any other series of capital stock. For any other dividends or similar distributions, the Series A stock shall participate with Common Stock on a pro rata basis.

Limitations on Transfers of Interests: Direct or indirect transfers of Company interests in the Company by the Key Managers will require the consent of the Hunt Investor, except for specified transfers to affiliates, family members or trusts for estate planning purposes, so long as such transferee(s) execute an agreement binding it to the same transfer restrictions as those affecting the Managing Member. In no event shall the Key Managers ever own less than 33% of the Company.

Hunt Investor will be permitted to transfer, without consent, its interest to descendants of Ruth Ray Hunt; such persons' spouses; entities such persons or their spouses control; or trusts for the benefit of such person or their spouse.

Limitation on Conflicts of Interest: Ron Konersmann will agree that he will devote his full time and attention to the business and affairs of the Company and avoid conflicts of interest for as long as Hunt retains an ownership interest in the Company (and in certain circumstances, during later periods) 031

(the "Substantial Commitment Test"). In light of the diverse business interest and relationships of Hunt, there will not be similar, corresponding restrictions on Hunt and its affiliates.

Status of Ron Konersmann:

In connection with specified special events, including the death or disability of Ron Konersmann, Ron Konersmann's breach of the Definitive Agreement, breach by Ron Konersmann of employment, non-competition or non-solicitation agreements entered into with the Company or the Company's bankruptcy, the Hunt Investor will have the option to assume management of the Company.

Hunt Investor Liquidity Rights:

The Definitive Agreement will contain standard unwind provisions, including a provision pursuant to which the Hunt Investor may cause the Company to redeem its interest or offer to sell its interest in the Company at a specified price to the other stockholders which will obligate the other stockholders to sell their interests if the other stockholders do not buy the Hunt Investor's interest or liquidate. The rights specified in the prior clause may not be exercised during the first three years following closing. At any time and from time to time following the fifth anniversary of the closing, the Hunt Investor shall have the right to cause the Company (either stock or assets) to be sold to a bona fide third party purchaser. Notwithstanding the foregoing, should Ron Konersmann no longer be satisfying the Substantial Commitment Test (including but not limited to reasons relating to death or disability), the Hunt Investor shall be free to exercise any Company unwind provisions irrespective of time prohibitions listed herein.

Employment Agreements:

Hunt will require the Key Managers to execute employment, non-competition and non-solicitation agreements in form and substance acceptable to Hunt.

Key Man Insurance:

The Company shall pay the costs for a key man term life insurance policy for the benefit of the Company on the life of Ron Konersmann in an amount not less than \$5,000,000. Such policy shall remain in effect for so long as the Hunt Investor owns an interest in the Company.

Special Conditions to Closing:

The following will have occurred prior to closing:

- (a) The Company shall have received a lease renewal option and an option to purchase the Company's manufacturing facility, and associated capital equipment used in the shelter manufacturing process, in Charleston, SC on terms and conditions satisfactory to Hunt;
- (b) Ron Konersmann shall have executed a voting agreement with existing common shareholders which will give him the right to vote on behalf of a minimum of 51% of the common shareholders containing such terms and conditions satisfactory to the Hunt Investor; and

- (c) There shall not have occurred any material adverse change in the business, assets (including intangible assets), financial condition or results of operations of the Company.

Conduct of the Business:

Prior to the closing of the proposed Investment, the Company shall be operated solely in the ordinary course of business consistent with past practices and, without Hunt's prior written consent, the Company will not make or enter into any material acquisition, contract or letter of intent binding the Company to make any dividend or share repurchase, bonus, discharge or hire any key employee or enter into employment agreements with existing employees, borrowing, increase in compensation or capital expenditures, asset sale, or affiliate transaction except non-material transactions in the ordinary course of business.

Confidentiality:

The signatories will not, and will cause the management of the Company, and their representatives not to, disclose to any person other than principals and representatives of the current shareholders the existence or the terms of this proposal.

Exclusivity:

So long as Hunt is proceeding in good faith with the proposed Investment, neither the Company nor the Key Managers shall negotiate with any other parties concerning a proposed financing, sale (whether by sale of stock or assets), recapitalization, merger, combination, etc. This exclusivity will remain in full force and effect until terminated upon delivery of written notice to the other party terminating discussions; provided, however, that such notice shall not be delivered by the Company until after 90 days following the execution of this letter.

Expenses:

The Company will pay the reasonable fees and expenses, not to exceed \$50,000, incurred by Hunt Investor in connection with the proposed transaction.

Non-binding Proposal:

It is understood and agreed that this is a non-binding proposal and does not contain all matters upon which an agreement must be reached in order for the proposed Investment to be consummated and creates no binding rights or other obligations in favor of any party, except for the binding rights and obligations referred to in the paragraphs labeled Conduct of Business, Confidentiality, Exclusivity and Non-binding Proposal. A binding agreement with respect to the Investment will result only from the execution of the Definitive Agreement, which any proposed party thereto may or may not execute in its respective sole and absolute discretion. This letter shall be governed by and interpreted in accordance with the laws of the State of Texas.

Counterparts:

This letter may be executed in counterparts, which, taken together, shall represent a fully executed letter.

1033

Expiration:

This non-binding term sheet will expire at 5:00 p.m. (Dallas, Texas time) on Friday, March 30, 2007, unless a fully executed copy of this letter is received by Hunt prior to such time. Upon execution hereof, Hunt shall commence formal due diligence and preparation of formal legal documents (the "Definitive Agreement"), subject in all respects, to satisfactory completion in Hunt's sole discretion.

We are very enthusiastic about partnering with management to grow and develop the Company. Upon signing of this letter, we are prepared to move forward expeditiously.

Sincerely,

HUNT GROWTH CAPITAL, L.P.

By: Hunt Growth Capital, L.L.C., its general partner

By: Michael T. Bierman
Name: MICHAEL T. BIERMAN
Title: Manager

21

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF MECKLENBURG NINTH JUDICIAL CIRCUIT
2009-CP-10-7516

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.

VIDEO

DEPOSITION OF: MICHAEL BURKE

DATE: December 18, 2013

TIME: 9:04 a.m.

LOCATION: Nexsen Pruet
701 Green Valley Road
Greensboro, NC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: LISA A. WHEELER, RPR, CRR

A. WILLIAM ROBERTS, JR. & ASSOCIATES

Fast, Accurate & Friendly

Charleston, SC	Hilton Head, SC	Myrtle Beach, SC
(843) 722-8414	(843) 785-3263	(864) 234-7030

Columbia, SC	Greenville, SC	Charlotte, NC
(803) 731-5224	(864) 234-7030	(704) 573-3919

1 APPEARANCES OF COUNSEL:
2 ATTORNEYS FOR THE PLAINTIFF
3 SKYWAVES I CORPORATION:

4 GEORGE J. KEFALOS, PA
5 BY: GEORGE J. KEFALOS
6 46A State Street
7 Charleston, SC 29401
8 (843) 722-6612
9 gjk@kefaloslaw.com
10 DUFFY & YOUNG
11 BY: JOHN P. LINTON
12 96 Broad Street
13 Charleston, SC 29401
14 (843) 720-2044
15 jlinton@duffyandyoung.com

16 ATTORNEYS FOR THE DEFENDANTS
17 BRANCH BANKING AND TRUST COMPANY,
18 successor in merger to BRANCH BANKING
19 AND TRUST COMPANY OF SC, a/k/a BB&T,
20 and JAMES EDAHL:
21 NEXSEN PRUET
22 BY: MOLLY CHERRY
23 205 King Street, Suite 400
24 Charleston, SC 29401
25 (843) 577-9440
mcherry@nexsenpruet.com

NEXSEN PRUET
BY: JULIO E. MENDOZA, JR.
1230 Main Street, Suite 700
Columbia, SC 29201
(803) 540-2026
rmendoza@nexsenpruet.com

ALSO PRESENT: Mike Hennessy
Russell Bogue

THE VIDEOGRAPHER: John Girdler

(INDEX AT REAR OF TRANSCRIPT)

(Commencing at approximately 9:04 a.m.)

* * * * *

STIPULATION

It is stipulated by and between Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial; and that the deponent does not waive reading and signing of this deposition.

* * * * *

THE VIDEOGRAPHER: We're going on the record. The time on the monitor is 9:04 a.m. This is the video deposition of Mike Burke taken by the Plaintiff in the matter of SkyWaves I Corporation, Plaintiff, versus Branch Banking & Trust Company, et al, Defendants, under the jurisdiction of the Court of Common Pleas for the Ninth Judicial Circuit, County of Charleston, Case Number 2009-CP-10-7516.

This deposition is being held at Nexsen Pruet, 701 Green Valley Road, Suite 100, Greensboro, North Carolina, on Wednesday, December 18th, 2013. My name is John Girdler. I'm the

video specialist. The court reporter is Lisa Wheeler. We're from A. William Roberts, Jr. & Associates.

Counsel will now state their appearances for the record and the court reporter will swear in the witness.

MR. KEFALOS: This is George Kefalos on behalf of SkyWaves.

MR. LINTON: John Linton on behalf of SkyWaves.

MS. CHERRY: Molly Cherry on behalf of the Defendants BB&T and Jim Edahl.

MR. MENDOZA: Rick Mendoza on behalf of the Defendants BB&T and Jim Edahl.

MICHAEL BURKE
being first duly sworn, testified as follows:

EXAMINATION

BY MR. KEFALOS:

Q. Mr. Burke, my name's George Kefalos. I'm one of the lawyers representing SkyWaves and we've just met. I want to ask you some questions about what you might know about this case. Do you feel well enough to answer my questions today?

A. I will do my best.

Q. And -- and will you give me full and

complete answers to my questions today?

A. Yes.

Q. And if you don't understand a question, will you ask me to explain it so that I know if you give an answer you believe you've understood the question?

A. I will.

Q. Good. Tell me a little bit about yourself. Where do you live currently?

A. I currently live outside of Atlanta in a suburb, Smyrna, Georgia.

Q. How long have you been there?

A. I've only been in Smyrna for a year-and-a-half. I moved to Acworth, Georgia, which is maybe 15 miles north of Atlanta in 1986. I moved from Chicago to Atlanta for work.

Q. What brought you from -- what sort of work brought you from Chicago to Atlanta?

A. I was working for Heller Financial at the time in factoring and they closed the factoring office in Chicago, expanded the Atlanta office because most of the clients we handled out of Chicago were in the southeast so we were closer to them.

Q. All right. You -- are you married?

1 arrangement not be linked to the sale of any
2 particular product, repayment of the asset-based
3 loan?

4 A. I believe it's still based on payment
5 because that is how your loan is -- is reduced.
6 And it doesn't have to be a product. It could be a
7 service.

8 Q. Well, sure. And there's obviously
9 going to be a payment schedule on an asset-based
10 loan, but I'm looking to see what the difference
11 is. In a -- in a asset-based loan BB&T will look
12 at the customer, determine what their line of
13 credit or their creditworthiness should be and make
14 a loan. The loan has to be paid back according to
15 a certain schedule.

16 A. Right.

17 Q. And the schedule does not depend on the
18 sale of any particular product or any service; it's
19 just the money is used for the operations and it
20 has to be repaid by schedule.

21 MS. CHERRY: Object to the form.

22 BY MR. KEFALOS:

23 Q. Is that generally accurate?

24 A. I don't -- I would like you to repeat
25 that if you could.

1 Q. Well, what I'm interested in knowing is
2 can you -- is it fair to say that a factoring loan,
3 the repayment is linked to a particular product
4 that BB&T, for example, would have a lien on while
5 the repayment of an asset-based loan is not linked
6 to the -- a particular product that BB&T might have
7 a lien on?

8 MS. CHERRY: Object to the form.

9 A. The repayment of a factoring loan is
10 based on our purchase of the receivables. I don't
11 know how the difference would be with an
12 asset-based loan.

13 Q. Well, you know that an asset-based loan
14 would be -- well, let me ask you this: Would an
15 asset-based loan be sort of a general line of
16 credit?

17 MS. CHERRY: Object to the form.

18 A. I'm not sure what you would mean by
19 general line of credit. It's a line of credit I
20 believe that is based on certain criteria.

21 Q. The criteria would be what?

22 A. The assets that you're lending against,
23 receivables or receivables and inventory and what
24 is eligible on those receivables and the
25 performance of those receivables.

1 Q. Okay. Well, is there a difference
2 between an asset-based loan and a factor --
3 factoring agreement?

4 A. Be -- in the agreements, yes, I'm sure
5 there are. I -- again, I am not an asset-based
6 lender so I --

7 Q. Okay.

8 A. -- I can't give you details on that but
9 I can tell you what a factoring agreement is like.

10 MR. KEFALOS: Let's take a break so we
11 can get those exhibits.

12 MR. MENDOZA: Yeah.

13 THE VIDEOGRAPHER: We're going off the
14 record at 9:25 a.m.

15 (Whereupon, there was a recess in the
16 proceedings from 9:25 a.m. to 9:27 a.m.)

17 (BURKE EXHIBIT 1, E-mail Message from
18 Walter Denning to James Edahl, et al, September 7,
19 2007, Subject: Otranto Station, was marked for
20 identification.)

21 THE VIDEOGRAPHER: We're going back on
22 the record at 9:27 a.m.

23 BY MR. KEFALOS:

24 Q. I've handed you what we've marked as
25 Exhibit Number 1 which is a memo from Mr. Denning

1 to Mr. Edahl dated September 7th, 2007. Have you
2 seen -- had you seen that when you first came on to
3 work on the SkyWaves account?

4 A. I don't recall seeing this but I could
5 have and I don't remember. There was a lot of
6 paper involved that I had to go through on
7 SkyWaves.

8 Q. Sure. Let me hand you what we'll mark
9 as Exhibit Number 2.

10 (BURKE EXHIBIT 2, Memorandum from Jim
11 Edahl to Walt Denning, September 20, 2007, Re:
12 Skywaves, was marked for identification.)

13 MR. KEFALOS: Would you pass that over
14 to Molly?

15 THE WITNESS: Sure.

16 BY MR. KEFALOS:

17 Q. Have you seen Exhibit Number 2 which is
18 a memo dated September 20, 2007 from Jim Edahl to
19 Walt Denning?

20 A. I don't recall. I can't say that I've
21 seen this or not.

22 Q. Do you remember taking stock of the
23 SkyWaves account when you first came on in -- was
24 it November of 2007?

25 A. It was the end of November, right.

1 Q. Yeah. And had you reviewed the -- what
2 had been the projected revenues and earnings when
3 you first came on?

4 A. I don't believe I did when I first came
5 on.

6 Q. When would you have done that?

7 A. I don't recall.

8 Q. Well, do you remember what your
9 thinking was about the SkyWaves account when you
10 looked -- when you first came on? Did it look like
11 it was a viable account? Did it look like there
12 was any problem or trouble with the account?

13 A. My initial impression was that it was a
14 different structure and I know at some point I saw
15 financial information and recall the company was, I
16 believe, showing losses at that time.

17 Q. Yeah. Were you at all concerned in
18 November of '07 that the company would not be able
19 to succeed?

20 A. I don't recall having that concern at
21 that time and it was a lot to look at and, I think,
22 assimilate so I was more concerned initially on
23 what my role was in managing the collateral of the
24 loan.

25 Q. Would you look at the last paragraph on

1 the first page of Exhibit 2. Mr. Edahl writes, we
2 were hoping that by the end of this year revenues
3 and profits would be at a level where purchase
4 order financing would be minimal and we would be in
5 a position to convert to more traditional ABL
6 financing for the operation.

7 Do you know what that means?

8 A. I have to assume that Mr. Edahl was
9 feeling that the company would progress to a better
10 financial condition and it could be moved from
11 factoring to ABL.

12 Q. To ABL?

13 A. That's an assumption on my part though.

14 Q. Sure. And he goes on to say, while
15 this goal has been delayed it appears that just
16 with the contract work in hand with General
17 Dynamics we'll be able to accomplish this goal in
18 2008.

19 Was that your impression at the time
20 you came on board?

21 A. At the time I came on board I didn't
22 have any impression of the financial set.

23 Q. Okay. When did you first learn that
24 BB&T was loaning money to SkyWaves on purchase
25 orders and not on invoices?

1 MS. CHERRY: Object to the form.

2 A. It had to be very shortly after I
3 started because I had to manage the account. So if
4 they needed any funding on purchase orders, they
5 would have come to me.

6 Q. Would anybody have told you about the
7 arrangement before you came on board?

8 A. I had a short period of time to work
9 with Castlen. I believe I actually took vacation
10 days from my previous job to go up, meet him and
11 visit some clients and discuss clients that I would
12 be handling. I don't recall if we discussed
13 SkyWaves at that time or not.

14 Q. So you don't remember if Mr. Castlen
15 Morris told you about the unusual nature of the
16 lending relationship with SkyWaves?

17 MS. CHERRY: Object to the form.

18 A. Could you repeat the last part? I'm
19 sorry.

20 Q. Do you remember whether Mr. Morris told
21 you of the unusual nature of the lending
22 relationship between BB&T and SkyWaves?

23 MS. CHERRY: Object to the form.

24 A. I don't remember what he told me. I
25 know I did talk to Castlen at some point near the

1 beginning of the relationship about the account,
2 but I don't recall exactly when we spoke about it.

3 Q. Okay. What was your reaction when you
4 learned that BB&T was loaning against purchase
5 orders?

6 MS. CHERRY: Object to the form.

7 A. I was surprised.

8 Q. And why were you surprised?

9 A. Because purchase order financing is
10 something I have never done. There are companies
11 that specialize in that and I just thought that
12 that was a different thing for a bank to be doing.

13 Q. You didn't like it?

14 A. I'm not saying that I didn't like it.
15 It was just out of the ordinary.

16 Q. Let's take a look at this --

17 MR. KEFALOS: Let's mark this as
18 Exhibit Number 3, March 26, '08.

19 (BURKE EXHIBIT 3, Memorandum from Tol
20 Broome to File, March 26, 2008, Re: Skywaves I
21 Corporation, was marked for identification.)

22 BY MR. KEFALOS:

23 Q. This is a memo dated March 26th, 2008
24 from Tol Broome to the file. Have you seen this
25 before?

1 A. Again, I can't say for sure. I feel
2 like I have, but I've seen so much paper.

3 Q. And who was Tol Broome?

4 A. Tol Broome at the time I believe was
5 the president of the commercial finance group at
6 BB&T.

7 Q. In his -- the first numbered paragraph
8 Mr. Broome writes, BB&T is not equipped to finance
9 purchase orders anywhere in the bank if we're
10 relying on the purchase orders for repayment.

11 Do you see that?

12 A. Yes, sir.

13 Q. Would you agree with that?

14 A. I would agree that we in the factoring
15 group weren't equipped to do it, but I can't speak
16 for any other part of the bank.

17 Q. What's the problem with purchase order
18 factoring from your standpoint?

19 A. It has to be monitored. There's more
20 risk involved. There are different kinds of
21 purchase order financing. You have purchase order
22 financing for finished goods, purchase order
23 financing for work in process, but it's a different
24 risk that you are taking there.

25 Q. And with the purchase order financing

1 versus an invoice financing, a purchase order does
2 not have a product yet for a lien to attach, does
3 it?

4 A. In -- in the -- could you repeat that?
5 I missed the last part. I'm sorry.

6 Q. I'm looking at the difference between
7 purchase order financing and lien -- or invoice
8 financing. In invoice financing there's a finished
9 product and an invoice has been issued. Purchase
10 order --

11 A. Right.

12 Q. And -- and that gives BB&T some level
13 of security, the fact that there's a product and an
14 invoice that's been issued?

15 A. Correct.

16 Q. Now in purchase order financing
17 there's -- there's no product and no invoice yet
18 that has been issued?

19 A. To my understanding that's correct.

20 Q. Good. And -- and with a purchase order
21 there's really no way of knowing or booking when
22 the invoice is supposed to be paid?

23 A. I don't know if that's correct since
24 I've not done purchase order financing or been
25 involved with it other than this case. I would --

1 would not know if the purchase order states any
2 information about when the project -- the product
3 will be completed and shipped to let you know when
4 an invoice would be created. I don't know that.

5 Q. Well, in the SkyWaves case there was no
6 indication when the purchase order was given when
7 the product would be completed, shipped and when
8 the invoice would be issued?

9 A. I don't -- I don't remember what
10 information was on the purchase order so that's
11 hard for me to answer right now.

12 Q. Okay. All right. When you came on
13 board did you understand that this funding purchase
14 orders had been going on for some time?

15 A. Once I started handling the account and
16 inquired about it, then I was aware of that.

17 Q. And could you see that the funding of
18 these purchase orders had become the course of
19 dealing between BB&T and SkyWaves?

20 MS. CHERRY: Object to the form.

21 A. By course of dealing what exactly do
22 you mean?

23 Q. Well, it had been going on for a while
24 and this was the way the funding was being handled.

25 A. It -- it had been going on for a while,

1 yes.

2 Q. All right. And could you see that
3 SkyWaves had come to rely on purchase order funding
4 as part of its business operations?

5 MS. CHERRY: Object to the form.

6 A. My opinion looking at the receivables
7 and the amount of purchase orders was that they
8 were relying on that.

9 Q. Good. And you coming in at that time
10 in November of 2007 under the circumstances that
11 this had been going on for some time and SkyWaves
12 had come to rely on it, do you think that it would
13 have been fair to pull the purchase order funding
14 without giving SkyWaves a reasonable opportunity to
15 get alternate funding?

16 MS. CHERRY: Object to the form.

17 A. I'm not sure if I know how to answer
18 that. If a client is in violation of a loan for
19 some reason, there could be justification to pull
20 that line of credit. We were financing purchase
21 orders here and my concern was not the continuation
22 of financing purchase orders but it appeared a
23 block of -- I'm not sure what to call them -- that
24 weren't purchase orders.

25 Q. Sure. We'll get to that in a minute

1 but I'm interested in the -- your thinking about
2 the purchase orders. And my -- my question is
3 really not a legal question. It's a moral
4 question. I want to know whether you think it
5 would have been fair for you to come in in November
6 of '07 knowing that this has been -- this had been
7 the course of dealing with SkyWaves and BB&T and
8 knowing that SkyWaves had come to rely on the
9 purchase order funding as part of its operation,
10 would it have been fair for BB&T to just
11 unilaterally stop the purchase order funding
12 without giving SkyWaves an opportunity to get an
13 alternate source of funding?

14 MS. CHERRY: Object to the form.

15 A. I don't believe that was the case.
16 Again, I'm not sure how to answer it. I don't
17 believe that was -- I don't believe that was the
18 case at the time.

19 Q. No. I'm asking a hypothetical --

20 A. Is it fair --

21 Q. -- really because I'm asking you --
22 when you came in in 2007 in November and you saw
23 this operation had been going on for a while you
24 didn't like it.

25 Do you think that it would have been

1 fair for BB&T to unilaterally stop it without
2 giving SkyWaves an opportunity to get an alternate
3 source of purchase order funding?

4 MS. CHERRY: Object to the form.

5 A. First of all, I would say I don't
6 believe I've said I don't like it. I think it was
7 unusual.

8 Q. Uh-huh.

9 A. And, again, I have a hard time
10 answering that because I don't believe -- I don't
11 believe that's an answerable question. We were
12 not -- there are times in a loan where you have to
13 say, I'm sorry, we can't fund you anymore. Maybe
14 some -- something arises to cause that. If a
15 company continues to lose money and our job is to
16 protect the bank's assets also, there comes a time
17 where you have to say, I'm sorry, we can't fund you
18 anymore. There's all different circumstances that
19 come into play in that.

20 Q. Sure. I mean, you're -- what you're
21 talking about is there might be defaults that come
22 into play that allow BB&T or would justify BB&T to
23 say we're not going to fund anymore. I'm asking
24 you not about the defaults, not about other
25 circumstances. I'm just asking about the purchase

1 order funding. This is a voluntary relationship,
2 isn't it?

3 MS. CHERRY: Object to the form.

4 BY MR. KEFALOS:

5 Q. BB&T has the right to cancel the
6 relationship at any time, doesn't it?

7 A. I still have a hard time with that.

8 We -- at the time -- and I'm not sure if we said
9 we're not -- I believe maybe we did say we're not
10 going to do purchase order fin -- financing
11 anymore, but our concern was that we had been
12 fan -- financing items that were not purchase
13 orders so I would not want to continue to finance.
14 Then I'm way undercollateralized so --

15 Q. You're talking about financing items
16 that weren't purchase orders. When did you first
17 learn that BB&T was loaning money to SkyWaves
18 without either purchase orders or invoices but on
19 site plans?

20 A. First of all, I don't believe I heard
21 the term site plans until some point when legal
22 issues were starting to come up and I read that. I
23 met, excuse me, with Ron Konersmann, John Voytko
24 and Jim Edahl sometime in January, I want to say
25 the 17th or 19th, to discuss my concern about a

1 number of items that looked like purchase orders we
2 had advanced on that we were not getting invoices
3 on. In that meeting I asked Ron and John
4 repeatedly if these were valid purchase orders and
5 after asking several times Mr. Konersmann told me
6 they were not.

7 Q. Was Mr. Edahl present at the time?

8 A. Yes.

9 Q. And what was your reaction when you
10 learned that BB&T was funding money -- providing
11 money to SkyWaves without a valid purchase order?

12 A. I was very shocked, very concerned and
13 had an empty feeling in my stomach.

14 Q. Yeah. Did you understand that these --
15 we call them site plans today. What did you call
16 them back then?

17 A. I didn't call them anything. I had
18 never heard that and in that meeting Mr. Konersmann
19 and Mr. Voytko never brought that up.

20 Q. Did they -- Mr. Voytko did tell you
21 that this had been approved by BB&T, didn't he?

22 A. I don't believe he ever did and it did
23 not come up at that meeting.

24 Q. Yeah. What was the problem with
25 funding these site plans?

1 A. You're basically providing equity
2 financing that you're going to be getting a
3 purchase order so my concern as a lender is I'm
4 looking at a company that's losing money on
5 receivables. It's manufacturing a product that
6 we're financing a PO so they could buy inventory,
7 but if you have to finance future POs and they're
8 still losing money, that's telling me that they
9 don't have anything in inventory to put into
10 production when they get a valid purchase order.
11 So the financial viability of the company then
12 became a very high concern to me.

13 Q. What -- what did you mean when you said
14 you're basically providing equity financing?

15 A. There wasn't an asset that you were
16 lending on so you are giving a company -- basically
17 you're an investor. You're giving the company
18 money that's unsecured.

19 MR. LINTON: Capital. Capital.
20 Capital.

21 BY MR. KEFALOS:

22 Q. It -- it's like a capital investment?

23 A. I think that could be similar.

24 Q. Yeah. Let me hand you what we'll mark
25 as Exhibit 4.

1 (BURKE EXHIBIT 4, E-mail String,
2 January 22, 2008, Subject: SkyWaves, was marked
3 for identification.)

4 BY MR. KEFALOS:

5 Q. And I direct your attention to the memo
6 at the bottom of the page. This is an e-mail from
7 you to Phil Allard and Jim Edahl --

8 A. Yes.

9 Q. -- dated January 22, 2008? And if you
10 look at the bottom of that first page, the last
11 couple of sentences, do you see where it says --
12 this is your writing, isn't it?

13 A. Yes.

14 Q. -- John was sure -- that is, John
15 Konersmann -- or John Voytko? John Voytko?

16 A. Right. Right.

17 Q. John was sure they had discussed this
18 with BB&T as part of the request for funding but,
19 again, I see no evidence of this in our files.

20 So did Mr. Voytko, in fact, tell you
21 that they got an approval for this site plan
22 funding from BB&T?

23 MS. CHERRY: Object to the form.

24 A. This was the first time I heard
25 anything related to this, but he's saying that he

1 was sure they discussed it with BB&T but I'm not
2 sure that he told me it was approved --

3 Q. Okay.

4 A. -- and that I believe -- I believe
5 later on or at some point he had told me too, I
6 recollect, that they would try to get purchase
7 orders for these -- what turned out to be site plan
8 financing.

9 Q. Okay. And these site plan financings
10 were not enforceable contracts, were they?

11 MS. CHERRY: Object to the form.

12 A. I -- I don't know what a site plan
13 would have been.

14 Q. And you mention here that you see no
15 evidence of this in our files. Did you review the
16 files to see whether there was any documentation of
17 an agreement by BB&T to --

18 A. I looked through everything that I had
19 received from Castlen Morris. I don't believe I
20 had let's say all the documents. What I believe I
21 was able to see would be the CAR reports or the
22 credit memos where the line would be changed or
23 increased or we agreed to do more financing, but I
24 could find no evidence of collateral more -- that
25 we were going to advance on this type of

1 collateral.

2 Q. Would you have expected to find some
3 kind of documentation in the file had BB&T really
4 agreed to this?

5 A. I would have, yes.

6 Q. And this whole idea of site plan
7 funding does not fit into a factoring model, does
8 it?

9 A. It does not and neither does PO
10 financing.

11 Q. Okay. There's no contract with --

12 MS. CHERRY: Object to --

13 BY MR. KEFALOS:

14 Q. -- site plan financing?

15 MS. CHERRY: Object to the form.

16 A. I -- I can't answer that. We have a
17 factoring contract that deals with the receivables.
18 Any other form of lending would have been
19 documented separately, whether it be inventory,
20 purchase orders, a line of credit. The factoring
21 contract generally and as far as I know just deals
22 with the receivables.

23 Q. Did you ever see any evidence of
24 purchase order financing that was memorialized in
25 the file?

1 the lack of documentation? Do you think that he
2 was trying to hide the nature of the agreement he
3 made with SkyWaves?

4 A. I can't say that he would be doing
5 that. It could have been that he or some other
6 people thought that these were very close to
7 purchase orders or could be interpreted as purchase
8 orders and that it was okay to fund on them.

9 Q. Uh-huh. But you knew that they were
10 not purchase orders?

11 A. I was told by Mr. Konersmann and
12 Mr. Voytko that they were not purchase orders.

13 Q. Now looking back at the last six months
14 did it look to you like this site plan funding had
15 become a course of dealings between SkyWaves and
16 BB&T?

17 MS. CHERRY: Object to the form.

18 A. When you say the last six months --

19 Q. Six months before January of '08:

20 A. What -- what I looked at were -- I
21 think everything was General Dynamics beginning
22 with WST, the site plan information. It was a
23 large block that -- I believe everyone was 53,000
24 maybe 925 Dollars and I believe they had been
25 financed between July and I want to say October.

1 They stuck out like a sore thumb to me because
2 other purchase orders from General Dynamics were
3 different. They were -- looked more like a
4 physical purchase order as I saw from Verizon and
5 Nextel. I saw other purchase orders previous to
6 these being paid, other purchase orders after being
7 paid. This one block never seemed to go away.
8 That was my concern that I brought up in the
9 meeting on January 17th or 19th.

10 Q. So these you say stuck out like a sore
11 thumb.

12 A. Yes.

13 Q. Does that mean that anybody could have
14 looked at it and realized that there was something
15 unusual about those loans?

16 MS. CHERRY: Object to the form.

17 A. I don't know if anybody could have, but
18 by the time -- as time kept passing and I inherited
19 the account and after, you know, several weeks of
20 handling it, other purchase orders I would get
21 invoices for. I never received anything on that
22 and I was concerned about that.

23 Q. Right. Did it --

24 A. At some -- at some point you have to
25 ask, why am I not getting invoices on these?

1 Q. Sure. Did it look to you like SkyWaves
2 had come to rely on this site funding as part of
3 its business operations?

4 MS. CHERRY: Object to the form.

5 A. That's difficult to answer because it
6 seemed like it took place over a period of time and
7 it may have stopped. I don't recall it continuing
8 so --

9 Q. Uh-huh.

10 A. -- I don't know if they were relying on
11 that anymore or not.

12 Q. Do you remember Mr. Edahl's deposition
13 saying that he believed that this agreement that he
14 made to fund site plans represented a contract
15 between BB&T and SkyWaves?

16 A. I don't remember that in the
17 deposition.

18 Q. Do you think it would have been fair in
19 December of 2007 to pull the site plan funding
20 without giving SkyWaves an opportunity to get
21 alternate funding?

22 MS. CHERRY: Object to the form.

23 A. Is it fair? There are times when that
24 is the best decision to do financially on a
25 company. There -- every situation is different.

1 Some things you feel you can work out; some things
2 you have to say we're calling the loan so it could
3 have been fair at that time.

4 Q. It could have been fair you think to
5 unilaterally pull the site plan funding without
6 giving BB&T (sic) an opportunity to obtain
7 alternate funding?

8 A. I don't know if we just pulled, if
9 those were your words, funding on the site plan
10 part but, again, I would say there are times when
11 you have to say, we're not going to finance this
12 anymore and, again, I don't recollect if we gave
13 them notice or we -- I think we sent a default
14 letter and would expect to get paid. Every
15 situation is different.

16 Q. There -- it is and there are other
17 reasons that came up later. But I'm asking about
18 in December of 2007 we know that there's been a
19 course of dealings between BB&T and SkyWaves to
20 fund these sites. BB&T has advanced \$1.2 Million
21 on account of these sites. Mr. Edahl testifies
22 that he made an agreement that's enforceable on
23 behalf of BB&T.

24 And I'm asking you do you think as a
25 factors man that under those circumstances it would,

1 you found a formal modification of any kind of loan
2 or factoring agreement.

3 MS. CHERRY: Object to the form.

4 A. Again, there was no modification of the
5 factoring agreement to deal with anything other
6 than receivables. And I did see, and I think it's
7 in that time line that I submitted to Mr. Broome,
8 various reports, credit approvals from the bank
9 changing the structure with advanced rate,
10 increasing the line, adding more to the number of
11 accounts we would do purchase order financing on.
12 I hope that answers your question.

13 Q. Well, what it -- it sort of does but
14 I'm looking at -- you have answered it. Before
15 your January meeting with Mr. Edahl and SkyWaves at
16 the plant did you ever ask Mr. Edahl about that
17 block of late cases?

18 A. I don't remember.

19 Q. Do you remember when you first noticed
20 them?

21 A. I can't say when but, again, I took
22 over the account January 19th or 20th. We had that
23 meeting with Sky -- not January, I'm sorry.
24 November.

25 Q. November. Then right after --

1 A. I --

2 Q. -- that would have been the
3 Thanksgiving holiday.

4 A. Right.

5 Q. So you wouldn't have had a whole lot of
6 time, would you, at that point?

7 A. Right. And I probably had 30 or 40
8 accounts to get used to handling. This would have
9 been probably the most intricate. And I've
10 forgotten exactly what I was supposed to answer.
11 I'm sorry.

12 Q. I'm interested in knowing when you
13 first realized that there was a block of business
14 that was not producing invoices.

15 A. Okay. It -- again, it all happened so
16 fast and I probably worked with the account for
17 eight weeks, but it would have been sometime at the
18 end of November or beginning of December or
19 sometime before that meeting as I was getting used
20 to handling the account and watching the purchase
21 orders move. At some point I noticed that I had no
22 activity on this one block and I can't tell you
23 when that was.

24 Q. But do you remember asking anybody
25 about that before that January meeting?

1 A. I cannot say specifically that I
2 remember talking to anybody about that. I know
3 Phil Allard and I had a conversation that we were
4 concerned about the account and I needed to get
5 over there and visit with them.

6 Q. And you would have had this
7 conversation sometime in December before -- before
8 the January 17 meeting?

9 A. It was probably closer to January --
10 sometime in January before the meeting because I
11 don't think we would have waited too long to go
12 visit and I set up the visit and made sure we
13 understood what the situation was.

14 Q. So you saw sometime before the January
15 meeting that there was a block of -- of advances
16 that didn't generate invoices and you talked to
17 Mr. Allard about it and you decided to go and find
18 out what was happening?

19 A. Again, I'm not sure exactly what Phil
20 and I talked about, but we were concerned and at
21 some point before the meeting I was getting
22 concerned that there were no receivables coming in
23 to reduce those advances and Jim Edahl and I
24 scheduled that meeting and went up and met with
25 them.

1 Q. Those advances wouldn't have had the
2 advances on the site plans -- the things that we
3 know now as site plans, wouldn't have had a
4 purchase -- or an invoice due date on them, would
5 they?

6 A. I don't remember exactly what was on
7 there. It was a sheet of paper and I couldn't tell
8 you exactly what's on the other purchase orders. I
9 believe they had numbers that I could match up when
10 I got a receivable. I could look at the
11 receivable. It would give me information on the
12 purchase order. I could match up that purchase
13 order I advanced on and clear that, but the General
14 Dynamics group, nothing ever seemed to happen on
15 that.

16 Q. Did you ever review the General
17 Dynamic -- General Dynamics contract?

18 A. I don't believe I had ever seen that.

19 Q. Would you refer your attention back to
20 what was marked as Exhibit 3. This is the memo
21 from Tol Broome to the file dated March 26th, 2008.
22 I think we talked about the last sentence in
23 Paragraph Number 2 where Mr. Tol Broome writes that
24 we were essentially providing venture capital. Did
25 we talk about that?

1 A. Would I talk about that?
 2 Q. Did we talk about that?
 3 A. I don't believe we did.
 4 Q. All right. Did -- do you -- do you
 5 agree with him that Sky -- that BB&T was
 6 essentially providing venture capital to SkyWaves?
 7 A. Yes, I do. I think at one point I had
 8 referred to it as equity financing.
 9 Q. Okay. And that's like getting an
 10 interest in the company, equity financing?
 11 A. We didn't get any interest in the
 12 company, but it's almost as if you would do equity
 13 financing and get an interest in the company. We
 14 just didn't get an interest.
 15 Q. Uh-huh. Now looking at the documents
 16 in hindsight can you say that this loan and
 17 factoring agreement did not start out as equity
 18 financing?
 19 A. I would say that, yes, I believe it
 20 started out strictly as a factoring arrangement on
 21 receivables.
 22 Q. On the invoices?
 23 A. Yes.
 24 Q. Okay. And that soon changed from
 25 factoring invoices to factoring purchase orders?

1 A. It --
 2 MS. CHERRY: Object to the form.
 3 A. It -- that facility was added at some
 4 point and without seeing a date I can't tell you
 5 when that was.
 6 Q. Sure. And there was -- you found no
 7 formal written confirmation of this change in the
 8 agreement, did you?
 9 MS. CHERRY: Object to the form.
 10 A. I have -- or had copies of the credit
 11 reports and the memos signed off by the appropriate
 12 people authorizing the steps into purchase order
 13 financing.
 14 Q. Sure. And that's what I call the
 15 course of dealing. But I'm asking whether you
 16 found a formal modification of the loan and
 17 factoring agreement to provide for purchase order
 18 financing.
 19 MS. CHERRY: Object to the form.
 20 A. I don't believe we had copies of
 21 that --
 22 Q. Uh-huh.
 23 A. -- of those actual contracts,
 24 agreements other than the factoring agreement
 25 because that came from our group. If we did, I

1 don't remember ever seeing that.
 2 Q. Well, this purchase order financing
 3 would have been a breach of the factoring
 4 agreement, wouldn't it be?
 5 MS. CHERRY: Object to the form.
 6 A. It had nothing to do with the factoring
 7 agreement. The factoring agreement only dealt with
 8 receivables. It wouldn't -- the factoring
 9 agreement is completely separate from the purchase
 10 order financing. It's part of the overall loan
 11 agreement, but the factoring agreement, the
 12 factoring contract only deals with receivables.
 13 Q. Okay. So this purchase order financing
 14 was not part of the factoring agreement to factor
 15 invoices?
 16 A. I believe that would be correct.
 17 Q. In -- under the original factoring
 18 agreement SkyWaves was not to receive any direct
 19 payments from customers?
 20 A. If they received any payments directly
 21 from the customers, they are required according to
 22 the agreement to turn them over to BB&T and inform
 23 they received it.
 24 Q. Sure. But before you get to the part
 25 about turning it over, it was supposed to be set up

1 so that SkyWaves would not get payments directly
 2 from customers, wasn't it?
 3 A. It's supposed to be -- the invoices are
 4 supposed to be marked payable and owned by BB&T to
 5 our lockbox.
 6 Q. Sure. And at some point you discovered
 7 that SkyWaves had been, in fact, receiving payments
 8 directly from customers for some time?
 9 MS. CHERRY: Object to the form.
 10 A. At some point we did discover that,
 11 yes.
 12 Q. How -- that was a breach of the
 13 factoring agreement, wasn't it?
 14 MS. CHERRY: Objection.
 15 A. It's a breach of the agreement if they
 16 don't turn the re -- the payment over to us.
 17 Q. We'll get to that. That's the second
 18 part of this --
 19 A. Okay.
 20 Q. -- receivable. Doesn't the factoring
 21 agreement require that SkyWaves make sure that the
 22 checks from the customers go directly to BB&T?
 23 A. That's a situation that they cannot
 24 always have control over.
 25 Q. Sure. But in this case SkyWaves was

1 receiving some checks directly from customers?

2 A. We did discover that, yes.

3 Q. Okay. And that, of course, is a
4 technical breach of the factoring agreement, just
5 receiving the money from the customers?

6 A. Just receiving the money you're asking?

7 Q. Yes.

8 A. No, that's not. I'm dealing with a
9 client now selling Amazon.com shoes. Amazon will
10 not pay us until we have a three-party agreement
11 signed. They will pay us until further notice by
12 all the parties directs them to change it. Some
13 customers you have to have a separate agreement on,
14 some customers will continue to send to the client,
15 but the issue is the client needs to turn over any
16 money they receive to BB&T.

17 Q. And you discovered that SkyWaves was
18 receiving payments directly from customers and not
19 turning the money immediately over to BB&T?

20 A. At some point, and I read it recently,
21 it might have been in the audit we did in January,
22 the field exam, that we found out they received I
23 think about 320, \$340,000 from Verizon and had not
24 turned that money over to us.

25 Q. And did you believe that that

1 A. I had asked people in cash processing
2 to look back, pull some large payments so they
3 could discover that, right. I don't consider that
4 bank records though. That's payment history coming
5 from the customers really.

6 Q. And what would happen when SkyWaves
7 received this money from its customers, it would
8 deposit it into BB&T accounts?

9 A. I don't know. I can't answer that. I
10 don't know where it was deposited.

11 Q. Well, isn't that how you realized that
12 this had been going on for some time, because you
13 saw the money being deposited into the BB&T
14 account?

15 A. No. We discovered it by -- and it
16 might be a -- just a matter of terminology here.
17 We discovered it that we were receiving payments
18 into our factoring lockbox from SkyWaves or wire
19 transfers to our system, our people and factoring
20 from SkyWaves. But if they were receiving payment
21 and depositing them in a BB&T checking account
22 someplace or another bank's checking account, we
23 might not have seen that unless somebody advised us
24 of that.

25 Q. So the factoring operation wouldn't

1 constituted a breach of the factoring agreement?

2 A. By not turning it over to us, yes.

3 Q. Uh-huh. And did you learn that this
4 had been going on for some time?

5 A. That prompted me to have our cash
6 processing people pull some other large payments
7 going back I believe several months in time to see
8 where the money came from and we found instances
9 where we were getting wire transfers, I believe, or
10 maybe checks from SkyWaves instead of the customers
11 and then I believe I also later found an e-mail
12 from Castlen Morris that he had talked to SkyWaves
13 about having that stopped so that led me to believe
14 that this had been happening to some degree in the
15 past.

16 Q. And the bank records would have
17 revealed that this had been going on for some time?

18 MS. CHERRY: Object to the form.

19 A. The bank records. I don't know how to
20 answer that.

21 Q. Well, you reviewed the documents. You
22 had your staff pull the invoices and you saw from a
23 review of the invoices that this had been going on
24 for some time, didn't you?

25 MS. CHERRY: Object to the form.

1 necessarily have been privy to the banking side,
2 the bank accounts?

3 A. Correct.

4 Q. Now did your review show that when John
5 Voytko would send a check from SkyWaves on account
6 of a payment he had received from a company, would
7 he also include a copy of the invoice with the
8 check?

9 A. I don't know because I don't think I
10 saw any instance of that until the end with the
11 Verizon money that I had asked them to send to us
12 so I -- I can't answer that. I don't know how
13 that -- I don't know what he did in the instances
14 in the past.

15 Q. You didn't have an opportunity or a --
16 an interest in examining the historical record?

17 A. My interest was only to see if they
18 were receiving money and not turning it over to us.
19 If they received the money and didn't return it and
20 didn't immediately turn it over to us but sent us a
21 copy of the invoice or the payment history, I'm
22 still concerned about it because they didn't give
23 us the money as they should have.

24 Q. Sure. Well, what I'm interested in
25 finding out is did BB&T have an opportunity to know

1 think I did see that --

2 Q. Will you look at the bottom of the
3 first page that's maybe the third sentence, I
4 advised him, meaning Mr. Konersmann, that the only
5 way we would be willing to work with them is to see
6 a plan that indicated we can go forward reducing
7 our exposure.

8 Do you see that?

9 A. Yes.

10 Q. So you were trying to work something
11 out with SkyWaves?

12 A. I was offering -- and, again, since I
13 was still fairly new at the bank I'm not sure if my
14 involvement in this had ended or not yet, but I
15 know a lot of lenders and I believe there's a
16 lender for almost anybody and if I could help them
17 find something that would help BB&T and help their
18 business, I would have done my best to do so.

19 Q. Well, at this point you knew of the
20 backlog of orders and potential orders that
21 SkyWaves had, didn't you?

22 MS. CHERRY: Object to the form.

23 A. I'm sorry. You said about the back
24 order?

25 Q. Yeah.

1 A. I believe so because it says here on
2 the 23rd I received a call from Ron. He's
3 explaining he's working hard and getting
4 confirmation of the Dynamics orders and actually
5 getting confirmed POs. So they were still
6 admitting to me they were not confirmed POs.

7 Q. Sure. And you knew their growth
8 potential?

9 A. I can't say that I do.

10 Q. Uh-huh. Did you think that SkyWaves
11 had a chance of working out -- working out this
12 problem without BB&T canceling its funding?

13 A. I believe there's always a chance of
14 working that out. It's -- it's the worst loan in
15 the world but somebody comes up and says, I'll give
16 you cash collateral, I can find a lender for that.

17 Q. Uh-huh. Now you mention here about a
18 plan that reduces our exposure. What did you have
19 in mind?

20 A. I'm not sure exactly what I was
21 thinking at that point, but in general if I have a
22 situation where maybe we are undercollateralized or
23 it's a loan we want to move out, if we could do
24 something with them to reduce the loan exposure,
25 it's easier to find another lender for somebody.

1 Q. On the second page you mention that you
2 are -- you told him that you're going to call some
3 equity groups that may be willing to put money into
4 his company. Do you see that?

5 A. I did -- I did -- yes.

6 Q. Okay. You thought that SkyWaves might
7 be a good investment for some people?

8 MS. CHERRY: Object to the form.

9 A. Again, there -- I always feel that
10 there's potential for anybody and SkyWaves had
11 shown us projections. I believe they gave us a
12 package at the meeting that Jim Edahl and I had
13 with them where they showed that they were going to
14 have a large increase in volume and be profitable.
15 If that was accurate, there might be something out
16 there who would take the chance or the opportunity,
17 however you look at it, to invest money in the
18 company.

19 Q. Did you make any calls to equity
20 investors?

21 A. I don't remember and right about that
22 time I think my involvement -- active involvement
23 with the account ended so I don't remember if I
24 did.

25 Q. Let me hand you what's -- what we'll

1 mark as Exhibit 8.

2 (BURKE EXHIBIT 8, Memo from Jim Edahl
3 to File, January 23, 2008, Re: Skywaves I Corp,
4 was marked for identification.)

5 BY MR. KEFALOS:

6 Q. Have you ever seen this before? This
7 is a memo from Jim Edahl dated January 23, 2008 to
8 the file.

9 A. I believe I've seen this, yes.

10 Q. Did you see it at the time?

11 A. Pardon me?

12 Q. Did you see it at the time, that is,
13 back in January of 2008?

14 A. I don't recall when I saw it.

15 Q. At the -- at the -- at the bottom of
16 the memo it says, he, meaning Ron Konersmann, asked
17 for a week or two to give him time to meet with the
18 board and others to help formulate a plan.

19 Did Mr. Konersmann ask you for a week
20 or two to try to formulate a plan?

21 A. I don't believe I ever had another
22 conversation with Mr. Konersmann after that meeting
23 in his office.

24 Q. Did you know that he had asked for some
25 time to work out a plan?

1 Q. He was a director.
 2 A. I don't recall that name.
 3 Q. Are you familiar with the proposal made
 4 by Mr. Meier to work out of the lending agreement
 5 with BB&T?
 6 A. I only remember generalities of one
 7 proposal. I don't know who it was from.
 8 Q. And that was the one that would result
 9 in a seven-figure loss?
 10 A. I believe it was an amount like that,
 11 yes.
 12 Q. Uh-huh. All right. Do you remember
 13 that SkyWaves asked to restructure the loan and
 14 advance another \$500,000 guaranteed by Mr. Meier?
 15 A. That sounds familiar vaguely but,
 16 again, I would not have been involved in it but I
 17 may have read something about that at some point.
 18 Q. Do you know why that was not
 19 acceptable?
 20 A. No, I do not.
 21 Q. Are you familiar with a -- the proposal
 22 made by Precision Mine Repair?
 23 A. Again, I don't know who made proposals.
 24 I re -- remember vaguely that one that I described,
 25 but I wasn't involved in any of the proposals or

1 any of the decisions at that time.
 2 Q. Were you aware of the Hunt Capital
 3 Group's interest in SkyWaves?
 4 A. I have the same answer. I -- I don't
 5 recall.
 6 Q. Do you know whether SkyWaves had any
 7 viable investor to come in and take BB&T out?
 8 A. I do not know.
 9 Q. If SkyWaves had an investor who was
 10 willing to take BB&T out, would B -- would you have
 11 continued to fund for a reasonable time until that
 12 could take place?
 13 A. I can't answer that because I was not
 14 as familiar with the financials or the ongoing
 15 discussions. I just wasn't involved in that so --
 16 Q. Okay.
 17 A. -- I don't believe I can answer that
 18 question.
 19 MR. KEFALOS: Let's take a break for a
 20 couple minutes.
 21 THE VIDEOGRAPHER: We're going off the
 22 record at 11:28 a.m.
 23 (Whereupon, there was a recess in the
 24 proceedings from 11:28 a.m. to 11:33 a.m.)
 25 THE VIDEOGRAPHER: We're going back on

1 the record at 11:33 a.m.
 2 BY MR. KEFALOS:
 3 Q. Was the factoring operation moved from
 4 High Point to Atlanta with your joining BB&T?
 5 A. When I joined BB&T the account
 6 executives, Castlen Morris and there was another
 7 person, I can't remember his name right now, Jim
 8 somebody, they -- the account executives up there
 9 did not report to Phil Allard and shortly after I
 10 joined being in Atlanta replacing Castlen I think
 11 Phil wound up with responsibility of managing all
 12 of the account executives. We have one up there
 13 now and three of us in Atlanta.
 14 Q. What -- where is Phil Allard? Is he in
 15 High Point?
 16 A. He's in Atlanta.
 17 Q. Oh, he's in Atlanta.
 18 A. Yes, sir.
 19 Q. Is anybody left in High Point?
 20 A. Bob Niebauer is our sole account
 21 executive up in High Point.
 22 Q. And where was Mr. Allard previously
 23 based? Was he in High Point?
 24 A. No. He was all -- when he joined BB&T
 25 he joined in Atlanta.

1 Q. In Atlanta. And you were brought down
 2 to the Atlanta office?
 3 A. Well, I -- I lived in Atlanta. I just
 4 moved over from another company.
 5 Q. Okay. You were talking earlier about
 6 the first time you saw the \$1.2 Million that had
 7 been advanced you were shocked, upset and had a
 8 feeling of your stomach falling?
 9 A. Yes.
 10 Q. Now your -- you didn't know at that
 11 time about Mr. Edahl's agreement to fund these site
 12 plans?
 13 A. I had not heard of any agreement to
 14 finance site plans.
 15 Q. You didn't learn about that until you
 16 read Mr. Edahl's deposition?
 17 A. Correct. It was, again, not brought up
 18 by anybody in that meeting.
 19 Q. And you read Mr. Edahl's deposition a
 20 couple months ago?
 21 A. I -- maybe a month ago, yes.
 22 Q. Might your reaction have been different
 23 back in January of -- of '08 had you known that
 24 Mr. Edahl had approved this funding?
 25 A. If BB&T had approved that type of

1 funding and I didn't know about it, my reaction
2 would have been different. I would have gone back
3 and said, what is this, how are we doing this and
4 dealt with it differently.

5 Q. That's all the questions that I have.
6 Have you given me full and complete answers to the
7 questions I've asked today?

8 A. I have.

9 Q. Have you felt well enough to answer my
10 questions?

11 A. I'm sorry?

12 Q. Have you felt well enough to answer my
13 questions?

14 A. Yes.

15 Q. And have you understood the questions
16 that you've answered?

17 A. I believe I have.

18 MR. KEFALOS: Thank you.

19 MS. CHERRY: And I have -- I have no
20 questions for the witness.

21 THE VIDEOGRAPHER: We're going off --
22 going off the record at 11:36 a.m.

23 (WHEREUPON, the deposition was
24 concluded at 11:36 a.m.)

25 (The witness, after having been advised

SIGNATURE OF DEPONENT

DEPONENT: MICHAEL BURKE

DEPOSITION DATE: DECEMBER 18, 2013

REPORTER: LISA A. WHEELER

CASE CAPTION: SKYWAVES I CORPORATION 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

(Please return both Signature of Deponent pages)

I, the undersigned, SKYWAVES I CORPORATION,
do hereby certify that I have read the foregoing
deposition and find it to be a true and accurate
transcription of my testimony, with the following
corrections, if any:

PAGE	LINE	CHANGE	REASON
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

1 of his right to read and sign this transcript, does
2 not waive that right.)

SIGNATURE OF DEPONENT (CONTINUED)

DEPOSITION DATE: DECEMBER 18, 2013

REPORTER: LISA A. WHEELER

CASE CAPTION: SKYWAVES I CORPORATION 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

PAGE	LINE	CHANGE	REASON
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

Michael Burke

Date

I, Lisa A. Wheeler, Notary Public for the
State of North Carolina at Large, do hereby certify
that the deponent was advised of his or her right
to read and sign said deposition both verbally and
in writing. If the deponent fails to execute and
return foregoing Signature of Deponent pages within
the thirty (30) days allowed pursuant to the Rules
of Civil Procedure, the original transcript may be
filed with the court.

Lisa A. Wheeler, RPR, CRR

My Commission expires

June 7, 2013

22

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON

SKYWAVES I CORPORATION, CASE NO. 2009-CP-10-7516

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.

VIDEOTAPED DEPOSITION OF CASTLEN MORRIS

Tuesday, May 6, 2014
10:10 a.m. - 1:14 p.m.

Nexsen Pruet, LLC
701 Green Valley Road, Suite 100
Greensboro, North Carolina

Reported By:
Rebecca Ely, CR
Notary Public, State of North Carolina

INDEX

Page

Examination by Mr. Kefalos	6
Examination by Mr. Chandler	94

EXHIBITS

Exhibit 1	- June 1, 2005, Letter	13
Exhibit 2	- October 3, 2005, History Record Report	14
Exhibit 3	- October 26, 2005, E-mail	16
Exhibit 4	- History Record Report With Dates of 02/08/06 and 02/10/06	21
Exhibit 5	- September 6, 2006, E-mail	27
Exhibit 6	- 09/14/06, E-mail	31
Exhibit 7	- October 5, 2006, Log	34
Exhibit 8	- Two-Page Document Dated October 6, 2006	36
Exhibit 9	- February 19, 2007, E-mail	40
Exhibit 10	- February 13, 2007, Fax	41
Exhibit 11	- March 2, 2007, Draft Letter	42
Exhibit 12	- March 8, 2007, Memo	44
Exhibit 13	- March 20, 2007, E-mail	48
Exhibit 14	- "CF Field Examiner's Internal Comments"	50

APPEARANCES:

On Behalf of Plaintiff:

GEORGE J. KEFALOS, PA
46A State Street
Charleston, South Carolina 29401
BY: GEORGE J. KEFALOS, ESQUIRE
JONNIE LINTON, ESQUIRE
843.722.6612

On Behalf of Defendant/BB&T:

NEXSEN PRUET
205 King Street, Suite 400
Charleston, South Carolina 29401
BY: MOLLY CHERRY, ESQUIRE
843.577.9440

On Behalf of Defendant/James Edahl:

CORRIGAN & CHANDLER, LLC
16 Charlotte Street, Suite B
Charleston, South Carolina 29403
BY: NELSON CHANDLER, ESQUIRE
843.720.1748
(Appearance by video-teleconference)

VIDEOGRAPHER: Brad Cartner

ALSO PRESENT: Mike Hennessy/Senior Vice President, BB&T

EXHIBITS
(CONT.)

Exhibit 15	- Client Contact Log	55
Exhibit 16	- August 28, 2007, Memo	56
Exhibit 17	- Two Memos	59
Exhibit 18	- Two-Page Document	65
Exhibit 19	- September 19, 2007, E-mail	67
Exhibit 20	- September 20, 2007, E-mail	72
Exhibit 21	- July 9, 2007, E-mail	78
Exhibit 22	- Document	82
Exhibit 23	- Enclosure to July 9, 2007, E-mail	83

1 Deposition taken before Rebecca Ely, Court Reporter and
2 Notary Public in and for the State of North Carolina at Large,
3 in the above cause.

4 ---

5 VIDEOGRAPHER: Good morning. We are now on the record.
6 Today's date is May the 7th, 2014. The time on the video
7 monitor is approximately 10:10 a.m. This is the videotaped
8 deposition of Castlen Morris. The location is Nexsen
9 Pruet, LLC, 701 Green Valley Road, Greensboro, North
10 Carolina.

11 My name is Brad Cartner, legal videographer,
12 representing A. William Roberts, Jr. and Associates. The
13 deposition is taken in the matter of Skywaves I Corporation
14 versus Branch Banking and Trust, et al., Case Number 2009
15 dash -- I believe that's CP or CD. I'm sorry. Dash 10
16 dash 7516.

17 Counsel, please introduce yourselves for the record.

18 MR. KEFALOS: This is George Kefalos. I'm one of the
19 lawyers representing Skywaves.

20 MR. LINTON: John Linton, one of the lawyers
21 representing Skywaves.

22 MS. CHERRY: Molly Cherry representing BB&T.

23 MR. CHANDLER: And Nelson Chandler remotely
24 representing James Edahl.

25 VIDEOGRAPHER: The court reporter today, also

1 preparation for this deposition today?

2 A. No. The only preparation was to meet with Molly. She
3 went over the format of the deposition, who would be in
4 attendance and who does what. And she also provided me the
5 transcript or records of a deposition of John Voytko, that he
6 would be making for a more efficient meeting. Other than that,
7 no.

8 Q. Did you review any BB&T documents?

9 A. No.

10 Q. Did Molly, or Ms. Cherry, tell you what the nature of
11 the claim was?

12 A. I do not know the nature of the claim.

13 Q. All you did was read Mr. Morris's deposition?

14 A. I --

15 Q. Or Mr. Voytko's deposition.

16 A. I fast read it. I do not know the nature of the
17 claim.

18 Q. Tell me a little bit about your personal background.
19 Where are you from and where do you live, where do you go to
20 school, that sort of thing.

21 A. I live here in High Point, North Carolina.

22 Q. How long have you been here?

23 A. Since 1973. I attended -- I graduated from Wake
24 Forest in Winston-Salem.

25 Q. What year was that?

1 representing A. William Roberts, Jr. and Associates, is
2 Rebecca Ely. Will the reporter please swear in the
3 witness.

4 THEREUPON,

5 CASTLEN MORRIS

6 having been first duly sworn, was examined and testified as
7 follows:

8 THE WITNESS: I do.

9 VIDEOGRAPHER: Please begin.

10 EXAMINATION

11 BY MR. KEFALOS:

12 Q. Mr. Morris, my name is George Kefalos. We met a few
13 minutes ago. I'm one of the lawyers that represents Skywaves,
14 and I want to ask you some questions about what you might know
15 about this case.

16 Do you feel well enough to answer my questions today?

17 A. Yes.

18 Q. Will you give me full and complete answers to my
19 questions today?

20 A. Best as I can.

21 Q. And if you don't understand a question, will you ask
22 me to rephrase it or repeat it so that I know that when you give
23 an answer you've understood the question?

24 A. Most definitely.

25 Q. Good. Now, tell me, first, did you do anything in

1 A. '88.

2 Q. What degree did you take?

3 A. Economics. That puts me at age 48.

4 Q. Where are you from originally?

5 A. Georgia.

6 Q. And did you take employment after you graduated from
7 Wake Forest?

8 A. Correct.

9 Q. Where did you work?

10 A. I started working for Wachovia Bank.

11 Q. What were you doing for Wachovia?

12 A. I was in management training going into their, at that
13 point in time, retail banking/small business banking program.

14 Q. And that was in '84, did you say?

15 A. That would be in '88. '88.

16 Q. Thank you. And then you stated Wachovia. And where
17 did you move from Wachovia?

18 A. I went to work for a small called community bank
19 called Triad Bank.

20 Q. Okay. When was that?

21 A. 1994 to 1996, for about two years.

22 Q. What did you do for the community bank?

23 A. I was -- I ran the branch offices. I did consumer
24 lending, small business lending, construction lending, a jack of
25 all trades, so to speak.

1 to get that bill and hold letter, that's our privilege to do so.
 2 Q. I see.
 3 A. And that would be a more conservative approach than
 4 what Mr. Denning is saying here, which I don't know Mr. Denning
 5 but I assume he would eagerly agree with that.
 6 Q. Eagerly agree that he --
 7 A. Because we were being more conservative --
 8 Q. You were being more conservative than he was.
 9 A. We were being more conservative, yes.
 10 Q. So you have not met Mr. Denning?
 11 A. I have not personally met Mr. Denning, no.
 12 Q. Okay. But you knew he was in charge of this overall
 13 operation?
 14 A. Yes. And I was aware of his reputation as a higher up
 15 credit administration officer within BB&T.
 16 Q. And you mentioned earlier that he wasn't down in weeds
 17 all the time.
 18 A. Well, as his role as credit administration officer, he
 19 would give the approval of the structure as presented by the
 20 banker loan officer at his level of authority. You know, he's
 21 not going to sit there and review invoices and bills of lading.
 22 Q. Sure. But he'll make decisions about general
 23 operating procedure?
 24 A. He would. And if we wanted to, I think if we wanted
 25 to augment that, if we saw something from our vantage point that

1 would strengthen the overall functioning of the relationship, I
 2 would -- I wouldn't say the word "guess," but I would guess that
 3 he would take our recommendation under advisement and let us
 4 implement them as we saw fit.
 5 Q. So if you made a change in the -- or if you saw a
 6 change that needed to be made in the relationship with Skywaves,
 7 you could make that recommendation to Mr. Denning and he would
 8 approve that?
 9 MS. CHERRY: Object to the form.
 10 MR. KEFALOS: You can answer.
 11 MS. CHERRY: You can answer.
 12 THE WITNESS: If we saw a need for a change in the
 13 relationship, my practice would be to go to the banking
 14 officer --
 15 BY MR. KEFALOS:
 16 Q. Who was that in this case?
 17 A. Jim Edahl.
 18 And I would coordinate with him and we would decide on
 19 how to elevate it to Mr. Denning's level.
 20 Q. I see. Well, you knew that Mr. Denning had approved
 21 the financing and purchase orders, which was out of the
 22 ordinary.
 23 A. Uh-huh.
 24 Q. And Mr. Denning had approved the waiver of this bill
 25 and hold language in the contracts.

1 A. I honestly -- I couldn't remember until you put this
 2 e-mail in front of me, but I take this e-mail to mean that he
 3 didn't require it be in the agreement. He didn't prohibit us
 4 from asking for it on our own.
 5 Q. I understand, but what I'm interested in knowing is he
 6 was involved in that decision.
 7 A. I'm sure he was involved in some manner or another,
 8 yes. I can't 100 percent tell you that, but I assume he was,
 9 yes.
 10 (Exhibit 6 marked for identification.)
 11 BY MR. KEFALOS:
 12 Q. I'm going to hand you what's been marked as Exhibit
 13 No. 6, and it is an e-mail it looks like from you to John Davis,
 14 and there's a note at the top that says 9/14/06.
 15 A. Uh-huh.
 16 Q. Do you recognize this or do you recall this?
 17 A. It looks to be an e-mail from me to John Davis. It
 18 looks like it -- the copy does not identify a time and date of
 19 sending. I guess that's why the handwritten day -- that's not
 20 my handwriting. I don't know where that came from but--
 21 Q. What I'm interested in knowing is what did you mean
 22 when you said in that first sentence "The approved structure
 23 that Jim Edahl got is definitely out of the box from what I'm
 24 used to."
 25 A. My meaning there was that -- in factoring we loan

1 moneys, we advance moneys, funds on invoices and those invoices
 2 are our collateral. Purchase orders are not invoices. Purchase
 3 orders are not collateral. Loaning on purchase orders was an
 4 out-of-the-box structure. I'm quite flexible for Skywaves, but
 5 it's out of the box compared to I loan on invoices that have
 6 been sent to the customer, not on purchase orders.
 7 Q. Loaning on purchase orders is not factoring, is it?
 8 A. I would not say it's factoring, no.
 9 Q. It's more like an --
 10 A. It's unsecured lending.
 11 Q. Unsecured lending.
 12 A. It's unsecured lending.
 13 Q. And in the case of purchase orders, there's no time
 14 required for the repayment.
 15 A. There may or -- oh, there may or may not be. I mean,
 16 a purchase order calls for, you know, product to be billed or
 17 what have you. There is no promise to pay -- to my knowledge,
 18 there is no promise to pay on a purchase order. The promise to
 19 pay comes from the rendering of the invoice.
 20 Q. Well, I'm talking about Skywaves' obligation when --
 21 Skywaves' obligation. When BB&T loans money on a purchase
 22 order, there's no specific date identified in this loan
 23 agreement on the purchase order when the money has to be repaid.
 24 A. I would agree with that. When the invoice was
 25 created -- when the purchase order migrated to an invoice, at 1054

1 that point in time we would repay the invoice -- I'm sorry, we
2 would repay the purchase order.

3 Q. I got you. Why was this program developed for
4 Skywaves, this out-of-the-box program?

5 A. I cannot give you an answer for that. I do not know
6 why.

7 Q. Do you remember any conversations with Mr. Edahl or
8 anybody at BB&T about how the bank viewed Skywaves' future?

9 A. I think the bank was very optimistic on Skywaves'
10 future, so that could have been why. I never clearly understood
11 the reason for allowing this flexibility.

12 Q. But you saw the flexibility occur and you guess that
13 it was because the bank really thought a lot of Skywaves at the
14 time?

15 MS. CHERRY: Objection to form.

16 You can answer.

17 BY MR. KEFALOS:

18 Q. Let me -- I didn't explain to you at the beginning,
19 but you're supposed to answer my questions, unless you're
20 ordered not to. An objection is simply for the record, and it's
21 not to prevent you from answering the question.

22 A. I've never been in a deposition, so I'm just
23 listening. I'm taking it all in. So do you want to ask that
24 question again.

25 Q. Well, the question is why -- what you understood the

1 reason to be and was that because the bank was so confident of
2 Skywaves' future that it was developing this flexible lending
3 model for Skywaves.

4 MS. CHERRY: Object to the form.

5 THE WITNESS: The -- first off, there was not a
6 program. The bank did not create a program to administer
7 to any number of clients that, you know, my understanding
8 or my assumption was that there was a high regard for
9 Skywaves. My -- my assumption was that there was a high
10 regard for Skywaves' management, was, you know, competent
11 in terms of their experience in the market to get a
12 start-up mature and that they thought it was a good
13 financing opportunity to, you know, help it get mature.

14 BY MR. KEFALOS:

15 Q. Would you say that this financing program was
16 tailor-made for Skywaves?

17 A. As far as my experience is concerned, yes. I cannot
18 say if it was tailor-made within BB&T as a whole.

19 Q. Okay. Now, you talked about -- we talked a minute ago
20 about the future. Do you remember any discussions with
21 Mr. Edahl about the possibility that the bank would take
22 Skywaves public eventually?

23 A. I remember no commentary about that.

24 (Exhibit 7 marked for identification.)

25 BY MR. KEFALOS:

1 Q. I'm going to give you what's been marked Exhibit 7.
2 This is, again, a log from Mr. Edahl, but I'd like to direct
3 your attention to an entry that looks like it takes place a
4 couple of weeks before this memo we just looked at. This is
5 dated October 5, 2006. It says, "Castlen Morris and I met --

6 A. Okay.

7 Q. -- with Ron and John" -- do you see that?

8 Skywaves picked up a second General Dynamics contract.

9 A. Okay.

10 Q. Skywaves has business in hand that should produce
11 about 14 million in sales in 2007 and a million -- what does PBT
12 stand for?

13 A. I'm assuming that -- to me it stands for profit before
14 tax.

15 Q. Okay.

16 A. But that may not be the intent of the writer.

17 Q. Then it says, the next to the last sentence, "Will
18 begin to get capital markets involved due to the potential to
19 grow to 35 million in sales with existing clients."

20 A. Okay.

21 Q. Do you remember that conversation with Mr. Edahl?

22 A. No. I'm not saying it didn't happen. I don't
23 remember it.

24 Q. And if that happens, they'll need additional capital,
25 and the note goes on. The 35 million, do you understand that to

1 mean the value of the company?

2 A. No. My interpretation of the sentence is that the
3 company will have \$35 million in annual sales.

4 Q. I see.

5 A. That does not mean value of company to me.

6 Q. Okay. And then the next note is "If that happens,
7 they'll need additional capital." Do you remember talking with
8 Mr. Edahl about how to raise the additional capital?

9 A. No, because I have no experience in that area.

10 Q. Do you remember Mr. Edahl talking to you about or
11 commenting about the possibility of taking Skywaves public and
12 raising capital that way?

13 A. I don't remember that, no.

14 (Exhibit 8 marked for identification.)

15 BY MR. KEFALOS:

16 Q. I'm going to give you a document marked Exhibit 8,
17 which is a two-page document from Mr. Edahl to Mr. Denning dated
18 October 6, 2006, about the same time, and a copy to you, and ask
19 you if you can remember that.

20 A. Do I remember this document? No. But it's obviously
21 a call report or an update provided to Mr. Denning.

22 Q. What's a call report?

23 A. Just notes regarding your meeting, like -- like here
24 or like -- like right here.

25 Q. What are those exhibits that you're referring to?

1 A. Relative to \$2 million it's not. It's 5 percent.
 2 Q. That was February 9th. I'm going to show you
 3 something that is February 13th. This is a -- it looks like
 4 it's a fax from Mr. Edahl to you dated February 13, 2007.
 5 (Exhibit 10 marked for identification.)
 6 BY MR. KEFALOS:
 7 Q. What I'm interested in knowing is that Mr. Edahl tells
 8 you that "I guess an alternative to raising the purchase order
 9 advance rate is to make sure John is submitting all the POs he
 10 has from all customers and having a higher PO sublimit under the
 11 line." Do you know what he's referring to there?
 12 A. My thoughts are that if, to use your percentage, if
 13 we're advancing 65 percent on a purchase order, if we're not
 14 able to drive that advance rate higher, then the customer should
 15 be submitting what purchase orders they can within the
 16 limitations allowed to maximize their access to funding.
 17 Q. Well, I'm interested in knowing what, if any,
 18 relationship this fax has to the previous Exhibit No. 9, which
 19 is decreasing the overall line.
 20 A. I'm not helping you there. I can't remember.
 21 Q. Does it look like Sky -- or it looks like the bank was
 22 trying to figure out how to get Skywaves more money?
 23 A. Based on Jim Edahl's memo here, it appears that we
 24 were trying to work within the current framework or structure
 25 to, you know, make sure that Skywaves was doing what they can to

1 maximize their availability to the funds.
 2 Q. Do you remember if Skywaves was short of cash at the
 3 time?
 4 A. I do not remember that specifically at this point in
 5 time.
 6 Q. Well, does this suggest that you're trying to find
 7 ways to get them cash?
 8 A. Within the existing framework that's been approved.
 9 Q. Sure. Because Skywaves needed the cash to grow?
 10 A. They were a small start-up company. They were
 11 cash-strapped, of course. Every small company I deal with is
 12 cash-strapped, so, you know, every dollar is important.
 13 (Exhibit 11 marked for identification.)
 14 BY MR. KEFALOS:
 15 Q. I'm going to hand you what's been marked as
 16 Exhibit 11, and this is a -- it looks like a draft of a letter
 17 that came out about two weeks after that last memo. It is from
 18 Mr. Edahl to Mr. Voytko dated March 2, 2007. Are you familiar
 19 with this?
 20 A. I mean, I'm sure I've seen it before, but I don't
 21 remember it from this presentation here, no, but I'm sure I've
 22 seen it before.
 23 Q. Sure. And this one appears to be changing the
 24 financing around a little bit, doesn't it?
 25 A. Yeah, it appears to. Yeah.

1 Q. It's taking the purchase order limit from 1.5 to 2
 2 million dollars. And look at --
 3 A. Okay.
 4 Q. -- Exhibit Number 9.
 5 A. Uh-huh.
 6 Q. So it's raising it, raises the purchase order.
 7 A. Okay.
 8 Q. That makes it easier for Skywaves to raise money.
 9 MS. CHERRY: Object to the form.
 10 THE WITNESS: That allows Skywaves more access to
 11 liquidity for their working capital purposes.
 12 BY MR. KEFALOS:
 13 Q. And it's going to advance 85 percent of invoices, and
 14 originally it was proposed to be 65 percent of -- or 60 percent
 15 of purchase orders but I tell you it was changed to 65 percent.
 16 A. Okay.
 17 Q. And then the fees were 45 percent of each invoice
 18 capped at 3,000 a month. No matter how many invoices BB&T
 19 factored, the most that you could charge for factoring these
 20 invoices was \$3,000 a month.
 21 A. That sounds consistent, yes.
 22 Q. And then the letter goes on to say "Assuming Skywaves
 23 budget in 2007, previously submitted, is achieved, we will
 24 consider further changes in the structure of the line and the
 25 rates." Do you know what changes were considered?

1 A. No, I don't remember. I don't remember what changes
 2 would have been considered.
 3 (Exhibit 12 marked for identification.)
 4 BY MR. KEFALOS:
 5 Q. I'm going to give you a document that's marked
 6 Exhibit 12. It's a -- it looks like it's an e-mail from -- or a
 7 memo from you to Rich -- Rick --
 8 A. Rick Benner.
 9 Q. Rick Benner and Phil Allard.
 10 A. Phil Allard.
 11 Q. Allard. Dated March 8, 2007, and so a couple of days
 12 after this Exhibit 11 took place.
 13 A. Okay.
 14 Q. Now, I think I've highlighted some of these sections
 15 here for you. There's a line in the middle of this paragraph
 16 that says "Due to competitive pressure, Jim wanted to cap the
 17 commission at \$2,000 a month, which I strongly disagree."
 18 What is the competitive pressure you were talking
 19 about there?
 20 A. I'm sure it was other lenders, other banks, possibly
 21 wanting to migrate the relationship from BB&T to their bank.
 22 Q. Other banks wanted to get Skywaves' business?
 23 A. I assume that, yes.
 24 Q. And you disagreed with reducing the cap on
 25 commissions.

1 which is a memo from you to Mr. Voytko dated August 28, 2007.
 2 A. Uh-huh.
 3 THE COURT REPORTER: Could you repeat that date,
 4 George.
 5 MR. KEFALOS: August 28, 2007.
 6 THE COURT REPORTER: Thank you.
 7 MS. CHERRY: George, will you hold on one minute.
 8 Thank you.
 9 BY MR. KEFALOS:
 10 Q. Now, this says that -- this is a memo from you to
 11 Mr. Voytko. It says "We received the Skywaves check and Verizon
 12 check today."
 13 A. Uh-huh. Check copy.
 14 Q. Check copy today.
 15 A. Uh-huh.
 16 Q. It's amazing that the Verizon check is dated May 24,
 17 2007, and they held it so long.
 18 A. Uh-huh.
 19 Q. When did you actually receive the check.
 20 A. Uh-huh.
 21 Q. Now, when Skywaves would send you a check in payment,
 22 would they customarily include the invoices which the check
 23 covered and a copy of the check they received from their
 24 customer?
 25 A. Some -- I can't remember. Sometimes they would and

1 sometimes they wouldn't. I liked -- I like to have the check
 2 copy. I think probably in this instance I asked for it because
 3 I wanted to know what was taking Verizon so long to pay.
 4 Q. Sure. And in this case you found that the Verizon
 5 check was -- Verizon to Skywaves was dated May 24, 2007, but
 6 Skywaves didn't forward it to you until August 28, 2007.
 7 A. Okay. Yeah.
 8 Q. It's almost three months --
 9 A. Uh-huh.
 10 Q. -- past the time that Skywaves received the check.
 11 You ask him "When did you actually receive the check?"
 12 Do you remember whether he responded?
 13 A. I don't remember if he -- John was pretty good about
 14 responding to me, but I don't remember if he responded or what
 15 his response was. You may very well have it in your possession.
 16 I don't know.
 17 Q. Yeah. We'll talk about it in a second. That's next.
 18 A. Okay.
 19 Q. Why hadn't this been picked up on the audit that had
 20 taken place the month before?
 21 A. I -- I can't give you an answer to that. You'd have
 22 to ask the field examiner.
 23 Q. Well, is this something that should have been picked
 24 up during the July audit?
 25 A. I -- I don't know. The check may not have come in in

1 time and it may have been an open invoice at the time the field
 2 examiner was there.
 3 Q. Well, if the check had come in shortly after it was
 4 dated, May 24, 2007, and deposited into Skywaves' account and
 5 not forwarded immediately to the bank, should the audit have
 6 picked it up?
 7 A. I would hope so.
 8 (Exhibit 17 marked for identification.)
 9 BY MR. KEFALOS:
 10 Q. I'm going to show you what we'll mark as Exhibit 17.
 11 I know that you've never seen this before but --
 12 A. Maybe I have.
 13 Q. Maybe you have. It comes from Skywaves' account,
 14 Skywaves' files. It might have been part of Mr. Voytko's
 15 deposition.
 16 A. Uh-huh.
 17 Q. This is a memo to the file that Mr. Voytko wrote, two
 18 memos.
 19 A. I've not seen this before.
 20 Q. But the one is dated September 1, 2007.
 21 A. Uh-huh.
 22 Q. And it says "Here are my notes with my discussion with
 23 Castlen yesterday regarding the Verizon payment that was sent to
 24 the bank this week." Exhibit 16 talks about the Verizon --
 25 A. Okay.

1 Q. -- payments.
 2 And it goes on to say "About two days ago he sent me
 3 an e-mail noting the delay between when the check was written
 4 and when it was received from the bank. He asked me about the
 5 delay and if Verizon had held the check, and I stated there's
 6 usually a 10-day delay between the check date and when we
 7 receive and deposit the check."
 8 In this case it was approximately six weeks before the
 9 payment was sent to the bank. So Skywaves held this check for
 10 six weeks?
 11 A. Uh-huh.
 12 Q. And this -- if you look at the last paragraph of that
 13 first memo it said, "This check that Skywaves held was
 14 \$350,000." Do you see that?
 15 A. Uh-huh.
 16 Q. He said that you asked him whether they were having
 17 cash problems and he replied that cash was always tight. Do you
 18 remember this conversation?
 19 A. I don't, but I had that conversation with all my
 20 clients. I mean, why do you borrow money? To smooth out the
 21 cash flow cycles.
 22 Q. Sure. Well, here -- and it goes on to say "He
 23 stated," that is Mr. Voytko, said that you said this could be
 24 viewed as a violation of the factoring --
 25 A. Uh-huh.

1 Q. -- agreement and would also reflect negatively on him
2 as well.

3 A. Uh-huh.

4 Q. Did you -- was that a violation of the factoring
5 agreement?

6 A. We -- first off, I've not seen this, but in reading
7 that I could have very well have shared that commentary with
8 him, because when a client receives funds from its customer, it
9 is preferably that you not even deposit the funds. They should
10 take the check and resend it to us, don't even deposit it.

11 Q. That's right.

12 A. Oftentimes it does get deposited. So, indeed, then
13 they cut us a check. That's why I think probably in the
14 first -- the last deposit I asked for a copy to verify that.
15 But, yes, technically-speaking, failure to remit cash proceeds
16 could be a violation of contract.

17 Q. Well, this would have been a pretty big violation of
18 the contract.

19 MS. CHERRY: Object to the form.

20 THE WITNESS: Could be.

21 BY MR. KEFALOS:

22 Q. \$350,000 held six weeks past the time that it was due?

23 A. I would say so, yes.

24 Q. Did you do anything to document this violation
25 anywhere besides -- anywhere?

1 A. I can't remember if I had discussion with my boss or
2 if I had discussion with Mr. Edahl, if I put a note in the local
3 file or what. I do not remember. There could be notes.
4 Oftentimes there are collectors' notes in the main frame and
5 that might be sufficient enough to document this. I don't
6 remember.

7 Q. And those collectors' notes in the main frame would
8 have been kept as part of BB&T's ordinary course of business?

9 A. They would have been kept for a period of, like, 90
10 days and then they would have been deleted.

11 Q. Oh, really?

12 A. Uh-huh.

13 Q. You wouldn't have a record of them?

14 A. No. After about 90 days or so AS400 deleted them out
15 completely.

16 Q. Why is that?

17 A. Space. We had a staff of 12 collectors that were
18 making hundreds of phone calls a day per person and documenting,
19 you know, in sentence format conversations with customers. It
20 was a space -- it was a space limitation issue.

21 Q. Well, aside from documenting the telephone
22 conversation, would you have put anything in the file to
23 document, hey, these guys kept \$350,000 --

24 A. I could -- I could have or I might not have or might
25 not have gotten to it at that point in time.

1 Q. There is another note here in that same -- in that
2 earlier -- the first memo.

3 A. The first -- the first -- the first section.

4 Q. Yeah.

5 THE VIDEOGRAPHER: Gentlemen, you're talking over each
6 other and I know the court reporter's having a little
7 trouble with that. Please be aware.

8 THE WITNESS: I'm sorry. Okay.

9 BY MR. KEFALOS:

10 Q. In the next to the last paragraph it says "In
11 addition, he noted that," Mr. Voytko's saying you noted, "that
12 we would pay interest on the borrowed funds regardless of being
13 a PO advance or an outstanding invoice and that it would be
14 better reflected as a PO advance." Do you see that?

15 A. I see it.

16 Q. Why would it be better reflected as a PO advance?

17 A. I cannot give you an answer to that, because he was
18 the one that composed it and he may be misunderstanding.
19 something or I may not be reading his sentence correctly. He
20 didn't consult with me in the writing of this, so I don't
21 understand this -- I don't understand this comment.

22 Q. Do you know what it means to be paying interest on the
23 borrowed funds regardless of being a PO advance or an
24 outstanding invoice?

25 A. Yeah. Whenever we advanced funds, be it supported by

1 a purchase order or supported by an invoice, there was an
2 interest charge for the time the funds were out there, so that
3 part I understand. The rest of the sentence I don't understand.

4 Q. Okay. Going down to the next entry on this Exhibit
5 17, there's a memo that's dated September 17th. "I had a
6 conversation with Castlen yesterday about sending remittances to
7 the bank for outstanding invoices. We reviewed the aging report
8 and identified the payments that had been received and needed to
9 be forwarded to the bank."

10 So did you talk with him and he explained to you that
11 he had actually received payments and had yet to forward them
12 to --

13 A. Based on this right here, I would say, yes, I did talk
14 to him.

15 Q. "I propose to send check stubs for the oldest items
16 and then process wire transfers to complete the process for
17 about \$250,000." Do you see that?

18 A. Uh-huh, I do.

19 Q. So on the 17th you learned that there was another
20 \$250,000 that was -- had not been sent?

21 MS. CHERRY: Object to the form.

22 THE WITNESS: Okay.

23 BY MR. KEFALOS:

24 Q. Is that correct?

25 A. Sounds correct.

1 Q. In the third paragraph, "He reiterated that payments
2 not received cannot be held and it could result in a
3 cancellation of the contract." Do you remember if you told him
4 that?

5 A. I'm sure in my conversation with him, as with every
6 client, I would have reiterated if you get money from your
7 customer you need to send it to us. You don't need to be
8 holding it.

9 Q. Now, we know that you first found 350,000 that had
10 been held --

11 A. Uh-huh.

12 Q. -- past due. That's a yes?

13 A. I'll say yes.

14 Q. And then now when you found another \$250,000 that had
15 been held past due, did you report this to anybody?

16 A. I can't remember if I did report it in writing or if I
17 had it oral -- you know, oral reporting or discussion.

18 Q. Is it something that you would have reported?

19 A. Not necessarily if I could get it corrected or, you
20 know, get it -- get the funds to clear the invoices. It would
21 not necessarily have been something I would have reported.

22 Q. Let's look at Exhibit 18. --

23 A. I could have, but might not have either.

24 (Exhibit 18 marked for identification.)

25 BY MR. KEFALOS:

1 MS. CHERRY: Okay.

2 MR. KEFALOS: So, take my word for it that it's part
3 of the document. We can confirm it later.

4 MS. CHERRY: Okay.

5 BY MR. KEFALOS:

6 Q. So we -- you found out on at least September 18th that
7 Skywaves had received a check in July and not paid that check
8 until September 18th?

9 A. I'm going to assume that's the case. I don't know --
10 I don't know if they received it in July or if they received it
11 at a later point. I would assume they received it in close
12 proximity to the date it was -- it was created.

13 Q. Okay.

14 A. So I assume what you say is correct.

15 Q. Good. Well, the next exhibit might clarify it or
16 might help confirm the attachment. That was 18. Let's talk
17 about 19.

18 (Exhibit 19 marked for identification.)

19 BY MR. KEFALOS:

20 Q. 19 is your e-mail of September 19, 2007, following
21 this September 18, 2007. Now, the -- your e-mail, which is
22 No. 19, says you received the wire.

23 A. Okay.

24 Q. And you were advancing Skywaves' checking account
25 today for 39.8, 15 percent of the wire. Now, if you'll look

1 Q. Now, the next exhibit is a two-page exhibit and it
2 includes a -- I'll tell you what. I'll hand it to you -- a
3 cover memo from Mr. Voytko to you --

4 A. Uh-huh.

5 Q. -- that says "FYI" and then it has an attachment to it
6 and the attachment is the second page. Do you see that?

7 A. The check copy?

8 Q. Yes.

9 Now, this is another late payment, isn't it?

10 A. I don't know if it's late or not. I mean, if I -- if
11 I asked them to give me a copy, I was probably trying to
12 determine that.

13 Q. Uh-huh. This is a check that was sent July 10th or
14 cut --

15 A. Uh-huh.

16 Q. -- on July 10, 2007, from Verizon to Skywaves for
17 \$259,000. Do you see that?

18 A. Yes.

19 MS. CHERRY: I'm sorry. Can I -- how do I know this
20 is an attachment to this?

21 MR. KEFALOS: Well, take my word for it. It's a
22 hyperlink contained in that attachment.

23 MS. CHERRY: So -- but it's got no --

24 MR. KEFALOS: It's got no reference. All it is is a
25 hyperlink.

1 back at the check, which I included with that earlier e-mail the
2 day before, that check is for \$259,400. And 15 percent of
3 \$259,409 is 38,900.

4 A. Okay. I don't dispute that.

5 Q. So you -- this is another evidence of late payment, or
6 receiving the money, holding it and not remitting it promptly.

7 A. I would say so.

8 Q. This is 200 -- this is a quarter of a million dollars.

9 And you say nothing in this e-mail to him about the
10 delay; is that right?

11 A. Correct. I don't see anything in here about a delay.

12 Q. In fact, you just acknowledged receipt of the money.

13 A. Correct.

14 Q. Did you make any written record of this in the file?

15 A. I can't remember.

16 Q. Now, this is -- this is, what, the third one now --

17 A. Uh-huh.

18 Q. -- in about a month, 350, 250, 250, that they'd been
19 holding for six to eight weeks each.

20 A. Uh-huh.

21 Q. Did you report any of this?

22 A. I can't remember. We had -- as a matter of our
23 internal protocol, we had weekly staff meetings where we
24 discussed how certain accounts were performing.

25 Q. Uh-huh.

1 A. I could have brought it up then to my management team.
2 I can't remember if I -- if I put anything in writing in the
3 file or not.

4 Q. Well, that's a pretty serious breach now. We've got
5 over a quarter -- three quarters of a million dollars that
6 you've discovered has been held, at least not in accordance --
7 not paid in accordance with the written agreement.

8 A. Uh-huh.

9 MS. CHERRY: Object to the form.

10 BY MR. KEFALOS:

11 Q. Is that right?

12 A. Sure. Okay.

13 Q. Did Mr. -- you talked to Mr. Voytko about it. Did he
14 ever explain to you that he understood that Skywaves could hold
15 the money it received for up to 60 days?

16 A. No. I would never have communicated that to him.

17 Q. No, I mean --

18 A. He didn't ask it.

19 Q. Yeah, I'm not asking whether you had agreed, but did
20 he ever tell you that Skywaves under the agreement with BB&T was
21 entitled to hold the money for up to 60 days?

22 A. I do not remember him saying that to me, no.

23 Q. Well, we do know that Mr. Edahl made agreements
24 directly with Skywaves that you weren't aware of.

25 MS. CHERRY: Object to the form.

1 THE WITNESS: I was not aware of a presentation that
2 Mr. Edahl made to Mr. Denning. I do not know if that
3 resulted in an agreement to Skywaves or not. I assume that
4 it did, but I don't know that for certain.

5 BY MR. KEFALOS:

6 Q. Okay. Well, did you talk to Mr. Denning about this?

7 A. No.

8 Q. You didn't report it to Mr. Edahl and you didn't speak
9 with Mr. Denning and you made no record of it in the file?

10 MS. CHERRY: Object to the form.

11 THE WITNESS: I don't know if I made a record or not.

12 You can assume I didn't or not. I don't know. I don't
13 remember.

14 BY MR. KEFALOS:

15 Q. Where would it have gone if you had made a record in
16 the file?

17 A. It probably would have gone into a local file that I
18 had kept there at the factoring offices.

19 Q. Uh-huh. Now, you mentioned earlier that the delay in
20 remitting the money wouldn't have caused you a lot of concern if
21 Skywaves had then paid it.

22 A. Obviously when a client gets funds I want them to be
23 remitted as quickly as possible.

24 Q. Sure.

25 A. And with Skywaves there had been consistent -- I don't

1 want to use the word "problems," but we weren't able to get
2 their customers to always remit every payment to us.

3 Q. Sure.

4 A. Preferably; that's what we want. But -- so the fact
5 that he received the checks wasn't necessarily out of the
6 ordinary.

7 Q. No, but the fact that he received the check and held
8 it for 60 days might have been some reason for concern.

9 A. That could be, yes.

10 Q. But as long as they -- that is, Skywaves then paid
11 that money, you felt no need to report --

12 A. If they could provide me evidence that they got the
13 money from the customer, because I didn't -- what I was trying
14 to -- one thing that I was trying to do here was to make sure
15 there was no fraudulent invoicing. So if Skywaves could send me
16 monies and they could send me verification, you know, then I
17 could be reasonably comfortable that they weren't creating a
18 fraudulent invoice.

19 Q. And you found no evidence that Skywaves was creating
20 fraudulent invoices, did you?

21 A. I did not see any evidence of a fraudulent invoice.

22 Q. Well, what I'm interested in knowing is we talked
23 about the three different late remittances.

24 A. Uh-huh.

25 Q. And we talked about how you didn't make any record in

1 the file of those late remittances, six weeks, eight weeks late.
2 And you mention that it wasn't important as long as when you
3 brought it to their attention they paid it.

4 A. I didn't say it wasn't important.

5 Q. Okay.

6 A. But --

7 Q. It wasn't -- in your idea, it wasn't something that
8 you needed to document.

9 A. That could be a fair comment.

10 Q. As long as Skywaves paid it when you brought it to
11 their attention.

12 A. That could be a fair comment.

13 (Exhibit 20 marked for identification.)

14 BY MR. KEFALOS:

15 Q. I'm going to hand you what's been marked Exhibit
16 No. 20. This is an e-mail from you to Mr. Voytko dated
17 September 20, 2007.

18 A. Uh-huh.

19 Q. Here you identified, it looks like, eight invoices
20 that had been paid to Skywaves but Skywaves hadn't remitted to
21 the bank --

22 A. Uh-huh.

23 Q. -- promptly.

24 A. Uh-huh.

25 Q. Is that a yes?

1 Q. Okay. So it's not identified as a purchase order.
 2 A. I do not see purchase order there, correct.
 3 Q. In fact, if you go across the top, there's an area
 4 that says "POR submitted" and "PO received." Do you see that?
 5 Then it says -- across the top of the column, and then it says
 6 "shelter ready" --
 7 A. Yeah.
 8 Q. -- "material ready" --
 9 A. I see it, yes.
 10 Q. And under -- I guess do you know what POR submitted
 11 means? Does that mean purchase order submitted or is that PDR?
 12 Well, look at the PO received, meaning the -- under where it
 13 says "purchase order received."
 14 A. Yes.
 15 Q. It says "no."
 16 A. I see that.
 17 Q. No, no, no, no, no, no, no, no. So there's no
 18 purchase order. And, in fact, there's a section that says
 19 shelter ready, no, no, no, no, no, no, no. And material ready,
 20 no. Hall tower ready. No. Generator available, no.
 21 This is clearly not a purchase order, is it?
 22 A. I -- no, I would say it's not a purchase order.
 23 Q. But you were advancing monies on the basis of this
 24 site schedule.
 25 A. I was advancing monies based on this as a summary of

1 purchase orders. That was my understanding of what the document
 2 was.
 3 Q. Did you talk to Mr. Edahl about what this document
 4 was?
 5 A. I can't clearly remember, but I don't think I did. I
 6 don't know.
 7 Q. Did your auditors have the information sufficient to
 8 check whether these were, in fact, purchase orders?
 9 A. I do not remember. I would think they would have had
 10 that, but I can't be certain.
 11 Q. They should have been able to tell whether these were
 12 purchase orders or not.
 13 A. I would assume they could dig through it, but I'm not
 14 certain of that.
 15 Q. I mean, they should have been able to tell if these
 16 were not purchase orders.
 17 A. I would --
 18 MS. CHERRY: Object to the form.
 19 THE WITNESS: I would think -- I would think so, yes.
 20 I mean, I can sit here and say these aren't -- these aren't
 21 purchase orders in the form that I'm used to seeing, that's
 22 correct.
 23 BY MR. KEFALOS:
 24 Q. Okay. But they were given instructions -- that is,
 25 your auditors were given instructions about what to look for

1 when conducting their quarterly audits.
 2 A. I -- I believe so. I mean, I'm not the one giving the
 3 instructions; they come from the audit department, but, yes.
 4 Q. Now, you understood that the written contract, the
 5 written contract between Skywaves and BB&T, required Skywaves to
 6 promptly pay over to BB&T any monies that they received from
 7 their customers.
 8 A. (Witness nods head.)
 9 Q. That's yes?
 10 A. I'm sorry. Yes.
 11 Q. And you knew that Skywaves had gotten into the habit
 12 of not doing so.
 13 A. Yes. There had been several instances, as you pointed
 14 out, where they were slow in remitting.
 15 Q. Yeah. By September you knew that they had held
 16 \$350,000 from May, \$259,000 from July, and \$325,000 in
 17 September.
 18 A. Yes.
 19 Q. And each one of these things could have been
 20 considered a significant breach of the agreement.
 21 MS. CHERRY: Object to the form.
 22 THE WITNESS: Each one could have been considered a
 23 violation of the agreement, a breach, yes.
 24 BY MR. KEFALOS:
 25 Q. But you did not notify anybody about these.

1 A. To my recollection, I didn't notify anybody in writing
 2 about them, no.
 3 Q. And you certainly didn't document anything in your
 4 file.
 5 A. I don't remember, but I would probably say no.
 6 Q. You mentioned earlier that you had a local file.
 7 A. Uh-huh.
 8 Q. Would that have been something that BB&T would have
 9 kept or is that something that you would have kept separately?
 10 A. That probably would have been destroyed years ago.
 11 Probably when I -- when I left the company, they probably would
 12 have destroyed it.
 13 Q. At that point in September when you knew of these
 14 things that could have been considered breaches of the
 15 agreement, were you aware of the customer contracts that BB&T
 16 had lined up for the future?
 17 A. I'm not sure I'm understanding your question.
 18 Q. Well, you were aware, for example, of the site -- or
 19 of the number of contracts that was lined up for General
 20 Dynamics that were identified in the site plan, weren't you?
 21 A. Yeah. I mean, yeah, as I saw this, this was a lot of
 22 business, a lot of shelters.
 23 Q. And did you feel pretty good about the fact that these
 24 shelters were going to be supported, were going to come through?
 25 A. I handled them in what I considered a standard course

1 of manner. To be -- to be honest with you, I never agreed -- I
2 say agreed. I never was comfortable in funding purchase orders
3 to begin with --

4 Q. Yeah.

5 A. -- so if it would have been Castlen Morris National
6 Bank, I would not have done the transaction.

7 Q. Sure. But I'm asking you about these orders that were
8 outstanding. Did you feel pretty comfortable that they were
9 going to come through and materialize as actual sales?

10 A. Yes, that's a fair statement. I would have expected
11 them to become shelters and put in place and all that, yes.

12 Q. Of course, when they -- when they converted to sales,
13 they were going to generate a lot of income to pay these loans.

14 A. They would have generated a lot of invoices that would
15 have created additional availability. That would have flowed to
16 the bottom of the income statement, i.e., a lot of income to pay
17 the loans or whatever you do with the profits.

18 Q. And -- and, as of the time that you left in November,
19 were you comfortable that Skywaves would be able to survive if
20 these contracts came through as they were projected?

21 A. I wasn't -- I didn't feel I was in a position to make
22 that determination. I didn't see that there was enough -- there
23 wasn't enough historical evidence to make me feel comfortable.
24 In looking at this list of sites I felt like the opportunity
25 sure was -- was good.

1 Q. Yeah. Now, did you have any kind of exit interview
2 with anybody at BB&T when you left?

3 A. No.

4 Q. You have any kind of meeting with Mr. Edahl or
5 Mr. Denning to pass on the --

6 A. No.

7 Q. -- file to the next person?

8 A. No.

9 Q. Did you meet with anybody who was going to take over
10 from your position?

11 A. I did -- I did meet with the gentleman that replaced
12 me, a fellow named Mike --

13 Q. Burk.

14 A. -- Burk. Michael Burk?

15 Q. Yes.

16 A. The last few days of my employment at BB&T were spent
17 going on site to the larger accounts that I worked with to
18 introduce him in person to those accounts.

19 Q. And you took him to Skywaves?

20 A. No.

21 Q. You did not?

22 A. No.

23 Q. Was Skywaves not one of your larger accounts?

24 A. No.

25 Q. No kidding.

1 A. No.

2 Q. Three and a half million dollars line of credit was
3 not considered a big account?

4 A. No.

5 Q. Did you ever mention to Mr. Burk or anybody about
6 Skywaves' record of not paying the money that they got promptly
7 to the bank?

8 A. I wouldn't -- I don't remember mentioning that to
9 Mr. Burk, no.

10 Q. Did you ever talk to anybody about the fact that
11 Skywaves wasn't complying with the terms in the letter of the
12 written agreement and that you let it go?

13 A. No. I did not -- there may have been some
14 conversation, but, no. As -- to the point that Skywaves could
15 produce for me payment and evidence that they received payment,
16 no.

17 Q. Okay. And we were talking earlier about why you
18 weren't more concerned about this delay in remittance and you
19 were telling me about the number -- the turnover, the volume.
20 You were explaining that there was so much happening; can you
21 elaborate on that? Explain to me why you weren't worried about
22 the delay in payment.

23 A. I'm not -- if I communicated to you that I wasn't
24 worried, then that's an error on my part.

25 Q. Well, then, let me ask you why it was that you didn't

1 call a default.

2 A. Because, as I said to you just a minute ago, if they
3 could rectify the situation, then I felt we could keep moving
4 forward. Because this was -- this was not unusual to happen
5 with a client. I had 30 clients that I administered. It is not
6 unusual for every client to get payments directly.

7 Now, granted, not every client had payments this
8 large.

9 Q. Yeah.

10 A. Okay? But it was not unusual. And the working
11 relationship that I had developed with Mr. Voytko, you know,
12 their ability to produce for me the funds and to produce for me
13 the copies of the customers' checks were sufficient in my mind
14 to keep moving forward and not -- and not call a violation.

15 Q. Were you at all concerned about them hitting a wall on
16 this? Do you know what I mean by that? But that if they were
17 using money that should have been remitted to the bank to
18 produce new shelters, were you worried there'd come a time when
19 there wouldn't be enough coming in to pay off the --

20 A. Yes. That's why I wanted to -- I'll ask them to give
21 me copies of payments the customers actually made to make sure
22 that the fund -- the funds were, you know what I'm saying, live
23 or real funds --

24 Q. Yeah.

25 A. -- that they actually came from the customer and there

23

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
COUNTY OF MECKLENBURG 2009-CP-10-7516

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.

VIDEOTAPED

DEPOSITION OF: FRANK CAPLE

DATE: December 2, 2013

TIME: 1:17 p.m.

LOCATION: Nexsen Pruet
701 Green Valley Road
Greensboro, NC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: LISA A. WHEELER, RPR, CRR

A. WILLIAM ROBERTS, JR. & ASSOCIATES

Fast, Accurate & Friendly

Charleston, SC Hilton Head, SC Myrtle Beach, SC
(843) 722-8414 (843) 785-3263 (864) 234-7030

Columbia, SC Greenville, SC Charlotte, NC
(803) 731-5224 (864) 234-7030 (704) 573-3919

APPEARANCES: (Continued)

ATTORNEYS FOR THE DEFENDANTS
BRANCH BANKING AND TRUST COMPANY,
successor in merger to BRANCH BANKING
AND TRUST COMPANY OF SC, a/k/a BB&T,
and JAMES EDAHL:
NEXSEN PRUET
BY: JULIO E. MENDOZA, JR.
1230 Main Street, Suite 700
Columbia, SC 29201
(803) 540-2026
rmendoza@nexsenpruet.com

ALSO PRESENT: Mike Hennessy

THE VIDEOGRAPHER: David Gibson

(INDEX AT REAR OF TRANSCRIPT)

APPEARANCES OF COUNSEL:

ATTORNEYS FOR THE PLAINTIFF
SKYWAVES I CORPORATION:

GEORGE J. KEFALOS, PA
BY: GEORGE J. KEFALOS (By VTC)
46A State Street
Charleston, SC 29401
(843) 722-6612
gjk@kefaloslaw.com

-and-

DUFFY & YOUNG
BY: JOHN P. LINTON (By VTC)
96 Broad Street
Charleston, SC 29401
(843) 720-2044
jlinton@duffyandyoung.com

-and-

DUFFY & YOUNG
BARNWELL, WHALEY, PATTERSON & HELMS
GEORGE KEFALOS, PA
ANDREW K. EPTING, JR., LLC
BY: KRISTIE SHAW,
Contract attorney (By VTC)
120 Van Der Horst Drive
Columbia, SC 29229
(843) 610-8168
kristiealexander@aol.com

(Appearances continued on next page.)

(Commencing at approximately 1:17 p.m.)

* * * * *

STIPULATION

It is stipulated by and between Counsel
that this deposition is being taken in accordance
with the North Carolina Rules of Civil Procedure,
Rule 30; that all objections as to Notice of this
deposition are hereby waived; that all objections
except as to form are reserved until the time of
trial; and that the deponent does not waive reading
and signing of this deposition.

* * * * *

THE VIDEOGRAPHER: We are now on the
record. Today's date is December 2nd, 2013. The
time is approximately 1:17 p.m. This is the video
deposition of Frank Caple taken by counsel for the
Plaintiff. The location is Nexsen Pruet, LLC, 701
Green Valley Road, Suite 100, Greensboro, North
Carolina, 27408.

My name is David Gibson, legal
videographer representing A. William Roberts, Jr. &
Associates. This deposition is taken in the matter
of SkyWaves I Corporation versus Branch Banking &
Trust, et al, Case Number 2009-CP-10-7516.

Counsel, please introduce yourselves

1 for the record.
 2 MR. KEFALOS: This is George Kefalos.
 3 I represent SkyWaves.
 4 MR. LINTON: John Linton of Duffy &
 5 Young.
 6 MS. SHAW: Kristie Shaw, contract
 7 attorney.
 8 MR. MENDOZA: Okay. I'm Rick Mendoza.
 9 I represent BB&T and Jim Edahl.
 10 THE VIDEOGRAPHER: Would the court
 11 reporter please swear in the witness.
 12 FRANK CAPLE
 13 being first duly sworn, testified as follows:
 14 EXAMINATION
 15 BY MR. KEFALOS:
 16 Q. Mr. Caple, my name is George Kefalos
 17 and we haven't formally met.
 18 MR. KEFALOS: Somebody's standing in
 19 front of the camera.
 20 BY MR. KEFALOS:
 21 Q. I want to ask you some questions about
 22 what you might know about this litigation. Do you
 23 feel well enough to answer my questions today?
 24 A. I do.
 25 Q. Will you give me full and complete

1 answers to my questions today?
 2 A. I will.
 3 Q. And if you don't understand a question,
 4 will you ask me to repeat it?
 5 A. Yes.
 6 Q. Tell me a little bit about yourself.
 7 How old are you?
 8 A. I am 50 years old.
 9 Q. And where do you live?
 10 A. I live in -- I live in Fairview, Texas,
 11 at the moment.
 12 Q. How long have you been in Fairview,
 13 Texas?
 14 A. I've been in Fairview, Texas, since the
 15 1st of August of this year.
 16 Q. And where did you live before that?
 17 A. I lived in Winston-Salem, North
 18 Carolina.
 19 Q. How long were you in Winston-Salem?
 20 A. Approximately three years.
 21 Q. And where were you before that?
 22 A. Charleston, South Carolina.
 23 Q. How long were you in Charleston?
 24 A. Approximately four years.
 25 Q. And before that?

1 A. I was in Florence, South Carolina.
 2 Q. And how long were you with -- in
 3 Florence?
 4 A. I was in Florence for approximately
 5 four years.
 6 Q. Where are you from originally?
 7 A. I'm from Myrtle Beach, South Carolina.
 8 Q. In all of these places you were living
 9 were you employed by BB&T?
 10 A. Yes, I was.
 11 Q. You're still employed by BB&T?
 12 A. That is correct.
 13 Q. Are you married?
 14 A. I am married.
 15 Q. Children?
 16 A. No children.
 17 Q. Can you tell me a little bit about your
 18 educational background. What sort of college
 19 degree do you have?
 20 A. I have a Bachelor of Science.
 21 Q. In what?
 22 A. Business administration.
 23 Q. Where did you go to school?
 24 A. I attended the Citadel.
 25 Q. When did you graduate?

1 A. 1985.
 2 Q. Did you do any graduate study?
 3 A. I did not.
 4 Q. Have you taken continuing education
 5 courses in the banking industry?
 6 A. No.
 7 Q. Have you attended seminars in the
 8 banking industry?
 9 A. No.
 10 Q. Now you work at BB&T today, is that
 11 correct?
 12 A. That is correct.
 13 Q. How long have you been at BB&T?
 14 A. I joined BB&T in 1990.
 15 Q. What did you do before you joined BB&T?
 16 A. I worked for Citizens & Southern
 17 National Bank.
 18 Q. And how long were you with C&S?
 19 A. I was with them for five years.
 20 Q. So your entire work life has been in
 21 banking?
 22 A. Correct.
 23 Q. What's your position at BB&T?
 24 A. I'm a regional loan administrator.
 25 Q. What was the position you held in 2006,

1 Q. How did you learn what factoring was
2 about?
3 A. I didn't need to.
4 Q. You could supervise a factored account
5 without knowing how factoring worked?
6 A. Coapproval was handled by the factoring
7 group.
8 Q. Who was the factoring group?
9 A. At that time I -- I don't have
10 recollection who the individuals were.
11 Q. Where were they located?
12 A. I -- I -- I don't know. I don't know
13 if it was in Winston-Salem or if it was in
14 High Point.
15 Q. Okay. Let me ask you about e-mails.
16 Do you use e-mails at BB&T?
17 A. I do.
18 Q. What's the policy about keeping
19 e-mails?
20 A. E-mails are to be retained.
21 Q. Were you privy to e-mails back in 2006,
22 '7 and '8?
23 A. Yes.
24 Q. Okay. Regarding the SkyWaves account?
25 A. Yes.

1 Q. And where would those e-mails be today?
2 A. I would -- they -- they should be on
3 the server.
4 Q. Looking at your personnel file I noted
5 that you had taken a course in banking ethics. Do
6 you remember that?
7 A. Banking ethics?
8 Q. Ethics, yes.
9 A. Possibly through the BB&T University,
10 yes. I took a lot of courses.
11 Q. Oh, so -- I'm sorry.
12 A. Through -- through our internal
13 training we had -- we take numerous courses.
14 Q. Well, when I asked you earlier about
15 whether you had continuing education programs, you
16 told me that you didn't.
17 A. I took it that you were saying outside
18 of -- outside of BB&T.
19 Q. Okay. So you did, in fact, engage in
20 various continuing education programs within BB&T?
21 A. Correct.
22 Q. And this is called the BB&T University?
23 A. It's -- it's -- BB&T University is the
24 entity that -- that administers any training that
25 occurs within BB&T.

1 Q. All right. You have spent your life in
2 banking. Do you consider yourself a banking
3 professional?
4 A. I consider myself an experienced
5 banker.
6 Q. You certainly know more than the
7 average person about banking?
8 A. I -- I do know -- because of the
9 experiences that I've had over my career, yes, I --
10 I do know --
11 Q. Do you not feel comfortable calling
12 yourself a professional?
13 A. I -- I have no problem calling myself a
14 professional because this is the profession that
15 I've take -- that I've undertaken.
16 Q. Now as a professional with, what, 25
17 years' experience in the industry do you think that
18 you know the standards of behavior that are
19 generally accepted in the banking industry?
20 A. I know the standards of behavior that
21 are accepted by BB&T within -- within our policy
22 and guidelines.
23 Q. Good. Well, would you agree that a
24 banker should be honest with his customer?
25 A. A banker should always be honest.

1 Q. And would you agree that a banker
2 should treat his customer fairly and reasonably?
3 A. Correct.
4 Q. And would you agree that a banker
5 should never mislead his customer?
6 A. Correct.
7 Q. And would you agree that a banker
8 should never intentionally cause unnecessary harm
9 to his customer?
10 A. Correct.
11 Q. Would you agree that a banker should
12 never mislead the bank or his supervisor?
13 A. Yes.
14 Q. And would you agree that a banker
15 should have actual authority from the bank before
16 he speaks for the bank?
17 A. Yes.
18 Q. Would you agree that a banker should
19 never speak for the bank without having authority
20 to do so?
21 A. Yes.
22 Q. Do you think a customer should be able
23 to trust that his banker has the authority to speak
24 on the bank's behalf?
25 A. Yes.

1 lending protocol and procedure with regard to the
2 funding of site plans?

3 MR. MENDOZA: Object to the form.

4 A. Here again, the -- you know, BB&T
5 Factors were the ones who originated this credit
6 facility. It -- it was never within my authority
7 to approve doing, you know, even the purchase order
8 financing from the very get-go.

9 Q. Who was the representative from BB&T
10 Factors at the time? Was that Mr. Burke?

11 A. At the point of origination?

12 Q. No. At the time this January issue
13 about default came up.

14 A. I believe it was -- it was Mr. Burke
15 because Mr. Morris had left the bank I believe at
16 that point.

17 Q. And prior to Mr. Burke there was
18 Mr. Morris who was the representative of the BB&T
19 factoring --

20 A. That's my under --

21 Q. -- operation?

22 A. That's my understanding, yes.

23 Q. Now are you aware that BB&T conducted
24 quarterly audits of the SkyWaves account?

25 A. I'm aware that -- that -- that it is

1 typical that field exams are completed.

2 Q. And these audits typically track
3 SkyWaves' sales, invoices, purchase order, loans
4 and income?

5 A. They -- they -- they typically track
6 numerous different things.

7 Q. Including the sales and invoices,
8 purchase orders and income?

9 A. That's very possible, yes.

10 Q. These audits are supposed to track the
11 money that BB&T loaned to SkyWaves to make sure
12 that the proceeds received were properly applied?

13 A. I would have to defer to the auditor to
14 answer that question.

15 Q. Well, I'm asking you about your
16 understanding of what the audit does.

17 A. My understanding is the audit does a
18 snapshot of, you know, where -- where the company
19 is at that point in time when the field examiner is
20 conducting their audit based on numerous different
21 metrics.

22 Q. And the snapshot includes a picture of
23 the money that's come in to SkyWaves and the money
24 that's supposed to be remitted to BB&T?

25 A. I believe that's correct.

1 Q. Do you know whether these audits showed
2 that BB&T was getting funding for site plans?

3 A. I -- I don't -- I do not know that.

4 Q. Do you agree that the bank was not set
5 up to fund site plans?

6 A. I don't know what -- what the bank was
7 set up to do since it was a factoring arrangement.

8 Q. Would you agree that the idea of site
9 plan funding is pretty radical?

10 A. I would agree that there -- there is --
11 is increased risk in doing so, yes.

12 Q. And would you agree that -- or -- or
13 have you ever seen in your 25 years with the bank
14 the bank fund site plan factoring?

15 A. I have not.

16 Q. It's a -- so as far as you know it's
17 never been done before?

18 A. I'm not aware of -- of it being done.

19 Q. And do you know that it's a violation
20 of BB&T's factoring guidelines?

21 A. I do not --

22 MR. MENDOZA: Object to the form.

23 A. I do not because I'm not familiar with
24 their guidelines.

25 Q. Do you find it odd that Mr. Edahl could

1 have approved this radical funding plan that had
2 never been done before in July 2007, had supervised
3 it for July, August, September, October, November
4 and December and then forgotten that he had
5 approved it in January?

6 A. Yes.

7 Q. Would you agree that -- that funding of
8 site plans is such an unusual agreement that it's
9 hard to believe Mr. Edahl forgot he approved it?

10 A. Yes.

11 Q. In fact, if you had approved such an
12 unusual funding arrangement in July and supervised
13 it for six months, you wouldn't have forgotten
14 about it by January, would you?

15 A. No.

16 Q. Are you at all interested in talking to
17 Mr. Edahl about how it was that he could have
18 forgotten that he gave approval to factor site
19 plans?

20 A. That -- that is not my responsibility
21 at this point with the bank.

22 Q. Are you at all interested in knowing
23 how it is he could have forgotten it?

24 A. I would be interested, yes.

25 Q. Looking back does it occur to you that

1 watchlist loan comments. Looks to be dated
2 2/12/08.

3 (CAPLE EXHIBIT 6, Watchlist Loan
4 Comments, was marked for identification.)

5 BY MR. KEFALOS:

6 Q: Do you see that?

7 A: Yes.

8 Q: And that's marked Exhibit 6?

9 A: Correct.

10 Q: Do you -- have you seen this before?

11 A: I have not seen this document. It's
12 very probable that I would have seen it back in
13 this time frame.

14 Q: Do you know who authored this document?

15 A: Oh, I believe it was authored by Mike
16 Hennessy.

17 Q: And what is a watchlist loan comment?

18 A: It's a -- it's a document that is
19 completed on a monthly basis which identifies
20 anything that may have changed or be happening with
21 an account that's classified on our watchlist.

22 Q: What is a watchlist?

23 A: Watchlist is -- is a credit -- is a --
24 is a credit that has been deemed to be unacceptable
25 from a risk standpoint. It's been downgraded to --

1 to other especially-mentioned or substandard --
2 there are different classifications. Once it --
3 once it is classified as a risk grade of a seven,
4 it -- it is on the watchlist.

5 Q: If you look at the first sentence in
6 the progress status down below -- the first line,
7 second sentence, the CEO and the CFO readily
8 acknowledged false purchase orders factoring.

9 Do you see that?

10 A: Yes.

11 Q: Did you have anything to do with
12 gathering that information leading to that
13 conclusion?

14 A: I know that -- I know there were, you
15 know, different events over a course of time,
16 meetings that were held where those individuals
17 could have -- have made that admission.

18 Q: Were you present at any of those
19 meetings?

20 A: I was present in -- in several
21 different meetings but, you know, specifically the
22 meeting that -- you know, the comments that appear
23 here were derived from -- you know, I don't -- I
24 don't know specifically if I was in that meeting.

25 Q: Well, did Mr. Konersmann and Mr. Voytko

1 ever admit or acknowledge to you false PO
2 factoring?

3 A: What I do know is that they admitted
4 that they didn't have the -- when -- they didn't
5 have the materials on hand to complete the units
6 that were tied to those POs.

7 Q: Does this relate -- when you talk about
8 the units, are you talking about the site --

9 A: I would not --

10 Q: -- plan funding?

11 A: No. I'm talking about the -- the
12 construction of a shelter.

13 Q: Well, tell me how that would work then.

14 A purchase order comes in and SkyWaves submits it
15 to BB&T for factoring. BB&T advances a certain
16 amount of money to SkyWaves, right?

17 A: Again, that's a question for our
18 factoring group who established the relationship as
19 it relates to --

20 Q: I'm asking what you -- what you
21 understand about it.

22 A: My understanding would be -- is that
23 the purchase order is delivered. We advance funds.
24 The purpose of those funds are to construct the
25 unit such that it could then be an invoice to

1 whomever the end user is and for the end user to
2 remit payment to pay for that unit and the funds
3 from -- from that remission should pay down the
4 line of credit, you know, based upon what's been --
5 been remitted.

6 Q: Did you understand the purchase
7 order --

8 MR. MENDOZA: Excuse me. I think --
9 George, I think that David's saying that he needs
10 to change tape right now. Is that --

11 MR. KEFALOS: Okay. We'll take a break
12 and change the tape.

13 THE VIDEOGRAPHER: We will now go off
14 the record. The time is approximately 3:07 p.m.
15 and this concludes Video Number 1 in the video
16 deposition of Frank Caple.

17 (Whereupon, there was a recess in the
18 proceedings from 3:07 p.m. to 3:09 p.m.)

19 THE VIDEOGRAPHER: We are now back on
20 the record. Today's date is December 2nd, 2013.
21 The time is approximately 3:09 p.m. This is Video
22 Number 2 in the video deposition of Frank Caple.

23 BY MR. KEFALOS:

24 Q: Mr. Caple, did you ever talk to
25 Mr. Denning about whether SkyWaves was in default,

24

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
COUNTY OF MECKLENBURG 2009-CP-10-7516

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.

VIDEO

DEPOSITION OF: TOL BROOME
DATE: December 19, 2013
TIME: 11:20 a.m.
LOCATION: Nexsen Pruet
701 Green Valley Road
Greensboro, NC
TAKEN BY: Counsel for the Plaintiff
REPORTED BY: LISA A. WHEELER, RPR, CRR

A. WILLIAM ROBERTS, JR. & ASSOCIATES
Fast, Accurate & Friendly
Charleston, SC Hilton Head, SC Myrtle Beach, SC
(843) 722-8414 (843) 785-3263 (864) 234-7030
Columbia, SC Greenville, SC Charlotte, NC
(803) 731-5224 (864) 234-7030 (704) 573-3919

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO.COM

(Commencing at approximately 11:20 a.m.)

STIPULATION

It is stipulated by and between Counsel
that this deposition is being taken in accordance
with the South Carolina Rules of Civil Procedure,
Rule 30; that all objections as to Notice of this
deposition are hereby waived; that all objections
except as to form are reserved until the time of
trial; and that the deponent does not waive reading
and signing of this deposition.

THE VIDEOGRAPHER: We're going on the
record. The time on the monitor is 11:20 a.m.
This is the video deposition of Tol Broome taken by
the Plaintiff in the matter of SkyWaves I
Corporation, Plaintiff, versus Branch Banking &
Trust Company, et al, Defendants, under the
jurisdiction of the Court of Common Pleas for the
Ninth Judicial Circuit, County of Charleston, Case
Number 2009-CP-10-7516.

This deposition is being held at Nexsen
Pruet, 701 Green Valley Road, Suite 100,
Greensboro, North Carolina, on Thursday, December
19th, 2013. My name is John Girdler. I'm the

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO.COM

APPEARANCES OF COUNSEL:
ATTORNEYS FOR THE PLAINTIFF
SKYWAVES I CORPORATION:

GEORGE J. KEFALOS, PA
BY: GEORGE J. KEFALOS
46A State Street
Charleston, SC 29401
(843) 722-6612
gjk@kefaloslaw.com

DUFFY & YOUNG
BY: JOHN P. LINTON
96 Broad Street
Charleston, SC 29401
(843) 720-2044
jlinton@duffyandyoung.com

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

NEXSEN PRUET
BY: MOLLY CHERRY
205 King Street, Suite 400
Charleston, SC 29401
(843) 577-9440
mcherry@nexsenpruet.com

NEXSEN PRUET
BY: JULIO E. MENDOZA, JR.
1230 Main Street, Suite 700
Columbia, SC 29201
(803) 540-2026
jmendoza@nexsenpruet.com

ALSO PRESENT: Russell Bogue
Michael Hennessy

THE VIDEOGRAPHER: John Girdler
(INDEX AT REAR OF TRANSCRIPT)

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO.COM

video specialist. The court reporter is Lisa
Wheeler. We're from A. William Roberts, Jr. &
Associates.

Counsel will now state their
appearances for the record and the court reporter
will swear in the witness.

MR. LINTON: Johnny Linton for the
Plaintiff.

MR. KEFALOS: George Kefalos for
SkyWaves.

MS. CHERRY: Molly Cherry for
Defendants BB&T and Jim Edahl.

MR. MENDOZA: Rick Mendoza for
Defendants BB&T and Jim Edahl.

TOL BROOME
being first duly sworn, testified as follows:

EXAMINATION

BY MR. LINTON:

Q. Mr. Broome, Johnny Linton and I'm going
to be asking you some questions. If I don't phrase
my question where it's clear, please ask me to
rephrase it so that we're communicating accurately
with each other.

A. Okay.

Q. And will you give me complete answers?

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO.COM

1 specialized lending?

2 A. That's right.

3 Q. Okay. And was SkyWaves a specialized

4 lending customer?

5 A. Yes.

6 Q. Okay.

7 A. Commercial finance was a part of

8 specialized lending.

9 Q. Okay. Did you have anything to do with

10 this 2007 commercial finance corporate plan?

11 A. Yes.

12 Q. You were the architect of it?

13 A. Yes.

14 Q. Okay. Did it differ in any material

15 substance from the 2006 plan?

16 A. I couldn't answer that without seeing

17 the 2006 plan.

18 Q. Okay. Well, let's go to the -- Page 2,

19 the mission statement. And I can give you a chance

20 to read that if you --

21 A. Okay. Okay.

22 Q. Now what is the purpose of this mission

23 statement?

24 A. To reinforce the bank's overall focus

25 on putting our clients first and then to state how

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO.COM

1 voluntary?

2 A. As far as I know he just left.

3 Q. In your review of the -- of the file

4 that you were asked to conduct did you ever

5 interview Mr. Morris?

6 A. No.

7 Q. Now he had left the bank?

8 A. That's right.

9 Q. So far as you know he left on good

10 terms?

11 A. Yes.

12 Q. And he had been with the bank for many

13 years?

14 A. I'm not sure how many but I --

15 Q. Some number of years?

16 A. Right.

17 Q. Okay. And he was the manager who at

18 least from the commercial finance standpoint would

19 have had the -- the closest relationship with

20 SkyWaves, is that --

21 A. Yes.

22 Q. And is there a reason that you wouldn't

23 have interviewed him to find out what he knew

24 and -- and when he knew it?

25 A. He was no longer with the bank.

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO.COM

1 we would in a specialized environment like

2 commercial finance execute on that mission.

3 Q. I notice in here it refers to the fact

4 that you're providing professional sales and risk

5 management direction to your customers.

6 A. Yes.

7 Q. Is that equivalent to saying that

8 you're giving advice to your customers?

9 A. Yes.

10 Q. All right. And who in commercial

11 finance would have been giving advice to SkyWaves

12 in 2007?

13 A. 2007?

14 Q. Right.

15 A. That primarily would have come through

16 the account executive, Castlen Morris.

17 Q. Okay. Who did he report to?

18 A. I believe he reported to Phil Allard if

19 I -- my memory's correct.

20 Q. All right. Do you know the

21 circumstances under Mr. Morris's departure from the

22 bank in around November of 2007?

23 A. He took a position with another

24 factoring company.

25 Q. Do you know if that was entirely

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO.COM

1 Q. Did that prevent you from talking to

2 him?

3 A. In a confidential collection matter,

4 yes.

5 Q. So you think it would have been

6 improper for anybody from the bank to talk to him

7 regarding --

8 A. It would have been --

9 Q. -- this matter?

10 A. -- improper for -- for me with what I

11 had been charged to do to talk to him.

12 Q. Well, would it be improper for anybody

13 who was being requested by you to collect the facts

14 to talk to him?

15 MS. CHERRY: Object to the form.

16 BY MR. LINTON:

17 Q. Go ahead.

18 A. Yeah, I would say so. I mean, it was

19 a -- it was a confidential bank matter that -- that

20 needed to be within the bank.

21 Q. Okay. Did you ask to receive a copy of

22 Mr. Morris's file so that you could review what he

23 had?

24 A. The credit file?

25 Q. Any file on SkyWaves. As you were

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO.COM

1 initiative or something like that?

2 A. I don't know. It may have been just

3 what we said in this document. Onboarding was sort

4 of a all-encompassing term that we used for, you

5 know, putting a new client relationship on the

6 books.

7 Q. Mr. Broome, would there be a similar

8 mission statement for the BB&T banking network

9 similar to what you have here in Exhibit 1?

10 A. The -- the banking network would

11 probably have just had the bank's overall mission

12 statement.

13 Q. Okay. Is that any significantly

14 different statement than what you have?

15 A. It has -- lists the four constituencies

16 of clients, associates, communities and

17 shareholders.

18 Q. Now in the mission statement that you

19 have, Exhibit 1, if I'm getting the testimony

20 correct, Castlen Morris would have been an account

21 executive who would have been under this BB&T

22 Commercial Finance, right?

23 A. Yes.

24 Q. And he was the principal contact with

25 commercial finance and SkyWaves?

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO.COM

1 wouldn't be something that was feedback to

2 SkyWaves.

3 A. That's right.

4 Q. Is there anybody else under the

5 community -- excuse me, the commercial finance

6 aspect of the bank that was having any dealings

7 with SkyWaves that you know of prior to Mr. Burke

8 taking over?

9 A. I don't know.

10 Q. Would it be normal when you have

11 someone like Mr. Morris who leaves the bank from

12 your testimony apparently upon good terms to review

13 each of his major accounts to go over what the

14 status is and orient with his replacement to those

15 accounts?

16 A. It depends. Oftentimes because of the

17 confidential nature of the information -- I don't

18 know what the circumstances were here, but there

19 may be a fairly abrupt departure so -- but I don't

20 know what the circumstances were here.

21 Q. Did you regard the SkyWaves account as

22 being sort of a unique situation in that it didn't

23 fit the -- the mold for factoring that was the

24 normal protocol?

25 MS. CHERRY: Object to the form. You

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO.COM

1 A. That's right.

2 Q. All right. And the mission statement

3 says that -- that they're to provide professional

4 sales and risk management direction, which I

5 believe you've testified means that they're giving

6 advice to the -- to the client about how the

7 products that you are offering could benefit the

8 client, is that right?

9 MS. CHERRY: Object to -- object to the

10 form. You can answer.

11 BY MR. LINTON:

12 Q. How did you see Mr. Morris's role with

13 SkyWaves? What advice was he supposed to be giving

14 them and -- and feedback to them?

15 MS. CHERRY: Object to the form.

16 BY MR. LINTON:

17 Q. Was Mr. Morris supposed to be giving

18 any advice to SkyWaves?

19 A. Yes, to the extent that he would be

20 asked questions about financial services that may

21 help the company, he -- he would be giving --

22 potentially giving advice. He also -- the -- the

23 mission statement also refers to providing sales

24 and risk management internally at -- at the bank.

25 Q. Of course, internally at the bank

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO.COM

1 can answer.

2 A. Yes, based on the memo that I wrote as

3 I uncovered the background of it I did see it as

4 unusual.

5 Q. All right. Let me go -- let me find

6 just one document and we'll ask you some questions

7 about it. Let's see. This is going to be the memo

8 of March the 26th. She's going to put a stamp on

9 it.

10 (BROOME EXHIBIT 2, Memorandum from Tol

11 Broome to File, March 26, 2008, Re: Skywaves I

12 Corporation, was marked for identification.)

13 BY MR. LINTON:

14 Q. You've got in front of you what's

15 marked as Exhibit 2 which is a document dated March

16 the 26th, 2008 which you authored, is that correct?

17 A. Yes.

18 Q. And you've told us what the purpose of

19 this memo was but so that it's -- we've got the

20 testimony in connection with the discussion of the

21 memo, tell me again what -- why you wrote this.

22 A. I wrote this because I was asked by my

23 supervisors to put together a lessons learned memo

24 based on what had happened historically with the

25 SkyWaves account.

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO.COM

1 Q. All right. In Number 1 your conclusion
2 was that BB&T is not equipped to finance purchase
3 orders anywhere in the bank if we are relying upon
4 purchase orders for repayment, is that correct?
5 A. Can you show me where that's --
6 Q. Under Number 1.
7 A. Oh, yes.
8 Q. Okay. Were you relying upon purchase
9 orders for repayment in the SkyWaves account?
10 A. We thought we were.
11 Q. Okay. So your conclusion is that the
12 financing mechanism of using purchase order
13 financing for a factoring platform was an
14 inappropriate financing mechanism --
15 MS. CHERRY: Object to the form. You
16 can answer.
17 BY MR. LINTON:
18 Q. -- is that correct?
19 A. Yes.
20 Q. And I'll just rephrase it. Was it an
21 appropriate financing mechanism for SkyWaves?
22 A. I -- I did not believe that it was.
23 Q. Okay. Do you know why Mr. Edahl would
24 have recommended it and Mr. Dennings would have
25 approved it?

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO.COM

1 for financing and not the client?
2 MS. CHERRY: Object to the form. You
3 can answer.
4 A. I'm -- I'm not aware of that, no.
5 Q. Number 2 your observation is based on
6 the financing that was provided you were
7 essentially providing venture capital, is that
8 correct?
9 A. That was intended to be a comparative
10 comment.
11 Q. I understand. And why did you consider
12 financing of purchase orders under the approved
13 arrangement to be essentially providing venture
14 capital?
15 A. Because the -- there was a lack of
16 equity in the business which is also documented
17 here and purchase orders are much further away from
18 cash than -- than what -- what I felt like was
19 appropriate.
20 Q. Number 3 when you refer to statement
21 quality you said, we should have followed policy
22 and required reviews at first. What kind of review
23 are you referring to?
24 A. It's a quality financial statement
25 opinion that the CPA provides that's not -- it's

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO.COM

1 A. No.
2 Q. Did you seek to find out in your
3 conversation with Mr. Dennings, why did you approve
4 this purchase order financing, it seems to be
5 inappropriate to me?
6 A. I don't recall.
7 Q. And you had no discussion with
8 Mr. Edahl, did you?
9 A. I did not.
10 Q. Just as the mission statement for the
11 commercial finance sets forth that you expect
12 advice to be given by the factoring folks, would
13 you expect advice regarding the proper financing
14 platform to be given by Mr. Edahl to the customer?
15 MS. CHERRY: Object to the form.
16 A. Not necessarily because the client had
17 asked for a certain type of financing. In his role
18 as a salesperson he's trying to advocate -- balance
19 the client's needs with the bank's practices and he
20 had the concurrence of a credit officer to provide
21 that type of financing which, again, was a -- yes,
22 it was an exception to policy but it is acceptable
23 at BB&T to make exceptions to policy.
24 Q. From your investigation are you aware
25 that it was Mr. Edahl who suggested this platform

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO.COM

1 the level below a full audit.
2 Q. Now was that something that would have
3 been required by BB&T policy?
4 A. It was -- yes, it was in our policy but
5 it was -- again, a credit officer could make
6 exceptions to those pol -- that policy.
7 Q. Did you see any documentation where a
8 credit officer had authorized deviation from that
9 policy?
10 A. To the extent that -- that the credit
11 had been approved by the credit officer with that
12 knowledge, yes.
13 Q. Was there any protocol written with the
14 credit -- credit approval of how we're going to
15 administer this such as audits are going to be
16 required, we want financials provided by a outside
17 CPA? Was any of that written in the protocol?
18 A. I don't recall.
19 Q. Would that be in the standard protocol
20 for factoring?
21 A. Yes. The policies of the bank were
22 applicable to factoring as well.
23 Q. Okay. I'm trying to understand how
24 there was communication between the bank and
25 factoring in this case so that the factoring

A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
SCHEDULEDEPO.COM

1073

27

Steven B. Licata

From: Hennessy, Michael [MHennessy@BBandT.com]
Sent: Friday, January 18, 2008 2:49 PM
To: Steven B. Licata
Subject: FW: Skywaves

Michael J. Hennessy
BB&T's Business Loan Admin.
200 West 2nd St 6th Floor
Winston Salem, NC 27101
Office 336-733-2557
Fax 336-733-2196
Cell 336-575-0889
MHennessy@BBandT.com

From: Edahl, James
Sent: Friday, January 18, 2008 2:25 PM
To: Hennessy, Michael
Cc: Denning, Walter; Caple, Frank; Burke, Mike
Subject: Skywaves

Mike, I have spoken by telephone today with Ron Konersmann, President, and John Voytko, CFO to formally tell them the over advance has put them in default of the commercial finance loan and that they will be getting written notice of same shortly. Could you please send me a form Notice letter? I would like to get it out ASAP. Thanks.

Jim Edahl
Senior Vice President
Charleston, SC
843-720-5152
jedahl@bbandt.com

29

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF MECKLENBURG NINTH JUDICIAL CIRCUIT
2009-CP-10-7516

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.

VIDEO

DEPOSITION OF: MICHAEL HENNESSY

DATE: December 18, 2013

TIME: 1:14 p.m.

LOCATION: Nexsen Pruet
701 Green Valley Road
Greensboro, NC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: LISA A. WHEELER, RPR, CRR

A. WILLIAM ROBERTS, JR. & ASSOCIATES

Fast, Accurate & Friendly

Charleston, SC Hilton Head, SC Myrtle Beach, SC
(843) 722-8414 (843) 785-3263 (864) 234-7030

Columbia, SC Greenville, SC Charlotte, NC
(803) 731-5224 (864) 234-7030 (704) 573-3919

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO

1 APPEARANCES OF COUNSEL:
2 ATTORNEYS FOR THE PLAINTIFF
3 SKYWAVES I CORPORATION:

4 GEORGE J. KEFALOS, PA
5 BY: GEORGE J. KEFALOS
6 46A State Street
7 Charleston, SC 29401
8 (843) 722-6612
9 gjk@kefaloslaw.com
10 DUFFY & YOUNG
11 BY: JOHN P. LINTON
12 96 Broad Street
13 Charleston, SC 29401
14 (843) 720-2044
15 jlinton@duffyandyoung.com

16 ATTORNEYS FOR THE DEFENDANTS
17 BRANCH BANKING AND TRUST COMPANY,
18 successor in merger to BRANCH BANKING
19 AND TRUST COMPANY OF SC, a/k/a BB&T,
20 and JAMES EDAHL:
21 NEXSEN PRUET
22 BY: MOLLY CHERRY
23 205 King Street, Suite 400
24 Charleston, SC 29401
25 (843) 577-9440
mcherry@nexsenpruet.com

16 NEXSEN PRUET
17 BY: JULIO E. MENDOZA, JR.
18 1230 Main Street, Suite 700
19 Columbia, SC 29201
20 (803) 540-2026
21 rmendoza@nexsenpruet.com

22 ALSO PRESENT: Russell Bogue
23 THE VIDEOGRAPHER: John Girdler
24 (INDEX AT REAR OF TRANSCRIPT)
25

1 video specialist. The court reporter is Lisa
2 Wheeler. We're from A. William Roberts, Jr. &
3 Associates.

4 Counsel will now state their
5 appearances for the record and the court reporter
6 will swear in the witness.

7 MR. LINTON: Johnny Linton for the
8 Plaintiffs.

9 MR. KEFALOS: George Kefalos for
10 SkyWaves.

11 MS. CHERRY: Molly Cherry for the
12 Defendants BB&T and Jim Edahl.

13 MR. MENDOZA: Rick Mendoza for the
14 Defendants BB&T and Jim Edahl.

15 MICHAEL HENNESSY
16 being first duly sworn, testified as follows:

17 EXAMINATION

18 BY MR. LINTON:

19 Q. Mr. Hennessy, we've met before at
20 earlier depositions.

21 A. We have.

22 Q. If I ask you a question you don't
23 understand, please ask me to rephrase it so we're
24 communicating accurately with each other.

25 A. I will.

1 (Commencing at approximately 1:14 p.m.)

2 * * * * *

3 STIPULATION

4 It is stipulated by and between Counsel
5 that this deposition is being taken in accordance
6 with the South Carolina Rules of Civil Procedure,
7 Rule 30; that all objections as to Notice of this
8 deposition are hereby waived; that all objections
9 except as to form are reserved until the time of
10 trial; and that the deponent does not waive reading
11 and signing of this deposition.

12 * * * * *

13 THE VIDEOGRAPHER: We're going on the
14 record. The time on the monitor is 1:14 p.m. This
15 is the video deposition of Mike Hennessy taken by
16 the Plaintiff in the matter of SkyWaves I
17 Corporation, Plaintiff, versus Branch Banking &
18 Trust Company, et al, Defendants, under the
19 jurisdiction of the Court of Common Pleas for the
20 Ninth Judicial Circuit, County of Charleston, Case
21 Number 2009-CP-10-7516.

22 This deposition is being held at Nexsen
23 Pruet, 701 Green Valley Road, Suite 100,
24 Greensboro, North Carolina, on Wednesday, December
25 18th, 2013. My name is John Girdler. I'm the

1 Q. All right, sir. And as Mr. Kefalos
2 said in the earlier deposition, if you'll give me
3 complete answers, I'll appreciate it.

4 A. I will.

5 Q. All right, sir. Now I've gone through
6 your personnel file so it's not my practice to
7 spend a lot of time going through all the
8 background of somebody, but why don't you go ahead
9 and just relate to us when you rejoined I believe
10 it was BB&T.

11 A. I was with BB&T from '03 to '06
12 roughly. I left -- I'm sorry, '02 to '05. I left,
13 came back in June of '06 back into problem loan
14 administration, specifically in charge at that
15 point in time of South Carolina with an overflow in
16 Georgia. South Carolina -- I shortly gave up
17 control of South Carolina, probably a little over a
18 year, year-and-a-half later, because Georgia was
19 having such problems. I'm now back in charge --
20 I'm the group leader for North Carolina/South
21 Carolina.

22 Q. Yes, sir. And in 2008 were -- what was
23 your title?

24 A. I was the problem loan administrator.

25 Q. Loan administrator. Is there any

Page 10	Page 12
1 reflects, why an account officer feels one way and 2 why a client feels something differently. But 3 ultimately I would have to tell you that the 4 documents would -- would reflect, you know, the 5 le -- the -- what the legal stance of the bank 6 might be. 7 Q. Okay. As part of being a professional 8 do you deem that you have a duty to know your 9 customer and your customer's needs? 10 A. Sure. 11 Q. Okay. And to know the history of the 12 relationship? 13 A. Yes. 14 Q. Okay. But -- and did you make an 15 effort -- well, strike that please. 16 When did you first become involved in 17 this matter? 18 A. January of '08. 19 Q. Right. Prior to that did you have any 20 dealings at all with SkyWaves? 21 A. No. 22 Q. All right. And when -- do you recall 23 the first meeting that you had, face-to-face 24 meeting, with -- 25 A. I do.	1 A. I -- I -- 2 MS. CHERRY: Object to the form. 3 A. I have rarely run into an oral 4 modification. 5 Q. Okay. When you say rarely, you mean 6 you can count it on one hand? 7 A. I can't even think of the last time 8 that it may have happened. 9 Q. Okay. 10 A. I'm not saying it hasn't happened. 11 Just can't think of the last time that it has 12 happened. 13 Q. All right. Well, can you even think of 14 one time that it ever happened? 15 A. Right off the top of my head right now 16 as we speak, no. 17 Q. Okay. Is that just while you've been 18 working at BB&T or your whole banking career? 19 A. Probably my whole banking career. 20 Q. Okay. Have you ever been involved in 21 your work with BB&T where a loan officer exceeded 22 his authority? 23 A. Yes. 24 Q. Okay. And does that happen, you know, 25 rarely or would you say it happens --
Page 11	Page 13
1 Q. Okay. And you -- do you recall what 2 you wanted to know from SkyWaves about the 3 relationship? 4 A. I do. 5 Q. All right. And what -- what was that? 6 A. Do you want me to tell you the meeting? 7 Is that what you're after? 8 Q. Sure. 9 A. Okay. So -- 10 Q. Strike that. I really was interested 11 in what your objective was in that meeting by way 12 of factual development. 13 A. To understand SkyWaves' current 14 financial position, what their -- what their 15 intentions were going forward and how they intended 16 to get from where they were financially to where 17 they expected to be. 18 Q. Did you want to know how they had 19 gotten where they were? 20 A. Absolutely. 21 Q. Okay. And you mentioned that the first 22 priority for you in pursuing an endeavor like this 23 is to get the documentation, study it to understand 24 what the documentation says and then to see if 25 there's any oral modifications?	1 A. Rarely. 2 Q. Rarely. Less than five times in your 3 banking career? 4 A. Five to ten times, I guess. 5 Q. Okay. All right. So let's get back to 6 the meeting. What were you trying to determine 7 about the relationship, that is, the -- any claim 8 that the bank had that the debtor had not followed 9 the -- the loan? 10 A. No. The ongoing viability. What -- 11 what triggered me first was the ongoing viability 12 of the company. 13 Q. Uh-huh. 14 A. I -- I did not believe, and I've been 15 doing this for 25 years, that this was a viable 16 entity. 17 Q. And what information did you have to 18 reach that conclusion and when did you reach it? 19 A. I had all of their financial 20 information through November of '07. Could have 21 been December of '07, but certainly November of '07. 22 I had their '07 projections. I had their '06 23 projections and actuals. I had the -- the enhanced 24 financing that we had done from factoring which is 25 probably the most riskiest lending a bank can do.

Page 22

1 Q. Okay.

2 A. I don't remember -- I mean, it's

3 been -- I haven't seen it in five years, but it was

4 a spreadsheet.

5 Q. It was not a contract, was it?

6 A. No.

7 Q. Like a purchase order where you have a

8 contract?

9 A. No.

10 Q. Okay. Where did you get the site plan

11 from?

12 A. Mike Burke I think sent it to us.

13 Q. And so when you reviewed the site

14 plans, you concluded that there was a purchase

15 order backing up those site plans?

16 A. That was my understanding.

17 Q. From Edahl?

18 A. Correct.

19 Q. Okay. You attended Edahl's deposition?

20 A. I did.

21 Q. Okay. Is your -- do you understand

22 from his testimony that -- that that was not the

23 case?

24 A. No.

25 Q. You think he supports that in his

Page 23

1 testimony?

2 A. I -- to be honest with you, without

3 something being in writing I -- I don't know. Alls

4 I know is when I asked Ron Konersmann and John

5 Voytko that exact question, they told me that they

6 submitted those site plans to the bank as purchase

7 orders so that's what I understood them to be up

8 until James Edahl conversation. But what verbal

9 agreement James Edahl and Ron Konersmann and/or

10 John Voytko reached, I -- I can't -- I can't tell

11 you. I don't have any idea.

12 Q. Let me ask you this: Prior to

13 Mr. Edahl's deposition did you have any forewarning

14 that he was going to testify he agreed to site plan

15 funding?

16 A. No.

17 Q. Did it come as a shock to you when you

18 heard him testify?

19 A. It was -- it was an eye opener.

20 Q. What does it take to shock you?

21 A. I've been in this business a long time.

22 Q. Well, okay. That's a fair enough

23 answer. When -- you say an eye opener. Is it

24 something that's never occurred before in your

25 problem loan administration?

Page 24

1 A. What, that -- that --

2 Q. Where -- where a bank officer says, I

3 did agree orally to site plan financing.

4 MS. CHERRY: Object to the form.

5 A. You know, that's -- I don't think that

6 that's really ever occurred especially after the --

7 the e-mails and the -- and the memos that were

8 written. I can't say that's occurred. Can't say

9 it hasn't but nothing comes to mind right now

10 that -- that is screaming that it's -- that it has.

11 Q. I'm not sure I'm understanding you,

12 Mr. Hennessy. Are you saying you don't believe

13 Mr. Edahl agreed to fund on site plans that were

14 not purchase orders?

15 A. No. What I'm saying to you is that I

16 don't understand how -- how -- how James Edahl has

17 now said that we did but the numerous e-mails and

18 memos in the file --

19 Q. Are contrary to that?

20 A. Contrary.

21 Q. I understand.

22 A. That's what I -- I don't understand.

23 Q. Okay. All right. Would this be an

24 example of an oral modification to a loan?

25 MS. CHERRY: Object to the form.

Page 25

1 A. I have earthly -- no earthly idea

2 because that would call a legal question and I

3 can't -- I mean, I don't know.

4 Q. I think you previously answered but

5 maybe I'm wrong that you weren't aware of any oral

6 modifications to loan agreements in the past. Is

7 that --

8 A. I said I couldn't recall any. Not that

9 they hadn't happened but I couldn't recall any --

10 Q. Okay.

11 A. -- right off the top of my head.

12 Q. Okay. Based on what you've reviewed of

13 Mr. Edahl's testimony, would you acknowledge that

14 this was an oral modification?

15 MS. CHERRY: Object to the form.

16 A. I -- I don't know what it takes to make

17 an oral modification to a written contract so --

18 so, I mean, if -- if James Edahl says that he

19 agreed to finance site plans, that could be one

20 small portion of a much larger conversation that

21 we're talking about. So I don't know if there were

22 other stipulations that were in that conversation

23 that said I will but they have to be followed up

24 with purchase orders within two days or a week or

25 whatever. I don't know what the oral modification

Page 26

1 was and I don't even know if it did, legally
 2 whether that actually modifies anything or not
 3 because I -- I would have to ask my attorney that.
 4 Q. Do you recall in -- hearing Mr. Edahl
 5 testify that he said that Mr. Dennings had approved
 6 the site plan financing?
 7 A. Correct. No. Mr. Dennings (sic)
 8 approved the site plan financing?
 9 Q. Right.
 10 A. Oh, yes. Yes. Yes. That's correct.
 11 He did say that. Right.
 12 Q. All right. Did -- have you asked
 13 Mr. Edahl about how could you have approved this
 14 site plan financing and not told me about it in
 15 2008?
 16 A. After his deposition?
 17 Q. Right.
 18 A. No, I've not spoken with Mr. Edahl.
 19 Q. Before his deposition.
 20 A. I didn't know about it until after his
 21 deposition.
 22 Q. Okay. And how about Mr. Dennings, have
 23 you asked him whether he, in fact, approved the
 24 site plan financing?
 25 A. No.

Page 27

1 Q. Can you explain to me why there
 2 wouldn't be any documentation of the site plan
 3 financing agreed to by Mr. Edahl?
 4 A. I -- it's as much a shock to me as it
 5 is to everybody else. I don't know.
 6 Q. Okay. In 2008 when you were
 7 considering the viability of SkyWaves did you
 8 consider this Million Two site plan financing that
 9 had been funded to be a breach by SkyWaves?
 10 A. Yes.
 11 Q. Okay. And you considered that they
 12 were not entitled to that because they didn't have
 13 a -- a purchase order to back it up, is that
 14 correct?
 15 A. I -- we had the conversation. If I'm
 16 anything, I'm blunt in my conversations with my
 17 clients because I want to be as clear and as
 18 concise as I possibly can and I asked them for an
 19 explanation why I had a site plan that was PO
 20 financing but no POs. And I asked them, did you
 21 submit this site plan as a purchase order to the
 22 bank? Yes, we did. Do you have site plans? No,
 23 we do not. Did you submit this fraudulently, for
 24 funding? Yes, we did. They acknowledged they
 25 submitted to me a fraudulent statement that they

Page 28

1 passed off as a purchase order when, in fact, they
 2 never existed.
 3 Q. Why would they need to do that if
 4 Mr. Edahl had agreed to have the site plan funding?
 5 A. I -- I'm telling you the way that the
 6 facts were at the time. I don't know what has --
 7 what it's come to now, but as the facts are at the
 8 time, I went down there with the demand letter in
 9 hand, with the information from Mike Burke, with
 10 the information from Jim Edahl and I asked them
 11 after touring the plant those specific questions to
 12 include the -- the reluctance on their part to put
 13 our address on the factored invoices. Never once
 14 did anybody ever tell me about an oral modification
 15 to a contract. Never once did anybody ever tell me
 16 they have 60 days. Had they done that, I probably
 17 would have had to do a 360.
 18 Q. What does that mean?
 19 A. I would have had to change my whole
 20 stance.
 21 Q. In what way?
 22 A. Well, if the bank has entered into an
 23 oral contract, if the bank had, in fact, given
 24 SkyWaves 60 days to -- on an invoice that they
 25 don't own -- which I don't understand how you do

Page 29

1 that because in a factored relationship you don't
 2 own the invoice. So I would have had to go --
 3 retreat and said, okay, gone back in and gone back
 4 to the attorney and figured out where the bank is
 5 legally and what obligations we have to SkyWaves.
 6 Q. Uh-huh.
 7 A. But nobody said that to me. The
 8 purchase order financing line was almost completely
 9 maxed out. There was no more room under the
 10 purchase order financing line to continue financing
 11 activities and I didn't see any way in order to
 12 protect the bank. Funding more money into this
 13 existing situation is not protecting the bank.
 14 Q. Who was present at the meeting?
 15 A. Jim Edahl -- at the first meeting Jim
 16 Edahl, Frank Caple, John Voytko, Ron Konersmann. I
 17 want to say his COO or some -- one of those.
 18 Either the C -- chief operating officer or chief
 19 manufacturing officer, one of those were there.
 20 Q. Okay. And this was at SkyWaves?
 21 A. Yes.
 22 Q. How long did that meeting take?
 23 A. Two-and-a-half hours.
 24 Q. What other subjects did you discuss at
 25 that meeting?

Page 50	Page 52
1 A. Second or third time. 2 Q. Yeah. 3 A. Yeah. 4 Q. And so afterwards you and must -- Edahl 5 must have had some discussion about, Jim, have you 6 seen this kind of conduct before in them or, you 7 know, how did we get so far down the road? Do 8 you -- 9 A. Correct. 10 Q. Well, what did he say? 11 A. He was -- he was a little 12 flabbergasted. He was -- he had been to the site, 13 and I don't remember the date, maybe September or a 14 little earlier. He hadn't been back except for 15 Mike Burke. He was absolutely shocked that the 16 warehouse was empty, that there were no buildings 17 being built. I think that's what started the 18 cascade was Jim's discovery that there were no 19 buildings being built, that he was out of -- you 20 know, we're -- we're factoring an unsecured line at 21 this point in time, that he was out of compliance 22 in this over -- in an overadvance situation because 23 at the time he believed and I think may still today 24 that buildings were supposed to be built. 25 Q. Mr. Hennessy, were you more shocked	1 Q. Don't you always go to documentation to 2 find out the truth? 3 A. Absolutely. 4 Q. All right. And Mr. Edahl has said that 5 it was approved but -- but now there's an issue 6 about what was approved. Do you have any 7 documentation to say that they had to use those 8 funds for a specific shelter? 9 A. No. It was an oral modification 10 between Jim and Ron Konersmann so I don't know what 11 was ever approved. 12 Q. Well, according to Mr. Edahl it was an 13 oral modification between him and Mr. Dennings and 14 SkyWaves, wasn't it, on behalf of the bank? 15 A. Mr. Dennings -- 16 MS. CHERRY: Object to the form. 17 A. He says Mr. Dennings approved some sort 18 of a -- some sort of an approval for site plan 19 financing, but I don't know what the conversation 20 was between Jim or Walt or Jim and SkyWaves. I -- 21 I don't know what was approved. 22 Q. But you do know this: That \$1,200,000 23 was advanced -- 24 A. Correct. 25 Q. -- on those site plans? And you do
Page 51	Page 53
1 when Mr. Konersmann in management said, we 2 submitted false, fraudulent documents for the site 3 plan financing or more shocked when Mr. Edahl told 4 you -- or you heard him testify that he, in fact, 5 had approved financing for the -- the site 6 financing? 7 A. Which is -- was I more shocked at? 8 Q. Right. 9 A. I -- I probably think Jim Edahl just 10 because it's not in his -- I've known Jim, I don't 11 know, eight years, ten years. You know, he's a 12 pretty level-headed guy so for him to not remember, 13 whatever, come up with this disclosure at the tenth 14 hour, no, I was pretty shocked. 15 Q. When you -- 16 A. But I still believed the fact that site 17 financing was approved but buildings were supposed 18 to still be built. 19 Q. Well, how would you know that? Where's 20 the documentation? 21 A. Well, I don't. I'm just -- 22 Q. Don't you -- 23 A. -- saying what I believe -- 24 Q. -- go to documentation first? 25 A. -- what I -- what I believe.	1 know that the -- the agreement between General 2 Dynamics and SkyWaves was not an enforceable 3 purchase order? You knew -- you know that, don't 4 you? 5 MS. CHERRY: Object to the form. 6 A. I -- I -- I do now. 7 Q. Okay. 8 A. And I gave SkyWaves ample opportunity 9 in our initial meeting to tell me about all there 10 was to say and nobody said a word to me about it. 11 Q. Did you give Mr. Edahl ample 12 opportunity since he had made the deal on behalf of 13 the bank to -- 14 MS. CHERRY: Object to the -- 15 BY MR. LINTON: 16 Q. -- tell you that? 17 MS. CHERRY: Object to the form. 18 A. Absolutely. And you can see his memos 19 from the day. There's not a mention of it. 20 Q. Why do you think he covered that up? 21 MS. CHERRY: Object to the form. 22 A. I don't think he covered it up. 23 Q. Okay. 24 A. I'm not -- I'm not sure what the 25 situation is that made him forget but -- I don't --

32

32

1083



Branch Banking & Trust Co.

2575 Atlanta Plaza
950 E. Paces Ferry Rd.
Atlanta, GA 30326
(404) 442-5000
Fax (404) 442-5087

January 25, 2008

Skywaves I Corporation
4280 Pace Street
North Charleston, SC 29405
Attention: President
Via Facsimile - 843-308-9767

Re: Factoring and Security Agreement dated March 22, 2005 between
Skywaves I Corporation ("Skywaves") and BB&T Factors Corporation
(now known as Branch Banking and Trust Company, through merger)
("BB&T") (the "Agreement")

Dear Sir:

As you are aware, BB&T has recently completed a routine audit of the books of Skywaves as allowed and required by the Agreement. As a result of the findings of that audit you are hereby notified that Skywaves is in default of the Agreement due to its breach of the terms thereof. In particular, but not by way of limitation, the default consists of the following:

1. The audit revealed, and you have personally confirmed, that Skywaves, in violation of Paragraph 8 of the Agreement, 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. The audit further revealed that 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. Based upon the most recent audit, BB&T currently has a good faith belief that the prospects of payment to it or performance of the Obligations (as defined in the Agreement) is impaired.

At this time, as a result of the default and/or in exercise of rights granted to it in the Agreement (regardless of the existence of a default), BB&T will make no further Advances (as defined in the Agreement). Additionally, BB&T is hereby demanding payment of the Obligations due under the Agreement (including any Advances outstanding).

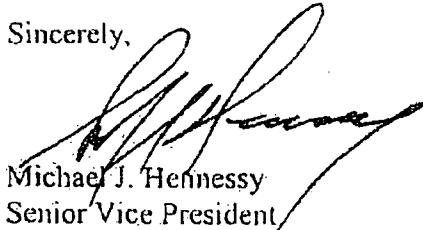
You are further advised that, at the present time, BB&T is exercising its rights to terminate its further performance under the Agreement. This action, together with

Skywaves I Corporation
January 25, 2008
Page 2 of 2

BB&T's election to provide further Advances, for the present time, terminates any obligation that BB&T might have to provide any additional funding to Skywaves.

Should you have any questions regarding this matter, do not hesitate to contact me at the number below.

Sincerely,



Michael J. Hennessy
Senior Vice President
Business Loan Administration
200 West 2nd St, 6th Floor
Winston-Salem, NC 27102
Office 336-733-2557
Fax 336-733-2196
Cell 336-575-0889

1085

SKYWAVES

Page 2

37

37

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

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.

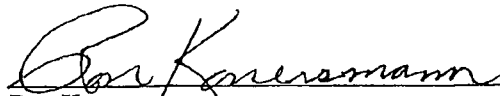
Civil Action: 2009-CP-10-07516

AFFIDAVIT OF
RONALD KONERSMANN

2015 APR 23 AM 9:25
JULIE A. HARRINGTON
CLERK OF COURT

1. I am Ronald Konersmann, I am over 18 years of age and I have personal knowledge of the things contained herein.
2. I was deposed in 2013 and give this affidavit to supplement my testimony.
3. On March 25, 2008 I had lunch with Mike Hennessey at the East Bay Deli. Mr. Hennessey was the BB&T bank Executive who wrote the default letter in late January 2008, declaring Skywaves to be in default of the funding agreement with BB&T.
4. Between the time of the default letter and the lunch with Mr. Hennessey Skywaves had continued in operation, producing and shipping shelters at the rate of approximately \$200,000 a week. In this manner Skywaves had reduced the BB&T debt by approximately \$1 million.
5. I toured the plant with Mr. Hennessey and viewed the operations and the inventory. Mr. Hennessey told me he had completed his review of Skywaves financial position and was convinced that Skywaves was viable and if permitted to continue operations, was capable of paying the BB&T debt in full. Mr. Hennessey was excited and his mood was optimistic and upbeat.
6. He told me that he would recommend that BB&T reinstate the line of credit and permit Skywaves to continue in business. Mr. Hennessey told me he had a conference call scheduled for the next day with everyone involved in the Skywaves matter during which time he would work out the details for reinstating the line of credit.
7. Mr. Hennessey returned to the plant the next day. Mr. Hennessey's mood had changed; he was somber and sounded tired and demoralized. Without explaining what had happened in his conference call that morning, he told me that there was nothing he could do to change BB&T's position and that it was out of his hands. I thanked him for trying and then he left to drive back to North Carolina.

FURTHER AFFIANT SAYETH NOT.


Ron Konersmann

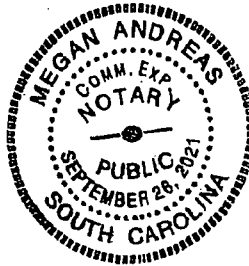
April 21 2015
Charleston South Carolina

Sworn to me this 21 day of April 2015,



Notary Public of South Carolina

My Commission Expires: 9/26/2021



CERTIFICATE OF SERVICE

I hereby certify that the foregoing **AFFIDAVIT OF RON KONERSMANN** has been served upon each of the parties to this action by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

Molly Hughes Cherry, Esq.
Nexsen Pruet, LLC
205 King Street, Ste. 400
Charleston, SC 29401
Attorneys for BB&T

Julio E. Mendoza, Esq.
Nexsen Pruet, LLC
1230 Main St., Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202
Attorneys for BB&T

Andrew K. Epting, Jr., Esq.
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401
Co-Counsel for Plaintiff

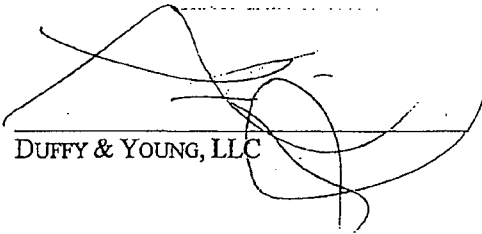
M. Dawes Cooke, Jr., Esq.
Barnwell Whaley Patterson and Helms
288 Meeting St., Suite 200
Charleston, SC 29401
Co-Counsel for Plaintiff

2015 APR 23 AM 9:25
JULIE S. MCKINNON
CLERK OF COURT

J.W. Nelson Chandler, Esq.
Corrigan & Chandler, LLC
PO Box 547
Charleston, SC 29402
Attorneys for James Edahl

George J. Kefalos, Esq.
Oana D. Johnson, Esq.
George K. Kefalos, PA
46A State Street
Charleston, SC 29401
Co-Counsel for Plaintiff

This 23rd day of April, 2015.


DUFFY & YOUNG, LLC

77003

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED

Roger M. Young, Circuit Court Judge

AUG 24 2015

SC Court of Appeals

Case No. 2009-CP-10-7516

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

NOTICE OF APPEAL

Plaintiff/Appellant Skywaves I Corporation appeals the following orders:

- (a) ORDER GRANTING IN PART DEFENDANT BB&T'S MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANT EDAHL'S MOTION MOTION (sic) FOR SUMMARY JUDGMENT[;] DENYING PLAINTIFF'S MOTION TO RECONSIDER; DENYING PLAINTIFF'S MOTION TO AMEND THE COMPLAINT; AND DENYING PLAINTIFF'S MOTION FOR COMMISSION OF (sic) ISSUANCE OF A SUBPOENA TO DEPOSE JOHN ALLISON, which the Honorable Roger M. Young signed and filed on or about July 23, 2015 in this matter (attached hereto as Exhibit A).
- (b) ORDER GRANTING DEFENDANT BB&T AND DEFENDANT EDHAL'S (sic) MOTION TO STRIKE PLAINTIFF'S DEMAND FOR JURY TRIAL, which the Honorable Roger M. Young signed and filed on or about February 9, 2015 in this matter (attached hereto as Exhibit B).
- (c) ORDER denying Plaintiff's Motion to Strike and granting Defendants' Motion to Amend Answers, which the Honorable Roger M. Young signed

1090

on March 13, 2014 and filed on March 17, 2014 (attached hereto as Exhibit C).

Plaintiff/Appellant received written notice of entry of the most recent order appealed from on July 23, 2015.

August __, 2015

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: M. Dawes Cooke, Jr.
M. Dawes Cooke, Jr., Esq.
John W. Fletcher, Esq.
288 Meeting Street, Ste 200
Charleston, SC 29401
(843) 577-7700 Fax: (843) 577-7708

George J. Kefalos, Esq.
George J. Kefalos, PA
3 State Street
Charleston, SC 29401
(843) 722-6612 Fax: (843) 377-1310

Brian C. Duffy, Esq.
John P. Linton, Esq.
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
(843) 720-2044 Fax: (843) 720-2047

Andrew K. Epting, Jr., Esq.
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401

Other Counsel of Record:

Molly Hughes Cherry, Esq.
Nexsen Pruet, LLC
P.O. Box 486
Charleston, SC 29402
(843) 720-1724 Fax: (843) 414-8209
MCherry@NexsenPruet.com

***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***

1091

Julio E. Mendoza, Esq.

Nexsen Pruet, LLC

1230 Main St., Suite 700 (29201)

Columbia, SC 29202

***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***

J.W. Nelson Chandler, Esq.

Corrigan & Chandler, LLC

PO Box 547

Charleston, SC 29402

Attorneys for Respondent James Edahl

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-10-7516

RECEIVED

AUG 24 2015

SC Court of Appeals

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

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on April 21st, 2015, addressed to their attorneys of record:

Molly Hughes Cherry, Esq.
Nexsen Pruet, LLC
P.O. Box 486
Charleston, SC 29402
(843) 720-1724 Fax: (843) 414-8209
MCherry@NexsenPruet.com

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

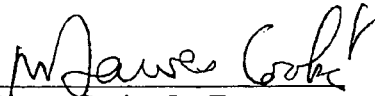
Julio E. Mendoza, Esq.
Nexsen Pruet, LLC
1230 Main St., Suite 700 (29201)
Columbia, SC 29202

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

J.W. Nelson Chandler, Esq.
Corrigan & Chandler, LLC
PO Box 547
Charleston, SC 29402

Attorneys for Respondent James Edahl

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: 
M. Dawes Cooke, Jr., Esq.
John W. Fletcher, Esq.
288 Meeting Street, Ste 200
Charleston, SC 29401
(843) 577-7700 Fax: (843) 577-7708

George J. Kefalos, Esq.
George J. Kefalos, PA
3 State Street
Charleston, SC 29401
(843) 722-6612 Fax: (843) 377-1310

Brian C. Duffy, Esq.
John P. Linton, Esq.
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
(843) 720-2044 Fax: (843) 720-2047

Andrew K. Epting, Jr., Esq.
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401

**BARNWELL
WHALEY**

PATTERSON & HELMS LLC

75
YEARS ■
1938-2013

Attorneys for businesses & professionals since 1938

John W. Fletcher, Esquire
jfletcher@barnwell-whaley.com

August 21, 2015

RECEIVED

AUG 24 2015

SC Court of Appeals

VIA U.S. MAIL

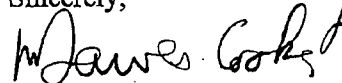
The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

RE: Skywaves I Corporation 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
C/A No.: 2009-CP-10-7516
BWPB File No.: 3496.001

Dear Ms. Armstrong,

Enclosed for filing is a Notice of Appeal in the above-referenced matter.

Sincerely,



M. Dawes Cooke, Jr.
John W. Fletcher

MDCjr/JWF/jgc
Enclosure

cc: Molly Hughes Cherry, Esquire
Julio E. Mendoza, Esquire
J.W. Nelson Chandler, Esquire
The Honorable Jenny Abbott Kitchings

0
M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.
Phillip S. Ferderigos
K. Michael Barfield
David S. Cox

William C. Helms, III*

* Registered patent attorney
* Retired

Ernest B. Lipscomb, III*
J. Gail Rahn
Todd M. Musheff
John A. Jones
Lucinda D. Gardner
John W. Fletcher

Allissa D. Fleming
Barbara J. Wagner, Ph.D.
Jeremy E. Bowers
D. Summers Clarke, II
Jeffrey M. Bogdan
Bradley B. Banias

1095

288 Meeting Street, Suite 200, Charleston, SC 29401

Mail: P.O. Drawer H, Charleston, SC 29402 P 843.577.7700 F 843.577.7708

www.barnwell-whaley.com

**BARNWELL
WHALEY**

PATTERSON & HELMS LLC

75
YEARS ■
1938-2013

Attorneys for businesses & professionals since 1938

John W. Fletcher, Esquire
jfletcher@barnwell-whaley.com

August 21, 2015

VIA FEDERAL EXPRESS

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED

AUG 24 2015

SC Court of Appeals

RE: Skywaves I Corporation vs. Branch Banking and Trust Company, Successor in
merger to Branch Banking and Trust Company of SC, a/ka BB&T, and James Edahl
C/A No.: 2009-CP-10-7516
BWPH File No.: 3496.001

Dear Ms. Kitchings,

Enclosed for filing is a Notice of Appeal in the above-referenced matter. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal on the Respondents;
- (2) A copy of the Order Granting in Part Defendant BB&T's Motion for Summary Judgment; Granting Defendant Edahl's Motion Motion (sic) for Summary Judgment[;] Denying Plaintiff's Motion to Reconsider; Denying Plaintiff's Motion to Amend the Complaint; and Denying Plaintiff's Motion for Commission of (sic) Issuance of a Subpoena to Depose John Allison;
- (3) Order Granting Defendant BB&T and Defendant Edhal's (sic) Motion to Strike Plaintiff's Demand for Jury Trial;
- (4) Order denying Plaintiff's Motion to Strike and granting Defendants' Motion to Amend Answers; and,
- (3) A filing fee of \$100.00.

Sincerely,

M. Dawes Cooke

M. Dawes Cooke, Jr.
John W. Fletcher

MDCjr/JWF/jgc
Enclosures

M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.
Phillip S. Ferderigos
K. Michael Barfield
David S. Cox

William C. Helms, III*
* Registered patent attorney
* Retired

Ernest B. Lipscomb, III*
J. Gail Rahn
Todd M. Musheff
John A. Jones
Lucinda D. Gardner
John W. Fletcher

Alissa D. Fleming
Barbara J. Wagner, Ph.D.
Jeremy E. Bowers
D. Summers Clarke, II
Jeffrey M. Bogdan
Bradley B. Banias

1096

288 Meeting Street, Suite 200, Charleston, SC 29401

Mail: P.O. Drawer H, Charleston, SC 29402 P 843.577.7700 F 843.577.7708

www.barnwell-whaley.com

The Honorable Jenny Abbott Kitchings
August 21, 2015
Page

cc: Molly Hughes Cherry, Esquire
Julio E. Mendoza, Esquire
J.W. Nelson Chandler, Esquire

30130

30152

FedEx Package
Express **US Airbill**
FedEx
Tracking
Number

8057 5796 5600

1 From

Date 8.21.15Sender's
NameJOHN W. FLETCHER Esq. Phone 843 577-7700

Company

BARNWELL WHALEY PATTERSON

Address

288 MEETING ST STE 200

City

CHARLESTON

State

SC

ZIP

29401-1584

2 Your Internal Billing Reference

3496 DOT

3 To

Recipient's
NameTHE HONORABLE JENNY ABBOTT KITCHING Phone 803 734-1890

Company

CLERK, SC COURT OF APPEALS

Address

1220 SENATE ST.

We cannot deliver to P.O. boxes or P.O. ZIP codes.

Dept./Floor/Suite/Room

Address

Use this line for the HOLD location address or for continuation of your shipping address.

City

COLUMBIA

State

SC

ZIP

29201

0114649472



8057 5796 5600

Form
ID No.

0215

BARNWELL WHALEY PATTERSON

4 Express Package Service

*To most locations.

NOTE: Service order has changed. Please select carefully.

Packages up to 150 lbs.
For packages over 150 lbs. use the
FedEx Express Freight US Airbill.

Next Business Day

☐ FedEx First Overnight
Earliest next business morning delivery to select locations. Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.

☐ FedEx Priority Overnight
Next business morning. Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.

☒ FedEx Standard Overnight
Next business afternoon. Saturday Delivery NOT available.

2 or 3 Business Days

☐ FedEx 2Day A.M.
Second business morning. Saturday Delivery NOT available.

☐ FedEx 2Day
Second business afternoon. Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.

☐ FedEx Express Saver
Third business day. Saturday Delivery NOT available.

5 Packaging

*Declared value limit \$500.

☒ FedEx Envelope*

☐ FedEx Pak*

☐ FedEx Box

☐ FedEx Tube

☐ Other

6 Special Handling and Delivery Signature Options

☐ SATURDAY Delivery

NOT available for FedEx Standard Overnight, FedEx 2Day A.M., or FedEx Express Saver.

☒ No Signature Required
Package may be left without obtaining a signature for delivery.

☐ Direct Signature
Someone at recipient's address may sign for delivery. Fee applies.

☐ Indirect Signature
If no one is available at recipient's address, someone at a neighboring address may sign for delivery. For residential deliveries only. Fee applies.

Does this shipment contain dangerous goods?

☒ No ☐ Yes
As per attached Shipper's Declaration. ☐ Shipper's Declaration not required.

Dangerous goods (including dry ice) cannot be shipped in FedEx packaging or placed in a FedEx Express Drop Box.

☐ Dry Ice
Dry ice, 9, UN 1845 _____ x _____ kg

☐ Cargo Aircraft Only

7 Payment Bill to:

☒ Sender ☐ Recipient ☐ Third Party ☐ Credit Card ☐ Cash/Check
Enter FedEx Acct. No. or Credit Card No. below. Obtain recip. Acct. No.

Total Packages

Total Weight

Credit Card Auth.

Our liability is limited to US\$100 unless you declare a higher value. See the current FedEx Service Guide for details.

611

Rev. Date 2/12 • Part #163134 • ©1994-2012 FedEx • PRINTED IN U.S.A. SRS

fedex.com 1800.GoFedEx 1800.463.3339

fedex.com 1800.GoFedEx 1800.463.3339

77029

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

RECEIVED

Case No. 2009-CP-10-7516

AUG 25 2015

SC Court of Appeals
Appellant

Skywaves I Corporation.....

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

AMENDED AND SUPPLEMENTAL NOTICE OF APPEAL

Plaintiff/Appellant Skywaves I Corporation appeals the following orders:

- (a) ORDER GRANTING IN PART DEFENDANT BB&T'S MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANT EDAHL'S MOTION MOTION (sic) FOR SUMMARY JUDGMENT[;] DENYING PLAINTIFF'S MOTION TO RECONSIDER; DENYING PLAINTIFF'S MOTION TO AMEND THE COMPLAINT; AND DENYING PLAINTIFF'S MOTION FOR COMMISSION OF (sic) ISSUANCE OF A SUBPOENA TO DEPOSE JOHN ALLISON, which the Honorable Roger M. Young signed and filed on or about July 23, 2015 in this matter (attached hereto as Exhibit A).
- (b) ORDER GRANTING DEFENDANT BB&T AND DEFENDANT EDHAL'S (sic) MOTION TO STRIKE PLAINTIFF'S DEMAND FOR JURY TRIAL, which the Honorable Roger M. Young signed and filed on or about February, 2015 in this matter (attached hereto as Exhibit B).
- (c) ORDER denying Plaintiff's Motion to Strike and granting Defendants' Motion to Amend Answers, which the Honorable Roger M. Young signed

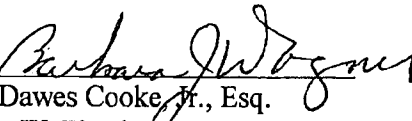
on March 13, 2014 and filed on March 17, 2014 (attached hereto as Exhibit C).

- (d) 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, which the Honorable Roger M. Young signed on October 26, 2011 and filed on November 8, 2011 (attached hereto as Exhibit D).
- (e) ORDER GRANTING SKYWAVES MOTION TO RECONSIDER, which the Honorable Roger M. Young signed on June 14, 2012 and filed on June 15, 2012 (attached hereto as Exhibit E).

Plaintiff/Appellant received written notice of entry of the most recent order appealed from on July 23, 2015.

August 24, 2015

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: 
M. Dawes Cooke, Jr., Esq.
John W. Fletcher, Esq.
Barbara J. Wagner, Esq.
288 Meeting Street, Ste 200
Charleston, SC 29401
(843) 577-7700 Fax: (843) 577-7708

George J. Kefalos, Esq.
George J. Kefalos, PA
3 State Street
Charleston, SC 29401
(843) 722-6612 Fax: (843) 377-1310

Brian C. Duffy, Esq.
John P. Linton, Esq.
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
(843) 720-2044 Fax: (843) 720-2047

Andrew K. Epting, Jr., Esq.
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401

Other Counsel of Record:

Molly Hughes Cherry, Esq.
Nexsen Pruet, LLC
P.O. Box 486
Charleston, SC 29402
(843) 720-1724 Fax: (843) 414-8209
MCherry@NexsenPruet.com

***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***

Julio E. Mendoza, Esq.
Nexsen Pruet, LLC
1230 Main St., Suite 700 (29201)
Columbia, SC 29202

***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***

J.W. Nelson Chandler, Esq.
Corrigan & Chandler, LLC
PO Box 547
Charleston, SC 29402
Attorneys for Respondent James Edahl

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

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

AUG 25 2015

SC Court of Appeals

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7516

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

PROOF OF SERVICE

I certify that I have served the Amended and Supplemental Notice of Appeal on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on August 24, 2015, addressed to their attorneys of record:

Molly Hughes Cherry, Esq.
Nexsen Pruet, LLC
P.O. Box 486
Charleston, SC 29402
(843) 720-1724 Fax: (843) 414-8209
MCherry@NexsenPruet.com

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

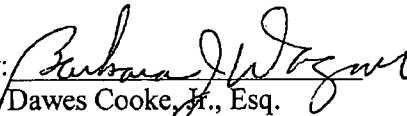
Julio E. Mendoza, Esq.
Nexsen Pruet, LLC
1230 Main St., Suite 700 (29201)
Columbia, SC 29202

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

J.W. Nelson Chandler, Esq.
Corrigan & Chandler, LLC
PO Box 547
Charleston, SC 29402

Attorneys for Respondent James Edahl

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: 
M. Dawes Cooke, Jr., Esq.
John W. Fletcher, Esq.
Barbara J. Wagner, Esq.
288 Meeting Street, Ste 200
Charleston, SC 29401
(843) 577-7700 Fax: (843) 577-7708

George J. Kefalos, Esq.
George J. Kefalos, PA
3 State Street
Charleston, SC 29401
(843) 722-6612 Fax: (843) 377-1310

Brian C. Duffy, Esq.
John P. Linton, Esq.
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
(843) 720-2044 Fax: (843) 720-2047

Andrew K. Epting, Jr., Esq.
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401

RECEIVED

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

AUG 28 2015

SC 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-10-7516

Skywaves I Corporation, ...Appellant

v.

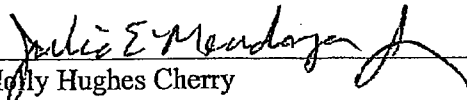
Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T;
and James Edahl Respondents

NOTICE OF CROSS APPEAL

Defendant/Respondent Branch Banking & Trust Company, successor in merger to
Branch Banking and Trust Company of SC, a/k/a BB&T ("Defendant BB&T") cross appeals the
following order:

- (a) ORDER GRANTING IN PART DEFENDANT BB&T'S MOTION FOR SUMMARY JUDGMENT, GRANTING DEFENDANT EDAHL'S MOTION MOTION [sic] FOR SUMMARY JUDGMENT; DENYING PLAINTIFF'S MOTION TO RECONSIDER; DENYING PLAINTIFF'S MOTION TO AMEND THE COMPLAINT; AND DENYING PLAINTIFF'S MOTION FOR COMMISSION OF [sic] ISSUANCE OF A SUBPOENA TO DEPOSE JOHN ALLISON (attached hereto as Exhibit A).

Defendant BB&T/Respondent received Appellant's Notice of Appeal on August 25, 2015, and Appellant's Amended and Supplemental Notice of Appeal on August 25, 2015.


Molly Hughes Cherry
Nexsen Pruet, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
Phone: 843.577.9440
Facsimile: 843.720.1777
E-mail: MCherry@nexsenpruet.com

Julio E. Mendoza, Jr.
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
P.O. Drawer 2426
Columbia, SC 29202
Phone: 803.771.8900
Facsimile: 803.253.8277
E-mail: rmendoza@nexsenpruet.com

*ATTORNEYS FOR RESPONDENT
BRANCH BANKING & TRUST COMPANY,
SUCCESSOR IN MERGER TO BRANCH
BANKING AND TRUST COMPANY OF SC,
A/K/A BB&T*

August 28, 2015
Charleston, South Carolina

OTHER COUNSEL OF RECORD:

M. Dawes Cooke, Jr., Esquire
John W. Fletcher, Esquire
BARNWELL WHALEY PATTERSON &
HELMS, LLC
288 Meeting Street, Suite 200
Charleston, SC 29401

Attorneys For Plaintiff/Appellant

Brian C. Duffy, Esquire
John P. Linton, Esquire
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401

Attorneys For Plaintiff/Appellant

J.W. Nelson Chandler, Esquire
CORRIGAN & CHANDLER LLC
P.O. Box 547
Charleston, SC 29401

Attorneys For Defendant/Respondent
James Edahl

George J. Kefalos, Esquire
George J. Kefalos, PA
46A State Street
Charleston, SC 29401

Attorneys For Plaintiff/Appellant

Andrew K. Epting, Jr., Esquire
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401

Attorneys For Plaintiff/Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

AUG 28 2015

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

SC Court of Appeals

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7516

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

PROOF OF SERVICE

I certify that I have served a copy of the NOTICE OF CROSS APPEAL on all counsel of record by placing the same in the United States mail, first class postage prepaid, on 28th day of August, 2015:

M. Dawes Cooke, Jr., Esquire
John W. Fletcher, Esquire
BARNWELL WHALEY PATTERSON &
HELMS, LLC
288 Meeting Street, Suite 200
Charleston, SC 29401

ATTORNEYS FOR PLAINTIFF/APPELLANT

Brian C. Duffy, Esquire
John P. Linton, Esquire
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401

ATTORNEYS FOR PLAINTIFF/APPELLANT

George J. Kefalos, Esquire
George J. Kefalos, PA
46A State Street
Charleston, SC 29401

ATTORNEYS FOR PLAINTIFF/APPELLANT

Andrew K. Epting, Jr., Esquire
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401

ATTORNEYS FOR PLAINTIFF/APPELLANT

1107

J.W. Nelson Chandler, Esquire
CORRIGAN & CHANDLER LLC
P.O. Box 547
Charleston, SC 29401

*ATTORNEYS FOR
DEFENDANT/RESPONDENT
JAMES EDAHL*



NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
P.O. Drawer 2426
Columbia, SC 29202
Phone: 803.771.8900

FILED

2009-CP-10-7516

FILED

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

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

RECEIVED

AUG 28 2015 1109

SC Court of Appeals

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.¹ 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).

¹ 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, Edhal 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.² The Court denies the Motion to Amend because the prior dismissal of those claims is the law of the case.

² 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.³ 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.

³ 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. Woolfson*, 384 S.C. 571, 578, 683 S.E.2d 495, 498 (2009).

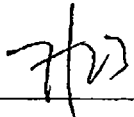
The Court concludes that the testimony that Plaintiff seeks from Mr. Allison is not reasonably calculated to lead to the discovery of admissible evidence and would subject BB&T to undue burden and expense. Plaintiff's Motion for Commission is denied, and BB&T's Motion for a Protective Order is granted.

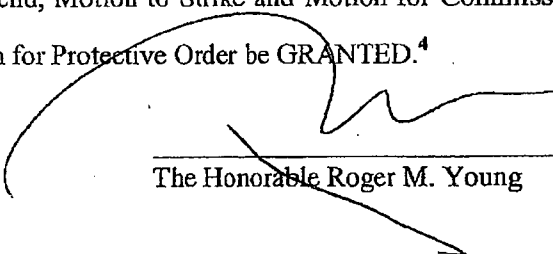
III.

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.⁴

IT IS SO ORDERED.


_____, 2015
Charleston, South Carolina



The Honorable Roger M. Young

⁴ 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.

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF CHARLESTON 2009-CP-10-7515
 2009-CP-10-7516
 2009-CP-10-7517
 2009-CP-10-7518

JAMES J. KERR, CRAYTON)
 WALTERS, and J.T. MAIN, LLC,)
)
 Plaintiffs,)

vs.)

August 15, 2011

Charleston, SC

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.)

* * * * *

SKYWAVES 1 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.)

* * * * *

RON KONERSMANN,)
)
 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.)

* * * * *

JOHN VOYTKO,)
)
 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.)

B E F O R E:

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

A P P E A R A N C E S:

Molly Cherry, Esquire
 M. Dawes Cooke, Jr., Esquire
 George J. Kefalos, Esquire
 Brian C. Duffy, Esquire

Amanda K. Haffenden, RPR, CRR
 Circuit Court Reporter 1124

1 (August 15, 2011.)

2 THE COURT: We got four cases and basically
3 each of one of them is today BB&T filing motions to
4 dismiss amended complaint on each of them. Can we at
5 least agree that's why we're here?

6 MS. CHERRY: Yes, Your Honor. As a practical
7 matter, the motions to dismiss are on behalf of both
8 defendants, BBB&T and Edahl, Your Honor. There were two
9 defendants in each case, and I should clarify, the motion
10 with respect to the Skywaves case by BB&T is only a
11 partial motion to dismiss, Your Honor.

12 THE COURT: We could start by pretending that
13 I know what I'm doing here, but I don't know what the
14 factoring agreements are and you all probably do, but
15 I've had a chance to read this a little bit, and I'm not
16 exactly sure factually that I understand it, so maybe it
17 would be good to make sure I do before we get into the
18 merits of the argument, okay?

19 MS. CHERRY: Certainly, Your Honor, and as I
20 indicated, if I may proceed --

21 THE COURT: You may.

22 MS. CHERRY: For the record, Molly Cherry,
23 and Rick Mendoza here on behalf of both defendants,
24 BB&T and James Edahl. And as Your Honor has pointed out,
25 these cases, in essence, arise out of a factoring 1125

1 agreement that was entered into between Skywaves
2 Corporation, which is one plaintiff in one of the cases,
3 and BB&T, and, Your Honor, for purposes setting the
4 stage, if you will, or the background of the players at
5 issue in all of these cases, obviously BB&T, as everyone
6 knows is a bank that has a branch here in Charleston, and
7 Jim Edahl is an employee at the branch here in
8 Charleston.

9 BB&T has a commercial lending department. It
10 has a factoring division as well, Your Honor. There are
11 other plaintiffs involved in this case other than
12 Skywaves. Skywaves is the actual customer of BB&T. One
13 plaintiff, Mr. Voytko was the CFO of Skywaves, and he
14 also invested in Skywaves.

15 THE COURT: Who was?

16 MS. CHERRY: Mr. Voytko. Mr. Voytko has no
17 direct relationship with BB&T, no direct contract with
18 BB&T, and for purposes of these lawsuits is not a
19 customer of BB&T. Mr. Konersmann, Your Honor, Ron
20 Konersmann, is another plaintiff in the third lawsuit
21 we're here about, if you will, Your Honor, and
22 Mr. Konersmann was also an officer in Skywaves and an
23 investigator in Skywaves. Mr. Konersmann is, for purpose
24 of these lawsuits, a customer of BB&T, he doesn't have a
25 direct relationship or direct contract with BB&T. 1126

1 Mr. Konersmann and Mr. Voytko, their lawsuits
2 are as employees and investors in Skywaves which, again,
3 is the only customer of BB&T that we're here about, and
4 then finally, Your Honor, there is a fourth lawsuit that
5 has been brought by James Kerr. Mr. Walters and J.T.
6 Main, LLC, these three plaintiffs have brought one
7 lawsuit as investors in Skywaves.

8 And, Your Honor, for purposes of the ease of
9 discussion, and unless the Court prefers otherwise, it
10 may be a little easier to refer to the Skywaves case and
11 then the other three cases as the investor cases, just to
12 distinguish them for purposes of the legal arguments
13 because there are -- despite the plaintiffs having filed
14 an omnibus brief, there actually are distinct arguments
15 with respect to Skywaves as the customer of BB&T, and as
16 I mentioned at the outset, BB&T has only filed a partial
17 motion to dismiss the Skywaves case.

18 So at the end of the day, even if BB&T's
19 partial motion to dismiss against Skywaves is granted,
20 Skywaves still would have some claims pending against
21 BB&T. BB&T has moved to dismiss all of the claims in the
22 investor lawsuits, for separate and distinct reasons, and
23 Mr. Edahl individually has moved to dismiss everybody's
24 claims in all of the lawsuits against him.

25 But, Your Honor, the crux of everyone's¹¹²⁷

1 claims in all of these lawsuits arises out of the
2 agreement between Skywaves, the customer, and BB&T, this
3 factoring agreement. And I'm sure plaintiff's counsel
4 will correct me if I get some of the facts wrong, but for
5 purposes of the motion to dismiss, taking the facts in
6 the complaints as true, the salient facts for the
7 purposes of these motions, Your Honor, are that Skywaves
8 developed a product for use in the wireless
9 communications industry, and they needed financing for
10 that product and they entered into an agreement with
11 BB&T, in essence, to enable them to make that product.

12 THE COURT: What was the product?

13 MS. CHERRY: If I understand it correctly, a
14 device that goes in the bottom of the cell phone towers
15 that is supposed to, I think, more effectively help the
16 telecommunications industry. I don't know all the
17 details in terms of how the device works, but I do know
18 there were some patents pending with respect to that.

19 MR. KEFALOS: I could explain that, if you're
20 interested, as a footnote right now. You drive by the
21 cell towers and you see little round building that are
22 sort of stucco. Skywaves built those buildings, and what
23 they did is instead of having each vendor provide a
24 different part that goes into a wireless communication
25 thing, Skywaves took all of those different vendors, 128

1 installed them in these buildings, and integrated all
2 their processings and then took and drop shipped the
3 things at a tremendous savings to the wireless people,
4 dropped them at the foot of their cell tower, and all
5 they had to do was plug them in. They took off like
6 gangbusters and were doing great for a while.

7 THE COURT: Okay.

8 MS. CHERRY: So, Your Honor, the factoring
9 agreement, basically, involved BB&T purchasing accounts
10 receivable at a discount, and when the product is
11 delivered and paid, then the money was to go to BB&T.
12 Just in terms of the cycle of how that agreement
13 initially worked, in a nutshell, Your Honor, so it's the
14 purchase of the AR, and then the money goes to BB&T as
15 opposed to back to Skywaves.

16 THE COURT: Kind of like buying a membership
17 to the gym, right?

18 MS. CHERRY: To some extent, yes, Your Honor,
19 but part of the allegations by Skywaves is that that
20 agreement and the way that agreement worked was modified
21 over a period of time, and I don't -- for purposes of
22 today, the actual modification of that agreement or how
23 it may have worked is not at issue. What is at issue is
24 that there was a financial agreement between BB&T and
25 Skywaves.

1 And when I say it's not at issue today, it is
2 at the heart of the issue, Your Honor, in terms of the
3 dispute between the parties, because at the end of the
4 day, Skywaves contends that BB&T promised to meet its
5 financial needs at present and in the future and
6 improperly stopped doing that, in essence, and improperly
7 called a default under their relationship, and Skywaves
8 is claiming -- and, again, Your Honor, I'm paraphrasing,
9 but they're claiming that as a result of that, they
10 ultimately petitioned for bankruptcy.

11 They went bankrupt, and they are blaming that
12 on BB&T and their employee, Mr. Edahl. They're claiming
13 that Mr. Edahl, in fact, is the individual that
14 represented the changes in the agreement and represented
15 that the funding would continue.

16 And so at the end of the day, they're
17 claiming but for that, they would not have gone into
18 bankruptcy, in a nutshell.

19 THE COURT: Well, usually these parties go
20 along in making money and are happy with that. When
21 they're in the business of making money, everything is
22 going fine. So what happened? Why did BB&T stop wanting
23 to do business with Skywaves?

24 MS. CHERRY: And, Your Honor, this is a
25 disputed point, and it's not the issue on the motions to ¹¹³⁰

1 dismiss, but at the end of the day, BB&T agrees that
2 there were some modifications to the agreement, but
3 ultimately, from BB&T's perspective, there were some
4 fraudulent documentations submitted in terms of what the
5 bank was advancing money off of.

6 And they went in and had an audit conducted
7 and for that and a host of other reasons called a default
8 under the factoring agreement, as they were entitled to
9 do.

10 What happened at that point, from BB&T's
11 perspective, is, in fact, that the officers of Skywaves
12 acknowledged that there had been wrongful conduct and
13 acknowledged a right to call a default under the
14 agreement. Suffice it to say that the plaintiffs wholly
15 disagree with that characterization, Your Honor. I
16 don't -- I do want to clarify for the Court, this is a
17 dispute between the parties in terms of the reason for
18 the default and the proprietary of the default, and that,
19 in fact, is what the parties are ultimately fighting
20 over.

21 BB&T actually has internally looked at it,
22 and external auditors looked at what transpired, and
23 there were, in January of 2008, a number of itemized
24 issues under the factoring agreement, and the default was
25 called at that point.

1 The parties did, in fact, engage in
2 negotiations after that point to see if there was
3 something that could be worked out, but, ultimately, a
4 workable solution did not arise between the parties, Your
5 Honor, which ultimately Skywaves ended up filing for
6 bankruptcy. They were not sound enough to continue their
7 business and didn't find other financing for it, and
8 again, Your Honor, I think those, at the end of the day,
9 are the issues in dispute, and I think, Your Honor, the
10 crux of this lawsuit, which, in fact, is part of the
11 reason BB&T's motion to dismiss with respect to the
12 Skywaves case is only a partial motion to dismiss.

13 Although we wholly disagree with the
14 plaintiff's characterization of the deterioration of the
15 relationship, we recognize, at the motion to dismiss
16 stage, that there is sufficient allegations at this stage
17 in the complaint to satisfy their burdens to at least
18 allege to survive a motion to dismiss.

19 THE COURT: Of what cause of action?

20 MS. CHERRY: We did not move to dismiss their
21 brief of contract cause of action, Your Honor, and their
22 promissory estoppel cause of action, and there was one
23 other contract they claim, Your Honor, that we didn't
24 move to dismiss, if you'll bear with me, because they had
25 eight -- Skywaves had eight causes of action against¹³²

1 BB&T. Breach of the covenant of good faith and fair
2 dealing, Your Honor, was the third cause of action that
3 BB&T did not move to dismiss.

4 Skywaves, in fact, asserted breach of
5 contract, breach of contract accompanied by fraudulent
6 acts, promissory estoppel, breach of the covenant of good
7 faith and fair dealing, negligent misrepresentation,
8 fraudulent misrepresentation, negligence in violation of
9 the South Carolina Unfair Trade Practices Act.

10 Now, Your Honor, the other -- the investor
11 plaintiffs did not assert the contract claims against
12 BB&T and Edahl. Instead, they asserted similar tort
13 claims for negligent misrepresentation, and some
14 plaintiffs have called it negligent misrepresentation,
15 some plaintiffs have called it negligent inducement, some
16 it's not clear if it's negligent inducement or fraudulent
17 inducement, so we've addressed both in our motions to
18 dismiss, and then they have asserted a violation of the
19 Unfair Trade Practices Act and a straight negligence
20 claim.

21 So the investor plaintiffs, Your Honor, had
22 asserted three what I'm calling noncontract based claims,
23 and if I may point out, Your Honor, as well, Skywaves did
24 not obviously assert the contract based claims against
25 Mr. Edahl. Those are only against BB&T, but Skywaves ~~1433~~ did

1 assert their claims for negligence, negligent
2 misrepresentation, fraudulent misrepresentation in
3 violation of the Unfair Trade Practices Act against Mr.
4 Edahl.

5 But, again, Your Honor, it all arises out, if
6 you will, of the leading up to and including the
7 deterioration of the financing arrangement between
8 BB&T and Skywaves. And, Your Honor, as I mentioned, at
9 the end of day, the motions to dismiss, I think
10 conceptually it may be easier to look at the investor
11 lawsuits. The motion to dismiss is based on a legal
12 argument with respect to those tort claims that the
13 investors in Skywaves have asserted against BB&T and
14 Mr. Edahl. In fact, all parties have cited to it, Your
15 Honor. It's section 37-10-107, and the statute in South
16 Carolina very clearly bars these investor claims.

17 And, Your Honor, if I may quote directly, the
18 statute says that no person may maintain an action for
19 legal relief, based upon a failure to perform an alleged
20 promise, undertaking, commitment, or agreement to lend
21 money or to renew, modify, or amend a loan of money or
22 any provision with respect to a loan of money unless the
23 party seeking to maintain the action, in this case, the
24 investors who are seeking to maintain the action, have
25 received a writing from the party to be charged. 1134

1 These investors are charging BB&T with an
2 agreement to continue lending money under whatever
3 modified arrangement they may be alleging in their
4 agreement, and although the parties dispute what that
5 modification was, at the end of the day for purposes of
6 this statute, it doesn't matter because the statute
7 specifically says, Whoever is maintaining the action has
8 to have received a writing outlining those terms.

9 These investor plaintiffs have not, and, Your
10 Honor, if you think about this conceptually, there is a
11 reason for this. Skywaves is in bankruptcy. These
12 investors have proofs of claim in the bankruptcy.
13 Skywaves has brought this lawsuit outside of the
14 bankruptcy to pursue it as a potential asset in the
15 bankruptcy.

16 Notwithstanding our disagreement over the
17 merits of Skywaves' claims, if anybody here today has a
18 claim, it is Skywaves. Skywaves was the customer of
19 BB&T. In essence, these investors are trying to bring a
20 derivative claim on behalf of Skywaves. More tellingly,
21 Your Honor, if Voytko and Konersmann, part of their
22 claims in these lawsuits, is that they lost their
23 salaries as employees of Skywaves.

24 That makes no sense whatsoever. I mean, if
25 they're allowed to proceed with these lawsuits, any¹¹³⁵

1 employee of any company that ever went bankrupt is going
2 to be able to sue the lender for the company. The South
3 Carolina statute expressly bars the claims the investor
4 plaintiffs are trying to bring in this case.

5 Your Honor, there were a couple of points
6 that plaintiff's counsel have made or arguments they have
7 made to contend that the South Carolina code section
8 37-10-137 doesn't bar their claims, and the first
9 argument that the plaintiffs are making is that the
10 factoring agreement between Skywaves and BB&T has a
11 choice of law provision that says North Carolina law
12 applies, but at the end of the day, Your Honor, these
13 investor plaintiffs, they aren't parties to that
14 agreement. They are trying to claim that BB&T had to do
15 X, Y, and Z and they promised they would do X, Y, and
16 Z and we were relying on those representations that they
17 would commit to lend this money, to do this financially.

18 You can't have it both ways. The South
19 Carolina statute is going to bar those claims unless they
20 meet the requirements of the statute. They can't rely on
21 a choice of law provision and agreement to which they
22 were not a party, and it makes no sense to say that that
23 choice of law provision is going to bar the application
24 of South Carolina law with respect to their claims.

25 Your Honor, they also state that with respect ¹¹³⁶

1 to -- they attempt to distinguish that statute and say
2 while maybe it bars the claims against BB&T, it certainly
3 doesn't bar the claims against Edahl because there was no
4 agreement between Edahl and Skywaves and that the law
5 relating to the statute of frauds says that it only
6 pertains to the two parties at issue.

7 But, Your Honor, in fact, the case law that
8 they cite talks about parties to an agreement and they're
9 privy, and, in essence, Your Honor, acknowledges that if
10 it is not going to allow a claim against BB&T, then it's
11 illogical to suggest it's going to allow a claim against
12 an employee of the party they're trying to charge with
13 this obligation.

14 I'm just -- there isn't any case law directly
15 on point, but, instead, the plaintiffs are just relying
16 on general South Carolina law relating to statutes of
17 fraud, but I think in that context, the case law applies
18 to parties and their privies, and I think in this case a
19 strong argument can be made that the employee of the
20 company is either, for all intents and purposes, the same
21 as the company or privy of the company. So I'm not
22 convinced that that would bar -- that would prevent the
23 South Carolina statute from barring the claim against
24 Mr. Edahl as well.

25 Additionally, and to the extent they want to

1 charge Mr. Edahl, they haven't received any writing from
2 Mr. Edahl either. The investor plaintiffs haven't
3 received any writing in this case, whether from BB&T or
4 Edahl.

5 Your Honor, also, there was an argument that
6 the statute itself talks about loans of money and the
7 investor plaintiffs distinguish a factoring agreement
8 from a loan, but, Your Honor, as a practical matter, the
9 allegations in the complaint are alleging that this
10 original factoring agreement eventually evolved into, in
11 essence, a line of credit, which is a loan of money, and
12 the plaintiff's own allegations are that the agreement
13 evolved to the point that it really is a loan.

14 Even if those allegations weren't there, Your
15 Honor, South Carolina code section 37-10-102 says that
16 statutes to be interpreted broadly to accomplish the
17 goals, the underlying goals, and purposes of the
18 statutes, and I think that would just be a hyper
19 technical interpretation of this lender liability statute
20 of frauds to suggest that it wouldn't apply in this
21 context.

22 And then finally, Your Honor, the plaintiffs
23 are alleging that the lender liability statute of frauds
24 doesn't bar fraud claims because it specifically
25 delineates negligent misrepresentation; however, Your Honor

1 Honor, we've cited in our brief actually the Lands End
2 case which is a South Carolina federal court case,
3 finding that this statute bars a fraud claim and it cites
4 a South Carolina Court of Common Pleas case in support of
5 that as well.

6 And, Your Honor, I think there are a number
7 of other very specific arguments pertaining to the
8 substance of the cause of action and the applicability of
9 the statute overall, but I think it might be more prudent
10 to let the plaintiffs argue their specific points and
11 then, if I may, just address them in turn to the extent
12 the Court has questions about them.

13 THE COURT: All right.

14 MR. COOKE: For the court reporter, I'm Dawes
15 Cooke with the firm Barnwell Whaley Patterson Helms
16 representing all plaintiffs, and I'll let other counsel
17 introduce themselves.

18 MR. DUFFY: Brian Duffy with Duffy and Young.
19 I'm on the papers representing Mr. Konersmann and
20 Mr. Voytko, but we're going to divide the argument by
21 substance rather than by party.

22 MR. KEFALOS: I'm George Kefalos. I
23 represent Skywaves.

24 MR. COOKE: Your Honor, we sacrificed
25 probably some clarity for the sake of less paper by¹¹³⁹

1 filing consolidated responses to all the motions, and it
2 maybe requires a little more work to sort out which
3 grounds are being asserted by the plaintiffs, but I think
4 Molly has already explained that to you.

5 But we did, rather than file separate
6 responses to each motion, we put them all together, and
7 we're going to try to save some time by dividing the
8 arguments, and generally I'm going to talk about the
9 statute of frauds issue and Mr. Duffy is going to talk
10 about the substantive cause of action and why those
11 should survive.

12 In broad summary, first of all, Your Honor,
13 we contend that this is a 12(b)6 motion to dismiss and
14 that there are at least two important issues that need to
15 be factually developed before you can interpret the
16 statute of frauds.

17 The first question is, what was this
18 agreement, factoring agreement? Was it the loan? Did it
19 ever become a loan? Is it something other than a loan?
20 Strictly speaking, a factoring agreement is not a loan.
21 It's a situation where they purchased an asset of their
22 customer at a discounted rate and pay the money up front
23 and then the asset pays itself directly to the bank.

24 For example, accounts receivable, they may
25 purchase accounts receivable to allow cash flow, and so

1 they'll -- we've got an order, we've got a customer who
2 owes us \$100,000. We might sell that account receivable
3 to the bank. They give us the money, and then they go
4 collect the account receivable from the customer, and
5 that works well because sometimes the agreements with our
6 customers are they don't pay us until the product is
7 delivered and installed and some other events have
8 occurred. We need the money sooner so we can build the
9 product for them.

10 The facts -- and then the second fact that we
11 think needs to be developed more is what were the
12 writings that we're relying on? If Your Honor finds that
13 the statute of frauds applies as interpreted by BB&T,
14 we've alleged in the complaint, and it's in paragraphs 8,
15 9, 18, 19, 20, 21, specifically, that there were
16 writings. The original factoring agreement was written,
17 signed by both parties. The modifications were in
18 writing, most in the form of e-mail. We've cited both
19 federal and state law that says e-mail can be the same as
20 a signed agreement.

21 We have alleged that Mr. Edahl at one point
22 said that, you know, we've all agreed to these
23 modifications. We're not going to do a formal agreement
24 because we don't want you to have to go hire lawyers to
25 paper it up, essentially.

1 So we believe at a very minimum, even without
2 agreeing with us on any of our legal arguments, that the
3 Court should deny the 12(b)6 motions so that those
4 allegations can be fleshed out so that you can see if the
5 statute applies.

6 I do want to talk a little bit about the bank
7 statute of frauds, which is at section 37-10-107, and I
8 almost brought a big board, but I thought you could
9 probably call it up on your computer and you would be
10 looking at it because it's a very oddly worded statute,
11 so much so that after we read it, we still don't all
12 agree on how you interpret it.

13 And I even went back to the action joint
14 resolution I was so convinced there was a typographical
15 error in it, but I know I'm not supposed to ask you
16 questions, but do you have it available there?

17 THE COURT: I can pull it up.

18 MS. CHERRY: Your Honor, I actually have a
19 paper copy of it. I just printed it off.

20 MR. COOKE: That's fine.

21 THE COURT: I'll tell you what: Why don't
22 you let me have that, because I follow along on the
23 realtime and frankly to do both at the same time is not
24 possible.

25 MR. COOKE: Section 37-10-107, if you read it ¹¹⁴²

1 literally, it says, item one, no person may maintain an
2 action for legal or equitable relief or defense based
3 upon a failure to perform an alleged promise undertaking
4 except to offer commitment or agreement, colon, A, to
5 lend or borrow money. And then there is a B, and then
6 there is a C, so there were three different things that
7 you cannot do under the statute, if you read it
8 literally: One is to maintain an action for legal or
9 equitable relief or defense based on an agreement to lend
10 or borrow money.

11 Well, that would be news to most people in
12 the world. We think that you can bring suit on an
13 agreement to lend money, but the statute must mean more
14 than that.

15 THE COURT: It does. It says involving a
16 case where the principal amount is in excess of \$50,000
17 unless it's in writing.

18 MR. KEFALOS: But, you see, that's the
19 curious part. That's where I was convinced there was a
20 typographical error, because I thought there must be a
21 break after \$50,000 and that unless must be in a separate
22 paragraph so that it would modify A, B, and C, but it's
23 not. If you go to the original language in joint
24 resolution, it's written just like it is here, which
25 means all that language only modifies item C, which is to¹¹⁴³

1 renew, modify, amend. The prohibitions against A and
2 B are absolute. They're not conditioned on the existence
3 of a writing.

4 So you're scratching your head, and then you
5 go to the next section, two, and what does it say? It
6 says failure to comply with subsection one precludes an
7 action or defense based on any of the following legal or
8 equitable theories, and then it's got A, B, C, D, E, the
9 various defenses, promissory equitable estoppel and
10 implied agreement based on course of dealing or
11 performance; C is an interesting one we're going to talk
12 about in a minute, partial performance, except to the
13 extent the partial performance may be explained only by
14 reference to the alleged promise and the accepted offer.

15 So digest that for a minute. Isn't that an
16 odd way to work the statute in? Instead of saying that
17 you may bring an action to lend or borrow money but you
18 can't raise these various defenses. It says you can't
19 bring that. You can't bring that action, but if you do,
20 failure to comply with subsection one, what is that
21 supposed to mean? Normally, you wouldn't even get that
22 far, because Molly would stand up and say, Judge, it says
23 no person may maintain an action and they did, so they're
24 not allowed to do that. But section two contemplates
25 that you have failed to comply with that section, and if

1 you do, you still get to bring a lawsuit but you don't
2 get to raise these various legal theories.

3 So that is odd enough, but you don't need to
4 solve that for purposes of this 12(b)6 motion because we
5 have alleged in numerous places in the complaint that
6 there were writings signed by BB&T that memorialize this
7 agreement.

8 We've also alleged there was partial
9 performance and that the partial performance did meet the
10 requirements of Section 2(c), because it may be explained
11 only by reference to the alleged promise undertaking
12 except to offer commitment or agreement. Specifically,
13 in our complaint, we allege that as Mr. Kefalos indicated
14 that things were just going great for Skywaves.

15 In paragraph number 12, it says that they had
16 won two General Dynamics contracts. They have won a \$12
17 million Navy Coast Guard project. They have won a \$20
18 million New York state police contract, that they were
19 increasing the number of requests for quotations and,
20 they decided they needed to go out and get a larger
21 source of financing, because you have to have the money
22 to make the product before you can sell it and send the
23 people a bill and have them pay it, and so you need a
24 bigger, better factoring agreement.

25 And so they went out. They had proposals 1145

1 from Hunt Capital and Wachovia and BB&T, and the
2 complaint alleges that Mr. Edahl, from BB&T, came and
3 said, We want to be your bankers. You guys are going to
4 make it big, and we're going to bend some of the rules.
5 We're going to do things for that are sort of outside our
6 underwriting guidelines, and we're going to expand your
7 capabilities under your factoring agreements. We're
8 going to change some of the requirements, and those were
9 all listed in the complaint as well.

10 So that reliance, that is, the reliance and
11 the partial performance, we allege that Skywaves agreed
12 to that and said, Okay, we're going to turn down Hunt
13 Capital. We're going to turn down Wachovia. We're going
14 to bank with you. So that reliance, that partial
15 performance was exactly as it says in subsection C. It
16 can be explained only by reference to the alleged promise
17 undertaking except for offered commitment or agreement.

18 THE COURT: I'm struggling with the concept
19 of -- even if everything that you're saying is true as
20 between Skywaves and BB&T having an agreement and there's
21 exceptions, like can you get around the various parts of
22 the statute, where is it in the law that investors in a
23 company that had an agreement with another company
24 get to sue directly? Shareholders, investors --

25 MR. COOKE: I'm going to let Mr. Duffy 1146

1 explain that, but let me just say my little piece on
2 that.

3 Their complaints allege that they were
4 induced to invest by those specific representations, by
5 Mr. Edahl, that they went to a meeting, they traveled to
6 a meeting with him in which he sat down and explained to
7 them how he was going to -- how he and BB&T were going to
8 be their banker and their complaints allege that in
9 reliance upon those representations, they made their
10 investments in the company.

11 Now, before I say anything wrong, I'm going
12 to allow Mr. Duffy to elaborate on that.

13 THE COURT: All right.

14 MR. DUFFY: Your Honor, that's exactly right.
15 There's too narrow of a view to suggest that those tort
16 claims arise out of a factoring agreement, and that
17 really is kind of theme that permeates a lot of the
18 briefing from the bank is that, hey, all we have is one
19 customer and we have a standard debtor/creditor
20 relationship and there is no duty to anyone else, but,
21 Your Honor, to answer your specific question about where
22 does the duty arise for the investors, that is from --
23 let's see, the allegations, and, really, the paragraphs
24 are different in all four complaints, but, essentially,
25 it is about the representations made.

1 There are several allegations regarding how
2 BB&T got Skywaves as a client to start with, but once
3 that happened and they needed this new capital call, or
4 had big expansion plans, BB&T's representative,
5 Mr. Edahl, went, travelled to McBee, South Carolina, to
6 make a presentation to investors, and it's based on what
7 he said to the investors, which isn't, hey, we're the
8 banker, it was, based on our review of the company, the
9 company is going to do well. This is well positioned.
10 It has these different markets to hit. We are fully
11 committed to being a partner, and we're going to
12 structure something outside of the ordinary course.

13 Well, our investors relied on those
14 representations, which we allege were known to be false
15 at the time or were negligently made, and that --

16 THE COURT: In what way? Because you can't
17 normally base a fraud claim on a future act. It has to
18 be something that presently exists, and that's the basis
19 for the fraud, not that, I think you're going to make a
20 lot of money in the future, if you do something in the
21 future.

22 MR. DUFFY: They said that what they would
23 provide is the equivalent of the private equity
24 financing, which was false, but that is what they told
25 the investors who then sunk their money into the company. ¹¹⁴⁸

1 THE COURT: What does that mean, we're going
2 to provide you with private equity financing?

3 MR. DUFFY: Everybody knows the Hunt Brothers
4 from Texas put money in whatever promising businesses
5 there are. Well, Hunt had proposed this private equity
6 firm, had proposed a multi million dollar investment in
7 this company.

8 THE COURT: And these people thought BB&T was
9 going to invest in their company?

10 MR. DUFFY: BB&T said, Don't do that. We can
11 meet your financing needs. We can create new, outside of
12 the ordinary course of business relationship to take you
13 public. That's exactly what was said.

14 Your question is, is it reasonable to rely on
15 that? That is a whole different factual issue, Your
16 Honor, but the duty is there based upon the
17 representations --

18 THE COURT: No, my question wasn't whether it
19 was reasonable to rely on that, it was whether or not it
20 was a false statement about something that existed at
21 that point in time.

22 MR. DUFFY: Yes, Your Honor.

23 THE COURT: You can't base a fraud claim on a
24 future act.

25 MR. DUFFY: Your Honor, what I'm saying¹¹⁴⁹ is

1 they represented something that was false at the time.

2 THE COURT: What is it that they promised
3 they would do that was not true at the time they said it?

4 MR. DUFFY: They said that -- first of all,
5 they're both negligent misrepresentations and fraudulent.

6 THE COURT: What did they say?

7 MR. DUFFY: They said that they were, in
8 paragraph 41 -- again, there, that they were a partner of
9 the company.

10 THE COURT: They were a partner of the
11 company?

12 MR. DUFFY: They were there in the partnering
13 growth. They were an equivalent means of financing as
14 private equity. That was the present time of what these
15 people were trying to decide, is where --

16 THE COURT: That gets back to the point.
17 These guys thought that BB&T was going to invest in their
18 company, when you're saying, We're going to be partners?
19 I mean, that's kind of like saying something nice about
20 you. We're going to be partners in the sense that we're
21 all going to work together, which is always true as long
22 as they're making money. But to sit there and go, You
23 think I'm going to buy equity in your company? That's --
24 they actually thought that BB&T was going to become a
25 partner and they were going to have to form a

1 partnership, governed by partnership law, other than just
2 a generic, Hey, we're going to be partners as long as the
3 good times roll kind of partners.

4 MR. DUFFY: Your Honor, they indicated they
5 had the flexibility and ability to provide financing that
6 they couldn't -- that we're saying they couldn't then do.

7 THE COURT: That's different now. Let's go
8 to that in just a second, but that first statement about
9 being partners, are you suggesting that they really did
10 believe that BB&T was going to invest in their company?

11 I don't know that they could, under banking
12 law, invest in a company, but they honestly believe that
13 BB&T was going to become an equity partner in Skywaves?

14 MR. DUFFY: No, but they were committed to
15 the financing it in a way that was different.

16 THE COURT: Now, again, that's something
17 that's different.

18 MR. DUFFY: I'm trying to explain to you what
19 I mean -- they say partner. I can't tell you what they
20 meant by it or not. All I'm telling you is that you have
21 the representative from a company -- from the bank,
22 coming to make a pitch to investors for the company.
23 That's odd to start with, and then you say you're going
24 to be the partner, meaning here we are, close
25 relationship, we want to do it all for you and that 1154

1 can do and will do what a private equity group could do
2 for you?

3 And I'm saying, Your Honor, that we have
4 alleged that was false at the time, negligently made at
5 the time. They had a pecuniary interest in doing it and
6 that created a duty and the representations to make them
7 fair, honest, accurate representations.

8 THE COURT: They ended up signing an
9 agreement with them, correct? I mean, BB&T and these
10 folks entered into a factoring agreement. That's what I
11 heard, right? So they entered into a financing
12 agreement.

13 MR. DUFFY: They already had a factoring
14 agreement. What they were saying is we are going to do
15 more, which I understand is the future part, but they
16 represented what their ability was --

17 THE COURT: At the time of this pitch, we'll
18 be partners and all that, the kumbaya meeting, that's
19 all -- they had already signed a factoring agreement?

20 MR. DUFFY: Yes, and the point of this
21 meeting was they were luring, inducing, investors into
22 the company.

23 THE COURT: They had already invested -- how
24 can you have an agreement with a company that doesn't
25 exist? Did this company exist or not, and at the time

1 BB&T and Skywaves entered into this factoring agreement,
2 did Skywaves exist and who owned it?

3 MR. DUFFY: Yes. Skywaves existed when they
4 initially in 2005 had their financing agreement.

5 THE COURT: And did these plaintiffs, Voytko,
6 Konersmann and these other folks that are investor
7 plaintiffs now, were they owners in Skywaves at the time
8 that the factoring agreement was entered into?

9 MR. DUFFY: Not all of them, for sure some of
10 them in a much smaller level than they ultimately were
11 off the growth plan that BB&T supported and induced
12 others to invest in. That was 2007, Your Honor. That
13 was after the company had been going. There had been a
14 relationship with the bank. This is an additional -- and
15 that's kind of what's hard to grasp about part of the
16 case.

17 THE COURT: That's what I'm having real
18 trouble grasping, because how you can say I'm induced to
19 invest in a company when I'm already invested in it?

20 MR. DUFFY: They then invested in the growth,
21 Your Honor, in hundreds of thousands of dollars, and
22 several of them had not previously invested.

23 THE COURT: They invested in the growth.
24 What does that mean? They think it's going to grow.
25 Everybody is going to make money off it.

1 MR. DUFFY: Your Honor, the reason there was
2 an investment and a need was because of the overwhelming
3 response they had got, and they needed capital to fund
4 the growth. So they had gone out and they had secured --
5 they sought proposals. They got proposals from a variety
6 of people, including BB&T.

7 BB&T then went and made a pitch to other
8 people rather than, you know, big, I'm going to be in
9 charge Hunt Capital people to say, Here is who we are and
10 what we can do, which we say was inaccurate, and that
11 induced additional investment from some people who had
12 never previously invested.

13 THE COURT: So what did they say -- all
14 right. They had already talked to outside investors.
15 You said the Hunt Brothers. That name -- I know a little
16 bit about it, but I don't know anything in real depth
17 about it, except I think they tried to corner the civil
18 market at one time, if that's the same Hunt Brothers.

19 So they said, We don't want to do business
20 with somebody who is actually going to own part of
21 Skywaves, correct?

22 MR. DUFFY: No. In fact, they didn't say
23 that. That's what BB&T pitched. Here is your advantage.
24 We can be as flexible in doing this, but you don't have
25 to give away the equity that you would --

1 THE COURT: That gets back to the first point
2 I'm trying to make. These folks really didn't think
3 BB&T was going to become partners in the sense that
4 lawyers recognize partners, all right? They don't become
5 equity investors because they were saying, You don't want
6 an equity investor. They're just going to take you over
7 like the Hunt Brothers would. We're basically going to
8 offer you some kind of financing and partners in the
9 sense that these guys were talking about is just a
10 feel-good term.

11 MR. DUFFY: And I don't mean to get hung up
12 on partnership term.

13 THE COURT: Well, I'm getting hung up on it
14 because you're alleging fraud, and that is -- we got to
15 talk about what, again, it is that they said was
16 fraudulent, what they knew or should have known was not
17 true at the time they made it, so I need to segregate
18 those issues, and when you said, We're going to be
19 partners, I said stop. That means something, in lawyer
20 world, and that means we're going to become equity
21 investors.

22 But now you're saying that's not true.
23 That's not what I meant, that's not what they meant, and
24 they understood that is not what they meant, that
25 BB&T was not going to become an equity investor because¹¹⁵⁵

1 part of BB&T's pitch was, You don't want an equity
2 investor. They'll take you over to run the show like the
3 Hunt Brothers.

4 In other words, your fraud claim is just
5 about a special financing that we can offer you that
6 exists without becoming an equity investor; is that
7 right?

8 MR. DUFFY: Generally speaking, yes, although
9 we are at 12(b)6, and I don't want to concede what people
10 are thinking.

11 THE COURT: I'm just trying to get my head
12 around what the deal is here.

13 MR. DUFFY: In essence, that's correct, and
14 the point is --

15 THE COURT: You didn't specify what your
16 fraud is enough, I don't think. So we got to focus on
17 that.

18 MR. DUFFY: Their fraud is they
19 misrepresented what they were ready, willing, and able to
20 do.

21 THE COURT: Okay. But that involves special
22 financing, not buying into a new company.

23 MR. DUFFY: Yes.

24 THE COURT: I think we've chased that rabbit
25 enough that if you want to go back to talk about the¹¹⁵⁶

1 special financing, talk about what true at the time they
2 said it, involving the special financing.

3 Did they say we're going to give you
4 something that is better than buying into your company?

5 MR. DUFFY: Your Honor, they represented,
6 according to our allegations, that they basically had
7 done their review of the company, understood the growth,
8 the growth cycle, shortened long-term capital needs, and
9 specifically told these people that they didn't need a
10 large bank or an equity investor.

11 THE COURT: What is not true about that?

12 MR. DUFFY: Because apparently they did,
13 because you have someone who doesn't -- they're
14 representing they had the capacity to be flexible with
15 their financing arrangements in the same way and be able
16 to carry them to an idea, which is how I suspect the
17 reason BB&T wanted to do this to start with is because
18 they wanted to hitch this on a rising star, like Edahl
19 did, so they were making representations that they
20 couldn't and knew they shouldn't make that they knew at
21 the time they couldn't live up to.

22 And so they advised people, taking on an
23 additional duty, by the way, under the cases, we've done
24 the review. Here is where you are. Here is how great
25 you're going to do. We're going to do something outside

1 the ordinary course, again, undertaking a duty beyond the
2 debtor-creditor relationship, and that you don't need --
3 that we are the equivalent of your other options, which
4 we have alleged that they're not. They weren't. They
5 made misrepresentations at the time, Your Honor. They
6 were -- other -- there are several others. I would be
7 happy to read them.

8 BB&T was fully committed to providing short
9 and long term financial needs for growth, act as a
10 partner, which I mentioned --

11 THE COURT: That kind of statement is so
12 vague. I mean that, would be -- unless they specifically
13 said something like, Well, we're going to loan you \$10
14 million, to say, We're going to provide your financial
15 needs in the future, I mean, you're going to have to meet
16 certain -- I don't think you get to walk in and say,
17 Well, in my mind they were going lend me \$10 million, and
18 maybe in their mind it only meant a million or maybe it
19 was 10 million and 100 million.

20 That's kind of so vague that it's not
21 actionable, I don't think, to just say we're committed to
22 meeting your short and long term financing needs. You
23 don't leave yourself that open within parameters.
24 Everybody knows you're going to have to provide documents
25 that aren't false and things like that.

1 MR. DUFFY: I think it sounds to me that what
2 you're describing is when a company comes in and says,
3 Here is what we want, and they say, Okay. We can work
4 with you. That's different than sending a representative
5 to someone who is not even a client to make a pitch to
6 induce people to invest money.

7 It's totally different than whatever your
8 client relationship is with Skywaves. You went there and
9 made representations to people about what you -- what you
10 analyzed, what you said you analyzed, and you people
11 relied on your analysis to make -- of the capability of
12 both the company and the bank to make that investment.

13 THE COURT: Yeah, but they don't -- are you
14 certain that it's the law that you get to go and make a
15 pitch to somebody and say, Look, we want to be your bank,
16 all right? And we want to be your lender, and we want to
17 loan you money.

18 Now, based on saying something that vague,
19 the people then get to say, My goodness, you had no
20 intention of loaning us money because later on you asked
21 us for financial statements and you asked us for proof of
22 contracts that we told you really existed and that sort
23 of thing. At some point in time, I mean, banks just
24 aren't in the business of loaning people money based on
25 sales pitches. There is always the follow-up where they

1 say, You know what? We're going to need to see your
2 lease. We're going to need to see your last year's tax
3 return. We're going to need a financial statement.
4 We're going to need this or need that. They don't say,
5 We're going to cart blanche finance your dream.

6 MR. DUFFY: Right, and what you're describing
7 is exactly what I'm saying is different. That is
8 describing what you can do for a client in that back and
9 forth. This is a different situation where they've
10 undertaken different duties to different people.

11 It's not anymore a deal with a bank, working
12 with a client. They've gone to outside people for the
13 purpose of telling them, This is good. Invest in this
14 group because we're here and look what we will do, what
15 we're able to do, and those people aren't going to have
16 the -- BB&T said, We've already done the analysis. Here
17 is where we are and here is what we're able to do, and
18 they weren't able to do it when they said.

19 THE COURT: Maybe that needs to be where we
20 circle back to the requirement of what BB&T said to these
21 folks and whether or not that needed to be in writing,
22 because, again, you're saying BB&T came in, made this
23 pitch, and they said they're going to do these things for
24 us, and based on that, we're going to rely on that.
25 Well, again, I'm suggesting that it's a little different

1 for anyone, whether sophisticated investor or not, but I
2 really don't think it's the law either that you get to
3 come in, make a sales pitch that is kind of broad, and
4 say, We want to be your bank.

5 I don't get those calls every day, maybe you
6 guys do, but banks don't come in and say, I want to be
7 your bank and this is what I can do. What they do is
8 they come in and typically say, We want to be your bank.
9 We want to be your bank especially, on a level like this
10 and put down in writing, This is what we're going to do
11 for you.

12 And you're saying all of this was done based
13 on a salesman from BB&T coming in and there was nothing
14 in writing?

15 MR. DUFFY: No, Your Honor. What I'm trying
16 to do is say that that all relates to a different point
17 of Skywaves and BB&T, whatever they were working on.
18 There are writings. We have alleged it and we have them,
19 that is there.

20 What we're talking about over here is totally
21 different than a bank coming to do a sales pitch for a
22 client. The bank is coming, giving advice about an
23 investment. That is entirely different than an ordinary
24 debtor/creditor relationship you're trying to create as a
25 salesman for the bank. You've already got the client. 1161

1 What are you doing, going out and trying to induce people
2 to invest in the company? That is taking on additional
3 duties that under -- let's see -- the cases for the
4 different duties --

5 THE COURT: This is where it just gets -- I
6 mean, it's so out of the realm of what is normal that I'm
7 having trouble getting my head around that a bank would
8 come in and have a set down meeting with investors and
9 investors-to-be of a company and say, we want to do
10 business with this company, and you're saying that those
11 investors get to say that sales pitch to become that
12 company's bank then becomes the basis for a fraud claim,
13 for the investors to sue the potential lender when a deal
14 down the road doesn't materialize and it wasn't in
15 writing.

16 It was just kind of vague, we want to be your
17 bank and we gave you very strong, good feelings that
18 we're going to invest in your -- we want to handle your
19 company's financial wellbeing for the purposes of this
20 factoring agreement, and based on that, an investor gets
21 to sue the bank and that that is a claim that exists
22 outside of the bank's claim against -- or the company's
23 claim against the bank for some sort of agreement, breach
24 of contract. I mean, I'm just struggling with that,
25 because as you've said, they're not fighting the fact¹¹⁶²

1 that you, at this point, have stated the basis of a
2 breach of contract claim with BB&T insofar as Skywaves is
3 concerned.

4 They ultimately don't think you would be able
5 to prove it, but you've alleged enough to get past it.
6 This is a different breed of cat to be able to say the
7 people that attended that meeting on the basis of wearing
8 two hats, employees of the company and people will decide
9 whether or not I guess they wanted to invest more time or
10 money into that company get to set down and then sue that
11 bank for what got said at that meeting when the contract
12 to do that got breached later is one thing, and then the
13 other would be to say, well, there's something you said
14 in that meeting that was false at the time and you knew
15 it was false, we relied on it, and it was significant
16 enough and material enough and specific enough that we
17 get to sue you down the road for it.

18 Now, I'm telling you, that's a tough nut to
19 crack. I think he wants to rescue you. I think you were
20 doing a good job on handling this.

21 MR. KEFALOS: This meeting, there were
22 certain representations of fact that were made. In a
23 typical factoring agreement, the way this -- in fact, the
24 way this factoring agreement began, BB&T would buy the
25 invoices, that is, the invoices for the products were¹¹⁶³

1 already built, 85 percent of the cost, and that was
2 memorialized in writing.

3 Orders continued to pour in. Skywaves
4 couldn't meet the orders, so BB&T says, Well, I'll tell
5 you what we'll do: Instead of waiting for the product to
6 be finished and you issue an invoice to buy it, we'll
7 start to buy your purchase orders from you, okay?

8 This was not memorialized with a new writing.
9 This was memorialized through the course of conduct and a
10 series of e-mails. The products continued to -- the
11 orders continued to roll in, so BB&T and Skywaves
12 couldn't keep up with the orders, so BB&T says, I'll tell
13 you what. Instead of buying your invoices or your
14 purchase orders, we'll now start buying your site plans.

15 In other words, when the New York state
16 police identify on a map where they're going to be
17 building in the next six months, we'll buy those from
18 you, so coming to the meeting with these investors, some
19 of whom were principals in the company and some of whom
20 weren't, the BB&T representative says, We're going to be
21 buying the site plans from you, so we'll be able to get
22 the money up front before you even start to put your
23 parts together, and that will allow you to figure your
24 process.

25 The representative also said, but we need 164

1 some more cash equity. We need to show some balance, and
2 we need you fellows to come up with some money to put
3 into the company so that the balance sheets looks better.

4 Based on those representations, that is, the
5 promise -- the representation and effect in the course of
6 dealing that BB&T was going to be buying the map plans,
7 these investors made their investment. Later on we found
8 out that was false because when the BB&T sent their
9 representative from the home office down to look at the
10 way things were operating and he says, Well, you guys are
11 submitting maps and getting paid on it, and he said,
12 Well, yeah, that is what our agreement was, he said, We
13 never do that. We never, under any circumstances, would
14 go ahead and fund a purchase order or buy a factor based
15 on a map that someone later says they're going to
16 develop.

17 So we learned at that point that what had
18 been promised before as being flexibility on BBT's was,
19 in fact, not true. They didn't have the authority. They
20 didn't have the right, and they didn't have the ability
21 to do this kind of flexible lending.

22 Now, this is an interesting e-mail process,
23 because the only formal written agreement is the 85
24 percent of the invoice. As the system evolved and as
25 BB&T moved down to purchasing the purchase orders and

1 purchasing based on the map locations, BB&T writes and
2 says -- writes to Skywaves and says, Look, we don't have
3 the forms or the paperwork that match up with what we're
4 doing, and rather than hire lawyers to draw new
5 paperwork, we've just let our letters serve as the
6 memorial of this agreement.

7 Skywaves says, Fine. We'll go ahead and
8 continue to act on that basis, and Skywaves did until
9 people from the home office, from BB&T came down and
10 said, Well, we never authorized this. This is not the
11 way we do business.

12 They accused Skywaves of committing fraud and
13 having committed some misconduct and pulled the plug on
14 the financing when this was the financing that had been
15 arranged all along by the BB&T representatives.

16 Anyway, I digress. The point I was making is
17 when the BB&T rep went to the investors, he said, We are
18 funding presently and will continue to fund based on
19 these map locations. We need you guys to put some money
20 into it to improve the balance sheet, and we will
21 continue on. Based on and in reliance of that
22 representation, these various investors --

23 THE COURT: Let me stop you. When they went
24 to them and said, We'll start doing financing on the
25 maps, they didn't do financing on the maps; is that¹¹⁶⁶

1 right?

2 MR. KEFALOS: That's right.

3 THE COURT: And it was subsequent to that
4 that some auditor, or somebody else up the food chain,
5 came down and said, Hey, somebody screwed up, and we
6 don't do that, and we're not going to do this anymore.

7 MR. KEFALOS: Yeah. They called a default,
8 saying you have been submitting false applications for
9 money.

10 THE COURT: Well, I guess maybe then when you
11 talk about that whole fraud, material element of fraud,
12 being a false statement at the time it was made --
13 because it sounded like maybe Edahl, he thought it was
14 true, and, in fact, it actually did come to fruition that
15 that is the way they financed them for a while until some
16 higher up found out and said, Wait a minute, wait a
17 minute. This was not done properly.

18 But how could Edahl be sued for -- how could
19 Edahl's statement be basis for a fraud claim if Edahl
20 thought he could do it and it turned out he did it for a
21 while?

22 MR. KEFALOS: Well, maybe Edahl thought he
23 could do it. Maybe he thought he could do better, but
24 that is something that needs to be fleshed out later. The
25 fact is when the higher ups came down and said nobody had

1 any authority to approve this, this is wrong, this is not
2 the way we do business at BB&T, that made what Edahl said
3 false.

4 THE COURT: No, it made it wrong. It may
5 have been false -- false in the sense of fraud. If Edahl
6 believed it was true, he was just mistaken. If what I'm
7 hearing is right, it's because it sounded like, in fact,
8 it became the method of financing thereafter until later
9 on down the road.

10 MR. KEFALOS: And it may be true, and that is
11 one part of what we have to look at, when we get into
12 discovery. Did Edahl believe this? Was he mistaken, or
13 was he going outside the party line? Edahl made promises
14 and representations about the method of funding based on
15 these map locations.

16 THE COURT: Okay.

17 MR. DUFFY: And to pick up on your point,
18 whether he thought it at the time or not, it was
19 negligent in making it that way. This company wouldn't
20 allow it. They should have investigated that beforehand.
21 That is clearly a negligent misrepresentation that you
22 have a duty to take reasonable care in making some
23 representations when you have a pecuniary interest in it.
24 The Winburn case establishes that. It establishes that
25 he individually had that duty if he has a pecuniary¹¹⁶⁸

1 interest, and it also says if you assume in the course of
2 your employment that establishes a pecuniary interest, so
3 he had a duty not to just go up and travel, make a pitch
4 of something they wanted to do. He had to know when he
5 said that they were able to do it that they were able to
6 do it, and they were, whether fraudulently, whether it
7 intended to mislead him, or whether he just misled them
8 negligently is something we can find out in discovery,
9 but it was something that he represented they were able
10 to do that they weren't.

11 And that was true at the time, because once
12 it got up to the people that make the decisions, they cut
13 it off. It's not that they didn't try to do, so that is
14 not really the point of whether -- of the nature of his
15 representation. And, Your Honor, to pick up on the issue
16 that we were struggling with, I think it helps to look at
17 the Murray versus Bank of America case where a duty --
18 there was a duty created to a non-client who just came in
19 when a fraudulent account had been opened in her name,
20 came to the bank and said, That's not my account, please
21 close it. You've got my information, and they didn't
22 close it for another month, and they were held liable
23 with a duty to her and negligence. She wasn't even a
24 client.

25 Now, here, the bank intentionally went ~~to~~¹⁶⁹

1 other people and said these things that we contend and
2 allege were false when said, that they were negligently
3 made or fraudulently made, and that certainly creates a
4 duty again to take reasonable care in your
5 representations. Under Winburn, it also has a duty of
6 disclosure, Your Honor, which is another part of the case
7 under a case I would be happen to hand up to you,
8 Consolidated Insurance Benefits versus Conseco Medical
9 Insurance. It's a district of South Carolina case that's
10 a very interesting parallel to this one because they
11 say -- they go through the analysis, say, Okay there is
12 no fiduciary duty there, in that situation, but what
13 happened was there was a course of dealings with an
14 insurance broker and essentially a provider of nationwide
15 health care programs, and they convinced this broker to
16 just use ours. It would be exclusive for us, and then
17 when they had financial trouble, the broker went to seek
18 advice from these -- from the head office who made these
19 assurances to him about the financial capabilities which
20 were not accurate, and that created this duty of
21 disclosure, that you have to report when it becomes -- in
22 fact, you weren't financially sound and you pulled the
23 plug and didn't do this kind of work anymore that you
24 convinced these people to do exclusively with you, and so
25 it's -- the point is, that as this relationship went¹⁷⁰

1 along for a little while, they never -- the bank never
2 even told -- never disclosed that we're not going to
3 do -- you know, we need to make something different. We
4 need to make changes. They just pulled the rug out from
5 underneath them, a breach in this duty to disclose which
6 under the Consolidated Financial case and under the South
7 Carolina National Bank -- another South Carolina case
8 along that line which they've undertaken by taking on
9 something they concede that was outside their ordinary
10 course of business, that they've gone and made pitches
11 to -- and given advice, which is, again, beyond the scope
12 of the ordinary business, for their benefit, for their
13 own benefit, that they had a pecuniary interest in.

14 And that creates additional duties for the
15 bank to both the -- to both Skywaves under, again, the
16 cases that are cited in the briefs, Your Honor, Burwell
17 versus South Carolina National Bank and Cowburn vs.
18 Leventis recognizes that you have that duty when you
19 undertake to advise, in that case a client, about
20 something that is beyond the scope of your contract duty.

21 Your Honor, the oft-cited Winburn case on a
22 negligent misrepresentation that we have the pecuniary
23 interest, they have the duty to take reasonable care,
24 which we have alleged Edahl did not and as Mr. Kefalos
25 explained, it's clear that he did not exercise reasonable

1 care in making these representations for the specific
2 purpose of inducing in investments into Skywaves, which
3 BB&T already had a relationship with.

4 Your Honor, there are a couple other points
5 I'll address briefly that the bank has raised in the
6 motion to dismiss. Some of them are about the unfair
7 trade practices claims. One of the points is it's not
8 applicable here because the bank is heavily regulated. I
9 expect you've seen that before, the Ward vs. Dick Dyer
10 Associates, South Carolina case in 1991. Supreme Court
11 said that's not what it means. It means if the
12 regulations specifically permits or allows the act that's
13 done, then you can't have an unfair trade practice, but
14 just because the industry is regulated doesn't mean you
15 can't have an unfair trade practice.

16 Same point they allege that we haven't made
17 specific allegations about protecting the public
18 interest, Casey Outdoor Advertising case makes clear the
19 potential for repetition, which we've alleged is
20 sufficient to establish the impact on the public
21 interest.

22 Again, the same issue for an unfair trade
23 practices claim for Mr. Edahl saying you can't have
24 unfair trade practice claim against him, which is really
25 against the company, but in Plowman vs. Bagnal 316 1172

1 S.C. 283, the South Carolina Supreme Court made clear if
2 the facts are done by the individual then that claim can
3 lie against the individual. Certainly, you know, if
4 you've lost a job, maybe it's harder to prove than as a
5 potential for repetition, but that something that would
6 need to be addressed after a 12(b)6 motion.

7 Your Honor, the breach of contract
8 accompanied by fraudulent act, there is a question here
9 also about allegations of fraud. Fraud in this instance
10 under Connor vs. City of Forest Acres means an act with
11 dishonesty in fact or unfair dealing, and that is exactly
12 what has been alleged, Your Honor.

13 Let's see. Paragraphs 55 and 56 -- again,
14 Your Honor, it's what we've discussed, that they
15 understood the needs, basically showing that they made
16 then analysis already that Skywaves did not need a large
17 bank or additional capital funding for its broker, that
18 it was essentially good investment, position for success,
19 they wanted to take them to an IPO that they would
20 provide funding to all the financial needs, and they
21 would do that through something outside of the ordinary
22 course of business that was devised exclusively for
23 Skywaves.

24 And Your Honor, the other representations
25 made at that meeting -- let's see. Based on their own¹¹⁷³

1 comprehensive review, BB&T believed Skywaves would be a
2 significant infrastructure supplier. That is
3 representing to investors, Here we have expertise. We've
4 done this review. This is a good investment, then the
5 representation was we are fully committed to providing
6 short- and long-term funding, would act as a partner, and
7 the commitment is going to be unique and the equivalent
8 of funding offered by Hunt Capital and by Wachovia, which
9 it wasn't. They weren't able to do it at the time, and
10 he should have known it if he didn't.

11 I'll be happy to answer any questions now.

12 THE COURT: It looks like Mr. Cooke wants to
13 say something.

14 MR. COOKE: Briefly, on that point, again,
15 this is a 12(b)6 and I think it's probably helpful to the
16 Court to have this dialogue, but we do have to look at
17 the what the complaint alleges, and the part that
18 Mr. Duffy just paraphrased is from paragraph 61 of the
19 complaint. It says -- and, bear in mind, BB&T had
20 already been Skywaves' banker for two years at this
21 point. The original factoring agreement was entered into
22 in 2005. This meeting occurred in July 2007.

23 Mr. Edahl wasn't some guy with a loud suit
24 and, you know, a slick way about him. He was already the
25 relationship manager between BB&T and Skywaves. His job

1 was to serve them and to keep them as a client.

2 Under the allegations of this complaint, we
3 may never be able to prove it, but what we would intend
4 to prove is that he oversold his authority. He made
5 representations that were not true and that he knew they
6 weren't true, and that is what we allege in the
7 complaint.

8 Paragraph 61 is all the things that Mr. Duffy
9 just said. Paragraph 66 says, however, defendant's
10 representations were untrue when made. Number 67 says,
11 In point of fact, at the time defendants made the above
12 detailed representations, they had no intention of
13 fulfilling their promises to Skywaves, and that invokes
14 the case as well, and I'm sure Your Honor knows that an
15 exception to the rule that says it has to be a present
16 fact is that if you had no intention or you did not have
17 the ability to fulfill your promises, then that could
18 become a fraud.

19 We've made in our brief some other arguments
20 that I don't think you need to get to. North Carolina
21 law applies. There is a provision in this statute of
22 frauds that says that if there is another statute of
23 frauds that is inconsistent with this one, then you use
24 the other one, but for our purposes, I think all we need
25 to say at this point in 12(b)6 is that further

1 development have made all the allegations in the
2 complaint very comprehensive, but further development
3 needs to be made as to the nature of the agreement
4 between the parties, and is it a loan? In other words,
5 does it come under the statute of frauds, or is it
6 something else, factoring agreement, and, second, do they
7 meet the writing requirements?

8 We've alleged in numerous paragraphs that
9 there was a writing. The original one was written and
10 actually literally signed, and that the parties entered
11 into what was the legal equivalent of signed agreements
12 by signing letters and e-mails and agreeing that that
13 would be the form agreement with the parties.

14 And now we have a third thing that needs to
15 be disputed, and that is what exactly was the
16 representation and does it rise to the level of negligent
17 misrepresentation or fraud and was the reliance
18 reasonable, or was it just puffery?

19 THE COURT: All right. Well, we've let them
20 gang up on you, Ms. Cherry, and you usually don't let
21 them do that, but I will let you respond.

22 MS. CHERRY: Just very briefly. As Mr. Cooke
23 had said, to the extent there may be some details or
24 specific questions that the Court has, I think we -- all
25 parties attempted, Your Honor, to address nuances that --

1 or discreet issues that may have come up, and I believe
2 we all filed our brief, so to the extent there is
3 something that I don't address, I would request -- my
4 hope is that it is addressed and if the Court has a
5 lingering question that it is addressed in the briefs.

6 But the overarching response, Your Honor, to
7 all of the arguments that have been made is to go back to
8 the very beginning and what we said at the outset.

9 Looking at the allegations in the
10 pleadings -- and I will submit to the Court there have
11 been some things said this afternoon that are actually
12 not alleged in the pleadings, but I do think paragraphs
13 53 through 61 in Skywaves' complaint pretty consistently
14 represents the allegations of all of the plaintiffs.

15 And, Your Honor, just for point of
16 clarification, there is no allegation that BB&T was
17 acting as a legal partner, and I think opposing counsel
18 concedes as much, in terms of at least at this stage
19 that's not the allegation, the specific is BB&T would act
20 as a partner in managing Skywaves' growth, but in context
21 of all the allegations, it is in terms of providing
22 Skywaves short-term, long-term financing needs, all of
23 these representations pertain to BB&T's alleged promises
24 to fund Skywaves, which is where we were at the very
25 beginning, Your Honor, notwithstanding the disagreement 1177

1 among the parties in terms of exactly what that agreement
2 was.

3 At the end of the day, it's an alleged
4 promise to fund their financing needs. And that's the
5 very cause of action, causes of action, by these
6 investors that the South Carolina statute bars. At most,
7 Your Honor, taking all of these allegations as true, the
8 only party who has potential claims against BB&T --
9 again, Your Honor, acknowledging that we don't agree with
10 the merits of those claims, but the claims themselves at
11 this stage, are Skywaves, which is precisely why
12 BB&T only filed a partial motion to dismiss, recognizing
13 the stage where we are, legitimately, is a matter of law,
14 BB&T couldn't move to dismiss those and exact to prevail,
15 but with respect to these investor claims against BB&T,
16 based upon alleged representations by one of its
17 employees to meet the future financing needs of Skywaves,
18 as a matter of law, cannot lie against BB&T and Edahl,
19 not just because of the statute, but because they are
20 claims of future performance, future promise.

21 And I will note, Your Honor, to the extent
22 that the plaintiffs are trying to argue that that created
23 some type of fiduciary relationship, the South Carolina
24 statute specifically says that it doesn't allow a claim
25 on an alleged fiduciary relationship.

1 And I would beg to differ with counsel's
2 argument that the provisions in subsection C of the
3 statute, unless the parties seeking to maintain the
4 action has received writing, doesn't apply to sections A,
5 B, or C. The phrase or is used, meaning A or B or C,
6 unless the parties seeking to maintain the action have
7 received a writing.

8 Again, Your Honor, these are investor claims
9 that have no basis in this Court against BB&T or Edahl,
10 based upon the statutory law and the case law in South
11 Carolina. There is no duty to those individual
12 plaintiffs as a matter of law under the circumstances
13 alleged, no right to rely. And, Your Honor, again, the
14 representations themselves would not give rise to a
15 negligent or fraudulent inducement claim because they are
16 alleged promises of future funding or future performance.

17 And at the final point under the unfair trade
18 practices act, the allegations in the complaint make
19 clear that this is a dispute based upon an agreement by
20 the parties, and I think the case law in South Carolina
21 establishes that if it is a circumstance that involves
22 the parties in and of themselves, that doesn't give rise
23 to an impact on the public interest, such that the
24 defendant's motion to dismiss should be granted as well,
25 Your Honor, on that cause of action.

1 If the Court has any specific questions, I
2 would welcome the opportunity to address them.

3 THE COURT: I think that's all I have for
4 today. I think what I would like y'all to do is submit
5 me proposed orders within two weeks, and I'll go back and
6 look at this.

7 In light of understanding the fact situation
8 a little bit better, I'm going to reread these briefs.
9 I'll let y'all know. Okay? So two weeks from today,
10 whatever that is.

11 - - -

12 (Whereupon, the proceedings were concluded.)

13 - - -

14

15

16

17

18

19

20

21

22

23

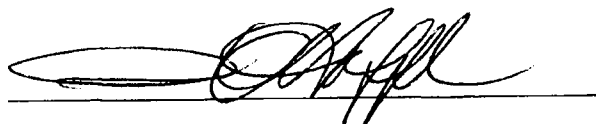
24

25

I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 15th of August 2011.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

February 10, 2012

A handwritten signature in black ink, appearing to read 'A. Haffenden', is written over a horizontal line.

Circuit Court Reporter

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON 2009-CP-10-7516

SKYWAVES I CORPORATION,	)	
	)	
Plaintiff,	)	TRANSCRIPT OF RECORD
	)	
-vs-	)	January 12, 2015
	)	
BB&T COMPANY, Successor	)	
in Merger to Branch Banking	)	Charleston, South Carolina
and Trust Company of SC,	)	
a/k/a BB&T, and JAMES EDAHL,	)	
	)	
Defendants.	)	

B E F O R E:

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

A P P E A R A N C E S:

Andrew Epting, Esquire
George J. Kefalos, Esquire
Attorneys for the Plaintiff

Molly Hughes Cherry, Esquire
John England, Esquire
Julio E. Mendoza, Jr., Esquire
J.W. Nelson Chandler, Esquire
Attorneys for Defendants

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

1 (Monday, January 12, 2015.)

2 THE COURT: All right. I guess there is a
3 motion to strike, a demand for a jury trial, and filings
4 going both ways on this, so I guess plaintiff made the
5 motion to strike; is that right?

6 MR. MENDOZA: Your Honor, Rick Mendoza for
7 BB&T. It was BB&T's motion to strike the jury demand,
8 and then Mr. Edahl, the other defendant, has joined in
9 too.

10 And, Your Honor, just by housekeeping,
11 Mr. Chandler and I are kind of splitting issues some so
12 that we don't duplicate the arguments, so if you'll
13 address principally the standing Mr. Edahl also has with
14 respect to the jury trial waiver provision.

15 THE COURT: All right. Feel free to go ahead
16 then.

17 MR. MENDOZA: Thank you, Your Honor. Your
18 Honor, Branch Banking & Trust Company, BB&T, filed its
19 motion to strike the jury trial demand based upon jury
20 trial waiver provisions in six documents signed by
21 Skywaves, the plaintiff in this case.

22 Your Honor, I say six documents because I
23 emphasize six times Skywaves signed a waiver of its right
24 to a jury trial. The jury trial waiver provisions are
25 applicable to the causes of action that the plaintiff has

1 alleged in its amended complaint. And Your Honor may
2 recall that you previously dismissed two of the causes of
3 action so there are now, I believe, six causes of action
4 remaining.

5 Your Honor, the jury trial waiver provisions
6 are quoted in full in the memorandum that BB&T filed with
7 the Court. Your Honor, we filed that memorandum on
8 December 22nd. We also filed a reply to the plaintiff's
9 memorandum in opposition to our motion. We filed it this
10 morning. We received the plaintiff's memorandum on
11 Thursday afternoon. We were unable to get our reply
12 prepared in time to file on Friday, and, Your Honor, I
13 would like to address some points that were raised in the
14 plaintiff's memorandum in opposition because, as I read
15 their objection, they don't take issue with the fact that
16 the jury trial waivers were conspicuous, that they're
17 unambiguous, nor to they take issue with these being
18 knowing waivers of the right to a jury trial by the
19 documents that are executed.

20 Your Honor, the plaintiff instead has noted
21 that it brought its actions under the factoring
22 agreement, as we refer to it, and it's Exhibit C. Your
23 Honor, there were joint exhibits submitted by the parties
24 previously, and it is Exhibit C in those exhibits.

25 The factoring agreement, Your Honor, includes

1 a choice of law provision that states that substantive
2 law matters will be decided under North Carolina law,
3 and, Your Honor, I'll be more specific to actually quote
4 the provision. Again, Your Honor, it's Exhibit C if you
5 would like to look at that sometime later, but the choice
6 of law provision is paragraph 25 -- it's actually titled
7 applicable law.

8 It says, This agreement shall not become
9 effective until accepted by BB&T in High Point North
10 Carolina, and here is the pertinent provision: All acts,
11 transactions, rights, and liabilities under this
12 agreement shall be governed in all respects by and
13 construed in accordance with the internal laws of the
14 state of North Carolina.

15 This same document includes a jury trial
16 waiver provision, Your Honor, and the plaintiffs take the
17 position that because the factoring agreement includes
18 this choice of law provision for North Carolina law and
19 there is a statute, a North Carolina general statute, I
20 think it's 22(b), but anyway, Your Honor, in North
21 Carolina one cannot waive jury trial, the right to a jury
22 trial; however, Your Honor, as we have set forth in the
23 reply, North Carolina law is not applicable with respect
24 to the question of the jury trial, and there are a couple
25 reasons why.

1 I referred to the choice of law provision a
2 few minutes ago as being substantive. When you look at
3 the authorities on this particular question -- and of
4 course, it's not the first time it's ever arisen. Your
5 Honor, it's summed up in the restatement of contracts
6 that the right to a jury trial is a matter of a local
7 forum. It is a procedural right, it's not a substantive
8 right, and the Courts have recognized this distinction
9 that you may have a choice of law provision which
10 provides that substantive legal issues will be decided
11 under that other state, I think they refer to it as a
12 foreign state, but the other state, in this case North
13 Carolina law, but that isn't a procedural matter.

14 That it's for the local forum to apply its
15 procedures and, Your Honor, there are a couple points I
16 would like to make in regard to that before I even move
17 on to another. One is that when you read the provision
18 that I just stated, it's very clear that the applicable
19 law provision, paragraph 25 of the factoring agreement,
20 clearly intended that the substantive law matters because
21 it says all acts, transactions, rights, and liabilities
22 under this agreement. Nowhere is there any reference to
23 procedural matters, such as a jury trial, and, in fact,
24 this very document includes a waiver of right to a jury
25 trial.

1 So the choice of law provision and the
2 factoring agreement clearly is intended to be limited to
3 substantive legal matters, and it makes sense, Your
4 Honor, also, because when you look at it, the right to a
5 jury trial doesn't determine, you know, what law will be
6 applied to the issues, it just determines the method in
7 which the case will be tried, and that's what several
8 commentators have noted.

9 The local forum determines the right to
10 determine what method will be used for the trial, whether
11 it's jury or nonjury. Your Honor, of course, as you're
12 aware, in South Carolina -- well, the Courts of South
13 Carolina recognize that the party may validly waive its
14 right to a jury trial, and we've cited the Supreme Court
15 decisions in our reply, and I'm sure Your Honor knows as
16 well.

17 We included a case that was decided in
18 Richland County just less than a month ago where the
19 Court forced BB&T provision for a jury trial waiver and
20 documents. I've been addressing, though, the question of
21 whether the factoring agreement -- we maintain the
22 factoring agreement provisions of their own would warrant
23 striking the plaintiff's jury trial demand, based on the
24 jury trial waiver provision in it, and then also the
25 choice of law provision being limited to substantive¹⁸⁷

1 legal matters, but, Your Honor, there are five other jury
2 trial waivers under documents that provide that South
3 Carolina law is controlling, and we have included those
4 provisions and they're essentially the same, and it is
5 very conspicuous and unambiguous, and, Your Honor, there
6 is one aspect I would like to quote.

7 In reading it, it says: The unsigned hereby
8 waive right to trial by jury of any matters or claim
9 arising out of, and, of course, the five different
10 documents, it cites the document, and then it carries on,
11 or out of the conduct of the relationship between the
12 undersigned and BB&T. Each of those five other waivers
13 provide that the right to a jury trial is waived as to
14 any claim the other party might assert, or BB&T would
15 assert, that arose out of the relationship between the
16 parties.

17 In fact, Your Honor, those other five
18 documents were just of that nature. They arise out of a
19 relationship. They pertained to funding or loans that
20 BB&T was providing in conjunction with the funding under
21 the factoring agreement to Skywaves. The other jury
22 trial waivers were essentially belt suspenders because we
23 maintained the waiver provision factoring agreement was
24 sufficient, but, Your Honor, if it weren't, we've got
25 five other jury trial waivers, and they all say the same

1 thing; essentially, Skywaves has waived its right to a
2 jury trial on any issues arising out of the relationship
3 it had with BB&T.

4 Your Honor, there were a couple points that
5 the plaintiff made in its memorandum in opposition to our
6 motion, or relating to the fact that well, those other
7 provisions don't really apply because those notes have
8 been satisfied and we never -- BB&T never called those
9 loans in default, didn't file proof of claim.

10 Well, Your Honor, that's not actually a valid
11 reason to ignore those other provisions because none of
12 those things matter. When you look at those
13 provisions -- and again, we've included them in the full
14 provision and memorandum we filed in December, but
15 they're also in the joint exhibits we've given exhibit
16 numbers, but, Your Honor, there is no condition that the
17 waiver of the rights of jury trial waiver is not
18 conditioned on anything. So long as this indebtedness is
19 outstanding, it's not limited in time.

20 In fact, the actual language is that the
21 undersigned hereby waive, hereby waive -- we're stating
22 that is immediate. When the document is executed, the
23 waiver occurred. Those provisions aren't limited in
24 time, and particularly when it goes on to say that it's
25 applicable to any claims that arise out of the

1 relationship between the parties. Certainly the other
2 five provisions have continued efficacy and are
3 applicable too.

4 So, Your Honor, we come back around to the
5 fact that the plaintiff, six times, waived its right to a
6 jury trial on any merits between the parties. The waiver
7 conditions are conspicuous, they're unambiguous, and we
8 maintain there is no basis on which they can properly
9 survive on jury trial on any of the matters in this case
10 at this time, and I mentioned earlier with regard to all
11 the causes of action as they stated in their memorandum,
12 their claims are all based in one matter, or, in other
13 words, on the factoring agreement, so it's not like there
14 could be some claim outside of it.

15 But even then as I say that, the labor
16 provisions say any claim arising out of the relationship,
17 so, Your Honor, we maintain that the jury trial demand be
18 stricken.

19 THE COURT: So it's your position, basically,
20 that North Carolina law controls the outcome of this case
21 except for the jury provision, and we're to ignore that
22 statute?

23 MR. MENDOZA: Well, Your Honor, yes, I say it
24 controls substantive matters. The other are procedural
25 matters that are particular to our Courts, the court 190

1 system, but we maintain the jury trial demand as a
2 procedural matter, and we have cited in this request this
3 morning authorities including the restatement, Your
4 Honor, for the provision.

5 THE COURT: All right. Are you speaking?

6 MR. CHANDLER: Judge, Nelson Chandler, and I
7 represent codefendant James Edahl who has been sued
8 individually, and rather than rehash the arguments about
9 the applicability and the enforceability of the jury
10 trial waivers, we rely on the arguments advanced by
11 BB&T with respect to the enforceability of the waivers.
12 I'm here to address the extent to which that waiver also
13 applies to my client, Mr. Edahl.

14 By way of background, the plaintiffs in this
15 case are the borrowers and the defendant is the bank. My
16 client, Mr. Edahl, was an officer/employee/agent of the
17 bank at all relevant times during this -- during the
18 underlying events, and he's been sued as the agent of the
19 bank in connection with the claims at issue.

20 The plaintiff's position is simple as to my
21 client, and it is that he was not a party to the
22 factoring agreement, or for any of the other five
23 agreements, and therefore he has no standing and cannot
24 assert the jury trial waiver provision as to the claims
25 against him.

1 Judge, first off, this is not a case where my
2 client is the only defendant. BB&T, who admittedly was a
3 party to all these agreements, has also moved to strike
4 the jury trial waiver -- moved to strike the jury trial
5 demand as to the entire case, and we join in that motion.
6 So the issue is before the Court with the party with
7 admitted standing to raise that issue, but even if my
8 client -- even if they sued only Mr. Edahl and not the
9 bank, it's our position that Mr. Edahl would still have
10 standing to raise, invoke, and rely upon the jury trial
11 waiver in the document signed by Skywaves and, Judge,
12 I've cited a case in my brief, and I'll just hand it up
13 to the Court. This is outside of this jurisdiction. I
14 have two copies here.

15 This issue has not been addressed squarely in
16 South Carolina one way or the other, Judge, but looking
17 to other jurisdictions for guidance, the leading case on
18 the subject appears to be the Third Circuit opinion in
19 Criscinda, a 2007 case, and in that opinion, the Court
20 looked at this very issue. That opinion actually arose
21 out of the dispute as a result of merger between Mercedes
22 and Chrysler, and the Chrysler folks sued the Mercedes
23 folks over some misrepresentations they alleged that
24 occurred as a result of that merger and they also sued
25 some of the officers of the company, and the officer¹⁰²

1 the company moved to strike the jury demand.

2 And the Court looked at the issue and
3 determined that where a corporate principal has entered
4 into an agreement with a valid jury trial waiver, an
5 agent of that corporate principal, even if he's a
6 non-signatory, may raise and rely upon the jury trial
7 waiver. And since that time, Judge, we've cited at
8 least, you know, eight or nine cases that have looked
9 back at Criscinda and followed its reasoning, including
10 one, at least in the Fourth Circuit there is a case I've
11 attached as well from the district of Maryland.

12 In that case they looked at the common law
13 and determined that the Fourth Circuit would do the same
14 thing, and also allowed an agent of a corporate principal
15 to invoke and rely upon a jury trial waiver in a document
16 signed by the corporate principal.

17 And the rationale there is basically a
18 corporation can only act through its agents and
19 employees, and if you could get around the jury trial
20 waiver simply by suing the agent of the company, the jury
21 trial waiver would really be of no practical effect
22 whatsoever, and, of course, jury trial waivers are
23 recognized under South Carolina law, so we believe that
24 this opinion -- and I'm not really aware of any -- I'm
25 not aware of any contrary law out there deciding that 193

1 Criscinda was wrongly decided or anything like that.

2 Finally, Judge, this would be a bit of a
3 tougher call if the plaintiff or if BB&T were trying to
4 enforce the jury trial waiver against my client, because
5 he was not a signatory to the agreement. That would be a
6 little bit of a tougher decision. South Carolina Supreme
7 Court has actually decided that you can enforce an
8 arbitration provision against an agent of a company or
9 against a non-signatory of an arbitration agreement, but,
10 anyway -- we don't have that here, but, anyway, that
11 would be a more difficult decision.

12 In our case, all we're trying to do is hold
13 Skywaves to the decision it signed, so we are a
14 non-signatory to this agreement. We're not a party to
15 those agreements, but we're trying to hold plaintiffs,
16 who did sign the agreement, to that agreement to the
17 extent they have to honor it with BB&T.

18 THE COURT: All right.

19 MR. CHANDLER: Thank you, Judge.

20 MR. EPTING: Judge, it's a small number of
21 this bench that I would ask this question of: Have you
22 had much time to look at the briefs that have been filed?

23 THE COURT: One just got handed to me prior
24 to walking in. I think I saw yours over the weekend, but
25 I don't -- I read one of them over the weekend. I just

1 got one of them, okay, so -- don't worry.

2 MR. EPTING: It may help, Judge, just a
3 little bit of background. Judge, I at one time was
4 talking to a jurist who told me he believed in the
5 concept of KISS: Keep it simple, stupid, and I believe
6 it's pretty good advice.

7 So what we have in this case is Skywaves had
8 three loans with BB&T: A \$400,000 loan in 2005 that had
9 a promissory note and a loan agreement, and that was,
10 Judge, related the purchase of some property. It had a
11 2007 promissory note, loan agreement, and security
12 agreement, so those are the five agreements, except for
13 the factoring agreement, which was also executed in 2005.

14 So we've got a \$400,000 loan, we have a
15 \$475,000 loan, the 2007 loan, 475,000, and then we have
16 the moneys that were withdrawn under the factoring
17 agreement. So the first brief filed by BB&T goes
18 through the reference to the five waiver provisions in
19 the five documents, excluding the factoring agreement,
20 but, Judge, each of those agreements is inapplicable.

21 Mr. Mendoza says what has that got to do with
22 it, that they aren't being sued by it? They aren't. The
23 answer concedes they're not being sued upon, when BB&T,
24 Judge, filed their claim in bankruptcy, the only document
25 that they claim they were owed money on was the factoring

1 agreement, and both the 400,000 and the \$475,000 loans
2 have been paid in full, but somehow BB&T says these
3 documents have some applicability, and a jury trial
4 waiver provision still prevails.

5 So I suppose, Judge, what that means is that
6 if Mr. Konersmann, who is in the courtroom, were hit by a
7 BB&T vehicle that somehow these documents survive and he
8 would have waived a trial by jury. I think that's
9 ridiculous. Those agreements aren't applicable here at
10 all. The only document that is in dispute as a claim or
11 as a defense is the factoring agreement.

12 So the factoring agreement, Judge -- and what
13 I would like to do is pass this up to Your Honor, if you
14 would like. We'll start on paragraph 29, and in this
15 case, in paragraph 29, there is some language about
16 whether it's conspicuous or not, but that's not really
17 our point in our argument.

18 You'll notice it says to the fullest extent
19 permitted by law, and it goes on to, Trial by jury and
20 the right to trial by jury on any issue in any way
21 pertaining to this agreement or in any transactions or
22 occurrences arising hereunder or governed hereby, so
23 that's what the waiver says in this document.

24 We then go, Judge, to paragraph 25, and it
25 says this agreement shall not become effective until 196

1 accepted by BB&T in High Point, North Carolina, and then
2 it says, All acts, transactions, rights, and liabilities
3 under this agreement shall be governed in all respects by
4 and construed in accordance with the internal laws of the
5 State of North Carolina.

6 So what we know, Judge, is this is a North
7 Carolina contract, and that provision -- that provision,
8 25, is repeated in two riders to the factoring agreement
9 which is pages two and three to the document that I
10 handed you up. Coincidentally, Judge, everything I am
11 giving to you has been sent to you and has been filed.

12 So we have this as a North Carolina contract
13 because it was executed and accepted in North Carolina,
14 and we have an agreement that North Carolina law applies.

15 THE COURT: Let me ask you this: If you
16 brought this lawsuit in North Carolina, your position
17 would be unequivocally that those paragraphs do not have
18 any weight whatsoever because there's a statute that
19 says, you can't waive them, no matter what it says.

20 MR. EPTING: Right.

21 THE COURT: No matter how express it appears
22 to be and highlighted, doesn't matter. There's a
23 statute. You can't waive it. We get a jury.

24 MR. EPTING: Right.

25 THE COURT: That's your position?

1 MR. EPTING: Right.

2 THE COURT: Okay.

3 MR. EPTING: And, Judge, what I would like to
4 do is pass up to you a case called Lister and ask if you
5 will refer with me to page 10 of this case. And
6 referring, Judge, to the bottom of the second column and
7 running over through the first paragraph on the next
8 page, and I am not going to read it, but, rather, just
9 ask if you wouldn't mind reading it, and then I would
10 like to address a few things raised by the case.

11 THE COURT: Okay.

12 MR. EPTING: And, Judge, since it came up
13 several times in remarks made by Mr. Mendoza, if you
14 would go over to the right-hand column of the second
15 page, page 11, and you see under most significant
16 relationship, midway in the page, second column, it
17 states, South Carolina has not adopted the modern choice
18 of law test found in the restatement.

19 THE COURT: You said 11. That's on page 10
20 of the one you handed up to me.

21 MR. EPTING: Sorry, Judge, 10. So in this
22 case, Judge, South Carolina law would say we would look
23 for validity and the interpretation of a contract to the
24 law of the state where the contract was made. So in the
25 absence, Judge, of a forum selection clause, which we 98

1 have in this case, South Carolina rules say you would go
2 to North Carolina law to determine the interpretation or
3 validity of a provision, and so while we've got the forum
4 selection clause that says North Carolina law applies,
5 you get to the same place when it came to the validity of
6 some provision in the contract, because North Carolina
7 law would still apply under South Carolina choice of law
8 provisions, and it would invalidate the waiver of a jury
9 trial.

10 And, Judge, I don't think there is any
11 dispute about this --

12 THE COURT: I'm not sure I follow that. If
13 South Carolina's law is we look to the contract and the
14 contract says North Carolina law applies and we apply
15 that to contractual terms, then you lose your right to a
16 jury trial because you've waived it, and the only thing
17 that gets you a jury trial is to apply the procedural
18 statute that says you can't waive it. Whether you're in
19 North Carolina or anywhere else, it remains to be seen.

20 MR. EPTING: Well, I'm not sure, Judge, if I
21 would agree with that, but I don't know that it makes any
22 difference in this case.

23 THE COURT: Well, as I understand, the only
24 thing that is saving you or gives you any argument to
25 stand on is that that North Carolina statute -- you, 199

1 got to follow that one as well, Judge, because you
2 otherwise clearly waived your right to a jury trial,
3 haven't you?

4 MR. EPTING: I think, Judge, we would have a
5 hard time arguing that it's not a waiver, yes.

6 THE COURT: Okay. So I guess it really boils
7 down to, tell me why I have to follow that statute that
8 says you can't waive your right to a jury trial?

9 MR. EPTING: Because that's what the contract
10 says you would do, is apply the law of North Carolina,
11 and in North Carolina, that provision is void.

12 THE COURT: So that's really what it boils
13 down to.

14 MR. EPTING: It really does, Judge.

15 THE COURT: Your position is that statute --
16 that provision of the contract applies to procedural
17 rules and statutes of North Carolina as well as
18 substantive law provisions of North Carolina.

19 MR. EPTING: Absolutely, Judge, but one
20 thing, I think that the Court -- the suggestion that this
21 is a procedural rule of a jury trial is erroneous,
22 because think of it this way, Judge: First of all,
23 Judge, it's a constitutional right. South Carolina law
24 says it's a substantive provision.

25 The case that Mr. Chandler handed up to you

1 says that it is a fundamental right, but leaving that
2 aside, Judge, if you apply the procedural law of South
3 Carolina, what would you apply? We'd be entitled to a
4 jury trial, right? If this truly were procedural --

5 THE COURT: If it truly were procedural, then
6 I would only look to the contract which you waived it,
7 because I wouldn't be concerned with -- well, for
8 instance, I have no idea what the law is on in North
9 Carolina about how long it takes to -- a defendant has
10 the right to answer, but let's just assume it's 45 days
11 as opposed to 30, right?

12 Because this contract says North Carolina law
13 applies, you file, sue them in South Carolina, and after
14 31 days after you've served them you haven't heard, you
15 move for an entry of default, but North Carolina, they
16 had 45 days, in my hypothetical, they come in and move to
17 set it aside, saying, Well, wait a minute. They sued us.
18 This contract says North Carolina law applies in North
19 Carolina. We have 45 days to answer a complaint, because
20 under your argument, that's what I would have to follow.

21 MR. EPTING: No, I wouldn't make that
22 argument, Judge, because I would say that that truly is a
23 procedural rule. But all I'm saying to you is, in your
24 example, you're assuming that it's a statute that says
25 it's 30 days, correct, that you answer in 30 days? 1201

1 you go -- if, in fact, this is procedural, then you would
2 go to the procedural law of South Carolina, which says we
3 would be entitled to a jury trial, I mean, if it truly
4 were procedural, Judge. It can't be procedural because
5 they're relying on a contractual provision that says
6 you've waived your trial by jury.

7 If we truly went to procedural law of South
8 Carolina, we would be entitled to a jury trial to start
9 with, so they can't even get there except for this
10 provision. And then their own document says that you
11 look to North Carolina law, and in North Carolina, this
12 provision is void.

13 THE COURT: Okay.

14 MR. EPTING: And, Judge, addressing
15 Mr. Chandler's argument in just a moment, you know, you
16 decided -- I call it Skywaves I. We called it the
17 investor suit, and I think I quoted it, Judge, the
18 Supreme Court in the case that you ruled in concerning
19 the investors ruled that the investors had no claim
20 because they were a third party to the agreement between
21 the bank and Skywaves and could not serve, so in this
22 case, Mr. Edahl has no right to an argument that there is
23 a waiver because he's not a party to this agreement, and
24 it is only this agreement and this provision that he
25 could rely on.

1 We're suing Mr. Edahl in tort.

2 THE COURT: For what?

3 MR. EPTING: Well, Judge, it's right
4 interesting. Since we were last here, of course,
5 Mr. Edahl -- we tried to raise this before you, Judge,
6 before the case was decided in the Supreme Court.

7 Mr. Edahl told some of his superiors, not all
8 of them, that this was financing -- that the factoring
9 agreement was financing based upon invoices and then
10 purchase orders and so that the amount of money that
11 Skywaves could withdraw was on the basis of, first,
12 invoices and later purchase orders.

13 And so on this basis, the bank called this
14 loan and put this company out of business. Mr. Edahl
15 swore to that in his first deposition. So at some point
16 in time, Mr. Edahl decided that was a lie. So Mr. Edahl
17 recanted, under oath, his entire testimony and confirmed
18 that the agreement was what we said the agreement was
19 every time we've been in here, and that was that they
20 were funding on the basis of the site plans that we were
21 getting from Verizon, AT&T, and General Dynamics so we
22 are suing Mr. Edahl for the misrepresentation in his tort
23 because it appears, at least to some extent, he has
24 misled some of his superiors at the bank, and so we don't
25 know at this time, Judge, if the bank agrees that 1203

1 Mr. Edahl is their agent or not, agent for all purposes.
2 So Mr. Edahl doesn't get the benefit of this provision,
3 in any event.

4 Judge, I have a case I'm going to hand up to
5 you. It's called Comer vs. Hurd. It is a case exactly
6 like this. What is the Court to do when the contract
7 provision provides for the applicable law and the
8 applicable law says that provision is void? And, in this
9 case, the Court decides that it must accept the law
10 because in matters of validity and interpretation of the
11 provision of the contract, the law where the contract is
12 made would govern it. May I?

13 Incidentally, the right that the jury trial
14 is provisional, I don't know what provision it is, but I
15 think it's part of our constitution. It's a substantive
16 right. We cite the case that says it's a substantive
17 right.

18 THE COURT: Go ahead.

19 MR. EPTING: George wanted me to make this
20 point, Judge: It is a question of what does the
21 agreement say, and the agreement says that all matters,
22 all rights -- uses the word all rights -- arising under
23 the agreement are determined under North Carolina law.
24 All liabilities are determined under North Carolina law,
25 and so they're saying one of the rights they have is ~~1204~~ this

1 contract provision that we waived a jury trial right.
2 You know, that's part of the contract, and that part of
3 the contract is determined by North Carolina law, under
4 the terms of the agreement.

5 THE COURT: I don't suppose I could convince
6 you to take a nonsuit and refile in North Carolina.

7 You want to reply?

8 MR. MENDOZA: Yes, Your Honor. I'll try to
9 be brief.

10 Your Honor mentioned earlier how the number
11 of days to answer the agreement is on point. This is a
12 procedural matter, the right to a jury trial. Whether
13 the Court applies North Carolina law to issues and causes
14 of action or whether a jury finds it, North Carolina law
15 will apply to the determination of the legal issues, the
16 substantive law matters.

17 And, Your Honor, if there is any doubt,
18 again, and it's been out loud a couple times, but I'll
19 read it again, the applicable law provision in this
20 factoring agreement states all acts, transactions,
21 rights, and liabilities under this agreement. No
22 reference to the right to a jury trial, no procedural
23 matters.

24 We recognize that the right to a jury trial
25 is certainly an important right under the constitution. 1205

1 as all due process matters are, but that doesn't mean
2 that is a substantive issue, and I think Mr. Epting
3 misspoke when he said there is a case they cited saying
4 the right to a jury trial is a substantive legal issue.

5 I think what he's referring to is a quote by
6 the Supreme Court, South Carolina Supreme Court, saying
7 it's a substantial right, not substantive, but
8 substantial right, and we recognize it is, but as, you
9 know, we already mentioned, in South Carolina, our courts
10 enforce waivers of jury trial, the right to a jury trial
11 where certain requirements are met regarding the
12 conspicuousness of the provision and also whether it's
13 ambiguous or unambiguous.

14 Those aren't the issues. Your Honor, I would
15 also note that the case that Mr. Epting passed up, *Lister*
16 *v. Nations Bank of Delaware* again, we maintain that that
17 is, again, substantive law.

18 I did want to briefly also say, Your Honor,
19 the position that Mr. Epting took with regard to the
20 other documents, as I said in my opening, those waiver of
21 jury trial provisions and the five other documents are
22 effective. There is no limitation on them, and they were
23 made immediate at that time. The provision said hereby
24 waived, and I also note that Mr. Epting and the plaintiff
25 includes no citation of authority or no specific 1206

1 references to language in their objection, or the
2 plaintiff's memorandum, I should say, that they filed in
3 opposition to our motion to strike the jury trial
4 provision. Those provisions remain operative because
5 they say they include claims arising out of relationship.

6 Also, Your Honor, it's notable that what
7 causes of action, negligence, by its very nature,
8 involves relationship of parties, and therefore it goes
9 beyond just the factoring agreement.

10 Your Honor, I said I'll be brief, and I will,
11 but I do want to say, and Mr. Chandler may have comment
12 about it. We maintain that the description of
13 Mr. Edahl's testimony just given is not accurate. We
14 maintain -- first off, it was not his testimony that
15 BB&T called the loan in default, the factoring agreement
16 in default based on the funding, the site plan -- the
17 site plans, Your Honor.

18 We have repeatedly taken the position, and I
19 believe Mr. Edahl's testimony -- we can always -- when
20 the time comes, it's not really before the Court today,
21 go directly to the transcripts of the depositions, but it
22 was not his testimony that the bank called the default on
23 that basis. That's what we know the plaintiff hopes to
24 persuade someone. But, Your Honor, we have steadfastly
25 maintained that that was not the basis, and we have 1207

1 documents to prove otherwise.

2 And then, Your Honor, he did not recant his
3 testimony. Mr. Edahl did not recant his testimony. He
4 corrected a point about his testimony, but, again, that's
5 not really before you today. I just felt I could not
6 leave that unaddressed.

7 Your Honor, if you have any questions -- I
8 said I would be brief. If you have any questions, I'll
9 be happy to try to address them.

10 THE COURT: Looks like y'all gave me
11 something to read about and think about for a little
12 while.

13 MR. MENDOZA: Thank you, sir.

14 MR. EPTING: Judge, one thing I forgot to
15 mention, the case that I tendered, there is a discussion
16 in there --

17 THE COURT: The Lister case or the --

18 MR. EPTING: No, Your Honor, the latter case.

19 THE COURT: The one out of Georgia?

20 MR. EPTING: Yes. In that case, the argument
21 that is being made is that there is a federal procedural
22 right, and so the party advancing either waiver is
23 effective argues the federal common law as to a jury
24 trial, and the federal judge rejects the notion that
25 you're entitled to some sort of procedural device in 208

1 federal court but, rather, says, no, you entered into
2 this agreement, and the applicable law is the one you
3 chose, and I'm going to apply it. You don't get the
4 procedural law in this forum.

5 THE COURT: All right. Did you want to say
6 something else?

7 MR. EPTING: I'm sorry.

8 MR. CHANDLER: That's all right, Mr. Epting.

9 Just very briefly, three points, Judge:
10 First, Mr. Epting mentioned the investor case where the
11 Supreme Court held that the investors themselves didn't
12 have standing to sue BB&T because they weren't parties to
13 the contract with BB&T.

14 That's an accurate statement of the Supreme
15 Court's opinion, but it has no bearing whatsoever on this
16 very different issue about whether Mr. Edahl can enforce
17 the jury trial waiver in the contract. This is not about
18 whether Mr. Edahl can sue BB&T as it was in the investor
19 case. This is an entirely different point, so that is
20 entirely irrelevant to the argument before the Court.

21 Secondly, we believe that -- we disagree
22 strongly with the characterization of Mr. Edahl's
23 testimony, and all that addresses, through the
24 substantive issues in the case that we didn't need to get
25 into here today, so I don't need to address any of ~~that~~ ^{that}.

1 The bottom line is that they have sued
2 Mr. Edahl in tort. There is a tort claim against
3 Mr. Edahl, and the tort claims are just as covered as the
4 contractual claims in terms of the jury trial waiver, so
5 those points, we don't feel, make any difference in the
6 outcome.

7 And finally, Judge, plaintiffs allege that
8 Mr. Edahl was acting at all times as an agent and
9 employee of the bank, and we admit he was acting at all
10 times as an agent and employee of the bank, and that's
11 why he's involved in this case. All of this arises out
12 of his conduct as an employee of the bank dealing with
13 Skywaves in his capacity as relationship manager for
14 BB&T, and I believe BB&T has also admitted that in their
15 answer, but I'm not sure, really, whether they've
16 admitted it or not is irrelevant. Again, we admitted it,
17 and plaintiffs allege it, so that's the only three points
18 I wanted to make.

19 Thank you.

20 THE COURT: Mr. Kefalos, do you want to say
21 anything?

22 MR. KEFALOS: I do. I have been listening to
23 the arguments, and I have an observation. I think
24 Mr. Epting touched on it, and I'm not sure it's on him.
25 It's not so much, it seems to me, a question of whether

1 the waiver of the jury trial is a procedural or
2 substantive issue, it's more a question under
3 Livingston -- or Lister, I'm sorry, Lister -- as to
4 whether that provision purporting to waive a jury trial
5 is valid in North Carolina, because irrespective of the
6 choice of laws provision, South Carolina would say, you
7 look to the state of formation to determine the validity,
8 interpretation, formation of the provisions of the
9 contract.

10 So irrespective of the choice of laws, South
11 Carolina would say, Is this provision valid in North
12 Carolina? And, if it's not, it doesn't make any
13 difference whether it affects the substantive or
14 procedural right, it is an invalid provision in this
15 contract. That's under the Lister case, and that's the
16 only thing I'd like to say.

17 THE COURT: One thing that does come to mind
18 is BB&T is a big bank and they presumably drafted this
19 contract. Why would they put in a contract that waives
20 the right to a jury trial when they know that there is a
21 statute in North Carolina that says you can't waive your
22 right to a jury trial?

23 MR. MENDOZA: Well, Your Honor, the plaintiff
24 took the 30(b)6 deposition of a bank representative just
25 this past week, and his testimony was it was intended to

1 address substantive law, the applicable law, and the jury
2 trial waiver, of course, and it emphasized there would be
3 no right to a jury trial.

4 Certainly, if the action had been brought in
5 North Carolina, then the North Carolina statute would
6 govern, but it was not.

7 MR. ENGLAND: Your Honor --

8 THE COURT: You get a chance now.

9 MR. ENGLAND: I was involved in the 30(b)6
10 deposition, and what Mr. Mendoza said is correct, but on
11 that same paragraph, in choice of law, it says in the
12 internal laws of South Carolina, and the witness said he
13 didn't know what that meant. That in itself created an
14 ambiguity.

15 We really do think that one of the earlier
16 questions that you asked is certainly the starting point,
17 is a right to a jury trial -- if a right is considered
18 substantive or fundamental such that it would not be
19 waived under the normal procedural -- waiver of a
20 procedural right. All these other arguments are
21 certainly on our side, I believe, are correct, but that's
22 the starting point that resolves the issue.

23 Molly, does the bank admit that Mr. Edahl was
24 the agent of the bank for all purposes in this
25 litigation? I thought it had been denied, but I could be

1 mistaken.

2 MS. CHERRY: Just so I can stand up and
3 speak, I don't have the answer in front of me, and I
4 don't know -- the reality is, I think I've told you
5 before, that we responded, that we haven't denied that he
6 did it and that the bank honored it, and the bank did
7 honor it and that he was an employee of the bank.

8 I don't remember what we put in the answer,
9 and I don't think that issue is before Court. He was an
10 employee of the bank, he was acting as an employee of the
11 bank, and we're not denying that.

12 MR. ENGLAND: I just don't want the record to
13 be such that Your Honor -- you know, the employee is
14 saying, I've admitted I was an agent. I thought the bank
15 denied it. I may be wrong, but I know I was worried
16 about it at one point, and, of course, the bank accused
17 Skywaves of fraud based upon Mr. Edahl's conduct that he
18 has now repudiated and admitted under oath that it was
19 untruthful and he knew it was untruthful when he made it.

20 That's in the deposition, but the agency
21 becomes somewhat important in this case, and he said he
22 had lied because he was out to save his job at the time,
23 and those are virtually direct quotes, Your Honor.

24 THE COURT: All right. Well, y'all have
25 given me something to read and think about, so I'll read

1 it and think about it and let you know what I decide.

2 MR. EPTING: Judge, one thing. This has
3 nothing to do with that motion.

4 We have a few more depositions that we need
5 to take, and I would want to lay out that there are just
6 some general discovery disputes over documents that
7 remain, and they fall, Judge, in two categories: There
8 is something called a serious incident report? Is that
9 what the name of it is?

10 MS. CHERRY: That's true, it is.

11 MR. EPTING: A serious incident report, and;
12 there are three of those, and then this period of time,
13 Judge, from January to March of '08 in which documents
14 are being withheld. The witness that is involved in that
15 period of time is Steve Mercato, and we want to take his
16 deposition, but we want to make sure we have all
17 documents that are relevant to his deposition before
18 going forward.

19 I'm convinced we could brief this on a
20 motion. I think probably we can, to some extent, agree
21 on some of these documents as privileged and not
22 privileged, but, eventually, I think it's going to
23 require the Court to weigh in, in camera, and so --

24 THE COURT: I don't weigh in on privilege
25 versus not privileged. I don't weigh in on

1 admissibility, and, as I understand the law and the rules
2 in In Re: Anonymous member of the bar is you produce it
3 unless you have a protective order that says you don't
4 have to. You answer the question unless you say we are
5 going to assert a privilege and seek a protective order
6 within five days.

7 MR. EPTING: Well -- and you know what,
8 Judge, actually, that may be the quickest way forward.
9 Rather than trying to figure out what documents are and
10 are not privileged in advance of the deposition, maybe
11 the thing to do is just that. Of course the problem is
12 we don't have the documents to cross-examine him, but
13 maybe that's the way to tee it up.

14 MS. CHERRY: And, Your Honor, just for
15 purposes of the record, I'm not entirely sure what
16 documents Drew is talking about. There is a suspicious
17 incident report at issue and an amended one, so that's
18 two, and -- so I just don't want there to be any
19 representation of a certain volume or number of documents
20 that have been withheld.

21 I've had discussions with him about serves,
22 Your Honor, and about Mr. Mercato's deposition, but I was
23 also under the impression that we were going to get our
24 arms around what the issues were and, to the extent we
25 can brief them, brief them to the Court.

1 So I'm not prepared to address that
2 substantively before the Court. I just didn't want there
3 to be any misunderstanding on the record.

4 THE COURT: Okay. I'll let you know
5 something as soon as I figure it out. Thanks.

6 - - -

7 (Whereupon, the proceedings were concluded.)

8 - - -

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

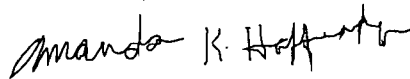
24

25

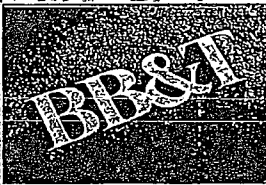
I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 12th of January 2015.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

April 19, 2015

A handwritten signature in cursive script, reading "Amanda K. Haffenden", is written over a horizontal line.

Circuit Court Reporter



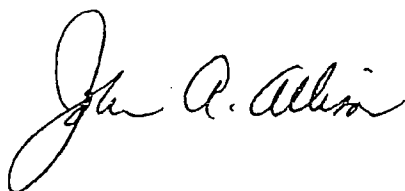
THE BB&T PHILOSOPHY

FOREWORD

In a rapidly changing and unpredictable world, individuals and organizations need a clear set of fundamental principles to guide their actions. At BB&T we know the content of our business will, and should, experience constant change. Change is necessary for progress. However, the context, our fundamental principles, is unchanging because these principles are based on basic truths.

BB&T is a mission-driven organization with a clearly defined set of values. We encourage our employees to have a strong sense of purpose, a high level of self-esteem and the capacity to think clearly and logically.

We believe that competitive advantage is largely in the minds of our employees as represented by their capacity to turn rational ideas into action towards the accomplishment of our mission.



John A. Allison
Chairman and Chief Executive Officer
BB&T Corporation

CONTENTS

BB&T VISION, MISSION AND PURPOSE	4
BB&T VALUES	6
CONCEPTS THAT DESCRIBE BB&T	18
STRATEGIC OBJECTIVES	26



BB&T Vision, Mission and Purpose

BB&T VISION

TO CREATE THE BEST FINANCIAL INSTITUTION POSSIBLE

"The Best of The Best"

BB&T MISSION

TO MAKE THE WORLD A BETTER PLACE TO LIVE BY:

- Helping our CLIENTS achieve economic success and financial security,
- Creating a place where our EMPLOYEES can learn, grow and be fulfilled in their work,
- Making the COMMUNITIES in which we work better places to be, and thereby
- Optimizing the long-term return to our SHAREHOLDERS, while providing a safe and sound investment

BB&T PURPOSE

OUR ULTIMATE PURPOSE IS TO CREATE SUPERIOR LONG-TERM ECONOMIC REWARDS FOR OUR SHAREHOLDERS.

This purpose is defined by the free market and is as it should be. Our shareholders provide the capital that is necessary to make our business possible. They take the risk if the business is unsuccessful. They have the right to receive economic rewards for the risk which they have undertaken.

However, our purpose, to create superior long-term economic rewards for our shareholders, can only be accomplished by providing excellent service to our clients, as our CLIENTS are our source of revenues.

To have excellent client relations, we must have outstanding EMPLOYEES to serve our clients. To attract and retain outstanding employees, we must reward them financially and create an environment where they can learn and grow.

Our economic results are significantly impacted by the success of our COMMUNITIES. The community's "quality of life" impacts its ability to attract industry for growth.

Therefore, we manage our business in a long-term context, as an integrated whole, with the ultimate objective of rewarding the SHAREHOLDERS for their investment, while realizing that the cause of this result is quality client service. Excellent service will be delivered by motivated employees working as an integrated team. These results will be impacted by our capacity to contribute to the growth and well-being of the communities we serve.

VALUES

Excellence is an art won by training and habituation. We are what we repeatedly do. Excellence then is not an act, but a habit — Aristotle

The great Greek philosophers saw values as guides to excellence in thinking and action. In this context, values are standards which we strive to achieve. Values are *practical habits* that enable us as individuals to live, be successful and achieve happiness. For BB&T, our values enable us to achieve our mission and corporate purpose.

To be useful, values must be consciously held and be consistent (non-contradictory). Many people have conflicting values which prevent them from acting with clarity and self-confidence.

There are 10 primary values at BB&T. These values are consistent with one another and are integrated. To fully act on one of these values, you must also act consistently with the other values. Our focus on values grows from our belief that ideas matter and that an individual's character is of critical significance.

Values are important at BB&T!

1. REALITY (FACT-BASED)

What is, is If we want to be better, we must act within the context of reality (the facts) Businesses and individuals often make serious mistakes by making decisions based on what they "wish was so," or based on theories which are disconnected from reality The foundation for quality decision making is a careful understanding of the facts

There is a fundamental difference between the laws of nature (reality), which are immutable, and the man made The law of gravity is the law of gravity The existence of the law of gravity does not mean man can not create an airplane However, an airplane must be created within the context of the law of gravity At BB&T, we believe in being "reality grounded "

2. REASON (OBJECTIVITY)

Mankind has a specific means of survival, which is his ability to think, i.e., his capacity to reason logically from the facts of reality as presented to his five senses. A lion has claws to hunt. A deer has swiftness to avoid the hunter. Man has his ability to think. There is only one "natural resource" — the human mind.

Clear thinking is not automatic. It requires intellectual discipline and begins with sound premises based on observed facts. You must be able to draw general conclusions in a rational manner from specific examples (induction) and be able to apply general principles to the solution of specific problems (deduction). You must be able to think in an integrated way, thereby avoiding logical contradictions.

We cannot all be geniuses, but each of us can develop the mental habits which ensure that when making decisions we carefully examine the facts and think logically without contradiction in deriving a conclusion. We must learn to think in terms of what is essential, i.e., about what is important. Our goal is to objectively make the best decision to accomplish our purpose.

Rational thinking is a learned skill which requires mental focus and a fundamental commitment to consistently improving the clarity of our mental processes. At BB&T, we are looking for people who are committed to constantly improving their ability to reason.

3. INDEPENDENT THINKING

All employees are challenged to use their individual minds to their optimum to make rational decisions. In this context, each of us is *responsible* for what we do and who we are. In addition, *creativity* is strongly encouraged and only possible with independent thought.

We learn a great deal from each other. Teamwork is important at BB&T (as will be discussed later). However, each of us thinks alone. Our minds are not physically connected. In this regard, each of us must be willing to make an independent judgment of the facts based on our capacity to think logically. Just because the "crowd" says it is so, does not make it so.

In this context, each of us is *responsible* for our own actions. Each of us is responsible for our personal success or failure, i.e., it is not the bank's fault if someone does not achieve his objectives.

All human progress by definition is based on *creativity*, because creativity is the source of positive change. Creativity is only possible to an independent thinker. Creativity is not about just doing something different. It is about doing something **BETTER**. To be better, the new method/process must be judged by its impact on the whole organization, and as to whether it contributes to the accomplishment of our mission.

There is an infinite opportunity for each of us to do whatever we do better. A significant aspect of the self-fulfillment which work can provide comes from creative thought and action.

4. PRODUCTIVITY

We are committed to being producers of wealth and well-being by taking the actions necessary to accomplish our mission. The tangible evidence of our productivity is that we have rationally allocated capital through our lending and investment process, and that we have provided needed services to our clients in an efficient manner resulting in superior *profitability*.

Profitability is a measure of the differences in the economic value of the products/services we produce and the cost of producing these products/services. In a long-term context and in a free market, the bigger the profit, the better. This is true not only from our shareholders' perspective (which would be enough justification), but also in terms of the impact of our work on society as a whole. Healthy profits represent productive work. At BB&T we are looking for people who want to create, to produce, and who are thereby committed to *turning their thoughts into actions* that improve economic well-being.

5. HONESTY

Being honest is simply being consistent with reality. To be dishonest is to be in conflict with reality, which is therefore self-defeating. A primary reason that individuals fail is because they become disconnected from reality, pretending that facts are other than they are.

To be honest does not require that we know everything. Knowledge is always contextual and man is not omniscient. However, we must be responsible for saying what we mean and meaning what we say.

6. INTEGRITY

Because we have developed our principles logically, based on reality, we will always act consistently with our principles. Regardless of the short-term benefits, acting inconsistently with our principles is to our long-term detriment. We do not, therefore, believe in compromising our principles in any situation.

Principles provide carefully thought-out concepts which will lead to our long-term success and happiness. Violating our principles will always lead to failure. BB&T is an organization of the highest integrity.

7. JUSTICE (FAIRNESS)

Individuals should be evaluated and rewarded objectively (for better or worse) based on their contributions toward accomplishing our mission and adherence to our values. Those who contribute the most should receive the most.

The single most significant way in which employees evaluate their managers is in determining whether the manager is just. Employees become extremely unhappy (and rightly so) when they perceive that a person who is not contributing is over-rewarded or a strong contributor is under-rewarded.

If we do not reward those who contribute the most, they will leave and our organization will be less successful. Even more important, if there is no reward for superior performance, the average person will not be motivated to maximize his productivity.

We must evaluate whether the food we eat is healthy, the clothes we wear attractive, the car we drive functional, etc., and we must also evaluate whether relationships with other people are good for us or not.

In evaluating other people, it is critical that we judge based on essentials. At BB&T we do not discriminate based on nonessentials such as race, sex, nationality, etc. We do discriminate based on competency, performance and character. We consciously reject egalitarianism and collectivism. Individuals must be judged individually based on their personal merits, not their membership in any group.

8. PRIDE

Pride is the psychological reward we earn from living by our values, i.e., from being just, honest, having integrity, being an independent thinker, being productive and rational

Aristotle believed that "earned" pride (not arrogance) was the highest of virtues, because it presupposed all the others. Striving for earned pride simply reinforces the importance of having high moral values.

Each of us must perform our work in a manner as to be able to be justly proud of what we have accomplished. BB&T must be the kind of organization with which each employee and client can be proud to be associated.

9. SELF-ESTEEM (SELF-MOTIVATION)

We expect our employees to earn positive self-esteem from doing their work well. We expect and want our employees to act in their rational, long-term self-interest. We want employees who have strong personal goals and who expect to be able to accomplish their goals within the context of our mission.

A necessary attribute for self-esteem is self-motivation. We have a strong work ethic. We believe that you receive from your work in proportion to how much you contribute. If you do not want to work hard, work somewhere else.

While there are many trade-offs in the content of life, you need to be clear that BB&T is the best place, all things considered, for you to work to accomplish your long-term goals. When you know this, you can be more productive and happy.

10. TEAMWORK/MUTUAL SUPPORTIVENESS

While independent thought and strong personal goals are critically important, our work is accomplished within teams. Each of us must consistently act to achieve the agreed-upon objectives of the team, with respect for our fellow employees, while acting in a mutually supportive manner.

Our work at BB&T is so complex that it requires an integrated effort among many people to accomplish important tasks. While we are looking for self-motivated and independent thinking individuals, these individuals must recognize that almost nothing at BB&T can be accomplished without the help of their team members. One of the responsibilities of leadership in our organization is to ensure that each individual is rewarded based on their contribution to the success of the total team. We need outstanding individuals working together to create an outstanding team.

Our values are held consciously and are logically consistent. To fully execute on any one value, you must act consistently with all 10 values. At BB&T values are practical and important!

THE ROLE OF EMOTIONS

Often people believe that making logical decisions means that we should be unemotional and that emotions are thereby unimportant. In fact, emotions are important. However, the real issue is how rational are our emotions. Emotions are mental habits which are often developed as children. Emotions give us automatic responses to people and events, these responses can either be very useful or destructive indicators. Emotions as such are not means of decision or of knowledge, the issue is: How were your emotions formed? The real question is: Are we happy when we should be happy, and unhappy when we should be unhappy, or are we unhappy when we should be happy?

Emotions are learned behaviors. The goal is to "train up" our emotions so that our emotions objectively reinforce the best decisions and behaviors toward our long-term success and happiness. Just because someone is unemotional does not mean that they are logical.



Concepts That Describe BB&T

1. CLIENT-DRIVEN

"WORLD CLASS" CLIENT SERVICE ORGANIZATION

- Our clients are our PARTNERS
- Our goal is to create WIN/WIN RELATIONSHIPS
- "You can tell we want your business"
- "It is easy to do business with BB&T"
- "Respect the individual, value the relationship"

We will absolutely never, ever, take advantage of anyone, nor do we want to do business with those who would take advantage of us. Our clients are long-term partners and should be treated accordingly. One of the attributes of partnerships is that both partners must keep their agreements. We keep our agreements. When our partners fail to keep their agreements, they are terminating the partnership.

There are an infinite number of opportunities where we can get better together, where we can help our clients achieve their financial goals and where our client will enable us to make a profit in doing so.

2. QUALITY ORIENTED

- Quality must be built into the process

In every aspect of our business we want to execute and deliver quality. It is easier and less expensive to do things correctly than to fix what has been done incorrectly.



Concepts That Describe BB&T

1. CLIENT-DRIVEN

"WORLD CLASS" CLIENT SERVICE ORGANIZATION

- Our clients are our PARTNERS
- Our goal is to create WIN/WIN RELATIONSHIPS
- "You can tell we want your business "
- "It is easy to do business with BB&T"
- "Respect the individual, value the relationship "

We will absolutely never, ever, take advantage of anyone, nor do we want to do business with those who would take advantage of us. Our clients are long-term partners and should be treated accordingly. One of the attributes of partnerships is that both partners must keep their agreements. We keep our agreements. When our partners fail to keep their agreements, they are terminating the partnership.

There are an infinite number of opportunities where we can get better together, where we can help our clients achieve their financial goals and where our client will enable us to make a profit in doing so.

2. QUALITY ORIENTED

- Quality must be built into the process

In every aspect of our business we want to execute and deliver quality. It is easier and less expensive to do things correctly than to fix what has been done incorrectly.



Concepts That Describe BB&T

1. CLIENT-DRIVEN

"WORLD CLASS" CLIENT SERVICE ORGANIZATION

- Our clients are our PARTNERS
- Our goal is to create WIN/WIN RELATIONSHIPS
- "You can tell we want your business "
- "It is easy to do business with BB&T"
- "Respect the individual, value the relationship "

We will absolutely never, ever, take advantage of anyone, nor do we want to do business with those who would take advantage of us. Our clients are long-term partners and should be treated accordingly. One of the attributes of partnerships is that both partners must keep their agreements. We keep our agreements. When our partners fail to keep their agreements, they are terminating the partnership.

There are an infinite number of opportunities where we can get better together, where we can help our clients achieve their financial goals and where our client will enable us to make a profit in doing so.

2. QUALITY ORIENTED

- Quality must be built into the process

In every aspect of our business we want to execute and deliver quality. It is easier and less expensive to do things correctly than to fix what has been done incorrectly.

3. EFFICIENT

- "Waste not, want not"
- Design efficiency into the system

4. GROWING BOTH OUR BUSINESS AND OUR PEOPLE

- Grow or die
- Life requires constant, focused thought and actions towards one's goals

5. CONTINUOUS IMPROVEMENT

- Everything can be done better
- Fundamental commitment to INNOVATION

Every employee should constantly use their reasoning ability to do whatever they do better everyday. All managers of systems/processes should constantly search for better methods to solve problems and serve the client.

6. OBJECTIVE DECISION MAKING

- Fact-Based and Rational

BB&T MANAGEMENT STYLE

- Participative
- Team Oriented
- Fact-Based
- Rational
- Objective

Our management process, by intention, is designed to be participative and team oriented. We work hard to create consensus. When people are involved in the decision process, better information is available to make decisions. The participant's understanding of the decision is greater and, therefore, execution is better.

However, there is a risk in participative decision making: the decision process can become a popularity contest. Therefore, our decision process is disciplined. Our decisions will be made based on the facts using reason. The best objective decision will be the one which is enacted.

Therefore, it does not matter who you know, who your friends are, etc., it matters whether you can offer the best objective solution to accomplishing the goal or solving the problem at hand.

BB&T MANAGEMENT CONCEPT

- Hire excellent people
- Train them well
- Give them an appropriate level of authority and responsibility
- Expect a high level of achievement
- Reward their performance

Our concept is to operate a highly autonomous, entrepreneurial organization. In order to execute this concept, we must have extremely competent individuals who are "masters" of BB&T's philosophy and who are "masters" in their field of technical expertise.

By having individuals who are "masters" in their field, we can afford to have less costly control systems and be more responsive in meeting the needs of our clients.

**ATTRIBUTES OF AN OUTSTANDING
BB&T EMPLOYEE**

- Purpose
- Rationality
- Self-Esteem

Consistent with our values, successful individuals at BB&T have a sense of purpose for their lives, i.e., they believe that their lives matter and that they can accomplish something meaningful through their work. We are looking for people who are rational and have a high level of personal self-esteem. People with a strong personal self-esteem get along better with others, because they are at peace with themselves.

BB&T POSITIVE ATTITUDE

Since we build on the facts of reality and our ability to reason, we are capable of achieving both success and happiness

We do not believe that "realism" means pessimism. On the contrary, precisely because our goals are based on and consistent with reality, we fully expect to accomplish them.

BB&T'S OBLIGATIONS TO ITS EMPLOYEES

We will do our best to

- COMPENSATE employees fairly in relation to internal equity and market-comparable pay practices — performance-based compensation
- Provide a comprehensive and market-competitive BENEFIT program
- Create a place where employees can LEARN and GROW — to become more productive workers and better people
- TRAIN employees so they are competent to do the work asked of them.
(Never ask anyone to do anything they are not trained to do)
- EVALUATE and RECOGNIZE performance objectively, fairly and consistently based on the individual's contribution to the accomplishment of our mission and adherence to our values
- Treat each employee as an INDIVIDUAL with dignity and respect

VIRTUES OF AN OUTSTANDING CREDIT CULTURE

Just as individuals need a set of values (virtues) to guide their actions, systems should be designed to have a set of attributes which optimize their performance towards our goals. In this regard, our credit culture has seven fundamental virtues.

1. Provides fundamental insight to help clients achieve their economic goals and solve their financial problems: We are in the high-quality financial advice business.

2. Responsive: The client deserves an answer as quickly as possible, even when the answer is no.

3. Flexible (Creative): We are committed to finding better ways to meet the client's financial needs.

4. Reliable: Our clients are selected as long-term partners and treated accordingly. BB&T must continue to earn the right to be known as the most reliable bank.

5. Manages risk within agreed-upon limits: Clients do not want to fail financially, and the bank does not want a bad loan.

6. Ensures an appropriate economic return to the bank for risk taken: The higher the risk, the higher the return. The lower the risk, the lower the return. This is an expression of justice.

7. Creates a "premium" for service delivery: The concept is to provide superior value to the client through outstanding service quality. A rational client will fairly compensate us when we provide sound financial advice, are responsive, creative and reliable, because these attributes are of economic value to the client.



Strategic Objectives

CREATE A HIGH PERFORMANCE FINANCIAL INSTITUTION
THAT CAN SURVIVE AND PROSPER IN A RAPIDLY
CHANGING, HIGHLY COMPETITIVE, GLOBALLY INTEGRATED
ENVIRONMENT

ACHIEVING OUR GOAL

The key to maximizing our probability of being both independent and prosperous over the long term is to create a SUPERIOR EARNINGS PER SHARE (EPS) GROWTH RATE without sacrificing the fundamental quality and long-term competitiveness of our business and without taking unreasonable RISK

While being fundamentally efficient is critical, the "easy" way to rapid EPS growth is to artificially cut cost. However, not investing for the future is long-term suicide, as it destroys our capability to compete.

The intelligent process to achieve superior EPS growth is to grow revenues by providing (and selling) superior quality service while systematically enhancing our margins, improving our efficiency, expanding our profitable product offerings and creating more effective distribution channels.

net
prc

em
cor
obj

ma
is r

**THE "WORLD STANDARD" REVENUE DRIVEN
SALES ORGANIZATION**

At BB&T, selling is about identifying our clients' legitimate financial needs and finding a way to help the client achieve economic goals by providing the right products and services

Effective selling requires a disciplined approach in which the BB&T employee asks the client about financial goals and problems and has a complete understanding of how our products can help the client achieve objectives and solve financial problems

It also requires exceptional execution by support staffs and product managers, since service and sales are fundamentally connected and creativity is required in product design and development

**"WORLD STANDARD" CLIENT SERVICE
COMMUNITY BANKS**

BB&T operates as a series of "Community Banks" The "Community Bank" concept is the foundation for local decision making and the basis for responsive, reliable and empathetic client service

By putting decision making closer to the client, all local factors can be considered and we can ensure that the client is being treated as an individual

To operate in this decentralized decision making fashion, we must have highly trained employees who understand BB&T's philosophy and are "masters" of their areas of responsibility

COMMITMENT TO EDUCATION/LEARNING

Competitive advantage is in the minds of our employees We are committed to making substantial investments in employee education to create a "knowledge-based learning organization" founded on the premise that knowledge (understanding), properly applied, is the source of superior performance

We believe in systematized learning founded on Aristotle's concept that "excellence is an art won by training and habituation " We attempt to train our employees with the best knowledge/methods in their fields and to habituate those behaviors through consistent management reinforcement The goal is for each employee to be a "master" of his or her role, whether it be a computer operator, teller, lender, financial consultant or any other job responsibility

OUR PASSIONS

TO CREATE THE BEST FINANCIAL INSTITUTION POSSIBLE.

TO CONSISTENTLY PROVIDE THE CLIENT WITH BETTER
VALUE THROUGH RATIONAL INNOVATION AND PRODUCTIVITY
IMPROVEMENT.

At BB&T we have two powerful passions. Our fundamental passion is our Vision To Create The Best Financial Institution Possible — The “World Standard” — The “Best of the Best.” We believe that the best can be objectively evaluated by rational performance standards in relation to the accomplishment of our mission.

To be the best of the best, we must constantly find ways to deliver better value to our clients in a highly profitable manner. This requires us to keep our minds focused at all times on innovative ways to enhance our productivity.

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

RECEIVED
AUG 16 2016
SC Court of Appeals

Appellate Case No. 2015-001809

Skywaves I Corporation, ...Appellant/Respondent,

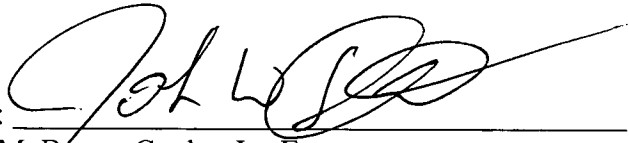
v.

Branch Banking & Trust Company, Successor in merger to Branch Banking & Trust
Company of SC, a/k/a BB&T, ...Respondent/Appellant

and James Edahl, ...Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal and Sealed Supplement to
Record on Appeal contain all material proposed to be included by any of the parties and not any
other material.

By: 

M. Dawes Cooke, Jr., Esq.

John W. Fletcher, Esq.

Barnwell, Whaley, Patterson & Helms, LLC

288 Meeting Street (29401)

P. O. Drawer H

Charleston, SC 29402

(843) 577-7700 Fax: (843) 577-7708

mdc@barnwell-whaley.com

jfletcher@barwnwell-whaley.com

Attorneys for Appellants/Respondents