THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Roger M. Young, Circuit Court Judge

Opinion No. 5557 (S.C. Ct. App. filed May 2, 2018)

Skywaves I Corporation, ...Respondent,

v.

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

And

James Edahl, ... Respondent,

PETITIONER'S APPENDIX
VOLUME 2 OF 5

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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

Appellate Case No. 2015-001809

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SC Court of Appeals

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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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August 12, 2016

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

James J. Kerr, Crayton, Walters, and J.T. Main, LLC, Plaintiffs, vs. Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Defendants.	C/A No. 2:10-0104-MBS
John Voytko, Plaintiff, vs. Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Defendants.	C/A No. 2:10-0109-MBS
Ron Konersmann, Plaintiff, vs. Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Defendants.	C/A No. 2:10-0110-MBS

Skywaves I Corporation, Plaintiff, vs. Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl, Defendants.	)	C/A No. 2:10-0111-MBS

ORDER

These related cases arise out of a number of business transactions between Defendants Branch Banking and Trust Company ("BB&T") and its representative, James Edahl ("Edahl"), and Plaintiff Skywaves I Corporation ("Skywaves"). Plaintiffs James J. Kerr; Crayton Walters; and J.T. Main, LLC (collectively, "Kerr") were investors in Skywaves. Plaintiff John Voytko ("Voytko") was Chief Financial Officer of Skywaves, as well as an investor in the company. Plaintiff Ron Konersmann ("Konersmann") was Chief Executive Officer of Skywaves, as well as an investor in the company. Plaintiffs filed complaints in the Court of Common Pleas for Charleston County on December 3, 2009, asserting causes of action for negligent misrepresentation and fraudulent inducement (Kerr, Voytko, Konersmann, Skywaves), lender liability (Kerr, Konersmann, Skywaves), violation of the South Carolina Unfair Trade Practices Act (SCUTPA), S.C. Code Ann. §§ 39-5-10 et seq. (Voytko, Konersmann), and breach of contract accompanied by a fraudulent act (Skywaves). Defendants removed the complaints to this court on January 14, 2010.

Plaintiffs amended their complaints on February 12, 2010 to allege causes of action for breach of contract as to BB&T (Skywaves), breach of contract accompanied by a fraudulent act as

to BB&T (Skywaves), promissory estoppel as to BB&T (Skywaves), breach of covenant of good faith and fair dealing as to BB&T (Skywaves) , negligent misrepresentation as to BB&T and Edahl (Voytko, Konersmann, Skywaves), fraudulent misrepresentation as to BB&T and Edahl (Voytko, Konersmann, Skywaves), negligence as to BB&T and Edahl (Voytko, Konersmann, Skywaves), and violation of the SCUTPA as to BB&T and Edahl (Voytko, Konersmann, Skywaves), negligent misrepresentation and fraudulent inducement as to all Defendants (Kerr), negligence and lender liability as to all Defendants (Kerr).

These matters are before the court on motions to remand filed by Plaintiffs on February 15, 2010. Defendants filed memoranda in opposition to Plaintiffs' motions on March 3, 2010, to which Plaintiffs filed replies on March 22, 2010. Also before the court are Defendants' motions to dismiss amended complaint, which motions were filed March 26, 2010. Plaintiffs filed responses on March 22, 2010, to which Defendants filed replies on April 1, 2010. The court held a hearing on May 11, 2010.

I. FACTS

According to the various complaints, Skywaves developed a product for the wireless telecomunications industry. Plaintiffs contend that on or about March 22, 2005, Skywaves and BB&T entered into a written "factoring agreement" whereby BB&T purchased certain receivables of Skywaves at a discount and agreed to collect the receivables on Skywaves' behalf. In exchange, BB&T received administrative fees. This financing arrangement allowed Skywaves to raise operating capital without incurring debt.

In early 2007, Skywaves won two General Dynamics contracts. Thereafter, Skywaves began receiving a number of requests for quotations, and the Board of Directors of Skywaves determined

that additional capital would be required to meet potential increased demand. Skywaves solicited proposals for expanded financial commitments, and received proposals from a number of financial institutions. However, BB&T offered to modify and expand the existing factoring agreement. According to Plaintiffs, Skywaves and BB&T exchanged a number of emails whereby the factoring agreement was modified for the purpose of Skywaves ultimately receiving capital infusions based on invoices, purchase orders, contracts, and site plans. Plaintiffs allege that Skywaves elected not to pursue other opportunities based upon representations made by BB&T by and through its agent, Edahl. Plaintiffs allege that on January 25, 2008, BB&T breached the modified factoring agreement by asserting a Skywaves default and by refusing to honor its commitments. As a result, Skywaves was forced to file for Chapter 7 liquidation under the Bankruptcy Code, causing economic harm to Plaintiffs.

II. DISCUSSION

The parties agree that the court first must determine whether it possesses subject matter jurisdiction before it can dispose of Defendants' motions to dismiss the amended complaints. Accordingly, the court turns to Plaintiffs' motions to remand.

Defendants removed the within actions from state court on the basis of diversity jurisdiction. See 28 U.S.C. §§ 1332, 1441, 1446. Plaintiffs all are citizens and residents of South Carolina. BB&T is a corporation organized and existing under the laws of the State of North Carolina, with its principal place of business in North Carolina. Defendant Edahl is a resident of South Carolina. However, BB&T contends that diversity is proper because Edahl is fraudulently joined as a Defendant for the purpose of defeating diversity.

Defendants bear the burden of demonstrating that jurisdiction is proper. Bartnikowski v.

NVR, Inc., 307 F. App'x 730 (4th Cir. 2009) (citing Strawn v. AT&T Mobility LLC, 530 F.3d 293, 296-97 (4th Cir.2008)). To show fraudulent joinder, the removing party must demonstrate either outright fraud in the plaintiff's pleading of jurisdictional facts or that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court. Stafford EMS, Inc. v. J.B. Hunt Transport, Inc., 2010 WL 1735149 (4th Cir. April 28, 2010) (quoting Hartley v. CSX Transp. Inc., 187 F.3d 422, 424 (4th Cir.1999)). In essence, the fraudulent joinder doctrine allows a court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction. Baltimore County v. Cigna Healthcare, 239 F. App'x 914, 920 (4th Cir. 2007) (citing Mayes v. Rapoport, 198 F.3d 457, 461 (4th Cir. 1999)). Defendants did not allege any bad faith in pleading; therefore, the only inquiry is whether Plaintiffs have any possibility of recovering damages from Edahl. A claim need not ultimately succeed to defeat removal; only a possibility of a right to relief need be asserted. Id. (citing Marshall v. Manville Sales Corp., 6 F.3d 229, 233 (4th Cir.1993)). In evaluating a claim of fraudulent joinder, all legal and factual issues must be resolved in favor of the plaintiff. Id. (citing Mayes, 198 F.3d at 464). A court making such an assessment is not bound by the allegations of the pleadings, but may instead consider the entire record, and determine the basis of joinder by any means available. Id. (citing Mayes, 198 F.3d at 464)). The standard for evaluating a fraudulent joinder issue is even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Id. (citing Hartley, 187 F.3d at 424). In this case, the issue is whether Edahl can be held individually liable for any of the torts alleged against him by Plaintiffs, i.e., negligent misrepresentation, fraudulent misrepresentation, negligence, and violation of the SCUTPA. The court will address Plaintiffs' negligence claims against Edahl.

Because the court finds that Plaintiffs have a possibility of a right to relief as to their claims against Edahl for negligent misrepresentation and negligence, it is not necessary to address Plaintiffs' remaining causes of action against him.

To establish liability for negligent misrepresentation, a plaintiff must show "'(1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.'" Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d 161, 166 (S.C. 2003) (quoting AMA Mgmt. Corp. v. Strasburger, 420 S.E.2d 868 (S.C. Ct. App.1992)).

Three elements are essential to a cause of action based on negligence: (1) the existence of a duty on the part of the defendant to protect the plaintiff; (2) the failure of the defendant to discharge the duty; and (3) an injury to the plaintiff resulting from the defendant's failure to perform. Winburn v. Ins. Co. of N. Am., 339 S.E.2d 142, 147 (S.C. Ct. App. 1985) (citing Crowley v. Spivey, 329 S.E.2d 774 (S.C. Ct. App.1985)).

Plaintiffs provide affidavits of Konersmann, Voytko, Kerr, and Thomas Martin (Martin), a shareholder of J.T. Main, LLC. In his affidavit, Konersmann states that during Skywaves' negotiations with BB&T for additional funding, Edahl represented to him that BB&T would provide capital for Skywaves; that BB&T had met Skywaves' needs in the past and would continue to do so in the future; and that he had authority to commit BB&T to provide advances under the parties' factoring agreement on a basis other than accounts receivables in order to provide for the

advancement of funds. Konersmann states that Edahl made a presentation at a meeting regarding BB&T's relationship with Skywaves and the future of this relationship; that Edahl stated he was supportive of the expansion plan; that he had the authority to promise BB&T would continue funding; and that there should be no surprises since he was the account manager for Skywaves' account.

Voytko attests in his affidavit that Edahl represented to him that BB&T was going to provide funding in the future as in the past and that he had the authority to commit BB&T to provide advances under the factoring agreement. Voytko states that later, in a telephone conversation, Edahl gave Voytko approval to submit site plans for advances, and that Voytko did so and funds were advanced.

Kerr's affidavit discloses that he was an investor in Skywaves who knew that Skywaves was seeking to improve its balance sheet and raise cash to fund a plan to expand. Kerr states that Edahl told investors at a presentation that BB&T was supportive of the expansion plan and that BB&T would continue to fund Skywaves. Kerr made a $100,000 loan on October 15, 2007 to Skywaves based upon Edahl's presentation. Kerr states that in mid-November 2007 he was asked to provide an additional $150,000 loan. He states that he contacted the other investors as well as Edahl to confirm that they were committed to funding the financing plan. According to Kerr, Edahl confirmed without hesitation that funding would continue and that BB&T would maintain its relationship with Skywaves. Based on these statements, Kerr funded an additional $150,000 loan to Skywaves on or about November 20, 2007.

Martin avers in his affidavit that he and his brother questioned whether Skywaves had the financing and capital ability to achieve the expansion needed to fulfill the private and government

contracts. Martin attests that in reliance on Edahl's presentation regarding BB&T's willingness to provide financing, he and his brother, as sole shareholders for J.T. Main, LLC, voted to approve a capital investment in Skywaves of $500,000.

Defendants contend, among other things, that, regardless of any alleged statements made by Edahl, he possessed no duty to Plaintiffs so that he may be held liable for a cause of action grounded in negligence. The court disagrees.

In Winburn v. Insurance Co. of North America, 339 S.E.2d 143 (S.C. 1985), an insured brought an action for fraud and negligence against an insurer and its adjuster, based upon certain representations made by the adjuster. The South Carolina Supreme Court noted that:

> The recovery of damages may be predicated upon a negligently-made false statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation. *A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction....* "The fact that the information is given in the course of the defendants business, profession or employment is a sufficient indication that he has a pecuniary interest in it, even though he receives no consideration for it at the time." Restatement (Second) of Torts § 552, Commend d, at 129-30 (1977); see Prosser and Keaton, The Law of Torts § 107 at 747 (5th ed. 1984).

Id. at 147 (emphasis added).

In this case, Edahl possessed a pecuniary interest in his relationship with the various Plaintiffs. He was the account manager for Skywaves and employed by BB&T. Therefore, Edahl possessed a duty to Plaintiffs to use due care in giving them information. Whether the duty was breached is not an issue for the court. Rather, for purposes of remand, the court concludes that Plaintiffs have a possibility of a right to relief against Edahl grounded in negligence.

Defendants contend that S.C. Code Ann. § 37-10-107(1)(a)-(c) precludes Plaintiffs' claims in their entirety. Section 37-10-107 provides, in relevant part:

> (1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:
>
> (a) to lend or borrow money;
>
> (b) to defer or forbear in the repayment of money; or
>
> (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.
>
> (2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:
>
> (a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;
>
> (b) promissory or equitable estoppel;
>
> (c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or
>
> (d) negligent misrepresentation.

According to Defendants, Plaintiffs have provided no writing signed by Edahl regarding the purported modification of the factoring agreement, and thus Plaintiffs' claims against Edahl fail as a matter of law. Plaintiffs respond, among other things, that (1) the factoring agreement is not an agreement to loan money, and therefore section 37-10-107 is not applicable; (2) if section 37-10-107 is applicable, there are numerous writings between the parties in the form of emails that set forth the terms and conditions of the modified factoring agreement; and (3) in any event, section 37-10-107 does not apply to Edahl's alleged tortious conduct, because Plaintiffs' claims are not based upon an agreement that Plaintiffs seek to enforce against Edahl.

The court has located no precedent in South Carolina interpreting or applying section 37-10-107. Given the novel issues presented, the court cannot say that section 37-10-107 prevents Plaintiffs as a matter of law from asserting the possibility of a right to relief against Edahl. Accordingly, the court concludes that Edahl is not fraudulently joined as a Defendant.

III. CONCLUSION

The court, having considered the motions, memoranda, applicable law, and arguments of counsel, concludes that Plaintiffs' motions to remand (Entry 12 in C/A No. 2:10-0104-MBS; Entry 12 in C/A No. 2:10-0109-MBS; Entry 12 in C/A No. 2:10-0110-MBS; Entry 12 in C/A No. 2:10-0111-MBS) should be **granted** and the cases remanded to the South Carolina Court of Common Pleas.

IT IS SO ORDERED.

/s/ Margaret B. Seymour
United States District Judge

Columbia, South Carolina

June 18, 2010.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

James J. Kerr, Crayton, Walters, and J.T. Main, LLC, Plaintiffs, vs. Branch Banking & Trust Co., Successor in merger to Branch Banking & Trust Co. of S.C., a/k/a BB&T, and James Edahl, Defendants.	)	Civil Action No. 2:10-CV-00104-MBS
John Voytko, Plaintiff, vs. Branch Banking & Trust Co., Successor in merger to Branch Banking & Trust Co. of S.C., a/k/a BB&T, and James Edahl, Defendants.	)	Civil Action No. 2:10-CV-00109-MBS
Ron Konersmann, Plaintiff, vs. Branch Banking & Trust Co., Successor in merger to Branch Banking & Trust Co. of S.C., a/k/a BB&T, and James Edahl, Defendants.	)	Civil Action No. 2:10-CV-00110-MBS

Skywaves I Corp.,	)	
	)	
Plaintiff,	)	Civil Action No. 2:10-CV-00111-MBS
	)	
vs.	)	
	)	
Branch Banking & Trust Co., Successor in merger to Branch Banking & Trust Co. of S.C., a/k/a BB&T, and James Edahl,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter is before the court on the above-named Plaintiffs' ("Plaintiffs") consolidated motion for attorneys' fees, filed on June 21, 2010. Entry 36. Defendants Branch Banking & Trust Co., a/k/a BB&T ("BB&T"), and James Edahl ("Edahl," and together with BB&T, "Defendants") filed a response in opposition to Plaintiff's motion for attorneys' fees on July 7, 2010. Entry 37. For the reasons set forth below, the court grants Plaintiffs' motion for attorneys' fees.

BACKGROUND

Plaintiffs filed complaints in the Court of Common Pleas for Charleston County, South Carolina, which Defendants removed to this court. Entry 1. Defendants removed the case on the basis of diversity, alleging that Edahl, a non-diverse party, was fraudulently joined. *Id.* Plaintiffs filed a motion to remand, arguing that Defendants did not overcome their burden in establishing that Edahl was fraudulently joined. Entry 12. The court granted the Plaintiffs' motion to remand on June 21, 2010, finding that Plaintiffs have a possibility of a right to relief in their claims against Edahl. Entry 34.

DISCUSSION

Upon remand, a court may order the payment of just costs and expenses, including attorneys' fees, incurred as a result of the removal. 28 U.S.C. 1447(c). After remanding a case to state court, district courts retain jurisdiction to award attorneys' fees and costs. *See, e.g., Stallworth v. Greater Cleveland Reg'l Transit Auth.*, 105 F.3d 252, 257 (6th Cir. 1997); *Mints v. Educ. Testing Serv.*, 99 F.3d 1253, 1257–58 (3d Cir. 1996); *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 445 (9th Cir. 1992); *see also Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992) (holding Rule 11 sanction was an order collateral to the merits and the district court retained jurisdiction to issue the order even though it had determined it lacked jurisdiction to hear the case on its merits); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990) (holding district court retained jurisdiction to impose Rule 11 sanctions even after plaintiff filed a notice of dismissal under Rule 41(a)(1)).

A court should award attorneys' fees following remand only when the removing party lacked an objectively reasonable basis for seeking removal. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). In this case, Defendants removed this case on the basis of diversity, alleging that diversity of citizenship existed between the parties because Edahl was fraudulently joined. Entry 1. The court remanded this action because there is a possibility that Plaintiffs have a right to recover from Edahl. Entry 34. Therefore, the court should award Plaintiffs' attorneys' fees if Defendants did not have an objectively reasonable basis to claim that Edahl was fraudulently joined.

A defendant claiming fraudulent joinder upon removal bears a heavy burden in proving its claim. *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir. 1999) (citing *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232–33 (4th Cir. 1993)). The defendant must show either "'outright fraud

in the plaintiff's pleading of jurisdictional facts'" or "that the plaintiff cannot establish a claim even after resolving all issues of law and fact in the plaintiff's favor." *Id.* (quoting *Marshall*, 6 F.3d at 232–33). Moreover, a district court should resolve doubts about the propriety of removal in favor of the state court retaining jurisdiction over the action. *Id.* at 425 (citing *Marshall*, 6 F.3d at 232).

In light of their heavy burden in demonstrating fraudulent joinder, Defendants must make a strong showing that seeking removal was objectively reasonable. Defendants did not contend that Plaintiffs committed an outright fraud in their pleadings. Consequently, Defendants must show that they had an objectively reasonable belief that Plaintiffs could not establish a claim against Edahl even after the court resolved all issues of law and fact in Plaintiffs' favor.

Defendants contend that they had an objectively reasonable basis to believe Plaintiffs could not establish a claim against Edahl because they understood S.C. Code Ann. § 37-10-107 to bar Plaintiffs' claims against Edahl and BB&T and Plaintiffs did not allege fraudulent or negligent conduct by Edahl individually. Entry 19. Defendants acknowledge that Plaintiffs did allege that BB&T was acting through Edahl. *Id.* Further, Defendants note that the Bankruptcy Court's order authorizing a lawsuit by Plaintiff Skywaves I Corp. against BB&T did not authorize a lawsuit against Edahl. Entry 37. Defendants did not receive a copy of a subsequent Bankruptcy Court order granting Plaintiff Skywaves I Corp. permission to bring suit against Edahl until a few days before the hearing on Plaintiffs' motion to remand. *Id.* Defendants contend that given these circumstances, they had an objectively reasonable basis to remove the action brought by Plaintiff Skywaves I Corp. *Id.*

As the court stated in its order to remand this action to state court, there is no applicable

precedent interpreting or applying S.C. Code Ann. § 37-10-107.[1] Therefore, this action presents a novel question of South Carolina law, and the court could not conclude that Plaintiffs had no possibility of a right to relief against Edahl because of the operation of S.C. Code Ann. § 37-10-107. Entry 34. Moreover, the court located South Carolina precedent that could establish that Edahl owed Plaintiffs a duty of care, so the court could not conclude that Plaintiffs could not establish a negligence claim against Edahl. *Id.* The court did not consider Plaintiffs' other causes of action because it determined that Plaintiffs had a possibility of a right to relief on their causes of action based on negligence. *Id.*

The court concludes that Defendants did not have an objectively reasonable basis for seeking removal. The heavy burden placed on Defendants to establish fraudulent joinder required Defendants to have a substantially supported argument that Plaintiffs could not establish any of Plaintiffs' claims against Edahl. Defendants' basis for their fraudulent joinder argument lacked adequate support from case law and South Carolina statutes. Therefore, Defendants not only could not overcome their burden to establish fraudulent joinder but also lacked an objectively reasonable basis for seeking removal.

CONCLUSION

For the reasons stated herein, Plaintiffs' motion for attorneys' fees (Entry 36) is **granted**.

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[1] In their response in opposition to Plaintiffs' motion to remand, Defendants cited two cases from the South Carolina Court of Common Pleas to support their contention that S.C. Code Ann. § 37-10-107 bars Plaintiffs' claims. Entry 19-2 (citing *Carolina First Bank v. Lucas*, et al., No. 03-CP-10-1907, 2004 WL 5208410 (S.C.C.P. June 14, 2004); *Robertson v. First Union Nat'l Bank*, No. 99-CP-10-288, 2000 WL 35722762 (S.C.C.P. Aug. 8, 2000)). However, neither case involved the application of S.C. Code Ann. § 37-10-107 to bar a claim against a non-lender defendant and neither case involved a "factoring agreement," the type of agreement at issue in this case. Therefore, the cases cited by Defendants do not represent applicable precedent for this case.

Defendants are granted the opportunity to object to the fees requested within twenty (20) days of the date of entry of this order.

IT IS SO ORDERED.

/s/ Margaret B. Seymour
United States District Judge

August 16, 2010

Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

James J. Kerr, Crayton, Walters, and J.T. Main, LLC, Plaintiffs, vs. Branch Banking & Trust Co., Successor in merger to Branch Banking & Trust Co. of S.C., a/k/a BB&T, and James Edahl, Defendants.	Civil Action No. 2:10-CV-00104-MBS
John Voytko, Plaintiff, vs. Branch Banking & Trust Co., Successor in merger to Branch Banking & Trust Co. of S.C., a/k/a BB&T, and James Edahl, Defendants.	Civil Action No. 2:10-CV-00109-MBS
Ron Konersmann, Plaintiff, vs. Branch Banking & Trust Co., Successor in merger to Branch Banking & Trust Co. of S.C., a/k/a BB&T, and James Edahl, Defendants.	Civil Action No. 2:10-CV-00110-MBS

Skywaves I Corp.,	)	
	)	
Plaintiff,	)	Civil Action No. 2:10-CV-00111-MBS
	)	
vs.	)	
	)	
Branch Banking & Trust Co., Successor in merger to Branch Banking & Trust Co. of S.C., a/k/a BB&T, and James Edahl,	)	
	)	
Defendants.	)	
	)	

ORDER

On December 3, 2009, Plaintiffs filed complaints in the Court of Common Pleas for Charleston County, South Carolina, alleging causes of action against Defendant Branch Banking and Trust Company ("BB&T") and its agent, Defendant James Edahl, for misrepresentation, fraud, and lender liability. Plaintiffs are citizens and residents of the State of South Carolina. BB&T is a corporation organized and existing under the laws of North Carolina. Edahl is a South Carolina resident.

Defendants removed the cases to this court on January 14, 2010 on the basis of diversity jurisdiction. Defendants alleged that Edahl was fraudulently joined for the purpose of destroying diversity and should be disregarded. Plaintiffs filed motions to remand on February 15, 2010, to which Defendants filed responses on February 15, 2010. The court granted Plaintiffs' motions to remand on June 21, 2010, finding that Plaintiffs have a possibility of a right to relief in their claims against Edahl. On June 21, 2010, Plaintiffs filed motions for attorneys' fees in each of the captioned cases. Plaintiffs Kerr, Walters, and Main (C/A No. 2:10-0104-MBS) were represented by Andrew K. Epting, Jr. of the Andrew K. Epting Jr. Law Office and Barbara J. Wagner, John William

Fletcher, and Morris Dawes Cooke, Jr. of Barnwell Whaley Patterson and Helms. Plaintiffs John Voytko and Ron Konersmann were represented by Barbara J. Wagner, John William Fletcher, and Morris Dawes Cooke, Jr., as well as John Edward Roxon of the Joye Law Firm. Plaintiff Skywaves I Corporation was represented by Barbara J. Wagner, John William Fletcher, and Morris Dawes Cooke, Jr., as well as George J. Kefalos of the George J. Kefalos Law Office. In support of their motions, Plaintiffs submitted documentation for in camera review. Plaintiffs seek a total of $52,565.48 in attorneys fees and costs.

By order filed August 16, 2010, the court granted Plaintiffs' motions for attorneys' fees and costs in the captioned matters, and granted Defendants an opportunity to review and object to the attorneys' fees and costs sought by Plaintiffs. Defendants filed a consolidated response to the court's order on September 3, 2010, to which Plaintiffs filed a consolidated response on September 21, 2010. Defendants asserts that Plaintiffs' request is excessive and duplicative and argue in favor of a fee award of no more than $9,000.00.

DISCUSSION

After finding that attorneys' fees are warranted, the court must determine a reasonable amount of attorneys' fees to award Plaintiffs. See In re Abrams & Abrams, P.A., 605 F.3d 238, 243 (4th Cir. 2010) ("'[T]he law of this circuit has long been clear that federal district courts have inherent power and an obligation to limit attorneys' fees to a reasonable amount.'")(quoting Bergstrom v. Dalkon Shield Trust (In re A.H. Robins Co., 86 F.3d 364, 373 (4th Cir. 1996)). "In calculating an award of attorney's fees, a court must first determine a lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate." Robinson v. Equifax Info. Servs., LLC, 560 F.3d 235, 243 (4th Cir. 2009) (citing Grissom v. The Mills Corp., 549 F.3d 313,

320 (4th Cir. 2008)). The Fourth Circuit has enumerated twelve factors to guide the court's determination of a reasonable number of hours and a reasonable rate. Id. These factors are as follows:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Id. at 243-44 (citing Barber v. Kimbrell's Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978)). The court may find that a number of the twelve factors do not affect the attorneys' fee in this case and are inapplicable; as such, these factors do not need to be strictly applied. See E.E.O.C. v. Service News Co., 898 F.2d 958, 965 (4th Cir. 1990) (stating that seven of the factors did not affect the fee in that case and moving on to an analysis of the factors that did affect the fee).

1. Time and labor expended

Plaintiffs' counsel expended substantial time and labor on this case. Defendants contend, however, that the fee submission submitted by Plaintiffs contains excessive and duplicative time, as well as time for matters unrelated to the remand motion. Defendants argue that essentially one attorney researched and prepared the legal arguments and one attorney made oral arguments at the hearing, so that submitting the time of five attorneys and two paralegals is unreasonable. The court disagrees.

As an initial matter, each Plaintiff is entitled to individual representation and is entitled to bring separate lawsuits. Moreover, the cases involve novel questions of state law as to the potential

liability of Defendant Edahl. The court does not find it unusual or improper that counsel spent time discussing the remand motion and the appropriate arguments. In addition, numerous affidavits were prepared setting forth the individual Plaintiffs' experiences with BB&T and Edahl that led to the within litigation. Although this factor weighs in favor of Plaintiffs, the court concludes, as set forth below, that some adjustment is necessary.

2. Novelty and difficulty of the questions raised

The court finds that this factor weighs in Plaintiffs' favor because the case involved legal issues relating to lender liability, which is a fairly complex practice area requiring unique legal skills. The case also involved the interpretation of S.C. Code Ann. § 37-10-107 and whether section 37-10-107 provides a right to relief against Edahl. The court located no precedent in South Carolina interpreting or applying section 37-10-107 in the manner urged by Plaintiffs.

3. Skill required to properly perform the legal services rendered

Given the unique nature of Plaintiffs' commercial litigation, Plaintiffs were justified in engaging knowledgeable, competent counsel to litigate Plaintiffs' claims against Defendants.

4. Attorneys' opportunity costs in pressing the instant litigation

The court finds that this factor does not affect the attorneys' fee in this case.

5. Customary fee for like work

The court finds that because Plaintiffs' counsel billed Plaintiffs at the attorneys' and paralegals' standard hourly rates, the fee charged in this case is the customary fee for like work.

6. Attorney's expectations at the outset of the litigation

The court finds that this factor does not affect the attorneys' fee in this case.

7. Time limitations imposed by the client or circumstances

The court finds that this factor does not affect the attorneys' fee in this case. The court notes, however, Plaintiffs were required to file the motions to remand in a timely manner as set forth by 28 U.S.C. § 1447(c), and thus counsel were subject to time constraints imposed by statute.

8. Amount in controversy and the results obtained

Plaintiffs contend that Defendants' conduct led to the bankruptcy of a profitable business and that damages will likely be in the millions of dollars. Plaintiffs assert that the lawsuits implicate novel legal questions under South Carolina statutory and common law as well as complex factual and legal questions. Plaintiffs contend that it was important to engage in a thorough and robust effort to remand the within actions and protect their right to have the state courts decide the issues. Plaintiffs were successful in achieving this goal.

9. Experience, reputation and ability of the attorney

Plaintiffs note that Attorneys Cooke, Epting, and Kefalos are listed as South Carolina Super Lawyers and have AV ratings in the Martindale-Hubbell listing. The court is satisfied that the standard hourly rate charged by each attorney, paralegal, and clerk reflects the experience, reputation, and ability of each and finds that the standard hourly rates are reasonable.

10. Undesirability of the case within the legal community in which the suit arose

The court finds that this factor does not affect the attorneys' fee in this case.

11. Nature and length of the professional relationship between attorney and client

The court has not been provided information regarding this factor.

12. Attorneys' fees awards in similar cases

The court has been unable to locate a case directly on point. In Allen v. Monsanto Co., 2007 WL 1859046 (S.D.W. Va. June 26, 2007), the court reduced the requested fee by 66% and

determined that too many lawyers were used for routine procedural legal work, which resulted in excessive and duplicative work. The court awarded an attorneys' fee of $22,275.00 on a "routine" remand motion. The court noted that the fee-shifting provision of 28 U.S.C. § 1447(c) allows for payment of just costs and expenses incurred as a result of removal, and was designed to put plaintiffs in the same position as before removal. Section 1447(c) is not intended to penalize defendants or give plaintiffs a windfall. Allen, 2007 WL 1859046, *3. Accordingly, the Allen court reduced the fee award by a percentage "'as a practical means of trimming fat from a fee application.'" Id. at *2 (quoting New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1146 (2d Cir. 1983)). In this case, Plaintiffs submitted virtually identical pleadings and motions despite the fact that different counsel represented different Plaintiffs. Further, as noted hereinabove, one counsel presented argument on behalf of all Plaintiffs. The court finds it practical to reduce the fee award by a percentage to eliminate overlap. The court therefore will reduce the attorneys' fees and costs requested by Plaintiffs of $52,565.48 by 25%, for a total award of $39,424.11.

CONCLUSION

For the reasons stated herein, Plaintiffs are awarded attorneys' fees in the total amount of $39,424.11.

IT IS SO ORDERED.

/s/ Margaret B. Seymour
United States District Judge

Columbia, South Carolina

March 28, 2011.

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-10-7516

SKYWAVES I CORPORATION	BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : Order Granting BB&T's Partial Motion to Dismiss Amended Complaint and James Edahl's Motion to Dismiss Amended Complaint with Prejudice

INFORMATION FOR THE PUBLIC INDEX

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

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

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

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

Circuit Court Judge

2134
Judge Code

Date

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Amanda Haffended

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION, Plaintiff, vs. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL, Defendants.	Civil Action No. 2009-CP-10-7516 **ORDER GRANTING BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T'S PARTIAL MOTION TO DISMISS AMENDED COMPLAINT AND JAMES EDAHL'S MOTION TO DISMISS AMENDED COMPLAINT WITH PREJUDICE**

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

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

I. FACTS

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

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

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

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

II. LEGAL ANALYSIS

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

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

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

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

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

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

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

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

1. No False Statement

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

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

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

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

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

2. No Right to Rely

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

IT IS SO ORDERED.

The Honorable Roger M. Young

10/24, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION, Plaintiff, v. BRANCH BANKING AND TRUST COMPANY, successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL, Defendants.	CASE NO. 2009-CP-10-7516 **ORDER GRANTING SKYWAVES' MOTION TO RECONSIDER**

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

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

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

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

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

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

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

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

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

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

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

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

a. **Fiduciary Duty**

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

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

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

For example, Skywaves alleges:

a. ...BB&T also **provided a designated relationship manager who assisted Skywaves** in raising additional capital through investors (Amended Complaint ¶ 11)

b. ...Defendant BB&T, acting primarily through Defendant Edahl...represented to Skywaves that BB&T was ready, willing and able **through the use of innovative and creative financial products to provide Skywaves with the capital needed** to become a successful manufacturer, that **Defendants understood exactly Skywaves' growth cycle**, and that BB&T was fully committed to providing the present and future banking needs of Skywaves (Amended Complaint ¶ 53)

c. ...Defendant BB&T acting primarily through Defendant Edahl told Skywaves: (a) that it **understood the short and long term capital needs of Skywaves**; (b) that **Skywaves did not need a large bank or additional capital funding** to continue its growth; (c) that Defendants believed Skywaves was strategically positioned for success; (d) that Defendants wanted to **take Skywaves to a sale or stock IPO**; and (e) that BB&T would provide capital funding all of Skywaves' financial needs. (Amended Complaint ¶ 56)

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

e. Defendant BB&T, acting primarily through Defendant Edahl, offered Skywaves a series of inducements in the form of financial commitments as a token of its bona fides...and include the following:...**raise the factoring from 80% to 85% of invoices and 60% of purchase orders**...reduce the bank charges to .45% with a cap of $3000 per month...**gratuitously advanced $330,000 into the Skywaves bank account without Skywaves request or solicitation**...(Amended Complaint ¶ 60)

f. Defendant Edahl traveled to MacBee, South Carolina on behalf of BB&T for the purpose of making a presentation to potential Skywaves lenders investors... Defendant Edahl told Skywaves and its potential lenders and investors:...**BB&T would act as a partner in managing Skywaves growth**...**BB&T's commitment to finance Skywaves' growth was unique to Skywaves, and was the equivalent of the funding offered by Wachovia or Hunt Capital**...(Amended Complaint ¶ 62)

g. **Defendants undertook to tailor a funding program outside its ordinary course of business lending relationships and unique to Skywaves**. (Amended Complaint ¶ 79)

h. This method of operation gave **BB&T a unique power and influence over the day to day operations of Skywaves and gave rise to a special relationship between the**

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

i. **Skywaves relied on Defendants' financial expertise and advice**. (Amended Complaint ¶ 82)

j. **Defendants knew** that **Skywaves relied on BB&T** to provide sound financial advice and information and that **Skywaves had entrusted its future existence and growth to BB&T's care**. (Amended Complaint ¶ 84)

k. "[BB&T] did not include the new $2,000,000 PO sub-limit or the 65% advance rate in the amendment as **this is typically not part of BB&T's standard contract (it is something out of the ordinary for Skywaves exclusively).**" (Ex 3 at hearing, 3/20/07 email from Morris Castlen of BB&T, referred to in Amended Complaint)

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

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

b. "Future Events"

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

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

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

3. Conclusion

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

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

On this 14 day of June 2012
Charleston, SC

The South Carolina Court of Appeals

Skywaves I Coporation, Appellant,

v.

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

Appellate Case No. 2012-205929

ORDER

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

FOR THE COURT

BY _____ CLERK

Columbia, South Carolina

FILED
8/20/12

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

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-10-7516

Skywaves I Corporation

PLAINTIFF(S)

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

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

FILED
2014 MAR 17 PM 1:4
JULIE J. ARMSTRONG
CLERK OF COURT
BY

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : Hearing was held on March 13, 2014. Plaintiff's Motion to Strike Defendants' Answers is DENIED. Defendant BB&T's Motion to Amend Answer is GRANTED, and its proposed answer may be filed. Defendant James Edahl's Motion to Amend Answer is GRANTED, and he has until the end of the day March 21, 2014 to file the Amended Answer.

INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

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

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

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Circuit Court Judge

2134
Judge Code

3/12/14
Date

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

IN THE STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	
)	Civil Action No.: 2009-CP-10-7516
SKYWAVES I CORPORATION,)	
)	
Plaintiff,)	
)	
v.)	
)	ORDER GRANTING DEFENDANT
BRANCH BANKING AND TRUST)	BB&T and DEFENDANT EDHALS'
COMPANY, Successor in merger to)	MOTION TO STRIKE PLAINTIFF'S
BRANCH BANKING AND TRUST)	DEMAND FOR JURY TRIAL
COMPANY OF SC, a/k/a/ BB&T, and)	
JAMES EDAHL.)	
)	
Defendants.)	

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

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

Statement of the Facts

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

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

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

are not applicable here.

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

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

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

Conclusion

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

Strike Plaintiff's Demand for Jury Trial is GRANTED.

IT IS SO ORDERED.

2/9, 2015

Charleston, South Carolina

Roger M. Young, Sr.
Circuit Court Judge

FILED 2009-CP-10-7516
2015 JUL 27 PM 4:21
JULIE J. ARMSTRONG
CLERK OF COURT

IN THE STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	Civil Action No.: 2009-CP-10-7516
)	
SKYWAVES I CORPORATION,)	ORDER GRANTING IN PART DEFENDANT BB&T'S MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANT EDAHL'S MOTION MOTION FOR SUMMARY JUDGMENT DENYING PLAINTIFF'S MOTION TO RECONSIDER; DENYING PLAINTIFF'S MOTION TO AMEND THE COMPLAINT DENYING PLAINTIFF'S MOTION TO STRIKE; and DENYING PLAINTIFF'S MOTION FOR COMMISSION OF ISSUANCE OF A SUBPOENA TO DEPOSE JOHN ALLISON
Plaintiff,)	
)	
v.)	
)	
BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a/ BB&T, and JAMES EDAHL.)	
)	
Defendants.)	

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

I. PROCEDURAL HISTORY AND BACKGROUND

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

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

A. Procedural History

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

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

B. Factual Background

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

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

1. Factoring Invoices Under the Factoring Agreement

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

2. BB&T Authorizes Advances Based on Purchase Orders

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

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

the parties' relationship continued into 2007.

3. BB&T Authorizes Advances Based on Site Plans

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

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

4. BB&T Terminates the Agreement

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

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

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

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

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

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

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

II. ANALYSIS

A. DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

1. Legal Standard

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

2. Governing Law

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

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

3. Substantive Claims

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

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

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

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

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

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

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

c. North Carolina Does Not Recognize Claims of Promissory Estoppel

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

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

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

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

i. The Economic Loss Doctrine

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

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

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

ii. Elements of the Tort Claims

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

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

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

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

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

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

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

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

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

C. PLAINTIFF'S MOTION TO AMEND COMPLAINT

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

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

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

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

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

2. The Amendments Are Barred Because of Undue Delay

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

3. The Amendments Are Futile

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

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

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

D. PLAINTIFF'S MOTION TO STRIKE

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

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

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

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

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

III. CONCLUSION

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

IT IS SO ORDERED.

The Honorable Roger M. Young

7/23, 2015

Charleston, South Carolina

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

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTOH)
)
SKYWAVES I CORPORATION)
Plaintiff(s))
)
vs.)
)
'CH BANKING AND TRUST COMPANY,)
:sor in merger to BRANCH BANKING
TRUST COMPANY OF SC, a/k/a BB&T,
ımes Edahl,
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2009- CP - 10 - 7516

(Please Print)
Submitted By: George J. Kefalos
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Charleston, SC 29401

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NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply)*

***If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Sexual Predator (510)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture (840)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Administrative Law Judge (980)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)

Submitting Party Signature: _____ **Date:** 11/30/2009 72

SCCA / 234 (8/06)

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY
Florence, Horry, Lexington, Richland, Greenville and Anderson

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	
COUNTY OF CHARLESTON)	**FOR THE NINTH JUDICIAL CIRCUIT**
SKYWAVES I CORPORATION,)	
)	**CASE NO. 09-CP-10-7516**
Plaintiff,)	
)	
vs.)	**SUMMONS**
)	
BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and James Edahl,)	
)	
Defendants.)	

FILED
2009 DEC -3 AM 9:29
JULIE J. ARMSTRONG
CLERK OF COURT
BY

09-CP-10-7516

TO: THE DEFENDANT(S) ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend the allegations of the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your responsive pleadings upon the subscriber at his office, 3 State Street, Charleston SC 29401, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to appear and defend within the time aforesaid, judgment will be entered against you by default for the relief demanded in the Complaint.

GEORGE J. KEFALOS, P.A.

BY:

George J. Kefalos, Esquire
3 State Street
Charleston, SC 29401

ATTORNEY FOR THE PLAINTIFF

Charleston, South Carolina
This ___ day of December, 2009

STATE OF SOUTH CAROLINA)		IN THE COURT OF COMMON PLEAS
)		
COUNTY OF CHARLESTON)		FOR THE NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION,)		
)		CASE NO. 09-CP-10-7516
Plaintiff,)		
)		
vs.)		**COMPLAINT**
)		(Breach of Contract, Fraud)
BRANCH BANKING AND TRUST COMPANY,)		(Lender liability, Jury Trial)
Successor in merger to BRANCH BANKING AND)		
TRUST COMPANY OF SC, a/k/a BB&T, and)		
James Edahl,)		
)		
Defendants.)		

FILED
2009 DEC -3 AM 9:29
JULIE J. ARMSTRONG
CLERK OF COURT

The Plaintiff SKYWAVES I CORPORATION ("Skywaves") complaining of the Defendant Branch Banking and Trust Company ("BB&T") state and allege as follows:

1. Plaintiff Skywaves is a South Carolina Corporation with its principal office and facilities in Charleston County, South Carolina.

2. Defendant BB&T is a corporation authorized to do business in South Carolina, listed in good standing with the South Carolina Secretary of State, and doing business in Charleston County, South Carolina.

3. James Edahl is an officer of BB&T who does business in Charleston County and is a citizen and resident of South Carolina.

4. This Court has jurisdiction over the parties to this action and over the subject matter alleged herein.

5. This action is filed in Charleston County pursuant to the June 16, 2009 Order of Judge David R. Duncan, US Bankruptcy Court, District of South Carolina (Exhibit 1) and venue is proper in Charleston County.

FOR A FIRST CAUSE OF ACTION
BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACTS

6. Skywaves developed an innovative product for the wireless telecommunications industry. Its customer base included Verizon, AT&T, Sprint/Nextel, as well as Federal and State government entities.

7. From 2005 through 2007 BB&T provided loans and a line of credit to fund the working capital needs of Skywaves along with a designated relationship manager who assisted Skywaves in raising additional capital through investors.

8. In early 2007 the Skywaves Board of Directors determined that it would need an expanded financial commitments beyond that 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.

9. BB&T competed with Wachovia and Hunt Capital to provide the expanded financing discussed above and was ultimately selected to do so because of their representations of commitment to provide funding for the company's short and long-term capital needs through this critical growth phase and into the foreseeable future.

10. BB&T failed to honor its financing commitments to the Plaintiff.

11. Subsequently, these Defendants continued to refuse to honor BB&T's various funding agreements which ultimately caused Skywaves to submit to Bankruptcy liquidation proceedings without the ability to reorganize and continue as an active business entity.

12. BB&T's breaches were accompanied by fraudulent acts and BB&T offered false excuses for its breaches.

13. As a direct and proximate result of BB&T's breaches of the Skywaves agreements Skywaves has incurred monetary damages.

14. Skywaves has incurred litigation expense and is entitled to recover reasonable attorney's fees and costs as a direct and proximate result of these breaches by BB&T.

15. Skywaves demands actual and punitive damages as a result of the breaches by BB&T.

FOR A SECOND CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION AND FRAUDULENT INDUCEMENT

16. The Plaintiff incorporates the allegations contained in Paragraphs 1 through 15, above as if fully set forth verbatim.

17. At all times the Defendants had a pecuniary interest in the transactions which are the subject of this litigation.

18. In February 2005, these Defendants induced Skywaves to move its financial accounts away from Wachovia by convincing Skywaves that BB&T was ready, willing and able to provide Skywaves with the financial products and capital needed to become a successful manufacturer, that these Defendants understood exactly Skywaves' growth cycle, and that BB&T was fully committed to providing the present and future banking needs of Skywaves.

19. These Defendants offered Skywaves financial commitments. Among other items, these commitments required Skywaves to secure additional funding from BB&T in the form of a separate loan to finance works in progress.

20. In March 2005 Skywaves accepted the BB&T Factoring offer and entered into the required separate $400,000 loan for short term funding which was secured by an assignment of the company's factoring proceeds from the BB&T Factoring Agreement.

21. In June 2005, these Defendants retroactively lowered BB&T's minimum monthly factoring commission for April and May to $1000 per month, and reduced their commissions to $2,500 per month for July to September. in an effort to keep Skywaves as a client.

22. As a direct result of the growth of the demand for Skywaves products, these Defendants amended the BB&T Factoring Agreement in May 2006 to increase the line of credit to $1.75 million.

23. Prior to each of these events these Defendants told Skywaves and its investors and lenders that these actions were proof of BB&T's commitment to provide funding for the Skywaves' short and long-term capital needs through this critical growth phase and into the foreseeable future.

24. In the first quarter of 2007 Skywaves' customer base had grown to the point that the BB&T line of credit was no longer adequate and Skywaves sought proposals from several capital funding companies, Wachovia, and BB&T.

25. In March 2007 these Defendants told Skywaves that they understood the short and long term capital needs of Skywaves, that Skywaves did not need a large bank or additional capital funding, that these Defendants believed Skywaves was strategically positioned for success, that these Defendants wanted to take Skywaves to a sale or stock IPO, and that BB&T would fund all the company's financial needs.

26. Skywaves relied on these representations when it awarded its financial business to BB&T in March 2007 after evaluating competing offers from Wachovia and Hunt Capital.

27. As a result of the competing proposals from other lending and funding institutions, these Defendants amended their existing Skywaves financial commitments.

28. Before and in July 2007 James Edahl traveled to MacBee South Carolina on behalf of BB&T for the purpose of making a presentation to potential Skywaves lenders and investors. During the presentation James Edahl told Skywaves and its potential lenders and investors that based on these Defendants' own comprehensive review, BB&T believed that Skywaves would grow to become a significant infrastructure supplier to the telecommunication and military markets and that BB&T was fully committed to providing all of Skywaves short-term and long-term financial needs for growth.

29. Skywaves relied on all of these representations by these Defendants when it was induced to make BB&T its exclusive financial institution and when it was induced by these Defendants to maximize the use of monetary advances against account receivables and fully draw on lines of credit provided by BB&T in lieu of working to raise sufficient additional investor capital.

30. These representations by these Defendants were false and fraudulent as evidenced by BB&T's abrupt and unilateral withdrawal of funding.

31. As a direct and proximate result of these Defendants' actions Skywaves was forced to cancel contracts in place and was prevented from accepting new purchase orders from

existing customers and is therefore entitled to the lost profits it would have received had these Defendants' actions not forced Skywaves to cease business operations.

32. As a direct and proximate result of these Defendants' actions Skywaves was forced into Chapter 7 Bankruptcy liquidation and has incurred the expenses of litigation and is entitled to recover from the Defendant reasonable attorney's fees and costs.

33. As a direct and proximate result of these Defendants' representations and inducements Skywaves has incurred monetary damages.

FOR A THIRD CAUSE OF ACTION
LENDER LIABILITY

34. The Plaintiff incorporates the allegations contained in Paragraphs 1 through 33, above as if fully set forth verbatim.

35. These Defendants convinced Skywaves that BB&T would provide Skywaves with the best financial services, advice and products to help Skywaves grow its manufacturing business over the long term.

36. Skywaves believed these Defendants' representations that BB&T was committed to helping Skywaves grow, committed to providing Skywaves with the best financial services and advice, and that BB&T's services would be superior to the services available from Wachovia or from other financial sources.

37. Skywaves relied on these Defendants' financial expertise and advice.

38. These Defendants abused their influence over Skywaves by inducing Skywaves to operate its business with BB&T as the primary source of credit.

39. These Defendants knew that Skywaves relied on BB&T to provide sound financial advice and information and that Skywaves had entrusted its future existence and growth to BB&T's care.

40. These Defendants had a duty to properly advise Skywaves in its financial matters.

41. These Defendants breached their duties to Skywaves and instead acted to maximize their own pecuniary interests and collections.

42. These activities by these Defendants were a breach of the special trust and relationship established with Skywaves and deprived Skywaves of the operating capital needed to sustain its manufacturing business.

43. As a direct and proximate result of these Defendants' actions Skywaves was forced to cancel contracts in place and was prevented from accepting new purchase orders from existing customers and is therefore entitled to the lost profits it would have received had these Defendants' actions not forced Skywaves to cease business operations.

44. As a direct and proximate result of these Defendants' actions Skywaves was forced into Chapter 7 Bankruptcy liquidation and has incurred the expenses of litigation and is entitled to recover from the Defendants reasonable attorney's fees and costs.

45. As a direct and proximate result of these Defendants breaches of fiduciary duty Skywaves has incurred monetary damages.

WHEREFORE Plaintiff requests the following relief:

a) Judgment against these Defendants for actual and punitive damages;

b) For attorney fees and costs associated with its Bankruptcy;

c) For interest, attorney fees and costs of this action; and

d) For such other and further relief as the Court may deem proper.

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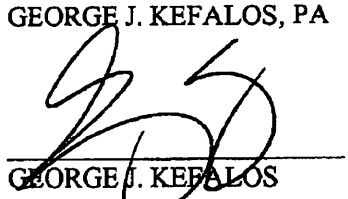
GEORGE J. KEFALOS, PA



GEORGE J. KEFALOS
3 State Street
Charleston, SC 29401

On this ___ day of December, 2009
Charleston, South Carolina

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 08-02316-dd

ORDER AUTHORIZING TRUSTEE TO EMPLOY SPECIAL COUNSEL

The relief set forth on the following pages, for a total of 2 pages including this page, is hereby ORDERED.

FILED BY THE COURT
06/15/2009

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

Entered: 06/16/2009

US Bankruptcy Court Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	)	
	)	
SKYWAVES 1 CORPORATION,	)	Bankruptcy Case No.: 08-02316-DD
	)	Chapter 7
	)	
Debtor.	)	

ORDER AUTHORIZING TRUSTEE TO EMPLOY SPECIAL COUNSEL ON A CONTINGENCY FEE BASIS

This matter comes before the Court upon the Application of Kevin Campbell, Trustee herein, for Skywaves 1 Corporation, for authorization to employ George J. Kefalos of George J. Kefalos, PA as his Special Counsel to represent him in an action against BB&T to be filed in the Court of Common Pleas for Charleston County, South Carolina.

After consideration of the Trustee's Application, and it appearing that George J. Kefalos of George J. Kefalos, PA is an attorney duly admitted to practice in this Court, and the Court being satisfied that pursuant to 11 U.S.C. Section 327(e), George J. Kefalos does not hold or represent any interest in this matter which will result in a conflict of interest. The Trustee and George J. Kefalos have agreed that George J. Kefalos PA shall be employed on a contingency fee basis, as follows: Thirty-Three and 33/100ths (33.33%) percent plus costs, of any gross recovery realized by the estate for this litigation if recovery is made prior to suit having to be instituted; 40% plus cost, or any recovery realized by the estate after suit is instituted and through trial, if no appeal is taken from that trial by the defendant; 50% plus costs, of any recovery realized if an appeal is filed. It is therefore

ORDERED, that the Trustee be, and hereby is, authorized to employ George J. Kefalos of George J. Kefalos, PA as Special Counsel for the Trustee. The compensation of the attorney shall be set by the Court pursuant to 11 U.S.C. '330(a) and may be different from the agreement between the Trustee and the attorney.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

Civil Action: 2:10-CV-00111-MBS

FILED
2011 DEC -8 PM 3:27
JULIE J. ARMSTRONG
CLERK OF COURT
BY

FIRST AMENDED COMPLAINT

Plaintiff SKYWAVES I CORPORATION ("Plaintiff" or "Skywaves"), complaining of Defendants Branch Banking and Trust Company ("BB&T") and James Edahl ("Edahl"), states and alleges as follows:

1. Plaintiff Skywaves is a South Carolina Corporation with its principal office and facilities in Charleston County, South Carolina.

2. Plaintiff is amending the Complaint with Defendants' Consent attached hereto as Exhibit1, according to Rule 15 (a)(2) of the Federal Rules of Civil Procedure.

3. Defendant BB&T is a corporation authorized to do business in South Carolina, listed in good standing with the South Carolina Secretary of State, and doing business in Charleston County, South Carolina.

4. James Edahl is an officer of BB&T who does business in Charleston County and is a citizen and resident of South Carolina.

5. Defendants previously removed this action to this Court from the Court of Common Pleas of Charleston County, South Carolina. Plaintiffs are moving to remand this case

back to state court. Plaintiffs specifically deny that this Court has subject-matter jurisdiction over this action.

6. Plaintiff originally filed this action in the Court of Common Pleas of Charleston County, South Carolina, pursuant to the June 16, 2009 Order of Judge David R. Duncan, United States Bankruptcy Court for the District of South Carolina (attached hereto as Exhibit 1).

FACTS COMMON TO ALL CAUSES OF ACTION

7. Skywaves developed an innovative product for the wireless telecommunications industry. Its customer base included Verizon, AT&T, Sprint/Nextel, as well as federal and state government entities.

8. On or about March 22, 2005, Skywaves and BB&T entered into a written factoring agreement, whereby BB&T purchased certain receivables of Skywaves at a discount and agreed to collect such receivables on Skywaves' behalf.

9. From 2005 through 2007, Skywaves and BB&T occasionally amended the terms of the factoring agreement via written modifications.

10. From 2005 through 2007 BB&T funded the working capital needs of Skywaves via the factoring agreement.

11. During that time period, BB&T also provided a designated relationship manager who assisted Skywaves in raising additional capital through investors.

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.

13. In early 2007 Skywaves solicited proposals for expanded financial commitments from various entities.

14. Skywaves received a proposal for a working capital investment from Hunt Capital.

15. Finally, Skywaves received a proposal to modify and expand the existing factoring agreement from BB&T.

16. In reasonable and foreseeable reliance upon BB&T's representations, Skywaves elected not to pursue the opportunities for capital investment or funding proposed by Wachovia or Hunt Capital.

17. In reasonable and foreseeable reliance upon BB&T's representations, Skywaves elected to use BB&T to raise additional operating capital, through modifications of the existing factoring agreement.

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.

22. On January 25, 2008 BB&T breached the terms and conditions of its factoring agreements — as modified — with Skywaves by asserting a SkyWaves default and by refusing to honor its further commitments to SkyWaves.

23. At that time, BB&T completely ended its business relationship with Skywaves.

24. Subsequently, BB&T continued to refuse to honor its obligations under the original factoring agreement and modifications thereto.

25. BB&T's conduct proximately caused Skywaves to submit to Bankruptcy liquidation proceedings, without the ability to reorganize and continue as an active business entity.

FOR A FIRST CAUSE OF ACTION
BREACH OF CONTRACT
(Plaintiff v. BB&T)

26. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

27. As alleged above, Plaintiff had a contract with BB&T — memorialized in emails and other documents signed by BB&T — modifying the parties' original factoring agreement.

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

29. Plaintiff has fully performed its duties and obligations under such agreement.

30. BB&T accepted the benefits of the performance by Plaintiff.

31. BB&T breached its agreement with Plaintiff by failing to perform its obligations thereunder and by terminating the parties' agreement without cause.

32. Plaintiff is entitled to damages for breach of contract, in an amount to be established at trial, plus costs and attorneys fees.

FOR A SECOND CAUSE OF ACTION
BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACTS
(Plaintiff v. BB&T)

33. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

34. BB&T's breach of the factoring agreement, alleged above, was done with fraudulent intent.

35. The justification advanced by BB&T was pretextual, if not outright false. Upon information and belief, BB&T's refusal to continue funding was not due to the reasons asserted

in the default letter, but was because BB&T was unhappy with and sought to renegotiate the parties' modified factoring agreement.

36. BB&T's breach of contract was accompanied by fraudulent acts characterized by dishonesty in fact and unfair dealing. While SkyWaves was not in default, it was prepared to end the financial relationship with BB&T and had proposed a program that would have retired the BB&T debt in an orderly fashion, while at the same time allowing itself to secure alternate capital financing. However, BB&T would not allow for such an orderly transition. Instead, BB&T unilaterally ceased funding in such a way as to maximize the harm to Skywaves.

37. As a direct and proximate result of BB&T's breaches of the Skywaves agreements Skywaves has incurred monetary damages.

38. Skywaves has incurred litigation expense and is entitled to recover reasonable attorney's fees and costs as a direct and proximate result of these breaches by BB&T.

39. Skywaves demands actual and punitive damages as a result of the breaches by BB&T.

FOR A THIRD CAUSE OF ACTION
PROMISSORY ESTOPPEL
(Plaintiff v. BB&T)

40. The Plaintiff incorporates the allegations contained in Paragraphs 1 through 33, above as if fully set forth verbatim.

41. Defendant BB&T made unambiguous promises to Plaintiff that it would provide capital financing to Skywaves, as agreed to in the modified factoring agreement, which was memorialized in writing by the parties.

42. Plaintiff acted in reasonable reliance upon these promises, in general and in the following particulars, inter alia, foregoing other possible sources of capital financing.

43. These acts of reliance by Plaintiff constituted a definite and substantial detrimental action or forbearance.

44. Such reasonable reliance by Plaintiff was expected and foreseeable by BB&T.

45. Plaintiff sustained injury as a direct and proximate result of its reliance upon Defendant BB&T's promises.

FOR A FOURTH CAUSE OF ACTION
BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING
(Plaintiff v. BB&T)

46. The Plaintiff incorporates the allegations contained in Paragraphs 1 through 33, above as if fully set forth verbatim.

47. Implied in the contract between the Plaintiff and BB&T — described above — was a covenant of good faith and fair dealing.

48. In failing and refusing to honor the terms of the parties' agreement, Defendant BB&T breached the implied covenant of good faith and fair dealing.

49. By reason of the breach of this implied covenant, Defendant BB&T is liable to Plaintiff for damages.

FOR A FIFTH CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION
(Plaintiff v. BB&T and Edahl)

50. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

51. At all times Defendants had a pecuniary interest in the transactions which are the subject of this litigation.

52. At all time relevant hereto, Defendant Edahl was the agent, servant and employee of Defendant BB&T, and acted within the scope and course of his employment.

53. In February 2005, Defendant BB&T, acting primarily through Defendant Edahl, induced Skywaves to move its financial accounts away from Wachovia. Defendant BB&T achieved this when Defendant Edahl represented to Skywaves that BB&T was ready, willing and able through the use of innovative and creative financial products to provide Skywaves with the capital needed to become a successful manufacturer, that Defendants understood exactly Skywaves' growth cycle, and that BB&T was fully committed to providing the present and

future banking needs of Skywaves. Skywaves is informed and believes that these representations are contained in written documents.

54. Defendant BB&T, acting primarily through Defendant Edahl, offered Skywaves a series of inducements in the form of financial commitments as a token of its bona fides as follows:

(a) In March 2005, Defendant BB&T offered and committed to a $400,000 loan for short term funding which was secured by an assignment of the company's factoring proceeds from the BB&T factoring agreement.

(b) In June 2005, Defendant BB&T, acting primarily through Defendant Edahl, offered and retroactively lowered BB&T's minimum monthly factoring commission for April and May to $1000 per month, and reduced their commissions to $2,500 per month for July to September, as an additional incentive to keep Skywaves as a client.

(c) Defendants amended the BB&T factoring agreement in May 2006 to increase the limit to $1.75 million.

(d) Defendant BB&T, acting primarily through Defendant Edahl, represented to Skywaves and its investors and lenders that these actions were proof of BB&T's commitment to provide capital funding for the Skywaves' short and long-term capital needs through this critical growth phase and into the foreseeable future.

55. In the first quarter of 2007, Skywaves' customer base had grown to the point that the BB&T line of credit was no longer adequate and Skywaves sought alternate sources of funding with Wachovia, and Hunt Capital.

56. In March 2007, Defendant BB&T acting primarily through Defendant Edahl told Skywaves: (a) that it understood the short and long term capital needs of Skywaves; (b) that Skywaves did not need a large bank or additional capital funding to continue its growth; (c) that Defendants believed Skywaves was strategically positioned for success; (d) that Defendants wanted to take Skywaves to a sale or stock IPO; and (e) that BB&T would provide capital funding all of Skywaves' financial needs. Skywaves is informed and believes that these representations are contained in writings signed by BB&T.

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.

58. Defendant BB&T, acting primarily through Defendant Edahl, further represented in writing that this special arrangement would not be memorialized by a "formal" written contract, as BB&T did not want to incur the attorney's fees necessary to redrafting the factoring agreement.

59. Defendant BB&T, acting primarily through Defendant Edahl, represented that it would factor the manufacture of Skywaves products without regard the need for Skywaves to either invoice or manufacture the product. In this way, BB&T agreed to advance the costs of manufacturing.

60. Defendant BB&T, acting primarily through Defendant Edahl, offered Skywaves a series of inducements in the form of financial commitments as a token of its bona fides. These financial commitments were intended to induce Skywaves to continue its banking relationship with BB&T, and enter into this "special" factoring arrangement and include the following:

(a) They offered to raise the credit limit from $1.75 to $3.5 million;

(b) They offered to raise the factoring from 80% to 85% of invoices and 60% of purchase orders and subsequently increased the factoring to 65% of purchase orders, which they make retroactive to accounts that had already been funded;

(c) They offered to reduce the bank charges to .45% with a cap of $3000 per month;

(d) They gratuitously advanced $330,000 into the Skywaves bank account without Skywaves request or solicitation; and

(e) They offered a loan of $475,000 to finance a new production line.

61. Before and in July 2007, Defendant Edahl traveled to MacBee, South Carolina on behalf of BB&T for the purpose of making a presentation to potential Skywaves lenders and

investors. During the presentation, Defendant Edahl told Skywaves and its potential lenders and investors:

(a) That based on Defendants' own comprehensive review, BB&T believed that Skywaves would grow to become a significant infrastructure supplier to the telecommunication and military markets and;

(b) That BB&T was fully committed to providing all of Skywaves short-term and long-term financial needs for growth;

(c) That BB&T would act as a partner in managing Skywaves growth;

(d) That BB&T's commitment to finance Skywaves' growth was unique to Skywaves, and was the equivalent of the funding offered by Wachovia or Hunt Capital; and

(e) That BB&T would commit to funding Skyway's growth based on invoices, purchase orders, contracts and site plans.

62. Defendants owed a duty of care to see that they communicated truthful information to the Plaintiff. Defendants breached that duty because all of the above representations were false. Defendants knew, or in the exercise due care should have known, that they were false.

63. Skywaves believed that all of these representations by Defendants were true and had no reason to believe they were not true.

64. Skywaves relied on the above-referenced representations and was induced to make BB&T its exclusive financial institution and was to maximize the use of monetary advances against account receivables, purchase orders, contracts and site plans, and fully draw on lines of credit provided by BB&T in lieu of working to raise sufficient additional investor capital.

65. As a direct and proximate result of Defendants' actions Skywaves passed up the opportunity to obtain a capital investment from Hunt Capital and awarded its capital financing business to BB&T.

66. However, Defendants' representations were untrue when made.

67. In point of fact, at the time Defendants made the above-detailed representations, they had no intention of fulfilling their promises to Skywaves.

68. As a direct and proximate result of the above-referenced misrepresentations, Skywaves was forced to cancel contracts in place and was prevented from accepting new purchase orders from existing customers. Skywaves is, therefore, entitled to recover the lost profits it would have received had Defendants' actions not forced Skywaves to cease business operations.

69. As a direct and proximate result of Defendants' actions, Skywaves was forced into Chapter 7 Bankruptcy liquidation and has incurred the expenses of litigation and is entitled to recover from Defendant reasonable attorney's fees and costs.

70. As a direct and proximate result of Defendants' representations and inducements Skywaves has incurred monetary damages.

FOR A SIXTH CAUSE OF ACTION
FRAUDULENT MISREPRESENTATION
(Plaintiff v. BB&T and Edahl)

71. All of the allegations above (to the extent they are not inconsistent) are incorporated herein as if they had been set forth fully hereunder.

72. As detailed in the prior Cause of Action, Defendants made numerous misrepresentations to Plaintiff.

73. Defendants made the above-referenced fraudulent misrepresentations knowing them to be untrue.

74. Defendants made these fraudulent misrepresentations with the intention that Plaintiff would rely thereon.

75. Plaintiff, in fact, relied upon these fraudulent misrepresentations, as set forth in detail above.

76. Such reliance was reasonable under the circumstances.

77. As a direct and proximate result of its reliance upon Defendants' fraudulent misrepresentations, Plaintiff has sustained damages.

FOR A SEVENTH CAUSE OF ACTION
NEGLIGENCE
(Plaintiff v. BB&T and Edahl)

78. The Plaintiff incorporates the allegations contained in Paragraphs 1 through 77, above as if fully set forth verbatim.

79. Defendants undertook to tailor a funding program outside its ordinary course of business lending relationships and unique to Skywaves.

80. Defendants undertook to provide funding for Skywaves in a manner that would be similar to a capital based lending program or a capital investment proposed by Hunt Capital.

81. This method of operation gave BB&T a unique power and influence over the day to day operations of Skywaves and gave rise to a special relationship between the parties, whereby Defendants had a fiduciary duty or other duty of care to Skywaves.

82. Skywaves relied on Defendants' financial expertise and advice.

83. Skywaves believed Defendants' representations that BB&T was committed to helping Skywaves grow, committed to providing Skywaves with the best financial services and advice, and that BB&T's services would be superior to the services available from Wachovia or other financial sources.

84. Defendants knew that Skywaves relied on BB&T to provide sound financial advice and information and that Skywaves had entrusted its future existence and growth to BB&T's care.

85. Having undertaken to provide funding in the manner aforementioned, BB&T had the duty to do so carefully, so as to provide Skywaves with the best financial services, advice and products to help Skywaves grow its manufacturing business over the long term.

86. Defendants abused their influence and control over Skywaves by failing to provide the kind of advice and funding necessary to help Skywaves grow its manufacturing

business over the long term and instead acted to maximize their own pecuniary interests and collections by creating a funding mechanism that was outside its charter..

87. These activities by Defendants were in breach of the special trust and relationship established with Skywaves and deprived Skywaves of the operating capital needed to sustain its manufacturing business.

88. As a direct and proximate result of Defendants' actions, Skywaves was forced to cancel contracts in place and was prevented from accepting new purchase orders from existing customers and is therefore entitled to the lost profits it would have received had Defendants' actions not forced Skywaves to cease business operations.

89. As a direct and proximate result of Defendants' actions Skywaves was forced into Chapter 7 Bankruptcy liquidation and has incurred the expenses of litigation and is entitled to recover from Defendants reasonable attorney's fees and costs.

90. As a direct and proximate result of Defendants breaches of fiduciary duty Skywaves has incurred monetary damages.

FOR AN EIGHTH CAUSE OF ACTION
SCUTPA
(Plaintiff v. BB&T and Edahl)

91. The Plaintiff incorporates the allegations contained in Paragraphs 1 through 90, above as if fully set forth verbatim.

92. The South Carolina Code, § 39-5-20 prohibits any unfair or deceptive trade practices in the conduct of any trade or commerce.

93. As detailed above, Defendants engaged in numerous misrepresentations to Plaintiff.

94. The conduct of Defendants, as set forth above, constitutes an unfair or deceptive act or practice within the contemplation of South Carolina's Unfair Trade Practices Act.

95. Pursuant to the Code of Laws of South Carolina § 39-57-80(e), Defendants' violations of the provisions of Chapter 39-57 of the Code of Laws of South Carolina constitute an unfair trade practice actionable under the Code of Laws of South Carolina § 39-5-20.

96. The Code of Laws of South Carolina § 39-5-20 provides that any person suffering an ascertainable loss of money or property as a result of the use by another person of an unfair or deceptive method, act or practice may bring an action individually to recover actual damages.

97. The unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition.

98. Defendants' conduct in perpetrating and perpetuating unfair and deceptive acts and practices is the actual and proximate cause of injury and damage to Plaintiff.

99. Defendants' unfair and deceptive acts and practices were conducted willfully and knowingly as those terms are utilized in the Code of Laws of South Carolina § 39-5-140(a).

100. Defendants' conduct as alleged herein constitutes violations of South Carolina's Unfair Trade Practices Act for which Defendants are liable to Plaintiff, and Plaintiff is entitled to recover from Defendants actual, special, and consequential damages, such damages being trebled.

WHEREFORE, Plaintiff requests the following relief:

a) Judgment against Defendants for actual and punitive damages;

b) For attorney fees and costs associated with its Bankruptcy;

c) For interest, attorney fees and costs of this action; and

d) For such other and further relief as the Court may deem proper.

GEORGE J. KEFALOS, PA

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On this 12th day of February, 2010
Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

SKYWAVES I CORPORATION, Plaintiff, vs. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL, Defendants.	Civil Action No. 2:10-cv-00111-MBS **ANSWER OF DEFENDANT BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC, A/K/A BB&T**

Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("Defendant" or "BB&T") responds to the First Amended Complaint in the above-captioned case as follows:

1. Each and every allegation contained in the First Amended Complaint not hereinafter specifically admitted is denied, and strict and competent proof of such allegation is demanded.

FOR A FIRST DEFENSE

2. Defendant admits, upon information and belief, the allegations of paragraph 1.

3. Responding to paragraph 2, Defendant admits that it consented to allow Plaintiff to amend its complaint.

4. In response to the allegations of paragraph 3, Defendant would show that it is a corporation organized under the laws of the State of North Carolina with its principal place of business in North Carolina. Defendant admits the remaining allegations of paragraph 3.

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5. Defendant admits the allegations of paragraph 4.

6. The allegations of paragraphs 5 and 6 constitute conclusions of law which Defendant is not required to admit.

7. Responding to paragraph 7, Defendant admits, upon information and belief, only that Plaintiff developed a structural product for the wireless telecommunications industry. Defendant further admits, upon and information and belief, only that Plaintiff's customer base included Verizon, AT&T, Sprint/Nextel and General Dynamic. Defendant denies any remaining allegations of paragraph 7.

8. Responding to paragraph 8, Defendant craves reference to the written factoring agreement and denies any allegations not consistent therewith.

9. Responding to paragraphs 9, 10 and 11, Defendant admits only that from 2005 to 2007, it provided a factoring line of credit to Plaintiff to support the manufacture of individual cell tower units, the terms of which were amended. Defendant further admits only that Defendant had a relationship manager on behalf of Defendant with Plaintiff. Defendant denies the remaining allegations of paragraphs 9, 10 and 11.

10. Defendant lacks information sufficient to form a belief at to the allegations of paragraph 12 and, therefore, denies the same.

11. Responding to paragraphs 13, 14 and 15, Defendant admits only that it submitted a commitment letter to bid on financing to Skywaves in March of 2007. Defendant lacks sufficient information to form a belief as to the allegations regarding solicitations by Plaintiff or proposals by other entities. Defendant denies any remaining allegations of paragraphs 13, 14 and 15.

12. Defendant denies the allegations of paragraphs 16, 17, 18, 19, 20, 21 and 22.

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13. Responding to paragraph 23, Defendant admits only that its business relationship with Plaintiff ended. Defendant denies the remaining allegations of paragraph 23.

14. Defendant denies the allegations of paragraphs 24 and 25.

AS TO THE FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT

15. Responding to paragraph 26, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

16. Defendant denies the allegations of paragraphs 27, 28, 29, 30, 31 and 32.

AS TO THE SECOND CAUSE OF ACTION FOR BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACTS

17. Responding to paragraph 33 Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

18. Defendant denies the allegations of paragraphs 34, 35, 36, 37, 38 and 39.

AS TO THE THIRD CAUSE OF ACTION FOR PROMISSORY ESTOPPEL

19. Responding to paragraph 40, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

20. Defendant denies the allegations of paragraphs 41, 42, 43, 44 and 45.

AS TO THE FOURTH CAUSE OF ACTION FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

21. Responding to paragraph 46, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

22. Defendant denies the allegations of paragraph 47, 48 and 49.

AS TO THE FIFTH CAUSE OF ACTION NEGLIGENT MISREPRESENTATION

23. Responding to paragraph 50, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

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24. Defendant denies the allegations of paragraphs 51, 52 and 53.

25. Responding to paragraph 54, with respect to subparagraph (a) Defendant admits only that it submitted a commitment letter to Plaintiff and craves reference to the terms of the written commitment letter. With respect to subparagraph (b), Defendant admits only that, at the request of Plaintiff and after determining to do so was viable, Defendant lowered its minimum monthly factoring commission for April and May and reduced its commissions for July to September. With respect to subparagraph (c), Defendant admits only that in 2006 Plaintiff's factoring line of credit was increased. Defendant denies the remaining allegations of paragraph 54.

26. Defendant lacks sufficient information to form a belief as to the allegations of paragraph 55.

27. Defendant denies the allegations of paragraph 56. By way of further answer to paragraph 56, Defendant craves reference to any valid writings signed by Defendant and denies any allegations not consistent therewith.

28. Defendant denies the allegations of paragraphs 57, 58 and 59.

29. Responding to paragraph 60, Defendant craves reference to any written financial commitments it provided to Plaintiff and denies any allegations not consistent therewith. Defendant denies the remaining allegations of paragraph 60.

30. Responding to paragraph 61, Defendant admits only that James Edahl traveled to MacBee, South Carolina in July of 2007, at the request of Plaintiff's president to observe a presentation being made by Plaintiff to potential investors. Defendant denies the remaining allegations of paragraph 61.

31. Defendant denies the allegations of paragraphs 62, 63, 64, 65, 66, 67, 68, 69 and 70.

AS TO THE SIXTH CAUSE OF ACTION
FRAUDULENT MISREPRESENTATION

32. Responding to paragraph 71, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

33. Defendant denies the allegations of paragraphs 72, 73, 74, 75, 76 and 77.

AS TO THE SEVENTH CAUSE OF ACTION FOR NEGLIGENCE

34. Responding to paragraph 78, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

35. Defendant denies the allegations of paragraphs 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89 and 90.

AS TO THE EIGHTH CAUSE OF ACTION FOR SCUPTA

36. Responding to paragraph 91, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

37. Defendant denies the allegations of paragraphs 92, 93, 94, 95, 96, 97, 98, 99 and 100, the same being the final allegations of the First Amended Complaint.

FOR A SECOND DEFENSE

38. The allegations contained in the First Amended Complaint fail to state a claim upon which relief can be granted and, therefore, the Complaint should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

FOR A THIRD DEFENSE

39. Plaintiff has failed to mitigate its alleged damages.

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FOR A FOURTH DEFENSE

40. To the extent there may be any discharge in Plaintiff's bankruptcy proceeding, Defendant asserts such discharge as an affirmative defense.

FOR A FIFTH DEFENSE

41. Plaintiff's claims are barred, in whole or in part, for failure to plead such claims with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure.

FOR A SIXTH DEFENSE

42. Plaintiff's claims are barred, in whole or in part, based on its fraudulent joinder of a defendant against whom there is no possibility that Plaintiff can prove its claims as a matter of law.

FOR A SEVENTH DEFENSE

43. Plaintiff's claims are barred, in whole or in part, by the statute of frauds

FOR AN EIGHTH DEFENSE

44. Upon information and belief, Plaintiff's claims are barred based upon the doctrines of waiver, laches and estoppel.

FOR A NINTH DEFENSE

45. Any damage or injury Plaintiff may have suffered was caused, in whole or in part, by persons or factors unrelated to Defendant, including Plaintiff.

FOR A TENTH DEFENSE

46. Plaintiff does not come to this action with clean hands, and Defendant pleads the defense of unclean hands as a complete defense to Plaintiff's claims.

FOR AN ELEVENTH DEFENSE

47. Defendant denies that it is liable for any punitive and/or exemplary damages. Defendant avers that any award of punitive damages against it would violate the constitutional safeguards provided under the Constitution of the United States of America, and the Constitution of South Carolina, in that punitive damages violate the due process and equal protection guarantees, place an undue burden on interstate commerce, violate the right to assembly and petition the government and violate the proscription against excessive fines.

48. Furthermore, Defendant avers that any award of punitive damages in this litigation is arbitrary, unreasonable, excessive and in violation of Defendant's right to due process of law and equal protection of the law under the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, and the Constitution of South Carolina, in that punitive damages are vague and not rationally related to legitimate government interests.

49. Furthermore, an award of punitive damages would be violative of the procedural safeguards provided to Defendant under the Sixth Amendment to the Constitution of the United States, and the Constitution of South Carolina, in that punitive damages are penal in nature and consequently, Defendant is entitled to the same procedural safeguards as accorded to a criminal defendant.

50. Furthermore, it would be violative of Defendant's rights guaranteed by the Constitution of the United States to impose punitive damages against it as such damages are penal in nature by requiring a burden of proof which is less than "beyond a reasonable doubt" burden of proof required in criminal cases. Punitive damages would also be in violation of Article 1, Section 10 of the Constitution of the United States, and the Constitution of South

Carolina, in that it would be a retrospective imposition of punitive damages under a new cause of action.

WHEREFORE, having fully answered the First Amended Complaint, Defendant prays that the Court grant appropriate relief to Defendant, including dismissal, and for such other further relief as the Court deems just and proper.

s/Molly Hughes Cherry
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ATTORNEYS FOR DEFENDANTS
BRANCH BANKING AND TRUST COMPANY,
SUCCESSOR IN MERGER TO BRANCH
BANKING AND TRUST COMPANY OF SC,
A/K/A BB&T, AND JAMES EDAHL

February 26, 2010
Charleston, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION, Plaintiff, vs. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL, Defendants.	Civil Action No. 2009-CP-10-07516 **DEFENDANT JAMES EDAHL'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS AMENDED COMPLAINT**

FILED
2011 AUG 10 PM 4:51
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Defendant James Edahl respectfully submits this Memorandum in Support of his Motion to Dismiss the Amended Complaint.

I. FACTS[1]

This is a lender liability case in which Plaintiff Skywaves I Corporation ("Plaintiff" or "Skywaves") alleges that Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("BB&T") failed to fund its financing needs, suggesting that BB&T had an obligation to fund its operations indefinitely with no rights or recourse for any default by Skywaves. Plaintiff's claims against Defendant Edahl ("Edahl") are based on its allegations that Edahl, in his capacity as an employee of BB&T, made representations to Skywaves on behalf of BB&T. In fact, the majority, if not all, of Plaintiff's allegations are against Defendant BB&T who Plaintiff alleges was "acting primarily through Defendant Edahl." (Amended Complaint at ¶¶ 53 - 61). Nevertheless, notwithstanding the

[1] Although the facts are disputed between the parties, Defendant has taken the facts as alleged by the Plaintiff as true for purposes of this Motion only.

inaccuracies in Plaintiff's allegations as to both Defendants, Plaintiff's claims should be dismissed as a matter of law because Plaintiff has failed to state facts sufficient to constitute a cause of action against Edahl.

Defendant BB&T is a banking institution with a branch in Charleston, South Carolina, and Defendant Edahl is one of its employees. (Amended Complaint ¶¶ 3, 32). Skywaves is a company that developed a structural product, specifically cell tower units, for use in the wireless telecommunications industry. (Amended Complaint ¶ 8; Answer at ¶ 8). To support the manufacture of these individual cell tower units, Skywaves entered into a certain factoring agreement with BB&T in the spring of 2005 whereby BB&T would purchase certain receivables of Skywaves at a discount and payment would then be made to BB&T. (Amended Complaint ¶ 9; Answer at ¶9). Skywaves also entered into a loan agreement with BB&T.

In January of 2008, BB&T declared a default by Plaintiff under the factoring agreement. (Amended Complaint at ¶ 22). Although Defendant disputes Plaintiff's allegations, Plaintiff contends the default was improper, as BB&T, acting through its employee Defendant Edahl, promised to "provide capital funding all of Skywaves' financial needs." (Amended Complaint at ¶ 56). Plaintiff claims the improper default caused it to go into bankruptcy. (Amended Complaint at ¶ 25). Plaintiff is currently in bankruptcy. (Amended Complaint at ¶ 6).

II. ARGUMENT AND CITATION OF AUTHORITY

In its Amended Complaint, Plaintiff asserts four claims against Edahl for: (1) negligent misrepresentation; (2) fraudulent misrepresentation; (3) negligence; and (4) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). (*See generally* Amended Complaint). Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, a claim may be dismissed when the facts alleged in the pleadings fail to establish a cause of action. *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (2003). The question is whether the pleadings, taken in

the light most favorable to the plaintiff, articulate a valid claim for relief. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). A Rule 12(b)(6) motion "must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (1997).

As demonstrated below, there is no possibility that Plaintiff can establish any of these causes of action against Edahl as a matter of law because Plaintiff fails to plead any alleged conduct on the part of Edahl that would support a claim for negligence, negligent or fraudulent misrepresentation or an unfair trade practice. Accordingly, pursuant to South Carolina Rule of Civil Procedure 12(b)(6), Edahl should be dismissed as a defendant in this case.

A. **Plaintiff fails to allege any conduct on the part of Edahl that would support its claims.**

Plaintiff's claims against Edahl should be dismissed because (1) Plaintiff fails to plead any alleged individual conduct on the part of Edahl that supports a claim for fraudulent inducement, much less allege such conduct with the particularity required by the Federal Rules of Civil Procedure; (2) Plaintiff's allegations are insufficient to establish a claim for negligent misrepresentation and fraudulent misrepresentation; (3) Plaintiff's allegations are insufficient to establish a claim for negligence; and (4) Plaintiff's allegations are insufficient to establish a claim for a violation of the South Carolina Unfair Trade Practices Act.

1. Plaintiff cannot sustain a claim against Edahl for negligent misrepresentation or fraudulent misrepresentation.

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

In addition to showing that a false representation was made, a plaintiff must also show that it had a right to rely on such representation in order to pursue a claim for either negligent misrepresentation or fraudulent misrepresentation. *See GSM Dealer Servs., Inc. v. Chrysler Corp.*, 32 F.3d 139, 142 (4th Cir. 1994) (applying South Carolina law). Plaintiff cannot establish it had a right to rely on any alleged false statements. When there is no fiduciary relationship between the parties and the situation involves an arm's length transaction between mature, educated parties, there is no right to rely. *Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina*, C.A. No. 2:98-158-23 (April 12, 1999)(attached)(*citing Florentine Corp. v. PEDA I., Inc.*, 339 S.E.2d 112, 114 (S.C. 1985)); *see also First Savings Bank, FSB v. Capital Investors, Inc.*, 450 S.E.2d 83 (S.C. Ct. App. 1994)((holding that guarantors of a note, who were sophisticated parties, could not reasonably have relied on a bank employee's oral representation that they would not be held liable in the event of a default by the borrower, where such a representation contradicted the written guaranty agreement), *rev'd in part on other grounds*, 459 S.E.2d 307 (S.C. 1995).

South Carolina law considers the normal relationship between a bank and its customer to be one of creditor-debtor and not one that is fiduciary in nature. *See Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986); *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 497, 220 S.E.2d 116, 119 (Ct. App.1975); *Johnson v. Serv. Mgmt., Inc.*, 319 S.C. 165, 167–68, 459 S.E.2d 900, 902 (Ct. App.1995). Moreover, as a general rule, officers, in their capacities as such, do not owe any individual fiduciary duties to Plaintiff. *See Burwell*, 288 S.C. at 40–41, 340 S.E.2d at 790. Thus, it is axiomatic that any duty Edahl might owe to Plaintiff would hinge on whether BB&T's relationship changed from debtor-creditor to one that is fiduciary in nature.

In the matter at hand, Plaintiff has put forth some effort in describing the alleged nature of BB&T's relationship with the Plaintiff and the alleged amount of customization that went into BB&T's product for the Plaintiff, but it still has not alleged any specific facts that would change the standard creditor-debtor framework and create a fiduciary relationship. Accordingly, as a matter of law, Plaintiff cannot, as a sophisticated, mature party, establish that it had a right to rely on any alleged false statements by Edahl. Under these circumstances, Plaintiff's claim for negligent or fraudulent misrepresentation against Edahl should be dismissed.

2. Plaintiff cannot sustain a claim against Edahl for negligence.

Moreover, Plaintiff cannot establish its claim for negligence against Edahl as a matter of law. To prove a claim for negligence, a plaintiff must establish a duty of care, a breach of that duty and damages proximately caused by the breach. *McKnight v. South Carolina Dept. of Corrections*, 684 S.E.2d 566, 569 (S.C.Ct.App.2009). In this case, Defendant Edahl neither had nor breached any duty to Plaintiff.

In his claim, Plaintiff alleges that "BB&T [had] a unique power and influence over the day to day operations of Skywaves and gave rise to a special relationship with the parties, whereby Defendants had a fiduciary duty or other duty of care to Skywaves." (Amended Complaint at ¶ 81). However, Plaintiff's allegations pertain to BB&T. Plaintiff cannot manufacture a duty by Edahl by unilaterally stating one exists.

"Duty is generally defined as the obligation to conform to a particular standard of conduct toward another." *Murray v. Bank of America, N.A.*, 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct. App. 2003). "Ordinarily, the common law imposes no duty on a person to act." *Id.* "An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Id.*

As noted above, South Carolina views the normal relationship between a bank and its customer as one of creditor-debtor and not one that is fiduciary in nature. *See Burwell, supra*; *Owens, supra*; *Johnson, supra*. As also noted above, as a general rule, officers of a bank, in their capacities as such, do not owe any individual fiduciary duties to Plaintiff. *See Burwell*, 288 S.C. at 40–41, 340 S.E.2d at 790. Here again, it is axiomatic that any duty Edahl might owe to Plaintiff hinges on whether BB&T's relationship changed from debtor-creditor to one that is fiduciary in nature. Plaintiff has put forth some effort in describing the nature of the financial product BB&T was allegedly providing or planning to provide to Plaintiff, but Plaintiff still has not alleged facts sufficient to expand the normal debtor-creditor relationship into one that was fiduciary in nature.

Given the normal relationship of a bank and its customer and the lack of any other circumstance creating an affirmative duty, Plaintiff cannot show that Edahl had any duty to breach. As a result, Plaintiff cannot establish its claim for negligence against Edahl and, therefore, this cause of action should be dismissed.

3. Plaintiff cannot sustain a claim against Edahl for violation of the South Carolina Unfair Trade Practices Act.

With regard to Plaintiff's claim for a violation of the South Carolina Unfair Trade Practices Act, Plaintiff has not pled sufficient allegations against Defendant Edahl to support such a claim against him.

Plaintiff's claims against Defendant Edahl should be dismissed because "in private actions under SCUTPA, directors and officers are not liable for the corporation's unfair trade practices unless they personally commit, participate in, direct, or authorize the commission of a violation of SCUTPA." *Plowman v. Bagnal*, 450 S.E.2d 36, 38 (S.C.1994). Plaintiff has not

made sufficient allegations regarding Defendant Edahl personally to sustain a claim against Defendant Edahl for an individual violation of SCUTPA.

Plaintiff's claims against Defendant Edahl should also be dismissed because to be actionable under SCUTPA, the unfair or deceptive act or practice must have an impact upon the public interest. *Noack Enterprises, Inc. v. Country Corner Interiors,* 351 S.E.2d 347 (S.C.Ct.App. 1986). Here, Plaintiff merely offers a conclusion of law that the "unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition." (Amended Complaint ¶ 97.) Absent from the Amended Complaint are any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition. At most, the Amended Complaint alleges, in sum, that Defendants promised to but then refused to fund the financing needs of Skywaves. These allegations do not comprise "unfair or deceptive acts " that are actionable under SCUTPA because business relationships that affect only the parties to the complained-of transaction are not actionable under SCUTPA. *See Noack Enterprises, Inc.* 351 S.E.2d at 349–50 (holding that an "unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace").

Although not delineated as a breach of contract claim, Plaintiff's claim is premised upon the breach of an alleged agreement to fund the financing needs of Skywaves. However, even "[a] deliberate or intentional breach of a valid contract, without more, does not constitute a violation of SCUTPA. Otherwise, every intentional breach of a contract within a commercial setting would constitute an unfair trade practice and thereby subject the breaching party to treble damages." *Ardis v. Cox*, 431 S.E. 2d 267, 271 (S.C. Ct.App. 1993).

For the foregoing reasons, Plaintiff's SCUTPA claim, therefore, should be dismissed.

III. CONCLUSION

For the reasons set forth above, Edahl respectfully requests that the Court grant his Motion to Dismiss the Amended Complaint and dismiss him as a defendant in this action pursuant to South Carolina Rule of Civil Procedure 12(b)(6).

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ATTORNEYS FOR DEFENDANTS
BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC, A/K/A BB&T, AND JAMES EDAHL

August 10, 2011
Charleston, South Carolina

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

SKYWAVES I CORPORATION, Plaintiff, vs. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL, Defendants.	Civil Action No. 2:10-cv-_____ **AFFIDAVIT OF JAMES J. EDAHL**

I, James J. Edahl, after being duly sworn, state that the following is true based upon my personal knowledge and observation:

1. I am over the age of 18 and have knowledge of certain facts and circumstances related to the above-captioned matter.

2. I am the Senior Vice President and Corporate Banker for Branch Banking & Trust Company in Charleston, South Carolina. I have been in this position since May of 2004.

3. BB&T's relationship with Skywaves I Corporation began in March of 2005, with a $1.5 million factoring line of credit through BB&T's Factors Group in its Commercial Finance Department and a $400,000 line of credit through BB&T to KWK, LLC and Skywaves I Corporation as co-borrowers, secured by a commercial building owned by KWK, LLC.

4. Tracking and monitoring of the factoring process, as well as any advances on the line of credit, were handled by a Factors account officer, Castlen Morris, in High Point, North Carolina, until November of 2007, and then by another Factors account officer, Mike Burke.

5. I was a relationship manager on behalf of BB&T with regard to the bank's relationship with Skywaves. My role was on behalf of BB&T, and at no time did I ever assist Skywaves with raising additional capital or with recruiting or soliciting investors.

6. At no time did I make any representations to Skywaves or any of its investors, potential investors, shareholders, officers or other lenders that BB&T was going to provide funding for Skywaves throughout its growth phase, into the foreseeable future or for its future banking needs or anything to that effect.

7. At no time did I make any representation to Skywaves or any of its investors, potential investors, shareholders, officers or other lenders that BB&T believed Skywaves was strategically positioned for success, that I or BB&T wanted to take Skywaves to a sale or stock IPO or that BB&T would fund all of the company's financial needs.

8. I traveled to MacBee, South Carolina in July of 2007, at the request of Ron Konersmann, the President and Chief Executive Officer of Skywaves, to listen to a presentation he and others were giving on behalf of Skywaves to potential investors, including a company called Mar Mac. I did not make a presentation or otherwise make representations to anyone present that BB&T was providing all of Skywaves' short-term and long-term financial needs. Neither Crayton Walters nor John Voytko were present at this presentation in MacBee in July 2007.

9. I confirmed at the meeting with Mar Mac that Skywaves banked with BB&T and answered a few questions, with Ron Konersmann's permission, about the general structure

of the banking relationship. I did not represent to Mar Mac that BB&T was providing all of Skywaves' short-term and long-term financial needs. I spoke with Mar Mac about their banking needs after Ron Konersmann's presentation and then met with another BB&T client in MacBee that afternoon.

10. Any commitments on behalf of BB&T were submitted to Skywaves through a commitment letter, which is the standard, customary banking practice.

FURTHER AFFIANT SAYETH NOT.

James J. Edahl

SWORN to before me this 13th day of January, 2010.

Katherine Blackman (SEAL)
Notary Public for South Carolina
My Commission Expires:

Katherine Blackman
Notary Public for South Carolina
My Commission [illegible]

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON SKYWAVES I CORPORATION, ☒ Plaintiff v. Branch Banking And Trust Company, Successor In Merger To Branch Banking And Trust Company Of Sc, A/K/A Bb&T, And James Edahl, ☐ Defendant.	)	IN THE COURT OF COMMON PLEAS CASE NO. 2009-CP-10-7516 MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
George J. Kefalos, Bar No. Address: 3 State Street Charleston, SC 29401 phone: 843-722-6612 fax: 843-377-1310 e-mail: george@kefaloslaw.com other:	Molly Hughes Cherry, Bar No. Address: 205 King Street, Ste. 400 Charleston, SC 29401 phone: 843-577-9440 fax: 843-414-8209 e-mail: mcherry@nexsenpruet.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Reconsideration
Estimated Time Needed: 15 Min. Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ _____
Signature of Attorney for ☒ Plaintiff / ☐ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

120

SCCA/233 (11-03)

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2009-CP-10-7516

SKYWAVES I CORPORATION,

Plaintiff,

v.

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

Defendants.

PLAINTIFF'S MOTION TO RECONSIDER, ALTER OR AMEND DISMISSAL AND FOR RELIEF FROM JUDGMENT

FILED
2011 NOV 18 PM 3:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: MOLLY HUGHES CHERRY, ESQ., COUNSEL FOR DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that as soon as counsel may properly be heard, Plaintiff Skywaves I Corporation ("Skywaves") will move the Court for an order reconsidering, altering or amending the judgment partially dismissing its Amended Complaint in this action with prejudice pursuant to Rule 59(e), and for relief from judgment due to clerical mistake pursuant to Rule 60(a) of the South Carolina Rules of Civil Procedure.

Plaintiff's motion is based on the ground that the partial motion to dismiss which this Court's Order of November 8, 2011 grants was filed in the United States District Court for the District of South Carolina after removal of this action and before its remand back to this Court. All pleadings and papers filed in the federal court are therefore a necessary part of the record of this Court's ruling on such motion. Otherwise, Defendants have no responsive pleading or motion on file and are in default.

The Court's November 8, 2011 Order fails to consider or address these necessary elements of the record. Plaintiff is entitled to have all materials in the federal court record provided to the clerk of this Court and made part of the record, to reconsideration of the motion based on such materials,

and to relief from the existing order based on clerical mistake to the extent that such materials have not been properly incorporated in the record of this Court.

Plaintiff further states that it received written notice of the Court's order from counsel for Defendants on November 17, 2011, and that the present motion is therefore timely pursuant to Rule 59(e).

WHEREFORE, based on the law of the State of South Carolina, the grounds set forth above, and such further materials as may be properly submitted to the Court, Plaintiff respectfully prays this Honorable Court to enter an order as follows:

1. ordering that all materials in the record of the United States District Court for the District of South Carolina during the period when this action was removed to that Court be incorporated into the record of this Court in this action;

2. reconsidering, altering or amending the judgment against Plaintiff and entering an order denying Defendants' Motion to Dismiss;

3. granting Plaintiff relief from the judgment based on clerical mistake; and

4. awarding Plaintiff such further relief as it may deem just and proper.

[*signature on following page*]

This 18th day of November, 2011 at Charleston, South Carolina.

George J. Kefalos
George J. Kefalos, PA
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Charleston, SC 29401
(843) 722-6612 (phone)
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and

M. Dawes Cooke Jr., Esquire
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Attorneys for Plaintiff Skywaves I Corporation

2009-CP-10-7516

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

Civil Action No. 2:10-cv-00111-MBS

DEFENDANT JAMES EDAHL'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS AMENDED COMPLAINT

FILED
2010 FEB 21 P 2:15
JULIE J. ARMSTRONG
CLERK OF COURT

Defendant James Edahl respectfully submits this Memorandum in Support of his Motion to Dismiss the Amended Complaint and in Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss.[1]

I. INTRODUCTION

This is a straightforward lender liability case in which Plaintiff Skywaves I Corporation ("Plaintiff") alleges that Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("BB&T") failed to fund its financing needs. In a clear attempt to defeat diversity and prevent removal of the case to this Court, Plaintiff also names James Edahl ("Edahl"), a South Carolina resident, as a defendant. Plaintiff's claims against Edahl are based solely on its allegations that Edahl, in his capacity as an employee

[1] In partial response to Defendant's Motion to Dismiss, Plaintiff filed an Amended Complaint and a Memorandum in Opposition to the Motion to Dismiss. Defendant has filed a Motion to Dismiss the Amended Complaint and files this Memorandum in Support of that Motion, as well as in Reply to Plaintiff's Memorandum in Opposition to the original Motion to Dismiss.

of BB&T, made representations to Plaintiff on behalf of BB&T. In fact, the majority, if not all, of Plaintiff's allegations are against Defendant BB&T who Plaintiff alleges was "acting primarily through Defendant Edahl." (Amended Complaint at ¶¶ 53 - 61). Because there is no possibility that Plaintiff can establish a cause of action against Edahl individually based on these allegations, he should be dismissed pursuant to the fraudulent joinder doctrine and Federal Rule of Civil Procedure 12(b)(6).

II. ARGUMENT AND CITATION OF AUTHORITY

In its Amended Complaint, Plaintiff asserts four claims against Edahl for: (1) negligent misrepresentation; (2) fraudulent misrepresentation; (3) negligence; and (4) violation of the South Carolina Unfair Trade Practices Act ("UTPA"). (*See generally* Amended Complaint). As demonstrated below, there is no possibility that Plaintiff can establish any of these causes of action against Edahl as a matter of law because they are barred under South Carolina Code Ann. § 37-10-107. Moreover, the claims against Edahl are barred because Plaintiff fails to plead any alleged conduct on the part of Edahl that would support a claim for negligence, negligent or fraudulent misrepresentation or an unfair trade practice and the evidence of record demonstrates conclusively that no such conduct occurred in this case. Accordingly, pursuant to the fraudulent joinder doctrine and Federal Rule of Civil Procedure 12(b)(6), Edahl should be dismissed as a defendant in this case.

A. The Fraudulent Joinder Doctrine and Rule 12(b)6).

The doctrine of fraudulent joinder permits a district court "to disregard, for jurisdictional purposes, the citizenship of certain non-diverse defendants, assume jurisdiction over a case, dismiss the non-diverse defendants, and thereby retain jurisdiction." *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999) (citation omitted). As Judge Wilkinson of the Fourth Circuit has pointed out, the doctrine exists to ensure fair treatment for out-of-state defendants sued by in-

state plaintiffs, as well as to protect individuals named as defendants for the sole purpose of destroying diversity jurisdiction:

> The cost of permitting this sort of jurisdictional gamesmanship extends beyond the mere defeat of what Congress deems the legitimate purposes of diversity jurisdiction. Fraudulent joinders exact a high toll on individuals who do not rightly belong in a lawsuit: as a result, lives are disrupted by expensive and unnecessary litigation. In my view, human beings are not sacrificial pawns on the board of a party's litigation strategy.

Baltimore County, Md. v. Cigna Healthcare, No. 06-1877, 2007 WL 1655461, at *13 (4th Cir. June 5, 2007) (Wilkinson, J., dissenting).[2] To establish that a non-diverse party has been fraudulently joined, a party must show that "there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court." *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir. 1999) (quoting *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232-33 (4th Cir. 1993)); *see also Benjamin v. Wal-Mart Stores, Inc.*, 413 F. Supp. 2d 652, 655-57 (D.S.C. 2006) (dismissing non-diverse defendant store managers as fraudulently joined in action against the store, holding that the complaint did not contain allegations sufficient to sustain a claim against the managers).

Similarly, Federal Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). Although a court reviewing a claim pursuant to a Rule 12(b)(6) motion accepts the well-pleaded allegations of the complaint as true, the Supreme Court has confirmed that Rule 12(b)(6) requires more than a simple conclusory recitation of the elements of a claim:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than

[2] In accordance with Local Rule 7.05(A)(4), copies of the unpublished decisions cited herein are attached as Exhibit "A."

> labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Bell Atl. Corp. v. Twombly, 550 U.S. 540, 127 S. Ct. 1955, 1959 (2007) (internal quotations and citations omitted). "Thus, a Rule 12(b)(6) motion should be granted unless the factual allegations in the plaintiff's complaint are sufficient to raise a 'reasonably founded hope' that the plaintiff will be able to make a case." *Williams v. Equity Holding Corp.*, No. 2:07cv66, 498 F. Supp. 2d 831, 2007 WL 2230723, at *3 (E.D. Va. Aug. 3, 2007) (quoting *Twombly*, 127 S. Ct. at 1969).

B. The Bankruptcy Order Permitting Plaintiff's Claims Against BB&T Does Not Include Edahl.

As an initial matter, Plaintiff brought this action by a June 16, 2009 Order of Judge David R. Duncan, U.S. Bankruptcy Court, District of South Carolina.. (Plaintiff's Amended Complaint at ¶ 6). The Order, however, only permits Plaintiff to pursue a claim against BB&T. The Order does not give Plaintiff permission to pursue a claim against Edahl. Accordingly, the claims against Edahl should be dismissed.

C. Section 37-10-107 of the South Carolina Code Bars All of Plaintiff's Claims Against Edahl.

All four of Plaintiff's claims asserted against Edahl are statutorily barred, as a matter of law. Many states, including South Carolina, have enacted specialized statutes concerning loan and credit agreements. These statutes bar enforcement of oral lending agreements and bar fraud and other claims based on alleged oral misrepresentations and other non-written conduct concerning these loan agreements. *See* S.C. Code § 37-10-107. In fact, these statutes completely prohibit any and all claims and defenses in contract or tort that are not based on the written agreement signed by the parties. *Id.* Many of these statutes were based on the Model Lender Liability Statute created by the American Bar Association ("ABA"). *See* John L. Culhane, Jr. &

Dean C. Gramlich, Lender Liability Limitation Amendments To State Statutes Of Frauds, 45 Bus. Law. 1779, 1792 (1990). By enacting these statutes, the legislatures of numerous states, including South Carolina, have determined that public policy weighs heavily in favor of these statutory protections.

Specifically, section 37-10-107 of the South Carolina Code Annotated provides:

> (1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:
>
> (a) to lend or borrow money;
>
> (b) to defer or forbear in the repayment of money; or
>
> (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.
>
> (2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:
>
> (a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;
>
> (b) promissory or equitable estoppel;
>
> (c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or
>
> (d) negligent misrepresentation.

S.C. Code Ann. § 37-10-107.

In the present case, Plaintiff's claims are all based upon alleged statements, promises, or representations made by BB&T that BB&T "was fully committed to providing the present and

future banking needs of Skywaves." (*See e.g.* Amended Complaint at ¶ 53). However, these claims are based upon alleged representations made by Defendant BB&T.

Plaintiff makes general reference to representations made "in writing"; however, Plaintiff has not alleged any material terms and conditions of any alleged agreements by Edahl, nor has Plaintiff alleged any violation of any material terms and conditions of the alleged agreements. In fact, Plaintiff even admits that there was no written agreement. (Amended Complaint at ¶ 58). Because Plaintiff has not alleged or provided anything in writing to evidence the material terms and conditions of the alleged promises or representations made to it by Defendant Edahl, its claims fail as a matter of law. *See Carolina First Bank v. Lucas*, Case No. 03-CP-10-1907, 2004 WL 5208410 (S.C. Com. Pl. Jun. 14, 2004)(the trial court granted summary judgment on plaintiff's fraud claims, noting that the purpose of section 37-10-107 was "to prevent claims or defenses to actions on loans that are not supported by a writing.") (attached as Exhibit A); *see also Robertson v. First Union Nat'l Bank*, Case No. 99-CP-10-288, 2000 WL 35722762 (S.C. Com. Pl. Aug. 8, 2000) (granting summary judgment for the lender where there was no writing, signed by the lender, stating the "terms and specifications" of the alleged agreement to refinance) (attached as Exhibit A). These South Carolina decisions are consistent with cases decided in other jurisdictions interpreting statutes similarly derived from the ABA's Model Lender Liability Statute. *See e.g., Schoen v. Morris*, 15 P.3d 1094, 1100 (Col. 2000) (holding a fraud action was barred because it was based on a bank's alleged oral misrepresentation); *Horseshoe Entertainment L.P. v. Gen. Elec. Capital Corp.*, 990 F. Supp. 737, 743 (E.D. Mo. 1997) (granting lender's motion for summary judgment arising out of the lender's alleged oral agreement to waive prepayment penalty).

Specifically, Plaintiff has not alleged that it "received a writing from the party to be charged [i.e. James Edahl] containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing." S.C. Code Ann. § 37-10-107(1)(c). Accordingly, as a matter of law, Plaintiff cannot "maintain an action for legal . . . relief . . . based upon [Edahl's alleged] failure to lend . . .money [to Skywaves.]" S.C. Code Ann. § 37-10-107(1)(a). Under these circumstances, Plaintiff cannot establish its claims against Edahl, as a matter of law. Accordingly, the action against Edahl should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

D. Plaintiff fails to allege any conduct on the part of Edahl that would support its claims, and the evidence demonstrates conclusively that no such conduct occurred.

As set forth above, all of Plaintiff's claims against Edahl fail under S.C. Code Ann. § 37-10-107. Moreover, these claims still should be dismissed because (1) Plaintiff fails to plead any alleged individual conduct on the part of Edahl that supports a claim for fraudulent inducement, much less allege such conduct with the particularity required by the Federal Rules of Civil Procedure; (2) Plaintiff's allegations are insufficient to establish a claim for negligent misrepresentation and fraudulent misrepresentation; (3) Plaintiff's allegations are insufficient to establish a claim for negligence; and (4) Plaintiff's allegations are insufficient to establish a claim for a violation of the South Carolina Unfair Trade Practices Act.

1. Plaintiff cannot sustain a claim against Edahl for fraudulent misrepresentation.

Plaintiff's claim for fraudulent inducement fails because as a matter of law it does not allege any fraudulent conduct on the part of Edahl individually — a necessary component of a claim for breach of contract accompanied by a fraudulent act. Rule 9(b) of the Federal Rules of Civil Procedure provides that a party alleging fraud must do so with particularity. FED. R. CIV.

P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). Here, Plaintiff fails to plead any alleged fraudulent misrepresentations or conduct on the part of Edahl with regard to this claim, much less plead such alleged fraud with the particularity required by Rule 9(b). Instead, all of Plaintiff's claims regarding alleged representations are by BB&T "acting primarily through Defendant Edahl." (*See e.g.* Amended Complaint at ¶ 53). Accordingly, Plaintiff's claim against Edahl for fraudulent inducement fails as a matter of law, and he should be dismissed from this action.

2. Plaintiff cannot sustain a claim against Edahl for negligent misrepresentation or fraudulent misrepresentation.

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

More specifically, the alleged false representation must be of a present or pre-existing fact. *See Spires v. Acceleration Nat'l Ins. Co.*, 417 F. Supp. 2d 750, 755-56 (D.S.C. 2006) (applying South Carolina law)(emphasis added). The negligent representation cannot be based

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

Plaintiff's claims for negligent misrepresentation and fraudulent inducement fail as a matter of law because there is no allegation of any false representations of a present or pre-existing fact made to the Plaintiff by Edahl. In support of this cause of action, Plaintiff has only alluded to alleged false representations by Defendants regarding the promise of future funding for Skywaves. For example, Plaintiff contends that BB&T represented that it was committed to providing the "present and future banking needs of Skywaves." (Amended Complaint at ¶ 53). Defendant Edahl denies making any such representation to Plaintiff. (Affidavit of Edahl, attached as Exhibit B).[3] Notwithstanding Edahl's affidavit, this representation did not relate to present or pre-existing facts and therefore cannot, as a matter of law, satisfy the requirements for a claim for negligent misrepresentation or fraudulent misrepresentation.

3. Plaintiff cannot sustain a claim against Edahl for negligence.

[3] Although the Court is limited to the allegations of the Amended Complaint in evaluating whether Plaintiff fails to state a claim upon which relief can be granted under Rule 12(b)(6), no such restriction applies with respect to the Court's determination regarding fraudulent joinder. Rather, the Fourth Circuit has made clear that a court evaluating fraudulent joinder "is not bound by the allegations of the pleadings, [and] may . . . consider the entire record and determine the basis of joinder by any means available." *Mayes v. Rapoport*, 198 F.3d 457, 464 (4th Cir. 1999)(quotations omitted).

Plaintiff cannot establish its claim for negligence against Edahl. To prove a claim for negligence, a plaintiff must establish a duty of care, a breach of that duty and damages proximately caused by the breach. *McKnight v. South Carolina Dept. of Corrections*, 684 S.E.2d 566, 569 (S.C.Ct.App.2009). In this case, Defendant Edahl neither had nor breached any duty to Plaintiff.

In his claim, Plaintiff alleges that "BB&T [had] a unique power and influence over the day to day operations of Skywaves and gave rise to a special relationship with the parties, whereby Defendants had a fiduciary duty or other duty of care to Skywaves." (Amended Complaint at § 81). However, Plaintiff's allegations pertain to BB&T. Plaintiff cannot manufacture a duty by Edahl by unilaterally stating one exists.

"Duty is generally defined as the obligation to conform to a particular standard of conduct toward another." *Murray v. Bank of America, N.A.*, 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct. App. 2003). "Ordinarily, the common law imposes no duty on a person to act." *Id.* "An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Id.*

South Carolina holds the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature. *See Burwell v. S.C. Nat'l Bank,* 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986); *Owens v. Andrews Bank & Trust Co.,* 265 S.C. 490, 497, 220 S.E.2d 116, 119 (Ct. App.1975); *Johnson v. Serv. Mgmt., Inc.,* 319 S.C. 165, 167–68, 459 S.E.2d 900, 902 (Ct. App.1995). Moreover, as a general rule, the officers, in their capacities as such, do not owe any individual fiduciary duties to Plaintiff. *See Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40–41, 340 S.E.2d 786, 790 (1986). Under these circumstances, Plaintiff cannot establish its claim for negligence against Edahl and, therefore, this cause of action should be dismissed.

4. Plaintiff cannot sustain a claim against Edahl for violation of the South Carolina Unfair Trade Practices Act.

With regard to Plaintiff's claim for a violation of the South Carolina Unfair Trade Practices Act, Plaintiff has not pled sufficient allegations against Defendant Edahl to support such a claim against him. As an initial matter, investor claims against lenders are generally a federally regulated arena. And, "[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States . . ." are generally exempt from the provisions of the UTPA. S.C. Code Ann. § 39-5-40(a).

Notwithstanding the foregoing, the claims against Defendant Edahl should be dismissed because "in private actions under the UTPA, directors and officers are not liable for the corporation's unfair trade practices unless they personally commit, participate in, direct, or authorize the commission of a violation of the UTPA." *Plowman v. Bagnal*, 450 S.E.2d 36, 38 (S.C.1994). Plaintiff has not made sufficient allegations regarding Defendant Edahl personally to sustain a claim against Defendant Edahl for an individual violation of the UTPA.

Moreover, to be actionable under the UTPA, the unfair or deceptive act or practice must have an impact upon the public interest. *Novack Enterprises, Inc. v. Country Corner Interiors,* 351 S.E.2d 347 (S.C.Ct.App. 1986). Here, Plaintiff merely offers a conclusion of law that the "unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition." (Amended Complaint ¶ 97.) Absent from the Amended Complaint are any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition. At most, the Amended Complaint alleges, in sum, that Defendants promised to but then refused to fund the financing needs of Skywaves. These allegations do not comprise "unfair or deceptive acts " that are actionable under the UTPA because business relationships that affect only the parties to the complained-of transaction are

not actionable under the UTPA. *See Novack Enterprises, Inc.* 351 S.E.2d at 349–50 (holding that an "unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace").

Although not delineated as a breach of contract claim, Plaintiff's claim is premised upon the breach of an alleged agreement to fund the financing needs of Skywaves. However, even "[a] deliberate or intentional breach of a valid contract, without more, does not constitute a violation of SCUTPA. Otherwise, every intentional breach of a contract within a commercial setting would constitute an unfair trade practice and thereby subject the breaching party to treble damages." *Ardis v. Cox*, 431 S.E. 2d 267, 271 (S.C. Ct.App. 1993).

For the foregoing reasons, Plaintiff's SCUTPA claim, therefore, should be dismissed as a matter of law.

III. CONCLUSION

In conclusion, Plaintiff has engaged in precisely the sort of "jurisdictional gamesmanship" that will exact a "high toll" on Edahl and make him a "sacrificial pawn[] on the board of [Plaintiff's] litigation strategy." Accordingly, in the absence of any possibility that Plaintiff can establish any viable claim against him, Edahl respectfully requests that the Court grant his Motion to Dismiss the Amended Complaint and dismiss him as a defendant in this action pursuant to the fraudulent joinder doctrine and Federal Rule of Civil Procedure 12(b)(6).

s/Molly Hughes Cherry
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ATTORNEYS FOR DEFENDANTS
BRANCH BANKING AND TRUST COMPANY,
SUCCESSOR IN MERGER TO BRANCH
BANKING AND TRUST COMPANY OF SC,
A/K/A BB&T, AND JAMES EDAHL

February 26, 2010
Charleston, South Carolina

EXHIBIT "B"

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

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

SKYWAVES I CORPORATION, Plaintiff, vs. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL, Defendants.	Civil Action No. 2:10-cv-_____ **AFFIDAVIT OF JAMES J. EDAHL**

I, James J. Edahl, after being duly sworn, state that the following is true based upon my personal knowledge and observation:

1. I am over the age of 18 and have knowledge of certain facts and circumstances related to the above-captioned matter.

2. I am the Senior Vice President and Corporate Banker for Branch Banking & Trust Company in Charleston, South Carolina. I have been in this position since May of 2004.

3. BB&T's relationship with Skywaves I Corporation began in March of 2005, with a $1.5 million factoring line of credit through BB&T's Factors Group in its Commercial Finance Department and a $400,000 line of credit through BB&T to KWK, LLC and Skywaves I Corporation as co-borrowers, secured by a commercial building owned by KWK, LLC.

4. Tracking and monitoring of the factoring process, as well as any advances on the line of credit, were handled by a Factors account officer, Castlen Morris, in High Point, North Carolina, until November of 2007, and then by another Factors account officer, Mike Burke.

5. I was a relationship manager on behalf of BB&T with regard to the bank's relationship with Skywaves. My role was on behalf of BB&T, and at no time did I ever assist Skywaves with raising additional capital or with recruiting or soliciting investors.

6. At no time did I make any representations to Skywaves or any of its investors, potential investors, shareholders, officers or other lenders that BB&T was going to provide funding for Skywaves throughout its growth phase, into the foreseeable future or for its future banking needs or anything to that effect.

7. At no time did I make any representation to Skywaves or any of its investors, potential investors, shareholders, officers or other lenders that BB&T believed Skywaves was strategically positioned for success, that I or BB&T wanted to take Skywaves to a sale or stock IPO or that BB&T would fund all of the company's financial needs.

8. I traveled to MacBee, South Carolina in July of 2007, at the request of Ron Konersmann, the President and Chief Executive Officer of Skywaves, to listen to a presentation he and others were giving on behalf of Skywaves to potential investors, including a company called Mar Mac. I did not make a presentation or otherwise make representations to anyone present that BB&T was providing all of Skywaves' short-term and long-term financial needs. Neither Crayton Walters nor John Voytko were present at this presentation in MacBee in July 2007.

9. I confirmed at the meeting with Mar Mac that Skywaves banked with BB&T and answered a few questions, with Ron Konersmann's permission, about the general structure

of the banking relationship. I did not represent to Mar Mac that BB&T was providing all of Skywaves' short-term and long-term financial needs. I spoke with Mar Mac about their banking needs after Ron Konersmann's presentation and then met with another BB&T client in MacBee that afternoon.

10. Any commitments on behalf of BB&T were submitted to Skywaves through a commitment letter, which is the standard, customary banking practice.

FURTHER AFFIANT SAYETH NOT.

James J. Edahl

SWORN to before me this 31st day of January, 2010.

Katherine Blackman (SEAL)
Notary Public for South Carolina
My Commission Expires:

Katherine Blackman
Notary Public for South Carolina
My Commission [illegible]

2009-CP-10 7516

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

SKYWAVES I CORPORATION, Plaintiff, vs. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL, Defendants.	Civil Action No. 2:10-cv-00111-MBS **DEFENDANT JAMES EDAHL'S NOTICE OF MOTION AND MOTION TO DISMISS AMENDED COMPLAINT**

FILED
2011 DEC 21 P 2:15
J. ARMSTRONG
CLERK OF COURT

COMES NOW Defendant James Edahl ("Defendant") and, pursuant to the fraudulent joinder doctrine and Federal Rule of Civil Procedure 12(b)(6), moves the Court to dismiss him as a defendant in this matter. As more fully demonstrated in the Memorandum of Law in Support of Motion to Dismiss the Amended Complaint filed concurrently herewith, dismissal is warranted because there is no possibility that Plaintiff will be able to establish a claim against Defendant upon which relief can be granted or otherwise establish liability on the part of Defendant under any of the claims set forth in the Amended Complaint.

WHEREFORE, Defendant respectfully requests that the Court grant his Motion to Dismiss the Amended Complaint and dismiss him as a defendant in this action.

s/Molly Hughes Cherry
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ATTORNEYS FOR DEFENDANTS
BRANCH BANKING AND TRUST COMPANY,
SUCCESSOR IN MERGER TO BRANCH
BANKING AND TRUST COMPANY OF SC,
A/K/A BB&T, AND JAMES EDAHL

February 26, 2010
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7516

Skywaves I Corporation,

Appellant,

v.

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

Respondents.

RECEIVED
DEC 2 8 2011
SC Court of Appeals

NOTICE OF APPEAL

Skywaves I Corporation appeals the order of the Honorable Roger M. Young, dated October 26, 2011 and filed November 8, 2011 and attached hereto as Exhibit 1. Appellant received written notice of entry of this order on November 16, 2011.

December 16, 2011

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Attorneys for Appellant

EXHIBIT 1

NEXSEN|PRUET

RECEIVED
NOV 16 2011
By

Molly Hughes Cherry
Member
Admitted In SC

November 15, 2011

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Andrew K. Epting, Jr., LLC
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Re: Skywaves I Corporation vs. Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl
Civil Action No.: 2009-CP-10-7516

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

Gentlemen:

Enclosed please find a filed, stamped copy of the Order granting Defendant Branch Banking and Trust Company of SC, a/k/a BB&T's Partial Motion to Dismiss Amended Complaint and Defendant Edahl's Motion to Dismiss Amended Complaint with Prejudice, which was entered by the Court on November 8, 2011.

Very truly yours,

Molly Hughes Cherry

MHC/ksh
Enclosures

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Attorneys and Counselors at Law

RECEIVED
NOV 16 2011
By

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-10-7516

SKYWAVES I CORPORATION

PLAINTIFF(S)

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

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

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

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : Order Granting BB&T's Partial Motion to Dismiss Amended Complaint and James Edahl's Motion to Dismiss Amended Complaint with Prejudice

INFORMATION FOR THE PUBLIC INDEX

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

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

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

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

Circuit Court Judge

2134
Judge Code

Date

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Amanda Haffended

RECEIVED
NOV 16 2011
By

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

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION, Plaintiff, vs. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL, Defendants.	Civil Action No. 2009-CP-10-7516 **ORDER GRANTING BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T'S PARTIAL MOTION TO DISMISS AMENDED COMPLAINT AND JAMES EDAHL'S MOTION TO DISMISS AMENDED COMPLAINT WITH PREJUDICE**

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

I. FACTS

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

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

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

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

II. LEGAL ANALYSIS

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

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

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

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

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

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

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

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

1. No False Statement

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

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

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

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

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

2. No Right to Rely

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

IT IS SO ORDERED.

The Honorable Roger M. Young

10/26, 2011
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7516

RECEIVED
DEC 28 2011
SC Court of Appeals

Skywaves I Corporation,

Appellant,

v.

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

Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on December 16, 2011, addressed to their attorney of record, Molly Hughes Cherry, Esq., Nexsen Pruet, LLC, P.O. Box 486, Charleston, SC 29402, on December 9, 2011.

December 16, 2011

GEORGE J. KEFALOS, PA

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George@ kefaloslaw.com

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BARNWELL WHALEY PATTERSON & HELMS, LLC
M. Dawes Cooke, Jr., Esq.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION, Plaintiff, vs. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL, Defendants.	Civil Action No. 2009-CP-10-7516 **ANSWER OF DEFENDANT JAMES EDAHL TO FIRST AMENDED COMPLAINT**

FILED
2012 JUL -6 AM 11:51
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Defendant James Edahl ("Defendant" or "Edahl") responds to the First Amended Complaint in the above-captioned case as follows:

1. Each and every allegation contained in the First Amended Complaint not hereinafter specifically admitted is denied, and strict and competent proof of such allegation is demanded.

FOR A FIRST DEFENSE

2. Defendant admits, upon information and belief, the allegations of paragraph 1.

3. Responding to paragraph 2, Defendant admits that it consented to allow Plaintiff to amend its complaint.

4. In response to the allegations of paragraph 3, Defendant would show that BB&T is a corporation organized under the laws of the State of North Carolina with its principal place of business in North Carolina. Defendant admits the remaining allegations of paragraph 3.

5. Defendant admits the allegations of paragraph 4.

6. The allegations of paragraphs 5 and 6 constitute conclusions of law which Defendant is not required to admit.

7. Responding to paragraph 7, Defendant admits, upon information and belief, only that Plaintiff developed a structural product for the wireless telecommunications industry. Defendant further admits, upon and information and belief, only that Plaintiff's customer base included Verizon, AT&T, Sprint/Nextel and General Dynamic. Defendant denies any remaining allegations of paragraph 7.

8. Responding to paragraph 8, Defendant craves reference to the written factoring agreement and denies any allegations not consistent therewith.

9. Responding to paragraphs 9, 10 and 11, Defendant admits only that from 2005 to 2007, BB&T provided a factoring line of credit to Plaintiff to support the manufacture of individual cell tower units, the terms of which were amended. Defendant further admits only that BB&T had a relationship manager on behalf of Defendant with Plaintiff. Defendant denies the remaining allegations of paragraphs 9, 10 and 11.

10. Defendant lacks information sufficient to form a belief at to the allegations of paragraph 12 and, therefore, denies the same.

11. Responding to paragraphs 13, 14 and 15, Defendant admits only that BB&T submitted a commitment letter to bid on financing to Skywaves in March of 2007. Defendant lacks sufficient information to form a belief as to the allegations regarding solicitations by

Plaintiff or proposals by other entities. Defendant denies any remaining allegations of paragraphs 13, 14 and 15.

12. Defendant denies the allegations of paragraphs 16, 17, 18, 19, 20, 21 and 22.

13. Responding to paragraph 23, Defendant admits only that BB&T's business relationship with Plaintiff ended. Defendant denies the remaining allegations of paragraph 23.

14. Defendant denies the allegations of paragraphs 24 and 25.

AS TO THE FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT

15. Responding to paragraph 26, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

16. The allegations of paragraphs 27, 28, 29, 30, 31 and 32 do not pertain to Defendant. To the extent a response is required, Defendant denies the same.

AS TO THE SECOND CAUSE OF ACTION FOR BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACTS

17. Responding to paragraph 33 Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

18. The allegations of paragraphs 34, 35, 36, 37, 38 and 39 do not pertain to this Defendant. To the extent a response is required, Defendant denies the same.

AS TO THE THIRD CAUSE OF ACTION FOR PROMISSORY ESTOPPEL

19. Responding to paragraph 40, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

20. The allegations of paragraphs 41, 42, 43, 44 and 45 do not pertain to Defendant. To the extent a response is required, Defendant denies the same.

AS TO THE FOURTH CAUSE OF ACTION FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

21. Responding to paragraph 46, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

22. The allegations of paragraphs 47, 48 and 49 do not pertain to Defendant. To the extent a response is required, Defendant denies the same.

AS TO THE FIFTH CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION

23. Responding to paragraph 50, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

24. Defendant denies the allegations of paragraphs 51, 52 and 53.

25. Responding to paragraph 54, with respect to subparagraph (a) Defendant admits only that BB&T submitted a commitment letter to Plaintiff and craves reference to the terms of the written commitment letter. With respect to subparagraph (b), Defendant admits only that, at the request of Plaintiff and after determining to do so was viable, BB&T lowered its minimum monthly factoring commission for April and May and reduced its commissions for July to September. With respect to subparagraph (c), Defendant admits only that in 2006 Plaintiff's factoring line of credit was increased. Defendant denies the remaining allegations of paragraph 54.

26. Defendant lacks sufficient information to form a belief as to the allegations of paragraph 55.

27. Defendant denies the allegations of paragraph 56. By way of further answer to paragraph 56, Defendant craves reference to any valid writings signed by BB&T and denies any allegations not consistent therewith.

28. Defendant denies the allegations of paragraphs 57, 58 and 59.

29. Responding to paragraph 60, Defendant craves reference to any written financial commitments BB&T provided to Plaintiff and denies any allegations not consistent therewith. Defendant denies the remaining allegations of paragraph 60.

30. Responding to paragraph 61, Defendant admits only that he traveled to MacBee, South Carolina in July of 2007, at the request of Plaintiff's president to observe a presentation being made by Plaintiff to potential investors. Defendant denies the remaining allegations of paragraph 61.

31. Defendant denies the allegations of paragraphs 62, 63, 64, 65, 66, 67, 68, 69 and 70.

AS TO THE SIXTH CAUSE OF ACTION
FRAUDULENT MISREPRESENTATION

32. Responding to paragraph 71, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

33. The allegations of paragraphs 72, 73, 74, 75, 76 and 77 pertain to a cause of action that was dismissed by the court. To the extent a response is required, Defendant denies the same.

AS TO THE SEVENTH CAUSE OF ACTION FOR NEGLIGENCE

34. Responding to paragraph 78, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

35. Defendant denies the allegations of paragraphs 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89 and 90.

AS TO THE EIGHTH CAUSE OF ACTION FOR SCUPTA

36. Responding to paragraph 91, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

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37. The allegations of paragraphs 92, 93, 94, 95, 96, 97, 98, 99 and 100 pertain to a cause of action that was dismissed by the court. To the extent a response is required, Defendant denies the same.

FOR A SECOND DEFENSE

38. The allegations contained in the First Amended Complaint fail to state a claim upon which relief can be granted and, therefore, the Complaint should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

FOR A THIRD DEFENSE

39. Plaintiff has failed to mitigate its alleged damages.

FOR A FOURTH DEFENSE

40. To the extent there may be any discharge in Plaintiff's bankruptcy proceeding, Defendant asserts such discharge as an affirmative defense.

FOR A FIFTH DEFENSE

41. Plaintiff's claims are barred, in whole or in part, for failure to plead such claims with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure.

FOR A SIXTH DEFENSE

42. Plaintiff's claims are barred, in whole or in part, based on its fraudulent joinder of a defendant against whom there is no possibility that Plaintiff can prove its claims as a matter of law.

FOR A SEVENTH DEFENSE

43. Plaintiff's claims are barred, in whole or in part, by the statute of frauds.

FOR AN EIGHTH DEFENSE

44. Upon information and belief, Plaintiff's claims are barred based upon the doctrines of waiver, laches and estoppel.

FOR A NINTH DEFENSE

45. Any damage or injury Plaintiff may have suffered was caused, in whole or in part, by persons or factors unrelated to Defendant, including Plaintiff.

FOR A TENTH DEFENSE

46. Plaintiff does not come to this action with clean hands, and Defendant pleads the defense of unclean hands as a complete defense to Plaintiff's claims.

FOR AN ELEVENTH DEFENSE

47. Defendant denies that it is liable for any punitive and/or exemplary damages. Defendant avers that any award of punitive damages against it would violate the constitutional safeguards provided under the Constitution of the United States of America, and the Constitution of South Carolina, in that punitive damages violate the due process and equal protection guarantees, place an undue burden on interstate commerce, violate the right to assembly and petition the government and violate the proscription against excessive fines.

48. Furthermore, Defendant avers that any award of punitive damages in this litigation is arbitrary, unreasonable, excessive and in violation of Defendant's right to due process of law and equal protection of the law under the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, and the Constitution of South Carolina, in that punitive damages are vague and not rationally related to legitimate government interests.

49. Furthermore, an award of punitive damages would be violative of the procedural safeguards provided to Defendant under the Sixth Amendment to the Constitution of the United

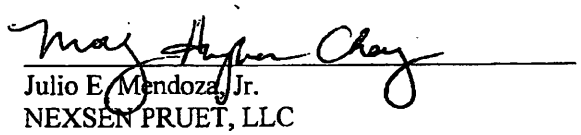
States, and the Constitution of South Carolina, in that punitive damages are penal in nature and consequently, Defendant is entitled to the same procedural safeguards as accorded to a criminal defendant.

50. Furthermore, it would be violative of Defendant's rights guaranteed by the Constitution of the United States to impose punitive damages against it as such damages are penal in nature by requiring a burden of proof which is less than "beyond a reasonable doubt" burden of proof required in criminal cases. Punitive damages would also be in violation of Article 1, Section 10 of the Constitution of the United States, and the Constitution of South Carolina, in that it would be a retrospective imposition of punitive damages under a new cause of action.

FOR A TWELFH DEFENSE

51. Plaintiff's claims against Defendant are barred by the applicable statute of limitations, to the extent any claims filed are based upon alleged actions that occurred prior to the applicable limitations period.

WHEREFORE, having fully answered the First Amended Complaint, Defendant prays that the Court grant appropriate relief to Defendant, including dismissal, and for such other further relief as the Court deems just and proper.



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ATTORNEYS FOR DEFENDANTS
BRANCH BANKING AND TRUST COMPANY,
SUCCESSOR IN MERGER TO BRANCH
BANKING AND TRUST COMPANY OF SC,
A/K/A BB&T, AND JAMES EDAHL

July 6, 2011
Charleston, South Carolina

NEXSEN|PRUET

Molly Hughes Cherry
Member
Admitted in SC

July 6, 2012

VIA HAND DELIVERY

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

Re: Skywaves I Corporation vs. Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl
Civil Action No.: 2009-CP-10-7516

Dear Ms. Armstrong:

Enclosed herewith for filing is the original and one copy of the Answer of Defendant Jame Edahl to First Amended Complaint in the above-referenced matter. Please file the original of record and return a clocked-in copy to me via our courier.

By copy of this letter, I am serving the same upon counsel of record.

Very truly yours,

Molly Hughes Cherry

MHC/dal
Enclosures

cc: M. Dawes Cooke, Jr., Esquire
Brian C. Duffy, Esquire
Andrew K. Epting, Esquire
George J. Kefalos, Esquire
Julio E. Mendoza, Jr., Esquire

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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

Case No. 2009-CP-10-7516

Skywaves I Corporation.....Appellant

v.

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

MOTION TO WITHDRAW APPEAL

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

GEORGE J. KEFALOS, PA

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

This 17 day of July, 2012
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

SKYWAVES I CORPORATION,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2009-CP-10-7516

ORDER GRANTING SKYWAVES' MOTION TO RECONSIDER

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

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

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

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

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

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

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

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

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

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

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

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

a. **Fiduciary Duty**

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

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

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

For example, Skywaves alleges:

a. ...BB&T also **provided a designated relationship manager who assisted Skywaves** in raising additional capital through investors (Amended Complaint ¶ 11)

b. ...Defendant BB&T, acting primarily through Defendant Edahl...represented to Skywaves that BB&T was ready, willing and able **through the use of innovative and creative financial products to provide Skywaves with the capital needed** to become a successful manufacturer, that **Defendants understood exactly Skywaves' growth cycle**, and that BB&T was fully committed to providing the present and future banking needs of Skywaves (Amended Complaint ¶ 53)

c. ...Defendant BB&T acting primarily through Defendant Edahl told Skywaves: (a) that it **understood the short and long term capital needs of Skywaves**; (b) that **Skywaves did not need a large bank or additional capital funding** to continue its growth; (c) that Defendants believed Skywaves was strategically positioned for success; (d) that Defendants wanted to **take Skywaves to a sale or stock IPO**; and (e) that BB&T would provide capital funding all of Skywaves' financial needs. (Amended Complaint ¶ 56)

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

e. Defendant BB&T, acting primarily through Defendant Edahl, offered Skywaves a series of inducements in the form of financial commitments as a token of its bona fides...and include the following:...**raise the factoring from 80% to 85% of invoices and 60% of purchase orders**...reduce the bank charges to .45% with a cap of $3000 per month...**gratuitously advanced $330,000 into the Skywaves bank account without Skywaves request or solicitation**...(Amended Complaint ¶ 60)

f. Defendant Edahl traveled to MacBee, South Carolina on behalf of BB&T for the purpose of making a presentation to potential Skywaves lenders investors... Defendant Edahl told Skywaves and its potential lenders and investors:...**BB&T would act as a partner in managing Skywaves growth**...**BB&T's commitment to finance Skywaves' growth was unique to Skywaves, and was the equivalent of the funding offered by Wachovia or Hunt Capital**...(Amended Complaint ¶ 62)

g. **Defendants undertook to tailor a funding program outside its ordinary course of business lending relationships and unique to Skywaves**. (Amended Complaint ¶ 79)

h. This method of operation gave **BB&T a unique power and influence over the day to day operations of Skywaves and gave rise to a special relationship between the**

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

i. **Skywaves relied on Defendants' financial expertise and advice**. (Amended Complaint ¶ 82)

j. **Defendants knew** that **Skywaves relied on BB&T** to provide sound financial advice and information and that **Skywaves had entrusted its future existence and growth to BB&T's care**. (Amended Complaint ¶ 84)

k. "[BB&T] did not include the new $2,000,000 PO sub-limit or the 65% advance rate in the amendment as **this is typically not part of BB&T's standard contract (it is something out of the ordinary for Skywaves exclusively).**" (Ex 3 at hearing, 3/20/07 email from Morris Castlen of BB&T, referred to in Amended Complaint)

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

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

b. "Future Events"

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

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

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

3. Conclusion

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

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

On this 14 day of June 2012
Charleston, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7517

Ron Konersmann ..... Appellant

v.

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

PROOF OF SERVICE

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

GEORGE J. KEFALOS, PA

By: _____

George J. Kefalos., Esq.
Oana D. Johson, Esq.
46 A State Street
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(843) 722-6612

Attorneys for Skywaves I Corporation

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON SKYWAVES I CORPORATION Plaintiff, vs. BRANCH BANKING AND TRUST COMPANY et.al. Defendant.	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2009-CP-10-7516 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney:	Defendant's Attorney:
George J. Kefalos, Bar No. 3325 Address: 46 A State Street, Charleston SC 29401 Phone: (843) 722-6612Fax _____ E-mail: george@kefaloslaw.comOther: _____	_____, Bar No. _____ Address: _____ Phone: _____ Fax_____ E-mail: _____Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Strike
Estimated Time Needed: 1 hour Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ _____
Signature of Attorney for ☐ Plaintiff /☐ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 25.00
☐ EXEMPT:
(check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☒ Other: Motion to Strike Defendants' Answer

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON SKYWAVES I CORPORATION, Plaintiff vs BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL. Defendants	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 09-CP-10-7516 **PLAINTIFF'S MOTION TO STRIKE**

FILED
2014 JAN 17 PM 1:59
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: DEFENDANTS AND THEIR ATTORNEY, MOLLY CHERRY, ESQUIRE

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through its undersigned counsel, hereby move this Honorable Court pursuant to the South Carolina Rules of Civil Procedure, within ten (10) days after service hereof or within such time as this Court may allow, for an order for an order striking Defendants' answers as sham. The basis for this motion is set forth in the memorandum attached hereto **(EXHIBIT A)**.

Please be present if so minded.

(Signatures on following page)

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Date: January 1, 2014
Charleston, South Carolina

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

Signed this 9 day of January, 2014 at 1:82
Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON SKYWAVES I CORPORATION, Plaintiff vs BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL. Defendants	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 09-CP-10-7516 **MEMORANDUM IN SUPPORT OF MOTION TO STRIKE DEFENDANTS' ANSWERS**

INTRODUCTION:

Plaintiff moves the Court to strike Defendants' answers as sham.

SUMMARY OF ARGUMENT:

Plaintiff sued Defendants for misrepresenting BB&T's willingness and agreement to orally modify a written loan (factoring) commitment. Defendants denied any agreement to orally modify the written factoring agreement. This denial resulted in protracted motion practice over the legal viability of Plaintiff's case; multiple hearings before this Court on the legal viability of Plaintiff's claim; and the dismissal of a companion case.

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Since that time Plaintiff has learned Defendants' denial of an oral modification is in fact false. Plaintiff deposed Defendant Edahl on September 19, 2013, who admitted the existence of an oral modification to the written factoring agreement as Plaintiffs alleged.

Plaintiff now moves this Court to strike Defendant's answers as a sham or in the alternative to judicially estop Defendants from taking a position inconsistent with their original denial, as a sanction for having mislead the Court, having wasted the Courts time and resources, and having corrupted the administration of justice.

ARGUMENT:

Rule 12, (f) SCRCP grants the court the power to strike all or part of a pleading as follows:

> **(f) Motion to Strike.** Upon motion pointing out the defects complained of, and made by a party before responding to a pleading or, if no responsive pleading is required within 30 days after the service of the pleading upon him or upon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

This Court has the power to strike an answer as a sham if it determines that it is in fact false and plead without color of fact:

> "A sham answer is one good in form, but false in fact, and not pleaded in good faith; being a mere pretense, set up in bad faith and without color or fact. * * * The motion to strike out an answer as sham presents a question of fact to be determined by the Court upon affidavits, or in such manner as the Court may direct." *Lancaster v. Sweat*, 239 S.C. 120, 124, 121 S.E.2d 444, 446 (1961) citing *Etiwan Fertilizer Co. v. Johns*, 202 S.C. 29, 24 S.E.2d 74, 76 (1943)

Skywaves' Amended Complaint alleged that it had an agreement (oral and confirmed by writings) with BB&T to modify its original loan agreement in order to loan money on the basis of (among other things) site plans.

Complaint:

> 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.
> (Paragraphs 18-21 of Skywaves Amended Complaint filed in Federal Court dated February 12, 2010, later filed in State court).

Defendant BB&T denied the existence of an oral agreement to modify the original writing:

> 12. Defendant demes the allegations of paragraphs 16, 17, 18, 19, 20, 21 and 22. (Paragraph 12 of BB&T Answer to Amended Complaint dated February 26, 2010 in Federal Court, later filed in State Court)

Complaint:

> 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.

Answer: Edahl and BB&T

> 28. Defendant denies the allegations of paragraphs 57, 58 and 59.

Complaint:

> 58. Defendant BB&T, acting primarily through Defendant Edahl, further represented in writing that this special arrangement would not be memorialized by a "fomal" written contract, as BB&T did not want to incur the attorney's fees necessary to redrafting the factoring agreement.

Answer: Edahl and BB&T

> 28. Defendant denies the allegations of paragraphs 57, 58 and 59.

Complaint:

59 . Defendant BB&T, acting primarily through Defendant Edahl, represented that it would factor the manufacture of Skywaves products without regard the need for Skywaves to either invoice or manufacture the product. In this way, BB&T agreed to advance the costs of manufacturing.

Answer: Edahl and BB&T

28. Defendant denies the allegations of paragraphs 57, 58 and 59.

Having denied the existence of an oral modification of the loan agreement to include loans on site plans, BB&T moved on August 10, 2011 to dismiss the claims of negligent misrepresentation and fraud arguing that any attempt to modify the written loan agreement was barred by the Banking Statute of Frauds. After two hearings and extensive briefings, this Court granted BB&T's motion as to a companion case, initially granted the motion as to the present case but eventually reconsidered, and denied it as to the present case.

Since that time Skywaves had the opportunity to depose Defendant James Edahl, the BB&T bank representative who made the oral misrepresentations to Skywaves. During his deposition Defendant Edahl admitted, for the first time, that he had in fact formed an agreement with Skywaves to factor on the basis of site plans:

7 Q. And in fact, after you considered it
8 did you approve that?
9 A. Talked to Walt Denning about that
10 concept, and Walt' s response was he was okay with
11 it if we could structure it like we had the
12 purchase orders and if we could track them. And
13 -- and we talked to Castlen and he felt that we
14 could monitor that okay, and -- and so we agreed
15 to factor the site plans at that time.
(Edahl deposition beginning page 47) (*emphasis added*)

Moreover, Edahl confirmed there was never a written modification of the original factoring agreement to reflect these new terms:

23 Q. Were these site plans being financed
24 under the fact -- under the existing factoring
25 agreement?
1. A. Yes.
2. Q. And was any written change to that
3 factoring agreement ?
4 A. No.
(Edahl deposition beginning page 48)

Edahl then testified that BB&T had an obligation to fund the site plans in accord with this oral modification:

12. Q. Did you feel that after you made the
13 agreement with Skywaves to finance site plans, as
14 you have testified to, that the bank was then
15 obligated to finance these plans?
16 A . Yes .
17 Q. And in fact, did the bank finance
18 those plans?

19 A. Some sites, yes.
(Edahl deposition Page 50)

BB&T's obligation to fund site plans goes to the heart of Skywaves case. BB&T's later refusal to fund the site plans, and its assertion that it never agreed to such funding, is the basis for the misrepresentation, fraud and breach of contract causes of action.

Despite the fact that Edahl's undisputed testimony shows that BB&T agreed to an oral modification of the written factoring agreement, BB&T and Edahl have failed to amend their answer to comport with the truth. *See, Scott v. Meek*, 228 S.C. 29, 33, 88 S.E.2d 768, 769 (1955) *citing Simmons Mfg. Co. v. Whitton Automotive Parts Co.*, 143 S.C. 152, 141 S.E. 363 ("[W]here the showing in support of the motion is susceptible of no reasonable inference other than that the pleading under attack is in fact sham, the motion to strike should be granted.").

Having denied the existence of an oral agreement which it now concedes existed, having caused this Court and counsel to expend its resources hearing issues that did not in fact exist, having failed to amend their answer to conform to the facts that exist, the Defendant's answer should be stricken and Defendants should be ordered to pay Skywave's attorneys fees and costs incurred.

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Date: January 1, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

Case No. 2009-CP-10-7516

AFFIDAVIT OF JAMES J. EDAHL

I, James J. Edahl, after being duly sworn, state that the following is true based upon my personal knowledge and observation:

1. From May of 2004 through early February of 2014, I was the Senior Vice President and Corporate Banker for Branch Banking & Trust Company ("BB&T") in Charleston, South Carolina.

2. On September 19, 2013, I was deposed in the above-captioned lawsuit. A portion of my testimony in the deposition is not correct, and I am providing this affidavit to correct the testimony.

3. I indicated in my deposition that I did not remember having agreed to site plan financing until having heard Ronald Konersmann's deposition testimony the week prior to my deposition. I stated that in January of 2008 and after, including at the time this lawsuit was filed, that I did not remember having agreed that BB&T would make loan advances to

Skywaves I Corporation ("Skywaves") based on site plans, or recall the detail of loan advances made upon the site plans.

4. Those statements are incorrect. I was aware in January 2008 that I had agreed to treat certain site plans of General Dynamics the same as purchase orders with respect to the funding under BB&T's factoring agreement with Skywaves, but did not reveal this information to BB&T or anyone out of fear and panic of the situation, in which the bank was exposed to a large loss, and how it might reflect negatively on me. I only recently revealed this information to BB&T.

FURTHER AFFIANT SAYETH NOT.

James J. Edahl

SWORN to before me this 11th day of February, 2014.

(SEAL)

Notary Public for South Carolina
My Commission Expires: 10/26/14

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON SKYWAVES I CORPORATION, ☐ Plaintiff v. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL, ☒ Defendant	IN THE COURT OF COMMON PLEAS CASE NO. 2009-CP-10-7516 MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
George J. Kefalos, Esquire Bar No. _____ Address: 3 State Street Charleston, SC 29401 Phone: 843.722.6612 fax: 843.377.1310 e-mail: George@kefaloslaw.com	Molly Hughes Cherry, Esquire Bar No. 11188 Address: Nexsen Pruet, LLC P.O. Box 486 Charleston, SC 29402 phone: 843.577.9440 fax: 843.414.8209 e-mail: mcherry@nexsenpruet.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T Notice of Motion and Motion to Amend Answer

Estimated Time Needed: 30 Minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Mary Cherry
Signature of Attorney for ☐ Plaintiff / ☒ Defendant

February 25, 2014
Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE: _____ Date: _____

SCCA/233 (11-03)

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

Case No. 2009-CP-10-7516

DEFENDANT BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC, A/K/A BB&T'S NOTICE OF MOTION AND MOTION TO AMEND ANSWER

FILED
2014 FEB 25 PM 4:44
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: PLAINTIFF SKYWAVES I CORPORATION AND ITS COUNSEL

YOU WILL PLEASE TAKE NOTICE THAT Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("Defendant" or "BB&T"), by and through its undersigned counsel, will move before the presiding Judge of the Court of Common Pleas for the Ninth Judicial Circuit for an Order pursuant to Rule 15(a) of the South Carolina Rules of Civil Procedure allowing Defendant to file an Amended Answer, a copy of which is attached hereto as Exhibit "A." This Motion is based upon the pleadings, the attached exhibit, and the applicable law.

The undersigned counsel certifies that pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, she consulted in good faith with opposing counsel prior to filing this Motion.

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ATTORNEYS FOR DEFENDANTS
BRANCH BANKING AND TRUST COMPANY,
SUCCESSOR IN MERGER TO BRANCH
BANKING AND TRUST COMPANY OF SC,
A/K/A BB&T, AND JAMES EDAHL

February 25, 2014
Charleston, South Carolina

EXHIBIT "A"

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

Case No. 2009-CP-10-7516

AMENDED ANSWER OF DEFENDANT BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC, A/K/A BB&T

Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("Defendant" or "BB&T") amends its response to the First Amended Complaint in the above-captioned case as follows:

1. Each and every allegation contained in the First Amended Complaint not hereinafter specifically admitted is denied, and strict and competent proof of such allegation is demanded.

FOR A FIRST DEFENSE

2. Defendant admits, upon information and belief, the allegations of paragraph 1.

3. Responding to paragraph 2, Defendant admits that it consented to allow Plaintiff to amend its complaint.

4. In response to the allegations of paragraph 3, Defendant would show that it is a corporation organized under the laws of the State of North Carolina with its principal place of business in North Carolina. Defendant admits the remaining allegations of paragraph 3.

5. Defendant admits the allegations of paragraph 4.

6. The allegations of paragraphs 5 and 6 constitute conclusions of law which Defendant is not required to admit.

7. Responding to paragraph 7, Defendant admits, upon information and belief, only that Plaintiff developed a structural product for the wireless telecommunications industry. Defendant further admits, upon and information and belief, only that Plaintiff's customer base included Verizon, AT&T, Sprint/Nextel and General Dynamic. Defendant denies any remaining allegations of paragraph 7.

8. Responding to paragraph 8, Defendant craves reference to the written factoring agreement and denies any allegations not consistent therewith.

9. Responding to paragraphs 9, 10 and 11, Defendant admits only that from 2005 to 2007, it provided a factoring line of credit to Plaintiff to support the manufacture of individual cell tower units, the terms of which were amended. Defendant further admits only that Defendant had a relationship manager on behalf of Defendant with Plaintiff. Defendant denies the remaining allegations of paragraphs 9, 10 and 11.

10. Defendant lacks information sufficient to form a belief at to the allegations of paragraph 12 and, therefore, denies the same.

11. Responding to paragraphs 13, 14 and 15, Defendant admits only that it submitted a commitment letter to bid on financing to Skywaves in March of 2007. Defendant lacks sufficient information to form a belief as to the allegations regarding solicitations by Plaintiff or proposals by other entities. Defendant denies any remaining allegations of paragraphs 13, 14 and 15.

12. Defendant denies the allegations of paragraphs 16~~,~~ and 17~~, 18, 19, 20, 21 and 22~~.

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13. Responding to paragraph 18, Defendant admits only that in March of 2007, Defendant 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 that it agreed 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 Defendant and provided to Plaintiff.

16. Defendant denies the allegations of paragraph 22.

17. ~~13.~~ Responding to paragraph 23, Defendant admits only that its business relationship with Plaintiff ended. Defendant denies the remaining allegations of paragraph 23.

18. ~~14.~~ Defendant denies the allegations of paragraphs 24 and 25.

AS TO THE FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT

19. ~~15.~~ Responding to paragraph 26, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

20. Defendant denies the allegations of paragraph 27.

21. Responding to paragraph 28, Defendant admits only that the March 22, 2005 Factoring Agreement was amended to allow for factoring of invoices and purchase orders. Defendant further admits that it agreed to finance site plans, to a limited extent, with certain limitations on the amounts being factored.

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22. ~~16.~~ Defendant denies the allegations of paragraphs ~~27, 28,~~ 29, 30, 31 and 32.

AS TO THE SECOND CAUSE OF ACTION FOR BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACTS

23. ~~17.~~ Responding to paragraph 33, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

24. ~~18.~~ Defendant denies the allegations of paragraphs 34, 35, 36, 37, 38 and 39.

AS TO THE THIRD CAUSE OF ACTION FOR PROMISSORY ESTOPPEL

25. ~~19.~~ Responding to paragraph 40, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

26. ~~20.~~ Defendant denies the allegations of paragraphs 41, 42, 43, 44 and 45.

AS TO THE FOURTH CAUSE OF ACTION FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

27. ~~21.~~ Responding to paragraph 46, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

28. ~~22.~~ Defendant denies the allegations of paragraph 47, 48 and 49.

AS TO THE FIFTH CAUSE OF ACTION NEGLIGENT MISREPRESENTATION

29. ~~23.~~ Responding to paragraph 50, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

30. ~~24.~~ Defendant denies the allegations of paragraphs 51, 52 and 53.

31. ~~25.~~ Responding to paragraph 54, with respect to subparagraph (a) Defendant admits only that it submitted a commitment letter to Plaintiff and craves reference to the terms of the written commitment letter. With respect to subparagraph (b), Defendant admits only that, at the request of Plaintiff and after determining to do so was viable, Defendant lowered its minimum monthly factoring commission for April and May and reduced its commissions for

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July to September. With respect to subparagraph (c), Defendant admits only that in 2006 Plaintiff's factoring line of credit was increased. Defendant denies the remaining allegations of paragraph 54.

32. ~~26.~~ Defendant lacks sufficient information to form a belief as to the allegations of paragraph 55.

33. ~~27.~~ Defendant denies the allegations of paragraph 56. By way of further answer to paragraph 56, Defendant craves reference to any valid writings signed by Defendant and denies any allegations not consistent therewith.

34. ~~28.~~ Defendant denies the allegations of paragraphs 57~~,~~ and 58 ~~and 59~~.

35. Responding to paragraph 59, Defendant admits only that it agreed to factor a certain percentage on purchase orders up to a certain limit, with the goal of the purchase orders converting to invoices. Defendant denies the remaining allegations of paragraph 59.

36. ~~29.~~ Responding to paragraph 60, Defendant craves reference to any written financial commitments it provided to Plaintiff and denies any allegations not consistent therewith. Defendant denies the remaining allegations of paragraph 60.

37. ~~30.~~ Responding to paragraph 61, Defendant admits only that James Edahl traveled to MacBee, South Carolina in July of 2007, at the request of Plaintiff's president to observe a presentation being made by Plaintiff to potential investors. Defendant denies the remaining allegations of paragraph 61.

38. ~~31.~~ Defendant denies the allegations of paragraphs 62, 63, 64, 65, 66, 67, 68, 69 and 70.

AS TO THE SIXTH CAUSE OF ACTION
FRAUDULENT MISREPRESENTATION

39. ~~32.~~ Responding to paragraph 71, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

40. ~~33. Defendant denies~~ The allegations of paragraphs 72, 73, 74, 75, 76 and 77 pertain to a cause of action that was dismissed by the court. To the extent a response is required, Defendant denies the same.

AS TO THE SEVENTH CAUSE OF ACTION FOR NEGLIGENCE

41. ~~34.~~ Responding to paragraph 78, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

42. ~~35.~~ Defendant denies the allegations of paragraphs 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89 and 90.

AS TO THE EIGHTH CAUSE OF ACTION FOR SCUPTA

43. ~~36.~~ Responding to paragraph 91, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

44. ~~37. Defendant denies~~ The allegations of paragraphs 92, 93, 94, 95, 96, 97, 98, 99 and 100 pertain to a cause of action that was dismissed by the court. To the extent a response is required, Defendant denies the same, the same being the final allegations of the First Amended Complaint.

FOR A SECOND DEFENSE

45. ~~38.~~ The allegations contained in the First Amended Complaint fail to state ~~a claim upon which relief can be granted~~facts sufficient to constitute a cause of action and, therefore, the Complaint should be dismissed pursuant to Rule 12(b)(6) of the ~~Federal~~South Carolina Rules of Civil Procedure.

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FOR A THIRD DEFENSE

46. ~~39.~~ Plaintiff has failed to mitigate its alleged damages.

FOR A FOURTH DEFENSE

47. ~~40.~~ To the extent there may be any discharge in Plaintiff's bankruptcy proceeding, Defendant asserts such discharge as an affirmative defense.

FOR A FIFTH DEFENSE

48. ~~41.~~ Plaintiff's claims are barred, in whole or in part, for failure to plead such claims with the particularity required by Rule 9(b) of the ~~Federal~~South Carolina Rules of Civil Procedure.

FOR A SIXTH DEFENSE

~~42. Plaintiff's claims are barred, in whole or in part, based on its fraudulent joinder of a defendant against whom there is no possibility that Plaintiff can prove its claims as a matter of law.~~

~~**FOR A SEVENTH DEFENSE**~~

49. ~~43.~~ Plaintiff's claims are barred, in whole or in part, by the statute of frauds

FOR ~~AN EIGHTH~~A SEVENTH DEFENSE

50. ~~44.~~ Upon information and belief, Plaintiff's claims are barred based upon the doctrines of waiver, laches and estoppel.

FOR ~~A NINTH~~AN EIGHT DEFENSE

51. ~~45.~~ Any damage or injury Plaintiff may have suffered was caused, in whole or in part, by persons or factors unrelated to Defendant, including Plaintiff.

FOR A ~~TENTH~~NINTH DEFENSE

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52. ~~46.~~ Plaintiff does not come to this action with clean hands, and Defendant pleads the defense of unclean hands as a complete defense to Plaintiff's claims.

FOR ~~AN ELEVENTH~~A TENTH DEFENSE

53. ~~47.~~ Defendant denies that it is liable for any punitive and/or exemplary damages. Defendant avers that any award of punitive damages against it would violate the constitutional safeguards provided under the Constitution of the United States of America, and the Constitution of South Carolina, in that punitive damages violate the due process and equal protection guarantees, place an undue burden on interstate commerce, violate the right to assembly and petition the government and violate the proscription against excessive fines.

54. ~~48.~~ Furthermore, Defendant avers that any award of punitive damages in this litigation is arbitrary, unreasonable, excessive and in violation of Defendant's right to due process of law and equal protection of the law under the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, and the Constitution of South Carolina, in that punitive damages are vague and not rationally related to legitimate government interests.

55. ~~49.~~ Furthermore, an award of punitive damages would be violative of the procedural safeguards provided to Defendant under the Sixth Amendment to the Constitution of the United States, and the Constitution of South Carolina, in that punitive damages are penal in nature and consequently, Defendant is entitled to the same procedural safeguards as accorded to a criminal defendant.

56. ~~50.~~ Furthermore, it would be violative of Defendant's rights guaranteed by the Constitution of the United States to impose punitive damages against it as such damages are penal in nature by requiring a burden of proof which is less than "beyond a reasonable doubt"

burden of proof required in criminal cases. Punitive damages would also be in violation of Article 1, Section 10 of the Constitution of the United States, and the Constitution of South Carolina, in that it would be a retrospective imposition of punitive damages under a new cause of action.

WHEREFORE, having fully answered the First Amended Complaint, Defendant prays that the Court grant appropriate relief to Defendant, including dismissal, and for such other further relief as the Court deems just and proper.

~~s/Molly Hughes Cherry~~

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ATTORNEYS FOR DEFENDANTS
BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC, A/K/A BB&T, AND JAMES EDAHL

February ~~26~~___, ~~2010~~2014
Charleston, South Carolina

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Add	66
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NEXSEN|PRUET

Molly Hughes Cherry
Member
Admitted in SC

February 25, 2014

VIA HAND DELIVERY

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

Re: Skywaves I Corporation vs. Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl
Civil Action No.: 2009-CP-10-7516

Dear Ms. Armstrong:

Enclosed herewith for filing is the original and one copy of Defendant Branch Banking and Trust Company, Successor in Merger to Branch Banking and Trust Company of SC, a/k/a BB&T's Notice of Motion and Motion to Amend Answer in the above-referenced matter. Also enclosed is the $25.00 filing fee. Please file the original of record and return a clocked-in copy to me via our courier.

By copy of this letter, I am serving the same upon counsel of record.

Very truly yours,

Molly Hughes Cherry

MHC/ksh
Enclosures
cc: M. Dawes Cooke, Jr., Esquire
John P. Linton, Esquire
George J. Kefalos, Esquire
Julio E. Mendoza, Jr., Esquire

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Attorneys and Counselors at Law

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON SKYWAVES I CORPORATION Plaintiff, vs. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL Defendants.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2009-CP-10-7516 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney : George J. Kefalos, Esquire Bar No. Address: George J. Kefalos, P.A. 46 A State Street, Charleston, SC 29401 Phone: (843) 722-6612 Fax: (843) 377-1310 E-Mail: george@kefaloslaw.com	Defendant's Attorney: J.W. Nelson Chandler, Esq. Bar No. Address: Corrigan & Chandler LLC P.O. Box 547, Charleston, SC 29402 Phone: (843) 577-5430 Fax: (843) 577-5650 E-mail: nelson@corriganchandler.com

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Defendant James Edahl's Notice of Motion and Motion to Amend Answer
Estimated Time Needed: 15 minutes Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

J.W. Chandler
Signature of Attorney for ☐ Plaintiff /☒ Defendant

March 3, 2014
Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $ 25.00
☐ EXEMPT: ow Cause in Child or Spousal Support
(check reason) Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:

JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE Date:

CLERK'S VERIFICATION

Collected by:___ Date Filed:
☐ MOTION FEE COLLECTED: $
☐ CONTESTED – AMOUNT DUE: $

209

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION,	)	
	)	CASE NO. 2009-CP-10-7516
Plaintiff,	)	
	)	
v.	)	**DEFENDANT JAMES EDAHL'S NOTICE OF MOTION AND MOTION TO AMEND ANSWER**
	)	
BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL,	)	
	)	
Defendants.	)	

FILED
2014 MAR -3 PM 4:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: PLAINTIFF SKYWAVES I CORPORATION AND ITS COUNSEL:

YOU WILL PLEASE TAKE NOTICE THAT Defendant James Edahl ("Defendant" or "Edahl"), by and through his undersigned counsel, will move before the presiding judge of the Court of Common Pleas for the Ninth Judicial Circuit for an Order pursuant to Rule 15(a) of the South Carolina Rules of Civil Procedure allowing Defendant to file an Amended Answer, a copy of which is attached hereto as Exhibit "A." This Motion is based upon the pleadings, the attached exhibit, and the applicable law.

The undersigned counsel certifies that pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, he consulted in good faith with opposing counsel prior to filing this Motion.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

J.W. Nelson Chandler
Corrigan & Chandler LLC
P.O. Box 547
Charleston, SC 29402
Phone: 843-577-5430; Fax: 843-577-5650
E-Mail: nelson@corriganchandler.com

ATTORNEYS FOR DEFENDANT
JAMES EDAHL

March 3, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION,	)	
	)	Case No. 2009-CP-10-7516
Plaintiff,	)	
	)	
v.	)	**AMENDED ANSWER OF DEFENDANT JAMES EDAHL TO FIRST AMENDED COMPLAINT**
	)	
BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL,	)	
	)	
Defendants.	)	

Defendant James Edahl ("Defendant" or "Edahl") amends his response to the First Amended Complaint in the above-captioned case as follows:

1. Each and every allegation contained in the First Amended Complaint not hereinafter specifically admitted is denied, and strict and competent proof of such allegation is demanded.

FOR A FIRST DEFENSE

2. Defendant admits, upon information and belief, the allegations of paragraph 1.

3. Responding to paragraph 2, Defendant admits that he consented to allow Plaintiff to amend its complaint.

4. In response to the allegations of paragraph 3, Defendant would show that BB&T is a corporation organized under the laws of the State of North Carolina with its principal place of business in North Carolina. Defendant admits the remaining allegations of paragraph 3.

5. In response to the allegations of paragraph 4, Defendant submits that he was an officer of BB&T until early February 2014; otherwise, Defendant admits the allegations of paragraph 4.

6. The allegations of paragraphs 5 and 6 constitute conclusions of law which Defendant is not required to admit.

7. Responding to paragraph 7, Defendant admits, upon information and belief, only that Plaintiff developed a structural product for the wireless telecommunications industry. Defendant further admits, upon and information and belief, only that Plaintiff's customer base included Verizon, AT&T, Sprint/Nextel and General Dynamic. Defendant denies any remaining allegations of paragraph 7.

8. Responding to paragraph 8, Defendant craves reference to the written factoring agreement and denies any allegations not consistent therewith.

9. Responding to paragraphs 9, 10 and 11, Defendant admits only that from 2005 to 2007, BB&T provided a factoring line of credit to Plaintiff to support the manufacture of individual cell tower units, the terms of which were amended. Defendant further admits only that BB&T had a relationship manager on behalf of Defendant with Plaintiff. Defendant denies the remaining allegations of paragraphs 9, 10 and 11.

10. Defendant lacks information sufficient to form a belief as to the allegations of paragraph 12 and, therefore, denies the same.

11. Responding to paragraphs 13, 14 and 15, Defendant admits only that BB&T submitted a commitment letter to bid on financing to Skywaves in March of 2007. Defendant lacks sufficient information to form a belief as to the allegations regarding solicitations by

Plaintiff or proposals by other entities. Defendant denies any remaining allegations of paragraphs 13, 14 and 15.

12. Defendant denies the allegations of paragraphs 16 and 17.

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.

16. Defendant denies the allegations of paragraph 22.

17. Responding to paragraph 23, Defendant admits only that BB&T's business relationship with Plaintiff ended. Defendant denies the remaining allegations of paragraph 23.

18. Defendant denies the allegations of paragraphs 24 and 25.

AS TO THE FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT

19. Responding to paragraph 26, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

20. The allegations of paragraph 27 do not pertain to Defendant. To the extent a response is required, Defendant denies the same.

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21. The allegations of paragraph 28 do not pertain to Defendant. To the extent a response is required, 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.

22. The allegations of paragraphs 29, 30, 31 and 32 do not pertain to Defendant. To the extent a response is required, Defendant denies the same.

AS TO THE SECOND CAUSE OF ACTION FOR BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACTS

23. Responding to paragraph 33 Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

24. The allegations of paragraphs 34, 35, 36, 37, 38 and 39 do not pertain to this Defendant. To the extent a response is required, Defendant denies the same.

AS TO THE THIRD CAUSE OF ACTION FOR PROMISSORY ESTOPPEL

25. Responding to paragraph 40, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

26. The allegations of paragraphs 41, 42, 43, 44 and 45 do not pertain to Defendant. To the extent a response is required, Defendant denies the same.

AS TO THE FOURTH CAUSE OF ACTION FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

27. Responding to paragraph 46, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

28. The allegations of paragraphs 47, 48 and 49 do not pertain to Defendant. To the extent a response is required, Defendant denies the same.

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AS TO THE FIFTH CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION

29. Responding to paragraph 50, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

30. Defendant denies the allegations of paragraphs 51, 52 and 53.

31. Responding to paragraph 54, with respect to subparagraph (a) Defendant admits only that BB&T submitted a commitment letter to Plaintiff and craves reference to the terms of the written commitment letter. With respect to subparagraph (b), Defendant admits only that, at the request of Plaintiff and after determining to do so was viable, BB&T lowered its minimum monthly factoring commission for April and May and reduced its commissions for July to September. With respect to subparagraph (c), Defendant admits only that in 2006 Plaintiff's factoring line of credit was increased. Defendant denies the remaining allegations of paragraph 54.

32. Defendant lacks sufficient information to form a belief as to the allegations of paragraph 55.

33. Defendant denies the allegations of paragraph 56. By way of further answer to paragraph 56, Defendant craves reference to any valid writings signed by BB&T and denies any allegations not consistent therewith.

34. Defendant denies the allegations of paragraphs 57 and 58.

35. Responding to paragraph 59, Defendant admits only that BB&T agreed to factor a certain percentage on purchase orders up to a certain limit, with the goal of the purchase orders converting to invoices. Defendant denies the remaining allegations of paragraph 59.

36. Responding to paragraph 60, Defendant craves reference to any written financial commitments BB&T provided to Plaintiff and denies any allegations not consistent therewith. Defendant denies the remaining allegations of paragraph 60.

37. Responding to paragraph 61, Defendant admits only that he traveled to MacBee, South Carolina in July of 2007, at the request of Plaintiff's president to observe a presentation being made by Plaintiff to potential investors. Defendant denies the remaining allegations of paragraph 61.

38. Defendant denies the allegations of paragraphs 62, 63, 64, 65, 66, 67, 68, 69 and 70.

AS TO THE SIXTH CAUSE OF ACTION
FRAUDULENT MISREPRESENTATION

39. Responding to paragraph 71, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

40. The allegations of paragraphs 72, 73, 74, 75, 76 and 77 pertain to a cause of action that was dismissed by the court. To the extent a response is required, Defendant denies the same.

AS TO THE SEVENTH CAUSE OF ACTION FOR NEGLIGENCE

41. Responding to paragraph 78, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

42. Defendant denies the allegations of paragraphs 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89 and 90.

AS TO THE EIGHTH CAUSE OF ACTION FOR SCUPTA

43. Responding to paragraph 91, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

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44. The allegations of paragraphs 92, 93, 94, 95, 96, 97, 98, 99 and 100 pertain to a cause of action that was dismissed by the court. To the extent a response is required, Defendant denies the same, the same being the final allegations of the First Amended Complaint.

45. Defendant denies that Plaintiff is entitled to relief sought in the final paragraph of the First Amended Complaint, beginning with "Wherefore," or to any other relief from this Defendant.

FOR A SECOND DEFENSE

46. The allegations contained in the First Amended Complaint fail to state facts sufficient to constitute a cause of action and, therefore, the First Amended Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

47. Plaintiff has failed to mitigate its alleged damages.

FOR A FOURTH DEFENSE

48. To the extent there may be any discharge in Plaintiff's bankruptcy proceeding, Defendant asserts such discharge as an affirmative defense.

FOR A FIFTH DEFENSE

49. Plaintiff's claims are barred, in whole or in part, for failure to plead such claims with the particularity required by Rule 9(b) of the South Carolina Rules of Civil Procedure.

FOR A SIXTH DEFENSE

50. Plaintiff's claims are barred, in whole or in part, by the statute of frauds.

FOR A SEVENTH DEFENSE

51. Upon information and belief, Plaintiff's claims are barred based upon the doctrines of waiver, laches and estoppel.

FOR AN EIGHTH DEFENSE

52. Any damage or injury Plaintiff may have suffered was caused, in whole or in part, by persons or factors unrelated to Defendant, including Plaintiff.

FOR A NINTH DEFENSE

53. Plaintiff does not come to this action with clean hands, and Defendant pleads the defense of unclean hands as a complete defense to Plaintiff's claims.

FOR A TENTH DEFENSE

54. Defendant denies that it is liable for any punitive and/or exemplary damages. Defendant avers that any award of punitive damages against it would violate the constitutional safeguards provided under the Constitution of the United States of America, and the Constitution of South Carolina, in that punitive damages violate the due process and equal protection guarantees, place an undue burden on interstate commerce, violate the right to assembly and petition the government and violate the proscription against excessive fines.

55. Furthermore, Defendant avers that any award of punitive damages in this litigation is arbitrary, unreasonable, excessive and in violation of Defendant's right to due process of law and equal protection of the law under the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, and the Constitution of South Carolina, in that punitive damages are vague and not rationally related to legitimate government interests.

56. Furthermore, an award of punitive damages would be violative of the procedural safeguards provided to Defendant under the Sixth Amendment to the Constitution of the United

States, and the Constitution of South Carolina, in that punitive damages are penal in nature and consequently, Defendant is entitled to the same procedural safeguards as accorded to a criminal defendant.

57. Furthermore, it would be violative of Defendant's rights guaranteed by the Constitution of the United States to impose punitive damages against it as such damages are penal in nature by requiring a burden of proof which is less than "beyond a reasonable doubt" burden of proof required in criminal cases. Punitive damages would also be in violation of Article 1, Section 10 of the Constitution of the United States, and the Constitution of South Carolina, in that it would be a retrospective imposition of punitive damages under a new cause of action.

FOR AN ELEVENTH DEFENSE

58. Plaintiff's claims against Defendant are barred by the applicable statute of limitations, to the extent any claims filed are based upon alleged actions that occurred prior to the applicable limitations period.

WHEREFORE, having fully answered the First Amended Complaint, Defendant prays that such First Amended Complaint be dismissed with prejudice, that the relief sought by the Plaintiff be denied, that judgment be rendered in favor of this Defendant, that Plaintiff be assessed with all costs of this action, and that Defendant have such other and further relief as this Court may deem just and proper.

Respectfully submitted,

J.W. Nelson Chandler
Email: nelson@corriganchandler.com
CORRIGAN & CHANDLER LLC
P.O. Box 547
Charleston, SC 29402
Phone: 843-577-5430
Fax: 843-577-5650

ATTORNEYS FOR DEFENDANT
JAMES EDAHL

March ____, 2014

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **AMENDED ANSWER OF DEFENDANT JAMES EDAHL TO FIRST AMENDED COMPLAINT** has been served upon the following counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this ____ day of March, 2014.

George J. Kefalos, Esquire
George J. Kefalos, P.A.
46 A State Street
Charleston, SC 29401

Attorneys for Plaintiff

John P. Linton, Esquire
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401

Attorneys for Plaintiff

M. Dawes Cook Jr., Esquire
Barnwell Whaley Patterson & Helms, LLC
P.O. Drawer H
Charleston, SC 29402-0197

Attorneys for Plaintiff

Julio E. Mendoza Jr., Esquire
Molly Hughes Cherry, Esquire
Nexsen Pruet, LLC
P.O. Box 486
Charleston, SC 29402

Attorneys for Branch Banking And Trust Company, Successor In Merger To Branch Banking And Trust Company Of SC, a/k/a BB&T

CORRIGAN & CHANDLER LLC

Louise S. Bavier, ACP
Advanced Certified Paralegal
P.O. Box 547
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Phone: 843-577-5410; Fax: 843-577-5650
E-Mail: louise@corriganchandler.com

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CORRIGAN & CHANDLER LLC

ATTORNEYS AT LAW

J.W. Nelson Chandler
(843) 577-5430 (direct)
nelson@corriganchandler.com

REPLY TO:
P.O. Box 547
Charleston, SC 29402

March 3, 2014

VIA HAND DELIVERY
The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad St., Suite 106
Charleston, SC 29401

Re: *Skywaves I Corporation v. Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl*
Case No. 2009-CP-10-7516

Dear Ms. Armstrong:

Enclosed please find an original and one copy of Defendant James Edahl's Notice of Motion and Motion to Amend Answer in the above captioned case, along with our check for $25.00 to cover the filing fee. Please file the original and return the clocked copy to me via my courier.

By copy of this letter, we are serving all counsel of record with a copy of the enclosed.

With kind regards, I am

Sincerely yours,

J.W. Nelson Chandler

Enclosures (as noted)

cc: George J. Kefalos, Esquire (w/enclosure)
John P. Linton, Esquire (w/enclosure)
M. Dawes Cook Jr., Esquire (w/enclosure)
Julio E. Mendoza Jr., Esquire/Molly Hughes Cherry, Esquire (w/enclosure)

16 CHARLOTTE STREET, SUITE B • POST OFFICE BOX 547 (29402) • CHARLESTON, SOUTH CAROLINA 29403
PHONE 843-577-5410 • FAX 843-577-5650

FILED
2014 MAR 13 AM 9:14
JULIE ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION,	)	
	)	Case No. 2009-CP-10-7516
Plaintiff,	)	
	)	
v.	)	**DEFENDANT JAMES EDAHL'S RESPONSE TO PLAINTIFF'S MOTION TO STRIKE ANSWERS**
	)	
BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL,	)	
	)	
Defendants.	)	

Defendant James Edahl ("Edahl"), by and through his undersigned counsel[1], responds to Plaintiff's Motion to Strike Defendants' Answers as follows:

I. INTRODUCTION

On or about January 17, 2014, Plaintiff moved to strike Defendants' Answers – in their entirety – "as sham." Plaintiff's motion, however, is based upon a misconstruction of Rule 12(f), SCRCP. Additionally, Plaintiff simply cannot meet its high burden of establishing that Mr. Edahl's Answer was manifestly false and in bad faith. Further, on March 3, 2014, Mr. Edahl moved to amend his Answer in certain particulars, which renders Plaintiff's motion moot. Plaintiff's motion should be denied, and Mr. Edahl's motion to amend should be granted.

II. ARGUMENT

A. Plaintiff's Motion Is Not Supported By Rule 12(f), SCRCP.

Plaintiff relies upon Rule 12(f), SCRCP, as the basis for its motion to strike. Rule 12(f), however, only authorizes matters to be stricken in three (3) instances – none of which apply: (1)

[1] The undersigned entered a Notice of Appearance on behalf of Mr. Edahl on February 28, 2014.

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when a motion is made by a party before responding to a pleading (*i.e.* by a defendant before answering a complaint); (2) when a motion is made within 30 days after service of a pleading to which no response is required (*i.e.* by a plaintiff within 30 days after receiving the answer); or (3) upon the court's *own* initiative, at any time. *See* Rule 12(f), SCRCP. The instant motion, filed by Plaintiff in the middle of discovery in this case, falls within none of the requisite categories.

Additionally, Rule 12(f) only provides for the striking of (1) an "insufficient defense," or (2) a "redundant, immaterial, impertinent or scandalous matter." *Id.* Plaintiff has neither alleged, nor established, any such grounds for its motion. Instead, Plaintiff contends that Mr. Edahl's entire answer should be stricken because Mr. Edahl, in his deposition, allegedly admitted one of the many disputed facts in this case. Based upon this testimony, taken out of context, Plaintiff argues that Mr. Edahl's entire answer is somehow a "sham." The modern Rule 12(f) was not designed to be used in such a manner.

Because the South Carolina rule is materially the same as the federal rule, the interpretation of Rule 12(f), FRCP, is instructive. *See generally Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 594, 748 S.E.2d 781, 786 (2013). Commenting on Rule 12(f), FRCP, *Moore's Federal Practice* states: "Rule 12 does not provide any authority to strike pleadings on the basis of falsity." 2 *Moore's Federal Practice*, § 12.37[3A] (3d ed.) (emphasis added). This is partly because "dismissal on the basis of falsity or 'sham' pleading is effectively a resolution on the merits, which is not appropriate at the pleading stage." *Id.* (emphasis added). Further, "[p]arties are allowed to plead in the alternative and to amend the pleadings as discovery progresses." *Id.* (emphasis added). Here, whether or not it is technically required, Mr. Edahl has sought to amend his answer in conformity with his testimony. Even where a motion to strike is granted, "the

court should ordinarily grant the defendant leave to amend so long as there is no prejudice to the opposing party." *Id.* at § 12.37[4]. Plaintiff is not prejudiced by having Mr. Edahl amend his answer in conformity with testimony that Plaintiff claims is helpful to it.

For the foregoing reasons, Plaintiff's reliance on Rule 12(f), SCRCP, is misplaced. Because Rule 12(f) does not support Plaintiff's position, the motion must be denied. *See, e.g., Boyd v. U.S.*, 861 F.2d 106, 108-109 (5th Cir. 1988) (affirming denial of motion to strike answer where defendant corrected his testimony at trial, holding that "falsity is not a grounds for striking an answer under Rule 12").

B. Plaintiff Has Failed to Establish Any Basis for Striking Mr. Edahl's Answer.

To the extent Plaintiff's motion is permitted to proceed, Plaintiff has not met the high burden necessary to prevail on a motion to strike. According to the Supreme Court, "[t]he plaintiff who moves to strike out an answer, good in form, as sham, is skating upon very thin ice . . . ." *Etiwan Fertilizer Co. v. Johns*, 202 S.C. 29, 24 S.E.2d 74, 76 (1943). The power to strike is to be "*very sparingly exercised*, and only where the pleading is manifestly false, interposed to delay and defeat the plaintiff's action, and only in cases free from doubt." *Id.* (emphasis added); *see also Germofert Mfg. Co. v. Castles*, 97 S.C. 389, 81 S.E. 665, 666 (1914). This is because, traditionally, a motion to strike must be directed against "an entire answer, or an entire defense," and an entire answer should "not be stricken out, upon showing that a separable part of it is sham." *Germofert*, 97 S.C. 389, 81 S.E. at 666 (emphasis added) (also emphasizing that such a motion "is not looked upon with favor . . .").

Here, Plaintiff falls far short of establishing that Mr. Edahl's Answer is a "sham." Indeed, Plaintiff's motion only takes issue with responses to seven (7) paragraphs of Plaintiff's one-hundred (100) paragraph Amended Complaint. (*See* Am. Compl. ¶¶ 18-21, 57-59).

Primarily, Plaintiff focuses on the alleged agreement to finance "site plans." Plaintiff argues that the Answer must be "false," because, in Mr. Edahl's deposition, he "admitted the existence of an oral modification to the written factoring agreement as Plaintiff alleged." (Plaintiff's Memo in Support of Motion, p. 2). Putting aside the fact that the Amended Complaint, in actuality, nowhere uses the term "oral modification" (and, in fact, repeatedly alleges written and memorialized modifications), the admissions in Mr. Edahl's deposition simply do not render the cited portions of his Answer "manifestly false."

In Paragraph 19 of the Amended Complaint, for example, Plaintiff alleges: "Under this modified factoring agreement, BB&T agreed, among other things, to provide capital infusions based on invoices, purchase orders, contracts and site plans." (Am. Compl., ¶ 19). This allegation is properly denied for several reasons, even in light of Mr. Edahl's deposition testimony. Mr. Edahl did not testify to that there was a modified factoring agreement to provide, "among other things," "capital infusions" based on "site plans," in the abstract. Rather, Mr. Edahl testified that they agreed to finance certain site plans of a particular customer of Plaintiff under the terms of the existing agreement, as they had done with purchase orders. (*See* Edahl Dep., pp. 46-48, attached as Exhibit A). This issue, like many issues in litigation, is more complicated than Plaintiff would prefer.[2]

Even if Plaintiff could establish an issue with certain limited paragraphs in the Answer, the larger and irrefutable point is that this does not, and cannot, render Mr. Edahl's *entire pleading* manifestly false and somehow in bad faith. *See Germofert*, 97 S.C. 389, 81 S.E. 665. In reality, the acknowledgment of an agreement to provide certain site plan financing is in no

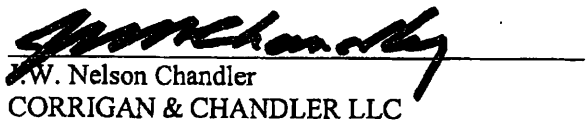
[2] There does not appear to be any requirement that Mr. Edahl formally amend his answer, throughout the course of discovery, each and every time new facts are developed. Nonetheless, he has filed the motion to amend his Answer to clarify that he is not denying the facts to which he testified.

way dispositive, nor does it impair the factual and legal defenses that exist to Plaintiff's claims. In an effort to overcome this hurdle, Plaintiff's motion attempts to recast the Amended Complaint into a dispute over whether BB&T had an "obligation to fund site plans." (Plaintiff's Memo in Support of Motion, p. 7). It is undisputed, however, that BB&T *did*, in fact, fund site plans. (*See* Edahl Dep., p. 50). The issue, at least as presented in the Amended Complaint, which controls, is whether Defendants breached any contractual or other alleged duties to Plaintiff, and whether such actions resulted in recoverable damages. Plaintiff has not established how any testimony elicited could render the various defenses to Plaintiff's actual claims manifestly false or in bad faith. To the contrary, Mr. Edahl continues to deny any liability to Plaintiff and should be permitted to amend his Answer as presented. *See Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716-717 (Ct. App. 2005) ("Leave to amend pleadings pursuant to Rule 15, SCRCP, shall be liberally and freely given when justice so requires and does not prejudice any other party"). Plaintiff's request that this Court exercise an unfavored and drastic remedy in striking Mr. Edahl's pleading should be denied, along with any other requested penalties.

III. CONCLUSION

Ultimately, it appears that Plaintiff may have asserted the instant motion in an effort to have BB&T, at least, take a position on certain factual issues presented in discovery. Because this has presumably been accomplished through the now-pending motions to amend, Plaintiff should withdraw its motion, consent to the amendments, and move on with the case. To the extent Plaintiff declines to do so, Defendant Edahl respectfully requests that this Court DENY Plaintiff's Motion to Strike and GRANT his motion to amend.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANT
JAMES EDAHL

March 12, 2014

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION,
Plaintiff,
vs. CASE NO. 2009-CP-10-7516
BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC, A/K/A BB&T, AND JAMES EDAHL,
Defendants.

DEPOSITION OF: JAMES EDAHL
DATE: September 19, 2013
TIME: 9:16 AM
LOCATION: Law Offices of
ANDREW K. EPTING, JR., LLC
46A State Street
Charleston, SC

TAKEN BY: Counsel for the Plaintiff
REPORTED BY: Roxanne M. Easterwood, RPR

A. WILLIAM ROBERTS, JR., & ASSOCIATES
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Charleston, SC Hilton Head, SC Myrtle Beach, SC
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APPEARANCES OF COUNSEL:
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SKYWAVES I CORPORATION:

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– and –

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ATTORNEYS FOR DEFENDANTS
BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC, A/K/A BB&T: AND JAMES EDAHL

NEXSEN PRUET, LLC
BY: MOLLY HUGHES CHERRY
JULIO (RICK) E. MENDOZA, JR.
205 King Street, Suite 400
Charleston, SC 29401
(843) 577-9440
Mcherry@nexsenpruet.com

ALSO PRESENT:
Michael Hennessy, Rusty Bogue, Ron Konersmann, Patty Konersmann
(INDEX AT REAR OF TRANSCRIPT)

STIPULATION

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

* * * * * * * * * * *

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

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

Counsel, please introduce yourselves for the record.

MR. LINTON: John Linton for the

plaintiffs.

MR. KEFALOS: George Kefalos for Skywaves.

MR. MENDOZA: Rick Mendoza for BB&T.

MS. CHERRY: Molly Cherry for BB&T and Jim Edahl.

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

JAMES EDAHL
being first duly sworn, testified as follows:

EXAMINATION

BY MR. LINTON:

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

A. I don't think.

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

A. Yes.

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

A. No, it was not.

EXHIBIT A

of getting the units to him to manufacture.
Q. Would that have been April or so 2007, the discussions?
A. Yes.
Q. Okay. Tell me what you understood the General Dynamics contract to be.
A. That Ron had a contract with General Dynamics to purchase shelter units for the New York State Police project up in New York I think it was.
Q. Did you ever see the contract?
A. Yes.
Q. Would you have gotten a copy of it?
A. Yes.
Q. Studied it?
A. Would have read through it.
Q. Okay. About how long was it?
A. It was fairly thick, as I recall.
Q. Tell me what your understanding was with the way that contract was going to work.
A. That General Dynamics had a contract with the State of New York to purchase or to --to deliver shelter units for their cell towers and that as those towers were to come online they would manufacture -- they would have Skywaves

manufacture the units and -- and ship them.
Q. At what point would those become purchase orders?
A. When General Dynamics would have issued a purchase order.
Q. So under -- excuse me. Did you finish?
A. When they would order -- issue a purchase order.
Q. So General Dynamics had discretion as to when it wanted to place a purchase order?
A. Yes.
Q. And you understood that?
A. Yes.
Q. And at some point did you start financing site plans?
A. Ron asked us to consider financing site plans in the spring of 2007, and he said that he was very certain that purchase orders would be forthcoming very soon. He was anxious to get production started on these units and asked if we could consider lending against the sites that he felt would turn into purchase orders very soon and -- and consuming the cycle. And in the context of, he -- well, yeah.

Q. And because the potential purchase order was somebody like General Dynamics, who had this contract with the state police, you felt that was a reasonable risk of the bank to take?
A. Yes. At the time I thought it was worth considering based on Ron's representations.
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.
Q. And basically what you have, from a business standpoint, you considered that the money will be there, it's just a matter of timing when the purchase order will be based and then the thing will be made?
A. Yes. Ron assured us that purchase orders would be forthcoming soon and that he really wanted to get production started on these units. And so, yes, we felt that under those circumstances it was reasonable to consider

advancing on sites.
Q. Okay. And did you advance at 65 percent?
A. Yes.
Q. Did you ask Ron to get any documentation from General Dynamics about a schedule, when -- when you could expect?
A. Yes. Ron provided in those initial discussions a site schedule from General Dynamics that outlined all of the sites involved in the contract and -- and provided that spreadsheet to us, and that's how Castlen was to track the advances on the sites.
Q. Was this financing of site plans, had you ever done that before?
A. No.
Q. In your banking career?
A. No.
Q. Do you know if Walt Denning had ever financed site plans?
A. Not to my knowledge.
Q. Was there any -- well, strike that. Were these site plans being financed under the fact -- under the existing factoring agreement?

A. Yes.
Q. And was any written change to that factoring agreement?
A. No.
Q. I -- I'm perplexed as to how people in a bank who don't have any experiencing financing site plans can agree to finance it and not have anything in writing for an auditor to understand what's being financed. So explain to me how that worked.
A. The request from Ron came in the context of the credit approval that we just received in March of '07 to expand the line and increase the percentage on purchase orders. We had already had experience with General Dynamics on purchase ordering, invoice factoring, and that was a satisfactory experience.
We felt a high confidence level in Ron and the company at that time. We felt we had good experience with conversion of the POs to invoices previously. We had experience with General Dynamics that was good.
Q. So it all made perfect sense, it just wasn't documented?
A. Well, at the time it made sense to us,

yes.
Q. But then a lot of things in hindsight that don't make sense but at the time they seem to make perfect business sense?
A. Within the context at the time, that sometimes happens.
Q. Did you consider that after you made this agreement with Skywaves to finance site plans that the bank was obligated to finance those plans?
A. I'm sorry, I didn't understand.
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.
Q. Were there any sites that were turned down?
A. Not that I'm aware of.
Q. I want to try to understand the coordination between an audit department and the credit and you as the relationship manager. In a

matter like this that I guess you would have to say is highly unusual because y'all had never done it before -- would you agree with that, highly unusual?
A. Yes.
Q. Okay. How does an auditor know what the contract is between the bank and Skywaves when they -- when they're doing their audit?
A. Yeah, I'm not sure how they look at that.
Q. Well, you got the audits from them, copies of it, didn't you?
A. Yes.
Q. Did you ever have any discussion with the auditors?
A. Not about that particular issue, no.
Q. Prior to the January audit being received by you did you have any concern about the Skywaves account?
A. Probably beginning in September of '07 we were getting financial information, albeit on a delayed basis, from 60 days, sometimes more, which was a concern in and of itself that financial reporting was becoming later, but the reporting that we were getting on the financial condition of

the company was not -- the revenues were beginning to decrease. Losses were increasing. And so that started to raise some concern in my mind of what was happening.
Q. But that concern was not a concern about whether they were in default but just a concern about the --
A. The general direction of the company, correct.
Q. Right? You said that right?
A. That's correct.
Q. And I think in November '07 you had a meeting with Ron updating you on the financials. Do you remember that?
A. I agree. That's true. Yes.
Q. As I recall, there was some infusion of equity at that time as well as some loans by Jimmy Kerr and Crayton Walters?
A. That's what we were told.
Q. Well, those accounts were with BB&T, weren't they?
A. Skywaves's checking account was with BB&T, yes.
Q. Right. So when you say that's what you were told, isn't, in fact, that's what

CORRIGAN & CHANDLER LLC

ATTORNEYS AT LAW

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nelson@corriganchandler.com

REPLY TO:
P.O. Box 547
Charleston, SC 29402

March 13, 2014

VIA HAND DELIVERY
The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad St., Suite 106
Charleston, SC 29401

Re: *Skywaves I Corporation v. Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl*
Case No. 2009-CP-10-7516

Dear Ms. Armstrong:

Enclosed for filing are an original and one (1) copy of Defendant James Edahl's *Response to Plaintiff's Motion to Strike Answers*. Please file the original, and return the clocked copy to the bearer of this letter.

By copy of this letter all counsel of record, I am providing them with a copy of the enclosed.

Should you have any questions, please let me know.

With kind regards, I am

Sincerely yours,

J.W. Nelson Chandler

Enclosure (as noted)

cc: George J. Kefalos, Esquire (via U.S. Mail and E-mail)
John P. Linton, Esquire (via U.S. Mail and E-mail)
M. Dawes Cook Jr., Esquire (via U.S. Mail and E-mail)
Julio E. Mendoza Jr., Esquire (via U.S. Mail and E-mail)
Molly Hughes Cherry, Esquire (via U.S. Mail and E-mail)

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PHONE 843-577-5410 • FAX 843-577-5650

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION,	)	
	)	Case No. 2009-CP-10-7516
Plaintiff,	)	
	)	
v.	)	**AMENDED ANSWER OF DEFENDANT JAMES EDAHL TO FIRST AMENDED COMPLAINT**
	)	
BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL,	)	
	)	
Defendants.	)	

FILED
2014 MAR 21 PM 3:21
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Defendant James Edahl ("Defendant" or "Edahl") amends his response to the First Amended Complaint in the above-captioned case as follows:

1. Each and every allegation contained in the First Amended Complaint not hereinafter specifically admitted is denied, and strict and competent proof of such allegation is demanded.

FOR A FIRST DEFENSE

2. Defendant admits, upon information and belief, the allegations of paragraph 1.

3. Responding to paragraph 2, Defendant admits that he consented to allow Plaintiff to amend its complaint.

4. In response to the allegations of paragraph 3, Defendant would show that BB&T is a corporation organized under the laws of the State of North Carolina with its principal place of business in North Carolina. Defendant admits the remaining allegations of paragraph 3.

5. In response to the allegations of paragraph 4, Defendant submits that he was an officer of BB&T until early February 2014; otherwise, Defendant admits the allegations of paragraph 4.

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6. The allegations of paragraphs 5 and 6 constitute conclusions of law which Defendant is not required to admit.

7. Responding to paragraph 7, Defendant admits, upon information and belief, only that Plaintiff developed a structural product for the wireless telecommunications industry. Defendant further admits, upon and information and belief, only that Plaintiff's customer base included Verizon, AT&T, Sprint/Nextel and General Dynamic. Defendant denies any remaining allegations of paragraph 7.

8. Responding to paragraph 8, Defendant craves reference to the written factoring agreement and denies any allegations not consistent therewith.

9. Responding to paragraphs 9, 10 and 11, Defendant admits only that from 2005 to 2007, BB&T provided a factoring line of credit to Plaintiff to support the manufacture of individual cell tower units, the terms of which were amended. Defendant further admits only that BB&T had a relationship manager on behalf of Defendant with Plaintiff. Defendant denies the remaining allegations of paragraphs 9, 10 and 11.

10. Defendant lacks information sufficient to form a belief as to the allegations of paragraph 12 and, therefore, denies the same.

11. Responding to paragraphs 13, 14 and 15, Defendant admits only that BB&T submitted a commitment letter to bid on financing to Skywaves in March of 2007. Defendant lacks sufficient information to form a belief as to the allegations regarding solicitations by Plaintiff or proposals by other entities. Defendant denies any remaining allegations of paragraphs 13, 14 and 15.

12. Defendant denies the allegations of paragraphs 16 and 17.

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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.

16. Defendant denies the allegations of paragraph 22.

17. Responding to paragraph 23, Defendant admits only that BB&T's business relationship with Plaintiff ended. Defendant denies the remaining allegations of paragraph 23.

18. Defendant denies the allegations of paragraphs 24 and 25.

AS TO THE FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT

19. Responding to paragraph 26, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

20. The allegations of paragraph 27 do not pertain to Defendant. To the extent a response is required, Defendant denies the same.

21. The allegations of paragraph 28 do not pertain to Defendant. To the extent a response is required, 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.

22. The allegations of paragraphs 29, 30, 31 and 32 do not pertain to Defendant. To the extent a response is required, Defendant denies the same.

AS TO THE SECOND CAUSE OF ACTION FOR BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACTS

23. Responding to paragraph 33 Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

24. The allegations of paragraphs 34, 35, 36, 37, 38 and 39 do not pertain to this Defendant. To the extent a response is required, Defendant denies the same.

AS TO THE THIRD CAUSE OF ACTION FOR PROMISSORY ESTOPPEL

25. Responding to paragraph 40, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

26. The allegations of paragraphs 41, 42, 43, 44 and 45 do not pertain to Defendant. To the extent a response is required, Defendant denies the same.

AS TO THE FOURTH CAUSE OF ACTION FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

27. Responding to paragraph 46, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

28. The allegations of paragraphs 47, 48 and 49 do not pertain to Defendant. To the extent a response is required, Defendant denies the same.

AS TO THE FIFTH CAUSE OF ACTION NEGLIGENT MISREPRESENTATION

29. Responding to paragraph 50, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

30. Defendant denies the allegations of paragraph 51.

31. Responding to paragraph 52, Defendant admits that he was an employee of BB&T acting within the scope and course of his employment; any other allegations are denied.

32. Defendant denies the allegations of paragraph 53.

33. Responding to paragraph 54, with respect to subparagraph (a) Defendant admits only that BB&T submitted a commitment letter to Plaintiff and craves reference to the terms of the written commitment letter. With respect to subparagraph (b), Defendant admits only that, at the request of Plaintiff and after determining to do so was viable, BB&T lowered its minimum monthly factoring commission for April and May and reduced its commissions for July to September. With respect to subparagraph (c), Defendant admits only that in 2006 Plaintiff's factoring line of credit was increased. Defendant denies the remaining allegations of paragraph 54.

34. Defendant lacks sufficient information to form a belief as to the allegations of paragraph 55.

35. Defendant denies the allegations of paragraph 56. By way of further answer to paragraph 56, Defendant craves reference to any valid writings signed by BB&T and denies any allegations not consistent therewith.

36. Defendant denies the allegations of paragraphs 57 and 58.

37. Responding to paragraph 59, Defendant admits only that BB&T agreed to factor a certain percentage on purchase orders up to a certain limit, with the goal of the purchase orders converting to invoices. Defendant denies the remaining allegations of paragraph 59.

38. Responding to paragraph 60, Defendant craves reference to any written financial commitments BB&T provided to Plaintiff and denies any allegations not consistent therewith. Defendant denies the remaining allegations of paragraph 60.

39. Responding to paragraph 61, Defendant admits only that he traveled to MacBee, South Carolina in July of 2007, at the request of Plaintiff's president to observe a presentation being made by Plaintiff to potential investors. Defendant denies the remaining allegations of paragraph 61.

40. Defendant denies the allegations of paragraphs 62, 63, 64, 65, 66, 67, 68, 69 and 70.

AS TO THE SIXTH CAUSE OF ACTION
FRAUDULENT MISREPRESENTATION

41. Responding to paragraph 71, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

42. The allegations of paragraphs 72, 73, 74, 75, 76 and 77 pertain to a cause of action that was dismissed by the court. To the extent a response is required, Defendant denies the same.

AS TO THE SEVENTH CAUSE OF ACTION FOR NEGLIGENCE

43. Responding to paragraph 78, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

44. Defendant denies the allegations of paragraphs 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89 and 90.

AS TO THE EIGHTH CAUSE OF ACTION FOR SCUPTA

45. Responding to paragraph 91, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

46. The allegations of paragraphs 92, 93, 94, 95, 96, 97, 98, 99 and 100 pertain to a cause of action that was dismissed by the court. To the extent a response is required, Defendant denies the same, the same being the final allegations of the First Amended Complaint.

47. Defendant denies that Plaintiff is entitled to relief sought in the final paragraph of the First Amended Complaint, beginning with "Wherefore," or to any other relief from this Defendant.

FOR A SECOND DEFENSE

48. The allegations contained in the First Amended Complaint fail to state facts sufficient to constitute a cause of action and, therefore, the First Amended Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

49. Plaintiff has failed to mitigate its alleged damages.

FOR A FOURTH DEFENSE

50. To the extent there may be any discharge in Plaintiff's bankruptcy proceeding, Defendant asserts such discharge as an affirmative defense.

FOR A FIFTH DEFENSE

51. Plaintiff's claims are barred, in whole or in part, for failure to plead such claims with the particularity required by Rule 9(b) of the South Carolina Rules of Civil Procedure.

FOR A SIXTH DEFENSE

52. Plaintiff's claims are barred, in whole or in part, by the statute of frauds.

FOR A SEVENTH DEFENSE

53. Upon information and belief, Plaintiff's claims are barred based upon the doctrines of waiver, laches and estoppel.

FOR AN EIGHTH DEFENSE

54. Any damage or injury Plaintiff may have suffered was caused, in whole or in part, by persons or factors unrelated to Defendant, including Plaintiff. To the extent Plaintiff alleges a negligence claim, which is denied, Plaintiff was comparatively negligent and/or otherwise at fault so as to bar or proportionally reduce any recovery herein pursuant to the doctrines of contributory and/or comparative negligence.

FOR A NINTH DEFENSE

55. Plaintiff does not come to this action with clean hands, and Defendant pleads the defense of unclean hands as a complete defense to Plaintiff's claims.

FOR A TENTH DEFENSE

56. Defendant denies that it is liable for any punitive and/or exemplary damages. Defendant avers that any award of punitive damages against it would violate the constitutional safeguards provided under the Constitution of the United States of America, and the Constitution of South Carolina, in that punitive damages violate the due process and equal protection guarantees, place an undue burden on interstate commerce, violate the right to assembly and petition the government and violate the proscription against excessive fines.

57. Furthermore, Defendant avers that any award of punitive damages in this litigation is arbitrary, unreasonable, excessive and in violation of Defendant's right to due process of law and equal protection of the law under the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, and the Constitution of South Carolina, in that punitive damages are vague and not rationally related to legitimate government interests.

58. Furthermore, an award of punitive damages would be violative of the procedural safeguards provided to Defendant under the Sixth Amendment to the Constitution of the United

States, and the Constitution of South Carolina, in that punitive damages are penal in nature and consequently, Defendant is entitled to the same procedural safeguards as accorded to a criminal defendant.

59. Furthermore, it would be violative of Defendant's rights guaranteed by the Constitution of the United States to impose punitive damages against it as such damages are penal in nature by requiring a burden of proof which is less than "beyond a reasonable doubt" burden of proof required in criminal cases. Punitive damages would also be in violation of Article 1, Section 10 of the Constitution of the United States, and the Constitution of South Carolina, in that it would be a retrospective imposition of punitive damages under a new cause of action.

FOR AN ELEVENTH DEFENSE

60. Plaintiff's claims against Defendant are barred by the applicable statute of limitations, to the extent any claims filed are based upon alleged actions that occurred prior to the applicable limitations period. twelfth

FOR A TWELFTH DEFENSE

61. Plaintiff's claims against Defendant are barred by the economic loss rule.

WHEREFORE, having fully answered the First Amended Complaint, Defendant prays that such First Amended Complaint be dismissed with prejudice, that the relief sought by the Plaintiff be denied, that judgment be rendered in favor of this Defendant, that Plaintiff be assessed with all costs of this action, and that Defendant have such other and further relief as this Court may deem just and proper.

[SIGNATURE ON FOLLOWING PAGE]

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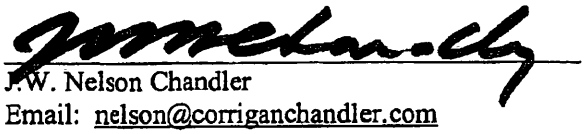
Respectfully submitted,



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Fax: 843-577-5650

ATTORNEYS FOR DEFENDANT
JAMES EDAHL

March 21, 2014

CORRIGAN & CHANDLER LLC

ATTORNEYS AT LAW

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nelson@corriganchandler.com

REPLY TO:
P.O. Box 547
Charleston, SC 29402

March 21, 2014

VIA HAND DELIVERY
The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad St., Suite 106
Charleston, SC 29401

Re: *Skywaves I Corporation v. Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl*
Case No. 2009-CP-10-7516

Dear Ms. Armstrong:

Enclosed please find an original and one copy of Defendant James Edahl's Amended Answer in the above captioned case. Please file the original and return the clocked copy to me via my courier.

By copy of this letter, we are serving all counsel of record with a copy of the enclosed.

With kind regards, I am

Sincerely yours,

J.W. Nelson Chandler

Enclosures (as noted)

cc: George J. Kefalos, Esquire (w/enclosure)
John P. Linton, Esquire (w/enclosure)
M. Dawes Cook Jr., Esquire (w/enclosure)
Julio E. Mendoza Jr., Esquire/Molly Hughes Cherry, Esquire (w/enclosure)

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PHONE 843-577-5410 • FAX 843-577-5650

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON SKYWAVES I CORPORATION, ☐ Plaintiff v. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL, ☒ Defendant	IN THE COURT OF COMMON PLEAS CASE NO. 2009-CP-10-7516 MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
George J. Kefalos, Esquire Bar No. _____ Address: 3 State Street Charleston, SC 29401 Phone: 843.722.6612 fax: 843.377.1310 e-mail: George@kefaloslaw.com	Molly Hughes Cherry, Esquire Bar No. 11188 Address: Nexsen Pruet, LLC P.O. Box 486 Charleston, SC 29402 phone: 843.577.9440 fax: 843.414.8209 e-mail: mcherry@nexsenpruet.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: DEFENDANT BRANCH BANKING AND TRUST COMPANY'S NOTICE OF MOTION AND MOTION TO STRIKE DEMAND FOR JURY TRIAL

Estimated Time Needed: 30 Minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — July 24, 2014 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE: _____ Date: _____

SCCA/233 (11-03)

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS IN THE NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION, Plaintiff, vs. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL, Defendants.	Case No. 2009-CP-10-7516 **DEFENDANT BRANCH BANKING AND TRUST COMPANY'S NOTICE OF MOTION AND MOTION TO STRIKE DEMAND FOR JURY TRIAL**

FILED
2009 JUL 24 PM 4:47
JULIE J. ARMSTRONG
CLERK OF COURT

TO: GEORGE J. KEFALOS, ESQUIRE AND JOHN P. LINTON, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("Defendant BB&T"), hereby move the Court for an Order striking the demand for a jury trial made in Plaintiff Skywaves I Corporation's ("Skywaves'") Complaint and First Amended Complaint (collectively, the "Complaint") and transferring the case to the non-jury docket.

The basis for this motion is that on March 22, 2005, Skywaves entered into a Factoring Agreement, Loan Agreement, Promissory Note and Security Agreement with Defendant BB&T. Pursuant to the plain language of these four documents, which were negotiated and entered into by sophisticated parties, Skywaves and Defendant BB&T expressly agreed that issues pertaining to the agreements or arising out of the conduct of the relationship between the parties shall be tried non-jury, and each party knowingly and voluntarily waived its right to a jury trial. The jury

trial waiver in each of the agreements is in bold typeface and appears just before the signature page.

Moreover, on April 2, 2007, Skywaves executed and submitted another Promissory Note and Security Agreement (the "2007 Note and Security Agreement") to Defendant BB&T. The 2007 Note and Security Agreement also contain jury trial waivers wherein Skywaves expressly agrees to waive the right to trial by jury on any matters or claims arising out of the 2007 Note and Security Agreement or any other loan document executed in connection with the loan thereunder, as well as for any matters or claims arising "out of the conduct of the relationship between [Skywaves] and [Defendant BB&T]." The jury trial waivers in the 2007 Note and Security Agreement are in bold typeface, in all-capital letters, and appear just before the signature pages of the 2007 Note and Security Agreement.

All of the causes of action alleged in Skywaves' Complaint are specifically encompassed by the conspicuous jury trial waivers in the controlling documents. Indeed, Skywaves knowingly and voluntarily waived its right to a jury trial on all of the causes of action alleged against Defendant BB&T in its Complaint. Accordingly, the demand for a jury trial should be stricken and this case should be moved to the non-jury docket. *See Wachovia Bank vs. Blackburn*, 407 S.C. 321, 332-33, 755 S.E.2d 437, 443 (2014) ("A party may waive the right to a jury trial by contract").

In support of this motion, Defendant BB&T relies upon the pleadings and record in this case, the applicable law, and such other materials, including a memorandum of law, that will be served upon you in connection with the hearing of this motion.

The undersigned undertook good faith efforts to resolve this motion with the counsel for Plaintiff.

Respectfully submitted,

Julio E. Mendoza, Jr., Esquire
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
Phone: (803) 771-8900
Facsimile: (803) 253-8277
E-mail: rmendoza@nexsenpruet.com

Molly Hughes Cherry, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, South Carolina 29402
PHONE: 843.577.9440
FACSIMILE: 843.720.1777
E-mail: mcherry@nexsenpruet.com

ATTORNEYS FOR DEFENDANT BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC, A/K/A BB&T

July 24, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON SKYWAVES I CORPORATION, ☐ Plaintiff v. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL, ☒ Defendant	IN THE COURT OF COMMON PLEAS CASE NO. 2009-CP-10-7516 MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
George J. Kefalos, Esquire Bar No. ____ Address: 3 State Street Charleston, SC 29401 Phone: 843.722.6612 fax: 843.377.1310 e-mail: George@kefaloslaw.com	Molly Hughes Cherry, Esquire Bar No. 11188 Address: Nexsen Pruet, LLC P.O. Box 486 Charleston, SC 29402 phone: 843.577.9440 fax: 843.414.8209 e-mail: mcherry@nexsenpruet.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: DEFENDANT BRANCH BANKING AND TRUST COMPANY'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

Estimated Time Needed: 30 Minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — July 24, 2014 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter:
- ☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE: ____ Date: ____

SCCA/233 (11-03)

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS IN THE NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION, Plaintiff, vs. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL, Defendants.	Case No. 2009-CP-10-7516 **DEFENDANT BRANCH BANKING AND TRUST COMPANY'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

FILED
2014 JUL 24 PM 4:45
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: GEORGE J. KEFALOS, ESQUIRE AND JOHN P. LINTON, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("Defendant BB&T"), by and through their undersigned attorneys, hereby move the Court, pursuant to Rule 56, SCRCP, for an Order granting summary judgment in favor of Defendant BB&T against the Plaintiff Skywaves I Corporation ("Plaintiff") on all Plaintiff's claims on the grounds that there is no genuine issue of material fact with regard to any of the claims, and Defendant BB&T is entitled to judgment as a matter of law. Moreover, Plaintiff's tort claims are barred by the economic loss doctrine, and its alleged recovery under any claim is limited to contractual remedies, which cannot be established as a matter of law.

This Motion is based upon the pleadings, the applicable law, and such other materials as may be served upon you, including a supporting legal memorandum, before or at the hearing of the Motion.

The undersigned hereby certifies and affirms that consultation with the Plaintiff for the purpose of resolving the subject matter of the within motion is not required by Rule 11 of the South Carolina Rules of Civil Procedure.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

Julio E. Mendoza, Jr., Esquire
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
Phone: (803) 771-8900
Facsimile: (803) 253-8277
E-mail: rmendoza@nexsenpruet.com

Molly Hughes Cherry, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, South Carolina 29402
PHONE: 843.577.9440
FACSIMILE: 843.720.1777
E-mail: mcherry@nexsenpruet.com

ATTORNEYS FOR DEFENDANT BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC, A/K/A BB&T

July 24, 2014
Charleston, South Carolina

NEXSEN|PRUET

Molly Hughes Cherry
Member
Admitted in SC

July 24, 2014

VIA HAND DELIVERY
The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

Re: Skywaves I Corporation vs. Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl
Civil Action No.: 2009-CP-10-7516

Dear Ms. Armstrong:

Enclosed herewith for filing is the original and one copy of the following in the above-referenced matter:

1. Defendant Branch Banking and Trust Company's Notice of Motion and Motion to Strike Demand for Jury Trial;

2. Defendant Branch Banking and Trust Company's Notice of Motion and Motion for Summary Judgment; and

3. Filing fee in the amount of $50.00.

Please file the original of both of record and return a clocked-in copy to me via our courier.

By copy of this letter, I am serving the same upon counsel for Plaintiff and Defendant Edahl.

Very truly yours,

Molly Hughes Cherry

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

205 King Street
Suite 400 (29401)
PO Box 486
Charleston, SC 29402
www.nexsenpruet.com

T 843.720.1724
F 843.414.8209
E MCherry@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

MHC/ksh
Enclosures
cc: J.W. Nelson Chandler, Esquire
M. Dawes Cooke, Jr., Esquire
John P. Linton, Esquire
George J. Kefalos, Esquire
Julio E. Mendoza, Jr., Esquire

STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON))) SKYWAVES I CORPORATION) Plaintiff,) vs.)) BRANCH BANKING AND TRUST) COMPANY, Successor in merger to) BRANCH BANKING AND TRUST) COMPANY OF SC, a/k/a BB&T, and JAMES) EDAHL) Defendants.)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2009-CP-10-7516 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney : George J. Kefalos, Esquire Bar No. Address: George J. Kefalos, P.A. 46 A State Street, Charleston, SC 29401 Phone: (843) 722-6612 Fax: (843) 377-1310 E-Mail: george@kefaloslaw.com	Defendant's Attorney: J.W. Nelson Chandler, Esq. Bar No. Address: Corrigan & Chandler LLC P.O. Box 547, Charleston, SC 29402 Phone: (843) 577-5430 Fax: (843) 577-5650 E-mail: nelson@corriganchandler.com

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Defendant James Edahl's Notice of Motion and Motion to Strike Demand for Jury Trial
Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff ☒ Defendant — July 28, 2014 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 25.00
☐ EXEMPT: ow Cause in Child or Spousal Support
(check reason) Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:

JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE Date:

CLERK'S VERIFICATION

Collected by: Date Filed:
☐ MOTION FEE COLLECTED: $
☐ CONTESTED – AMOUNT DUE: $

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION,	)	
	)	CASE NO. 2009-CP-10-7516
Plaintiff,	)	
	)	
v.	)	**DEFENDANT JAMES EDAHL'S NOTICE OF MOTION AND MOTION TO STRIKE DEMAND FOR JURY TRIAL**
	)	
BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL,	)	
	)	
Defendants.	)	

FILED
2011 JUL 28 PM 4:06
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: PLAINTIFF SKYWAVES I CORPORATION AND ITS COUNSEL:

YOU WILL PLEASE TAKE NOTICE THAT Defendant James Edahl ("Edahl"), by and through his undersigned counsel, will move before the Business Court Judge, Court of Common Pleas for the Ninth Judicial Circuit, at such time and place as the Court may direct, for an Order striking the demand for a jury trial made in the Complaint and First Amended Complaint (collectively, the "Complaint") of Plaintiff Skywaves I Corporation ("Plaintiff"), and transferring the case to the non-jury docket.

This case arises out of a contractual dispute between Plaintiff and Defendant Branch Banking and Trust Company of SC a/k/a BB&T ("BB&T"), Edahl's employer at all times relevant hereto. On March 22, 2005, Plaintiff entered into a Factoring Agreement, Loan Agreement, Promissory Note and Security Agreement with BB&T. Pursuant to the plain language of these four documents, which were negotiated and entered into by sophisticated parties, Plaintiff expressly agreed that issues pertaining to the agreements or arising out of the conduct of the relationship between the parties shall be tried non-jury and knowingly and voluntarily waived its right to a jury trial. The jury

trial waiver in each of the agreements is in bold typeface and appears just before the signature page.

On April 2, 2007, Plaintiff executed and submitted another Promissory Note and Security Agreement (the "2007 Note and Security Agreement"). The 2007 Note and Security Agreement also contain jury trial waivers wherein Plaintiff expressly agrees to waive the right to trial by jury on any matters or claims arising out of the 2007 Note and Security Agreement or any other loan document executed in connection with the loan thereunder, as well as for any matters or claims arising "out of the conduct of the relationship between [Plaintiff] and [BB&T]." The jury trial waivers in the 2007 Note and Security Agreement are in bold typeface, in all capital letters, and appear just before the signature pages.

All of the causes of action alleged against Edahl are specifically encompassed by the conspicuous jury trial waivers. Accordingly, the demand for a jury trial should be stricken and this case should be moved to the non-jury docket. *See Wachovia Bank vs. Blackburn*, 407 S.C. 321, 332, 755 S.E.2d 437, 443 (2014) ("A party may waive the right to a jury trial by contract").

This motion is based upon the pleadings, the discovery, the law, and such other and further material as may be presented to the Court at or before the hearing on this matter. Pursuant to Rule 11, SCRCP, the undersigned certifies that consultation with opposing counsel regarding this motion would serve no useful purpose.

[SIGNATURE BLOCK APPEARS ON FOLLOWING PAGE.]

Respectfully submitted,

J.W. Nelson Chandler
CORRIGAN & CHANDLER LLC
P.O. Box 547
Charleston, SC 29402
Phone: 843-577-5430; Fax: 843-577-5650
E-Mail: nelson@corriganchandler.com

ATTORNEYS FOR DEFENDANT
JAMES EDAHL

July 28, 2014

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON SKYWAVES I CORPORATION Plaintiff, vs. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL Defendants.	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2009-CP-10-7516 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney : George J. Kefalos, Esquire Bar No. Address: George J. Kefalos, P.A. 46 A State Street, Charleston, SC 29401 Phone: (843) 722-6612 Fax: (843) 377-1310 E-Mail: george@kefaloslaw.com	Defendant's Attorney: J.W. Nelson Chandler, Esq. Bar No. Address: Corrigan & Chandler LLC P.O. Box 547, Charleston, SC 29402 Phone: (843) 577-5430 Fax: (843) 577-5650 E-mail: nelson@corriganchandler.com

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Defendant James Edahl's Notice of Motion and Motion for Summary Judgment
Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff/☒ Defendant — July 28, 2014 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 25.00
☐ EXEMPT:
(check reason)
- ☐ Show Cause in Child or Spousal Support
- ☐ Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

JUDGE'S SECTION	JUDGE CODE
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	Date:

CLERK'S VERIFICATION

Collected by: Date Filed:
☐ MOTION FEE COLLECTED: $
☐ CONTESTED – AMOUNT DUE: $

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION,	)	
	)	Case No. 2009-CP-10-7516
Plaintiff,	)	
	)	
v.	)	**DEFENDANT JAMES EDAHL'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**
	)	
BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL,	)	
	)	
Defendants.	)	

FILED
2011 JUL 28 PM 4:05
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: PLAINTIFF SKYWAVES I CORPORATION AND ITS COUNSEL:

YOU WILL PLEASE TAKE NOTICE THAT Defendant James Edahl ("Edahl"), by and through his undersigned counsel, will move before the Business Court Judge, Court of Common Pleas for the Ninth Judicial Circuit, at such time and place as the Court may direct, for an Order entering summary judgment in his favor and dismissing the allegations against him, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, on the grounds that there are no genuine issues of material fact and Edahl is entitled to judgment as a matter of law.

More specifically, this case arises out of a contractual dispute between Plaintiff Skywaves I Corporation ("Plaintiff") and Defendant Branch Banking and Trust Company of SC a/k/a BB&T ("BB&T"). Nonetheless, Plaintiff asserted certain claims against Edahl, individually, as the agent of BB&T. As initially alleged, those claims consisted of: negligent misrepresentation; fraudulent misrepresentation; negligence; and violation of the South Carolina Unfair Trade Practices Act. (Amended Complaint, Counts 5-8, ¶¶ 50-100). Following this Court's rulings on Edahl's motion to dismiss and Plaintiff's

motion to reconsider, only two claims survived: (1) negligent misrepresentation and (2) negligence. (Order Granting Motion to Dismiss, filed Nov. 8, 2011; Order Granting Motion to Reconsider, filed June 15, 2012). Edahl now moves for summary judgment on all remaining claims against him.

First, though this is a contractual dispute involving alleged economic losses, both claims against Edahl sound in tort. Accordingly, the claims against Edahl are barred as a matter of law pursuant to the economic loss doctrine.

Additionally, Plaintiff's claims against Edahl are barred by the statute of frauds set forth in S.C. Code Ann. § 37-10-107.

Finally, Plaintiff has not established the elements of either negligent misrepresentation or negligence. As to negligent misrepresentation, Plaintiff has not established an actionable misrepresentation by Edahl or Plaintiff's justifiable reliance upon the same. As to negligence, Plaintiff has not established any actionable duty or breach thereof. To the extent Plaintiff's "negligence" claim is actually one for breach of "fiduciary duty" based on a "special relationship" (Amended Complaint, ¶¶ 81, 90), Plaintiff has failed to establish the same.

For these and any other reasons the Court may deem appropriate, Edahl is entitled to summary judgment on all of Plaintiff's claims against him.

This motion is based upon the pleadings, the discovery, the law, and such other and further material as may be presented to the Court at or before the hearing on this matter. To the extent applicable to Edahl, Edahl further incorporates and relies upon any arguments in favor of summary judgment that may be raised by BB&T.

Respectfully submitted,

J.W. Nelson Chandler
CORRIGAN & CHANDLER LLC
P.O. Box 547
Charleston, SC 29402
Phone: 843-577-5430; Fax: 843-577-5650
E-Mail: nelson@corriganchandler.com

ATTORNEYS FOR DEFENDANT
JAMES EDAHL

July 28, 2014

CORRIGAN & CHANDLER LLC

ATTORNEYS AT LAW

J.W. Nelson Chandler
(843) 577-5430 (direct)
nelson@corriganchandler.com

REPLY TO:
P.O. Box 547
Charleston, SC 29402

July 28, 2014

VIA HAND DELIVERY
The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad St., Suite 106
Charleston, SC 29401

Re: *Skywaves I Corporation v. Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl*
Case No. 2009-CP-10-7516

Dear Ms. Armstrong:

Enclosed please find an original and one copy of Defendant James Edahl's Notice of Motion and Motion for Summary Judgment and Defendant James Edahl's Notice of Motion and Motion to Strike Demand for Jury Trial in the above-referenced case. Please file the originals and return the clocked copies to me via my courier.

By copy of this letter, we are serving all counsel of record with the enclosed.

With kind regards, I am

Sincerely yours,

J.W. Nelson Chandler

Enclosures (as noted)

cc: George J. Kefalos, Esquire (w/enclosure)
John P. Linton, Esquire (w/enclosure)
M. Dawes Cook Jr., Esquire (w/enclosure)
Julio E. Mendoza Jr., Esquire/Molly Hughes Cherry, Esquire (w/enclosure)

16 CHARLOTTE STREET, SUITE B • POST OFFICE BOX 547 (29402) • CHARLESTON, SOUTH CAROLINA 29403
PHONE 843-577-5410 • FAX 843-577-5650

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

Case No. 2009-CP-10-7516

AMENDED ANSWER OF DEFENDANT BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC, A/K/A BB&T

FILED
2014 DEC -2 PM 3:31
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("Defendant" or "BB&T") amends its response to the First Amended Complaint in the above-captioned case as follows:

1. Each and every allegation contained in the First Amended Complaint not hereinafter specifically admitted is denied, and strict and competent proof of such allegation is demanded.

FOR A FIRST DEFENSE

2. Defendant admits, upon information and belief, the allegations of paragraph 1.

3. Responding to paragraph 2, Defendant admits that it consented to allow Plaintiff to amend its complaint.

4. In response to the allegations of paragraph 3, Defendant would show that it is a corporation organized under the laws of the State of North Carolina with its principal place of business in North Carolina. Defendant admits the remaining allegations of paragraph 3.

5. Defendant admits the allegations of paragraph 4.

6. The allegations of paragraphs 5 and 6 constitute conclusions of law which Defendant is not required to admit.

7. Responding to paragraph 7, Defendant admits, upon information and belief, only that Plaintiff developed a structural product for the wireless telecommunications industry. Defendant further admits, upon and information and belief, only that Plaintiff's customer base included Verizon, AT&T, Sprint/Nextel and General Dynamic. Defendant denies any remaining allegations of paragraph 7.

8. Responding to paragraph 8, Defendant craves reference to the written factoring agreement and denies any allegations not consistent therewith.

9. Responding to paragraphs 9, 10 and 11, Defendant admits only that from 2005 to 2007, it provided a factoring line of credit to Plaintiff to support the manufacture of individual cell tower units, the terms of which were amended. Defendant further admits only that Defendant had a relationship manager on behalf of Defendant with Plaintiff. Defendant denies the remaining allegations of paragraphs 9, 10 and 11.

10. Defendant lacks information sufficient to form a belief at to the allegations of paragraph 12 and, therefore, denies the same.

11. Responding to paragraphs 13, 14 and 15, Defendant admits only that it submitted a commitment letter to bid on financing to Skywaves in March of 2007. Defendant lacks sufficient information to form a belief as to the allegations regarding solicitations by Plaintiff or proposals by other entities. Defendant denies any remaining allegations of paragraphs 13, 14 and 15.

12. Defendant denies the allegations of paragraphs 16 and 17.

266

13. Responding to paragraph 18, Defendant admits only that in March of 2007, Defendant 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 that it agreed 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 Defendant and provided to Plaintiff.

16. Defendant denies the allegations of paragraph 22.

17. Responding to paragraph 23, Defendant admits only that its business relationship with Plaintiff ended. Defendant denies the remaining allegations of paragraph 23.

18. Defendant denies the allegations of paragraphs 24 and 25.

AS TO THE FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT

19. Responding to paragraph 26, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

20. Defendant denies the allegations of paragraph 27.

21. Responding to paragraph 28, Defendant admits only that the March 22, 2005 Factoring Agreement was amended to allow for factoring of invoices and purchase orders. Defendant further admits that it agreed to finance site plans, to a limited extent, with certain limitations on the amounts being factored.

22. Defendant denies the allegations of paragraphs 29, 30, 31 and 32.

AS TO THE SECOND CAUSE OF ACTION FOR BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACTS

23. Responding to paragraph 33, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

24. Defendant denies the allegations of paragraphs 34, 35, 36, 37, 38 and 39.

AS TO THE THIRD CAUSE OF ACTION FOR PROMISSORY ESTOPPEL

25. Responding to paragraph 40, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

26. Defendant denies the allegations of paragraphs 41, 42, 43, 44 and 45.

AS TO THE FOURTH CAUSE OF ACTION FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

27. Responding to paragraph 46, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

28. Defendant denies the allegations of paragraph 47, 48 and 49.

AS TO THE FIFTH CAUSE OF ACTION NEGLIGENT MISREPRESENTATION

29. Responding to paragraph 50, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

30. Defendant denies the allegations of paragraphs 51, 52 and 53.

31. Responding to paragraph 54, with respect to subparagraph (a) Defendant admits only that it submitted a commitment letter to Plaintiff and craves reference to the terms of the written commitment letter. With respect to subparagraph (b), Defendant admits only that, at the request of Plaintiff and after determining to do so was viable, Defendant lowered its minimum monthly factoring commission for April and May and reduced its commissions for July to

September. With respect to subparagraph (c), Defendant admits only that in 2006 Plaintiff's factoring line of credit was increased. Defendant denies the remaining allegations of paragraph 54.

32. Defendant lacks sufficient information to form a belief as to the allegations of paragraph 55.

33. Defendant denies the allegations of paragraph 56. By way of further answer to paragraph 56, Defendant craves reference to any valid writings signed by Defendant and denies any allegations not consistent therewith.

34. Defendant denies the allegations of paragraphs 57 and 58.

35. Responding to paragraph 59, Defendant admits only that it agreed to factor a certain percentage on purchase orders up to a certain limit, with the goal of the purchase orders converting to invoices. Defendant denies the remaining allegations of paragraph 59.

36. Responding to paragraph 60, Defendant craves reference to any written financial commitments it provided to Plaintiff and denies any allegations not consistent therewith. Defendant denies the remaining allegations of paragraph 60.

37. Responding to paragraph 61, Defendant admits only that James Edahl traveled to MacBee, South Carolina in July of 2007, at the request of Plaintiff's president to observe a presentation being made by Plaintiff to potential investors. Defendant denies the remaining allegations of paragraph 61.

38. Defendant denies the allegations of paragraphs 62, 63, 64, 65, 66, 67, 68, 69 and 70.

AS TO THE SIXTH CAUSE OF ACTION
FRAUDULENT MISREPRESENTATION

39. Responding to paragraph 71, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

40. The allegations of paragraphs 72, 73, 74, 75, 76 and 77 pertain to a cause of action that was dismissed by the court. To the extent a response is required, Defendant denies the same.

AS TO THE SEVENTH CAUSE OF ACTION FOR NEGLIGENCE

41. Responding to paragraph 78, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

42. Defendant denies the allegations of paragraphs 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89 and 90.

AS TO THE EIGHTH CAUSE OF ACTION FOR SCUPTA

43. Responding to paragraph 91, Defendant incorporates herein all of the previous paragraphs as if stated verbatim.

44. The allegations of paragraphs 92, 93, 94, 95, 96, 97, 98, 99 and 100 pertain to a cause of action that was dismissed by the court. To the extent a response is required, Defendant denies the same, the same being the final allegations of the First Amended Complaint.

FOR A SECOND DEFENSE

45. The allegations contained in the First Amended Complaint fail to state facts sufficient to constitute a cause of action and, therefore, the Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

46. Plaintiff has failed to mitigate its alleged damages.

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FOR A FOURTH DEFENSE

47. To the extent there may be any discharge in Plaintiff's bankruptcy proceeding, Defendant asserts such discharge as an affirmative defense.

FOR A FIFTH DEFENSE

48. Plaintiff's claims are barred, in whole or in part, for failure to plead such claims with the particularity required by Rule 9(b) of the South Carolina Rules of Civil Procedure.

FOR A SIXTH DEFENSE

49. Plaintiff's claims are barred, in whole or in part, by the statute of frauds

FOR A SEVENTH DEFENSE

50. Upon information and belief, Plaintiff's claims are barred based upon the doctrines of waiver, laches and estoppel.

FOR AN EIGHT DEFENSE

51. Any damage or injury Plaintiff may have suffered was caused, in whole or in part, by persons or factors unrelated to Defendant, including Plaintiff.

FOR A NINTH DEFENSE

52. Plaintiff does not come to this action with clean hands, and Defendant pleads the defense of unclean hands as a complete defense to Plaintiff's claims.

FOR A TENTH DEFENSE

53. Defendant denies that it is liable for any punitive and/or exemplary damages. Defendant avers that any award of punitive damages against it would violate the constitutional safeguards provided under the Constitution of the United States of America, and the Constitution of South Carolina, in that punitive damages violate the due process and equal protection

guarantees, place an undue burden on interstate commerce, violate the right to assembly and petition the government and violate the proscription against excessive fines.

54. Furthermore, Defendant avers that any award of punitive damages in this litigation is arbitrary, unreasonable, excessive and in violation of Defendant's right to due process of law and equal protection of the law under the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, and the Constitution of South Carolina, in that punitive damages are vague and not rationally related to legitimate government interests.

55. Furthermore, an award of punitive damages would be violative of the procedural safeguards provided to Defendant under the Sixth Amendment to the Constitution of the United States, and the Constitution of South Carolina, in that punitive damages are penal in nature and consequently, Defendant is entitled to the same procedural safeguards as accorded to a criminal defendant.

56. Furthermore, it would be violative of Defendant's rights guaranteed by the Constitution of the United States to impose punitive damages against it as such damages are penal in nature by requiring a burden of proof which is less than "beyond a reasonable doubt" burden of proof required in criminal cases. Punitive damages would also be in violation of Article 1, Section 10 of the Constitution of the United States, and the Constitution of South Carolina, in that it would be a retrospective imposition of punitive damages under a new cause of action.

WHEREFORE, having fully answered the First Amended Complaint, Defendant prays that the Court grant appropriate relief to Defendant, including dismissal, and for such other further relief as the Court deems just and proper.

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ATTORNEYS FOR DEFENDANTS
BRANCH BANKING AND TRUST COMPANY,
SUCCESSOR IN MERGER TO BRANCH
BANKING AND TRUST COMPANY OF SC,
A/K/A BB&T, AND JAMES EDAHL

December 2, 2014
Charleston, South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION,	)	
	)	Case No. 2009-CP-10-7516
Plaintiff,	)	
	)	
v.	)	
	)	
BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL,	)	**DEFENDANT JAMES EDAHL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
	)	
Defendants.	)	

FILED
2014 DEC 22 PM 4:54
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Defendant James Edahl ("Defendant" or "Edahl"), by and through his undersigned counsel, respectfully submits this Memorandum of Law in Support of his Motion for Summary Judgment, filed on July 28, 2014, pursuant to Rule 56, SCRCP.

I. INTRODUCTION

This case arises out of the termination of a lending relationship between a borrower and a bank. The central issue in contention is whether the bank, Defendant Branch Banking and Trust Company of SC a/k/a BB&T ("BB&T"), acted within its contractual rights when it declared a default and terminated the relationship with its financially-distressed borrower, Plaintiff Skywaves I Corporation ("Skywaves"). Skywaves – which had consistently lost money despite the infusion of funds by BB&T – contends that but for the termination of the lending relationship, it would have made a miraculous turnaround and avoided bankruptcy.

As noted by the Supreme Court in affirming this Court's dismissal of the sister lawsuits brought by Skywaves' individual investors, "this case revolves around the contractual relationship between BB&T and its customer, Skywaves." *Kerr v. Branch Banking and Trust*

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Co., 408 S.C. 328, 333, 759 S.E.2d 724, 726 (2014) (emphasis added). Nonetheless, Skywaves has attempted to broaden the scope of the action by alleging certain non-contractual claims against both BB&T and its agent, Defendant Edahl. Edahl was BB&T's relationship manager on the Skywaves account. Skywaves' currently-pending claims against Edahl are for (i) negligent misrepresentation and (ii) negligence. (Order Granting Motion to Dismiss, filed Nov. 8, 2011; Order Granting Motion to Reconsider, filed June 15, 2012). Edahl is entitled to summary judgment on all claims against him on the following grounds:

(A) Since they are based upon alleged, extra-contractual representations, Skywaves claims against Edahl are barred by the statute of frauds set forth in S.C. Code Ann. § 37-10-107.

(B) Skywaves' claims against Edahl sound in tort and, therefore, are also barred by the economic loss rule.

(C) Skywaves has otherwise failed to establish the elements of its claims for negligent misrepresentation and negligence.

For these and any other reasons the Court may deem appropriate, this Court should grant Edahl's Motion for Summary Judgment and dismiss Skywaves' claims against him, with prejudice.

II. BACKGROUND

BB&T terminated the lending relationship with Skywaves only after it became apparent that Skywaves was a sinking ship. A start-up company founded in the early-2000s, Skywaves manufactured "shelters" to house communications equipment for cell phone towers. BB&T provided the majority of its funding for Skywaves through a factoring agreement executed in March 2005. (Factoring Agreement, Exhibit "C"[1]). As ultimately amended, BB&T advanced

[1] All exhibits refer to those filed jointly by Edahl and BB&T in connection with their respective memoranda supporting their motions for summary judgment and to strike the jury demand.

85% to Skywaves on factored invoices, which invoices were effectively purchased by BB&T and then payable to it in full. (March 2, 2007 Letter, Exhibit "C3"). By late 2006, BB&T had also begun to advance funds (ultimately at 65%) based upon purchase orders sent to Skywaves, understanding invoices would subsequently be issued and factored. (March 14, 2007 Letter, Exhibit "C4"). Through Edahl, in 2007, BB&T also approved advancing funds on certain sites identified in a General Dynamics contract, financing them at 65% as if they were purchase orders. (Konersmann Dep. at pp. 303-304, Exhibit "A"). The factoring relationship began with an agreement to provide up to $1.5 million in credit to Skywaves, and, as of March 2007, had been increased to provide up to $3.5 million in credit (with a sublimit of $2 million for purchase orders). (Ex. C; Ex. C3). By the end of 2007, however, Skywaves had effectively exhausted its credit limit with BB&T. (December 14, 2007 Email, Exhibit "I").

Although already unprofitable in 2006, Skywaves took a turn for the worse in 2007. Though it projected a profit of $1.4 million for 2007, Skywaves revised its estimates in September 2007 to project an annual *loss* of approximately $120,000. (Voytko Dep. at pp. 175-176, Exhibit "B"). Then, at year's end, it turned out that Skywaves suffered an actual, annual loss of $1.4 million. *Id.* Also at this time, BB&T learned that Skywaves – contrary to the factoring agreement and as a sign of its cash shortage – had failed to promptly remit payment to BB&T of over $340,000 in payments received on factored invoices. (February 11, 2008 Letter, Exhibit "M," ultimately finding over $400,000 in diverted funds). Though Skywaves unilaterally claims it had "60 days" to turn over payments to BB&T, it has come forward with no documentary evidence to support its assertion. Regardless, Skywaves was also failing, admittedly, to make prompt payments on its other bills in the regular course of business. (Voytko Dep., at pp. 206-207, Ex. B.)

BB&T ultimately came to the conclusion that Skywaves' ability to repay BB&T was impaired. As a result, BB&T declared a default in January 2008. (January 25, 2008 Letter, Exhibit "J"). By its own terms, however, the factoring agreement was set to expire in March 2008, which Skywaves admits that BB&T was not obligated to renew. (Voytko Dep. at pp. 187-188, Ex. B). Sometime thereafter, Skywaves declared bankruptcy. Blaming BB&T and Edahl for its financial misfortunes, Skywaves initiated the instant lawsuit in 2009.

III. ARGUMENT

A. SKYWAVES' CLAIMS AGAINST EDAHL ARE BARRED BY THE STATUTE OF FRAUDS FOUND IN S.C. CODE ANN. § 37-10-107.

Since Skywaves' claims against Edahl are based upon alleged, extra-contractual representations and obligations, they are precluded by the statute of frauds set forth in S.C. Code Ann. § 37-10-107. Pursuant to this code section:

> (1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:
>
> (a) to lend or borrow money;
>
> (b) to defer or forbear in the repayment of money; or
>
> (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless [#1] the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and [#2] the party to be charged, or its duly authorized agent, has signed the writing.

Subsection (2) of Section 37-10-107 goes on to explicitly preclude, *inter alia*, actions based upon theories of a "fiduciary relationship" or "negligent misrepresentation." S.C. Code Ann. § 37-10-107(2)(a) and (2)(d) (emphasis added). Subsection (3) provides for exemptions related to personal and household loans, consumer credit, overdrafts, and to otherwise avoid

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rendering common commercial agreements unenforceable. S.C. Code Ann. § 37-10-107(3). Subsection (3) is, thus, inapplicable here, but the exemptions for household loans and consumer credit further underscore the statute's intent to affirmatively apply in the context of commercial relationships – precisely like the one at issue in this case.

Based on its plain language, Section 37-10-107 prohibits any claim based upon "a failure to perform" in connection with a promise or agreement to "lend . . . money." S.C. Code Ann. § 37-10-107(1)(a). As Subsection (1)(c) makes clear, this prohibition is expansive, and extends to claims arising from a failure to "renew, modify [or] cancel" a loan or "any provision" related thereto, as long as there is a principal amount in excess of $50,000. S.C. Code Ann. § 37-10-107(1). Again, such claims are barred, "unless" the party bringing the claim (1) has a writing containing the "material terms and conditions" and (2) said writing is signed by the party to be charged. *Id.* In other words, all claims arising from commercial lending relationships exceeding $50,000 are barred except where they are based upon signed documentation. This statute is no doubt based upon the policy that actors at this level of sophistication are well-equipped to codify their expectations and otherwise should not be heard to complain.

Section 37-10-107 squarely applies on the facts of this case. First, the principal amount extended to Skywaves greatly exceeded the $50,000 minimum required by the statute. Second, Skywaves' claims against Edahl all relate to BB&T's alleged failure to perform with respect to its lending relationship with Skywaves. Third, the claims against Edahl (negligent misrepresentation and negligence/breach of fiduciary duty) are expressly precluded by the statute. Fourth, Skywaves' claims against Edahl appear to be based upon alleged, verbal representations or promises, instead of signed writings containing "material terms and conditions." Though the Amended Complaint vaguely alleges the existence of "writings" (*see,*

e.g., ¶ 56), mere generalized allegations are insufficient to overcome summary judgment. Accordingly, Skywaves' claims against Edahl fail as a matter of law, and Edahl is entitled to summary judgment. *See Yadkin Valley Bank & Trust v. Oaktree Homes, Inc.*, 2014 WL 3747342, at *2 (Ct. App. July 30, 2014) (affirming summary judgment on negligent misrepresentation claim under Section 37-10-107) (unpublished); *Berlinsky v. Palmetto Federal Sav. Bank of South Carolina*, 2008 WL 9841492, at *2 (Ct. App. April 15, 2008) (relying upon Section 37-10-107 in affirming summary judgment on claims, including negligent misrepresentation, and rejecting proffered "writings," included signed loan application, as inadequate under the statute) (unpublished).

B. SKYWAVES' CLAIMS AGAINST EDAHL ARE ALSO BARRED BY THE ECONOMIC LOSS RULE.

"The economic loss rule bars a negligence action 'where duties are created solely by contract.'" *Midland Mortg. Corp. v. Wells Fargo Bank, N.A.*, 926 F.Supp.2d 780, 788 (D.S.C. 2013) (citing *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989)); *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F.Supp. 1027, 1054 (D.S.C. 1993) ("South Carolina law has long recognized the principle that no tort claim will lie where the parties' duties are defined by a contract"). "The purpose of the economic loss rule is to define the line between recovery in tort and recovery in contract." *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009). "Contract law seeks to protect the expectancy interests of the parties. Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property." *Id.* Thus, the economic loss rule prevents contract law from "drowning in a sea of tort" by barring tort recovery for economic loss when unaccompanied by physical property damage or personal injury. *See id.*; *Myrtle Beach Pipeline*, 843 F.Supp. at 1054.

Again, as stated by the Supreme Court, "this case revolves around the contractual relationship between BB&T and its customer, Skywaves." *Kerr v. Branch Banking and Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 726 (2014). Plainly, this is not a case involving physical damage to other property, or personal injury to life or limb. *Cf. Sapp*, 386 S.C. at 147, 687 S.E.2d at 49. Rather, the dispute in this case centers squarely on the contractual relationship between corporate entities and on the extent of the *economic losses* – if any – arising from the termination of that contractual relationship. To permit Plaintiff to bypass, or supplement, its purported contractual right of recovery in favor of an open-ended tort recovery would be to permit the very blurring of lines that the economic loss rule was designed to prevent. *See Wilson Group, Inc. v. Quorum Health Resources, Inc.*, 880 F.Supp. 416, 429 (D.S.C. 1995) ("The court must be vigilant in preventing the 'inevitable efforts of lawyers to turn every breach of contract into a tort'") (emphasis added).

In this case, Skywaves must pursue recovery under the law of contract, not tort. The economic loss rule bars Skywaves' purported claims based on negligence, regardless of how Skywaves contends the contractual relationship was breached. *See, e.g., Meddin v. Southern Ry.–Carolina Div.*, 218 S.C. 155, 62 S.E.2d 109, 112 (1950) ("[I]f the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie"). Accordingly, Edahl is entitled to summary judgment, and Skywaves' claims against him should be dismissed with prejudice. *See Manchin v. QS/1 Data Systems*, 2014 WL 2980258, *5 (D.S.C. July 1, 2014) (granting summary judgment on negligence-based claims under economic loss rule in favor of software service provider where duties were created by contract); (*White v. Holiday Kamper & Boats*, 2008 WL 4155663, *5 (D.S.C. Sept. 9, 2008)

(granting summary judgment on negligence and negligent misrepresentation based on economic loss rule).

C. SKYWAVES HAS FAILED TO ESTABLISH THE ELEMENTS OF ITS CLAIMS FOR NEGLIGENT MISREPRESENTATION AND NEGLIGENCE.

1. Skywaves' Negligent Misrepresentation Claim Fails As A Matter of Law.

To prove its claim for negligent misrepresentation, a plaintiff must establish the following elements: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation. *Quail Hill, LLC v. County of Richland,* 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010). Skywaves cannot demonstrate a genuine issue of material fact on each element of this claim against Edahl.

To begin, a claim for negligent misrepresentation must be predicated upon the existence of a false statement. Further expounding upon this element, the Court of Appeals has clarified that, "to be actionable, the representation must relate to a present or pre-existing fact and be false when made." *Koontz v. Thomas*, 333 S.C. 702, 713, 511 S.E.2d 407, 413 (Ct. App. 1999) (citing *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App.1993) (emphasis added)). "The representation cannot ordinarily be based on unfulfilled promises or statements as to future events." *Id.* Here, Skywaves has not come forward with evidence of a false statement of present or pre-existing fact. Skywaves' conclusory allegations of "unfulfilled promises" about what BB&T would do for Skywaves in the future do not suffice, as a matter of law. *See id.*

Additionally, Skywaves must establish that it "justifiably relied" on any alleged misrepresentations by Edahl to Skywaves. As noted by the Supreme Court in *Kerr*, "[w]here there is no confidential or fiduciary relationship and an arm's length transaction between mature, educated people is involved, there is no right to rely, and the party has not stated a claim for negligent misrepresentation or fraudulent inducement." 408 S.C. at 333, 759 S.E.2d at 727 (citing *Florentine Corp. v. PEDA I, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985)). "This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests." *Id.* at 334, 759 S.E.2d at 727 (citing *Thomas v. Am. Workmen*, 197 S.C. 178, 182–83, 14 S.E.2d 886, 887–88 (1941)). Referring to the very individuals who invested in Skywaves, the Supreme Court noted that they were "sophisticated investors who, between the six of them, invested almost $1.5 million . . . over a protracted period of time." *Id.* at 334, fn. 8, 759 S.E.2d at 727, fn. 8. These investors included Ron Konersmann and John Voytko, who were, respectively, the CEO and CFO of the company.[2] Thus, the Supreme Court has, in effect, already determined that Skywaves' management team was of the degree of sophistication sufficient to negate any purported "right to rely." *Id.* (quoting *Poco–Grande Invs. v. C & S Family Credit, Inc.*, 301 S.C. 323, 325, 391 S.E.2d 735, 736 (Ct. App. 1990) for the proposition that "sophisticated and mature businessmen" have no right to rely on alleged misrepresentations in the financial setting). Accordingly, Skywaves cannot establish this element of its claim.

[2] Konersmann, the CEO, also served as Chairman of the Board and ultimately owned approximately 44% of the company. He was one of Skywaves' initial founders and brought decades of experience in both owning and operating businesses, including experience in wireless telecommunications. He holds an undergraduate degree in engineering from Memphis State and an MBA from Notre Dame. He is currently involved in the developmental stages of a new business to develop apps for the soccer industry. (Konersmann Dep. at pp. 22-23, 27-28, 110-111; Ex. A; Konersmann Resume, Exhibit "P"). Voytko, the CFO, joined Skywaves in 2005 at age 50. He had a degree in accounting, an inactive license as a CPA, and a background in the telecommunications industry. After Skywaves, he joined a franchise that provides CFO services to companies "up to the 20- to 25-million-dollar range." (Voytko Dep. at pp. 25-26, 32, 36-37; Ex. B).

Finally, Skywaves must demonstrate a pecuniary loss as the proximate result of its alleged reliance on misrepresentations. To satisfy the requirements of this element, Skywaves must demonstrate that "but for" the termination of the lending relationship, it would not have filed for bankruptcy. The undisputed evidence, however, demonstrates that Skywaves was grossly underperforming – even measured against its own projections – and, in fact, lost $1.4 million dollars in 2007 alone. (Voytko Dep. at pp. 175-176, Ex. B). It was also withholding funds due to BB&T and otherwise failing to pay its business bills on time. (Voytko Dep., at pp. 206-207, Ex. B; Ex. M). In order to survive summary judgment, Skywaves must come forward with more than mere conjecture to show that it would have survived had BB&T maintained the effectively-maximized terms of credit in January 2008. This is particularly impossible in light of the fact that the factoring agreement – which BB&T admittedly had no obligation to renew – was set to expire in March 2008, at which time the entire debt would have become due and owing. (Voytko Dep. at pp. 187-188, Ex. B). For this reason as well, Skywaves' claim fails as a matter of law, and Edahl is entitled to summary judgment.

2. Skywaves' Negligence Claim Fails as a Matter of Law.

Though captioned as a negligence claim, Skywaves appears to base its negligence cause of action on an alleged breach of "fiduciary duty." (Amended Complaint, ¶¶ 81, 90). To establish a claim for breach of fiduciary duty, a plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant. *RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335-336, 732 S.E.2d 166, 173 (2012); *see also Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 163, 714 S.E.2d 869, 873 (2011). (noting that a negligence claim requires proof of "(1) a duty of care owed by the defendant to the

plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach"). Skywaves cannot establish a claim for negligence based on breach of fiduciary duty.

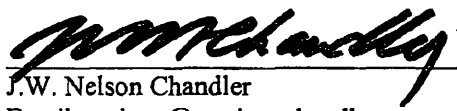
To begin with, the existence of a fiduciary duty is a question of law for the court. *Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). Skywaves cannot establish, as a matter of law, that Edahl owed it a fiduciary duty. Indeed, "[i]t is well-established that banks owe a limited duty of care to their customers." *Kerr*, 408 S.C. at 333, 759 S.E.2d at 726; *Regions Bank v. Schmauch*, 354 S.C. 648, 670-671, 582 S.E.2d 432, 444 (2003); *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986). Any suggestion that Edahl, as an agent of BB&T, somehow became a financial advisor to Skywaves – giving rise to fiduciary obligations – is without evidentiary support. As noted, Skywaves was managed by educated and sophisticated businessmen who understood the respective roles of Skywaves and BB&T in the lending relationship. *Id.* at 40, 340 S.E2d at 790 (further noting, in context of dealing with a bank employee, that "mere respect for another's judgment or trust in his character is usually not sufficient to establish a [fiduciary] relationship"). Because Skywaves has not demonstrated facts sufficient to justify a departure from the long-established rules governing this area, Edahl is entitled to summary judgment on this claim as well.

Additionally, for the same reasons set forth in Section C(1), above, Skywaves has not established that it suffered a proximate result of any alleged breach of duty on the part of Edahl. As such, Edahl is entitled to judgment as a matter of law.

IV. CONCLUSION

For all of the foregoing reasons, and any others the Court may deem appropriate, Skywaves has failed to establish a genuine issue of material fact for trial on its claims against Defendant Edahl. Therefore, Edahl respectfully requests that this Court GRANT his Motion for Summary Judgment, pursuant to Rule 56(c), SCRCP, and dismiss the claims against him, with prejudice.

Respectfully submitted,



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December 22, 2014

CORRIGAN & CHANDLER LLC

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REPLY TO:
P.O. Box 547
Charleston, SC 29402

December 22, 2014

VIA HAND DELIVERY
The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad St., Suite 106
Charleston, SC 29401

Re: *Skywaves I Corporation v. Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl*
Case No. 2009-CP-10-7516

Dear Ms. Armstrong:

Enclosed please find an original and one copy of (1) Defendant James Edahl's Memorandum of Law In Support Of Motion for Summary Judgment and (2) Defendant James Edahl's Memorandum of Law in Support of Motion to Strike Plaintiff's Jury Demand in the above referenced case. Please file the originals and return the clocked copies to me via my courier.

By copy of this letter, we are serving all counsel of record with a copy of the enclosed.

With kind regards, I am

Sincerely yours,

J.W. Nelson Chandler

Enclosures (as noted)

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS IN THE NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION, Plaintiff, vs. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL, Defendants.	Case No. 2009-CP-10-7516 **DEFENDANT BRANCH BANKING AND TRUST COMPANY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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JULIE J. ARMSTRONG
CLERK OF COURT

Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("Defendant" or "BB&T"), respectfully submits this Memorandum in Support of its Motion for Summary Judgment.

I. INTRODUCTION

This is a lender liability case in which Plaintiff Skywaves I Corporation ("Skywaves") alleges that BB&T failed to fund its financing needs and improperly declared Skywaves in default of its obligations under the controlling financing document. Skywaves, however, was a startup company in dire financial straits, despite BB&T's financing and efforts to assist the company. Ultimately, Skywaves' precarious financial condition jeopardized BB&T's ability to protect its rights of repayment. Skywaves' argument wholly and fundamentally ignores BB&T's rights under the clear and express terms of the agreement it signed, and suggests, instead, that BB&T had an obligation to fund its operations indefinitely, regardless of any impact on the bank and with no rights or recourse for any default. BB&T prudently and appropriately ended its relationship with Skywaves, and there is no basis for any of the claims asserted in this case. For

the reasons set forth more fully herein, BB&T is entitled to summary judgment, as a matter of law, on all of Skywaves' claims.

II. FACTS

BB&T is a banking institution with branch offices in Charleston, South Carolina. Skywaves was a start-up company that developed a structural product, specifically equipment housing buildings (often referred to as shelters) that would be placed at the base of cell tower units, for use in the wireless telecommunications industry. (Deposition of Ronald D. Konersmann, p. 51, ll. 9 – 14, attached as Exhibit A).[1] Ronald Konersmann, an experienced businessman, was the president and chief executive officer of and an investor in Skywaves. (Konersmann depo. at p. 111, ll. 15-19). John Voytko, a licensed CPA, was the chief financial officer. (Deposition of John Voytko, p. 36, l. 23 – p. 37, l. 4, attached as Exhibit B).

As a start-up company, cash flow was tight. (Voytko depo. at p. 151, ll. 5-12). To support the manufacture of these individual cell tower units and to provide financing for operations, Skywaves entered into a number of written agreements with BB&T, including a Factoring Agreement on or about March 22, 2005. (Factoring Agreement, attached as Exhibit C).

A. The Factoring Agreement

The Factoring Agreement detailed the terms of the financing agreement between BB&T and Skywaves. In signing it, Skywaves and BB&T agreed that the Factoring Agreement expressed "the entire understanding between the parties." Skywaves and BB&T executed the Factoring Agreement on March 22, 2005, and in doing so agreed that it "supersede[d] all prior and contemporaneous agreements and understandings, inducements and conditions, whether

[1] All exhibits are contained Defendants' Exhibits to Memoranda in Support of Motions for Summary Judgment and to Strike Plaintiff's Demand for Jury Trial.

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 . . . or amended orally or in any manner other than by an agreement in writing signed by the parties hereto." (Factoring Agreement at ¶24).

Under the Factoring Agreement, BB&T agreed to purchase certain accounts receivables of Skywaves and, as a result, own those accounts. (Factoring Agreement at ¶¶ 2, 3; Voytko depo. at p. 53, ll. 3-7; Konersmann depo. at p. 142, ll. 5-13). Skywaves agreed to sell and assign the accounts to BB&T and further agreed that all of Skywaves' rights with respect to the accounts vested in BB&T. (Factoring Agreement at ¶ 2). BB&T's purchase of the accounts was with its "full recourse to [Skywaves], and [Skywaves] assume[d] the risk of loss from the failure of an Account Debtor to pay at maturity, irrespective of the reason or cause of such nonpayment." (Factoring Agreement at ¶ 3).

As part of the account assignment to BB&T, "[e]ach invoice to an Account Debtor [was required to] state plainly on the face thereof that the Account . . .has been assigned and sold to, is owned by and is payable to BB&T only." (Factoring Agreement at ¶ 10). Skywaves contends that it objected to this requirement at the time because its customers could not accommodate two addresses for remitting payment in their systems and because their customers were not willing to make payment directly to a bank. (Voytko depo. at p. 63, l. 19 – p. 66, l. 15; Konersmann depo. at p. 191, l. 13 – p. 192, l. 18). However, there is nothing in writing or otherwise reflecting any amendment to this requirement in the Factoring Agreement, and BB&T repeatedly admonished Skywaves to put the required notification on invoices. (See *e.g.* February 15, 2006 e-mail; June 5, 2006 e-mail; February 14, 2007 e-mail, attached as Exhibit D).

In furtherance of BB&T's right to receive all payments upon the accounts, Skywaves also agreed that, in the event a customer on a factored account made payment directly to Skywaves, Skywaves, "as trustee of an express trust created for BB&T's benefit, shall hold such remittances as the property of BB&T, without comingling any such remittance with any funds or property of [Skywaves], and shall immediately turn over to BB&T the identical checks, monies . . . or other forms of remittance received." (Factoring Agreement at ¶ 8). Skywaves, however, now contends that it did not agree to remit money immediately to BB&T, because it "would not work" for the company, and it contends that it had 60 days from the customer due date on an invoice to remit that payment to BB&T. (Voytko depo. at p. 68, l. 20 – p. 69, l. 23; Konersmann depo. at p. 152, l. 3 – p. 153, l. 23). There is nothing in writing to evidence this alleged amendment to the Factoring Agreement, either.

Skywaves admits, without explanation or qualification, that it did not segregate or even have a separate account for payments it received upon factored invoices but, instead, commingled all money that came in. (Voytko depo. at p. 86, ll. 3-9). There is nothing in writing stating or suggesting that this requirement in the Factoring Agreement - that Skywaves segregate and remit to BB&T account payments it received - was amended.

As Skywaves was a startup company, BB&T understandably had some concerns over the viability of the company and in making sure the bank got repaid. To that end, Skywaves represented, covenanted and warranted to BB&T that it was "able to pay, does pay and will continue to pay its debts as they mature in the Ordinary Course of Business [and] the financial statement last provided to BB&T accurately states [Skywaves'] financial condition and there has not been any material adverse change in the financial condition or business prospects of

[Skywaves] since the date of such financial statement." (Factoring Agreement at ¶ 7). Skywaves had a continuing obligation for these representations under the Factoring Agreement.

Indeed, Skywaves had certain financial reporting obligations under the Factoring Agreement to "keep adequate records and books of account with respect to its business activities" and to furnish to BB&T "within 30 days after the end of each month . . . unaudited interim financial statements . . . on a consolidated and consolidating basis, certified by the principal financial officer of [Skywaves] as prepared in accordance with GAAP . . . ." (Factoring Agreement at ¶ 21(b)). Skywaves often presented interim financial statements late, beyond the 30-day time period, and it does not contend that these reporting requirements in the Factoring Agreement were amended. (Voytko depo. at p. 55, ll. 7 – 17).

B. Renewal of and Amendments to the Factoring Agreement to Include Purchase Orders

Skywaves began factoring invoices in late 2005. (Voytko depo. at p. 59, ll. 11-16). Prior to that time, the Factoring Agreement was amended to reduce the commission structure in Skywaves' favor to accommodate its expectations. (June 1, 2005 Letter, Exhibit C1). Indeed, BB&T entered into several written amendments to the Factoring Agreement in an effort to accommodate Skywaves throughout the life of their relationship.

The Factoring Agreement was scheduled to expire on March 21, 2006, but was automatically renewed for another year. (Exhibit C at ¶ 19). It was then amended in writing on May 11, 2006, to reflect an increase in the maximum credit allowed to Skywaves to $1,750,000, and to modify the commission structure in a manner more favorable to Skywaves. (Exhibit C2, May 2006 Amendment to Factoring Agreement.) All other terms and conditions of the March 22, 2005 Factoring Agreement remained in effect. (Exhibit C2).

Skywaves was not profitable in 2006. (Konersmann depo. at p. 221, ll. 5-7). As time continued, BB&T indulged Skywaves' request to factor purchase orders for one client, Nextel, and began considering the addition of another customer, Cingular. (Voytko depo. at p. 72, l. 9 – p. 73, l. 13; March 25, 2006 e-mail, attached as Exhibit E). If a purchase order were factored, Skywaves received a smaller percentage from BB&T on the purchase order than it received on invoices. If and when the purchase order converted to an invoice, the amount that had been factored on the purchase order was deducted and then Skywaves received the remaining balance available to be factored on the invoice. (Voytko depo. at p. 168, ll. 3-19). If no purchase order was involved and only the invoice was factored, then Skywaves received the full advance available on that invoice. (*Id.*). Eventually, the Factoring Agreement was amended to reflect the factoring of purchase orders for all of Skywaves' clients, in addition to invoices.

C. BB&T's Continuing Commitment to Skywaves

BB&T was committed to funding Skywaves' business needs, as appropriate, and according to Skywaves, confirmed that commitment in the March or April timeframe of 2007. (Konersmann depo. at p. 301, ll. 8-22). As explained by Skywaves, BB&T assured the company that the bank "would work with us" to provide our needs. (Konersmann at p. 295, ll. 14-25). Indeed, as part of its commitment, BB&T renewed the Factoring Agreement that was set to expire in March of 2007, so that their relationship continued into 2007.

As part of the renewal, BB&T increased the factoring line available to Skywaves under the Factoring Agreement, agreed to finance purchase orders for all customers, modified the commission schedule still further, and agreed to repayment terms of interest only monthly, with the principal due at maturity on April 5, 2008. (March 2, 2007 Renewal Letter, attached as Exhibit C3).

On March 2, 2007, BB&T wrote to Skywaves, outlining these modifications to the terms of the Factoring Agreement as part of the renewal, to include an increased $3,500,000 limit on outstanding advances made, with a $2,000,000 sub-limit for advances upon purchase orders. The advance rates were 85% for invoices and 60% for purchase orders. (Exhibit C3). Further still, on March 14, 2007, BB&T increased the amount of the advance rate for purchase orders to 65%. (March 14, 2007 Letter, attached as Exhibit C4). Both of the March letters confirmed that: "All other terms and conditions remain the same." (Exhibits C3, C4).[2]

As part of its on-going effort to work with Skywaves, in the March 2, 2007 letter to Skywaves, BB&T noted:

> ***Assuming Skywaves 2007 budget previously submitted to BB&T is achieved,*** [BB&T] ***will consider*** further changes in the structure of the line as to rates and terms ***once the final year 2007 financial statements become available***.

(Exhibit C3)(emphasis added).

The original 2007 Forecast provided by Skywaves projected total net income of $1.4 million. (2007 Projected Financials, attached as Exhibit G). Skywaves did not meet its 2007 budget. (Voytko depo. at p. 119, ll. 3-12).

D. Skywaves' Financial Struggles

Skywaves did not come close to meeting any of its projections in 2007. In May of 2007, Skywaves provided to BB&T for the first time its financial statements for the first quarter of 2007. (Actual Financials for Q1 2007, attached as Exhibit G1). In the first three months of 2007, Skywaves' net income declined, against a projected increase. For example, the budgeted net income for January of 2007 was $98,835, but was actually $47,629.47; the budgeted net

[2] BB&T also sent an Amendment to the Factoring Agreement to reflect the increased advance percentage on invoices and the overall increase in the factoring limit. (2007 Amendment to Factoring Agreement, Exhibit C5). The Amendment document did not reference the purchase order financing, instead allowing the March 2007 letters to confirm those rates. (March 20, 2007 e-mail, attached as Exhibit F).

income for February of 2007 was $98,835, compared to the actual net income of ($31,227.29) [a loss in this amount]; and the budgeted net income for March of 2007 was $116,835, but was actually ($35,250.18) [a loss in this amount]. Part of the explanation provided in May of 2007 for the low numbers in the first quarter of 2007 was a delay in the General Dynamics project in New York. Skywaves explained that it expected the project to start back up in July of 2007. (Exhibit G1).

In September of 2007, Skywaves provided a revised forecast to BB&T for the remainder of 2007, with notes explaining the reason for the revisions. The notes included the explanation that there was a further delay in the General Dynamics project in New York. (Revised 2007 Forecast, attached as Exhibit G2).

The revised forecast included the actual financials for the second quarter of 2007: April, May and June. Notably, the budgeted net income for April of 2007 was $116,835, compared to the actual net income of ($94,919) [a loss in this amount]; the budgeted net income for May of 2007 was $116,835, compared to the actual net income of ($117,245) [a loss in this amount]; and the budgeted net income for June of 2007 was $134,835, compared to the actual net income of ($121,200) [a loss in this amount].

The revised projections for the remainder of 2007 lowered the net income expectations for each month from the original projections that had been provided. The revised projections went from an overall year-end net income projected to be $1,429,022, to the revised projected year-end net income of ($120,532) [a loss in this amount]. (Exhibit G2).

Notably, in August of 2007, BB&T reached out to Skywaves with a concern that the company had waited approximately six weeks before remitting payment from a customer to the bank. (Voytko depo. at p. 150, l. 21 – p. 151, l. 24; September 2007 Notes, attached as Exhibit

H). Skywaves explained that money was a little tighter than usual and that it held onto the customer payment a little longer than usual. (Exhibit H). BB&T reminded Skywaves that payments received could not be held by Skywaves and that doing so could result in a cancelation of the Factoring Agreement. (Voytko depo. at p. 153, l. 1 – p. 154, l. 3; Exhibit H).

E. Factoring of Site Plans

Because of the repeated problems with the General Dynamics contract, in July of 2007, Skywaves asked BB&T to consider advancing funds on site plans for General Dynamics through December. (Konersmann depo. at p. 303, l. 9 – p. 304, l. 20). The site plans identified locations where General Dynamics anticipated placing cell towers with shelters built by Skywaves under a master contract General Dynamics had with Skywaves. Skywaves attempted to get actual purchase orders for the site plans, but did not. (Konersmann depo. at p. 310, ll. 1-23). There is nothing in writing evidencing any agreement to indulge Skywaves' request and finance site plans. BB&T indulged Skywaves' request and factored site plans through the end of the year.

F. December of 2007/January of 2008

In November of 2007, Skywaves provided BB&T with the actual financial statements for August and September. (November 5, 2007 e-mail with Financial Reports, attached as Exhibit G3). The actual net income numbers were even lower than the revised projected numbers Skywaves had sent to BB&T less than two months earlier. (Voytko depo. at p. 163, ll. 14-17). Specifically, the revised projected net income for August of 2007 was ($114,600) versus the actual net income of ($146,508) [a loss in this amount]; and the revised projected net income for September of 2007 was ($79,970) versus the actual net income of ($149,942) [a loss in this amount].

On December 14, 2007, Skywaves sent an invoice assignment to BB&T, requesting an 85% advance on it. (December 14, 2007 e-mail, attached as Exhibit I). However, no advance could be made because there was no availability under the $3,500,000 limit. (Exhibit I).

In January 17, 2008, BB&T made a visit to Skywaves' warehouse, where Skywaves gave a presentation to the new BB&T employee handling the factoring relationship. (Voytko depo. at p. 169, ll. 15 – p. 170, l. 1; Konersmann at p. 337, ll. 1-16). At that visit, Skywaves provided to BB&T its year-end actual financial statements for 2007. (Voytko depo. at p. 173, ll. 10-17).

The year-end financial statements were shocking, at best. The actual net income for October of 2007 was ($143,295) [a loss in this amount]; for November of 2007 it was ($251,888) [a loss in this amount]; and for December of 2007 it was ($197,238) [a loss in this amount]. Skywaves' year-end actual net income was ($1,398,349) [losses in this amount]. (Exhibit G3). The $1,398,349 loss in 2007 was in stark contrast to the company's original forecast of a year-end net income of $1,400,000. (Compare Exhibit G to G3). Furthermore, the actual loss for 2007 was $1,275,000 larger than the revised forecast projection of a year-end loss of $120,532, which Skywaves had presented to BB&T just four months earlier in September, 2007. (Compare Exhibit G2 to G3). The year-end net income of negative $1.4 million showed BB&T that the company was in trouble.

G. Skywaves Default

BB&T was distressed to learn of the dire financial straits of Skywaves. After investigating matters further, on January 25, 2008, BB&T notified Skywaves that it was in default of the March 22, 2005 Factoring Agreement. (January 25, 2008 Letter, Exhibit J). The letter specifically identified the following defaults:

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

At the time, BB&T was not aware of the approval of the site plan factoring and believed Skywaves to have submitted the site plans improperly as purchase orders. However, while troubling, BB&T did not call a default under the Factoring Agreement based upon site plan financing.

BB&T further informed Skywaves that:

> At this time, as a result of the default and/or in exercise of rights granted to it in the Agreement (regardless of the existence of a default), BB&T will make no further Advances (as defined in the Agreement). Additionally, BB&T is hereby demanding payment of the Obligations due under the Agreement (including any Advances outstanding).
>
> You are further advised that, at the present time, BB&T is exercising its right to terminate its further performance under the Agreement. This action, together with BB&T's election to provide [sic] further Advances, for the present time, terminates any obligation that BB&T might have to provide any additional funding to Skywaves.

(Exhibit J).

As for BB&T calling the default under the Factoring Agreement, Skywaves acknowledged, ultimately, that, based on the "paperwork," BB&T "certainly can do what they want to do." (Konersmann depo. at p. 139, l. 22 – p. 140, l. 15). Skywaves also admitted that a lot of the Factoring Agreement was "protecting the bank, which is fine, you know, it's their money and we're borrowing it so if anything happens, they should be the person to try to, you know, get all of their money back." (Konersmann depo. at p. 169, l. 24 – p. 170- l. 4).

1. Failure to Remit Payment

Nevertheless, in the lawsuit, Skywaves contends that BB&T's assertion of default based on Skywaves' failure to remit account payments immediately pursuant to Paragraph 8 of the Factoring Agreement was "contrary to the agreement we had and that we had operated under for three years." (Voytko depo. at p. 190, ll. 17-25). Skywaves does not state or even suggest that it objected to this provision in the Factoring Agreement when it executed the agreement. Instead, Skywaves disregards Paragraph 8 and unilaterally contends that it had 60 days from the customer due date to remit the customer's payment to BB&T. (Voytko depo. at p. 68, l. 20 – p. 69, l. 23; Konersmann depo. at p. 124, l. 20- p. 125, l. 10). Skywaves has nothing in writing to evidence this alleged "60-day" agreement. Skywaves does admit, however, that if it went beyond 60 days without remitting payment to BB&T, it was not in compliance with the Factoring Agreement. (Konersmann depo. at p. 138, ll. 1-10).

The Factoring Agreement provides that any modifications to it or waivers of rights under it must be in writing signed by the parties.[3] There is no written agreement modifying the requirements in Paragraph 8 of the Factoring Agreement, no written waiver of rights under Paragraph 8 signed by BB&T, and no written agreement stating the 60-day period for remittance of account/customer payments alleged by Skywaves. Skywaves admits that payments for four items were "48 days late past the customer due date," but contends that no default existed because the payments were not outside the 60-day time period Skywaves alleges had been agreed. (Konersmann at p. 141, ll. 2-14).

[3] In regard to possible modification, the Factoring Agreement includes the following provision: "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." (Exhibit C at ¶ 24). In regard to possible waiver of rights by a party, the Factoring Agreement provides that, "No waiver by a party hereunder shall be effective unless it is in writing and signed by the party making such waiver, and then only to the extent specifically stated in writing." (Exhibit C at ¶ 23).

2. Failure to Pay Debts

Skywaves disputed that it was not paying its debts as they mature in the ordinary course of business (with approximately 37% of its payables over 60 days). According to Skywaves, 25% of the payables were to StructurTech, one of its vendors, owned by Franz Meier, and, although Skywaves was "technically late with Franz" and he "certainly was concerned about it," he had agreed to give Skywaves an extension of terms. (Voytko depo. at p. 194, l. 15 – p. 195, l. 2; Konersmann at p. 342, l. 16 – p. 343, l. 21). Skywaves did not provide to BB&T at the time, nor has it since provided any evidence of an agreement by Mr. Meier to extend the payments terms for the Skywaves' debt to him. More importantly, however, Skywaves agrees that 12% of its payables to various vendors was over 60 days old. (Voytko depo. at p. 206, l. 24 – p. 207, l. 7).

3. Impaired Ability to Repay

At the time BB&T called Skywaves in default based on BB&T's good faith belief that its prospects of payment to it or performance of Skywaves' obligations under the Factoring Agreement were impaired, the following conditions existed:

(a) Skywaves had reached the $3.5 million maximum factoring allowed under the Factoring Agreement, which included a sublimit of $2 million for purchase orders, such that no further advances could be made, or, if some availability existed, the amount would be limited and insufficient to fund Skywaves' operations (Exhibit I);

(b) Instead of achieving net income of $1.4 million in 2007 as it originally projected, Skywaves lost approximately $1.4 million in 2007;

(c) The revised forecast given by Skywaves to BB&T in September, 2007, which projected a year-end loss of $120,532, proved to be alarmingly wrong, in that it underestimated the year-end loss by nearly $1.2 million;

(d) Skywaves' payments due to its vendors, including StucturTech, were not current;

(e) Skywaves was not immediately remitting account/customer payments it received to BB&T, or even segregating such payments, but instead was comingling such payments with other funds; and

(f) The Factoring Agreement was set to expire in less than 90 days, on April 5, 2008, at which time all indebtedness due to BB&T under the Factoring Agreement would mature and become due for payment. (March 2, 2007 Renewal Letter, attached as Exhibit C3).

Skywaves does not and cannot explain how its ability to repay BB&T in full was not impaired. Skywaves seems to suggest that an infusion of money from investors solved the problem or that they had "two or three million dollars of work" and their "purchase orders were going up and that would allow the cash flow to catch up on some of this." (Konersmann depo. at p. 345, ll. 3-14).

Skywaves wholly ignores, however, that its repayment obligation would be at least the full $3.5 million. Moreover, Skywaves had reached its financing limit at $3.5 million, as of December 17, 2007. Skywaves has not indicated how it intended to obtain additional funding in a sufficient amount to give it cash flow to fill any customer orders.

Instead of addressing or refuting any of the concerns raised by BB&T in January of 2008, in response to the default notification, Skywaves expressly indicated its "sincere appreciation and regret for the mistakes made in the past dealing with the bank" while it attempted to piece

together a "rescue plan" which included additional financing and a number of items Skywaves was requesting from BB&T, including: "the immediate reopening of the line of credit to fund existing, new purchase orders and invoices. And second, the recategorization of the non-conforming $1.6M together with a new advance of $500K as a separate commercial loan outside the line of credit." (February 8, 2008 e-mail from Earl Hewlette, attached as Exhibit K).

In other words, instead of addressing BB&T's concerns, Skywaves requested that BB&T take $1.6 million of the Skywaves debt off of the amount due under the Factoring Agreement, which would be recategorized as something else, and make a new $500,000 loan to Skywaves separate and apart from the Factoring Agreement. These requests alone show that Skywaves' ability to repay its obligations to BB&T was seriously impaired.

H. Skywaves' Bankruptcy and the Lawsuit

BB&T was not willing to agree to the terms proposed by Skywaves, which included the bank advancing additional funds with no security or assurance of payment. Ultimately, the parties were not able to reach any agreement, and Skywaves filed for bankruptcy. Skywaves blames its bankruptcy on BB&T and has sued, alleging causes of action against BB&T for: (1) breach of contract; (2) breach of contract accompanied by fraudulent acts; (3) promissory estoppel; (4) breach of covenant of good faith and fair dealing; (5) negligent misrepresentation; and (6) negligence.[4] Because Skywaves breached the terms of the Factoring Agreement, BB&T had the right to declare a default. For the reasons that follow, BB&T is entitled to summary judgment, as a matter of law, on all of Skywaves' claims.

[4] Skywaves originally asserted 8 causes of action; however, this Court dismissed two of them, such that there are only 6 pending claims. *See* November 8, 2011 Order Granting Partial Motion to Dismiss and June 15, 2012 Order Granting Motion to Reconsider.

III. STANDARD OF REVIEW

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. Summary judgment should be granted "when it is clear that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Toomer v. Norfolk S. Ry Co.*, 344 S. C. 486, 492-93, 544 S.E.2d 634, 637 (Ct. App 2001). Moreover, this Court is not "required to single out some one morsel of evidence... to create an issue of fact that is not genuine." *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993).

It is also well settled that, when a party establishes entitlement to judgment as a matter of law, the Court must grant summary judgment unless the other party comes forward with other evidence giving rise to a genuine issues of fact. *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 407 S.E.2d 637, 638 (1991). "A party's response to the motion must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him." *Dickert v. Metropolitan Life Ins. Co.*, 306 S.C. 311, 411 S.E.2d 672 (Ct. App. 1992). Because there is no genuine issue of material fact with regard to any of Skywaves' claims against BB&T, BB&T is entitled to summary judgment.

IV. LEGAL ARGUMENT

The Factoring Agreement provides that "[a]ll 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." (Exhibit C at ¶ 25). Choice of law clauses are generally honored in South Carolina, unless application of the designated state's law would

result in a violation of South Carolina public policy. *Team IA, Inc. v. Lucas*, 395 S.C. 237, 249, 717 S.E.2d 103, 108-09 (Ct. App. 2011). In this case, North Carolina law applies to Skywaves' claims for breach of contract and promissory estoppel. As to the remaining claims, South Carolina law applies.

With regard to the claim for breach of the implied covenant of good faith and fair dealing, South Carolina does not recognize such a claim separate and apart from a breach of contract claim, such that applying North Carolina law would result in a violation of South Carolina's public policy. *See RoTec Servs., Inc., v. Encompass Servs., Inc.*, 359 S.C. 467, 472-73, 597 S.E.2d 881, 883-84 (Ct. App. 2004); *see also Ameristone Tile, LLC v. Ceramic Consulting Corp., Inc.*, 966 F. Supp. 2d 604, 618 (D.S.C. 2013).

As for the remaining claims, which are premised on alleged torts, under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the state in which the injury occurred." *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 143, 494 S.E.2d 449, 454 (Ct. App. 1997); *see also Dawkins v. State*, 306 S.C. 391, 392-93, 412 S.E.2d 407, 408 (1991). North Carolina choice of law principles are the same. *See Harco Nat. Ins. Co. v. Grant Thornton LLP*, 206 N.C. App. 687, 692, 698 S.E.2d 719, 722-23 (N.C. Ct. App. 2010) ("For actions sounding in tort, the state where the injury occurred is considered the situs of the claim.)

A. Breach of Contract: BB&T Did Not Breach the Factoring Agreement By Declaring a Default and, Thus, is Entitled to Summary Judgment.

Skywaves' first claim is for breach of the Factoring Agreement. (Am. Compl. ¶¶ 26-32). Specifically, Skywaves alleges that BB&T breached the "modified factoring agreement" by "failing to perform its obligations thereunder and by terminating the parties' agreement without cause." (*Id.* at ¶¶ 28, 31). Under North Carolina law, the elements of breach of contract are: (1)

the existence of a valid contract and (2) breach of the terms of the contract. *Long v. Long*, 160 N.C. App. 664, 668 (2003).[5] "[W]hen the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court, and the court cannot look beyond the terms of the contract to determine the intentions of the parties." *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 207, 652 S.E.2d 701, 709 (N.C. Ct. App. 2007) (internal quotations omitted). Thus, "it must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean." *Id.* Here, Skywaves' claim for breach of contract fails as a matter of because it has not identified any instance whereby BB&T failed to perform its obligations under the agreement or that terminating the agreement otherwise constituted a breach of the agreement.

1. Skywaves Admits it Failed to Pay Debts that Were Due.

In its January 25, 2008 Letter, BB&T specifically outlined certain non-exclusive reasons for declaring a default, including Skywaves' failure to pay debts as due in the ordinary course of business. (Exhibit J). Included in the list of events of default under the Factoring Agreement is "any breach, violation or default of any covenant, warranty or undertaking in this Agreement." (Exhibit C at ¶ 12(b)). In the Factoring Agreement, Skywaves expressly represented, covenanted and warranted to BB&T that it "is able to pay, does pay and will continue to pay its debts as they mature." (Exhibit C at ¶ 7(b)). Accordingly, Skywaves' failure to comply with this representation and covenant constitutes a breach of the Factoring Agreement.

[5] South Carolina's law is essentially the same. To recover for breach of contract under South Carolina law, Plaintiff must prove by a preponderance of the evidence: (1) the existence of a valid contract; (2) breach of the contract; and (3) damages proximately caused by the breach. *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 271-72, 705 S.E.2d 73, 76 (Ct. App. 2010) (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)).

Skywaves does not contend that is objected to this provision in the Factoring Agreement or that it was somehow amended or modified. Instead, Skywaves appears to be arguing that it was not breached because the company was paying its debts as they matured, disagreeing with some, but not all, of the examples BB&T gave of the debts that were not being paid. Skywaves' argument fails, as a matter of law.

BB&T highlighted that approximately 37% of Skywaves' payables were over 60 days due. According to Skywaves, 25% of those payables were to StructurTech, one of its vendors, which was owned by Franz Meier. Although Skywaves admits it was "technically late with Franz" and he "certainly was concerned about it," the company contends Mr. Meier had agreed to give Skywaves an extension of terms. (Voytko depo. at p. 194, l. 15 – p. 195, l. 2; Konersmann at p. 342, l. 16 – p. 343, l. 21). However, Skywaves does not dispute that the debt was due and owing to StructurTech and had not been paid. Indeed, according to Mr. Meier, he had "assumed more debt than [he] intended" and the "amounting receivables have now put StructurTech in serious trouble. (Konersmann depo. at p. 347, ll. 5-24; January 31, 2008 memo from Franz Meier, attached as Exhibit L). Regardless, Skywaves did not provide to BB&T at the time, nor has it since provided, any evidence of an agreement by Mr. Meier to extend the payments terms for the Skywaves' debt to him.

More importantly, however, Skywaves admits and agrees that 12% of its payables to various vendors was over 60 days old. (Voytko depo. at p. 206, l. 24 – p. 207, l. 7). On this basis alone, Skywaves was in breach of the Factoring Agreement, and BB&T was entitled to call a default. "[W]hen parties have dealt at arms length and contracted, the Court cannot relieve one of them because the contract has proven to be a hard one." *Bald Head Island Utilities, Inc. v.*

Village of Bald Head Island, 165 N.C. App. 701, 704, 599 S.E.2d 98, 99 (N.C. Ct. App. 2004). Accordingly, Skywaves' claim for breach of contract should be dismissed, as a matter of law.

2. Skywaves Admits it Did Not Immediately Remit Payment to BB&T.

Additionally, BB&T identified other non-exclusive reasons for declaring a default, including Skywaves' failure to remit payment immediately to BB&T. Pursuant to Paragraph 8 of the Factoring Agreement, if any customer of Skywaves remitted payment to Skywaves on an invoice that had been factored by BB&T, Skywaves was to "hold such remittances as the property of BB&T, without commingling any such remittance with any funds or property of [Skywaves] and shall immediately turn over to BB&T the . . . remittance received." (Exhibit C at ¶ 8). Notably, BB&T identified at least eight instances where funds had been received by Skywaves and not remitted immediately to BB&T. (February 11, 2008 Letter from Steve Licata, Exhibit M).

Skywaves admits payments were not remitted immediately to BB&T[6] but, nevertheless, disregards Paragraph 8 and unilaterally contends that it had 60 days from the customer due date to remit the customer's payment to BB&T. (Voytko depo. at p. 68; l. 20 – p. 69, l. 23; Konersmann depo. at p. 124, l. 20- p. 125, l. 10). However, Skywaves has nothing in writing to evidence this alleged "60-day" agreement. Indeed, the Factoring Agreement provides that any modifications to its terms must be in writing signed by the parties: "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." (Exhibit C at ¶ 24). There is no written agreement modifying the requirements in

[6] Skywaves admits that payments for four items were "48 days late past the customer due date." (Konersmann at p. 141, ll. 2-14).

Paragraph 8 of the Factoring Agreement, and no written agreement stating the 60-day period for remittance of account/customer payments alleged by Skywaves.

Skywaves seems to suggest that, because BB&T had never called a default in the past on the failure to remit payment immediately, the bank could not do so at any point in time. However, as expressly stated in the Factoring Agreement: "Neither the failure . . . on the part of BB&T to exercise any right" under the Factoring Agreement "shall operate as a waiver thereof . . . nor be construed as an agreement to modify the terms of this Agreement." (Exhibit C at ¶ 23). Notably, in August of 2007, BB&T reached out to Skywaves with a concern that the company had waited approximately six weeks before remitting payment from a customer to the bank. (Voytko depo. at p. 150, l. 21 – p. 151, l. 24; September 2007 Notes, attached as Exhibit H). Skywaves explained that money was a little tighter than usual and that it held onto the customer payment a little longer than usual. (Exhibit H). BB&T reminded Skywaves that payments received could not be held by Skywaves and that doing so could result in a cancelation of the Factoring Agreement. (Voytko depo. at p. 153, l. 1 – p. 154, l. 3; Exhibit H).

Regardless, Skywaves ignores that, as of February 11, 2008, BB&T identified at least eight payments that had been received by Skywaves and not immediately remitted to BB&T, totaling in excess of $340,000. (February 11, 2008 Letter, attached as Exhibit M). Of the payments identified by BB&T on February 11, 2008, as having been received by Skywaves and not yet paid to BB&T, one is dated December 5, 2007 and another is dated December 11, 2007. So, even under Skywaves' 60-day theory, Skywaves received customer payments, did not immediately remit the received funds to BB&T, and did not segregate the funds.

Tellingly, in response to BB&T's identification of the instances where funds had not been segregated or remitted to BB&T, Skywaves at least tacitly admitted the diversion of funds but

indicated "at no time has SkyWaves or any of its officers diverted funds advanced by BB&T or receivables due to BB&T for purposes outside the operation of SkyWaves' business . . ." (February 26, 2008 Memo from Earl Hewlette, attached as Exhibit K). Skywaves' failure to segregate client funds and remit payment immediately to BB&T constitute another breach of the Factoring Agreement, supporting BB&T's declaration of default and providing an additional basis to dismiss Skywaves' claim for breach of contract.

3. BB&T Determined that Skywaves' Ability to Repay the Bank was Impaired.

The Factoring Agreement also identified as a ground for default if BB&T "for any reason" deemed itself insecure. (Exhibit C at ¶ 12(l)). At the time BB&T called Skywaves in default, BB&T had a good faith belief that its prospects of payment to it or performance of Skywaves' obligations under the Factoring Agreement were impaired, and Skywaves cannot show or otherwise even suggest otherwise.

Indeed, the year-end financial statements for 2007, which BB&T received in January of 2008, were shocking, at best. The actual net income for October of 2007 was ($143,295) [a loss in this amount]; for November of 2007 it was ($251,888) [a loss in this amount]; and for December of 2007 it was ($197,238) [a loss in this amount]. Skywaves' year-end actual net income was ($1,398,349) [losses in this amount]. (Exhibit G3). The $1,398,349 loss in 2007 was in stark contrast to the company's original forecast of a year-end net income of $1,400,000. (Compare Exhibit G to G3). Furthermore, the actual loss for 2007 was $1,275,000 larger than the revised forecast projection of a year-end loss of $120,532, which Skywaves had presented to BB&T just four months earlier in September, 2007. (Compare Exhibit G2 to G3). The year-end net income of negative $1.4 million showed BB&T that the company was in trouble, and Skywaves cannot seriously suggest otherwise.

As set forth in detail above, the following conditions existed at the time BB&T determined Skywaves was in default:

(a) Skywaves had reached the $3.5 million maximum factoring allowed under the Factoring Agreement, which included a sublimit of $2 million for purchase orders, such that no further advances could be made, or, if some availability existed, the amount would be limited and insufficient to fund Skywaves' operations (Exhibit I);

(b) Instead of achieving net income of $1.4 million in 2007 as it originally projected, Skywaves lost approximately $1.4 million in 2007;

(c) The revised forecast given by Skywaves to BB&T in September, 2007, which projected a year-end loss of $120,532, proved to be alarmingly wrong, in that it underestimated the year-end loss by nearly $1.2 million;

(d) Skywaves' payments due to its vendors, including StucturTech, were not current;

(e) Skywaves was not immediately remitting account/customer payments it received to BB&T, or even segregating such payments, but instead was comingling such payments with other funds; and

(f) The Factoring Agreement was set to expire in less than 90 days, on April 5, 2008, at which time all indebtedness due to BB&T under the Factoring Agreement would mature and become due for payment. (March 2, 2007 Renewal Letter, attached as Exhibit C3).

Skywaves does not and cannot explain how its ability to repay BB&T in full was not impaired. Skywaves seems to suggest that an infusion of money from investors solved the problem or that they had "two or three million dollars of work" and their "purchase orders were going up and that would allow the cash flow to catch up on some of this." (Konersmann depo. at p. 345, ll. 3-14). Skywaves wholly ignores, however, that its repayment obligation would be at

least the full $3.5 million. Moreover, Skywaves had reached its financing limit at $3.5 million, as of December 17, 2007. Skywaves has not indicated how it intended to obtain additional funding in a sufficient amount to give it cash flow to fill any customer orders.

Instead of addressing or refuting any of the concerns raised by BB&T in January of 2008, in response to the default notification, Skywaves expressly indicated its "sincere appreciation and regret for the mistakes made in the past dealing with the bank" while it attempted to piece together a "rescue plan" which included a number of additional financing and items Skywaves was requesting from BB&T, including: "the immediate reopening of the line of credit to fund existing, new purchase orders and invoices. And second, the recategorization of the non-conforming $1.6M together with a new advance of $500K as a separate commercial loan outside the line of credit." (February 8, 2008 e-mail from Earl Hewlette, attached as Exhibit K). In other words, instead of addressing BB&T's concerns, Skywaves requested that BB&T take $1.6 million of the Skywaves debt off of the amount due under the Factoring Agreement, which would be recategorized as something else, and make a new $500,000 loan to Skywaves separate and apart from the Factoring Agreement. These requests alone show that Skywaves' ability to repay its obligations to BB&T was seriously impaired and provide yet another basis to support the default and to dismiss Skywaves' breach of contract claim.

B. Breach of Contract Accompanied by a Fraudulent Act: BB&T Did Not Breach the Factoring Agreement and, Thus, is Entitled to Summary Judgment.

Skywaves' second claim is for breach of contract accompanied by a fraudulent act. (Am. Compl. ¶¶ 33-39). Specifically, Skywaves alleges that BB&T "pretextual[ly]" breached the Factoring Agreement. (*Id.* at ¶ 35). To recover for breach of contract accompanied by a fraudulent act, Skywaves must show: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act

accompanying the breach. *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002).

As an initial matter, Skywaves cannot establish a breach of contract. Thus, as a matter of law, Skywaves cannot then establish a claim for breach of contract accompanied by a fraudulent act. It necessarily follows that without a breach of contract, there can be no claim for breach of contract accompanied by a fraudulent act. *Peeples v. Orkin Exterminating Co.*, 244 S.C. 173, 178, 135 S.E.2d 845, 847 (Ct. App. 1985).

Moreover, Skywaves cannot show any "fraudulent intent" or "fraudulent act" relating to the alleged breach of contract. *See e.g. Floyd v. Country Squire Mobile Homes*, 287 S.C. 51, 53, 336 S.E.2d 502, 503 (Ct. App. 1985) (breach of a contract, even if willful or with fraudulent purpose, is not sufficient to entitle a plaintiff to go to the jury on the issue of punitive damages); *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 142, 494 S.E.2d 449, 454 (Ct. App. 1997).

Skywaves seems to suggest that Jim Edahl's denial in January of 2008 that he had approved site plan financing and subsequent admission that he had approved site plan financing somehow supports this claim. However, Skywaves wholly ignores that BB&T actually indulged Skywaves' request for site plan financing and provided it for the remainder of 2007 on the General Dynamics site plans. More importantly, BB&T did not call a default under the Factoring Agreement on the basis that site plans had been financed. Where there is no evidence of an independent fraudulent act which accompanied a contract breach, the defendant is entitled to judgment as a matter of law. *See McNair v. Rainsford*, 330 S.C. 332, 358-59, 499 S.E.2d 488, 502 (Ct. App. 1998) (affirming summary judgment where plaintiff did not allege fraud with particularity and failed to offer evidence of fraud); *see also Minter v. GOCT, Inc.*, 322 S.C. 525,

529-30, 473 S.E.2d 67, 70-71 (Ct. App. 1996) (independent evidence of fraud must accompany the alleged breach).

Under the foregoing circumstances, Skywaves cannot, as a matter of law, establish a claim for breach of contract accompanied by a fraudulent act, and BB&T is entitled to summary judgment on this claim.

C. North Carolina Does Not Recognize Affirmative Claims of Promissory Estoppel, Such that BB&T is Entitled to Summary Judgment.

Skywaves' third claim is for promissory estoppel. (Am. Compl. ¶¶ 40-45). Specifically, Skywaves alleges that BB&T made "unambiguous promises to Plaintiff that it would provide capital financing to Skywaves" that Skywaves "acted in reasonable reliance upon these promises" and "sustained injury." (*Id.* at ¶¶ 41, 42, 45). North Carolina does not recognize offensive or affirmative claims for promissory estoppel but, instead, only recognizes promissory estoppel as an equitable defense. As such, under North Carolina law, Skywaves' affirmative claim for promissory estoppel fails, as a matter of law. *See Penguin Restoration, Inc. v. Nationwide Mut. Ins. Co.*; 2013 WL 4419355, at *2 (M.D. N.C. Aug. 15, 2013) (granting defendant's 12(b)(6) motion on plaintiff's promissory estoppel claim because North Carolina state courts have stated emphatically that promissory estoppel "has only been permitted in North Carolina for defensive relief." (*citing Home Elec. Co. of Lenoir, Inc. v. Hall and Underdown Heating and Air Conditioning Co.*, 86 N.C. App. 540, 543 (1987)).[7]

[7] Even under South Carolina law, however, this claim fails as a matter of law. To establish a promissory estoppel claim in South Carolina, Skywaves must show: (1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise. *Rushing v. McKinney*, 370 S.C. 280, 295, 633 S.E.2d 917, 925 (Ct. App. 2006). Notwithstanding that a vague alleged promise "to provide capital financing" is ambiguous, at best, and provides no terms whatsoever, any reliance upon such a statement is unreasonable, as a matter of law, in light of the express provisions in the Factoring Agreement that it encompasses the entire agreement between the parties. (Exhibit C at ¶ 24)

D. South Carolina Does Not Recognize a Separate Cause of Action for Breach of the Covenant of Good Faith and Fair Dealing and, Thus, BB&T is Entitled to Summary Judgment.

Skywaves' fourth claim is for breach of the covenant of good faith and fair dealing that is "implied in the contract between Plaintiff and BB&T." (Am. Compl. ¶ 47). An alleged breach of the implied covenant of good faith and fair dealing does not create an ***independent*** or ***separate*** cause of action in South Carolina and is instead subsumed by a claim for breach of contract. *RoTec Servs., Inc., v. Encompass Servs., Inc.*, 359 S.C. 467, 472-73, 597 S.E.2d 881, 883-84 (Ct. App. 2004) ("[W]e conclude that the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract."); *see also Ameristone Tile, LLC v. Ceramic Consulting Corp., Inc.*, 966 F. Supp. 2d 604, 618 (D.S.C. 2013) (dismissing breach of implied covenant claim after plaintiff conceded it is not a separate cause of action). Because Skywaves' claim does not exist as a separate or independent cause of action in South Carolina, BB&T is entitled to summary judgment, as a matter of law.[8]

E. Skywaves' Claims for Promissory Estoppel, Negligence and Negligent Misrepresentation are Statutorily Barred and, Thus, BB&T is Entitled to Summary Judgment.

Skywaves' claims for promissory estoppel, negligence and negligent misrepresentation appear to be based upon an alleged oral promise to "provide capital financing" for Skywaves or to "fund Skywaves' financing needs." To the extent these claims are for alleged oral promises outside the confines of the Factoring Agreement, they are statutorily barred, as a matter of law. South Carolina has a statute that bars enforcement of oral lending agreements and bars claims based on alleged oral misrepresentations and other non-written conduct concerning these loan

[8] Even under North Carolina law, BB&T is entitled to summary judgment. In North Carolina, to state a separate claim for breach of the implied covenant of good faith and fair dealing, a "plaintiff must allege a specific implied contractual obligation and allege how the violation of that obligation denied that plaintiff the fruits of the contract." *Scott v. Lackey*, 2012 WL 6017776, at *14 (N.C. Super. Dec. 3, 2012). Skywaves has not and cannot identify any implied obligation that was breached and denied it the benefit of the terms of the Factoring Agreement.

agreements. *See* S.C. Code Ann. § 37-10-107. In fact, this statute completely prohibits any and all claims and defenses in contract or tort that are not based on the written agreement signed by the parties. *Id.* Specifically, § 37-10-107 provides in relevant part:

> (1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:
>
> (a) to lend or borrow money;
>
> (b) to defer or forbear in the repayment of money; or
>
> (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.
>
> (2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:
>
> (a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;
>
> (b) promissory or equitable estoppel;
>
> (c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or
>
> (d) negligent misrepresentation.

S.C. Code Ann. § 37-10-107.

Skywaves' claims are all based upon alleged statements, promises, or representations made by BB&T that BB&T "was fully committed to providing the present and future banking needs of Skywaves." (*See e.g.* Amended Complaint at ¶ 53). These claims are based upon alleged representations made by BB&T, but Skywaves has no written agreement signed by BB&T for such alleged agreement.

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Indeed, Skywaves makes general reference to representations made "in writing"; however, it has not alleged or provided any material terms and conditions of any alleged agreements by BB&T. Because Skywaves has not provided and cannot provide anything in writing from BB&T to evidence the material terms and conditions of the alleged promises or representations made to it by Defendant Edahl or anyone on behalf of BB&T, Skywaves' claims for promissory estoppel, negligence and negligent misrepresentation fail as a matter of law. *See Carolina First Bank v. Lucas*, Case No. 03-CP-10-1907, 2004 WL 5208410 (S.C. Com. Pl. Jun. 14, 2004)(the trial court granted summary judgment on plaintiff's fraud claims, noting that the purpose of section 37-10-107 is "to prevent claims or defenses to actions on loans that are not supported by a writing.") (attached as Exhibit N); *see also Robertson v. First Union Nat'l Bank*, Case No. 99-CP-10-288, 2000 WL 35722762 (S.C. Com. Pl. Aug. 8, 2000) (granting summary judgment for the lender where there was no writing, signed by the lender, stating the "terms and specifications" of the alleged agreement to refinance) (attached as Exhibit O). These South Carolina decisions are consistent with cases decided in other jurisdictions interpreting statutes similarly derived from the ABA's Model Lender Liability Statute. *See e.g., Schoen v. Morris*, 15 P.3d 1094, 1100 (Col. 2000) (holding a fraud action was barred because it was based on a bank's alleged oral misrepresentation); *Horseshoe Entertainment L.P. v. Gen. Elec. Capital Corp.*, 990 F. Supp. 737, 743 (E.D. Mo. 1997) (granting lender's motion for summary judgment arising out of the lender's alleged oral agreement to waive prepayment penalty).

Skywaves has not produced or otherwise provided, and cannot provide, any evidence of a writing from BB&T "containing the material terms and conditions of the [alleged] promise, undertaking, accepted offer, commitment, or agreement" that is signed by BB&T. S.C. Code Ann. § 37-10-107(1)(c). Accordingly, as a matter of law, Skywaves cannot "maintain an action

for legal . . . relief . . . based upon [the alleged] failure to lend . . .money [to Skywaves.]" S.C. Code Ann. § 37-10-107(1)(a). Accordingly, Skywaves' claims for promissory estoppel, negligence and negligent misrepresentation should be dismissed, and summary judgment granted to BB&T.

F. BB&T is Entitled to Summary Judgment on Skywaves' Claims for Negligence and Negligent Misrepresentation.

1. Skywaves' Tort Claims are Barred By the Economic Loss Doctrine.

Skywaves' fifth and sixth causes of action for negligent misrepresentation and negligence are, in essence, recharacterized contract claims. These claims, however, are barred by the economic loss doctrine, under which Skywaves may not pursue a tort claim for purely economic loss arising under contract. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54-55, 463 S.E.2d 85, 88 (1995) ("A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie."). No duty arises independently of contract in this case that could support a tort action, and, therefore, the economic loss doctrine bars Skywaves' non-contractual tort and equitable claims as a matter of law. *See Palmetto Linen Serv. v. U.N.X., Inc.*, 205 F.3d 126, 129 (4th Cir. 2000) (applying South Carolina law to find that the economic loss doctrine barred any tort claims arising solely from a vendor-vendee relationship); *Trevillyan v. APX Alarm Sec. Sys., Inc.*, No. 2:10-1387-MBS, 2011 U.S. Dist. LEXIS 694, at *23 (D.S.C. Jan. 3, 2011) (rejecting negligence claim where no duty was shown to arise independent of the parties' contract).

Skywaves' claims seek to recover for the alleged "loss of a bargained-for" financing arrangement "based on a commercial transaction," which is a loss adequately protected by contract law. *See Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1049

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(D.S.C. 1993), *aff'd mem.*, 46 F.3d 1125 (4th Cir. 1995); *see also Sapp v. Ford Motor Co.*, 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009) ("Contract law seeks to protect the expectancy interests of the parties. Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property."). Skywaves' remedy is, thus, limited to that provided under applicable contract law principles, if any, and the tort claims alleged in the Amended Complaint should be dismissed as a matter of law.

2. BB&T Did Not Make Any Misrepresentation.

Additionally, Skywaves' cannot establish the requisite elements for its fifth cause of action for negligent misrepresentation. (Am. Compl. ¶¶ 50-70). To do so, Skywaves must show that: (1) BB&T made a false representation to the Skywaves; (2) BB&T had a pecuniary interest in making the statement; (3) BB&T owed a duty of care to see that it communicated truthful information to Skywaves; (4) BB&T breached that duty by failing to exercise due care; (5) Skywaves justifiably relied on the representation; and (6) Skywaves suffered a pecuniary loss as the proximate result of his reliance upon the representation. *Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003) (quoting *AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct.App.1992)). Skywaves' claim fails, as a matter of law, because BB&T did not make any false statements, nor did it breach any duty to Skywaves.

As an initial matter, Skywaves has not identified any false statement made by BB&T. Negligent misrepresentation is predicated upon the transmission of a negligently made false statement. *See Armstrong v. Collins*, 366 S.C. 204, 220, 621 S.E.2d 368, 376 (Ct. App. 2005); *Sauner*, 354 S.C. at 407, 581 S.E.2d at 166; *Robertson v. First Union Nat'l Bank* , 350 S.C. 339, 349, 565 S.E.2d 309, 315 (Ct. App. 2002); *Brown v. Stewart*, 348 S.C. 33, 42, 557 S.E.2d 676,

680–81 (Ct. App. 2001); *West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000).

To the extent Skywaves contends an alleged promise to fund the future needs of Skywaves constitutes a false statement, to be actionable, the statement must relate to a present or preexisting fact, and cannot be predicated on unfulfilled promises or statements as to future events. *Davis v. Upton*, 250 S.C. 288, 291, 157 S.E.2d 567, 568 (1967). A negligent representation cannot be based on unfulfilled promises or statements as to future events. *See Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993). In addition, an integral component of this element is that the representation must be false at the time it is made. *See GSM Dealer Servs., Inc. v. Chrysler Corp.*, 32 F.3d 139, 142 (4th Cir. 1994) (applying South Carolina law).

As noted in detail above, there are no statements made by anyone at BB&T that were false, at the time they were made or otherwise. As for financing Skywaves' future business needs, BB&T did in fact provide financing. BB&T financed Skywaves' site plans throughout 2007, as identified by Skywaves, and continued to finance Skywaves needs throughout the remainder of 2007 and into 2008, many months after the alleged promise was made in the spring of 2007.

Skywaves does not and cannot contend that BB&T made any promise that it would never call a default under the Factoring Agreement or never seek to protect its interest in the right of repayment of the money advanced to Skywaves. As set forth in detail above, the relationship between Skywaves and BB&T was clearly set forth in the Factoring Agreement. Indeed, Skywaves admitted that a lot of the Factoring Agreement was "protecting the bank, which is fine, you know, it's their money and we're borrowing it so if anything happens, they should be

the person to try to, you know, get all of their money back." (Konersmann depo. at p. 169, l. 24 – p. 170- l. 4).

Skywaves cannot establish any of the other elements of this cause of action, including proximate cause and damages. Because Skywaves cannot establish any false representation made by BB&T or otherwise show that BB&T did not provide financing to Skywaves consistent with the express terms of the Factoring Agreement or otherwise meet the remaining elements for this cause of action, its claim for negligent misrepresentation fails, as a matter of law, and BB&T is entitled to summary judgment.

3. Skywaves Cannot Establish a Claim for Negligence.

To establish its final claim for negligence, Skywaves must prove: (1) a duty of care owed to it by BB&T; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach. *Chakrabarti v. City of Orangeburg,* 403 S.C. 308, 743 S.E.2d 109 (Ct. App. 2013); *Carolina Chloride, Inc.*, 394 S.C. at 163, 714 S.E.2d at 873. "The existence of a duty owed is a question of law for the courts." *Houck,* 620 S.E.2d at 329; *see also Doe v. Batson,* 345 S.C. 316, 323, 548 S.E.2d 854, 857 (2001); *Washington v. Lexington Cnty. Jail*, 337 S.C. 400, 523 S.E.2d 204 (Ct. App. 1999); *Ellis v. Niles*, 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996). Skywaves cannot establish, as a matter of law, that BB&T owed any duty to Skywaves outside of those duties provided in the Factoring Agreement or that BB&T somehow breached any duty to it.

Skywaves cannot unilaterally manufacture a duty by BB&T where none exists. "Duty is generally defined as the obligation to conform to a particular standard of conduct toward another." *Murray v. Bank of America, N.A.*, 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct. App.

2003). Skywaves has not identified any standard of conduct required of BB&T or otherwise breached by BB&T.

Skywaves alleges that "BB&T [had] a unique power and influence over the day to day operations of Skywaves and gave rise to a special relationship with the parties, whereby Defendants had a fiduciary duty or other duty of care to Skywaves." (Am. Compl. ¶ 81). However, South Carolina law considers the normal relationship between a bank and its customer to be one of creditor-debtor and not one that is fiduciary in nature. *See Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986); *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 497, 220 S.E.2d 116, 119 (Ct. App.1975); *Johnson v. Serv. Mgmt., Inc.*, 319 S.C. 165, 167–68, 459 S.E.2d 900, 902 (Ct. App.1995). The relationship between Skywaves and BB&T was clearly stated in the Factoring Agreement.

As set forth in detail above, BB&T acted in compliance with the express terms of the Factoring Agreement. Skywaves cannot establish any separate and independent duty owed by BB&T to Skywaves that was somehow breached. Additionally, Skywaves cannot establish any of the other elements of this cause of action, including proximate cause and damages. Under these circumstances, BB&T is entitled to summary judgment on Skywaves' claim for negligence.

V. CONCLUSION

For the reasons set forth above, BB&T respectfully requests that the Court grant its Motion for Summary Judgment.

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December 22, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION,	)	
	)	Case No. 2009-CP-10-7516
Plaintiff,	)	
	)	
v.	)	
	)	
BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL,	)	**DEFENDANTS' EXHIBITS TO MEMORANDA IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT AND TO STRIKE PLAINTIFF'S DEMAND FOR JURY TRIAL**
	)	
Defendants.	)	

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SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "A"

RONALD D. KONERSMANN
DEPOSITION EXCERPTS

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

SKYWAVES I CORPORATION,

Plaintiff,

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

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

Defendants.

DEPOSITION OF: RONALD D. KONERSMANN - VOLUME I

DATE: September 12, 2013

TIME: 9:17 AM

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

TAKEN BY: Counsel for the Defendants

REPORTED BY: TERRI L. BRUSSEAU, RPR,
CERTIFIED REALTIME REPORTER

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

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

Island and then we left there in I think '09.

Q. Where were you before you first moved to South Carolina?

A. We were in Falcon Ridge in Great Falls, Virginia. Been awhile.

Q. Are you currently an owner of any business?

A. No.

Q. Other than perhaps through a mutual fund, an investment portfolio, are you currently an investor in any business?

A. No.

Q. Other than SkyWaves, have you ever had an ownership interest in any other business?

A. Ever?

Q. Yes.

A. Yes.

Q. Okay. Tell me what businesses you've had ownership interest in.

A. Kontek, Fibrebond, SkyWaves, of course. I think that's all.

Q. Are you currently employed?

A. I am not.

Q. Since SkyWaves' bankruptcy filing have you been employed anywhere?

A. No.

Q. Are you currently serving as a consultant?

A. I'm working in trying to develop a business but it is prefunding.

Q. What business are you trying to develop?

A. Football Ventures.

Q. What is Football Ventures?

A. It is in the soccer investment business, a developer of apps for soccer, and we'll implement schools for grassroots training.

Q. You said you're trying to develop this business. Tell me what that means.

A. Pre -- prefunding, simple as that.

Q. Well, I'm not sure I understand what prefunding means.

A. Well, it's not funded. Developmental.

Q. So does -- do your efforts at trying to develop that business include obtaining funding or trying to obtain funding?

A. Yes.

Q. Okay. Have you engaged in any efforts to try to obtain funding for this business?

A. I'm more into advisor.

new direction, audit the books, make sure that it can -- that the books are reliable and can be explained and verified to its investors.

Q. Mr. Konersmann, I want to ask you a little bit about your education and work background and I'm going to make it easier because I think I have a resume --

A. Okay.

Q. -- with some dates on it.

A. Okay.

Q. And I'm going to hand you what we've marked as Exhibit Number 1.

(DFT. EXH. 1, Curriculum Vitae of Ron Konersmann, BB&T/JE_000381, was marked for identification.)

BY MS. CHERRY:

Q. That looks like it may have been a resume at one point that I believe was submitted to BB&T but I want to ask you if you recognize this document.

A. Okay. Yes.

Q. And is everything on this document accurate up to your time with SkyWaves?

A. To my belief, yes.

Q. Okay.

A. Should be.

Q. Other than your BS from Memphis State and MBA from Notre Dame, do you have any other formal education?

A. No.

Q. Do you have any certifications?

A. No.

Q. Any licenses?

A. No.

Q. At the bottom of this list you've got Owens-Illinois listed as one of your employers, looks like from 1970 to '82. Do you see that?

A. Um-hum.

Q. What is Owens-Illinois?

A. It's a packaging company.

Q. Are they still -- do they still exist?

A. They've been broken apart and there's a piece, a glass piece of it, but the package, it had a series of packages -- packaging materials and they've sold off over the years.

Q. Okay. And tell me -- and I know you've got your position listed on your resume but tell me what you did for Owens-Illinois.

A. Well, I started out after MBA school in the -- working for the CFO, the president, started

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

THE WITNESS: Yeah, sure.

(A recess transpired.)

BY MS. CHERRY:

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

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

Q. When was the company formed?

A. The company was formed around 2001, 2002.

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

BY MS. CHERRY:

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

Q. At the time SkyWaves filed bankruptcy, how many shares in the company did you own?

A. Percentage-wise it was around 44 percent.

Q. Do you know how many numbers of shares that represented?

A. Not offhand.

(DFT. EXH. 26, SkyWaves Corporation Debt Schedule March 2005, was marked for identification.)

BY MS. CHERRY:

Q. Mr. Konersmann, I'm going to hand you what we've marked as Exhibit 26 and this is titled a debt schedule for SkyWaves as of March 2005. Do you know who prepared this document?

A. I assume it's John Voytko.

Q. I was going to ask you, would he likely have been the person who had prepared that?

A. Likely, yeah.

Q. Okay.

(DFT. EXH. 27, SkyWaves I Corporation Stock Ledger, was marked for identification.)

BY MS. CHERRY:

Q. I hand you what we've marked as Exhibit 27, Mr. Konersmann, and this is a stock ledger for

SkyWaves?

A. Um-hum.

Q. Do you know who prepared this document?

A. I do not. What's the date on this?

Q. It doesn't have a date on it. The last ownership record is dated October 10th of 2007 if you look at the third page.

A. Okay. Again, probably John Voytko.

MS. CHERRY: I just glanced at my watch and realized we've been going for a couple of hours. Do you want to take a break?

MR. KEFALOS: Sure.

(A luncheon recess transpired.)

BY MS. CHERRY:

Q. Mr. Konersmann, I want to make sure I understand. What's your position with SkyWaves? Were you CEO?

A. Chairman of the board, president and CEO.

Q. And then you had mentioned at one point that -- was it Jim Phillips was president?

A. Yes.

Q. Okay. So was there a period of time when you were only CEO and Jim was president?

A. Yeah.

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

A. I think we had some.

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

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

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

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

Q. Do you remember who the telecommunications company was?

A. No. Out of Charlotte.

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

BY MS. CHERRY:

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

A. Yes.

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

A. Yes, it is.

Q. As CEO of SkyWaves?

A. Yes.

Q. And tell me what this document is.

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

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

A. Yes.

Q. Okay. Tell me when. The context.

A. Fibrebond and I believe Kontek.

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

A. No. I don't remember.

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

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

Q. I'm sorry, the bank of?

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

Q. I had it in my head as Madrid.

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

Q. Truth is stranger than fiction.

A. No kidding.

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

A. I would have been, yes.

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

A. Um-hum.

Q. And then how about for Kontek?

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

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

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

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

A. Right.

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

A. Yes.

Q. Okay. How is the bank paid?

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

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

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

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

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

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

Q. How about the factoring agreement at Kontek?

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

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

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

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

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

Q. What if you didn't pay them?

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

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

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

Q. Yeah. I'm asking you.

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

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

A. No, that was basically the agreement.

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

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

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

A. Um-hum.

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

A. Right.

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

A. Right.

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

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

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

Q. And I'm curious about that.

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

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

A. Yes.

Q. And so when you say you don't know why, do you mean you don't understand --

A. I don't understand.

Q. -- the reasons that BB&T gave?

A. Yeah.

Q. And when you say you don't understand, do you mean that literally you don't understand the reasons were given or figuratively you don't understand?

A. Well, the reasons -- in my view the reasons were -- would not cause a default, you know. The primary reason as I understand it, a lot of paper around that, but we had four buildings that were 48 days late past the customer due date. We have 60 days, what's the problem? It wasn't out of 60-day terms and that was, you know, what was in I think the -- you know, the official default letter.

Q. Okay.

A. It just doesn't make sense to me.

Q. How about if there were buildings that were more than 60 days? Would that change whether you understood what had happened?

A. Yes.

Q. How would it change?

A. Well, we were -- if it goes past 60 days, what was supposed to happen is just that -- that building would be taken off of our list. If we're talking hypothetical here. But if we had a

means?

A. Yes.

Q. Tell me what you understand Paragraph 8 to mean.

A. What this says is that the trustee is -- or the client is a trustee for the bank's benefit and shall hold the remittance as property of BB&T, meaning the money, but without commingling with other monies, I would assume, any such remittance, property client -- property of client, shall immediately turn over to BB&T the identical check, money, notes, money orders, drafts acceptance or other forms of remittance received. I am very familiar with Number 8.

Q. Okay.

A. Because when we were going to sign this, I said, we can't sign this, this won't work for our company.

Q. Okay. And who did you say that to, Mr. Konersmann?

A. Jim Edahl.

Q. And as I understand it, you said that to Jim Edahl before you signed this agreement?

A. Yes. We talked about it before I signed it.

Q. Okay.

A. But this was not -- this was not the agreement that I was making with the bank. I understand that the bank has to have title of this so they can get their money back and, you know, the bank did have clear title and we respected that but this -- you know, the way our business runs and these companies who, like I said earlier, will only, you know, submit back payments to the vendor, this was impossible to implement. What I was told was this is a standard form that has to be assigned the way it is but that we had to comply with our agreement and the agreement was going to be developed expressly for us so that we could operate our business effectively.

You know, if it's not -- if you're getting a factoring system put in place and it doesn't allow you to grow your business, which is what this was intended to do, then, you know, it's not -- it's not a -- it's not an alternative that can be successful. But BB&T did own the property as it came through that -- you know, that factoring system.

(DFT. EXH. 31, Financial Covenant Rider, was marked for identification.)

(DFT. EXH. 35, BB&T Loan Agreement, was marked for identification.)

BY MS. CHERRY:

Q. I hand you what we've marked as Exhibit 35, Mr. Konersmann, and if you flip to the last page on this loan agreement, I wanted to ask is that your signature on this agreement on behalf of SkyWaves and on behalf of KWK?

A. Yes.

Q. And tell me what -- this appears to be a loan document for a line of credit.

A. Right.

Q. Tell me, who is the line of credit for?

A. The line of credit was used for SkyWaves.

Q. Was KWK an owner in SkyWaves?

A. Yes.

(DFT. EXH. 36, BB&T Promissory Note, was marked for identification.)

BY MS. CHERRY:

Q. I'm going to hand you Exhibit 36 and ask you to confirm whether that is your signature on this promissory note on behalf of SkyWaves and KWK.

A. Yes, it is.

Q. Okay.

(DFT. EXH. 37, BB&T Security Agreement, was marked for identification.)

BY MS. CHERRY:

Q. Same question on Exhibit 37, Mr. Konersmann, can you flip to the signature page and confirm for me if that is your signature on behalf of SkyWaves Corporation on the last page?

A. Yes.

(DFT. EXH. 38, BB&T of South Carolina Mortgage of Real Estate, was marked for identification.)

BY MS. CHERRY:

Q. Same question on 38, Mr. Konersmann, the mortgage of real estate. If you flip to the second page, I want to ask if that is your signature on behalf of KWK.

A. The third page is my signature.

Q. Sorry.

A. That's okay.

Q. And, Mr. Konersmann, who owned this five acres of property, was it just KWK?

A. Yes.

(DFT. EXH. 39, Assignment of Leases and Rents, was marked for identification.)

And where he -- we agree -- or where I explained what I needed, he would say, Ron, let me go back and talk, get approval and come back. And I truly believe that Jim Edahl did nothing on his own, he was a good manager and he managed through this and we came up with this system that later became alive and well but it -- it does not -- like I say, that one there I remembered because you can't do business with these big companies with Number 8. We wouldn't have -- we couldn't have gone forward with this agreement.

Q. Anything else that you remember in Exhibit 30 that was amended or modified?

A. I probably have to go through this.

Q. Sure. Take your time. Let's take a break. Take your time and review that.

A. Yeah, you guys take a break and let me read this thing.

MS. CHERRY: Sure.

(A recess transpired.)

BY MS. CHERRY:

Q. Have you had an opportunity to look through Exhibit 30?

A. Yes, I have. I looked through it. I'm not a lawyer but, you know, a lot of it is

protecting the bank, which is fine, you know, it's their money and we're borrowing it so if anything happens, they should be the person to try to, you know, get all of their money back.

You know, one of my personal pet peeves in running these businesses in the past through good times and bad is that everybody gets paid, mostly the vendor side so, I mean, I have no problem with that. Like I said, I remember that only because it's so not -- it could not possibly be implemented with this company, it just doesn't work for these lawyers, telecommunication companies.

And the only other thing I'd say about is given this is a lot of protection to the bank but, you know, it says here in default, and I really don't need to get into all this but in the event default shall be deemed to have occurred under this agreement at BB&T, shall be entitled to take such action as is elsewhere provided herein if any one or more of the following events and conditions exist.

All I can say about that is we were -- we paid all our bills, we paid all the interest, we were in good standing to BB&T when the decision was

made for the company to succeed -- secede or to be shut down I'll say. I personally don't believe that the local bankers were aware of that, they -- they thought that we were going to be in a situation where that the bank may raise the terms and conditions, which I didn't have a big problem with.

And the letter of default talking about the four buildings being 45 days, you know, past the due date would not be under my -- the agreement I had with BB&T would not be a reason for a default so this document does protect the bank. I accept that and the rate was unworkable and I personally don't understand, you know, why the company all of a sudden became in default. I just don't get it. But that's for me and I'm sure all this will work out in the future but I just wanted to give you that feedback.

Q. Okay. And you were -- when you were talking about events of default, you were referring to Paragraph 12 --

A. Yes.

Q. -- is that correct? Okay. You made a comment, Mr. Konersmann, that you're not a lawyer. Did SkyWaves have counsel when it entered into this

Q. Okay. Did you have any discussions with Mr. Voytko about BB&T contacting Nextel or any of Skyways' customers regarding payment on invoices?

A. I mean, I don't recall Nextel. I believe some of the customers knew that we had a factoring agreement but that's -- we converted a couple customers to pay direct. Where they would do that, we would do that.

Q. Okay.

A. I don't remember this particular situation here.

Q. Did SkyWaves have any obligation to notify its customers of the factoring arrangement with BB&T?

A. No.

Q. How about on invoices, did SkyWaves have any obligations to identify BB&T factors on any invoices?

A. No. No, like I said, in this industry their rule is to pay the vendor who they have a contract with or who they have sent appeal to and so they're very reluctant to send it anywhere else and that was a problem. That's one of the things that we got, you know, that the bank understood and

worked with us on so we were not out, you know, explaining all that to them.

Q. Why would -- well, let me ask you. Did SkyWaves put on its invoices where payment was to be made?

A. Yeah, to SkyWaves Corporation.

Q. Okay. Why would a customer -- you keep saying customers were very reluctant to send payment somewhere else.

A. Yeah, for legal reasons. When we talk to the purchasing agents, their law firm -- their lawyers took a position almost industry-wide because what would happen is if a company built a shelter say for the company and they diverted it to a bank or converted it to someone who had some financial position with them, then maybe the vendor would come back and say we should have sent it over there.

So their basic policy was, you know, we didn't order from a company, we're going to get that product, we're going to send it back to them, then they deal with their own finances and all, we don't all that so they were reluctant to do that. Some we got to convert and didn't have a problem trying. We tried, you know. But the ones we

Q. Okay. And he says, and gives it the cash to assure transition to profitability. Do you see that?

A. Um-hum.

Q. Was SkyWaves profitable at this point in time?

A. In '06, I do not believe so.

Q. Now, if you go down to Paragraph Number 2 in his correspondence to you, he's referencing selling shares to acquire cash, converting current debt to PK, which I believe is Patricia Konersmann?

A. Um-hum.

Q. And FXM, which is his business, into shares and pay off high-interest loans to private investors. Do you see that?

A. Um-hum.

Q. Do you know anything about the high-interest loans to private investors?

A. That he's referring to?

Q. Yes.

A. I do not.

Q. Then in the next sentence he says, the stated goals are to preserve Ron and Patty's majority position. Do you see that?

A. Um-hum.

A. Yes, I do.

Q. So did Wachovia ever present a proposal to SkyWaves?

A. Well, we had that need for about 4 to 500,000 dollars worth of equipment. And what they said was we could -- you know, to stay a part of this, we could give you a asset-based line of credit to pay for the equipment you need but they couldn't give us the working capital line.

Q. Okay. So it's your testimony that Wachovia was willing to loan SkyWaves 4 to 500,000 dollars, that 400,000 dollar need we talked about at the end of '06?

A. I think it's the same number, yes.

Q. Okay. Is there -- is that what you're interpreting this March 19, 2000 letter to mean?

A. No, I think what he's saying is that we had the assets, we had something to back up, you know, the business like we have, you know, we have the orders in hand, et cetera, then, you know, he could do something in the five million dollar range is what I'm reading here and they could structure something but on an asset-based scenario. Just going through here, typical collateral package would generally have these kinds of things. So

Q. Okay. And the credit amount is being increased, is that correct?

A. Yes.

Q. Okay. And then it looks like the factoring commission rate's being changed, is that correct?

A. Yes.

Q. And the last sentence before Branch Banking & Trust Company says, all other terms and conditions will remain in effect. Do you see that?

A. Yes, I do.

Q. Okay. Is that correct?

A. Yes, it is.

(DFT. EXH. 72, Certificate of Corporate Resolutions and Authorization to Borrow, was marked for identification.)

BY MS. CHERRY:

Q. Mr. Konersmann, I'm going to quickly go through and ask you to confirm your signature on what I've marked as Exhibit 72, which is authorization to borrow. Is that your signature on the second page as CEO of SkyWaves?

A. Yes, it is.

Q. Okay.

(DFT. EXH. 73, BB&T Promissory Note,

was marked for identification.)
BY MS. CHERRY:
Q. And I've marked as Exhibit 73 a promissory note in the amount of 475,000 dollars and is that your signature on the last page of this on behalf of BB&T --
A. Yes, it is.
Q. -- on behalf of SkyWaves, sorry. You knew what I was talking about.
A. I did.
Q. Thank you.
A. This is the second day of this so...
(DFT. EXH. 74, BB&T Security Agreement, was marked for identification.)
BY MS. CHERRY:
Q. I know and I'm trying to move through this quickly. If you'd turn to Page 6 of what we've marked as Exhibit 74. This is a security agreement dated April 2nd, 2007 between SkyWaves and BB&T. Is that your signature on this document, Mr. Konersmann, on behalf of SkyWaves?
A. Yes, it is.
(DFT. EXH. 75, BB&T Guaranty Agreement, was marked for identification.)
BY MS. CHERRY:

Q. I've marked as Exhibit 75, Mr. Konersmann, a guaranty dated April 2nd, 2007 on behalf of SkyWaves. And if you look at Page 3 of 4, is that your signature individually on this page, Mr. Konersmann?

A. Yes, it is.

Q. Now, Mr. Konersmann, the promissory note that we looked at that we've marked as Exhibit 73 for 475,000 dollars --

A. Yes.

Q. -- was that a loan from BB&T?

A. I believe this was the equipment loan.

Q. Okay. So that -- the 400,000 dollar need we had talked about?

A. This took care of it.

Q. That took care of that?

A. I think so, yeah.

Q. Okay.

(DFT. EXH. 76, Modification, Renewal And Restatement of Note, was marked for identification.)

BY MS. CHERRY:

Q. I'm going to hand you what we've marked as Exhibit 76, Mr. Konersmann. This is a modification of a note. This is the note between

KWK and SkyWaves and BB&T.

A. Okay.

Q. Is that your signature on that document? If you flip to Page 4 of 4, it looks like it's got your signature on behalf of SkyWaves and KWK?

A. There's another signature somewhere. Okay, here. Okay. Yes, that is.

Q. Okay. And this on the front page says modification amount, 400,000 dollars. Do you see that, Mr. Konersmann?

A. Yes, uh-huh.

Q. What was that 400,000 dollars for?

A. Well, because -- well, KWK had a note and this was a modification so it's -- it's probably -- legally it's restating the note is 400,000.

Q. Okay.

(DFT. EXH. 77, BB&T Guaranty Agreement, was marked for identification.)

BY MS. CHERRY:

Q. I'm going to hand you what we've marked as Exhibit 77, Mr. Konersmann. This is a guaranty agreement dated April 25th of '07. And if you flip to Page 3 of 4, can you confirm for me whether that

you know, Jim Edahl was, you know, completely privy to all the information, he was very, you know, current. We had, you know, decided to stay with BB&T and BB&T being Jim Edahl again is the only contact we had, you know, that he was assuring us that they were going to meet our financial needs in the future and so that's where the Defendants' own comprehensive review. You know, it's a point that Mr. Edahl, you know, had total confidence in us, had given us some help on the terms and conditions we were working with and that he believed and I think the bank believed that, you know, we're on a path here to get into the 3G business when it hit.

Q. In Paragraph B there's a reference to BB&T being fully committed to providing all of SkyWaves' short-term and long-term financial needs for growth. Do you see that?

A. Uh-huh.

Q. In July of 2007, what were SkyWaves' short-term and long-term financial needs for growth?

A. Well, the primary -- the primary -- well, it was whatever we needed. We had the assurances that the bank would work with us to provide the needs, they had provided all of our

about that.

Q. Did these individual investors or any investors ask to see the bank documents?

A. They came over to the plant a couple times and I think they were looking at our contracts more than the bank documents and they may have seen some but I don't remember that.

Q. Okay. Did Mr. Edahl ever say to you that BB&T would commit to funding SkyWaves' growth based on invoices, purchase orders, contracts and site plans?

A. Oh, absolutely.

Q. When did he say that?

A. Well, it was all reiterated in that March/April time frame when we were talking about how do we move forward and fund this growth. The thing that isn't there is that -- because this was important, you know, to me. You know, the bank had been great, Hunt is in that business of taking a company at our -- at that level and funding it completely and taking it all the way as far as they want to take it.

And it was important to me that, you know, the bank was going to be there so, you know, I asked them about various things, you know, if we

you'll be able to keep your stock which, of course, as we said throughout the two days, you know, stock positioning is important because that's how you make the money and you want to keep your stock position as high as you can and not dilute it. And in the other part of -- that we considered was in Hunt Capital we would be diluting our stock, which means we would have less.

So we talked about specifically this is -- you know, I talked about General Dynamics back in December/January and this big project up in New York. You know, Jim and I talked about that work up there as with the government and the government has a lot of rules as well and there's going to be quite a bit of business for us and we -- we talked about it, you know, how are we going to do that.

And again, you know, he said -- and -- we talked about it in general and talked about the sites and the shelters and the amount of work, et cetera. But in negotiating I said -- when he said do you have anything else that we could use as collateral, I said, well, what we have is we have the site plans for the government work and, you know, it has -- you know, General Dynamics has the

contract, you know, we've got the vendor contract and, you know, this shows you all the sites and you can look down here, it will show which sites have shelters on them and so can we use that?

He said, well, let's say we'll consider it, I don't want to commit to it today, I'd have to get approval but, you know, if we need it again for this window between March/April and December because I was fairly sure based on my experience that this would -- this would really kick off for sure in January, hopefully sooner, but if it didn't, this was something we could look at.

And so in July we talked about, you know, where we were. And I said, you know, Jim, I would like to have you consider using the site plans to factor and so he looked it over and he said, well, let me get back to you. And he took it and came back and said, you know, we'll -- we understand it and, you know, we'll do that. And so we started factoring site plans.

So when I got to, you know -- that was my gap filler between, you know, April 12 and December and then if we're figuring that we're going to double/triple our business, our backlog going from two or three million to seven, eight,

General Dynamics laying out the site plans and where the shelters would go. I went to them and said, look, you know, this is great, we're going to get the business but I would like to -- and Jim and I talked about it, you know. I said, I'm going to see if I can get these converted to purchase orders. And I tried and the people up there were very -- were very happy having us and had a good relationship with them but what they finally came down and said is, by the government, Homeland Security rule, they couldn't at that time give us a PO but, you know, they give us -- so we could see what the anticipated work would be, they gave us -- they shared the site plans with us, okay? So that's where the site plan started.

And like I said, when we were talking about -- you know, when we were discussing how is the bank going to close this gap, you know, I -- I brought that back up, we reviewed it, I showed him, you know, how it worked, we had a contract over it so it wasn't like it was just a piece of paper, an arbitrary piece of paper, you know, it was backed by our contract with General Dynamics.

And he looked at it and he said, we'll consider it and, you know, we may not need it and

Exhibit 84, Mr. Konersmann. This appears to be another SkyWaves PowerPoint presentation. This one is dated January 17th of 2008. It says it's for Jim Edahl and Mike Burke at BB&T.

A. Yes.

Q. Did you prepare this presentation?

A. This is a presentation we put together for them.

Q. And what was the purpose of this presentation?

A. Mike Burke -- Jim called me and said that Mike Burke said they were moving the factoring from North Carolina down to Atlanta and that Mike Burke was going to come in and take over the factoring agreement and he was stopping by, he was in town, and we set up a meeting, January 17th.

Q. If you flip over, I don't -- maybe midway -- there's a number in the bottom right-hand corner that says 002809. This slide says 2007 volume issue and there's a reference to Jim Phillips on the slide. Bullet Number 2 under Jim Phillips says, slow rolled his efforts to open up regions. What does that mean?

A. What we found out after the fact was that -- Jim was responsible for a large part of --

Number 1 and dispute that reason?

A. Well, I mean, I'm not sure what the paperwork was with the lawyers but, yeah, that was simply not true. And, you know, when I explained how we operated in the meeting with Burke, you know, Burke said he was not happy with our -- you know, not with our account but just not happy that the bank would have this sort of agreement. And Jim Edahl was there and -- but I don't -- I'm sure -- I mean, I'm not sure. I don't know what we responded to at that point. We were -- basically our accounts were pulled almost immediately so we were out of business, you know, right at that time frame, within a week or two, so I don't know what correspondence. I know lawyers were talking.

Q. So Paragraph Number 2, were 37 percent of SkyWaves' payables over 60 days due, is that accurate?

A. Well, we had already explained to the bank about our payables, that a lot of that -- a significant portion was the payables that we were late technically with Franz Meier and StructureTech but Franz Meier was okay with that. You know, he was working hard, diligent, you know, trying to, you know, not impact the company. If we needed to

extend that, you know, he was okay with that. We redid the numbers and as I remember sent an analysis or small analysis out showing that the impact of this -- of the payables were not over 60 days when you take out Franz Meier and StructureTech's piece of it.

Q. Let me -- let's go back and look at Exhibits 82 and 83.

A. Um-hum.

Q. Do you have anything in writing from Mr. Meier -- 82 and 83 are what I've seen in November of 2007.

A. Right.

Q. Do you have anything in writing from him indicating that he was okay with, as you put it, SkyWaves' debt to him and his company?

A. Well, he certainly was concerned about it but what we had talked about with him was that he would use that 400,000 dollar security deposit to catch himself up if he wanted to so, sure, you know, he'd rather be paid than not paid. I'm not suggesting that. But, you know, he wasn't taking any action at that time and he had an option of taking it out of the 400,000 dollar security deposit and the security deposit was supposed to be

Paragraph 3?

A. Yes, I do.

Q. Tell me why you disagree with that.

A. Well, because we were bringing in two or three -- at that time two or three million dollars of work, our purchase orders were going up and that would allow the cash flow to catch up on some of this. You know, we had been waiting and we had been dealing with the cash flow in '07 to get to the -- you know, the position where we were -- you know, situated to get these orders. The orders were coming in and so, you know, very quickly the way that works is, you know, that cash would come in and we could, you know, improve those areas.

Q. How long was that going to take?

A. Well, it would take as long as you -- it takes -- it would take you as long as you took the money coming in and took a portion of it to catch up so that was a managerial type decision, you could focus on it, get it caught up quickly or you could focus on it and say we're going to -- you know, we're going to have a schedule, we're going to provide what's due plus 20 percent or 30 percent, whatever, and catch it up over a six-month period, et cetera. When we -- after the bank

this so, you know, he was not happy but I'm sure we talked about it verbally. I don't know that we responded formally to this. This has many moving parts.

Q. Sure. And I was just curious about it because you had indicated that Mr. Meier was on board with -- when we were talking about the receivables or payable from SkyWaves to him --

A. Yeah.

Q. -- that he was okay with that.

A. Well, let me -- I somewhat misspoke. With our relationship through the year, if we were -- you know, if we were behind, you know, he was okay working with us through there. At this point, January 31st, you know, there was concern on our side about -- you know, about the factoring in general, you know, I didn't get a warm feeling from Burke that he was on board with our account so I don't know exactly what was happening. This is day to day but this is, you know, a recommendation from Franz but the problem is implementing this would be very difficult and I'm sure we talked about it and maybe we did respond to this but this would be very difficult to do at the last days of the company.

(DFT. EXH. 87, E-mail dated 2/8/08 to

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "B"

JOHN VOYTKO
DEPOSITION EXCERPTS

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT

SKYWAVES I CORPORATION,

Plaintiff,

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

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

Defendants.

DEPOSITION OF: JOHN VOYTKO

DATE: February 28, 2014

TIME: 8:41 a.m.

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

TAKEN BY: Counsel for the Defendant

REPORTED BY: Ann P. Harris, NCRA Merit Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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Q. Have you ever been married to anyone other than Annmarie?

A. No.

Q. Do you all have any children over the age of 17?

A. Yes.

Q. Okay. Do they reside in Charleston County?

A. Two do, one does not, and I say that because I have a daughter in college at Clemson. So she is officially here but lives elsewhere.

Q. Okay. And her last name is Voytko?

A. Yes.

Q. And then what about the other over the age of 17?

A. She lives in New York.

Q. And what is her last name?

A. Voytko too.

Q. Do you or your wife have any family members, other than your children, who live in Charleston County?

A. No.

Q. Okay. Where did you go to college?

A. University of Toledo.

Q. And what was your degree in?

A. Accounting.
Q. When did you get it?
A. In 1980.
Q. Do you have any other formal education?
A. No.
Q. You hesitated.
A. No, because -- well, I say no, but I did take and pass the CPA exam, so I prepared for that, and I have done professional education courses throughout my career.
Q. Okay. So are you a licensed CPA?
A. I am licensed, but it is inactive.
Q. Okay.
A. In the state of Ohio.
Q. Okay. And just so I understand the nomenclature, the public records say it is suspended. Does that mean inactive for purposes --
A. Yes, yes.
Q. Okay. Have you ever had your license revoked?
A. No.
Q. Okay. Have you ever had it suspended for any reason other than being inactive?
A. No.
Q. Okay. Were you ever licensed in South

Hargray and B2B?

A. Looked for a job.

Q. Okay.

A. And found it very difficult. It was the first time I ever ran into discrimination, age discrimination, in my opinion, and so my decision was to join B2B CFO. It is a franchise opportunity located in -- they are headquartered out in Phoenix, Arizona, and it is a collection of about 200, 225 people like me that have been in corporate the majority of their careers, and my business plan now is to work with small- to medium-size companies, generally speaking up to the 20- to 25-million-dollar range, and help them bring a level of expertise to the company that they would not otherwise be able to afford full-time.

Q. You referenced age discrimination. How old are you, Mr. Voytko?

A. Fifty-six, I think.

Q. How old were you when you were CFO of SkyWaves?

A. That would have been six years ago, so 50. At least 50.

Q. Have you ever worked for Football Ventures Corporation?

customers of SkyWaves?

A. The pricing, I was aware of those discussions, but it was usually negotiated between Jeff Ward, our sales department, Mr. Konersmann, and the customers.

Q. Okay. When did you start working for SkyWaves?

A. In February of 2005.

Q. And at that point in time, as I understand it, you indicated you were looking for a job; is that correct?

A. That's correct.

Q. Did you have any other options other than SkyWaves?

A. I think I was talking with one other company at the time. It wasn't really that serious, and this was an opportunity that I thought really, because of my telecommunications background, was a very timely opportunity.

Q. Okay. And the telecommunications background was the work with Alltel and SunCom?

A. Yes.

Q. And in what capacity did you start working for SkyWaves?

A. The capacity was the same as I finished

at, was the person in charge of all of the financial aspects, but I believe the title changed. It might have been a manager to start with and then was changed to CFO as the company began to grow.

Q. Okay. Had you ever heard of SkyWaves prior to -- did you apply for a position with SkyWaves? How did you come to learn about the position at SkyWaves?

A. I think we saw it posted somewhere, and I contacted Mr. Konersmann, sent him a copy of my resume, and then he asked me to come out to the factory and tour the facility, meet him and other people, and that's how we started.

Q. Okay. Prior to that, had you ever heard of SkyWaves?

A. No.

Q. Okay. When you say "we saw it posted," what do you mean?

A. I was working with a person in the HR placement business at the time. It was when I left MBT, I was given some outplacement services, and it was through that process.

Q. Who was that?

A. It was a company called -- I think it was like Signet. The woman, she is still in

Q. I am going to hand you what we have marked as Exhibit 9, Mr. Voytko. Do you recognize this document?

A. I recognize it as part of what was reviewed and signed with the original execution of documents in March of '05.

Q. Okay. And if you look at paragraph 4 on page 3 of this document, do you see where it says Financial Reporting? It looks to me in subparagraph b, within 30 days after the end of each month, SkyWaves is to provide unaudited interim financial statements as of the end of each month. Do you see that?

A. Yes.

Q. Did you do that?

A. With a few exceptions, we provided financials as soon after the month-end as we could.

Q. How soon after month-end -- you have been CFO of several companies, correct?

A. Uh-huh.

Q. And in that position, just generally as CFO, were you responsible for preparing financial statements for the various companies?

A. Yes.

Q. How soon after month-end would you

from Castlen Morris to you and Ron Konersmann. Tell me who Castlen Morris is.

A. He worked for their factoring group, and he was my primary contact there.

Q. When you say there, you mean BB&T?

A. BB&T, yes.

Q. This references that SkyWaves expects to start factoring invoices in July of 2005. Do you see that?

A. Yes, I do.

Q. Okay. Did SkyWaves start factoring in 2005?

A. I don't believe we did. I think it was later that year.

Q. Okay. Later in 2005?

A. Uh-huh, yes.

(DFT. EXH. 11, 7/13/05 E-MAILS, was marked for identification.)

Q. I hand you what is marked as Exhibit 11, Mr. Konersmann. This is an e-mail exchange between you and Mr. Morris, whom you have identified as your primary point of contact at BB&T Factors. This is from July of 2005, and I just wanted to ask, at the top of your response -- and by all means take a minute to review this -- but

have to use the factoring agreement, we didn't use it because it's expensive. And let's say, for example, we had shelter 1-A shipping immediately, and we knew we would get a quick turnaround on it, and we were not stretched for cash, we would not factor it. We would just send it in. So to do this, you would have -- you would require the vendor to have two separate -- remit two addresses in their system, and at this time they just could not accommodate that. So that was one item that we objected to immediately, and we are really clear on it, and in that case, at the time, Jim's response to us was, you know, don't worry about it, we will work it out as we go along. So that was, say, a concession in terms of the initial agreement that we talked about, that you walked me through the pieces of, that was changed as a matter of course through this whole arrangement.

Q. So let's go back and look at the factoring agreement. So as I understand it, you agree with me that SkyWaves was at least originally supposed to instruct its customers for accounts that had been factored to remit payment directly to BB&T?

A. That's how the document is written.

Q. Okay. So you agree with me there. I understand that you are saying there was an accommodation made, but you agree with me --

A. But what I want to make clear is that we objected to the form in the very beginning and were told this is a formality, this is something we need to get -- just get it in place, and we will deal with that later.

Q. Okay. Did you ever deal with that in writing later?

A. There were a couple of issues that were -- I would use the term memorialized via e-mails and conversations but not in a formal what you would consider an addendum to the agreement.

Q. Okay. Do you have any e-mail that specifically states SkyWaves does not have to instruct customers on accounts that have been factored to remit payment to BB&T?

A. Those would have been more verbal conversations than agreements.

Q. So is your answer to my question no, you do not have an e-mail expressly stating that?

A. That would be correct.

Q. Do you have anything in writing expressly stating that SkyWaves does not have to

instruct customers who on accounts that have been factored must remit payment directly to BB&T?

A. What I do have is when we agreed on -- I am sure you have the e-mails, but there were attempts on Castlen's and my part to come up with wording that would identify an invoice as being factored but was something less than, or different from what was stated in this agreement.

Q. And as I understand it, you said, "We made clear we could not abide by the requirement to notify customers to remit payment to BB&T"?

A. Yes.

Q. Tell me who "we" is.

A. It would have been Ron and myself.

Q. Okay. And tell me to whom you made that clear.

A. To Jim Edahl.

Q. Anyone other than Jim?

A. To Castlen and to Steve May. He would have been -- I think he had like a lead role in the factoring, or maybe it was a regional guy out of Charlotte.

Q. And as I understand it, the explanation that you gave me for SkyWaves not abiding by that requirement was that they, meaning SkyWaves'

customers, could not accommodate two addresses for remitting payment in their systems?

A. As I understood, talking with them, yes. I couldn't speak to that authoritatively because I am not an employee of those companies, and the other part to that was just the confusion that it would create because it is not like I am sending an invoice to you. You are like one location. For example, all of these companies are -- they're nationwide, and they have regional operations. So depending on what their systems were, even though you send it to one location through their systems, they would be approved by different areas, and you would have many people involved with it.

Q. Okay. Well, you say understand in talking with them. Tell me -- at this point, as I understand it, you have told me the only customers at issue were Nextel and you said you thought Alltel?

A. ATT.

Q. ATT.

A. Or Cingular at the time. Their wireless division, I think it started as Cingular, went to AT&T and went back to Cingular, but it was

approved so you know you are not paying Molly's sister for something but you are paying the right person for it, and then they are set up in the system as -- there could easily be the same remit to as the company's address, or the company's address could be region northeast, but the remit to would be their corporate headquarters or processing center somewhere else. So, generally speaking, you would have an address for a company and one remit to address.

Q. Is it hard to look at an invoice to determine where payment is to be made?

A. When you are a company processing thousands a day with people that are just instructed to enter the invoice in, then, yes, it would be.

Q. Did SkyWaves issue thousands of invoices a day?

A. We did not.

Q. So if a customer of SkyWaves remitted payment directly to SkyWaves on an account that had been factored, who owned that money? Who did that money belong to on a factored account?

A. Ultimately the bank would have loaned us money and ultimately would have been paid back.

Q. Okay. That is not my question, Mr. Voytko. Who owned it? Who owned that account receivable on a factored account?

A. BB&T would have.

Q. Okay. So if a customer paid SkyWaves on an account owned by BB&T, what was SkyWaves required to do with that money?

A. Okay. As you know, there was a gap between March 20th of 2005, when we first started using the factoring agreement, or using the factoring line of credit. Part of that was because of the cost, part of it was because we did not need to factor it because we had adequate cash flow, and in some of these correspondence, there was some disappointment on BB&T's side that we did not use it more frequently and with more vendors, so as we started to use it, one of the things that -- an agreement that we worked out with Mr. Edahl was that as the money came in, we would remit it to the bank, but if there was -- but the ultimate agreement was, as long as it was received within 60 days of the customer due date, everything would be fine.

Q. Okay. And tell me with whom this agreement that you have just described, with whom

not the way we were operating, not what we had agreed to, and I think I may have made some notes to that effect, but in terms of the -- then after we had that conversation, everything went and would continue to go on and operate as we had. We did not change our procedure of how we administered it.

(DFT. EXH. 13, MARCH 2006 E-MAILS, was marked for identification.)

Q. I show you what we have marked as Exhibit 13, Mr. Voytko. This is an e-mail communication between you and Mr. Morris, and it looks like Mr. Edahl is originally copied, and then in your response it looks like you bring Mr. Konersmann in as a copy. Do you see that? From March of 2006. If you look at the bottom, it is from Castlen to you with a copy to Jim.

A. Uh-huh.

Q. And you respond to Castlen at the top, and you bring Mr. Konersmann in. Do you see that?

A. I do see that.

Q. Now, why don't you take a minute to review Castlen's e-mail to you because I want to ask you a little bit about it.

A. Okay. I am kind of back up to speed.

Q. Okay, great. In Mr. Morris's e-mail to

you, he references the logistics of trying to set up Cingular on a similar purchase order financing scenario to Nextel. Do you see that?

A. Yes, I saw that.

Q. At this point in 2006 is it your understanding that Nextel was the only customer of SkyWaves set up on this purchase order financing?

A. Right. As I read this, you need to differentiate between just factoring and then invoice and factoring.

Q. Sure.

A. I would say from this memo, I would interpret the same.

Q. Okay. And it looks like he is discussing concerns -- collection activity concerns that you and he discussed.

A. Yes.

Q. Did SkyWaves have collection activity concerns by BB&T? That's how I am reading this, but I want to understand what -- who had the concern and what it was.

A. Right. I want to digress a little bit back, as we did before, going back to the original agreement. Part of the procedure they put in place with most typical factoring companies is that if an

same account that all of the BB&T money rotated. We only had one account.

Q. Okay. So by that, I take it to mean you did not segregate and have a separate account for factored invoices?

A. That is correct.

Q. So you commingled all money that came in?

A. Yes.

Q. Okay. Now, if you --

A. And to add to the process here, the reason he wanted that money to come back to him was just so he could close it out in the system and show that there wasn't a write-off, which ultimately if you were to analyze the history -- in fact, I think if we wrote off $10,000 in three years, that was a lot. I mean, we got paid for everything, and we remitted what we were required to remit to the bank.

Q. Okay. Do you have anything in writing with Castlen that says -- well, let me just use this as an example. Your response to Castlen, why didn't you remind him that you had already paid off 1714 because it was more than 60 days due?

A. It wasn't necessary because -- it just

it says about two days ago he sent you an e-mail noting the delay between when the check was written and when it was received from the bank. So this would have been an e-mail to you towards the end of August of '07, correct?

A. Yes.

Q. And it indicates that he asked you about the delay and whether Verizon had held the check. Am I reading that correctly?

A. You are accurate.

Q. And you have noted that your response was that there is usually a 10-day delay between the check date and when we, SkyWaves, receive and deposit the payment. Then you go on to say the payment is then sent to BB&T along with a check to retire the receivable. Do you see that?

A. Yes.

Q. Is that what you told Castlen Morris?

A. I would say it is based on what I had noted here.

Q. Okay. Then we go on to the third paragraph. "In this case approximately six weeks had passed before the payment was sent to the bank. He asked why there was such a long delay and whether we were having cash problems. I replied

that cash was always tight and that I held onto the payment longer than I usually did." Is that what you told Mr. Morris?

A. Yes.

Q. Was cash always tight at SkyWaves?

A. Considering we were a startup business with growth and then some of the delays in the programs that we have documented here, I would not say always -- I mean always is a general term to say in a startup business cash is going to be tight. In this case, as I have noted, it was a little tighter than usual.

Q. Okay. And you are telling Mr. Morris that you held onto the payment longer than you usually did?

A. Yes. As I mentioned when we first started talking about the holding onto the payments and utilizing those, this was part of the cash management between -- the decision whether to hold onto it longer, as you would perhaps in an asset base lending situation, or turning it over so you can save money on interest. So this was part of that balancing strategy that we had been using for the entire agreement.

Q. And there is nothing in here about you

A. Actually, I don't know. I am sorry.

Q. All right. You go on to say, "We reviewed the aging report and identified the payments that have been received and need to be forwarded to the bank." Is that an accurate recount of your discussion with Castlen Morris on September 16th of 2007?

A. That would be -- yes, and those would be ones that would be approaching the 60-day time period.

Q. Then you make a reference that you sent an assignment and an advance on Friday that Castlen held off processing until you and he had this conversation, the one that you have referenced in the paragraph above, correct?

A. Yes.

Q. And it indicates you made a commitment to resolving those issues; is that correct?

A. Yes.

Q. Okay. And then in the third paragraph, you note that Mr. Morris reiterated that the payments received cannot be held, and it could result in a cancellation of the contract. Do you see that?

A. I see that.

Q. Did Mr. Morris tell you that?

A. He did, and that's what raised my level of concern to document this, as I said before.

Q. You were concerned that he has told you this could result in a cancellation of the contract?

A. Absolutely, and that was not the understanding we had, so, yes, I was very concerned.

Q. Well, other than writing this in a note to your file, did you write this to anybody at BB&T?

A. I didn't think it was necessary at the time, so I did not.

Q. Okay. You were concerned but not concerned enough to go to somebody at BB&T over Castlen Morris's head to say, "Wait a minute, wait a minute, he is wrong on this"?

A. That's correct, because I knew the agreement we had, and if this presented a problem, then we would address it with Jim Edahl, who is our bank representative, our sole point of contact, and so I would think that all of the discussions that we had would not indicate that this should be an issue, but because he was expressing that, I

A. Okay. So it is slightly higher by -- it is 117 versus -- it is around 118 loss forecast to 133 loss actual, so not very big of a difference.

Q. Okay, but slightly larger loss?

A. Slightly, yes.

Q. And then August?

A. It is 114 versus 131. It would be 27,000 difference.

Q. How about September?

A. It's 134 loss versus an 80 loss.

Q. So it's a bigger loss?

A. Larger, yes.

Q. So the losses for July, August, and September have gotten larger than the projected losses in this forecast?

A. Yes.

Q. Okay. After getting the actuals through September of '07, did you revise -- I think you said you revised the forecast after first quarter's numbers. Did you ever revise the forecast after getting numbers through September?

A. Yes.

Q. Okay. And did you ever send a revised forecast after -- I guess it would had to have been

A. It means we did not take an advance on the particular purchase order for this.

Q. Okay. Just so I understand, if you did take an advance on a purchase order, then that just cut into, if you will, what was available to advance on the invoice?

A. Yes.

Q. Okay.

A. Right, because I would have already had 65 percent of it.

Q. Okay. I just want to make sure I understand how it worked. So when a purchase order came into play, you got 65 percent, and when it converted to an invoice, you got another 20 percent?

A. That's correct.

Q. And then if there was no purchase order and it was a straight invoice, you got 85 percent?

A. Yes.

Q. Okay.

(DFT. EXH. 56, 12/14/07 E-MAILS, was marked for identification.)

Q. I hand you Exhibit 56, and this is Mr. Burke's response to you on December 14th and requested the straight 85 percent advance, and he

indicates that he doesn't have any availability to advance until the past due gets cleared or we get more sales. Do you see that?

A. I do.

Q. He is telling you he didn't have any availability at this point to advance you any money, correct?

A. Yes.

Q. Okay. And we saw that had happened before with Castlen Morris, correct?

A. Yes, and -- well, early '07, coming off of '06, yes.

(DFT. EXH. 57, 1/17/08 PRESENTATION, was marked for identification.)

Q. I am going to hand you what we have marked as Exhibit 57, and ask you if you recognize this, Mr. Voytko.

A. I do.

Q. Okay. And tell me what this is. I can read the title. It says it is a presentation for Jim Edahl and Mike Burke. Is that what this was used for, to your knowledge?

A. Yes, this was used for a presentation to both of them when they made their visit to SkyWaves on the 17th, and it was the first time

that Mr. Burke had been at the facility.

Q. Okay. Were you involved in making this presentation to Mr. Edahl and Mr. Burke?

A. Yes.

Q. Okay. Did you help prepare this presentation to Mr. Edahl and Mr. Burke?

A. Yes.

Q. Okay. And if you look towards the back of this presentation, it has a 2008 income statement.

A. Yes.

Q. I am assuming that as of January 17th of 2008, this is a forecast?

A. Yes, it is.

Q. Okay. Did you prepare this forecast?

A. I was one of many that did, yes.

Q. Now, as of January 17th, 2008, did you have SkyWaves' year-end --

A. I did.

Q. Financials prepared?

A. I did.

Q. Okay. Did you review those in putting together the 2008 income statement?

A. Yes.

Q. And tell me again what the purpose of

A. Yes.
Q. And what was the purchase order sub-limit?
A. Two million, I think.
Q. Okay.
A. So you are wanting to go --
Q. No, I have already asked you about Exhibit 57.
A. Okay.
Q. Do you remember when you provided the 2007 year-end actual financial statements to BB&T?
A. I believe it was around the time of this presentation because I made, I'll say, a concerted effort, I wanted to get those done, so we had them not just to be able to do the forecasting but also to be able to get those into everyone's hands.
(DFT. EXH. 59, 2007 PROFIT & LOSS, was marked for identification.)
Q. And I am going to hand you, Mr. Voytko, Exhibit Number 59 and ask you if this is SkyWaves' actual P&L for 2007.
A. Yes, I believe it is.
Q. And did you prepare this document?
A. Yes, I would have.

Q. Okay. How about let's look at the original.

A. At the bottom of 43?

Q. Well, 44 is what I want to ask about. As I understand it, you prepared 44, but you said you prepared 44 without any actual numbers?

A. Yes.

Q. Okay. And in Exhibit 44, which is your forecast for what SkyWaves' net income would be at year-end, what did you forecast it as?

A. We will assume this is the very first forecast. We projected an income of 1.4 million.

Q. Okay. Plus 1.4?

A. Yes, positive 1.4.

Q. And the actuals that I am looking at here on Exhibit 59 show us that it's actually the exact opposite, correct?

A. Yes.

Q. So it is a negative 1.4?

A. Yes.

Q. Okay. And just in the revised forecast for '07 that you sent to Jim at BB&T in September of '07, so as of September of '07, what are you projecting to the bank that SkyWaves' net income would be?

A. A negative loss of 120,000.

Q. Okay. So we have got three more months, and we actually end up with -- well, let me ask you this: You talked about material differences. Would you consider a negative 1.4 million to be a material difference from 120,000 negative?

A. Yes, it is.

Q. Okay.

A. But just to add, the purpose of forecast was to update based on new sets of facts, and so that's different from when you report financial information that is actual and is meant to be relied on by investors. So just to clarify that.

Q. Sure. Well, let me ask you this: In this exhibit that we looked at, 43, in September of '07, you are revising the forecast that you are sending to the bank, correct?

A. Yes.

Q. And you identified in your notes six reasons why you revised the forecast.

A. Yes.

Q. Okay. So you are looking at six reasons that you think are going to require you to

to continue turning the money -- I mean, that is what lending and doing business is all about -- we would have generated profits from that, and those profits could have gone towards building that shelter that was already advanced on. The only time we get really in trouble is when they say, "I want all of these now," then if we had that problem, then we have to seek perhaps a private equity company or an angel-type investor, but that money is going to be expensive, and that party wanted a piece of equity. That would be an alternative. We never got to the point of having to face that dilemma because, as you know, in the end of January, our line was pulled, and we basically had access to zero.

Q. When did the factoring agreement with BB&T end by its own terms?

A. March.

Q. Of 2000?

A. It would have been March of 2008, yes.

Q. So as of January of 2008, had SkyWaves entered into any discussions with other lenders?

A. We had not, and that's because in 2007, in March, when we did the last renewal, we explored other options. We had other options that were

viable, and the bank stood up and said, "Pick us, we will see you through to the end." And we relied on that.

Q. And was the bank obligated to renew the factoring agreement when it expired in March of '08?

A. As far as I know, they were not obligated.

(DFT. EXH. 61, HISTORICAL & PROJECTED INCOME STATEMENT 2002-2009, was marked for identification.)

Q. Okay. Let me hand you what I am marking Exhibit 61, and, Mr. Voytko, this is a historical and projected income statement from '02 to '09 for SkyWaves, and I wanted to just ask, did you prepare this document?

A. Yes, I would have prepared it.

Q. Okay. And if I take this projected income statement from '02 to '09, as I understand it, you were there in '05, correct? You were at SkyWaves in 2005, correct?

A. Yes.

Q. And you prepared actual financial statements for SkyWaves in 2005, correct?

A. Yes.

Q. Okay. And do you understand this to be BB&Ts letter of default?

A. Yes, I do.

Q. Okay, and did you discuss this letter with Mr. Konersmann?

A. I did.

Q. Tell me what you and Mr. Konersmann discussed.

A. Well, we discussed in detail the reasons noted.

Q. Okay. And I want to note, if you look at the end of the first paragraph, it says, "In particular, but not by way of limitation, the default consists of the following." Do you see that?

A. I see that.

Q. Do you understand that these were three defaults that the bank was identifying?

A. Yes.

Q. Okay. And I want to ask you, tell me what you and Mr. Konersmann discussed about paragraph number 1.

A. That that was contrary to the agreement we had and that we had operated under for three years.

the factoring line, how it worked.

Q. And tell me --

A. Exactly?

Q. Exactly what you said. Don't summarize. Tell me what you told Mr. Hennessy.

A. We would have explained that as purchase orders came in, we got advances on those. As those were completed, they were turning in the purchase orders. We had the 60-day rule, and we would call it in formula, that had been agreed upon, and we were consistent in three years in how we handled that. And essentially based on the information he may have had or may not have had, I would think he chose to believe anything we said.

Q. And I am asking you to tell me specifically what you told him. Anything else that you recall telling Mr. Hennessy?

A. Well, on these other points, we would have talked about the payables, the payables of that approximately 37 percent, and about 25 percent represented payables with an investor who was one of our vendors who had agreed to give us extended terms.

Q. And who was that?

A. That was Structured Tech, which was

owned by Franz Meier, who is a large investing company.

Q. So you told Mr. Hennessy that 25 percent of the 37 percent of the payables that were over 60 days were payables to a company owned by Franz Meier and that he had agreed to extend the repayment terms?

A. Yes.

Q. Okay.

A. And then the good faith belief in that portion would have been a rebuttal through the investors bringing more money into the company, and then we asked him, here again based upon what Jim had told us, me personally and through Ron, that I understood that the bank was willing to work with us. So we spent hours and weeks working on, you know, just suggestions in trying to come up with a plan that would be acceptable to the bank.

Q. Did you have any more discussions with Mr. Hennessy after this meeting that you and Mr. Konersmann had with him?

A. There were several. There were several.

Q. Okay. Several meetings with Mr. Hennessy in which you participated or several

information would have been confidential. I don't know if we would have supplied it either, like, for example, some employee details, but some would have been easy, and some would have been difficult. It would have been very time consuming, and as I recollect the time, there was 30 hours a week -- 30 hours' worth of week to do in a day, so we had to choose priorities.

Q. Now, as I understand it from looking at Exhibit Number 4, Mr. Meier was a shareholder, was he not?

A. He was.

Q. So you made reference to not giving him that information because some of it was confidential. Would he not have had a right to it as a shareholder in the company?

A. Not necessarily, because they take payroll information, for example. That is not something that you just share with even an investor. You know, to use the example, if you owned a hundred shares in IBM, I doubt you would be able to walk into their HR department and ask to see payroll files.

Q. Now, you indicated in response to paragraph number 2 that 25 percent of the payables

over 60 days were to Mr. Meier, correct?

A. Yes, uh-huh.

Q. What about the other 12 percent?

A. They would have been various vendors.

Q. Okay. Do you disagree that 12 percent was over 60 days due and owing?

A. I would agree that is accurate.

(DFT. EXH. 65, MARCH 2008 E-MAILS, was marked for identification.)

Q. I am going to hand you what we have marked as Exhibit 65, Mr. Voytko, and this is an e-mail communication between you and Mr. Burke. If you look on the back page, on March 11th of 2008, you are telling Mr. Burke that the following Verizon payments have been mailed to your attention in Atlanta, and it has got four invoice numbers. Do you see that?

A. Yes.

Q. And the amount is off to the right. Did SkyWaves receive those payments directly from Verizon?

A. Yes.

Q. And upon receipt of those payments, did you turn around and send them to Mike Burke?

A. I did, because we didn't have a bank

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "C"

FACTORING AGREEMENT

FACTORING AND SECURITY AGREEMENT

THIS FACTORING AND SECURITY AGREEMENT is made and entered into this 22 day of March, 2005, between Skywaves 1 Corporation, a Delaware Corporation, having its principal place of business at 4280 Pace Street, North Charleston, SC 29405 ("Client"), and BB&T FACTORS CORPORATION, a North Carolina corporation having its principal place of business at Market Street Tower, 317 West High Street, High Point, North Carolina 27260 ("BB&T").

1. **Definitions and Rules of Construction.**

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

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

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

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

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

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

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

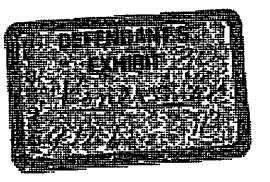
"Business Day" shall mean a day that is not a Saturday, Sunday, legal holiday under the laws of the State of North Carolina or a day on which banking institutions located in such state are authorized or required to be closed.

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) If to Client: Skywaves I Corporation
4280 Pace Street
North Charleston, SC 29405
Attention: President
Facsimile No.: (843) 308-9767
email: _____

(b) If to BB&T: BB&T Factors Corporation
317 West High Street
High Point, North Carolina 27260
Attention: President
Facsimile No.: (336) 889-9917

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

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

a. as soon as available, and in any event within 120 days the close of each fiscal year of Client, reviewed financial statements of Client and its Subsidiaries as of the end of such fiscal year, on a consolidated and consolidating basis, certified without material qualification by a firm of independent certified public accountants of recognized standing selected by Client but reasonably acceptable to BB&T; and

b. as soon as available, and in any event within 30 days after the end of each month hereafter (but within 30 days after the last month in a fiscal year), including the last month of Client's fiscal year, unaudited interim financial statements of Client and its Subsidiaries as of the end of such month and of the portion of Client's fiscal year then elapsed, on a consolidated and consolidating basis, certified by the principal financial officer of Client as prepared in accordance with GAAP and fairly presenting the consolidated financial position and results of operation of Client and its Subsidiaries for such month, subject only to changes from audit and year-end adjustments.

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

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

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

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

25. Applicable Law. This Agreement shall not become effective until accepted by BB&T in High Point, North Carolina. All acts, transactions, rights, and liabilities under this Agreement shall be governed in all respects by, and construed in accordance with, the internal laws of the State of North Carolina.

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

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

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

29. Waivers. **To the fullest extent permitted by applicable law, Client hereby knowingly, intelligently and expressly waives demand, protest, notice of protest, notice of default or dishonor, notice of payment or nonpayment, and notice of default, release, compromise, settlement, extension, or renewal of any instruments or guaranties held by BB&T on which Client may in any way be liable; trial by jury and the right to trial by jury on any issue in any way pertaining to this Agreement or any transactions or occurrences arising hereunder or governed hereby (which right BB&T likewise waives); and notice of BB&T's acceptance of this Agreement.**

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

ATTEST:

Secretary

(CORPORATE SEAL)

SKYWAVES I CORPORATION
("Client")

By: _____
Title: CEO

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

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

By: _____
Title: SVP

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "C1"

JUNE 1, 2005 LETTER

BB&T

BB&T Factors Corporation

317 West High Street (27260)
Post Office Box 310
High Point, NC 27261-0310
(336) 889-3355
Fax (336) 889-9917

June 1, 2005

SkyWaves 1 Corporation
Mr. Ron Konersmann
Mr. John Voytko
4280 Pace Street
North Charleston, SC 29405

Dear Ron & John:

Please accept this letter as a short follow-up to discussion with Steve May regarding the contractual minimum commission charges between SkyWaves 1 Corporation (Skywaves) and BB&T Factors Corporation (BBTF). As explained to BBTF, based on certain events, SkyWaves does not expect to start factoring invoices until July 2005. In the spirit of cooperation and desire to have SkyWaves as a client, BBTF plans to change, to SkyWaves' favor, the minimum commission schedule as follows:

*$1,000/month each month for May and June 2005 (a decrease from $2,500 per month);
*$2,500/month each month for July 2005 to September 2005 (a decrease from $5,000 per month);
*$5,000/month for October 2005 forward.

This change should more closely accommodate SkyWaves' invoicing expectations while providing some income to BBTF.

Feel free to call me at 336-889-3355, x-204, as necessary.

Sincerely,

W. Castlen Morris, Jr.
Client Administration

/wcm

cc: Steve May

DEFENDANT'S EXHIBIT

419

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "C2"

MAY 2006 AMENDMENT TO
FACTORING AGREEMENT

BB&T

BB&T Commercial Finance
317 West High Street (27260)
Post Office Box 310
High Point, NC 27261-0310
(336) 889-3355
Fax (336) 889-9917

Amendment to
Factoring and Security Agreement
Dated March 22, 2005
Between
Branch Banking and Trust Company
(Successor in merger to BB&T Factors Corporation)
And
SkyWaves 1 Corporation

Certain paragraphs of the above referenced Agreement are amended as follows:

Paragraph (1)-Definitions and Rules of Construction:

Section A-"Maximum Credit Amount"

The Maximum Credit Amount shall be increased from One-Million Five-Hundred Thousand Dollars ($1,500,000) to One-Million Seven-Hundred Fifty Thousand Dollars ($1,750,000).

Paragraph (6)-Factoring Commission:

The minimum commission will be Two-Thousand Five-Hundred Dollars ($2,500) per calendar month beginning May 2006 and continuing forward monthly thereafter.

All other terms and conditions will remain in effect.

Branch Banking and Trust Company

By: _____
W. Castlen Morris, Jr.
Asst. Vice-President

Acknowledged this 11TH day of MAY, 2006.

SkyWaves 1 Corporation

By: Ron Konersmann
Ron Konersmann
Chief Executive Officer

421

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "C3"

MARCH 2, 2007 RENEWAL LETTER

BB&T

Branch Banking & Trust Co.

1962 Sam Rittenberg Boulevard
Charleston, SC 29407
(843) 852-5087
Fax (843) 852-5066

James J. Edahl
Senior Vice President

March 2, 2007

Mr. John Voytko
Chief Financial Officer
Skywaves Corporation
4280 Pace Street
Charleston, SC 29405

Re: Line of credit renewal

Dear John:

On behalf of BB&T I am pleased to present the following summary renewal terms for our existing line of credit to Skywaves I Corporation:

Amount: $3,5000,000. Sub-limit of $2,000,000 for purchase order financing. All existing contracts are eligible to be financed.

Advance Rates: 85% of qualified invoices, 60% of qualified purchase orders.

Interest Rate: The prime rate of BB&T plus 1% adjusted daily as the prime rate may change from time to time.

Fees: .45% of each invoice financed capped at $3,000 a month.

Repayment: Interest monthly, principal at maturity of 4/5/08.

Other: All other existing terms and conditions will remain the same.

Assuming Skywaves 2007 budget previously submitted to BB&T is achieved, we will consider further changes in the structure of the line as to rates and terms once the final year 2007 financial statements become available.

I have enjoyed working with you, Ron, and the Skywaves team over the last two years as you have successfully grown your business. We at BB&T look forward to continuing to assist you as you continue to build the company.

Very truly yours,

Jim Edahl
Senior Vice President

EXHIBIT
Pltf 28
Voytko
3/13/14
App

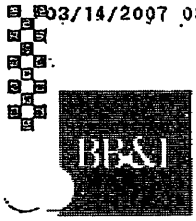
423

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "C4"

MARCH 14, 2007 LETTER



Branch Banking & Trust Co.

1962 Sam Rittenberg Boulevard
Charleston, SC 29407
(843) 852-5067
Fax (843) 852-5066

James J. Edahl
Senior Vice President

March 14, 2007

Mr. John Voytko
Skywaves Corporation
4280 Pace Street
Charleston, SC 29405

Re: Summary of renewal terms dated 3/2/2007

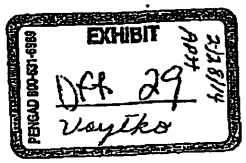
Dear John:

This letter modifies the purchase order advance rate contained in the 3/2/2007 summary of terms from 60% to 65%. All other terms and conditions remain the same.

We look forward to working with you, Ron, and the Board as Skywaves continues to grow. Please let me know if you need additional information.

Very truly yours,

Jim Edahl
Senior Vice President



SKYWAVES

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "C5"

2007 AMENDMENT TO FACTORING AGREEMENT

BB&T

BB&T Commercial Finance

317 West High Street (27260)
Post Office Box 310
High Point, NC 27261-0310
(336) 889-3355
Fax (336) 889-9917

Amendment to
Factoring and Security Agreement
Dated March 22, 2005
Between
Branch Banking and Trust Company
(Successor in merger to BB&T Factors Corporation)
And
SkyWaves 1 Corporation

Certain paragraphs of the above referenced Agreement are amended as follows:

Paragraph (1)-Definitions and Rules of Construction:

Section A-"Advance Percentage"

The Advance Percentage shall increase from Eighty Percent (80%) to Eighty-Five Percent (85%).

Section A-"Maximum Credit Amount"

The Maximum Credit Amount shall be increased from Two-Million One-Hundred Fifty Thousand Dollars ($2,150,000) to Three-Million Five-Hundred Thousand Dollars ($3,500,000).

Paragraph (6)-Factoring Commission:

The factoring commission rate of Ninety-Five One Hundreths of One Percent (0.95%) is deleted and replaced with a monthly fixed factoring commission charge of Three Thousand Dollars ($3,000.00).

All other terms and conditions will remain in effect.

Branch Banking and Trust Company

By: _____
W. Castlen Morris, Jr.
Asst. Vice-President

427

Acknowledged this _____ day of _____, 2007.

SkyWaves 1 Corporation

By: _____
Ron Konersmann
Chief Executive Officer

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "D"

FEBRUARY 15, 2006, JUNE 5, 2006 AND
FEBRUARY 14, 2007 E-MAILS

Edahl, James To Cr. File

From: Morris, Castlen
Sent: Wednesday, February 15, 2006 9:13 AM
To: 'John Voytko'
Cc: Edahl, James
Subject: SkyWavesNextel PartnersBBT PO Report.xls

Attachments: SkyWavesNextel PartnersBBT PO Report.xls

SkyWavesNextel PartnersBBT PO ...

John:

I reviewed the spreadsheet that you created. It looks to be adequate for our purposes. I did make some small corrections in the input fields:

*today's funding date being 2/15/06 (not 1/15/06);
*PO #416491 was corrected from $24,665 to $26,500;
*PO #416822 was corrected from $24,500 to $24,665.

All that said, I will advance to you $85,746 today. Confirm the accuracy of my number.

Invoice assignments should be made in the usual manner without the shipping information as shelters may not have been shipped at time of invoicing.

I also need an "assignment header/summary" from you on invoice #1655. Going forward, make sure that BB&T's notification sticker goes on each invoice to Nextel which instructs Nextel to remit payments to our Charlotte, NC lockbox.

From:	Morris, Castlen
To:	John Voytko </O=SKYWAVESCORP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=JOHN>
Cc:	Edahl, James
Subject:	Collection effort on Nextel and Cingular
Date:	Monday, June 05, 2006 8:54:23 AM

John:

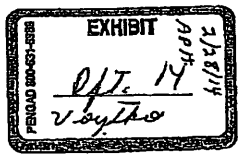
As you are aware by reviewing SkyWaves' aging, numerous Cingular and Nextel invoices are past due. In fact, over $150,000 is 30+ days past due (you have alerted us to $30,186 from Cingular that is in route to BB&T as they remitted a check to SkyWaves). We need your help here. It is necessary for BB&T to have direct communication with SkyWaves' customers in order for us to provide our services. Your assistance in pushing invoices through customers' A/P departments is very helpful. In fact, your assistance is extremely important in pushing invoices through. However, we need to be able to have direct communication with customers. Our ability to do what we do hinges on this important capability. If for some reason you feel that this is not possible, then Jim Edahl, Ron Konersman, you and me need to come up with something else that can meet SkyWaves' need beside factoring. We place extremely high value on the SkyWaves' relationship, but we still have to follow certain protocols.

Additionally, what success have you had in getting Cingular and Nextel to electronically remit payments to BB&T? I noticed on recent assignments that you did not affix BB&T's payment notification language instructing customers to remit payments to BB&T. Do the original invoices contain this payment notification?

Let's talk as necessary. I am available to come down to Charleston, if need be.

Thanks,

Castlen Morris
BB&T Commercial Finance
317 W. High St.
11th Floor Market Square Tower
High Point, NC 27260
336-889-3355, x-204
336-889-9917 (fax)



From:	Morris, Castlen
To:	John Voytko </O=SKYWAVESCORP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=JOHN>
Cc:	Edahl, James
Subject:	Various Items
Date:	Wednesday, February 14, 2007 3:27:40 AM

John:

Jim notified me of your meeting yesterday and that he is working on some options to meet your working capital needs going forward. I wanted to also catch up with you on a few things.

1)Partial balance open on invoice #1839:

There was a $2,879.94 partial balance outstanding on Verizon invoice #1839. The invoice was for $57,778.94 and Verizon paid $54,899.00. From review of the invoice, this amount represents 8% tax that I think you said won't be paid. I have charged the balance off the ledger.

2)Notification Language on Invoices:

BB&T's full notification language needs to go on each invoice that you factor. All I have been seeing is the sentence "This invoice has been purchase by BB&T Factors Corporation." This is incomplete. The complete language needs to be:

This account is assigned to and is owned by Branch Banking and Trust Company. Payment should be made to:

BB&T
P. O. Box 890011
Charlotte, NC 28289-0011

Payment to any party other than BB&T does not constitute payment of the account. Notify BB&T of any discrepancy within 10 days after receipt of invoice.

Phone: 336-889-3355

Do you anticipate any problems in correcting this going forward?

3)Electronic Payment/Remittances for Invoices:

When do you expect to have Nextel, Verizon, and General Dynamics remitting electronically? We have not seen any recent electronic payments from Cingular, but I haven't been expecting any since we aren't factoring those invoices right now.

4)Cingular PO #1246567:

We need to retire the purchase order advance from the remaining Cingular PO #1246567.

Thanks.

Castlen Morris
BB&T Commercial Finance
317 W. High St.
11th Floor Market Square Tower
High Point, NC 27260

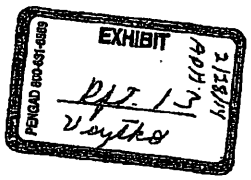
336-889-3355, x-204
336-889-9917 (fax)
castlen.morris@bbandt.com

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "E"

MARCH 25, 2006 E-MAIL



From:	John Voytko
To:	Morris, Castlen
Cc:	Edahl, James; Ron Konersmann </O=SKYWAVESCORP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=Ron>
Subject:	RE: Nextel Partners and Cingular
Date:	Monday, March 27, 2006 12:15:00 PM

Castlen,

Today I received payment for invoice #1671 and #1674 from Nextel Partners. Please relay this information to Bryan Watts.

Please call me Wednesday to discuss your note below.

Best regards,

John S. Voytko
Chief Financial Officer
Skywaves Corporation

john@skywavescorp.com

(843) 308-9757 Office
(843) 224-2020 Cell

From: Morris, Castlen [mailto:Castlen.Morris@BBandT.com]
Sent: Saturday, March 25, 2006 1:03 PM
To: John Voytko
Cc: Edahl, James
Subject: Nextel Partners and Cingular

John:

Jim Edahl approached me late Friday afternoon to discuss the logistics of trying to set up Cingular on a similar purchase order financing scenario as we have done for Nextel Partners. Towards that end, among other things, we discussed the collection activity concerns of which you and I spoke on Friday. I wanted to share with you what we think SkyWaves and BB&T should do, on a collaborative basis, to manage any necessary collection activity. That said, realizing your concerns, if you have not already done so, please make your appropriate contacts at Nextel aware of the factoring relationship between SkyWaves and BB&T. See if your contacts can put us together with a specific individual(s) in their corporate accounts payable area so that we can call them and only them as needed on a particular invoice. By contacting specific Nextel people who are aware of the SkyWaves/BB&T relationship and our purpose in calling, it should not be alarming/distressing/irritating to anyone in the Nextel organization. It truly hinges on your disclosure of the SkyWaves/BB&T relationship to Nextel and their understanding of it. Our inquiry to Nextel would be to find out scheduled payment date(s) on past due invoices. This would happen when invoices reach 10-15 days past due. Assuming that Nextel pays according to terms, no collection calls would be expected as we would receive their checks directly before invoices even reach 10-15 days past due.

The same process would need to occur with Cingular, assuming that Jim and I are successful in establishing a purchase order program for them.

Quite honestly, the financing program that we have put together for you on Nextel and, hopefully, Cingular, is a great departure from what we would do for a "typical" client. Attribute that to the high regard that we at BB&T hold for SkyWaves, its people, and its mission. In order for this type of

program to continue, we ask for your trust in understanding how our business model needs to function as we are trusting how your model needs to function. Direct communication with your customers does not undermine that trust but helps position us to continue to grow our relationship in ways heretofore impossible.

Please contact Jim and/or myself with any questions. Thanks.

Castlen Morris
BB&T Commercial Finance
317 W. High St.
11th Floor Market Square Tower
High Point, NC 27260
336-889-3355, x-204
336-889-9917 (fax)

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "F"

MARCH 20, 2007 E-MAIL

From:	Morris, Castlen
To:	John Voytko </O=SKYWAVESCORP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=JOHN>
Cc:	Edahl, James
Subject:	SkyWavesAmendment3.20.07.doc
Date:	Tuesday, March 20, 2007 5:40:59 AM
Attachments:	SkyWavesAmendment3.20.07.doc

<<SkyWavesAmendment3.20.07.doc>>

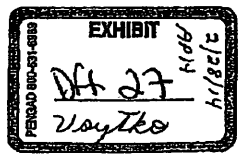
John:

Please print the attached amendment, have Ron sign, and send back to me. I will forward an original for all parties to sign.

Per our conversation this morning, no further commission charges will be assessed against SkyWaves' ledger for the balance of March. Beginning April, the charge will only be $3,000 per month for each successive month. I did not include the new $2,000,000 PO sub-limit or the 65% PO advance rate in the amendment as this is typically not part of BB&T's standard contract (it is something out of the ordinary for SkyWaves exclusively). I didn't want to potentially expose SkyWaves to any legal fees for counsel to create a document. At this point, I am comfortable letting Jim Edahl's proposal letter of March 2, 2007 function in that capacity.

Thanks.

Castlen



Amendment to
Factoring and Security Agreement
Dated March 22, 2005
Between
Branch Banking and Trust Company
(Successor in merger to BB&T Factors Corporation)
And
SkyWaves 1 Corporation

Certain paragraphs of the above referenced Agreement are amended as follows:

Paragraph (1)-Definitions and Rules of Construction:

Section A-"Advance Percentage"

The Advance Percentage shall increase from Eighty Percent (80%) to Eighty-Five Percent (85%).

Section A-"Maximum Credit Amount"

The Maximum Credit Amount shall be increased from Two-Million One-Hundred Fifty Thousand Dollars ($2,150,000) to Three-Million Five-Hundred Thousand Dollars ($3,500,000).

Paragraph (6)-Factoring Commission:

The factoring commission rate of Ninety-Five One Hundreths of One Percent (0.95%) is deleted and replaced with a monthly fixed factoring commission charge of Three Thousand Dollars ($3,000.00).

All other terms and conditions will remain in effect.

Branch Banking and Trust Company

By:_____
W. Castlen Morris, Jr.
Asst. Vice-President

Acknowledged this _____ day of _____, 2007.

SkyWaves 1 Corporation

By:_____
Ron Konersmann
Chief Executive Officer

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "G"

SKYWAVES 2007 PROJECTED FINANCIALS

SEE EXHBIT "V1" FOR CONFIDENTIAL
SKYWAVES 2007 PROJECTED FINANCIALS

CONFIDENTIAL INFORMATION SUBMITTED TO COURT IN CONNECTION WITH CONFIDENTIALITY ORDER FILED ON OCTOBER 23, 2012

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "G1"

ACTUAL FINANCIALS FOR Q1 2007

SEE EXHBIT "V2" FOR CONFIDENTIAL
ACTUAL FINANCIALS FOR Q1 2007

CONFIDENTIAL INFORMATION SUBMITTED TO COURT IN CONNECTION WITH CONFIDENTIALITY ORDER FILED ON OCTOBER 23, 2012

SkyWaves Corporation

Lightweight Communication Shelters

May 8, 2007

Jim Edahl

Re: First Quarter Financial Statement Notes

Jim, I have prepared notes to the 1st Quarter Financial Statements to explain variances to Plan. Please call me if you have questions or want to discuss in greater detail.

Revenues:

For the month of February the number of shelters invoiced equaled plan at 32 shelters. The revenue variance of $250,000 is due to invoicing 5 more Nextel Partner shelters and less Verizon and General Dynamics shelters.

For the month of March the number of shelters invoiced was below plan at 24 vs. a plan of 39 shelters. The revenue variance of $523,000 is due to invoicing 5 less Verizon and 10 General Dynamics shelters (combination of both the New York and Rescue-21 projects.

The New York project has been delayed due to weather issues this past winter that has delayed shelter deployment and subsequent system testing. We expect the project to start back up in July and the 2007 production forecast will be completed in the 3rd and 4th quarters of 2007.

Production flow through has also affected first quarter results. Projects are underway to increase casting productivity and production lines are being installed to more efficiently move shelters through the plant.

Expenses:

Crane costs continue to run above plan. These costs will be reduced with the planned purchase of a crane to move shelters.

Verizon Integration costs of $30,000 were also recorded in February as a carryover from the initial Verizon business received during the fourth quarter of 2006.

John

EXHIBIT
Dft. 36
Vaytko
2/28/12

4280 Pace Street • North Charleston, SC • 29405
Telephone (843) 308-9757 • Fax: (843) 308-9767
www.skywavescorp.com

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "G2"

REVISED 2007 FORECAST

SEE EXHBIT "V3" FOR CONFIDENTIAL
REVISED 2007 FORECAST

CONFIDENTIAL INFORMATION SUBMITTED TO COURT IN CONNECTION WITH CONFIDENTIALITY ORDER FILED ON OCTOBER 23, 2012

444

From:	John Voytko
To:	Jim Edahl (jedahl@bbandt.com) <jedahl@bbandt.com>
Cc:	Ron Konersmann </o=skywavescorp/ou=First Administrative Group/cn=Recipients/cn=ron>
Subject:	SkyWaves Forecast
Date:	Monday, September 17, 2007 10:13:00 AM
Attachments:	Skywaves Forecast 9-17-07.xls

Jim,

I have attached is the revised forecast for 2007 and notes explaining the differences from the prior forecast.

Please call me if you have any questions.

Thanks,

John

John S Voytko
Chief Financial Officer
Skywaves Corporation

john@skywavescorp.com

(843) 308-9757 Office
(843) 225-3903 Direct
(843) 224-2020 Cell

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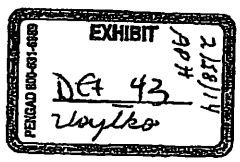


SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "G3"

SKYWAVES YEAR-END FINANCIAL STATEMENTS

SkyWaves Corporation
Profit & Loss
January through December 2007

	Jan 07	Feb 07	Mar 07	Apr 07	May 07	Jun 07	Jul 07	Aug 07	Sep 07	Oct 07	Nov 07	Dec 07	TOTAL
Ordinary Income/Expense													
Income													
Sales	1,042,560.00	857,350.00	827,088.00	787,868.00	610,014.00	502,842.00	407,384.00	408,377.00	416,515.00	486,519.00	141,229.00	135,774.00	6,703,621.00
Total Income	1,042,560.00	857,350.00	827,088.00	787,868.00	610,014.00	502,842.00	407,384.00	408,377.00	416,515.00	486,519.00	141,229.00	135,774.00	6,703,621.00
Cost of Goods Sold													
Cost of Goods Sold	738,507.89	663,063.02	593,438.69	558,209.02	438,555.55	364,098.90	297,567.13	277,725.38	294,724.69	351,668.30	104,153.16	96,000.66	4,788,312.31
Job Materials	0.00	58.62	187.88	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	246.40
Total COGS	738,507.89	663,721.64	593,626.57	558,209.02	438,555.55	364,098.90	297,567.13	277,725.38	294,724.69	351,668.30	104,153.16	96,000.66	4,788,558.71
Gross Profit	304,072.11	273,628.46	233,462.43	209,658.98	171,458.45	138,743.10	109,798.87	130,651.62	121,790.41	134,850.70	37,075.84	39,773.32	1,904,962.29
Expense													
Bank Service Charges	1,747.27	1,061.43	1,055.04	5,985.91	1,281.95	1,337.46	1,891.53	1,800.07	-21.63	1,788.51	1,698.12	1,432.78	21,014.45
Communications	1,234.60	728.69	2,636.15	1,176.14	1,617.67	1,514.04	1,466.40	1,462.75	2,010.16	1,292.35	1,838.07	1,150.18	18,126.29
Contract Labor	5,296.63	7,838.79	8,124.00	6,081.03	18,028.62	18,959.86	19,004.30	15,688.03	15,828.33	15,080.00	17,240.00	15,944.00	157,109.83
Contributions	0.00	0.00	250.00	0.00	0.00	125.00	0.00	0.00	200.00	0.00	0.00	0.00	575.00
Dues and Subscriptions	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	99.00	0.00	0.00	0.00	99.00
Factory Building Rent	35,777.52	35,777.52	35,777.52	35,777.52	35,777.52	35,777.52	35,777.52	35,777.52	35,777.52	35,777.52	35,777.52	34,777.52	429,330.24
Factory Expenses	13,178.72	16,585.29	17,503.60	16,436.17	11,028.58	10,998.05	15,343.74	27,662.68	14,763.63	13,302.10	12,050.89	4,868.37	175,555.82
Factory Equip Rent	6,598.04	7,600.43	3,436.52	5,506.81	3,065.83	1,848.06	2,438.24	4,428.48	5,468.24	4,190.65	4,247.50	2,367.65	51,170.25
Freight & Delivery	10,967.50	13,780.00	8,212.50	10,092.50	17,025.00	14,327.50	17,862.50	9,975.00	11,105.36	12,957.75	7,887.50	5,200.00	139,093.11
Hiring & Recruiting	793.67	0.00	236.02	122.12	682.15	0.00	0.00	0.00	0.00	0.00	0.00	0.00	2,143.99
Temporary Housing	2,700.00	6,150.00	1,950.00	3,450.00	3,450.00	3,450.00	3,450.00	3,450.00	3,550.00	3,450.00	3,837.67	4,687.33	42,485.00
Insurance	9,668.02	20,257.24	20,215.12	24,274.70	20,864.31	24,274.11	24,931.80	20,646.41	25,662.61	7,146.42	21,160.74	21,004.79	262,626.57
Loan Expense	0.00	0.00	0.00	0.00	0.00	20.77	0.00	0.00	0.00	0.00	0.00	0.00	20.77
Marketing	2,965.00	3,621.10	3,092.05	11,430.40	625.00	0.00	0.00	0.00	67.98	63.19	-5,821.07	1,903.62	17,847.52
Office Expenses	5,110.34	2,337.03	2,645.62	2,628.98	3,936.13	4,094.54	3,065.30	2,538.94	2,498.98	3,535.08	2,529.85	2,004.36	37,024.83
Overhead Allocation	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Payroll, Property & Other Taxes	25,422.12	21,080.10	28,069.11	19,092.60	18,190.81	14,298.00	14,564.38	14,791.94	17,614.89	13,038.43	13,468.36	11,656.20	206,777.94
Professional Fees	8,414.88	1,896.64	140.00	-8,628.65	11,148.64	5,572.24	4,433.07	7,334.27	6,204.20	2,227.74	8,741.77	5,638.88	53,861.36
Repairs and Maintenance	16,302.91	14,583.60	13,681.53	12,780.84	7,820.48	11,214.46	9,018.06	9,022.65	8,602.89	8,842.74	9,028.18	4,333.28	126,040.05
Salaries and Wages	72,949.32	71,467.72	81,081.56	88,110.78	73,399.27	55,341.55	56,033.66	71,257.73	73,200.00	59,650.00	59,650.00	56,200.00	817,501.63
Security	341.07	341.07	677.07	341.07	341.07	341.07	341.07	843.36	341.07	341.07	341.07	359.83	4,749.81
Travel & Ent	4,673.33	3,008.09	4,086.87	13,127.36	5,759.29	14,983.68	8,158.42	10,834.86	12,920.75	11,577.31	10,918.30	8,822.44	109,569.91
Utilities	1,660.84	1,700.77	1,418.94	1,316.74	1,834.93	2,394.52	1,385.54	1,304.26	1,553.06	1,653.70	949.35	1,101.36	17,997.91
Total Expense	220,860.96	229,469.76	241,466.25	247,127.72	241,503.49	217,871.80	217,462.85	248,548.92	239,083.30	192,663.43	202,666.83	188,613.18	2,692,749.59
Net Ordinary Income	77,412.05	44,158.70	-6,025.82	-37,468.74	-70,105.04	-79,128.70	-107,665.98	-117,895.30	-116,272.89	-58,132.73	-165,582.99	-148,839.86	-787,787.30
Other Income/Expense													
Other Income													
Other Income	23,455.50	-3,082.01	17,125.69	-7,087.49	-7,360.07	-2,850.19	82.12	12,246.36	3,450.68	-39,720.42	-32,524.07	-3,639.82	-39,901.80
Interest Income	0.00	0.00	0.00	0.00	0.00	0.00	0.00	411.58	269.37	32.76	3.07	3.13	719.94
Total Other Income	23,455.50	-3,082.01	17,125.69	-7,087.49	-7,360.07	-2,850.19	82.12	12,658.97	3,719.05	-39,687.64	-32,521.00	-3,636.79	-39,182.86
Other Expense													
Interest Expense - Notes	26,172.32	27,500.74	31,595.27	28,511.36	24,630.65	21,862.55	27,569.58	26,008.03	27,686.02	30,437.11	30,747.21	29,523.43	341,236.07
Depreciation Expense	9,500.00	12,500.00	12,500.00	12,500.00	12,500.00	12,500.00	12,500.00	12,500.00	12,500.00	12,500.00	12,500.00	12,500.00	143,000.00
Amortization Expense	2,537.50	2,537.50	2,537.50	2,537.50	2,537.50	2,537.50	2,537.50	2,537.50	2,537.50	2,537.50	2,537.50	2,537.50	30,451.20
Other Expenses	20,000.00	30,000.00	0.00	6,692.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	56,692.00
Total Other Expense	54,209.82	72,538.24	46,632.87	50,240.86	39,668.25	36,900.15	42,607.18	42,045.53	42,724.52	45,474.71	53,784.81	44,561.03	571,379.27
Net Other Income	-30,754.42	-75,620.36	-29,507.18	-57,328.45	-47,028.32	-39,750.34	-42,525.06	-29,376.66	-39,005.47	-86,162.36	-86,305.81	-48,197.82	-610,662.13
Net Income	46,657.63	-31,461.66	-37,533.00	-84,797.19	-117,133.36	-118,879.04	-150,211.04	-147,271.96	-155,278.36	-143,295.09	-251,888.80	-197,237.68	-1,398,349.43

EXHIBIT
2/16/11 APH
Dft. 59
Voytko
PENGAD 800-631-6989

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "H"

SEPTEMBER 2007 NOTES

9-1-07

Ron,

Here are notes from my discussion with Castlen yesterday regarding the Verizon payment that was sent to the Bank this week.

About two days ago he sent me an email noting the delay between when the check was written and when it was received from the bank. He asked me about the delay and if Verizon had held the check. I stated that there is usually a 10 day delay between the check date and when we receive and deposit the payment. The payment is then sent to BB&T along with a check to retire the receivable.

In this case approximately 6 weeks had past before the payment was sent to the bank. He asked why there was such a long delay and whether we were having cash problems. I replied that cash was always tight and that I held on to the payment longer than I usually did.

He stated that this could be viewed as a violation of the factoring agreement and it would also reflect negatively on him as well. In addition he noted that we would pay interest on the borrowed funds regardless of being a PO advance or an outstanding invoice and that it would be better reflected as a PO advance.

We then discussed the approximate amount that was held longer which is in the $350K range. I stated that additional payments were in route to him which should apply after Labor Day and that around mid month I would be able to submit additional payments and be closer to the spirit of the factoring agreement.

9-17-07

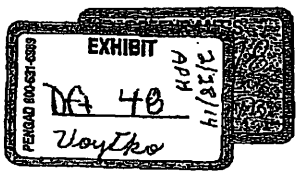
Ron,

I had a conversation with Castlen yesterday about sending remittances to the bank for outstanding invoices. We reviewed the aging report and identified the payments that have been received and need to be forwarded to the bank. I proposed to send check stubs for the oldest items and then process a wire transfer to complete the process for about $250k that will generate about $45k that I can use to clear another invoice and get current through July 07. To do this I need to advance on 7 PO's today.

I had sent an assignment and an advance on Friday that he held off processing until we had this conversation and I made a commitment to resolving these issues.

He reiterated that the payments received cannot be held and it could result in a cancellation of the contract. It does not appear that there is any other spotlight on the status at this point in time. In addition, he mentioned that the purpose of the PO line is to provide the up front financing and not to extend the receivables.

We also discussed setting up the remaining customers to remit via wire transfers. I need to complete this process for VZ.



SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "I"

DECEMBER 14, 2007 E-MAIL

From: Burke, Mike
To: John Voytko </O=SKYWAVESCORP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=JOHN>
Subject: RE: SkyWaves Assignment #100
Date: Friday, December 14, 2007 3:06:17 AM

John,
We purchased the assignment but even with that I show a shortfall on the account in the amount of $36,100. This is due to some past dues over 60 days for $43,125 that we are reserving for. I don't have any availability then to send until the past due gets cleared or we get more sales.

Michael Burke

Vice President
BB&T Commercial Finance
950 East Paces Ferry Road, Suite 2200
Atlanta, GA 30326
404-442-5128 office
770-714-7812 cell
MTBurke@BBandT.com

From: John Voytko [mailto:john@skywavescorp.com]
Sent: Friday, December 14, 2007 10:43 AM
To: Burke, Mike
Subject: SkyWaves Assignment #100
Importance: High

Mike,

Here is a small assignment for today. Both invoices are a straight 85% advance. Both shelters have been invoiced so there is nothing on the PO Ledger. Let me know the amount of the deposit for today.

Thanks,

I hope all went well yesterday.

John

John S Voytko
Chief Financial Officer
Skywaves Corporation

john@skywavescorp.com

(843) 308-9757 Office
(843) 225-3903 Direct
(843) 224-2020 Cell

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SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "J"

JANUARY 25, 2008 LETTER

BB&T

Branch Banking & Trust Co.

2575 Atlanta Plaza
950 E. Paces Ferry Rd.
Atlanta, GA 30326
(404) 442-5000
Fax (404) 442-5087

January 25, 2008

Skywaves I Corporation
4280 Pace Street
North Charleston, SC 29405
Attention: President
Via Facsimile – 843-308-9767

Re: Factoring and Security Agreement dated March 22, 2005 between Skywaves I Corporation ("Skywaves") and BB&T Factors Corporation (now known as Branch Banking and Trust Company, through merger) ("BB&T) (the "Agreement")

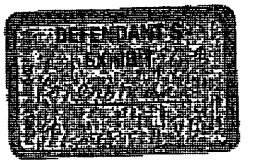
Dear Sir:

As you are aware, BB&T has recently completed a routine audit of the books of Skywaves as allowed and required by the Agreement. As a result of the findings of that audit you are hereby notified that Skywaves is in default of the Agreement due to its breach of the terms thereof. In particular, but not by way of limitation, the default consists of the following:

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

At this time, as a result of the default and/or in exercise of rights granted to it in the Agreement (regardless of the existence of a default), BB&T will make no further Advances (as defined in the Agreement). Additionally, BB&T is hereby demanding payment of the Obligations due under the Agreement (including any Advances outstanding).

You are further advised that, at the present time, BB&T is exercising its rights to terminate its further performance under the Agreement. This action, together with



BB&T's election to provide further Advances, for the present time, terminates any obligation that BB&T might have to provide any additional funding to Skywaves.

Should you have any questions regarding this matter, do not hesitate to contact me at the number below.

Sincerely,

Michael J. Hennessy
Senior Vice President
Business Loan Administration
200 West 2nd St, 6th Floor
Winston-Salem, NC 27102
Office 336-733-2557
Fax 336-733-2196
Cell 336-575-0889

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

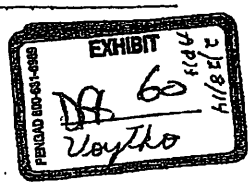
EXHIBIT "K"

FEBRUARY 8, 2008 E-MAIL

SEE EXHIBIT "V4" FOR SKYWAVES
2008 FINANCIALS

CONFIDENTIAL INFORMATION SUBMITTED TO COURT IN CONNECTION WITH CONFIDENTIALITY ORDER FILED ON OCTOBER 23, 2012

Edahl, James



From: earl@hewlette.com
Sent: Friday, February 08, 2008 8:14 AM
To: Hennessy, Michael
Cc: Caple, Frank; Edahl, James; ron@skywavescorp.com
Subject: Skywaves Corporation
Attachments: SKyWaves Cost Savings-Production schedule-1.xls; BB&T repayment schedules.pdf

Michael,

As we discussed last evening, immediate help from BB&T is necessary in order to sustain operations. I believe this is in the best interests of the bank for two reasons: First, there are 36 shelters in various stages of construction which in a short period of time can be completed, invoiced, and proceeds in excess of $1M paid to the bank and second, continuing operations is the only way I can see to repay the non-conforming $1.6M. ~~Immediate assistance from the bank will also give Skywaves enough time to find sufficient~~ equity capital from a venture capital group or by sale or merger of the company. Any of these avenues would enable Skywaves to replace your credit line. I have been retained by the company to pursue this and believe this can be accomplished.

In furtherance of a rescue plan, Skywaves has adopted a work force cost reduction plan which will reduce overhead significantly ($54k per month) while still enabling completion of scheduled work. Attached are worksheets on the cost reduction plan and the current production schedule. Further, the company has established an operating committee consisting of the CEO, myself, and Franz X. Meier, a director and major shareholder and landlord. This committee will have control of the day to day financial affairs of the company.

In our meeting Monday, you asked for some comfort as to the reasonableness of the revenue assumptions of the 2008 business plan. I expect to have today a letter from Verizon supporting our estimate that they will purchase almost $12M in shelters this year.

You also asked for something to balance the risk to the bank for accepting our rescue plan. For this we can offer a collateral assignment of all of Skywaves intellectual property rights and the personal guaranty in the amount of $500k by Franz Meier of the new money loaned by the bank as described below.

To effect this rescue plan, Skywaves needs the following two things from the bank. First, the immediate reopening of the line of credit to fund existing, new purchase orders and invoices. And second, the recategorization of the non-conforming $1.6M together with a new advance of $500k as a separate commercial loan outside the line of credit. This loan would be interest only until August of this year when it would be amortized with 10% of every shelter invoice until paid. Attached are spread sheets demonstrating the repayment of

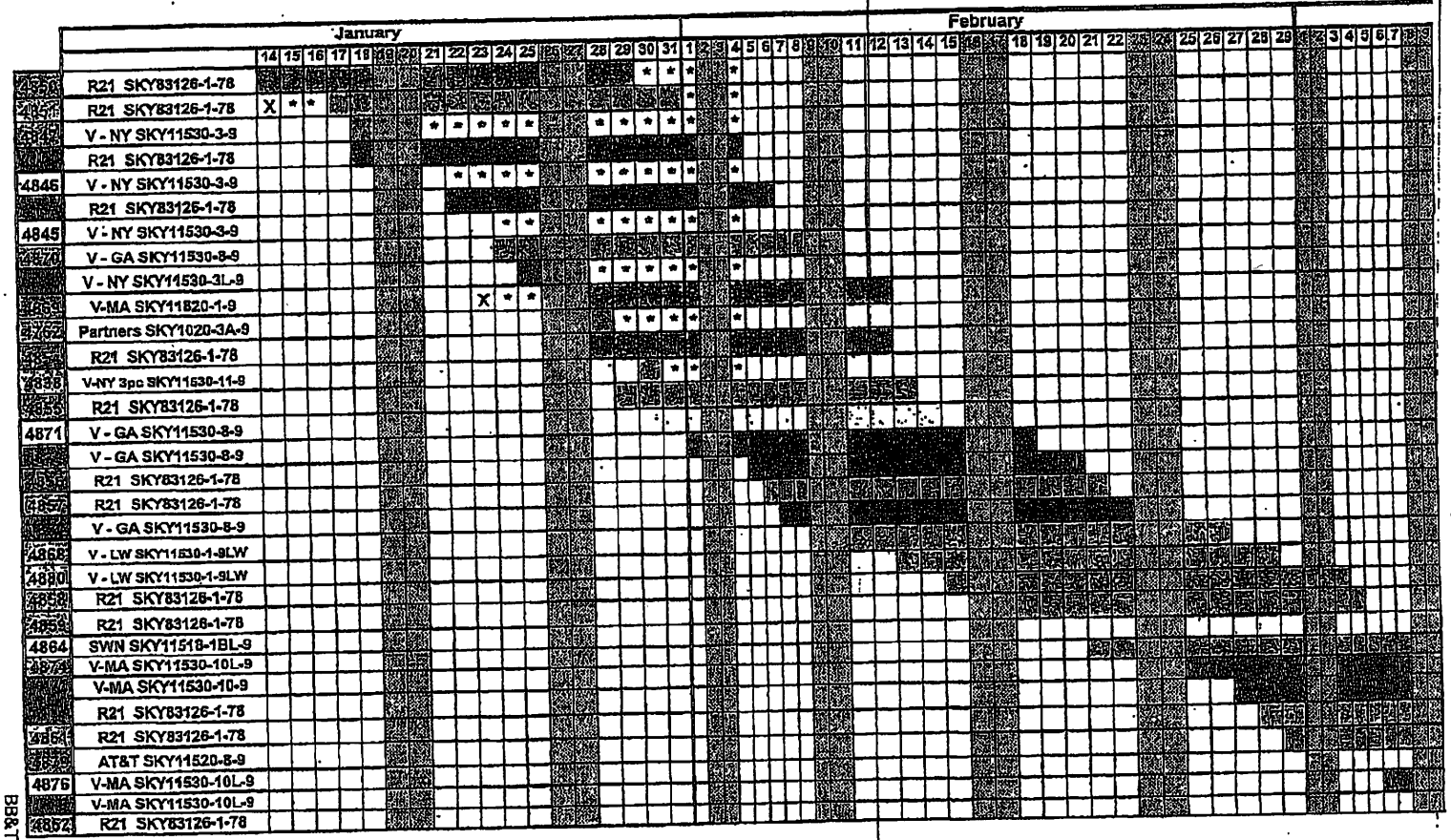
this $2.1M if the company makes its 2008 plan as well as using assumptions of a 20% shortfall in sales and a 20% favorable variance to sales.

Michael, I believe this company is worth saving and that management has a sincere appreciation and regret for the mistakes made in past dealing with the bank and hope you will come to the same conclusion today.

Sincerely,

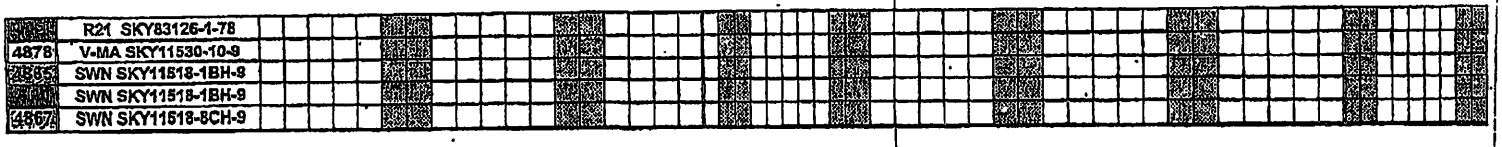
Earl D. Hewlette
PO Box 1450
Mt. Pleasant, SC 29465
843-224-3275
earl@hewlette.com

Production Timeline 2008



BB&T/JE_002768459

Production Timeline 2008



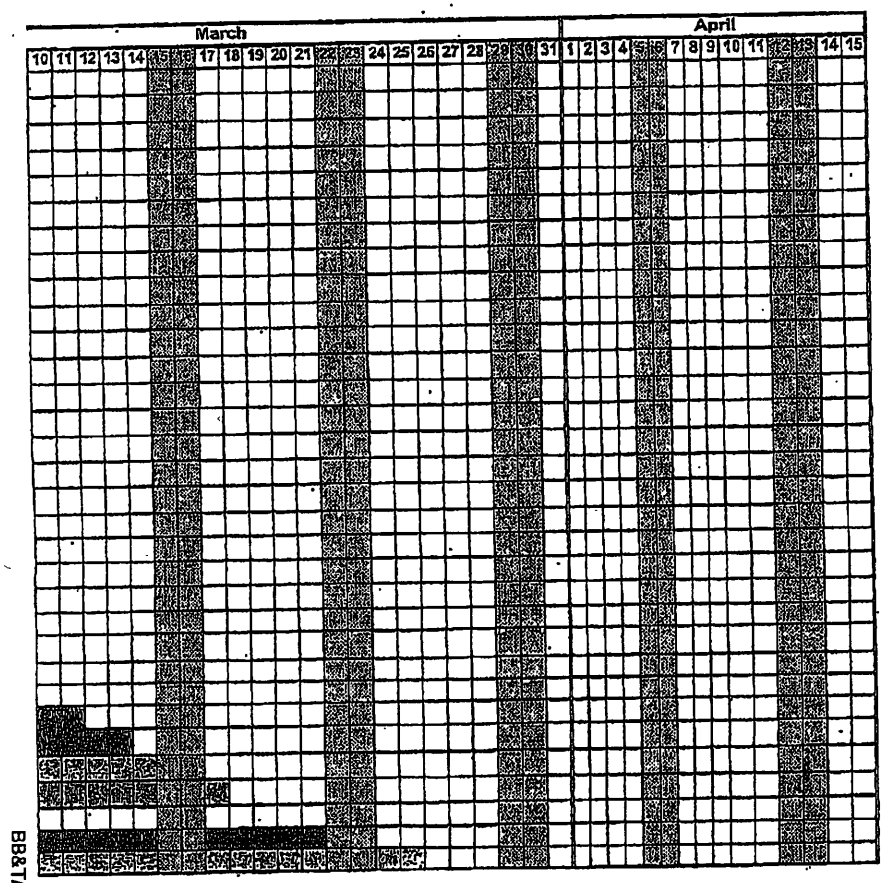
Legend

Scheduled Start/Finish Date	- multi-color
In Progress	- *
Actual Start	- X
Actual Completion	- C
Weekend	-

Revised 2/1/08

BB&T/JE_002764460

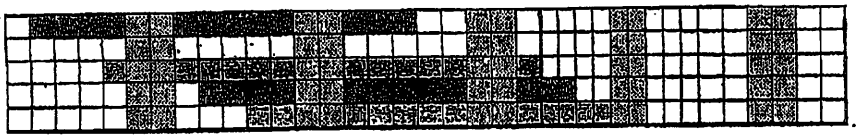
Production Timeline 2008



Revised 2/1/08

BB&T/JE_0027761

Production Timeline 2008



Revised 2/1/08

BB&T/JE_00277462

Employee Name	Department	Bi-weekly	Incremental Payroll 2-8-08
Bundrick, Glenn	Salary	$ 1,600.00	800.00
Hoats, Matthew R	Electrical Production Overtime	920.00	920.00
Sarvis, Michael S	Production Supervision	1,520.00	760.00
McMillan, Bradford G	Electrical Production Overtime	1,280.00	1,280.00
Bundrick, Jr., Glenn D	Fit & Finish	1,120.00	1,120.00
Hollingsworth, Charles L	Electrical Production Overtime	1,280.00	1,280.00
Masula, Jeremy W	Purchasing-Salary	1,288.46	-
Marcelleus Birk	Inventory	960.00	480.00
Ricardo Dominguez	Fit-Finish	720.00	360.00
Rene Camilo	Fit Finish	720.00	360.00
Harold Weathers	Maintenance	800.00	400.00
Alejandro Moreno	Casting	840.00	420.00
David Sarmiento	Casting	760.00	380.00
Orlando Rosas	Caging	720.00	360.00
Bartolo Perez	Electrical	920.00	460.00
Reynaldo Santiago	Electrical	800.00	400.00
Leon Valentino	Electrical	800.00	400.00
Ricardo Dominguez	Fit-Finish	720.00	360.00
Augustin Lara	Trim-Interior	800.00	400.00
Segundo Villatoro	Fit-Finish	720.00	360.00
Alfonso Salas	Trim-Interior	720.00	360.00
Ricardo Sanchez	Trim-Interior	1,120.00	560.00
Staff Reductions via Lay-Offs - 12		$ 21,128.46	$ 12,220.00

Reduce work week - 4 Days 8 hrs	$6,176.00
Total For Two weeks	$27,304.46
Monthly Savings	[redacted]

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "L"

JANUARY 31, 2008 MEMO

January 31, 2008

Ron,
Because of SkyWaves continually missing their growth projections for the past three years, I have invested more money and assumed more debt than I had intended. The delay in business growth for the last three months and the mounting receivables have now put StructurTech in serious trouble. It is critical for both of us to have a clean sheet to work from in all of our business relationships. This has to be done before we can prepare a business proposal for a major investor.
We have actually three types of relationships a) Landlord to Tenant b) StructurTech to SkyWaves and c) Board member/shareholder to SkyWaves. They have been intermingled to some degree and need to be straightened out. Here is what I suggest:
As to Landlord/Tenant:

- Remove the tie in between SW, ST and FXM by eliminating the fluctuating panel credit based on quarterly use of panel.
- Replace it with a fixed panel price reduction to $2.10.
- Remove from the lease the provision to use up to 12 months of the security deposit for rent credit.
- Leave the full amount of the SD in place until SkyWaves is profitable for at least a full calendar year. The deposit can then be reduced annually by a prorated amount as long as the company makes money.
- Sign a release of the parking lot from our lease, as an assurance for Ginn that there will be no delay of transfer beyond the stipulated time.

In turn, I will agree not to call the lease in default, extend a negotiated period of time to catch up on back rent due and guarantee to use the proceeds from the parking lot sale for improvements and/or purchases of additional property for the use of SW.

As to StructurTech to SkyWaves:

- Sign an option agreement, which allows us to represent that SW has control over the panel.
- SW assumes the operation of ST as soon as the cost savings from panel purchases exceed the direct operating costs and enter into a lease for the machinery and a royalty payment agreement based on raw material purchases as per our previous proposal.
- Until SW takes over the operation, SW pays C.O.D.

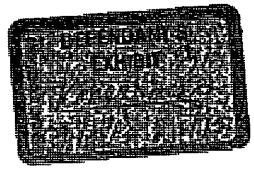
In turn, ST will reduce payables by $100,000 as compensation for the rent shortfall.

As to the shareholder relationship:

- SW recognizes Earl Hewlette as its agent representing SW and ST in a joint effort to find an operating/financial partner with an adequate cash contribution to assure that future capital needs can be met.
- We need to develop a financing plan, which can be approved quickly by the shareholders
- FXM will assist in finding short term financing to the best of his ability

I realize how critical the next three months are and I assure you that I will do everything in my power to get on stable ground. As we both know, this does not solve the long term problem. Hopefully, we can solve it and get a decent price for our investment of money and time.

Franz



SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "M"

FEBRUARY 11, 2008 LETTER

LAW OFFICE OF STEVEN B. LICATA, P.C.

ATTORNEY AT LAW
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Columbia, South Carolina 29223

MAILING ADDRESS:
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Certified Bankruptcy Specialist

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E-Mail: SLicata@sc.rr.com

February 11, 2008

Ronald Konersmann
Skywaves I Corporation
4280 Pace Street
North Charleston, SC 29405

Re: Factoring and Security Agreement dated March 22, 2005 between Skywaves I Corporation ("Skywaves") and BB&T Factors Corporation (now known as Branch Banking and Trust Company, through merger) ("BB&T) (the "Agreement")

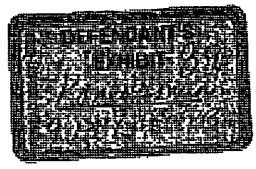
Dear Mr. Konersmann:

As you are aware from prior correspondence, this firm represents BB&T in connection with the obligations owed to it by Skywaves. As a result, I have been asked to respond to Mr. Earl Hewlette's e-mail of February 8, 2008.

Initially, so that there is no misunderstanding whatsoever, due to its default under the Agreement, Skywaves is in default under all of its Note obligations to BB&T (including its March 22, 2005 Note in which it is a co-borrower with KWK, LLC) at this time and BB&T has declared those defaults. BB&T will continue to receive payments on these loans but does so without waiving the default which currently exists. All payments made will be applied to the accelerated balances due.

In direct response to Mr. Hewlette's request, it would be helpful if I first restated what BB&T believes Skywaves to be requesting. From Mr. Hewlette's e-mail, it would appear that the request is as follows:

1. Take $1,600,000.00 (utilizing his numbers) from the existing "line of credit" (presumably referring to the Factoring and security Agreement) and place that amount under a new note;
2. Provide an additional amount of $500,000.00 under this "new note" for a total indebtedness of $2,100,000.00 outside of the existing "line of credit";
3. Reopen the existing "line of credit" for new funding (presumably with the same



$3,500,000.00 limit)

The result of the above would be to have approximately $900,000.00 owed on the Agreement with a renewed availability of $2,600,000.00 and new restructured debt in the amount of $2,100,000.00 for a total debt and/or availability of $5,600,000.00 under and from the Agreement (not including the additional commercial loans of Skywaves and other related entities), an increase of $2,100,000.00 over current availability. As additional security for this increased debt, BB&T is being offered the guaranty of Franz Meier in the amount of $500,000.00. BB&T will not provide funding on these terms, as requested.

Without, in any way, committing to providing further financing of any kind, there are four issues which must be addressed immediately in order for BB&T to even consider not taking immediate action to protect its rights in connection with the current defaults (both as to Skywaves and its property and as to the guarantors for the various debts currently outstanding as well as any debt as to which Skywaves may be a co-borrower).

The first issue relates to BB&T funds which were diverted and converted by Skywaves and one or more of its officers. As you are clearly aware, Paragraph 8 of the Agreement clearly provided:

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

Under these provisions, any funds received by you attributable to an invoice which had been sold to BB&T pursuant to the terms of the Agreement were the property of BB&T. Any use of those funds by Skywaves was an improper and illegal conversion of the funds which is actionable as to Skywaves, any officer or employee participating in or directing the diversion and, possibly, any person or entity knowingly receiving these funds. A recent audit of the books of Skywaves revealed that as of January 22, 2008, the following payments on receivables had been paid directly to Skywaves and the amounts received converted by Skywaves, through the action of one or more of its officers:

Invoice #	Customer	Amount	Date Received
2173	Verizon	$39,751.00	12/5/2007
2169	Alcatel	$41,615.00	12/11/2007
2186	Verizon	$49,101.00	12/18/2007
2181	Verizon	$50,935.50	12/18/2007
2176	Verizon	$43,008.00	12/20/2007
2185	Verizon	$51,172.80	1/4/2008

2179	Verizon	$52,458.00	1/4/2008
2191	Verizon	$13,996.02	1/4/2008
		$342,037.32	

Subsequent to the audit, BB&T has discovered the further diversion of funds as follows:

Invoice #	Customer	Amount
381937	Alcatel	$41,615.00
384417	Alcatel	$27,465.00
		$69,080.00

The total funds diverted that have been discovered by BB&T total $411,117.32. It is BB&T's position that these funds must be immediately returned to BB&T in order to avoid action by BB&T against Skywaves and any individual or entity responsible for this contractually improper and illegal diversion/conversion of the funds of BB&T. In regard to this issue, I must point out to you that if this issue is not resolved through immediate payment of these sums, BB&T will explore and pursue its rights to demand direct payment from Alcatel and Verizon on the involved accounts in view of the sale of these accounts and payment to Skywaves not constituting payment of the assigned invoices.

The second issue which must be addressed relates to amounts owed resulting from funding by BB&T on what it understood to be purchase orders which are maintained under Ledger No. 7702. As of January 29, 2008, the amount advanced and due in this category was $1,908,903.92. Of this amount, approximately $1,200,000.00 was advanced beginning in July, 2007 on "purchase orders" from General Dynamics which the recent audit revealed did not exist as "purchase orders" from General Dynamics. Instead, it was determined that these "purchase orders" were contractual obligations of General Dynamics which had not yet reached the stage where General Dynamics had actually placed the orders, a stage of the process at which BB&T had never agreed to provide funding. It is BB&T's current belief, based upon information provided to it and your admissions during discussions related to this matter, that the 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.

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. It is fully understood that such assets may have to be pledged by parties other than Skywaves as the existing assets of Skywaves already secure the existing debt owed to BB&T.

The third issue is that BB&T is entitled to receive and has requested that it be provided with monthly financial statements from Skywaves. Unfortunately, these statements have not been provided as requested. Receipt of these statements is necessary to allow BB&T to evaluate the company's ability to meet its projections that you have

provided and to verify management's representations as to the use of the funds described above that were improperly received by the company and/or obtained through improper representations. At this point, the failure to provide the requested information leads to the conclusion that what would be revealed in these financials would cause BB&T further concerns. These statements must be received and reviewed by BB&T to determine what other curative action will be necessary as to Skywaves and/or related entities or individuals to which Skywaves may have provided funds (in whatever manner).

The fourth issue is that BB&T currently has advanced approximately $700,000.00 on what it believes, at this time, to be legitimate purchase orders. It is presumed that these purchase orders represent most of the 36 shelters which Mr. Hewlette indicates are in "various stages of construction." Please provide BB&T with a break-down of the purchase orders currently being filled and the status of each of the units covered by those purchase orders including the percentage completion and additional costs to complete.

In a follow-up e-mail to Mr. Hennessy, Mr. Hewlette refers to the "intellectual property" having been offered as additional collateral for the requested additional funds. BB&T already has any intellectual property rights, including patent rights, of Skywaves as collateral for its loans. If Mr. Hewlette is referring to rights held by some other individual entity or person, please provide BB&T with a full description of what you believe is available, the value thereof and, if a proceeding or application is pending, the status of that proceeding or application.

In summary, the above four issues as to the current indebtedness must be resolved to BB&T's satisfaction in order to avoid immediate action by BB&T to protect its rights. If those issues are resolved to BB&T's satisfaction, the opportunity to consider further funding for working capital may be addressed. Such funding, however, is unlikely to be provided in any manner other than as fully secured by relatively liquid collateral.

I am addressing this letter to you as you are an authorized officer of Skywaves. Although you have inserted Mr. Hewlette into the process, BB&T has nothing in writing from you indicating that Mr. Hewlette represents Skywaves and that we are authorized to communicate directly with him. In order for us to conduct discussions with Mr. Hewlette we will need written direction to that effect.

Should you have any questions regarding the foregoing, do not hesitate to contact either the undersigned or Mr. Hennessy. Given the current status of this relationship, no one else has authority to act on behalf of BB&T as to this matter.

Very Truly Yours,

/ Steven B. Licata

Steven B. Licata