THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Roger M. Young, Circuit Court Judge

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

FINAL REPLY BRIEF OF RESPONDENT/APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

I. THIS COURT HAS DISCRETION TO CONSIDER BB&T'S CROSS-APPEAL.

Skywaves argues that in *Olson v. Faculty House of S.C.*, 354 S.C. 1, 580 S.E.2d 440 (2003), the Supreme Court "definitively foreclosed the appealability of summary judgment," Resp.'s Br. of Appellant/Resp. at 15. Therefore, Skywaves contends, this Court has no discretion to consider BB&T's cross-appeal of the denial of summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act. Skywaves is incorrect. In *Olson*, the Supreme Court distinguished, but did not overrule, *Davis v. Lunceford*, 287 S.C. 242, 335 S.E.2d 798 (1985), in which the Court allowed an appeal from the denial of summary judgment in the interest of finally resolving a long-running case. *See id.*at 242-43, 335 S.E.2d at 799.

The *Olson* Court's treatment of *Davis* indicates that the rule against appellate review of an interlocutory order is not as absolute as Skywaves would have it seem. The actual rule, as articulated in BB&T's opening brief, is that an appellate court in South Carolina has discretion to review an otherwise unappealable order in conjunction with its review of an appealable order. Indeed, both the Supreme Court and this Court have recognized this rule in numerous cases decided after *Olson*. *See, e.g.*, *Se. Housing Found. v. Smith*, 380 S.C. 621, 635 n.14, 670 S.E.2d 680, 688 n.14 (2008); *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 371 & n.20, 628 S.E.2d 902, 918 & n.10 (Ct. App. 2006); *Edge v. State Farm Mut. Ins. Co.*, 366 S.C. 511, 516-17, 623 S.E.2d 387, 390 (2005); *Brown v. Cty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005).

These decisions identify the parameters of the Court's discretion to consider an otherwise unauthorized appeal of an interlocutory order. *First*, the Court must already have before it an appealable issue. In all of the cases cited in the preceding paragraph, the question was whether the Court should review an otherwise un-appealable order in addition to its review of an order subject to immediate appeal. *Second*, immediate review must be supported by principles of judicial economy. *See, e.g.*, *Se. Housing Found.*, 380 S.C. at 635 n.14, 670 S.E.2d at 688 n.14 ("Because the trial court's grant of summary judgment ... is a final determination that is properly before this Court, we believe judicial economy argues for the resolution of Smith's arguments on the 60(b) motion at this time."); *Edge*, 366 S.C. at 516-17, 623 S.E.2d at 390 (exercising jurisdiction over cross-appeal of order denying motion to dismiss "because of judicial economy"). *Third*, there must be a nexus between the appealable order and the non-appealable order. *See Brown*, 366 S.C. at 362 n.5, 622 S.E.2d at 538 n.5 (declining to exercise jurisdiction when the unappealable issue "lack[ed] a sufficient nexus or companionship to justify this Court's exercise of immediate appellate review"); *accord Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 338-39, 574 S.E.2d 502, 511-12 (Ct. App. 2002) (exercising jurisdiction over denial of summary judgment that was "closely connected to" appealable issues). BB&T's cross-appeal meets all of these criteria.

Appealable Issue. There is no dispute that Skywaves' appeal of the circuit court's grant of summary judgment on several of its claims is properly before the Court. Accordingly, this requirement is satisfied.

Judicial Economy. Judicial economy supports the exercise of jurisdiction here. As of the filing of this Reply Brief, this litigation has been ongoing for roughly 6½ years, since December 2009. It has already been the subject of one appeal, filed by Skywaves in 2011 and withdrawn in 2012. Consideration of BB&T's cross-appeal may "avoid another appeal in the future and potentially narrow the issues for trial," *Edge*, 366 S.C. at 517, 623 S.E.2d at 390—indeed, the case may be resolved in its entirety. Further, both parties have fully briefed the merits of BB&T's cross-appeal. *See Pitts*, 352 S.C. at 339, 574 S.E.2d at 512 (holding that exercise of discretion was supported by the fact that the parties had briefed the merits); *cf. State v. Hewins*, 409 S.C. 93, 113, 760 S.E.2d 814, 824 (2014) ("In the interest of judicial economy, we have decided to address the merits of this issue as the parties did in their briefs and at oral argument.").

Nexus. The issues raised in BB&T's cross-appeal are closely intertwined with the issues raised in Skywaves' appeal. The circuit court's summary judgment order addressed all of Skywaves' surviving claims, granting summary judgment to BB&T on the claims for promissory estoppel, breach of the covenant of good faith and fair dealing, negligent misrepresentation, and negligence, and denying summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act. All of these claims arise out of the same facts, and all rest, ultimately, on Skywaves' claim that BB&T improperly declared Skywaves to be in default of the Factoring Agreement in January 2008.

In view of the foregoing, BB&T respectfully asks the Court to exercise its discretion to review the denial of summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act.

II. BB&T IS ENTITLED TO SUMMARY JUDGMENT ON THE BREACH OF CONTRACT CLAIM.

Skywaves' breach of contract claim, as stated in its First Amended Complaint, alleges that BB&T breached the "modified factoring agreement" by "failing to perform its obligations thereunder and terminating the parties' agreement without cause." (R. p. 89, Am. Compl. ¶¶ 28, 31). Knowing it cannot succeed on this theory, Skywaves asserts a new theory on appeal: that BB&T breached the Factoring Agreement by "demand[ing] immediate repayment of all advances that BB&T had made to Skywaves," even though "Skywaves was not obligated to repay any of the money advanced on site plans until the line of credit expired in April 2008." Resp.'s Br. of Appellant/Resp., at 15. "It is well settled that one cannot present and try his case on one theory and then change his theory on appeal." *Gurganious v. City of Beaufort*, 317 S.C. 481, 488, 454 S.E.2d 912, 916 (Ct. App. 1995).

Regardless of the theory, however, Skywaves cannot point to evidence creating a genuine issue of material fact on its breach of contract claim. Therefore, BB&T is entitled to summary judgment.

A. Skywaves misstates the standard of review.

Throughout its brief, Skywaves repeatedly asserts that the circuit court's denial of summary judgment should be affirmed because BB&T has not shown that Skywaves was in default under the Factoring Agreement. *See, e.g.*, Resp.'s Br. of

Appellant/Resp., at 18 (arguing that BB&T "has not shown that Skywaves breached this provision of the Factoring Agreement"). Skywaves ignores that it is the plaintiff in this litigation, not BB&T. The burden is on Skywaves to prove the elements of its claim that BB&T breached the Factoring Agreement by declaring a default. *See Hennes v. Shaw*, 397 S.C. 391, 399, 725 S.E.2d 501, 506 (Ct. App. 2012) ("To recover for a breach of contract, *the plaintiff must prove*: (1) a binding contract; (2) a breach of contract; and (3) damages proximately resulting from the breach." (emphasis added)). Therefore, to avoid summary judgment Skywaves must point to evidence that would permit a reasonable factfinder to conclude that it was *not* in default under the Factoring Agreement. *See S.C. Nat'l Bank v. S. Polymers, Inc.*, 313 S.C. 246, 249, 437 S.E.2d 148, 149 (Ct. App. 1993) (holding that to avoid summary judgment on claim that lender breached contract by declaring default under "deems insecure" clause, plaintiff must demonstrate that "the evidence was susceptible of the inference that the [defendant bank] was *without reasonable grounds* for insecurity" (emphasis added)).

B. Skywaves mischaracterizes the documentary and testimonial evidence.

Skywaves contends that BB&T cannot be entitled to summary judgment unless it first "overcome[s] the genuine issues of material fact regarding the actual terms of the" Factoring Agreement. Resp.'s Br. of Appellant/Resp., at 5. In reality, however, there is very little dispute about the terms of Factoring Agreement, either as it was executed in 2005 or as modified over time. In particular, there is no dispute that BB&T agreed to advance funds on the basis of site plans submitted by General Dynamics, nor is there any dispute that such funding was provided, exactly as

promised.[1] The only factual dispute regarding modifications to the Factoring Agreement is over Skywaves' claim that it was allowed to keep payments on factored invoices for up to 60 days, rather than remitting them immediately to BB&T. But, as discussed *infra*, even if Skywaves' allegation is accepted as true, BB&T is still entitled to summary judgment.

Skywaves' recitation of "Underlying Facts," Resp.'s Br. of Appellant/Resp., at 5-12, is replete with errors and half-truths. This becomes clear when the statements in Skywaves' brief are compared to the actual documents and testimony.

1. Skywaves misstates the terms of the Factoring Agreement.

Skywaves' description of the terms of the Factoring Agreement is almost entirely incorrect. According to Skywaves,

> Under the Factoring Agreement as written, BB&T purchased Skywaves' invoices at a discount and Skywaves was required to repay the sums when it received payment from the customer. Through this Factoring Agreement, Skywaves could obtain prompt partial payment of invoices and repay the advance once the customer paid the invoice in full.

Resp.'s Br. of Appellant/Resp., at 6 (citation omitted). The first part of the statement is correct: under the Factoring Agreement, BB&T purchased Skywaves' invoices for 80 percent of their face value.[2] (R. p. 404, Factoring Agreement ¶ 1(a) (defining

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[1] Skywaves makes much of Jim Edahl's deposition testimony and subsequent affidavit correcting his testimony, concerning the agreement to provide funds on the basis of site plans submitted by General Dynamics. (These events are discussed in BB&T's Respondent's Brief of Respondent/Appellant, at 24-28.) There is no dispute, however, that the agreement was made and that BB&T provided funds on the basis of site plans, exactly as it had agreed to do. Moreover, as discussed *infra*, the site plan funding was not the reason BB&T declared Skywaves in default of the Factoring Agreement.

[2] The Factoring Agreement was subsequently modified to increase the Advance Percentage to 85 percent on invoices. The advance percentage for purchase orders

"Advance Percentage")). The remainder of the statement, however, reflects a fundamental misunderstanding of both how factoring works generally, and of the specific terms of terms the Factoring Agreement between Skywaves and BB&T. In general terms, factoring is a form of financing in which "[a] factor purchases the accounts receivable without recourse but at a discount, and then collects the accounts." *Ivey v. First Citizens Bank & Trust Co.*, 539 B.R. 77, 79 (M.D.N.C. 2015). At that point, the factor owns the receivable, and payment is due from the customer to the factor, not to the company. The benefit to the company is improved cash flow; the benefit to the factor is the margin between the purchase price and the amount collected on the account, plus any fees the factor may charge.

Consistent with this definition of factoring, the Factoring Agreement between Skywaves and BB&T clearly provided that BB&T *purchased* invoices from Skywaves. (R. p. 408, Factoring Agreement ¶ 2 (providing that BB&T became the "absolute owner" of factored invoices)). Because BB&T owned the factored invoices, the Factoring Agreement required Skywaves to include language on factored invoices "stat[ing] 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." (R. p. 411, Factoring Agreement ¶ 10). Payments on factored invoices were supposed to be made by the customer directly to BB&T. In the event a Skywaves customer mistakenly sent payment on a factored invoice to Skywaves, the Factoring Agreement required Skywaves to hold the payment "as the property of BB&T," to keep it separate from

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(and, eventually, for site plans) was 65 percent. (R. p. 423, Letter from Edahl to Voytko (Mar. 2, 2007)).

Skywaves' funds, and to remit the payment to BB&T without delay. (R. p. 410, Factoring Agreement ¶ 8).

In view of the foregoing, Skywaves' statements that "[u]nder the Factoring Agreement ... Skywaves was required to repay the sums [for factored invoices] when it received payment from the customer," and that "Skywaves could obtain prompt partial payment of invoices and repay the advance once the customer paid in full," Resp.'s Br. of Appellant/Resp., at 6, are obviously wrong.[3] These statements assume, contrary to the terms of the Factoring Agreement, that payments on factored invoices could go directly to Skywaves and, worse, that payments on factored invoices belonged to Skywaves, not to BB&T. Throughout the existence of the factoring relationship, however, Skywaves persistently failed to notify its customers that payment on factored invoices was due directly to BB&T, and it persistently held onto payments on factored invoices rather than remitting them immediately to BB&T. Although BB&T elected not to place Skywaves in default each time this happened, it nevertheless repeatedly reminded Skywaves of its obligations under the Factoring Agreement. (R. p. 1059, Morris Dep. 65:1-21).

2. BB&T was not fully cognizant of Skywaves' financial condition in December 2007 and early January 2008.

Attempting to suggest that BB&T somehow did something underhanded by declaring a default of the Factoring Agreement on January 25, 2008, Skywaves claims that BB&T was "[f]ully cognizant of Skywaves' financial condition" in

[3] Skywaves' statement that "BB&T maintained a security interest in the [factored] invoice," Resp.'s Br. of Appellant/Resp., at 8, is also wrong, because BB&T *owned* the factored invoices.

December 2007 and early January 2008, and yet took no action. Resp.'s Br. of Appellant/Resp., at 10. However, the testimony of Skywaves' CFO, John Voytko, contradicts Skywaves' claim.

Skywaves initially projected a net income of $1.4 million for 2007.[4] (R. p. S-5, 2007 Projection). In September, it adjusted its projections, estimating a net loss of ($120,532). (R. p. S-18, Revised 2007 Projection). However, the revised projection also estimated positive net income for the months of October, November, and December 2007. (*Id*). Although Skywaves was supposed to provide BB&T with monthly financial statements, information for the fourth quarter of 2007 was not provided until January 17, 2008—at which point it became clear to BB&T that Skywaves had incurred massive losses (rather than the predicted profits) during October, November, and December. At that point, BB&T brought in Mike Hennessy, a problem loan administrator.

BB&T was certainly concerned about Skywaves' financial condition prior to mid-January 2008. Internal memos, confirmed by deposition testimony, reflect the bank's growing concern about Skywaves' finances. (R. p. S-39, Email from Denning to Edahl (Sept. 7, 2007);[5] R. p. S-46, Memo from Edahl to Denning (Sept. 20, 2007); R. p. S-49, Memo from Edahl to Denning (Nov. 12, 2007)). Skywaves seems to believe that BB&T should have declared a default as soon as the first cloud appeared

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[4] The facts summarized here are set forth in more detail in BB&T's opening brief. *See* Appellant's Br. of Resp./Appellant, at 8-12.

[5] The September 7, 2007 email from Walter Denning to Jim Edahl summarized the discussion of Skywaves during a meeting of the Business Loan Subcommittee. Denning noted, "I do want to stress, our position is not to increase our exposure ... The company must understand that any additional needs should be funded through additional equity investment or other sources."

on Skywaves' horizon. This is a rather ironic stance, given that the premise of every one of Skywaves' claims is that success was just around the corner if BB&T had just kept funding it a little longer. Moreover, Skywaves ignores that it entered into the Factoring Agreement because it was a startup company, and short on cash—a fact of which BB&T was perfectly aware.

3. The site-plan funding was not the reason BB&T declared Skywaves in default.

When Mike Hennessey became involved in mid-January 2008, he initially thought that Skywaves had represented the site plans as being purchase orders, because that is what Ron Konersmann and John Voytko told him. (R. p. 1080, Hennessey Dep. 23:3-8). Skywaves notes that Hennessey testified that if he had known, in January 2008, that BB&T had authorized funding based on site plans, he "would not have considered Skywaves [to be] in default on the site plan funding program." (R. p. 1020, BB&T 30(b)(6) Dep. 65:8-16). However, Hennessey also made clear that this knowledge "wouldn't have made any difference because the default [was] not based upon" the funding of site plans; "[t]he default [was] based upon the financial condition of Skywaves." (R. p. 1019, BB&T 30(b)(6) Dep. 64:14-18). Additionally, a memo written by Mike Burke makes clear that BB&T was very concerned about Skywaves' failure to remit payments on factored invoices, and that this concern was clearly communicated to Skywaves. (R. p. S-52-53, Memo from Burke to Allard (Jan. 24, 2008)).

C. Skywaves cannot show a genuine issue of material fact regarding BB&T's right to declare Skywaves in default.

1. Skywaves failed to remit payments on factored invoices.

The Factoring Agreement provided that customer payments on factored invoices were to be made directly to BB&T. (R. p. 411, Factoring Agreement ¶ 10). The Agreement also provided that if a Skywaves customer mistakenly sent payment on a factored invoice to Skywaves, rather than to BB&T, Skywaves, "as trustee of an express trust created for BB&T's benefit ... shall immediately turn over to BB&T the identical checks ... or other forms of payment received." (R. p. 410, Factoring Agreement ¶ 8). Skywaves' failure to comply with this provision was the first ground of default identified in the January 25, 2008 Default Letter. Additionally, on January 22, 2008 Mike Burke spoke with Konersmann and Voytko regarding $342,000 in payments on factored invoices that had not been sent to the bank; Burke "advised both that this was a serious issue and that we expected to be repaid this money at once." (R. p. S-52, Memo from Burke to Allard (Jan. 28, 2008)).

Skywaves contends that the parties agreed to a modification of the Factoring Agreement, under which it was allowed to keep misdirected payments on factored invoices for up to 60 days (effectively giving itself interest-free short-term loans amounting to hundreds of thousands of dollars).[6] Although the Factoring Agreement

[6] Skywaves confuses the issue by contending that it had no obligation to "repay" advances on site plans or purchase orders until it issued an invoice to a customer. Resp.'s Br. of Appellant/Resp., at 8. This is a correct statement, in that the customer would have no obligation to send payment to BB&T until the structure had been built and an invoice issued. However, it has nothing to do with the first ground of default, which concerned what happened *after* Skywaves issued an invoice to a customer. Skywaves was in default because when a customer sent payment to Skywaves rather than to BB&T, Skywaves kept the money rather than remitting it immediately to BB&T.

required any modification of its terms to be made through a signed writing (R. p. 416, Factoring Agreement ¶ 24), there is no written modification of the Factoring Agreement incorporating this change. There is, however, substantial documentary evidence indicating that no such modification was ever made. Among other things, the record includes at least three separate emails from Castlen Morris to John Voytko reminding him of Skywaves' obligation to promptly remit to BB&T all payments on factored invoices. (R. p. 430, Email from Morris to Voytko (Feb. 15, 2006); R. p. 431, email from Morris to Voytko (June 5, 2006); R. p. 432, email from Morris to Voytko (Feb. 14, 2007). For example, Morris emailed Voytko in June 2006 about $150,000 Skywaves had held for "30+ days." If there really were a 60-day grace period, one would expect that such an email would not have been sent, or that Voytko would have responded by reminding BB&T of the terms of their deal. But, such emails were sent—repeatedly, in fact—and there is no evidence that Voytko, or anyone else at Skywaves, ever told Morris that Skywaves was allowed to keep payments for up to 60 days.

Undeterred, Skywaves contends that the modification was made orally, citing *Son-Shine Grading Co. v. ADC Constr. Co.*, 68 N.C. App. 417, 315 S.E.2d 346 (1984), for the proposition that a written contract may be orally modified even when it prohibits oral modifications.[7] Resp.'s Br. of Appellant/Resp., at 17. However, while North Carolina courts have "recognize[d] the validity of an oral modification to a written contract despite the contract's inclusion of a 'no oral modifications' clause, [they]

[7] To the extent Skywaves believes a modification occurred because BB&T did not immediately declare a default when Skywaves held onto a misdirected payment, it is incorrect. The Factoring Agreement clearly provides that any leeway granted by BB&T did not operate as a waiver. (R. pp. 415-416, Factoring Agreement ¶ 23).

have not done so where, as here, the original contract was subject to the statute of frauds." *Nixon Assocs., LLC v. Brown*, 768 S.E.2d 201, 2014 WL 7466753, at *3 (N.C. Ct. App. 2014) (distinguishing *Son-Shine Grading*). When the statute of frauds requires that a contract be in writing, any oral modification of that contract "will be ineffectual unless there is some memorandum of it." *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 465, 323 S.E.2d 23, 26 (1984).

Even if Skywaves' claimed oral modification were accepted as true, Skywaves still cannot show that it was not in default. Skywaves acknowledged that holding a misdirected payment on a factored invoice for more than 60 days would violate the Factoring Agreement as (allegedly) modified. (R. pp. 336-337, Konersmann Dep. 124:20-125:10). The evidence in the record demonstrates that more than once, Skywaves held such payments longer than 60 days:

- In November 2006, BB&T notified Skywaves that nearly $80,000 paid to Skywaves by Cingular was "60+ days past due." (R. p. 994, Voytko Dep. 98:5-100:5).
- In August 2007, BB&T questioned Skywaves regarding a payment from Verizon that Skywaves held for *three months*—far longer than the supposed 60-day grace period. (R. p. 1057, Morris Dep. 57:10-58:12).
- On September 18, 2007, Skywaves notified BB&T that it was finally remitting a payment made by Verizon on 70 days earlier. (R. p. 1059, Morris Dep. 66:1-67:9).

Moreover, BB&T warned Skywaves, over and over, that it was not permitted to hold payments on factored invoices. (R. p. 449, Sept. 2007 notes; R. p. 1059, Morris Dep. 65:5-8).

2. Skywaves was not paying its debts as they came due.

The second ground of default was that Skywaves was not paying its debts as they came due in the ordinary course of business. (R. pp. 454-455, Default Letter).

Skywaves devotes only 17 lines of its brief to this issue, and it points to no evidence at all to show that it was in compliance with this term of the Factoring Agreement. Nor can it do so, given that both Ron Konersmann and John Voytko admitted that Skywaves was substantially overdue on payments to a number of vendors. (R. pp. 399-400, Voytko Dep. 194:15-195:2; R. pp. 363-364, Konersmann Dep. 342:16-343:21). In addition, a field auditor examined Skywaves' financial records through December 31, 2007, and determined that Skywaves had total accounts payable of $977,843, and of that amount, $362,207 was over 60 days old. (R. p. 860, Audit Report).[8] Skywaves was also delinquent on its payroll taxes. (*Id*). In light of the testimony and the documentary evidence, no reasonable factfinder could conclude that Skywaves was paying its debts as they came due.

3. BB&T had a good-faith basis for deeming itself insecure.

In its opening brief, BB&T explained why the undisputed facts establish that it had a good faith basis for deeming itself insecure, an event of default under the Factoring Agreement. Appellant's Br. of Resp./Appellant, at 24-26. Skywaves does not attempt to challenge the facts, but instead expresses outrage that BB&T supported its argument with citations to the North Carolina Uniform Commercial Code (NC-UCC), N.C. Gen. Stat. §§ 25-1-101, *et seq.*[9] According to Skywaves, there

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[8] Skywaves contends that most of this amount was owed to Franz Meier, who was an investor in Skywaves and who had agreed to give Skywaves more time to pay. But, Skywaves does not attempt to refute BB&T's argument that forbearance by a corporate insider is not "the ordinary course of business." Further, Skywaves does not dispute that a portion of its overdue accounts payable were owed to creditors who were not insiders of the company.

[9] BB&T cited N.C. Gen. Stat. § 25-1-309 (providing that a "deems insecure" contract term may be invoked "only if that party in good faith believes that the

is no "legal or factual basis" for applying the NC-UCC to the Factoring Agreement. Resp.'s Br. of Appellant/Resp., at 20. Skywaves is wrong, both legally and factually. As a legal matter, the Factoring Agreement is "[a] sale of accounts, chattel paper, payment intangibles, or promissory notes" and thus is covered by NC-UCC Article 9, Secured Transactions. N.C. Gen. Stat. § 25-9-109(a)(3); *see Rentenbach Constructors, Inc. v. CM P'ship*, 181 N.C. App. 268, 271, 639 S.E.2d 16, 18 (2007). As a factual matter, the Factoring Agreement defines "UCC" as referring to the NC-UCC (R. p. 407, Factoring Agreement ¶ 1(a)); incorporates the NC-UCC's definition of several terms (R. p. 407, Factoring Agreement ¶ 1(b)); and elsewhere incorporates portions of the NC-UCC. (R. pp. 412-414, Factoring Agreement ¶¶ 13, 14, 17).

As a fallback, Skywaves contends that even if the NC-UCC applies, § 25-1-309 "does not permit a party to *terminate an agreement* because they feel insecure, reasonably or otherwise." Resp.'s Br. of Appellant/Resp., at 20 (emphasis added).[10] But, of course, BB&T did not "terminate" the Factoring Agreement; it declared Skywaves in default, with the goal of working through the issues with Skywaves. (R.

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prospect of payment or performance is impaired") and N.C. Gen. Stat. § 25-1-201(b)(20) (defining "good faith" as "honesty in fact and the observance of commercially reasonable standards of dealing"). Based on these definitions, BB&T identified the specific, undisputed facts supporting its invocation of the "deems insecure" clause as a ground of default. Appellant's Br. of Resp./Appellant, at 24-25.

[10] Skywaves describes the "deems insecure" clause as "unenforceable, baseless, [and] self-serving." Resp.'s Br. of Appellant/Resp., at 20. Skywaves' claim that the "deems insecure" clause is unenforceable was not raised below, and in any event is without merit. *See Crockett v. First Fed. Sav. & Loan Ass'n of Charlotte*, 289 N.C. App. 620, 631, 224 S.E.2d 580, 588 (1976). The claim that the clause is "baseless" is nonsensical. As for "self-serving," Konersmann himself agreed, under oath, that the Factoring Agreement "is protecting the bank, *which is fine*, you know, *it's their money* and we are borrowing it." (R. pp. 346-347, Konersmann Dep. 169:24-170:2 (emphasis added)).

p. 1022, BB&T 30(b)(6) Dep. 110:1-5 ("If a default exists, almost every single problem loan administrator calls that default, and then we work through the issues if we can. But you don't ever waive a default until you call it."); R. p. 1021, BB&T 30(b)(6) Dep. 108:5-6 (testifying that the declaration of default "started the conversation")). Critically, **BB&T continued to fund Skywaves even after declaring the default**. (R. p. 1021, BB&T 30(b)(6) Dep. 107:14-18). Specifically, BB&T funded payroll and advanced funds to enable Skywaves to build shelters ordered by Verizon. (R. p. 1043, BB&T 30(b)(6) Dep. 144:12-24).

D. Because BB&T was entitled to declare a default under the plain terms of the Factoring Agreement, Skywaves' other arguments are irrelevant.

1. The materiality of Skywaves' defaults is irrelevant because BB&T was entitled to declare a default under the plain terms of the Factoring Agreement.

Skywaves argues at length that BB&T failed to establish that Skywaves' defaults under the Factoring Agreement were material, such that BB&T's declaration of default was not justified. Resp.'s Br. of Appellant/Resp., at 21-27. As an initial matter, Skywaves, not BB&T, has the burden of proof. Regardless, however, the cases on which Skywaves relies do not support its argument.

Skywaves cites numerous cases in support of its purported rule that only a *material* violation of contract terms justifies a declaration of default. The cited cases, however, involved claims for equitable relief, where the presence or absence of a material breach was a necessary prerequisite to obtaining the relief sought. *See, e.g.*, *Ebert v. Ebert,* 735 S.E.2d 451 (Table), 2012 WL 5857386, at *2-*3 (N.C. Ct. App. 2012) (holding that a party who is in material breach of a contract is not entitled to

specific performance); *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 705, 682 S.E.2d 726, 738-39 (2009) (holding equitable remedy of rescission is available only if other party's breach goes to the heart of the parties' bargain); *Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E.2d 240, 243 (1964) ("The right to rescind does not exist where the breach ... does not go to the heart of an agreement.").

The problem with Skywaves' reliance on these cases is twofold. First, Skywaves is seeking damages, not an equitable remedy. Therefore, cases discussing the standard for obtaining equitable relief are entirely irrelevant. Second, and more fundamentally, Skywaves again ignores that it bears the burden of proof. If the materiality of its default were an issue, it would be up to Skywaves to prove that its default was *not* material.

Materiality is not an issue in this case, because the plain terms of the Factoring Agreement entitled BB&T to declare a default. North Carolina law is clear that when "contract language is plain and unambiguous on its face," it "will be enforced as written as a matter of law." *Fairview Developers, Inc. v. Miller*, 187 N.C. App. 168, 172, 652 S.E.2d 365, 368 (2007); *see Kenley Family P'ship v. Yu*, 635 S.E.2d 537, 2006 WL 2947148, at *2 (N.C. Ct. App. 2006) (unpublished) (holding that default clause must be enforced as written); *accord, e.g., Bank of Am., N.A. v. JB Hana, LLC*, 766 F.3d 841, 856 (8th Cir. 2014) (holding lender was entitled, under the plain terms of the contract, to declare a default); *J.E. Robert Co. v. Signature Props., LLC*, 71 A.3d 492, 508-09 (Conn. 2013) (same); *First State Bank of Or. v. Hoehnke Nursery Co.*, 667 P.2d 1022, 1025 (Or. Ct. App. 1983) (same).

2. BB&T did not waive its right to declare a default.

Skywaves additionally contends that BB&T waived its right to call a default by not doing so the very first time Skywaves held onto a misdirected payment on a factored invoice. Resp.'s Br. of Appellant/Resp., at 23-24. Skywaves once again ignores the plain language of the Factoring Agreement, which made clear that leniency on BB&T's part would not constitute a waiver. (R. p. 415, Factoring Agreement ¶ 23 ("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 ...")).

The cases Skywaves cites in support of this argument involved contracts for the sale of real property. Therefore, they are not controlling in this case, which is concerned with a lending contract. *See Speer v. Great W. Bank*, 2016 WL 791203, at *4 (N.C. Ct. App. Mar. 1, 2016) (making this distinction). In the context of lending agreements, North Carolina law is clear that "no waiver results from isolated instances of acceptance of late payments." *Barker v. Agee*, 93 N.C. App. 537, 541, 378 S.E.2d 566, 569 (1989). Waiver occurs only upon "a consistent course of accepting past-due installments." *Id.* Even then, "such waiver certainly [does] not render the Note unenforceable for all time." *Speer*, 2016 WL 791203, at *4. If the lender notifies the borrower "that prompt payment is again required," a subsequent late payment will entitle the lender to hold the borrower in default. *Driftwood Manor Invs. v. City Fed. Sav. & Loan Ass'n*, 63 N.C. App. 459, 464, 305 S.E.2d 204, 207 (1983).

Skywaves' waiver argument also fails because settled North Carolina law holds that a waiver does not occur when a lender, although not calling a default, "makes clear to the debtor its intent to hold the debtor to the terms of the agree-

ment." *NationsBank of N.C., N.A. v. Baines*, 116 N.C. App. 263, 270, 447 S.E.2d 812, 816 (1994). In this case, BB&T repeatedly reminded Skywaves that payments on factored invoices were to be made directly to the bank, and routinely warned Skywaves that failure to promptly remit misdirected payments was a violation of the Factoring Agreement. Such reminders and warnings were given throughout the existence of the Factoring Agreement, including on February 15, 2006 (R. p. 430, Email from Morris to Voytko); June 5, 2006 (R. p. 431, Email from Morris to Voytko regarding payments on factored invoices held for "30+ days"); February 14, 2007 (R. p. 432, Email from Morris to Voytko); and in August and September of 2007 (R. p. 449, Sept. 2007 notes). Under these circumstances, Skywaves could not reasonably believe that BB&T was intentionally abandoning its right to prompt remittance of misdirected payments on factored invoices.

This point is reinforced by Paragraph 29 of the Factoring Agreement, which provides that Skywaves "knowingly, intelligently and expressly waives demand, protest, notice of protest, notice of default or dishonor, notice of payment or nonpayment, and notice of default." (R. p. 416, Factoring Agreement ¶ 29). North Carolina courts will recognize and enforce such provisions according to their terms. *See, e.g.*, *Harty v. Underhill*, 211 N.C. App. 546, 553-54, 710 S.E.2d 327, 333 (2011). In light of this provision, and regardless of any warnings or reminders given to Skywaves, no waiver was created by BB&T's decision not to place Skywaves in default every time it violated the plain terms of the Factoring Agreement. However, as has already been noted, BB&T repeatedly reminded Skywaves of its obligation to immediately remit payments on factored invoices to BB&T and, on multiple

occasions, warned Skywaves that its failure to comply with the factoring agreement would jeopardize its relationship with the bank. *See Nixon Assocs.*, 2014 WL 7466753, at *5 (holding that acceptance of partial rent payments did not establish waiver of right to collect unpaid rent under the terms of the lease agreement).

III. BB&T IS ENTITLED TO SUMMARY JUDGMENT ON SKYWAVES' CLAIM FOR BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT.

Skywaves does not respond to BB&T's argument that this claim sounds in tort, and thus is governed by South Carolina law. Apellant's Br. of Resp./Appellant, at 26-27. Under South Carolina law, to survive summary judgment on a claim of breach of contract accompanied by a fraudulent act, the plaintiff must create a genuine issue of material fact as to each of three elements: (1) a breach of contract; (2) fraudulent intent relating to the breach (and not merely to the making of the contract); and (3) a fraudulent act accompanying the breach. *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 53-54, 336 S.E.2d 502, 503-04 (Ct. App. 1985).

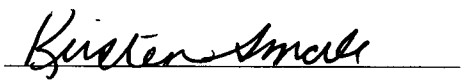
Skywaves cannot create an issue of fact on any of these elements. First, as discussed at length in Part II of this brief, Skywaves cannot point to evidence that would allow a reasonable factfinder to conclude that BB&T breached the Factoring Agreement by calling a default. Second, Skywaves cannot show fraudulent intent. Although Skywaves asserts that there is evidence that "BB&T misrepresented its motive" for declaring the default, Resp.'s Br. of Appellant/Resp., at 28, it does not identify any such evidence. Moreover, even if BB&T had some undisclosed motive for declaring a default, the simple reality is that the plain terms of the Factoring Agreement entitled it to do so. *See Martin v. Hamilton State Bank*, 723 S.E.2d 726, 728-29 (Ga. Ct. App. 2012) (holding that a bank's possible motivation was immaterial

because the terms of the agreement entitled it to declare a default). Third, there is no evidence at all of any fraudulent act committed by BB&T. The only "act" identified by Skywaves is the declaration of default, *i.e.*, the act that constitutes the alleged breach of contract. Skywaves does not identify any other fraudulent act committed by BB&T. Therefore, BB&T is entitled to summary judgment on Skywaves' claim for breach of contract accompanied by a fraudulent act.

CONCLUSION

For the foregoing reasons, BB&T respectfully asks the Court to exercise its discretion to consider the merits of BB&T's cross appeal and to reverse the denial of summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act.

Respectfully submitted,



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Greenville, South Carolina
September 6, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Roger M. Young, Circuit Court Judge

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SC Court of Appeals

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v.

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

And

James Edahl, ... Respondent,

CERTIFICATION OF COMPLIANCE

Undersigned counsel hereby certifies that the foregoing FINAL REPLY BRIEF OF RESPONDENT/APPELLANT complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Kirsten E. Small, Esquire, hereby certify that on the 6th day of September, 2016, I served a copy of the FINAL REPLY BRIEF OF RESPONDENT/APPELLANT, submitted by Respondent/Appellant Branch Banking and Trust Company, Successor in Merger to Branch Banking and Trust Company of SC, a/k/a BB&T, on counsel for the Appellant/Respondent and on counsel for Respondent James Edahl via United States Mail, postage prepaid, and addressed as follows:

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