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

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

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STATEMENT OF ISSUES ON APPEAL

A. Did the trial court err in holding that Skywaves waived its constitutional right to a jury trial through contract language that was expressly prohibited by North Carolina law, which the parties selected to govern their agreement?

B. Did the trial court err in dismissing Skywaves' tort causes of action where Skywaves presented evidence that BB&T breached a duty by, *inter alia*, misrepresenting its then-existing commitment and in undertaking to design a financing vehicle that was wholly inappropriate and doomed to fail?

C. Did the trial court err in in dismissing Skywaves SCUTPA claim, where the evidence showed that BB&T's misconduct was part of its method of doing business and affected the public interest through the financing of new businesses?

D. Did the trial court err in refusing to strike Defendants' Answers as a sanction for their dishonest conduct?

STATEMENT OF THE CASE

Skywaves I Corporation ("Skywaves") filed this action on December 3, 2009 in the Court of Common Pleas for Charleston County against Defendant Branch Banking and Trust company, Successor in merger to Branch Banking and Trust Company of South Carolina ("BB&T"); it sued BB&T and James Edahl ("Edahl") for breach of contract, breach of contract accompanied by a fraudulent act, negligent misrepresentation, fraudulent inducement, and lender liability.

Defendants removed this case to the United States District Court for the District of South Carolina on January 14, 2010. The District Court remanded to the Court of Common Pleas for Charleston County on June 21, 2010 and imposed sanctions for Defendants' wrongful removal. Skywaves filed a First Amended Complaint on December 12, 2010, alleging claims of: (1) breach of contract; (2) breach of contract accompanied by fraudulent act; (3) promissory estoppel; (4) breach of the covenant of good faith and fair dealing; (5) negligent misrepresentation; (6) fraudulent misrepresentation; (7) negligence; and (8) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). The case was assigned to the Business Court for Charleston County on January 6, 2011.

BB&T filed a Partial Motion to Dismiss and Edahl filed a Motion to Dismiss the First Amended Complaint on or about February 10, 2011. On November 8, 2011 the Business Court initially granted those Motions in part, and denied them in part. Specifically, the trial court dismissed Plaintiff's claims against Edahl and five of Plaintiff's eight causes of action against BB&T (breach of contract accompanied by a fraudulent act, negligent misrepresentation, fraudulent misrepresentation, negligence and SCUTPA).

Skywaves filed a Motion to Reconsider, Alter or Amend Dismissal and for Relief from Judgment concerning the November 8, 2011 Order on November 18, 2011. At the

same time (and out of an abundance of caution), Skywaves filed a Notice of Intent to Appeal the November 8, 2011 Order on December 28, 2011. On or about June 15, 2012 the Business Court granted Plaintiff's Motion to Reconsider and modified the November 8, 2011 Order so as to permit Plaintiff to proceed on its claim for breach of contract accompanied by a fraudulent act against BB&T and claims for negligence and negligent misrepresentation against BB&T and Edahl. Plaintiff then filed a Motion to Withdraw its Appeal, (July 17, 2012) as the June 15, 2012 Order rendered that appeal moot.

Discovery proceeded and revealed that Edahl had perjured himself at deposition — and that numerous material allegations of Defendants' pleadings (and statements contained in affidavits) were demonstrably untrue. On January 17, 2014 Skywaves filed a Motion to Strike BB&T's and Edahl's Answers ("First Motion to Strike"), on the ground that they were sham pleadings. Subsequently, BB&T and Edahl filed Motions to Amend their answers to address Edahl's false statements, though they did not admit the true state of facts without condition. On March 17, 2014 the trial Court denied Plaintiff's First Motion to Strike and granted the Defendants' Motions to Amend.

BB&T and Edahl filed Motions for Summary Judgment and Motions to Strike Plaintiff's Demand for a Jury Trial on July 24 and 28, 2014 respectively.

On February 9, 2015, the Court issued an Order granting Defendants' Motions to Strike the Jury Trial Demand. On February 18, 2015, Skywaves filed a Motion to Reconsider the Order Striking the Jury Trial Demand. Out of an abundance of caution, Skywaves also filed a Notice of Appeal from that Order on March 10, 2015. In light of the pendency of the Motion to Reconsider, the Court of Appeals dismissed that Appeal without prejudice on April 27, 2015. Defendants filed Memoranda in Opposition to Plaintiff's Motion to Reconsider the Order Striking the Jury Trial Demand.

Plaintiff filed a Motion to Amend its complaint on April 16, 2015 and a second Motion to Strike Defendants' Answers on April 16, 2015 ("Second Motion to Strike").

On July 27, 2015 the trial court filed an Order (1) Granting in Part BB&T's Motion for Summary Judgment; (2) granting Edahl's Motion for Summary Judgment; (3) denying Skywaves motion to Amend the Complaint; (4) denying Skywaves Motion to Strike the Answer of BB&T and Edahl; and (5) denying Skywaves Motion to Reconsider the Order Striking the Demand for a Jury Trial.

On and after August 24, 2015 Skywaves filed the instant Notice of Appeal and Amended and Supplemental Notice of Appeal, appealing the Order of July 27, 2015, along with the Orders of November 8, 2011, June 15, 2012, March 13, 2014, and February 9, 2015. Collectively these Orders:

1. Grant BB&T & Edahl summary judgment on promissory estoppel; breach of the covenant of good faith and fair dealing; fraud; negligent misrepresentation; and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA");

2. Grant BB&T & Edahl motion to strike the demand for jury trial;

3. Deny Skywaves motion to strike BB&T's and Edahl's answers as sham.

ARGUMENTS

I. THE TRIAL COURT ERRED IN HOLDING THAT SKYWAVES WAIVED ITS CONSTITUTIONAL RIGHT TO A JURY TRIAL, WHERE SUCH A CONTRACTUAL PROVISION WOULD VIOLATE GOVERNING LAW

This appeal presents numerous unique substantive issues, including the Rule 12 dismissal of claims, the granting of summary judgment and the district court's refusal to sanction Defendants for their dishonest misconduct. However, a distinct question from the substance of Skywaves' claims is Skywaves' appeal from the trial court's denial of Skywaves' right to a jury trial.

The trial court erroneously deprived Plaintiff of its constitutionally-protected right to a jury trial on the grounds that it had contractually waived that right under the parties' March 22, 2005 Factoring and Security Agreement ("Factoring Agreement"). (*See* R. pp. 897-911). The trial court compounded this error by extending this claimed waiver to deprive Skywaves of its right to a jury trial on its claims against BB&T employee Edahl, who was not a signatory to any agreement between BB&T and Skywaves.

A. Boilerplate Language in the Factoring Agreement Purporting to Waive the Right to a Jury Trial Is Void Under Controlling North Carolina Law as to BB&T

There is only one agreement potentially forming the basis for Skywaves claims that is relevant to this issue: the Factoring Agreement, which contains two provisions relevant to the issue presented to this Court:

> 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. ("Factoring Agreement").
>
> 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. ("Factoring Agreement").

(*See* R. p. 910). Accompanying these provisions are three important, undisputed facts: (1) BB&T drafted the Factoring Agreement; (2) it is BB&T's standard document; and (3) BB&T intended that North Carolina law apply to all substantive and legal issues. As BB&T's Rule 30(b)(6) designee testified, this provision expressed BB&T's intent to have North Carolina law apply "with regard to any substantive Issues or legal issues that would arise under the agreement." (*See* R. p. 543 (*quoting* Transcript of 30(b)(6) Deposition of BB&T, at 8:7-11 and 11:1-5)).

The parties' choice of law is generally binding on the court as long as they had a reasonable basis for their choice and the law chosen does not violate a fundamental public policy of the state or otherwise applicable law. *See King v. Bryant*, 225 N.C. App. 340, 737 S.E.2d 802 (2013). Under relevant North Carolina law, contractual waivers of the right to a jury trial are not enforceable. Specifically, N.C. Gen. Stat. Ann. § 22B-10 states:

> Any provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable.

When a contract or any clause of the contract is, as a matter of law, unconscionable the Court should refuse to enforce the contract, or enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause as to avoid any unconscionable result. *See* N.C. Gen. Stat. Ann. § 25-2-302. "Unconscionability" relates to contract terms that are oppressive; it is applicable to one-sided provisions, denying a contracting party any opportunity for meaningful choice. *Billings v. Joseph Harris Co., Inc.*, 220 S.E.2d 361, 27 N.C. App. 689 (1975). Thus, North Carolina law voids the jury trial waiver contained in the Factoring Agreement.

The North Carolina Supreme Court "has held that where parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect." *Land Co. v. Byrd,* 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980). Judge Young correctly held "[c]ontracts are to be governed as to their nature, validity and interpretation of the law by the place where they are made, unless the contracting parties clearly appear to have some other place or in view" (*See* R. p. 54). It is clear from the facts in this case that not only did the parties have no other "place in view," as evidenced by their choice to use North Carolina law for governing the contract, but also that North Carolina is where the contract became effective. (*See* R. p. 910 ¶ 25). The Court further correctly noted that "The right to freedom of contract is no small part of a citizen's liberty, and this Court must enforce and maintain a contract between two experienced parties." (*See* R. p. 56). However, Judge Young failed to recognize this tenet of contract law, as the parties' agreement was that North Carolina law controlled and the jury trial waiver is void pursuant to North Carolina law.

1. Lower Court Misapplies Legal Principles

Although he correctly stated the law, Judge Young erred in that he incorrectly focused his analysis on whether the right to jury trial is procedural or substantive.[1] Specifically, he held incorrectly that the issue was procedural and thus South Carolina procedural law applied. Here, Judge Young's logic "jumped the rails." The procedural law of South Carolina as to jury trials is that a party is entitled to a jury trial; however, the issue of the permissible waiver of that right is a matter of contract. South Carolina allows parties to contractually waive the right to a jury trial. On the other hand, North Carolina law does not allow jury trial waivers in contracts. The question of the validity of a jury

[1] Judge Young holds the issue of the right to a jury trial is determined by the forum state; South Carolina provides for a jury trial but what is in issue is not the procedural law of South Carolina rather the validity of a contractual waiver. (*See* 2/9/2015 Order, at 3).

trial waiver in a contract is a substantive legal issue, not a procedural issue in the first instance. Second, the issue is a matter of contract validity where, even in the absence of the parties' agreement to apply North Carolina law, it would be governed by the laws of North Carolina. The jury trial waiver in the Factoring Agreement is void under North Carolina law. It is not the law of the forum as to procedural questions that is at issue, (if this was the issue, South Carolina law gives parties the right to a jury trial), rather it is a matter of the validity of a contractual waiver that is at issue. Therefore, pursuant to the Factoring Agreement, the question of this specific clause's validity is governed by North Carolina Law.

2. Defendant's Attempt to Buttress The Factoring Agreement

The Plaintiff and BB&T entered into two promissory notes, one loan agreement and the Factoring Agreement. All agreements, except for the Factoring Agreement, provide the applicable law is that of South Carolina. BB&T attempted to seduce Judge Young with the relevance of these other agreements and utterly failed as:

1. Plaintiff has sued only because of BB&T's breach of the modified Factoring Agreement. (*See generally* R. pp. 86-99).

2. Defendant BB&T has never declared Skywaves in breach of any other agreements. (*See generally* R. pp. 234-44, 265-73).

3. Defendant BB&T concedes in its Proof of Claim in Skywaves' bankruptcy that the basis for its claim is "Factoring." (*See* R. pp. 569-603).

4. The other agreements were not in default when this dispute arose over the Factoring Agreement terms. (*See* R. pp. 604-06).

5. The other notes were satisfied. (*See id.*)

BB&T attempts to cloak its nakedness in the Factoring Agreement by way of reference to the Jury Trial Waiver language in the promissory notes and loan agreement which provides:

> the undersigned hereby waive the right to trial by jury on any matters of claims arising out of this document or out of the conduct of the relationships between the undersigned and BB&T.

BB&T urges that the choice of law provisions in the promissory notes and loan agreements somehow override the choice of law provision in the Factoring Agreement because the documents together establish "a relationship between BB&T and Plaintiff."[2] While this argument lacks even facial appeal, more importantly it violates the Factoring Agreement, which provides that:

> [t]his 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 part of this Agreement, unless the terms of such Rider expressly otherwise provide.

(*See* R. p. 910 ¶ 24).

B. Edahl May Not Benefit From the Waiver Provision In an Agreement To Which He Is Not a Signatory

The trial court also held that, as Defendant Edahl was an employee of BB&T acting at all times within the scope of his employment, he too can obtain the benefit of the claimed jury trial waiver. Specifically, the lower court held that "[t]he claims are all causes in contract, breach of contract, promissory estoppel and breach of the covenant of good faith and fair dealing." (*See* R. p. 56). Plaintiff plead tort claims against Defendant Edahl which were wrongfully dismissed by the lower Court (R. pp. 58-71; see further

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[2] To its full extension, if such language were contained in a retired 10 years old note and a present defaulted agreement failed to contain the waiver, the retired 10 year old note would be relevant; it is not relevant.

sections of this brief *infra*). Should the lower Court be reversed on this issue, Edahl is not entitled to rely on the jury trial waiver.

An individual is liable personally for his tortious conduct even if committed in a representative capacity. *See 16 Jade St., LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 347, 728 S.E.2d 448, 452-53 (2012). Skywaves has sued Edahl in tort, not for his breach of the Factoring Agreement, to which he was not a party. Consequently, that agreement is not directly controlling or material to Defendant Edahl's liability for his own tortious conduct. As the Court held in the related case of *Kerr, et al. v. BB&T and Edahl*: "Thus, despite Appellants' assertion to the contrary, the choice of law provision found in the Factoring Agreement regarding the selecting of North Carolina law, is irrelevant as Appellants are neither parties nor intended third-party beneficiaries to the Contract." (Appellants were investors in Skywaves suing for misrepresentations made to them by Edahl causing them to invest in Skywaves; this Court ruled that the investor Appellants could not rely on an agreement to which they were not parties.).

As Edahl is sued in tort and as he is not a signatory to the Factoring Agreement, Skywaves certainly did not intend to waive it right to a jury trial as to those claims against Edahl.

BB&T used its superior bargaining power to require in its standard manuscript document that North Carolina law apply to matters of contractual validity. Its 30(b)(6) designee testified that North Carolina Law governs all legal issues. Waiver of a jury trial is a contractual issue as to which North Carolina law controls. The waiver is void under North Carolina law, and Plaintiff is entitled to try its case before a jury.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO SKYWAVES' TORT CLAIMS, AS THERE IS EVIDENCE THAT DEFENDANTS BREACHED A DUTY BY MISREPRESENTING THE SCOPE OF BB&T'S COMMITMENT AND BY DESIGNING AN INAPPROPRIATE FINANCING VEHICLE

> Summary judgment is proper when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings.

NationsBank v. Scott Farm, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995) (internal citations omitted). "An appellate court[, such as this one] reviews the granting of summary judgment under the same standard applied by the trial court." *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998).

A. Facts Relevant to Skywaves' Tort Claims

In the early 2000's, Skywaves developed and patented a unique and highly sought-after product in the 3G telecommunications industry. The product consisted of a lightweight pre-engineered shelter containing the electronics necessary for the operation of a cell phone tower. With this invention, it was no longer necessary for a cell phone provider to hire contractors to construct a building at the base of a tower and separate contractors to install the devices necessary for operation of the tower. They could instead purchase a turnkey shelter from Skywaves for less than what it would cost to build the shelter piecemeal. This technology was groundbreaking and by 2007, Skywaves had a bright future and unlimited growth potential.

Skywaves' relationship with BB&T had begun on March 22, 2005 when it entered into a conventional Factoring Agreement whereby BB&T purchased certain receivables

(invoices) of Skywaves at a discount and agreed to collect such receivables on Skywaves' behalf. (*See* R. pp. 897-911). Under this Factoring Agreement and other contractual documents, BB&T purchased the invoices for the individual products Skywaves manufactured, for 80% (*See id.*). This was later increased to 85% of face value (*See* R. pp. 1008-11). In this way, Skywaves could obtain prompt partial payment of its invoices and repay the advance once the customer paid the invoice in full. Skywaves' growth proceeded so quickly that, by May of 2006, it had achieved over $6 million in revenue and planned a significant capital expansion to increase production capacity. (*See* R. p. 968 ("[W]e had a three plant strategy from day one"); *accord* R. p. 970 ("[I]t was a time when in order to meet the needs of when the business was ready and we were going to get the orders, we needed to expand the plant and make some major capital changes . . . ."")). By 2007, Skywaves secured commitments for contracts from Verizon and General Dynamics that would assure continuing success. (*See* R. p. 969).

During this time Skywaves was being courted by other banks and venture capitalists offering various financing options. (*See* R. p. 971). One such proposal came from a group known as Hunt Capital, who offered to purchase of 30% of Skywaves stock for $4 million; this would have been more than adequate to capitalize Skywaves' expansion. (*See* R. pp. 1029-35). Under "competitive pressure" from other banks who wanted to obtain Skywaves' business, BB&T was anxious to keep Skywaves' as a customer. (*See* R. p. 932).

At this time, Edahl was the exclusive "relationship officer" for Skywaves. Through this position, Edahl became the face of BB&T as to Skywaves. Edahl garnered the confidence of Skywaves' management and, with BB&T's knowledge and support,[3]

[3] Edahl's role as a relationship manager is described in a summary that BB&T published, which stated that Edahl would bring "a level of expertise that earns the client's attention and loyalty by applying industry knowledge and perspective" to the client's existing and future needs; BB&T represented that Edahl would become "a trusted- and not easily replaced- source of advice and insight," "providing continuity and leadership to your

convinced them that he understood Skywaves' business needs and had designed a custom funding vehicle that would provide for those needs:

> So in my mind the bank had a strategy knowing who we were and what we were going to need, had the means to give me -- you know, to provide whatever financial need, you know, we had.

(*See* R. p. 975).

Edahl represented BB&T had devised a funding vehicle based on a factoring model that was unique[4] to Skywaves and was capable of providing for Skywaves' capital needs, and he knew that he knew Skywaves was relying on BB&T to do so. (*See* R. pp. 946-47).

Edahl's proposal included an agreement to loan money on the basis of purchase orders as well as sites identified for future construction of cell phone towers. (*See* R. p. 934). Under this new agreement, there was **no time** set for repayment of the money advanced for purchase orders or site plans. (*See* R. p. 936). This commitment was a radical departure from conventional factoring, and one that was largely unknown to BB&T management. (*See* R. P. 923 ("Q: Did you approve the loan—loaning money on site plans? A. No."); *accord* R. p. 1042 ("I was shocked, very concerned and had an empty feeling in my stomach")). BB&T had never used site plans to fund in similar circumstances, due to the risk involved. Site plan financing would essentially be secured

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entire BB&T relationship team" with "access to a full spectrum of related financial services" and "commitment to put those resources to work for you." (*See* R. pp. 916-17). Skywaves was "justified in believing that the relationship manager is speaking on behalf of the bank" that Skywaves could put its trust in Edahl, and because of the relationship, "a relationship manager should never mislead his customer or his regional loan administrator." (*See* R. p. 929).

[4] BB&T witnesses testified that the Skywaves' deal was a "unique situation in that it didn't fit the -- the mold for factoring that was the normal protocol." (*See* R. p. 929; *accord* R. p. 1055 (agreeing that "this financing program was tailor-made for Skywaves")).

only by company's assets, since there was not an actual invoice in existence at the time (and one might never issue).

Based on Edahl's promises, Skywaves elected to forego an opportunity to obtain alternative sources of capital (*See* R. p. 972) and placed its trust instead in Edahl and BB&T. Skywaves did not know it at the time, but BB&T was not equipped to finance Skywaves growth as Edahl had structured it. (*See* R. p. 1041 ("[W]e in the factoring group weren't equipped to do it."); *accord* R. p. 1073 ("BB&T is not equipped to finance purchase orders anywhere in the bank if we are relying on purchase orders for repayment.")). Further, unbeknownst to Skywaves, Edahl's supervisors never approved loaning money on the basis of site plans. (*See* R. p. 923 ("Q: Did you approve the loan — loaning money on site plans? A. No."); *accord* R. p. 9042 ("I was shocked, very concerned and had an empty feeling in my stomach")). In other words, Skywaves passed up a legitimate opportunity to obtain alternate financing based on promises that Edahl never had the authority to make!

Later, after BB&T repudiated the parties' agreement and wrongfully declared Skywaves in default, BB&T likened its actions to "venture capital" lending, something BB&T would never have considered doing for Skywaves. (*See* R. pp. 1072-73; *accord* R. p. 1043). There is nothing to factor when lending money on a purchase order. (*See* R. p. 1054 ("I would not say it's factoring, no."); *accord* R. p. 1018 ("Because you can't factor an unsecured anything. I don't know what you're factoring.")). Under such circumstances, the arrangement was more akin to "unsecured lending." (*See* R. p. 1054). There is no security interest and no assignment of a chose in action as in a conventional factoring arrangement. (*See* R. p. 1041).

In addition to making these unachievable promises, the financing Edahl devised was wholly inappropriate for funding a startup company (something even Edahl's supervisors would later concede. (*See* R. p. 1073 (stating that using purchase order financing was not an "appropriate financing mechanism for Skywaves")).

To reiterate, **none** of this was known to Skywaves at the time, nor could it have been. Skywaves is not in the banking or financing business. It should not be punished — and left without recourse — for relying on information provided to it regarding the intricate workings of an industry of which it possessed no knowledge, when it obtained that information from someone on whom it was reasonable to rely. Skywaves only knew that Edahl represented that BB&T had agreed to increase the line to $3.5 million overall (*see* R. p. 996; *accord* R. p. 942) with a sub limit for purchase orders of $2 million and (*see* R. p. 933) and no time set for repayment of the money advanced for purchase orders or site plans (*see* R. p. 936).[5]

Production proceeded under this new agreement until January 17, 2008 when Edahl and a new BB&T employee in the relationship, Mike Burke, visited Skywaves' warehouse. During that visit, Burke learned that BB&T had advanced $1.2 million unsecured based on site plans. (*See* R. p. 1042). Burke had not known of Edahl's agreement to loan money on the basis of site plans and "was very shocked, very concerned" (*see id.*); he demanded to know why the money had been advanced. Edahl, "out of fear of losing [his] job," falsely denied knowledge of the agreement to fund site plans. (*See* R. p. 941). Then, in a breathtakingly Orwellian move, Edahl, the man who had agreed to the site plan funding, denied knowledge of the agreement to fund site plans:

> As we discussed Friday, neither you or I had any idea that the GD NYST purchase orders funded from July through October were not documented and funded exactly like the other purchase orders...

(*See* R. p. 945).

Edahl unbelievably then proceeded to declare that Skywaves in default of the Factoring Agreement because of the very site plan financing that he had approved!

> Mike: I have spoken by telephone today with Ron Konersmann, President, and John Voytko, CFO to formally tell them the over advance has put

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[5] Ultimately, BB&T advanced $1.2 million dollars, unsecured, on account of site plans in 2007. (*See* R. p. 1082).

> 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.

(*See* R. pp. 1074-75).

Edahl's dishonesty led BB&T to accuse Skywaves of diverting funds and engaging in fraud:

> [T]he funds obtained based upon "purchase orders" from General Dynamics which did not exist were funds fraudulently obtained from BB&T for which Skywaves and all of its officers and employees who participated in the process would be liable.

(*See* R. pp. 1008-11; *accord* R. p. 1068 (referencing February 12, 2008 Watchlist Memorandum accusing Skywaves' management of fraud)).

Based on these meritless claims accusations that Skywaves engaged in misconduct, BB&T moved to accelerate payments and demanded that Skywaves provide immediate collateral for the $1.2 million advanced on site plans:

> As to the funds now carried on Ledger Account 7702 as described above, approximately $1,200,000.00, these funds must be immediately collateralized by "hard" (real or personal property) assets acceptable to BB&T.

(*See* R. pp. 1008-11). Years later, BB&T has been forced do an about-face and admit that Skywaves was *not* in violation of the of the site plan funding agreement (although BB&T characterizes it as an accommodation):

> Q. Okay. Is it your testimony today that based upon the accommodation that was reached by Mr. Edahl that SkyWaves did not breach the site plan funding at all?
>
> A. Yes.
>
> Q. So SkyWaves, in 2007 to 2008, was in full compliance with the site plan accommodation, but based on what you believe was other information, the bank charged fraud.
>
> A. Yes.

(*See* R. p. 1017).[6]

Skywaves was unable to meet BB&T's demands. Without a line of credit, it was unable to continue operations or find a buyer. Consequently, it was forced to declare bankruptcy, and this suit followed. Plaintiff Skywaves has asserted three main overall theories of recovery (in multiple causes of action): one in contract, one in tort, and one under the South Carolina Unfair Trade Practices Act.

The contract cause is simple. BB&T agreed to loan $2 million on account of site plans. This money was not to be repaid until the site plans were fully developed and an invoice paid. BB&T breached this contract — not Skywaves — by wrongfully demanding security for the money it loaned. The Bank's admission that Skywaves was not in breach constitutes an admission of the wrongful conduct. (*See* R. p. 1017).

The breach of contract was accompanied by fraudulent acts characterized by dishonesty in fact and unfair dealing. BB&T made material misrepresentations in order to induce Skywaves into continuing its relationship with BB&T rather than working with Hunt Capital, Wachovia, and other lenders, by offering to modify the factoring agreement to fund based on Skywaves' invoices and purchase orders and site plans. After Skywaves turned down proposals for working capital investments from other lenders, BB&T sought to change the terms of the modified factoring agreement back to the terms of the original agreement. When Skywaves refused, BB&T called a default citing pretextual reasons and immediately stopped funding in order to harm Skywaves.

The tort claims arise out of misrepresentations Defendants made for the purpose of inducing Skywaves to enter (and remain) in a relationship with BB&T. Edahl knew that the misrepresentations were likely to cause Skywaves to enter into a contract with BB&T, and that such a contract was predicated on the notion that Skywaves could rely on

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[6] Ironically, Mike Hennessey, the man who called the default, has testified he "would have had to do a 360 (sic)" and "change [his] whole stance" had he known the truth at the time. (*See* R. p. 1081).

BB&T to fulfill the representations that Edahl made. Beyond that, Edahl purposefully induced Skywaves to pass up alternative funding and rely on BB&T to provide funding by representing that he had designed a financing program that was suitable for Skywaves' needs (*see* R. p. 947) when even BB&T admits it was not a suitable financing program. (*See* R. p. 929 (noting that purchase order financing was not an "appropriate financing mechanism for Skywaves")). Defendants further induced Skywaves by misrepresenting that BB&T was willing to capitalize Skywaves' future growth based on site plans, when BB&T would have never approved of such a plan, had the appropriate management known about it. (*See* R. p. 923 ("Q: Did you approve the loan—loaning money on site plans? A. No."); *accord* R. p. 1042 ("I was shocked, very concerned and had an empty feeling in my stomach")). The SCUTPA cause arises because Defendant's deception induced a relationship for its profit and because Defendants' conduct directly affects the public interest and is capable of repetition.

In its baffling Order granting (in part) Defendants' motions for summary judgment, the lower court found evidence sufficient to sustain an action for breach of contract and breach of contract accompanied by a fraudulent act, but held that the same evidence that made out a fraudulent act did not make out a case for misrepresentation/tort or a violation of SCUTPA.

B. The Trial Court Erred in Granting Summary Judgment as to Skywaves' Tort Claims

For the reasons that follow, this Court should reverse the trial court's entry of summary judgment as to Skywaves' tort claims. The lower court granted summary judgment on Skywaves' tort causes because it mistakenly concluded there exists no duty that could support tort recovery.

Initially, the trial judge's conclusion conflicts with the law of this case. The trial court previously concluded that the facts alleged in the Amended Complaint — which the evidence in the record has bolstered — were sufficient to raise a duty. In 2012,

Defendants moved to dismiss Skywaves' Amended Complaint, arguing that it owed no duty to Skywaves, due to the nature of the bank/customer relationship. The court denied those motions, ruling that Skywaves' Amended Complaint alleged a *prima facie* case of duty:

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

(*See* R. p. 46). As discussed in the preceding section, the facts are consistent with those allegations.

The lower court's error is even more surprising because the Supreme Court, in related lawsuits that Skywaves' investors filed, has determined that there was enough evidence to show that BB&T may have undertaken a duty to Skywaves. In *Kerr v. Branch Banking & Trust Co.,* 408 S.C. 328, 333, 759 S.E.2d 724, 726 (2014), the Supreme Court contrasted the bank's duty to investors, who did not have a contract, with the duty Defendants owed Skywaves: "[W]e conclude that while Skywaves may be able to show that, as a BB&T customer, the bank owed the corporation a duty, Appellants are not BB&T's customers and therefore are not owed a similar duty." *See Kerr,* 408 S.C. at 333, 759 S.E.2d at 724.

Even if the existence of a duty was not already the law of the case, Skywaves adduced sufficient evidence supporting its allegations to create a question of fact as to the existence of a duty. In a typical banking relationship, the bank does not owe a customer a tort duty, *unless* the bank undertakes to provide advice as part of its services. It is well-established that banks owe a limited duty of care to their customers; a bank-customer relationship is merely a lender-borrower relationship and is not fiduciary in nature unless

the bank undertakes to advise its customers as part of the services that the bank offers. *See Kerr,* 408 S.C. at 333, 759 S.E.2d at 726.

The evidence shows that the Skywaves/BB&T relationship was not a typical bank-customer relationship. BB&T undertook to provide financial advice and design a unique capitalization vehicle for Skywaves as part of the services it provided. For example, Edahl testified that "[w]e designed that program." (*See* R. p. 947). Moreover, another BB&T witness testified that he Skywaves' account was "sort of a unique situation in that it didn't fit the -- the mold for factoring that was the normal protocol." (*See* R. p. 1072). In fact, BB&T witness have testified that "this financing program was **tailor-made for Skywaves**." (*See* R. p. 1055).

In a typical banking relationship, the customer might decide, for example, that it wishes to expand operations to meet future business. When this situation arises it will analyze the market for its product and anticipated costs, and calculate financing and capital necessary to meet that need. The customer will then explain its plans to the bank and request a specific type of financing, on specific terms designed to finance that particular development. In a garden-variety banking relationship, the bank will then review the submission and decide whether to take the risk of lending the money. If the business fails, the customer cannot blame the bank, since the bank provided no advice. The relationship in this hypothetical is purely lender-borrower in nature.

Skywaves' situation was very different from that hypothetical "typical" relationship. BB&T and Edahl undertook to provide specific financial and business advice to Skywaves to guide the operation of its business. Moreover, BB&T actually promoted the fact that it was more than a bank and that it provides (through employees such as Edahl) business advice and that it expects its customers to rely on that business advice. The BB&T philosophy, published by John A. Allison the chairman and CEO explains: "*We are in the high-quality financial advice business.*" (*See* R. pp. 1218-49). He describes his "*clients as long term partn*ers." ***Id.*** BB&T's mission statement

expressly states it provides business management advice and direction, including "providing professional sales and risk management direction and support." (*See* R. pp. 927-28). BB&T represented that it would become a "**trusted -- and not easily replaced** -- source of **advice and insight**." (*See* R. pp. 916-17 (emphasis added)).

Tol Broome, BB&T's President of Commercial Finance, testified that the mission statement means BB&T gives advice to clients:

> Q. I notice in here it refers to the fact that you're providing professional sales and risk management direction to your customers.
>
> A. Yes.
>
> Q. Is that equivalent to saying that you're giving advice to your customers?
>
> A. Yes.

(*See* R. p. 1071)

BB&T's business model was based on the notion that it would induce its customers to trust and rely on its advice. Frank Bullard, BB&T's South Carolina market president and Edahl's supervisor, testified that, as a relationship manager, Edahl's job was to develop the confidence and trust of the customer so as to render valuable advice:

> Q. Is one of the goals of a relationship manager to develop confidence and trust in your customers?
>
> A. Yes.
>
> Q. And to be able to render value advice to the customer?
>
> A. Yes.

(*See* R. pp. 912-15).

Against this backdrop, BB&T undertook to not merely fund Skywaves, but to advise it as to *how* to capitalize its future business expansion. The advice BB&T provided Skywaves included designing a plan that was *unique* to Skywaves and was intended to meet its capitalization needs. Mr. Broome testified that the capitalization

plan BB&T and Edahl created for Skywaves was a "unique situation in that it didn't fit the -- the mold for factoring that was the normal protocol." (*See* R. p. 929).

Castlen Morris, the account executive in charge of the Factoring Agreement that BB&T created specifically for Skywaves, testified that the "approved structure that Jim Edahl got is definitely *out of the box from what I'm used to.*" (*See* R. p. 1054). He further testified that "this financing program was **tailor-made for Skywaves."** (*See* R. p. 1055 (emphasis added)). He additionally expressed that "this is typically not part of BB&T's standard contract (it is something out of the ordinary for Skywaves exclusively." (*See* R. pp. 1008-11). Finally, he noted that "[this] **is a great departure from what we would do for a 'typical' client**." (*See* R. pp. 1005-07 (emphasis added)).

Though based on a factoring platform, the funding scheme that BB&T and Edahl devised was to be the equivalent of a working capital investment that Hunt Capital had offered to Skywaves to fund its growth. (*See* R. p. 972).

The lower Court's finding that "Skywaves cannot establish justifiable reliance" (*see* R. p. 58-71 Order Granting BB&T Motion for Summary Judgment in part, at 10) is astonishing since BB&T actually conceded that it knew Skywaves relied on its advice:

> Q. Do you think SkyWaves relied upon your recommendation to fund this growth for purchase order financing?
>
> A. Yes.
>
> Q. Okay. The same thing with site plans?
>
> A. Yes.

(*See* R. p. 947). Moreover, BB&T has acknowledged its duty to understand its customers' needs:

> Q. Do you think that a relationship manager should know his customer's business needs?
>
> A. Yes.

(*See* R. p. 921). Another BB&T witness testified that:

Q. Okay. As part of being a professional do you deem that you have a duty to know your customer and your customer's needs?

A. Sure.

(*See* R. p. 1079).

BB&T's understanding its customers' needs is important because BB&T makes recommendations that are supposed to be in its customer's best interest:

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

A. Right.

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

A. Right.

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

A. That's correct.

(*See* R. p. 915).

Of course BB&T has a duty to be honest and to never mislead its customer with regard to the advice it provides:

Q. And would you agree that a banker should treat his customer fairly and reasonably?

A. Correct.

Q. And would you agree that a banker should never mislead his customer?

A. Correct.

(*See* R. p. 1056)

BB&T admits the bank's customer is justified in believing the truth of what the relationship manager says on behalf of the bank:

Q. And do you believe that the customer should be entitled to believe that what the relationship manager says on behalf of the bank is true?

A. Yes.

(*See* R. p. 921).

Having undertaken a duty to advise Skywaves in a professional capacity and on which it was reasonable for Skywaves to rely, BB&T owed Skywaves a standard of care that it failed to meet. Edahl's representation that his financing plan included a promise to loan money on the basis of site plans was patently false when made. His supervisor never approved the scheme:

Q. Did you approve the loan—loaning money on site plans?

A. No.

(*See* R. p. 923).

Edahl's scheme for financing Skywaves' growth on a factoring platform was not suitable for Skywaves needs as BB&T now admits. BB&T now concedes that it was not an "appropriate financing mechanism for Skywaves." (*See* R. p. 929). In fact, BB&T witness Tol Broome likened the plan to "venture capital" lending, something it would never had considered for Skywaves. (*See* R. pp. 1072-73; *accord* R. p. 1043).

In summary, contrary to the trial court's conclusions, there is ample evidence that "the BB&T relationship manager had developed a relationship upon which they [Skywaves] were entitled to rely." BB&T led Skywaves to believe it understood Skywaves financing needs. It undertook to give Skywaves unique advice, catered to Skywaves, regarding how to finance its growth. It induced Skywaves to trust and believe its recommendations for financing. BB&T expected Skywaves to justifiably rely on BB&T's advice for financing (and even acknowledges its duty). BB&T and Edahl then lied about what BB&T was prepared to do. Defendants also made recommendations for financing that were known to be wholly inappropriate for Skywaves needs.

In light of this undisputed evidence, it is clear that the trial court erred in granting summary judgment to Defendants as to Skywaves' claims.

III. THE TRIAL COURT ERRED IN DISMISSING SKYWAVES' SCUTPA CLAIM, BECAUSE BB&T'S MISCONDUCT AFFECTED THE PUBLIC INTEREST AND WAS CAPABLE OF REPETITION

The standards governing the analysis of a Motion to Dismiss in South Carolina are well-settled:

> "On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper. *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008).

Grimsley v. South Carolina Law Enforcement Div., 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) (reversing grant of motion to dismiss). "'The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action.'" *See Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 568, 703 S.E.2d 197, 199 (2010).

The lower court dismissed Skywaves' action for violation of the South Carolina Unfair Trade Practices Act, mistakenly concluding that the Amended Complaint lacked any allegations "that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition." To the contrary, Skywaves presented evidence that Defendants' conduct created a potential for repetition, stemming from the fact that this conduct was part of BB&T's institutional procedures.

Under SCUTPA, "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce[7] are hereby declared unlawful." *See* S.C. Code § 39-5-20(a). "In order to bring an action under the UTPA, the plaintiff must demonstrate (1) that the defendant engaged in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest." *See Havird Oil Co. v. Marathon Oil Co.,* 149 F.3d 283, 291 (4th Cir. 1998) (applying SCUTPA):

> An impact on the public interest may be shown if the acts or practices have the potential for repetition. *Crary v. Djebelli*, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998) (citation omitted). The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts. Id. at 388, 496 S.E.2d at 23. (citation omitted).

Accord Singleton v. Stokes Motors, Inc., 358 S.C. 369, 379, 595 S.E.2d 461 (2004). SCUTPA should be given a liberal construction, *McTeer v. Provident Life and Acc. Ins.,* 712 F. Supp. 512 (D.S.C 1989), and should not be construed to increase a plaintiff's burden of proving liability, since its purpose is to give additional protection to victims of unfair practices, not to make a case more difficult than under common law. *See Debondt v. Carlton Motorcars,* 342 S.C. 254, 269, 536 S.E.2d 399 (Ct. App. 2000).

As Skywaves has detailed in the preceding sections, its First Amended Complaint and the undisputed evidence contains numerous details of Defendants' fraudulent and wrongful conduct. This behavior (undertaking to provide advice) is not an isolated incident. Rather, Defendants' actions were taken as part of BB&T's philosophy and

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[7] S.C. Code § 39-5-10 defines "trade and commerce" as: "Trade" and "commerce" shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible, real, personal, or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.

mission. Similarly, BB&T's efforts to keep customers away from other banks by misrepresenting the details of the relationship are not necessarily limited to Skywaves. To the contrary, this is the precise type of unfair practice that is capable of repetition. As a result, Judge Young erred in dismissing Plaintiff Skywaves' SCUTPA claim.

IV. THE TRIAL COURT SHOULD HAVE GRANTED PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' ANSWERS AND ENTERED DEFAULT AS A SANCTION FOR DEFENDANTS' PATTERN OF DECEITFUL CONDUCT

A. Applicable Legal Standards

Either exercising its inherent powers or under the doctrines of unclean hands or judicial estoppel, the trial judge should have sanctioned Defendants for their dishonest conduct, by entering a default judgment against them. Defendants' admitted pattern of misconduct in violation of Rules of Civil Procedure 11 and 37, including making knowingly false pleadings, interrogatory answers, affidavits and perjured deposition testimony, requires the sternest of action to protect the integrity of the judicial process.

"A trial court has the inherent power to protect itself from indignities and to enable it effectively to administer its judicial functions." *See State v. Brantley*, 279 S.C. 215, 217, 305 S.E.2d 234, 235 (1983) (citations and internal quotation marks omitted). In *Chewning v. Ford Motor Co.*, 354 S.C. 72, 579 S.E.2d (2003), the Supreme Court noted that fraud on the court "requires a showing that one has acted with bad faith or and intent to deceive or defraud the court." "The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings . . . and consequently to the due administration of justice." *State v. Goff*, 228 S.C. 17, 22, 88 S.E.2d 788, 790-91 (1955).

Similarly, judicial estoppel is intended to ensure the integrity of the judicial process. *See Hawkins v. Bruno Yacht Sales*, 342 S.C. 352, 536 S.E.2d 698 (Ct. App. 2000); *accord Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E. 2d 629, 631 (2004) (*citing Hawkins v. Bruno Yacht Sales*, 353 S.C. 31, 42, 577 S.E.2d 202, 208 (2003) ("The

purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary."). The elements of judicial estoppel are well-settled:

> (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

See Cothran, 357 S.C. at 215-16, 592 S.E.2d at 632.

While "unclean hands" is normally asserted for the protection of a party's own rights, it is closely related to judicial estoppel and courts have treated it as such. For example, in *Wachovia Bank, NA. v. Coffey,* 389 S.C. 68, 698 S E.2d 244 (Ct. App. 2010), as a sanction for "unclean hands," the Court of Appeals prohibited a bank from pursuing equitable foreclosure and legal causes of action. In *Matrix Fin. Serv. Corp. v. Frazer,* 394 S.C. 714 S.E. 2d 532 (2011), the Supreme Court applied unclean hands to bar a lender from legal or equitable remedies.

B. Defendants Have Engaged in Dishonest Conduct in Their Relationship With Skywaves and in This Litigation

Defendants' history with Skywaves has, unfortunately, been replete with the Defendants' dishonesty and misrepresentations, all to Skywaves' detriment. However, Defendants' untruthful actions have not been limited to the facts giving rise to this lawsuit. In addition to the underlying fraud Defendants inflicted on Skywaves, Defendants have also made numerous untrue factual claims in this litigation, which have harmed not only Skywaves, but also the dignity of the South Carolina court system. For the reasons that follow, the trial court should have sanctioned Defendants for their misconduct by striking their answers.

For example, for four years Defendants refused to admit that Edahl acted as its agent within the course and scope of his employment. That was simply untrue. In reality, the testimony shows that BB&T actually granted Edahl incentive pay (bonus) for the work he performed as Skywaves' exclusive relationship officer in 2007. (*See* R. p. 707). When BB&T subsequently felt it would be advantageous to admit that Edahl was its agent — in an effort to deprive Skywaves of its constitutional right to a jury trial four years later — it did so. (*See* R. pp. 709-13). For example, in a January 15, 2015 letter brief to the trial court, in an effort to evade any possible jury trial, BB&T argued that Defendant Edahl should obtain the benefit of the claimed jury trial waiver and "confirm[ed] that BB&T admits that Mr. Edahl was its employee when the financing at issue was provided under the Factoring Agreement." (*See* R. pp. 629-31). Defendants' refusal to admit the obvious fact that Edahl was BB&T's agent is one illustration of Defendants' dishonest conduct.

More to the heart of this case, Defendants also defrauded the trial court with regard to the nature of the relationship between the parties. Specifically, Defendant Edahl lied about the undisputed modification of the parties' Factoring Agreement. Defendants did their best to conceal this misrepresentation, and only admitted the truth when they had no choice. Even then, Defendants did what they could to minimize and qualify their admission.

In its First Amended Complaint, Skywaves made numerous allegations to the effect that it had an agreement (orally and confirmed in writing) with BB&T to modify the original Factoring Agreement to provide for the advancement of capital based, *inter* alia, on site plans (as opposed to having to await invoices):

> 12. In early 2007, Skywaves' Board of Directors determined that it would need an expanded financial commitments to provide capital infusion beyond those being currently provided by BB&T to meet the increasing number of Requests for Quotations it was receiving as a result of winning two General Dynamics contracts, one for $12 million with the Navy/Coast Guard and the other a $20 million multi-year homeland security initiative with the New York state SWN Police. . . .
>
> 18. Between March and December of 2007, Skywaves and BB&T exchanged a series of emails, letters and documents, which memorialized the

relevant and material terms of a new and expanded factoring agreement (or a modification of the prior agreement).

19. Under this modified factoring agreement, BB&T agreed, among other things, to provide capital infusions based on invoices, purchase orders, contracts and site plans.

20. Skywaves received numerous writings from BB&T containing the material terms and conditions of this promise, undertaking, accepted offer, commitment, or agreement. BB&T, or its duly authorized agent, signed those writings to the extent required by the law.

21. For example, BB&T sent numerous email messages confirming the relevant terms of the modifications to the existing factoring agreement. . . .

57. Defendant BB&T, acting primarily through Defendant Edahl, represented in writing that if Skywaves would continue its banking relationship with BB&T, BB&T would devise a funding program tailored exclusively for Skywaves, not in keeping with their ordinary contract and course of business with other customers.

(*See* R. pp. 86-99 ¶¶ 12, 18-21, & 57). In its original Answer, originally filed in 2010 in federal court while the case was on removal, BB&T flatly denied these allegations. (*See* R. pp. 100-07 ¶¶ 12, 18-21 & 28). In his original Answer (filed on July 6, 2012), Defendant Edahl — the BB&T agent actually making the modification — also completely denied those allegations. (*See* R. pp. 161-170 ¶¶ 12, 18-21 & 28).

In making these denials, Defendants knowingly perpetrated a fraud on the court in that they denied the existence of the modified agreement with unclean hands, without any good faith basis for doing so. In fact, Defendants knew that BB&T had, through Defendant Edahl, authorized and agreed to such a modification of the Factoring Agreement. For years in this lawsuit, Defendants continued to vehemently deny that BB&T had modified the Factoring Agreement, despite Skywaves' testimony and pleadings to the contrary.

During his deposition in 2013, Defendant Edahl finally admitted, for the first time, that what Plaintiff had been saying was true all along: Edahl (on behalf of BB&T) had in fact modified the Factoring Agreement to permit capitalization based on site plans:

Q: And in fact, after you considered it did you approve that?

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

(*See* R. p. 188). Defendant Edahl confirmed there was never a formal written modification of the original Factoring Agreement to reflect these new terms. (*See id.*). Edahl testified that BB&T was obligated to fund Plaintiff's site plans in accordance with this modification:

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

A: Yes.

Q; And in fact, did the bank finance those plans?

A: Some sites, yes.

(*See* R. pp. 188-89). After Edahl's testimony, BB&T conducted a second fraud investigation. It examined Edahl's conduct and terminated him because he "admitted to false statements." (*See* Sealed R. p. S-37). Edahl was subsequently redeposed and admitted that he perjured himself in his 2013 deposition.

Despite Edahl's admission that he had approved advances based upon site plan funding, Defendants did not initially move to amend their answers to reflect the truth, despite Plaintiff's pleas for them to promptly do so. (*See* R. pp. 714-16). Because of this testimony (and Defendants' refusal to rectify it), on January 17, 2014, Skywaves filed a Motion to Strike Defendants' Answers as being based on false information. Shortly thereafter, apparently realizing that they could no longer deny reality, Defendants' filed Motions to Amend their Answers. (*See* R. pp. 193-223). However, even then, in their proposed amended answers Defendants refused to unqualifiedly admit what was obvious and indisputable.

13. Responding to paragraph 18, Defendant admits only that in March of 2007, BB&T and Skywaves memorialized certain written modifications to the March 22, 2005 Factoring Agreement. Defendant denies the remaining allegations of paragraph 18.

14. Responding to paragraph 19, Defendant admits only that the March 22, 2005 Factoring Agreement was amended to allow for factoring of invoices and purchase orders. Defendant further admits an agreement to finance site plans, to a limited extent, with certain limitations on the amounts being factored. Defendant denies the remaining allegations of paragraph 19.

15. Responding to paragraphs 20 and 21, Defendant admits only that the March 2007 amendment to the March 22, 2005 Factoring Agreement was in writing, signed on behalf of BB&T and provided to Plaintiff.

(*See* R. p. 200 ¶¶ 13-15). In their proposed Amended Answers, Defendants also continued to deny agreeing to modify the Factoring Agreement to permit advances based upon General Dynamics' proposed purchase orders. In other words, even though the clear evidence demonstrates that Defendants' position is demonstrably false, they have not fully and unequivocally admitted what they cannot deny.

Defendants knowingly perpetrated a fraud on the trial court and denied the existence of the modified agreement with unclean hands. As a sanction, the Court should strike Defendants' Answers and permit Plaintiff to prove damages. For years, in both state and federal court, Defendants have contended that S.C. Code § 37-10-107 barred some of Plaintiffs' claims and have denied that BB&T ever modified the Factoring Agreement to provide funding based on General Dynamics' proposed purchase orders (*i.e.,* site plans). For seven years, BB&T denied agreeing to advance funds based on site plans. For over four years, Defendants' fraudulent denial was memorialized in pleadings and an affidavit submitted in federal court.

Long before the Skywaves asked the Court to sanction Defendants, Defendant Edahl's testimony confirmed that BB&T modified the Factoring Agreement to provide for funding based on site plans. In response, months after Edahl's testimony, Defendants amended their Answers to finally — but only half-heartedly — admit their misstatement, conceding only that they agreed to lend "to a limited extent, with certain limitations on the amount being factored."

BB&T's Rule 30 (b)(6) designee, Michael Hennessy — the same person who accused Skywaves of fraud and claimed Skywaves' principals would go to jail for bank fraud — admitted that Skywaves was "in full compliance" with the parties' modified agreement when it obtained the $1.2 million advance. Edahl has come clean and admitted that: (a) he had testified dishonestly and (b) BB&T had made the modified agreement. Despite these concessions (made only after years of protracted litigation), Defendants only amended their answers in a self-serving way that fails to acknowledge the complete truth and continues to assert the statute of frauds as a sham defense.

Further, even years after Defendants amended their Answers (and only weeks before Skywaves' Second Motion to Strike), BB&T dishonestly answered an interrogatory; when asked the date it first claimed Skywaves was in default, BB&T answered January 25, 2008, the day that BB&T sent a letter setting forth a pretextual basis for default. In reality, Edahl's memorandum of January 18, 2008 documented that BB&T declared Skywaves in default — not for the contrived reasons stated in its January 25, 2008 letter — but because Skywaves had secured $1.2 million in advances under the site plan program. (*See* Sealed R. p. S-35). Yet, it persisted with its disdain for the truth in its answers to supplemental interrogatories, served as late as March 23, 2015.

Defendants perpetrated an artifice on the Court by denying (in pleadings and elsewhere) that BB&T modified the line of credit to permit advances based upon the proposed contract with General Dynamics. Defendants removed the case to United States District Court on the baseless premise that Defendant Edahl (who made numerous misrepresentations to Plaintiff) was fraudulently joined to destroy diversity. The District Court rejected Defendants' arguments and remanded the case back to this Court, granting Plaintiff a substantial award of attorneys' fees. In the proceedings in federal court, BB&T filed a false affidavit from Edahl, which claimed that all funding commitments were written and in accordance with customary practice. Edahl subsequently admitted in his

second deposition that paragraph 10 of his Affidavit filed in United States District Court was "false," and he knew it was false when he signed it. (*See* R. pp. 717-20).

In 2014, Defendants *finally* amended their Answers, but failed to acknowledge that Skywaves had complied with the parties' modified agreement. Defendants qualified their admission by stating that BB&T agreed to "finance site plans, to a limited extent, with certain limitations on the amount being factored." (*See* R. pp. 234-44, 265-73).

This lie is consistent with how BB&T treated Skywaves throughout the relationship. For example, as discussed in detail above, BB&T and its agents not only held Skywaves in default of the Factoring Agreement, but they also accused them of engaging in illegal conduct. However, the reality is that Skywaves was acting, at all times, in full conformity with the agreement that Defendants led it to believe governed. Michael Hennessy testified on behalf of BB&T that Skywaves was in full compliance with the modified agreement (General Dynamics site plan funding):

> Q. Okay. Is it your testimony today that based upon the accommodation that was reached by Mr. Edahl that Skywaves did not breach the site plan funding at all?
>
> A. Yes.
>
> Q. So Skywaves, in 2007 to 2008, was in full compliance with the site plan accommodation, but based on what you believe was other information, the bank charged fraud.
>
> A. Yes.

(*See* R. pp. 696).

Certainly, in order to protect its integrity, the trial court could have elected to refer this matter to the Solicitor or United States attorney; however, that Court was not powerless to sanction Defendants. The Court's inherent power and the doctrines of judicial estoppel and unclean hands justify sanctions for Defendants' misrepresentations to the Court. Defendants' fraud on the Court was pervasive, duping even their own esteemed and completely honorable counsel who relied on information from their clients

to state earlier that "from BB&T's perspective, is, in fact, that the officers of Skywaves acknowledged that there had been wrongful conduct and acknowledged a right to call a default under the agreement." (*See* R. p. 1131). Over time, BB&T has been forced to concede that Edahl approved site plan funding and that it wrongfully accused Skywaves of fraud. Yet, Defendants have not apologized to Skywaves for their accusations and denial and their pattern of misbehaviors remains unchecked.

Defendants knowingly took false positions for years in this lawsuit that were unsupported by any evidence — and were, in fact, demonstrably incorrect. They have received substantial benefit in this litigation and other related litigation from taking these positions. Finally, Defendants have been caught in their lies. Their misconduct began with a wrongful removal to the Unites States District Court supported by a false affidavit of Defendant Edahl. The District Judge remanded and entered sanctions against the Defendants.

It is insignificant whether the Court views Defendants conduct through the prism of unclean hands, judicial estoppel, or any other doctrine intended to protect the integrity of the justice system. Defendants' pattern of conduct was willful, wanton, and reckless, exhibiting a distain for the truth. Defendants acted with disrespect to the other parties and contempt for the Court. While the striking of an answer is an extreme sanction, it is available for a reason. As a remedy, it serves to discipline the improper conduct of parties such as Defendants and to give fair notice to others that the Court will not condone dishonest obstructionism. South Carolina courts have exercised this sanction judiciously, but firmly; if the reported appellate decisions are any examples, courts have imposed the sanction with greater frequency in recent years. *See, e.g., McNair v. Fairfield City.*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008); *QZO, Inc. v. Moyer,* 358 S.C. 246, 257, 594 S.E.2d 541, 548 (Ct. App. 2004); *Barnette v. Adams Bros. Logging, Inc.,* 355 S.C. 588, 593, 596 S.E.2d 572, 575 (2003); *Griffin Grading & Clearing v. Tire Serv. Equip. Mfg. Co., Inc.,* 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999); *Halverson v. Yawn,*

328 S.C. 618, 493 S.E.2d 883 (Ct. App. 1997); *Horry County v. Aquafina Partners of* S.C., *LLC,* 2014 WL 2589852 (Ct. App. April 2, 2014) (unpublished).

To paraphrase Justice Douglas, dishonest testimony and false pleadings taint the judicial process "as an open sewer may ruin a river." *See Berman v. Parker,* 348 U.S. 26, 33 (1954). Sanctions are the only disinfectant available to the Court. Although Defendant BB&T is a successful business enterprise, its actions toward the trial court have polluted judicial waters intentionally, consistently, and contemptuously. BB&T should have been sanctioned for its open and obvious misconduct. Plaintiff asks that the Court maintain the quality of the judicial river by reversing the trial court's refusal to strike Defendants' answers as a sanction for their improper conduct.

CONCLUSION

For the foregoing reasons, Plaintiff Skywaves respectfully requests this Honorable Court to reverse the trial court's orders in the following respects:

(a) Reverse the trial court's granting of Defendants' motions to strike Plaintiff's constitutionally-protected request for a jury trial;

(b) Reverse the trial court's granting of summary judgment as to Plaintiff's tort claims;

(c) Reverse the trial court's dismissal of Plaintiff's SCUTPA claim; and

(d) Reverse the trial court's refusal to strike Defendants' Amended Answers as a sanction for their dishonest conduct in this litigation.

August 31, 2016

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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

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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 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

APPELLANT/RESPONDENT'S RULE 211 CERTIFICATE OF COMPLIANCE

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The undersigned certifies that Respondent/Appellant's Final Appellant's Brief, Final Appellant's Reply Brief, and Corrected Final Respondent's Brief comply with Rule 211(b), SCACR.

September 28, 2016

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AND

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

PROOF OF SERVICE

I certify that I have served the Appellant/Respondent's Final Appellant's Brief on the above-referenced Respondent/Appellant and Respondent by depositing a copy of it in the United States Mail, postage prepaid, on September 1, 2016, addressed to their attorneys of record:

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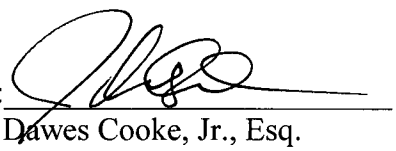
By: 
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