THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 23 2018
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 3 OF 5

Julio E. Mendoza, Jr.
Kirsten E. Small
Molly Hughes Cherry
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
803.540.2026

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

See reverse for other counsel of record

Other Counsel of Record:

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

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

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

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

Attorneys for Respondent

J.W. Nelson Chandler, Esq.
Chandler & Dudgeon, LLC
P.O. Box 547
Charleston, SC 29402
(843) 577-5430
nelson@chandlerdudgeon.com

Attorneys for Respondent James Edahl

INDEX

VOLUME ONE

Appellant/Respondent's Final Appellant's Brief 1
Final Respondent's Brief of Respondent/Appellant 51
Final Brief of Respondent 89
Appellant/Respondent's Final Appellant's Reply Brief 126
Final Appellant's Brief of Respondent/Appellant 161
Appellant/Respondent's Corrected Final Respondent's Brief 199
Final Reply Brief of Respondent/Appellant 239

VOLUME TWO

Record on Appeal – Volume I of III 268

VOLUME THREE

Record on Appeal – Volume II of III 742

VOLUME FOUR

Record on Appeal – Volume III of III 1177
Court of Appeals Opinion No. 5557 1545
Petition for Rehearing 1567
Order Denying Petition for Rehearing 1580

VOLUME FIVE (SEALED)

Sealed Supplement to Record on Appeal Pursuant to Court Order 1582

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
AUG 16 2016
SC Court of Appeals

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

Roger M. Young, Circuit Court Judge

22962

Appellate Case No. 2015-001809

Skywaves I Corporation.....Appellant/Respondent

v.

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

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

AND

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

RECORD ON APPEAL – VOLUME II OF III

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

(continued on next page)

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

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

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

(continued on next page)

Other Counsel of Record:

Molly Hughes Cherry, Esq.
Nexsen Pruet, LLC
P.O. Box 486
Charleston, SC 29402
(843) 720-1724 Fax: (843) 414-8209
MCherry@NexsenPruet.com
Attorneys for Respondent/Appellant Branch Banking & Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T

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

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

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

INDEX

VOLUME I

Orders

6/21/10 Order Remanding Case to State Court....10

8/16/10 Order Granting Attorneys' Fees in Removed Case....20

3/28/11 Order Granting Attorneys' Fees in Removed Case....26

10/26/11 (filed 11/8/11) ORDER GRANTING BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T'S PARTIAL MOTION TO DISMISS AMENDED COMPLAINT AND JAMES EDAHL'S MOTION TO DISMISS AMENDED COMPLAINT WITH PREJUDICE....33

6/14/12 (filed 6/15/12) ORDER GRANTING SKYWAVES MOTION TO RECONSIDER....44

8/20/12 Order of South Carolina Court of Appeals....50

3/13/14 (filed 3/17/14) ORDER denying Plaintiff's Motion to Strike and granting Defendants' Motion to Amend Answers....51

2/9/15 ORDER GRANTING DEFENDANT BB&T AND DEFENDANT EDHAL'S (sic) MOTION TO STRIKE PLAINTIFF'S DEMAND FOR JURY TRIAL....53

7/23/15 ORDER GRANTING IN PART DEFENDANT BB&T'S MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANT EDAHL'S MOTION MOTION (sic) FOR SUMMARY JUDGMENT[;] DENYING PLAINTIFF'S MOTION TO RECONSIDER; DENYING PLAINTIFF'S MOTION TO AMEND THE COMPLAINT; AND DENYING PLAINTIFF'S MOTION FOR COMMISSION OF (sic) ISSUANCE OF A SUBPOENA TO DEPOSE JOHN ALLISON....58

Pleadings

12/3/09 Complaint....72

2/12/10 First Amended Complaint....86

2/26/10 BB&T Answer to First Amended Complaint....100

8/10/11 Edahl Memorandum of Law in Support of His Motion to Dismiss Amended Complaint....108

Exhibit B Affidavit of James Edahl 116

11/18/11 Skywaves' Motion to Reconsider, Alter or Amend Dismissal or for Relief from Judgment 120

12/21/11 Edahl and BB&T Memorandum in Support of Motion to Dismiss (originally filed in federal court 2/26/10) 125

Exhibit B Affidavit of James Edahl 138

12/21/11 Edahl Motion to Dismiss (originally filed in federal court 2/26/10) 142

12/28/11 Notice of Appeal 144

Exhibit 1 10/26/11 (filed 11/8/11) ORDER GRANTING BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T'S PARTIAL MOTION TO DISMISS AMENDED COMPLAINT AND JAMES EDAHL'S MOTION TO DISMISS AMENDED COMPLAINT WITH PREJUDICE 147

7/6/12 Edahl Answer to First Amended Complaint (filed in federal court, later filed in state court) 161

7/17/12 (filed 7/19/12) Skywaves Motion to Withdraw Appeal 171

1/17/14 Plaintiff's Motion to Strike 180

Exhibit A Memorandum in Support 183

2/11/14 Affidavit of Edahl 191

2/25/14 BB&T Motion to Amend Answer 193

Exhibit A Proposed Amended Answer 198

3/3/14 Edahl Motion to Amend Answer 209

Exhibit A Proposed Amended Answer 212

3/12/14 (filed 3/13/14) Edahl's Response to Plaintiff's Motion to Strike Answers 224

Exhibit A 9/19/13 Deposition of James Edahl Excerpt 230

3/21/14 Edahl Amended Answer 234

7/24/14 Defendant BB&T's Notice of Motion and Motion to Strike Demand for Jury Trial 245

7/24/14 Defendant BB&T's Notice of Motion and Motion for Summary Judgment 250

7/28/14 Defendant Edahl's Notice of Motion and Motion to Strike Demand for Jury Trial 256

7/28/14 Defendant Edahl's Notice of Motion and Motion for Summary Judgment 260

12/2/14 Amended Answer of Defendant BB&T 265

12/22/14 Defendant Edahl's Memorandum in Support of Motion for Summary Judgment 274

12/22/14 Defendant BB&T's Memorandum in Support of Its Motion for Summary Judgment 287

Exhibit A	9/12/13 Deposition of Ronald Konersmann (Excerpts)	324
Exhibit B	2/28/14 Deposition of John Voytko (Excerpts)	367
Exhibit C	3/22/05 Factoring and Security Agreement	403
Exhibit C-1	6/1/05 Letter from Morris to Konersmann and Voytko	418
Exhibit C-2	5/11/06 Amendment to Factoring and Security Agreement	420
Exhibit C-3	3/2/07 Letter from Edahl to Voytko	422
Exhibit C-4	3/14/07 Letter from Edahl to Voytko	424
Exhibit C-5	2007 Amendment to Factoring and Security Agreement	426
Exhibit D	2/15/06 Email from Morris to Voytko; 6/5/06 Email from Morris to Edahl and 2/14/07 Email from Morris to Voytko	429
Exhibit E	3/25/06 Email from Voytko to Morris	434
Exhibit F	3/20/07 Email from Morris to Voytko	437
Exhibit G-1	5/8/07 Letter from Voytko to Edahl	442
Exhibit G-2	9/17/07 Email from Voytko to Edahl	444
Exhibit G-3	2007 Year-End Financial Statements	446
Exhibit H	September 2007 Notes	448
Exhibit I	12/14/07 Email from Burke to Voytko	450

Exhibit J 1/25/08 Letter from Hennessy to Skywaves 453

Exhibit K 2/8/08 Email from Hewlette to Hennessy 456

Exhibit L 1/31/08 Memorandum 465

Exhibit M 2/11/08 Letter from Licata to Konersmann 467

VOLUME II

Exhibit N Caselaw 472

Exhibit O Caselaw 476

Exhibit P Resume of Ron Konersmann 482

Exhibit Q 2005 Loan Agreement 484

Exhibit R: 2005 Promissory Note 493

Exhibit S 2005 Security Agreement 498

Exhibit T 2007 Promissory Note 505

Exhibit U 2007 Security Agreement 510

Exhibit V-1 2007 Projected Financials (CONFIDENTIAL) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)

Exhibit V-2 Actual Financials Q1 2007 (CONFIDENTIAL) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)

Exhibit V-3 Revised 2007 Forecast (CONFIDENTIAL) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)

Exhibit V-4 2008 Financials (CONFIDENTIAL) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)

12/22/14 BB&T's Memorandum in Support of Motion to Strike Plaintiff's Demand for Jury Trial 520

12/22/14 Edahl's Memorandum in Support of Motion to Strike Plaintiff's Demand for Jury Trial 538

1/12/15 Skywaves' Memorandum in Opposition to Motions to Strike Jury Trial Demand 541

Exhibit A First Amended Complaint 546

Exhibit B Amended Answer of BB&T 560

Exhibit C Proof of Claim 569

Exhibit D Affidavit of Konersmann 604

1/12/15 BB&T's Reply to Plaintiff's Memorandum in Opposition to Motions to Strike Demand for Jury Trial 607

Exhibit *Abikhaled* Case 613

1/12/15 Edahl's Reply to Plaintiff's Memorandum in Opposition to Motions to Strike Jury Demand 621

1/13/15 Skywaves' Letter Brief to the Trial Court in further opposition to Motion to Strike Jury Trial Demand 627

1/15/15 Defendants' Letter Brief to the Trial Court in further support of Motion to Strike Jury Trial Demand 629

2/18/15 Skywaves' Motion to Reconsider and Memorandum 632

4/13/15 Skywaves' Motion to Amend First Amended Complaint 640

4/13/15 Skywaves' Memorandum in Support of Motion to Amend First Amended Complaint 659

4/16/15 Skywaves' Motion to Strike Answers of Defendant Based on Fraud Upon the Court and Unclean Hands and Violation of Rule 37 and Rule 11 and Incorporated Memorandum in Support 668

Exhibit A 4/7/15 Affidavit of James Kerr 681

Exhibit B Excerpt from 3/26/15 Deposition of Richard C.F. Spencer 687

Exhibit C Excerpt from 1/6/15 Deposition of BB&T 694

Exhibit D Excerpt from 9/19/13 Deposition of James Edahl 705

Exhibit E 1/15/15 Letter from Mendoza to Judge Young 709

Exhibit F (None)

Exhibit G 9/25/13 Letter from Linton to Cherry and Mendoza 714

Exhibit H 1/18/08 Email from Edahl to Hennessy (CONFIDENTIAL) (SL/EM-000001) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)

Exhibit I Excerpt from 11/21/14 Deposition of James Edahl 717

Exhibit J Edahl Termination Document (CONFIDENTIAL) (BB&T/PA_003833) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)

4/23/2015 Skywaves' Memorandum in Opposition to Motions for Summary Judgment (Revised and Annotated to Identify the Exhibits) 721

4/24/15 Edahl's Response in Opposition to Plaintiff's Motion to Reconsider the Order Striking Plaintiff's Jury Demand 792

4/24/15 Edahl's Response to Plaintiff's Motion to Amend First Amended Complaint 797

4/24/15 BB&T's Reply in Support of Motion for Summary Judgment 813

4/24/15 Edahl's Reply in Support of Motion for Summary Judgment 837

4/24/15 BB&T's Memorandum in Opposition to Plaintiff's Motion to Strike 850

Exhibit 1 1/22/08 CF Field Examiner's Internal Comments 859

Exhibit 2 2/8/08 Email from Hewlette to Hennessy 862

Exhibit 3 2/11/08 Letter from Licata to Konersmann 865

Exhibit 4: BB&T's 3/23/15 Answers to Plaintiff's Supplemental Set of Interrogatories 870

4/25/15 Edahl's Memorandum in Opposition to Plaintiff's Motion to Strike Answers 880

Exhibit A: 3/17/14 Order 884

Exhibit B 2/11/14 Affidavit of James Edahl 886

4/27/15 BB&T's Memorandum in Opposition to Plaintiff's Motion to Reconsider Jury Trial Order 888

VOLUME III

4/29/15 Plaintiff's Notice of Filing of Exhibits to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment (NOTE: EXHIBITS HAVE BEEN EXCERPTED) 895

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

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

Exhibit 14: 1/6/15 Deposition of BB&T Pursuant to Rule 30(b)(6) (Michael Hennessy) Pages 26-27, 31, 39-40, 64-65, 107-08, 110, 144 1012

Exhibit 17: Affidavit of Ron Konersmann (and Ex. 1, Hunt Capital Term Sheet) 1024

Exhibit 19 9/20/07 BB&T Memo from Edahl to Denning (CONFIDENTIAL) (BB&T/FC_000523-524) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)

Exhibit 20 11/12/07 BB&T Memo from Edahl to Denning (CONFIDENTIAL) (BB&T/FC_002378-2379) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)

Exhibit 21: 11/18/13 Deposition of Michael Burke Pages 21-27, 32-34, 50-51, 60, 62, 66, 78-80, 97-98 1036

Exhibit 22: 5/6/14 Deposition of Castlen Morris Pages 31-32, 34-35, 42-44, 57-58, 64-67, 71-72, 87, 89 1051

Exhibit 23 12/2/13 Deposition of Frank Caple Pages 16, 39, 77-80 1063

Exhibit 24 12/19/13 Deposition of Tol Broome Pages 22, 35-40 1069

Exhibit 27 1/18/08 Email from Hennessy to Licata 1074

Exhibit 29 12/18/13 Deposition of Michael Hennessy Pages 10, 23, 28-29, 52-53 1076

Exhibit 32 1/25/08 Letter from Hennessy to Skywaves 1083

Exhibit 35 1/24/08 BB&T Memo from Burke to Allard (CONFIDENTIAL) (BB&T/FC_001252-1253) (Not included in this version of Record on Appeal; filed as part of Sealed Supplement to Record on Appeal Pursuant to Court Order)

Exhibit 37 4/21/15 Affidavit of Ronald Konersmann 1086

Skywaves' Notice of Appeal 1090

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

BB&T's Notice of Cross-Appeal 1104

Transcripts

8/15/11 Transcript of Argument 1123

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

Exhibits

The BB&T Philosophy 1218

August 12, 2016

BARNWELL WHALEY PATTERSON & HELMS, LLC

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

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

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

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

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "N"

CAROLINA FIRST BANK V. LUCAS,
CASE NO. 03-CP-10-1907, 2004
WL 5208410

H

Court of Common Pleas of South Carolina.
Charleston County
CAROLINA FIRST BANK, Plaintiff,
v.
David H. LUCAS, Stephen D. Lucas, and Cary Oil Company, Inc, Defendants.
No. 03-CP-10-1907.
June 14, 2004.

Order for Partial Summary Judgment

Thomas L Houghston, Circuit Court Judge.
This matter is before the Court on motion of Carolina First Bank ("Carolina First"), for summary judgment on the "First Cause of Defense and Counterclaim" and "Second Cause of Defense and Counterclaim" of the Answer and Counterclaim of David H. Lucas and Stephen Lucas (the "Lucases") on the grounds that the claims are barred by *South Carolina Code* § 37-10-107 (1991). Present at the call of the case was Charles T. Smith, attorney for the plaintiff. The pro se defendants, David H Lucas and Stephen D. Lucas, were not present and were not represented by counsel

After waiting to see if the pro se defendants would appear, a hearing was held to determine whether there exist any genuine issue of material fact sufficient to preclude partial summary judgment. For the reasons stated herein, the Court grants partial summary judgment to Carolina First

FACTS

This matter arises out of nine loans made by Carolina First to the Lucases for the purchase of nine lots in Rivertowne Country Club Each of the loans was evidenced by a note and secured by a mortgage, all dated May 7, 2002 Payments due on the notes and mortgages are in default since January 1, 2003

Carolina First commenced this action to foreclose the nine mortgages. The Lucases filed and served an Answer and Counterclaim admitting all the allegations in the Complaint The first defense and counterclaim alleged that Carolina First promised to provide construction financing for nine homes on the lots but refused to provide the construction financing after demand from the Lucases The second defense and counterclaim alleged that Carolina First procured the breach of the promissory notes and the mortgages by its failure to provide construction financing

Frank Hanna, a regional manager for Carolina First, testified in his deposition that he told the Lucases that Carolina First would look at making construction loans However, Carolina First never received construction plans and specifications or updated financial information. He testified that he did not promise the Lucases that Carolina First would make construction loans and that the Lucases were not given a written commitment that Carolina First Bank would make construction loans

David Lucas testified that he has a B A Degree from the University of South Carolina, worked as an appraiser for Home Federal and as a branch manger for a savings and loan He purchased Wild Dunes in the 1980s and

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

more recently developed travel plazas David Lucas testified that he has been involved in over one hundred bank loans

David Lucas admitted in his deposition that he and Frank Hanna did not discuss specific dollar amounts for any construction loans or identify a specific borrower. He further admitted that he did not submit applications *for* the *construction* loans and that he did not receive any written loan commitments

Stephen Lucas testified in his deposition that he has participated in fifty or more bank loans He admitted that the discussions with Carolina First didn't move beyond talking about the percentage of appraised value Carolina First might loan He further admitted that he did not receive any written documents containing the terms and conditions of any construction loans

The Lucases' responses to interrogatories and requests for production do not include any written documents containing the terms and conditions of any construction loans

ANALYSIS

For purposes of summary judgment, the evidence both supporting and opposing the motion is viewed in the most favorable to the opposing parties *Summer v Carpenter,* 328 S C 36, 491 S E 2d 55 (1997) The deposition testimony reflects that there were preliminary discussions between the Lucases and Carolina First concerning the possibility of construction loans; that essential terms such as the identity of the borrower and the amount of the loans were not resolved, and, that Carolina First did not issue a written loan commitment Absent a written agreement, the Lucases' claim must fall as a matter of law.

South Carolina Code §37-10-107 precludes any legal or equitable action or 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"

"The purpose of *South Carolina Code* §37-10-107 is to prevent claims or defenses to actions on loans that are not supported by a writing." *Derrick v Branch Banking and Trust Company of South Carolina,* Order Granting Defendant's Motion for Summary Judgment, 96-CP-42-2095 at page 8 (S C Ct. Cm Pl 9/8/98 (Judge Thomas Ervin)

Because the Lucases have identified no writing signed by Carolina First Bank that contains the material terms and conditions of the alleged commitment to make construction loans, either in their depositions or in their discovery responses, Carolina First is entitled to judgment on the claims for fraudulent inducement and procurement of breach as a matter of law

Accordingly, Carolina First's motion for partial summary judgment is granted

AND IT IS SO ORDERED

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

T. L. Houghston

Thomas L Houghston

Circuit Court Judge

Charleston, South Carolina

June 14, 2004

CAROLINA FIRST BANK, Plaintiff, v. David H. LUCAS, Stephen D. Lucas, and Cary Oil Company, Inc, Defendants.
2004 WL 5208410 (S.C.Com.Pl.) (Trial Order)

END OF DOCUMENT

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "O"

ROBERTSON V. FIRST UNION NAT'L BANK,
CASE NO. 99-CP-10-288
2000 WL 35722762

Court of Common Pleas of South Carolina.
Charleston County
Willie ROBERTSON, Raymond Brown and Richard Pinckney d/b/a Hollywood Financial Enterprises, Inc., A
Plaintiffs, Counterclaim-Defendants,
v.
FIRST UNION NATIONAL BANK formerly known as, First Union National Bank of South Carolina, Defendant and Counterclaim Plaintiff,
andAtlantic Appraisals, Defendants,
v.
United States of America by and Through Its Agency the Department of Treasury-Internal Revenue Service, South Carolina Department of Revenue and Taxation, Charleston County Business License User Fees Department, Additional Counterclaim Defendants.
No. 99-CP-10-288.
August 8, 2000.

Order

R. Markley Dennis, Jr., Presiding Judge.
This matter comes before the court on a motion for summary judgment. The plaintiffs claim that First Union National Bank (FUNB), by agreeing to make an acquisition loan for a piece of commercial property in the amount of S160,000, made a representation to them that the property was worth $200,000. When, at the end of the five-year term of the note, the property appraised for substantially less, the plaintiffs claim that FUNB's "representation" of value at the closing was false and damaged them in that they never would have bought the property if FUNB had not agreed to lend them the money to buy it. In addition, the plaintiffs claim that Atlantic Appraisals, by giving the appraisal to FUNB in 1993, harmed them.

FUNB and Atlantic moved for summary judgment on all causes of action alleged by the plaintiffs against them.

Based on the motions, the memoranda submitted, the record before the Court and the arguments of counsel, this Court finds that there are no genuine issues as to any material fact and that FUNB and Atlantic are entitled to summary judgment as a matter of law.

This case arises out of a default of a note and mortgage on commercial property in Hollywood, S.C. In 1993 the plaintiffs, who were operating a check-cashing business, collectively agreed to purchase the building they were leasing from their landlord, Robert Chaplin. *See Willie Robertson deposition, page 9, lines 3-19.* The seller, Chaplin, set the price at $200,000 and the buyers agreed to pay that p rice. There were no negotiations between Chaplin and the plaintiffs on the amount of the sales price. *See Willie Robertson deposition, page 8, lines 13-24.*

After that, the plaintiffs engaged a mortgage broker who delivered their financial information to FUNB, *See Willie Robertson deposition, page 11, line 1-page 14 line 1.*, which reviewed the financial package and ultimately made the plaintiffs a loan for $160,000. *See Gregory D. Shealy deposition, page 23, lines 6-19, and Shealy deposition Exhibit 2.*

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

As part of the normal underwriting process for a commercial real estate loan, FUNB hired Atlantic Appraisals (Atlantic) to appraise the property. *See Gregory D.* Shealy deposition, page 20, lines 9-25, and Shealy depoition Exhibit 1. Atlantic appraised the property at $200,000. *See Atlantic appraisal dated November 16, 1993.*

Though it was FUNB's policy to give one copy of the appraisal to the borrowers as part of the closing package, *See Gregory D. Shealy deposition, page 21, lines 17-page 22, line 4,* the plaintiffs say that they did not receive a copy of the appraisal. *See Willie Robertson deposition, page 41, lines 10-14.*

The plaintiffs' attorney, Ed Brown, closed the loan.

Prior to the balloon payment under the terms of the Note, FUNB had another appraisal done, again using Atlantic. *See Willie Robertson deposition, page 30, line3 - page 31, line 21.* This appraisal showed the value of the property to be $80,000. See *Atlantic appraisal dated January 28, 1998.* The plaintiffs did not make the balloon payment, *See Willie Robertson deposition, page 35, line 24- page 36 line 16* and are in default.

FUNB sent the plaintiffs a notice of default.

Before the foreclosure was instituted, the plaintiffs filed this action on January 25, 1999, and FUNB counterclaimed with the foreclosure action on March 29, 1999. On May 23, 2000, the plaintiff amended to add Atlantic as an additional defendant. Atlantic answered on June 21, 2000.

FUNB's Motion

The plaintiffs' theory is that by making the loan for $160,000, FUNB represented to them that the property was worth $200,000. The plaintiffs say that representation was false and damaged them in that they never would have bought the property if FUNB had not agreed to lend them the money to buy it. The plaintiffs have pled theories of fraud, negligent misrepresentation, civil conspiracy, unfair trade practices, breach of the covenant of good faith and fair dealing and breach of contract against FUNB. None of these allegations state a cause of action as a matter of law. Fraud

To establish fraud, the following nine elements must be shown: 1) a representation or nondisclosure of a material fact, 2) its falsity, 3) its materiality, 4) either knowledge of its falsity or a reckless disregard of its truth or falsity, 5) intent that the representation be acted upon, 6) the hearer's ignorance of its falsity, 7) the hearer's reliance on its truth, 8) the hearer's right to rely thereon, and 9) the hearer's consequent and proximate injury. *Manning v. Dial,* 271 S.C. 79, 245 S.E.2d 120 (1978).

In this case, there is no evidence that FUNB made any representation to the plaintiffs regarding the value of the property. FUNB, in order to comply with federal regulations and as part of its underwriting process, obtained an appraisal on the property in the ordinary course of its business. There is nothing in the record to suggest that FUNB represented any value of the property to the plaintiffs. To the contrary, FUNB simply agreed to lend $160,000 to the plaintiffs.

Further, even though the fact of giving the loan was not a "representation," if it was a representation, there is no evidence that it was a false statement of value in 1993. Further still, even if the value was not $200,000 in 1993, there is no evidence that FUNB knew the representation was false when made, or that FUNB intended that the plaintiffs rely on the representation.

Significantly, the price of $200,000 was set by the seller, Chaplin, and the plaintiffs had agreed to pay that price

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

before they ever presented the sales agreement to FUNB for financing. The plaintiffs could not have relied on a "representation" that the property was worth $200,000 when they brought a contract to buy the property for $200,000 to the bank to obtain financing.

Civil Conspiracy

A civil conspiracy consists of a combination of two or more parties joined for the purpose of injuring the plaintiff thereby causing him special damage. *Future Group, II v. Nationsbank*, 324 S.C. 89, 478 S.E.2d 45 (1996). Concert of action, amounting to a conspiracy, may be shown by circumstantial as well as direct evidence. *Id.* In order to establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. *Id.* A conspiracy is actionable only if overt acts pursuant to the common design proximately cause damage to the party bringing the action. *Id.*

There is no evidence of any combination to harm the plaintiffs. The only "combination" in the record was FUNB's contract with Atlantic to render an appraisal to determine whether it would lend the plaintiffs the money to buy the property. The facts of the case are susceptible of no inference that FUNB and Atlantic combined to do economic damage to the plaintiffs.

Negligent Misrepresentation

In order to state a claim for negligent misrepresentation, the plaintiff must allege the following:
(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 communicate 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 reliance on the representation.

Koontz v. Thomas, 333 S.C. 702, 511 S.E.2d 407, 413(S.C.App. 1999), citing *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 105,439 S.E.2d 283, 285 (Ct.App.1993). In addition, to be actionable, the representation must relate to a present or pre-existing fact and be false when made. *Id.* "The representation cannot ordinarily be based on unfulfilled promises or statements as to future events." *Id.*

For many of the same reasons stated in the ruling on the fraud cause of action, the negligent misrepresentation also fails. There is no evidence that FUNB made a representation to the plaintiffs, that any representation that might be argued to have existed was false, that FUNB knew or should have known that it was false or that the plaintiffs relied on any representation that FUNB could be argued to have made. That an appraisal on the same property five years later was $80,000, standing alone, supports no inference that the value in 1993 was anything but $200,000.

Covenant of Good Faith / Fair Dealing

There exists in every contract an implied covenant of good faith and fair dealing. *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 147 S.E.2d 481 (1966). However, "one who seeks to recover damages for breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready and willing to perform it." *Parks v. Lyons*, 219 S.C. 40, 48,

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

64 S.E.2d 123, 126 (1951).

Not only is there no evidence of any breach of good faith or fair dealing, but the plaintiffs here are clearly in default of their obligations under the Note and Mortgage. The plaintiffs' counsel conceded as much in argument at the hearing.

Breach of Contract: Oral Agreement to Refinance

There is no evidence of any agreement to refinance other than the plaintiffs' testimony. *Under S.C. Code Ann.* Section 37-10-107, this cause of action is barred because there is no writing, signed by the party to be charged, outlining the terms and specifications of the agreement. In addition, the agreement would be unenforceable under the Statute of Frauds. *S.C. Code Ann.* Section 32-3-10.

South Carolina Unfair Trade Practices Act

"To be actionable under the UTPA, the unfair or deceptive act or practice must have an impact upon the public interest. Unfair or deceptive acts or practices have an impact upon the public interest if the acts or practices have the potential for repetition." *York v. Conway Ford, Inc.,* 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) (citation omitted).

To prove a potential for repetition, the plaintiff must present evidence that the defendant also engaged in unfair or deceptive acts when they had those opportunities in the past or that they were inclined to engage in unfair or deceptive acts or practices if given the opportunity in the future. *Crary v. Djebelli,* 321 S.C. 38, 467 S.E.2d 128, 131, (S.C.App. 1995), citing *Eastlake Constr. Co. v. Hess,* 102 Wash.2d 30, 686 P.2d 465 (1984) (the potential for repetition must be real and substantial, as opposed to a hypothetical possibility that the defendant's act would be repeated); *Rouse v. Glascam Bldrs.,* 101 Wash.2d 127, 677 P.2d 125 (1984) (there was no potential for repetition of a condominium builders unfair acts toward one of the condominium owners because there was no evidence that the builder had acted unfairly or deceptively toward any other owner in the development); see generally Stephan V. Futeral, Public Impact: The Stumbling Block To Stating a Private Cause of Action Under the South Carolina Unfair Trade Practices Act, S.C. Bar, South Carolina Lawyer (Vol. 7, No. 2, Sept./Oct. 1995) at 32. "In the course of human endeavor, every action has some potential for repetition. The mere proof that the actor is still alive and engaged in the same business is not sufficient to establish this element." *Jefferies v. Phillips,* 316 S.C. 523, 451 S.E.2d 21,24(1994).

Here there is no evidence of an act or practice that is unfair or one that affects the public interest.

Atlantic's Motion

The plaintiffs pled causes of action for civil conspiracy, negligent misrepresentation and unfair trade practices against Atlantic, based on the same facts and theories outlined above. For all of the reason previously stated, these causes of action cannot be sustained against Atlantic. The only party in privity with Atlantic with regard to the 1993 appraisal was FUNB. The plaintiffs admit that they did not hire Atlantic in 1993 and did not see the 1993 appraisal until 1998. Again, the seller, Chaplin set the price and the plaintiffs agreed to that price before either FUNB or Atlantic became involved.

Finally, the plaintiffs argue that the motions for summary judgment are premature because the plaintiffs still have discovery that they would like to pursue. The plaintiffs filed this case in January 1999 and the case is there-

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

fore over eighteen months old. Further, extensive discovery has been conducted in the case. Though Atlantic was not brought in as a party until May 2000, its principals, Bamberg and Middleton, were deposed by the plaintiffs in April 2000. The plaintiffs point to their Sixth and Seventh Sets of Interrogatories sent to FUNB that they assert have not been answered completely and additional depositions of further FUNB personnel that are scheduled in the future. There is no evidence, though, that any party has unduly delayed discovery to the plaintiffs' detriment: there is no motion to compel discovery pending. See, e.g., *Degenhart v. Knights of Columbus*, 309 S.C. 114,420 S.E.2d 495, 497 (S.C. 1992).

The court finds that the plaintiffs have had ample time and opportunity to conduct discovery and that the motions for summary judgment, therefore are not premature.[FN1]

FN1. The plaintiffs additionally sought to supplement the record at the hearing with an affidavit by an expert they assert would support their position that the method used by Atlantic to conduct the appraisal in 1993 was flawed. That affidavit was not filed as the rules require, however, and the Court did not allow the plaintiffs to submit the affidavit over the objections of Atlantic and FUNB. See SCRCP 6 (d), 56.

CONCLUSION

The motion of FUNB for summary judgment as to all causes of action pled by the plaintiffs in their complaint against it is granted. Additionally, the motion of Atlantic for summary judgment as to all causes of action pled by the plaintiffs against it is granted. This case will therefore proceed on the remaining counterclaims stated by FUNB against the plaintiffs/ counterclaim defendants.

IT IS SO ORDERED.

<<signature>>

R. Markley Dennis, Jr. Presiding Judge.

August 8, 2000

Charleston, S.C.

Robertson v. First Union Nat. Bank
2000 WL 35722762 (S.C.Com.Pl.) (Trial Order)

END OF DOCUMENT

© 2014 Thomson Reuters. No Claim to Orig. US Gov. Works.

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "P"

RON KONERSMANN RESUME

Management Experience in Shelter Business

RON KONERSMANN

PROFESSIONAL EXPERIENCE

SkyWaves Corporation Charleston, SC 2002-Present
CEO

SkyWaves Corporation is a Delaware Corporation, headquartered in Charleston, SC and formed to provide the design and build out of lightweight communication shelters in the mobile wireless industry. SkyWaves provides all necessary wireless infrastructure products and integration services.

Global Net, Incorporated Reston, VA 1996-2002
Vice Chairman of the Board
President and CEO

Global Net Inc. is a turnkey systems integrator with proprietary interconnect software for low cost, fixed Wireless Local Loop (WLL) telephone network solutions in developing countries. Market focus is on Eastern Europe, South America and the Pacific Rim. Company offered for cash plus product royalties and sold to Globalcomm Inc.

Andrew Corporation Chicago, IL 1993-1996
Global Business Development Director
Business Unit Director, Newnan, GA

Andrew Corporation is a major supplier of electronic communications products. Redesigned division to meet the special needs of the cellular and PCS wireless markets. **Sales grew four-fold to $100 Million and achieved profitability.**

Kontek Industries Inc. New Madrid, MO 1986-1993
President and CEO

Kontek Industries is a "Turn-Key" infrastructure manufacturer specifically designed to meet the special need of the cellular and fiber optics industry.

Fibrebond Corporation Minden, LA 1982-1986
President and CEO

Founded company to meet the new demand for telephone infrastructure created by the subsequent "break-up" of AT&T. Designed "turn-key" telephone systems that are built complete in the factory and sent to the construction site, set up, and ready for immediate use.

Owens-Illinois Inc. Toledo, OH 1970-1982
Southwest Regional Manager, Sales Manager, Corporate Planning and Acquisition Manager

Owens Illinois Inc., a $7 Billion Fortune 100 company. Increasing general management positions with growing P & L responsibilities.

EDUCATION

MBA	Finance and Marketing	University of Notre Dame	1970
BS	Industrial Engineering	Memphis State University	1968

Confidential and Proprietary

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "Q"

2005 LOAN AGREEMENT

BB&T

LOAN AGREEMENT

Account Number [redacted]0795 RK

RK Account Number

This Loan Agreement (the "Agreement") is made this 21 day of March, 2005 by and between BRANCH BANKING AND TRUST COMPANY OF SOUTH CAROLINA, a South Carolina banking corporation ("Bank"), and:

KWK, LLC, a South Carolina limited liability company and Skywaves I Corporation, a South Carolina Corporation ("Borrower") having its chief executive office at Charleston, SC and whose manager and CEO respectively is Ron Konersmann.

Ronald D. Konersmann, James J. Kerr and Crayton Walters (individually "Guarantor" and collectively the "Guarantors").

The Borrower has applied to Bank for and the Bank has agreed to make, subject to the terms of this Agreement, the following loan:

Line of Credit ("Line of Credit") in the maximum principal amount not to exceed $400,000 at any one time outstanding for the purpose of funding the short term working capital needs of Skywaves I Corporation which shall be evidenced by the Borrower's Promissory Note dated on or after the date hereof which shall mature Maturity Date, when the entire unpaid principal balance then outstanding plus accrued interest thereon shall be paid in full. Prior to maturity or the occurrence of any Event of Default hereunder and subject to Availability, the Borrower may borrow, repay, and reborrow under the Line of Credit through maturity. The Line of Credit shall bear interest at the rate set forth in any such Note evidencing all or any portion of the Line of Credit, the terms of which are incorporated herein by reference.

Section 1 Conditions Precedent

The Bank shall not be obligated to make any disbursement of Loan proceeds until all of the following conditions have been satisfied by proper evidence, execution, and/or delivery to the Bank of the following items in addition to this Agreement, all in form and substance satisfactory to the Bank and the Bank's counsel in their sole discretion:

Note: The Note evidencing the Loan duly executed by the Borrower.

Mortgage: The Mortgage of Real Estate in which Borrower, or other owner thereof, shall grant to Bank a first mortgage lien on the specified real property and improvements thereon ("Mortgaged Property").

Assignment of Leases and Rents: The Assignment of Leases and Rents in which the Borrower or other owner thereof shall assign to Bank all existing and thereafter arising leases on the Mortgaged Property and the rents and profits therefrom.

Title Insurance: A Standard ALTA mortgage policy from a company or companies approved by the Bank, providing coverage for the aggregate principal amount of the Note(s) which are secured by the Mortgage(s) and containing no title exceptions not approved by the Bank and Bank's counsel.

Survey: A certified copy of a recent survey of the Mortgaged Property prepared by a registered land surveyor or a civil engineer.

Flood Hazard Certification: Evidence satisfactory to Bank and Bank's counsel as to whether the Mortgaged Property is located within an area identified as having "special flood hazards" as such term is used in the Federal Flood Disaster Protection Act of 1973.

Environmental Audit Report: A favorable "Phase I" unedited environmental audit covering the Mortgaged Property from an independent environmental engineering firm satisfactory to Bank which reflects that no hazardous waste, toxic substances, or other hazardous materials have contaminated the Mortgaged Property or, if the Mortgaged Property has been so contaminated, that it has been satisfactorily cleaned up in accordance with all Environmental Laws. The Bank shall be fully authorized to discuss all aspects of the audit with the engineering firm.

Security Agreement: Security Agreement in which Borrower and any other owner (a "Debtor") of personal property collateral shall grant to Bank a first priority security interest in the personal property specified therein. (If Bank has or will have a security interest in any collateral which is inferior to the security interest of another creditor, Borrower must fully disclose to Bank any and all prior security interests, and Bank must specifically approve any such security interest which will continue during the Loan.)

UCC Financing Statements: Acknowledged copies of UCC Financing Statements duly filed in Borrower's or other owner's state of incorporation, organization or residence, and in all jurisdictions necessary, or in the opinion of the Bank desirable, to perfect the security interests granted in the Security Agreement, and certified copies of Information Requests identifying all previous financing statements on record for the Borrower or other owner, as appropriate from all jurisdictions indicating that no security interest has previously been granted in any of the collateral described in the Security Agreement, unless prior approval has been given by the Bank.

Commitment Fee: A commitment fee of $1,000 payable to the Bank on the date of execution of the Loan Documents.

Guaranty: Guaranty Agreements duly executed by the Guarantors.

Limited Liability Company Operating Agreement: A copy of KWK's Operating Agreement, certified by KWK's manager(s) and/or members as to its completeness and accuracy.

Declaration of Limited Liability Company: A declaration or resolution from KWK's manager(s) authorizing the execution, delivery, and performance of the Loan Documents on or in a form provided by or acceptable to Bank.

Limited Liability Company Articles of Organization: A copy of the Articles of Organization and all other organizational documents of KWK, all filed with and certified by the Secretary of State of KWK's organization.

Appraisal: Two (2) copies of an appraisal ordered by the Bank of the estimated market value of the real and/or personal property offered as collateral for the Loan referenced herein. The appraisal must be addressed to the Bank and must conform to the Uniform Standards of Professional Appraisal Practice ("USPAP") adopted by the Appraisal Standards Board of the Appraisal Foundation. Any deviation from the

EXHIBIT

1

485

USPAP must be explained in the appraisal. The appraiser must be licensed and/or certified if required by applicable Federal Deposit Insurance Corporation regulations or state laws.

Additional Documents: Receipt by the Bank of other approvals, opinions, or documents as the Bank may reasonably request including but not limited to the Articles of Incorporation, by laws and resolutions of Skywaves I Corporation, any subordination agreements required by Bank from other lenders to Skywaves I Corporation, and an Assignment of Factoring Proceeds and Intercreditor Agreement between BB&T Factors, Skywaves I Corporation, and Bank.

Section 2 Representations and Warranties

The Borrower and Guarantors represent and warrant to Bank that:

2.01. Financial Statements. The balance sheet of the Borrower and its subsidiaries, if any, and the related Statements of Income and Retained Earnings of the Borrower and its subsidiaries, the accompanying footnotes together with the accountant's opinion thereon, and all other financial information previously furnished to the Bank, are true and correct and fairly reflect the financial condition of the Borrower and its subsidiaries as of the dates thereof, including all contingent liabilities of every type, and the financial condition of the Borrower and its subsidiaries as stated therein has not changed materially and adversely since the date thereof. Each Guarantor further represents and warrants that all financial statements provided by such Guarantor to Bank concerning such Guarantor's financial condition are true and correct and fairly represent such Guarantor's financial condition as of the dates thereof.

2.02. Name, Capacity and Standing. The Borrower's exact legal name is correctly stated in the initial paragraph of the Agreement. If the Borrower and/or any Guarantor is a corporation, general partnership, limited partnership, limited liability partnership, or limited liability company, each warrants and represents that it is duly organized and validly existing under the laws of its respective state of incorporation or organization; that it and/or its subsidiaries, if any, are duly qualified and in good standing in every other state in which the nature of their business shall require such qualification, and are each duly authorized by their board of directors, general partners or member/manager(s), respectively, to enter into and perform the obligations under the Loan Documents.

2.03. No Violation of Other Agreements. The execution of the Loan Documents, and the performance by the Borrower, by any and all pledgors (whether the Borrower or other owners of collateral property securing payment of the Loan (hereinafter sometimes referred to as the "Pledgor")) or by the Guarantor(s) thereunder will not violate any provision, as applicable, of its articles of incorporation, by-laws, articles of organization, operating agreement, agreement of partnership, limited partnership or limited liability partnership, or, of any law, other agreement, indenture, note, or other instrument binding upon the Borrower, Pledgor or Guarantor(s), or give cause for the acceleration of any of the respective obligations of the Borrower or Guarantor(s).

2.04. Authority. All authority from and approval by any federal, state, or local governmental body, commission or agency necessary to the making, validity, or enforceability of this Agreement and the other Loan Documents has been obtained.

2.05. Asset Ownership. The Borrower and each Guarantor have good and marketable title to all of the properties and assets reflected on the balance sheets and financial statements furnished to the Bank, and all such properties and assets are free and clear of mortgages, deeds of trust, pledges, liens, and all other encumbrances except as otherwise disclosed by such financial statements. In addition, each other owner of collateral has good and marketable title to such collateral, free and clear of any liens, security interests and encumbrances, except as otherwise disclosed to Bank.

2.06. Discharge of Liens and Taxes. The Borrower and its subsidiaries, if any, and each Guarantor have filed, paid, and/or discharged all taxes or other claims which may become a lien on any of their respective properties or assets, excepting to the extent that such items are being appropriately contested in good faith and for which an adequate reserve (in an amount acceptable to Bank) for the payment thereof is being maintained.

2.07. Regulation U. None of the Loan proceeds shall be used directly or indirectly for the purpose of purchasing or carrying any margin stock in violation of the provisions of Regulation U of the Board of Governors of the Federal Reserve System.

2.08. ERISA. Each employee benefit plan, as defined by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), maintained by the Borrower or by any subsidiary of the Borrower or Guarantor(s) meets, as of the date hereof, the minimum funding standards of Section 302 of ERISA, all applicable requirements of ERISA and of the Internal Revenue Code of 1986, as amended, and no "Reportable Event" nor "Prohibited Transaction" (as defined by ERISA) has occurred with respect to any such plan.

2.09. Litigation. There is no claim, action, suit or proceeding pending, threatened or reasonably anticipated before any court, commission, administrative agency, whether State or Federal, or arbitration which will materially adversely affect the financial condition, operations, properties, or business of the Borrower or its subsidiaries, if any, or the Guarantor(s), or the ability of the Borrower or the Guarantor(s) to perform their obligations under the Loan Documents.

2.10. Other Agreements. The representations and warranties made by Borrower to Bank in the other Loan Documents are true and correct in all respects on the date hereof.

2.11. Binding and Enforceable. The Loan Documents, when executed, shall constitute valid and binding obligations of the Borrower and Guarantors respectively, the execution of such Loan Documents has been duly authorized by the parties thereto, and are enforceable in accordance with their terms, except as may be limited by bankruptcy, insolvency, moratorium, or similar laws affecting creditors' rights generally.

2.12. Commercial Purpose. The Loan is not "consumer transactions", as defined in the South Carolina Uniform Commercial Code, and none of the collateral was or will be purchased or held primarily for personal, family or household purposes.

Section 3 Affirmative Covenants

BB&T

LOAN AGREEMENT

The Borrower covenants and agrees that from the date hereof and until payment in full of all indebtedness and performance of all obligations owed under the Loan Documents, Borrower shall:

3.01. **Maintain Existence and Current Legal Form of Business.** (a) Maintain its existence and good standing in the state of its incorporation or organization, (b) maintain its current legal form of business indicated above, and, (c) as applicable, qualify and remain qualified as a foreign corporation, general partnership, limited partnership, limited liability partnership or limited liability company in each jurisdiction in which such qualification is required.

3.02. **Maintain Records.** Keep adequate records and books of account, in which complete entries will be made in accordance with GAAP consistently applied, reflecting all financial transactions of the Borrower.

3.03. **Maintain Properties.** Maintain, keep, and preserve all of its properties (tangible and intangible) including the collateral necessary or useful in the conduct of its business in good working order and condition, ordinary wear and tear excepted.

3.04. **Conduct of Business.** Continue to engage in an efficient, prudent, and economical manner in a business of the same general type as now conducted.

3.05. **Maintain Insurance.** Maintain insurance with financially sound and reputable insurance companies or associations in such amounts and covering such risks as are usually carried by companies engaged in the same or a similar business, and business interruption insurance if required by Bank, which insurance may provide for reasonable deductible(s). The Bank shall be named as loss payee (Long Form) on all policies which apply to the Bank's collateral, and the Borrower shall deliver certificates of insurance at closing evidencing same. All such insurance policies shall provide, and the certificates shall state, that no policy will be terminated without 20 days prior written notice to Bank.

3.06. **Comply With Laws.** Comply in all respects with all applicable laws, rules, regulations, and orders including, without limitation, paying before the delinquency of all taxes, assessments, and governmental charges imposed upon it or upon its property, and all Environmental Laws.

3.07. **Right of Inspection.** Permit the officers and authorized agents of the Bank, at any reasonable time or times in the Bank's sole discretion, to examine and make copies of the records and books of account of, to visit the properties of the Borrower, and to discuss such matters with any officers, directors, managers, members or partners, limited or general of the Borrower, and the Borrower's independent accountant as the Bank deems necessary and proper.

3.08. **Reporting Requirements.** Furnish to the Bank:

Monthly Financial Statements: As soon as available and not more than 30 days after the end of each month, Skywaves I Corporation will submit balance sheets, statements of income, cash flow, and retained earnings for the period ended and a statement of changes in the financial position, all in reasonable detail, and all prepared in accordance with GAAP consistently applied and certified as true and correct by an officer of Skywaves I Corporation.

Annual Financial Statements: As soon as available and not more than 120 days after the end of each fiscal year, balance sheets, statements of income, and retained earnings for the period ended and a statement of changes in the financial position, all in reasonable detail, and all prepared in accordance with GAAP consistently applied. The financial statements must be of the following quality or better: Review.

Notice of Litigation: Promptly after the receipt by the Borrower, or by any Guarantor of which Borrower has knowledge, of notice or complaint of any action, suit, and proceeding before any court or administrative agency of any type which, if determined adversely, could have a material adverse effect on the financial condition, properties, or operations of the Borrower or Guarantor, as appropriate.

Tax Returns: As soon as available each year, but not later than 30 days after filing thereof, complete copies (including all schedules) of all state and federal tax returns filed by Borrower.

Notice of Default: Promptly upon discovery or knowledge thereof, notice of the existence of any event of default under this Agreement or any other Loan Documents.

Other Information: Such other information as the Bank may from time to time reasonably request.

3.09. **Deposit Accounts.** Maintain substantially all of its demand deposit/operating accounts with the Bank.

3.10. **Affirmative Covenants from other Loan Documents.** All affirmative covenants contained in any Mortgage, Security Agreement, Assignment of Leases and Rents, or other security document executed by the Borrower which are described in paragraph 2 hereof are hereby incorporated by reference herein.

Section 4 Guarantors Covenants

Each Guarantor covenants and agrees that from the date hereof and until payment in full of all indebtedness and performance of all obligations owed under the Loan Documents, Guarantor shall:

4.01. **Maintain Existence and Current Legal Form of Business.** If Guarantor is a corporation, partnership, limited partnership, limited liability partnership or limited liability company, (a) maintain its existence and good standing in the state of its incorporation or organization, (b) maintain its current legal form of business as shown on the guaranty agreement provided by Guarantor to Bank in connection with the Loan, and (c) without the Bank's prior written consent, change Guarantor's name, or enter into any merger, consolidation, reorganization or exchange of stock, ownership interests or assets, and (d) as applicable, qualify and remain qualified as a foreign corporation, general partnership, limited partnership, limited liability partnership or limited liability company in each jurisdiction in which such qualification is required.

4.02. **Maintain Properties.** Not, without the prior written consent of Bank, sell, transfer or otherwise dispose of all or substantially all of Guarantor's properties (tangible and intangible), except in the ordinary course of business.

BB&T

LOAN AGREEMENT

4.03. **Comply With Laws.** Comply in all respects with all applicable laws, rules, regulations, and orders including, without limitation, paying before the delinquency of all taxes, assessments, and governmental charges imposed or assessed upon Guarantor or upon Guarantor's property, and all Environmental Laws.

4.04. **Reporting Requirements.** Furnish to the Bank:

Annual Financial Statement: A personal financial statement promptly after the anniversary date of the Loan, on form provided by the Bank and in such reasonable detail as the Bank may require.

Notice of Litigation: Promptly after the receipt by Guarantor, or by Borrower of which Guarantor has knowledge, of notice of any action, suit, and proceeding before any court or governmental agency of any type which, if determined adversely, could have a material adverse effect on the financial condition, properties, or operations of the Guarantor or Borrower, as appropriate.

4.05. **Transfer of Ownership.** Not, without the prior written consent of the Bank: If Guarantor is a corporation, (a) issue, transfer or sell any new class of stock, or (b) issue, transfer or sell, in the aggregate, from its treasury stock and/or currently authorized but unissued shares of any class of stock, more than 10% of the total number of all such issued and outstanding shares as of the date of this Agreement; or, if Guarantor is a general partnership, limited partnership, limited liability partnership or limited liability company, issue, transfer or sell any interest in Guarantor.

4.06. **Tax Returns:** As soon as available each year, but not later than 30 days after the filing thereof, furnish complete copies (including all schedules) of all state and federal tax returns filed by Guarantor.

4.07. **Other Information:** Furnish such other information as the Bank may from time to time reasonably request..

Section 5 Financial Covenants

The Borrower covenants and agrees that from the date hereof until payment in full of all indebtedness and the performance of all obligations under the Loan Documents, the Borrower shall at all times maintain the following financial covenants and ratios all in accordance with GAAP unless otherwise specified:

Tangible Net Worth. A minimum tangible net worth of not less than $1,000,000 by 12/31/05 for Skywaves I Corporation. Tangible Net Worth is defined as net worth, plus obligations contractually subordinated to debts owed to Bank, minus goodwill, contract rights, and assets representing claims on stockholders or affiliated entities.

Section 6 Negative Covenants

The Borrower covenants and agrees that from the date hereof and until payment in full of all indebtedness and performance of all obligations under the Loan Documents, the Borrower shall not, without the prior written consent of the Bank: Which consent shall not be unreasonably withheld

6.01. **Liens.** Create, incur, assume, or suffer to exist any lien upon or with respect to any of Borrower's properties, or the properties of any Pledgor securing payment of the Loan, now owned or hereafter acquired, except:

(a) Liens and security interests in favor of the Bank;
(b) Liens for taxes not yet due and payable or otherwise being contested in good faith and for which appropriate reserves are maintained;
(c) Other liens imposed by law not yet due and payable, or otherwise being contested in good faith and for which appropriate reserves are maintained;
(d) Purchase money security interests on any property hereafter acquired, provided that such lien shall attach only to the property acquired.

6.02. **Debt.** Create, incur, assume, or suffer to exist any debt, except:

(a) Debt to the Bank;
(b) Debt outstanding on the date hereof and shown on the most recent financial statements submitted to the Bank;
(c) Accounts payable to trade creditors incurred in the ordinary course of business;
(d) Debt secured by purchase money security interests as outlined above in Section 6.01 (d);

6.03. **Change of Legal Form of Business; Purchase of Assets.** Change Borrower's name or the legal form of Borrower's business as shown above, whether by merger, consolidation, conversion or otherwise, and Borrower shall not purchase all or substantially all of the assets or business of any Person. w/o prior written consent of BB&T.

6.04. **Leases.** Create, incur, assume, or suffer to exist any leases, except:

(a) Leases outstanding on the date hereof and showing on the most recent financial statement submitted to the Bank;

6.05. **Guaranties.** Assume, guarantee, endorse, or otherwise be or become directly or contingently liable for obligations of any Person, except guaranties by endorsement of negotiable instruments for deposit or collection or similar transactions in the ordinary course of business.

6.06. **Disposition of Assets.** Sell, lease, or otherwise dispose of any of its assets or properties except in the ordinary and usual course of its business.

6.07. **Transfer of Ownership.** If Borrower is a corporation, (a) issue, transfer or sell any new class of stock, or (b) issue, transfer or sell, in the aggregate, from its treasury stock and/or currently authorized but unissued shares of any class of stock, more than 10% of the total number of all such issued and outstanding shares as of the date of this Agreement. If Borrower is a general partnership, limited partnership, limited liability partnership or limited liability company, issue, transfer or sell any interest in Borrower.

6.08. **Negative Covenants from other Loan Documents.** All negative covenants contained in any Mortgage, Security Agreement, Assignment of Leases or Rents, or other security document executed by the Borrower which are described in paragraph 2 hereof are hereby incorporated by reference herein.

Section 7 Hazardous Materials and Compliance with Environmental Laws

7.01. Investigation. Borrower hereby certifies that it has exercised due diligence to ascertain whether its real property, including without limitation the Mortgaged Property, is or has been affected by the presence of asbestos, oil, petroleum or other hydrocarbons, urea formaldehyde, PCBs, hazardous or nuclear waste, toxic chemicals and substances, or other hazardous materials (collectively, "Hazardous Materials"), as defined in applicable Environmental Laws. Borrower represents and warrants that there are no such Hazardous Materials contaminating its real property, nor have any such materials been released on or stored on or improperly disposed of on its real property during its ownership, occupancy or operation thereof. Borrower hereby agrees that, except in strict compliance with applicable Environmental Laws, it shall not knowingly permit any release, storage or contamination as long as any indebtedness or obligations to Bank under the Loan Documents remains unpaid or unfulfilled. In addition, Borrower does not have or use any underground storage tanks on any of its real property, including the Mortgaged Property which are not registered with the appropriate Federal and/or State agencies and which are not properly equipped and maintained in accordance with all Environmental Laws. If requested by Bank, Borrower shall provide Bank with all necessary and reasonable assistance required for purposes of determining the existence of Hazardous Materials on the Mortgaged Property, including allowing Bank access to the Mortgaged Property, and access to Borrower's employees having knowledge of, and to files and records within Borrower's control relating to the existence, storage, or release of Hazardous Materials on the Mortgaged Property.

7.02. Compliance. Borrower agrees to comply with all applicable Environmental Laws, including, without limitation, all those relating to Hazardous Materials. Borrower further agrees to provide Bank, and all appropriate Federal and State authorities, with immediate notice in writing of any release of Hazardous Materials on the Mortgaged Property and to pursue diligently to completion all appropriate and/or required remedial action in the event of such release.

7.03. Remedial Action. Bank shall have the right, but not the obligation, to undertake all or any part of such remedial action in the event of a release of Hazardous Materials on the Mortgaged Property and to add any expenditures so made to the principal indebtedness secured by the Mortgage. Borrower agrees to indemnify and hold Bank harmless from any and all loss or liability arising out of any violation of the representations, covenants, and obligations contained in this Section 7, or resulting from the recording of the Mortgage.

Section 8 Events of Default

The following shall be "Events of Default" by Borrower or any Guarantor:

8.01. The failure to make prompt payment of any installment of principal or interest on any of the Note(s) when due or payable.

8.02. Should any representation or warranty made in the Loan Documents prove to be false or misleading in any material respect.

8.03. Should any report, certificate, financial statement, or other document furnished prior to the execution of or pursuant to the terms of this Agreement prove to be false or misleading in any material respect.

8.04. Should the Borrower or any Guarantor default on the performance of any other obligation of indebtedness when due or in the performance of any obligation incurred in connection with money borrowed.

8.05. Should the Borrower, any Guarantor or any Pledgor breach any covenant, condition, or agreement made under any of the Loan Documents.

8.06. Should a custodian be appointed for or take possession of any or all of the assets of the Borrower or any Guarantor, or should the Borrower or any Guarantor either voluntarily or involuntarily become subject to any insolvency proceeding, including becoming a debtor under the United States Bankruptcy Code, any proceeding to dissolve the Borrower or any Guarantor, any proceeding to have a receiver appointed, or should the Borrower or any Guarantor make an assignment for the benefit of creditors, or should there be an attachment, execution, or other judicial seizure of all or any portion of the Borrower's or any Guarantor's assets, including an action or proceeding to seize any funds on deposit with the Bank, and such seizure is not discharged within 30 days.

8.07. Should final judgment for the payment of money be rendered against the Borrower or any Guarantor which is not covered by insurance and shall remain undischarged for a period of 30 days unless such judgment or execution thereon be effectively stayed.

8.08. Upon the death of, or termination of existence of, or dissolution of, any Borrower, Pledgor or Guarantor.

8.09. Should the Bank in good faith deem itself, its liens and security interests, if any, or any debt thereunder unsafe or insecure, or should the Bank believe in good faith that the prospect of payment of any debt or other performance by the Borrower or any Guarantor is impaired.

8.10. Should any lien or security interest granted to Bank to secure payment of the Note(s) terminate, fail for any reason to have the priority agreed to by Bank on the date granted, or become unperfected or invalid for any reason.

Section 9 Remedies Upon Default

Upon the occurrence of any of the above listed Events of Default, the Bank may at any time thereafter, at its option, take any or all of the following actions, at the same or at different times:

9.01. Declare the balance(s) of the Note(s) to be immediately due and payable, both as to principal and interest, without presentment, demand, protest, or notice of any kind, all of which are hereby expressly waived by Borrower and, each Guarantor, and such balance(s) shall accrue interest at the Default Rate as provided herein until paid in full;

9.02. Require the Borrower or Guarantor(s) to pledge additional collateral to the Bank from the Borrower's or any Guarantor's assets and properties, the acceptability and sufficiency of such collateral to be determined in the Bank's sole discretion;

9.03. Take immediate possession of and foreclose upon any or all collateral which may be granted to the Bank as security for the indebtedness and obligations of Borrower or any Guarantor under the Loan Documents;

9.04. Exercise any and all other rights and remedies available to the Bank under the terms of the Loan Documents and applicable law, including the South Carolina Uniform Commercial Code;

9.05. Any obligation of the Bank to advance funds to the Borrower or any other Person under the terms of under the Note(s) and all other obligations, if any, of the Bank under the Loan Documents shall immediately cease and terminate unless and until Bank shall reinstate such obligation in writing.

Section 10 Miscellaneous Provisions

10.01. **Definitions.**

"**Availability**" shall mean the lesser of 50% of Bank approved purchase orders or $400,000.

"**Default Rate**" shall mean a rate of interest equal to Bank's Prime Rate plus five percent (5%) per annum (not to exceed the legal maximum rate) from and after the date of an Event of Default hereunder which shall apply, in the Bank's sole discretion, to all sums owing, including principal and interest, on such date.

"**Environmental Laws**" shall mean all federal and state laws and regulations which affect or may affect the Mortgaged Property, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. Sections 9601 et seq.), the Resource Conservation and Recovery Act (42 U.S.C. Sections 6901 et seq.), the Federal Water Pollution Control Act (33 U.S.C. Sections 1251 et seq.), the Clean Air Act (42 U.S.C. Section 7401 et seq.), the Toxic Substances Control Act (15 U.S.C. Section 2601 et seq.), the Pollution Control Act (1976 S.C Code 48-1-10 et seq.), the Erosion and Sediment Reduction Act of 1983 (1976 S.C. Code 48-18-10 et seq.), the South Carolina Mining Act (1976 S.C. Code 48-19-10 et seq.), as such laws or regulations have been amended or may be amended.

"**Loan Documents**" shall mean this Agreement including any schedule attached hereto, the Note, the Mortgage, the Security Agreement, the Assignment of Leases and Rents, all UCC Financing Statements, the Guaranty Agreements, and all other documents, certificates, and instruments executed in connection therewith, and all renewals, extensions, modifications, substitutions, and replacements thereto and therefore.

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

"**GAAP**" shall mean generally accepted accounting principles as established by the Financial Accounting Standards Board or the American Institute of Certified Public Accountants, as amended and supplemented from time to time.

"**Prime Rate**" shall mean the rate of interest per annum announced by the Bank from time to time and adopted as its Prime Rate, which is one of several rate indexes employed by the Bank when extending credit, and may not necessarily be the Bank's lowest lending rate.

10.02. **Non-impairment.** If any one or more provisions contained in the Loan Documents shall be held invalid, illegal, or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained therein shall not in any way be affected or impaired thereby and shall otherwise remain in full force and effect.

10.03. **Applicable Law.** The Loan Documents shall be construed in accordance with and governed by the laws of the State of South Carolina.

10.04. **Waiver.** Neither the failure or any delay on the part of the Bank in exercising any right, power or privilege granted in the Loan Documents shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise of any other right, power, or privilege which may be provided by law.

10.05. **Modification.** No modification, amendment, or waiver of any provision of any of the Loan Documents shall be effective unless in writing and signed by the Borrower and Bank.

10.06. **Payment Amount Adjustment.** In the event that any Loan(s) referenced herein has a variable (floating) interest rate and the interest rate increases, Bank, at its sole discretion, may at any time adjust the Borrower's payment amount(s) to prevent the amount of interest accrued in a given period to exceed the periodic payment amount or to cause the Loan(s) to be repaid within the same period of time as originally agreed upon.

10.07 **Stamps and Fees.** The Borrower shall pay all federal or state stamps, taxes, or other fees or charges, if any are payable or are determined to be payable by reason of the execution, delivery, or issuance of the Loan Documents or any security granted to the Bank; and the Borrower and Guarantor agree to indemnify and hold harmless the Bank against any and all liability in respect thereof.

10.08. **Attorneys' Fees.** In the event the Borrower or any Pledgor or Guarantor shall default in any of its obligations hereunder and the Bank believes it necessary to employ an attorney to assist in the enforcement or collection of the indebtedness of the Borrower to the Bank, to enforce the terms and provisions of the Loan Documents, to modify the Loan Documents, or in the event the Bank voluntarily or otherwise should become a party to any suit or legal proceeding (including a proceeding conducted under the Bankruptcy Code), the Borrower and Guarantors agree to pay the reasonable attorneys' fees of the Bank and all related costs of collection or enforcement that may be incurred by the Bank. The Borrower and Guarantor shall be liable for such attorneys' fees and costs whether or not any suit or proceeding is actually commenced.

10.09. **Bank Making Required Payments.** In the event Borrower shall fail to maintain insurance, pay taxes or assessments, costs and expenses which Borrower is, under any of the terms hereof or of any Loan Documents, required to pay, or fail to keep any of the properties and assets constituting collateral free from new security interests, liens, or encumbrances, except as permitted herein, Bank may at its election make expenditures for any or all such purposes and the amounts expended together with interest thereon at the Default Rate, shall become immediately due and payable to Bank, and shall have benefit of and be secured by the collateral; provided, however, the Bank shall be under no duty or obligation to make any such payments or expenditures.

10.10. **Right of Offset.** Any indebtedness owing from Bank to Borrower may be set off and applied by Bank on any indebtedness or liability of Borrower to Bank, at any time and from time to time after maturity, whether by acceleration or otherwise, and without demand or notice to Borrower. Bank may sell participations in or make assignments of any Loan made under this Agreement, and Borrower agrees that any such participant or assignee shall have the same right of setoff as is granted to the Bank herein.

10.11. **UCC Authorization.** Borrower authorizes Bank to file such UCC Financing Statements describing the collateral in any location deemed necessary and appropriate by Bank.

10.12. **Modification and Renewal Fees.** Bank may, at its option, charge any fees for modification, renewal, extension, or amendment of any terms of the Note(s) permitted by law.

10.13. **Conflicting Provisions.** If provisions of this Agreement shall conflict with any terms or provisions of any of the Note(s) or Security Agreement(s), the provisions of such Note(s) or Security Agreement(s), as appropriate, shall take priority over any provisions in this Agreement.

10.14. **Notices.** Any notice permitted or required by the provisions of this Agreement shall be deemed to have been given when delivered in writing to the City Executive or any Vice President of the Bank at its offices in Charleston, South Carolina, and to the Manager of KWK and the CEO of Skywaves at their offices in Charleston, South Carolina when sent by certified mail and return receipt requested.

10.15. **Consent to Jurisdiction.** Borrower hereby irrevocably agrees that any legal action or proceeding arising out of or relating to this Agreement may be instituted in the Superior Court in Greenville County, South Carolina, or the United States District Court for South Carolina Greenville Division, or in such other appropriate court and venue as Bank may choose in its sole discretion. Borrower consents to the jurisdiction of such courts and waives any objection relating to the basis for personal or in rem jurisdiction or to venue which Borrower may now or hereafter have in any such legal action or proceedings.

10.16. **WAIVER OF JURY TRIAL. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS AGREEMENT OR ANY OF THE LOAN DOCUMENTS EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO MAKE THE LOAN AND ENTER INTO THIS AGREEMENT. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION. NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.**

10.17. **Counterparts.** This Agreement may be executed by one or more parties on any number of separate counterparts and all of such counterparts taken together shall be deemed to constitute one and the same instrument.

10.18. **Entire Agreement.** The Loan Documents embody the entire agreement between Borrower and Bank with respect to the Loans, and there are no oral or parol agreements existing between Bank and Borrower with respect to the Loans which are not expressly set forth in the Loan Documents.

[SIGNATURES ON FOLLOWING PAGE]

BB&T

LOAN AGREEMENT

SIGNATURE PAGE

IN WITNESS WHEREOF, the Bank, Borrower and Guarantor(s) have caused this Agreement to be duly executed under seal all as of the date first above written.

Borrower is a General Partnership, Limited Partnership, Limited Liability Partnership, or Limited Liability Company:

WITNESS:

KWK, LLC (SEAL.)
Name of Partnership, LLC or LLP

By: _____ (SEAL)
Ron Konersmann
General Partner or Manager

By: _____ (SEAL.)
Enter Name
General Partner or Manager

By: _____ (SEAL)
Enter Name
General Partner or Manager

Additional Co-Borrowers or Guarantors:

WITNESS:

Skywaves I Corporation

By: _____ (SEAL)
Ronald D. Konersmann, CEO

_____ (SEAL)
Ronald D. Konersmann

_____ (SEAL)
James P. Kerr

_____ (SEAL.)
Crayton Walters

WITNESS:

BRANCH BANKING AND TRUST COMPANY OF SOUTH CAROLINA

By: _____
James J. Edahl

Title: Senior Vice President

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "R"

2005 PROMISSORY NOTE

Borrower: KWK LLC and SKYWAVES I CORPORATION

Account Number: [redacted]795

Address: 4280 PACE STREET
NORTH CHARLESTON, SC 29405-0000

BB&T of South Carolina

Note Number: 00001

CHARLESTON, South Carolina

Date: March 22, 2005

PROMISSORY NOTE

BORROWER(S) REPRESENTS HEREWITH THAT THE LOAN EVIDENCED HEREBY IS BEING OBTAINED FOR BUSINESS/COMMERCIAL PURPOSES. For value received, the undersigned, jointly and severally, if more than one, promises to pay to BRANCH BANKING AND TRUST COMPANY OF SOUTH CAROLINA, a South Carolina banking corporation (the "Bank"), or order, at said bank at any of its offices in the above referenced city (or such other place or places that may be hereafter designated by Bank), the sum of

FOUR HUNDRED THOUSAND DOLLARS & 00/100 Dollars ($ 400,000.00), in immediately available coin or currency of the United States of America. ☐ Borrower shall pay a prepayment penalty as set forth in the Prepayment Penalty Addendum attached hereto.

Interest shall accrue from the date hereof on the unpaid balance outstanding from time to time at the:

☐ Fixed rate of _____ % per annum.

☒ Variable rate of the Bank's Prime Rate plus 0.500 % per annum to be adjusted Daily as the Bank's Prime Rate changes. If checked here ☐, the interest rate will not exceed a(n) ☐ fixed ☐ average maximum rate of _____ % or a ☐ floating maximum rate of the greater of _____ % or the Bank's Prime Rate; and the interest rate will not decrease below a fixed minimum rate of _____ %. If an average maximum rate is specified, a determination of any required reimbursement of interest by Bank will be made: ☐ when Note is repaid in full by Borrower ☐ annually beginning on _____.

☐ Fixed rate of _____ % per annum through _____ which automatically converts on _____ to a variable rate equal to the Bank's Prime Rate plus _____ % per annum which shall be adjusted _____ as such Prime Rate changes.

☐ _____.

Principal and interest is payable as follows

☒ Principal (plus any accrued interest not otherwise scheduled herein) } is due in full at maturity on 04/05/2006

☐ Principal plus accrued interest }

☐ Payable in consecutive _____ installments of ☐ Principal ☐ Principal and Interest } commencing on _____ and continued on the same day of each calendar period thereafter, in _____ equal payments of $_____, with one final payment of all remaining principal and accrued interest due on _____

☐ ChoiceLine Payment Option: 2% of outstanding balance is payable monthly commencing on _____ and continuing on the same day of each calendar period thereafter, with one final payment of all remaining principal and accrued interest due on _____.

☒ Accrued interest is payable Monthly commencing on May 5, 2005 and continuing on the same day of each calendar period thereafter, with one final payment of all remaining interest due on April 5, 2006,

☐ Bank reserves the right in its sole discretion to adjust the fixed payment due hereunder _____ on _____ and continuing on the same day of each calendar period thereafter, in order to maintain an amortization period of no more than _____ months from the date of this Note. Borrower understands the payment may increase if interest rates increase.

☒ Prior to an event of default, Borrower may borrow, repay, and reborrow hereunder pursuant to the terms of the Loan Agreement, hereinafter defined.

☐ _____

☐ Borrower hereby authorizes Bank to automatically draft from its demand deposit or savings account(s) with Bank or other bank, any payment(s) due under this Note on the date(s) due. Borrower shall provide appropriate account number(s) for account(s) at Bank or other bank.

The undersigned shall pay to Bank a late fee in the amount of five percent (5%) of any installment past due for fifteen (15) or more days. When any installment payment is past due for fifteen (15) or more days, subsequent payments shall first be applied to the past due balance. In addition, the undersigned shall pay to Bank a returned payment fee if the undersigned or any other obligor hereon makes any payment at any time by check or other instrument, or by any electronic means, which is returned to Bank because of nonpayment due to nonsufficient funds.

All interest shall be computed and charged for the actual number of days elapsed on the basis of a year consisting of three hundred sixty (360) days. In the event periodic accruals of interest shall exceed any periodic fixed payment amount described above, the fixed payment amount shall be immediately increased, or additional supplemental interest payments required on the same periodic basis as specified above (increased fixed payments or supplemental payments to be determined in the Bank's sole discretion), in such amounts and at such times as shall be necessary to pay all accruals of interest for the period and all accruals of unpaid interest from previous periods. Such adjustments to the fixed payment amount or supplemental payments shall remain in effect for so long as the interest accruals shall exceed the original fixed payment amount and shall be further adjusted upward or downward to reflect changes in the variable interest rate; provided that unless elected otherwise above, the fixed payment amount shall not be reduced below the original fixed payment amount. However, Bank shall have the right, in its sole discretion, to lower the fixed payment amount below the original payment amount.

This Note is given by the undersigned in connection with the following agreements (if any) between the undersigned and the Bank:

Mortgage(s) / Deed of Trust(s) granted in favor of Bank as mortgagee / beneficiary:

☒ dated 03/22/2005 in the maximum principal amount of $ 400,000.00 granted by KWK LLC

☐ dated _____ in the maximum principal amount of $ _____ granted by _____

EXHIBIT 2

ACCOUNT# / NOTE#
[redacted]795 00001

1472SC (0408)

Security Agreement(s) granting a security interest to Bank:

[X] dated 03/22/2005 given by SKYWAVES I CORPORATION

[ ] dated _____ given by _____

[ ] Securities Account Pledge and Security Agreement dated _____, executed by _____

[ ] Control Agreement(s) dated _____, covering [ ] Deposit Account(s) [ ] Investment Property [ ] Letter of Credit Rights [ ] Electronic Chattel Paper

[ ] Assignment of Certificate of Deposit, Security Agreement, and Power of Attorney (for Certificated Certificates of Deposit) dated _____, executed by _____

[ ] Pledge and Security Agreement for Publicly Traded Certificated Securities dated _____, executed by _____

[ ] Assignment of Life Insurance Policy as Collateral dated _____, executed by _____

[X] Loan Agreement dated 03/22/2005, executed by Borrower and [X] Guarantor(s).

[X] Assignment of Leases and Rents dated 03/22/2005 executed by KWK LLC

All of the terms, conditions and covenants of the above described agreements (the "Agreements") are expressly made a part of this promissory note (the "Note") by reference in the same manner and with the same effect as if set forth herein at length and any holder of this Note is entitled to the benefits of and remedies provided in the Agreements and any other agreements by and between the undersigned and the Bank.

No delay or omission on the part of the holder in exercising any right hereunder shall operate as a waiver of such right or of any other right of such holder, nor shall any delay, omission or waiver on any one occasion be deemed a bar to or waiver of the same or of any other right on any future occasion. Every one of the undersigned and every endorser or guarantor of this Note regardless of the time, order or place of signing waives presentment, demand, protest and notices of every kind and assents to any one or more extensions or postponements of the time of payment or any other indulgences, to any substitutions, exchanges or releases of collateral if at any time there be available to the holder collateral for this Note, and to the additions or releases of any other parties or persons primarily or secondarily liable.

The failure to pay any part of the principal or interest when due on this Note or to fully perform any covenant, obligation or warranty on this or on any other liability to the Bank by any affiliate (as defined in 11USC Section (101) (2)), or by any guarantor or surety of this Note (said affiliate, guarantor, and surety are herein called "Obligor"); or if any financial statement or other representation made to the Bank by any of the undersigned or any Obligor shall be found to be materially incorrect or incomplete; or in the event the default pursuant to any of the Agreements or any other obligation of any of the undersigned or any Obligor in favor of the Bank; or in the event the Bank demands that the undersigned secure or provide additional security for its obligations under this Note and security deemed adequate and sufficient by the Bank is not given when demanded; or in the event one or more of the undersigned or any Obligor shall die, terminate its existence, allow the appointment of a receiver for any part of its property, make an assignment for the benefit of creditors, or where a proceeding under bankruptcy or insolvency laws is initiated by or against any of the undersigned or any Obligor; or in the event the Bank should otherwise deem itself, its security interest, or any collateral unsafe or insecure; or should the Bank in good faith believe that the prospect of payment or other performance is impaired; or if there is an attachment, execution, or other judicial seizure of all or any portion of the Borrower's or any Obligor's assets, including an action or proceeding to seize any funds on deposit with the Bank, and such seizure is not discharged within 20 days; or if final judgment for the payment of money shall be rendered against the Borrower or any Obligor which is not covered by insurance or debt cancellation and shall remain undischarged for a period of 30 days unless such judgment or execution thereon is effectively stayed; or the termination of any guaranty agreement given in connection with this Note, then any one of the same shall be a material default hereunder and this Note and other debts due the Bank by any one or more of undersigned shall immediately become due and payable without notice, at the option of the Bank. From and after any event of default hereunder, interest shall accrue on the sum of the principal balance and accrued interest then outstanding at the variable rate equal to the Bank's Prime Rate plus 5% per annum ("Default Rate"), provided that such rate shall not exceed at any time the highest rate of interest permitted by the laws of the State of South Carolina; and further provided that such rate shall apply after judgement. In the event of any default, the then remaining unpaid principal amount and accrued but unpaid interest then outstanding shall bear interest at the Default Rate called for hereunder until such principal and interest have been paid in full. In addition, upon default, the Bank may pursue its full legal remedies at law or equity, and the balance due hereunder may be charged against any obligation of the Bank to any party, including any Obligor. Bank shall not be obligated to accept any check, money order, or other payment instrument marked "payment in full" on any disputed amount due hereunder, and Bank expressly reserves the right to reject all such payment instruments. Borrower agrees that tender of its check or other payment instrument so marked will not satisfy or discharge its obligation under this Note, disputed or otherwise, even if such check or payment instrument is inadvertently processed by Bank unless in fact such payment is in fact sufficient to pay the amount due hereunder.

WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS NOTE OR ANY LOAN DOCUMENT EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO MAKE THE LOAN EVIDENCED BY THIS NOTE. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.

Unless otherwise required under a Loan Agreement, if applicable, and as long as any indebtedness evidenced by this Note remains outstanding or as long as Bank remains obligated to make advances, the undersigned shall furnish annually an updated financial statement in a form satisfactory to Bank, which, when delivered shall be the property of the Bank.

The term "Prime Rate," if used herein, means the rate of interest per annum announced by the Bank from time to time and adopted as its Prime Rate. The Prime Rate is one of several rate indexes employed by the Bank when extending credit. Any change in the interest rate resulting from a change in the Bank's Prime Rate shall become effective as of the opening of business on the effective date of the change. If this Note is placed with an attorney for collection, the undersigned agrees to pay, in addition to principal and interest, all costs of collection, including reasonable attorneys' fees which the undersigned agrees shall be equal to 15% of the principal and interest outstanding at the time of acceleration or other action by Lender to collect the sums due hereunder, unless the actual attorneys' fees incurred, based upon Bank's counsel's normal hourly fees chargeable to Bank, shall be greater than 15% of principal and interest, in which case such billed amount based on such hourly rate shall be the attorneys' fee payable hereunder. All obligations of the undersigned and of any Obligor shall bind his heirs, executors, administrators, successors, and/or assigns. Use of the masculine pronoun herein shall include the feminine and the neuter, and also the plural. If more than one party shall execute this Note, the term "undersigned" as used herein shall mean all the parties signing this Note and each of them, and all such parties shall be jointly and severally obligated hereunder. Whenever possible, each provision of this Note shall be interpreted in such a manner to be effective and valid under applicable law, but if any provision of this Note shall be prohibited by or invalid under such law, such provision shall be ineffective but only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Note. All of the undersigned hereby waive all exemptions and homestead laws. The proceeds of the loan evidenced by this Note may be paid to any one or more of the undersigned. No waivers and modifications shall be valid unless in writing and signed by the Bank. In case of conflict between the terms of this Note and the Loan Agreement or Commitment Letter issued in connection herewith, the priority of controlling terms shall be first this Note, then the Loan Agreement, and then the Commitment Letter. This Note shall be governed by and construed in accordance with the laws of South Carolina.

(SIGNATURES ON FOLLOWING PAGE)

BB&T
of South Carolina

PROMISSORY NOTE SIGNATURE PAGE

Borrower: KWK LLC

Account Number: [redacted]0795 Note Number: 00001

Note Amount: $ 400,000.00 Date: 03/22/2005

Notice of Right to Copy of Appraisal: If a 1-4 family residential dwelling is pledged as collateral for this Note, you, the undersigned, have a right to a copy of the real estate appraisal report used in connection with your application for credit. If you wish to receive a copy, please notify in writing the branch office where you applied for credit. You must forward your request to the Bank no later than 90 days after the date of this Note. In your request letter, please provide your name, mailing address, appraised property address, the date of this Note, and the Account and Note Numbers shown on the front of this Note.

Waiver of Appraisal Rights. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. TO THE FULLEST EXTENT PERMITTED BY LAW AND AS A MATERIAL INDUCEMENT FOR LENDER TO MAKE THE LOAN, MORTGAGOR HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.

IN WITNESS WHEREOF, the undersigned, on the day and year first written above, has caused this note to be executed under seal.

If Borrower is a Corporation:

WITNESS:

SKYWAVES I CORPORATION
NAME OF CORPORATION

By: _____ (SEAL)

Title: CEO

By: _____ (SEAL)

Title: _____

If Borrower is a Partnership, Limited Liability Company, or Limited Liability Partnership:

WITNESS:

KWK LLC
NAME OF PARTNERSHIP, LLC, OR LLP

By: _____ (SEAL)
GENERAL PARTNER OR MANAGER

By: _____ (SEAL)
GENERAL PARTNER OR MANAGER

By: _____ (SEAL)
GENERAL PARTNER OR MANAGER

If Borrower is an Individual:

WITNESS:

_____ (SEAL)

Additional Co-makers:

WITNESS:

_____ (SEAL)

_____ (SEAL)

_____ (SEAL)

_____ (SEAL)

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "S"

2005 SECURITY AGREEMENT

City: CHARLESTON, SC

BB&T SECURITY AGREEMENT

This Security Agreement ("Security Agreement"), is made March 23, 2005, between SKYWAVES I CORPORATION

("Debtor"), and Branch Banking and Trust Company of South Carolina, a South Carolina banking corporation ("Secured Party").

This Security Agreement is entered into in connection with (check applicable items):

☒ (i) a Loan Agreement ("Loan Agreement") dated on or before the date of this Security Agreement under which the Secured Party has agreed to make a loan(s) and/or establish a line(s) of credit

☒ (ii) a promissory note dated 03/22/2005 (including all extensions, renewals, modifications and substitutions thereof, the "Note") of the Debtor or of KWK LLC and SKYWAVES I CORPORATION (the "Borrower"), in the principal amount of $ 400,000.00

☒ (iii) a guaranty agreement or agreements (whether one or more, the "Guaranty") executed by the guarantors named therein (whether one or more, the "Guarantors") dated on or about the same date as this Security Agreement;

☐ (iv) a control agreement covering the Debtor's, Borrower's, or any Guarantor's Deposit Account(s), Investment Property, Letter-of-Credit Rights, or Electronic Chattel Paper dated on or about the same date as this Security Agreement executed by the Debtor, the Borrower, and any such Guarantor;

☐ (v) the sale by Debtor and purchase by Secured Party of Accounts, Chattel Paper, Payment Intangibles and/or Promissory Notes; and/or

☐ (vi) _____

Secured Party and Debtor agree as follows:

1. DEFINITIONS.

1.1 Collateral. Unless specific items of personal property are described below, the Collateral shall consist of all now owned and hereafter acquired and wherever located personal property of Debtor identified below, each capitalized term as defined in Article 9 of the South Carolina Uniform Commercial Code ("UCC") (check applicable items):

☒ (i) Accounts, including all contract rights and health-care-insurance receivables;
☐ (i-a) The Account(s), contract right(s) and/or Health-Care-Insurance Receivables specifically described as follows;

☒ (ii) Inventory, including all returned inventory;
☐ (ii-a) The Inventory specifically described as follows:

☐ (iii) Equipment, including all Accessions thereto, and all manufacturer's warranties, parts and tools therefor;
☐ (iii-a) The Equipment, including all Accessions thereto, all manufacturer's warranties therefor, and all parts and tools therefor, specifically described as follows:

☐ (iv) Investment Property, including the following certificated securities and/or securities account(s) specifically described as follows:

☐ (v) Instruments, including all promissory notes and certificated certificates of deposit specifically described as follows:

☐ (vi) Deposit Accounts with Secured Party specifically described below (list account number(s)):
☐ (vi-a) The Deposit Accounts with other financial institutions specifically described as follows (list financial institution and account numbers):

☐ (vii) Chattel Paper (whether tangible or electronic);
☐ (vii-a) The Chattel Paper specifically described as follows:

☐ (viii) Goods, including all Fixtures and timber to be cut, located or situated on the real property specifically described as follows (list legal description as shown on deed including county and state):

EXHIBIT 3

ACCOUNT# / NOTE#
[redacted]0795 00001

☐ (ix) Farm Products, including all crops grown, growing or to be grown, livestock (born and unborn), supplies used or produced in a farming operation, and products of crops and livestock;
☐ (ix-a) The Farm Products specifically described as follows:

☐ (x) As-Extracted Collateral from the following location(s) (list legal description including county and state):

☐ (xi) The Letter-of-Credit Rights under the following letter(s) of credit (list issuer, number and amount):

☐ (xii) Documents of Title, including all warehouse receipts and bills of lading specifically described as follows:

☐ (xiii) Commercial Tort Claim(s) more specifically described as follows:

☐ (xiv) Money, including currency and/or rare coins delivered to and in possession of the Secured Party specifically described as follows:

☐ (xv) Software specifically described as follows:

☐ (xvi) Manufactured Home(s):

	Model	Year	Serial Number 1	Doublewide Serial Number 2
1.				
2.				

☐ (xvii) Vehicles, including recreational vehicles and watercraft described below:

	New/Used	Year/Make	Model/Body Type	VIN Number/Serial Number
1.				
2.				
3.				
4.				
5.				
6.				

☒ (xviii) General Intangibles, including all Payment Intangibles, copyrights, trademarks, patents, tradenames, tax refunds, company records (paper and electronic), rights under equipment leases, warrantes, software licenses, and the following, if any:

☒ (xix) Supporting Obligations;

☒ (xx) to the extent not listed above as original collateral, all proceeds (cash and non-cash) and products of the foregoing.

1.2 Obligations. This Security Agreement secures the following (collectively, the "Obligations"):

(i) Debtor's or Borrower's obligations under the Note, the Loan Agreement, and this Security Agreement, and in addition to the foregoing obligations, if the Debtor is a Guarantor, its obligations under its Guaranty;

(ii) all of Debtor's or Borrower's present and future indebtedness and obligations to Secured Party;

(iii) the repayment of (a) any amounts that Secured Party may advance or spend for the maintenance or preservation of the Collateral, and (b) any other expenditures that Secured Party may make under the provisions of this Security Agreement or for the benefit of Debtor or Borrower;

(iv) all amounts owed under any modifications, renewals, extensions or substitutions of any of the foregoing obligations;

(v) all Default Costs, as defined in Paragraph VIII of this Security Agreement; and

(vi) any of the foregoing that may arise after the filing of a petition by or against Debtor or Borrower under the Bankruptcy Code, even if the obligations do not accrue because of the automatic stay under Bankruptcy Code § 362 or otherwise.

1.3 UCC. Any term used in the UCC and not otherwise defined in this Security Agreement has the meaning given to the term in the UCC.

II. GRANT OF SECURITY INTEREST.

Debtor grants a security interest in the Collateral to Secured Party to secure the payment and performance of the Obligations.

III. PERFECTION OF SECURITY INTERESTS.

3.1 Filing of Security Interests.

(i) Debtor authorizes Secured Party to execute on the Debtor's behalf and file any financing statement (the "Financing Statement") describing the Collateral in any location deemed necessary and appropriate by Secured Party.

(ii) Debtor authorizes Secured Party to file a Financing Statement describing any agricultural liens or other statutory liens held by Secured Party.

(iii) Secured Party shall receive prior to the closing an official report from the Secretary of State of each Place of Business and the Debtor State, each as defined below, collectively (the "Filing Reports") indicating that Secured Party's security interest is prior to all other security interests or other interests reflected in the report.

3.2 Possession.

(i) Debtor shall have possession of the Collateral, except where expressly otherwise provided in this Security Agreement or where Secured Party chooses to perfect its security interest by possession in addition to the filing of a Financing Statement.

(ii) Where Collateral is in the possession of a third party, Debtor will join with Secured Party in notifying the third party of Secured Party's security interest and obtaining an acknowledgment from the third party that it is holding the Collateral for the benefit of Secured Party.

3.3 Control Agreements. Debtor will cooperate with Secured Party in obtaining a control agreement in form and substance satisfactory to Secured Party with respect to Collateral consisting of (check appropriate items):

☐ Deposit Accounts (for deposit accounts at other financial institutions);

☐ Investment Property (or securities accounts, mutual funds and other uncertificated securities;

☐ Letter-of-credit rights; and/or

☐ Electronic chattel paper.

3.4 Marking of Chattel Paper. If Chattel Paper is part of the Collateral, Debtor will not create any Chattel Paper without placing a legend on the Chattel Paper acceptable to Secured Party indicating that Secured Party has a security interest in the Chattel Paper.

IV. POST-CLOSING COVENANTS AND RIGHTS CONCERNING THE COLLATERAL.

4.1 Inspection. The parties to this Security Agreement may inspect any Collateral in the other party's possession, at any time upon reasonable notice.

4.2 Personal Property. Except for items specifically identified by Debtor and Secured Party as Fixtures, the Collateral shall remain personal property at all times, and Debtor shall not affix any of the Collateral to any real property in any manner which would change its nature from that of personal property to real property or to a fixture.

4.3 Secured Party's Collection Rights. Secured Party shall have the right at any time to enforce Debtor's rights against any account debtors and obligors.

4.4 Limitations on Obligations Concerning Maintenance of Collateral.

(i) Risk of Loss. Debtor has the risk of loss of the Collateral.

(ii) No Collection Obligation. Secured Party has no duty to collect any income accruing on the Collateral or to preserve any rights relating to the Collateral.

4.5 No Disposition of Collateral. Secured Party does not authorize, and Debtor agrees not to:

(i) make any sales or leases of any of the Collateral;

(ii) license any of the Collateral; or

(iii) grant any other security interest in any of the Collateral.

4.6 Purchase Money Security Interests. To the extent Debtor uses the Loan to purchase Collateral, Debtor's repayment of the Loan shall apply on a "first-in-first-out" basis so that the portion of the Loan used to purchase a particular item of Collateral shall be paid in the chronological order the Debtor purchased the Collateral.

4.7 Insurance. Debtor shall obtain and keep in force such insurance on the Collateral as is normal and customary in the Debtor's business or as the Secured Party may require, all in such amounts, under such forms of policies, upon such terms, for such periods and written by such insurance companies as the Secured Party may approve. All policies of insurance will contain the long-form Lender's Loss Payable clause in favor of the Secured Party, and the Debtor shall deliver the policies or complete copies thereof to the Secured Party. Such policies shall be noncancellable except upon thirty (30) days' prior written notice to the Secured Party. The proceeds of all such insurance, if any loss should occur, may be applied by the Secured Party to the payment of the Obligations or to the replacement of any of the Collateral damaged or destroyed, as the Secured Party may elect or direct in its sole discretion. The Debtor hereby appoints (which appointment constitutes a power coupled with an interest and is irrevocable as long as any of the Obligations remain outstanding) Secured Party as its lawful attorney-in-fact with full authority to make, adjust, settle claims under and/or cancel such insurance and to endorse the Debtor's name on any instruments or drafts issued by or upon any insurance companies.

V. DEBTORS REPRESENTATIONS AND WARRANTIES.

Debtor represents and warrants to Secured Party:

5.1 Title to and transfer of Collateral. It has rights in or the power to transfer the Collateral and its title to the Collateral is free of all adverse claims, liens, security interests and restrictions on transfer or pledge except as created by this Security Agreement.

5.2 Location of Collateral. All collateral consisting of goods (equipment, inventory, fixtures, crops, unborn young of animals, timber to be cut, manufactured homes; and other tangible, movable personal property) is located solely in the following States (the "Collateral States"): SC

5.3 Location, State of Incorporation and Name of Debtor. Debtor's:

(i) chief executive office (if Debtor has more than one place of business), place of business (if Debtor has one place of business), or principal residence (if Debtor is an individual), is located in the following State and address (the "Place of Business"):
4XXD PACE STREET
NORTH CHARLESTON, SC 29405-0000

(ii) state of incorporation or organization is South Carolina (the "Debtor State");

(iii) exact legal name is as set forth in the first paragraph of this Security Agreement.

5.4 **Business or Agricultural Purpose.** None of the Obligations is a Consumer Transaction, as defined in the UCC and none of the Collateral has been or will be purchased or held primarily for personal, family or household purposes.

VI. DEBTORS COVENANTS.

Until the Obligations are paid in full, Debtor agrees that it will:

6.1 preserve its legal existence and not, in one transaction or a series of related transactions, merge into or consolidate with any other entity, or sell all or substantially all of its assets;

6.2 not change the Debtor State of its registered organization;

6.3 not change its registered name without providing Secured Party with 30 days' prior written notice; and

6.4 not change the state of its Place of Business or, if Debtor is an individual, change his state of residence without providing Secured Party with 30 days' prior written notice.

VII. EVENTS OF DEFAULT.

The occurrence of any of the following shall, at the option of Secured Party, be an Event of Default:

7.1 Any default or Event of Default by Borrower or Debtor under the Note, Loan Agreement, any of the other loan documents, and Guaranty or any of the other Obligations;

7.2 Debtor's failure to comply with any of the provisions of, or the incorrectness of any representation or warranty contained in, this Security Agreement, the Note, the Loan Agreement, or in any other document relating to the Obligations;

7.3 Transfer or disposition of any of the Collateral, except as expressly permitted by this Security Agreement;

7.4 Attachment, execution or levy on any of the Collateral;

7.5 Debtor voluntarily or involuntarily becoming subject to any proceeding under (a) the Bankruptcy Code or (b) any similar remedy under state statutory or common law;

7.6 Debtor shall fail to comply with, or become subject to any administrative or judicial proceeding under any federal, state or local (a) hazardous waste or environmental law, (b) asset forfeiture or similar law which can result in the forfeiture of property, or (c) other law, where noncompliance may have any significant effect on the Collateral; or

7.7 Secured Party shall receive at any time following the closing a UCC filing report indicating that Secured Party's security interest is not prior to all other security interests or other interests reflected in the report.

VIII. DEFAULT COSTS.

8.1 Should an Event of Default occur, Debtor will pay to Secured Party all costs incurred by the Secured Party for the purpose of enforcing its rights hereunder, including:

(i) costs of foreclosure;

(ii) costs of obtaining money damages; and

(iii) a reasonable fee for the service of attorneys employed by Secured Party for any purpose related to this Security Agreement or the Obligations, including without limitation consultation, drafting documents, sending notices or instituting, prosecuting or defending litigation or arbitration.

IX. REMEDIES UPON DEFAULT.

9.1 **General.** Upon any Event of Default, Secured Party may pursue any remedy available at law (including those available under the provisions of the UCC), or in equity to collect, enforce or satisfy any Obligations then owing, whether by acceleration or otherwise.

9.2 **Concurrent Remedies.** Upon any Event of Default, Secured Party shall have the right to pursue any of the following remedies separately, successively or concurrently:

(i) File suit and obtain judgment and, in conjunction with any action, Secured Party may seek any ancillary remedies provided by law or at equity, including levy of attachment and garnishment.

(ii) Take possession of any Collateral if not already in its possession without demand and without legal process. Upon Secured Party's demand, Debtor will assemble and make the Collateral available to Secured Party as it directs. Debtor grants to Secured Party the right, for this purpose, to enter into or on any premises where Collateral may be located.

(iii) Without taking possession, sell, lease or otherwise dispose of the Collateral at public or private sale in accordance with the UCC.

X. FORECLOSURE PROCEDURES.

10.1 **No Waiver.** No delay or omission by Secured Party to exercise any right or remedy accruing upon any Event of Default shall (a) impair any right or remedy, (b) waive any default or operate as an acquiescence to the Event of Default, or (c) affect any subsequent default of the same or of a different nature.

10.2 **Notices.** Secured Party shall give Debtor such notice of any private or public sale as may be required by the UCC.

10.3 **Condition of Collateral.** Secured Party has no obligation to repair, clean-up or otherwise prepare the Collateral for sale.

10.4 **No Obligation to Pursue Others.** Secured Party has no obligation to attempt to satisfy the Obligations by collecting them from any other person liable for them and Secured Party may release, modify or waive any collateral provided by any other person to secure any of the Obligations, all without affecting Secured Party's rights against Debtor. Debtor waives any right it may have to require Secured Party to pursue any third person for any of the Obligations.

10.5 **Compliance With Other Laws.** Secured Party may comply with any applicable state or federal law requirements in connection with a disposition of the Collateral and compliance will not be considered adversely to affect the commercial reasonableness of any sale of the Collateral.

10.6 **Warranties.** Secured Party may sell the Collateral without giving any warranties as to the Collateral and may specifically disclaim any warranties of title or the like. This procedure will not be considered adversely to affect the commercial reasonableness of any sale of the Collateral.

10.7 **Sales on Credit.** If Secured Party sells any of the Collateral upon credit, Debtor will be credited only with payments actually made by the purchaser, received by Secured Party and applied to the indebtedness of the purchaser. In the event the purchaser fails to pay for the Collateral, Secured Party may resell the Collateral and Debtor shall be credited with the proceeds of the sale as and when received, less expenses.

10.8 **Purchases by Secured Party.** In the event Secured Party purchases any of the Collateral being sold, Secured Party may pay for the Collateral by crediting some or all of the Obligations of the Debtor.

10.9 No Marshaling. Secured Party have no obligation to marshal any assets in favor of Debtor, or against or in payment of:

(i) the Note,

(ii) any of the other Obligations, or

(iii) any other obligation owed to Secured Party, Borrower or any other person.

XI. MISCELLANEOUS.

11.1 Assignment.

(i) Binds Assignees. This Security Agreement shall bind and shall inure to the benefit of the successors and assigns of Secured Party, and shall bind all heirs, personal representatives, executors, administrators, successors and permitted assigns of Debtor.

(ii) No Assignments by Debtor. Secured Party does not consent to any assignment by Debtor except as expressly provided in this Security Agreement.

(iii) Secured Party Assignments. Secured Party may assign its rights and interests under this Security Agreement. If an assignment is made, Debtor shall render performance under the Security Agreement to the assignee. Debtor waives and will not assert against any assignee any claims, defenses or set-offs which Debtor could assert against Secured Party except defenses which cannot be waived.

11.2 Severability. Should any provision of this Security Agreement be found to be void, invalid or unenforceable by a court or panel of arbitrators of competent jurisdiction, that finding shall only affect the provisions found to be void, invalid or unenforceable and shall not affect the remaining provisions of this Security Agreement.

11.3 Notices. Any notices required by this Security Agreement shall be deemed to be delivered when a record has been (a) deposited in any United States postal box if postage is prepaid, and the notice properly addressed to the intended recipient, (b) received by telecopy, (c) received through the Internet, and (d) when personally delivered.

11.4 Headings. Section headings used in this Security Agreement are for convenience only. They are not a part of this Security Agreement and shall not be used in construing it.

11.5 Governing Law. This Security Agreement is being executed and delivered and is intended to be performed in the State of South Carolina and shall be construed and enforced in accordance with the laws of the State of South Carolina, except to the extent that the UCC provides for the application of the law of the Debtor State.

11.6 Rules of Construction.

(i) No reference to "proceeds" in this Security Agreement authorizes any sale, transfer, or other disposition of the Collateral by the Debtor except in the ordinary course of business.

(ii) "Includes" and "including" are not limiting.

(iii) "Or" is not exclusive.

(iv) "All" includes "any" and "any" includes "all."

11.7 Integration and Modifications.

(i) This Security Agreement is the entire agreement of the Debtor and Secured Party concerning its subject matter.

(ii) Any modification to this Security Agreement must be made in writing and signed by the party adversely affected.

11.8 Waiver. Any party to this Security Agreement may waive the enforcement of any provision to the extent the provision is for its benefit.

11.9 Further Assurances. Debtor agrees to execute any further documents, and to take any further actions, reasonably requested by Secured Party to evidence or perfect the security interest granted herein or to effectuate the rights granted to Secured Party herein.

11.10 WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS SECURITY AGREEMENT OR ANY LOAN DOCUMENT EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND SECURED PARTY. THIS PROVISION IS A MATERIAL INDUCEMENT FOR SECURED PARTY TO MAKE THE LOAN TO DEBTOR OR BORROWER. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF SECURED PARTY, NOR SECURED PARTY'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SECURED PARTY WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF SECURED PARTY, NOR SECURED PARTY'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.

SIGNATURES ON THE FOLLOWING PAGE

The parties have signed this Security Agreement under seal as of the day and year first above written.

If Debtor is a Corporation:

WITNESS:

SKYWAVES I CORPORATION
NAME OF CORPORATION

By: _____ (SEAL)

Title: CEO

_____

By: _____ (SEAL)

Title: _____

If Debtor is a Partnership, Limited Liability Company, or Limited Liability Partnership

WITNESS:

_____
NAME OF PARTNERSHIP, LLC, OR LLP

_____ By: _____ (SEAL)
GENERAL PARTNER OR MANAGER

_____ By: _____ (SEAL)
GENERAL PARTNER OR MANAGER

_____ By: _____ (SEAL)
GENERAL PARTNER OR MANAGER

If Debtor is an Individual:

WITNESS:

_____
TYPE NAME OF DEBTOR

_____ _____ (SEAL)

_____
TYPE NAME OF DEBTOR

_____ _____ (SEAL)

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "T"

2007 PROMISSORY NOTE

Borrower: SKYWAVES I CORPORATION

Account Number: [redacted]833

Address: 4280 PACE ST
NORTH CHARLESTON, SC 29405-7455

BB&T

Note Number: 00005

CHARLESTON, South Carolina

Date: April 2, 2007

PROMISSORY NOTE

BORROWER(S) REPRESENTS HEREWITH THAT THE LOAN EVIDENCED HEREBY IS BEING OBTAINED FOR BUSINESS/COMMERCIAL PURPOSES. For value received, the undersigned, jointly and severally, if more than one, promises to pay to BRANCH BANKING AND TRUST COMPANY, a North Carolina banking corporation (the "Bank"), or order, at said bank at any of its offices in the above referenced city (or such other place or places that may be hereafter designated by Bank), the sum of

FOUR HUNDRED SEVENTY-FIVE THOUSAND DOLLARS & 00/100 Dollars ($ 475,000.00), in immediately available coin or currency of the United States of America. ☐ Borrower shall pay a prepayment penalty as set forth in the Prepayment Penalty Addendum attached hereto.

Interest shall accrue from the date hereof on the unpaid balance outstanding from time to time at the:

☒ Fixed rate of 7.625 % per annum.

☐ Variable rate of the Bank's Prime Rate plus _____ % per annum to be adjusted _____ as the Bank's Prime Rate changes. If checked here ☐, the interest rate will not exceed a(n) ☐ fixed ☐ average maximum rate of _____ % or a ☐ floating maximum rate of the greater of _____ % or the Bank's Prime Rate; and the interest rate will not decrease below a fixed minimum rate of _____ %. If an average maximum rate is specified, a determination of any required reimbursement of interest by Bank will be made: ☐ when Note is repaid in full by Borrower ☐ annually beginning on _____.

☐ Fixed rate of _____ % per annum through _____ which automatically converts on _____ to a variable rate equal to the Bank's Prime Rate plus _____ % per annum which shall be adjusted _____ as such Prime Rate changes.

☐ _____

Principal and interest is payable as follows

☐ Principal (plus any accrued interest not otherwise scheduled herein) } is due in full at maturity on _____.
☐ Principal plus accrued interest }

☒ Payable in consecutive Monthly installments of ☐ Principal ☒ Principal and interest } commencing on 05/02/2007 and continued on the same day of each calendar period thereafter, for 59 equal payments of $ 9,572.82, with one final payment of all remaining principal and accrued interest due on 04/02/2012.

☐ ChoiceLine Payment Option: 2% of outstanding balance is payable monthly commencing on _____ and continuing on the same day of each calendar period thereafter, with one final payment of all remaining principal and accrued interest due on _____.

☐ Accrued interest is payable _____ commencing on _____ and continuing on the same day of each calendar period thereafter, with one final payment of all remaining interest due on _____.

☐ Bank reserves the right in its sole discretion to adjust the fixed payment due hereunder _____ on _____ and continuing on the same day of each calendar period thereafter, in order to maintain an amortization period of no more than _____ months from the date of the initial principal payment due hereunder. Borrower understands the payment may increase if interest rates increase.

☐ Prior to an event of default, Borrower may borrow, repay, and reborrow hereunder pursuant to the terms of the Loan Agreement, hereinafter defined.

☐ _____

☐ Borrower hereby authorizes Bank to automatically draft from its demand deposit or savings account(s) with Bank or other bank, any payment(s) due under this Note on the date(s) due. Borrower shall provide appropriate account number(s) for account(s) at Bank or other bank.

The undersigned shall pay to Bank a late fee in the amount of five percent (5%) of any installment past due for fifteen (15) or more days. When any installment payment is past due for fifteen (15) or more days, subsequent payments shall first be applied to the past due balance. In addition, the undersigned shall pay to Bank a returned payment fee if the undersigned or any other obligor hereon makes any payment at any time by check or other instrument, or by any electronic means, which is returned to Bank because of nonpayment due to nonsufficient funds.

All interest shall be computed and charged for the actual number of days elapsed on the basis of a year consisting of three hundred sixty (360) days. In the event periodic accruals of interest shall exceed any periodic fixed payment amount described above, the fixed payment amount shall be immediately increased, or additional supplemental interest payments required on the same periodic basis as specified above (increased fixed payments or supplemental payments to be determined in the Bank's sole discretion), in such amounts and at such times as shall be necessary to pay all accruals of interest for the period and all accruals of unpaid interest from previous periods. Such adjustments to the fixed payment amount or supplemental payments shall remain in effect for so long as the interest accruals shall exceed the original fixed payment amount and shall be further adjusted upward or downward to reflect changes in the variable interest rate; provided that unless elected otherwise above, the fixed payment amount shall not be reduced below the original fixed payment amount. However, Bank shall have the right, in its sole discretion, to lower the fixed payment amount below the original payment amount.

This Note is given by the undersigned in connection with the following agreements (if any) between the undersigned and the Bank:

Mortgage(s) / Deed of Trust(s) granted in favor of Bank as mortgagee / beneficiary:

☐ dated _____ in the maximum principal amount of $ _____
granted by _____

☐ dated _____ in the maximum principal amount of $ _____
granted by _____

EXHIBIT 5

ACCOUNT# / NOTE#
[redacted]833 00005

1472SC (9810)

Security Agreement(s) granting a security interest to Bank:

[X] dated 04/02/2007 given by SKYWAVES I CORPORATION

[ ] dated _____ given by _____

[ ] Securities Account Pledge and Security Agreement dated _____, executed by _____

[ ] Control Agreement(s) dated _____, covering [ ] Deposit Account(s) [ ] Investment Property [ ] Letter of Credit Rights [ ] Electronic Chattel Paper

[ ] Assignment of Certificate of Deposit, Security Agreement, and Power of Attorney (for Certificated Certificates of Deposit) dated _____, executed by _____

[ ] Pledge and Security Agreement for Publicly Traded Certificated Securities dated _____, executed by _____

[ ] Assignment of Life Insurance Policy as Collateral dated _____, executed by _____

[ ] Loan Agreement dated _____, executed by Borrower and [ ] Guarantor(s).

[ ] _____

[ ] _____

All of the terms, conditions and covenants of the above described agreements (the "Agreements") are expressly made a part of this promissory note (the "Note") by reference in the same manner and with the same effect as if set forth herein at length and any holder of this Note is entitled to the benefits of and remedies provided in the Agreements and any other agreements by and between the undersigned and the Bank.

No delay or omission on the part of the holder in exercising any right hereunder shall operate as a waiver of such right or of any other right of such holder, nor shall any delay, omission or waiver on any one occasion be deemed a bar to or waiver of the same or of any other right on any future occasion. Every one of the undersigned and every endorser or guarantor of this Note regardless of the time, order or place of signing waives presentment, demand, protest and notices of every kind and assents to any one or more extensions or postponements of the time of payment or any other indulgences, to any substitutions, exchanges or releases of collateral if at any time there be available to the holder collateral for this Note, and to the additions or releases of any other parties or persons primarily or secondarily liable.

The failure to pay any part of the principal or interest when due on this Note or to fully perform any covenant, obligation or warranty on this or on any other liability to the Bank by any affiliate (as defined in 11USC Section (101) (2)), or by any guarantor or surety of this Note (said affiliate, guarantor, and surety are herein called "Obligor"); or if any financial statement or other representation made to the Bank by any of the undersigned or any Obligor shall be found to be materially incorrect or incomplete; or if any of the undersigned shall fail to furnish information to the Bank sufficient to verify the identity of the undersigned as required under the USA Patriot Act; or in the event of a default pursuant to any of the Agreements or any other obligation of any of the undersigned or any Obligor in favor of the Bank; or in the event the Bank demands that the undersigned secure or provide additional security for its obligations under this Note and security deemed adequate and sufficient by the Bank is not given when demanded; or in the event one or more of the undersigned or any Obligor shall die, terminate its existence, allow the appointment of a receiver for any part of its property, make an assignment for the benefit of creditors, or where a proceeding under bankruptcy or insolvency laws is initiated by or against any of the undersigned or any Obligor; or in the event the Bank should otherwise deem itself, its security interest, or any collateral unsafe or insecure; or should the Bank in good faith believe that the prospect of payment or other performance is impaired; or if there is an attachment, execution, or other judicial seizure of all or any portion of the Borrower's or any Obligor's assets, including an action or proceeding to seize any funds on deposit with the Bank, and such seizure is not discharged within 20 days; or if final judgment for the payment of money shall be rendered against the Borrower or any Obligor which is not covered by insurance or debt cancellation and shall remain undischarged for a period of 30 days unless such judgment or execution thereon is effectively stayed; or the termination of any guaranty agreement given in connection with this Note, then any one of the same shall be a material default hereunder and this Note and other debts due the Bank by any one or more of undersigned shall immediately become due and payable without notice, at the option of the Bank. From and after any event of default hereunder, interest shall accrue on the sum of the principal balance and accrued interest then outstanding at the variable rate equal to the Bank's Prime Rate plus 5% per annum ("Default Rate"), provided that such rate shall not exceed at any time the highest rate of interest permitted by the laws of the State of South Carolina; and further provided that such rate shall apply after judgement. In the event of any default, the then remaining unpaid principal amount and accrued but unpaid interest then outstanding shall bear interest at the Default Rate called for hereunder until such principal and interest have been paid in full. In addition, upon default, the Bank may pursue its full legal remedies at law or equity, and the balance due hereunder may be charged against any obligation of the Bank to any party, including any Obligor. Bank shall not be obligated to accept any check, money order, or other payment instrument marked "payment in full" on any disputed amount due hereunder, and Bank expressly reserves the right to reject all such payment instruments. Borrower agrees that tender of its check or other payment instrument so marked will not satisfy or discharge its obligation under this Note, disputed or otherwise, even if such check or payment instrument is inadvertently processed by Bank unless in fact such payment is in fact sufficient to pay the amount due hereunder.

WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS NOTE OR ANY LOAN DOCUMENT EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO MAKE THE LOAN EVIDENCED BY THIS NOTE. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.

Unless otherwise required under a Loan Agreement, if applicable, and as long as any indebtedness evidenced by this Note remains outstanding or as long as Bank remains obligated to make advances, the undersigned shall furnish annually an updated financial statement in a form satisfactory to Bank, which, when delivered shall be the property of the Bank.

The term "Prime Rate," if used herein, means the rate of interest per annum announced by the Bank from time to time and adopted as its Prime Rate. The Prime Rate is one of several rate indexes employed by the Bank when extending credit. Any change in the interest rate resulting from a change in the Bank's Prime Rate shall become effective as of the opening of business on the effective date of the change. If this Note is placed with an attorney for collection, the undersigned agrees to pay, in addition to principal and interest, all costs of collection, including reasonable attorneys' fees which the undersigned agrees shall be equal to 15% of the principal and interest outstanding at the time of acceleration or other action by Lender to collect the sums due hereunder, unless the actual attorneys' fees incurred, based upon Bank's counsel's normal hourly fees chargeable to Bank, shall be greater than 15% of principal and interest, in which case such billed amount based on such hourly rate shall be the attorneys' fee payable hereunder. All obligations of the undersigned and of any Obligor shall bind his heirs, executors, administrators, successors, and/or assigns. Use of the masculine pronoun herein shall include the feminine and the neuter, and also the plural. If more than one party shall execute this Note, the term "undersigned" as used herein shall mean all the parties signing this Note and each of them, and all such parties shall be jointly and severally obligated hereunder. Whenever possible, each provision of this Note shall be interpreted in such a manner to be effective and valid under applicable law, but if any provision of this Note shall be prohibited by or invalid under such law, such provision shall be ineffective but only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Note. All of the undersigned hereby waive all exemptions and homestead laws. The proceeds of the loan evidenced by this Note may be paid to any one or more of the undersigned. No waivers and modifications shall be valid unless in writing and signed by the Bank. In case of conflict between the terms of this Note and the Loan Agreement or Commitment Letter issued in connection herewith, the priority of controlling terms shall be first this Note, then the Loan Agreement, and then the Commitment Letter. This Note shall be governed by and construed in accordance with the laws of South Carolina.

(SIGNATURES ON FOLLOWING PAGE)

BB&T

PROMISSORY NOTE SIGNATURE PAGE

Borrower: SKYWAVES I CORPORATION

Account Number: 9520220833 Note Number: 00005

Note Amount: $ 475,000.00 Date: 04/02/2007

Notice of Right to Copy of Appraisal: If a 1-4 family residential dwelling is pledged as collateral for this Note, you, the undersigned, have a right to a copy of the real estate appraisal report used in connection with your application for credit. If you wish to receive a copy, please notify in writing the branch office where you applied for credit. You must forward your request to the Bank no later than 90 days after the date of this Note. In your request letter, please provide your name, mailing address, appraised property address, the date of this Note, and the Account and Note Numbers shown on the front of this Note.

Waiver of Appraisal Rights. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. TO THE FULLEST EXTENT PERMITTED BY LAW AND AS A MATERIAL INDUCEMENT FOR LENDER TO MAKE THE LOAN, MORTGAGOR HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.

IN WITNESS WHEREOF, the undersigned, on the day and year first written above, has caused this note to be executed under seal.

If Borrower is a Corporation:

WITNESS:

SKYWAVES I CORPORATION
NAME OF CORPORATION

By: _____ (SEAL)
Ronald D. Konersmann
Title: Chief Executive Off.

By: _____ (SEAL)
John Voytko
Title: Chief Financial Off.

If Borrower is a Partnership, Limited Liability Company, or Limited Liability Partnership:

WITNESS:

_____
NAME OF PARTNERSHIP, LLC, OR LLP

By: _____ (SEAL)
GENERAL PARTNER OR MANAGER

By: _____ (SEAL)
GENERAL PARTNER OR MANAGER

By: _____ (SEAL)
GENERAL PARTNER OR MANAGER

If Borrower is an Individual:

WITNESS:

_____ (SEAL)

Additional Co-makers:

WITNESS:

_____ (SEAL)

_____ (SEAL)

_____ (SEAL)

_____ (SEAL)

SKYWAVES I CORPORATION V. BRANK BANKING AND TRUST COMPANY, ET AL.
CASE NO. 2009-CP-10-7516

JOINT EXHIBIT

EXHIBIT "U"

2007 SECURITY AGREEMENT

City: CHARLESTON , SC

BB&T SECURITY AGREEMENT

This Security Agreement ("Security Agreement"), is made April 2, 2007, between SKYWAVES I CORPORATION

("Debtor"), and Branch Banking and Trust Company, a North Carolina banking corporation ("Secured Party").

This Security Agreement is entered into in connection with (check applicable items):

☐ (i) a Loan Agreement ("Loan Agreement") dated on or before the date of this Security Agreement under which the Secured Party has agreed to make a loan(s) and/or establish a line(s) of credit;

☒ (ii) a promissory note dated 04/02/2007 (including all extensions, renewals, modifications and substitutions thereof, the "Note") of the Debtor or of SKYWAVES I CORPORATION the "Borrower"), in the principal amount of $ 475,000.00;

☒ (iii) a guaranty agreement or agreements (whether one or more, the "Guaranty") executed by the guarantors named therein (whether one or more, the "Guarantors") dated on or about the same date as this Security Agreement;

☐ (iv) a control agreement covering the Debtor's, Borrower's, or any Guarantor's Deposit Account(s), Investment Property, Letter-of-Credit Rights, or Electronic Chattel Paper dated on or about the same date as this Security Agreement executed by the Debtor, the Borrower, and any such Guarantor;

☐ (v) the sale by Debtor and purchase by Secured Party of Accounts, Chattel Paper, Payment Intangibles and/or Promissory Notes; and/or

☐ (vi) _____

Secured Party and Debtor agree as follows:

I. DEFINITIONS.

1.1 Collateral. Unless specific items of personal property are described below, the Collateral shall consist of all now owned and hereafter acquired and wherever located personal property of Debtor identified below, each capitalized term as defined in Article 9 of the South Carolina Uniform Commercial Code ("UCC") (check applicable items):

☒ (i) Accounts, including all contract rights and health-care-insurance receivables;
☐ (i-a) The Account(s), contract right(s) and/or Health-Care-Insurance Receivables specifically described as follows:

☒ (ii) Inventory, including all returned inventory;
☐ (ii-a) The Inventory specifically described as follows:

☐ (iii) Equipment, including all Accessions thereto, and all manufacturer's warranties, parts and tools therefor;
☒ (iii-a) The Equipment, including all Accessions thereto, all manufacturer's warranties therefor, and all parts and tools therefor, specifically described as follows:
See Attached Exhibit "A" to Security Agreement

☐ (iv) Investment Property, including the following certificated securities and/or securities account(s) specifically described as follows:

☐ (v) Instruments, including all promissory notes and certificated certificates of deposit specifically described as follows.

☐ (vi) Deposit Accounts with Secured Party specifically described below (list account number(s)):
☐ (vi-a) The Deposit Accounts with other financial institutions specifically described as follows (list financial institution and account numbers):

☐ (vii) Chattel Paper (whether tangible or electronic):
☐ (vii-a) The Chattel Paper specifically described as follows:

☐ (viii) Goods, including all Fixtures and timber to be cut, located or situated on the real property specifically described as follows (list legal description as shown on deed including county and state):

ACCOUNT# / NOTE#
[redacted]433 00005

1476SC (0610)

EXHIBIT 6

☐ (ix) Farm Products, including all crops grown, growing or to be grown, livestock (born and unborn), supplies used or produced in a farming operation, and products of crops and livestock;
☐ (ix-a) The Farm Products specifically described as follows:

☐ (x) As-Extracted Collateral from the following location(s) (list legal description including county and state):

☐ (xi) The Letter-of-Credit Rights under the following letter(s) of credit (list issuer, number and amount):

☐ (xii) Documents of Title, including all warehouse receipts and bills of lading specifically described as follows:

☐ (xiii) Commercial Tort Claim(s) more specifically described as follows:

☐ (xiv) Money, including currency and/or rare coins delivered to and in possession of the Secured Party specifically described as follows:

☐ (xv) Software specifically described as follows:

☐ (xvi) Manufactured Home(s):

Model	Year	Serial Number 1	Doublewide Serial Number 2
1.			
2.			

☐ (xvii) Vehicles, including recreational vehicles and watercraft described below:

New/Used	Year/Make	Model/Body Type	VIN Number/Serial Number
1.			
2.			
3.			
4.			
5.			
6.			

☒ (xviii) General Intangibles, including all Payment Intangibles, copyrights, trademarks, patents, tradenames, tax refunds, company records (paper and electronic), rights under equipment leases, warranties, software licenses, and the following, if any:

☒ (xix) Supporting Obligations;

☒ (xx) to the extent not listed above as original collateral, all proceeds (cash and non cash) and products of the foregoing.

☐ See Schedule "A" to Security Agreement.

1.2 Obligations. This Security Agreement secures the following (collectively, the "Obligations"):

(i) Debtor's or Borrower's obligations under the Note, the Loan Agreement, and this Security Agreement, and in addition to the foregoing obligations, if the Debtor is a Guarantor, its obligations under its Guaranty;

(ii) all of Debtor's or Borrower's present and future indebtedness and obligations to Secured Party including without limitation any obligation to reimburse and repay Secured Party for paying any Standby or Commercial Letter of Credit issued on the account of Debtor or Borrower pursuant to an application therefor;

(iii) the repayment of (a) any amounts that Secured Party may advance or spend for the maintenance or preservation of the Collateral, and (b) any other expenditures that Secured Party may make under the provisions of this Security Agreement or for the benefit of Debtor or Borrower;

(iv) all amounts owed under any modifications, renewals, extensions or substitutions of any of the foregoing obligations;

(v) all Default Costs, as defined in Paragraph VIII of this Security Agreement; and

(vi) any of the foregoing that may arise after the filing of a petition by or against Debtor or Borrower under the Bankruptcy Code, even if the obligations do not accrue because of the automatic stay under Bankruptcy Code § 362 or otherwise.

1.3 UCC. Any term used in the UCC and not otherwise defined in this Security Agreement has the meaning given to the term in the UCC.

512

II. GRANT OF SECURITY INTEREST.

Debtor grants a security interest in the Collateral to Secured Party to secure the payment and performance of the Obligations.

III. PERFECTION OF SECURITY INTERESTS.

3.1 Filing of Security Interests.

(i) Debtor authorizes Secured Party to execute on the Debtor's behalf and file any financing statement (the "Financing Statement") describing the Collateral in any location deemed necessary and appropriate by Secured Party.

(ii) Debtor authorizes Secured Party to file a Financing Statement describing any agricultural liens or other statutory liens held by Secured Party.

(iii) Secured Party shall receive prior to the closing an official report from the Secretary of State of each Place of Business and the Debtor State, each as defined below, collectively (the "Filing Reports") indicating that Secured Party's security interest is prior to all other security interests or other interests reflected in the report.

3.2 Possession.

(i) Debtor shall have possession of the Collateral, except where expressly otherwise provided in this Security Agreement or where Secured Party chooses to perfect its security interest by possession in addition to the filing of a Financing Statement.

(ii) Where Collateral is in the possession of a third party, Debtor will join with Secured Party in notifying the third party of Secured Party's security interest and obtaining an acknowledgment from the third party that it is holding the Collateral for the benefit of Secured Party.

3.3 Control Agreements. Debtor will cooperate with Secured Party in obtaining a control agreement in form and substance satisfactory to Secured Party with respect to Collateral consisting of (check appropriate items):

☐ Deposit Accounts (for deposit accounts at other financial institutions);

☐ Investment Property (for securities accounts, mutual funds and other uncertificated securities);

☐ Letter-of-credit rights; and/or

☐ Electronic chattel paper.

3.4 Marking of Chattel Paper. If Chattel Paper is part of the Collateral, Debtor will not create any Chattel Paper without placing a legend on the Chattel Paper acceptable to Secured Party indicating that Secured Party has a security interest in the Chattel Paper.

IV. POST-CLOSING COVENANTS AND RIGHTS CONCERNING THE COLLATERAL.

4.1 Inspection. The parties to this Security Agreement may inspect any Collateral in the other party's possession, at any time upon reasonable notice.

4.2 Personal Property. Except for items specifically identified by Debtor and Secured Party as Fixtures, the Collateral shall remain personal property at all times, and Debtor shall not affix any of the Collateral to any real property in any manner which would change its nature from that of personal property to real property or to a fixture.

4.3 Secured Party's Collection Rights. Secured Party shall have the right at any time to enforce Debtor's rights against any account debtors and obligors.

COPY

4.4 Limitations on Obligations Concerning Maintenance of Collateral.

(i) Risk of Loss. Debtor has the risk of loss of the Collateral.

(ii) No Collection Obligation. Secured Party has no duty to collect any income accruing on the Collateral or to preserve any rights relating to the Collateral.

4.5 No Disposition of Collateral. Secured Party does not authorize, and Debtor agrees not to:

(i) make any sales or leases of any of the Collateral other than in the ordinary course of business;

(ii) license any of the Collateral; or

(iii) grant any other security interest in any of the Collateral.

4.6 Purchase Money Security Interests. To the extent Debtor uses the Loan to purchase Collateral, Debtor's repayment of the Loan shall apply on a "first-in-first-out" basis so that the portion of the Loan used to purchase a particular item of Collateral shall be paid in the chronological order the Debtor purchased the Collateral.

4.7 Insurance. Debtor shall obtain and keep in force such insurance on the Collateral as is normal and customary in the Debtor's business or as the Secured Party may require, all in such amounts, under such forms of policies, upon such terms, for such periods and written by such insurance companies as the Secured Party may approve. All policies of insurance will contain the long-form Lender's Loss Payable clause in favor of the Secured Party, and the Debtor shall deliver the policies or complete copies thereof to the Secured Party. Such policies shall be noncancellable except upon thirty (30) days' prior written notice to the Secured Party. The proceeds of all such insurance, if any loss should occur, may be applied by the Secured Party to the payment of the Obligations or to the replacement of any of the Collateral damaged or destroyed, as the Secured Party may elect or direct in its sole discretion. The Debtor hereby appoints (which appointment constitutes a power coupled with an interest and is irrevocable as long as any of the Obligations remain outstanding) Secured Party as its lawful attorney-in-fact with full authority to make, adjust, settle claims under and/or cancel such insurance and to endorse the Debtor's name on any instruments or drafts issued by or upon any insurance companies.

V. DEBTORS REPRESENTATIONS AND WARRANTIES.

Debtor represents and warrants to Secured Party:

5.1 Title to and transfer of Collateral. It has rights in or the power to transfer the Collateral and its title to the Collateral is free of all adverse claims, liens, security interests and restrictions on transfer or pledge except as created by this Security Agreement.

5.2 Location of Collateral. All collateral consisting of goods (equipment, inventory, fixtures, crops, unborn young of animals, timber to be cut, manufactured homes; and other tangible, movable personal property) is located solely in the following States (the "Collateral States"): SC

5.3 Location, State of Incorporation and Name of Debtor. Debtor's:

(i) chief executive office (if Debtor has more than one place of business), place of business (if Debtor has one place of business), or principal residence (if Debtor is an individual), is located in the following State and address (the "Place of Business"):
4280 PACE ST
NORTH CHARLESTON, SC 29405-7455

(ii) state of incorporation or organization is Delaware (the "Debtor State");

(iii) exact legal name is as set forth in the first paragraph of this Security Agreement.

5.4 Business or Agricultural Purpose. None of the Obligations is a Consumer Transaction, as defined in the UCC and none of the Collateral has been or will be purchased or held primarily for personal, family or household purposes.

VI. DEBTORS COVENANTS.

Until the Obligations are paid in full, Debtor agrees that it will:

6.1 preserve its legal existence and not, in one transaction or a series of related transactions, merge into or consolidate with any other entity, or sell all or substantially all of its assets;

6.2 not change the Debtor State of its registered organization;

6.3 not change its registered name without providing Secured Party with 30 days' prior written notice; and

6.4 not change the state of its Place of Business or, if Debtor is an individual, change his state of residence without providing Secured Party with 30 days' prior written notice.

VII. EVENTS OF DEFAULT.

The occurrence of any of the following shall, at the option of Secured Party, be an Event of Default:

7.1 Any default or Event of Default by Borrower or Debtor under the Note, Loan Agreement, any of the other loan documents, and Guaranty or any of the other Obligations;

7.2 Debtor's failure to comply with any of the provisions of, or the incorrectness of any representation or warranty contained in, this Security Agreement, the Note, the Loan Agreement, or in any other document relating to the Obligations;

7.3 Transfer or disposition of any of the Collateral, except as expressly permitted by this Security Agreement;

7.4 Attachment, execution or levy on any of the Collateral;

7.5 Debtor voluntarily or involuntarily becoming subject to any proceeding under (a) the Bankruptcy Code or (b) any similar remedy under state statutory or common law;

7.6 Debtor shall fail to comply with, or become subject to any administrative or judicial proceeding under any federal, state or local (a) hazardous waste or environmental law, (b) asset forfeiture or similar law which can result in the forfeiture of property, or (c) other law, where noncompliance may have any significant effect on the Collateral; or

7.7 Secured Party shall receive at any time following the closing a UCC filing report indicating that Secured Party's security interest is not prior to all other security interests or other interests reflected in the report.

VIII. DEFAULT COSTS.

8.1 Should an Event of Default occur, Debtor will pay to Secured Party all costs incurred by the Secured Party for the purpose of enforcing its rights hereunder, including:

(i) costs of foreclosure;

(ii) costs of obtaining money damages; and

(iii) a reasonable fee for the service of attorneys employed by Secured Party for any purpose related to this Security Agreement or the Obligations, including without limitation consultation, drafting documents, sending notices or instituting, prosecuting or defending litigation or arbitration.

IX. REMEDIES UPON DEFAULT.

9.1 General. Upon any Event of Default, Secured Party may pursue any remedy available at law (including those available under the provisions of the UCC), or in equity to collect, enforce or satisfy any Obligations then owing, whether by acceleration or otherwise.

9.2 Concurrent Remedies. Upon any Event of Default, Secured Party shall have the right to pursue any of the following remedies separately, successively or concurrently:

(i) File suit and obtain judgment and, in conjunction with any action, Secured Party may seek any ancillary remedies provided by law or at equity, including levy of attachment and garnishment.

(ii) Take possession of any Collateral if not already in its possession without demand and without legal process. Upon Secured Party's demand, Debtor will assemble and make the Collateral available to Secured Party as it directs. Debtor grants to Secured Party the right, for this purpose, to enter into or on any premises where Collateral may be located.

(iii) Without taking possession, sell, lease or otherwise dispose of the Collateral at public or private sale in accordance with the UCC.

X. FORECLOSURE PROCEDURES.

10.1 No Waiver. No delay or omission by Secured Party to exercise any right or remedy accruing upon any Event of Default shall (a) impair any right or remedy, (b) waive any default or operate as an acquiescense to the Event of Default, or (c) affect any subsequent default of the same or of a different nature.

10.2 Notices. Secured Party shall give Debtor such notice of any private or public sale as may be required by the UCC.

10.3 Condition of Collateral. Secured Party has no obligation to repair, clean-up or otherwise prepare the Collateral for sale.

10.4 No Obligation to Pursue Others. Secured Party has no obligation to attempt to satisfy the Obligations by collecting them from any other person liable for them and Secured Party may release, modify or waive any collateral provided by any other person to secure any of the Obligations, all without affecting Secured Party's rights against Debtor. Debtor waives any right it may have to require Secured Party to pursue any third person for any of the Obligations.

10.5 Compliance With Other Laws. Secured Party may comply with any applicable state or federal law requirements in connection with a disposition of the Collateral and compliance will not be considered adversely to affect the commercial reasonableness of any sale of the Collateral.

10.6 Warranties. Secured Party may sell the Collateral without giving any warranties as to the Collateral and may specifically disclaim any warranties of title or the like. This procedure will not be considered adversely to affect the commercial reasonableness of any sale of the Collateral.

10.7 Sales on Credit. If Secured Party sells any of the Collateral upon credit, Debtor will be credited only with payments actually made by the purchaser, received by Secured Party and applied to the indebtedness of the purchaser. In the event the purchaser fails to pay for the Collateral, Secured Party may resell the Collateral and Debtor shall be credited with the proceeds of the sale as and when received, less expenses.

10.8 Purchases by Secured Party. In the event Secured Party purchases any of the Collateral being sold, Secured Party may pay for the Collateral by crediting some or all of the Obligations of the Debtor.

10.9 No Marshalling. Secured Party have no obligation to marshal any assets in favor of Debtor, or against or in payment of:

(i) the Note,

(ii) any of the other Obligations, or

(iii) any other obligation owed to Secured Party, Borrower or any other person.

XI. MISCELLANEOUS.

11.1 Assignment.

(i) Binds Assignees. This Security Agreement shall bind and shall inure to the benefit of the successors and assigns of Secured Party, and shall bind all heirs, personal representatives, executors, administrators, successors and permitted assigns of Debtor.

(ii) No Assignments by Debtor. Secured Party does not consent to any assignment by Debtor except as expressly provided in this Security Agreement.

(iii) Secured Party Assignments. Secured Party may assign its rights and interests under this Security Agreement. If an assignment is made, Debtor shall render performance under this Security Agreement to the assignee. Debtor waives and will not assert against any assignee any claims, defenses or set-offs which Debtor could assert against Secured Party except defenses which cannot be waived.

11.2 Severability. Should any provision of this Security Agreement be found to be void, invalid or unenforceable by a court or panel of arbitrators of competent jurisdiction, that finding shall only affect the provisions found to be void, invalid or unenforceable and shall not affect the remaining provisions of this Security Agreement.

11.3 Notices. Any notices required by this Security Agreement shall be deemed to be delivered when a record has been (a) deposited in any United States postal box if postage is prepaid, and the notice properly addressed to the intended recipient, (b) received by telecopy, (c) received through the Internet, and (d) when personally delivered.

11.4 Headings. Section headings used in this Security Agreement are for convenience only. They are not a part of this Security Agreement and shall not be used in construing it.

11.5 Governing Law. This Security Agreement is being executed and delivered and is intended to be performed in the State of South Carolina and shall be construed and enforced in accordance with the laws of the State of South Carolina, except to the extent that the UCC provides for the application of the law of the Debtor State.

11.6 Rules of Construction.

(i) No reference to "proceeds" in this Security Agreement authorizes any sale, transfer, or other disposition of the Collateral by the Debtor except in the ordinary course of business.

(ii) "Includes" and "including" are not limiting.

(iii) "Or" is not exclusive.

(iv) "All" includes "any" and "any" includes "all."

11.7 Integration and Modifications.

(i) This Security Agreement is the entire agreement of the Debtor and Secured Party concerning its subject matter.

(ii) Any modification to this Security Agreement must be made in writing and signed by the party adversely affected.

11.8 Waiver. Any party to this Security Agreement may waive the enforcement of any provision to the extent the provision is for its benefit.

11.9 Further Assurances. Debtor agrees to execute any further documents, and to take any further actions, reasonably requested by Secured Party to evidence or perfect the security interest granted herein or to effectuate the rights granted to Secured Party herein.

11.10 WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS SECURITY AGREEMENT OR ANY LOAN DOCUMENT EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND SECURED PARTY. THIS PROVISION IS A MATERIAL INDUCEMENT FOR SECURED PARTY TO MAKE THE LOAN TO DEBTOR OR BORROWER. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF SECURED PARTY, NOR SECURED PARTY'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SECURED PARTY WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF SECURED PARTY, NOR SECURED PARTY'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.

COPY

SIGNATURES ON THE FOLLOWING PAGE

The parties have signed this Security Agreement under seal as of the day and year first above written.

If Debtor is a Corporation:

WITNESS:

SKYWAVES I CORPORATION
NAME OF CORPORATION

By: _____ (SEAL)
Ronald D. Konersmann
Title: Chief Executive Off.

By: _____ (SEAL)
John Voytko
Title: Chief Financial Off.

If Debtor is a Partnership, Limited Liability Company, or Limited Liability Partnership

WITNESS:

NAME OF PARTNERSHIP, LLC, OR LLP

By: _____ (SEAL)
GENERAL PARTNER OR MANAGER

By: _____ (SEAL)
GENERAL PARTNER OR MANAGER

By: _____ (SEAL)
GENERAL PARTNER OR MANAGER

If Debtor is an Individual:

WITNESS:

TYPE NAME OF DEBTOR

_____ (SEAL)

TYPE NAME OF DEBTOR

_____ (SEAL)

Exhibit "A" to Security Agreement
dated April 2, 2007
between Skywaves I Corporation and
Branch Banking and Trust Company

All Equipment now owned or hereafter acquired including all proceeds thereof including but not limited to the following:

COPY

Two Roll Up Doors and Two Levelers
Conveyor System for Aggregate Storage
10,000 Square Foot Casting Beds
Concrete Pumping System (2 Pumps)
Environmental System for Batch Plant
Automate Batch Plant
Two Rail Production Line System (Casting to Shipping)
Crane/Hoist System
Loading/Shipping System
Two Cranes
Yard Truck/Trailer

Skwaves I Corporation

Ronald D. Konersmann, Chief Executive Off.

John Voytko, Chief Financial Off.

NEXSEN|PRUET

Molly Hughes Cherry
Member
Admitted in SC

December 22, 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 Julie:

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 Memorandum in Support of its Motion for Summary Judgment; and

2. Defendant Branch Banking and Trust Company's Memorandum in Support of Motion to Strike Plaintiff's Demand for Jury Trial.

Please file each original of record and return a clocked-in copy to me via our courier.

By copy of this letter, I am sending a courtesy copy to Judge Young, as this case is in business court, and serving a copy of the Memoranda upon counsel for Plaintiff and Defendant Edahl. Please note Exhibit V is not being filed but submitted for in-camera review, per the provisions of the Confidentiality Order.

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: The Honorable Roger M. Young, Sr.
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 IN THE NINTH JUDICIAL CIRCUIT Case No. 2009-CP-10-7516 **DEFENDANT BRANCH BANKING AND TRUST COMPANY'S MEMORANDUM IN SUPPORT OF MOTION TO STRIKE PLAINTIFF'S DEMAND FOR JURY TRIAL**

FILED
2014 DEC 22 PM 3:54
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 ("BB&T") respectfully submits this Memorandum in Support of its Motion to Strike Plaintiff's Demand for Jury Trial in the above-referenced matter.

INTRODUCTION

Plaintiff Skywaves I Corporation ("Skywaves") demanded a jury trial for all of its causes of action in its Complaint and First Amended Complaint (collectively, the "Complaint") filed in this case. On July 24, 2014, BB&T filed that certain Defendant Branch Banking and Trust Company's Notice of Motion and Motion to Strike Demand for Jury Trial (the "Motion") with the Court, requesting that the Court strike Skywaves' demand for a jury trial and transfer this case to the non-jury docket.

BB&T's Motion is based on the existence of jury trial waivers in four (4) documents executed by Skywaves on March 22, 2005 and two (2) documents executed by Skywaves on or about April 2, 2007. The four documents executed and submitted contemporaneously by Skywaves to BB&T on March 22, 2005, all of which contain jury trial waivers, are that certain

(1) Loan Agreement (the "2005 Loan Agreement"); (2) Promissory Note (the "2005 Promissory Note"); (3) BB&T Security Agreement (the "2005 Security Agreement"); and (4) Factoring and Security Agreement (the "Factoring Agreement").[1] The two documents executed and submitted contemporaneously by Skywaves to BB&T on April 2, 2007 are that certain (1) Promissory Note (the "2007 Promissory Note") and (2) BB&T Security Agreement (the "2007 Security Agreement").[2] Collectively, the 2005 Loan Agreement, 2005 Promissory Note, 2005 Security Agreement, Factoring and Security Agreement, 2007 Promissory Note, and 2007 Security Agreement shall be referred to as the "Loan Documents."

Based on the jury trial waivers in the six Loan Documents, BB&T asserts that Skywaves' demand for a jury trial on all of its causes of action should be stricken because (1) Skywaves knowingly and voluntarily waived its right to a jury trial on all of its causes of action alleged against BB&T through its execution and submission of the six Loan Documents to BB&T, and (2) all of Skywaves' causes of action are encompassed by the conspicuous jury trial waivers in the six Loan Documents.

FACTS

A. Background and Language of Jury Trial Waivers

This is a lender liability case in which Skywaves alleges that BB&T failed to fund its financing needs and suggests that BB&T had an obligation to fund its operations indefinitely with no rights or recourse for any default by Skywaves. BB&T is a banking institution with branch offices in Charleston, South Carolina. Skywaves is a company that developed a structural

[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. The 2005 Loan Agreement is **Exhibit # Q**. The 2005 Promissory Note is **Exhibit # R**. The 2005 Security Agreement is **Exhibit # S**. The Factoring Agreement is **Exhibit # C**.

[2] The 2007 Promissory Note is **Exhibit # T**. The 2007 Security Agreement is **Exhibit # U**.

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. (Konersmann depo. at p. 51:9 – 14.)[3]

To support the manufacture of these individual cell tower units and to provide financing for operations, Skywaves entered into the 2005 Loan Agreement, 2005 Promissory Note, 2005 Security Agreement, and Factoring Agreement on or about March 22, 2005. (Konersmann depo. at p. 161:4 – 162:9.) Also as part of the borrower-lender relationship between Skywaves and BB&T, Skywaves entered into the 2007 Promissory Note and the 2007 Security Agreement with BB&T on or about April 2, 2007. (Konersmann depo. at p. 290:3 – 291:18.)

Despite the knowing and voluntary jury trial waivers that are quoted below, Skywaves demanded a trial by jury for all of its causes of action in the Complaint. (*See* First Am. Compl.) Skywaves' alleged eight causes of action against BB&T in its Complaint: (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; (6) fraudulent misrepresentation; (7) negligence; and (8) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). (*See generally* First Am. Compl.) Subsequently, the Court dismissed Skywaves' causes of action for fraudulent misrepresentation and violation of the SCUTPA pursuant to Rule 12(b)(6), SCRCP.[4] (*See* Order Granting Skywaves' Mot. Recons.)

[3] The September 12-13, 2013, deposition of Mr. Konersmann is **Exhibit # A.**

[4] Initially, in its 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, the Court dismissed Skywaves' causes of action for (1) negligent misrepresentation, (2) fraudulent misrepresentation, (3) negligence, (4) violation of the SCUTPA, and (5) breach of contract accompanied by a fraudulent act. Subsequently, in its Order Granting Skywaves' Motion to Reconsider, the Court reconsidered its dismissal of the negligent misrepresentation, negligence, and breach of contract accompanied by a fraudulent act causes of action, and, therefore, revived those three causes of action.

The Jury Trial Waiver in the 2005 Loan Agreement

The 2005 Loan Agreement provided for the extension of a line of credit by BB&T to Skywaves. (Konersmann depo. at p. 161:10-15.) In addition to stating terms of this line of credit, which is further evidenced by the 2005 Promissory Note and the 2005 Security Agreement, the 2005 Loan Agreement specifically states:

> 10.16 **WAIVER OF JURY TRIAL. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS AGREEMENT OR ANY OF THE LOAN DOCUMENTS EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO MAKE THE LOAN AND ENTER INTO THIS AGREEMENT. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION. NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.**

The above jury trial waiver appears in bold typeface and all-capital letters on the page immediately preceding the signature page. The signature page does not include any additional paragraphs and only includes signature blocks for the parties. No other paragraphs on this page of the 2005 Loan Agreement are in bold typeface or all-capital letters. Ron Konersmann signed the 2005 Loan Agreement on behalf of Skywaves in his capacity as Chief Executive Officer. (Konersmann depo. at p. 161:1-9.)

The Jury Trial Waiver in the 2005 Promissory Note

The 2005 Promissory Note specifically states:

> **WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS NOTE OR ANY LOAN DOCUMENT**

EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO MAKE THE LOAN EVIDENCED BY THIS NOTE. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.

The above jury trial waiver appears in bold typeface and all-capital letters near the bottom of the page immediately preceding the signature page of the 2005 Promissory Note. No other paragraphs on this page of the 2005 Promissory Note appear in bold typeface or all-capital letters. Ron Konersmann signed the 2005 Promissory Note on behalf of Skywaves in his capacity as Chief Executive Officer. (Konersmann depo. at p. 161:18-25.)

The Jury Trial Waiver in the 2005 Security Agreement

The 2005 Security Agreement specifically states:

11.10 WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS SECURITY AGREEMENT OR ANY LOAN DOCUMENT EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND SECURED PARTY. THIS PROVISION IS A MATERIAL INDUCEMENT FOR SECURED PARTY TO MAKE THE LOAN TO DEBTOR OR BORROWER. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF SECURED PARTY, NOR SECURED PARTY'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SECURED PARTY WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF SECURED PARTY, NOR SECURED PARTY'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.

The above jury trial waiver appears in bold typeface and all-capital letters as the last separately numbered paragraph on the page immediately preceding the signature page. The signature page does not include any additional paragraphs, and only includes a signature block for Skywaves. No other paragraphs on this page of the 2005 Security Agreement appear in bold typeface and all-capital letters. Ron Konersmann signed the 2005 Security Agreement on behalf of Skywaves in his capacity as Chief Executive Officer. (Konersmann depo. at p. 162:2-9).

The Jury Trial Waiver in the Factoring Agreement

To support the manufacture of the shelters for cell tower units and to provide financing for operations, Skywaves entered into the Factoring Agreement with BB&T on or about March 22, 2005. (*See* Konersmann depo. at p. 153:16-23.) In paragraph 29, the Factoring Agreement specifically states:

> 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.**

The above jury trial waiver appears in bold typeface as the last separately numbered paragraph on the page immediately preceding the signature page. The signature page does not include any additional paragraphs, and only includes a signature block for both Skywaves and BB&T. Ron Konersmann signed the Factoring Agreement on behalf of Skywaves in his capacity as Chief Executive Officer. (Konersmann depo. at p. 121:19-122:9.)

The Jury Trial Waiver in the 2007 Promissory Note and 2007 Security Agreement

Also as part of the borrower-lender relationship between Skywaves and BB&T, Skywaves entered into a loan agreement with BB&T on April 2, 2007, which is evidenced by the 2007 Promissory Note and the 2007 Security Agreement executed by Ron Konersmann on behalf of Skywaves. (Konersmann depo. at p. 290:3 – 291:18.) Skywaves executed and submitted the 2007 Promissory Note and the 2007 Security Agreement to BB&T in order to obtain additional financing from BB&T outside of the financing that it received from the 2005 Promissory Note and the Factoring Agreement. Skywaves used the financing provided to it by BB&T under the 2007 Promissory Note and the 2007 Security Agreement to purchase certain equipment. (Konersmann depo. at p. 285:4-9; 290:3-291:18.)

The 2007 Promissory Note specifically states:

> **WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS NOTE OR ANY LOAN DOCUMENT EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO MAKE THE LOAN EVIDENCED BY THIS NOTE. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.**

The above jury trial waiver appears in bold typeface and all-capital letters in the last paragraph containing a heading on the page immediately preceding the signature page. No other paragraphs on this page of the 2007 Promissory Note appear in bold typeface or all-capital

letters. Ron Konersmann signed the 2007 Promissory Note on behalf of Skywaves in his capacity as Chief Executive Officer. (Konersmann depo. at p. 289:25-290:11.)

Lastly, the 2007 Security Agreement specifically states:

> **11.10 WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIMS ARISING OUT OF THIS SECURITY AGREEMENT OR ANY LOAN DOCUMENT EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND SECURED PARTY. THIS PROVISION IS A MATERIAL INDUCEMENT FOR SECURED PARTY TO MAKE THE LOAN TO DEBTOR OR BORROWER. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF SECURED PARTY, NOR SECURED PARTY'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SECURED PARTY WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF SECURED PARTY, NOR SECURED PARTY'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISION.**

The above jury trial waiver appears in bold typeface and all-capital letters as the last separately numbered paragraph on the page immediately preceding the signature page. The signature page does not include any additional paragraphs, and only includes a signature block for Skywaves. No other paragraphs on this page of the 2007 Security Agreement appear in bold typeface and all-capital letters. Ron Konersmann signed the 2007 Security Agreement on behalf of Skywaves in his capacity as Chief Executive Officer. (Konersmann depo. at p. 290:13-22.)

II. STANDARD OF REVIEW

It is clear that pre-litigation jury trial waivers are allowed and enforceable in South Carolina. *See Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 332-33, 755 S.E.2d 437, 443 (2014); *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533,

535, 416 S.E.2d 637, 638 (1992); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002). The South Carolina Supreme Court accepted the validity of pre-litigation jury trial waivers in *North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, citing the similar conclusion from the Fourth Circuit Court of Appeals in *Leasing Service Corporation v. Crane*, where the Fourth Circuit stated:

> The seventh amendment right is of course a fundamental one, but it is one that can be knowingly and intentionally waived by contract. Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed.

806 F.2d 828, 832-33 (4th Cir. 1986) (citations omitted).

As more recently stated by the South Carolina Supreme Court in *Wachovia Bank, Nat'l Ass'n v. Blackburn*:

> "A party may waive the right to a jury trial by contract." However, although the right to a trial by jury is a substantial right, and we "strictly construe" such waivers, "[a] person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it." Instead, when a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents. "The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document."

407 S.C. 321, 332-33, 755 S.E.2d 437, 443 (2014) (quoting *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002); *Regions Bank v. Schmauch*, 354 S.C. 648, 663-64, 582 S.E.2d 432, 440 (Ct. App. 2003)) (internal citations omitted). Therefore, South Carolina law is clear that a contract signed by a party that contains a knowing and voluntary jury trial waiver is allowed and enforceable.

III. ARGUMENT

A. Each of the Jury Trial Waivers are Knowing and Voluntary Waivers of Skywaves' Right to a Jury Trial.

To examine whether a party has knowingly and voluntarily waived its right to a jury trial by contract, the South Carolina Supreme Court has looked to whether the waiver is (1) conspicuous in its location within the contract, and (2) unambiguous in its wording. *Blackburn*, 407 S.C. at 333, 755 S.E.2d 437, 443 n.8.

Each of the Jury Trial Waivers are Conspicuous

First, with respect to whether a jury trial waiver is conspicuous within a document, the Court has looked to such factors as: (1) whether the heading of the waiver is in bold typeface or underlined, (2) whether the language of the waiver is in all-capital letters, (3) whether the waiver is near the signature page or buried within the contract, and (4) whether the jury trial waiver stands out in some way from the other paragraphs in the contract. Here, each of the jury trial waivers are conspicuous in each of their respective contracts.

First, the jury trial waiver in the 2005 Loan Agreement appears in bold typeface and all-capital letters as the second to last paragraph on the page immediately preceding the signature page. The signature page did not include any additional paragraphs and only included signature blocks for the parties. No other paragraphs on this page of the 2005 Loan Agreement are in bold typeface or all-capital letters.

Second, the jury trial waiver in the 2005 Promissory Note appears in bold typeface and all-capital letters as the next to last paragraph of the page immediately preceding the signature page. Furthermore, no other paragraphs on this page of the 2005 Promissory Note appear in bold typeface or all-capital letters.

Third, the jury trial waiver in the 2005 Security Agreement appears in bold typeface and all-capital letters as the last separately numbered paragraph on the page immediately preceding the signature page. The signature page does not include any additional paragraphs, and only includes a signature block for Skywaves. No other paragraphs on this page of the 2005 Security Agreement appear in bold typeface and all-capital letters.

Fourth, the jury trial waiver in the Factoring Agreement appears in bold typeface as the last separately numbered paragraph on the page immediately preceding the signature page. The signature page does not include any additional paragraphs, and only includes a signature block for both Skywaves and BB&T.

Fifth, the jury trial waiver in the 2007 Promissory Note appears in bold typeface and all-capital letters in the last paragraph containing a heading on the page immediately preceding the signature page of the 2007 Promissory Note. No other paragraphs on this page of the 2007 Promissory Note appear in bold typeface or all-capital letters.

Lastly, the jury trial waiver in the 2007 Security Agreement appears in bold typeface and all-capital letters as the last separately numbered paragraph on the page immediately preceding the signature page. The signature page does not include any additional paragraphs, and only includes a signature block for Skywaves. No other paragraphs on this page of the 2007 Security Agreement appear in bold typeface and all-capital letters.

Therefore, based on the above, each of the jury trial waivers at issue in this case is conspicuous within each of their respective contracts.

Each of the Jury Trial Waivers are Unambiguous

The South Carolina Supreme Court has held that "[a] contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person

who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Williams v. GEICO*, App. Case No. 2011-196449, 2014 WL 4087958, at *3 (S.C. Aug. 20, 2014) (quoting *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997)). Based on this standard, it is clear that the jury trial waivers at issue in this action are unambiguous.

First, with respect to the language of each of the jury trial waivers, the plain meaning of the language of each of the waivers is capable of only one meaning: the signatories to each of the contracts waived their right to a jury trial. Furthermore, the jury trial waivers in the 2005 Loan Agreement, the 2005 Promissory Note, the 2005 Security Agreement, the 2007 Promissory Note, and the 2007 Security Agreement all clearly provide that the undersigned parties are waiving their right to a jury trial for matters or claims arising out of each those respective documents, any documents executed in connection therewith, and for such matters or claims "arising out of the conduct of the relationship between" the parties.

Lastly, it is clear that Ron Konersmann, who signed each of the documents containing the jury trial waivers in his capacity as Chief Executive Officer of Skywaves, is both a "reasonably intelligent person" and is cognizant of the general terms often used in financial documents. This is evidenced by Mr. Konersmann's history of being a party to loan documents, including factoring agreements, on behalf of companies in which Mr. Konersmann was employed prior to Skywaves. (Konersmann depo. at p. 122:10–123:2.) In addition, Mr. Konersmann holds a Masters in Business Administration degree from the University of Notre Dame. (Konersmann depo. at p. 27:11-24; 28:1-24.) As discussed above, "[a] person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it."

Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) (citing *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981)).

Based on the above, it is clear that Mr. Konersmann should have understood the plain and unambiguous language of each of the jury trial waivers at issue in this case and, therefore, Skywaves knowingly and voluntarily waived its right to a jury trial in this case.

B. Each of the Jury Trial Waivers Encompass All of Skywaves' Causes of Action.

In reviewing the plain language of each of the six jury trial waivers, it is clear that they encompass all of Skywaves' causes of action in this case and, therefore, Skywaves' jury trial demand should be stricken for all of its causes of action. First, as discussed above, the jury trial waivers in the 2005 Loan Agreement, the 2005 Promissory Note, the 2005 Security Agreement, the 2007 Promissory Note, and the 2007 Security Agreement all clearly provide that the undersigned parties are waiving their right to a jury trial for (1) matters or claims arising out of each of those respective documents, (2) matters or claims arising out of any documents executed in connection with the Loan Documents, and (3) those matters or claims "*arising out of the conduct of the relationship between*" the parties. (emphasis added).

Each of Skywaves' causes of action arises out of its relationship with BB&T. (First Am. Compl. ¶¶ 7-100.) Skywaves' first cause of action, breach of contract, contains allegations that squarely arise out of conduct of its relationship with BB&T. (First Am. Compl. ¶¶ 26-32.) Skywaves' second cause of action, breach of contract accompanied by fraudulent acts, contains allegations regarding a breach of the agreement between the parties, including dishonesty in fact and unfair dealing on behalf of BB&T. (First Am. Compl. ¶¶ 33-39.) These allegations also squarely arise out of the conduct of Skywaves' relationship with BB&T. Skywaves' third cause of action, promissory estoppel, contains allegations that BB&T made certain promises to

Skywaves, upon which Skywaves detrimentally relied. (First Am. Compl. ¶¶ 40-45.) These allegations squarely arise out of the conduct of Skywaves' relationship with BB&T.

Skywaves' fourth cause of action, breach of the covenant of good faith and fair dealing, contains allegations that BB&T failed to honor its agreement with Skywaves, which allegations squarely arise out of the conduct of Skywaves' relationship with BB&T. (First Am. Compl. ¶¶ 46-49.) Skywaves' fifth cause of action, negligent misrepresentation, contains allegations that BB&T made certain inducements and misrepresentations to Skywaves that have caused Skywaves to suffer damages. (First Am. Compl. ¶¶ 50-70.) Again, such allegations squarely arise out of the conduct of Skywaves' relationship with BB&T. Lastly, Skywaves' sixth cause of action, negligence, contains allegations that BB&T owed a duty of care to Skywaves, BB&T breached such duty through its alleged misrepresentations and failed commitments, and Skywaves suffered damages based on these alleged actions taken by BB&T. (First Am. Compl. ¶¶ 78-90.) These allegations also squarely arise out of the conduct of the relationship between Skywaves and BB&T.

Accordingly, the jury trial waivers found in the 2005 Loan Agreement, the 2005 Promissory Note, the 2005 Security Agreement, the 2007 Promissory Note, and the 2007 Security Agreement each encompass all of Skywaves' causes of action.

Moreover, the jury trial waiver found in the Factoring Agreement provides, as quoted verbatim above, that it encompasses "any issue in any way pertaining to this Agreement or any transactions or occurrences arising hereunder or governed hereby." The allegations of each of Skywaves' causes of action, as stated above, all pertain to the Factoring Agreement or occurrences that arose under the Factoring Agreement or are governed by the Factoring Agreement. (First Am. Compl. ¶¶ 7-100.) Skywaves' first cause of action is directly focused on

the Factoring Agreement itself. (First Am. Compl. ¶¶ 26-32.) Furthermore, Skywaves' remaining five causes of action all focus directly on alleged occurrences, namely alleged misrepresentations made by BB&T, that squarely arose out of the Factoring Agreement. (First Am. Compl. ¶¶ 33-100.) Without the existence of the Factoring Agreement, the purported misrepresentations and inducements alleged by Skywaves in its causes of action could not have occurred. Therefore, the jury trial waiver contained in the Factoring Agreement also encompasses each of Skywaves' causes of action.

CONCLUSION

Six times Skywaves waived its right to a jury trial of claims it might have against BB&T. The waivers were each conspicuous and clear in their plain meaning and intended effect. The language of the jury trial waivers unambiguously includes the causes of action alleged by Skywaves against BB&T. Accordingly, Skywaves' jury trial demand for each of its causes of action in this case should be stricken, and this case should be transferred to the non-jury roster.

[Signature page to follow]

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: 843.414.8209
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

December 22, 2014
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 NINTH JUDICIAL CIRCUIT Case No. 2009-CP-10-7516 **DEFENDANTS' EXHIBITS TO MEMORANDA IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT AND TO STRIKE PLAINTIFF'S DEMAND FOR JURY TRIAL**

FILED
2014 DEC 22 3:55
JULIE J. ARMSTRONG
CLERK OF COURT
Clocked in date Canceled

J.W. Nelson Chandler
CORRIGAN & CHANDLER LLC
P.O. Box 547
Charleston, SC 29402
Phone: (843) 577-5430
Facsimile: (843) 577-5650
E-Mail: nelson@corriganchandler.com

ATTORNEYS FOR DEFENDANT JAMES EDAHL

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

536

INDEX

Exhibit	Description
A	Ronald D. Konersmann Deposition Excepts
B	John Voytko Deposition Excerpts
C	Factoring Agreement
C1	June 1, 2005 Letter
C2	May 2006 Amendment to Factoring Agreement
C3	March 2, 2007 Renewal Letter
C4	March 14, 2007 Letter
C5	2007 Amendment to Factoring Agreement
D	February 15, 2006, June 5, 2006, February 14, 2007 E-Mails
E	March 25, 2006 E-Mail
F	March 20, 2007 E-Mail
G	Skywaves 2007 Projected Financials
G1	Actual Financials for Q1 2007
G2	Revised 2007 Forecast
G3	Skywaves Year-End Financial Statements
H	September 2007 Notes
I	December 14, 2007 E-Mail
J	January 25, 2008 Letter
K	February 8, 2008 E-mail
L	January 31, 2008 Memo
M	February 11, 2008 Letter
N	Carolina First Bank v. Lucas, Case No. 03-CP-10907, 2004 WL 5208410
O	Robertson v. First Union Nat'l Bank, Case No. 99-CP-10-288, 2000 WL 35722762
P	Konersmann's Resume
Q	2005 Loan Agreement
R	2005 Promissory Note
S	2005 Security Agreement
T	2007 Promissory Note
U	2007 Security Agreement
V	Confidential Financial Documents Submitted For In Camera Review, Per Confidentiality Order
V1	2007 Projected Financials
V2	Actual Financials for Q1 2007
V3	Revised 2007 Forecast
V4	Skywaves 2008 Financials

2009-CP-10-7516

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS 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 **DEFENDANT JAMES EDAHL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE PLAINTIFF'S JURY DEMAND**

FILED
2014 DEC 22 PM 4:47
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 to Strike the Plaintiff's Jury Demand, filed on July 28, 2014, in the above-captioned case.

All claims in this case – including those against Edahl – arise out of a contractual dispute between Skywaves and Defendant Branch Banking and Trust Company of SC a/k/a BB&T ("BB&T"). Pursuant to this contractual relationship, for which Edahl was the "relationship manager," Skywaves signed at least six (6) documents containing express waivers of its right to a jury trial. (*See* Factoring Agreement, March 22, 2005, Exhibit "C"[1]; Loan Agreement, March 22, 2005, Exhibit "Q"; Promissory Note, March 22, 2005, Exhibit "R"; Security Agreement, March 22, 2005, Exhibit "S"; Promissory Note, April 2, 2007, Exhibit "T"; Security Agreement, April 2, 2007, Exhibit "U").

"A party may waive the right to a jury trial by contract." *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 332, 755 S.E.2d 437, 443 (2014) (quoting *Beach Co. v. Twillman, Ltd.*,

[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.

538

351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002)). Further, "although the right to a trial by jury is a substantial right, and [the court will] 'strictly construe' such waivers, a person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it." *Id.* (citing *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003)). Instead, when a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents. *Id.* at 333, 755 S.E.2d at 443. A plaintiff cannot overcome a waiver by arguing that he was "unaware" of the provision. *Id.* at 333, fn. 8, 755 S.E.2d at 443, fn. 8 (finding that the waiver in question was conspicuous and unambiguous).

In this case, Skywaves has not made, and cannot make, any argument that its officers were ignorant or unwary individuals. To the contrary, by all indications, they were sophisticated and educated individuals who were fully capable of reading and understanding what it means to waive one's right to trial by jury. *See Kerr v. Branch Banking and Trust Co.*, 408 S.C. 328, 334, fn. 8, 759 S.E.2d 724, 727, fn. 8 (2014) (finding that Skywaves was funded by "sophisticated investors"). Each of the six documents was signed by Ron Konersman, CEO of Skywaves; two of the documents were additionally signed by John Voytko, CFO. The waivers themselves stand out in each of the documents, appearing in **bold** lettering in all of the documents and in CAPITAL lettering in five out of six of the documents. (Exhibits C, Q, R, S, T, and U). Additionally, they are plain and unambiguous provisions. The waivers relate not only to claims arising out of the documents themselves, but to "any transactions or occurrences" arising thereunder and to claims arising "out of the conduct of the relationship" between the parties. (*See id.*)

Skywaves currently has two claims against Edahl, both sounding in negligence. (Amended Complaint, ¶¶ 50-70, 78-90). Both of the claims against Edahl are based upon alleged conduct arising out of the lending relationship between Skywaves and BB&T and/or to transactions or occurrences related to that relationship. (*See id.*) At all times relevant hereto, Edahl was employed by BB&T and acting as its agent with respect to BB&T's lending relationship with Skywaves. Thus, by their express terms, the jury trial waivers apply to the claims asserted against Edahl as much as they do to the claims asserted against BB&T. Skywaves knowingly and voluntarily waived its right to a jury trial based on the plain language of the controlling documents. Accordingly, Skywaves' demand for a jury trial should be stricken and this case should be moved to the non-jury docket.[2]

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

December 22, 2014

[2] Edahl further incorporates herewith all arguments of Defendant BB&T in support of its motion to strike Skywaves' demand for a jury trial.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

Civil Action: 2009-CP-10-07516

FILED
2015 JAN 12 PM 1:52
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTIONS TO STRIKE DEMAND FOR JURY TRIAL

AND NOW COMES Plaintiff, SKYWAVES I CORPORATION ("Skywaves"), by and through its undersigned counsel, and files this Memorandum in Opposition to Motions to Strike Demand for Jury Trial:

INTRODUCTION

Defendants Branch Banking & Trust Company ("BB&T") and James Edahl ("Edahl") have filed Motions to Strike Plaintiff's demand for a trial by jury in this matter. Defendants posit primarily that Plaintiff Skywaves has contractually waived its right to a jury trial in its March 22, 2005 Factoring and Security Agreement ("Factoring Agreement") with BB&T and other documents.

It is true that Plaintiff and Defendant BB&T entered into two promissory notes, one loan agreement, two security agreements and the Factoring Agreement, as it was modified.[1] It is also

[1] Defendant Edahl has no agreement with Plaintiff, so there exists no jury trial waiver provision that in any way relates or applies to Edahl. Therefore, Plaintiff has the right to a jury trial as to Edahl. In a related case filed by investors in and lenders to Skywaves the Supreme Court held that "[t]he choice of law provision in the Factoring Agreement and selecting North Carolina law is irrelevant as Appellants (investors and lenders) are neither parties nor intended third-party beneficiaries to the contract." *See Kerr v. Branch Banking & Trust Co.*, 408 S.C. 541

true that Defendant BB&T accurately quoted the provisions from those various agreements relating to the right to a jury trial. It is *not* true that any of the signed agreements, except for the Factoring Agreement, are relevant to this motion:

1. Plaintiff has sued because of BB&T's breach of the modified Factoring Agreement. (Exhibit A, Amended Complaint)

2. Defendant BB&T has never declared a breach of the other agreements. (*See* Exhibit B, Amended Answer).

3. Defendant BB&T concedes in its Bankruptcy filing that it is only the Factoring Agreement in which they claim a default. (*See* Exhibit C, Proof of Claim containing 2005 Factoring Agreement)

4. The other agreements were not in default when this dispute arose over the Factoring Agreement terms. (*See* Exhibit D, Affidavit of Ron Konersmann)

5. The other notes have been satisfied. (*See id.*)

For the reasons that follow, the Factoring Agreement does not constitute a waiver of Skywaves' constitutional right to a jury trial.

ARGUMENT

The waiver upon which BB&T relies provides that:

> 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.

(See Exhibit C, 2005 Factoring Agreement ¶ 29). While the wording is not so clear nor the disclaimer so bold as in the other five provisions quoted by the Defendant BB&T, paragraph 25 provides: "All acts, transactions, rights, and liabilities under this Agreement shall be governed in

328, 333 n.7, 759 S.E.2d 727 n.7 (2014). Edahl was not a party or an intended third-party beneficiary of the Factoring Agreement.

542

all respects by, and construed in accordance with, the internal laws of the State of North Carolina." (*See* Factoring Agr't ¶ 25). In addition, the Defendant BB&T's 30(b)(6) witness to answer questions related to the terms of the Factoring Agreement, testified that BB&T intended North Carolina law apply as to substantive and legal issues:

> 1 Q. In using this provision, is it your
> 2 intent that North Carolina law apply?
> 3 A. Yes, with regard to any substantive
> 4 issues or legal issues that would arise under the
> 5 agreement.

(Transcript of 30(b)(6) Deposition of BB&T, Page 11:1 to 11:5). North Carolina law controls the validity of this waiver[2] and North Carolina law provides:

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

N.C. Gen. Stat. Ann. § 22B-10. As a result, the putative jury waiver provision is void and is not a part of the parties' contractual agreement, because such provisions are unconscionable and violate North Carolina public policy. *See GMAC Commercial Mortg. Corp. v. Roberts*, 2005 WL 7084823, at *2 n.3 (S.C. Ct. App. Oct. 12, 2005) ("Under North Carolina law, a provision for the waiver of the right to a jury trial is unconscionable and unenforceable.").

Irrespective of the choice of law provision in the Factoring Agreement, traditional South Carolina choice of law rules further 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.,*

[2] The exact scope of the applicability of North Carolina law need not be addressed as the only issue raised by this motion is the right to trial by jury which is a substantive right. *See e.g. Lester v. Dawson*, 327 S.C. 263, 264, 491 S.E.2d 240, 240 (1997). *See also North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992)("Trial by jury is a substantial right and any waiver thereof must be strictly construed.").

N.A., 329 S.C. 133, 144, 494 S.E.2d 449, 455 (Ct. App. 1997) (*quoting Livingston v. Atlantic Coast Line R.R.*, 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). In addition to the choice of law provision in Paragraph 25, the Factoring Agreement specifically states that it is "effective when duly executed by Client and thereafter accepted by BB&T in High Point, North Carolina...and, when so accepted, shall be deemed a contract made in the State of North Carolina and shall be governed in all respects and construed in accordance with the internal laws of the state of North Carolina." (*See* Exhibit C, 2005 Factoring Agreement Inventory Rider ¶ 11, Financial Covenant Rider ¶ 5).[3] Thus, as the Factoring Agreement was made in North Carolina and is deemed a North Carolina agreement, as to the issue of validity of the contract provisions, North Carolina law applies and the jury trial waiver is invalid.

[3] Paragraph 24 of the Factoring Agreement states that "[i]f 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..."

544

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motions to Strike Skywaves' proper jury trial demand.

Respectfully Submitted By:

Andrew K. Epting, Jr., Esquire
Michelle N. Endemann, Esquire
46A State Street
Charleston, SC 29401
P: 843-377-1871
F: 843-377-1310
ake@epting-law.com
mne@epting-law.com

GEORGE J. KEFALOS, PA
George J. Kefalos, Esquire
Oana D. Johnson, Esquire
46A State Street
Charleston, SC 29401
P: 843-722-6612
F: 843-377-1310
gjk@kefaloslaw.com
oana@kefaloslaw.com

BARNWELL WHALEY PATTERSON & HELMS, LLC
M. Dawes Cooke Jr., Esquire
John W. Fletcher, Esquire
Barbara J. Wagner, Esquire
288 Meeting Street, Ste 200
Charleston, SC 29401

DUFFY & YOUNG, LLC
Brian Duffy, Esquire
John Linton, Esquire
96 Broad Street
Charleston, SC 29401

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) in 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 8 day of JANUARY, 2015 at Charleston, South Carolina

DATED: January 8, 2015
Charleston, South Carolina

545

2009-CP-10-7515

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 Exhibit 1, 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

Binderlek #CLEX A

546

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

S/George Kefalos
George J. Kefalos
Fed Id. No. 02290
3 State Street
Charleston, SC 29401

george@kefaloslaw.com

On this 12th day of February, 2010
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

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 3:33
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.

Binderlek #CLEX
B

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.

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.

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.

Julio E. Mendoza, Jr. Fed ID No. 3365
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
Phone: (803) 771-8900
Facsimile: (803) 253-8277
E-mail: rmendoza@nexsenpruet.com

Molly Hughes Cherry, Esquire Fed ID No. 7067
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 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

B10 (Official Form 10) (12/07)

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF SOUTH CAROLINA

PROOF OF CLAIM

Name of Debtor: SKYWAVES I CORPORATION

Case Number: 08-02316-dd

NOTE: *This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):
BRANCH BANKING AND TRUST COMPANY

☒ Check this box to indicate that this claim amends a previously filed claim.

Name and address where notices should be sent:

STEVEN B. LICATA
P.O. BOX 23407
COLUMBIA, SC 29224

Telephone number:
803-699-6550

Court Claim Number: 58
(*If known*)

Filed on: 5/28/2008

Name and address where payment should be sent (if different from above):

Telephone number:

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check this box if you are the debtor or trustee in this case.

1. Amount of Claim as of Date Case Filed: $1,756,379.17

If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.

If all or part of your claim is entitled to priority, complete item 5.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.

2. Basis for Claim: Factoring
(See instruction #2 on reverse side.)

3. Last four digits of any number by which creditor identifies debtor: 7702

3a. Debtor may have scheduled account as: _____
(See instruction #3a on reverse side.)

4. Secured Claim (See instruction #4 on reverse side.)
Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.

Nature of property or right of setoff: ☐ Real Estate ☐ Motor Vehicle ☑ Other
Describe: ACCOUNTS, INVENTORY AND EQUIPMENT

Value of Property: $Unknown **Annual Interest Rate** 76 %

Amount of arrearage and other charges as of time case filed included in secured claim, if any: $_____ **Basis for perfection:** UCC 1 FILING

Amount of Secured Claim: $1,756,379.17 **Amount Unsecured:** $0.00

6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.

7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements or running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. *(See definition of "redacted" on reverse side.)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.

Specify the priority of the claim.

☐ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

☐ Wages, salaries, or commissions (up to $10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4).

☐ Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).

☐ Up to $2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).

☐ Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8).

☐ Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(__).

Amount entitled to priority:

$_____

**Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

FOR COURT USE ONLY

Date: 6/26/2008

Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.

/ STEVEN B. LICATA
STEVEN B. LICATA, ATTORNEY FOR BRANCH BANKING AND TRUST COMPANY

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C.

Binderek #CLEX C 569

FACTORING AND SECURITY AGREEMENT

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

1. **Definitions and Rules of Construction.**

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

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

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

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

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

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

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

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

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

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

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

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

570

"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).

571

"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.

572

"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.

573

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

574

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

575

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

576

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**.

578

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

579

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

581

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.**

582

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: _____

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

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

By: _____
Title: SVP

583

FINANCIAL COVENANT RIDER

THIS FINANCIAL COVENANT RIDER (this "Rider") dated 3-22, 2005, is hereby made a part of and incorporated into that certain Factoring and Security Agreement (together with all supplements thereto, all amendments thereof and all other riders thereto, as the "Factoring Agreement"), dated March 22, 2005 between **BB&T FACTORS CORPORATION**, a North Carolina corporation ("BB&T"), and Skywaves I Corporation, a Delaware Corporation ("Client").

1. **Definitions**. All capitalized terms contained in this Rider shall have the same definitions as set forth in the Factoring Agreement unless they are specifically defined in this Rider. When used in this Rider, 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):

Cash Equivalents - (i) marketable direct obligations issued or unconditionally guaranteed by the United States government and backed by the full faith and credit of the United States government having maturities of not more than 12 months from the date of acquisition; (ii) domestic certificates of deposit and time deposits having maturities of not more than 12 months from the date of acquisition, bankers' acceptances having maturities of not more than 12 months from the date of acquisition and overnight bank deposits, in each case issued by any commercial bank organized under the laws of the United States, any state thereof or the District of Columbia, which at the time of acquisition are rated A-1 (or better) by Standard & Poor's Ratings Group(a division of McGraw-Hill, Inc.) or P-1 (or better) by Moody's Investors Services, Inc., and not subject to offset rights in favor of such bank arising from any banking relationship with such bank; (iii) repurchase obligations with a term of not more than 30 days for underlying securities of the types described in clauses (i) and (ii) entered into with any financial institution meeting the qualifications specified in clause (ii) above; and (iv) commercial paper having at the time of investment therein or a contractual commitment to invest therein a rating of A-1 (or better) by Standard & Poor's Ratings Group or P-1 (or better) by Moody's Investors Services, Inc., and having a maturity within 9 months after the date of acquisition thereof.

Current Assets - at any date, the amount at which all of the current assets of Client would be properly classified as current assets on a balance sheet at such date in accordance with GAAP consistently applied ***[except that amounts due from Affiliates and investments in Affiliates shall be excluded therefrom]***.

Current Liabilities - at any date, the amount at which all of the current liabilities of Client would be properly classified as current liabilities on a balance sheet at such date in accordance with GAAP consistently applied ***[excluding any advances outstanding under the Factoring Agreement or any Rider thereto and current maturities of any long-term indebtedness]***.

Debt - as applied to Client, without duplication: (i) all items which in accordance with GAAP would be included in determining total liabilities as shown on the liability side of a balance sheet of Client on the date as of which Debt is to be determined, including capitalized lease obligations; (ii) all obligations of other Persons which Client has guaranteed; (iii) all reimbursement obligations in connection with letters of credit or letter of credit guaranties issued for the account of Client; and (iv) the Obligations. The Debt of Client shall include any recourse Debt of any partnership in which Client is a general partner.

Distribution - in respect of any entity, (i) any payment of any dividends or other distributions on Equity Interests of the entity (except distributions in such Equity Interests) and (ii) any purchase, redemption or other acquisition or retirement for value of any Equity Interests of the entity or any Affiliate of the entity unless made contemporaneously from the net proceeds of the sale of Equity Interests.

EBITDA - for any fiscal period of Client, Client's (i) income (or loss) before interest and taxes plus, (ii) to the extent deducted in determining such income (or loss), depreciation, amortization and other similar non-cash charges, *minus* (iii) to the extent recognized in determining such income (or loss), extraordinary gains (or losses), all determined for the period in question in accordance with GAAP consistently applied.

Equity Interest - the interest of (i) a shareholder in a corporation, (ii) a partner (whether general or limited) in a partnership (whether general, limited or limited liability), (iii) a member in a limited liability company, or (iv) any other Person having any other form of equity security or ownership interest.

GAAP - 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.

Net Worth - Client's total shareholder's equity (including, without limitation, capital stock, additional paid-in capital and retained earnings, after deducting treasury stock) which would appear as such on a balance sheet of Client prepared in accordance with GAAP consistently applied.

Restricted Investment - any acquisition of property by Client in exchange for cash or other property, whether in the form of an acquisition of Equity Interests or Debt, or the purchase or acquisition by Client of any other property, or a loan, advance, capital contribution or subscription, except acquisitions of the following: (i) fixed assets to be used in the business of Client so long as the acquisition costs thereof do not violate any provisions of the Factoring Agreement that restrict capital expenditures by Client; (ii) goods held for sale or lease, or to be used in the manufacture of goods or the provision of services by Client, in the ordinary course of Client's business; (iii) Current Assets arising from the sale or lease of goods or the rendition of services in the Ordinary Course of Business; and (iv) Cash Equivalents to the extent they are not subject to rights of offset in favor of any Person other than BB&T.

Subsidiary - any Person in which more than 50% of its outstanding Voting Securities or more than 50% of all Equity Interests is owned directly or indirectly by Client, by one or more other Subsidiaries of Client or by Client and one or more other Subsidiaries.

Upstream Payment - a payment or distribution of cash or other property by a Subsidiary to Client, whether in repayment of Debt owed by such Subsidiary to Client, to pay dividends on account of Client's ownership of Equity Interests or otherwise.

Voting Securities - Equity Interests of any class or classes of a corporation or other entity the holders of which are ordinarily, in the absence of contingencies, entitled to elect a majority of the corporate directors or Persons performing similar functions.

Working Capital - at any date, Current Assets *minus* Current Liabilities on such date.

2. **Affirmative Covenants**. For so long as the Factoring Agreement is in effect and until payment in full of the Obligations, Client covenants that it shall:

a. achieve a minimum Net Worth of at least $1,000,000.00 by 12/31/05. (does not include subordinated debt)

3. **Negative Covenants**. For so long as the Factoring Agreement is in effect and until payment in full of the Obligations, Client covenants that it shall not and shall not permit any Subsidiary to:

a. declare or make any Distributions, except for Upstream Payments;

b. create or suffer to exist any encumbrance or restriction on the ability of a Subsidiary to make any Upstream Payment, except for any that may exist under applicable law;

c. make or have any Restricted Investment;

d. change its fiscal year;

e. Client shall not make any distribution in excess of the net profit of the company.

4. **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 after the close of each fiscal year of Client, unqualified 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 (including accounts payable and accounts receivable agings).

5. **Effectiveness; Governing Law**. This Rider shall be effective when duly executed by Client and thereafter accepted by BB&T in High Point, North Carolina (notice of which acceptance by BB&T is hereby waived by Client), and, when so accepted by BB&T, shall be deemed a contract made in the State of North Carolina and shall be governed in all respects by and construed in accordance with the internal laws of the State of North Carolina.

SKYWAVES I CORPORATION
("Client")

Attest:

By: _____
Title: CEO

Secretary

[CORPORATE SEAL] SKYWAVES I J.L.P.

Accepted and effective in High Point, North Carolina:

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

By: _____
Title: SVP

INVENTORY RIDER

THIS INVENTORY RIDER (this "Rider") dated 3-22, 2005, is hereby made a part of and incorporated into that certain Factoring and Security Agreement (together with all supplements and riders thereto and all amendments thereof, the "Factoring Agreement"), dated 3-22, 2005 between **BB&T FACTORS CORPORATION**, a North Carolina corporation ("BB&T"), and Skywaves I Corporation, a Delaware Corporation ("Client").

1. **Definitions.** Capitalized terms used in this Rider shall have the same definitions as set forth in the Factoring Agreement unless they are specifically defined in this Rider.

2. **Grant of Security Interest.** As security for the prompt payment and performance of all of the Obligations, Client hereby grants to BB&T a continuing security interest in all of the following property, whether now owned or existing or hereafter acquired and wheresoever located and in all cash and non-cash proceeds thereof, including, without limitation, proceeds of any insurance covering any of such property (collectively, the "Inventory"):

> All of Client's inventory, including, without limitation, all goods intended for sale or lease by Client or for display or demonstration; all work-in-process; all raw materials and other materials and supplies or every nature and description used or which might be used in connection with the manufacturing, printing, packing, advertising, selling, leasing or furnishing of such goods or otherwise used or consumed in Client's business; and all documents evidencing and general intangibles relating to any of the foregoing.

The term "Collateral," as used in the Factoring Agreement, shall be deemed to include all of the Inventory, whether or not constituting Eligible Inventory (as defined below).

3. **Advances.**

(a) So long as there has not occurred under the Factoring Agreement any Event of Default or any event or condition which, with the giving of notice or the passage of time, or both, would constitute an Event of Default, Client may request and BB&T, in its discretion, may make advances to Client from time to time (each an "Inventory Advance"), provided that BB&T may limit the aggregate amount of Inventory Advances that may be outstanding on any date to the Inventory Formula Amount on such date, as determined by BB&T. The Inventory Formula Amount on any date shall be an amount determined by BB&T to be equal to the sum of (i) N/A percent (N/A%) of the value of Eligible Inventory consisting of finished goods on such date, *plus* (ii) N/A percent (N/A %) of the value of Eligible Inventory consisting of raw materials on such date. Eligible Inventory shall be valued at the lower of cost or fair market value, on a first-in, first-out basis, in accordance with generally accepted accounting principles consistently applied. BB&T may, in its discretion, at any time or times hereafter, increase or decrease the percentages stated above without establishing a custom, and each such increase or decrease shall become effective immediately upon written notice to Client for purposes of calculating new Inventory Advances hereunder. All Inventory Advances outstanding from time to time and interest and other charges payable in connection therewith shall form a part of the Obligations and shall be secured by all of the Collateral, including, without limitation, all Inventory.

(b) At any time that Client requests an advance from BB&T, BB&T may, to the extent it elects to fund such advance, fund the requested advance pursuant to the provisions of paragraph 5 of the Factoring Agreement as an advance against the purchase price for one or more Accounts (each such advance, an "Accounts Advance") or as an Inventory Advance pursuant to paragraph 3(a) hereof, and BB&T shall record each advance on its books and records as either an Accounts Advance or an Inventory Advance. Prior to the occurrence of an Event of Default, and notwithstanding anything to the contrary in the Factoring Agreement, all payments allocable to any advances outstanding from time to time under the Factoring Agreement shall be applied first to reduce the outstanding principal amount of and accrued interest payable with respect to the Inventory Advances and thereafter to the principal amount of and accrued interest with respect to the Accounts Advances. At any time that an Event of Default exists, BB&T may apply any payments in such order of application as it may elect in its discretion.

4. **Eligible Inventory**. BB&T may condition its willingness to make Inventory Advances under this Rider upon BB&T's receipt of a certificate from Client relating to the existence, calculation and amount of Eligible Inventory as of the date of request for such advance. As used in this Rider, the term "Eligible Inventory" shall mean such Inventory of Client (other than packaging materials, labels and supplies) which BB&T, in its sole credit judgment, deems to be Eligible Inventory. Without limiting the generality of the foregoing, no Inventory will be deemed Eligible Inventory unless (i) it is ***[raw materials or]*** finished goods; (ii) it is owned by Client and not held by it on consignment; (iii) it is in good, new and saleable condition; (iv) it is not slow-moving, obsolete or unmerchantable; (v) it meets all standards imposed by any governmental agency or authority; (vi) it conforms in all respects to the warranties and representations made at any time by Client with reference to such Eligible Inventory; (vii) it is all times subject to BB&T's duly perfected. first priority security interest and no other Lien that is not a Permitted Lien; (viii) it is situated in the continental United States and is not in transit or consigned to any Person; and (ix) it is not subject to any license or other agreement that limits, conditions or restricts Client's or BB&T's right to sell or otherwise dispose of such Eligible Inventory.

5. **Payment of Interest**. Client agrees to pay BB&T interest upon the actual daily sum of Inventory Advances 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 N/A percent (N/A %). The Prime Rate in effect on the date hereof is N/A percent (N/A %). Interest shall be computed on a daily basis (calculated on the actual number of days elapsed over 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 Rider. In computing interest hereunder, all checks received by BB&T in payment of any of the Inventory Advances shall be credited after allowing N/A Business Days for collection from the date of deposit. In no event shall the rate of interest charged or collected hereunder exceed the maximum rate or amount permitted under applicable law (it being the intent hereof that BB&T not contract for or receive interest in excess of the maximum authorized by law). All interest hereunder 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 the Inventory Advances 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 each day, *plus* N/A percent (N/A %).

6. **Inventory Locations**. All Inventory, other than Inventory in transit, shall at all times be kept by Client at one or more of the business locations of Client set forth in **Exhibit A** hereto and shall not be moved therefrom, without the prior written approval of BB&T, except that in the absence of an Event of Default and acceleration of the maturity or demand for payment of the Obligations in consequence thereof, Client may (i) make sales of Inventory in the ordinary course of Client's business, and (ii) move Inventory or any records relating to any Inventory to a location in the United States other than those shown on **Exhibit A** hereto so long as Client has given BB&T at least 30 days prior written notice of such new location and prior to moving any Inventory to such location Client has executed and delivered to BB&T appropriate UCC-1 financing statements and any other appropriate documentation to perfect or continue the perfection and priority of BB&T's security interest with respect to such Inventory. Notwithstanding anything to the contrary contained in this Rider, Client shall not be permitted to keep, store or otherwise maintain any Inventory at any location (including any location described in **Exhibit A**), unless (i) Client is the owner of such location, (ii) Client leases such location and the landlord has executed in favor of BB&T an agreement in form and content acceptable to BB&T, by which an owner or mortgagee of premises upon which any Inventory is located agrees to waive or subordinate any Lien or other claim it may have with respect to such Inventory in favor of BB&T's security interest therein and to permit BB&T to enter upon such premises and to remove such Inventory or to use such premises to store or dispose of such Inventory, or (iii) with respect to Inventory placed with a warehouseman or a processor, BB&T has received from such warehouseman or processor an acceptable waiver of Liens arising at any time in favor of such warehouseman or processor and an appropriate UCC-1 financing statement has been filed with the appropriate filing office in the jurisdiction where such warehouseman or processor is located in order to perfect, or to maintain the uninterrupted perfection of, BB&T's security interest in such Inventory.

7. **Safeguarding of Inventory**. BB&T shall not be liable or responsible in any way for the safekeeping of any of the Inventory or for any loss or damage thereto (except for reasonable care in the custody thereof while any Inventory is in BB&T's actual possession) or for any diminution in the value thereof, or for any act or default of any warehouseman, carrier, forwarding agency, or other Person, but the same shall be at Client's sole risk. All expenses of protecting, storing, warehousing, insuring, handling, maintaining and shipping any Inventory, and all taxes imposed under any applicable law on any of the Inventory or in respect of the sale thereof shall be borne and paid by Client; but, if Client fails to pay promptly any portion thereof when due, BB&T may, at its option, but shall not be required to, pay the same and charge Client therefor.

8. **Inventory Reporting**. Client shall keep accurate and complete records of its Inventory and shall furnish BB&T inventory reports respecting such Inventory in form and detail satisfactory to BB&T at such times as BB&T may request, but so long as no Event of Default exists, no more frequently than once each week. Client shall conduct a physical inventory no less frequently than annually and shall provide to BB&T a report based on each such physical inventory promptly thereafter, together with such supporting information as BB&T may request.

9. **Disposition of Inventory**. Client shall not (i) return any of its Inventory to a supplier or vendor thereof, or any other Person, whether for cash, credit against future purchases or then existing payables, or otherwise, without the prior written consent of BB&T, or (ii) sell, assign, lease, consign or otherwise dispose of any Inventory or any interest therein except for sales of Inventory in the Ordinary Course of Business for so long as no Event of Default exists hereunder. Client represents and warrants to BB&T that no Inventory has been produced in violation of the Fair Labor Standards Act (29 U.S.C. ɜ 201 *et seq.*).

10. **Audits and Appraisals**. Client agrees that BB&T shall have the right to conduct audits of Client's books and records and appraisals of any of the Collateral. Client shall reimburse BB&T for all reasonable costs and expenses incurred by BB&T in connection with all such audits and appraisals.

11. **Remedies**. Upon or after the occurrence of an Event of Default, BB&T shall have the right to foreclose upon its security interest in the Inventory in accordance with applicable law and to apply the proceeds therefrom to the cost and expenses incurred by BB&T (including legal fees) in connection with such foreclosure and thereafter to the payment of the remaining Obligations in such order of application as BB&T

may elect from time to time in its discretion. All costs and expenses incurred by BB&T in realizing upon its security interest in any of the Inventory or in the repossession, custody, preservation or disposition thereof, including all legal fees, accounting fees, insurance premiums, auctioneer fees, appraisal fees and all other costs and expenses incident to the refurbishing, preparation for sale, advertising for sale or sale of any of the Inventory, shall be added to and form a part of the Obligations. Upon the request of BB&T, Client agrees to assemble and make the Inventory or any part thereof available to BB&T at a place designated by BB&T. The foregoing remedies are in addition to all other rights and remedies of BB&T under the Factoring Agreement (and any other Rider thereto) or applicable law.

11. **Effectiveness; Governing Law**. This Rider shall be effective when duly executed by Client and thereafter accepted by BB&T in High Point, North Carolina (notice of which acceptance by BB&T is hereby waived by Client), and, when so accepted, shall be deemed a contract made in the State of North Carolina and shall be governed in all respects by and construed in accordance with the internal laws of the State of North Carolina.

SKYWAVES I CORPORATION
("Client")

Attest:

Secretary

By: _____
Title: CEO

[CORPORATE SEAL]

SKYWAVES I
J.C.P.

Accepted and effective in High Point, North Carolina:

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

By: _____
Title: SVP

EXHIBIT "A"
to
INVENTORY RIDER

All Inventory, other than inventory in transit, is kept by Client at one or more of the following business locations:

	Street Address	City	State	Identity of Owner of Premises
1.	4280 Pace St	North Charleston	S C	Franz Meier
2.				
3.				
4.				
5.				

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
Chief Executive Officer

593

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

594

Acknowledged this 1ST day of APRIL, 2007.

SkyWaves 1 Corporation

By: Ron Konersmann

Ron Konersmann
Chief Executive Officer

9520220893-5

UCC FINANCING STATEMENT AMENDMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]

8008335778

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

UCC DIRECT SERVICES
2727 ALLEN PARKWAY
SUITE 1000
HOUSTON TX 77019

DELAWARE DEPARTMENT OF STATE
U.C.C. FILING SECTION
FILED 09:41 AM 01/12/2007
INITIAL FILING # 5102166 7
AMENDMENT # 2007 0153907
SRV: 070038913

1a. INITIAL FINANCING STATEMENT FILE #: 5102166 7

1b. ☐ This FINANCING STATEMENT AMENDMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS.

2. ☐ TERMINATION: Effectiveness of the Financing Statement identified above is terminated with respect to security interest(s) of the Secured Party authorizing this Termination Statement.

3. ☐ CONTINUATION: Effectiveness of the Financing Statement identified above with respect to security interest(s) of the Secured Party authorizing this Continuation Statement is continued for the additional period provided by applicable law.

4. ☐ ASSIGNMENT (full or partial): Give name of assignee in item 7a or 7b and address of assignee in item 7c; and also give name of assignor in item 9.

5. AMENDMENT (PARTY INFORMATION): This Amendment affects ☐ Debtor or ☒ Secured Party of record. Check only one of these two boxes.

Also check one of the following three boxes and provide appropriate information in items 6 and/or 7.

☒ CHANGE name and/or address: Give current record name in item 6a or 6b; also give new name (if name change) in item 7a or 7b and/or new address (if address change) in item 7c. ☐ DELETE name: Give record name to be deleted in item 6a or 6b. ☐ ADD name: Complete item 7a or 7b, and also item 7c; also complete items 7d-7g (if applicable).

6. CURRENT RECORD INFORMATION:

6a. ORGANIZATION'S NAME: BB&T FACTORS CORPORATION

OR

6b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

7. CHANGED (NEW) OR ADDED INFORMATION:

7a. ORGANIZATION'S NAME: BRANCH BANKING AND TRUST COMPANY

OR

7b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

7c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY
317 W. HIGH STREET 11TH FLOOR	HIGH POINT	NC	27260	US

7e. TYPE OF ORGANIZATION	7f. JURISDICTION OF ORGANIZATION	

8. AMENDMENT (COLLATERAL CHANGE): check only one box.

Describe collateral ☐ deleted or ☐ added, or give entire ☐ restated collateral description, or describe collateral ☐ assigned.

9. NAME of SECURED PARTY of RECORD AUTHORIZING THIS AMENDMENT

BB&T FACTORS CORPORATION

10. OPTIONAL FILER REFERENCE DATA

DE-0-23246695-1074001

WEBRM3 RB&T CLIENT LEDGER DETAIL PAGE 1
CLIENT 7702 SKYWAVES 1 CORP (PO LEDGER) Oct 2007

DATE	CD	DESCRIPTION	BATCH	A/R CREDIT	A/R DEBIT	A/R BALANCE	RESERVE CREDIT	RESERVE DEBIT	RESERVE BALANCE
09/30	AA	BEGIN BALANCE							1,723,639.36
10/03	LA	LOAN ADVANCE	307					27,955.20	1,751,594.56
10/03	CA	ACCOUNT CLEARED	10307				10,547.91-		1,741,046.65
10/03	CA	ACCOUNT CLEARED	10307				32,492.20-		1,708,554.45
10/05	CA	ACCOUNT CLEARED	10507				38,135.50-		1,670,418.95
10/15	LA	LOAN ADVANCE	1507					140,257.00	1,810,675.95
10/15	CA	ACCOUNT CLEARED	10157				38,135.50-		1,772,540.45
10/19	CA	ACCOUNT CLEARED	10197				85,046.00-		1,687,494.45
10/23	LA	LOAN ADVANCE	2307					27,955.20	1,715,449.65
10/25	LA	LOAN ADVANCE	2507					118,671.80	1,834,121.45
10/31	CA	ACCOUNT CLEARED	10317				38,135.50-		1,795,985.95
10/31	IT	INTEREST						13,037.58	1,809,023.53

SUMMARY

LA	LOAN ADVANCE	314,839.20
CA	ACCOUNT CLEARED	242,492.61-
IT	INTEREST	13,037.58

WEBEMS BB&T CLIENT LEDGER DETAIL PAGE 1
CLIENT 7702 SKYWAVES 1 CORP (PO LEDGER) Nov 2007

DATE	CD	DESCRIPTION	BATCH	A/R CREDIT	A/R DEBIT	A/R BALANCE	RESERVE CREDIT	RESERVE DEBIT	RESERVE BALANCE
10/31	AA	BEGIN BALANCE							1,809,023.53
11/05	LA	LOAN ADVANCE	10507					33,670.00	1,842,693.53
11/05	CA	ACCOUNT CLEARED	11057				13,037.58-		1,829,655.95
11/09	LA	LOAN ADVANCE	10907					55,910.40	1,885,566.35
11/09	CA	ACCOUNT CLEARED	11907				76,271.00-		1,809,295.35
11/15	CA	ACCOUNT CLEARED	11157				14,859.00-		1,794,436.35
11/15	CA	ACCOUNT CLEARED	11157				174,582.20-		1,619,854.15
11/15	LA	LOAN ADVANCE	11507					27,955.20	1,647,809.35
11/19	CA	ACCOUNT CLEARED	11197				54,410.85-		1,593,398.50
11/19	CA	ACCOUNT CLEARED	11197				18,668.00-		1,574,730.50
11/28	CA	ACCOUNT CLEARED	11287				35,202.00-		1,539,528.50
11/30	IT	INTEREST						11,565.63	1,551,094.13

SUMMARY

LA	LOAN ADVANCE	117,535.60
CA	ACCOUNT CLEARED	387,030.63-
IT	INTEREST	11,565.63

WEBEMG BB6T CLIENT LEDGER DETAIL PAGE 1
CLIENT 7702 SKYWAVES 1 CORP (PO LEDGER) Dec 2007

DATE	CD	DESCRIPTION	BATCH	A/R CREDIT	A/R DEBIT	A/R BALANCE	RESERVE CREDIT	RESERVE DEBIT	RESERVE BALANCE
11/30	AA	BEGIN BALANCE							1,551,094.13
12/05	CA	ACCOUNT CLEARED	12507				70,404.00-		1,480,690.13
12/10	CA	ACCOUNT CLEARED	12107				27,955.20-		1,452,734.93
12/12	CA	ACCOUNT CLEARED	12127				27,999.20-		1,424,735.73
12/18	LA	LOAN ADVANCE	21807					329,784.00	1,754,519.73
12/21	CA	ACCOUNT CLEARED	12217				16,835.00-		1,737,684.73
12/28	LA	LOAN ADVANCE	22807					132,602.00	1,870,286.73
12/31	IT	INTEREST						11,566.18	1,881,852.91

SUMMARY

CA	ACCOUNT CLEARED	143,193.40-
LA	LOAN ADVANCE	462,386.00
IT	INTEREST	11,566.18

WEBRM3 SB6T CLIENT LEDGER DETAIL PAGE 1
CLIENT 7702 SKYWAVES 1 CORP (PO LEDGER) Jan 2008

DATE	CD	DESCRIPTION	BATCH	A/R CREDIT	A/R DEBIT	A/R BALANCE	RESERVE CREDIT	RESERVE DEBIT	RESERVE BALANCE
12/31	AA	BEGIN BALANCE							1,881,852.91
01/08	CA	ACCOUNT CLEARED	10808				66,090.70-		1,815,762.21
01/17	LA	LOAN ADVANCE	11708					114,276.21	1,930,038.42
01/22	CA	ACCOUNT CLEARED	12208				23,272.14-		1,906,766.28
01/22	CA	ACCOUNT CLEARED	12208				5,000.00-		1,901,766.28
01/23	CA	ACCOUNT CLEARED	12308				5,000.00-		1,896,766.28
01/29	IT	INTEREST						12,137.64	1,908,903.92

SUMMARY

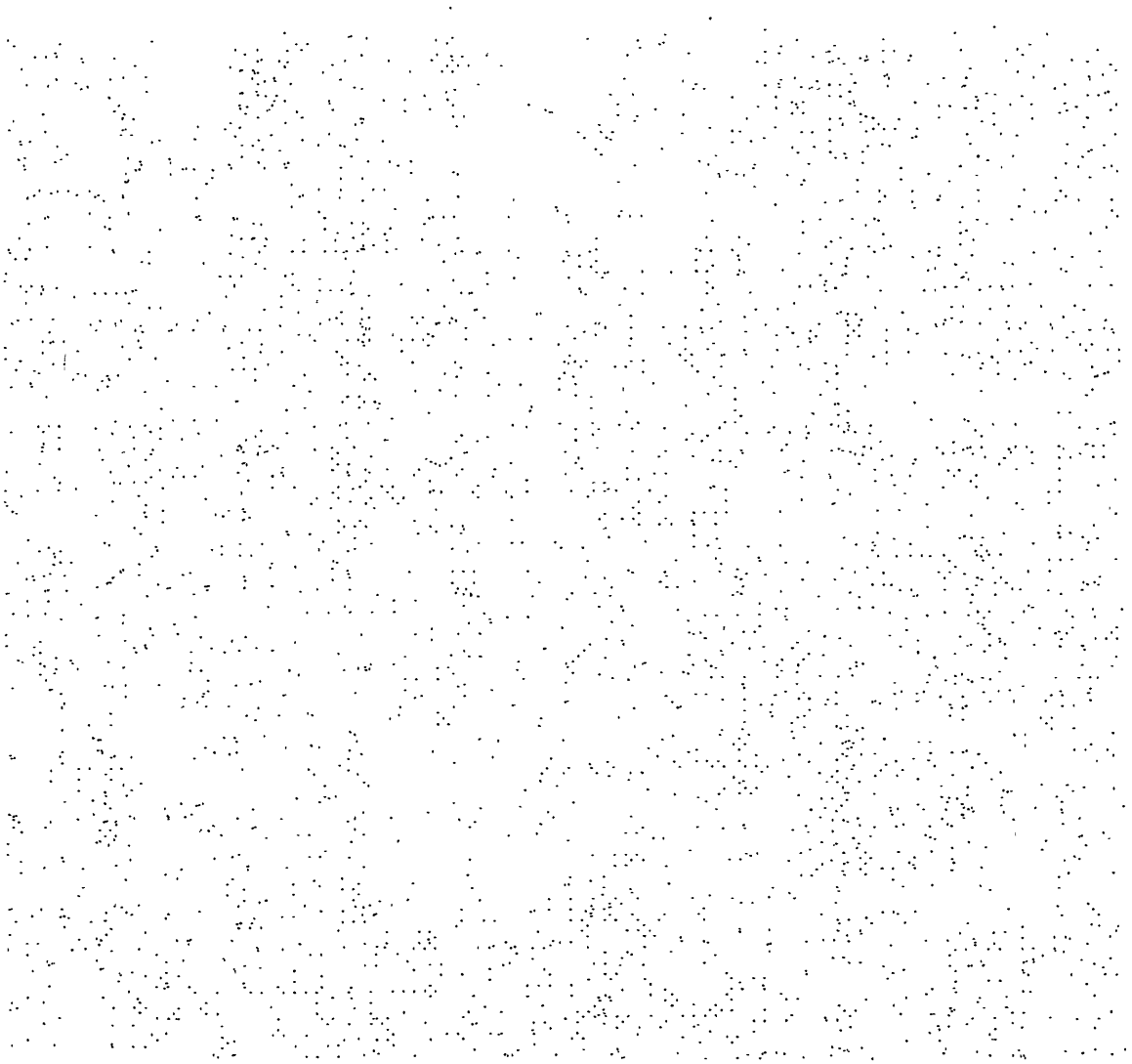
CA	ACCOUNT CLEARED	99,362.84-
LA	LOAN ADVANCE	114,276.21
IT	INTEREST	12,137.64

WEBDM3 BB&T CLIENT LEDGER DETAIL PAGE 1
CLIENT 7702 SKYWAVES 1 CORP (FO LEDGER) Feb 2008

DATE	CD	DESCRIPTION	BATCH	A/R CREDIT	A/R DEBIT	A/R BALANCE	RESERVE CREDIT	RESERVE DEBIT	RESERVE BALANCE
01/31	AA	BEGIN BALANCE							1,909,694.24
02/01	FC	FACTOR COMMISS	99999						1,909,694.24
02/26	IT	INTEREST						9,654.57	1,919,348.81

SUMMARY

FC	FACTOR COMMISS	
IT	INTEREST	9,654.57



601

WEBEM3 BB&T CLIENT LEDGER DETAIL PAGE 1
CLIENT 7702 SKYWAVES 1 CORP (PO LEDGER) Mar 2008

DATE	CD	DESCRIPTION	BATCH	A/R CREDIT	A/R DEBIT	A/R BALANCE	RESERVE CREDIT	RESERVE DEBIT	RESERVE BALANCE
02/29	AA	BEGIN BALANCE							1,920,462.79
03/13	PA	CASH RECEIPTS	46486		41,223.00-	41,223.00-			1,920,462.79
03/13	31	ADJ RESERVE	46486	41,223.00			41,223.00-		1,879,239.79
03/19	PA	CASH RECEIPTS	46544		133,474.25-	133,474.25-			1,879,239.79
03/20	31	ADJ RESERVE	46552	133,474.25			133,474.25-		1,765,765.54
03/31	IT	INTEREST						10,613.63	1,756,379.17

SUMMARY

PA	CASH RECEIPTS	174,697.25-
31	ADJ RESERVE	174,697.25
IT	INTEREST	10,613.63

602

B10 (Official Form 10) (12/07)

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF SOUTH CAROLINA

PROOF OF CLAIM

Name of Debtor: SKYWAVES I CORPORATION

Case Number: 08-02316-dd

NOTE: *This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):
BRANCH BANKING AND TRUST COMPANY

Name and address where notices should be sent:
STEVEN B. LICATA
P.O. BOX 23407
COLUMBIA, SC 29224

Telephone number:
803-699-6550

☒ Check this box to indicate that this claim amends a previously filed claim.

Court Claim Number: 58
(If known)

Filed on: 5/28/2008

Name and address where payment should be sent (if different from above):

Telephone number:

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check this box if you are the debtor or trustee in this case.

1. Amount of Claim as of Date Case Filed: $1,756,379.17

If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.

If all or part of your claim is entitled to priority, complete item 5.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.

2. Basis for Claim: Factoring
(See instruction #2 on reverse side.)

3. Last four digits of any number by which creditor identifies debtor: 7702

3a. Debtor may have scheduled account as: _____
(See instruction #3a on reverse side.)

4. Secured Claim (See instruction #4 on reverse side.)
Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.

Nature of property or right of setoff: ☐ Real Estate ☐ Motor Vehicle ☐ Other
Describe:

Value of Property: $_____ **Annual Interest Rate** ___%

Amount of arrearage and other charges as of time case filed included in secured claim, if any: $_____ **Basis for perfection:** _____

Amount of Secured Claim: $_____ **Amount Unsecured:** $1,756,379.17

5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.

Specify the priority of the claim.

☐ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

☐ Wages, salaries, or commissions (up to $10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4).

☐ Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).

☐ Up to $2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).

☐ Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8).

☐ Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(__).

Amount entitled to priority:

$_____

**Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.

7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements or running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. *(See definition of "redacted" on reverse side.)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

Date: 11/8/2013

Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.

/ STEVEN B. LICATA
STEVEN B. LICATA, ATTORNEY FOR BRANCH BANKING AND TRUST COMPANY

FOR COURT USE ONLY

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

603

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 **AFFIDAVIT OF RON KONERSMANN**

1. My name is Ron Konersmann.
2. I was the CEO of Skywaves I Corporation ("Skywaves") and am familiar with the loan documents and Factoring Agreement at issue in this case.
3. In its Motion to Strike Skywaves' demand of a jury trial, BB&T references several agreements that it refers to as the "Loan Documents," including the 2005 Promissory Note and Security Agreement, the 2007 Note and Security Agreement, and the 2005 Factoring Agreement.
4. The 2005 Note was current as of January 2008 and was later paid off by KWK, LLC, a borrower on the Note.
5. The 2007 Note was an equipment loan that was also current as of January 2008 with a balance of approximately $180,000.00. The collateral was sold and the note deemed satisfied by BB&T. (See Exhibit A, Satisfaction).

Ron Konersmann

Sworn and Subscribed Before me
On this 8 day of January 2015

Notary Public for the State of SC
My commission expires:

MICHELLE N. ENDEMANN NOTARY PUBLIC SOUTH CAROLINA My Comm. Exp. 01-14-2020

Bindertek #CLEX D

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:	CASE NO: 08-02316 CHAPTER: 7
Skywaves I Corporation	WITHDRAWAL OF CLAIM NO. 25
Debtor(s).	

Branch Banking and Trust Company ("BB&T") hereby withdraws Claim No. 25 filed in the amount of $229,283.44 as said claim has been paid in full.

/s/ Steven B. Licata
Steven B. Licata
Law Office of Steven B. Licata, P.C.
P.O. Box 23407
Columbia, S.C. 29224
Phone (803) 699-6550
Facsimile (803) 699-9858
E-Mail: Slicata@sc.rr.com
District Court ID No. 2682

Columbia, South Carolina
November 8, 2013

E & A

ANDREW K. EPTING, JR., L.L.C.
ATTORNEYS AT LAW

January 8, 2015

The Honorable Julie J. Armstrong
Charleston County
Clerk of Court
100 Broad Street
Charleston, SC 29401

Re: *Skywaves I Corporation v. Branch Banking and Trust Company*
CA No.(s): **2009-CP-10-07515**

Dear Ms. Armstrong:

Enclosed for filing please find the original and one copy of the Plaintiff's Memorandum in Opposition to Motions to Strike Demand for Jury Trial in the above-referenced matter. I would greatly appreciate your filing the original and returning a file stamped copy to me in the self-addressed, stamped envelope provided.

With kindest regards,

ANDREW K. EPTING, JR., LLC

Andrew K. Epting, Jr., Esquire

AKE, Jr./agg

Enclosures – as stated

cc: All Counsel of Record

Andrew K. Epting, Jr. · ake@epting-law.com
Michelle N. Endemann · mne@epting-law.com
46A State Street · Charleston · South Carolina · 29401
Phone: (843) 377-1871 · Fax: (843) 377-1310

FILED
2015 JAN 12 AM 9:18
JULIE J. ARMSTRONG
CLERK OF COURT

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 **REPLY OF DEFENDANT BRANCH BANKING AND TRUST COMPANY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE DEMAND FOR JURY TRIAL**

Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("BB&T") respectfully submits this Reply to Plaintiff's Memorandum in Opposition to Motion to Strike Demand for Jury Trial ("Plaintiff's Memorandum") in the above-referenced matter.[1]

The Plaintiff's Memorandum asserts that the jury trial waiver in the Factoring and Security Agreement dated May 22, 2005 (the "Factoring Agreement") is unenforceable because the Factoring Agreement provides that North Carolina law applies to it, and jury trial waivers are unenforceable under North Carolina law, pursuant to N.C. Gen. Stat. Ann § 22B-10. The Plaintiff's Memorandum also asserts that the jury trial waivers in the other five documents executed by Skywaves I Corporation ("Skywaves") are not applicable to this case because (1) Plaintiff has sued the defendants based on the alleged breach by BB&T of the Factoring

[1] BB&T's motion to strike Plaintiff's demand for a jury trial seeks to have the jury trial demand stricken as to both defendants in this case. Defendant James Edahl is, upon information and belief, filing a reply to Plaintiff's Memorandum addressing his standing to assert the jury trial waivers which are the subject of BB&T's motion. BB&T supports Mr. Edahl's assertion of standing.

Agreement, (2) BB&T never declared the other agreements in default, (3) in its claim filed in the Skywaves bankruptcy, BB&T did not claim a default under any documents other than the Factoring Agreement, (4) the other agreements in which Skywaves waived its right to a jury trial were not in default when the dispute in this case arose over the Factoring Agreement terms, and (5) the promissory notes included in the other five documents have been satisfied.

In response to these assertions made in the Plaintiff's Memorandum, BB&T submits:

A. The Jury Trial Waiver in the Factoring Agreement is Enforceable Because the Right to a Jury Trial is a Procedural Right, Not a Substantive Right

The Factoring Agreement provides that, "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." *See* Section 25 of the Factoring Agreement (attached to the Plaintiff's Memorandum as Exhibit C). As indicated by its wording, this choice of law provision pertains to substantive issues, not procedural issues. It is the "acts, transactions, rights and liabilities" under the Agreement that are to be governed and construed under North Carolina law. This choice of law provision does not reference procedural rights.

"The local law of the forum determines whether an issue shall be tried by the court or by a jury." Restatement (Second) of Conflict of Laws § 129 (1971). A choice of law provision applies only to substantive issues; while the law of the forum applies to procedural matters, even if a foreign state's substantive law is applicable. *See* 17A Am. Jur. 2d, *Contracts* § 264 (citing *Terrace Group v. Vermont Castings, Inc.*, 753 A.2d 350 (R.I. 2000)); and 43 Am. Jur. 2d, *Insurance* § 331 (citing *Burge v. Mid-Continent Cas. Co.*123 N.M. 1, 933 P.2d 210 (N.M. 1996)).

South Carolina recognizes that the right to a jury trial may be waived. *See Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 332-33, 755 S E.2d 437, 443 (2014); *N.*

608

Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc. 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992); and *Beach Co. v. Twillman, ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002). The South Carolina Supreme Court has recognized that the right to a jury trial is a "substantial right" (as opposed to a *substantive* right), but held that the right may be contractually waived. *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 332-33, 755 S.E.2d 863, 866. South Carolina courts enforce jury trial waivers when properly made. *See Branch Banking and Trust Company v. Abikhaled*, Case No. 2014-CP-40-2968 (Richland County, South Carolina Court of Common Pleas, Order filed December 19, 2014), a copy of which decision is attached to this Reply. South Carolina's recognition that the right to a jury trial may be waived is implicit recognition that the right is a procedural right, one that relates to the manner in which the case is to be tried.

Accordingly, with regard to the enforceability of the jury trial waiver in the Factoring Agreement, South Carolina law governs. North Carolina law will govern substantive issues arising regarding the "acts, transactions, rights and liabilities" under the Factoring Agreement, but not the method of trial of the case.

It is noted that the Plaintiff's Memorandum includes citation of the unpublished decision of the South Carolina Court of Appeals in *GMAC Commercial Mortg. Corp. v. Roberts*, 2005 WL 7084823, at *2 n.3 (Ct. App. October 12, 2005), with regard to the unenforceability of jury trial waivers under North Carolina. However, this cited decision did not find North Carolina law applicable. Instead, the question was whether South Carolina or Connecticut law applied with regard to the jury trial waiver, and the Court found that the jury trial waivers are enforceable under both South Carolina and Connecticut law, subject to requirements for enforceability, and the Court found it unnecessary to determine which state's law applied.

B. The Jury Trial Waivers in the Other Documents Signed by Skywaves Are Enforceable

The jury trial waivers in the other five documents signed by Skywaves are enforceable to this case. In regard to the asserted reasons Plaintiff maintains the other documents are inapplicable to this case, BB&T responds:

1. As set forth in Defendant Branch Banking and Trust Company's Memorandum in Support of Motion to Strike Plaintiff's Demand for Jury Trial ("BB&T's Memorandum") filed on December 22, 2014, in addition to the Factoring Agreement, Skywaves signed five (5) other documents which included jury trial waivers, in Skywaves' relationship with BB&T. The documents are identified in BB&T's Memorandum and given the defined term names the "2005 Loan Agreement," the "2005 Promissory Note," the "2005 Security Agreement," the "2007 Promissory Note," and the "2007 Security Agreement." The jury trial waiver in each of these documents is substantially the same. Each of these documents provides that it is governed by South Carolina law.

2. BB&T acknowledges that Plaintiff has sued BB&T and Mr. Edahl based upon alleged breaches of the Factoring Agreement; however, the jury trial waivers in the other documents specifically state, in pertinent part, that, ". . . THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OR CLAIM ARISING OUT OF THIS [document] . . . OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND [BB&T]." This provision expressly includes the matters arising from the conduct of the relationship between Skywaves and BB&T under the

Factoring Agreement. The waiver of the right to a jury trial under these other documents is, of course, consistent with the waiver of the right to a jury trial made in the Factoring Agreement.[2]

3. The jury trial waivers in the other five documents include no language conditioning the waiver upon a breach of, or a default under, the document. Furthermore, the jury trial waiver provisions are not limited in time, and the waiver is made immediately upon the execution of the document (". . . THE UNDERSIGNED HEREBY WAIVE . . ."). The waivers specifically state that the waiver is a material inducement for BB&T to make the loan to Skywaves, and it is not surprising that BB&T, in making other loans to Skywaves in the course of their relationship, would insist upon further confirmation that, if claims were made against BB&T arising from **any** part of the relationship, the right to a jury trial was waived. Notably, Plaintiff points to no language in the documents stating that the jury trial waivers are enforceable only if the document is in default, nor does Plaintiff cite any legal authority for this proposition.

4. The satisfaction of the notes does not terminate the jury trial waivers. The language makes clear that the waiver is immediate upon execution of the document (*see* paragraph 3 above), and by the breadth and scope of the waiver, which includes all matters and claims "arising out of the conduct of the relationship" between Skywaves and BB&T, the waiver is not limited to the payment of the loan evidenced by the note. Plaintiff cites no language in the documents and no legal authority for its assertion that satisfaction of the notes terminates the effectiveness of the jury trial waivers. The jury trial waivers remain effective as to matters and claims arising out of the conduct of the relationship between Skywaves and BB&T under the Factoring Agreement.

[2] The full texts of the jury trial waivers are stated in the BB&T Memorandum.

C. Conclusion

The jury trial waiver provisions in the Factoring Agreement, and in the five other documents signed by Skywaves, are enforceable and should be enforced by the Court in this case.

Respectfully Submitted on this the 12th day of January, 2015, at Charleston, South Carolina.

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: 843.414.8209
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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	
Branch Banking and Trust Company,	)	Case No.: 2014-CP-40-2968
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER GRANTING PLAINTIFF'S**
	)	**MOTION TO STRIKE**
Elie Abikhaled and Ghazi Abikhaled,	)	**DEFENDANTS' JURY DEMAND**
	)	
Defendants.	)	
	)	

2014 DEC 19 AM 9:12

Presiding Judge:	Hon. Deadra L. Jefferson
Plaintiff's Attorney:	Paul Hoefer, Esq.
Defendant's Attorney:	Tommy Lydon, Esq.
Date of Hearing:	October 16, 2014
Court Reporter:	Aminah Hardy

This matter came before the Court for a hearing on Plaintiff's Motion to Strike Defendants' Jury Demand, filed August 25, 2014. Plaintiff, Branch Banking and Trust Company (Bank or BB&T), moved to strike the demand for a jury trial asserted by Defendants (Borrowers) in their Answer and Counterclaims. Present at the hearing were attorney for Plaintiff, Paul Hoefer, Esquire, and attorney for Defendants, Tommy Lydon, Esquire. Based on the pleadings and supporting memoranda filed herein and the arguments of counsel, this Court hereby GRANTS Plaintiff's Motion to Strike Defendants' Jury Demand. This Court makes the following findings of fact and conclusions of law.

I. FACTUAL AND PROCEDURAL BACKGROUND

This is a collection action on a debt alleged to be owed to Plaintiff by Defendants pursuant to personal guarantees of payment. The underlying commercial loan is evidenced by a Promissory Note executed by Cedar Development II, LLC (Borrower) dated June 29, 2011 in favor of Bank for $730,411.44 (the Note), and which is further secured by a mortgage on real

property in Richland County, South Carolina (the Mortgage). Plaintiff's foreclosure suit against Borrowers is ongoing in a separate lawsuit currently pending before the Master in Equity, Case Number 2013–CP–40–5115. The present action is separate from the foreclosure action; in the instant case, Plaintiff prays for a personal, deficiency judgment against Borrowers in order to satisfy the loan balance not recovered from the foreclosure and sale of the subject property.

The guaranty agreements executed by Defendants each provide unconditional, joint and several guarantees of all indebtedness of Borrower to Bank whether then existing or thereafter arising (collectively the Guarantees). The Guarantees each contain the following jury trial waiver provision in all capitalized, bold text:

> **WAIVER OF TRIAL BY JURY. UNLESS EXPRESSLY PROHIBITED BY APPLICABLE LAW, THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OF CLAIMS ARISING OUT OF THIS GUARANTY OR THE BORROWER'S NOTE(S), AND THE RELATED LOAN DOCUMENTS EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND THE BANK OR THE BORROWER AND THE BANK. THIS PROVISION IS A MATERIAL INDUCEMENT FOR BANK TO ACCEPT THIS GUARANTY AND TO MAKE THE LOAN(S) TO THE BORROWER. FURTHER, THE UNDERSIGNED HEREBY CERTIFY THAT NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT BANK WOULD NOT SEEK TO ENFORCE THIS WAIVER OR RIGHT TO JURY TRIAL PROVISION IN THE EVENT OF LITIGATION. NO REPRESENTATIVE OR AGENT OF BANK, NOR BANK'S COUNSEL, HAS THE AUTHORITY TO WAIVE, CONDITION OR MODIFY THIS PROVISON.**

In response to Plaintiff's Complaint, Defendants filed an Answer in which they asserted counterclaims for breach of the covenant of good faith and fair dealing, interference with prospective contractual relations, accounting and appraisal, and negligent misrepresentation. The factual basis underlying the counterclaims is Plaintiff's alleged failure to provide additional financing to Borrower to upfit the building that is the subject of the Mortgage.

II. STANDARD

An action to collect on a guaranty is an action at law. Crafton v. Brown, 346 S.C. 347, 351, 550 S.E.2d 904, 905 (Ct. App. 2001). "A mortgage foreclosure is an action in equity." Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 440–41 (2014), *reh'g denied* (Apr. 2, 2014) (citing Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). "However, '[w]hether a party is entitled to a jury trial is a question of law.'" Id. citing (Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010)).

A party may waive the right to a jury trial by contract, but such waiver will be strictly construed as the right to a jury trial is a substantial right. Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63–64, 566 S.E.2d 863, 866 (Ct. App. 2002) (citing N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992)). "However, terms in a contract provision must be construed using their plain, ordinary and popular meaning." Id. (citing Fritz-Pontiac-Cadillac-Buick v. Goforth, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994)). A jury trial waiver must be made knowingly and voluntarily. See Blackburn, 407 S.C. at 332, 755 S.E.2d at 443; Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437–38 (1995) ("intentional relinquishment of a known right" required for waiver).

III. NATURE OF DEFENDANTS' COUNTERCLAIMS

Plaintiff argues Defendants defaulted under terms of the Guarantees and that because its suit on the Guarantees is not an equitable action, the dispositive issue is not whether Defendants' counterclaims are permissive or compulsory at law as discussed by the Supreme Court in Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 440–41 (2014), *reh'g denied* (Apr. 2, 2014). Rather, Plaintiff argues, the issue is simply whether Defendants contractually waived their rights to a jury trial as to their counterclaims. Additionally, Plaintiff

argues Defendants' counterclaims are included within the scope of the jury trial waiver in the Guarantees.

Defendants argue that had Plaintiff included the guarantors as defendants in its equitable foreclosure action, Blackburn would be controlling. Additionally, Defendants argue the waiver clause is unconscionable. Both parties contend Blackburn is inapplicable in the present case. The parties arguments regard whether Defendants counterclaims are encompassed within the scope of the waiver and whether the waiver is unconscionable.

The Supreme Court in Blackburn clarified the analytical framework for determining whether borrowers are entitled to a jury trial on their counterclaims. See Blackburn, 407 S.C. at 329–30, 755 S.E.2d at 441–442. Ultimately, however, the court declined to definitively determine whether the borrowers' counterclaims were legal or equitable, compulsory or permissive. See id. at 331–32, 755 S.E.2d at 442–43. The court held that the only way borrowers could obtain a jury trial was if their waivers were not knowingly and voluntarily made and thus invalid and unenforceable. See id. at 332, 755 S.E.2d at 443.

Here, Plaintiff's Complaint is legal, but Defendant's counterclaims are both legal and equitable; therefore, the analytical framework expounded in Blackburn is inapplicable. See id. at 329–30, 755 S.E.2d at 441–442; Rushing v. McKinny, 370 S.C. 280, 289, 633 S.E.2d 917, 922 (Ct. App. 2006) (breach of the covenant of good faith and fair dealing and negligent misrepresentation are legal causes of action); United Ed. Distribs., LLC v. Ed. Testing Serv., 350 S.C. 7, 14, 564 S.E.2d 324, 328 (Ct. App. 2002) (interference with prospective contractual relations is a tort action for damages and an action at law); Historical Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009) (an action for an accounting is an action in equity); see also Consignment Sales LLC v. Tucker Oil Co., 391 S.C. 266, 272, 705 S.E.2d 73, 76–77 (Ct. App. 2010); Santoro v. Schulthess, 384 S.C. 250, 259, 681 S.E.2d 897,

901–902 (Ct. App. 2009) (citing Longshore v. Saber Sec. Servs., Inc., 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct. App. 2005)). Consequently, this Court need not determine whether borrowers' counterclaims are permissive or compulsory. Defendants have no right to a trial by jury on their equitable accounting and appraisal counterclaim. See Historical Charleston Holdings, LLC, 381 S.C. at 427, 673 S.E.2d at 453; Blackburn, 407 S.C. at 332, 755 S.E.2d at 443. Similarly, Defendants have no right to a jury trial on their legal counterclaims because such claims are squarely within the scope of the waiver clause. See Blackburn, 407 S.C. at 332, 755 S.E.2d at 443. Consequently, this Court must determine only whether the waivers were executed knowingly and voluntarily. See id.

IV. VALIDITY OF WAIVER

Defendants presented no evidence or argument that Borrowers were unable to freely, voluntarily, intelligently, and knowingly waive their right to a jury trial. Accordingly, this Court finds the waivers are valid and enforceable. Further, the waivers were conspicuous, noticeable, and unambiguous, printed in all capital letters in bold type with a bold heading. See Blackburn, 407 S.C. at 334, n.8, 755 S.E.2d at 433, n.8.

V. SCOPE OF WAIVER AND COUNTERCLAIMS

Defendants argue that the subject of their counterclaims—Plaintiff's failure to extend financing to upfit the subject property—are not related to the existing relationship between the parties and, therefore, their counterclaims are beyond the scope of the jury trial waiver contained in the Guarantees. In contrast, Plaintiff argues Defendants' counterclaims concern matters or claims arising out of either the Guarantees or the Note and the related documents executed in connection with the Guarantees, or claims occurring as a result of the relationship between the Bank and Borrowers. Simply stated, Borrowers executed the subject Guarantees in connection with the Note and Mortgage obtained from Plaintiff. The Guarantees encompass all claims

regarding the Note, Mortgage, and subject property. Defendants concede that their claims are based on Plaintiff's conduct growing out of Plaintiff and Defendant's fiduciary relationship and, ultimately, from the underlying Note attached to the property: Defendants argue that Plaintiff breached its promise to extend future financing relating to the subject property. The waiver expressly provides: THE UNDERSIGNED HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS OF CLAIMS ARISING OUT OF THIS GUARANTY OR THE BORROWER'S NOTE(S), AND THE RELATED LOAN DOCUMENTS EXECUTED IN CONNECTION HEREWITH OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND THE BANK OR THE BORROWER AND THE BANK. Therefore, the counterclaims asserted by Defendants are within the scope of the jury trial waiver provision contained in each of the Guarantees, in which Defendants contractually waived their right to a jury trial.

VI. UNCONSCIONABILITY OF WAIVER

Defendants argue they could not have contemplated that in signing the Guarantees, they were waiving their right to a jury trial on claims arising from future misrepresentations and misconduct by Plaintiff and, thus, the waiver is unconscionable. Unconscionability is defined "as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). "If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result." RESTATEMENT OF CONTRACTS (SECOND) § 208 (1981). "Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear

grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract." Gladden v. Boykin, 402 S.C. 140, 145, 739 S.E.2d 882, 884–85 (2013). "[T]he proper test is whether an important clause was particularly inconspicuous, as if the drafter intended to obscure the term." Id.

"Further, South Carolina's 'general principle ... is that it is not the function of the court to rewrite contracts for the parties.'" York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 90, 749 S.E.2d 139, 151 (Ct. App. 2013) (citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007)). Thus, the court must determine whether unconscionability is "due to both an absence of meaningful choice and oppressive, one-sided terms." Id. (citing Simpson, 406 S.C. at 25, 644 S.E.2d at 669). "In determining whether a contract was tainted by an absence of meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." Id. at 86, 749 S.E.2d at 148–49 (citing Simpson, 406 S.C. at 25, 644 S.E.2d at 669). The loss of the right to a jury trial is relevant to this determination. Id. (citing Simpson, 406 S.C. at 27, 644 S.E.2d at 670). "Terms are oppressive when 'no reasonable person would make them and no fair and honest person would accept them.'" See id. at 87–88, 749 S.E.2d at 149–150 (citing Simpson, 406 S.C. at 25, 644 S.E.2d at 668).

Having found Borrowers' waivers were made knowingly and voluntarily, this Court finds the waiver provision is conscionable and declines to strike the clause from the parties' contract. Defendants failed to present any evidence or argument that the waivers were entered into by

Borrowers as a result of any procedural unconscionability, or bargaining unfairness, and substantive unfairness. Defendants argue the waivers contained in the Guarantees purport to waive future claims on matters not directly related to the loan that is the subject of the Guarantees, and are thus unconscionable. Defendants also argue they could not have possibly contemplated waving future claims by signing the Guarantees. Defendants presented no evidence or case law supporting their argument. Whereas surprise and hardship caused by the waiver provision is just one factor to be assessed in the court's overall determination of unconscionability, according to the prevailing case law, the scope of the waiver term is not a factor to be considered in this analysis. Ultimately, this Court finds the record does not support a conclusion that Borrowers lacked meaningful choice whether to accept any one-sided terms of the Guarantees, including the waiver provision; accordingly, this Court declines to strike the waiver clause based on unconscionability.

VII. CONCLUSION

Therefore, IT IS HEREBY ORDERED that Plaintiff's Motion to Strike Defendants' Jury Demand is GRANTED.

AND IT IS SO ORDERED.

Deadra L. Jefferson
Presiding Judge

December 16, 2014
Charleston, South Carolina
At Chambers

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 REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTIONS TO STRIKE JURY DEMAND**
)	
Defendants.)	

FILED
2015 JAN 12 AM 9:09
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Defendant James Edahl ("Edahl"), by and through his undersigned counsel, respectfully submits this Reply to Plaintiff's Memorandum in Opposition to the Motions to Strike the Jury Demand.

I. INTRODUCTION

Plaintiff Skywaves I Corporation ("Skywaves") argues (1) that this Court should consider the jury trial waiver in the Factoring Agreement only (as opposed to the waiver in at least five other agreements) and (2) that said jury trial waiver is void and/or otherwise invalid. (*See* Factoring Agreement, March 22, 2005, Exhibit "C" as previously filed). Additionally, as to Defendant Edahl, Skywaves argues (3) that the jury trial waiver is, in any event, inapplicable, because Edahl is not himself a party to the Factoring Agreement. (Skywaves' Memorandum in Opposition, fn. 1).

For purposes of replying to arguments (1) and (2) (regarding the applicability and enforceability of the subject jury trial waivers), Edahl relies upon and incorporates herein the arguments of Defendant Branch Banking and Trust Company ("BB&T"). Edahl offers this

621

Reply, however, to specifically respond to Skywaves' argument (3) that the jury waiver is inapplicable to Edahl individually. For the reasons stated hereinbelow, Skywaves has waived its right to a jury trial against Edahl to the same extent that it has waived its right to a jury trial against BB&T.

II. ARGUMENT

Skywaves argues that Edahl cannot rely upon the jury trial waiver in the Factoring Agreement because Edahl was "not a party or an intended third-party beneficiary of the Factoring Agreement." (Skywaves' Memorandum in Opposition, fn. 1).

First, this is not a case where Edahl is the only party seeking to enforce the jury trial waivers signed by Skywaves. Rather, BB&T also moved to strike Skywaves' jury demand, and BB&T's motion seeks the transfer of the case – as a whole – to the non-jury docket. Thus, to the extent Skywaves contends that Edahl has no right or standing to raise this issue, the issue is already before the Court upon motion of a party who is admittedly a signatory to the Factoring Agreement. Edahl joins in and consents to BB&T's motion to strike Skywaves' jury demand. Accordingly, Skywaves' opposition to Edahl's motion is unavailing.

Regardless, Skywaves overlooks the critical fact that, at all times relevant hereto, Edahl was acting as an agent and employee BB&T. (Amended Complaint, ¶ 52). Where a corporate principal has signed a contract containing a valid jury trial waiver, its agents and employees may also enforce the provision as agents of the corporation. *See Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 222–25 (3rd Cir. 2007). Though South Carolina's appellate courts do not appear to have addressed this issue, it was squarely decided by the U.S. Court of Appeals for the Third Circuit in *Tracinda,* and since that time, numerous other courts have followed its well-reasoned approach allowing nonsignatory agents to invoke jury waivers in contracts entered into

by their corporate principals. *See Mowbray v. Zumot*, 536 F. Supp. 2d 617 (D. Md. 2008) (holding that nonsignatory agent of corporation may enforce jury trial waiver provision and that rationale of *Tracinda* is based upon the same common law agency principles in Fourth Circuit law); *Andre v. Sellstate Realty Sys. Network, Inc.*, 2010 WL 3259415, at *3 (M.D. Fla. July 30, 2010) (holding that nonsignatory individual defendants, who were CEO and president, could invoke jury trial waiver contained in promissory note and included by reference in other agreements between plaintiff and corporate defendant because they were sued as agents of signatory corporation); *Price v. Cushman & Wakefield, Inc.*, 808 F. Supp. 2d 670 (S.D.N.Y. 2011) (holding that nonsignatory real estate broker could invoke jury trial waiver in company's contract); *Hamilton v. Sheridan Healthcorp., Inc.*, 2014 WL 537343, at *3 (S.D. Fla. Feb. 11, 2014) (citing *Tracinda* and holding that nonsignatory individual defendants, doctors sued based on their actions as agents of signatory hospital, could enforce jury trial waiver in employment agreement between plaintiff and hospital); *SBAV LP v. Porter Bancorp, Inc.*, 2014 WL 1922874, at *3 (W.D. Ky. May 14, 2014) (citing *Tracinda* and holding that individual defendants, who were chairman and president/CEO of bank, could invoke jury trial waiver contained in securities purchase agreement between plaintiff and defendant bank); *Boardakan Restaurant LLC v. Atlantic Pier Associates, LLC*, 2014 WL 4058723, at *5, n. 6 (E.D. Pa. Aug. 15, 2014) (citing *Tracinda* and holding that nonsignatory corporate and individual defendants, as agents of signatory corporate entity, had standing to enforce jury waiver). Additional, state court cases are further in accord: *See In re Credit Suisse First Boston Mortg. Capital, L.L.C.*, 273 S.W.3d 843, 848 (Tex. Ct. App. 2008) (applying *Tracinda*'s extension-through-agency rationale under Texas law); *Colorado Coffee Bean, LLC v. Peaberry Coffee Inc.*, 251 P.3d 9, 26-27 (Colo. App. 2010) (applying *Tracinda*).

623

In *Tracinda*, the Court noted that its holding was consistent with the axiomatic concept that corporations can act "only through agents and employees." 502 F.3d at 225; *see also State ex rel. Callison v. National Linen Service Corp.*, 225 S.C. 232, 235, 81 S.E.2d 342, 344 (1954) ("A corporation can act as such only through its agents and employees"). Further, if a nonsignatory agent of a signatory corporation were *not* allowed to invoke a valid contractual jury waiver, such provisions would be "of little practical value" because the provision could easily be circumvented by naming the individuals as defendants instead of (or in addition to) the entity itself. *See Tracinda*, 502 F.3d at 225.

The instant case does not present the more difficult issue of whether a jury trial waiver should be enforced *against* a *nonsignatory*. *Cf. Pearson v. Hilton Head Hospital*, 400 S.C 281, 733 S.E.2d 597 (Ct. App. 2012) (permitting enforcement of arbitration provision *against nonsignatory* pursuant to doctrine of equitable estoppel). Though Skywaves claims that the jury waiver provision is unenforceable, Skywaves was nonetheless a signatory to the Factoring Agreement, as well as the other agreements containing like provisions. Thus, Edahl is only seeking to require Skywaves to adhere to an agreement that Skywaves admittedly signed. Indeed, but for the Factoring Agreement and other agreements signed by Skywaves, Skywaves would have had no interaction with Edahl. Under these circumstances, and because Skywaves' claims against Edahl are inextricably intertwined with the claims against BB&T, Skywaves should, additionally, be equitably estopped using Edahl's nonsignatory status as a basis for opposing the motion to strike the jury demand. *See generally Goer v. Jasco Industries*, 395 F. Supp. 2d 308 (D.S.C. 2005) (finding that plaintiff-signatories to arbitration agreement were equitably estopped from claiming that nonsignatory, individual defendants could not enforce arbitration agreement signed by their corporate entity).

III. CONCLUSION

For these reasons, and any others the Court may deem appropriate, Skywaves has waived its right to a jury trial against Edahl to the same extent that it has waived its right to a jury trial against BB&T. Accordingly, both Defendants' motions to strike the jury demand should be GRANTED.

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

January 12, 2015

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

January 12, 2015

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 REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTIONS TO STRIKE JURY DEMAND*** in the above referenced 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
John P. Linton, Esquire
M. Dawes Cook Jr., Esquire
Julio E. Mendoza Jr., Esquire/Molly Hughes Cherry, Esquire

16 CHARLOTTE STREET, SUITE B • POST OFFICE BOX 547 (29402) • CHARLESTON, SOUTH CAROLINA 29403
PHONE 843-577-5410 • FAX 843-577-5650

ANDREW K. EPTING, JR., L.L.C.
ATTORNEYS AT LAW

January 13, 2015

The Honorable Roger M. Young
Circuit Court Judge
100 Broad Street, Ste. 368
Charleston, SC 29401

Re: Skywaves I Corp. v. BB&T, et al
Case No. 2009-CP-10-7516

Dear Judge Young:

BB&T's Motion to Strike and Brief did not raise the issue of "procedural versus substantive" matters. Rather, they first raised this argument in their Reply, which we received the morning of the hearing. Please accept this as Plaintiff's response.

The South Carolina Supreme Court has stated, with regard to the right to trial by jury, that "orders affecting the mode of trial (by jury) affect *substantial* rights ... and must therefore, be appealed immediately. *Lester v. Dawson*, 327 S.C. 263, 265, 491 S.E.2d 240, 241 (1997) (emphasis added). South Carolina Courts further provide: "Constitutional provisions guaranteeing the right of trial by jury are addressed to the preservation *of substance* rather than form, the object being to preserve *the substantive right* rather than to describe the details of the method by which it shall be exercised and enjoyed." *McGlohon v. Harlan*, 254 S.C. 207, 224, 174 S.E.2d 753, 761 (1970) (emphasis added), *citing* 47 Am. Jur. 2d 640, Jury § 18.

North Carolina law likewise refers to "the *substantive* right to a jury trial found in article I of the original Constitution..." *Kiser v. Kiser*, 325 N.C. 502, 506, 385 S.E.2d 487, 489 (1989). North Carolina law also dictates that "[n]o Rule of procedure or practice shall abridge *substantive* rights or limit the right of trial by jury." *Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858 (1994) (emphasis added).

Even if the issue before you were substantive versus procedural, BB&T's motion would fail. The South Carolina constitution guarantees trial by jury; BB&T's argument is that this right was waived by a *contractual provision*. Plaintiff and BB&T cannot make South Carolina procedural law – that rests solely with the legislature and courts. As to the validity of a contractual provision, (which is a quintessential substantive legal question, not procedural), according to the contract drawn by BB&T, the parties have chosen North Carolina law to govern their agreement. Further, as the contact was made in North Carolina — according to the terms BB&T drew[1] — North Carolina law would apply even in the absence of a choice

[1] See 2005 Factoring Agreement Inventory Rider ¶ 11, Financial Covenant Rider ¶ 5: The contract is "effective when duly executed by Client and thereafter accepted by BB&T in High Point, North Carolina...and, when so accepted, shall be deemed a contract made in the State of North Carolina

Andrew K. Epting, Jr. · ake@epting-law.com
Michelle N. Endemann · mne@epting-law.com
46A State Street · Charleston · South Carolina · 29401
Phone: (843) 377-1871 · Fax: (843) 377-1310

of law provision, since South Carolina choice of law rules require that the law of the place where the contact is made governs validity and interpretation of the provisions of the contract. *See Lister v. NationsBank of Del., N.A.*, 329 S.C. 133, 144, 494 S.E.2d 449, 455 (Ct. App. 1997).

Characterization of the right to a jury trial as "procedural" or "substantive" has nothing to do with the issue before the Court: the validity of a contractual waiver that BB&T is asserting. BB&T's drafted document says to look to North Carolina law. North Carolina law says the provision is unconscionable and against public policy. This Court must recognize the law the parties agreed to govern their *contract.*

With regard to Edahl's motion to strike Plaintiff demand for a jury trial, Edahl claims that he is entitled to a non-jury trial despite not being a party to the contract because he was at all relevant times BB&T's agent. However, in its Answer, BB&T has denied Edahl was its agent. For example, in response to the allegation contained in paragraph 52 of Plaintiff's Amended Complaint that, "Defendant Edahl was the agent, servant and employee of Defendant BB&T, and acted within the scope and course of his employment," BB&T responded "Defendant denies the allegations of paragraphs 51, 52, and 53." (BB&T Amended Answer ¶ 30). Edahl's motion to strike must be denied in any event as BB&T claims Edahl was not its agent for the events in question.

With kindest regards,

ANDREW K. EPTING, JR., LLC

Drew

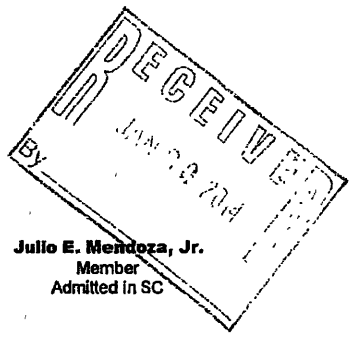
Drew Epting

AKE:rhm

Cc: Counsel of Record

and shall be governed in all respects and construed in accordance with the internal laws of the state of North Carolina."

NEXSEN|PRUET



Julio E. Mendoza, Jr.
Member
Admitted in SC

January 15, 2015

The Honorable Roger M. Young
Circuit Court Judge
Charleston County Courthouse
100 Broad Street, Suite 368
Charleston, SC 29401

Re: Skywaves I Corporation v. Branch Banking and Trust Company, *et al.*,
Case No. 2009-CP-10-7516

Dear Judge Young:

In regard to BB&T's motion to strike Plaintiff's jury trial demand, Drew Epting's recent letter to you raises points which warrant a response. BB&T filed its Reply the morning of the hearing because Plaintiff served its memorandum in opposition to BB&T's motion the afternoon of Thursday, January 8, 2015. In its Reply, BB&T responded to the choice of law question with the discussion of the "procedural versus substantive" nature of matters.

Although Mr. Epting's letter presents arguments on the "procedural versus substantive" issue, none of the cases cited in his letter involve the issues of whether the right to a jury trial is a procedural matter or a substantive matter, and whether a choice of law provision is or is not effective with respect to a jury trial waiver. In this regard:

1. In the cited decision *McGlohon v. Harlan*, 254 S.C. 207, 174 S.E.2d 753 (1970), the court was dealing with the right of the defendant to a jury trial on the issue of whether he could be compelled to pay support to his illegitimate child – the Court found he was not entitled to a jury trial – and the Court did not determine that the right to a jury trial in a civil case is a matter of substantive law. *See* 254 S.C. at 215-17, 174 S.E.2d at 757-58. Moreover, the passage cited by the plaintiff is in the *dissent* to the decision, not in the decision itself. *See* 254 S.C. at 223, 174 S.E.2d at 761.

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

1230 Main Street
Suite 700 (29201)
PO BOX 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.540.2026
F 803.727.1478
E RMendoza@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

2. In the cited decision *Kiser v. Kiser*, 325 N.C. 502, 385 S.E.2d 487 (1989), a divorce case, the court reviewed the right to a jury trial under the North Carolina Constitution, and concluded that the husband did not have a right to a jury trial of the equitable distribution of marital property. The case did not involve a contractual choice of law provision, and, by its very nature, involved the law of the forum court.

3. In the cited decision *Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858 (1994), criminal defendants had filed a class action against the Durham, North Carolina district attorney alleging injury and violation of their constitutional rights by the district attorney's statutory authority to set the court's trial calendar. The quote from the decision in Mr. Epting's letter is actually a quote from the North Carolina Constitution, which the court used in the context of discussing whether the North Carolina General Assembly had the authority to enact procedural rules granting the district attorney the right to set the court's calendar. *Id.*, 339 N.C. at 373, 451 S.E.2d at 868. The matter did not involve any issue of the waiver of the right to a jury trial in a civil action.

4. The cited decision of *Lister v. NationsBank of Delaware, N.A., et al.*, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997), did not involve an issue of the right to a jury trial.

As set forth in BB&T's Reply, and as presented in argument at the hearing on Monday, the right to a jury trial is a procedural matter to be determined by the forum court. Put another way, the method of trial, by jury or non-jury, is determined by the local law of the forum court. *See* Restatement (Second) of Conflict of Laws § 129 (1971); and 17A Am. Jur. 2d, *Contracts* § 264. In the same way that the rules of the court governing the manner of discovery, pre-trial, trial and post-trial proceedings in this case are procedural matters, the right to a jury trial is a procedural matter. This Court does not apply the North Carolina Rules of Civil Procedure in this case, and, likewise, because this case is in South Carolina, the right to a jury trial is determined under South Carolina law.

Finally, this letter will confirm that BB&T admits that Mr. Edahl was its employee when the financing at issue was provided under the Factoring Agreement. In denying the allegations of paragraph 52 of the Amended Complaint, BB&T was responding to the entirety of the allegations therein that, "At all times relevant hereto, Defendant Edahl was the agent, servant and employee of Defendant BB&T, and acted within the scope and course of his employment." BB&T does not deny that Mr. Edahl was its employee, and thus its agent, in the financing provided under the Factoring Agreement. Mr. Edahl is entitled to enforcement of the jury trial waivers, as set forth in the Reply he filed on January 12, 2015.

With best regards,

Rick Mendoza

Julio E. Mendoza, Jr.

JEM/jeb
cc: Andrew K. Epting, Jr., Esquire
George J. Kefalos, Esquire
John P. Linton, Sr., Esquire
Oana D. Johnson, Esquire
Molly H. Cherry, Esquire
J. W. Nelson Chandler, Esquire

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

Skywaves I Corporation)
☒ Plaintiff)

v.)

Branch Banking And Trust Company, Et Al.)
☐ 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:
John P. Linton, Bar No. 3346 Address: 96 Broad Street Charleston, SC 29401 phone: 843-720-2044 fax: 843-720-2047 e-mail: jlinton@duffyandyoung.com other:	See Certificate Of Service, 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 for Reconsideration
Estimated Time Needed:20 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 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: _____

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

632

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

Civil Action: 2009-CP-10-07516

Plaintiff's Motion to Reconsider Order Granting Defendant Edahls' Motion to Strike Plaintiff's Demand for Jury Trial

Plaintiff hereby moves for reconsideration of the Order dated February 5, 2015 for the reasons set forth in the attached memorandum in support of the motion.

FILED
2015 FEB 18 PM 3:28
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Brian C. Duffy
John P. Linton
Seth W. Whitaker
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
Telephone: (843) 720-2044
Facsimile: (843) 720-2047
Attorneys for Plaintiffs

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

Civil Action: 2009-CP-10-07516

FILED
2015 FEB 18 PM 3:28
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER

COMES NOW Plaintiff, SKYWAVES I CORPORATION ("Skywaves"), by and through its undersigned counsel, and files this Memorandum in Support of its Motion to Reconsider the Court's Order of February 9, 2015 granting Defendants' Motion to Strike Jury Trial.

In his speech to the French people, "Sleep to Gather Strength for the Morning," Winston Churchill said: "You will excuse my speaking frankly, because this is not a time to mince words." In this spirit, Plaintiff addresses Your Honor with candor about the enigmatic conclusion in his Order adopting Defendants' position that Plaintiff waived its constitutional right to a jury trial in a form contract that is repugnant to the law of the state whose law it chooses to govern it. The proper application of several propositions of law relied upon by Your Honor should have compelled the opposite conclusion. Respectfully, Plaintiff submits that Your Honor has reached that a manifestly incorrect conclusion.

Your Honor has correctly observed that the freedom to contract "is no small part of a citizen's liberty." (*See* Order at p. 4). The issue is whether that freedom allows the parties to choose North Carolina law to govern their contract, where the contract was performed, at least in

part, in North Carolina and was formed in North Carolina. (*See id.* Order ¶ 25). BB&T exercised its freedom to contact and unambiguously imposed the condition that: "[a]ll acts, transactions, rights, and liabilities under this Agreement shall be governed in all respects by, and in accordance with, the internal laws of the State of North Carolina." BB&T declared that North Carolina law governed any questions or enforceability of that agreement.

With regard to the putative waiver of a jury trial, the Factoring Agreement, the written agreement relevant to at least some of Plaintiff's claims, provides "*to the full extent permitted by applicable law*, Client ... waives trial by jury on any issue in any way pertaining to this Agreement or any transaction or occurrences arising hereunder or governed hereby." Section 25 of that Agreement, entitled "Applicable Law," declares in BOLD BLACK that the internal law of North Carolina governs that agreement.

BB&T, the sole author of the Factoring Agreement, chose North Carolina law to govern that contract. Thus, the putative jury trial waiver in the agreement must be circumscribed by the qualifying language "to the fullest extent provided by law." The Defendants admit that North Carolina law is clear that jury trial waivers are inherently unconscionable and unenforceable. *See* N.C. Gen Stat. Ann 22-B-10 ("[A]ny provision in a contract requiring a party to a contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable."); *accord GMAC Comm. Mortg. Corp. v. Roberts*, 2005 WL 7084823, at *2 n.3 (S.C. Ct. App. Oct. 12, 2005) ("Under North Carolina law, a provision for the waiver of the right to a jury trial is unconscionable and unenforceable.").

Defendant has not cited to any South Carolina case even discussing whether South Carolina courts would dishonor the parties' contractual choice of law in the circumstances presented in this case. There is none. The fact North Carolina law might produce a different outcome from applying South Carolina law is not a reason to disregard North Carolina law,

particularly since the parties have chosen it. The result is different because the parties, as part of their freedom to contract, chose North Carolina law. Actually, the Court should not permit the bank, having chosen North Carolina law (particularly with it being headquartered in North Carolina) to circumvent North Carolina's strong policy against such unconscionable contracts simply because it does not like the result in this case. If BB&T wanted to have an enforceable jury trial waiver, it should not have selected North Carolina law to govern the parties' agreement.

Although the Order discusses several propositions of law, the Order's legal foundation is unclear. The discussion about procedure and substantive rights cannot support the holding, as those cases deal with rules of construction in the absence of a contractual choice of governing law. Likewise, the annotation discussing the statute of limitation does not justify the decision to deny a trial by jury.

The right to a jury trial certainly can be waived, and North Carolina fully recognizes that a party's conduct after the filing of a lawsuit can constitute a waiver. North Carolina, however, offers protection for prospective jury waivers in contracts governed by its law. That protection precludes precisely the type of waiver that the bank seeks to enforce here. *See Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439. Although the Order concluded the waiver was intentional, no testimony supports that conclusion. Former Skywaves CEO Mr. Konersmann, who was deposed for two days, was not asked whether he was aware of the waiver. He recalls no discussion about the paragraph and was presented with a stack of documents at the bank to sign. (Konersmann Affidavit). Perhaps the Court would have been entitled to find a waiver if under South Carolina law governed the contract, but the finding that there was actual knowledge to support an intentional waiver is not supported in the record.

Plaintiff respectfully raises related issues concerning the causes of action at issue and that under a South Carolina case, the waiver does not apply to Defendant Edahl. The Court describes

this action as containing "all causes of action in contract." This is in error. There are claims pending in tort as well. These deal with numerous misrepresentations and other wrongful conduct in the tort claims. The tort claims are not encompassed with the alleged written waiver. They are not based on the factoring agreement "or any transaction or occurrence arising hereunder," but deal with separate representations and conduct.

In accordance with established precedent involving equity and law causes of action with similar or overlapping facts, the jury matters must be tried first in recognition of the preeminence of Plaintiff's right to have jury matters to be submitted to a jury before non-jury matters are considered. *North Carolina Federal Savings and Loan Ass. v. Day Corp.*, 298 SC514 , 381 S.E.2d 903 (1989): *Plantation Fed. Bank v. Gray*, 401 SC 507, 737 S.E.2d 515 (Ct App 2013) actions at law to be tried before non-jury matters.

Finally, Defendants argued that the waiver of jury trial applies to the Defendant Edahl. In a related case, at the urging of these Defendants, the Supreme Court concluded Skywaves' investors could not pursue claims because any duty the Defendants owed was to Skywaves. Yet, Edahl now claims that he is a beneficiary of rights bestowed in the same contract. The court said: "Thus, despite Appellants' assertions to the contrary, the choice of law provision found in the factoring agreement and selecting North Carolina law is irrelevant as Appellants are neither parties nor intended third-party beneficiaries to the contract." *Kerr, et al. v. BB&T and Edahl* Opinion 27379 (April 9, 2014). While BB&T established mutuality of waiver, Edahl did not, and he should not be permitted to simultaneously disavow and claim third-party benefits of the same contract to suit his own needs. In *North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 416 S.E.2d 637 (1992), our Court held waiver of a jury trial applied to landlord and tenant *but not* to guarantors. Surely if the waiver was not effective for a guarantor, Edahl cannot claim plaintiff waiver of jury trial applies to him.

In the alternative, Plaintiff respectfully submits that Your Honor should vacate its order and empanel an advisory jury for trial. If your honor was convinced the plaintiff effectively waived a jury trial at the conclusion of the case, but recognizes there is no precedent controlling, an advisory jury could publish its recommendation. Plaintiff could then appeal from the failure to have a binding jury verdict. If Plaintiff succeeds on appeal, the jury verdict would be adopted. If not, the court could accept the advisory verdict, or issue its order in accordance with its view of the facts. This might avoid an immediate appeal which otherwise is required for plaintiff to protect its rights. The appellate process will inject a lengthy delay into this case that is already four years old. If Your Honor refuses to reconsider his decision that Plaintiff waived its right to a jury trial, an advisory jury could be an efficient tool for the Court. This procedure would certainly promote judicial efficiency. If Defendants succeed on appeal, the Court will have the benefit of an advisory jury's view of the evidence to assist Your Honor in ruling on the case.

CONCLUSION

For all of the foregoing reasons, this Court should grant Plaintiff's Motion to Reconsider the Court's Order of February 9, 2015 granting Defendants' Motion to Strike Jury Trial.

This 19th day of February, 2015 at Charleston, South Carolina.

Brian C. Duffy
John P. Linton
Seth W. Whitaker
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
Telephone: (843) 720-2044
Facsimile: (843) 720-2047
Attorneys for Plaintiffs

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.com Other: _____	_____, 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 Amend Complaint
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: $_____
☐ 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

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

639

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

Civil Action: 2009-CP-10-07516

NOTICE OF MOTION AND MOTION TO AMEND FIRST AMENDED COMPLAINT

FILED
2015 APR 13 PM 4:35
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Plaintiff hereby moves to amend its First Amended Complaint in the following respects: (a) to add allegations regarding negligent misrepresentation; (b) to reinstate its cause of action for fraud, which will incorporate additional factual allegations in the proposed Second Amended Complaint; (c) to reinstate its cause of action for violation of the statutory Unfair Trade Practices Act, but based upon the application of the North Carolina Unfair Trade Practices Act (N.C. Gen. Stat. § 75-1.1.); (d) to add a cause of action for breach of fiduciary duty; and (e) to add or supplement causes of action for equitable estoppel, for the wrongful manner in which BB&T terminated the parties' agreements which violated equity and good conscience , and constituted bad faith and unfair dealing, all in violation of law. Specifically, Skywaves seeks leave to file the proposed Second Amended Complaint attached hereto as Exhibit A. Skywaves supports (or will support) this Motion with the factual recitation in its Memorandum of Law in Opposition to the Defendant's Motion for Summary Judgment, which it will file after an important factual deposition scheduled for March 26, 2015 and which is incorporated by reference as if set forth at length herein. The Motion is further supported by facts that have been developed through discovery in this matter as well as the Memorandum in Support of this Motion that Plaintiff will submit in due course.

640

Counsel for Plaintiff certifies that they have consulted with counsel for Defendant BB&T and counsel for James Edahl regarding this motion and have not been able to obtain consent.

GEORGE J. KEFALOS, PA
George J. Kefalos, Esquire
Oana D. Jonson, Esquire
46 A State Street
Charleston, SC 29401
george@kefaloslaw.com
oana@kefaloslaw.com

DUFFY & YOUNG, LLC
John Linton, Esquire
96 Broad Street
Charleston, SC 29401
Phone 843.720.2044| Fax 843.720.2047
jlinton@duffyandyoung.com

BARNWELL, WHALEY PATTERSON & HELMS, LLC
M. Dawes Cooke, Jr., Esquire
John W. Fletcher, Esquire
PO Drawer H
Charleston, SC 29402
MDC@barnwell-whaley.com
jfletcher@barnwell-whaley.com

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

On this 8th day of April, 2015
Charleston, South Carolina

641

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT Civil Action: 2009-CP-10-7516
SKY WAVES I CORPORATION, Plaintiff	Second 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	

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. 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. 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

5. 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.



Pet. App. 924

6. 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.
7. From 2005 through 2007, Skywaves and BB&T occasionally amended the terms of the factoring agreement via written modifications.
8. From 2005 through 2007 BB&T funded the working capital needs of Skywaves via the factoring agreement and in doing so, became intimately familiar with Skywaves' operations, its plans for future development and its financial needs.
9. During that time BB&T came to recognize Skywaves potential for growth and profit and became interested in taking Skywaves to and IPO.
10. During that time period, BB&T designated Defendant Edahl as a relationship manager whose job was to (a) bring a level of expertise that earns Skywaves attention and loyalty by applying industry knowledge (b) was to become a trusted- and not easily replaced-source of advice and insight (c) and to provide continuity and leadership to the BB&T team servicing Skywaves (d) assist Skywaves in raising additional capital through investors and (e) provide advice in ways that builds Skywaves trust and to be mindful of the full range of Skywaves needs.
11. BB&T expected Skywaves to believe the relationship manager James Edahl was speaking for the BB&T and it could rely on what he said.
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.

643

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

14. Skywaves received a $4 million proposal for an equity investment of working capital from Hunt Capital.

15. At the same time, BB&T was interested in securing Skywaves' ongoing business in order that it might profit from an IPO, and in an effort to persuade Skywaves to decline the $4 million equity investment and allow BB&T to provide the funding necessary for its growth, represented that:

    a. it was familiar with Skywaves needs; and

    b. it had designed a unique funding program for Skywaves that would be the equivalent to a capital investment; and

    c. this program included BB&T's agreement to advance capital on the basis of future anticipated business, such advances were not due until the orders for the future business materialized and Skywaves was paid;

    d. this program would provide funding and guidance for Skywaves through its anticipated expansion to an IPO.

    e. it would satisfy any cash flow needs and

    f. a capital investment was imprudent because it would unnecessarily dilute existing shareholders investment.

16. BB&T intended that Skywaves rely on the above representations.

17. 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.

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

644

19. 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).

    a. Under this modified factoring agreement, BB&T agreed, among other things, to provide capital infusions based on invoices, purchase orders, contracts, and future business (known as site plans). Money advanced on the basis of site plans was to be repaid only after the sites were developed and an invoice issued.

    b. Under this modified factoring agreement BB&T agreed to allow a 60 day grace period to remit payment on invoices.

20. Based on its reliance of the availability of credit as described above Skywaves incurred large expenses, including for installation of an additional production line and employment and training of employees.

21. 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.

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

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

24. 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)

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

26. 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.

645

27. Under this modified factoring agreement, BB&T agreed, among other things, to provide capital infusions based on invoices, purchase orders, contracts and future business (known as site plans).

28. Specifically BB&T agreed to provide funding for Skywaves based on future business opportunities (known as site plans). Such funding was not to be repaid until the orders for the future business materialized and Skywaves was paid. In this way BB&T advanced approximately $1.2 million dollars.

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. Specifically, BB&T demanded repayment of the aforesaid $1.2 million without prior notice, without cause and before the money was due.

32. Plaintiff is entitled to damages for breach of contract, in an amount to be established at trial, plus costs and attorney's fees, plus pre-judgment under North Carolina law.

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

33. The Plaintiff incorporates the allegations contained above as if fully set forth verbatim.

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

646

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 threatened Skywaves directors with criminal prosecution and 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 plus pre-judgment under North Carolina law.

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

40. The Plaintiff incorporates the allegations contained 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 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. Defendant BB&T breached the implied covenant of good faith and fair dealing in the following respects:

    a. In failing and refusing to honor the terms of the parties' agreement; and

    b. In terminating the agreement without giving Skywaves the opportunity to obtain alternate financing; and

    c. In terminating the agreement with accusations of fraud and criminal wrongdoing making it impossible to obtain alternate financing; and

    d. In encouraging members of the Board and investors to contribute new money to Skywaves with assurances of continued bank financing when the bank had in fact determined to limit the line of credit and was considering not renewing the line;

    e. in terminating the agreement in a way that caused unnecessary harm to Skywaves;

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

52. 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.

53. 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.

54. 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.

55. 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;

649

c. that Defendants believed Skywaves was strategically positioned for success;

d. that Defendants wanted to take Skywaves to a sale or stock IPO;

e. that it had devised a funding program tailored exclusively for Skywaves, not in keeping with their ordinary contract and course of business with other customers;

f. that the program it had devised would finance 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.

g. 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.

56. 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.

57. 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

650

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

58. 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 was acting 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 had committed to funding Skyway's growth based on invoices, purchase orders, contracts and future business (site plans).

59. By and through these undertakings BB&T changed the relationship from a conventional banker/customer relationship and became a trusted advisor:

a. who guided Skywaves' growth, development and expansion;

b. who directed Skywaves' financial and banking operations and

c. made Skywaves wholly dependent on BB&T.

60. These undertakings gave BB&T a unique power and influence over the day to day operations of Skywaves.

61. By and through these undertakings BB&T became a fiduciary such that Skywaves was justified in trusting, believing and relying upon the representations, advice, and guidance provided by BB&T.

62. BB&T was aware Skywaves trusted, believed and relied on the representations, advice, and guidance provided by BB&T.

651

63. BB&T intended that Skywaves trust, believe and rely on the representations, advice, and guidance provided by BB&T.

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

65. Defendants owed a duty of care to see that they communicated truthful information to the Plaintiff.

66. 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.

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

68. Skywaves relied on the above-referenced representations and followed BB&T's recommendations for growth and expansion and made 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.

69. 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.

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

71. In point of fact, at the time Defendants made the above-detailed representations, they had no intention of fulfilling their promises to BB&T.

72. 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.

73. 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.

74. 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)

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

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

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

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

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

80. Such reliance was reasonable under the circumstances.

81. 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)

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

653

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

84. Defendants undertook to devise a funding plan for Skywaves that it said would be similar to a capital based lending program or a capital investment proposed by Hunt Capital.

85. 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.

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

87. 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.

88. 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.

89. 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.

90. Defendants breached this duty in that the financing program they devised was wholly inappropriate for a startup business such as Skywaves as even BB&T now admits.

91. 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.

92. 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.

654

93. 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.

94. 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.

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

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

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

97. The North Carolina Unfair Trade Practices Act (N.C. Gen. Stat. § 75-1.1.) governs this action and prohibits any unfair or deceptive trade practices in the conduct of any trade or commerce.

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

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

100. The North Carolina Unfair Trade Practices Act (N.C. Gen. Stat. § 75-1.1.) 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.

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

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

103. Defendants' unfair and deceptive acts and practices were conducted willfully and knowingly as those terms are utilized in the North Carolina Unfair Trade Practices Act (N.C. Gen. Stat. § 75-1.1.)

104. Defendants' conduct as alleged herein constitutes violations of North 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.

FOR AN NINTH CAUSE OF ACTION
PRE-JUDGMENT INTEREST
(Plaintiff v. BB&T and Edahl)

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

106. Plaintiff is entitled to pre-judgment interest under North Carolina law.

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;

d) For pre-judgment interest; and

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

GEORGE J. KEFALOS, PA

_____
GEORGE J. KEFALOS
46A State Street
Charleston, SC 29401

656

BARNWELL, WHALEY PATTERSON &
HELMS, LLC
M. Dawes Cooke, Jr., Esquire
PO Drawer H
Charleston, SC 29402
MDC@barnwell-whaley.com

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

Duffy & Young, LLC
John Linton, Esquire
96 Broad Street
Charleston, SC 29401
Phone 843.720.2044| Fax 843.720.2047
jlinton@duffyandyoung.com

On this ___ day of April, 2015
Charleston, South Carolina

George J. Kefalos P.A.
ATTORNEYS AT LAW

George J. Kefalos, Esquire
george@kefaloslaw.com

April 9, 2015

The Honorable Julie Armstrong
Clerk of Court, Charleston County
100 Broad Street
Charleston, SC 29401

RE: Skywaves 1 Corporation et. Al v. BB&T and James Edahl

Dear Ms. Armstrong,

Enclosed for filing please find the original and one copy of the Notice of Motion and Motion to Amend First Amended Complaint together with Plaintiff's Memorandum in Support in the above-referenced matter. I have also enclosed my firm's check in the amount of $25.00. I would greatly appreciate your filing the originals and returning the file stamped copies to me in the self-addressed, stamped envelope provided.

Very truly yours,

s/ *George*

George J. Kefalos

GJK/agg
Enclosures

46A State Street • Charleston, SC 29401
Tel: (843) 722-6612 • www.kefaloslaw.com • Fax: (843) 377-1310

FILED
2015 APR 13 PM 4:55
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

Civil Action: 2009-CP-10-07516

MEMORANDUM IN SUPPORT OF MOTION TO AMEND FIRST AMENDED COMPLAINT

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

INTRODUCTION

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

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

659

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

(a) Skywaves failed to allege fraudulent conduct to support its breach of contract accompanied by a fraudulent act claim (Count 2);

(b) Skywaves' fraud and negligent misrepresentation claims (Counts 5 and 6) failed because there was no allegation of a misrepresentation of a presently existing fact and no right to rely on same;

(c) Skywaves' negligence claim (Count 7) failed because Defendants owed no duty of care to Skywaves;

(d) Skywaves' South Carolina Unfair Trade Practices Act claim (Count 8) failed because the claimed conduct did not impact the public interest and was not "capable of repetition."

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

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

660

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

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

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

(a) Adding allegations regarding negligent misrepresentation;

(b) Reinstating its fraud count with additional factual allegations;

(c) Reinstating its statutory cause of action for unfair trade practices, but based on the North Carolina Unfair Trade Practices Act (N.C. Gen. Stat. § 75-1.1.);

(d) Adding a cause of action expressly for breach of fiduciary duty; and

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

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

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

ARGUMENTS

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

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

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

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

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

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

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

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

663

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

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

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

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

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

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

664

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

> "The central requirement here is that the party defending against the new claim have sufficient notice of it, i.e., 'the new claim must be 'logically related' to the matters originally pleaded so that the defendant is not prejudiced by the new claim asserted after the statute of limitations has expired.'" *Whitfield Constr. Co. v. Bank of Tokyo Trust Co.*, 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Ct. App. 1999) (*quoting* James F. Flanagan, South Carolina Civil Procedure 127 (2d ed. 1996)) (emphasis in original).
>
> > In federal practice, the factors to determine whether or not a claim arose out of the same conduct, transaction, or occurrence set forth in the original pleading include: (1) whether the party defending against the new claim had notice of it; (2) whether the party seeking to add the new claim will rely on the same kind of evidence offered in support of the original claim to prove the new claim; and (3) whether unfair surprise to the defending party would result if the amendment were to relate back.
>
> *Id.* (*citing* James Wm. Moore, Moore's Federal Practice § 15 .192 (Daniel R. Coquillette et al eds., 3d 1999)).

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

665

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

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

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

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

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

GEORGE J. KEFALOS, PA
George J. Kefalos, Esquire
Oana D. Jonson, Esquire
46 A State Street
Charleston, SC 29401
george@kefaloslaw.com
oana@kefaloslaw.com

DUFFY & YOUNG, LLC
John Linton, Esquire
96 Broad Street
Charleston, SC 29401
Phone 843.720.2044| Fax 843.720.2047
jlinton@duffyandyoung.com

BARNWELL, WHALEY PATTERSON & HELMS, LLC
M. Dawes Cooke, Jr., Esquire
John W. Fletcher, Esquire
PO Drawer H
Charleston, SC 29402
MDC@barnwell-whaley.com
jfletcher@barnwell-whaley.com

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

On this ___ day of April, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO AMEND FIRST AMENDED COMPLAINT** has been served upon each of the 667

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Skywaves I Corporation ☒ Plaintiff v. Branch Banking And Trust Company, Et Al. ☐ 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:
John P. Linton, Bar No. 3346 Address: 96 Broad Street Charleston, SC 29401 phone: 843-720-2044 fax: 843-720-2047 e-mail: jlinton@duffyandyoung.com other:	See Certificate Of Service, 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 Answers
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.

_____ April 6, 2010
Signature of Attorney for ☒ Plaintiff / ☐ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ 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: _____

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

668

SCCA/233 (11-03)

FILED
2015 APR 16 PM 1:52
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
SKYWAVES I CORPORATION, Plaintiff,	Civil Action: 2009-CP-10-07516
vs.	**MOTION TO STRIKE ANSWERS OF DEFENDANTS BASED ON FRAUD UPON THE COURT AND UNCLEAN HANDS AND VIOLATION OF RULE 37 AND RULE 11 AND INCORPORATED MEMORANDUM IN SUPPORT**
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 hereby moves to strike Defendants' answers under the Court's inherent powers, because of Defendants' pattern of misconduct including unclean hands, discovery abuses and intentional misstatements in their pleadings and in violation of Rule 37 and Rule 11 of the South Carolina Rules of Civil Procedure.

Plaintiff has set forth the facts of this case in detail in its Memorandum in Opposition to Defendants' Motions for Summary Judgment and incorporates those facts into this Memorandum.

This motion is based first upon a fraud Defendants perpetrated upon the court for years by denying in pleadings and an affidavit that Defendant Branch Banking and Trust Company ("BB&T") had approved a modification of the parties' agreement, so as to allow advances based upon proposed purchase orders. Instead of honoring the modified agreement, Defendants accused Plaintiff of fraudulently submitting false documentation that misrepresented proposed purchase orders of General Dynamics, referred to by the parties as site plans, as actual purchase orders. Second, BB&T denied Defendant Edahl was its agent. Third, they argued in this and related litigation that a statute of frauds shielded them from the truth, in effect using that statute as a sword to perpetuate their fraud, rather than its intended purpose—to shield them against fraudulent oral assertions. Fourth, they intentionally answered an interrogatory untruthfully.

669

Deposition testimony has shown the wisdom of the old adage that the truth has no fear of trial. Yet even then they continued with their sham defenses and did not fully correct their pleadings.

BACKGROUND FACTS

Plaintiff and BB&T entered into a March 22, 2005 Factoring and Security Agreement, under which BB&T purchased certain receivables of Skywaves at a discount and agreed to collect such receivables on Skywaves' behalf. In late 2006, Skywaves' Board of Directors determined that it needed expanded financial commitments to provide capital infusion (in addition to the financing BB&T provided under the factoring agreement) to meet the increasing need after General Dynamics declared its intention to award contracts totaling approximately $32 million. Thereafter, Skywaves solicited proposals for expanded financial commitments from various entities, including a proposal for a capital investment from Hunt Capital.

Defendants' advised Skywaves to decline an equity investment of $4 million and to modify and expand the existing factoring agreement with BB&T. By July, 2007, BB&T agreed, among other things, to provide advances based on proposed purchase orders from General Dynamics. The modified agreement was not reduced to writing as required by BB&T's internal rules, which it never disclosed to Skywaves.

On January 18, 2008, BB&T breached the parties' agreement by claiming that Skywaves was in default of its $3.5 million line of credit. Defendant BB&T (through its agent Defendant Edahl) wrongfully declared Skywaves in default, claiming it had secured advances of over $1.2 million by misrepresenting future proposed contracts (site plans) with General Dynamics as actual purchase orders. Edahl did so even though he had confirmed to Skywaves, upon which it had relied, that site plans had been approved by BB&T for Skywaves to secure advances.

Numerous bank officials claimed Skywaves' actions constituted fraud. BB&T asserted that Skywaves' officers and directors could be personally liable and would be criminally culpable. Mike Hennessy, a problem account administrator who had no prior dealings with Skywaves, angrily threatened Skywaves' directors with jail. (*See* affidavit of James Kerr

attached as Exhibit A). After default was declared, Hennessy exercised control of the Skywaves matter for the Bank.

Rick Spencer, Hennessy's supervisor, has acknowledged that each problem loan administrator is guided by his discretion, with no training based upon policies, procedures, or practices. (Deposition of Richard Spencer, 23:6-11, 24:5-17).[1] He acknowledged formally counseling Hennessy as part of his personnel review to try to control Hennessy's emotional responses.

Spencer had personally observed Hennessy's flaw in his attitude towards his own team, documenting in an evaluation that "Mike can let his emotions control how he reacts with people from time to time." (Deposition of Richard Spencer, 17:21-18:2, 19:9-11). Hennessy acted unprofessionally and aggressively towards Skywaves, which he erroneously believed had defrauded BB&T out of $1.2 million. He reached the erroneous conclusion the first time he met Skywaves personnel, and was "certain" that Skywaves had defrauded BB&T. (30(b)(6) Deposition of BB&T, 166:1-173:25)[2]. Because of Edahl's lies and BB&T's inadequate investigation, BB&T terminated the parties' agreement and, within three months, Skywaves was being liquidated in bankruptcy.

DEFENDANTS' LITIGATION POSTURING AND DECEITFUL CONDUCT

BB&T flatly denied in its answer and amended answer that Edahl acted as BB&T's agent within the course and scope of his employment for four years. Ironically, the testimony proves that he was actually granted incentive pay (a bonus) for the work he performed as Skywaves' exclusive relationship officer in 2007. (Deposition of James Edahl, Vol 1, 86:20-87:3)[3]. But, when BB&T thought it would be advantageous to admit Edahl was its agent to resist a jury trial four years later, it did so. (*See* Jan. 15, ,2015 Letter of Mendoza and oral statement of Mrs. Cherry at the hearing of Jan. 15, 2015, attached hereto as Exhibit E and Exhibit F, respectively).

[1] Deposition excerpts of Richard Spencer's testimony are attached as Exhibit B.
[2] Deposition excerpts of BB&T's 30(b)(6) testimony are attached as Exhibit C.
[3] Deposition excerpts of James Edahl's Vol. 1 testimony are attached as Exhibit D.

671

Defendants also denied ever agreeing to modify the factoring agreement to permit advances based upon General Dynamics' proposed purchase orders in their Answer and their Amended Answer. They knowingly perpetrated a fraud on the court and denied the existence of the modified agreement with unclean hands. As a sanction, the Court should strike Defendants' Answers and permit Plaintiff to prove damages.

Defendants began their journey toward the truth in a 2013 deposition of James Edahl. They claimed the error in their answers was because they had *forgotten* that BB&T approved the site plan financing, even though the financing package was unique. Defendants claimed their impaired memory lasted from 2008 to 2013, including when he declared Skywaves in default, during BB&T's investigation, in filings in bankruptcy court, and in preparation of pleadings in two lawsuits and discovery responses. For five months after Edahl's ultimate admission that he had approved advances based upon site plan funding, Defendants did not amend their answers to reflect the truth, despite Plaintiff's pleas. (*See* letter Sept. 25, 2013 Linton to Cherry, attached as Exhibit G).

For years — in this court and in federal court — Defendants have contended that some of Plaintiffs' claims may be barred under S.C. Code §37-10-107 and denied that BB&T ever agreed through its agents to provide funding based on General Dynamics' proposed purchase orders, called site plans. For seven years, BB&T denied it had agreed to advance funds based on site plans. For over four years, Defendants' fraudulent denial was memorialized in pleadings and an affidavit submitted in federal court. Over a year ago, based on its own witness' testimony, BB&T finally conceded that it had agreed to fund on site plans. Their current Answers say they only agreed to lend "to a limited extent, with certain limitations on the amount being factored."

Earlier this year, BB&T's Rule 30 (b)(6) designee, Michael Hennessy— the same person who accused Skywaves of fraud and claimed Skywaves' principals would go to jail for bank fraud — admitted that Skywaves was "in full compliance" with the parties' modified agreement when it obtained the $1.2 million advance. Edahl has admitted that he had testified dishonestly and that BB&T had made the modified agreement. Despite his concession (made only after 672

years of litigation), Defendants amended their answers in a self-serving way that fails to acknowledge the complete truth and continues to assert the statute of frauds as a sham defense.

Further, just weeks ago BB&T answered an interrogatory dishonestly. It was asked about the date it first claimed Skywaves was in default. BB&T answered January 25, 2008, the day that BB&T sent a letter which set forth a pretextual basis for default. In reality, Edahl's memorandum of January 18, 2008 documented that BB&T declared Skywaves in default — not for the three contrived reasons later stated — but because Skywaves had secured $1.2 million in advances under the site plan program. (BB&T Document SL/EM_000001, attached hereto as Exhibit H). Yet, it persisted with its disdain for the truth in its answers to supplemental interrogatories, served March 23, 2015.

Defendants perpetrated an artifice on the Court by denying in pleadings and elsewhere that BB&T modified the line of credit to permit advances based upon the proposed contract with General Dynamics. Defendants removed the case to United States district court on the baseless premise that Defendant Edahl (who made numerous misrepresentations to Plaintiff) was fraudulently joined to destroy diversity. The District court rejected Defendants' arguments and remanded the case back to this Court, granting Plaintiff a substantial award of attorneys' fees. In the proceedings in federal court, BB&T filed a false affidavit from Edahl, which claimed that all funding commitments were written and in accordance with customary practice. Edahl subsequently admitted in his second deposition that paragraph 10 of his Affidavit filed in U.S. District Court was "false," and he knew it was false when he signed it. (Deposition of James Edahl, Vol 2, 46:18-47:11).[4]

In 2014, Defendants finally amended their Answers, but failed to acknowledge that Skywaves had complied with the parties' modified agreement. Defendants qualified their admission by stating that BB&T agreed to "finance site plans, to a limited extent, with certain limitations on the amount being factored." (*See* Amend. Answer, 14, 21, 28).

[4] Deposition excerpts of James Edahl's Vol. 2 testimony are attached as Exhibit I.

673

A year later Edahl confirmed that, far from being mistaken, he had testified dishonestly in 2013 and had lied for five years. BB&T conducted a second fraud investigation. This time it examined Edahl's conduct and terminated him for his dishonesty. His personnel file reflects that BB&T terminated him because he "admitted to false statements." (BB&T document BB&T/PA 003833, attached as Exhibit J). Later, Edahl was redeposed and in effect admits that he perjured himself in his 2013 deposition.

Michael Hennessy, as BB&T's Rule 30(b)(6) designee, testified Skywaves was in full compliance with the modified agreement (General Dynamics site plan funding):

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

(*See* BB&T's 30(b)(6) Depo., at 31:14-23).

Certainly, in order to protect its integrity, the Court may elect to refer this matter to the Solicitor and to the United States attorney; however, the Court is not otherwise powerless to sanction Defendants. The Court's inherent power and the doctrines of judicial estoppel and unclean hands justify sanctions for Defendants' misrepresentations to the Court. Defendants' fraud on the Court was pervasive, duping their own esteemed and completely honorable counsel who relied on information from their clients to state earlier that "from BB&T perspective, there were some fraudulent documentations submitted in terms of what BB&T was advancing money off of." (*See* Transc., at 9). Over time, BB&T has been forced to concede that Edahl approved site plan funding and that it wrongfully accused Skywaves of fraud. Yet, Defendants have not apologized to Skywaves for their accusations and denial and their pattern of misbehaviors remains unchecked.

674

For the reasons that follow, this Court should strike Defendants' answers as a sanction for their plainly fraudulent and inappropriate conduct.

If Defendants dispute Plaintiff's factual assertions herein , Skywaves requests that the Court conduct an evidentiary hearing to require Defendants to provide sworn testimony in Your Honor's presence, so you can observe the demeanor of the witness, and ask such questions as you may think desirable. The Court will be disappointed in Defendants' conduct when it closely examines BB&T's investigation and Defendants' false statements to this Court.

ARGUMENTS

I. THE INHERENT POWER OF THE COURT

"A trial court has the inherent 'power to protect itself from indignities and to enable it effectively to administer its judicial functions.'" *State v. Brantley*, 279 S.C. 215, 217, 305 S.E.2d 234, 235 (1983) (citations omitted). Defendants have, through perjury and artifice, inflicted a significant indignity upon the Court in an effort to prevent Skywaves from obtaining justice. After years of proceedings, Skywaves finally ferreted out the truth. The Court should penalize Defendants for their misconduct by striking their Answers.

In *Chewning v. Ford Motor Co.*, 354 S.C. 72, 579 S.E.2d (2003), the Supreme Court noted that fraud on the court "requires a showing that one has acted with bad faith or and intent to deceive or defraud the court." Plaintiff respectfully posits that testifying falsely and submitting a false affidavit is the personification of such bad faith and knowingly interposing the statute of frauds as a defense to perpetuate a fraud is deceitful. Likewise, denying Edahl was its agent for conduct for which it paid him a bonus is worse than bad faith. It is shocking and odious. For over four years BB&T has demonstrated its disrespect to the Court. Its conduct is flagitious and insulting to the Court.

The Court possesses inherent authority over a party that comes to court with unclean hands. Nothing, other than tampering with a jury, is more menacing to the judicial process than a party's perjury or the filing of an untrue pleading that has no merit and was filed in bad faith. "The power to punish for contempt is inherent in all courts. Its existence is essential to the

675

preservation of order in judicial proceedings . . . and consequently to the due administration of justice." State v. Goff, 228 S.C. 17, 22, 88 S.E.2d 788, 790-91 (1955)

II. UNCLEAN HANDS

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

The protection afforded by the statue of frauds is a personal privilege of the parties to the agreement and may be waived by them. *See Walker v. Preacher*, 188 S.C. 431, 199 S.E. 675, 677 (1938). The law has long been settled in South Carolina that a party's admission may obviate a statute of frauds defense. More than 200 years ago, in *Smith v. Brailsford*, 1 Desaus. 350 (1794), the Court stated that a defendant "[h]aving acknowledged the agreement, the court considers it such an assent in writing, as overrules his plea of the statute of frauds." *See also Robert Harmon & Bore, Inc. v. Jenkins*, 282 S.C. 189, 193, 318 S.E.2d 371, 373-74 (Ct. App. 1984); *Wallace v. Dowling*, 86 S.C. 307, 69 S.E. 571 (1910); *accord Gibson v. Arnold*, 288 F.3d 1242, 1246-47 (10th Cir. 2002) ("[V]irtually every court that has addressed the issue during the last twenty-five years has held that judicial admissions are an exception to the statute of frauds."); *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 142 (6th Cir. 1983) (applying exception to statute of frauds in context of deposition admission); *Litzenberg v. Litzenberg*, 307 Md. 408, 514 A.2d 476, 480 (1986) (recognizing exception to statute of frauds applying to

admissions by sworn testimony, deposition, or pleadings); *Powell v. City of Newton*, 200 N.C. App. 342, 684 S.E.2d 55 (N.C. Ct. App. 2009) (enforcing settlement made orally in open court).[5]

Ironically BB&T and Edahl have attempted to convert a statute of frauds, designed as protection from spurious claims, to shield them from the truth. Edahl's sworn testimony that BB&T had modified the terms of financing satisfies the statute of frauds and waived that defense. Moreover, Mike Hennessy's testimony as BB&T's Rule 30(b)(6) designee binds BB&T. Defendants cannot dispute that the real reason for their wrongful termination of the agreement and contumacious conduct in this litigation is a lie. Defendants' unclean hands in dealings with Skywaves and this Court preclude it from seeking shelter from Skywaves' claims. This Court should not tolerate Defendants' dishonest conduct, which has ruined Skywaves financially, caused unnecessary litigation expense and offended this Court's very power.

III. JUDICIAL ESTOPPEL

Judicial estoppel is intended to ensure the integrity of the judicial process. *See Hawkins v. Bruno Yacht Sales*, 342 S.C. 352, 536 S.E.2d 698 (Ct. App. 2000); *accord Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) (*citing Hawkins v. Bruno Yacht Sales*, 353 S.C. 31, 42, 577 S.E.2d 202, 208 (2003) ("The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary."). The elements of judicial estoppel are well-settled:

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

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

Defendants' actions satisfy these requirements. Defendants knowingly took a false positions, unsupported by the evidence, for years in this litigation. They have received

---

[5] For unknown reasons, Defendants have cited South Carolina cases on this issue, despite the contract selecting North Carolina law to apply.

substantial benefit in this litigation and other related litigation from taking these positions. Now, they have been caught in their lies.

An evasive or incomplete answer is to be treated and a failure to answer. SCRCP 37(a)(3); *Young v. South Carolina Dep't of Disabilities & Special Needs*, 374 S.C. 360, 371, 649 S.E.2d 488, 493 (2007). Rule 37(a) does not affect situations in which a court may impose discretionary sanctions under Rule 37(b). *See Young*, 374 S.C. 360, 371, 649 S.E.2d 371, 494.

In *Kilcawley v. Kilcawley*, 312 S.C. 425, 440 S.E.2d 892 (S.C. Ct. App. 1994), the court reminded the bar that under SCRCP Rule 11(a) "The signature of an attorney . . . constitutes a certificate by him that he has read the pleading, motion or other paper; that *to the best of his knowledge, information and belief there is good ground to support it*; and that it is not interposed for delay." *Id.* at n.2 (emphasis in original). In *Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 713 S.E.2d 624, 628 (2011), the court stated that SCRCP Rule 11 "still may be violated with a filing that is so patently without merit that no reasonable attorney could have a good faith belief in its propriety." *Id.* at 598, 713 S.E.2d at 628. Defendants caused their counsel to file an evasive and incomplete answer and to answer discovery in violation of the above cited cases because Defendants' deception was not only of the Court, the adverse parties and its counsel . . . but of its own counsel.

CONCLUSION

It is insignificant whether the Court views Defendants conduct through the prism of unclean hands, judicial estoppel, or any other doctrine intended to protect the integrity of the justice system. Defendants' pattern of conduct was willful, wanton, and reckless, exhibiting a distain for the truth. Defendants acted with disrespect to the other parties and contempt for the Court. While dismissal or striking of an answer is an extreme sanction, it is available for a reason. As a remedy, it serves to discipline parties such as Defendants and to give fair notice to others that the Court will not condone dishonest obstructionism. Our courts have exercised this sanction judiciously, but firmly; if the reported appellate decisions are any examples, courts have been imposing the sanction with greater frequency in recent years. *See, e.g., McNair v. Fairfield* 678

Cty., 379 S.C. 462, 665 S.E.2d 830 (Ct. App 2008); *QZO, Inc. v. Moyer*, 358 S.C. 246, 257, 594 S.E.2d 541, 548 (Ct. App 2004); *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 596 S.E.2d 572, 575; *Griffin Grading & Clearing v. Tire Serv. Equip. Mfg. Co., Inc.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999); *Halverson v. Yawn*, 328 S.C. 618, 493 S.E.2d 883 (Ct. App. 1997); *Horry County v. Aquasino Partners of S.C., LLC*, 2014 WL 2589852 (Ct. App. April 2, 2014) (unpublished).

Dishonest testimony and false pleadings taint the judicial process, like an open sewer pollutes a river, to paraphrase Justice Douglas in *Berman v. Parker*, 348 U.S. 26, 33 (1954). Sanctions for such conduct are the only disinfectant available to the Court. Although the corporate Defendant is a highly successful business enterprise, its actions toward this Court are those of a miscreant, which has polluted judicial waters intentionally, consistently, and contemptuously, and thus it should be disciplined as a miscreant. Plaintiff asks that the Court maintain the quality of its judicial river, by striking Defendants' answers.

DUFFY & YOUNG, LLC
John Linton, Esquire
96 Broad Street
Charleston, SC 29401
Phone 843.720.2044| Fax 843.720.2047
jlinton@duffyandyoung.com

George J. Kefalos
GEORGE J. KEFALOS, PA
46A State Street
Charleston, SC 29401

BARNWELL, WHALEY PATTERSON & HELMS, LLC
M. Dawes Cooke, Jr., Esquire
PO Drawer H
Charleston, SC 29402
MDC@barnwell-whaley.com

679

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

On this 12th day of April, 2015
Charleston, South Carolina

EXHIBIT A

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

AFFIDAVIT OF
JAMES J. KERR

FILED
2015 APR -8 AM 10:37
JULIE J. ARM STRONG
CLERK OF COURT
BY

1. My name is Jimmy Kerr. I graduated from the Citadel in 1965 and have been in the commercial real estate market, more recently, specifically in managing, buying and selling apartment complexes. I have served on 2 bank boards and am presently Chairman of The Citadel Business School Advisory Board, the Star Gospel Mission Board, and The Board of the Barrier Island Free Medical Clinic.
2. I was an original investor in Skywaves. I own several cell towers and watched the business evolve to the point that vast expansion was imminent. The wireless business model appeared to be more viable than line service, and the concept of manufacturing a lightweight modular structure to "plug in" at a cell phone tower appeared to be a superior technology in providing the support facilities at the tower.
3. I knew Jim Edahl as he provided banking services to my other ventures. I placed great confidence in Jim as his advice in my other ventures had been quite helpful in assisting me in my decision-making. My confidence in BB&T was high as I had the opportunity to hear John Allison, its president at the time, speak at The Citadel. His comments and their literature stressed the importance of the relationship with customers and the encouragement of their loan officers to think outside the box and be creative. Jim became

in essence a member of the Skywaves Board of Directors. BB&T became investors through their unique funding model and became a board member by their advice and directions to the Board. The formative decisions about financing, the financing that ultimately led to our failure, was made by the Skywaves Board but our decisions in these regards were directed by Jim Edahl:

a. Jim advised Skywaves to "clean up" its balance sheet in part by converting shareholders loans to equity, as this would be advantageous to Skywaves in the public offering. Skywaves followed Jim's counsel. I personally followed Jim's advice.

b. Jim attended a meeting in McBee with a potential investor and encouraged the investor to invest based on the strength of the company; he told the investor he personally had designed a very unique financing package to replace the proposed equity investment, because of his strong belief in the company. The investor bought $500,000 of Skywaves stock.

c. Jim advised Skywaves to decline a $4 million offer from Hunt because Edahl advised he could design a program that would give the same attributes as equity to be used to address cash flow needs for our expansion, and further advised Skywaves would be making a mistake to dilute the existing shareholders interest, and that when the Gen Dynamics contract was in place, BB&T had the experience and capacity to underwrite an initial public offering at far less cost than an equity investor.

d. Jim actively encouraged Skywaves to expand its production capacity with the addition of another line and encouraged hiring of additional personnel to be able to service the General Dynamics contract. Skywaves followed his advice. These added expenses were substantial, exceeding perhaps $1 million for 2007. Skywaves would never have done this

if they had known the site plan financing had not been approved, or that apparently no actions were being taken internally by the bank for an IPO.

e. On several occasions as late as December, 2007, Jim told me that he was pleased with Skywaves and would be prepared to underwrite the IPO when the General Dynamics proposed contracts converted to actual purchase orders. I sought his assurance that the bank was happy with Skywaves when I put additional funds into the company in late 2007. Jim provided assurance and that the bank would continue supporting us as was their practice and would be prepared to handle the IPO.

f. In February 2008, on my first meeting with Mike Hennessey after default had been declared, I saw Jim in the BB&T office, and he advised he had been removed from the account, and that what BB&T was doing was unfair and wrong, but beyond his control. On this same day, Mike Hennessy said we (board members) were going to jail for the fraud that had been committed unless we paid $1 million dollars immediately, and had security for the full amount of indebtedness, around $2.8 million. He was abrupt, loud, accusatory and entirely unprofessional. The term "out of control" certainly would describe his demeanor.

g. Crayton Walters, who served with me on the Harbor National Bank Board, also attended the meeting with Edahl and then Hennessey, and we immediately walked to Harbor National Bank, and reported to its President, Charles Rivers, that we needed to resign as members of the board as we had been accused of criminal fraud by BB&T. Harbor was a start-up bank and we felt resignation was needed to protect the other shareholders and board members. Mr. Rivers said he would monitor the situation with us but didn't feel resignation was needed.

h. The board members were capable of raising $1 million dollars within a week, if the bank had not declared default and accused Skywaves of fraud. The assertion by BB&T that Ron Konersmann had falsified purchase orders, palming off site plans as a purchase order interfered with the normal Board. Management Relationship and impeded Skywaves ability to propose a workout. When BB&T accused Mr. Konersmann of defrauding it out of over $1.2 million dollars, while we had confidence in Mr. Konersmann, the allegations certainly had to be taken seriously, particularly when most of the Board members were investors, but not involved in the day to day management of the company. No more decisive wedge could have been driven between the board and management.

i. Skywaves was the best business model I had encountered in over 40 years of entrepreneurship. It had seasoned management. The proof of the idea is in the passage of the last 8 years. The wireless industry has soared and our concept was adopted by an ex-employee and that business itself has done extremely well. That in 2015, I am writing this affidavit about why this loss occurred and now known to all is that Skywaves was truthful throughout and BB&T acted on the basis of incorrect information is hard to accept. But even with BB&T's withdrawal of funding, except for Mike Hennessy's claim that we acted fraudulently, this business would have succeeded. These accusations made to our business colleagues, vendors, and supporters wrecked all options we had.

JAMES J. KERR

Sworn to and subscribed before me
this 7 day of April, 2015.

LIANE MARCOTULLI
My Commission Expires
NOTARY PUBLIC
11-27-2022
SOUTH CAROLINA

Notary Public for South Carolina
My Commission Expires: 11/27/22

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **AFFIDAVIT OF JAMES J. KERR** has been served upon each of the parties to this action by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

Molly Hughes Cherry, Esq.
Nexsen Pruet, LLC
205 King Street, Ste. 400
Charleston, SC 29401
Attorneys for BB&T

Julio E. Mendoza, Esq.
Nexsen Pruet, LLC
1230 Main St., Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202
Attorneys for BB&T

J.W. Nelson Chandler, Esq.
Corrigan & Chandler, LLC
PO Box 547
Charleston, SC 29402
Attorneys for James Edahl

Andrew K. Epting, Jr., Esq.
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401
Co-Counsel for Plaintiff

M. Dawes Cooke, Jr., Esq.
Barnwell Whaley Patterson and Helms
288 Meeting St., Suite 200
Charleston, SC 29401
Co-Counsel for Plaintiff

George J. Kefalos, Esq.
Oana D. Johnson, Esq.
George K. Kefalos, PA
46A State Street
Charleston, SC 29401
Co-Counsel for Plaintiff

FILED
2015 APR -8 AM 10:37
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This 8th day of April, 2015.

DUFFY & YOUNG, LLC

EXHIBIT B

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

SKYWAVES I CORPORATION,

Plaintiff,

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

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

Defendants.

VIDEOTAPED DEPOSITION OF: RICHARD C.F. SPENCER

DATE: March 26, 2015

TIME: 9:12 AM

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

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: SANDRA K. BJERKE, RDR, CRR, CBC

A. WILLIAM ROBERTS, JR. & ASSOCIATES

Fast, Accurate & Friendly

Charleston, SC (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

Rusty Bogue's deposition.

Q. I believe that Mr. Hennessy testified that prior to his 30(b)(6) deposition that he conferred with you to see -- and I'm paraphrasing -- if he had missed anything in his evaluation of matters that he was going to testify to. And I want to ask you if you have any recollection of having any discussion.

A. He could very well have. I talk to a lot of people every day.

Q. I understand.

A. And at this point in time there's about 35, 36 people that report to me through various different managers. I'm on the phone with them on a day-in-and-day-out basis. So remembering one conversation is not that easy for me to do.

Q. How would you describe Mr. Hennessy's workload in January, February and March of 2008?

A. I'd have to pull records and look to see what that workload exactly was.

Q. You mentioned that you had done a review of Mr. Hennessy in 2008. I happen to have that. I'll be glad to mark it for identification if Molly prefers. But on the category of summary of weaknesses it says:

Mike can let his emotions control how he reacts with people from time to time.

And I believe this was signed by you. Do you recall ever having any discussion with Mr. Hennessy about that?

MS. CHERRY: Johnny, do you mind letting the witness see the document?

MR. LINTON: No, of course not.

BY MR. LINTON:

Q. The page I read from is on the top, but chronologically it should be on the bottom.

MR. KONERSMANN: Big table.

THE WITNESS: It is a big table. If it's written here, I would have discussed it with him.

BY MR. LINTON:

Q. Well, when you say if it's written here, in fact, it is written here.

A. It is written here. So, therefore, I would have discussed it with him, yes.

Q. Right. I just wanted to make sure I wasn't, you know --

A. My apologies.

Q. No, no. Not at all. How would that have come to your attention? That is, that he has

a problem controlling his emotions or whatever it says.

MS. CHERRY: Object to the form.

THE WITNESS: I don't believe that's what it says.

BY MR. LINTON:

Q. Why don't you read it, because I don't have it now in front of me.

A. It says:

Mike can let his emotions control how he reacts with people from time to time.

Q. Okay. How did that come to your attention?

A. My view is that Mr. Hennessy, when frustrated, can become -- his voice inflections becomes louder than it may -- may need to be. I write some of that off from the fact that he's from Long Island.

Q. Well, let's elaborate a little bit on that. When you say his voice inflection --

A. Um-hum.

Q. -- are you referring to the fact that he can be loud?

A. Yes.

Q. And confrontational?

that Mike doesn't react to facts or not saying by that comment that Mike does anything other than get loud at points in time.

BY MR. LINTON:

Q. Um-hum.

A. In regard to training, there is no specific training classes that we provide for problem loan administrators. We put them under very schooled managers and basically approach -- take an approach that the best training is field training with a very strong mentor.

Q. And were you his field manager in 2008?

A. I was his direct manager.

Q. Is there a field manager?

A. No, not for Mike.

Q. Okay.

A. Mike would -- I would consider Mike a field manager. When I use the word field, what I'm talking about is the problem loan administrators or asset managers who, as part of their job on a regular basis, are responsible for the loans and they're assigned individual responsibility.

Mike as a group leader -- and I'd have to go back again and look at 2008 to see how the organizational chart was set up -- does not have

direct -- or generally does not have direct responsibility. In 2008 he may have had a portfolio of relationships that he managed himself, but I'd have to go back and look at the org charts.

Q. If I understood your testimony correctly, you're saying there was no formal training that a problem loan administrator had for BB&T; is that correct?

A. That's correct.

Q. Okay. Are there policies or procedures that the problem loan administration division has so that people such as Mr. Hennessy know what guidelines they're to operate under?

A. There are accounting standards and things of that nature, but there are no policies, procedures or written documents in how to collect an individual relationship.

Q. And have you worked in problem loan administration in other banks?

A. Yes.

Q. And do they have policies and procedures?

A. The collection of a commercial problem loan is unique each time you face it, and it's not possible to write a policy or a procedure or

EXHIBIT C

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

SKYWAVES I CORPORATION,

Plaintiff,

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

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

Defendants.

VIDEOTAPED 30(b)(6)
DEPOSITION OF: BRANCH BANKING AND TRUST COMPANY
BY RUSSELL S. BOGUE and
MICHAEL J. HENNESSY

DATE: January 6, 2015

TIME: 1:16 PM

LOCATION: Andrew K. Epting, Jr., LLC
46-A State Street
Charleston, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: SANDRA K. BJERKE, RDR, CRR, CBC

A. Based upon my conversation with Ron Konersmann and John Voytko, that letter was written where they acknowledged that they did that.

Q. Okay. You didn't answer my question. I want to know if you're going to acknowledge that this letter of February the 11th, which charged these folks with fraud, SkyWaves, by the bank, was known to you at that time.

A. That, yes, I knew about the letter.

Q. Okay. Did you consider that the bank was charging SkyWaves with fraud in the -- securing funds from the site plan?

A. Yes.

Q. Okay. Is it your testimony today that based upon the accommodation that was reached by Mr. Edahl that SkyWaves did not breach the site plan funding at all?

A. Yes.

Q. So SkyWaves, in 2007 to 2008, was in full compliance with the site plan accommodation, but based on what you believe was other information, the bank charged fraud.

A. Yes.

Q. Okay. What was that information other than the conversation with Mr. Konersmann and

and his termination.

MR. LINTON: Okay.

MS. CHERRY: The documents that I said I'm claiming privilege on that we'll need to address with the court are the production of the actual SIR or amended SIR, those documents. But those documents aren't regarding Edahl's termination.

MR. LINTON: Okay. Rather than take up time here, could you just --

MS. CHERRY: Send you?

MR. LINTON: Something that says these are the following documents we're claiming privilege on?

MS. CHERRY: Yes.

MR. LINTON: Or some sort of description?

MS. CHERRY: Yes.

BY MR. LINTON:

Q. On behalf of the bank, did you request a investigation of whether Mr. Edahl had committed fraud in -- sometime in 2013?

A. Yes.

Q. Why did you do that for the bank?

A. Because his deposition and testimony

differed greatly from what was originally told to the bank.

Q. Anything else?

A. No.

Q. I think I've asked you this earlier, but we've -- I'm trying to think of a term to substitute for bamboozled.

A. I appreciate it. Unless you have a definition of bamboozled.

Q. Well, I'm sure the court reporter or someone could pull it up, but I thought it was fairly common. Rather than me asking you a lot of questions to substitute for bamboozled, how did you feel -- that is, how did you feel on behalf of the bank at the end of the meeting on January the 25th regarding the fraud that you thought that had been committed against the bank? How did the bank feel?

A. I don't think -- I mean, I -- anytime that I think that there's fraud I'm certainly on end [sic]. I'm more cautious in the actions that I take.

But if you're asking me was I mad, was I vindictive, was I any of that kind of stuff, no. I've been doing this a long time. It takes a real, real lot to get me all worked up, and this --

Q. Didn't rise to that level --
A. No.
Q. -- to get you worked up?
A. No.
Q. But you were -- you weren't just suspicious of fraud. You were certain of fraud when you left that meeting on January 25th, 2008, weren't you?
A. Yes.
THE VIDEOGRAPHER: Five minutes, counselor.
BY MR. LINTON:
Q. And remained certain of that fraud throughout your dealings with SkyWaves.
A. And what?
Q. And you remained certain of that fraud throughout your dealings with SkyWaves.
A. Yes.
Q. Did you feel -- or did the bank feel that it had been duped?
A. Duped. I don't know what the difference is between duped and having fraud committed against it, but the bank thought that it had fraud committed against it.
Q. But you did know the meaning of duped.

A. Yeah. Duped is what you do to an account officer who doesn't understand what he's -- what he's financing. Yes, duped.

Q. Okay. So when you left the meeting on January 25th, 2008, did the bank feel it had been duped?

A. I don't use those terms, so it's hard for me to sit here and say yes. But I could tell you the bank certainly thought that fraud had been committed against the bank, and we had unjustly advanced moneys on items that --

Q. Did the bank feel it had been ambushed?

A. Ambushed.

Q. You know the meaning of ambushed.

A. I know that -- what's the matter with fraud, that fraud had been connected with it?

Q. Well, did the bank feel it had been ambushed --

MS. CHERRY: Objection.

BY MR. LINTON:

Q. -- when it left the meeting in 2008?

MS. CHERRY: Object to form.

BY MR. LINTON:

Q. January 25th.

A. Ambushed.

Q. Yes.
A. Is that different than fraud?
Q. Tell me what you think ambushed is.
A. Ambushed -- I'm from the military, so ambushed is just that, where people get ambushed and get shot and killed. Did I think the bank got shot and killed? No. Did I think that we advanced $2 million under fraudulent circumstances? Absolutely.
Q. Is the only reason you didn't think the bank had been ambushed because it wasn't killed?
MS. CHERRY: Object to the form.
BY MR. LINTON:
Q. Did you think the bank had been sabotaged?
A. Sabotaged.
MS. CHERRY: Object to the form.
BY MR. LINTON:
Q. Go ahead.
MR. BOGUE: This is ridiculous.
THE WITNESS: No. I think it was --
MR. LINTON: Please get that on the record.
THE WITNESS: -- fraud had been committed.

MS. CHERRY: Johnny, you can finish answering [sic] your questions. I mean, I feel like the witness has answered and I do feel like it's become a little bit of harassment, but I'm assuming you're wrapping it up.

MR. LINTON: I am wrapping it up. Trying to be wrapped.

BY MR. LINTON:

Q. So did you respond to that before the ridiculous comment was made by co-counsel for the bank? Did you think that the bank had been sabotaged?

A. Sabotaged? No. I thought the bank had been defrauded.

Q. Okay.

THE VIDEOGRAPHER: Three minutes, counselor.

MR. LINTON: That's probably a good thing.

BY MR. LINTON:

Q. Have you --

MR. LINTON: Strike that.

BY MR. LINTON:

Q. I was going to say have you attended any courses about the policy the bank has on the

procedures and objectives of problem loan administration?

A. There aren't any courses on that.

Q. It's hit the streets and learn as you go along?

MS. CHERRY: Object to the form.

THE WITNESS: Well, I've been doing this 25 years. I hit the streets 25 years ago to learn.

BY MR. LINTON:

Q. In those 25 years, how many times have you continued business with a company that you thought had defrauded you?

A. A few.

Q. Less than a handful?

A. Yeah.

MR. LINTON: Thank you.

MS. CHERRY: I don't have any questions.

MR. CHANDLER: No questions.

THE VIDEOGRAPHER: This concludes the video deposition of Michael Jane -- excuse me -- of Michael J. Hennessy. The time is approximately 5:28 PM. We are now off the record.

(The witness, after having been advised

of his right to read and sign this transcript, waives that right.)

(The deposition was concluded at 5:26 PM.)

EXHIBIT D

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT

SKYWAVES I CORPORATION,

Plaintiff,

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

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

Defendants.

DEPOSITION OF: JAMES EDAHL

DATE: September 19, 2013

TIME: 9:16 AM

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

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: Roxanne M. Easterwood, RPR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

Fast, Accurate & Friendly

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

it was a serious situation, that a demand letter wasn't coming, we want -- we still want to work with you. And in fact, we did.

We could have immediately demanded the loan and exercised all of the rights under the agreements, but all we chose to do at that point was to stop funding under the agreement and give them time to try and work something out.

Q. And in looking at your personnel file which I -- which as I indicated I only did briefly, I didn't see any reference in 2008's review to Skywaves. Was -- was there any?

A. Not that I -- I don't remember. That was six -- five, six years ago, and I haven't reviewed that.

Q. Have you received any, you know, memo to the file that, you know, you mishandled this account?

A. Not that I'm aware of.

Q. In fact, I guess you had received a bonus that year, didn't you, 2008?

A. If I did it would have been based on 2007 results. My recollection is that there was no bonus the following year because of the charge off that was taken.

Q. That was really just figuring into the matrix?

A. Correct.

Q. Did anybody come to you and say, Jim, we've got to have a serious conversation, the bank may have lost a good bit of money because you weren't tending to business? Did -- did you have any conversation like that?

A. We had conversations of the progression of the unusual nature of the credit, that certainly in hindsight that may not be something we do again. Obviously, took a large loss on it, and we -- and tried to use it as a way to, you know, how do we improve next time.

Those are general discussions among all of the folks that were involved, as typically happens when you have a large charge off.

Q. Are you involved in any factoring now?

A. No.

Q. All right. Is Mr. Denning?

A. Not that I'm aware of.

Q. And -- and how about Mr. Burke, is he still in the factoring?

A. I'm not sure.

Q. Does he still work for the bank?

EXHIBIT E

NEXSEN|PRUET

Julie E. Mendoza, Jr.
Member
Admitted in SC

January 15, 2015

The Honorable Roger M. Young
Circuit Court Judge
Charleston County Courthouse
100 Broad Street, Suite 368
Charleston, SC 29401

Re: Skywaves I Corporation v. Branch Banking and Trust Company, *et al.*, Case No. 2009-CP-10-7516

Dear Judge Young:

In regard to BB&T's motion to strike Plaintiff's jury trial demand, Drew Epting's recent letter to you raises points which warrant a response. BB&T filed its Reply the morning of the hearing because Plaintiff served its memorandum in opposition to BB&T's motion the afternoon of Thursday, January 8, 2015. In its Reply, BB&T responded to the choice of law question with the discussion of the "procedural versus substantive" nature of matters.

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

Although Mr. Epting's letter presents arguments on the "procedural versus substantive" issue, none of the cases cited in his letter involve the issues of whether the right to a jury trial is a procedural matter or a substantive matter, and whether a choice of law provision is or is not effective with respect to a jury trial waiver. In this regard:

1. In the cited decision *McGlohon v. Harlan*, 254 S.C. 207, 174 S.E.2d 753 (1970), the court was dealing with the right of the defendant to a jury trial on the issue of whether he could be compelled to pay support to his illegitimate child – the Court found he was not entitled to a jury trial – and the Court did not determine that the right to a jury trial in a civil case is a matter of substantive law. *See* 254 S.C. at 215-17, 174 S.E.2d at 757-58. Moreover, the passage cited by the plaintiff is in the *dissent* to the decision, not in the decision itself. *See* 254 S.C. at 223, 174 S.E.2d at 761.

1230 Main Street
Suite 700 (29201)
PO BOX 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.540.2026
F 803.727.1478
E RMendoza@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

2. In the cited decision *Kiser v. Kiser*, 325 N.C. 502, 385 S.E.2d 487 (1989), a divorce case, the court reviewed the right to a jury trial under the North Carolina Constitution, and concluded that the husband did not have a right to a jury trial of the equitable distribution of marital property. The case did not involve a contractual choice of law provision, and, by its very nature, involved the law of the forum court.

3. In the cited decision *Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858 (1994), criminal defendants had filed a class action against the Durham, North Carolina district attorney alleging injury and violation of their constitutional rights by the district attorney's statutory authority to set the court's trial calendar. The quote from the decision in Mr. Epting's letter is actually a quote from the North Carolina Constitution, which the court used in the context of discussing whether the North Carolina General Assembly had the authority to enact procedural rules granting the district attorney the right to set the court's calendar. *Id.*, 339 N.C. at 373, 451 S.E.2d at 868. The matter did not involve any issue of the waiver of the right to a jury trial in a civil action.

4. The cited decision of *Lister v. NationsBank of Delaware, N.A., et al.*, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997), did not involve an issue of the right to a jury trial.

As set forth in BB&T's Reply, and as presented in argument at the hearing on Monday, the right to a jury trial is a procedural matter to be determined by the forum court. Put another way, the method of trial, by jury or non-jury, is determined by the local law of the forum court. *See* Restatement (Second) of Conflict of Laws § 129 (1971); and 17A Am. Jur. 2d, *Contracts* § 264. In the same way that the rules of the court governing the manner of discovery, pre-trial, trial and post-trial proceedings in this case are procedural matters, the right to a jury trial is a procedural matter. This Court does not apply the North Carolina Rules of Civil Procedure in this case, and, likewise, because this case is in South Carolina, the right to a jury trial is determined under South Carolina law.

Finally, this letter will confirm that BB&T admits that Mr. Edahl was its employee when the financing at issue was provided under the Factoring Agreement. In denying the allegations of paragraph 52 of the Amended Complaint, BB&T was responding to the entirety of the allegations therein that, "At all times relevant hereto, Defendant Edahl was the agent, servant and employee of Defendant BB&T, and acted within the scope and course of his employment." BB&T does not deny that Mr. Edahl was its employee, and thus its agent, in the financing provided under the Factoring Agreement. Mr. Edahl is entitled to enforcement of the jury trial waivers, as set forth in the Reply he filed on January 12, 2015.

With best regards,

Rick Mendoza

Julio E. Mendoza, Jr.

JEM/jeb
cc: Andrew K. Epting, Jr., Esquire
George J. Kefalos, Esquire
John P. Linton, Sr., Esquire
Oana D. Johnson, Esquire
Molly H. Cherry, Esquire
J. W. Nelson Chandler, Esquire

EXHIBIT F

TO BE SUPPLEMENTED

EXHIBIT G

DUFFY & YOUNG LLC
96 BROAD STREET, CHARLESTON SC 29401
telephone 843-720-2044 facsimile 843-720-2047
ATTORNEYS AT LAW

September 25, 2013

Molly Hughes Cherry
205 King Street
Suite 400
Charleston, SC 29401

Rick Mendoza
1230 Main Street
Suite 700
Columbia, SC 29201

Dear Rick and Molly,

After the deposition of Mr. Edell, Rick advised that you were considering amending the answer or answers. I expect that we will consent to the amendment but of course we will need to look it over first.

We would like to take the depositions of the people listed below between October 30th and December 15th. We would like to video them and will take them whenever and wherever is most convenient to you, BB&T, Mr. Edall, and the witnesses. The consequences of the sequence of taking the witnesses are subordinate to completing the depositions in a timely fashion. I expect that each witness would not take more than four hours so that we could schedule two on any given day. We would prefer a long lunch break, say an hour and a half, between witnesses if two are scheduled in a day. Someone on our side will be available throughout the suggested period, and we would like to complete them before the Christmas Holiday season is in full thrust.

I believe we have requested personnel files of each of the requested deponents and would appreciate your advising when we can expect receipt of these documents.

I assume that you will want to take John's deposition. Please send a few dates which are convenient for you and we will do our best to have him available.

If you are going to amend the answer or answers, we would request that you do so by October 4th so that we can consider your position as we review the documents and prepare for depositions.

I think we need to have a conference regarding the privilege log and redacted documents. George and I are happy to come to your office for that conference and hope that it could be sometime during the week of October 7th.

jlinton@duffyandyoung.com
WWW.DUFFYANDYOUNG.COM

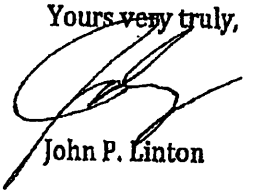
We will send you our concerns about your privilege log in advance of the meeting.

I am not going to be in the office until Monday, and may not have access to email after mid afternoon, but I imagine the others will. If there is anything we might discuss over the telephone, my mobile number is 843.343.4403.

Michael A. Sordillo, CPA
Michael Burke
Frank J. Caple
Michael Hennessey
Walter Denning
Tol Broome

With kindest regards, I am

Yours very truly,



John P. Linton

CC via email: George Kefalos, Andrew K. Epting, M. Dawes Cooke, Brian C. Duffy

EXHIBIT I

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

SKYWAVES I CORPORATION,

Plaintiff,

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

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

Defendants.

VIDEOTAPED DEPOSITION OF: JAMES J. EDAHL

DATE: NOVEMBER 21, 2014

TIME: 9:17 AM

LOCATION: DUFFY & YOUNG
96 Broad Street
Charleston, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: Laura J. Bash, RPR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

Fast, Accurate & Friendly

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

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

A. Correct.

MS. CHERRY: Object to the form.

BY MR. LINTON:

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

A. Yes.

Q. So this affidavit was false, then.

MR. CHANDLER: Object to the form.

MS. CHERRY: Object to the form.

BY MR. LIPTON:

Q. Was the affidavit false?

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

Q. Fair enough.

Is Paragraph 10 false?

A. Yes.

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

A. No, not consciously.

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

A. Yes.

Q. And you knew you had made a commitment for the site plan funding, didn't you?
A. Yes.
Q. So to that extent, you knew that Paragraph 10 was misleading.
A. Yes.
Q. And false.
MR. CHANDLER: Object to the form.
BY MR. LINTON:
Q. And false.
A. Yes.
MR. LINTON: I think the court reporter wants a break. I thought she was saying 4.
THE REPORTER: Did you want to mark that as 4?
MR. LINTON: Oh. Excuse me. We'll take a five-minute break.
(PLF. EXH. 4, Affidavit of James J. Edahl, was marked for identification.)
THE VIDEOGRAPHER: Off the record at approximately 10:10 a.m.
(A recess transpired.)
THE VIDEOGRAPHER: We are back on the record at approximately 10:17 a.m.
BY MR. LINTON:

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

Civil Action: 2009-CP-10-07516

FILED
2015 APR 23 PM 4:51
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT
(Revised and Annotated to Identify the Exhibits)

AND NOW COMES Plaintiff, SKYWAVES I CORPORATION ("Skywaves") and files this Memorandum in Opposition to Defendants' Motions for Summary Judgment:

FOREWORD

Defendants' memoranda argues pages of claimed facts, bringing to mind the observation "that to spell out the obvious is to call it into question." *See Wachovia Bank v. Harbinger Cap. Ptnrs. Master Fund*, No. 07 CVS 5097, 2008 WL 684926 (N.C. Super. Business March 13, 2008). Although Defendants' narration produces a kaleidoscope image, the following recitation will endeavor to bring that image into focus. Defendants omit critical facts and admissions from their own witnesses that undermine their Motion.

BACKGROUND

A. The Skywaves-BB&T Relationship

In the early 2000's, Skywaves developed a unique, highly sought-after product in the 3G telecommunications industry. Its future was bright, with unlimited potential. Plaintiff and Defendant Branch Banking and Trust Co. ("BB&T") entered into a March 22, 2005 Factoring and Security Agreement, under which BB&T purchased certain receivables of Skywaves at a.

721

discount and agreed to collect such receivables on Skywaves' behalf. (*See* March 22, 2005 Factoring and Sec. Agr't, Exhibit 1). Under this factoring agreement and other contractual documents, BB&T provided funding and financing for the capitalization of Skywaves' operations.

Defendant James Edahl ("Edahl") was BB&T's "relationship manager" for Skywaves. One of the goals of this position is to develop trust and confidence in BB&T's customers and to render advice to its customers. (*See* Bullard Depo, at 7:24-8:6, Exhibit 2). In that regard, part of the responsibility of a relationship manager is to make recommendations in the best interest of the client. (*See id.*, at 16:10-17:4, Exhibit 2). Frank Bullard, Edahl's supervisor, testified that the duties of a relationship manager are summarized in a BB&T marketing document, and that those obligations include "[g]iving consistent advice that helps the client achieve his goals of financial security and economic success." (*See id.*, at 17:23-19:22 and Ex. 1 to Bullard Depo, Exhibits 2 and 3).

By 2006, Skywaves achieved over $6 million in revenue working with financing from Defendant BB&T. In 2007, Skywaves secured commitments for contracts that would assure continuing success and sought capitalization to finance its anticipated growth. BB&T was anxious to continue doing business with Skywaves, but the original agreements would be insufficient to fund Skywaves' growth. In March of 2007, Edahl advised Skywaves to forego an opportunity for a proposed capital investment. In exchange, BB&T amended the existing arrangement to include funding based on purchase orders and doubled the previous ceiling.

Walter Denning, a regional loan administrator whose involvement in credit decisions normally involved requests for a minimum of $5 million credit, was personally familiar with Skywaves' product and had visited the site; he considered the proposed arrangement with Skywaves to be "unique." (*See* Denning Depo., at 35:3, Exhibit 4). BB&T had never financed purchase orders as part of a factoring agreement like he approved in March, 2007. He acknowledged that if the bank later handled a public offering for Skywaves might be "a pretty big deal" for BB&T. (*See* Denning Depo., at 35-39, Exhibit 4). Skywaves accepted BB&T's

722

advice and recommendation with regard to its capitalization. BB&T claimed it essentially provided the same liquidity capacity as an alternative equity investment from Hunt Capital. BB&T promised it would adjust and modify its traditional factoring model further if needed to provide Skywaves cash flow.

By July, 2007, Edahl represented to Skywaves that BB&T had modified and liberalized its financing. Skywaves was entitled to advancements for $2 million based on potential purchase orders from General Dynamics, the parties later referred to these as "site plans." BB&T and Edahl knew that these "site plans" were not purchase orders. Moreover, Edahl previously confirmed he had consulted its capital markets division for it to represent Skywaves through an Initial Public Equity Offering. The financing now functioned as a working capital loan. As it turned out, Edahl did not have authority from BB&T to modify the parties' agreement in that respect, and unknown to Skywaves, any inquiry Edahl made to BB&T capital markets was very preliminary.

Edahl was BB&T's exclusive "relationship officer" for Skywaves and, as such, was the face of BB&T. Skywaves "was justified (in believing) he was speaking on behalf of the bank" that Skywaves could put its trust in Edahl, and because of the relationship, "a relationship manager should never mislead his customer or mislead the regional loan administrator". (*See* Bullard Depo, at 14, Exhibit 2). Moreover, Denning testified that Edahl should know his customers' needs and only design financing arrangements suitable for the clients' needs. (*See* Bullard Depo, at 15, Exhibit 2). Edahl's role is described in a summary that BB&T published, which stated that Edahl would bring "a level of expertise that earns the client's attention and loyalty by applying industry knowledge and perspective" to the client's existing and future needs; BB&T represented that Edahl would become "a trusted – and not easily replaced- source of advice and insight," "providing continuity and leadership to your entire BB&T relationship team" with "access to a full spectrum of related financial services" and "commitment to put those resources to work for you." (Exhibit 1 to Bullard Depo, attached hereto as Exhibit 3). BB&T further holds itself out as an expert advisor for its clients, not merely a banker: "Count on us to

723

advise you in ways that build trust, keeping in mind the full range of your financial needs." The tagline of this document is instructive: "Our focus is long range, so is our staying power." (*See id.*).

Due to dishonesty, trickery and gross negligence of BB&T's now terminated Senior Vice President Defendant Edahl, and BB&T's shamefully inept conduct understanding the risk it had undertaken and unfathomably inept conduct accusing Skywaves of fraud, BB&T wrongfully declared Skywaves in default, sought to terminate its agreement to fund Skywaves and demanded immediate payment of almost $3 million. As a result of Defendants' actions, Skywaves ultimately filed for bankruptcy.

Many of BB&T's promises were outright lies, and BB&T knew them to be so when made. BB&T now concedes that the capitalization program that it designed was never suitable for Skywaves. Tol Broome, President of BB&T Commercial Financing, said financing purchase orders amounted to "venture capital" (Broome Deposition, at 39, Exhibit 5) and were not appropriate for any of the lending platforms in the bank. Mr. Broome testified that purchase order financing was not appropriate "[f]or Skywaves" (Broome Deposition, at 49, Exhibit 5). Broome knows commercial lending. The section he headed earned over $47 million for BB&T in 2007. (Broome Deposition, at 16, Exhibit 5).

B. Modification of the Agreement

In July 2007, Edahl confirmed that BB&T had modified the parties' relationship so that BB&T would advance funds on the basis of site plans for proposed purchase orders that General Dynamics identified. Repayment of money advanced on site plans would not be due until Skywaves converted them to actual purchase orders, built the structures, and was due payment. BB&T breached this agreement because it declared Skywaves in default and demanded repayment of the advanced sums before Skywaves received payment. BB&T compounded the wrong by accusing Skywaves of fraud for obtaining the very funding that Edahl falsely told Skywaves BB&T had approved.

Defendants knew that Skywaves needed access to funds for working capital because of delays in a massive order proposed by existing customer General Dynamics, a proposed contract that would span at least 24 months of future purchases and more than double Skywaves' revenues. BB&T also knew that the acceptance of such a large order would likely increase operational costs. BB&T knew that the modification of the agreement — which Edahl told Skywaves had been approved — was to ensure immediate access to the two million dollar line of credit. Such liquidity was needed because of the uncertainty of when new proposed purchases by General Dynamics would commence. Edahl's testimony is replete with responses supporting these statements:

Q: Do you remember when he gave you the site plans, that you knew that those were not purchase orders?

A: Yes.

Q: Did you consider that you had gone beyond your loan authority to approve the site plan funding?

A: No, because I thought I had approval.

Q: From Mr. Denning?

A: Yes.

(*See* Edahl Depo. Vol. II, at 51:13-22, Exhibit 6).

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

A: Yes.

(*See id.*, at 50:3-8, Exhibit 6).

Q: And so that I'm clear on it, the site plans were designated as potential sites with no specified schedule of when those orders would be placed; is that right?

A: That's right.

Q: Okay. And that is a working capital loan in banking terms, isn't it?

A: I guess could be construed that way.

(*See* Edahl Depo. Vol. I, at 74:4-11, Exhibit 7):

Q: Okay. Do you think Skywaves relied upon your recommendation to fund this growth for purchase order financing?

A: Yes.

Q: Okay. The same thing with site plans?

A: Yes.

(*See* Edahl Depo. Vol. II, at 74:8-14, Exhibit 6).

Edahl knew that Skywaves could not control the timing for converting proposed orders to contracts, but BB&T was not concerned because of the confidence that proposed purchase orders would be finalized as contracts. (*See* Edal. Depo. Vol. I, at 49, Exhibit 7). Skywaves regularly made monthly interest payments. Two months after BB&T approved advances on proposed purchase orders, in September, 2007, Denning observed that "Skywaves had a strong track record, converting over 200 purchase orders to satisfactory payment to BB&T, and account administrators were satisfied with how everything was handled." (*See* Sept. 7, 2007 Denning Letter, Exhibit 8).

The modified agreement did not impose a deadline for conversion of proposed purchase orders to actual purchase order contracts or of contracts to invoices. Beginning in July, 2007, BB&T advanced funds for the proposed purchase orders. Edahl told Skywaves and potential new investors that BB&T had approved the site plan funding amendment.

Skywaves would typically send invoices when it shipped a product, with payment terms of 30 or 60 days. For example, payment would be due for a purchase order dated August 1 some time between January 1 and February 1. Defendants confirmed that Skywaves would have a 60 day grace period after expiration of the payment terms between it and a customer to remit payment to BB&T. (*See* Konersman Depo., at 125; Voytko Depo., at 153, Exhibits 9 and 10).

Defendants told Skywaves that the written agreement was a standard form agreement, which would customize and tailor to suit Skywaves' needs. Skywaves and BB&T agreed to the

grace period and agreed that Skywaves could continue to receive certain customer payments, subject to that grace period. BB&T now denies the grace period, but acknowledges that the whole agreement was "out of the ordinary for Skywaves exclusively" and was a great departure from what BB&T would do for a "typical" client. (*See* BB&T Morris e-mails to Voytko, Exhibits 13 and 27 to Voytko Depo, Exhibits 11 and 12 hereto).

Site plans were *proposed* purchase orders with no conversion start date. Ultimately, the balance of advances for purchase orders and site plans would become due when the line of credit expired on April 5, 2008, even if payments were not due or made to Skywaves by its customer. The parties contemplated a conversion to a more liberal asset based financing program by that time, which would be supplanted by an initial public equity offering managed and promoted by BB&T.

Throughout 2007, Skywaves and BB&T were aware of delays in the General Dynamics purchase orders. Both were also aware that Skywaves could not control the date of conversion of potential purchase orders to actual purchase orders. However, Edahl was comfortable with that unknown and recognized that the question was not *if* revenues would be generated, but *when.* (*See* Edahl Depo. Vol. I, at 47, Exhibit 7). As the bank officer who originated the Skywaves account in 2005, designed the "completely unique" (*See* Edahl Depo. Vol. II, at 57:8, Exhibit 6) financing arrangement, and was the relationship officer assigned to Skywaves, Edahl knew more about the account than anyone at BB&T. He testified that BB&T exercised sound judgment approving the financing modification in July to finance proposed purchase orders. (*See* Edahl Depo. Vol. I, at 49, Exhibit 7).

C. BB&T Charges Skywaves with Fraud -- It Now Admits its Error

Shortly after BB&T wrongfully declared a default on January 18, 2008, BB&T's lawyer, Steven Licata, wrote Skywaves 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." (*See* Licata to Skywaves, February 11, 2008, Exhibit 13). A number of internal bank

727

memos also accused Skywaves of committing fraud, including the Business Loan charge off report of late March, 2008. BB&T also filed an SIR—serious incident report—with regulatory authorities, presumably claiming Skywaves' fraud. The Bank has attempted to shield this document by claiming privilege.

In January, 2008, the bank wrongfully claimed the General Dynamics proposed orders were represented by Skywaves as actual, completed purchase orders to Edahl and Castlen Morris, the administrative functionary assigned to the account. They claimed they had only recently learned of the fraud. They also claimed the fraudulently obtained funds for that program were almost $1.3 million of the applicable $2 million line of credit.

The fraud they asserted was two pronged: first, that the site plans were palmed off to the bank as confirmed purchase orders; secondly, and perhaps even more critical from a financial risk, the advances were made as a construction type loan and restricted to the actual construction of each shelter for the purchase order advanced upon, secured by the shelter, and could not be used as a working capital loan. Skywaves' testimony contradicts each point.

The Bank has admitted its error as to each prong. It agrees Skywaves fully performed its agreement with the bank regarding the site plan funding. The bank erroneously formally declared default on January 18, for over advances of almost $1.3 million dollars on the site plan funding program.

The bank in a recent Rule 30(b)(6) deposition now, finally, has admitted Skywaves did not breach the terms of the modification of the contract (Referred to by the witness as an accommodation, but one Skywaves could rely upon (p. 43:22-24, Exhibit 14)).

Q. Okay. Is it your testimony today that based upon the accommodation that was reached by Mr. Edahl that Skywaves did not breach the site plan funding at all?

A. Yes.

Q. So Skywaves, in 2007 to 2008, was in full compliance with the site plan accommodation, but based on what you believe was other information, the bank charged fraud.

A. Yes.

(*See* BB&T Rule 30(b)(6) Depo., at 31, Exhibit 14).

He further testified that, if he had known of Edahl's accommodation for site plan funding in January of 2008, he would not have considered Skywaves in default. (*See* BB&T Rule 30(b)(6) Depo., at 65, Exhibit 14).

Furthermore, he testified that Skywaves was in full compliance with the agreement as modified to reflect accommodations based on the site plan funding. (*See id., at* 95, Exhibit 14).

Edahl continues to maintain that Skywaves misapplied funds advanced for general corporate purposes, although he admits there was no such written or otherwise expressed restriction, and that every construction loan in his lengthy banking career has been administered by incremental draws based upon percentage of completion. (Edahl Deposition, Vol. II, Exhibit 6).

Hennessy testified that at his first meeting with Skywaves, it admitted it had defrauded the bank by misrepresenting the site plans as purchase orders. Skywaves denies this and no bank record throughout its detailed investigation asserts Skywaves admitted fraud. According to the bank, the site plan funding scheme was the only fraud admitted by Skywaves (*see* Rule 30(b)(6) p. 32, 95, 161, Exhibit 14), and BB&T now admits that Skywaves fully complied with the modification for site plan funding.

Although almost $200,000 of available credit remained on the $2 million component of the $3.5 million dollar line of credit and almost $600,000 on the invoice component, the bank refused any further disbursement. On January 25, the bank attempted to amend its declaration of default with three pretexts declared to establish a default and demanded immediate payment of the outstanding amount of over $2.8 million.

D. BB&T and Edahl's Lie About the Modification

Initially, Defendants denied in their pleading that the loan agreement had been modified as contended by Plaintiff. They denied it again in an affidavit in US District Court in support of their wrongful removal of this action years ago. Finally, on September 19, 2013, Mr. Edahl

729

testified the line of credit had been modified as described above. He claimed five years of amnesia, and that he had inadvertently misled BB&T, such that it was convinced of the fraud asserted by Licata on behalf of the bank. In 2013, Edahl testified that he only recalled the modification after hearing testimony from the former president of Skywaves earlier that month.

Denning, who BB&T internally required to approve the modification, denied that BB&T approved the modification or that he had ever discussed it with Edahl. (*See* Denning Depo., at 27:21-24, Exhibit 4). He further testified that he likely would not have approved it, as he was reluctant to accept purchase orders as "security" for the release of funds:

> I had trouble doing the purchase orders so I seriously don't think I would have done anything that adds even more risk or takes us a step further away from confirming a sale.

(*See id.* at 28:5-11, Exhibit 4).

Edahl's deposition testimony led to a December, 2013, BB&T fraud investigation of Edahl and his termination for deceitful and "unethical" conduct and (perhaps) his perjured deposition testimony. His personnel record says he was involuntarily terminated because he "admitted to false statements". (BB&T Document PA 003833, Exhibit 15). Subsequently, Nexsen Pruet withdrew as Edahl's counsel, and BB&T and Edahl both amended their answers.

After about **four years**, the amended answers now admit that BB&T "agreed to finance site plans, to a limited extent, with certain limitations, on the amounts being funded." (*See* Am. Ans. to Compl. ¶¶ 14, 21, 28, attached hereto as Exhibit 16). Edahl and BB&T begrudgingly made that admission to avoid a continued fraud on the court.

Subsequently, Skywaves deposed Edahl again. This time, he admitted that he had knowingly deceived BB&T starting a week before he wrongfully declared Skywaves in default and had been knowingly dishonest in his deposition testimony and affidavit in federal court. He testified he lied to save his job, in 2008, in 2010, and in 2013. His prior deposition testimony about site plan funding in his deposition was a lie:

Q: Was it untruthful?

A: Yes

Q: All right. It was false.

A: Yes

Q: It was a lie.

A: Yes.

(*See* Edahl Depo. Vol. II, at 36:1-12, Exhibit 6). Edahl continued that he believed, beyond any doubt, that he had secured necessary approval for this "completely unique financing" — even though he knew that Denning denied giving that approval and had no recollection of even discussing site plan funding. (*See* Edahl Depo. Vol. II, at 54:10-15 and 58:8-10, Exhibit 6).

Because of Skywaves' growth potential, Edahl believed that the modification was appropriate; however, he admitted that he did not follow BB&T's internal protocol and documentation. Moreover, BB&T investigation concluded that Licata accused Skywaves of fraud based on Edahl's false statements in 2008 and the absence of proper documentation.

E. The Impact of Defendants' Fraudulent Conduct

Skywaves relied on its right to full financing to be released for the General Dynamics purchase orders as set forth in the parties' modification of the agreement. Skywaves undertook a massive and costly expansion (adding an additional shift and specialized training) and expanded its sales personnel. Skywaves did all this in reliance on BB&T's promise to provide funding for those purchase orders. Edahl encouraged and monitored those expenditures, regularly meeting with Skywaves' management. In 2007, those operational expenses increased by approximately one million dollars. In late 2007 and early 2008, with the conversion of phase one of the General Dynamics order and other finalized orders, Skywaves was destined to more than double its revenues in 2008. (*See* Konersmann Affidavit, Exhibit 17).

F. If Edahl Told the Truth, Skywaves Would Have Pursued Alternatives

If Edahl told the truth in July, 2007 — that BB&T could not modify the parties' arrangement and would not finance proposed purchase orders and was apprehensive about

financing confirmed purchase orders —Skywaves would have taken reasonable steps to provide funding for its growth. For example, it would have raised capital from its shareholders or third-party investors. It would have secured credit from another lender or its equity holders. Alternatively, it could have delayed its expansion until orders were actually in place.

When Edahl misrepresented that BB&T approved the financing modification, Skywaves was in a position to secure additional capital. In fact, Edahl was confirmed the modification in July 2007, Skywaves sold a small percent of treasury stock for five hundred thousand dollars to a sophisticated investor. Edahl confirmed the strength of BB&T's relationship to the investor and Skywaves prior to consummation of the sales agreement. This transaction valued the company at thirteen million dollars on a per share basis. (Konersmann Affidavit, Exhibit 17).

Skywaves could have taken reasonable steps to secure additional equity investment from existing shareholders or third parties. Earlier, in March of 2007, Hunt Capital of Texas, after completing preliminary due diligence, had entered into a formal letter of intent to buy thirty percent of Skywaves for four million dollars cash. (*See* Konersmann Affidavit and attached letter of intent, Exhibit 17).

If Edahl had told the truth in 2007, Skywaves could have pursued one of the options above, including deferring operational expansion expenses within its control. Such additional expenses were appropriately a million dollars in 2007. (Konersmann Affidavit, Exhibit 17).

Thereafter, Edahl's reckless conduct continued. He remained silent when he had a duty to speak. In August, 2007, a month after Edahl confirmed BB&T's modification, BB&T's credit officer, Dennings, met with the Business Loan Sub-Committee for Skywaves' routine annual review. Dennings wrote Edahl:

> I do want to stress our position is not to increase our exposure against purchase orders. The company must understand that any additional needs should be funded through additional equity investment or other sources.

(*See* September 7, 2007 e mail to Edahl, Exhibit 4 to Walter Denning's Deposition, attached hereto as Exhibit 8). Dennings expected Edahl to convey BB&T's position. (*See* Dennings Deposition at 24:3-5, Exhibit 4). Unfortunately, Edahl failed to do so.

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

A: Not that I can remember.

(*See* Edahl Depo. Vol. I, at 92:8-12, Exhibit 7).

In retrospect, Edahl admits that he should have been honest and let Skywaves know that BB&T was uncomfortable with the risk it had already undertaken and, more importantly, that BB&T had no idea that Edahl approved and authorized advances on site plans, which had already been made. (*See* Second Depo. of Edahl, at 71:11-22, Exhibit 6).

Q: Did you ever think about, you know, Denning told me to get with them and maybe they would have, you know, developed a different financing plan?

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

Q: Okay. You knew that Skywaves was relying upon the plan you had designed, that is the purchase order and the site plan funding, right?

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

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

A: Correct.

Q: $2 million.

A: Correct.

Q: Up to $2 million.

A: Yes.

Q: And you actually did design that program for them.

A: No.

Q: Who did?

A: That was at – we designed that program in response to their request that –

Q: To access more cash?

A: -- to do purchase order financing. And then site plan financing after that.

(*See* Second Depo. of Edahl, at 72:5-73:5, Exhibit 6).

Edahl met Skywaves on September 20, 2007; he reported to Dennings that he had reviewed Skywaves' financials and was updated about the status of the General Dynamics and other orders. He continued to express BB&T's satisfaction to Skywaves and his superiors and concluded:

> We were hoping that by the end of this year revenues and profits would be at a level where purchase order financing would be minimal and we were in a position to convert to more traditional ABL financing of the operation. While this goal has been delayed, it appears that just with the contract work in hand with General Dynamics that we will be able to accomplish this goal in 2008. The current factoring relationship comes up for review in March which by then we should be able to determine if these assumptions are being met and adjust the credit facility accordingly. Please let me know if you need additional information.

(*See* Second Depo. of Edahl, Ex. 5 to Denning's Deposition, attached hereto as Exhibit 19).[1]

Dennings did not request additional information.

Edahl was quite aware that site plan funding was more risky than confirmed purchase orders. (*See* Edahl Depo. Vol. 2, at 70, Exhibit 6). Nonetheless, he failed to advise Dennings or anyone else at BB&T that he had confirmed to Skywaves that BB&T had approved site plan funding and disbursed a large portion of the $2 million line based site plans. Through litigation, Skywaves learned that — contrary to Edahl's representations — at the time BB&T increased the line of credit in March, 2007, it actually intended to reduce Skywaves' credit line by $100,000 per month. On March 25, 2008, in retrospective about Skywaves' then-failed business, Dennings wrote:

[1] ABS is asset based lending which is an upgrade from the existing factoring of invoice and permitting access to funds only with purchase orders , or proposed purchase order, although and asset based lending is a loan really premised on the future success of a business plan.

734

> At the time we were increasing our line (March, 2007), investors were kicking in more equity. We also decided that $2MM was the most exposure we were willing to take against purchase orders: we also wanted to rachet (sic) down $100,000 each month. But, it does not appear the company was able to accomplish this.

That memo is also critical of Edahl's decision to finance purchase orders, much alone purchase orders from one company.

This all leads to question of why Edahl persisted in continuing to breach his obligations to Skywaves and BB&T? Even if he honestly thought he had authority to modify the relationship — which would be implausible in light of Dennings' memo of September 7 — he knew he violated BB&T's protocol to have documented approval of the terms of the modification including restrictions on the use of funds. Because a large portion of funds had already been advanced, he was likely afraid to speak the truth because of the risk of losing his job, which was the reason he acknowledged he lied in January, 2008. Perhaps he recalled that BB&T had formally reprimanded him years before for exceeding loan authority. (*See* BB&T Document PA 003833, Exhibit 15).

G. Defendants Continue to Conceal the Truth

Prior to BB&T's default letter of January 25, 2008, it never required Skywaves to increase capital or cash reserves. Nonetheless, due to the delays and expansion costs discussed above, local shareholders James Kerr and Crayton Walters infused $400,000 funding for cash needs. Based on that funding, Edahl remained comfortable with Skywaves. He reported to Dennings on November 12, 2007 (*see* BB&T document PA 002378-002379, Exhibit 20), that the end of the year loss was projected at $929,000. He explained the circumstances and concluded:

> Bottom line, continued delays in receiving various purchase orders has prevented Skywaves from achieving break even production volume in 2007. The losses have been covered finally allow the company to become profitable in 2008.It appears that confirmed business will finally allow the company to become profitable in 2008. Please let me know if you need additional information.

None was requested.

In December, 2007, Edahl met with Skywaves and was fully advised of additional revenue shortfalls. He advised Skywaves to prepare a three year expansion plan for formal

presentation that would be used for initial public offering; he wanted this to be completed so, as soon as the General Dynamics order was confirmed, its revenue stream would be clear. Konersmann Affidavit). Edahl justifiably was confident in Skywaves. In 2007, its stockholders had voluntarily contributed almost $1 million to address cash needs, without BB&T having to ask. Despite any short-term issues, Skywaves' future forecast reminded Edahl of BB&T's commercial lending credo: "Our focus is long term, so is our staying power". Edahl was confident of Skywaves' future, and remained so even after default was declared by BB&T.

H. BB&T Fumbled the Transition of New Administration to Skywaves' Account

On January 17, 2008, Edahl and a new administrative person on the account from North Carolina, Michael Burke, met to introduce Mr. Burke to Skywaves' team. Before that meeting, BB&T did not set an agenda and did not express any concern about the relationship or Skywaves' financial performance. Burke and Edahl had studied the 2007 year-end financials — which showed a year-end loss of $1.4 million — *before* that meeting, as well as the substantial accounts receivable and payable. Edahl recommended to Denning that he consider placing Skywaves as a "candidate" for a watch list on January 14, 2008, after having a full understanding of the delays in purchase orders. He remained convinced of Skywaves' viability

In Edahl's first deposition, he agreed there was no significant change in Skywaves' financial situation or relationship with BB&T between November, 2007 and January, 2008. Edahl's November analysis expressed no alarm and noted routine review of the operating assumptions would be made in March, 2008, at which time BB&T would consider renewal of the line of credit. He further testified that, prior to January 17, 2008, he did not communicate any concern to Skywaves:

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

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

(*See* Second Depo. of Edahl, at 90:12-17, Exhibit 6). Edahl testified more specifically:

Q. Were you satisfied with the relationship with Skywaves as of January the 16th, 2008?

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

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

A. Assuming the credit—assuming the credit profile would allow us to do that sure.

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

A. Yeah, hopefully so.

(*See* Second Depo. of Edahl, at 91:1-13, Exhibit 6).

Before reviewing the facts from the January 17, 2008 meeting and the default letter a week later, to put the Defendants' conduct in prospective, it may be useful to the Court to understand the depth and quality of the parties relationship and understandings.

I. Additional Facts Supporting Creation of Fiduciary Duty, Good Faith and Fair Dealing and Defendant BB&T' Breach of Contract

Skywaves' action for breach of fiduciary duties is not about the normal lender-borrower relationship. James Edahl and the bank coveted Skywaves as a client because of its growth potential. While BB&T's Memorandum in Support flaunts examples of its paternalistic "accommodation" of Skywaves, the testimony is clear BB&T actively pursued Skywaves, even inducing Skywaves to forego other sources of funding. It offered financing for capital projects that were not even requested and unilaterally lowered finance charges to prevent Wachovia and other lenders from being involved with Skywaves.

In December, 2006, Skywaves' board instructed its president to secure additional capital to help fund growth. Revenues had increased from start up in 2004 to over $6 million in 2006. Skywaves' niche in the telecommunications market was poised to explode.

When Skywaves shared with Edahl the Hunt Capital's letter of intent of $4 million cash equity investment, he advised Skywaves to decline it, and to wait going to capital markets until

the anticipated additional growth was achieved. He promised BB&T could supply a loan as working capital equivalent to the Hunt proposed equity investment. Edahl became Skywaves investment adviser. He advised Skywaves the bank would take Skywaves public with a future initial public offering much more efficiently and less costly.

Edahl has admitted discussions of the bank handling a public offering through its capital markets division. He discussed the public offering with BB&T capital markets division and advised Skywaves it had the experience in telecommunication area, and capacity and desire to do so.

Significantly, Skywaves did not propose the $3.5 million dollar line of credit. Edahl designed the financing and proposed the line of credit. Virtually all bank witnesses has testified the financing scheme was unique for BB&T. Edahl testified it as "completely unique" (*see* Deposition of James Edahl, Vol I, at 58, Exhibit 7) financing which he designed and he knew Skywaves was relying upon it. Skywaves declined the $4 million dollar equity investment at Edahl's suggestion because Edahl said he would design its equivalent as an interim step towards the public equity offering. After default, bank witness Burke described the loan as "venture capital" and at one point referred to it as "equity financing," except BB&T did not get an "interest" in the company. (*See* Deposition of Michael Burke, at 62, Exhibit 21). BB&T wanted to act as Skywaves' underwriter in an equity public offering.

The bank's former account administrative officer said the financing package Edahl designed was "tailor made" for Skywaves and that he would never have authorized it, but he assumed it had the blessing of those well above his "pay grade." (See Deposition of Castlen Morris, at 49, Exhibit 22). Other bank officials have described the terms of the loan as a venture capital loan that was not appropriate for BB&T. Obviously, this was never disclosed to Skywaves except through litigation.

Before Skywaves declined the Hunt equity investment, it advised the bank it might need easier access to the $3.5 million line, the amount and terms which had been designed and recommended by Edahl. Edahl said he would be able to take care of a loan modification if

738

needed. But, with the line of credit being doubled to meet expansion needs for Skywaves, he preferred to defer modifying it. Of course, when the delay in the General Dynamics orders occurred, Skywaves requested loan modification. Edahl quickly confirmed by July, 2007, that the bank had approved the modification.

Skywaves placed its trust in Edahl. He was a senior vice president loan officer in charge of its account with many years of banking experience. Frank Caple, senior credit officer for BB&T, testified a customer is entitled to believe and rely on the truth of what a banker tells him. (*See* Deposition of Frank Caple, at 17, Exhibit 23). Toll Broome, President of BB&T Commercial Finance, testified BB&T's bank mission for his department includes "the equivalent to saying we are giving advice to your customers." (*See* Deposition of Tol Broome, at 22, Exhibit 24). Instead, because of Edahl's deceit and trickery, Skywaves was wrongfully placed in default and accused of fraud. Blunt threats of criminal prosecution were asserted.

J. The January 17, 2008 Meeting – BB&T Ambushes Skywaves

On January 17, 2008, Konersmann was introduced to Mike Burke, who assumed administrative responsibility for its account in November when Castlen Morris left BB&T. Burke and Morris conferred about many accounts and paid routine visits to some of them. Unfortunately, Morris did not provide Burke any transition assistance or information about the "completely unique" Skywaves relationship or how Morris had handled Skywaves' payments in the past. Burke's experience at BB&T was as a traditional factoring account administrator. He did not have experience with the unique financing arrangement prepared for Skywaves and was new to that account.

Burke and Edahl reviewed Skywaves' current and year end financials several days before the meeting. Burke was concerned about a number of purchase order advances beginning in July, 2007 that he felt were delinquent. He further felt that purchase order financing was "out of the ordinary," and he was "surprised" that BB&T had agreed to it. In his view, under those

circumstances, there was nothing to factor, as traditional factoring dealt with the sale of invoices for completed contracts. (*See* Burke Depo., at 25:7-13, 39, Exhibit 21).

In Edahl's words the purpose of the meeting was for "Mike to meet Skywaves". (*See* Edahl Depo. Vol. I, at 54, Exhibit 7). Edahl testified that he did not express alarm or concern to Burke about Skywaves prior to that meeting. (*See* Edahl Depo. Vol. I, at 54:18-24, Exhibit 7). Burke's sole communication before the meeting (after his review of the year end financials), with Skywaves was an email two days prior concerning $1.8 million in advances on General Dynamics: "This is the latest PO ledger that I have. There are a lot of PO's from General Dynamics still open and I want to make sure they are still valid. Let me know. See you Thursday." (*See* Document 002374 produced by BB&T, Exhibit 25).

These potentially stale advances were part of the General Dynamics site plan financing program that Edahl approved on BB&T's behalf. Burke was unaware the program had existed, and had never known of such an arrangement at BB&T. Mr. Konersmann explained the arrangement to Burke at the meeting. Burke was surprised that purchase order financing had ever been approved, but was absolutely stunned that site plan funding (riskier than purchase order funding), had been approved. In his words, he was "very shocked, very concerned and had an empty feeling in his stomach." (*See* Burke Depo., at 33:9-12, Exhibit 21).

Because Burke's experience was as a traditional factoring account administrator and he was new to the account, he remained calm at the meeting and made no accusations. His decency was manifest. He was wary, and likely suspicious, since the financial arrangement Konersmann described was foreign to his banking experience. He remained respectful and professional, perhaps adhering to the Reagan maxim, "Trust but verify."

Tellingly, Edahl did not deny in Konersmann's presence that the site plan program had been approved or that the grace period had been incorporated into the parties' agreement. When the meeting was concluded, there was no suggestion to Skywaves that BB&T was even considering a default.

What difference would it make if Burke had been told the truth by Edahl? Burke's testimony is illuminating.

> Q. Might your reaction have been different back in January of – of '08 had you known that Mr. Edahl had approved this funding A. If BB&T had approved that type of funding and I didn't know about it, my reaction would have been different. I would have gone back and said, what is this, how are we doing this and dealt with it differently.'

Burke deposition 97:22-98:4, Exhibit 21.

BB&T's secretive ambush of Skywaves began shortly after the meeting when Edahl told Burke an outright lie: that he had never heard of site plan financing for Skywaves. Edahl reported to Dennings that same day, January 17th, by email:

> "During the course of our discussion it became apparent that we were over advanced on our factoring line by $1,262,313." In the same email, he stated "Mike and I do not know how these sites got set up as purchase orders and funded. Mike will be doing a review of the documentation in file immediately to try to determine how this happened."

(*See* Exhibit 5 to Edahl's Deposition, Exhibit 26).

The next day, Edahl e-mailed Hennessy and reported that he called Skywaves "to formally tell them the over advance has put them in default of the commercial finance loan and they would be getting a written notice of same shortly. Could you please send me a form Notice letter? I would like to get it out ASAP. Thanks." (*See* BB&T document SL/EM 000001 A -- Jan. 18, 2008 Email Edahl to Hennessy, Exhibit 27). BB&T never withdrew that declaration of default. Its written pretext default letter one week later curiously does not reference the $1.2 million default that Edahl allegedly orally identified. Within three weeks Attorney Licata would formally accuse Skywaves of fraud based on the site plan financing.

Immediately after the January 17 meeting, Burke began an investigation. Former BB&T employee Morris told Burke his recollection was that site plans were purchase orders. On January 22, 2007, Burke advised Edahl about Morris' recollection. Burke also said he could find no record supporting that Skywaves could be funded other than on actual invoices, but that

Mr. Voytko maintained that BB&T was aware of the site plan funding arrangement, with a site plan spreadsheet having been sent to Morris. (*See* BB&T/FC_000627-000628, Exhibit 28). Eighteen minutes after receipt of Burke's email, Edahl sent an e mail to Denning which concluded:

> Mike Hennessy is working with our outside counsel Steve Licata to get out a default letter. Please call Mike Hennessy to get him the information he will need to get to Licata. We will need to get the default letter out this week. We then need to get together internally and discuss what a repayment plan will be."

(*See* BB&T/FC_000627-000628, Exhibit 28).

Curiously, Edahl's e mail of January 18 confirming that he had "formally" declared default does not mention *any* concern of the three items upon which default was declared a week later, although Konersmann had explained that a grace period of 60 days for remittance of revenue proceeds from factored invoices had been included in the program, and thus no such payments were overdue. The financial picture, including Skywaves' payables, had been discussed thoroughly. Simply put, prior to BB&T's ambush of Skywaves, BB&T had *never raised any of those issues* as default issues.

Burke immediately checked his file and determined there was no written documentation of the site plan program, nor did he see written confirmation of the grace period. He called Skywaves' CFO, Voytko, who confirmed each had been made and administered as part of the agreement. Shortly thereafter, Burke reached Morris by telephone and inquired about the "site plan program." Morris said he thought the site plans were purchase orders, although he now admits that Skywaves did not mislead him about what they were and that a cursory examination would reveal what they were. When Edahl was asked if he told Morris that the site plans were purchase orders that he told Morris site plans had been approved for release of funds from the $2 million line of credit. (See Edahl Depo. Vol. II, at 11:4-12, Exhibit 6)

It is apparent that BB&T's ambush of Skywaves was the product of the fraudulent conduct of its agent, Defendant Edahl. Because Edahl lied — to Skywaves and everyone involved at BB&T — BB&T suddenly took a harsh tenor in its dealings with Skywaves. Burke's

testimony illuminates that, if Edahl had told the truth from the onset, BB&T likely would have handled Skywaves' situation differently than it did. (*See* Burke Depo., at 91:22-98:4, Exhibit 21 ("If BB&T had approved that type of funding and I didn't know about it, my reaction would have been different. I would have gone back and said, what is this, how are we doing this and dealt with it differently.")).

K. The Involvement of Mike Hennessy Compounds Issues

Almost immediately, Edahl was removed from the account. Burke never visited Skywaves again. His authority to administer the account was almost immediately directed to Mike Hennessy, problem loan administrator, who had no prior dealings with Skywaves. He had never met or even communicated with Skywaves .Hennessy depended upon Edahl and Burke for information. More importantly, he depended heavily on the file which *did not reference the site plan* program. Because Edahl denied its existence to him, Hennessy was also unaware of that program.

Relying on his experience and on BB&T's file, Hennessy disregarded Skywaves' statement, which turned out to be true. He stated he could not recall another time a bank officer had exceeded his authority with an oral modification; in fact, he had only seen an officer exceed authority *in any way* a few times during his entire career. (*See* Hennessy Depo., at 12-13, Exhibit 29). Ironically, BB&T had reprimanded and previously disciplined Edahl for exceeding his authority years earlier. (*See* Edahl Personnel File BB&T Document, Exhibit 30).

Hennessy first spoke to Skywaves at a meeting on January 25, 2008. Due to his heavy workload, Hennessy was extremely busy and did not have time for normal due diligence. He signed the default letter purporting to terminate the agreement on the same day as this first meeting with Skywaves. He admits to being "blunt" with Skywaves, as his custom since his forte is problem account administration. (*See* Hennessy Depo., at 27, Exhibit 29). He claims that Skywaves expressly admitted the site plans were represented as purchase orders and that they had committed fraud. (*See* Hennessy Depo., at 27:22-24, Exhibit 29). Skywaves denies this

accusation and was shocked to hear Hennessy's testimony, particularly since (to its knowledge from Edahl) BB&T had consistently authorized that arrangement.

Skywaves says crude, brash, and out of control" more accurately describe Hennessy's behavior at that meeting than "blunt;" Hennessy went so far as to threaten criminal prosecution for Skywaves' principals. (*See* Konersmann and Kerr Affidavit, attached hereto as Exhibits 17 and 31). Since the filing of this lawsuit, Hennessy has back-pedaled from that threat; he now claims that he only said that Skywaves' conduct "might be a prosecutorial offense." (*See* Hennessy Depo., at 27, Exhibit 29). BB&T produced numerous emails in discovery discussing its inaccurate allegation of fraud by Skywaves, but none of them even suggests Skywaves *admitted* fraud. Burke's e-mails confirm Skywaves reviewed the site plan funding with him and always maintained it had acted in compliance with the agreement. Although Hennessy has been reprimanded or counseled about his attitude towards customers, there is no explanation for his testimony, other than a rush to judgment, gross negligence or worse by him.

L. **BB&T Wrongfully Terminates**

On January 25, 2008, Hennessy sent a letter to Skywaves purporting to terminate the parties' agreement. This letter claimed that Skywaves was in default of the agreement because of its breaches:

> 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 3 7% 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.

(*See* Hennessy's letter to Skywaves dated Jan. 25, 2008, Exhibit 32). In this regard, BB&T refused to advance any further capital financing to Skywaves and demanded immediate payment

by Skywaves of any outstanding obligations. As discussed herein, BB&T's stated justifications are not only inaccurate, but they are also improper pretext designed to hide BB&T's true motivation in terminating the agreement. It sought to fully securitize the $1.3 million advance which Edahl had approved as an unsecured loan seven months earlier.

M. BB&T Accused Skywaves of Fraud, But Now Admits its Error

Shortly after BB&T wrongfully declared Skywaves in default on January 18, 2008, BB&T's lawyer, Steven Licata, wrote to Skywaves 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." (*See* Licata Letter to Skywaves, February 11, 2008, Exhibit 13). In addition to this letter, several BB&T memos accused Skywaves of committing fraud, including the Business Loan charge off report of late March, 2008. At the motion to dismiss the Defendants mislead their own counsel who, in response to the Court's questioning of why the parties stopped dealing with each other, answered: "from BB&T's perspective, there were some fraudulent documents submitted in terms of what BB&T was advancing money off of." (*See* Transcript of Aug. 15, 2011 Hearing, at 9, Exhibit 34).

In January, 2008, BB&T wrongfully claimed that Skywaves had represented to Edahl and Castlen Morris (the functionary assigned to the account) that the General Dynamics proposed orders were actual, completed purchase orders. They also claimed the fraudulently obtained funds for that program were almost $1.3 million of the applicable $2 million line of credit. The fraud BB&T asserted was two pronged: (a) that Skywaves misrepresented site plans as confirmed purchase orders; (b) that advances were restricted to the actual construction of each shelter for the purchase order advanced upon, secured by the shelter, and could not be used as working capital financing. Skywaves' testimony contradicts each point. BB&T has admitted its error as to each prong. It agrees Skywaves fully performed its agreement with BB&T regarding the site plan funding. BB&T erroneously formally declared default on January 18, for over advances of almost 1.3 million dollars on the site plan funding program.

745

In a recent Rule 30(b)(6) deposition, BB&T finally admitted that Skywaves did not breach the modification of the contract. (*See* BB&T Rule 30(b)(6) Depo., at 43:22-24, Exhibit 14). Another BB&T witness testified:

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

(*See* Rule 30(b)(6) Depo., at 31:14-23, Exhibit 14). BB&T's representative further confirmed that, had he known of Edahl's "accommodation" for site plan funding in January of 2008, he would not have considered Skywaves in default. (*See* Rule 30(b)(6) Depo., at 65, 95, Exhibit 14).

Edahl still maintains that Skywaves misapplied funds advanced for general corporate purposes, but admits that there was no written restriction.

Hennessy testified that at his first meeting with Skywaves, it admitted that it defrauded BB&T by misrepresenting the site plans as purchase orders. Skywaves denies this and no bank record throughout its detailed investigation has ever concluded that Skywaves committed fraud. According to BB&T, the site plan funding scheme was the only fraud admitted by Skywaves. (*See* BB&T's Rule 30(b)(6) at 32, 95, 161, Exhibit 14). BB&T's current admission is now made by Hennessy as a Rule 30(b)(6) deponent. (*See* BB&T's Rule 30(b)(6), Exhibit 14).

Although almost $200,000 of available credit remained on the $2 million component of the $3.5 million dollar line of credit and almost $600,000 on the invoice component, BB&T refused any further disbursement. On January 25, BB&T attempted to amend its declaration of default with three pretexts declared to establish a default and demanded immediate payment of the outstanding amount of over $2.8 million.

N. **What is Good Faith and Fair Dealing; Equity and Good Conscience Indicia of Bad Faith Conduct**

Under such circumstances, can one expect the bank would discharge its obligation of good fair and fair dealing as required by contract, or its fiduciary duty obligations? The bank's primary functionary from January 25th moving forward was Hennessy. He claimed Skywaves admitted fraud of 1.2 million dollars and doesn't even mention that in the termination letter as the reason for declaring default. (Rule 30(b)(6) Depo 160-161, Exhibit 14). If the bank had known the truth from Edahl, a problem loans specialist would not even taken over the account.

Even Hennessy admits that had he known the truth, he would have taken an entirely different approach and, if he had done so, Skywaves "might" have succeeded. (*See* Hennessy Depo.). He does concede when he learned the truth five years later from Edahl that he was "had to pick my jaw off the floor. I was pretty shocked." (*See* 30(b)(6), at 52:1, Exhibit 14). Burke confirmed he would have taken completely different action. Most likely, problem loans would never have been assigned the account.

In reality, BB&T had agreed to a loan that was beyond its risk tolerance from its inception, and compounded by its agreement to modify it for the proposed purchase orders. As Hennessy viewed the situation, the loan was equity financing, except the bank did not get an equity interest. He referred to the loan as improper because it was a "permanent working capital loan". (*See* Rule 30(b)(6) Depo., at 40, Exhibit 14). But, instead of adhering to its agreement, the bank disregarded the contractual risk it had assumed and declared default. Importantly, Hennessy knew the consequence of delivery of the default letter of January 25, 2008 would be that BB&T would effectively eliminate *all* banking funding sources to Skywaves and that Skywaves would have to infuse equity as its only available solution, and the fraud charges made that exceedingly unlikely with any new investors.

Hennessy opined that Skywaves' problem all along was lack of capital, "always, always always undercapitalized" (Hennessy Depo 79:2-8, Exhibit 29) and not its business plan. But, he

did not know it was BB&T that advised Skywaves to decline capital infusion through Hunt Capital because it caused unneeded dilution of its stock. (*See* Konersmann Affidavit, Exhibit 17). In reality, Edahl's advice was to protect BB&T's opportunity for lucrative fees from underwriting and promoting a public stock offering, and his own bonus compensation and standing. He testified if BB&T managed the initial public offering, he would remain as the relationship officer in charge of the account, and that his 2007 bonus was increased by the performance of the Skyways account. (*See* Deposition of Edahl, Vol. II, at 40-43, 86, Exhibit 6).

BB&T's brief characterizes Skywaves as the prodigal son, noting how it "repeatedly admonished Skywaves" and identifying three examples of Skywaves' alleged improper actions. (*See* BB&T Memo., at 3). However, BB&T fails to note the latest of examples given is before the bank doubled its commitment and six months before the site plan program was approved and it advanced funds. Edahl characterized the relationship then as "good or excellent. It is the same thing." (*See* Deposition of Edahl, Vol. II, at 39, Exhibit 6). In fact, close to "two hundred purchase orders were successfully financed and collected through July of 2007." (*See* BB&T document BB&T/FC_001194-001198 dated March 18 and 21, 2008, Exhibit 33). Regional Loan Administrator Denning said in September, 2007, that the factoring department administering the loan reported everything was "OK", and that "all purchase orders have converted to invoices without exception." Thus the bank's carping of past petty deviations from the contract is rather insignificant, and thus its kaleidoscopic format requires focus from its own witnesses to present reality.

More generally, Defendants' Memoranda in Support chastise Skywaves for not segregating revenues from invoices and prompt remittance of payments. Examination of the testimony of the only loan administrator of the account through mid-November, 2007, Castlen Morris, demonstrates the shallowness of the bank's accusations. Most importantly, BB&T fails to acknowledge that Skywaves has testified it was at all times simply adhering to its agreement, but which BB&T had never previously documented internally. Only on one occasion in

September, 2007 did BB&T email Skywaves raising any concern about the long standing practice of using proceeds from customer receipts during the grace period.

Prior to its written default letter of January 25, it searched for a pretext to assert to amend its real reason for declaring default. With the unsecured site plan funding it has undertaken the risk of a loan beyond its risk tolerance. Now, the bank finally admits its previous acceptance by Morris of payments on invoices the bank claimed should have been made directly to it or remitted immediately to it was not out of the ordinary (*see* Rule 30(b)(6) Depo., at 76, Exhibit 14) and that the bank does not claim Morris handled the payment issue improperly (*See id.*, at 77:9-11, Exhibit 14). Even if they were overdue and had been comingled, a clearly disputed fact, these are normal accommodations an account officer has discretion to administer. Moreover, each party had a right to cancel the agreement on sixty days notice without cause. Obviously, if Skywaves' purported sins had risen to a material breach, BB&T would have opted out under paragraph 18 of the Factoring agreement.

When Hennessy declared default, he did not consider Morris' prior course of dealing. His concern was: "I had no collateral securing my $2 million purchase order line . . . ." (*See* Rule 30(b)(6) Depo. at 81, Exhibit 14). Indeed, Hennessy did not consider past due payments of $250,000 during the handling of the loan remarkable. "Remarkable? Not when a shelter's selling at a hundred thousand dollars or so. I don't think that is remarkable. It was – it was concerning that they kept the money for that long, but . . .". (*See* Rule 30(b)(6) Depo., at 83, Exhibit 14).

By agreement, the two million dollar line was always unsecured. Hennessy reacted then, and throughout any workout phase, based on the misinformation about what risk the bank had undertaken, and his belief that Skywaves had defrauded the bank. His individual and 30b6 testimony is consistently dramatic on the subject.

Hennessy as the bank's 30(b)(6) witness testified that the practice of BB&T's problem loans administration was to call a default before attempting a solution. (*See* Rule 30(b)(6) Depo 109-110, Exhibit 14). If Burke had known the truth, the file would not be assigned to problem loan. It had only been identified as a potential candidate for the watch list by Edahl a week

749

earlier and he thought Skywaves was viable. Hennessy admitted if Skywaves payment of the claimed past due amounts to it and aged accounts payable over 30 days would have acceptable to satisfy those claimed defaults. (*See* Rule 30(b)(6) Depo., at 93-94, 101, Exhibit 14).

Hennessy testified his decision to declare default was because "the bank was unsecured on every site plan". The defaults asserted are merely pretext. Hennessy told Skywaves on January 25th, in order to move forward with the bank through the April 5, 2008 when the line expired, Skywaves must secure $3.5 to $5 million equity. Such as position was contrary to admission, over objection, that yes "The bank opted to take that risk." (*See* Rule 30(b)(6) Depo., at p.96, Exhibit 14 (referring to unsecured site plans financing) .

Hennessy testified he declared default at the meeting January 25th, after he learned of the fraud. (*See* Rule 30(b)(6)Depo, at 118, Exhibit 14). He also testified the only fraud discussed at that meeting was the site plan issue. (*See* Rule 30(b)(6) Depo. p. 32, 95, 161, Exhibit 14). Hennessy confirms he would have wanted collateral such as a CD for $1.9 million to secure the unsecured site plan funding. (*See* Rule 30(b)(6) Depo., at 122, Exhibit 14). Even if he had known what BB&T now admits: Skywaves was in full compliance with the terms of the site plan funding agreement which the bank made as an unsecured loan. (*See* Rule 30(b)(6) Depo., at 65, 95, Exhibit 14).

The default status was never withdrawn. Hennessy's viewpoint was contaminated by his belief Skywaves had defrauded the bank and had a $2 million advanced unsecured based on the fraudulent scheme. He testified once a default was declared, the bank gave no consideration to reducing the loss to Skywaves. In response to any responsibility the bank had if it could help reduce Skywaves loss without any increased risk of loss to itself , Hennessy said "not once the loan was placed into default". (*See* Rule 30(b)(6) Depo. at 153, Exhibit 14). Was Skywaves in full compliance with the site plan funding? "We understand that now to be the case." (*See* Rule 30(b)(6) Depo. at 95, Exhibit 14).

The predominant issue regarding whether the bank exercised good faith and fair dealing , even if its declaration of default was proper because Skywaves actions constituted a material

breach , is could it have reasonably accommodated Skywaves through the expiration of the line on April 5, without substantially increasing any risk of loss to the bank. Hennessy's testimony is compelling. Hennessy was asked if he had known the truth about the site plan funding to which he now admits, and Skywaves agreed to secure $500,000 cash into Skywaves within ten days of the default letter, would the bank have agreed to a forbearance agreement until the line of credit expired on April 5? He answered:

> A. And sitting here today, under those circumstances, I—I don't know that would have been enough to enter into a forbearance agreement. $500,000 is a lot of money. So, you know, maybe, but I can't tell you that yes.
>
> Q. Okay, With that last question that I asked you, I want you to add to that. Would that proposal from Skywaves have reduced the risk of loss to the bank?
>
> A. Yes.

(*See* Rule 30(b)(6) Depo., at 135 -136, Exhibit 14).

In reality, Hennessy was not suspicious of fraud based on the acquisition and use of $1.2 million dollars of site plan funding. He was "certain of it" - from January 25th until Edahl confessed and Hennessy had to "pick my jaw up of the floor." (*See* Rule 30(b)(6) Depo. at 51-52, Exhibit 14). Now, the bank has finally confessed, his "certainty" was in error, and Skywaves was fully compliant with that program, but he first insisted Skywaves secure $3.5 to $5 million equity to clear the claimed default, and would never consider any payment of current obligations that did not also include a CD or its equivalent value to fully secure the 1.3 site plan funding. When Hennessy was asked if he ever continued a banking relationship with a client he "suspected of fraud", he acknowledged that in his 25 years or better doing this work, those situations were less than a handful. (*See* (30(b)(6), at 162, Exhibit 14). The question asked on page 27- Can anyone expect that Hennessy discharged BB&T's obligation of good faith and fair dealing, terminated the contract "in equity and good conscience", or fulfilled its fiduciary duties to Skywaves, has

been answered with the bank's own testimony. Under our system, this role is for the fact finder under all causes of action advanced.

ARGUMENTS

A. Standard of Review

The standard of review governing a motion for summary judgment is well-settled in South Carolina:

> Under Rule 56, SCRCP, a party is entitled to a judgment as a matter of law 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. In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. [(Citations omitted).]

See Boyd v. Bellsouth Telephone & Telegraph Co., 369 S.C. 410, 415, 633 S.E.2d 136, 138 (2006). "'[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.'" *See Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 617 n.4, 698 S.E.2d 879, 882 n.4 (Ct. App. 2010) (citation omitted). The Court should cautiously invoke summary judgment so that no person will be improperly deprived of a trial. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). When the action requires proof by a preponderance of the evidence, the nonmoving party need only submit a "mere scintilla" of evidence to survive summary judgment. *See Hancock v. Mid-South Mgmt Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Apropos to the Court's consideration of the pending motion is a statement contained in *Johnson v. Phoenix Mut. Life Ins. Co.*, 44 N.C. App. 210, 261 S.E.2d 135 (1979):

> Summary judgment is apt to be inappropriate in an action based on a complex scheme of fraud where the court is asked to decide the motion on lengthy affidavits and documents and voluminous depositions. The case before us is precisely such an action.

Id. 44 N.C. App. at 214-15.

B. **Choice of Law**

The parties' factoring agreement, which forms the groundwork for Skywaves' claims, includes the following choice of law provision: "All acts, transactions, rights, and liabilities under this Agreement shall be governed in all respects by, and construed in accordance with, the internal laws of the State of North Carolina." (*See* 2005 Factoring Agr't ¶ 25, Exhibit 1). South Carolina courts will generally enforce the parties' choice of law to govern their relationship:

> Choice of law clauses are generally honored in South Carolina. *Nucor Corp. v. Bell*, 482 F. Supp. 2d 714, 728 (D.S.C. 2007) ("Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law."); *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 221, 578 S.E.2d 329, 336 (2003) ("We hold that a settlor may designate the law governing his trust, and absent a strong public policy reason, or lack of substantial relation to the trust, the choice of law provision will be honored."); *see also Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994) ("When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect.").

See Team IA, Inc. v. Lucas, 395 S.C. 237, 248-49, 717 S.E.2d 103, 108-09 (Ct. App. 2011).

Thus, the parties have selected North Carolina law to govern all of the aspects of the BB&T-Skywaves relationship, including any tort claims. The choice of law provision applies by its terms to "[a]ll acts, transactions, rights, and liabilities" under that agreement. Skywaves respectfully submits that such broad language would include any torts committed within the context of that agreement. As a result, North Carolina law would apply to all claims in this case.

C. **The Court Should Deny Summary Judgment as to the Breach of Contract Claim**

1. **There Is a Genuine Issue of Material Fact as to BB&T's Breach**

BB&T has admitted that it orally modified the factoring agreement, as discussed in detail above. While the parties might dispute some modified terms, there is evidence that BB&T agreed to fund Skywaves based on sites identified on a General Dynamics map. There is also evidence that BB&T agreed that Skywaves had no obligation to repay advances until it developed the sites, issued a purchase order and sent an invoice. There is no question that BB&T demanded repayment of the advances before any of these events occurred. In other

753

words, BB&T materially breached its contractual obligations to Skywaves under the parties' modified agreement by demanding things that Skywaves never agreed to. Moreover, it is undisputed that BB&T failed to fulfill its obligations to fund Skywaves in accordance with the parties' agreement. In addition, Skywaves has proffered evidence that BB&T wrongfully terminated the Factoring Agreement in bad faith based on pretext.

2. BB&T Has Not Shown That Skywaves *Materially* Breached the Parties' Agreement So As to Excuse It From Performance

BB&T argues that it could terminate the Factoring Agreement because: (a) Skywaves failed to pay debts to third-parties when they came due; (b) Skywaves failed to immediately remit customer payments to BB&T and "commingled" such payments with other funds; and (c) BB&T deemed itself insecure of Skywaves' performance. However, for the reasons discussed below, these claimed breaches did not excuse BB&T's performance because they were not *material* breaches that would excuse it from the agreement and permit termination.

The Restatement (Second) of Contracts provides that a party's contractual duties may be excused by the other party's *uncured material* breach. *See* Restatement (Second) of Contracts § 237. Thus, under North Carolina law:

> [a] party may not insist upon the performance of a contract or a provision of it where that party is personally guilty of a material or substantial breach of that contract or provision. The other party's duty to perform is excused by a material failure to perform contractual obligations or a material breach. Therefore, in the case of bilateral contracts, if either party commits a material breach of the contract, the other party should be excused from the obligation to perform further.

See Ebert v. Ebert, 2012 WL 5857386, at *2-*3 (N.C. Ct. App. Nov. 20, 2012) (citations omitted); *accord Monster Daddy, LLC v. Monster Cable Prods., Inc.*, 2012 WL 2311831, at *4 (4th Cir. June 19, 2012) (South Carolina law) ("This doctrine only excuses a non-breaching party's performance when such obligations were dependent upon the promises that the breaching party failed to perform. [Citation omitted.] Thus, a party's breach of one promise does not discharge the non-breaching party's duties with respect to unrelated or independent promises to perform under the parties' contract.").

A material breach is one "going to the heart of the contract." *See Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 705, 682 S.E.2d 726 (N.C. Ct. App. 2009). A breach is material where the provision breached "is such an essential part of the bargain that the failure of it must be considered as *destroying the entire contract*; or where it is such an indispensable part of what both parties intended that the contract would not have been made with the covenant omitted." *See Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E.2d 240 (1964) (emphasis added); *accord Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (N.C. Ct. App. 2003) ("[Material breach] substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform."); *see also Brazell v. Windsor*, 384 S.C. 512, 516-17, 682 S.E.2d 824, 826 (2009) ("A breach of contract claim warranting rescission of the contract must be so substantial and fundamental as to defeat the purpose of the contract." (citation omitted)).

"[W]hether failure to perform a contractual obligation is so material as to discharge the other parties' performance is *a question of fact* for the jury or for the trial court without a jury." *Opsahl v. Pinehurst Inc.*, 81 N.C. App. 56, 64-65, 344 S.E.2d 68, 74 (N.C. Ct. App. 1986) (emphasis added) ("[W]e cannot determine from the record as a matter of law whether defendant's delay here constitutes a material breach justifying rescission."); *accord Allison v. Davidson*, 2011 WL 6036140, at *3 (N.C. Ct. App. Dec. 6, 2011) (stating that question of whether breach is material is question of fact) (*citing Millis Constr. Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 512, 358 S.E.2d 566, 570 (N.C. Ct. App. 1987)); *Crosby v. Bowers*, 87 N.C. App. 338, 345, 361 S.E.2d 97, 102 (N.C. Ct. App. 1987); *Coleman v. Shirlen*, 53 N.C. App. 573, 577, 281 S.E.2d 431, 434 (N.C. Ct. App. 1981).

Even if Skywaves materially breached an agreement, BB&T's performance would not be excused until Skywaves had an opportunity to cure that breach:

> When a breach occurs by nonperformance or defective performance, "[e]ven if the failure is material, it may still be possible to cure it by subsequent performance without a material failure," Restatement (Second) Contracts § 237 cmt. b, and the non-breaching party's obligations are not excused. A failure to

755

> cure within a reasonable time may then be treated as a repudiation, see *id.* § 251 cmt. c, illus. 5, as would a positive statement by the breaching party that it does not intend to cure its nonperformance. For repudiation to result in a breach of contract where there is still time to cure, "the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute."

See Weaver's Asphalt & Maintenance Co. v. Williams, 2011 WL 705150, at *4 (N.C. Ct. App. March 1, 2011) (remanding for finding of whether party repudiated contract and excused other party from performance).

Assuming that everything BB&T claims is true, an issue of fact exists as to whether Skywaves' alleged defaults were "material" so as to excuse of BB&T's performance and permit termination. There is at least a scintilla of evidence that the claimed deficiencies were minor, when viewed in light of the entire relationship. At the very least, the materiality of any breach is an issue of fact that should be determined after trial.

With regard to the first alleged breach, failure to immediately remit customer payments to BB&T, BB&T has confirmed that any breach by Skywaves was not material. Castlen Morris was in charge of a BB&T commercial lending division and was responsible for Skywaves' account. He knew of Skywaves' alleged failure to immediately remit payments and characterized them as breaches of the agreement, but not sufficiently important to even document:

> Q: Now, you understood that the written contract, the written contract between Skywaves and BB&T, required Skywaves to promptly pay over to BB&T any monies that they received from their customers.
>
> A: . . . Yes.
>
> Q: And you knew that Skywaves had gotten into the habit of not doing so.
>
> A: Yes. There had been several instances, as you pointed out, where they were slow in remitting.
>
> Q. Yeah. By September you knew that they had held $350,000 from May, $259,000 from July, and $325,000 in September.
>
> A: Yes. . . .
>
> Q: But you did not notify anybody about these.

A: To my recollection, I didn't notify anybody in writing about them, no.

Q: And you certainly didn't document anything in your file.

A: I don't remember, but I would probably say no.

(*See* Morris Depo., at 87-88, Exhibit 22). He testified that, so long as there was no fraudulent invoice and Skywaves sent the money after he brought the delay to its attention, there was no reason to document the event. (*See id.* at 71-72, Exhibit 22). He explained that such slow payment was not uncommon for a start-up like Skywaves: "They were a small start-up company. They were cash-strapped, of course. Every small company I deal with is cash-strapped, so, you know, every dollar is important." (*See id.* at 42, Exhibit 22). There is no evidence in the record that BB&T ever considered late payments to be material breaches of the parties' agreement. To the contrary, BB&T was comfortable with such late payments until it needed an excuse to terminate the parties' agreement.

BB&T next argues that Skywaves breached the agreement by failing to timely pay third-party receivables. Specifically, BB&T argues that in the factoring agreement, Skywaves expressly represented, covenanted and warranted that it "is able to pay, does pay and will continue to pay its debts as they mature." (*See* 2005 Factoring Agr't ¶ 7(b), Exhibit 1). However, with regard to third-party debts, BB&T has not proffered evidence that Skywaves was actually in breach of the parties' agreement, let alone in material breach. Aside from proffering evidence of a percentage (37%) of payables that were, at one point, more than 60-days aged — most of which were owed to a vendor that had agreed to extended terms (*see* Voytko Depo., at 194-95, Exhibit 10). BB&T does not contest that the vast majority of those aged accounts were subject to an agreement to extend time and does not provide evidence of specific any delinquent accounts or their status at any given time. More importantly, BB&T presents no evidence that this situation in any way was material to BB&T's rights under the parties' agreement. Such evidence is plainly insufficient to warrant the entry of summary judgment against Skywaves on this issue.

Finally, Skywaves contends that it was entitled to terminate the agreement under a provision creating an event of default where BB&T might "for any other reason deem itself insecure." (*See* 2005 Factoring Agr't ¶ 12(*l*), Exhibit 1). Initially, there is conflicting evidence as to whether BB&T could reasonably deem itself insecure. The evidence shows that the parties, at the time of the termination, were comfortable and committed to the agreement. There is no evidence that BB&T had ever suggested that it felt "insecure" in any way or was contemplating triggering this provision in an effort to evade the agreement.

Skywaves' alleged defaults discussed above did not deprive BB&T of the value of the parties' relationship. There is no evidence that Skywaves had ever committed a breach of the agreement that would have completely destroyed the relationship. To the contrary, despite any claimed defaults, the parties were consistently performing under the agreement in a mutually-satisfactory manner. Had BB&T provided Skywaves with sufficient notice and an opportunity to cure (which it did on numerous occasions in the past) the claimed defaults, Skywaves could have cured the alleged breach and continued performing under the parties' agreement. More importantly, but for BB&T's untimely and unjustified termination, Skywaves could have grown its business and generated more profits for BB&T. Skywaves is entitled to have a jury determine whether its putative breaches were material so as to excuse BB&T from its obligations and allow it to terminate the Factoring Agreement.

The immateriality of Skywaves' alleged defaults is reinforced by reference to Edahl's actions leading up to the putative termination. On January 17, 2008, Edahl and Burke met to introduce Burke to Skywaves' team. Prior to that meeting, Burke and Edahl had studied the 2007 year-end financials, which showed a loss of $1.4 million, as well as the substantial accounts receivable and payable. Edahl remained convinced of Skywaves' viability, as was later confirmed by Michael Hennessy.

Edahl's November 12, 2007 analysis expressed no alarm and noted routine review of the operating assumptions would be made in March, 2008, at which time BB&T would consider renewal of the line of credit. In addition, in December, 2007, Edahl asked Skywaves to prepare a

three-year plan to be used for an initial public offering; he wanted this to be completed so, as soon as the General Dynamics order was confirmed, its revenue stream would be clear

Edahl further testified that, prior to January 17, 2008, he did not say anything that might alert Skywaves that BB&T was even contemplating calling a default. (*See* Edahl Depo. Vol. II, at 90, Exhibit 6). Edahl testified more specifically that he was satisfied with the status of Skywaves under the agreement shortly before the putative termination:

> Q. Were you satisfied with the relationship with Skywaves as of January the 16th, 2008?
>
> A. It was getting riskier from my perspective, but generally yeah.
>
> Q. And would you have wanted to go forward with them?
>
> A. Assuming the credit—assuming the credit profile would allow us to do that sure.
>
> Q. I mean, based on what you knew January 16th, 2008, would you have expected to continue the credit with Skywaves?
>
> A. Yeah, hopefully so.

(*See* Edahl Depo. Vol. II, at 91, Exhibit 6). Simply put, there is substantial evidence that, notwithstanding the claimed defaults, BB&T at all times treated the Skywaves contract as being positive and never indicated that a termination was ever on the horizon.

In reality, BB&T's termination of the agreement had nothing to do with Skywaves' claimed default. Skywaves' claimed "breaches" were mere pretext that BB&T used to evade an arrangement that it later discovered contained terms it did not like (concerning funding based on site plans and purchase orders). If BB&T viewed Skywaves' putative breaches as "material" to such a valuable contract, BB&T would have raised those issues much sooner and provided Skywaves with a chance to cure to salvage the parties' agreement. It did neither. Instead, BB&T concocted a pretext for termination of the Factoring Agreement to conceal its real motive.

3. A Question of Fact Exists Regarding BB&T's "Good Faith" Belief It was Entitled to Terminate the Factoring Agreement

Skywaves anticipates that BB&T will argue that the "materiality" of Skywaves' claimed breaches is irrelevant because the Factoring Agreement permits termination "[u]pon and after the occurrence of any Event of Default." (*See* Ex. A ¶ 13, Exhibit 1). An "Event of Default" includes circumstances where "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 . . . ." (*See* Ex. A ¶ 12(b), Exhibit 1). In addition, an Event of Default would exist where "BB&T shall for any other reason deem itself insecure or the Collateral impaired." (*See* Ex. A ¶ 12(*l*), Exhibit 1). Skywaves anticipates that BB&T will posit that "any" default, even if immaterial or pretextual, would permit it to terminate the agreement.

A question exists as to whether BB&T's claim of breach for these grounds is made in good faith, as BB&T believed Skywaves was a viable company and many members of its management recommended against unilateral termination. Mike Hennessy is BB&T's credit manager who had ultimate responsibility for terminating the relationship. Hennessy terminated the agreement based not on any sudden breach by Skywaves, but on his incorrect belief that Skywaves committed fraud in obtaining funding for site plans. He testified that had he known the reality (*i.e.*, that BB&T *per* Edahl had agreed to fund site plans) his decision might have been different:

> Never once did anybody ever tell me about an oral modification to a contract. Never once did anybody ever tell me they have 60 days. Had they done that, I probably would have had to do a 360. . . . I would have had to change my whole stance.

(*See* Hennessy Depo., at 28, Exhibit 29).

Even without knowledge of that truth, evidence shows that BB&T believed Skywaves would succeed. Konersmann testified that, after having reviewed the General Dynamics commitments and business plan, Hennessy believed the company was viable and should not be shut down but Hennessy was overruled. (*See* Konersmann affidavit, Exhibit 17). Mike Burke, the account executive assigned to Skywaves' account, testified that the business plan showed

760

Skywaves was going "to have a large increase in volume and be profitable." (*See* Burke Depo., at 80, Exhibit 21). Burke was so optimistic that he solicited equity investors:

> I also told him that I would try to help by making some calls to equity groups that may be willing to put some money into his company but again, that will take a solid plan that shows a realistic turnaround.

(*See* BB&T/FC_001252-001253, Exhibit 35). Burke testified he would be willing to "work with" Skywaves on continuing funding if Skywaves could reduce BB&T's exposure. (*See* Burke Depo., at 78, Exhibit 21; BB&T/FC_001252-001253, Exhibit 35). Skywaves did so. Even after BB&T terminated funding, Skywaves continued to manufacture and deliver shelters and paid the debt down by $1.2 million in the weeks following termination. Even Edahl recommended that BB&T continue funding at the same level until they had a chance to meet with the company (*See* Burke Depo., at 83, Exhibit 21). Simply put, it is apparent that BB&T never gave any signal that Skywaves was in breach of the factoring agreement in any way.

BB&T has not shown that the parties intended the agreement to supplant the law, which only excuses performance on a *material* breach. BB&T has not cited any law permitting the use of boilerplate language to allow termination for *any* breach, no matter how immaterial. *See Harris Teeter, Inc. v. Moore & Van Allen, P.C.*, 390 S.C. 275, 284, 701 S.E.2d 742, 746 (2010) (lease may not be terminated "for a trivial or technical breach *even when the parties have specifically agreed* that 'any breach' gives rise to the right of termination.") (emphasis added) (citation omitted). Therefore, as an initial matter, BB&T may not use this boilerplate language to grant itself a right to terminate the agreement for *any* breach.

Even if BB&T *could* have terminated for Skywaves' alleged breaches, a jury question exists as to whether its exercise of that right was proper. "In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Williams v. Craft Dev., LLC*, 199 N.C. App. 500, 506, 682 S.E.2d 719, 723 (2009). "[W]here 'a contract confers on one party a discretionary power affecting the rights of the other, this discretion must be exercised in a

reasonable manner based upon good faith and fair play.'" *See Area Storage, Inc. v. Old Oak Estates Community Ass'n,* 2012 WL 1688645, at *2 (N.C. Ct. App. May 15, 2012) (*quoting Mezzanotte v. Freeland,* 20 N.C. App. 11, 17, 200 S.E.2d 410, 414 (1973)); *accord Strategic Outsourcing, Inc. v. Continental Cas. Co.*, 414 F. Supp. 2d 545, 553 (W.D.N.C. 2006) ("Where a contract gives one party discretionary power, such as the unilateral right to terminate if dissatisfied, good faith is measured by an objective standard of reasonableness.") (citations omitted).

Likewise, South Carolina cases have held that, even where a party has a right to terminate an agreement, it must do so in a reasonable manner so as to avoid unnecessary injury:

> It is settled law in that state [South Carolina] that regardless of broad unilateral termination powers, the party who terminates a contract commits an actionable wrong if the manner of termination is contrary to equity and good conscience. *Philadelphia Storage Battery Co. v. Mutual Tire Stores,* 161 S.C. 487, 159 S.E. 825; *Gaines W. Harrison & Sons v. J.I. Case Co.*, E.D.S.C., 180 F. Supp. 243. That standard of conduct is far more stringent than one forbidding only actual fraud, and it may apply to an unconscionable reason for termination as well as to the causing of needless injury in the course of termination. *Gaines W. Harrison & Sons v. J.I. Case Co., supra.* Although the formal claim *in Philadelphia Storage Battery Co.* utilized the term 'fraud,' the actual conduct alleged was little different from that claimed here, and the opinion of the South Carolina Supreme Court does not indicate that semantics played any part in its decision.

See deTreville v. Outboard Marine Corp., 439 F.2d 1099, 1100 (4th Cir. 1971) (applying South Carolina law). In *Parham-Thomas-McSwain,* 111 S.C. 37, 96 S.E. 697 (1918), involving the cancellation of an insurance agency contract, the plaintiff presented evidence supporting a jury finding that cancellation was fraudulent and in bad faith. The Court held that the jury could infer that the insurance company representative had "other and sinister reasons to cancel the contract than those he testified to." *See id.*, 96 S.E. at 700.

Since BB&T was wrong about its accusations of fraud, there is a question of fact whether its termination of the agreement was justified, was unreasonably harsh and/or caused unnecessary damage. As discussed above, there is evidence that the claimed breaches were minor, at worst. On the other hand, there is also evidence that BB&T had led Skywaves to

762

forego other financing options to stay with BB&T. Under such circumstances, there is at least a factual question as to whether BB&T's sudden and unexpected termination of the agreement, for reasons never even mentioned before as possible grounds for termination, was a good faith exercise of BB&T's claimed contractual rights.

Konersmann had several potential investors wishing to replace BB&T providing capitalization to Skywaves; one potential investor even proposed paying BB&T up to $3 million for its debt, (*see* BB&T/FC_001123, Exhibit 36) although BB&T refused. Konersmann asked for an extension on the funding to work out a payment plan, but BB&T refused. General Dynamics offered to provide the funding needed to construct $1.2 million worth of shelters. but BB&T refused. BB&T was so eager to falsely accuse Skywaves of fraud that it refused to fund it so it could continue to grow its business. If BB&T had given Skywaves an opportunity to obtain alternate sources of finance, Skywaves could have continued in business.

As pointed out above, despite the claimed breaches, BB&T believed Skywaves was a viable company and many members of BB&T's upper management recommended against unilateral termination.

The evidence here shows that BB&T utilized pretext to terminate the parties' relationship, when it actually terminated solely because it no longer liked its terms. BB&T reneged on its promises to Skywaves without considering its impact on Skywaves. BB&T knew or should have known that Skywaves heavily relied on BB&T's ongoing fulfillment of the agreement for its continuing existence and growth. BB&T and Edahl knew that, if BB&T did not keep its promises, Skywaves' financial health would be devastated. The disastrous impact to Skywaves from termination overshadowed any claimed harm to BB&T from Skywaves' alleged technical breach.

BB&T's termination of the agreement for Skywaves' claimed minor breaches was unreasonable, against equity and good conscience and not in good faith. All of the facts and circumstances of the parties' relationship make clear that BB&T could not in good faith use immaterial putative breaches by Skywaves as a pretext for it to abandon Skywaves and leave it to

763

a certain demise. To the contrary, given the nature of the parties' relationship and Skywaves' fiscal condition, good faith dictated that BB&T take care to ensure that its actions — particularly in termination of the agreement — did not harm Skywaves.

BB&T could not have terminated the agreement in good faith. Beginning on January 25, 2008, BB&T's primary actor was Hennessy, who claimed that Skywaves admitted fraud of $1.2 million, but did not even mention that in the termination letter as the reason for declaring Skywaves in default. (*See* BB&T 30(b)(6) Depo., at 160-61, Exhibit 14). If Edahl had told his employer BB&T the truth from the onset, Hennessy would never have become involved in Skywaves' account. Hennessy admits that, had he known the truth, he would have taken an entirely different approach. (*See* Hennessy Depo., at 28-29, Exhibit 29). He concedes that when he learned the truth five years later from Edahl he "had to pick [his] jaw off the floor" and was "shocked." (*See* Rule 30(b)(6) Depo., at 52, Exhibit 14).

Contrary to what Edahl disclosed, he committed BB&T to an arrangement that was beyond its risk tolerance and compounded this by agreeing to modify it to allow funding for proposed purchase orders. As Hennessy viewed the situation, the financing was akin to equity financing, except that BB&T did not receive an equity interest in Skywaves. He testified that he felt the relationship was improper because it was, in his view, the equivalent of a "permanent working capital loan." (*See* Rule 30(b)(6) Depo., at 40, Exhibit 14).

Instead of honoring its agreement, BB&T wrongfully declared default simply because Hennessy learned about Edahl's deceit (of both BB&T and Skywaves). Hennessy knew that the default letter would effectively deprive Skywaves of *all* funding sources and that Skywaves would have equity investment as its only remaining potential solution. However, BB&T's fraud accusations made it exceedingly unlikely that Skywaves would ever attract any new investors.

Hennessy opined that Skywaves' problem all along was that it was "always, always always undercapitalized," not its business plan. (*See* Hennessy Depo., at 79, Exhibit 29). However, he did not know it was *BB&T* that advised Skywaves to decline capital infusion through Hunt Capital. In reality, Edahl's advice was designed to protect BB&T's opportunity for

764

lucrative underwriting and promotion fees from an anticipated Skywaves' IPO. He testified that if BB&T managed the initial public offering, he would remain as the relationship officer in charge of the account and that the Skywaves' account positively impacted his 2007 bonus. (*See* Edahl Depo. Vol. I at 42, Exhibit 7).

BB&T characterizes Skywaves as a prodigal son, noting that it "repeatedly admonished Skywaves" and identifying examples alleged improper acts. (*See* BB&T Memo., at 3). However, BB&T does not note the most recent example it provided occurred before BB&T doubled its commitment and six months before the site plan program began. Edahl characterized the parties' relationship at that time as "good or excellent." (*See* Edahl Depo. Vol. I at 39, Exhibit 7). In fact, nearly "two hundred purchase orders were successfully financed and collected through July of 2007" (*See* BB&T Document 001196, Exhibit 33). Denning said in September, 2007, that the factoring department reported everything was "OK" and that "all purchase orders have converted to invoices without exception." (*See* Ex. 4 to Denning Depo., Exhibit 8).

BB&T chastises Skywaves for not segregating revenues from invoices and prompt remittance of payments. However, the testimony of the only administrator of that account through mid-November, 2007, Castlen Morris, demonstrates the emptiness of BB&T's accusations. Most importantly, BB&T fails to acknowledge that Skywaves has testified it at all times simply adhered to the parties' modified agreement. As it turns out, contrary to Edahl's repeated assurances, BB&T had not previously internally documented that modification. Aside from one occasion in September, 2007, BB&T never communicated to Skywaves about the practice of using proceeds from customer receipts during the grace period. At no time did BB&T ever threaten to terminate the parties' agreement for that reason.

Prior to the January 25, 2008 default, BB&T was searching for a pretextual reason to break its promises to Skywaves, since it had undertaken risks beyond its normal tolerance. Only now has BB&T finally admitted that the later payments on invoices BB&T claimed should have been made directly to it or remitted immediately was not out of the ordinary. (*See* Rule 30(b)(6)

765

Depo., at 76, Exhibit 14). BB&T does not claim that Morris handled that payment issue improperly. (*See* Rule 30(b)(6) Depo., at 77, Exhibit 14). Even if they were overdue or commingled, which Skywaves disputes, these are normal accommodations within his discretion. Moreover, each party could terminate the factoring agreement on sixty days notice. Obviously, if Skywaves' alleged acts rose to the level of a material breach, BB&T could have exercised its right to terminate with notice; it did not do so.

When Hennessy declared Skywaves in default, he did not even consider the parties' course of dealing. His only concern was that he "had no collateral securing my $2 million purchase order line." (*See* Rule 30(b)(6) Depo., at 81, Exhibit 14). Hennessy did not consider past due payments of $250,000 during the handling of the account to be remarkable. (*See* Rule 30(b)(6) Depo., at 83, Exhibit 14 ("Remarkable? Not when a shelter's selling at a hundred thousand dollars or so. I don't think that is remarkable."). By agreement, the two million dollar line was always unsecured. Hennessy reacted then and throughout based on misinformation about the risk that BB&T had undertaken and on his belief that Skywaves had defrauded BB&T.

Hennessy agreed that BB& practice was that, once problem accounts administration was assigned a file default would be declared before attempting a solution or workout. (*See* Rule 30(b)(6) Depo., at 109-111, Exhibit 14). If Edahl had told Burke the truth, the file would not have been designated as "problem." Edahl had identified Skywaves as a potential candidate for the watch list only a week earlier, and he thought Skywaves was viable. Hennessy testified that Skywaves' payment within a week or so of claimed past due amounts to it and accounts payable over 30 days would have been acceptable to satisfy those claimed defaults. (*See* Hennessy 30(b)(6) Depo., at 93-94, 101, Exhibit 14).

Hennessy testified that his decision to declare Skywaves in default was motivated by the fact that BB&T was unsecured on every site plan. The defaults asserted were mere pretext. Hennessy told Skywaves on January 25, 2008 that, in order to move forward with BB&T through April 5, 2008 (when the line expired), Skywaves would need to secure $3.5 to 5 million

equity; however, this position is contrary to the admission that "[t]he bank opted to take that risk." (*See* Rule 30(b)(6) Depo., at 96, Exhibit 14 (referring to unsecured site plans financing)).

Hennessy testified he declared default at the meeting after he learned of the accusations that Skywaves committed fraud. (*See* Rule 30(b)(6) Depo., at 118, Exhibit 14). He also testified the only fraud discussed at the meeting was the site plan issue. (See Rule 30(b)(6) Depo., at 32, 95, 161, Exhibit 14) Hennessy confirms he would have wanted collateral such as a CD for 1.9 million to secure the unsecured site plan funding. (*See* Rule 30(b)(6) Depo., at 95, 122, Exhibit 14).

Although it was based on a false premise, BB&T never withdrew its declaration of default. Hennessy's viewpoint was contaminated by his belief Skywaves had defrauded BB&T and had a $2 million advanced unsecured based on a fraudulent scheme. He never testified that, once default was declared, BB&T did anything to mitigate the harm from the wrongful termination to Skywaves. When asked whether Skywaves was in compliance with the site plan funding modification, he responded that "[w]e understand that now to be the case." (*See* Rule 30(b)(6) Depo., at 95, Exhibit 14).

An importunate issue regarding whether BB&T acted in good faith is whether BB&T could have accommodated Skywaves through the expiration of the line on April 5, 2008 without substantially increasing its own risk. Hennessy's testimony on this topic is compelling. When asked whether — had BB&T known in early 2008 about site plan funding — it would have agreed to forbearance until the line of credit expired on April 5 if Skywaves agreed to secure $500,000 within ten days of the default letter, he responded:

> A. And sitting here today, under those circumstances, I—I don't know that would have been enough to enter into a forbearance agreement. $500,000 is a lot of money. So, you know, maybe, but I can't tell you that yes.
>
> Q. Okay. With that last question that I asked you, I want you to add to that. Would that proposal from Skywaves have reduced the risk of loss to the bank?
>
> A. Yes.

767

(*See* Rule 30(b)(6) Depo., at 135-36, Exhibit 14).

Hennessy was not suspicious of fraud based on the acquisition and use of $1.2 million of site plan funding, he was "certain of it" — from January 25, 2008 until five years later when Edahl confessed and Hennessy's "jaw dropped to the floor." When Hennessy was asked if he ever continued a banking relationship with a client he "suspected of fraud," he acknowledged that in his 25 years or better doing this work, those situations were less than a handful. (*See* Rule 30(b)(6) Depo., at 171-72, Exhibit 14).

Under the facts of this case, there is evidence that BB&T could not have terminated the contract in equity and good conscience. For these reasons, Skywaves is entitled to a trial on its claims for a determination of this factual question.

4. BB&T Waived the Right to Terminate Because of Skywaves' Alleged Breach

Even if Skywaves was in default of the factoring agreement, BB&T waived its right to terminate for that reason. Under North Carolina law, parties can waive contractual rights by acting in a manner showing an intent to relinquish such rights:

> It is well settled in North Carolina that a "party may waive a contractual right by any intentional and voluntary relinquishment." *McNally v. Allstate Ins. Co.*, 142 N.C. App. 680, 683, 544 S.E.2d 807, 809-10 (2001) (citation omitted). "The essential elements of waiver are (1) the existence, at the time of the alleged waiver, of a right, advantage or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit." *Fetner v. Granite Works*, 251 N.C. 296, 302, 111 S.E.2d 324, 328 (1959) (citation omitted).
>
> "The intention to waive may be expressed or implied from acts or conduct that naturally lead the other party to believe that the right has been intentionally given up." *Klein v. Insurance Co.*, 289 N.C. 63, 68, 220 S.E.2d 595, 599 (1975). For example, this Court held that a party may waive a condition precedent by performing on the contract despite knowledge that a condition has not occurred. *Fletcher v. Jones*, 314 N.C. 389, 333 S.E.2d 731 (1985).

Demeritt v. Springsteed, 204 N.C. App. 325, 328-29, 693 S.E.2d 719, 721 (N.C. Ct. App. 2010). "[U]nlike modification of a contract, the efficacy of a waiver of contractual rights is generally not thought to require special tokens of reliability, such as a writing, consideration, reliance,

judicial screening, or a heightened standard of proof." *See Plasma Ctrs. of Am., LLC v. Talecris Plasma Res., Inc.*, 731 S.E.2d 837, 842 n.1 (N.C. Ct. App. 2012) (citation omitted).

An issue of fact exists as to whether BB&T waived its right to terminate the agreement based on Skywaves' claimed defaults. BB&T cannot dispute that it had prompt constructive knowledge of all of Skywaves' alleged breaches long before its putative termination. BB&T had actual or constructive knowledge that Skywaves had allegedly not paid debts to third-parties when they came due and did not immediately remit payments BB&T. Moreover, BB&T knew or had reason to know the facts underlying its claimed "insecurity." However, BB&T did not immediately terminate the Factoring Agreement or even bring these alleged breaches to Skywaves' attention. It did not document those alleged defaults in writing. To the contrary, BB&T acted as if it intended to continue performing under the agreement and induced Skywaves to believe that it would accommodate Skywaves and provide needed ongoing capitalization. There is sufficient evidence to at least create a factual issue on the question of whether Skywaves waived its right to terminate the agreement.

BB&T argues that Paragraph 23 of the Factoring Agreement excuses its waiver of Skywaves' putative breaches. That provision provides that BB&T's failure to exercise any contractual right will not "operate as a waiver thereof" and should not "be construed as an agreement to modify the terms of this Agreement." However, "[t]he general view is that a party to a written contract can waive a provision of that contract by conduct expressly or surrounding performance, despite the existence of a so-called anti-waiver or failure to enforce clause in the contract." *See 42 East, LLC v. D.R. Horton, Inc.*, 218 N.C. App. 503, 511, 722 S.E.2d 1, 7 (N.C. Ct. App. 2012) (citation omitted) ("[T]he non-waiver clause in the Agreement does not preclude a determination that Horton waived the 'time is of the essence' clause."). Consequently, the claimed "non-waiver" provision does not assist BB&T.

5. **BB&T and Skywaves Modified the Factoring Agreement**

BB&T's assertion that its termination of the parties' agreement was not a breach fails because evidence shows that Skywaves was not in default of the parties' agreement as modified.

Although BB&T argues that the Factoring Agreement only permits modification by signed writing, under North Carolina[2] law, *irrespective of such a provision,* parties are free to modify their agreements orally or by their conduct:

> It is well established under our law that: The provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract have been modified or waived, even though the instrument involved provides that only written modifications shall be binding. *W.E. Garrison Grading Co. v. Piracci Construction Co., Inc.*, 27 N.C. App. 725, 221 S.E.2d 512 (1975), *rev. denied*, 289 N.C. 296, 222 S.E.2d 695 (1976).

Son-Shine Grading Co. v. ADC Constr. Co., 63 N.C. App. 417, 315 S.E.2d 346 (N.C. Ct. App. 1984). "The most ironclad written contract can always be cut into by the acetylene torch of parol modification supported by adequate proof. . . . The hand that pens a writing may not gag the mouths of the assenting parties." *See Angel Med. Ctr., Inc. v. Abernathy*, 159 F. Supp. 2d 215, 222 (W.D.N.C. 2000) (citation omitted)). "A modification to a contract occurs if there is mutual assent to the terms of the modification and consideration supporting the modification." *Brumley v. Mallard, LLC*, 154 N.C. App. 563, 567-68, 575 S.E.2d 35, 38 (2002).

Here, there is evidence that Skywaves and BB&T (through Edahl) orally modified their agreement to restrict the right to terminate and to change some of Skywaves' obligations. As discussed above, the parties' ongoing course of conduct evidenced an intention that BB&T would no longer have the right to terminate the agreement under the provisions it relied upon. To the contrary, BB&T agreed to continue funding Skywaves and modified that funding, with complete knowledge of the defaults it now relies upon in an effort to escape its contractual duties.

---

[2] Under South Carolina law, "[w]ritten contracts may be orally modified by the parties, even if the writing itself prohibits oral modification." *See ESA Servs., Inc. v. South Carolina Dep't of Rev.*, 392 S.C. 11, 23, 707 S.E.2d 431, 438 (Ct. App. 2011) (citation omitted).

770

C. **The Court Should Deny Defendant BB&T's Motion for Summary Judgment as to Skywaves' Breach of Contract Accompanied by a Fraudulent Act Claim**

1. **As Discussed Above, There Is a Genuine Issue of Material Fact As to Skywaves' Breach of Contract Claim**

BB&T first argues that the breach of contract accompanied by a fraudulent act claim must fail because "Skywaves cannot establish a breach of contract." (*See* BB&T's Mem. Supp. Mot. Summ. J., at p.25). As set forth in the preceding Sections, there exists at least a genuine issue of material fact that BB&T breached its 2005 factoring agreement with Skywaves. Therefore, this Court should deny Defendant BB&T's Motion for Summary Judgment.

2. **Skywaves Can Proffer Evidence of a "Fraudulent Act" by BB&T Supporting This Claim**

Defendant BB&T next argues that this claim fails because there is no evidence of a "fraudulent act" supporting the claim.

Under North Carolina law, punitive damages may be recovered in a breach of contract claim where the case "smacks" of fraud:

In *Oestreicher v. Stores*, our Supreme Court held:

> In cases involving fraud, our Court has consistently used language such as the following: Punitive damages are never awarded, except in cases where there is an element either of fraud, malice, ... or other causes of aggravation in the act or omission causing the injury.... In the so-called breach of contract actions that smack of tort because of the fraud and deceit involved, we do not think it is enough just to permit defendant to pay that which the lease contract required him to pay in the first place. If this were the law, defendant has all to gain and nothing to lose. If he is not caught in his fraudulent scheme, then he is able to retain the resulting dishonest profits. If he is caught, he has only to pay back that which he should have paid in the first place.

290 N.C. 118, 136, 225 S.E.2d 797, 808–809 (1976) (internal citations omitted). *See Zubaidi v. Earl L. Pickett Enterps., Inc.*, 164 N.C. App. 107, 114-15, 595 S.E.2d 190, 194-95 (2004)

There is at least a genuine issue of material fact as to whether BB&T engaged in a "fraudulent" act in connection with its breach of the 2005 factoring agreement. As set forth

above, the record is replete with evidence that BB&T misrepresented its motive for termination the agreement and used a pretext. Although it claims that its termination was motivated by Skywaves' alleged breaches, there is evidence supporting the conclusion that BB&T actually terminated the agreement because Defendant Edahl had agreed to terms that it simply did not like (funding based on site plans). It also, through its agent Edahl, misled Skywaves about whether site plan financing had been properly approved. When the relationship tanked, BB&T then accused Skywaves of engaging in fraudulent conduct. This evidence is at least sufficient to warrant a trial.

C. **The Court Should Deny Summary Judgment as to Promissory Estoppel**

BB&T argues that Skywaves' promissory estoppel claim fails because, under North Carolina law, promissory estoppel may not be used "offensively" as a cause of action for recovery. However, North Carolina law permits the "offensive" use of promissory estoppel "as an alternative mechanism for enforcement of Plaintiff's promise in the [formal agreement] if the court ultimately finds the agreement itself unenforceable." *See Sonic Automotive, Inc. v. Mercedes-Benz USA, Inc.*, 2010 WL 1782269, at *5 (N.C. Super. Ct. Business May 4, 2010). Therefore, at the very least, the promissory estoppel claim should remain as an alternative theory of liability to the extent any portion of the agreement is found unenforceable or, as BB&T claims here, might be unenforceable for being terminated.

In addition, there is evidence supporting this theory. BB&T made numerous specific promises to Skywaves. For example, it promised that: (a) it would provide funding based on site plans and invoices; (b) it would allow Skywaves grace as to some of the very provisions now asserted in this lawsuit; and (c) it intended to continue the parties' relationship under the same terms in the long run. In reliance on those promises, Skywaves took reasonable, expected and foreseeable actions. For example, it bypassed alternative methods of capitalization, such as the opportunity to work with Hunt Capital. Additionally, Skywaves made significant investment in its operations on the expectation that BB&T would honor its word. When BB&T failed to do so

and unilaterally terminated the contract, it significantly harmed Skywaves. This is sufficient to support a promissory estoppel claim.

D. Breach of the Covenant of Good Faith and Fair Dealing

Defendant BB&T's Motion argues primarily that the breach of the covenant of good faith and fair dealing fails because, under South Carolina law, there is no separate cause of action under that theory. Instead, that claim is subsumed in and part of the breach of contract claim.

However, as set forth above, the parties selected North Carolina law to govern their relationship, especially with regard to contractual or quasi-contractual rights. North Carolina law does not prohibit a count of breach of the covenant of good faith and fair dealing.

According to well-established North Carolina law, every contract contains "'an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.'" *See Bicycle Transit Authority v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation omitted). The evidence shows that there is at least a scintilla of evidence that BB&T terminated the parties' agreement in bad faith, using a pretext in an effort to shield its misconduct. Moreover, as discussed in detail throughout this memorandum, BB&T continually (through its agents such as Edahl) misled Skywaves, ultimately leading to Skywaves' bankruptcy. Such evidence is sufficient to at least create a factual question as to whether BB&T breached its duty of good faith and fair dealing.

BB&T asserts in a footnote and without discussion that Skywaves' claims fail under North Carolina law because Skywaves "cannot identify any implied obligation that was breached and denied it the benefit of the terms of the Factoring Agreement." (*See* BB&T's Mem. Supp. Mot. Summ. J., at 27 n.8). However, the case that BB&T cites in support of that proposition, *Scott v. Lackey*, 2012 WL 6017776, at* 14 (N.C. Super. Dec. 3, 2012), applies *Delaware* law, not North Carolina law.

E. **South Carolina Code § 37-10-107 Does Not Bar Skywaves' Claims**

Defendants posit that they are entitled to summary judgment under South Carolina's "lender liability" statute of frauds, S.C. Code § 37-10-107. Defendant BB&T posits that it is immune from liability to the extent Skywaves relies on promises not contained in the formal factoring agreement.

For the reasons that follow, Defendants' argument lacks merit.

1. **Defendants Admit That an Agreement Existed**

Section 37-10-107 does not apply because Defendants admitted in pleadings and testimony that there were contracts in effect under the terms alleged by Skywaves (including site plan financing). It is well-settled that such an admission in a pleading or testimony can be a writing sufficient to satisfy a statute of frauds. *See Gibson v. Arnold*, 288 F.3d 1242, 1246-47 (10th Cir. 2002) ("[V]irtually every court that has addressed the issue during the last twenty-five years has held that judicial admissions are an exception to the statute of frauds."); *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 142 (6th Cir. 1983) (applying exception to statute of frauds in context of deposition admission); *Litzenberg v. Litzenberg*, 307 Md. 408, 514 A.2d 476, 480 (1986) (recognizing exception to statute of frauds applying to admissions by sworn testimony, deposition, or pleadings); *Powell v. City of Newton*, 200 N.C. App. 342, 684 S.E.2d 55 (N.C. Ct. App. 2009) (enforcing settlement made orally in open court).

This result also follows under South Carolina law, which recognizes that a party may judicially admit an agreement, thereby obviating a statute of frauds:

> In South Carolina, a pleading admitting a parol agreement that is within the statute of frauds may constitute a sufficient writing within the statute so as to enable the court to enforce the contract [*Smith v. Brailsford*, 1 S.C.Eq. (1 Desauss.) 350 (1794)]; however, the pleading must be sufficiently definite and certain and it must be signed by the party to be charged or by his agent or attorney on his behalf. *Walker v. Preacher*, 188 S.C. 431, 199 S.E. 675 (1938); see also 72 Am.Jur.2d Statute of Frauds § 307 at 826 (1974). A pleading can be regarded as a sufficient writing within the statute even if the pleader at the same time sets up and relies upon the statute as a defense. *Wallace v. Dowling*, 86 S.C. 307, 68 S.E. 571 (1910). To be sufficient, the alleged oral contract must be substantially the same as the contract purportedly admitted in the pleading.

774

> The written admission must contain all the essential elements of the contract, and the terms and conditions must be stated with reasonable certainty, that is, all material parts must be contained in the memorandum, and it is insufficient where it omits an essential term. [Citation omitted.] It is obvious that the terms stated or admitted must be those mutually agreed to by the parties. Otherwise there is no complete agreement.
>
> *Walker v. Preacher*, 199 S.E. at 677; 72 Am. Jur. 2d Statute of Frauds § 339 at 862 (1974).

See Robert Harmon & Bore, Inc. v. Jenkins, 282 S.C. 189, 193, 318 S.E.2d 371, 373-74 (Ct. App. 1984).

Defendants' Amended Answers to the Amended Complaint admitted "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 be factored." (*See* Am. Ans. to Am. Compl. ¶ 21). Defendants further admitted that BB&T and Skywaves "memorialized certain written modifications to the March 22, 2005 Factoring Agreement." (*See id.* ¶ 13). Finally, Defendants admitted 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." (*See id.* ¶ 35). These admissions are sufficient to satisfy any potentially-applicable statute of frauds.

2. <u>South Carolina Code § 37-10-107 Does Not Apply Because the Factoring Agreement Selects North Carolina Law</u>

Defendants argue that South Carolina Code § 37-10-107 bars certain of Plaintiff's claims; this statute states that:

> (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; . . .
>
> (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. . . .

(4) In the event of a conflict between this section and any other provision of law of this State relating to the requirement of a signed writing, the provisions of the other provision of law shall control.

S.C. Code § 37-10-107(1), (2) & (4).

While Defendants argue that Section 37-10-107 governs the enforceability of the BB&T-Skywaves agreements, this is inconsistent with the choice of North Carolina law that BB&T selected to govern the parties' agreement. The Factoring Agreement, the basis of Skywaves' contractual claims, includes the following choice of law provision:

All acts, transactions, rights, and liabilities under this Agreement shall be governed in all respects by, and construed in accordance with, the internal laws of the State of North Carolina.

(*See* Ex. A ¶ 25). Defendants' argument that South Carolina Code § 37-10-107 applies in this case is unavailing. Although BB&T argues that Plaintiff's claims involve promises outside of the Factoring Agreement, all of Defendants' tortious conduct, promises and representations occurred within the context of the Factoring Agreement. Consequently, the South Carolina statute does not apply.

3. Section § 37-10-107 Does Not Apply to Skywaves' Claims Against Edahl

The South Carolina statute of frauds does not apply as to Defendant Edahl. South Carolina Code Section 37-10-107(1) provides that: "[n]o 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 . . . ." This statute, on its face, does not apply to the

claims asserted against Edahl because the claims against him sound in tort and are not "based upon" an agreement to which he was a party.

Section 37-10-107(1) cannot be construed to require that *he* sign a writing, because the claims against him in these cases are not "based upon" allegations that *he* breached any contract. "It is well settled that the protection afforded by the statute of frauds is a personal privilege of the parties to the agreement [citation omitted], and a stranger to an oral contract cannot avail himself of the fact that the statute of frauds renders the contract unenforceable." *See Hatcher v. Harleysville Mut. Ins. Co.*, 266 S.C. 548, 553, 225 S.E.2d 181, 183 (1976) (*citing Walker v. Preacher*, 188 S.C. 431, 199 S.E. 675 (1938)); *accord Hobgood v. Pennington*, 300 S.C. 309, 315 n.1, 387 S.E.2d 690, 693 n.1 (Ct. App. 1989) ("The statute of frauds is not pertinent to this case because a stranger to an oral contract cannot avail himself of the fact that the statute of frauds renders the contract unenforceable."); *accord Tupper v. Dorchester County*, 326 S.C. 318, 324, 487 S.E.2d 187, 190 (1997) ("[T]he purpose of the statute of frauds is to protect the promisor . . . ."). It is black-letter law that statutes of frauds are intended to protect the party *against whom contract enforcement is sought*:

> It is the intent and purpose of the Statute of Frauds to give to *the party to an oral contract, against whom the enforcement of the contract is sought* by the other party, the right to assert the Statute as a defense to his or her own liability. A third party should not be able to assert the invalidity of such transactions unless he or she is an assignee or successor to a party to the contract. The defense of the Statute is a personal one available only to a party to the contract to which the Statute is alleged to apply and his representatives and privies. Its benefits cannot be claimed by one who is not a party or privy to the oral contract and is not sought to be charged personally on the contract.

See Williston on Contracts § 27:12 (4th ed.) (emphasis added); *accord* Restatement (Second) of Contracts § 144 ("Only a party to a contract or a transferee or successor of a party to the contract can assert that the contract is unenforceable under the Statute of Frauds."). Stated otherwise:

> The statute of frauds is designed to give *to a party to an oral contract against whom the enforcement of the contract is sought* by the other party the right to avail himself or herself of the provisions of the statute as a defense to liability. Thus, the statute is intended to protect the party against whom enforcement of the contract is sought. The statute, when asserted by such party as a defense, is a defense to an action against him

> or her either for the enforcement of the oral contract or for damages for its breach. The defense is a personal one. . . . The defense of the statute of frauds is not available to strangers to the agreement or to the public at large.

See 73 Am. Jur. 2d, Statute of Frauds § 484 (emphasis added). Statutes of frauds are not designed to protect third-party tortfeasors:

> *Tortfeasors and fraudulent intermeddlers will not be permitted to use the statute of frauds as a defense to a wrongful act or as a means of consummating a fraudulent design.* Under this rule, one who . . . *commits other such tortious acts cannot defend* upon the ground that the plaintiff's right or interest exists only by virtue of a contract unenforceable under the statute of frauds, where the other party to the contract has not rescinded or repudiated the contract upon the ground that he or she is not bound by the contract. . . . If fulfillment of contracts with third persons is prevented by false and fraudulent representations of the defendant, an action will lie although the contract is within the statute of frauds, where it plainly appears that the contract would have been performed except for such representations.

See 73 Am. Jur. 2d, Statute of Frauds § 492 (emphasis added); *accord Greenfield v. Heckenbach*, 144 Md. App. 108, 140, 797 A.2d 63, 82 (Md. Ct. App. 2002) ("[T]he statute of frauds does not bar a tort suit for either fraud or negligent misrepresentation because *those counts are not based 'on ... [the] contract'* between the parties but are based on misrepresentations that induced the contract") (emphasis added).

As the Supreme Court has held in a related action, Section 37-10-107 "only applies to suits between lenders and borrowers, such as that between Skywaves and BB&T." *See Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 332, 759 S.E.2d 724, 726 (2014). It only applies to claims *against a contracting party seeking enforcement of the contract.* The statute was not intended to preclude tort claims against non-contracting parties. A contrary construction of Section 37-10-107(1) would insulate a non-contracting party from suit in tort simply because he had the fortune to commit his torts in the context of a loan; this is not a reasonable construction of the statute. *See Carolina Power & Light Co. v. Town of Pageland*, 321 S.C. 538, 543, 471 S.E.2d 137, 140 (1996) ("[T]he court will construe the statute so as to escape the absurdity and carry the intention into effect."). Skywaves' claims against Edahl are not based upon *his* failure to perform a contract. Skywaves' claims against Edahl sound entirely in tort and are based on his

misrepresentations and other tortious actions. Since Skywaves does not claim that there was a contract with Edahl, Section 37-10-107(1) would not govern the claims against him.

4. Assuming *Arguendo* That South Carolina Law Applies, Section § 37-10-107 Does Not Preclude the Claims Against Edahl Because a Qualifying Writing Was Signed by the Party to Be Charged

Edahl's arguments also fail because a writing was signed by the party to be charged, BB&T. Edahl posits that Skywaves did not receive a writing that he signed. The relevant part of the statute states that "the party seeking to maintain the action or defense has received a writing from the party to be charged . . . and the party to be charged, or its duly authorized agent, has signed the writing." *See* S.C. Code § 37-10-107(1)(c). This provision does not require that Skywaves have received a writing signed *by him* to support the tort claims against him.

The "party to be charged" with the agreement here is BB&T, not Edahl. While Edahl's liability relates to BB&T's contract with Skywaves, Skywaves does not claim that Edahl was in direct contractual privity with it. As set forth below, Skywaves has proffered sufficient evidence that Skywaves received a writing signed by BB&T — the party to be charged with enforcement of the agreement — satisfying the statute.

Defendant Edahl has not cited any authority establishing that "the party to be charged" means that a non-contracting party is insulated from *tort* liability because it did not sign an underlying agreement. That result would be inconsistent with the statute's language. Notably, the statute states that the writing must be signed by "the party to be charged," not "the party sued," "the tortfeasor" or "the defendant." If the legislature intended that only a person who signs a writing under the statute may be sued even in tort, it would have said so. Defendant Edahl can cite no authority construing the South Carolina statute or any similar statute to require that a non-contracting tortfeasor sign a writing memorializing an agreement as a prerequisite to suit.

5. **The Parties' Part Performance Satisfies S.C. Code § 37-10-107(2)(c)**

The South Carolina statute provides that the absence of a qualifying writing does not preclude an action based on part performance "to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement." *See* S.C. Code § 37-10-107(2)(c). As discussed herein, there is significant evidence that Skywaves and BB&T continued performing under the Factoring Agreement as modified until BB&T wrongfully terminated it in 2008.

6. **Section 37-10-107 Does Not Apply Because the Parties' Agreement Was Not an Agreement to Lend or Borrow Money**

Section 37-10-107 requires writings to evidence agreements to "lend or borrow money" or modifications to "loans of money." BB&T and Skywaves were in a factoring agreement and business capitalization relationship. This was not an archetypical loan, with BB&T providing money to Skywaves and Skywaves repaying with interest at agreed-upon times. Instead, Skywaves sold receivables to BB&T in order to obtain working capital; BB&T was to collect those receivables from Skywaves' customers and earn administrative fees. This unique arrangement was designed to provide Skywaves with working capital. BB&T and Skywaves were working together to find creative ways to fund Skywaves' operations. Because this was not a traditional "loan," it was not an agreement to "lend or borrow money" implicating Section 37-10-107.

7. **S.C. Code § 37-10-107(2)(c) Does Not Preclude Plaintiff's Fraud Claim**

The South Carolina statute states that a failure to properly memorialize a contract within the statute precludes claims under 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 § 37-10-107(2). Skywaves alleged fraudulent misrepresentation and negligence/breach of duty, which are not included in the list of precluded claims. Had the legislature intended to bar those causes of action, it could have included them in that list. "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000). Thus, the South Carolina statute does not bar claims unless they are specifically enumerated.

8. South Carolina Code § 37-10-107 Does Not Support Summary Judgment Because the Agreement Is Governed by a Different Statute of Frauds

Under the South Carolina statute, "[i]n the event of a conflict between this section and any other provision of law of this State relating to the requirement of a signed writing, the provisions of the other provision of law shall control." *See* S.C. Code § 37-10-107(4). Assuming South Carolina law applies in the first place, another statute of frauds might apply to the parties' agreement:

> No action shall be brought whereby . . . [t]o charge any person upon any agreement that is not to be performed within the space of one year from the making thereof; [u]nless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

See S.C. Code § 32-3-10(5). The Factoring Agreement has a minimum term of one year and one day. (*See* Exhibit ¶ 19). Thus, if a South Carolina statute of frauds applies, it would be Section 32-3-10(5), not Section 37-10-107. Defendants have not shown that the Factoring Agreement violates Section 32-3-10(5), which differs from the "lender" statute of frauds. Section 32-3-10(5) does not expressly preclude part performance, fraud and estoppel.

F. The Court Should Deny Defendants' Motions for Summary Judgment as to Skywaves' Claims of Negligence and Negligent Misrepresentation

1. The Economic Loss Doctrine Does Not Bar These Claims

Defendants argue that the economic loss doctrine bars Skywaves' tort claims. Defendants' arguments fail for a number of reasons.

First, as discussed above, under the parties' choice of law, *North Carolina* law applies to Skywaves' tort claim, not South Carolina law. Defendants only cite to South Carolina law in their Memoranda. For this reason alone, Defendants' Motion fails.

Moreover, it is apparent that, under North Carolina law, Skywaves' claims are not barred by the economic loss rule. One judge has noted several "guideposts" to assist in understanding the economic loss rule in North Carolina:

> 1. A tort action generally will not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. . . .
>
> 3. That bar, however, does not extend to claims alleging negligent misrepresentation. . . .
>
> 4. Moreover, where a breach of contract "'smack[s] of tort because of the fraud and deceit involved,'" North Carolina law will allow a party to pursue punitive damages based on the fraudulent act. . . .
>
> 5. The North Carolina appellate courts have yet to extend the application of the economic loss doctrine to bar claims based on fraud.

See Club Car, Inc. v. Dow Chem. Co., 2007 WL 2570088, at *3-4 (N.C. Super. May 3, 2007) (citations omitted).

In this case, Skywaves' claim is not simply that Defendants failed to perform their contract. In fact, as Defendant Edahl has argued repetitively, he is not a party to any contract; as a result, he may not obtain the benefit of the economic loss rule. In any event, Skywaves does not simply allege improper performance of contractual duties. Instead, it alleges that Defendants breached duties going beyond those imposed in contract. Discovery has disclosed that Defendants undertook duties beyond those expressly spelled out in the agreement. For example, BB& Defendants advised Skywaves concerning its most suitable capitalization options. In doing so, Defendants reached beyond any express contractual obligations in their dealings with

Skywaves. The keystone of Skywaves' claims is that the Defendants engaged in fraudulent conduct. Under North Carolina law, the economic loss rule would not apply.

Moreover, Defendants' arguments would fail under South Carolina law. *Laidlaw Env'l Servs., (TOC), Inc. v. v. Honeywell, Inc.*, 966 F. Supp. 1401, 1414-15 (D.S.C. 1996), discusses the contours of economic loss under South Carolina law:

> The economic loss rule is founded on the theory that parties to a contract may allocate their risks by agreement and do not need the special protections of tort law to recover for damages caused by a breach of contract. [Citations omitted.] . . . "[T]he 'economic loss rule' will ... apply where duties are created solely by contract. In that situation, no cause of action in negligence will lie." [Citation omitted.] In *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995), the Supreme Court of South Carolina reaffirmed its conclusion that the economic loss rule applies to bar a tort claim if the parties' obligations are grounded exclusively in contract, explaining that "[a] breach of duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie." *Id.* 463 S.E.2d at 88. Thus, "[i]n most instances, a negligence action will not lie when the parties are in privity of contract." *Id.* The *Tommy L. Griffin* court observed, however, that the rule will not apply "if there is a special relationship between the alleged tortfeasor and the injured party not arising in contract." *Id.* If a "special relationship" is present, a tort action will lie. *See id.*

See id. at 1414-15. Where the defendant undertakes duties beyond those in the contract, the economic loss doctrine does not apply. *See Simons v. Wal-Mart Stores East, L.P.*, 2013 WL 393998, at *5 (D.S.C. Jan. 31, 2013) ("The economic loss rule does not bar tort claims where a defendant voluntarily assumes a duty to use due care over and above the duty required by the contract.").

Despite the doctrine, South Carolina law has long imposed tort liability on those who render negligent educated advice to clients. *See e.g., Tommy L. Griffin Plumbing & Heating v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 88-89 (1995) (design professionals may have tort duty); *Beachwalk Villas Condo. Ass'n v. Martin*, 305 S.C. 144, 146-47, 406 S.E.2d 372, 374 (1991) (special duty for architects); *Lloyd v. Walters*, 276 S.C. 223, 226, 277 S.E.2d 888, 889 (1981) (attorney liable for economic loss to corporate shareholder). Skywaves' claims here are no different from claims that have long been permitted under South

Carolina law. Just as a client may sue his attorney — with whom he has a contractual relationship — in tort for breaching a duty to advise or engaging in fraudulent conduct, Skywaves may sue Defendants for violating duties that the law imposed.

2. **There Is Evidence That Defendants Made Misrepresentations to Skywaves**

Under North Carolina law, one who, in the course of his business or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. See *Jordan v. Earthgrains Cos.*, 155 N.C. App. 762, 767, 576 S.E.2d 336, 340 (2003); *accord Brinkman v. Barrett Kays & Assocs., P.A.*, 155 N.C. App. 738, 742, 575 S.E.2d 40, 43-44 (2003) ("'[t]he tort of negligent misrepresentation occurs when (1) a party justifiably relies, (2) to his detriment, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care.'"); *accord Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 241, 692 S.E.2d 499, 509 (2010).

Defendants first argue that there was no actionable misrepresentation because any statements related to future intention, not present facts; however, this rule is not absolute. "As a general rule, a mere promissory representation will not support an action for fraud. . . . However, a promissory misrepresentation may constitute actual fraud if the misrepresentation is made with intent to deceive and with no intent to comply with the stated promise or representation." *See Braun v. Glade Valley Sch., Inc.*, 77 N.C. App. 83, 87, 334 S.E.2d 404, 407 (1985); *accord 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) ("An exception to the general rule is recognized for unfulfilled promises which were made by a party who never intended to fulfill the promise and only made it to induce the performance of another party.").

There is substantial evidence that Defendants BB&T and Edahl made actionable misrepresentations of fact:

- There is evidence that Defendants represented that Defendant BB&T authorized and had the present intention to fund Skywaves based on site plans and/or purchase orders. Edahl represented that he had BB&T's approval for such an approach when he did not.
- There is evidence that Defendants represented that BB&T had the present intention to fulfill Skywaves' financing needs when BB&T did not have such an intention.
- There is evidence that Defendants represented to Skywaves that it did not need to seek alternative sources of capitalization.
- There is evidence that BB&T represented that it would not treat the alleged defaults that it now relies upon as a ground to terminate the agreement.
- There is evidence that Defendants falsely represented that BB&T's present intention was to treat the Factoring Agreement as terminable only upon reasonable cause.

Defendants next argue that Skywaves could not have reasonably relied on Defendants' misrepresentations because Skywaves was a sophisticated business comprised of sophisticated businessmen. In support of this contention, Defendant Edahl relies on the South Carolina Supreme Court's decision in a related matter, *Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 726 (2014), which cited *Florentine Corp. v. PEDA I, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985). Defendants' arguments miss the mark.

First of all, these case do not govern, as North Carolina law would apply to Skywaves' claims, since Skywaves and BB&T selected that law to apply in their agreement. Second, even under South Carolina law, this rule would not apply because, as discussed below, there is evidence of a fiduciary relationship in this matter. There is evidence that Skywaves, by no means an expert in the area of capital funding, relied upon Defendants to provide fiduciary advice to it on that subject. Under such circumstances, it is reasonable for Skywaves to rely on Defendants' multiple fraudulent statements. Defendants' argument would lead to the untenable position that corporate entities could never reasonably rely upon advice from financial advisors. Defendants proffer no evidence that Skywaves had any special knowledge about corporate capitalization, factoring, equity investment or any other area of corporate finance.

The evidence supports that Skywaves reasonably relied upon these representations. There is no evidence that Skywaves was sophisticated in the area of capital financing. To the

contrary, its lack of expertise in that area was why it got BB&T involved in its financing. In reliance on Defendants' misrepresentations, Skywaves passed on a number of alternative financing vehicles. For example, it elected to forego capitalization from Hunt Capital. Such alternatives were real opportunities that Defendants, through their misrepresentations, convinced Skywaves not to pursue. Defendant Edahl represented to Skywaves that it did not need to pursue alternative financing because BB&T was presently committed and bound to financing Skywaves' growth. In addition, in reliance on BB&T's promise to fund Skywaves based on site plans, Skywaves incurred substantial operational expenditures, including hiring a second shift and key employees.

3. **Defendants Owed a Duty of Care to Skywaves**

Defendants finally argue that they are entitled to summary judgment because they owed no duty of care to Skywaves.

Under North Carolina law, a negligence duty of care may arise from a special relationship between the parties or via a voluntary undertaking:

> The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm and calls a violation of that duty negligence. *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E.2d 551 (1951); *Stroud v. Transportation Co.*, 215 N.C. 726, 3 S.E.2d 297 (1939). The duty to protect others from harm arises whenever one person is by circumstances placed in such a position towards another that anyone of ordinary sense who thinks will at once recognize that if he does not use ordinary care and skill in his own conduct with regard to those circumstances, he will cause danger of injury to the person or property of the other. *Insurance Co. v. Sprinkler Co.*, 266 N.C. 134, 146 S.E.2d 53 (1966); *Honeycutt v. Bryan*, 240 N.C. 238, 81 S.E.2d 653 (1954). The duty to exercise due care may arise out of contractual relations.

See Davidson & Jones, Inc. v. New Hanover Cnty., 41 N.C. App. 661, 666, 255 S.E.2d 580, 584 (1979); *accord Murray v. Bank of America, N.A.*, 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct. App. 2003) ("An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance.").

In this case, because of Defendants' position, the duty goes beyond a mere duty of reasonable care to encompass a fiduciary duty. In North and South Carolina, a fiduciary duty arises when "there has been a special confidence reposed in one who in equity and good conscious is bound to act in good faith and with due regard to the interest of the one reposing confidence." *See Curl v. Key*, 331 N.C. 259, 264 316 S.E.2d 272, 275 (1984); *compare Hendricks v. Clemson Univ.*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003); *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 794 (1990); *Steele v. Victory Sav. Bank*, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988). Defendants' argument is, in essence, that there is no duty of care in this case (notwithstanding the relationship among the parties) because BB&T happens to be a bank and, in most cases, a bank does not owe a duty of care to customers. However, this rule is not absolute and does not apply here because this is not a simple bank-client arrangement.

A bank customer's breach of duty claims are actionable where the circumstances created an issue of fact whether a fiduciary relationship was formed. *See WNC Holdings, LLC v. Alliance Bank & Trust Co.*, 2012 WL 4713722 (N.C. Super. Ct. Oct. 2, 2012). In *WNC*, the borrowers sought a loan to purchase and develop real property. The lender served as a financial and development advisor, reviewed project documents and suggested changes, performed inspections of the property and development, and on more than one occasion prepared *pro forma* feasibility statements for the borrowers. *Id.* The court denied the lender's motion to dismiss, stating that the borrowers had pled facts beyond the typical debtor-creditor relationship and holding that the borrowers could state various tort claims. *Id.*

There exists, at the very least, an issue of fact as to whether Defendants owed fiduciary duties to Skywaves. As detailed throughout, the relationship between Skywaves and BB&T/Edahl greatly exceeded the usual bank-customer relationship. Far from the garden-variety bank-customer or lender-borrower relationship, Defendants provided detailed advice to Skywaves as to how it should capitalize and operate its business. Skywaves relied on this advice in planning and managing its business growth. Defendants discouraged Skywaves from seeking

787

other financing and undertook to design a capitalization strategy and to advise Skywaves concerning its business operations. Skywaves relied on Defendants to fairly and accurately provide advice about capitalization options. This relationship transcended the normal bank-customer relationship. Defendants were more than a bank; they were active participants in Skywaves' business, giving professional expertise to assist Skywaves' business.

In addition, as to Edahl, because Skywaves was not in a direct contractual relationship with him, *Burwell*'s observation that a bank normally does not owe a tort duty to customers would not apply. There is evidence that Edahl's relationship with Skywaves involved him advising Skywaves and providing financial guidance as the most appropriate form of capitalization to maximize its growth. There is evidence that Skywaves relied on Edahl to provide such advice. Tort law would recognize that, where Edahl undertook to provide such services to Skywaves, he was under a duty to ensure that he did so with reasonable care.

Skywaves' claims do not arise out of a traditional lender-borrower relationship. Edahl and BB&T coveted Skywaves as a client because of its growth potential. While BB&T's Memorandum claims that it paternalistically "accommodate" Skywaves, in reality, BB&T actively pursued Skywaves, even convincing it to forego alternative capitalization options. BB&T offered financing for capital projects that Skywaves did not even request and lowered finance charges to prevent Skywaves from becoming involved with competing institutions. (*See* E-mail from Edahl to Denning BB&T document March, 2007, soliciting Skywaves $475,000 capital equipment loan).

In December, 2006, Skywaves' Board decided to seek additional capital to fund its growth. Its revenues had increased dramatically to over $6 million. Skywaves' niche in the telecommunications market was poised to expand. When Skywaves shared with Edahl that it had a letter of intent from Hunt Capital for a $4 million cash equity investment, he advised Skywaves to decline it and delay going to capital markets until the anticipated additional growth was achieved *through BB&T*. He promised that BB&T would provide working capital for Skywaves' growth equivalent to Hunt's proposed equity investment. In this regard, Edahl was acting not

788

simply as a banker, but had become Skywaves' business adviser. He further advised Skywaves that BB&T would more efficiently handle a future public offering. Edahl admitted that he discussed BB&T's handling a public offering through its capital markets division. Having done so, he represented to Skywaves that BB&T had the experience in telecommunication area and capacity and desire to handle this.

Significantly, Skywaves did not propose the $3.5 million line of credit; rather, Edahl designed that financing. Virtually all BB&T witnesses have testified that the financing arrangement for Skywaves was unusual for BB&T, not a garden-variety loan. Edahl testified it as "completely unique" financing which he designed and that he knew Skywaves was relying on it. BB&T witness Burke described the financing as "venture capital" and referred to it as "equity financing," aside from the fact that BB&T did not get an equity interest in Skywaves. BB&T desperately wanted to serve as Skywaves' underwriter in an equity public offering. BB&T's former account administrative officer testified that the financing Edahl designed was "tailor made" for Skywaves and that he would not have authorized it, although he assumed it had the blessing his superiors. (*See* Morris Depo., at 34). Other bank officials have characterized the financing as venture capital that was not appropriate for BB&T; obviously, BB&T never disclosed this to Skywaves except through this lawsuit.

Before Skywaves declined the Hunt Capital equity investment, it advised BB&T that it might need easier access to the $3.5 million line, the amount and terms which Edahl had designed and recommended. Edahl said he would be able to take care of a modification if needed, but he preferred to defer modifying it. When the delay in the General Dynamics orders occurred, Skywaves requested modification of the parties' relationship; Edahl quickly confirmed by July, 2007, that BB&T had approved the modification to provide funding based on site plans.

Skywaves placed its trust in Edahl, a senior vice president and officer in charge of its account, with extensive experience in finance. Frank Caple, BB&T's senior credit officer, testified that a customer is entitled to believe and rely on what a professional such as Edahl says. Tol Broome, BB&T's President of Commercial Finance, testified that BB&T's mission for his

789

department includes "the equivalent to saying we are giving advice to your customers." (*See* Broome Depo., at 22). Thus, the parties had much more than a garden variety "bank-customer" relationship; instead, Defendants were more akin to business advisers, who provided Skywaves with advice concerning the operation of its business and strategies for capitalization. Far beyond simply making loans to Skywaves, BB&T was more like Skywaves' business partner, taking an active role in advising Skywaves in its capitalization.

In support of their contention, Defendants cite *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986) —a South Carolina case — for the proposition that banks do not ordinarily owe tort duties to customers. However, *Burwell* observed that "a fiduciary relationship *may be created* between a bank and a customer if the bank undertakes to advise the customer as a part of the services the bank offers. Such a relationship charges the bank with a duty to disclose material facts which may affect its customers' interest." *See Burwell*, 288 S.C. at 40-41, 340 S.E.2d at 790. Thus, even where there is a bank-customer relationship, the bank may be subject to a tort duty of care if it goes beyond merely providing banking services such as accepting deposits or making loans. As set forth above, the facts of this case far exceed the typical bank-customer relationship.

CONCLUSION

For the reasons discussed herein, this Court should deny Defendants' Motions for Summary Judgment and permit Plaintiff Skywaves to present its claims at trial.

DUFFY & YOUNG, LLC
John Linton, Esquire
96 Broad Street
Charleston, SC 29401
Phone 843.720.2044| Fax 843.720.2047
jlinton@duffyandyoung.com

George J. Kefalos
GEORGE J. KEFALOS, PA
46A State Street
Charleston, SC 29401

BARNWELL, WHALEY PATTERSON &
HELMS, LLC
M. Dawes Cooke, Jr., Esquire
PO Drawer H
Charleston, SC 29402
MDC@barnwell-whaley.com

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

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

2009-CP-10-7516

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 IN OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER THE ORDER STRIKING PLAINTIFF'S JURY DEMAND**
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
2015 APR 24 AM 8:33
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Defendant James Edahl, by and through his undersigned counsel, respectfully submits this Response in Opposition to Plaintiff's Motion to Reconsider the Order Striking Plaintiff's Jury Demand (the "Motion to Reconsider").

I. INTRODUCTION

This Court granted Defendants' motions to strike Skywaves' jury demand on February 9, 2015 (the "Order"). Skywaves moved to reconsider on February 18, 2015.[1] Nothing in Plaintiff's Motion to Reconsider changes the fact that Plaintiff has waived its right to a jury trial against Edahl to the same extent that it has waived its right to a jury trial against BB&T.[2]

[1] Skywaves also filed a Notice of Appeal on March 10, 2015. Accordingly, it appears that the Court of Appeals has exclusive jurisdiction over this issue pursuant to Rule 205, SCACR. Edahl respectfully submits that the Motion to Reconsider should be held in abeyance unless and until Skywaves dismisses the appeal.

[2] For purposes of responding to Skywaves' arguments regarding the enforceability of the subject jury trial waivers, Edahl relies upon and incorporates herein Defendants' prior arguments and the responsive brief of BB&T, filed in conjunction herewith. Edahl submits this brief to specifically respond to Plaintiff's argument that the jury waiver is inapplicable to Edahl, individually, and inapplicable to the tort claims against him. Also, unless otherwise noted, all abbreviations, such as "Skywaves" and "BB&T," refer to those terms as defined in Edahl's Memorandum in Support of Motion for Summary Judgment and related filings.

II. ARGUMENT

A. EDAHL MAY ENFORCE THE JURY TRIAL WAIVER AS AN AGENT OF THE SIGNATORY CORPORATE PRINCIPAL, BB&T.

In the Motion to Reconsider, Skywaves repeats its prior argument that Edahl should not be permitted to rely upon the jury trial waiver in the Factoring Agreement because he was not a party to the Factoring Agreement and cannot "claim third-party benefits . . . to suit his own needs." (Plaintiff's Memo in Support of Motion to Reconsider, p. 4). Skywaves' argument, however, misses the mark because Edahl is not relying upon a third-party beneficiary argument, but an agency argument supported by a well-reasoned and consistent body of precedent. *See, e.g., Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 222–25 (3rd Cir. 2007). As previously argued, where a corporate principal has signed a contract containing a valid jury trial waiver, its agents and employees may also enforce the provision as agents of the corporation. *Id.* at 222–25; *see also Mowbray v. Zumot*, 536 F. Supp. 2d 617 (D. Md. 2008) (holding that nonsignatory agent of corporation may enforce jury trial waiver provision and that the rationale of *Tracinda* is based upon the same common law agency principles in Fourth Circuit law).[3]

Skywaves offers no case law critical of *Tracinda* and its progeny. Instead, Skywaves cites to a twenty-five year old case that is not on point, *North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 416 S.E.2d 637 (1992). In *North Charleston*, the Supreme Court declined to enforce a jury trial waiver against individual guarantors of a lease who were not parties to the lease. *Id.* at 535, 416 S.E.2d at 638. The instant case does not present the more difficult issue of whether a jury trial waiver should be enforced *against* a *nonsignatory*. Rather, Edahl is only seeking to require Skywaves to adhere to the agreement that Skywaves admittedly signed. *See generally Goer v. Jasco Industries*, 395 F.

[3] Additional cases are cited in Edahl's *Reply to Plaintiff's Memorandum in Opposition to Motions to Strike Jury Demand*, p. 3, filed January 12, 2015.

793

Supp. 2d 308 (D.S.C. 2005) (finding that plaintiff-signatories to arbitration agreement were equitably estopped from claiming that nonsignatory, individual defendants could not enforce arbitration agreement signed by their corporate entity). If nonsignatory agents could *not* enforce such provisions, they truly would be "of little practical value," because they could be circumvented in every case by naming individual agents and employees. *See Tracinda,* 502 F.3d at 225. Thus, Edahl is covered by the jury trial waiver under sound principles of estoppel and agency law. *See id.*

B. THE JURY TRIAL WAIVER APPLIES TO THE TORT CLAIMS AS WELL AS THE CONTRACTUAL CLAIMS.

Skywaves correctly notes that it has certain surviving tort claims (namely, one for negligent misrepresentation and one for negligence), which are asserted against Edahl, individually, as well as BB&T. In the Motion to Reconsider, Skywaves argues for the first time that the tort claims are not encompassed within the jury trial waiver because they are not based on the Factoring Agreement "or any transactions or occurrence[s] arising hereunder." (Plaintiff's Memo in Support of Motion to Reconsider, p. 4). The Court's Order striking the jury demand granted Defendants' motions in full, but also noted that all causes of action are contract-related. (Order, p. 4). To the extent there is any question on this point, the jury trial waiver applies across the board to all of Skywaves' causes of action, whether based in contract or in tort.

First, the jury trial waiver in the Factoring Agreement applies not only to claims arising under the agreement, but to "any issue *in any way pertaining* to this Agreement or any *transactions or occurrences arising hereunder* or governed hereby . . . ." (Factoring Agreement, Ex. C to Defendants' Motions for Summary Judgment and Motions to Strike) (emphasis added). In their Memorandum in Opposition to Summary Judgment, Skywaves contends that all of the alleged, "tortious conduct, promises and representations occurred within the context of the

794

Factoring Agreement." (Plaintiff's Memorandum in Opposition to Summary Judgment, p. 56). Thus, under Skywaves' own argument, the tort causes of action appear be covered by the jury trial waiver, pursuant to the plain language of the provision.

Additionally, the South Carolina Supreme Court recently applied a jury trial waiver to various tort claims asserted in a case involving loan documents containing a jury trial waiver provision. *See Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014). Specifically, in *Blackburn*, the defendant asserted numerous torts (as well as contract and equitable claims) as counterclaims to a foreclosure action. *Id.* Though trial by jury is automatically waived when permissive counterclaims are asserted in an equitable action, the Court also found that trial by jury was waived to the extent the counterclaims were compulsory because they were encompassed by the otherwise valid and enforceable jury trial waiver. *Id.* at 332, 755 S.E.2d at 443. Notably, the claims at issue included those for negligent misrepresentation, breach of fiduciary duty, and fraud/fraud in the inducement. *Id.* at 325, 55 S.E.2d at 440. Thus, recent precedent exists to support the application of the waiver to Plaintiff's tort claims as well as its contractual claims. *Id.*; *see also Zaklit v. Global Linguist Solutions, LLC*, --- F.Supp.3d ---, 2014 WL 4656204, at *16 (E.D.Va. 2014) (applying jury trial waiver to tort claims, including fraud, where they were "an outgrowth of the contractual relationship").[4]

[4] Because this Court found that the jury trial waiver under the Factoring Agreement applied, it did not need to reach the jury trail waivers contained in the other five documents signed by Skywaves. As discussed in the prior memoranda, those waivers would also apply to Skywaves' claims.

795

III. CONCLUSION

For these reasons, and any others the Court may deem appropriate, Skywaves has waived its right to a jury trial against Edahl to the same extent that it has waived its right to a jury trial against BB&T. Accordingly, Plaintiff's Motion to Reconsider the Order Striking Plaintiff's Jury Demand should be DENIED.

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

April 24, 2015

09-7516

FILED
2015 APR 24 AM 8:33
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON SKYWAVES I CORPORATION, Plaintiff, v. BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL, Defendants.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT Case No. 2009-CP-10-7516 **DEFENDANT JAMES EDAHL'S RESPONSE TO PLAINTIFF'S MOTION TO AMEND FIRST AMENDED COMPLAINT**

Defendant James Edahl, by and through his undersigned counsel, respectfully submits this Response to Plaintiff's Motion to Amend First Amended Complaint, filed April 13, 2015 (the "Motion to Amend").

I. INTRODUCTION

After five years and four months of litigation, Skywaves[1] has moved to amend its Amended Complaint, seeking to reinstate causes of action dismissed by this Court over three years ago. (*See* Order of November 8, 2011). Skywaves offers no compelling reason why the Motion to Amend should be granted. In fact, under the law of the case, the previously dismissed claims cannot be "reinstated," as Skywaves requests. Additionally, granting the Motion to Amend would result in unfair prejudice to Edahl. Finally, the proposed amendments are futile because Skywaves' claims fail as a matter of law.[2]

[1] Unless otherwise noted, all abbreviations, such as "Skywaves," refer to those terms as defined in Edahl's Memorandum in Support of Motion for Summary Judgment and related filings.

[2] Edahl incorporates herein by reference all of BB&T's arguments in opposition to the Motion to Amend, to the extent applicable to Edahl and not otherwise set forth herein.

797

II. ARGUMENT

A. SKYWAVES' MOTION TO AMEND IS BARRED BY THE LAW OF THE CASE.

Though presented as "Motion to Amend," Skywaves' motion nonetheless asks the Court to "reinstate" its cause of action for fraud and "for violation of the statutory Unfair Trade Practices Act."[3] (Motion to Amend, p. 1). The Motion to Amend must be denied, however, because the dismissal of these claims is the law of the case.

By way of background, Skywaves originally asserted these causes of action in its Complaint, filed December 3, 2009, and Amended Complaint, filed February 2, 2010. Edahl moved to dismiss all of Skywaves' claims against him. On November 8, 2011, the Court granted Edahl's motion, dismissing all claims against him *with prejudice*. (Order filed November 8, 2011). Though Skywaves moved to reconsider this Order, it also filed a timely Notice of Appeal. Thereafter, on June 15, 2012, this Court entered a second Order. As against Edahl, the second Order only reinstated Skywaves' claims for negligence and negligent misrepresentation.[4] (Order filed June 15, 2012). Over a month later, Skywaves moved to dismiss its appeal as moot, sending the Court of Appeals a copy of the Order of June 15, 2012. (Motion to Withdraw Appeal, dated July 17, 2012, attached hereto as Exhibit "A"). Thereafter, on August 20, 2012, the Court of Appeals entered an Order dismissing the appeal, and on September 7, 2012, remitted

[3] Indeed, Skywaves goes to some lengths to emphasize that its proposed amendments are not new, but instead "do not expand the factual scope of the claim beyond what was alleged in the original and First Amended Complaints" and "do not inject any novel issues in the case." (Memorandum in Support of Motion to Amend First Amended Complaint, p. 3). Skywaves further 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 under the South Carolina statute.

[4] Skywaves does not disagree with this procedural history, but asserts that the Court's failure to reinstate the fraud claim in its Order of June 15, 2012, was a "clerical mistake." (Memorandum in Support of Motion to Amend First Amended Complaint, p. 2). The subject Order is clear, however: "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." (Order filed June 15, 2012, p. 6). (The claim for breach of contract accompanied by fraudulent act is not asserted against Edahl, however).

798

the case to this Court. (Remittitur and Order, attached hereto as Exhibit "B"). Now, over three years after the Order dismissing the subject claims with prejudice, and over two years after dismissing its appeal from that Order, Skywaves seeks to reassert the very claims that were dismissed with prejudice.

As stated unequivocally by the South Carolina Supreme Court: "Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order." *Hudson ex rel. Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 119, 754 S.E.2d 486, 490 (2014) (emphasis added); *see also Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (holding that Appellant may not seek relief from a prior unappealed order of the circuit court because the ruling has become the law of the case); *In re Morrison*, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal). This case falls squarely within the rule set forth in *Hudson ex rel. Hudson.* Skywaves cannot relitigate matters decided in the Order that it appealed, and then voluntarily abandoned.[5] Accordingly, Skywaves' motion to reinstate its claims for fraud and unfair trade practices must be denied.

B. THE AMENDMENTS WOULD RESULT IN UNFAIR PREJUDICE.

Though courts have wide latitude in allowing amendments to the pleadings, "this power should not be used indiscriminately, or to prejudice or surprise another party . . . ." *Brown v.*

[5] Notably, Skywaves did not request, and did not receive, a dismissal without prejudice from the Court of Appeals, presumably due to its satisfaction with the Order of June 15, 2012, which it provided to the Court of Appeals. (*See* Exhibits A and B). Separately, even if Skywaves had not appealed, the Court's orders are final and constitute the law of this case. *See generally Ness v. Eckerd Corp.*, 350 S.C. 399, 403, 566 S.E.2d 193, 195 (Ct. App. 2002) (finding that circuit court lacked jurisdiction to vacate his own order denying motion to set aside default after more than ten days has passed); *Serowski v. Serowski*, 381 S.C. 306, 315, 672 S.E.2d 589, 594 (Ct. App 2009) ("*Until written and entered*, a court has discretion to modify or amend a ruling") (emphasis added).

799

James, 389 S.C. 41, 59, 697 S.E.2d 604, 614 (Ct. App. 2010) (also noting that "the decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal") (quoting *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct.App.1997)). Here, Skywaves concedes and, in fact, argues that its proposed amendments relate back to facts and claims as they were asserted in this case since 2009. Skywaves has offered no justification for the dilatory nature of its motion, which comes months after Defendants moved and briefed their arguments for summary judgment. The South Carolina Supreme Court recently affirmed the denial of a motion to amend under similar circumstances. *See Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013). In *Health Promotion Specialists, LLC,* the plaintiff moved to amend the complaint some seven years after filing the initial complaint. *Id.* at 632, 743 S.E.2d at 813. The Court found that it would be unduly prejudicial to the defendant to be forced to defend against "arguably new theories of the case when so much time ha[d] elapsed." *Id.* Again, Skywaves' claims for fraud and unfair trade practices were dismissed over three years ago. The proposed amendments are unfairly prejudicial to Edahl, particularly insofar as they would include potential liability under a North Carolina statute that has never been at issue in this case. This Court should use its sound discretion to reject Skywaves' eleventh hour attempt to re-inject dismissed causes of action in this five-year old case.

C. THE AMENDMENTS ARE FUTILE.

Skywaves' proposed amendments should also be rejected on the grounds of "futility." *See Higgins v. Medical University of South Carolina*, 326 S.C. 592, 604-605, 486 S.E.2d 269, 275 (Ct. App. 1997) (rejecting proposed amendment to complaint where it would be futile). Particularly, Skywaves' fraudulent misrepresentation claim fails for the same reasons that its

negligent misrepresentation claim fails, as set forth in Edahl's memoranda in support of motion for summary judgment. Additionally, Skywaves has not met the "clear and convincing" standard of evidence that would be necessary to substantiate such a claim. *See Turner v. Milliman*, 392 S.C. 116, 125, 708 S.E.2d 766, 770 (2011). 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 Charleston, South Carolina. (Proposed Second Amended Complaint, ¶ 3). Finally, Skywaves' proposed factual supplementation of its pre-existing claims fail for all the reasons stated in Edahl's memoranda in support of his motion for summary judgment.

III. CONCLUSION

For all of the foregoing reasons, and any others the Court may deem appropriate, Edahl respectfully requests that this Court DENY Plaintiff's Motion to Amend the Amended Complaint.

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

April 24, 2015

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

By: _____
George J. Kefalos
Oana D. Johnson
46 A State Street

802

EXHIBIT A[1]

Charleston, SC 29401
P: (843) 722-6612
F: (843) 377-1310
george@kefaloslaw.com

M. Dawes Cooke, Jr., Esq.
John W. Fletcher, Esq.
BARNWELL WHALEY PATTERSON & HELMS, LLC
885 Island Park Drive (29492)
P. O. Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708
Attorneys for Appellant Skywaves I Corporation

Other Counsel of Record:
Molly Hughes Cherry, Esq.
Nexsen Pruet, LLC
P.O. Box 486
Charleston, SC 29402
(843) 720-1724 Fax: (843) 414-8209
MCherry@NexsenPruet.com
Attorneys for Respondents Branch Banking & Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl

This 17 day of July, 2012
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:

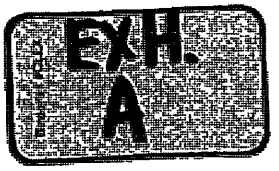
1. **A Complaint for Breach Of Contract Accompanied By A Fraudulent Act does NOT Require Allegations of Specific Acts or Conduct under Rule 9(b)**

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



804

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
Charleston, SC 29401
(843) 722-6612

Attorneys for Skywaves I Corporation

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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

September 07, 2012

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

REMITTITUR

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

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

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

RECEIVED
9/10/12
811

EXHIBIT B

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

812

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 REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

FILED
2015 APR 24 AM 8:32
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 Reply in Support of its Motion for Summary Judgment, in response to the Plaintiff's Memorandum in Opposition to Motions for Summary Judgment (the "Opposition") filed by Plaintiff Skywaves I Corporation ("Plaintiff" or "Skywaves").

I. INTRODUCTION

Skywaves' entire case is premised upon the idea that BB&T called a default under the Factoring and Security Agreement (the "Factoring Agreement") for what it deems a wrong and "pretextual" reason. Notwithstanding that is incorrect, Skywaves ignores the fundamental and inescapable reality that its financial performance steadily and substantially declined throughout the course of 2007, culminating in a $1.4 million loss, such that the prospects of Skywaves repaying BB&T or otherwise performing its obligations under the Factoring Agreement were severely impaired, at best, if not impossible.

Instead of recognizing the economic reality that the company was underwater, Skywaves seeks to capitalize on a subsequent admission by BB&T's former relationship banker on its account that he had approved financing on site plans, although he denied it to BB&T at the time, arguing that BB&T would not or should not have called a default had it known of the approval. The admission, however, is not only irrelevant to the merits of this case but Skywaves' reliance upon it represents an unwillingness to admit or, perhaps, a misguided effort to obscure, Skywaves' hobbled financial condition and the inevitable outcome of the company.

BB&T did not call a default because of unapproved site plan financing. Regardless, however, Skywaves' argument myopically focuses on one aspect of the financing at issue and wholly ignores the clear and express terms of the Factoring Agreement. Indeed, Skywaves' position suggests, if not outright states, that BB&T had no rights under the Factoring Agreement, but, instead, had an obligation to fund its operations indefinitely, regardless of any impact on the bank and with no rights or recourse for any default. Following Plaintiff's argument to its illogical conclusion, there is no basis upon which BB&T could have ever called a default or, frankly, ended the Factoring Agreement. That argument is simply incorrect, as a matter of law and undisputed fact.

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 in BB&T's Memorandum in Support of its Motion for Summary Judgment and herein, BB&T is entitled to summary judgment on all of Skywaves' claims.

II. LEGAL ARGUMENT

Skywaves has asserted six causes of action against BB&T: (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. BB&T is entitled to summary judgment on each of these claims. Throughout the 70 pages of its Opposition to BB&T's Memorandum in Support of its Motion for Summary Judgment, Skywaves changes the alleged oral modifications of the Factoring Agreement, the alleged promises or agreements made and allegedly breached by BB&T and the alleged representations made and relied upon by Skywaves, depending on which cause of action it is trying to address and which alleged promise presumably best suits its needs for purposes of attempting to survive summary judgment.[1]

Notably, the crux of Skywaves' argument is based upon testimony given by Jim Edahl in September of 2013 that he had originally agreed to site plan financing but forgot at the time, which testimony he subsequently modified in January of 2014 to state that he, in fact, had not forgotten but, instead, panicked over Skywaves' poor financial state of affairs. All parties have been in possession of this information for over a year and a half, and that revelation does not change the legal issues before the Court.

Perhaps recognizing the quandary this presents, Skywaves has broadly identified innumerable and alternatively changing alleged agreements, modifications or promises with the hope that one of them might rise to a cognizable claim. In fact, none of them do. The allegations by Skywaves comprehensively are as follows:

(1) Alleged Breaches: BB&T (a) "demand[ed] things that Skywaves never agreed to" in the Factoring Agreement; (b) used a "pretextual" reason for calling a default in the

[1] The parties originally agreed to a briefing schedule that would have Skywaves submitting its Opposition to Summary Judgment during the first week of January, barring Skywaves' need for additional testimony after receiving BB&T's Memorandum in Support of its Motion for Summary Judgment. Skywaves subsequently indicated a need for additionally testimony, though the main and majority of arguments and issues raised in its Opposition are based upon depositions and information it has had since before BB&T's Memorandum in Support of Summary Judgment was filed. Nevertheless, Skywaves submitted its 70-page Opposition to BB&T in April, though as of April 23, 2015, it has not provided copies of any of the exhibits referenced therein.

Factoring Agreement, different from the one provided in writing, because it was not comfortable with the financing arrangement; (c) did not really care whether some of Skywaves' accounts payable were over 60 days past due, such that calling a default on that basis was not material; (d) knew that its finances were in shambles, such that declaring a default based upon a year end loss of $1.4 million compared to a projected $1.4 million gain was unreasonable; and (e) never gave Skywaves any advance notice that its deteriorated financial state would lead the bank to stop advancing money.

(2) Alleged Oral Modifications and/or Waivers: (a) the Factoring Agreement terms were modified or waived such that Skywaves did not have to immediately remit to BB&T any payments made directly to Skywaves on accounts BB&T had factored and, thus, owned; (b) BB&T waived its right to call a default on the bases that it did because Skywaves had engaged in the same behavior previously and no default was called, notwithstanding that it did not, until after December 31, 2007, submit year end financials reflecting a $1.4 million loss; and (c) that BB&T would not call a default on the bases that it called in January of 2008.

(3) Alleged Promises and Representations: (a) that BB&T would not unreasonably call a default; (b) that BB&T would fund certain site plans, in addition to purchase orders and invoices under the Factoring Agreement; (c) that BB&T would fund Skywaves' financing needs and (d) that BB&T would provide capital financing.

As set forth more fully in its Memorandum in Support of its Motion for Summary Judgment and below, BB&T is entitled to summary judgment on all of Skywaves' claims.

A. Applicable Law: North Carolina and South Carolina Law Apply

North Carolina law applies to Plaintiff's claims arising under the Factoring Agreement, and South Carolina law applies to Plaintiff's remaining claims. 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)(emphasis added).[2]

By its own terms, the language of paragraph 25 provides that North Carolina law only applies to Plaintiff's claims arising under the Factoring Agreement. *See In re Marine Energy Systems, Corp.*, 362 B.R. 247, 254 (D.S.C. 2006); *see also Kerr, et al. v. BB&T and Edahl*, C/A No. 2009-CP-10-7515 (June 2011), *aff'd on different grounds* Opinion No. 27379 (S.C.Sp. Ct. 2014)(holding in Order granting motion to dismiss that similar tort claims as those alleged by Skywaves in this case did not fall under the Factoring Agreement)(attached as Exhibit 1). This provision is narrowly limited to claims arising "under" the Factoring Agreement, as opposed to a broader wording to include claims "arising from or relating to" the Factoring Agreement or the "relationship of the parties." Indeed, paragraph 25 is not worded so broadly as to cover the entire relationship between the parties nor does it otherwise refer to any claim or controversy that may arise between them. This provision cannot and, indeed, should not, govern Plaintiff's other claims. *See id.*

Moreover, even if paragraph 25 were more broadly worded (which it is not), the law of the state of North Carolina expressly provides that, "[fo]r actions sounding in tort, the state where the injury occurred is considered the situs of the claim." *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). Accordingly, even under North Carolina law, Plaintiff's tort claims would be governed by South Carolina law.

B. Breach of Contract: BB&T Did Not Breach the Factoring Agreement and, Thus, is Entitled to Summary Judgment.

[2] All exhibit references herein are to the Joint Set of Exhibits filed by Defendants previously.

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). Skywaves has now expanded its argument to claim that BB&T breached the Factoring Agreement by "demanding things that Skywaves never agreed to" and by using a "pretextual" reason for calling the default. (Plaintiff's Opposition at pp. 33 and 39). Skywaves cannot establish, as a matter of law, any breach of the Factoring Agreement nor otherwise create a question of material fact. Accordingly, BB&T is entitled to summary judgment on the breach of contract claim.

With regard to Skywaves' contention that BB&T improperly called a default, the bank detailed three non-exclusive reasons for calling a default. (Memorandum in Support of Summary Judgment at pp. 17-23). Notably, Skywaves does not deny that it failed to pay debts that were due; that it did not immediately remit account payments it received to BB&T; or that its year-end financial statements were horrendous, such that its ability to repay the bank was impaired. Skywaves does not, because it cannot.

Instead, Skywaves provides a litany of excuses and reasons why the express terms of the Factoring Agreement should not apply and, in essence, contends BB&T could not ever stop its financing under the Factoring Agreement. Because the express terms of the Factoring Agreement apply and were followed by BB&T in ceasing further funding and in calling a default, Skywaves' claims should be dismissed and summary judgment granted to BB&T.

1. Materiality

Skywaves contends BB&T has not shown a material breach. It spends six pages in its Opposition trying to explain why BB&T's reasons set forth in the January 25, 2008 letter calling

default under the Factoring Agreement did not amount to "material" breaches by Skywaves, such that BB&T's declaration of default was not justified. (Plaintiff's Opposition at pp. 33-39). As an initial matter, Skywaves, and not BB&T, has the burden of proof. Regardless, however, the cases cited by Skywaves do not apply to its claim for breach of contract. All of the cited cases deal with the necessity of showing a material breach before providing the equitable remedy of rescission of those contracts by the other, non-breaching party. Moreover, all of the cases involve agreements that did not expressly delineate what constituted a breach of or default under the agreement, and that did not provide a remedy or otherwise detail what happens in the event of a breach. The cases cited by Skywaves are wholly inapposite and do not apply to their claim for damages against BB&T.

Indeed, the "materiality" of the breach requirement arises in the context of rescission in a breach of contract action by the non-breaching party where the agreement does not contain express provisions outlining what constitutes a breach and what happens in the event of a breach. *See e.g. Ebert v. Ebert,* 735 S.E.2d 451 (Table), 2012 WL 5857386 (N.C. Ct. App. 2012)(plaintiff wife sought equitable remedy of specific performance of alimony provisions in domestic support agreement for alleged breach by her ex-husband when he reduced the amount of alimony he was paying); *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 682 S.E.2d 726 (N.C. Ct. App. 2009)(discussing "material breach" in the context of the equitable remedy of rescission where the plaintiff sought rescission for breach of settlement agreement); *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964)(discussing "material breach" in the context of the equitable remedy of rescission of a domestic support agreement for alleged breach by ex-husband for failure to pay remaining alimony).

Notwithstanding that Skywaves cannot seriously contend that it "never agreed" to repay the bank, BB&T neither sought rescission nor filed a breach of contract or any other action against Skywaves upon the defaults. BB&T did not immediately terminate the Factoring Agreement or require immediate repayment by Skywaves. Instead, BB&T called the defaults and suspended further advances of money under the Factoring Agreement.

Skywaves notably ignores that, in the January 25, 2008 letter, BB&T specifically stated: "[A]s a result of the default ***and/or in exercise of rights granted to it in the [Factoring] Agreement (regardless of the existence of a default),*** BB&T will make no further Advances (as defined in the Agreement." (Exhibit J)(emphasis added). The Factoring Agreement did not require an event of default for BB&T to exercise its right to stop advancing funds to Skywaves until it was paid on a particular account. The Factoring Agreement expressly provides that BB&T "shall not be required to" advance funds "unless and until BB&T receives full payment from [Skywaves] of the full amount of such Account." (Exhibit C, at ¶ 5).

On January 25, 2008, BB&T ceased advancing funds, as it was entitled to do, but did not require Skywaves to repay the bank in full immediately. Instead, BB&T attempted to work with Skywaves throughout February and March to establish some sort of work-out plan. When they were not able to do so, Skywaves filed for bankruptcy on April 17, 2008, after the Factoring Agreement ended by its own terms on April 5, 2008. (Plaintiff's Opposition at p. 47).

Skywaves has not addressed the provisions of paragraph 5 of the Factoring Agreement which permit BB&T to stop advancing funds until receipt of payment. However, following the illogical theory behind Skywaves' other arguments in opposition to summary judgment, it would presumably contend that BB&T could not cease advancing funds under the Factoring Agreement

under any circumstances. That cannot be, and is not, correct under the express terms of the Factoring Agreement or the law.

Not only are Skywaves' materiality arguments inapplicable, they are also incorrect. The Factoring Agreement expressly states what constitutes a breach or default by Skywaves and what happens in the event of a default, including BB&T's right to call a default, such that those provisions are necessarily material. Nevertheless, Skywaves contends, for example, that BB&T's determination that Skywaves was not paying, was not able to pay and would not continue to pay its debts as they matured was questionable and certainly not a material breach of the Factoring Agreement. (Plaintiff's Opposition at p. 37). To that end, Skywaves contends that BB&T did not proffer evidence of breach of debt payables. (*Id.*).

In this regard, Skywaves is again improperly trying to shift its burden of proof to BB&T, and it fundamentally ignores that its own financial statements showed 37% of its accounts payable as being over 60 days overdue. Further, by way of example only, with regard to Skywaves' suggestion that BB&T is blowing its accounts payable out of proportion, it wholly ignores that one of the accounts payable not included in the 60 day figure was to the federal government for payroll taxes. Skywaves paid its November payroll taxes late in December, and as of January 22, 2008, had not paid payroll taxes for December.

In short, Skywaves' contention that none of (a) its delinquent accounts payable, (b) its precarious financial position, or (c) its failure to immediately remit account payments it received to BB&T, was a material breach of the Factoring Agreement is in complete disregard of the provisions of the Factoring Agreement and BB&T's rights under the Factoring Agreement. BB&T is entitled to summary judgment on the breach of contract claim.

2. No Modification

Skywaves also contends that the Factoring Agreement was orally modified, in an effort to call into question the first ground identified as a basis for default set forth in the January 25, 2008 letter, namely that Skywaves failed to remit account payments Skywaves received to BB&T. (Exhibit J at ¶ 2). Skywaves contends, instead, that it had no obligation to repay advances until it developed sites, issued a purchase order and sent an invoice. (Plaintiff's Opposition at p. 33). As an initial matter, this argument confuses payments Skywaves received from customers upon invoices for goods already sent by Skywaves to the customer, *i.e.*, a collected account receivable, which Skywaves was obligated to immediately remit to BB&T, with advances on site plans for which no account receivable yet existed. The January 25, 2008 letter cited the failure to remit collected accounts receivable as a default, not the failure to repay advances made to Skywaves. (Exhibit J at ¶ 2). The Factoring Agreement expressly provides that Skywaves was to immediately remit account payments it received to BB&T. (Exhibit C, ¶ 8).

Notably, Skywaves' argument on oral modification only addresses one of the three default grounds raised by BB&T in the January 25, 2008 letter. Skywaves has not provided any evidence or argument of an alleged oral modification of the Factoring Agreement pertaining to the second and third grounds regarding delinquent accounts payable or BB&T's insecurity. (Exhibit J). Perhaps in recognition of the problem that lack of evidence poses, Skywaves also makes a unilaterally broad and unsupported statement that the Factoring Agreement was orally modified to "restrict the right to terminate," such that BB&T would no longer have the right to terminate the Factoring Agreement under the provisions upon which it relied. (Plaintiff's

Opposition at p. 50). Skywaves has presented no evidence whatsoever to support that ludicrous statement because there is none. (Plaintiff's Opposition at p. 50).

Nevertheless, any such alleged oral modification would be invalid. Skywaves cites *Son-Shine Grading Co. v. ADC Constr. Co.*, 63 N.C. App. 417, 315 S.E.2d 346 (N.C.Ct.App. 1984), for the proposition that a written contract may be orally modified "even though the instrument involved provides that only written modifications shall be binding." (Plaintiff's Opposition at p. 49). However, while North Carolina courts have "recognize[d] the validity of an oral modification to a written contract despite the contract's inclusion of a 'no oral modifications' clause, [they] have not done so where, as here, the original contract was subject to the statute of frauds." *Nixon Associates, LLC v. Brown*, 768 S.E.2d 201, 2014 WL 7466753 (N.C. Ct. App. 2014)(attached)(distinguishing *Son-Shine Grading Co. v. ADC Constr. Co.*, 63 N.C. App. 417, 315 S.E.2d 346 (N.C.Ct.App. 1984). Indeed, written contracts subject to the statute of frauds cannot be orally modified. *Id.* (*citing Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 465, 323 S.E.2d 23, 26 (1984)).

As set forth in BB&T's Memorandum in Support of its Motion for Summary Judgment and in further detail below, the Factoring Agreement is subject to the statute of frauds. Even Skywaves at least tacitly admits that the Factoring Agreement is subject to the statute of frauds, only arguing which statute of frauds applies, not whether it does. (Plaintiff's Opposition at pp. 53-60). Under these circumstances, Skywaves' argument that the Factoring Agreement was orally modified in any manner as Skywaves now contends, fails, as a matter of law.

3. No Waiver

Skywaves additionally contends that BB&T waived its right to call a default because it did not call a default earlier for the alleged same breaches of the Factoring Agreement that

Skywaves made previously. (Plaintiff's Opposition at p. 48). This argument is flawed, at best. *See Nixon Associates, LLC v. Brown*, 768 S.E.2d 201, 2014 WL 7466753 (N.C. Ct. App. 2014).

Although Skywaves concedes a waiver requires an "intention to waive" (Plaintiff's Opposition at p. 48), it does not address and conveniently ignores that BB&T expressly stated its intention not to waive its rights under the Factoring Agreement: "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 . . .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 writing." (Exhibit C at ¶ 23). Skywaves has not provided any argument as to why paragraph 23 does not or should not apply.

Moreover, Skywaves has not shown and cannot show that BB&T "waived" a previous breach based upon Skywaves' failure to pay its debts as due or because of Skywaves' precarious financial condition. Indeed, a determination with regard to each of those items would necessarily require an assessment of a company's financial performance at a particular point in time, because financial performance is a dynamic and changing picture, such that it will not be the same every day, week or month. Notably, in this case, Skywaves was repeatedly behind in providing financials, and its financial picture continued to worsen over time, such that its financial picture was different each month. Accordingly, BB&T could not have waived or expressed an intention to waive a right based upon a year-end financial loss of $1.4 million, when that loss was not demonstrated until the year end financials were provided.

Plaintiff unilaterally contends that at the time of termination the parties were "comfortable and committed to the agreement," with no support whatsoever. (Plaintiff's Opposition at p. 37). Skywaves fails to explain how any lender could be "comfortable" with a customer's $1.4 million loss, against a projected $1.4 million profit. (Compare Exhibits G and G3). The woefully poor financial health of Skywaves at the end of 2007 was a sufficient basis alone to warrant termination of further advances.

In the *Nixon* case, the court granted summary judgment when the plaintiff mounted a similar argument as to the one Skywaves mounts here. The *Nixon* plaintiff argued that the defendant waived its right to collect unpaid rent from her under the terms of a written Lease Agreement because it had accepted partial payments from her that were less than the full rent amount. *Nixon Associates, LLC,* 2014 WL 7466753. The court determined that summary judgment in favor of the defendant was warranted because acceptance of partial payment did not "demonstrate[] an intention to give up its right to collect the unpaid rent owed to it under the [l]ease [a]greement." *Id.* Here, there is the added fact that the Factoring Agreement expressly provides there is no intention to waive any of BB&T's rights.

Because Skywaves has not shown and cannot show an intention by BB&T to waive its rights under the Factoring Agreement, Skywaves' argument fails, and BB&T is entitled to summary judgment on its breach of contract claim.

C. Good Faith: BB&T Did Not Breach Any Covenant of Good Faith and Fair Dealing.

Skywaves contends BB&T's declaration of default was unreasonable or in bad faith, alleging that BB&T was looking for a "pretextual" reason to call a default because it was uncomfortable with its arrangement, having undertaken risks beyond its normal tolerance.

(Plaintiff's Opposition at pp. 45 and 52).[3] In doing so, Skywaves conflates its argument that BB&T did not have a "good faith" basis to call a default under the Factoring Agreement with its arguments that BB&T breached a covenant of good faith and fair dealing. (Plaintiff's Opposition at pp. 41 and 52).

As an initial matter, the claim that BB&T breached a covenant of good faith and fair dealing should not be recognized in this lawsuit. 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). 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).

Moreover, while North Carolina recognizes a separate cause of action for breach of the covenant of good faith and fair dealing, this claim still fails, as a matter of law, because Skywaves is attempting to use the cause of action as another effort to avoid the express language of the Factoring Agreement. Under North Carolina law, a breach of good faith and fair dealing claim "cannot be used to contradict the express terms of a contract." *Heron Bay Acquisition, LLC v. United Metal Finishing, Inc.*, 2014 WL 1878885 (N.C. Super. Ct. 2014).

[3] Skywaves harps on not having received any advance notice of the default, claiming it was ambushed by the declaration. (Plaintiff's Opposition at p. 19). As an initial matter, no notice of default is required under the Factoring Agreement, which also provides that after the occurrence of an event of default, BB&T "may, at its option and without notice . . .of any kind (all of which are hereby expressly waived by [Skywaves]), declare all of the Obligations to be, and the same shall thereupon become, immediately due and payable . . . ." (Exhibit C at ¶ 13). As set forth *supra.*, BB&T, in fact, did not require immediate repayment by Skywaves but, instead, exercised its right to stop any further advances.

826

Indeed, where there is no breach of contract, there can be no breach of the covenant of good faith and fair dealing. *SunTrust Bank v. Bryant/Sutphin Props., LLC*, 732 S.E.2d 594 (N.C. Ct. App. 2012)("As the jury determined that plaintiff did not breach any of its contracts with defendants, it would be illogical for this Court to conclude that plaintiff somehow breached implied terms of the same contracts."); *Gunn v. Lab. Corp. of Am.*, 2014 WL 3045135 (N.C. Super. Ct. July 3, 2014); *Taylor Family Ltd. P'ship v. Bank of Granite*, 762 S.E.2d 531 (N.C. Ct. App. 2014).

According, Skywaves' claim for breach of the covenant of good faith and fair dealing fails, as a matter of law, and BB&T is entitled to summary judgment.

D. No Breach of Contract Accompanied by a Fraudulent Act

It is axiomatic that, where there is no breach of contract, there can be no claim for breach of contract accompanied by a fraudulent act. *See e.g. Peoples v. Orkin Exterminating Co.*, 244 S.C. 173, 178, 135 S.E.d2d 845, 847 (Ct.App. 1985). It is not clear that North Carolina law recognizes an express cause of action for breach of contract accompanied by a fraudulent act, such that neither side has cited to any authority so expressly stating. Nevertheless, notwithstanding that there was and has been no fraudulent conduct, the cases cited by Plaintiff to support a finding under its theory state the requirement that there must first be a breach of contract, before addressing whether punitive damages may be recoverable for a breach of contract. *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). Because Skywaves' breach of contract claim fails as a matter of law, so does its claim for breach of contract accompanied by a fraudulent act.

E. North Carolina Does Not Recognize Affirmative Claims of Promissory Estoppel, Such that BB&T is Entitled to Summary Judgment.[4]

Skywaves' third claim is for promissory estoppel, wherein Skywaves contends it has been injured and for which Skywaves is actual seeking damages. (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). In that regard, Skywaves is unquestionably using the promissory estoppel claim offensively, seeking damages.

Skywaves conceded that North Carolina does not recognize offensive or affirmative claims for promissory estoppel but, instead, only recognizes promissory estoppel as an equitable defense. *See Penguin Restoration, Inc. v. Nationwide Mut. Ins. Co.*, 2013 WL 4419355, at *2 (M.D. N.C. Aug. 15, 2013).[5]

Skywaves, however, attempts to take a reference in an earlier North Carolina case out of context to suggest that it can use promissory estoppel "offensively" to enforce a promise if the written agreement is otherwise unenforceable. *See Sonic Automotive, Inc. v. Mercedes-Benz USA, Inc.*, 2010 WL 1782269 (N.C. Sup. Ct. 2010). In the *Sonic Automotive* case, the defendant refused to agree to a sale because the plaintiff had not complied with certain promises. When the plaintiff sued the defendant for breach of contract, the defendant asserted a counterclaim for

[4] Interestingly, the specific promises Skywaves contends BB&T made are that BB&T would provide funding based on site plans and invoices; would allow Skywaves grace as to some provisions; and would continue the relationship with Skywaves on the same terms in the long run. (Plaintiff's Opposition at p. 52). Plaintiff has not shown any evidence that BB&T did not do all three things. To the extent Skywaves is claiming some broader, open ended promise of unconditional, limitless financing or otherwise, the same is addressed herein.

[5] Significantly, this claim also fails as a matter of law, on the merits. To establish a promissory estoppel claim in South Carolina or North 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); *Sonic Automotive, Inc. v. Mercedes-Benz, USA, Inc.* , 2010 WL 1782269 (N.C. Super. Ct. 2010). 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).

828

breach of contract, defending against the plaintiff's claims. There, the defendant was not seeking damages but, instead, counterclaimed to enforce plaintiff's agreement in defense of plaintiff's claim that defendant had breached the agreement at hand.

Here, Skywaves is not attempting to enforce a promise but, instead, is bringing an affirmative, offensive claim for damages against BB&T, akin to its breach of contract claim. This claim is yet another end run effort to establish an oral modification to the Factoring Agreement or waiver, which North Carolina law does not allow. Indeed, if anything, defensive promissory estoppel applies to the seventh defense BB&T alleged in its Amended Answer to Skywaves' Amended Complaint and would afford BB&T relief, not Skywaves. Under these circumstances, Skywaves' claim for promissory estoppel is barred and fails, as a matter of law.

F. Skywaves' Claims for Promissory Estoppel, Negligence and Negligent Misrepresentation are Statutorily Barred and, Thus, BB&T is Entitled to Summary Judgment.

In its Opposition, Skywaves wholly ignores that its claims for promissory estoppel, negligence and negligent misrepresentation are based upon much more than an alleged oral promise to provide site plan financing, such that they do not fall "under" the Factoring Agreement. *See Kerr, et al. v. BB&T and Edahl*, C/A No. 2009-CP-10-7515 (June 2011), *aff'd on different grounds* Opinion No. 27379 (S.C.Sp. Ct. 2014)(Dismissal Order noting that similar tort claims as those alleged by Skywaves did not fall under the Factoring Agreement)(attached as Exhibit 1). To the extent Skywaves agrees that is claims for promissory estoppel, negligence and negligent misrepresentation are based solely upon an alleged promise to provide limited site plan financing until December of 2007, under the terms as conceded by its president, Ron Konersmann, BB&T is entitled to summary judgment on those claims because it is undisputed

that BB&T provided the financing.[6] *See e.g.* Memorandum in Support of Defendant's Motion for Summary Judgment at pp. 30-34.

Skywaves, however, now appears to claim BB&T agreed to "provide capital financing" for Skywaves or to "fund Skywaves' financing needs." To the extent these claims are for alleged oral promises outside the Factoring Agreement, they are statutorily barred, as a matter of law, under S.C. Code Ann. § 37-10-107, often referred to as the South Carolina Lender Liability Statute of Frauds. (Memorandum in Support of Defendant's Motion for Summary Judgment at pp. 30-34).

Skywaves does not contend that the S.C. Code Ann. § 37-10-107 would not, by its express provisions, bar its claims for promissory estoppel, negligence and negligent misrepresentation. Instead, Skywaves contends the statute is not applicable because North Carolina law applies to its claims. However, if Skywaves contends the alleged promises arose under the Factoring Agreement, then, as set forth in detail above, the claims are expressly barred under North Carolina law.

To survive the inevitable reality that its claims are barred under North Carolina law, Skywaves would have to concede that the alleged promises and representations were for something more than the promises or representations stated in the Factoring Agreement. If so, however, the claims are not based on the Factoring Agreement, the North Carolina choice of law provision in the Factoring Agreement does not apply, and South Carolina law necessarily applies. To that end, Defendant incorporates herein its arguments on the South Carolina Lender

[6] As set forth in detail in Defendant's Memorandum in Support of its Motion for Summary Judgment, BB&T provided the site plan financing as set forth in its Amended Answer. Indeed, the limited site plan financing until December of 2007, is undisputed by either side, such that those allegations alone are insufficient, as a matter of law, to support any of the causes of action pled. There is no evidence that BB&T did not comply with those terms and, in fact, the evidence shows BB&T did.

Liability Statute of Frauds. (Memorandum in Support of Motion for Summary Judgment at pp. 27-30).[7]

G. BB&T is Entitled to Summary Judgment on Skywaves' Claims for Negligence and Negligent Misrepresentation Because These Claims are Merely Recharacterization of Skywaves' Contract Claims.

BB&T is also entitled to summary judgment on Skywaves' claims for negligence and negligent misrepresentation because they are nothing more than a recharacterization of its contract claims. Skywaves' fifth and sixth causes of action for negligent misrepresentation and negligence are, in essence, recharacterized contract claims, such that they are barred by the economic loss doctrine. *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.").

Skywaves argues that its claims for negligent misrepresentation and negligence are not recharacterized contract claims because they have alleged breaches of duties going beyond those implied in contract. (Plaintiff's Opposition at p. 62). The only example Skywaves gives to support this contention is that BB&T allegedly had a duty to and advised Skywaves "concerning its most suitable capitalization options." *(Id.)* Skywaves' argument, however, is circular and wholly ignores that, in its effort to show that the most suitable capitalization option arguably was not provided, it necessarily implicates the Factoring Agreement and its argument that BB&T breached the Factoring Agreement.

[7] BB&T appropriately addressed the majority of the arguments Skywaves raises now in opposition to application of the South Carolina Lender Liability Statute of Frauds. Skywaves also contends the South Carolina Lender Liability Statute of Frauds does not bar its fraud claim. Skywaves does not have a pending fraud claim. Even if Skywaves did, the South Carolina Lender Liability Statute of Frauds bars fraud claims. *See e.g. Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina*, C.A. No. 2:98-158-23(DSC. 1999)(citing *Derrick v. Branch Banking and Trust Company of South Carolina*, 96-CP-42-2095 (S.C.Ct.Cm.P. 9/8/98). Skywaves also contends the statute conflicts with S.C. Code § 32-3-10(5); however, the two statutes can be read together, such that they both stand. *See In the Interest of Shaw*, 265 S.E.2d 522, 524 (S.C. 1980).

831

Indeed, Skywaves' reliance upon North Carolina law in its Opposition, contending that its claim falls "under" the Factoring Agreement, is indicative of the contract implications at issue. (Plaintiff's Opposition at pp. 61-62). Skywaves is, in fact, recharacterizing its breach of contract claim by arguing that, if BB&T properly called a default under the Factoring Agreement, then it necessarily must have been because BB&T did not provide the most suitable financing to Skywaves.

Skywaves' claims clearly seek to recover for the alleged "loss of a bargained-for" financing arrangement "based on a commercial transaction," *i.e.*, the Factoring Agreement, which would be 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); *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.

H. BB&T is Entitled to Summary Judgment on the Negligence and Negligent Misrepresentation Claims on Other and Further Grounds.

Moreover, BB&T is entitled to summary judgment on Skywaves' claims for negligence and negligent misrepresentation for the separate and independent reasons set forth below.

1. Negligent Misrepresentation

Skywaves appears to be relying upon several alleged representations to support this claim, including alleged representations regarding BB&T's intention to fund site plans and purchase orders under the Factoring Agreement, as well as alleged representations that BB&T

would "fulfill Skywaves' financing needs", that BB&T would not "treat the alleged defaults that it now relies upon as a ground to terminate the agreement" and that BB&T would "treat the Factoring Agreement as terminable only upon reasonable cause."

As an initial matter, Skywaves has not identified any actionable false statement made by BB&T. Negligent misrepresentation is predicated upon the transmission of a negligently made false statement. *See e.g. Armstrong v. Collins*, 366 S.C. 204, 220, 621 S.E.2d 368, 376 (Ct. App. 2005). Skywaves recognizes that the five alleged false statements that were allegedly made relate to future events or promises, such that they do not generally give rise to a claim for negligent misrepresentation. (Plaintiff's Opposition at p. 64). Indeed, Skywaves agrees that a promissory statement of future events will not give rise to an actionable statement, except in circumstances where the alleged misrepresentation is made with the intent to deceive and no intention to comply with the stated representation. *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.C. 226, 562 S.E. 2d 620 (2002). Skywaves fundamentally ignores that there is absolutely no evidence that the five alleged statements were false at the time, that BB&T had an intent to deceive Skywaves when they were allegedly made or that BB&T did not intend, at the time the statements were allegedly made, to fulfill them.

Ultimately, 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. 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).

Additionally, Skywaves cannot establish any of the other elements of this cause of action, including reasonable reliance, proximate cause and damages. Notably, South Carolina, as well as North Carolina, requires "reasonable reliance" on the alleged representation to state an actionable claim for negligent misrepresentation. *See 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)); *Jordan v. Earthgrains Cos.*, 155 N.C. App. 762, 767, 576 S.E.2d 336, 340 (2003). As set forth in detail above, the Factoring Agreement expressly provided that it "constitute[d] and expresse[d] the entire understanding between the parties hereto . . . and supersede[d] all prior and contemporaneous agreements and understandings . . . and supersede[d] any course of performance . . . " (Exhibit C at ¶ 24). Any argument by Skywaves that it reasonably relied on any alleged representations not contained in the express terms of the Factoring Agreement fail, as a matter of law and of fact. Skywaves' contention that it reasonably relied upon alleged representations that are expressly disclaimed in the Factoring Agreement is a misguided attempt to circumvent the express terms to which it agreed.

Moreover, Skywaves cannot establish any proximate damages are a result of the alleged negligent misrepresentation. As set forth in detail above, BB&T had the right to call a default and properly called a default under the Factoring Agreement.

2. 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 contends that BB&T had a duty to advise it as to the most appropriate funding. However, 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.

III. CONCLUSION

For the reasons set forth above and in BB&T's Memorandum in Support of its Motion for Summary Judgment, BB&T respectfully requests that the Court grant its Motion for Summary Judgment.

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: 843.414.8209
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

April 24, 2015
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.	)	
	)	**DEFENDANT JAMES EDAHL'S REPLY IN SUPPORT OF 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
2015 APR 24 AM 8:32
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Defendant James Edahl, by and through his undersigned counsel, respectfully submits this Reply in Support of Motion for Summary Judgment.

I. INTRODUCTION

Despite claiming to bring the case "into focus," Skywaves resorts to deflection and obfuscation in its 70-page Memorandum in Opposition to Summary Judgment (the "Opposition").[1] Nowhere in the Opposition does Skywaves set forth a consistent, viable theory of liability sufficient to withstand Defendants' motions for summary judgment. Instead, the fact remains that Skywaves was rapidly failing (suffering a loss of $1.4 million in 2007), which resulted in BB&T's termination of its lending relationship with Skywaves in January 2008, pursuant to the underlying contract. (Voytko Dep. at pp. 175-176, Ex. B).[2] Edahl's

[1] Skywaves did not serve the Opposition until April 7, 2015; and still has not provided the referenced citations to the record. Edahl filed his Motion for Summary Judgment on July 28, 2014, and his Memorandum in Support on December 22, 2014.

[2] All exhibits refer to those filed jointly by Defendants on December 22, 2014, in connection with their respective memoranda supporting the motions for summary judgment and to strike the jury demand. Also, unless otherwise noted, all abbreviations, such as "Skywaves" and "BB&T," refer to those terms as defined in Edahl's Memorandum in Support of Motion for Summary Judgment.

acknowledgment in the course of this litigation that he agreed, in 2007, to treat certain "site plans" as purchase orders for purposes of the financing agreement between BB&T and Skywaves does nothing to change the result in this case. Though Skywaves has asserted tort claims against Edahl for negligence and negligent misrepresentation, this remains a commercial contract dispute between sophisticated parties. *See Kerr v. Branch Banking and Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 726 (2014) (reiterating the trial court's finding that, "at its core, this case revolves around the contractual relationship between BB&T and its customer, Skywaves"). For the reasons previously raised, and those that follow, Edahl is entitled to summary judgment on the claims asserted against him.[3]

II. ARGUMENT

A. SOUTH CAROLINA LAW APPLIES TO ALL CLAIMS ASSERTED AGAINST DEFENDANT EDAHL.

Skywaves argues – without citation to case law – that its surviving tort claims against Edahl should be governed by North Carolina law. (Opposition, p. 33). In support of its contention, Skywaves states only that "the parties selected North Carolina law," referring to the "Applicable Law" provision contained in the Factoring Agreement. *Id.* Skywaves' argument is unavailing, for several reasons:

1. First, as repeatedly noted by Skywaves, Edahl is not himself a party to the Factoring Agreement. Skywaves has not cited any precedent that would permit the enforcement of a choice-of-law provision against an individual who is not party to the agreement containing the choice-of-law provision. Indeed, this argument appears to run contrary to equity and common sense. *See Kerr*, 408 S.C. at 333, 759 S.E.2d at 726 (finding the applicable law provision in the Factoring Agreement irrelevant as to the investors in Skywaves, since they were

[3] Edahl further incorporates herein by reference all of BB&T's arguments in favor of summary judgment, to the extent applicable to Edahl and not otherwise set forth herein.

not parties to the Factoring Agreement). Absent the "Applicable Law" provision in the Factoring Agreement, it is undisputed that South Carolina law applies to the tort claims against Edahl.

2. Second, the subject provision states: "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." (Ex. C, p. 13) (emphasis added). Skywaves' *contractual* claims are, clearly, "under the Agreement" and may be subject to the substantive law of North Carolina. (*See* BB&T's Memorandum in Support of Its Motion for Summary Judgment). Skywaves' tort claims, on the other hand, purport to involve extra-contractual representations and would not be subject to North Carolina law, under the plain language of the provision. *See In re Marine Energy Systems Corp.*, 362 B.R. 247, 254-255 (Bankr. D.S.C. 2006) (declining to apply choice of law provision to tort claims for negligent misrepresentation and fraud and, instead, applying the law of South Carolina, as the place of the alleged wrong).

3. Third, even looking to North Carolina law in the first instance would result in the application of South Carolina law. North Carolina, like South Carolina, follows the traditional doctrine of *lex loci delicti,* which provides that the law of the place where the injury occurred governs all substantive questions. *See Boudreau v. Baughman*, 322 N.C. 331, 336, 368 S.E.2d 849, 854 (N.C. 1988) (recognizing that North Carolina has "consistently adhered to the *lex loci* rule in tort actions" and identifying it as an "objective and convenient approach which continues to afford certainty, uniformity, and predictability of outcome in choice of law decisions"); *Dillon v. Frazer,* 383 S.C. 59, 66, 678 S.E.2d 251, 254 (2009) (citing *Lister v. NationsBank of Delaware*, 329 S.C. 133, 143, 494 S.E.2d 449, 454 (Ct. App. 1997) ("In choice of law in South Carolina, the general rule is that the substantive law governing a tort action is the law of the state

where the injury occurred")). Thus, the courts of both states would apply South Carolina law to Skywaves' tort claims.

4. Finally, the lender liability statute, or S.C. Code Ann. § 37-10-107, should apply regardless of any choice of underlying, substantive law. In both South Carolina and North Carolina, when foreign law applies to the substance of claims, the forum state will still apply its own procedural, or remedial, law. *Lister*, 329 S.C. at 143, 494 S.E.2d at 454; *Boudreau*, 322 N.C. at 335, 368 S.E.2d at 854 (noting that "remedial or procedural rights are determined by *lex fori*, the law of the forum"). For example, South Carolina will apply its own statute of limitations, even where another state's law may govern certain substantive issues. *See, e.g., Georgia Bank & Trust Co. of Augusta v. Trenery*, 2010 WL 3271732, *7 (D.S.C. Aug. 18, 2010). S.C. Code Ann. § 37-10-107 is a similarly remedial statute, barring certain actions absent evidence of a signed writing. Accordingly, this Court should apply S.C. Code Ann. § 37-10-107 as *lex fori*.

B. S.C. CODE ANN. § 37-10-107 BARS SKYWAVES' CLAIMS AGAINST DEFENDANT EDAHL.

Skywaves argues that S.C. Code Ann. § 37-10-107 is inapplicable to Defendant Edahl because he was a "stranger" to the contract at issue who has been sued in tort.[4] (Opposition, p. 56). This argument ignores the plain language of the statute, which makes no such exception for individual agents and employees of the institutional lender and, in fact, *expressly* bars tort claims like the ones asserted by Skywaves. *See* S.C. Code Ann. § 37-10-107.

First, Section 37-10-107 begins: "No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise . . . ." (S.C. Code Ann. § 37-10-107(1)) (emphasis added). The language of the statute is clear and

[4] Skywaves' "stranger to the contract" argument is ironic in light of it simultaneous position that Edahl is somehow bound by the "Applicable Law" provision in the contract.

840

unambiguous. It does not purport to constrain its scope to actions against institutions or entities only. Rather, the law simply states that no such action "may [be] maintain[ed]." Skywaves' interpretation would require the court to read an additional, restrictive clause into the statute, which, respectfully, it may not do. *See Holmes v. East Cooper Community Hosp., Inc.*, 408 S.C. 138, 152-153, 758 S.E.2d 483, 491 (2014) ("When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language . . .") (quoting *Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000)). Thus, the plain text of the statute renders it applicable to the claims against Edahl, as well as BB&T.[5]

In any event, though Edahl was not himself a party to the agreements with Skywaves, he was hardly a "stranger" to the relationship between Skywaves and BB&T. Instead, Edahl was BB&T's "relationship manager" on the Skywaves' account, who acted at all times as the agent and employee of BB&T. (Amended Complaint, ¶ 52). The authorities cited by Skywaves do not pertain to this type of relationship. *Cf. Hatcher v. Harleysville Mut. Ins. Co.*, 266 S.C. 548, 553, 225 S.E.2d 181, 183 (1976) (finding *insurer* could not rely on statute of frauds to challenge insured's oral contract with a third-party to buy the real property insured); *Hobgood v. Pennington*, 300 S.C. 309, 315, fn. 1, 387 S.E.2d 690, 693, fn. 1 (Ct. App. 1989) (rejecting defendant's attempt to argue that contract which he tortiously interfered was unenforceable under statute of frauds). Regardless, except for one reference to *Kerr*[6], Skywaves cites to authorities

[5] Skywaves makes a half-hearted argument that Section 37-10-107 does not apply to the claims against either Defendant because this case does not involve an "archetypical loan." (Opposition, p. 59). Whether or not the factoring was "archetypical," the undisputed facts clearly bring the case within broad ambit of the statute, which applies not only to "lend[ing] or borrow[ing]," but to any promise, etc., to defer, forebear, renew, modify, amend, or cancel a loan "or any provision with respect to a loan." S.C. Code Ann. § 37-10-107(1)(a)-(c). Additionally, BB&T loaned money on purchase orders and site plans, in addition to purchasing invoices from Skywaves.

[6] The Supreme Court in *Kerr* simply noted that Section 37-10-107 "only applies to suits between lenders and borrowers." 408 S.C. at 332, fn. 5, 759 S.E.2d at 726, fn. 5. This statement is true, as far as it goes, and was made in the context of rejecting the application of the statute as against the investors in

841

addressing the traditional "statute of frauds," not Section 37-10-107. (Opposition, pp. 56-57). Section 37-10-107, however, is a separate and distinct provision in the law, specifically enacted to curtail extra-contractual liability with respect to commercial lending. Accordingly, cases and treatises dealing with the traditional statute of frauds are inapposite.

Skywaves also argues that Section 37-10-107 somehow does not apply to the tort claims against Edahl. (Opposition pp. 56-58). This argument is difficult to follow insofar as the statute appears to have been crafted specifically to bar such tort claims. Subsection (2) of Section 37-10-107 explicitly precludes, *inter alia*, actions based upon theories of (a) "an implied agreement based on course of dealing or performance or on a fiduciary relationship" or (d) "negligent misrepresentation." S.C. Code Ann. § 37-10-107(2)(a) and (2)(d). Case law is in accord. *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) (unpublished).[7]

Finally, Skywaves suggests that Section 37-10-107 somehow does not apply because Defendants "admit that an agreement existed." (Opposition, pp. 53-54). The fact that an agreement existed between Skywaves and BB&T is, indeed, the point, but it only underscores the applicability and importance of Section 37-10-107. Skywaves is bound to its agreement and

---

Skywaves, who were not themselves parties to the Factoring Agreement. The *Kerr* Court did not have occasion to address Edahl's right to rely upon the statute, as an agent and employee of BB&T, as against Skywaves, which was, of course, a party to the Factoring Agreement.

[7] Skywaves further argues that Section 37-10-107 does not preclude its "fraud" claim. (Opposition, pp. 59-60). Skywaves, however, does not have a fraud claim. Skywaves' claim for "fraudulent misrepresentation" was dismissed by this Court per its Order of November 8, 2011. Regardless, this Court has already determined that S.C. Code Ann. § 37-10-107 would bar a claim for fraud. *See* Order, filed June 15, 2012, *Kerr et al. v. BB&T et al.*, Case No. 2009-CP-10-07515 *et al.* (citing other opinions of the S.C. Court of Common Pleas).

cannot be heard to complain regarding alleged, amorphous representations that are not part of the agreement between the parties. Here, again, Skywaves' point that Defendants have admitted to an agreement to advance funds on certain "site plans" is irrelevant. Defendants not only agreed to "site plan" financing, *but provided that financing pursuant to their agreement,* as Skywaves' own president, Ron Konersmann, described it. (Konersmann Dep. at pp. 303-304, 310, Ex. B). Thus, notwithstanding the "site plan" financing agreement, Section 37-10-107 operates to foreclose Skywaves' attempts to make an end-run around the operative agreement by alluding to other, alleged promises or representations.[8]

C. THE ECONOMIC LOSS RULE BARS SKYWAVES' CLAIMS AGAINST DEFENDANT EDAHL.

Skywaves argues that Edahl "may not obtain the benefit of the economic loss rule" because, again, he is not a party to any contract with Skywaves. (Opposition, p. 62). Notably, Skywaves cites no authority for this position. The economic loss rule bars tort actions where the duties at issue are created solely by contract. *See 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)). According to Skywaves: "[A]ll of Defendants' tortious conduct, promises and representations occurred within the context of the Factoring Agreement." (Opposition, p. 56) (emphasis added). Taking Skywaves at its word[9],

[8] Skywaves claims that Section 37-10-107(2)(c) does not preclude certain actions based on "part performance," but does not establish how that provision has any applicability in the instant case. (Opposition, p. 59). It also asserts that the general statute of frauds found in S.C. Code Ann. § 32-3-10 somehow applies to the exclusion of S.C. Code Ann. § 37-10-107 because the latter section includes a provision yielding to other law "in the event of a conflict." S.C. Code Ann. § 37-10-107(4). (Opposition, pp. 60-61). Because no such conflict exists, Skywaves' argument is misplaced.

[9] In actuality, as discussed elsewhere herein, Skywaves appears to be alleging various purported claims well outside of any actual agreement between the parties. As such, those claims are barred by S.C. Code Ann. § 37-10-107 and for the other reasons set forth in Defendants' motions and memoranda. To the extent Skywaves actually means what it says, though, its tort claims are barred as a matter of law under the economic loss doctrine.

this is precisely the case for "vigilan[ce] in preventing the 'inevitable efforts of lawyers to turn every breach of contract into a tort.'" *See Wilson Group, Inc. v. Quorum Health Resources, Inc.*, 880 F. Supp. 416, 429 (D.S.C. 1995); *see also Kerr*, 408 S.C. at 333, 759 S.E.2d at 726 ("[A]at its core, this case revolves around the contractual relationship between BB&T and its customer, Skywaves").

Skywaves asserts the same tort claims against Edahl as it does against BB&T. The rationale supporting the application of the rule to the claims against BB&T applies with equal force to the extent the claims are 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"). South Carolina does not appear to have limited the rule in the manner contemplated by Skywaves, and case law from other jurisdictions illustrates the applicability of the rule to individuals acting as agents of the contracting party. *See Ben-Yishay v. Mastercraft Development, LLC*, 553 F. Supp. 2d 1360, 1370-71 (S.D. Fla. 2008) (relying upon the economic loss rule to dismiss fraudulent inducement and fraudulent misrepresentation claims against corporate officer who negotiated the agreement at issue, noting that alleged misrepresentations were "inseparable from the essence of the parties' agreement"); *Gilbert Unified School District No. 41 v. Crosspointe, LLC*, 2012 WL 1564660, at *4 (D. Ariz. May 2, 2012) (dismissing fraudulent inducement claim against corporate officer, "even though [he was] not a party to a contract with the [plaintiff]," under the economic loss rule, where tort claim was also precluded against the corporate contracting party); *Foxworthy, Inc. v. CMG Life Service, Inc.*, 2012 WL 1269127, at *2-4 (N.D. Ga. April 16, 2012) (finding that tort claims were not controlled by choice of law provision in contract and that economic loss rule barred claims for breach of fiduciary duty and fraud against individual defendants who were acting "in their

roles as members and officers of the corporate defendants"). Indeed, "[t]o find otherwise would lead to [the] incongruous result that the economic loss rule would bar applicable tort claims against a corporation, but not against the directors or officers who negotiated the agreement." *Ben-Yishay*, 553 F. Supp. 2d at 1371 (further noting that such an outcome "would be inconsistent with the rationale of the economic loss rule and would eviscerate its application . . .").

Skywaves attempts to bypass this result by arguing that the rule will not apply if a "special relationship" exists between the tortfeasor and injured party and attempts to liken this case to one for legal malpractice. (Opposition, pp. 62-63) (citing *Laidlaw Envtl. Servs. (TOC), Inc. v. Honeywell, Inc.*, 966 F. Supp. 1401, 1414-15 (D.S.C. 1996) (finding that commercial relationship at issue did not constitute a "special relationship" precluding operation of the economic loss rule)). Skywaves' argument is unavailing. As repeatedly noted, and observed by the Supreme Court, this case centers on a *contractual* lending relationship between sophisticated, commercial entities. The relationship between Skywaves, and its bank, BB&T (including its employee, Edahl) simply is not akin to one between an attorney and a client, where duties and obligations arise, regardless of the contractual relationship at issue. Speaking directly to that relationship as codified in the Factoring Agreement, Ron Konersmann, President of Skywaves, acknowledged, "a lot of it is protecting the bank, which is fine, you know, it's their money and we're borrowing it . . . ." (Konersmann Dep. at 169-70, Ex. A). Under the circumstances of this case, the law would not recognize a "special relationship" of the type advocated by Skywaves. *See generally Midland Mortgage Co.*, 926 F.Supp.2d at 793-94 (finding that plaintiff's commercial transaction with bank was "arm's length transaction between two sophisticated banking entities"); *Kerr*, 408 S.C. at 333, 759 S.E.2d at 726 ("It is well established that banks owe a limited duty of care to their customers"). For these reasons, as more fully set forth in

Edahl's initial memorandum, Skywaves' tort claims against Edahl are barred by the economic loss rule.

D. SKWYAVES HAS OTHERWISE FAILED TO ESTABLISH THE ELEMENTS OF ITS CLAIMS AGAINST DEFENDANT EDAHL.

Though the foregoing arguments foreclose Skywaves' claims, as a matter of law, Skywaves has also failed to come forward with sufficient evidence on the merits of its causes of action for negligence and negligent misrepresentation against Edahl.

First, Skywaves' claim for negligence, which it presents as a claim for breach of "fiduciary duty," fails for want of any such duty for the reasons previously argued. *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"). Skywaves' Opposition amounts to little more than an effort to unilaterally impose such a duty based on alleged, *post hoc* perceptions of the subject relationship, which are insufficient as a matter of law. *See Moore v. Moore,* 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004) ("As a general rule, a fiduciary relationship cannot be created by the unilateral action of one party"); *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986) (noting "mere respect for another's judgment or trust in his character is usually not sufficient to establish a [fiduciary] relationship").

Interestingly, Skywaves' central factual allegation on this claim appears to undercut its own argument. Specifically, Skywaves claims that, in early 2007, it had "a letter of intent" from Hunt Capital for a $4 million investment, but that Edahl somehow became a "business advisor" with fiduciary obligations when BB&T offered a competing $3.5 million dollar line of credit. (Opposition, pp. 68-69). Assuming *arguendo* that this "letter of intent" represented a serious alternative for Skywaves[10], it was Skywaves – not Edahl or BB&T – who held the superior

[10] Per the terms on the face of the document produced by Skywaves, the letter was "not binding"

bargaining position. Indeed, this is borne out in the more advantageous financing terms that Skywaves was able to extract from BB&T in March 2007. (See BB&T Letters to Ron Konersmann of March 2, 2007, and March 14, 2007, Ex. C). One of the many requirements for a fiduciary relationship is that the fiduciary be in a "superior position to the other [party]." *Burwell*, 88 S.C. at 40, 340 S.E.2d at 790. Skywaves' argument demonstrates that *it* was holding the cards with respect to the relationship during the time period in question.[11]

Secondly, Skywaves has failed to establish the elements of its claim for negligent misrepresentation. Despite conclusory statements to the contrary, Skywaves has not demonstrated evidence of a false statement of "present or pre-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"). Instead, without citations to the record, the Opposition alleges several unfulfilled promises. (Opposition, p. 64). Even if these allegations were to be considered, 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 grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002).

Additionally, for the reasons argued hereinabove, Skywaves cannot establish the critical element of reasonable, justifiable reliance. Interestingly, Skywaves seeks to bypass this hurdle by claiming that it – necessarily meaning its management – was "by no means an expert in the field of capital funding . . . ." (Opposition, p. 65). Putting aside the seemingly disingenuous

---

and Hunt Capital had no obligation under it to Skywaves. ("Preliminary Non-binding Term Sheet," 3/22/07, attached to affidavit of Ron Konersmann, signed April 7, 2015). Thus, Skywaves' argument is entirely speculative.

[11] Where a fiduciary relationship does exist, "the bank must only disclose material facts that may affect its customer's interests." *Kerr*, 408 S.C. at 333, 759 S.E.2d at 727 (quoting *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003)). Skywaves has also failed to establish the breach of duty and any proximately resulting damages.

nature of this argument, 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." *Kerr*, 408 S.C. at 334, fn. 8, 759 S.E.2d at 727, fn. 8 (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). At minimum, they had the degree of competence "to have utilized 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)).

Finally, Skywaves has failed to come forward with more than mere conjecture as to any proximately caused damages. Skywaves has not established that it could and would have been able to survive and profit had BB&T maintained the effectively-maximized terms of credit. *Drews Co., Inc. v. Ledwith-Wolfe Associates, Inc.*, 296 S.C. 207, 213, 371 S.E.2d 532, 536 (1988) ("The crucial requirement in lost profits determinations is that they be established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative"). For all of these reasons, Skywaves' claims for negligence and negligent misrepresentation fail as a matter of law, and Edahl is entitled to summary judgment.

[CONCLUSION AND SIGNATURE BLOCK ON FOLLOWING PAGE.]

III. CONCLUSION

For all of the foregoing reasons, and any others the Court may deem appropriate, Defendant 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,

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

April 24, 2015

FILED
2015 APR 24 AM 8:35
JULIE J. ARMSTRONG
CLERK OF COURT
BY

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 MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE

Defendant Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("BB&T"), by and through its undersigned counsel, respectfully submits this Memorandum in Opposition to Plaintiff's second Motion to Strike Defendant's Answer (the "Second Motion to Strike") in the above-referenced matter.

INTRODUCTION

Plaintiff filed its first Motion to Strike Defendant's Answer on or about January 17, 2014 (the "First Motion to Strike"), seeking to strike BB&T's Answer on the ground that it was as a sham pleading, or, in the alternative, to judicially estop BB&T from taking a position inconsistent with its Answer. Notably, at the time Plaintiff's First Motion to Strike was filed, Defendant Jim Edahl had been deposed, wherein he first indicated he had approved site plan financing but had previously not remembered having done so. Defendant Edahl subsequently provided an affidavit on February 11, 2014, wherein he explained that he had remembered and known at the time in 2008 that he had agree to certain limited site plan financing. BB&T filed a

Motion to Amend its Answer on February 25, 2014, because Plaintiff would not consent to the Amended Answer. The parties argued Plaintiff's First Motion to Strike and BB&T's Motion to Amend in March of 2014. This Court denied Plaintiff's Motion to Strike, and granted BB&T's Motion to Amend.

Plaintiff now seeks, via its Second Motion to Strike, to strike the very Amended Answer to which it objected and which this Court allowed. Plaintiff's had almost all of the same information upon which it relies now in the Second Motion to Strike at the time the First Motion to Strike was argued. Indeed, the Second Motion to Strike does not raise any new substantive issues or theories that Plaintiff did not have when it previously pursued its First Motion to Strike, which this Court denied, and its opposition to BB&T's Motion to Amend, which this Court granted. Moreover, Plaintiff's Second Motion to Strike is wholly inappropriate, inflammatory and unfounded. It appears to be an effort to force concessions or admissions by BB&T on facts and issues that may otherwise be problematic for Plaintiff's case. The Second Motion to Strike is not based on any new information or, as Plaintiff so boldly and incorrectly asserts, on any fraudulent or bad faith conduct by BB&T or its counsel.

Ultimately, the Second Motion is, at its core, a recitation of the same arguments in the First Motion to Strike, which was denied, and appears to be a misguided and inappropriate effort by Plaintiff to avoid summary judgment on the merits of its claims.

CORRECTION TO PLAINTIFF'S MISSTATEMENT OF FACTS

Plaintiff bases its Second Motion on four alleged facts. First, Plaintiff contends that BB&T perpetrated a fraud on the Court by denying that it had approved a modification of the Factoring and Security Agreement (the "Factoring Agreement") that allowed financing of "site plans" (*i.e.*, locations where General Dynamics intended to construct cell towers, for which

Plaintiff anticipated it would receive a future purchase order for its units) and by then accusing Plaintiff of fraudulently submitting and misrepresenting the site plans as purchase orders. (Second Motion to Strike at p. 1). Plaintiff is incorrect, and its statements are inaccurate. As a preliminary matter, Plaintiff had the testimony upon which it is relying in its Second Motion to Strike at the time its First Motion to Strike was argued and, notably, waited until four months after receiving BB&T's Memorandum in Support of its Motion for Summary Judgment to file its Second Motion to Strike. Apart from the timing, however, Plaintiff's attempt at charging BB&T of a fraud ignores the evidence and, more importantly, ignores that BB&T had a good faith belief at the time of its original Answer that, in fact, Plaintiff had submitted site plans as purchase orders on behalf of General Dynamics.

Indeed, in January of 2008, the only information BB&T had was that there should have been, but were not, purchase orders supporting the advances that were based on Plaintiff's expected sales to General Dynamics. Although Plaintiff seems to suggest that BB&T's problem loan administrator, Mike Hennessy, should have somehow uncovered the alleged approval of site plan financing at the time, there is no evidence that Plaintiff, or anyone, ever told Mr. Hennessy or anyone else at BB&T that Defendant Edahl had approved site plan financing. It is undisputed that all of Defendant Edahl's communications at the time in 2008 indicated otherwise.

Moreover, during a routine field exam on January 22, 2008, the third-party field examiner on Plaintiff's account indicated that the "purchase order line" was also reviewed during the exam with John Voytko, one of Plaintiff's officers. Specifically, the examiner noted her discussion with Mr. Voytko, observing that Skywaves "currently does **not** have purchase orders to support $1,971,355 of the amounts listed under General Dynamics (GD). Per John Voytko, the

controller, the company is working with GD to obtain a purchase order to support these." (Exhibit 1).

Additionally, after Mike Hennessy met with Ron Konersmann and John Voytko, wherein Plaintiff admitted having submitted site plans as purchase orders, Plaintiff had its consultant, Earl Hewlette, follow up with BB&T. Specifically, on February 8, 2008, Earl Hewlette wrote to Mr. Hennessy on behalf of Plaintiff with potential proposals to repay BB&T for the "non-conforming" money advances, indicating that Plaintiff's management had "a sincere appreciation and regret for the mistakes made in the past in dealing with the bank." (Exhibit 2).

Moreover, on February 11, 2008, counsel for BB&T wrote to Ron Konersmann, specifically identifying the submission of site plans as purchase orders as one of the issues Plaintiff needed to address with BB&T. (Exhibit 3). Neither Plaintiff, Mr. Konersmann, Mr. Hewlette nor anyone else on Plaintiff's behalf responded in any manner to address or refute that issue as identified by BB&T's counsel. Under these circumstances, BB&T's Answer to the First Amended Complaint denying any agreement to finance site plans was wholly appropriate.

Only after Ron Konersmann testified that he had asked, and Defendant Edahl had agreed, for BB&T to advance funds on site plans for General Dynamics through December of 2007 (Konersmann depo. at p. 303, l. 9 – p. 304, l. 20), did Defendant Edahl subsequently testify that he had agreed to certain site plan financing. Approximately five months later, Defendant Edahl further admitted that he had remembered in 2008 that he had approved the limited site plan financing. Shortly thereafter, notwithstanding the issues raised above, BB&T moved to amend its Answer to admit the limited site plan financing.

Plaintiff's complaint in its Second Motion to Strike is that BB&T amended its answer "in a self-serving way that fails to acknowledge the complete truth and continues to assert the statute

of frauds as a sham defense." (Second Motion to Strike at p. 5). Notably, Plaintiff suggests BB&T somehow improperly qualified its admission that there was "limited" site plan financing. Plaintiff is incorrect. Plaintiff's argument also ignores that it has alleged a number of representations, oral modifications and promises in its First Amended Complaint well above and beyond limited site plan financing. Indeed, Plaintiff dedicates numerous pages in its opposition to BB&T's Motion for Summary Judgment arguing a variety of representations it contends were made, with which BB&T disagrees and which it has denied. It appears, in this Second Motion to Strike, that Plaintiff is suggesting that BB&T should be required to admit something more with regard to limited site plan financing or have its Amended Answer stricken. There is no basis in law or in fact to support such a position or warrant such a ruling.

As the second reason or fact that Plaintiff believes BB&T's Amended Answer should be stricken, Plaintiff cites BB&T's denial in its Amended Answer that Edahl was its agent. However, Plaintiff's statements are misleading. (Amended Answer at ¶ 30). Plaintiff ignores that its allegation in the First Amended Complaint is that "[a]t all times relevant hereto, Defendant Edahl was the agent, servant and employee of Defendant BB&T, and acted within the scope and course of his employment." (First Amended Complaint at ¶ 52). BB&T admitted earlier in its Answer and then in its Amended Answer that Defendant Edahl was an officer of BB&T. (First Amended Complaint at ¶ 4; Amended Answer at ¶ 5). To that end, Defendant Edahl is necessarily an agent when acting within the course and scope of his employment, and it is not fraudulent or inappropriate to so indicate. BB&T is not required, however, to admit that Defendant Edahl was its agent and servant and acting within the scope and course of his employment at all times, in responding to one of the allegations in Plaintiff's First Amended

Complaint, particularly where it is unclear exactly what Plaintiff is contending Defendant Edahl did and where BB&T has actually denied some of Plaintiff's contentions and allegations.

Again, Plaintiff alleges a number of broad statements with regard to representations and promises allegedly made by Defendant Edahl in its First Amended Complaint, including certain representations that have, in fact, been denied.[1] While BB&T amended its Answer to acknowledge Defendant Edahl's subsequent admission regarding limited site plan financing, BB&T is not required under any theory to so broadly admit to agency, servant-hood or that Defendant Edahl was acting in the course and scope of his employment to every other allegation in the First Amended Complaint.

With regard to the statute of frauds, Plaintiff contends that BB&T has somehow improperly argued in this lawsuit, as well as other lawsuits, the statute of frauds as a defense to the claims of Plaintiff and others. This argument is based solely upon the issue of the limited site plan financings, the background for which is explained above. By this argument of Plaintiff, one would think that Plaintiff's entire case is based upon the site plan funding, but its pleadings indicate otherwise. As set forth above and in detail in BB&T's Memorandum in Support of its Motion for Summary Judgment and Reply Memorandum, Plaintiff has alleged many more representations other than pertaining to site plan financings, and the statute of frauds defense is applicable and appropriately raised.

Finally, Plaintiff incorrectly and misleadingly contends that BB&T recently "answered an interrogatory dishonestly." (Second Motion to Strike at p. 5). Specifically, Plaintiff asked in Supplemental Interrogatory Number 5: "Did BB&T declare the Skywaves account in default

[1] For example only, in its 70-page opposition to Defendant's Motion for Summary Judgment, Plaintiff identifies innumerable promises and representations made by Defendant Edahl, which appear to change somewhat depending on the particular cause of action being addressed, including a blanket statement of, in essence, future, unlimited funding, and that BB&T represented or promised it would not call a default for the reasons identified in the January 25, 2008.

prior to the letter of January 25, 2008? If so, what was the claimed default?" BB&T responded: "No." (Exhibit 4). Plaintiff contends, however, that the answer is "dishonest" because Defendant Edahl spoke with two of Plaintiff's officers to tell them an overadvance "had put [Skywaves] in default . . . and that they would be getting written notice of the same." (Second Motion to Strike at p. 5). Notably absent from Plaintiff's argument is the fact that, in its Supplemental Interrogatory Number 4, Plaintiff asked BB&T to: "[i]dentify by name, title, address, and phone number the person(s) who had the authority to declare the Skywaves account in default in January, 2008." BB&T's response was: " . . . The following individuals had authority to declare the Skywaves account in default in January of 2008: Mike Hennessy, Walt Denning, and Mike Burke." (Exhibit 4). BB&T did not list or otherwise identify Defendant Edahl.

More importantly, however, Plaintiff fundamentally ignores that its question was whether BB&T "declared" a default. The express terms of the Factoring Agreement require a declaration of default to be in writing. "All notices, requests and demands to or upon a party hereto shall be in writing . . ." (Exhibit 6 at ¶ 20). Indeed, a default could exist under the Factoring Agreement without BB&T making a declaration of default. For a default to be declared, and not just discussed, paragraph 20 of the Factoring Agreement requires written notice. For Plaintiff to state that BB&T's response to its discovery request was dishonest is disingenuous, at best:

LEGAL ARGUMENT

All of Plaintiff's legal theories are generally premised on the idea of bad faith or an intent to deceive, none of which exist in this case. Not only have BB&T and its counsel acted in good faith, there is no evidence to suggest or support Plaintiff's unfounded allegations, and its Second Motion to Strike should be denied.

"Motions to strike an answer or defense as sham are not favored in law and should be granted only where the evidence demonstrates that the pleading is manifestly false and made in bad faith." *Ins. Co. of N. Am. v. Hyatt*, 290 S.C. 159, 163, 348 S.E.2d 532, 535 (Ct. App. 1986) (*citing Germofert Mfg. Co. v. Castles*, 97 S.C. 389, 81 S.E. 665, 666 (1914)). Similarly, as Plaintiff has noted, the idea of a fraud on the court requires a showing of bad faith or intent to deceive. *See Chewing v. Ford Motor Co.*, 354 S.C. 72, 579 S.E.2d (2003). With regard to the provisions of Rule 11, they are grounded on good faith beliefs in the grounds to support a pleading, motion or other paper. *See Kilcawley v. Kilcawley*, 312 S.C. 425, 440 S.E.2d 892 (S.C.Ct.App. 1994). And, a claim for judicial estoppel requires inconsistent positions that are totally inconsistent and part of an intentional effort to mislead the court. *See Cothran v. Brown*, 357 S.C.210, 592 SE.2d 629 (2004).

Under the facts and circumstances above, there is simply no basis whatsoever to support the unfounded position Plaintiff has taken in its Second Motion to Strike. BB&T had and has a good faith basis for all of its actions throughout this litigation, and a sound legal position founded in evidentiary support for the positions taken throughout the case. BB&T has not taken totally inconsistent positions, nor has it engaged in any intentional effort to mislead the Court. There is no evidence or even an inference from any evidence that BB&T or its counsel has acted in any way inappropriately. It is simply incredible that Plaintiff would suggest, particularly at this stage in the litigation with a pending hearing on BB&T's Motion for Summary Judgment, that BB&T or its counsel has done anything fraudulently, in bad faith or otherwise unjustly that would warrant remedies Plaintiff is now seeking. Moreover, Plaintiff's Second Motion to Strike is in disregard of this Court's denial of its First Motion to Strike.

Plaintiff does not, and cannot, meet its heavy burden for the dismissal of BB&T's Answer as a sham pleading or otherwise striking any defense or argument BB&T is entitled to make.

CONCLUSION

As set forth in detail above, Plaintiff's Second Motion to Strike should be denied, and BB&T respectfully requests the Court consider any further appropriate relief it deems appropriate for BB&T.

Julio E. Mendoza, Jr., Esquire
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 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: 843.414.8209
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

April 24, 2015
Charleston, South Carolina

EXHIBIT "1"

DEFENDANT BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC, A/K/A BB&T'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE

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
Civil Action No. 2009-CP-10-7516

CF Field Examiner's Internal Comments

CONFIDENTIAL
FOR INTERNAL USE ONLY

Client:	SkyWaves Corporation	Review Time:	0.5 hours
Report Type:	Regular	Exam Time:	12
		Travel Time:	15 min
CF Examiner(s):	Stephanie T. Spath, ST Consulting, LLC	Detail Summary:	
Exam Date:	01/22/08	Accounts Receivable:	889,962
Records As Of:	12/31/07	A/R % Eligible:	100.0%
Exam Grade:	Unsatisfactory	A/R Turnover:	383 days per month
Risk Grade:	5B	A/R Turnover 12 months:	55 days
Relationship Manager:	Jim Edahl	Availability:	(24,299)
Advance Rates and Exam Frequency:		Dilution YTD:	0.0%
		12 month dilution	2.5%
		Lockbox Percentage:	N/A

Approved:

A/R %:	85%
INV %:	n/a
Exam Frequency:	Quarterly

Total Concentrations:
Number of accounts: 4
% of A/R: 100.0%

Total Inventory:
Adj. Inventory Turnover:
Eligible Inventory:
Total Accounts Payable: 977,843
A/P Over 60 Days: 362,207
as % of Total: 37.0%
A/P Turnover: 74 days

CF Exam Recommends:		REASONS FOR RECOMMENDATIONS
A/R %:		
INV %:		
Exam Frequency:		

Exam Payment Method:	Exam Fee	0.00	This section is to inform all persons involved with this credit as to the amount and method used to collect all required/related Exam fees. The Examiner will check the appropriate collection method and other information for collection.
	Expenses	0.00	
	Total	0.00	
Debit Client's DDA:		5126290693	
Debit Profit Center #:			

SPECIFIC CONCERNS SPECIFIC RECOMMENDATIONS GENERAL COMMENTS

The overall rating of the exam is Unsatisfactory due to the following reasons: shortfall of availability, the company not submitting all cash received in house on factored AR to the bank in a timely manner and the poor status of accounts payable. Per the examiner's calculation, as detailed on page 3, the shortfall of availability for line #7700 is ($346,459) as of 1/22/08.

Specific Concerns

-The company is one month in arrears for payroll taxes. November payroll taxes were paid in December and per John Voyko, the December payroll taxes will be paid in January before the end of the month when the 4th quarter 941 is due.

-The company appears to be tight on cash.

-There were 2 invoices in the invoice sample that had been paid at the company, which the company has not submitted to the bank yet.

-According to the company's reconciliation of AR, there is $342,037 of cash received for factored AR that has not been submitted to the bank as of 1/4/08. A detail of these invoices is included in the work papers.

-AP condition is considered poor with 37% of AP over 60 days past due date. StructurTech represents 20% of the past due balance as of 12/31/07. StructurTech's owner does have an investment in Skywaves and per the controller, they do have a verbal agreement of extended terms. There is also a note receivable from StructurTech Tech on the general ledger of $20,932 as of 12/31/07. It looks like this decreased by $200,000 from 11/30/07. The larger AP balances were reviewed with the client and most of these balances were being slowly paid. The client noted that there was some vendor pressure, but it was manageable.

Specific Recommendations

-The Bank should consider an additional reserve or escrow for the unpaid federal taxes in December of approximately $27M based on amounts paid in 3rd quarter.

-The company should be reminded that cash received in house for factored AR should be remitted to the bank when it is received. The current $342,037 collected for factored AR at the company should be immediately sent to the bank.

-Officers of the company and key employee salaries should be reviewed and possibly be temporarily reduced to help mitigate the cash crunch.

Additional Comments

-The purchase order line was also reviewed this exam. The company currently does not have purchase orders to support $1,971,355 of the amounts listed under General Dynamics (GD). Per John Voyko, the controller, the company is working with GD to obtain a purchase order to support these. These are listed on the inserted 'PO info' tab.

Internal Comments are for BB&T internal use only.

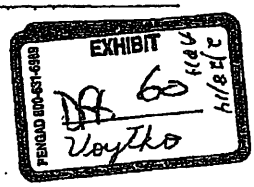
The above report is intended to share the Examiner's specific recommendations on advance rates and Exam frequency as well as brief general comments about the above proposed or current CF relationship. Comments represents both objective and subjective observations based on the Field Exam itself and are intended to enhance, but not replace, the Relationship Manager's (and co- approver's) full underwriting of this credit. A copy of Comments will be prepared for each new CF relationship and after any subsequent Field Exam if the Field Examiner believes a change of conditions deserves special comment. All co-approvers will receive a copy of Comments separate from the actual CF Exam Report.

EXHIBIT "2"

DEFENDANT BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC, A/K/A BB&T'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE

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
Civil Action No. 2009-CP-10-7516

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

EXHIBIT "3"

DEFENDANT BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC, A/K/A BB&T'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE

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
Civil Action No. 2009-CP-10-7516

LAW OFFICE OF STEVEN B. LICATA, P.C.

ATTORNEY AT LAW
9365 Two Notch Road, Suite C
Columbia, South Carolina 29223

Steven B. Licata
Certified Bankruptcy Specialist

MAILING ADDRESS:
Post Office Box 23407
Columbia, South Carolina 29224-3407

Telephone: (803) 699-6550
Facsimile: (803) 699-9858
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")

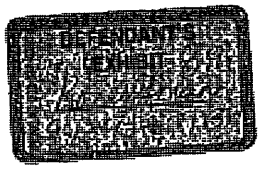
Dear Mr. Konersmann:

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

EXHIBIT "4"

DEFENDANT BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC, A/K/A BB&T'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE

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
Civil Action No. 2009-CP-10-7516

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 ANSWERS TO PLAINTIFF'S SUPPLEMENTAL SET OF INTERROGATORIES TO 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, success in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("Defendant") responds to Plaintiff's Supplemental Set of Interrogatories to Defendant Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC a/k/a BB&T as follows:

1. Identify the rating on the Skywaves loan of a maximum $3.5 million from March, 2007 until April, 2008. In your response, please identify the dates the loan rating was changed, and who was responsible for each change.

ANSWER: In March of 2007, the Skywaves loan was rated 5B and was downgraded to 7 on January 18, 2008, by Heather Morton at the direction of Walt Denning, and then downgraded to a 9 on March 8, 2008, by Christy Foster at the direction of Mike Hennessy.

2. Identify the exact date when the Skywaves account transferred to problem loan administration for primary handling.

ANSWER: Defendant objects to this request to the extent that it characterizes internal bank activities as having an "exact" date and to "transferring" and "primary" handling. Defendant's problem loan administration department may be aware of and involved with accounts or loans prior to the account being transferred to problem loan administration. When the Skywaves account was downgraded to a 7 on January 18, 2008, it moved into the problem loan administration department for primary handling.

3. Identify the date when the Skywaves account was first placed on the "watch list" and identify by name, title, address, and phone number the person(s) responsible for placing it on the "watch list."

ANSWER: January 18, 2008, by Heather Morton at the direction of Walt Denning, Regional Loan Administrator.

4. Identify by name, title, address, and phone number the person(s) who had the authority to declare the Skywaves account in default In January, 2008.

ANSWER: Skywaves had a number of accounts at the bank. The following individuals had authority to declare the Skywaves account in default in January of 2008: Mike Hennessy, Walt Denning, and Mike Burke.

5. Did BB&T declare the Skywaves account in default prior to the letter of January 25, 2008? If so, what was the claimed default?

ANSWER: No.

6. Describe the normal procedure for advising an account that it has been placed on "watch list" status.

ANSWER: The watch list is an internal BB&T watch list, and accounts are not notified of the same.

7. Prior to January 17, 2008, did BB&T have any discussion about renewing the loan agreement in March or April, 2008? If so, please identify the individuals involved in the discussion, identify the date of the discussion, and describe the substance of the discussion.

ANSWER: Defendant objects to this request as overly broad and unduly burdensome. The time period at issue was over 7 years ago. To the best of Defendant's knowledge, there were no discussions about renewal of the Factoring Agreement. The Factoring Agreement with Skywaves automatically renewed unless terminated by either party.

8. Overall, was BB&T either very satisfied or satisfied with Skywaves based upon its performance through December, 2007?

ANSWER: No.

9. Identify and describe any and all discussions that any agent, employee, or representative with BB&T had at any time prior to January, 2008 regarding handling an initial public offering or having the BB&T capital markets division provide services to Skywaves.

ANSWER: Defendant objects to this request as overly broad and unduly burdensome in that the Factoring Agreement with Skywaves began over 9 years ago. Subject to these objections, Defendant has no record of any internal discussions at BB&T

regarding handling an initial public offering or having BB&T capital markets division provide services to Skywaves.

10. Identify the date of Michael Hennessey's first official involvement with Skywaves, and the name, title, address, and phone number of the individual who initiated the request for Mr. Hennessey.

ANSWER: On January 18, 2008, when the Skywaves account was downgraded to a 7, it moved into the problem loan administration department for primary handling. Michael Hennessy was aware of the Skywaves account in late December of 2007 or early January 2018, and Jim Edahl contacted him on or about January 17, 2008, about the account. There was no specific request for Michael Hennessy.

Julio E. Mendoza, Jr.
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 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

March 23, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing DEFENDANT BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T'S ANSWERS TO PLAINTIFF'S SUPPLEMENTAL SET OF INTERROGATORIES TO DEFENDANT BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC A/K/A BB&T has been served upon the following counsel of record via e-mail correspondence and by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 23rd day of March, 2015.

George J. Kefalos, Esquire
George J. Kefalos, PA
3 State Street
Charleston, SC 29401
E-mail: george@kefaloslaw.com

ATTORNEYS FOR PLAINTIFF SKYWAVES I CORPORATION

J. W. Nelson Chandler, Esquire
Corrigan & Chandler LLC
P.O. Box 547
Charleston, SC 29402
nelson@corriganchandler.com

ATTORNEYS FOR DEFENDANT JAMES EDAHL

John P. Linton, Esquire
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
E-mail: jlinton@duffyandyoung.com

ATTORNEYS FOR PLAINTIFF SKYWAVES I CORPORATION

Karen L. Hucks

NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, South Carolina 29402
Telephone: (843) 577-9440

EXHIBIT "5"

DEFENDANT BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN MERGER TO BRANCH BANKING AND TRUST COMPANY OF SC, A/K/A BB&T'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE

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
Civil Action No. 2009-CP-10-7516

FACTORING AND SECURITY AGREEMENT

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

1. **Definitions and Rules of Construction.**

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

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

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

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

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

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

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

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

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

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

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

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



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.

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

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 OF 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,	)	
	)	
Defendants.	)	

FILED
2015 APR 27 AM 9:26
JULIE J. ARMSTRONG
CLERK OF COURT

Defendant James Edahl, by and through his undersigned counsel, respectfully submits this Response to Plaintiff's Motion to Strike Answers, filed April 16, 2015 (the "Motion" or "Motion to Strike").

I. INTRODUCTION

This Court denied Skywaves' Motion to Strike Defendants' Answers on March 17, 2014. (Order of March 17, 2014, attached hereto as Exhibit "A"). Now, one year later, Skywaves reprises its Motion with the same underlying facts, but with added vitriol for Defendants, and, by extension, their counsel. Indeed, the Motion strikes an inflammatory tone, likening Defendants' testimony and pleadings to an "open sewer" requiring the "disinfectant" of a drastic sanction – the striking of Defendants' Answers. Ironically, Skywaves seeks to strike the very Amended Answers permitted by this Court at the March 13, 2014, hearing. (Ex A). At root, the Motion appears to be an attempt to deflect from the merits on the eve of the summary judgment hearing. For the reasons that follow, Skywaves' Motion to Strike, if it is reached, should be denied.

880

II. ARGUMENT

As against Edahl, Skywaves has no information it did not have at the time of the hearing on its prior Motion to Strike in March 2014. Skywaves' counsel deposed Edahl on September 19, 2013. In his deposition, Edahl admitted that he had agreed to advance funds under the Factoring Agreement based on certain "sites" identified a General Dynamics contract submitted to Skywaves. This is what the parties in this case commonly refer to as "site plan financing." In 2007, BB&T did, in fact, advance funds on these "site plans" as if they were purchase orders. (At the time, the Factoring Agreement had already been extended to provide for "purchase order financing," another term commonly used by the parties in this case.)

Edahl further testified that his recollection on this subject had been refreshed and that he did not, previously, recall the agreement to finance site plans. In February 2014, Edahl corrected this statement, by affidavit, stating that he was, in fact, aware in January 2008 that he had agreed to treat certain site plans the same as purchase orders under the Factoring Agreement. (Affidavit of James Edahl, February 11, 2014, attached as Exhibit "B"). He further stated that he was afraid to disclose this information at the time because BB&T was exposed to such a large financial loss. (Ex. B). When, after receiving Edahl's affidavit, Skywaves asked to re-depose Edahl, Edahl cooperated and fully answered all questions posed by Skywaves' counsel.

In sum, Edahl chose to tell the truth in his deposition regarding the terms of the "site plan financing." The only issue was whether he had always remembered the terms of that agreement or whether his memory had recently been refreshed. Edahl has more than corrected the record on this issue by voluntarily submitting an affidavit and agreeing to sit for a second deposition. Despite Skywaves' efforts to vilify him, Edahl has told the truth and, in the process, undergone the loss of his job after approximately three decades with BB&T.

The foregoing has not changed since this Court denied Skywaves' last Motion to Strike. As is often the case in litigation, Skywaves has established the truth *of one fact among many* that it sought to prove in this case. This is why the litigation process exists. Further, Edahl has amended his answer – with the approval of this Court – to concede that he agreed to "finance site plans, to a limited extent." (Amended Answer, ¶ 14). Though Skywaves may not be satisfied with the Amended Answer, Edahl and BB&T simply did not agree to finance site plans *ad infinitum*, nor have Skywaves' own witnesses alleged as much. Additionally, BB&T did, in fact, finance the subject site plans.

While Skywaves would prefer to distract the Court with this issue, it does not change the result in this case, nor does it somehow illegitimatize Edahl's dispositive defenses. Skywaves focuses particularly on the defense asserted under S.C. Code Ann. § 37-10-107. Because BB&T fulfilled its agreement to finance site plans, Skywaves' discussion of Section 37-10-107 in this context appears misplaced. Skywaves overlooks the fact that it has alleged a plethora of additional promises and representations – purportedly outside of the terms of the Factoring Agreement – which are squarely barred under S.C. Code Ann. § 37-10-107. Edahl's testimony on the site plan issue simply has nothing to do with the viability of this defense, or any of the other arguments advanced in Edahl's Motion for Summary Judgment.

The striking of an answer is a drastic remedy, which should only be considered, much less imposed, in the most extreme circumstances. Respectfully, this case does not present such circumstances, and Skywaves' Motion to Strike should be denied. *Ins. Co. of N. Am. v. Hyatt*, 290 S.C. 159, 163, 348 S.E.2d 532, 535 (Ct. App. 1986) ("Motions to strike an answer or defense as sham are not favored in law and should be granted only where the evidence demonstrates that the pleading is manifestly false and made in bad faith").

882

III. CONCLUSION

For all of the foregoing reasons, and any others the Court may deem appropriate, Edahl respectfully requests that this Court DENY Skywaves' Motion to Strike Defendants' Answers.

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

April 25, 2014

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
CHARLESTON COUNTY

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.. or additional taxable costs not available at the time the form and final order are submi clerk. **Note: Title abstractors and researchers should refer to the official court orde**

SCRCP Form 4C (10/2011)

884

EXHIBIT A

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:

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

EXHIBIT B

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: 10/26/19

FILED
2015 APR 27 AM 9:37
JULIE J. ARMSTRONG
CLERK OF COURT

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'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER JURY TRIAL ORDER

Defendant Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("BB&T"), by and through its undersigned counsel, respectfully submits this Memorandum in opposition to Plaintiff's Motion to Reconsider Order Granting Defendant BB&T and Defendant Edahl's Motion to Strike Plaintiff's Demand for Jury Trial (the "Motion for Reconsideration") in this case.

As a preliminary matter, BB&T notes that Plaintiff Skywaves I Corporation ("Plaintiff" or "Skywaves") filed a Notice of Appeal on or about March 10, 2015, appealing this Court's Order Granting Defendant BB&T and Defendant Edahl's Motion to Strike Plaintiff's Demand for Jury Trial (the "Jury Trial Order") filed on February 9, 2015, and pursuant to South Carolina Appellant Court Rules 205 and 241, jurisdiction over the jury trial matter now resides with the South Carolina Court of Appeals. The Court of Appeals now has exclusive jurisdiction over the jury trial matters, and the Motion for Reconsideration is no longer before this Court.

888

#1 Jem

INTRODUCTION

Skywaves included a demand for a jury trial in its First Amended Complaint in this case. BB&T and Defendant James Edahl ("Edahl") each filed a motion to strike Skywaves' demand for a jury trial, memoranda were filed by the parties, and the Court conducted a hearing on the motions to strike on January 12, 2015. The Jury Trial Order was filed on February 9, 2015. On February 18, 2015, Skywaves filed its motion for reconsideration of the Jury Trial Order.

Skywaves' Motion for Reconsideration is essentially a re-argument of the arguments it made at the hearing on January 12, 2015. The Court's ruling in the Jury Trial Order was correct, and the Motion for Reconsideration provides no basis for the Court to change its decision.

ARGUMENT

The right to a jury trial is procedural, and thus South Carolina law applies to the enforceability of the jury trial waivers executed by Skywaves. "The local law of the forum determines whether an issue shall be tried by the court or by a jury." Restatement (Second) of Conflict of Laws § 129 (1971). Skywaves waived its right to a jury trial in six documents it executed with BB&T, in return for and as a condition to financing provided to it by BB&T, including the Factoring and Security Agreement (the "Factoring Agreement"). Under South Carolina law, a party may waive its right to a jury trial. *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 332-33, 755 S.E.2d 437, 443 (2014); *N. Charleston joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992); and *Beach Co. v. Twillman, ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002). This Court properly determined that Skywaves waived its right to a jury trial.

1. The Right to A Jury Trial is a Matter of Procedural Law

Skywaves again argues that the right to a jury trial in this case is determined by North

Carolina law, based upon the choice of law provision of the Factoring Agreement, and that pursuant to North Carolina law, jury trial waivers are not enforceable. However, a choice of law provision applies only to substantive issues, while the law of the forum applies to procedural matters, even if a foreign state's substantive law is applicable. *See* 17A Am. Jur. 2d, *Contracts* § 264 (citing *Terrace Group v. Vermont Castings, Inc.*, 753 A.2d 350 (R.I. 2000)); and 43 Am. Jur. 2d, *Insurance* § 331 (citing *Burge v. Mid-Continent Cas. Co.*, 123 N.M. 1, 993 P.2d 210 (N.M. 1996). As a procedural matter, Skywaves' waiver of its right to a jury trial is governed by South Carolina law, as this Court is the forum chosen by Skywaves for the filing of its actions against BB&T and Edahl. *See* Restatement (Second) of Conflict of Laws § 129 (1971).

2. Skywaves' Five Other Jury Trial Waivers Are Also Applicable

As stated above, in addition to the waiver of the right to a jury trial in the Factoring Agreement, Skywaves waived its right to a jury trial five (5) other times in documents it executed with BB&T. These documents are described in BB&T's memorandum in support of its motion to strike Skywaves' jury trial demand, which it filed on December 22, 2014, which BB&T incorporates herein by reference. Each of the other five documents is governed by South Carolina law, and would be sufficient basis to enforce the waiver of the jury trial right in this case. Skywaves summarily dispenses with these other waivers of the right to a jury trial by saying that the loans evidenced by those documents have been satisfied or are no longer outstanding. This argument is without merit.

Notably, the jury trial waiver provisions in each of those documents (which are each quoted in BB&T's memorandum filed on December 22, 2014) (1) are broadly worded to include "ANY MATERS OR CLAIM ARISING OUT OF THIS [document] . . . OR OUT OF THE CONDUCT OF THE RELATIONSHIP BETWEEN THE UNDERSIGNED AND [BB&T]"; (2)

include no language conditioning the waiver upon a breach of, or default under, the document; (3) the jury trial waiver provisions are not limited in time, and the waiver is made immediately upon the execution of the document (". . . THE UNDERSIGNED HEREBY WAIVE . . ."); and (4) the waiver provision states that Skywaves is waiving the right as an inducement to BB&T for the financing. Skywaves points to no language in the documents stating that the jury trial waivers are enforceable only if the document is in default or that the waiver is limited in time, nor does it cite any authority supporting such argument.

Skywaves' waiver of its right to a jury trial was unequivocally made six (6) times: in the Factoring Agreement; in the 2005 Loan Agreement; in the 2005 Promissory Note; in the 2005 Security Agreement; in the 2007 Promissory Note; and in the 2007 Security Agreement. Skywaves undeniably has waived its right to a jury trial.

3. Skywaves Cannot Disavow the Waiver As Having Been Unknowing

In the Motion for Reconsideration, Skywaves makes the assertion that the waiver of jury was not knowingly made because Mr. Konersmann did not know it was in the document when he signed the Factoring Agreement. Presumably, Skywaves also asserts that Mr. Konersmann did not read and was unaware of the jury trial waivers in the other five documents he signed waiving Skywaves' right to a jury trial. This assertion is contrary to the position taken by Skywaves at the hearing on January 12, 2015, and cannot be allowed; it is also of no effect because Mr. Konersmann is well-educated and an experienced businessman, such that he is presumed to have read and understood the provisions of the documents he signed, even if he did not read them.

The following exchange occurred at the hearing on January 12, 2015 on this matter:

> THE COURT: Well, as I understand, the only thing that is saving you or gives you any argument to stand on is that North Carolina stature - - you've got to follow that one as well, Judge, because you otherwise clearly waived your right to a jury trial, haven't you?

> MR. EPTING: I think, Judge, we would have a hard time arguing that it's not a waiver, yes.

See Transcript of Hearing on January 12, 2015, pp. 18:23–25, 19:1–3.

Skywaves acknowledged the effectiveness of the waiver, except for its argument that North Carolina law applies. Indeed, for it to attempt new argument that the waiver was not knowingly made is to deny both the facts and the law.

Ron Konersmann, who signed each of the documents containing the jury trial waivers in his capacity as Chief Executive Officer of Skywaves, is both a reasonably intelligent person and is cognizant of the general terms often used in financial documents. This is evidenced by Mr. Konersmann's history of being a party to loan documents, including factoring agreements, on behalf of companies in which Mr. Konersmann was employed prior to Skywaves. (Konersmann Deposition taken September 12 – 13, 2013 at p. 122:10 – 123:2, the transcript of which is Exhibit A to BB&T's memorandum in support of the motion to strike Skywaves' jury trial demand.) In addition, Mr. Konersmann holds a Masters in Business Administration degree from the University of Notre Dame. (Konersmann Dep. at pp. 27: 11-24, 28:1-24.)

"A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it." *Regions Bank v. Schmauch*, 354 S.C. 648, 663, S.E.2d 432, 440 (Ct. App. 2003)(citing *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981)). Mr. Konersmann was responsible for reading the documents and making sure of their Contents; BB&T did not have a duty to explain to Mr. Konersmann what he could learn from Simply reading the documents. *Id.*

Skywaves is deemed to have knowingly and voluntarily waived its right to a jury trial.

4. The Jury Trail Waivers Apply to All Skywaves Causes of Action, Including Tort Claims

In reviewing the plain language of each of the six jury trial waivers, it is clear that they encompass all of Skywaves' causes of action in this case and, therefore, Skywaves' jury trial demand should be stricken for all of its causes of action. First, as discussed above, the jury trial waivers in the 2005 Loan Agreement, the 2005 Promissory Note, the 2005 Security Agreement, the 2007 Promissory Note, and the 2007 Security Agreement all clearly provide that the undersigned parties are waiving their right to a jury trial for (1) matters or claims arising out of each of those respective documents, (2) matters or claims arising out of any documents executed in connection with the Loan Documents, and (3) those matters or claims "*arising out of the conduct of the relationship between*" the parties. (emphasis added).

Each of Skywaves' causes of action arises out of its relationship with BB&T. (First Am. Compl. ¶¶ 7-100.) The Court correctly found the waiver applicable to all Skywaves causes of action. *See Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014) (jury trial waiver applied to all claims, including tort and equitable claims).

CONCLUSION

The Motion for Reconsideration presents no valid basis for the Court to change its ruling. The Court correctly granted the motions to strike of BB&T and Edahl, striking Skywaves' demand for a jury trial.

[Signatures follow on next page.]

#6

Respectfully submitted on this the 27th day of April, 2015 at Charleston, South Carolina.

Julio E. Mendoza, Jr., Esquire
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
Telephone: 803.540.2026
Facsimile: 803.727.1478
E-mail: rmendoza@nexsenpruet.com

Molly Hughes Cherry, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
Post Office Box 486
Charleston, South Carolina 29402
Telephone: 843.577.9440
Facsimile: 843.414.8209
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

#7