THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Roger M. Young, Circuit Court Judge

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

Skywaves I Corporation, ...Respondent,

v.

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

And

James Edahl, ... Respondent,

PETITIONER'S APPENDIX
VOLUME 4 OF 5

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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

Roger M. Young, Circuit Court Judge

Appellate Case No. 2015-001809

Skywaves I Corporation.....Appellant/Respondent

v.

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

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

AND

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

RECORD ON APPEAL – VOLUME III OF III

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August 12, 2016

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2009-CP-10-7516

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

Civil Action: 2009-CP-10-7516

FILED
2010 APR 29 PM 1:49
JULIE J. ARMSTRONG
CLERK OF COURT
BY

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

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

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On this 29th day of April, 2015
Charleston, South Carolina

1

FACTORING AND SECURITY AGREEMENT

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

1. Definitions and Rules of Construction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) If to Client: Skywaves I Corporation
4280 Pace Street
North Charleston, SC 29405
Attention: President
Facsimile No.: (843) 308-9767
email: _____

(b) If to BB&T: BB&T Factors Corporation
317 West High Street
High Point, North Carolina 27260
Attention: President
Facsimile No.: (336) 889-9917

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

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

a. as soon as available, and in any event within 120 days the close of each fiscal year of Client, reviewed financial statements of Client and its Subsidiaries as of the end of such fiscal year, on a consolidated and consolidating basis, certified without material qualification by a firm of independent certified public accountants of recognized standing selected by Client but reasonably acceptable to BB&T; and

b. as soon as available, and in any event within 30 days after the end of each month hereafter (but within 30 days after the last month in a fiscal year), including the last month of Client's fiscal year, unaudited interim financial statements of Client and its Subsidiaries as of the end of such month and of the portion of Client's fiscal year then elapsed, on a consolidated and consolidating basis, certified by the principal financial officer of Client as prepared in accordance with GAAP and fairly presenting the consolidated financial position and results of operation of Client and its Subsidiaries for such month, subject only to changes from audit and year-end adjustments.

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

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

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

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

25. Applicable Law. This Agreement shall not become effective until accepted by BB&T in High Point, North Carolina. All acts, transactions, rights, and liabilities under this Agreement shall be governed in all respects by, and construed in accordance with, the internal laws of the State of North Carolina.

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

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

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

29. Waivers. **To the fullest extent permitted by applicable law, Client hereby knowingly, intelligently and expressly waives demand, protest, notice of protest, notice of default or dishonor, notice of payment or nonpayment, and notice of default, release, compromise, settlement, extension, or renewal of any instruments or guaranties held by BB&T on which Client may in any way be liable; trial by jury and the right to trial by jury on any issue in any way pertaining to this Agreement or any transactions or occurrences arising hereunder or governed hereby (which right BB&T likewise waives); and notice of BB&T's acceptance of this Agreement.**

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

ATTEST:

Secretary

(CORPORATE SEAL)

SKYWAVES I CORPORATION
("Client")

By: _____
Title: CEO

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

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

By: _____
Title: SVP

2

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.

VIDEOTAPE
DEPOSITION OF: J. FRANK BULLARD, III

DATE: February 27, 2015

TIME: 10 04 a m

LOCATION: Nexsen Pruet
205 King Street
Charleston, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: Patricia L. Thompson,
Registered Professional Reporter

A WILLIAM ROBERTS, JR , & ASSOCIATES

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Greenville, SC (864) 234-7030
Charlotte, NC (704) 573-3919

APPEARANCES OF COUNSEL.

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jlinton@duffyandyoung.com

and

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successor in merger to BRANCH BANKING
and TRUST COMPANY OF SC a/k/a BB&T.

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ATTORNEYS FOR THE DEFENDANT
JAMES EDAHL.

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Nelson@corriganchandler.com

ALSO PRESENT.

Ron Konersmann

Mike Hennessy, Senior Vice President
Asset Resolution Group, BB&T

(INDEX AT REAR OF TRANSCRIPT)

STIPULATION

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

* * * * * * * * * * * *

THE VIDEOTAPE SPECIALIST: We are now on the record. Today's date is February 27th, 2015. The time is 10.04 a.m This is the video deposition of Frank Bullard taken by counsel for the plaintiff. The location is 205 King Street, Charleston, South Carolina.

This deposition is taken in the matter of Skywaves 1 Corporation versus Branch Bank & Trust Company, et al, Case No 2009-CP-10-7516.

Counsel, please introduce yourselves for the record

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

MR. KEFALOS: George Kefalos for Skywaves.

MR. CHANDLER. Nelson Chandler for Jim Edahl

MS. CHERRY: Molly Cherry for BB&T.

J FRANK BULLARD, III

being first duly sworn, testified as follows:

EXAMINATION

BY MR. LINTON.

Q Mr Bullard, my name is John Linton. I'm going to be asking you some questions. If you don't understand any question that I ask you, if you'll just let me know and I'll try to rephrase it so we're communicating accurately with each other. All right?

A. Yes.

Q. Have you given a deposition before?

A. Yes.

Q. For the bank?

A. For the bank.

Q. On how many occasions?

A. Twice. This will be my third.

Q. What is your present position with the bank?

A. Market president for BB&T here in Charleston, South Carolina.

Q. And what was your position in 2006,

seven and eight?

A. Regional president for the coastal region, BB&T.

Q. So that area would include --

A. Florence, Charleston, Myrtle Beach, Hilton Head, Hampton County. Coastal South Carolina.

Q What were your duties in 2007, 2008?

A. To oversee the road profitability, service quality, and quality of the coastal region.

Q. Did you ever become involved with the loan to Skywaves?

A. No

Q Was there a reason for that?

A. No, other than it was the responsibility of the relationship manager

Q. And who was the relationship manager?

A. Jimmy Edahl

Q I understand that you were his supervisor; is that correct?

A Yes.

Q Was Mr. Edahl's title Senior Vice-President?

A. Yes.

Q. And is "relationship manager" a term

that BB&T uses?

A. Yes. It's more of a generic title. There are specific functional titles and also titles that's more of a generic title.

Q. So you were in charge of supervising Mr. Edahl?

A. Yes.

Q. As a relationship manager what was his goal?

A. His goal was to oversee his portfolio loans. And he had other sales responsibilities to produce revenue, but overall he was responsible for the growth and the profitability of his portfolio.

Q. Have you ever been a relationship manager?

A. Yes.

Q. For what period of time?

A. From 1981 to 1999.

Q. Since 1999 has the role of relationship manager changed substantially?

A. I would say the role has not changed, but a lot of the processes have changed as far as loans and collecting payments and different responsibilities that they have.

Q. Is one of the goals of a relationship

manager to develop confidence and trust in your customers?

A. Yes.

Q. And to be able to render value advice to the customer?

A. Yes.

Q. That is the goal of a relationship manager?

A. That's one of the responsibilities.

Q. How do you go about achieving that responsibility or that objective of developing confidence and trust in your customers and rendering advice to your customers?

A. Well, part of it's the relationship that's built over time and positive feedback on how the relationship is going.

Q. When you served in the role as a relationship manager, what did you do to make sure that the customer reposed confidence and trust in you?

A. I tried to carry out the duties in a way that would promote a feeling of honesty between me and the client.

Q. Would you render advice to the client?

A. Yes

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

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

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

A. No.

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

A. No.

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

MS. CHERRY: Object to the form.

MR CHANDLER: Same objection.

A. Do I have to answer that question?

Q. Yes.

A. Would you restate it?

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

MS. CHERRY: Object to the form

MR. CHANDLER: Same objection.

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

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

MS. CHERRY: Object to the form.

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

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

MS CHERRY: Object to the form.

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

MS. CHERRY: Object to the form.

MR. CHANDLER: Same objection.

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

Q. So you see no problem with --

A No.

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

MS CHERRY: Object to the form.

A. Would you restate that?

(The court reporter read the pending question.)

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

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

A. I would say it was an unusual request.

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

investor?

MS. CHERRY: Object to the form.

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

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

A. Right.

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

A. Right.

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

MS. CHERRY: Object to the form.

MR. CHANDLER Same objection.

A. That's correct.

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

A. Yes.

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

A. Yes.

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What you can expect from BB&T:

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

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

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PLAINTIFF'S EXHIBIT Bullard 2-27-15 PT
RENGAD 800-631-6989

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

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

VIDEO DEPOSITION OF: WALTER DENNING

DATE: December 19, 2013

TIME: 9:13 a.m.

LOCATION: Nexsen Pruet
701 Green Valley Road
Greensboro, NC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: LISA A. WHEELER, RPR, CRR

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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NEXSEN PRUET
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(803) 540-2026
rmendoza@nexsenpruet.com

ALSO PRESENT: Russell Bogue
Michael Hennessy

THE VIDEOGRAPHER: John Girdler

(INDEX AT REAR OF TRANSCRIPT)

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(Commencing at approximately 9:13 a.m.)

* * * * * * * * * * * *

STIPULATION

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

* * * * * * * * * * * *

THE VIDEOGRAPHER: We're going on the record. The time on the monitor is 9:13 a.m. This is the video deposition of Walt Denning taken by the Plaintiff in the matter of SkyWaves I Corporation, Plaintiff, versus Branch Banking & Trust Company, et al, Defendants, under the jurisdiction of the Circuit Court of -- of -- the Court of Common Pleas for the Ninth Judicial Circuit, County of Charleston, Case Number 2009-CP-10-7516.

This deposition is being held at Nexsen Pruet, 701 Green Valley Road, Suite 100, Greensboro, North Carolina, on Thursday, December

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19th, 2013. My name is John Girdler. I'm the video specialist. The court reporter is Lisa Wheeler. We're from A. William Roberts, Jr. & Associates.

Counsel will now state their appearances for the record and the court reporter will swear in the witness.

MR. KEFALOS: This is George Kefalos on behalf of SkyWaves.

MR. LINTON: Johnny Linton on behalf of SkyWaves.

MS. CHERRY: Molly Cherry. I'm here for Defendants BB&T and Jim Edahl.

MR. MENDOZA: Rick Mendoza on behalf of Defendants BB&T and Jim Edahl.

WALTER DENNING

being first duly sworn, testified as follows:

EXAMINATION

BY MR. KEFALOS:

Q. Mr. Denning, I'm George Kefalos and we've just met. I'm one of the lawyers that represent SkyWaves and I want to ask you some questions about what you might know about this case. Do you feel well enough to answer my questions today?

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A. Yeah, I do

Q. Will you give me full and complete answers to my questions today?

A. Yes

Q. And if you don't understand a question, will you stop me and ask me to explain it before you answer?

A. Okay.

Q. Good. Tell me a little bit about yourself. Where do you live?

A. I live in Kernersville, North Carolina.

Q. How long have you been there?

A. I've been there since 1983.

Q. Long time. Where are you from originally?

A I grew up in New York City.

Q. What brought you south?

A. Work. I moved south with First Union National Bank.

Q. When was that, in '83?

A. In '78.

Q. Are you married?

A. I am.

Q. Tell me about your education. Where -- where did you go to school?

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A That would be correct.
Q. Do you think that a customer should be able to trust his relationship manager?
A. I do.
Q. Do you think that the relationship manager should be honest with his customer?
A Yes. I mean, it works both ways.
Q. Certainly. And would you agree that a relationship manager should never intentionally cause unnecessary harm to his customer?
A. Yes.
Q. And would you agree that the relationship manager should never mislead his customer or mislead his regional loan administrator?
A. Yes.
Q. Would you agree that when a relationship manager speaks to a customer the customer is justified in believing that the relationship manager is speaking on behalf of the bank?
MS. CHERRY: Object to the form.
MR. LINTON: I don't think the court reporter's got a -- got an answer.
BY MR. KEFALOS:

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Q. You can -- you can answer that.
A. Yes.
Q. And do you believe that the customer should be entitled to believe that what the relationship manager says on behalf of the bank is true?
MS. CHERRY: Object to the form.
A. Yes.
Q. Do you think that a relationship manager should know his customer's business needs?
A. Yes.
Q. And do you think the relationship manager should never recommend a loan that's not suitable for the customer's business leads -- needs?
A. Based on their understanding of the customer's needs.
Q. When did you first have involvement in -- with the SkyWaves account?
A. I made a call with Jim Edahl and I can't tell you when but I was in Charleston on other bank business and he asked if I would accompany him on a call with the client and that was the precursor to the loan request.
Q. Well, I think the original loan request

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came in in 2005. Would it -- would that have been 2005 or would it have been after that?
A. It probably would have been later, I think.
Q. Okay. Who did -- did you replace anybody? Who -- who -- who had your position before you?
A. I can't remember.
Q. You talked about the loan request. At some point you were involved in a decision to approve a loan for --
A. Correct.
Q. -- SkyWaves?
A. That's correct. Yeah.
Q. Were -- and you had -- called on SkyWaves preliminary to their -- to its -- its loan request?
A. Correct.
Q. So you were aware of some of the efforts that were made to get SkyWaves as a customer of BB&T?
A. I think they were already a customer if I recall.
Q. Did you know that BB&T had -- well, tell you what, let me --

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

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

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Q. Yeah.
A. – SkyWaves. I'm not – I'm not sure what you mean by incentives.
Q. Well, when SkyWaves -- when BB&T was courting SkyWaves as a customer did you know that there was also the possibility of bringing in Jimmy Kerr and Creighton Walters as bank customers if BB&T secured the SkyWaves account?
MS. CHERRY: Object to the form.
A. Not specifically. I thought they already were or, like I said earlier, I thought there was enough of a relationship outside of SkyWaves that caused the total credit exposure to come to Winston-Salem.
Q. Well, according to this note Jimmy Kerr had been with SouthTrust before --
A. Okay.
Q. – and once you secured the SkyWaves account you were successful in bringing Jimmy Kerr into the BB&T family.
A. Yeah.
MS. CHERRY: Object to the form.
George, could you speak up just a little bit? I'm sorry.
MR. KEFALOS: I'll try to do that.

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

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interested in the factoring arrangement?
MS. CHERRY: Object to the form.
A. No.
Q. It was BB&T – did you know that it was BB&T who suggested financing SkyWaves through a factoring arrangement?
A. No.
Q. Looking back did you find that the traditional factoring arrangement that BB&T had in place did not fit the SkyWaves business model?
MS. CHERRY: Object to the form.
A. It fit to the extent they had invoices.
Q. And once they did not have invoices the traditional factoring arrangement did not fit the –
A. Well, traditional factoring would be to – to purchase invoices.
Q. Yeah. Well, you were aware that the factoring arrangement that BB&T proposed for SkyWaves was a great departure from the typical client?
A. Yes.
Q. And you were aware that BB&T had developed a very unusual borrowing base with SkyWaves?

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a -- had a growing need, you know, so you wonder if their plan's going to work, if their projections are going to pan out.

Q. Now here Mr. Edahl says that the -- the factoring agreement comes up for review in March. Were you planning at this time to use March as the opportunity to review your continued relationship?

MS. CHERRY: Object to the form.

A. I -- I can't remember.

Q. Did you have any contingency plans at this time to cut off credit based on the information that you had at this time?

A. I remember having a conversation at one time. Whether or not it was here or not I can't remember.

Q. Who did you have the conversation with?

A. It was probably Jim Edahl.

Q. You know, we've been talking the past couple days about site plans. You -- you are familiar with the difference between funding purchase orders and funding site plans?

A. No. Un-huh.

Q. You are not?

A. Un-huh

Q. Did you approve the loan -- loaning

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money on site plans?

A. No.

Q. Did -- did you read Mr. Edahl's deposition?

A. Not in its entirety.

Q. Did you read the part where he talked about you having given him authority to approve the funding for site plans?

A. I did.

Q. All right. Did you do that?

A. No.

Q. Did you ever have a conversation with Mr. Edahl about July or so of 2007 about changing the nature of the funding for SkyWaves?

A. Not that I recall.

Q. Did you know that Mr. Edahl was proposing to loan money to SkyWaves on the basis of sites identified in a General Dynamics proposal?

A. No. Loaning money based on their purchase orders is -- is all I remember.

Q. All right. So when Mr. Edahl says he talked to you about getting approval from you for funding the site plans, that's not correct?

A. That's right.

Q. It's not --

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A. It's not correct.

Q. Okay. You never talked to him about it?

A. No.

Q. Would you have approved funding for site plans?

A. 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.

Q. What was the problem with funding purchase orders?

A. Well, you're unsecured is the main risk.

Q. You mean -- when -- what do you mean when you say unsecured?

A. There are no receivables at that point in time. There's no inventory at that point in time which is where we would traditionally want to be. So you're dependent on performance in that the inventory has to be created. It has to be shipped. It has to be invoiced before we have a document that we could go after their client if you will to collect.

Q. I see. And without -- with a purchase

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order you don't have that?

A. You just have a promise to buy that's not enforceable in my opinion.

Q. Did you ever talk with any representative of SkyWaves after the January 17th plant inspection?

A. I met with SkyWaves early on so I'm thinking the answer is no.

Q. This would have been January 17th, 2008.

A. I don't believe I did.

Q. Did you ever talk with their -- any representative of SkyWaves after the default was called?

A. No.

Q. Did you ever have anyone inquire what SkyWaves' position was on the terms of the loan?

A. Not that I recall.

Q. We talked earlier about those memos regarding the way BB&T was changing the factoring agreement for SkyWaves, how it was tweaked and how it contained language that wasn't part of the standard agreement.

A. You're talking about the factoring agreement?

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

SKYWAVES I CORPORATION,
Plaintiff,
vs.
BRANCH BANKING AND TRUST COMPANY, successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL,
Defendants.

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

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ALSO PRESENT. Russell Bogue
Michael Hennessy

THE VIDEOGRAPHER: John Girdler
(INDEX AT REAR OF TRANSCRIPT)

(Commencing at approximately 11:20 a.m.)

* * * * * * * * * * *

STIPULATION

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

* * * * * * * * * * *

THE VIDEOGRAPHER: We're going on the record. The time on the monitor is 11:20 a.m. This is the video deposition of Tol Broome taken by the Plaintiff in the matter of SkyWaves I Corporation, Plaintiff, versus Branch Banking & Trust Company, et al, Defendants, under the jurisdiction of the Court of Common Pleas for the Ninth Judicial Circuit, County of Charleston, Case Number 2009-CP-10-7516.

This deposition is being held at Nexsen Pruet, 701 Green Valley Road, Suite 100, Greensboro, North Carolina, on Thursday, December 19th, 2013. My name is John Girdler. I'm the

video specialist. The court reporter is Lisa Wheeler. We're from A. William Roberts, Jr. & Associates.

Counsel will now state their appearances for the record and the court reporter will swear in the witness.

MR. LINTON: Johnny Linton for the Plaintiff.

MR. KEFALOS: George Kefalos for SkyWaves.

MS. CHERRY: Molly Cherry for Defendants BB&T and Jim Edahl.

MR. MENDOZA: Rick Mendoza for Defendants BB&T and Jim Edahl.

TOL BROOME

being first duly sworn, testified as follows:

EXAMINATION

BY MR. LINTON:

Q. Mr. Broome, Johnny Linton and I'm going to be asking you some questions. If I don't phrase my question where it's clear, please ask me to rephrase it so that we're communicating accurately with each other.

A. Okay.

Q. And will you give me complete answers

to the questions?

A. Sure.

Q. Have you been deposed before?

A. Yes.

Q. Approximately how many times?

A. Probably half a dozen or so.

Q. In connection with BB&T matters?

A. Yes, or other banks.

Q. Other banks. All right. And in 2007 what was your position with BB&T?

A. I was the president of BB&T Commercial Finance.

Q. All right. And what documents have you reviewed in preparation for this deposition?

A. Various file documents related to commitments that were made, written commitment letters and then some follow-up documentation -- the default letter that was sent and follow-up documentation including a memo that I had put together in March of 2008.

Q. Have you reviewed any of Mr. Edahl's testimony?

A. Yes.

Q. What portions of it or the entire deposition?

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Q. All right. sir. Now this goes on to have a mission statement, various other --
A. Uh-huh.
Q. -- objectives. How is the message in this 2007 corporate plan for the commercial finance area communicated to the sales execs, somebody like Mr. Edahl?
A. The sales execs for commercial finance or for the bank?
Q. For commercial finance.
A. Mr. Edahl was not a sales executive for commercial finance:
Q. Okay.
A. So the -- the commercial finance sales executives we would have had -- first I would have met with my direct managers -- well, before that we -- I would have gotten them involved in putting together the corporate plan.
Q. Of course.
A. Then I would have met with them and said, okay, this has been approved. Here's what we're going to do this year. Then they would have gone and met with their reports to talk about what we were going to do.
Q. Is there anybody in commercial finance

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who would have been involved with SkyWaves' credit?
A. Yes.
Q. Who is that prior -- prior to December of 2007?
A. Well, Castlen was the account executive, Castlen Morris.
Q. Okay. And how about on the bank side, would that be beyond your jurisdiction?
A. It was at the time, yes.
Q. But is -- now it is under your jurisdiction?
A. From a sales management perspective, yes.
Q. Okay. What is your current position?
A. Director of regional corporate banking sales and service.
Q. And so would -- what would that involve on the bank side? Like Mr. Dennings, would -- would he be involved under you now?
A. No. He's on the credit -- in the credit department.
Q. Would he have been involved in 2007 under you?
A. No.
Q. How did you happen to be doing the

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

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specialized lending?
A. That's right.
Q. Okay. And was SkyWaves a specialized lending customer?
A. Yes.
Q. Okay.
A. Commercial finance was a part of specialized lending.
Q. Okay. Did you have anything to do with this 2007 commercial finance corporate plan?
A. Yes
Q. You were the architect of it?
A. Yes.
Q. Okay. Did it differ in any material substance from the 2006 plan?
A. I couldn't answer that without seeing the 2006 plan.
Q. Okay. Well, let's go to the -- Page 2, the mission statement. And I can give you a chance to read that if you --
A. Okay. Okay.
Q. Now what is the purpose of this mission statement?
A. To reinforce the bank's overall focus on putting our clients first and then to state how

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we would in a specialized environment like commercial finance execute on that mission.
Q. I notice in here it refers to the fact that you're providing professional sales and risk management direction to your customers.
A. Yes.
Q. Is that equivalent to saying that you're giving advice to your customers?
A. Yes.
Q. All right. And who in commercial finance would have been giving advice to SkyWaves in 2007?
A. 2007?
Q. Right.
A. That primarily would have come through the account executive, Castlen Morris.
Q. Okay. Who did he report to?
A. I believe he reported to Phil Allard if I -- my memory's correct.
Q. All right. Do you know the circumstances under Mr. Morris's departure from the bank in around November of 2007?
A. He took a position with another factoring company.
Q. Do you know if that was entirely

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voluntary?
A. As far as I know he just left.
Q. In your review of the -- of the file that you were asked to conduct did you ever interview Mr. Morris?
A. No.
Q. Now he had left the bank?
A. That's right.
Q. So far as you know he left on good terms?
A. Yes.
Q. And he had been with the bank for many years?
A. I'm not sure how many but I --
Q. Some number of years?
A. Right.
Q. Okay. And he was the manager who at least from the commercial finance standpoint would have had the -- the closest relationship with SkyWaves, is that --
A. Yes.
Q. And is there a reason that you wouldn't have interviewed him to find out what he knew and -- and when he knew it?
A. He was no longer with the bank.

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Q. Did that prevent you from talking to him?
A. In a confidential collection matter, yes.
Q. So you think it would have been improper for anybody from the bank to talk to him regarding --
A. It would have been --
Q. -- this matter?
A. -- improper for -- for me with what I had been charged to do to talk to him.
Q. Well, would it be improper for anybody who was being requested by you to collect the facts to talk to him?
MS. CHERRY: Object to the form.
BY MR. LINTON:
Q. Go ahead.
A. Yeah, I would say so. I mean, it was a -- it was a confidential bank matter that -- that needed to be within the bank.
Q. Okay. Did you ask to receive a copy of Mr. Morris's file so that you could review what he had?
A. The credit file?
Q. Any file on SkyWaves. As you were

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trying to conduct your investigation to determine what went wrong here and how do we avoid this from happening again -- I think that was basically what your assignment was, wasn't it?
MS. CHERRY: Object to the form.
BY MR. LINTON:
Q. Wasn't your assignment to determine what the facts were and how we avoid any future losses, what lessons can be learned?
A. Yes.
MS. CHERRY: Object to the form. You can answer.
A. Yes.
Q. What was --
A. It was a less -- it -- the purpose of the memo was to -- to write a lessons learned memo --
Q. Okay.
A. -- after the fact.
Q. All right. And as part of that investigation was Mr. Morris's file as the manager for commercial finance available to you if you requested?
A. Yes.
Q. Okay. Why didn't you request it?

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A. That's right.
Q. All right. And the mission statement says that -- that they're to provide professional sales and risk management direction, which I believe you've testified means that they're giving advice to the -- to the client about how the products that you are offering could benefit the client, is that right?
MS. CHERRY: Object to -- object to the form. You can answer.
BY MR. LINTON:
Q. How did you see Mr. Morris's role with SkyWaves? What advice was he supposed to be giving them and -- and feedback to them?
MS. CHERRY: Object to the form.
BY MR. LINTON:
Q. Was Mr. Morris supposed to be giving any advice to SkyWaves?
A. Yes, to the extent that he would be asked questions about financial services that may help the company, he -- he would be giving -- potentially giving advice. He also -- the -- the mission statement also refers to providing sales and risk management internally at -- at the bank.
Q. Of course, internally at the bank

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

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

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

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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

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ALSO PRESENT:
Michael Hennessy, Rusty Bogue, Ron Konersmann, Patty Konersmann

(INDEX AT REAR OF TRANSCRIPT)

STIPULATION

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

* * * * * * * * * * *

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

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

Counsel, please introduce yourselves for the record.

MR. LINTON: John Linton for the

plaintiffs.

MR. KEFALOS: George Kefalos for Skywaves.

MR. MENDOZA: Rick Mendoza for BB&T.

MS. CHERRY: Molly Cherry for BB&T and Jim Edahl.

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

JAMES EDAHL

being first duly sworn, testified as follows:

EXAMINATION

BY MR. LINTON:

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

A. I don't think.

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

A. Yes.

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

A. No, it was not.

Q. What did it involve?

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

a customer would you memorialize it with a memo to your file?
A. Not necessarily.
Q. Do you know of any memo to the file where you expressed dissatisfaction with the results of an audit to the debtor?
A. Not that I'm aware of.
Q. I think there's probably several different types of bankers, some bankers who are sticklers to details, others who seem to identify with customer needs and have a lot more flexibility just in their style of being a relationship manager. Have you found that to be true in your years of banking?
A. I think different bankers have different styles, just like different individuals have different personalities.
Q. Right. What -- how would you describe your style?
A. I would describe my style as, you know, empathetic and responsive to customers' needs and trying to fit those appropriately within the bank.
Q. All right. You would consider yourself a professional?

A. Yes.
Q. And that engaging and have a relationship with a client to build their confidence in you and vice versa?
A. Yes.
Q. And was it one of your desires to expand the credit relationship with Skywaves from the -- from the inception?
A. No. It was my desire to meet the needs of Skywaves as they were presented to us.
Q. Well, there were a number of different relationships that you had over the years with them, credit relationships; is that correct?
A. I'm not sure what you mean.
Q. Well, I'm thinking about, I think it was a capital loan that was made. There were credit cards that were changed over from another company, another bank.
I'm just trying to ask you if you weren't trying to grow the relationship on behalf of the bank and consistent with Skywaves's needs?
A. We were trying to be sensitive to the needs of Skywaves and respond to them as they presented to us, sure.
Q. Are you telling me that you were not

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

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

by BB&T?
A. I'm not sure I understand the question.
Q. You indicated Mr. Konersmann mislead you into thinking that Wachovia and Hunt Capital had made definite proposals to them.
MS. CHERRY: Object to form.
THE WITNESS: No. I mentioned that the testimony that was present -- presented a few days ago was at variance with what he told me at the time. At the time I didn't believe he was misrepresenting anything, in 2007.
BY MR. LINTON:
Q. I'm trying to understand if you took any action on behalf of the bank based on what Mr. Konersmann told you in March of 2007 regarding Wachovia or Hunt Capital?
A. Based on the needs that Ron felt -- he thought he would have going forward, we increased the factoring line I think to 3-and-a-half million and the fee purchase order sub limit at 2 million and increased the advance rate from 60 to 65 percent on purchase orders. Ron said he thought that would allow us to continue to be their bank.
Q. And you thought that was a reasonable

thing to do on behalf of BB&T?
A. At the time, yes.
Q. What financial analysis did you make in order to come to that conclusion?
A. We put together a credit package at the time based on the financials that were provided to us at that time.
Q. And insofar as you know were those financials accurate?
A. So far as I knew at the time.
Q. Well, I'm talking about now. Is there anything now that you know that you could say the financial package that you were given in March of 2007 or thereabouts was inaccurate?
A. No. It was -- as far as I know, it was accurate.
Q. Okay. I may not have been phrasing that question very well. I'm trying to understand -- I understand that in 2007 you thought it was accurate?
A. Uh-huh.
Q. Do you still think it was accurate based on anything you know today?
A. Yes.
Q. Okay. And you were willing to expand

the relationship greatly?
A. The bank was willing to expand the relationship per the terms that I just mentioned, yes.
Q. And were you the person who made that recommendation?
A. Yes.
Q. And to whom did you make it?
A. Walt Denning.
Q. Okay. And -- and was there anybody else that was -- had been involved in that decision to expand the credit line?
A. Not from a credit approval perspective.
Q. And did -- were you and Walt Denning referred to as co either authors or -- or -- whose signature was required for the -- that expansion approval?
A. Walt's.
Q. Okay. Now, at the time he -- you were expanding that, you knew that -- that Skywaves was trying to expand rapidly and that's one of the reasons they needed the additional credit?
A. Yes.
Q. Okay. And you were comfortable with

their financials and their operation to extend 65 percent payment rather than 60 percent?
MS. CHERRY: Object to form.
THE WITNESS: On purchase orders, that's correct.
BY MR. LINTON:
Q. Okay. What is a purchase order, as you use that term?
A. It's an order from a client to, in this case, manufacture a shelter unit.
Q. All right. So you -- and you were going to loan 65 percent of the -- of the --
A. Of the amount of that purchase order.
Q. Okay. And how long down the road would it be before a purchase order converts into a receivable?
A. Typically in that -- in Skywaves's case the purchase order would take -- and Castlen could answer that question more accurately than I could -- but it seems around probably take 30 to 60 days to construct a shelter.
Q. Had you ever financed purchase orders before?
A. No.
Q. Factoring normally finances

of getting the units to him to manufacture.
Q. Would that have been April or so 2007, the discussions?
A. Yes.
Q. Okay. Tell me what you understood the General Dynamics contract to be.
A. That Ron had a contract with General Dynamics to purchase shelter units for the New York State Police project up in New York I think it was.
Q. Did you ever see the contract?
A. Yes.
Q. Would you have gotten a copy of it?
A. Yes.
Q. Studied it?
A. Would have read through it.
Q. Okay. About how long was it?
A. It was fairly thick, as I recall.
Q. Tell me what your understanding was with the way that contract was going to work.
A. That General Dynamics had a contract with the State of New York to purchase or to –to deliver shelter units for their cell towers and that as those towers were to come online they would manufacture -- they would have Skywaves

manufacture the units and -- and ship them.
Q. At what point would those become purchase orders?
A. When General Dynamics would have issued a purchase order.
Q. So under -- excuse me. Did you finish?
A. When they would order -- issue a purchase order.
Q. So General Dynamics had discretion as to when it wanted to place a purchase order?
A. Yes.
Q. And you understood that?
A. Yes.
Q. And at some point did you start financing site plans?
A. Ron asked us to consider financing site plans in the spring of 2007, and he said that he was very certain that purchase orders would be forthcoming very soon. He was anxious to get production started on these units and asked if we could consider lending against the sites that he felt would turn into purchase orders very soon and -- and consuming the cycle. And in the context of, he -- well, yeah.

Q. And because the potential purchase order was somebody like General Dynamics, who had this contract with the state police, you felt that was a reasonable risk of the bank to take?
A. Yes. At the time I thought it was worth considering based on Ron's representations.
Q. And in fact, after you considered it did you approve that?
A. Talked to Walt Denning about that concept, and Walt's response was he was okay with it if we could structure it like we had the purchase orders and if we could track them. And -- and we talked to Castlen and he felt that we could monitor that okay, and -- and so we agreed to factor the site plans at that time.
Q. And basically what you have, from a business standpoint, you considered that the money will be there, it's just a matter of timing when the purchase order will be based and then the thing will be made?
A. Yes. Ron assured us that purchase orders would be forthcoming soon and that he really wanted to get production started on these units. And so, yes, we felt that under those circumstances it was reasonable to consider

advancing on sites.
Q. Okay. And did you advance at 65 percent?
A. Yes.
Q. Did you ask Ron to get any documentation from General Dynamics about a schedule, when -- when you could expect?
A. Yes. Ron provided in those initial discussions a site schedule from General Dynamics that outlined all of the sites involved in the contract and -- and provided that spreadsheet to us, and that's how Castlen was to track the advances on the sites.
Q. Was this financing of site plans, had you ever done that before?
A. No.
Q. In your banking career?
A. No.
Q. Do you know if Walt Denning had ever financed site plans?
A. Not to my knowledge.
Q. Was there any -- well, strike that.
Were these site plans being financed under the fact -- under the existing factoring agreement?

A. Yes.
Q. And was any written change to that factoring agreement?
A. No.
Q. I -- I'm perplexed as to how people in a bank who don't have any experiencing financing site plans can agree to finance it and not have anything in writing for an auditor to understand what's being financed. So explain to me how that worked.
A. The request from Ron came in the context of the credit approval that we just received in March of '07 to expand the line and increase the percentage on purchase orders. We had already had experience with General Dynamics on purchase ordering, invoice factoring, and that was a satisfactory experience.
We felt a high confidence level in Ron and the company at that time. We felt we had good experience with conversion of the POs to invoices previously. We had experience with General Dynamics that was good.
Q. So it all made perfect sense, it just wasn't documented?
A. Well, at the time it made sense to us,

yes.
Q. But then a lot of things in hindsight that don't make sense but at the time they seem to make perfect business sense?
A. Within the context at the time, that sometimes happens.
Q. Did you consider that after you made this agreement with Skywaves to finance site plans that the bank was obligated to finance those plans?
A. I'm sorry, I didn't understand.
Q. Did you feel that after you made the agreement with Skywaves to finance site plans, as you have testified to, that the bank was then obligated to finance these plans?
A. Yes.
Q. And in fact, did the bank finance those plans?
A. Some sites, yes.
Q. Were there any sites that were turned down?
A. Not that I'm aware of.
Q. I want to try to understand the coordination between an audit department and the credit and you as the relationship manager. In a

matter like this that I guess you would have to say is highly unusual because y'all had never done it before -- would you agree with that, highly unusual?
A. Yes.
Q. Okay. How does an auditor know what the contract is between the bank and Skywaves when they -- when they're doing their audit?
A. Yeah, I'm not sure how they look at that.
Q. Well, you got the audits from them, copies of it, didn't you?
A. Yes.
Q. Did you ever have any discussion with the auditors?
A. Not about that particular issue, no.
Q. Prior to the January audit being received by you did you have any concern about the Skywaves account?
A. Probably beginning in September of '07 we were getting financial information, albeit on a delayed basis, from 60 days, sometimes more, which was a concern in and of itself that financial reporting was becoming later, but the reporting that we were getting on the financial condition of

the company was not -- the revenues were beginning to decrease. Losses were increasing. And so that started to raise some concern in my mind of what was happening.
Q. But that concern was not a concern about whether they were in default but just a concern about the --
A. The general direction of the company, correct.
Q. Right? You said that right?
A. That's correct.
Q. And I think in November '07 you had a meeting with Ron updating you on the financials. Do you remember that?
A. I agree. That's true Yes.
Q. As I recall, there was some infusion of equity at that time as well as some loans by Jimmy Kerr and Crayton Walters?
A. That's what we were told.
Q. Well, those accounts were with BB&T, weren't they?
A. Skywaves's checking account was with BB&T, yes.
Q. Right. So when you say that's what you were told, isn't, in fact, that's what

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

arrangement and he also approved the site plan arrangement?
A. Yes.
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.
Q. Well, didn't -- and that was the way you considered it?
A. No. I considered it that the funds would be used, again, to build specific shelters for the specific sites that we were advancing.
Q. Well, and is there any reason to believe that they were used for corporate purposes? For example, payroll, expansion, materials?
A. Yeah, I don't know what they ended up being used for.
Q. Did you ever make any investigation?
A. I didn't personally, no.
Q. Did you ever ask Ron or John for any

report regarding the use of those funds that were site plan funds?
A. No, not regarding use of funds.
Q. Okay. But -- but you claim that the bank had restricted them to use that simply for the construction of site specific facilities; is that right?
A. That's right.
Q. And there's not -- not a piece of paper in the whole bank file that says that, is there?
A. Not that specific sentence, not that I'm aware of.
Q. Well, what in -- in the bank records that you have seen as the relationship manager that tells Skywaves that the funds that were advanced for site plans have to be used for materials? Is there anything?
A. There is nothing now in writing that I'm aware of that's a document. What is in writing is the site plans, the advances against those site plans, and two-and-a-half years of experience of every single advance that had ever been made under our factoring agreement was tied to the specific shelter.

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

couldn't -- I didn't recall the -- the detail of the site plan financing.
Q. I'm going to ask the question again. Did you lie to Mike Burke and tell him that you were unaware that there was site plan financing?
A. No, I did not lie to Mike Burke.
Q. Did you tell him that you weren't aware of the site plan financing?
A. We didn't discuss site plan financing.
Q. You and Mike Burke didn't discuss that?
A. No, not at that point.
Q. What did -- did you ever discuss it with Mike Burke?
A. Yeah, I'm sure I did. I don't know exactly when.
Q. Mr. Edahl, do you recall saying that to Walt Denning, Frank Capel, and Mike Hennessy that neither you or I had any idea that the GD NYST purchase orders funded from July through October were not documented and funded exactly like the other purchase orders we had received and funded over the last two years?
A. Yes, I do recall that. And they weren't because no shelters were constructed.

Q. Are you -- are you trying to tell me that you told Mike Burke that the site plan funding had been approved so there's nothing unusual about the site plan funding?
A. No, I'm not saying that.
Q. Did you tell Mike Burke, look, we -- we got off the factoring agreement and made a new agreement where we're going to finance purchase orders? Did you tell him about that?
A. No. That was in the record.
Q. Where was it in the record?
A. Various agreements that had been made and memorialized.
Q. Okay. Did you tell Mike Burke that thereafter we decided to finance site plans?
A. No.
Q. Did you lead him to believe that you had no knowledge that that there was funding of site plans?
A. No. At that point in time I do not recall that the agreement to fund site plans. Again, that was -- it was so much going on at that point in time, a lot of things to deal with that.
Q. Do you recall being involved in the preparation of material for a serious -- serious

incident report?
A. I'm sorry?
Q. Do you recall being involved in filling out the serious incident report?
A. I don't recall that at the moment, no.
Q. Do you recall any statement that you made regarding the site plan financing?
A. There are some other memos I think or as we've moved through the process about trying to address the situation that we mentioned that, yes.
Q. Do you recall claiming that you did not have knowledge of the site plan financing?
A. Yes, I do.
Q. Was that truthful?
A. At the time it was.
Q. Explain that to me, because I thought you -- you had testified that you approved the site plan financing and that Mr. Denning approved the site plan financing; is that correct?
A. Yes.
Q. And then you've gone into testimony about your understanding of what the terms of that said site plan financing?
A. Uh-huh.
Q. Right?

A. Yeah.
Q. Now, in January or February of 2008 did you intend to convey to your superiors that you didn't know about the site plan finance -- financing and those were supposed to be purchase orders and that these were crooks?
A. No.
MS. CHERRY: Object to form.
THE WITNESS: Not my intentions, and I didn't convey that either.
BY MR. LINTON:
Q. Okay. What were you trying to convey when you were filling out information for your superiors to rely on regarding the site plan financing?
MS. CHERRY: Object to the form.
THE WITNESS: What I remembered, I was trying to convey the situation as I remembered it at that time.
BY MR. LINTON:
Q. At the time did you remember that site plan financing had been approved by you and Mr. Denning?
A. No, at the time I didn't. That recollection came as we were preparing for the --

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

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

A. Uh-huh.

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

A. That's correct.

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

MS. CHERRY: Object to the form.

BY MR. LINTON:

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

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

Q. And did you make a note about that?

A. I don't recall.

Q. Come on now. This --

A. I don't.

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

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

Q. So his testimony refreshed your recollection?

A. Yes, it did.

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

A. Yes.

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

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

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

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

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

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

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

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

A. Yes.

Q. Tell me about that.

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

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

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

BY MR. LINTON:

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

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

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

A. No.

Q. Or anybody at the bank?

A. No.

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

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

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

A. No, not that I recall.

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

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

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

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

7

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
SKYWAVES I CORPORATION,
Plaintiff,
vs CASE NO. 2009-CP-10-7516
BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL,

Defendants

VIDEOTAPED
DEPOSITION OF JAMES J EDAHL

DATE: NOVEMBER 21, 2014

TIME: 9 17 AM

LOCATION: DUFFY & YOUNG
96 Broad Street
Charleston, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY Laura J. Bash, RPR

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

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

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

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

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

Could all counsel present please introduce yourselves for the record.

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

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

MR. CHANDLER: Nelson Chandler for Jim Edahl.

MS. CHERRY: Molly Cherry for BB&T.

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

(Whereupon, the witness was placed

under oath by the court reporter.)

JAMES J. EDAHL,

being first duly sworn, and responding, "I do," testified as follows:

EXAMINATION

BY MR. LINTON:

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

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

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

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

Q. When did you review them?

A. Um. Yesterday.

Q. Okay. Was that in preparation for --

A. Yes, sir.

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

A. It was revolving around the site plan financing.

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

Q. Why did you give that untruthful testimony in your deposition?.
A. I think out of fear of losing my job, at that point.
Q. That was the same reason that you had failed to alert the bank that you had approved the site fund planning when the bank was closing the doors on SkyWaves?
A. Correct.
Q. Was there something about the bank culture that would have made you afraid that they were going to terminate you, when you had been a senior vice president, if you had just, in January of 2008, told the truth?
A. No.
Q. Why did you feel it necessary to lie in January 2008, if Mr. Denning had approved this financing?
A. The pressure that I was feeling was that they probably -- twofold. When I found out in January of 2008 that the site plan advances had not turned into purchase orders quickly, and, in fact, that no units had been constructed at all, and I was very concerned about the situation that that put the bank and me in at that point.

Q. But if Mr. Denning had approved it and Castlen Morris was the administrator, you had done everything that you were supposed to do, why would you be afraid?
MS. CHERRY: Object to the form.
THE WITNESS: I think at -- at the time, I was just very surprised and shocked that no units had been constructed and that the site plans hadn't converted to purchase orders, and so that caused a great bit of concern on my part.
BY MR. LIPTON:
Q. Mr. Edahl, you were -- you testified you went to SkyWaves maybe every other month to do a site visit, right?
A Well, I would talk with management --
Q. Talk with management --
A. -- about various issues.
Q. Right. But you would physically be on the property.
A. Uh-huh.
Q. The shelters that SkyWaves were building were fairly large, weren't they?
A. Uh-huh.
Q. And typically when you had a visit out there, would you sort of walk around to look at

what was in inventory? I don't mean conducting inventory, but look at what was in inventory and look at what shelters were being built?
A. I would certainly note what was around the plan, and production lines going.
Q. All right, sir. So you were there in November and December, weren't you, of 2007?
A. I'd have to check on that. I assume I was, but I don't know that for a fact.
Q. Did you make note at any time that there's -- these shelters are not works in progress in late 2007?
A. No.
Q. Did you ask anybody at SkyWaves about, you know, guys, I was hoping these things would convert into purchase orders, we've advanced $1,200,000, you know, where are the shelters?
Did you ask anything like that?
A. No.
Q. And there was really no written requirement that the advances for the site plans be spent on specific shelters, were there?
A. There was no written agreement to that.
Q. All right. You've probably managed construction loans from time to time, haven't you?

A. Yes.
Q. And if I was to come to you to get a construction loan and, typically, there might be percentage payments or draws; is there right?
A. Yes.
Q. And when you have that kind of limitation on the use of the proceeds, the bank, in a written document, tells you what the percentage of draw will be, doesn't it?
A. Correct.
Q. Was there anything like that in this verbal agreement?
A. Just the 65 percent initial advance.
Q. But in terms of the use of those proceeds, there was nothing at all that was agreed to in writing; is that correct?
A. Not in writing.
Q. Was there anything that you specifically can tell me that Ron Konersmann or John Voytko, or anybody from SkyWaves said, we agree that when we are getting these funds it's specifically to build this particular shelter?
A. Yes. Well, that was the understanding, because --
Q. I'm not asking you about your

investigator said to you that made you feel like, oh, gosh, I gave untruthful testimony?
A. Yeah. When I was talking with her about my testimony, I wanted to correct that part of the testimony.
Q. Just so I don't have to answer -- ask you the question several times, every time you use the word "correct the testimony," I'm going to ask you if you're talking about -- acknowledged that it was untruthful testimony.
A. Okay.
Q. And I do that because there's a difference between correcting an error and correcting false testimony.
You understand that?
A. Yes.
Q. Okay. Now, I'm going to hand you an errata sheet and your signature to it. And this looks like it's dated September the 27th, and the deposition was September 19th.
Now, let's mark that as Exhibit 3.
(PLF. EXH. 3, Signature of Deponent sheets from the deposition of James Edahl, was marked for identification.)
BY MR. LIPTON:

Q. You made a number of corrections to your testimony that you gave in that deposition.
Do you see them there?
A. Yes.
Q. And just looking at the extent of those corrections, you must have read your deposition pretty carefully. Is that correct?
A. Yes. Yes.
Q. And you had over a week after your deposition to reflect on the fact that you had given false testimony. And when you read through it, it didn't dawn on you that you had given false testimony?
A. No.
Q. Okay. I'm assuming that you never have given false testimony before.
That is, knowingly given false testimony; is that correct?
A. No, that's correct.
Q. I think we have covered these things in your affidavit. You said that the reason you didn't speak truthfully was out of fear and panic; is that correct?
A. That's correct.
Q. Did you write this affidavit?

A. No.
Q. Who did?
A. I believe Molly drafted it and I reviewed it.
Q. Were there any earlier drafts that you struck things out of?
A. No.
Q. Did you -- did you make any changes to the draft after it had been submitted to you?
A. Not that I recall.
Q. And you say in here about your prior testimony -- or recall the detail of loan advances made upon site plans.
You want to look at your affidavit and see that?
A. I'm sorry. Where is it?
Q. Right at the top of the second page, (indicating).
A. Okay.
Q. Mr. Edahl, we're looking at Paragraph 3 of your affidavit. This is Exhibit 1. And I've called your attention to language used: Or recall the detail of loan advances made upon the site plans.
Do you see that?

A. I'm sorry. Yes. Uh-huh.
Q. Okay. What do you recall about the detail of loan advances made upon the site plans?
A. What I do recall was that SkyWaves supplied the bank with a spreadsheet of the various site plans related to the New York contract, the General Dynamics' contract, and that we had agreed to advance up to 65 percent of the cost of the shelters for each of those units. And that we expected those advances to turn into purchase orders quickly.
Q. But no specific timetable; is that correct?
A. Correct.
Q. Did you ever caution SkyWaves that the purchase orders were not turning into invoices or receipts quickly enough?
A. I remember expressing concerns about delays in general, but I don't remember anything specifically.
Q. I'm going to turn to your amended answer. And on Page 3 -- this answer was filed in March 2014 -- and I just want to ask you about one or two provisions in it.
Look at Paragraph 13 and 14, on Page 3.

Q. But that letter doesn't include all of the details of the commitment letter, does it?
MS. CHERRY: Object to the form.
BY MR. LINTON:
Q. Does that letter contain all the details that a normal commitment letter would include?
A. A commitment -- it outlined the agreement, in a general way, with the company regarding that credit facility at the time.
Q. How long have you worked with commitment letters in your banking career?
A. As long as I've been in banking, about 30 years.
Q. Okay. And you and I have just discussed the kind of terms and detail that normally are contained in a commitment letter, haven't we?
A. Yes.
Q. Did the March letter from you contain all of the terms and conditions that you expect in a commitment letter?
A. It was a modification of our existing commitment. So it would be a slightly different format from a standard commitment letter.

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:

Q. Mr. Edahl, I believe you've testified that it was probably early July 2007 when you authorized funding of site plans; that is, the release of funds for SkyWaves; is that right?
A. Yes.
Q. Okay. And prior to that time, had you met with Mr. Konersmann, the president of SkyWaves, to understand the cash needs that the company would have?
A. I assume I did, but I can't recall specifically.
Q. You were aware that the -- as you've testified to, that the General Dynamics and other contracts had been delayed in 2007.
A. Yes.
Q. And you knew that SkyWaves was pursuing an expansion.
A. Yes.
Q. A substantial expansion; is that right?
A. Yes.
Q. And as a banker, that would obviously mean to you that they were going to need to have cash, whether it be equity investment or the ability to secure financing, right?
A. Yes.

Q. At that time was BB&T providing all of the financing for SkyWaves?
A. We're the only bank financing in the credit, that I'm aware of.
Q. Right. And actually, you had requested that SkyWaves convert some of its other loans with other institutions to you, prior to 2007?
A. We had been given the opportunity to look at some equipment financing through a related company. I think it was KWK.
Q. And how about as far as a new capital equipment loan? That had been made in 2007, hadn't it?
A. I think that was the loan to KWK for some equipment. It might have been earlier.
Q. In any event, you knew in July, when Mr. Konersmann was needing to secure financing with the site plan funding, that the company would need cash. Right?
A. Yes. Well, in general.
Q. And you knew that he was going to rely upon the commitment that you had made about the General Dynamics contract.
MS. CHERRY: Object to the form.
THE WITNESS: I certainly knew he was

dependent on BB&T for the financing, at the time.
BY MR. LIPTON:
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.
Q. Okay. And you were aware that he might be looking for up to 36 shelters, for financing?
A. I didn't know how many at the time.
Q. When did you become aware that the bank would be financing 36 General Dynamics's proposed shelters?
A. Became aware that we had 36 advances on site plans out in January of 2008.
Q. What did you do between August of 2007 and January of 2008, as the relationship manager and bank representative, to determine the number of site plans that were being funded?
A. I was depending on Castlen to keep track of it.
Q. When you say "depending on," did you get any reports or check with him about the extent of site plan funding?

A. Occasionally, we'd just talk about the general levels of advances that were out there, compared to our limits that we had in place, the $3.5 million total limit and the $2 million supplement for PO financing.
Q. And do you recall in the spring of 2007 Mr. Konersmann coming to you and saying we're going to need to access more cash and you said something along the lines of, well, what security can you give me? Do you remember any --
A. No, I don't remember the details of that.
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.
Q. How long was your discussion with Mr. Denning about the site plan funding?
A. It was probably 10, 15 minutes on the

telephone.
Q. And that would have been around March of 2007?
A. Around April, probably.
Q. Okay. So it would be after the $3.5 million credit line had been established?
A. Yes.
Q. Did Mr. Denning have any reservation about the site plan funding, that he expressed to you?
A. What he expressed to me was if we could track it and monitor it like we had the purchase orders, he would be open to looking at that.
Q. Open to looking at that?
A. Uh-huh.
Q. Does that mean, I agree with you, it's approved? Or that, send me something and I'll consider it?
A. Yeah. No. It means he would be open to looking at it.
Q. Uh-huh. So that's the only time you talked with him about it?
A. No. After that, I checked with Castlen, and talked with Castlen about the request regarding the site plan financing and if he thought

A. Yes.
Q. And there's almost six years later that you corrected it with your affidavit.
A. Yes.
Q. Might the way the bank handled this matter in January of 2008 been different if you'd been truthful?
MR. CHANDLER: Object to the form.
MS. CHERRY: Object to the form.
THE WITNESS: I don't think so. I can't speak for the bank.
BY MR. LIPTON:
Q. Well, you know Mr. Hennessy has testified that it might have been different.
MS. CHERRY: Object to the form.
BY MR. LINTON:
Q. A 180-degree difference.
MR. CHANDLER: Object to the form.
MS. CHERRY: Object to the form.
BY MR. LINTON:
Q. Were you aware of that testimony?
A. I'm aware of Mike's testimony.
Q. Uh-huh. Well, maybe I misconstrued it.
Are you aware that he testified that if he had known the truth, that he would have done a

180 degrees, his approach would have been different and it might have made a difference?
MS. CHERRY: Object to the form.
THE WITNESS: I can't speak to that because --
BY MR. LINTON:
Q. You're not familiar with that testimony?
A. No.
Q. Have you read his deposition?
A. I've read parts of it. I don't recall specifically the...
Q. Okay. I didn't recall you testifying earlier this morning that you had read his deposition.
A. I didn't read it in preparation for this deposition.
Q. What did you read it for?
A. It was -- I think when I first engaged counsel back in February, I had been provided with copies of most of the depositions that had occurred after my deposition, so I was getting copies of those.
Q. Let's mark the next exhibit, January 22nd.

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

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

Q. Okay. Maybe. And continued on in August, right?
A. Uh-huh.
Q. Mr. Denning is telling you that "we discussed our exposure to this company, particularly lending against purchase orders."
You see that?
A. Uh-huh.
Q. And he goes on to say: I do want to stress our position is not to increase our exposure against purchase orders.
You see that?
A. Uh-huh.
Q. "The company must understand that any additional needs should be funded through additional equity investment or other sources." Right?
A. Correct.
Q. Now, when you received that e-mail, you knew that the site plan funding had been released, as you call it, in July and throughout August and September, didn't you?
A. Yes.
Q. And you knew the plan was to be financing a number of them, whether it was 30 or

36, but a large number. Right?
A. A number of them, yes.
Q. Okay. And you generally were aware that that might be better than a million dollars of a loan?
A. Yes.
Q. Okay. When you got this e-mail that Mr. Denning is sort of saying, we're real leery of purchase order financing, did it occur to you, I better talk to him and say I've already authorized site plan funding, which we know is a lot more risky than the purchase order?
Did it occur to you to contact him about that?
A. No, it didn't.
Q. Okay. Did you consider the site plan funding is more risky than purchase order?
A. Only to the -- no, not really, because I thought they were going to be converting to purchase orders very quickly.
Q. Certainly got to be more risk when you don't have a purchase order?
A. Yes.
Q. Okay. Now what did you do to explain to the company that the bank wanted them to

understand it was leery about purchase order financing and if the company needed more cash, it needed to line up investors or some other lender?
Did you talk with the company about that?
A. No. I don't recall discussing with the company, at the time, the comments from the loan review.
Q. When you read Mr. Denning's deposition, do you recall him saying that he expected you to communicate that to the company?
A. No, I didn't read that part of the deposition.
Q. Why didn't you have a heart-to-heart discussion with him, that the bank might be on thin ice with purchase order financing and certainly with the site plans?
A. It didn't occur to me that -- to do that at the time.
Q. In retrospect, do you think you should have?
A. In retrospect, yes.
Q. When did you first come to that conclusion?
A. What, in the retrospect?

Q. Right. When did you first, in retrospect --
A. Now.
Q. Well, I know now, but this has been going on for six years. 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.
Q. Did you think the purchase order financing was an appropriate method of financing this start-up company?
A. At the time that the request was presented, we felt it was something we could look at, yes.
Q. Well, you approved it, so I'm assuming that you thought it was an appropriate method of financing the operation of the company.
A. Yeah. The bank approved the purchase order financing.
Q. Okay. I don't know if you have reviewed some of the testimony of the bank officials who say that the purchase money finance should -- purchase order financing was never an appropriate way to finance this company.
MS. CHERRY: Objection.
THE WITNESS: No, I haven't seen that.
BY MR. LINTON:
Q. You remember Tom Brune, president of

the bank -- the commercial division?
A. Yeah.
Q. Did you ever review the sort of memo that he wrote about lessons to be learned?
A. I reviewed that.
Q. Years ago?
A. Years ago.
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.
Q. Do you have a memo dated September 20th in front of you?
A. No.
Q. Okay.
(PLF. EXH. 9, 9/20/2007 Edahl to Walt Denning letter, BB&T/FC-000523 through 000524, was marked for identification.)
BY MR. LINTON:
Q. Exhibit 9 is a response from you to Mr. Denning's memo of September 7th. Is that correct?
A. I don't know if it's a response to his

memo or not. I'm not sure what memo you're referring to from Walt.
Q. One -- the previous memo, it was dated September 7th from him to you?
A. No, it's not a response to that.
Q. It's not?
A. Huh-uh.
Q. Did you respond to the memo of September 7th?
A. Not that I recall.
Q. Okay. Down in the last paragraph on the first page, you tell Mr. Denning: 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.
Do you see that?
A. Uh-huh.
Q. And the goal you're referring to is to convert from factoring and purchase order site plan financing to asset-based lending. Is that right?
A. Correct.
Q. And did you discuss with SkyWaves, in the fall of 2007, that you thought converting to asset-based lending would be likely moving forward?

A. I don't recall, specifically.
Q. Do you recall discussing asset-based lending?
A. Yes.
Q. Would you consider that asset-based learning is a bump up from factoring?
A. Yes.
Q. Okay. Did you discuss with them, in the fall, the possibility of having an initial public offer?
A. No, not that I recall.
Q. Do you remember, in December of 2007, SkyWaves had presented a -- a plan for growth for the future?
A. That's possible. I don't remember that, specifically.
Q. A business plan?
You remember that plan contemplated that there could be three factories with three sites?
A. That sounds familiar.
Q. Okay. And do you remember suggesting to them to get that plan together so that when the General Dynamics orders started coming in you would be in a position to take it to the capital market

about the future of SkyWaves?
A. Not that I recall.
Q. I mean, you knew he was either going to borrow money or invest additional money, six figures?
A. That's what he told me.
Q. Right. Did he ask you anything about, well, Jim, before I commit to additional funding, I want to make sure that the relationship with the bank is solid, I understand you may not be increasing your lines?
Was there any discussion like that?
A. Not that I recall.
Q. Okay. Towards the end of 2007, and this probably would have been in connection with the business plan that you've testified to, you remembered was a three manufacturing plant facility plan. Do you remember that?
A. Uh-huh.
Q. Do you remember comparing the 2006 and 2007 balance sheets at that time --
A. No.
Q. -- and saying, well, based on the equity investment and subordination debt that y'all have brought in in 2007, you're just as well off

now, or better, than you were in 2006?
A. I don't recall that conversation, no.
Q. Do you recall studying the balance sheets towards the end of 2007?
A. I don't. I know when financial statements came in, we would certainly study them, but I don't remember specifically what sheets I was looking at in 2007, if any.
Q. Uh-huh.
A. Because financial reporting had been delayed at that point as well.
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.
Q. Prior to that date, was it your expectation that the $3.5 million credit line that expired at the end of March would be renewed?
A. I hadn't thought about renewal yet.
Q. Did you have any reason to think that it would not be renewed as of January 16th, 2008?
A. Again, I didn't think about it. Renewal wasn't on my mind at that point in time.

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 you would 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.
Q. I have asked you about Mr. Denning's memo to you of September 7, 2007 in which he asked you to make sure the bank -- excuse me -- SkyWaves understood the bank's position.
Do you recall that memo?
A. I don't think I saw that.
Is this the one you're talking about (indicating)?
Q. Yes. In this memo, which is Exhibit 8, Mr. Denning says: The company continues to improve but has not reached profitability based on the most recent year-to-date numbers. 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.
That is September 7th.
A. Uh-huh.
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.
Q. And why was that?
A. I mean, I literally -- just because I -- I could have -- certainly, without going back and looking at my notes, I -- I don't recall if I had specific conversations about that with...
Q. So it wasn't that you were intentionally not going to follow his --
A. Right. I just don't recall when the discussion occurred.
Q. Excuse me.
Did you consider that a directive for you to affirmatively sit down with SkyWaves and explain exactly what the bank's concerns were?

9

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

SKYWAVES I CORPORATION,
Plaintiff,
vs. CASE NO. 2009-CP-10-7516
BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL,
Defendants.

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

LOCATION: Law Offices of
Nexsen Pruet, LLC
205 King Street, Suite 400
Charleston, SC
TAKEN BY: Counsel for the Defendants
REPORTED BY: TERRI L. BRUSSEAU, RPR,
CERTIFIED REALTIME REPORTER

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ALSO PRESENT
James J. Edahl
Mike Hennessy
John Voytko

(INDEX AT REAR OF TRANSCRIPT)

STIPULATION

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

* * * * * * * * * * *

RONALD D. KONERSMANN

being first duly sworn, testified as follows:

EXAMINATION

BY MS. CHERRY:

Q. Good morning, Mr. Konersmann.

A. Morning.

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

A. Yes, I do.

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

A. Yes.

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

A. Yes.

Q. Can you tell me approximately how many times?

A. Approximately -- probably two.

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

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

Q. Okay. What was the lawsuit about?

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

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

A. Fibrebond Corporation.

Q. Okay. And who was the defendant?

A. Well, the company and I was.

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

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

Q. And so Kontek was your employer?

A. Well, yes. I was the majority

Q. What's his first name?
A. John.
Q. Okay. And then how about Patricia Real, does she have any family in Charleston County?
A. No.
Q. Where do you live?
A. We live in 1122 Snapdragon Court, Mount Pleasant.
Q. And how long have you lived there?
A. About two weeks.
Q. Okay. Did you live in Charleston County prior to that?
A. We lived -- well, yes, we lived at -- up in Brickyard. I think that's Charleston County.
Q. How long did you live there?
A. Two and a half, three years.
Q. When did you move to Charleston?
A. Moved to Charleston in about 2000, 2001.
Q. And where did you live before that?
A. Daniel Island.
Q. How long did you live on Daniel Island?
A. From -- well, from -- you know, let's see. Well, when we moved here, we moved to Daniel

Island and then we left there in I think '09.
Q. Where were you before you first moved to South Carolina?
A. We were in Falcon Ridge in Great Falls, Virginia. Been awhile.
Q. Are you currently an owner of any business?
A. No.
Q. Other than perhaps through a mutual fund, an investment portfolio, are you currently an investor in any business?
A. No.
Q. Other than SkyWaves, have you ever had an ownership interest in any other business?
A. Ever?
Q. Yes.
A. Yes.
Q. Okay. Tell me what businesses you've had ownership interest in.
A. Kontek, Fibrebond, SkyWaves, of course. I think that's all.
Q. Are you currently employed?
A. I am not.
Q. Since SkyWaves' bankruptcy filing have you been employed anywhere?

A. No.
Q. Are you currently serving as a consultant?
A. I'm working in trying to develop a business but it is prefunding.
Q. What business are you trying to develop?
A. Football Ventures.
Q. What is Football Ventures?
A. It is in the soccer investment business, a developer of apps for soccer, and we'll implement schools for grassroots training.
Q. You said you're trying to develop this business. Tell me what that means.
A. Pre -- prefunding, simple as that.
Q. Well, I'm not sure I understand what prefunding means.
A. Well, it's not funded. Developmental.
Q. So does -- do your efforts at trying to develop that business include obtaining funding or trying to obtain funding?
A. Yes.
Q. Okay. Have you engaged in any efforts to try to obtain funding for this business?
A. I'm more into advisor.

Q. So is anyone trying to obtain funding for Football Ventures?
A. Yes.
Q. Who is that?
A. Michael Smith.
Q. Who is he?
A. He lives here in Plantation Point, I guess. Planters Pointe. Planters Pointe, yeah. I mean, he's been involved in soccer for 15 years or so.
Q. How did you come to try to develop the soccer investment business?
A. Michael has been involved in that for -- heavily for about four years and since I wasn't working, you know, I could -- I could help him with his presentations and that sort of thing. When we get funded, you know, I'll be the chairman of the board and basically work on the board side of it.
Q. What type of entity -- well, is Football Ventures an entity?
A. Yes, it is.
Q. What type of entity?
A. It's a corporation.
Q. When was it formed?

A. Probably two years ago. I'm not sure.
Q. Okay. Who are the owners of Football Ventures?
A. Basically it's the -- it's a family trust for Michael Smith.
Q. Do you have any ownership interest in Football Ventures?
A. Not yet.
Q. Since SkyWaves' bankruptcy filing, have you had any source of income?
A. No. You mean outside source? I'm sorry.
Q. Well, we'll start with that, outside source.
A. No.
Q. Have you had any outside source?
A. No.
Q. Have you had any inside source of income?
A. Savings, selling assets and borrowing money from my kids.
Q. What assets have you sold?
A. We sold our house, we've sold our belongings, our furniture, we've -- we have a double-wide trailer in Mississippi that we're in

the process of selling and we have 30 acres up in North Carolina that's for sale.
Q. Anything else?
A. Not that I can think of right now.
Q. Do you still have any ownership interest in Kontek?
A. No.
Q. How about in Fibrebond?
A. No.
Q. You mentioned that you would become the chairman of the board for Football Ventures.
A. Um-hum.
Q. So do you envision having a Board of Directors for Football Ventures?
A. Yes.
Q. Okay. Do you know what the responsibilities are for directors?
A. Yes.
Q. What are they?
A. Well, it's to control the -- to make sure that the company is in compliance with its charter, with its -- you know, the strategic business plan, to make sure that, you know, if it's -- if it's -- all the paperwork for running it as a corporation is met, to make decisions about

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

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

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

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

A. No.

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

A. No.

Q. Why did you leave Owens-Illinois?

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

Q. Who was the friend in town?

A. Claude Walker.

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

A. Yes.

Q. And what type of entity was Fibrebond?

A. Corporation.

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

A. He and I.

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

A. Um-hum.

Q. Did Mr. Walker have a role?

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

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

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

Q. What were your responsibilities as president?

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

a manufacturing guy so he also ran the factory.

Q. And is Fibrebond still in business?

A. Yes, they are.

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

A. Yes.

Q. Why did you leave Fibrebond?

A. I was fired.

Q. By whom?

A. By Claude.

Q. Why?

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

Q. What expenditures were you against?

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

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

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

A. Um-hum.

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

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

Q. Did you invest in Fibrebond?

A. Yes.

Q. How did you invest in Fibrebond?

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

Q Were you issued shares in return for

your start-up money?
A. Yes.
Q. How many shares -- well, what percentage interest did you have in --
A. I think it was between 40 and 50 percent. I'm not sure.
Q. So did Mr. Walker have the majority ownership in the entity?
A. Yes, he did.
Q. And when Mr. Walker terminated your employment, did he buy out your shares?
A. Yes, he did.
Q. Did Fibrebond have a CFO?
A. Yes.
Q. Do you remember who that was?
A. I can't.
Q. And you said you wanted to reduce the debt. Why did you want to reduce the debt?
A. Well, in a start-up mode you're -- you know, you're growing so you have, you know, a continuous need for cash and return profitable. I wanted to reduce the debt to reduce our costs, improve the balance sheet.
Q. I know you said in terms of the responsibilities of a CEO depends on the business

but are there general responsibilities for a CEO of any business?
A. I'm sure there are.
Q. Do you know what they are?
A. No.
Q. Did you have an employment agreement with Fibrebond?
A. Yes.
Q. Did you have a restrictive -- did you have a covenant not to compete with Fibrebond?
A. I think so, yes. I think so.
Q Did you have a confidentiality agreement?
A. Right.
Q. Or nondisclosure agreement with Fibrebond?
A. I did have that.
Q. Do you recall whether those agreements, the covenant not to compete and nondisclosure, whether those were at issue in the lawsuit that you mentioned?
A. Yes.
Q. They were?
A. I think so.
Q. And then you mentioned Kontek

Industries earlier. Tell me what Kontek is.
A. Well, after I left Fibrebond, I -- we moved to the Bootheel, Missouri, New Madrid, Missouri and started a shelter company there.
Q. And why did you move to -- why that area?
A. Central to the United States.
Q. And you said we started a shelter corporation. Who is we?
A. We is my wife and I.
Q. It looks like that was in '86 so was that your first wife?
A. Yes.
Q. And I say '86, I'm sorry, I was looking at Exhibit I.
A. Right.
Q. So were you and your wife the owners of Kontek?
A. Yes.
Q. What type of entity was Kontek?
A. It was a corporation.
Q. Were there any other owners in Kontek?
A. There were but I don't remember who was involved.
Q. Did you serve on its Board of

Directors?
A. I don't know if we had a Board of Directors as such.
Q. What did you do for Kontek?
A. Ran the company.
Q. But was your wife employed by Kontek?
A. No.
Q. What did running the company entail?
A. Running the company was going out and getting the order and coming back and producing the order and shipping the order and going out and getting some more orders.
Q. Did Kontek have a CFO?
A. Yes.
Q. Do you remember who that was?
A. I don't.
Q. Is Kontek still in existence?
A. I don't know.
Q. Why did you leave Kontek?
A. Because -- well, the lawsuit was an issue from a financial standpoint with Fibrebond.
Q. Okay.
A. And so I was able to sell the company and basically what they did was they came in and supported it and then I left.

Q. Okay. Who did you sell the company to?
A. A group out of -- investment group out of Cleveland, Ohio.
Q. Do you have copies of those closing documents pertaining to the sale?
A. No.
Q. Do you recall any of the terms of the sale?
A. No.
Q. Do you remember the name of the investment group out of Cleveland, Ohio?
A. I don't.
Q. And it looks like after that you went to Andrew Corporation, is that correct?
A. Yes.
Q. Tell me what Andrew Corporation is.
A. They were in the wireless products business selling wireless products to the wireless industry.
Q. What did you do for them? I know it's got your title there but tell me what you did.
A. They were -- they had been in the business of selling shelters for a long time but their effort, they weren't a large player in the market so I was hired to come in and evaluate the

shelter business and the tower business. Evaluate and run it, basically.
Q. Did you own any stock in Andrew Corporation?
A. Yes.
Q. Do you still?
A. No.
Q. How did you come to own that stock, was it through an employee stock ownership?
A. The same, right.
Q. Were you ever a board member of Andrew Corporation?
A. No.
Q. Why did you leave Andrew Corporation?
A. The board basically -- what was happening is that the board was making a decision that all products -- they built a lot of products. They were a -- they were a manufacturer of several product lines but 70 percent of what they did they purchased and over time they were purchasing more and more of these products in either Mexico or China and the board made a decision that all products would be -- that they did not manufacture themselves would go to China or to Mexico and if you couldn't have a manufactured or supplied, then

they would be dropped. So I knew that, you know, concrete shelters weren't going to come out of China.
Q. Okay.
A. So they got -- they got out of business.
Q. So does Andrew Corporation currently -- is Andrew Corporation currently in the concrete shelter business?
A. I don't know.
Q. Did you have any restrictive covenants with Andrew Corporation, like a noncompete or nondisclosure?
A. I don't remember.
Q. How did -- well, it looks like you next went to GlobalNet, Incorporated. What is GlobalNet?
A. GlobalNet is a wireless company that basically the business I've been in is mobile wireless and this is fixed wireless, meaning you have a site and you plug a phone into your house and you can pick up a wireline phone but it has -- you know, it's not wired, it's wireless, but it's not mobile.
Q. How did you come to work at GlobalNet?

A. They had a nationwide search, headhunter, looking for somebody to run the company and I -- I got it that way.
Q. But you didn't start that company?
A. No.
Q. Did you own stock in that company?
A. An investment group owned it and I don't think there was stock involved but I don't remember, to be honest with you.
Q. Okay. Why did you leave GlobalNet?
A. I resigned from GlobalNet. The investment company had a series of a couple dozen companies, most of which were not profitable, and they were using some of the cash flow as fees that was concerning to me because those fees were then used to prop up some of the other companies so I got uncomfortable with that.
Q. Why were you uncomfortable with that? I'm not sure I'm following you.
A. Well, moving money around between companies and, you know, I didn't think that was ethical.
Q. Why not?
A. Well, GlobalNet was restricted in what it could do if it was being drained, the cash it

had. What's the point?
Q. What do you mean when you say, what's the point?
A. Well, if you can't -- if you're trying to run a company and your cash is being pulled out, what's the point of -- what are you going to -- you know, how are you going to proceed as a company and how are you going to -- you know, to take advantage of the market, you know, if you're restricted in the cash that you could use.
Q. And they were restricted in the cash because the fees were being used to prop up other companies?
A. Right. And the fees were go -- were getting bigger. They called them fees but I didn't think they were fees. Fees are for services rendered. They were just moving it around.
Q. I wanted to ask, there wasn't on this resume but I thought I saw on LinkedIn that you were with a company called localsports.com?
A. Yes.
Q. Tell me what that -- what I saw was '99 to '01. Are those dates correct?
A. Yeah, about that.
Q. Okay. And what is localsports.com?

A. That was going to be an Internet company and I was again assisting Mike, Michael Smith, to put together a sports Internet company during that time.
Q. Okay. Now, is that company still in existence?
A. It's in existence but I think it's a shell.
Q. Okay. What kind of entity was that?
A. I think it was an LLC.
Q. Were you employed by localsports.com?
A. I was advising them.
Q. Were you paid any consulting fee or advising fee?
A. I might have but it wasn't significant. I actually -- the part that's missing too is that for a year or so after GlobalNet I was working with a company, Gateway Partners out of San Diego, to consolidate the wireless business. And when that effort stopped, I made the decision to come to Charleston to develop a different kind of structure and open a shelter business. And while I was doing that, I was also assisting with Michael for the sports -- the local sports company.
Q. Now, Gateway Partners, you said when

that effort stopped.
A. Right.
Q. Why did that effort stop?
A. Well, they had just been involved with taking a -- consolidating the wireline business. The wireline business was decreasing in scope and they pulled together a consolidation of the industry and doing that they were doing the market research and they were -- they were noticing that, you know, the wireline business was huge but the wireless business was more profitable and growing so.
When they finished the wireline business piece of it, they found me and wanted my help in looking at consolidating the wireless business and that -- I think I worked with that for about a year. They -- they quite frankly got the -- putting the wireline business together was more complex than they had thought so they put it on hold in the effort to go -- to do the same in the wireless business.
Q. So what impact did that have on your role?
A. Well, I couldn't wait on them to put that together, you know, if they weren't going to

get it done so that's when I decided to get back into the shelter business myself.
Q. Well, when you say you couldn't wait on them, were you --
A. I wasn't waiting on them.
Q. Okay. So when you left GlobalNet --
A. Um-hum.
Q. -- and before you started SkyWaves --
A. Um-hum.
Q. -- was there a period of time when you were not employed? I'm looking from a timeline.
A. Well, I'm looking at -- yeah, 2002. That would probably -- that's off a little bit.
Q. So for that time period when you were the -- you said I think about a year with the Gateway Partners?
A. About -- yeah, about a year, um-hum.
Q. Okay. Were you employed anywhere during that time period?
A. No.
Q. Did you have a source of income during that time period?
A. No.
Q. Any other companies other than Fibrebond and Kontek and SkyWaves that you've

financials and that sort of thing.
Q. Okay.
A. But basically the plan was my plan.
Q. Okay. And I guess that -- so the -- and I understand you said the 50,000 foot view.
A. Um-hum.
Q. And that was more my question. So if there were amendments, I'm not talking about the physical preparing the slide or --
A. Got you.
Q. But conceptually the amendments to the plan, would those come from you?
A. Well, I would, of course, talk to -- you know, I had a management team throughout my, you know -- throughout all of this history and so certainly, you know, we would -- we would talk about it as a management team but as far as setting the direction and scope of what we were trying to do, those were my decisions.
Q. Were those your responsibilities?
A. Um-hum.
Q. You've mentioned a management team. Who was on the -- not necessarily names, but positions. Who was on the management team?
A. At?

Q. At SkyWaves.
A. At SkyWaves? Myself, John Voytko, Jim Phillips, Jeff Ward. That's probably it.
Q. As I understand it, Mr. Voytko was the CFO?
A. Yes.
Q. Was he the CFO the entire time of SkyWaves' operation?
A. No, he was not.
Q. Was there ever another CFO?
A. No, not a CFO.
Q. Okay. When did Mr. Voytko come on board?
A. I don't remember exactly. I think it was late '04 but I could be wrong, when we started doing business.
Q. And what about Mr. Phillips, what was his role?
A. He was first a sales manager responsible for sales and then at some point he was president.
Q. And how about Jeff Ward?
A. He was vice-president of technology of engineering.
MS. CHERRY: I'm going to ask you a

little more about the formation of SkyWaves but why don't we take a little break before we get into that. I think this may be a good stopping point.
THE WITNESS: Yeah, sure.
(A recess transpired.)
BY MS. CHERRY:
Q. Mr. Konersmann, I wanted to ask you -- tell me what SkyWaves Corporation is or was.
A. SkyWaves Corporation was in the business of selling telecommunication huts to the wireless industry with shelters and providing all the electrical, mechanical services to be able to send out a plug-and-play unit to a site that had all the radios and technology in and tested.
Q. When was the company formed?
A. The company was formed around 2001, 2002.
(DFT. EXH. 2, First Amendment To Operating Agreement Of SkyWaves, LLC, with attached Exhibit A, was marked for identification.)
BY MS. CHERRY:
Q. I'm going to hand you what we've marked as Exhibit Number 2, Mr. Konersmann, and ask you -- these are some documents that have been produced by SkyWaves in the lawsuit and so I wanted to ask you

about some of them.
A. Okay.
Q. Tell me what this Exhibit 2 is.
A. This looks like the first document where SkyWaves was an LLC initially out of Virginia.
Q. Okay. And based on this, it looks like as of October 15th of 2001 you and Patricia Konersmann were the members in this LLC, is that correct?
A. Yes.
Q. And does this Exhibit A accurately reflect the membership units that each of you held on the second page of this document?
A. Oh, okay. Yes.
Q. How did you come to hold 2,550,000 membership units in SkyWaves, LLC? Did you purchase them?
A. Yes.
Q. Okay. How much did you pay for them?
A. I don't remember.
Q. How about Patricia Konersmann, do you know whether she purchased her membership units?
A. I don't know. I don't remember.
Q. And this document says that it's a

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

you recognize this document.
A. Yes.
Q. What is this document?
A. This I assume is to add Jim Phillips on this as a stockholder.
Q. If we look at Exhibit A, that looks to be the case, Mr. Phillips has been added?
A. Yes.
Q. Tell me -- and I know you told me that Mr. Phillips was a sales manager and then president of SkyWaves.
A. Right.
Q. At this point in time, in April of 2002, was Mr. Phillips employed by SkyWaves?
A. I think that was part of his employment, was the stock.
Q. Did Mr. Phillips pay any money for these membership units?
A. I don't believe so.
Q. How was it determined the amount of membership units Mr. Phillips would get?
A. It was based on what his experience, background was worth to the company to bring him in, entice him to come to SkyWaves.
Q. Did you know Mr. Phillips?

A. Yes.
Q. How did you know Mr. Phillips?
A. Jim was -- had worked for Andrew Corporation. I think that's -- that's the first time I met him.
Q. Had you worked with -- did you work with him at Andrew Corporation?
A. Let me see here. Yeah, Andrew Corporation. Yes, he was a salesman.
Q. But did you work with him? I mean, other than just knowing him from --
A. Well, no -- yeah, I worked with him, he was in shelters.
Q. And was he still with Andrew Corporation when he came to SkyWaves?
A. I believe he was.
Q. Okay.
A. But I'm not sure. I believe he was.
Q. And who did the calculation in terms of or who made the determination that 300 membership units were what would be given to Mr. Phillips?
A. Well, I made a determination but then I reviewed it with the other stockholders to get them to accept it.
Q. Was there a meeting to discuss that, do

you know?
A. I don't know, don't remember.
Q. Do you know if there were any minutes -- were there regular meetings of the members in SkyWaves, LLC?
A. Not regular members, no. Not regular meetings.
Q. Were there any regular meetings for the members of SkyWaves, LLC?
A. Yes.
Q. Were there minutes taken of those meetings?
A. Not formal minutes probably.
Q. How about informal?
A. Well, I mean, there might be some notes and things like that, e-mail back and forth but...
Q. Where would those be kept?
A. I mean, this again was very early on so, you know, I don't -- I don't know if they're in our files or not.
Q. And when you say our files, you mean --
A. My files, the stuff that I have.
Q. Okay.
(DFT. EXH. 5, Fourth Amendment To Operating Agreement Of SkyWaves, LLC, with attached

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

Q. At the time SkyWaves filed bankruptcy, how many shares in the company did you own?
A. Percentage-wise it was around 44 percent.
Q. Do you know how many numbers of shares that represented?
A. Not offhand.
(DFT. EXH. 26, SkyWaves Corporation Debt Schedule March 2005, was marked for identification.)
BY MS. CHERRY:
Q. Mr. Konersmann, I'm going to hand you what we've marked as Exhibit 26 and this is titled a debt schedule for SkyWaves as of March 2005. Do you know who prepared this document?
A. I assume it's John Voytko.
Q. I was going to ask you, would he likely have been the person who had prepared that?
A. Likely, yeah.
Q. Okay.
(DFT. EXH. 27, SkyWaves I Corporation Stock Ledger, was marked for identification.)
BY MS. CHERRY:
Q. I hand you what we've marked as Exhibit 27, Mr. Konersmann, and this is a stock ledger for

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

Q. Okay. Do you remember when that was?
A. In the -- no, I don't. '06, '07.
Q. Okay. So other than that time period when Jim Phillips was president, have you been the president of SkyWaves?
A. Yes.
Q. I just want -- there was no other president of SkyWaves?
A. No. Well, let me just clarify that. There was a fellow that we were hiring when the company closed and so we didn't really have an opportunity to put him as president but he was going to be the next one.
Q. And who was that?
A. I can't remember his name, quite frankly.
Q. I think I might have something with his name on it.
A. Yeah. Jim seems familiar to me but I'm not sure.
Q. What was your responsibilities as CEO of SkyWaves?
A. To run the company.
Q. So would you agree with me as CEO you had overall responsibility for the company?

Q. Do you recall whether you got any other resumes or inquiries about the CFO position?
A. I think we had some.
Q. Do you recall who any of those candidates may have been?
A. They were more like accountants, local people working in accounting departments, that sort of thing. I think John was -- you know, by far had more credentials, you know, than the other people we were looking at.
Q. And when you say more credentials, what do you mean?
A. Well, his experience as CFO in the past working for a telecommunication company in the past.
Q. Do you remember who the telecommunications company was?
A. No. Out of Charlotte.
(DFT. EXH. 30, Factoring And Security Agreement, was marked for identification.)
BY MS. CHERRY:
Q. I hand you what we've marked as Exhibit number 30, Mr. Konersmann, and ask you if you recognize this document.
A. Yes.

Q. And is that your signature on the last page?
A. Yes, it is.
Q. As CEO of SkyWaves?
A. Yes.
Q. And tell me what this document is.
A. It's our agreement for factoring and security for the terms and conditions it listed to factor our invoices.
Q. Prior to this March 22nd, '05 agreement with BB&T Factors Corporation, had you on behalf of the company or entity ever entered into a factoring agreement before?
A. Yes.
Q. Okay. Tell me when. The context.
A. Fibrebond and I believe Kontek.
Q. And do you recall what entities -- what financial institution Fibrebond had a factoring agreement with?
A. No. I don't remember.
Q. Do you recall what financial institution Kontek had a factoring agreement with?
A. I'm pretty sure we had a factoring agreement at Kontek and that would have been the bank of New Madrid.

Q. I'm sorry, the bank of?
A. New Madrid, M-A-D-R-I-D.
Q. I had it in my head as Madrid.
A. We had a sale a couple weeks ago and this woman was walking out with a picture of New Madrid and we stopped her and said, do you know somebody in Bootheel, Missouri? And she said, absolutely not, but I've got a daughter in Italy. She gave it back. Can't make that up.
Q. Truth is stranger than fiction.
A. No kidding.
Q. So with the factoring agreement that Fibrebond had, do you recall whether you were the signatory on that agreement?
A. I would have been, yes.
Q. So as you said, you likely would have been the signatory on the factoring agreement?
A. Um-hum.
Q. And then how about for Kontek?
A. I'm pretty sure we had a factoring agreement but I'm not totally sure about that one but we had a factoring agreement with Fibrebond.
Q. Okay. So tell me what your understanding of a factoring agreement is. I'm not asking specifics about this document.

A. When we have an invoice to our customer, we presented the invoice to the bank and then they would give us a certain percentage of that face value at that time.
Q. Under a factoring agreement then if you give the invoice from the customer to the bank and they give a percentage of the face value?
A. Right.
Q. Does the bank at some point get paid back?
A. Yes.
Q. Okay. How is the bank paid?
A. Well, the -- the agreement we had that -- get into the agreement, we would have an invoice and we would -- we would take it to the bank and then they would loan against it and then we had a customer due date and then we had 60 days, within 60 days of the customer due date to pay the bank back.
Q. Now, is that your general understanding of a factoring agreement? I'm going to ask you some specifics about what I've marked as --
A. Well, that's what we had at BB&T, that's the way it worked. And the reason for that is that this is a construction company and so you

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

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

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

Q. How about the factoring agreement at Kontek?

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

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

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

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Q. Okay.

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

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

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

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

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you're not being able to control.

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

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

A. Yes.

Q. Is that agreement reflected anywhere in writing?

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

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

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

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

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

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

described to me?
A. Well, we talked about the problem of the -- of the bank calling on these key customers when their due dates hit. Normally their due dates, after that it would be -- it would be in arrears or it would be due, payable. So we wanted to avoid, you know, that so we got 60 days that way.
The other issue we talked about early on, it was continuing through the process, was the idea that, you know, the customer would send the checks to the bank direct because these companies had a policy that if -- because they're so large again because if you have -- if they have a contractor like us or anybody else who provided a product, no matter what the circumstances were, they would only pay back to that -- to that contractor.
In other words, if somebody else said we had claim to that, you know, we want you to send the check to us, they never would do that for their legal purposes, they always sent it to wherever they ordered the product from. So those were issues we had about how do we make this factoring line work for our company. And it worked for our

company, you know.
Q. Who else at SkyWaves -- let's say you fell ill and were unable to communicate, who else at SkyWaves knew the terms of the factoring agreement as you've just described them to me?
A. John Voytko.
Q. Anybody else at SkyWaves other than you and John Voytko?
A. That's probably it.
Q. Okay. And was your and John Voytko's understanding of the factoring agreement as you've just described it to me in writing anywhere either by the two of you, I mean documented anywhere, was there anything documenting this?
A. There might be but, you know, it was a process, you know, it wasn't -- you know, we looked at how can we work together to make this effective for our company and we would talk about a lot of things. And then Jim would say, okay, let me take this back to the bank and we'll look at it and then I'll call you or whatever, a couple days later he'd say, okay, Ron, we're going to do this.
So we were operating under the system of BB&T Bank is you have one representative, you don't go anywhere else, it's effective cost-wise

and it's effective to support our company, which I totally believe in and believed in. So as we worked through these different corporations and different -- different corporations being different customers, we would sit down with Jim and go over each one of them and tell him, you know, what their requirements were and how could we fit that in and then he would say, well, in this situation, you know, we'll do this, that and the other. So we were really working through our customer base and new customers and, you know, working with Jim to make sure that we qualified for the factoring piece of this thing.
Q. So --
A. I mean, there may be, like I say, some documentation of e-mails, something like that, but I don't think there was a -- you know, an agreement per se.
Q. Okay. So let me ask you this. So you've said that you would sit down with Mr. Edahl when there was a customer to address the customer needs or issues.
A. Um-hum.
Q. So how would that work? Who were the customers of SkyWaves?

A. AT&T.
Q. Okay.
A. Verizon, General Dynamics. In the past there was another half a dozen, you know, similar type companies, Nextel, Sprint, et cetera. And so they all had different terms and conditions and they had different situations.
Q. Okay. Well, so let's -- let me start with AT&T. Tell me what the process was for the factoring agreement as you've described it to me for AT&T.
A. Well, the way it worked was pretty much the same for all of them, that is, we have 30, 60, 90-day terms with various of these accounts. So the one -- the one defining point was when was the -- when was the invoice due. So the customer due date was the date for AT&T. It might be a 30-day term situation, Nextel might be a 60-day term but the due date was when it met the terms and conditions of the invoice, of the customer invoice, whether we were given 30, 60, 90 days. So it was when it was due based on the terms of that account.
Q. Okay. So let's -- just walk me through this. Let's just assume AT&T's terms were 30 days.
A. Okay.

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

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

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

A. Right.

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

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

Q. What if you didn't pay them?

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

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

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

Q Yeah. I'm asking you.

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

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

A. No, that was basically the agreement.

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

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

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

A. Um-hum.

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

A. Right.

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

A. Right.

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

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

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

Q. And I'm curious about that.

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

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

A. Yes.

Q. And so when you say you don't know why, do you mean you don't understand --

A. I don't understand.

Q. -- the reasons that BB&T gave?

A. Right.
Q. I understand that the contract may designate SkyWaves as the supplier.
A. Right.
Q. What I'm trying to understand is when SkyWaves actually gets a purchase order --
A. Right.
Q. -- that SkyWaves knows there is a product to be built?
A. Yes.
Q. So it's the purchase order as I understand it that triggers SkyWaves to begin constructing something?
A. Absolutely, yes.
Q. Okay. When the purchase order comes in, does SkyWaves get any money from General Dynamics to use them specifically?
A. No.
Q. Okay. At what point does SkyWaves actually get money from its customers, from General Dynamics?
A. After we invoiced, we get the invoice. When the invoice is paid.
Q. Let's look at Exhibit 30, Mr. Konersmann, and I wanted to ask you about

Paragraph 3. I believe you told me that BB&T owned SkyWaves' accounts receivable that had been factored and I want to ask you, if you look at Paragraph 3, that indicates that BB&T in fact is purchasing those accounts in the factoring agreement. Did you understand that that was what was occurring?
A. Yes.
Q. And if you look, Mr. Konersmann, at Paragraph 10 of this agreement where it says invoicing and assignment, do you see that?
A. Um-hum.
Q. And it indicates client, which I understand is SkyWaves, shall provide BB&T with a manually signed assignment for each account purchased by BB&T. Did SkyWaves do that?
A. I'm not sure I understand what that means.
Q. Who would have handled the financial aspects of the factoring agreement, would that have been Mr. Voytko?
A. When you say assignment, manually assigned assignment, what does that mean?
Q. Well, Mr. Konersmann, what I'm trying to understand is who on behalf of SkyWaves would

know what SkyWaves' obligations were under Paragraph 10 and whether they were complied with?
A. I'm not sure what this says.
Q. Okay. Let me ask it another way. Who was responsible at SkyWaves for invoicing to SkyWaves' customers?
A. John Voytko.
Q. Okay. Was there anybody else at SkyWaves who was responsible for invoicing of customers?
A. No.
Q. Who was the primary person at SkyWaves in terms of the details of the factoring agreement?
A. John Voytko.
Q. Okay. Let me ask you to look at Paragraph Number 8, Mr. Konersmann. It's titled remittances.
A. Yes.
Q. Do you see that?
A. Um-hum.
Q. Take a minute and read Paragraph 8 and I want to ask you if you understand what that means.
A. Okay.
Q. Do you understand what Paragraph 8

means?
A. Yes.
Q. Tell me what you understand Paragraph 8 to mean.
A. What this says is that the trustee is -- or the client is a trustee for the bank's benefit and shall hold the remittance as property of BB&T, meaning the money, but without commingling with other monies, I would assume, any such remittance, property client -- property of client, shall immediately turn over to BB&T the identical check, money, notes, money orders, drafts acceptance or other forms of remittance received. I am very familiar with Number 8.
Q. Okay.
A. Because when we were going to sign this, I said, we can't sign this, this won't work for our company.
Q. Okay. And who did you say that to, Mr. Konersmann?
A. Jim Edahl.
Q. And as I understand it, you said that to Jim Edahl before you signed this agreement?
A. Yes. We talked about it before I signed it.

And where he -- we agree -- or where I explained what I needed, he would say, Ron, let me go back and talk, get approval and come back. And I truly believe that Jim Edahl did nothing on his own, he was a good manager and he managed through this and we came up with this system that later became alive and well but it -- it does not -- like I say, that one there I remembered because you can't do business with these big companies with Number 8. We wouldn't have -- we couldn't have gone forward with this agreement.

Q. Anything else that you remember in Exhibit 30 that was amended or modified?

A. I probably have to go through this.

Q. Sure. Take your time. Let's take a break. Take your time and review that.

A. Yeah, you guys take a break and let me read this thing.

MS. CHERRY: Sure.

(A recess transpired.)

BY MS. CHERRY:

Q. Have you had an opportunity to look through Exhibit 30?

A. Yes, I have. I looked through it. I'm not a lawyer but, you know, a lot of it is

protecting the bank, which is fine, you know, it's their money and we're borrowing it so if anything happens, they should be the person to try to, you know, get all of their money back.

You know, one of my personal pet peeves in running these businesses in the past through good times and bad is that everybody gets paid, mostly the vendor side so, I mean, I have no problem with that. Like I said, I remember that only because it's so not -- it could not possibly be implemented with this company, it just doesn't work for these lawyers, telecommunication companies.

And the only other thing I'd say about is given this is a lot of protection to the bank but, you know, it says here in default, and I really don't need to get into all this but in the event default shall be deemed to have occurred under this agreement at BB&T, shall be entitled to take such action as is elsewhere provided herein if any one or more of the following events and conditions exist.

All I can say about that is we were -- we paid all our bills, we paid all the interest, we were in good standing to BB&T when the decision was

made for the company to succeed -- secede or to be shut down I'll say. I personally don't believe that the local bankers were aware of that, they -- they thought that we were going to be in a situation where that the bank may raise the terms and conditions, which I didn't have a big problem with.

And the letter of default talking about the four buildings being 45 days, you know, past the due date would not be under my -- the agreement I had with BB&T would not be a reason for a default so this document does protect the bank. I accept that and the rate was unworkable and I personally don't understand, you know, why the company all of a sudden became in default. I just don't get it. But that's for me and I'm sure all this will work out in the future but I just wanted to give you that feedback.

Q. Okay. And you were -- when you were talking about events of default, you were referring to Paragraph 12 --

A. Yes.

Q. -- is that correct? Okay. You made a comment, Mr. Konersmann, that you're not a lawyer. Did SkyWaves have counsel when it entered into this

factoring agreement?

A. You know, I just can't remember if we had a lawyer with us. I just -- I really can't remember.

Q. Did SkyWaves have any outside counsel that it used regularly or more often than someone else?

A. Mostly Holland & Knight for corporate papers and that sort of thing.

Q. I know, Mr. Konersmann, you focused on Paragraph 8 --

A. Yes.

Q. -- of the factoring agreement. Is there any reason when you signed this agreement that you didn't strike through that paragraph?

A. I wanted to and Jim told me this was a standard bank document, could not have been modified and that we would -- a strategy, we would have a formula or, you know, we would have an agreement. I don't know what you call those things but, like I said, it was really getting started and then looking at our needs. And in Jim's mind, he felt that we could work through and qualify for factoring for businesses that we had and that we would just take it as we go so it wasn't like just

this but, you know, again, we weren't a large corporation and we had half a dozen people involved so we didn't do formal minutes and stuff but the backlog would be that backlog at that time period and we would have backlog reports, maybe not coincide directly but we kept, you know, the backlog, we have a history of the backlog.

Q. And so backlog of what, orders that need to be filled?

A. Right. What we have ready to produce. Or what we have to produce.

Q. Okay. Meaning what you're obligated to produce when you say what we have --

A. The backlog would be those buildings that had purchase orders.

Q. Okay. That had not been fulfilled yet?

A. Right.

Q. And there's a paragraph that says conversion of long-term debt.

A. Um-hum.

Q. Who at SkyWaves managed the company's long-term debt?

A. I'm not sure what that refers to.

Q. Okay. And there's a reference to this Lloyd Bordon, the West Coast opportunity. I know

we talked about that earlier. Did anything ever come to fruition with the West Coast opportunity?

A. He invested I believe a hundred thousand dollars into that but it never -- it never developed.

Q. Okay. How did the factoring process work with Nextel, the purchase orders that SkyWaves would get for Nextel?

A. I would assume just like we've talked about in terms of the agreement.

(DFT. EXH. 46, E-mail dated 3/25/06 to John from Castlen Morris, BB&T/JE_001728, was marked for identification.)

BY MS. CHERRY:

Q. Mr. Konersmann, I'm going to hand you what I've marked as Exhibit 46 and this is an e-mail from Castlen Morris to John at skywavescorp.com. And I want to ask if you've ever seen this e-mail before.

MR. LINTON: What's the date on that, Molly?

MS. CHERRY: March 25th, '06.

THE WITNESS: Yeah, I'm not aware of this, this e-mail.

BY MS. CHERRY:

Q. Okay. Did you have any discussions with Mr. Voytko about BB&T contacting Nextel or any of Skyways' customers regarding payment on invoices?

A. I mean, I don't recall Nextel. I believe some of the customers knew that we had a factoring agreement but that's -- we converted a couple customers to pay direct. Where they would do that, we would do that.

Q. Okay.

A. I don't remember this particular situation here.

Q. Did SkyWaves have any obligation to notify its customers of the factoring arrangement with BB&T?

A. No.

Q. How about on invoices, did SkyWaves have any obligations to identify BB&T factors on any invoices?

A. No. No, like I said, in this industry their rule is to pay the vendor who they have a contract with or who they have sent appeal to and so they're very reluctant to send it anywhere else and that was a problem. That's one of the things that we got, you know, that the bank understood and

worked with us on so we were not out, you know, explaining all that to them.

Q. Why would -- well, let me ask you. Did SkyWaves put on its invoices where payment was to be made?

A. Yeah, to SkyWaves Corporation.

Q. Okay. Why would a customer -- you keep saying customers were very reluctant to send payment somewhere else.

A. Yeah, for legal reasons. When we talk to the purchasing agents, their law firm -- their lawyers took a position almost industry-wide because what would happen is if a company built a shelter say for the company and they diverted it to a bank or converted it to someone who had some financial position with them, then maybe the vendor would come back and say we should have sent it over there.

So their basic policy was, you know, we didn't order from a company, we're going to get that product, we're going to send it back to them, then they deal with their own finances and all, we don't all that so they were reluctant to do that. Some we got to convert and didn't have a problem trying. We tried, you know. But the ones we

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a customer for 100 homes down here in Virginia who would like to see the plant 11:00 AM. He did -- he did a lot of tours and that's relating to his business.

Q. Sure.

A. So again, I'm not sure. And, I'm sorry, your question was?

Q. Sure. My question was so you believe there may have been a note to Mr. Meier or his company? My question was about debt to Mr. Meier's company.

A. I don't remember any direct debt but he may have -- well, he lent money at the last company -- he did loan some money personally to the company.

Q. Okay.

A. So that would be -- that would be one.

Q. Okay. And then as I understand it Mr. Meier's company was a vendor to SkyWaves?

A. Yes. That was a primary relationship, business relationship we had.

Q. Okay. So if there were any monies due and owing to a vendor such as Mr. Meier's company, that would be reflected in financial statements, correct?

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A. Yes, um-hum.

Q. Okay. So if you flip to the last page of this, there's a bullet point, offer from Franz Meier.

A. Um-hum.

Q. And when he references reducing company debt to FXM, you don't have any specific knowledge about SkyWaves' debt to FXM, do you?

A. Where does that say that?

Q. If you look at the first bullet point.

A. Oh, I see. I'm sorry. I don't remember that.

Q. Okay.

(DFT. EXH. 51, Memo dated 3/25/06 to Ron Konersmann and John Voytko from Franz, was marked for identification.)

BY MS. CHERRY:

Q. I'll hand you what we've marked as Exhibit 51, Mr. Konersmann. This appears to be another communication from Mr. Meier to you and John Voytko. Do you recognize -- I know you've indicated that Mr. Meier made several proposals.

A. Yes.

Q. Do you recognize this correspondence from Mr. Meier?

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A. This is going to be one of several.

Q. Sure.

A. He was a major investor in SkyWaves but he always wanted to merge the two companies. And my general point to him was that down the road, you know, once we became a much larger company, we may want to consider that and it probably would make some sense absorbing a key part of how we made our buildings. These panels were unique so, you know, it made some sense but it didn't -- it didn't make any business sense to us because we weren't in the home building business. So this looks like one proposal that he had at that time but this would run verbally and everything else continuously, you know, trying to push the company together.

Q. Okay. Let me ask you just about this particular correspondence. In Paragraph A he mentions strengthening SkyWaves financially. Do you see that?

A. Um-hum.

Q. Did SkyWaves need to be strengthened financially?

A. Well, any time you get more money into a start-up, it strengthens it. You have more money to do more with.

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Q. Okay. And he says, and gives it the cash to assure transition to profitability. Do you see that?

A. Um-hum.

Q. Was SkyWaves profitable at this point in time?

A. In '06, I do not believe so.

Q. Now, if you go down to Paragraph Number 2 in his correspondence to you, he's referencing selling shares to acquire cash, converting current debt to PK, which I believe is Patricia Konersmann?

A. Um-hum.

Q. And FXM, which is his business, into shares and pay off high-interest loans to private investors. Do you see that?

A. Um-hum.

Q. Do you know anything about the high-interest loans to private investors?

A. That he's referring to?

Q. Yes.

A. I do not.

Q. Then in the next sentence he says, the stated goals are to preserve Ron and Patty's majority position. Do you see that?

A. Um-hum.

Q. Okay. Where did the million dollars come from?
A. I just looked at our -- where we were and how much money we would need to -- you know, to move further along with the business.
Q. What did you look at? When you say looked at --
A. Our firm financials and then if we assumed we were going to expand out to the West Coast, how much would that cost us to expand to the West Coast, you know, that sort of thing.
Q. Do you have any notes or projections or -- in terms of how you came to that one million dollar figure? Was this something you just did in your head or did you do a calculation?
A. Yeah, we did calculations on our company and what we wanted to do -- like I say, the best example would be if you want to expand to the midwest, you know, we would have to put more salesmen out there, we would have to, you know, probably put an office out there, et cetera, so we were always long-term going to expand and be a national company.
Q. Okay.
A. So -- and we had a three plant strategy

from day one so, you know, we're -- when we have these opportunities, we have a substantial investor with great connections, then if someone asked you -- if Franz was saying, you know, how much would you need to expand, then we would look at where we were, add up how we would expand, what expansion are we talking about, the northeast, midwest, and then we would look at the cost of doing all that and then we would come up with a projection and might say that we needed 700,000 dollars to do this so I probably mentioned one million dollars to cover the expansion we were talking about.
Q. Okay.
A. Or thinking about I should say.
Q. Sure. And I guess what I'm trying to understand, if Mr. Meier had said this investor's interested, he wants to see where the million dollar figure came from --
A. Right.
Q. -- what information would you give that investor to --
A. We would give them -- we would give them a -- and we have lots of them. We would give them a slide presentation.

Q. Okay.
A. That we'd go over the company in terms of the product, our experience, how we build the building, take them through a plant tour, of course, where we were at that time financially and what we would -- you know, how we would expand, why would expansion be relevant and explain what we were going to spend the money on.
Q. Okay. What would you -- what would you show them to show where SkyWaves was financially?
A. A financial package.
Q. What would be included in that financial package?
A. It depended on how strong -- how far along. You know, if we had a substantial investor who we did not know with great connections of which we did not know what connections he has, we probably wouldn't have shown him financials at that time but I think your question was, you know, how would you tie all that together. So we would customize the presentation to the viewer depending on how much we knew about him, et cetera. And sometimes we asked for confidentiality agreements and that sort of thing. Sometimes we didn't ask for them because, you know, what we're giving him,

you know, was not confidential, more of a sales marketing tool.
Q. And if you were comfortable sharing financial information with a potential investor, what financial information would you share with them?
A. Historical balance sheet, income statement balance sheet, cash flow.
Q. Then you indicated you would show how SkyWaves was going to expand.
A. Right.
Q. What -- in terms of explaining how the company was going to expand, did that include financial information or logistical information or conceptual?
A. All of the above.
Q. Okay. And who would prepare that information for a potential investor?
A. That would probably start out as kind of a team event where it would be, you know, myself and Jeff Ward and John Voytko, Jim Phillips. We'd get together and look at the possible opportunity, then everyone would give their input based on, you know, their thoughts about it and then we would start putting together a presentation.

have no recollection. I don't think he would be a guy that we would be going through this detail with.

Q. Okay. There's a reference that says please call me at. Is that your telephone number?

A. That's my cell phone number.

Q. Okay. Was that your cell phone number in December of 2006?

A. Yes, it was.

Q. Any reason to believe you didn't write this letter?

A. I don't have any reason, I just don't remember it.

Q. Okay. I want to ask you about this, some of the paragraphs in this letter. In Paragraph Number 2, there's a reference that during the first quarter of 2006 Nextel partners made the decision to integrate their shelters at the site locations --

A. Right.

Q. -- which had a negative impact on our margins.

A. Right.

Q. What does that mean?

A. What that means is, you know, we would

sell -- we would -- most of -- we would sell empty buildings and we started out that way, then we were integrating all the equipment and the customers, you know, the regional managers, et cetera. Most of them would have us do a turn-key plug and play where everything is together, everything is tested and we go out and plug it in but for various reasons, be it equipment or preference, whatever, they would -- they would buy just a shell and then they would go ahead and put the equipment in.

During this time, of course, there's a lot of technology changing and so some managers of these customers were -- didn't want guys like us to know what they put in because they thought it was special, you know, and they didn't want us to -- we wouldn't, but they didn't want us to put the special equipment in and then show it to another -- their competitor.

So they would say, okay, we're going to buy your shelters but we're not going to have you integrate our work. That took -- that reduced obviously dollars and the margins on the building are good but the integration dollars, you know, is -- there's more profit in that part so that's what I'm referring to I believe here is that they

were going to not -- do the buildings but not do the integration, which would reduce the amount of money we got for that site.

Q. Okay. Do you know what SkyWaves' margins were on shelters at that point in time?

A. I do not.

Q. In Paragraph 3 there's a reference to in 2007 our product mix includes a greater percentage of business from General Dynamics and Verizon. Do you see that?

A. Yes, I do.

Q. From where does that information come?

A. From our backlog.

Q. Okay. Backlog of what?

A. Of the shelters that -- you know, both the shelters we're producing and the shelters we're going to produce. What it means in that snapshot of time, we had more General Dynamics than Verizon say versus AT&T.

Q. Okay. More General Dynamics than Verizon what?

A. Orders.

Q. So as of December 7th, 2006, SkyWaves had orders from General Dynamics and Verizon?

A. Yes.

Q. Okay. Where would those orders be located?

A. The order file.

Q. Okay. Paragraph 4 says, see attached breakdown of operating expenses.

A. Um-hum.

Q. Do you see that?

A. Um-hum.

Q. There was no attachment to this letter.

A. Um-humm.

Q. Would -- how would SkyWaves go about getting a breakdown of operating expenses for December of 2006?

A. That would be information we'd keep and that would be provided by John Voytko.

Q. In Paragraph 5 there's a reference to SkyWaves centrally considering '06 to be a break-even year.

A. Um-hum.

Q. Do you see that?

A. Um-hum.

Q. Was 2006 a break-even year?

A. It was not.

Q. Did you know that in December of 2006?

A. Well, I'm not sure where we were at the

2007 SkyWaves' Board of Directors determined that it would need an expanded financial commitment to provide capital infusion beyond those being currently provided by BB&T.

A. Um-hum.

Q. Do you see that?

A. Yes, I do.

Q. Then it goes on to say, 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 New York State SWN Police. Do you see that?

A. Yes, I do.

Q. So this determination in early 2007, was that for the 400,000 dollars we've just seen or is that something else?

A. That would be for something else.

Q. Okay. So are there any Board of Directors meeting minutes or documentations that indicate how much financial commitment was needed?

A. Well, back in December of '06 we were looking forward into '07 and we had some -- you know, the 3G build-up was being delayed and we --

everyone knew that when -- because we had the national contracts that we would be a major player in that build-out so -- but we didn't know when they were going to, you know, start producing and shipping these. They have to be budgeted with the customers and there's a rollout, you know, and we were working -- we had a good idea as to what amount of business we were going to do and with whom and it was going to be a major increase in our backlog, it was going to easily double our business when it hit but we didn't know when it was going to hit.

And at that time we were, you know, using, you know, the factoring but the bank also had, you know -- through the documents had control of all of our assets, et cetera, and I had, you know, and my wife together had 51 percent, we had control but it was a time when in order to meet the needs of when the business was ready and we were going to get the orders, we needed to expand the plant and make some major capital changes so I didn't -- my position was that we needed to, you know, go out and check the market to see what it would cost us to bring in, you know, some substantial investment at that time.

Q. So what you're telling me is that's in addition to this 400,000 dollars we've just been talking about?

A. Yes.

Q. Okay. So tell me what changed, if you will, from December of '06 and -- this is December of '06, these requests and indications for expansion of production --

A. Right.

Q. -- the 400,000 dollars, to early 2007 in the complaint.

A. Well, the 400,000 was related to equipment. We were not addressing -- at that time, you know, we knew that we were not going to -- the 3G build-out was not going to be, you know, within the next 90 days but I knew it was coming up. And when we looked at what we were going to get in terms of the future business, it was substantially more than what we were doing.

So in order to be able to produce and gear up to run literally one building a day to seven, eight buildings a day, we would arrange to do that. And so this was more of a forward thinking, you know, we had to structurally bring in a different level of investment, a bigger

investment to get ready for this build-out.

Q. When did SkyWaves win -- well, this says two General Dynamics contracts. When did SkyWaves win the Navy/Coast Guard contract?

A. I'm not sure but we did win the Navy/Coast Guard contract and we -- I don't remember the dates.

Q Okay. When -- where could I find that information out, when SkyWaves won the General Dynamics -- the two contracts, the Navy/Coast Guard and the New York State SWN Police?

A. I don't know if it's in the files we have or not. The person who would know more about that would be Jeff Ward.

Q. And how about this increasing number of requests for quotations? What's a request for a quotation?

A. The company's contacting our company to quote their business and instead of quoting five sites, they were coming in and quoting 100 sites, 200 sites, I mean, just a massive amount of work that's going to happen when -- two things, when they were budgeted to do the 3G and when the 3G equipment was going to be sent to them so they could have it produced.

were using with --
A. No. No, we were -- our normal financials of 2007 would be our projections as we were and we did -- like I said, we didn't know when the 3G build-out would happen so we were basically on -- you know, looking at other -- looking at alternative financing, looking at whenever this would happen that we would have the plant ready and that we would have the money to absorb, you know, a backlog of seven, eight million dollars versus two or three. You know, you're talking about a factor of three or four times so it was a major need for money to fund that.
Q. When you say 3G build-out, are you talking about with General Dynamics or are you talking about in the industry as a whole?
A. In the industry as a whole, right.
Q. And when you're talking about industry as a whole, is that what gives rise to the request for quotations because of this build-out in the industry?
A. No -- well, you always are getting a request for quotations, that's how it comes in and then you go to that but -- and at the time in early '07 we were just -- you know, we were just doing

the business that we were doing but what we were planning for and the reason to go out and look for, you know, what we -- you know, BB&T was doing everything for us, they always met our needs so we didn't have a problem with BB&T but I just thought that given the size of this thing, you know, from a diligence part from me I needed to see if -- what the value of our company would be to others as to what they would invest to meet the needs.
And what we basically -- what we would review with them would be this -- the general contracts we have which, you know, they would come in and review the contracts like we talked about before and look at the -- their own data from what they think the industry is going to do. And when you have, you know, a company that has a contract with AT&T and they have three national contract -- three national shelter suppliers, they look at what that kind of build-out will be. You know, you're not guaranteed a third of it but if you're a part of it, just by the sheer amount of business, it's going to -- you're going to get a lot of business. The industry -- the industry, you know, through that time period is very clear about, you know, the fact that it's not if 3G, it's going to be when 3G.

Q. So now you mentioned expanded financial commitments and actually in the complaint you've identified or SkyWaves has identified a couple of institutions but can you tell me if you recall where SkyWaves sought financial commitments?
A. Well, I mean, I'm not -- you know, we didn't -- you know, we put an inquiry into financial institutions and invest in telecommunications, we might have sent it -- or talked to people who we have known before. We didn't have any financial institutions involved with the company yet so we didn't have business with them but, you know, we were just looking for people who would be interested in looking at our situation.
Q. And there's a reference in the complaint to Hunt Growth Capital and Wachovia and I want to ask you about them but do you recall anyone else from whom SkyWaves sought financial commitments in early 2007?
A. No. I think we were generally, you know, looking but these were the three -- the two respondents that we focused on.
Q. Hunt Growth Capital and Wachovia?
A. Right. But we had talked to other

people but, you know, we didn't get into a negotiation or anything. We didn't get into negotiation with -- we didn't get a response, a proposal from anyone else.
Q. Anyone else other than Hunt Growth Capital and Wachovia?
A. Right.
(DFT. EXH. 66, E-mail chain dated 3/27/07 to John Voytko from Ron Konersmann, was marked for identification.)
BY MS. CHERRY:
Q. I'm going to ask you -- I'll mark as Exhibit 66 what was produced by SkyWaves and it appears to be the proposal from Hunt Growth Capital in March of 2007.
A. Yes.
Q. Do you recognize this e-mail exchange that's actually an e-mail from Bob Kosian --
A. Yes.
Q. -- to you and it looks like it has a luminary nonbinding term sheet attached. Do you see that?
A. Yes.
Q. And it is signed by Michael Bierman, I believe, if you look on Page 7. And then on Page 8

it has a signature line for SkyWaves, do you see that?
A. Yes.
Q. Did SkyWaves enter into this term sheet with Hunt Growth Capital?
A. No.
Q. Okay. Do you have -- this is all I've seen. Was any information provided to Hunt Growth Capital that led to this term sheet?
A. Yes, there would be.
Q. Okay. Who provided information to Hunt Growth Capital that led to this term sheet?
A. We provided information to Bob Kosian and then he was talking to them.
Q. Okay. And who is we?
A. The company.
Q. Okay. Who on behalf of the company provided the information?
A. Well, that would be something we would put together. Bob Kosian lives here so he came over to the plant and we went over so it would be myself and probably John Voytko.
Q. Was this term sheet presented to SkyWaves' Board of Directors?
A. Yes.

Q. Okay. When was that done?
A. When we received it.
Q. Do you have anything documenting that this was sent to SkyWaves' directors?
A. Well, we probably gave them a copy of it.
Q. Did the Board of Directors have any discussions about this term sheet?
A. We talked about it.
Q. Okay. Tell me what you recall about this term sheet.
A. Well, you know, this is -- this is the term -- the term sheet was presented to us. We had requested Wachovia, you know, to look at, you know, how they could fund this business that we're coming into and Hunt presented this and we didn't -- we didn't start getting into negotiating the details of it because, quite frankly, I wanted to -- I mean, we were talking to them but we -- we sat down with Jim Edahl and talked about how does BB&T handle this bump in increasing our capacity and providing the working capital to run this 3G business.
And we had a close relationship with the bank and we had -- we had assurances from Jim

that, you know, the factoring has worked so far, we get to this point and these purchase orders come in, that they'll be able to step up and provide the money we need to run the business. So, you know, we didn't -- you know, we didn't -- we didn't negotiate a final deal with these guys.
Q. These guys being Hunt?
A. Hunt.
Q. And Hunt Capital was under their term sheets going to invest a total of four million payable in cash at closing, correct?
A. Um-hum, yes.
Q. Do you recall any discussions that SkyWaves' Board of Directors had about a four million dollar cash investment?
A. Well, they thought that that was a good offer, that would -- that would take care of what our needs would be when 3G happened and, you know, something that we should pursue if we felt that BB&T couldn't handle the business.
Q. Did SkyWaves ask BB&T for a four million dollar cash investment?
A. Well, we asked them -- well, we told them about the four million dollar offer and, you know, the position of the bank was, you know, we've

taken care of your needs so far and, you know, we'll -- you know, we'll take care of them in the future and when this comes in, when your purchase orders, you know, grow like they're looking like they're going to, we'll be there for you, you know, we'll take care of it.
Q. Now, on the proposal for -- well, are there any meeting minutes or any documentations about discussions the board members may have had about the Hunt Growth Capital proposal?
A. I don't remember any.
Q. Okay. And under this proposal I think I saw where the Board of Directors would change. Let's see. I want to ask you about that.
A. Okay.
Q. Who would have the majority of the stock ownership under the proposal by Hunt Growth Capital?
A. Who would have the most shares?
Q. Yes.
A. I would.
Q. There, under management of the company, if you look on Page 2 there's a reference to the Board of Directors. And this has some individuals, Michael Bierman and Matthew Golden, who look like

they're with Hunt Growth Capital so they would be on the board also, correct, under this proposal?
A. Where is that at?
Q. On Page 2.
A. 2?
Q. If you look --
A. Oh, right here. Yes.
Q. Now, did SkyWaves respond in any way to this term sheet from Hunt Growth Capital?
A. Well, they came into town and we reviewed -- we reviewed the offer and we told them that we would get back to them once we decided what we were going to do.
Q. And my question, Mr. Konersmann, simply is in the documents that SkyWaves produced, I asked for documents relating to Hunt Growth Capital proposal. This is all we got so there's no e-mail correspondence other than this term sheet and so what I'm trying to understand is how communications occurred.
A. You know, the problem -- the tough part is that, you know, the company was shut down. We were not in control and so we had what we have but we don't have, you know, everything. And I don't know what's missing. I mean, I really don't. So,

you know, where we were with them was that they gave us an offer that we can take a hard look at, it was a good offer, Hunt Capital can put this amount of money in and obviously, you know, what was really good about this is that they were going to take a minority position, which they never do, but because of the industry we were in they had high confidence that we were going to do well.
But the other side of it is if we went with them, then that was a company who could put any amount of money they wanted into a business opportunity. So with our goal of going to an IPO and going nationwide, et cetera, they could have made that happen for us financially and they have a long record of doing that. So, you know, putting two people on the board changed the board, putting -- or giving them 30 percent of the company took me out of control from a stock standpoint but, you know, it would be a strategic decision for us and I worked with the board to make sure that, you know, we understood all of this and, you know, like I say, we have what we have and we -- that's all we have to work with.
(DFT. EXH. 67, Letter dated 3/19/07 to Mr. Ron Konersmann from Jeffrey S. Spicer, was

marked for identification.)
BY MS. CHERRY:
Q. I'm going to hand you what we've marked as Exhibit 67 which is from Wachovia and that is a letter to you from Jeff Spicer and I know you indicated Jeff was SkyWaves' contact at Wachovia.
A. Yes.
Q. In the first paragraph, Mr. Spicer references the purpose of the letter is to follow up on your recent conversations about establishing a working capital line of credit with Wachovia.
A. Um-hum.
Q. Do you see that?
A. Um-hum.
Q. Tell me what a working capital line of credit is.
A. Well, it's a line of credit that the bank will give you so that you can use that monies to use for your business.
Q. And it looks like at the bottom of this first paragraph Jeff says, although it still may be too early to enter into this credit facility today, our goal is to share with you what our solution might look like when profitability targets are met. Do you see that?

A. Yes, I do.
Q. So did Wachovia ever present a proposal to SkyWaves?
A. Well, we had that need for about 4 to 500,000 dollars worth of equipment. And what they said was we could -- you know, to stay a part of this, we could give you a asset-based line of credit to pay for the equipment you need but they couldn't give us the working capital line.
Q. Okay. So it's your testimony that Wachovia was willing to loan SkyWaves 4 to 500,000 dollars, that 400,000 dollar need we talked about at the end of '06?
A. I think it's the same number, yes.
Q. Okay. Is there -- is that what you're interpreting this March 19, 2000 letter to mean?
A. No, I think what he's saying is that we had the assets, we had something to back up, you know, the business like we have, you know, we have the orders in hand, et cetera, then, you know, he could do something in the five million dollar range is what I'm reading here and they could structure something but on an asset-based scenario. Just going through here, typical collateral package would generally have these kinds of things. So

you know, we know these guys, we know there's position for this, you know, and we had just come off of sorting through whether we were going to stay with BB&T or not and that decision was made so he was assuring them that BB&T, you know, was going to be there for SkyWaves.

Q. What I'm hearing you say, and correct me if I'm wrong, Mr. Konersmann, but up to that point BB&T had done everything that they said they were going to do in terms of the equipment loan, increasing the factoring line?

A. Absolutely.

Q At that point in time everything's been done?

A. Yeah, absolutely. We could -- you know, they have been very important to us and very professional and, you know, he was going down there to -- you know, to give them those assurances, you know, that the bank was solidly behind our company.

Q. Okay. Mr. Konersmann, as a result of that, I mean, I know you've indicated that you considered BB&T a partner. Would you consider it important for SkyWaves to be truthful to BB&T?

A. Of course.

Q. Now, there's a reference in Paragraph D

that says 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. Do you see that?

A. Yes.

Q. What funding had been offered by Wachovia as of July of 2007?

A. Wachovia, as it says, they were declining the build-out funding but would provide us with the equipment funding.

Q. Okay. And that statement is based on the March 19th, 2007 letter we just looked at from Wachovia to you?

A. Yes.

Q. And then the Hunt Capital funding, is that reference in Subparagraph D to the March 2007 commitment sheet --

A. Yes.

Q. -- we saw from Hunt Capital?

A. Yes.

Q. Now, there's a reference in Paragraph E that says that BB&T would commit to funding SkyWaves' growth based on invoices, purchase orders, contracts and site plans.

A. Yes.

Q. Do you see that?

A. Um-hum.

Q. Tell me about that presentation by Mr. Edahl to these investors.

A. Well, you know, the global concept was that Jim was assuring them that there would be no surprises and that the bank was going to be there for us as we transitioned through. You know, you can't -- you know, you don't know what the future is but, you know, the point is the commitment that BB&T made in April was that, you know, we want to take you as we started, you know, they wanted to be our bank and they want to meet our needs and they did so and that, you know, they'll -- they will be there to fund this growth.

Q. Do you have anything documenting that Mr. Edahl made the representation you've got -- SkyWaves has listed here in Paragraph E?

A. There was a discussion about the things that the bank, you know, how they were -- how they were funding this and stuff, you know, and the kinds of funding, et cetera. And there was a long discussion because these guys really drove down on, you know, how committed is the bank. That's what their concern was and so there was a discussion

about that.

Q. Did these individual investors or any investors ask to see the bank documents?

A. They came over to the plant a couple times and I think they were looking at our contracts more than the bank documents and they may have seen some but I don't remember that.

Q. Okay. Did Mr. Edahl ever say to you that BB&T would commit to funding SkyWaves' growth based on invoices, purchase orders, contracts and site plans?

A. Oh, absolutely.

Q. When did he say that?

A. Well, it was all reiterated in that March/April time frame when we were talking about how do we move forward and fund this growth. The thing that isn't there is that -- because this was important, you know, to me. You know, the bank had been great, Hunt is in that business of taking a company at our -- at that level and funding it completely and taking it all the way as far as they want to take it.

And it was important to me that, you know, the bank was going to be there so, you know, I asked them about various things, you know, if we

have a big bump in the road where we're going to increase the business, you know, how are you going to do that. You have all of our assets right now, we don't have any more so how does that work?

And he said, well, I'd invite you to come to our corporate office and meet with our -- the people who do the IPO work and they'll present what they do and, you know, they'll explain how that will work but basically we can do several things but -- he said, one of which is we can assign a block of stock over as collateral and then we -- when we go to an IPO, we'll do the deal, we'll make money on the transaction and then we turn over your stock back to you and then you do with what you want.

So in my mind the bank had a strategy knowing who we were and what we were going to need, had the means to give me -- you know, to provide whatever financial need, you know, we had. And when we were -- the last part of our discussions, Jim said, Ron, I know you're evaluating these things, I know you're going to the board, would you please make sure you tell Jimmy Kerr that if you take the bank's deal that you won't have to dilute yourselves by 30 percent and you can -- you know,

you'll be able to keep your stock which, of course, as we said throughout the two days, you know, stock positioning is important because that's how you make the money and you want to keep your stock position as high as you can and not dilute it. And in the other part of -- that we considered was in Hunt Capital we would be diluting our stock, which means we would have less.

So we talked about specifically this is -- you know, I talked about General Dynamics back in December/January and this big project up in New York. You know, Jim and I talked about that work up there as with the government and the government has a lot of rules as well and there's going to be quite a bit of business for us and we -- we talked about it, you know, how are we going to do that.

And again, you know, he said -- and -- we talked about it in general and talked about the sites and the shelters and the amount of work, et cetera. But in negotiating I said -- when he said do you have anything else that we could use as collateral, I said, well, what we have is we have the site plans for the government work and, you know, it has -- you know, General Dynamics has the

contract, you know, we've got the vendor contract and, you know, this shows you all the sites and you can look down here, it will show which sites have shelters on them and so can we use that?

He said, well, let's say we'll consider it, I don't want to commit to it today, I'd have to get approval but, you know, if we need it again for this window between March/April and December because I was fairly sure based on my experience that this would -- this would really kick off for sure in January, hopefully sooner, but if it didn't, this was something we could look at.

And so in July we talked about, you know, where we were. And I said, you know, Jim, I would like to have you consider using the site plans to factor and so he looked it over and he said, well, let me get back to you. And he took it and came back and said, you know, we'll -- we understand it and, you know, we'll do that. And so we started factoring site plans.

So when I got to, you know -- that was my gap filler between, you know, April 12 and December and then if we're figuring that we're going to double/triple our business, our backlog going from two or three million to seven, eight,

ten million dollars, that was so huge, I said, you know, how do you do that? And he said, well, that's where we would bring in the -- we would bring in the guys from corporate, they would work that out. And I said, well, you guys are asset-based lenders, you know, we don't have any assets. And he said, well, at that point we could maybe -- as a possibility maybe use your stock as an asset.

Well, to me it made sense, you know, and the bank had did everything for us, it was a great relationship so, you know, I had -- I had comfort in all of that. And that's why, you know, when we -- we negotiated through that. And Jimmy Kerr, you know, is an astute businessman, he appreciated and understood what -- you know, what BB&T was doing for us so, I mean, we were all very positive about it, happy about it and then we had an opportunity to sell some shares. Jim, you know, said, well, let me come down and give him those same assurances. Because I told Jim that these guys had -- they had some kind of an issue with BB&T ten years ago or so and they're concerned that maybe the bank would surprise us, you know. He said, well, let me come down and talk to them.

General Dynamics laying out the site plans and where the shelters would go. I went to them and said, look, you know, this is great, we're going to get the business but I would like to -- and Jim and I talked about it, you know. I said, I'm going to see if I can get these converted to purchase orders. And I tried and the people up there were very -- were very happy having us and had a good relationship with them but what they finally came down and said is, by the government, Homeland Security rule, they couldn't at that time give us a PO but, you know, they give us -- so we could see what the anticipated work would be, they gave us -- they shared the site plans with us, okay? So that's where the site plan started.

And like I said, when we were talking about -- you know, when we were discussing how is the bank going to close this gap, you know, I -- I brought that back up, we reviewed it, I showed him, you know, how it worked, we had a contract over it so it wasn't like it was just a piece of paper, an arbitrary piece of paper, you know, it was backed by our contract with General Dynamics.

And he looked at it and he said, we'll consider it and, you know, we may not need it and

if we do, come back to me but I can't commit to it today. Well, again, in good faith with everything else that was going on, you know, I thought that was a fair position to take, you know, you have to get approval of it and you get it or you don't get it and if we don't get it, we have to go get it somewhere else, that's the way we grow a business.

Q. And I just want to understand. I get that you're telling me Mr. Edahl said he would consider it.

A. Right.

Q. So did you ever go back to Mr. Edahl and ask him to consider it?

A. No, I -- no, in around July time frame Jim -- you know, Jim and I got together and talked about the spreadsheet, you know, which he'd seen before. And, you know, I said, Jim, I think we need to factor this, you know. And he knew the story, knew the -- you know, knew what it was. I went back through it again with him to acquaint him with it again and that's when he said, you know, let me go back and I'll let you know. So I reviewed it at that time, you know, can we do the factoring with these.

Q. Did he come back and let you know?

A. Yes, he did.

Q. Okay. When did he come back to you and let you know?

A. I think it was a few days later and he said he was going to get with I think Voytko and Castlen and going to set it up as approved.

Q. Did he tell you who had approved it?

A. No.

Q. Did you get anything in writing from him documenting this?

A. No. No. I mean, our whole relationship with BB&T is -- in the way it's structured is you have one person who can make decisions quickly and it allows, you know, the bank to be very efficient and they can get -- you know, these guys can get to the right people to get the decisions. And, quite frankly, I was a proponent and I was out there selling the bank when I had people saying, you know, which bank do you use, well, you know, BB&T was not bogged down in a lot of layers of communication, you know, you had one guy.

At one point somewhere through there, I don't know when, Jim called me and said, hey, I got my boss here, can you come by and look at the

plant. And he came out, nice guy, and, you know, after we had toured the plant and all that sort of thing, I said, normally in my career I usually do a stewardship report. Once a year I'll come to the corporate bank, we'll do a presentation and tell you what's going on.

And he said, you know, Ron, that's great. He said, we're very much aware of you guys, we're excited about you guys but we don't work that way, you know, Jim can get you everything you need. And so, I mean, I had full confidence that -- I believed that Jim without a step would always do whatever he needed to do to do his job to get these commitments in place and, you know, it was just a great relationship.

MS. CHERRY: Let's take a break.

(A luncheon recess transpired.)

(DFT. EXH. 78, Letter dated 9/1/07 to Ron, was marked for identification.)

BY MS. CHERRY:

Q. Mr. Konersmann, I wanted to ask you about -- these are some notes from SkyWaves' production that I've marked as Exhibit 78 and this document, it's got two dates on it, at the top, September 1st of '07, and then in the middle,

September 17th of '07. Do you see those dates?
A. Yes, I do.
Q. And in both instances it looks like it's addressed to you -- or Ron. I'm assuming that's you.
A. Right. Yes.
Q. If you would take a moment -- I read through this and it looks like something that Mr. Voytko perhaps sent to you but I'm not sure.
A. Yes.
Q. Do you recall these notes?
A. I do not.
Q. Okay. Let me take them one -- the top that's dated September 1st of '07.
A. Right.
Q. On or about September 1st of '07 did you have any conversation with Mr. Voytko about his discussion with Castlen, who I believe is Castlen Morris, at BB&T regarding the Verizon payment?
A. From time to time -- you know, Voytko and Castlen worked day to day and time to time, you know, if they had conversations, you know, share what the conversations were about if I needed to be involved in it. This looks like that he was telling me some of their conversations around that

time.
Q. Okay. Do you recall having any discussion with Mr. Voytko about the Verizon payment being sent to the bank?
A. No.
Q. Do you recall around September 1st of 2007 having any conversation with Mr. Voytko about Mr. Morris' statement that this payment issue could be viewed as a violation of the factoring agreement?
A. No, I do not recall.
Q. Do you recall having any conversations with Mr. Voytko in September of 2007 about any activity by SkyWaves that could be viewed as a violation of the factoring agreement?
A. The only -- the only thing, I think we talked about this yesterday, that I remember is the audit, whenever that was, it was in this time period, the auditor put the word default in it. And when I saw that, I asked John about it and he said, well, that was one building and he said that that was not a big deal. And so I also then talked to Jim Edahl about it and he said that the auditor does not know what our -- doesn't understand our agreement and that that doesn't constitute a

default from the bank.
Q. Let me ask you, in the third paragraph of this first entry from September 1st of '07, it looks like Mr. Voytko is indicating that he held on to the Verizon payment longer than he usually did and there's a reference to six weeks, suggesting that holding on to a check for six weeks is longer than Mr. Voytko usually did. Do you know why Mr. Voytko would be holding on to a check from a SkyWaves customer?
A. Well, the way we operate it from start to finish was that -- and been to stay away from this whole concept of the customer due date, we had 60 days to pay. As long as the bank was paid inside that 60 days, then, you know, that was fine, there was no follow-up with it, but after 60 days, it went past 60 days, of course then that would -- that would fall out of that timeline and then, you know, that would -- that would have to be rectified.
Q. Okay.
A. So I don't know if that -- holding it six weeks, I don't know if came out of the 60-day period or what.
Q. If you look down at September 17th of

'07, the second entry on this page, it looks like Mr. Voytko is informing you of another conversation he had with Castlen Morris. Do you see that?
A. Yes.
Q. He says about sending remittances to the bank for outstanding invoices.
A. Are you talking about the second paragraph?
Q. Yes, the second. Do you see that?
A. Just a second.
Q. Okay.
A. The next paragraph.
Q. Sure. I'm going to move down to the next paragraph so I want to make sure we're looking at the same entry. And Mr. Voytko states, he, meaning Castlen, reiterated that the payments received cannot be held and it could result in a cancellation of the contract. Do you see that?
A. I do.
Q. Do you remember having any conversation with Mr. Voytko about that cancellation of the contract from holding payments received in September of '07?
A. I do not but I do know that as payments would come close to the 60-day period, then there

I also felt like in our conversations he was still trying to figure out how we could come up to push the two companies together so that we would have, you know, a bigger presence and because we were pushed together, that would make us more valuable and then we would be able to go out and raise more money, et cetera.

Just because we owned the panel machine and could have -- could produce our own panels, there was a cost savings to that but I didn't think it would make any difference in terms of the company owning or not owning the panels that we used. And of course his -- he wanted to get this done because once we started producing six to eight, ten buildings a day, the cash flow would break even around 12, 14 million dollars, would very quickly go away and we'd be profitable and we could go ahead and straighten this out.

Q. I was asking you about --

A. So that's why we went our own way is what I'm trying to get at.

Q. Sure. Okay. When he says own plan, he indicates Deb and I are trying to find investors for your plan anyway.

A. Um-hum.

Q. So what were investors needed for?

A. Well, what he was saying is if I didn't like his options, that they would continue because he was, you know, truly a -- you know, a supporter of SkyWaves that, you know, if he found some other way to make investments, you know, to grow the company, then they were -- even if we went our own way, that they were willing to do that.

Q. If you look at the seventh paragraph, there's a reference to SkyWaves soon being three months behind in rent. Do you see that?

A. Where is that?

Q. Next paragraph.

A. I got you, right.

Q. And was SkyWaves behind in rent to FXM in November of 2007?

A. We were behind in rent, which was okay, and then, you know, when we got to be three months, you know, we talked about it. When we -- when we went into a lease with Franz, he wanted a large security deposit and that security deposit was for 400,000 dollars, I believe, which is fairly a large amount of money, you know, that you would put up. But we put that up and in that agreement it said that if we became in arrears with any of our rent

or whatever, that he could -- he could deduct that off the 400,000 dollar deposit.

And so what we recommended to him, that we would take it as a reduction in our 400,000 dollar deposit, which was going to come due the end of '08 with a five-year agreement. So at the end of '08 he was going to give us back 400,000 dollars and, you know, we said, you know, we could handle it that way.

Q. And he makes a reference to accumulating approximately 200,000 dollars in receivables. What can you tell me about that? Did SkyWaves owe any money to StructureTech?

A. Yes. The agreement was the reduction -- the formula for the reduction of the panels and price and we had, you know, two different sets of numbers, if you will, as to what we owed but we were -- we were, you know, behind on general payment.

(DFT. EXH. 84, SkyWaves Corporation Presentation for Jim Edahl & Mike Burke, Branch Banking & Trust Co. 1/17/08, BB&T/JE_002799 to 002823, was marked for identification.)

BY MS. CHERRY:

Q. Let me hand you what we've marked as

Exhibit 84, Mr. Konersmann. This appears to be another SkyWaves PowerPoint presentation. This one is dated January 17th of 2008. It says it's for Jim Edahl and Mike Burke at BB&T.

A. Yes.

Q. Did you prepare this presentation?

A. This is a presentation we put together for them.

Q. And what was the purpose of this presentation?

A. Mike Burke -- Jim called me and said that Mike Burke said they were moving the factoring from North Carolina down to Atlanta and that Mike Burke was going to come in and take over the factoring agreement and he was stopping by, he was in town, and we set up a meeting, January 17th.

Q. If you flip over, I don't -- maybe midway -- there's a number in the bottom right-hand corner that says 002809. This slide says 2007 volume issue and there's a reference to Jim Phillips on the slide. Bullet Number 2 under Jim Phillips says, slow rolled his efforts to open up regions. What does that mean?

A. What we found out after the fact was that -- Jim was responsible for a large part of --

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Number 1 and dispute that reason?
A. Well, I mean, I'm not sure what the paperwork was with the lawyers but, yeah, that was simply not true. And, you know, when I explained how we operated in the meeting with Burke, you know, Burke said he was not happy with our -- you know, not with our account but just not happy that the bank would have this sort of agreement. And Jim Edahl was there and -- but I don't -- I'm sure -- I mean, I'm not sure. I don't know what we responded to at that point. We were -- basically our accounts were pulled almost immediately so we were out of business, you know, right at that time frame, within a week or two, so I don't know what correspondence. I know lawyers were talking.
Q. So Paragraph Number 2, were 37 percent of SkyWaves' payables over 60 days due, is that accurate?
A. Well, we had already explained to the bank about our payables, that a lot of that -- a significant portion was the payables that we were late technically with Franz Meier and StructureTech but Franz Meier was okay with that. You know, he was working hard, diligent, you know, trying to, you know, not impact the company. If we needed to

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extend that, you know, he was okay with that. We redid the numbers and as I remember sent an analysis or small analysis out showing that the impact of this -- of the payables were not over 60 days when you take out Franz Meier and StructureTech's piece of it.
Q. Let me -- let's go back and look at Exhibits 82 and 83.
A. Um-hum.
Q. Do you have anything in writing from Mr. Meier -- 82 and 83 are what I've seen in November of 2007.
A. Right.
Q. Do you have anything in writing from him indicating that he was okay with, as you put it, SkyWaves' debt to him and his company?
A. Well, he certainly was concerned about it but what we had talked about with him was that he would use that 400,000 dollar security deposit to catch himself up if he wanted to so, sure, you know, he'd rather be paid than not paid. I'm not suggesting that. But, you know, he wasn't taking any action at that time and he had an option of taking it out of the 400,000 dollar security deposit and the security deposit was supposed to be

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in cash somewhere so it was money that he could pull and use so he could pay himself. And we were -- we had no problem with that.
Q. Sure. And so I understand it, it's your testimony that the lease agreement with Mr. Meier's company provided that he could use that 400,000 dollar deposit --
A. For --
Q. -- for rent payments that SkyWaves was in arrears for?
A. Or for his panel payments.
Q. If I -- and I've got the lease agreement in my office and I'll go get it. If I get it, can you show me in the lease agreement where it says that?
A. Probably -- I would have to take some time to do that. What's the year for the lease agreement?
Q. When we take a break I'll go get it and you can show me that. Okay. And in Paragraph 3, BB&T determined that the prospects of being paid under the factoring agreement or agreements with SkyWaves is impaired?
A. Um-hum.
Q. Do you disagree with that statement in

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Paragraph 3?
A. Yes, I do.
Q. Tell me why you disagree with that.
A. Well, because we were bringing in two or three -- at that time two or three million dollars of work, our purchase orders were going up and that would allow the cash flow to catch up on some of this. You know, we had been waiting and we had been dealing with the cash flow in '07 to get to the -- you know, the position where we were -- you know, situated to get these orders. The orders were coming in and so, you know, very quickly the way that works is, you know, that cash would come in and we could, you know, improve those areas.
Q. How long was that going to take?
A. Well, it would take as long as you -- it takes -- it would take you as long as you took the money coming in and took a portion of it to catch up so that was a managerial type decision, you could focus on it, get it caught up quickly or you could focus on it and say we're going to -- you know, we're going to have a schedule, we're going to provide what's due plus 20 percent or 30 percent, whatever, and catch it up over a six-month period, et cetera. When we -- after the bank

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STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT

SKYWAVES I CORPORATION,

Plaintiff,

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

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

Defendants.

DEPOSITION OF: JOHN VOYTKO

DATE: February 28, 2014

TIME: 8:41 a.m.

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

TAKEN BY: Counsel for the Defendant

REPORTED BY: Ann P. Harris, NCRA Merit Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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ALSO PRESENT:
Ron Konersmann
Rusty Bogue
Mike Hennessey
James Edahl

(INDEX AT REAR OF TRANSCRIPT)

STIPULATION

It is stipulated by and among Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial; and that the deponent waives reading and signing of this deposition.

* * * * * * * * * * * *

JOHN VOYTKO,

being first duly sworn, testified as follows:

EXAMINATION

BY MS. CHERRY:

Q. Good morning, Mr. Voytko.

A. Good morning.

Q. My name is Molly Cherry, and I am here representing BB&T in a lawsuit that SkyWaves has filed against the bank and Jim Edahl. Are you aware that you have been identified as a witness in this case?

A. Yes.

Q. Okay. And have you ever been deposed before?

A. Yes.

Q. Approximately how many times?

A. Twice.

Q. Tell me about those occasions and tell me a little bit about why you were deposed.

A. Okay. The first was back in the early 2000s, I was with a company, SunCom, and after I left them, also I think at that time a former employee brought a suit against the company claiming that she lost her child as a result of pressures at work and everything, and because I was her supervisor, I was deposed in that case, and it ended up being resolved in favor of the company.

Q. Okay. Were you a named defendant in that lawsuit?

A. No.

And then the second time involved also a former employer who was a local businessman. He sold his company to a Venture Capital firm, and he was asked to hold a million-dollar note. I think this would have been just a note to the company, a loan, if you would, to the company, and then through some legal maneuvering, they tried to avoid having to pay him that loan, and so I was their chief financial officer, and as part of the proceeding. I don't know how it ended. They

our customers within the next 30 to, say, 180 days.
Q. Okay. But backlog of purchase orders?
A. Uh-huh.
Q. Okay. So as I understand it, you didn't review any documents that you haven't already produced in this lawsuit?
A. That would be correct.
Q. Okay. Mr. Konersmann indicated in his deposition that you had his laptop that he used while he was at SkyWaves.
A. I do not have his laptop that he used.
Q. Did you at any point in time have the laptop that he used while he was at SkyWaves?
A. No.
Q. Only because I asked him where it was, and he said you had it. Do you have any idea where his laptop is that he used when he was at SkyWaves?
A. I do not.
Q. Mr. Konersmann also indicated that you had more files than he did at SkyWaves, and I just want to make sure I understand this. I realize that you have produced electronically information that you had, but Mr. Konersmann has produced 14 boxes of things from his garage. Do you have hard files, paper copies, cardboard boxes? Do you

have hard files of anything pertaining to SkyWaves at home, in your office, anywhere in your possession?
A. I do not.
Q. Okay. How about electronic files pertaining to SkyWaves that you have not produced to counsel?
A. No.
Q. Mr. Konersmann also indicated that you were responsible for keeping corporate records for SkyWaves?
A. Yes.
Q. Where did you keep those when you were with SkyWaves?
A. Those would have been in my office at SkyWaves.
Q. Hard copies or electronic copies?
A. Hard copies.
Q. What did you do with those hard copies?
A. Those were left behind as we were asked to leave the building.
Q. Okay. So you did not take any hard copies of corporate records with you when you left SkyWaves?
A. That's right.

Q. Did you have backup electronic copies of the hard copies?
A. I had backups to my hard drive on my computer.
Q. And have you produced those backups in this lawsuit?
A. I did not produce the backups, but I produced my hard drive, which was not compromised during the five years.
Q. Okay. Did you speak with Earl Hewlette prior to your deposition?
A. No.
Q. Okay. Did you review his deposition transcript?
A. Yes, I did. I am sorry about that.
Q. That's okay. Why did you review Earl Hewlette's deposition transcript?
A. Because I was not present for it, and Earl was instrumental in trying to help us resolve the situation with the bank in '08.
Q. I asked you earlier, I understand Annmarie is your wife; is that correct?
A. Yes.
Q. What's her maiden name?
A. Walton, W-A-L-T-O-N.

Q. Have you ever been married to anyone other than Annmarie?
A. No.
Q. Do you all have any children over the age of 17?
A. Yes.
Q. Okay. Do they reside in Charleston County?
A. Two do, one does not, and I say that because I have a daughter in college at Clemson. So she is officially here but lives elsewhere.
Q. Okay. And her last name is Voytko?
A. Yes.
Q. And then what about the other over the age of 17?
A. She lives in New York.
Q. And what is her last name?
A. Voytko too.
Q. Do you or your wife have any family members, other than your children, who live in Charleston County?
A. No.
Q. Okay. Where did you go to college?
A. University of Toledo.
Q. And what was your degree in?

A. Accounting.
Q. When did you get it?
A. In 1980.
Q. Do you have any other formal education?
A. No.
Q. You hesitated.
A. No, because -- well, I say no, but I did take and pass the CPA exam, so I prepared for that, and I have done professional education courses throughout my career.
Q. Okay. So are you a licensed CPA?
A. I am licensed, but it is inactive.
Q. Okay.
A. In the state of Ohio.
Q. Okay. And just so I understand the nomenclature, the public records say it is suspended. Does that mean inactive for purposes --
A. Yes, yes.
Q. Okay. Have you ever had your license revoked?
A. No.
Q. Okay. Have you ever had it suspended for any reason other than being inactive?
A. No.
Q. Okay. Were you ever licensed in South

Carolina?
A. No.
Q. Were you ever licensed in North Carolina?
A. No.
Q. As of what date was your license inactive in Ohio?
A. I don't know.
Q. Okay. Were you a licensed CPA at the time you were working at SkyWaves?
A. No.
Q. I know you talked a little bit about SunCom and NBT International, but can you walk me through generally your employment history prior to SkyWaves?
A. Do you want me to start at the beginning?
Q. Sure, and you know what? I have your Linkedin profile. I'll hand it to you and just ask if that is accurate rather than test your memory.
A. The only thing I can add to that is prior to working with Alltel, I worked for a department store retail in Cleveland, Ohio, as -- my last position with them was director of internal audit, and then prior to that, I was an auditor

with K-Mart Corporation.
Q. So that would have been between '80 and '88?
A. Yes.
Q. Okay. Let's just mark this as Exhibit 3.
(DFT. EXH. 3, MR. VOYTKO'S LINKEDIN PROFILE, was marked for identification.)
Q. Okay. Let me ask you, Mr. Voytko, Alltel has you as the area director?
A. Yes.
Q. Tell me why you left Alltel.
A. I left Alltel because they were going through -- throughout my career with them, they went through a series of consolidations where regions were consolidated and accounting operations were removed to their corporate headquarters in Little Rock, Arkansas, and a long story short, I was given three opportunities to move to Little Rock, and I chose not to move to Little Rock, and I left them at that time.
Q. Okay. And then I see you were at -- it says Trident PCS. That is SunCom?
A. Yes.
Q. Where were they located?

A. Trident PCS was located in Pennsylvania, outside of Philadelphia.
Q. And I may be mistaken, but I was thinking that you had said the SunCom lawsuit where you testified was was here.
A. Yes, because they had two regions. One was in Richmond, and the other was here in Charleston. So I was a regional employee.
Q. Okay. And you were there for a year; is that correct?
A. A little over a year, yes.
Q. And why did you leave them?
A. They were going through more consolidation. That was on the horizon, and I did not want to relocate and to seek additional growth in my career, so we left. We parted ways.
Q. Okay. Voluntarily?
A. Yes.
Q. Okay. And that didn't have anything to do with the lawsuit that you told me about?
A. No, no.
Q. Okay. And then you have got MBT International. Was that your first position as a CFO?
A. Yes.

Q. And why did you leave them?
A. There was a -- the company was being positioned to be sold, and the situations leading up to that were that I had experienced a kidney failure in '99, and in 2004 I received a transplant and missed significant time, and in the interim, they hired a person that was to fill in, and that person had more M&A background than I did, so they chose to stay with him. I came back for a short period of time for transition purposes, and then they packaged me out basically.
Q. Okay. And where were you with them?
A. Here in town. It was in West Ashley.
Q. Okay. Were you working for them at the time -- did you leave them to start with SkyWaves, or were you unemployed for a period of time?
A. I was unemployed.
Q. Okay. And I know we have got SkyWaves next, and I will ask you about that, but let me move to after SkyWaves and ask. It looks like you were the controller at Hargray?
A. Yes.
Q. Were you based in Charleston, or were you in Beaufort with Hargray?
A. They were on Hilton Head Island, and I

kept the house here because my one daughter was finishing high school, and I had an apartment there, and I would travel on weekends back.
Q. And why did you leave Hargray?
A. Because of a reorganization. The company -- at the time I joined them, they were in acquisition mode, and they brought on a lot of really high-talented people to be able to effectively add on more companies, and with the downturn in the economy in '08, that acquisition was -- they exercised their right to pull out of it. And then as everyone is generally aware, the economy was in pretty bad shape after that, so there were no other acquisitions that were -- that could be let's say instituted to help the company grow, so they chose to do it more organically, which is basically growing internally versus acquisitions to grow, so they really didn't need me and/or a few other people that were selectively, you know, released during that time period.
Q. Okay. So they released you from their employ?
A. Yes, and I had a six-month severance package with them.
Q. Okay. And then what did you do between

Hargray and B2B?
A. Looked for a job.
Q. Okay.
A. And found it very difficult. It was the first time I ever ran into discrimination, age discrimination, in my opinion, and so my decision was to join B2B CFO. It is a franchise opportunity located in -- they are headquartered out in Phoenix, Arizona, and it is a collection of about 200, 225 people like me that have been in corporate the majority of their careers, and my business plan now is to work with small- to medium-size companies, generally speaking up to the 20- to 25-million-dollar range, and help them bring a level of expertise to the company that they would not otherwise be able to afford full-time.
Q. You referenced age discrimination. How old are you, Mr. Voytko?
A. Fifty-six, I think.
Q. How old were you when you were CFO of SkyWaves?
A. That would have been six years ago, so 50. At least 50.
Q. Have you ever worked for Football Ventures Corporation?

A. I am currently on a retainer with them. That is part of the companies that I am working for under my B2B umbrella business.
Q. And how long have you been on retainer with Football Ventures Corporation?
A. Since September, I think.
Q. Of 2013?
A. Yes.
Q. Were you affiliated in any way with Football Ventures Corporation prior to that time?
A. I did contract work that lasted I think it was about two weeks. It was a one off, and what I mean by that, it was here, read these documents, tell us what they mean, and then when you are through with that, the assignment was over. That is what I mean by one off.
Q. Are you aware you're listed on Football Ventures' website as their CFO?
A. Yes, I am.
Q. And how did you know about Football Ventures Corporation?
A. Well, I knew Michael Smith when I was with SkyWaves, and Ron Konersmann is also involved with that venture
Q. Okay. Did Mr. Konersmann have anything

to do with your involvement with Football Ventures Corporation?
A. Yes.
Q. And did you know Mr. Konersmann prior to SkyWaves?
A. I did not.
Q. Okay. Would you consider Mr. Konersmann a friend of yours?
A. I would.
Q. What about LV Group, Inc.? What is that?
A. That is a small company that a friend of mine from college -- we started back in the mid-'90s, and it was to manufacture and sell automotive parts, and we ran that at a very small level. It has been dormant for approximately ten years, but I keep the company -- I file the taxes, I do what I need to do, so it is in good standing.
Q. I'm going to ask you about SkyWaves and your work there, but tell me what SkyWaves Corporation is.
A. I am sorry to be flippant, but it is out of business right now.
Q. Sure.
A. SkyWaves was a company that was formed

to produce shelters for the telecommunications industry as well as other companies that would need that type of a structure to house electronic equipment.
Q. Okay. Had you ever worked for -- do you have an engineering background?
A. I do not.
Q. Okay. Do you understand how the shelters were constructed?
A. I do.
Q. Okay. Did you understand the cost of constructing one of the shelters?
A. Yes.
Q. How did you come to understand the cost of constructing one of the shelters?
A. Our engineer, Jeff Ward, had a detailed byproduct of how much cubic yards of cement, how many pieces of like board that was needed to finish the inside, based on the customer and their specifications, the amount of interior upfit that would be needed. It would be similar to deciding, if you are buying a house, whether you want tile floor or linoleum, things like that.
Q. Were you involved in determining the pricing for the shelters that were sold to

customers of SkyWaves?
A. The pricing, I was aware of those discussions, but it was usually negotiated between Jeff Ward, our sales department, Mr. Konersmann, and the customers.
Q. Okay. When did you start working for SkyWaves?
A. In February of 2005.
Q. And at that point in time, as I understand it, you indicated you were looking for a job; is that correct?
A. That's correct.
Q. Did you have any other options other than SkyWaves?
A. I think I was talking with one other company at the time. It wasn't really that serious, and this was an opportunity that I thought really, because of my telecommunications background, was a very timely opportunity.
Q. Okay. And the telecommunications background was the work with Alltel and SunCom?
A. Yes.
Q. And in what capacity did you start working for SkyWaves?
A. The capacity was the same as I finished

at, was the person in charge of all of the financial aspects, but I believe the title changed. It might have been a manager to start with and then was changed to CFO as the company began to grow.
Q. Okay. Had you ever heard of SkyWaves prior to -- did you apply for a position with SkyWaves? How did you come to learn about the position at SkyWaves?
A. I think we saw it posted somewhere, and I contacted Mr. Konersmann, sent him a copy of my resume, and then he asked me to come out to the factory and tour the facility, meet him and other people, and that's how we started.
Q. Okay. Prior to that, had you ever heard of SkyWaves?
A. No.
Q. Okay. When you say "we saw it posted," what do you mean?
A. I was working with a person in the HR placement business at the time. It was when I left MBT, I was given some outplacement services, and it was through that process.
Q. Who was that?
A. It was a company called – I think it was like Signet. The woman, she is still in

A. I would.
Q You at SkyWaves did that?
A Uh-huh.
Q And in terms of complying with the procedures set forth in this factoring agreement, who at SkyWaves was responsible for that?
A I would have been the primary person.
Q. Okay. Who would have been secondary?
A. Well, we would have been -- I would think that -- I am referring to Mr. Konersmann, who would be my superior in the company.
Q. Okay. Anyone other than you or Mr. Konersmann who was responsible for complying with the terms of this agreement in terms of the procedures set forth in the agreement?
A. No.
Q. Okay. At the time in 2005, when you were CFO. did you ever look at the factoring agreement?
A. I looked at it when it was -- when we reviewed it and signed it.
Q. Okay. At the time, in 2005?
A. Uh-huh.
(DFT. EXH. 9, FINANCIAL COVENANT RIDER, was marked for identification.)

Q. I am going to hand you what we have marked as Exhibit 9, Mr. Voytko. Do you recognize this document?
A. I recognize it as part of what was reviewed and signed with the original execution of documents in March of '05.
Q. Okay. And if you look at paragraph 4 on page 3 of this document, do you see where it says Financial Reporting? It looks to me in subparagraph b, within 30 days after the end of each month, SkyWaves is to provide unaudited interim financial statements as of the end of each month. Do you see that?
A. Yes.
Q. Did you do that?
A. With a few exceptions, we provided financials as soon after the month-end as we could.
Q. How soon after month-end -- you have been CFO of several companies, correct?
A. Uh-huh.
Q. And in that position, just generally as CFO, were you responsible for preparing financial statements for the various companies?
A. Yes.
Q. How soon after month-end would you

prepare financial statements?
A. That would be -- that would vary greatly by company, depending on your capabilities and systems that support you. I have closed the books in as little as five days, and I have closed the books in as -- consistently as much as six weeks after, depending on the amount of effort that would go into the process.
Q. Okay. So would you consider a range between five days and six weeks to be a reasonable time, depending on capabilities and systems, to prepare month-end financial statements?
A. I think that is on the short end, meaning quick. I have not been a part of, but I am aware of companies that took longer than that to do them.
Q. Okay. And when you say it depends on the capabilities and systems, explain to me what you mean by that.
A. Well, there is a lot that goes in to preparing. According to GAAP, you have to not just record the transactions, but you also have to look at things like accruals that you might have to do. Like, for example, if you have expenses that you may not have invoices for, yet they have to be

included in that period, so you are matching expenses with revenue. So then you would have to make sure you brought everything together and did it consistently so that the statements would be applicable when compared throughout the months and then ultimately the year.
Q. Are expenses -- you mentioned that. Is that the biggest hang-up?
A. Expenses would probably be the easiest, but there would be other things that -- but it could involve everything from interest, calculating interest, depending on how you book your revenues, there again, depending on the company, and calculating certain other liabilities. It can take time.
Q. Okay. What do you mean depending on how you book your revenues? Explain that.
A. Well, what is important, any businesses that you have a revenue recognition policy, and depending on how complex it is, you might render a service today, but you might not record it or report it as revenue -- I should say recognize it as revenue until the following month, and then you have things like progress-type billings that would be handled differently. So it depends on the

business, and so I can't get into specifics of every business. It would take forever. But those add complexity depending upon the type of business you are in.

Q. How about a product-based business? Is there a revenue recognition complexity inherent with a product-based business?

A. There can be if it is part of a larger contract that is maybe paid for all at once but not delivered throughout. So it could. It could be complex.

Q. How about a product that the customer doesn't pay for until it is delivered? Anything special about how revenue is booked in that regard?

A. Usually it's upon their acceptance and when there is a known and measurable price associated with that.

(DFT. EXH. 10, 6/1/05 LETTER FROM W. CASTLEN MORRIS, JR., was marked for identification.)

Q. I hand you what has been marked as Exhibit 10, Mr. Voytko, and ask you if you recognize this document.

A. Yes, I do recognize it.

Q. Okay. And this appears to be a letter

from Castlen Morris to you and Ron Konersmann. Tell me who Castlen Morris is.

A. He worked for their factoring group, and he was my primary contact there.

Q. When you say there, you mean BB&T?

A. BB&T, yes.

Q. This references that SkyWaves expects to start factoring invoices in July of 2005. Do you see that?

A. Yes, I do.

Q. Okay. Did SkyWaves start factoring in 2005?

A. I don't believe we did. I think it was later that year.

Q. Okay. Later in 2005?

A. Uh-huh, yes.

(DFT. EXH. 11, 7/13/05 E-MAILS, was marked for identification.)

Q. I hand you what is marked as Exhibit 11, Mr. Konersmann. This is an e-mail exchange between you and Mr. Morris, whom you have identified as your primary point of contact at BB&T Factors. This is from July of 2005, and I just wanted to ask, at the top of your response -- and by all means take a minute to review this -- but

there is a reference to you sending a check to Castlen and a copy of the P. Konersmann note, and I wanted to ask you about that. Just let me know when you have finished reviewing it.

A. (The witness reviewed the document.) Okay.

Q. Okay. And do you recall why you were sending a check to Mr. Morris, what that check was for?

A. It looks like it says the invoice for commissions. So I guess in number 2, what it is basically saying is that he is telling me that they got a check in for a thousand dollars, but it was reported incorrectly by their application to cash app department and applied it to our ledger as payment, where it should have gone to pay for -- it looks like he said part of this payment covers the June field exam. So that would have been their quarterly audit that they do. It appears to me the check got mishandled on their side.

Q. Okay. So it wasn't for payment on an invoice from SkyWaves?

A. No, it does not appear to be.

(DFT. EXH. 12, 2/15/06 E-MAIL, was

marked for identification.)

Q. Okay. I am going to hand you what we have marked as Exhibit 12. This is another e-mail exchange from Mr. Morris to you in February of 2006. Now, at this point was BB&T factoring any invoices other than Nextel, that you recall?

A. I think we were also doing some AT&T. I am not positive, but I think so.

Q. Okay. And this e-mail, and I did not see the attachment to this e-mail, but it references a spreadsheet, and Castlen says he reviewed the spreadsheet that you, meaning you, Mr. Voytko, created.

A. Uh-huh.

Q. He goes on to say, "It looks to be adequate for our purposes." Do you recall what you were creating a spreadsheet for?

A. It was to track the purchase orders and the invoice -- I think at this time it was mainly invoices that were factored so he knew what was on the production schedule and what was coming forth, and ultimately that expanded into tracking the purchase orders initially. This was our initial attempt at tracking all of the activity.

Q. Okay. But it was a spreadsheet that

you created to do this?
A. Yes, uh-huh.
Q. Okay. And I notice in the last paragraph of this e-mail, Mr. Morris is indicating to you, "Going forward, make sure that BB&T's notification sticker goes on each invoice to Nextel." Do you see that?
A. Uh-huh, yes.
Q. "Which instructs Nextel to remit payments to our Charlotte, NC lockbox." Do you see that?
A. I see.
Q. Did you understand that Mr. Morris was instructing you to put a notification sticker on the invoice directing payment to BB&T's lockbox?
A. That's what the memo says, but in the -- when we first entered into the agreement with BB&T, and some of the procedures and requirements, we made clear to them in the beginning that we felt that we could not abide by those. The one was to have Nextel remit all payments to -- or any company to remit the payments, because the way the agreement was set up, we did not factor everything, and so if we were to -- depending on cash-flow needs, if we didn't

have to use the factoring agreement, we didn't use it because it's expensive. And let's say, for example, we had shelter 1-A shipping immediately, and we knew we would get a quick turnaround on it, and we were not stretched for cash, we would not factor it. We would just send it in. So to do this, you would have -- you would require the vendor to have two separate -- remit two addresses in their system, and at this time they just could not accommodate that. So that was one item that we objected to immediately, and we are really clear on it, and in that case, at the time, Jim's response to us was, you know, don't worry about it, we will work it out as we go along. So that was, say, a concession in terms of the initial agreement that we talked about, that you walked me through the pieces of, that was changed as a matter of course through this whole arrangement.
Q. So let's go back and look at the factoring agreement. So as I understand it, you agree with me that SkyWaves was at least originally supposed to instruct its customers for accounts that had been factored to remit payment directly to BB&T?.
A. That's how the document is written.

Q. Okay. So you agree with me there. I understand that you are saying there was an accommodation made, but you agree with me --
A. But what I want to make clear is that we objected to the form in the very beginning and were told this is a formality, this is something we need to get -- just get it in place, and we will deal with that later.
Q. Okay. Did you ever deal with that in writing later?
A. There were a couple of issues that were -- I would use the term memorialized via e-mails and conversations but not in a formal what you would consider an addendum to the agreement.
Q. Okay. Do you have any e-mail that specifically states SkyWaves does not have to instruct customers on accounts that have been factored to remit payment to BB&T?
A. Those would have been more verbal conversations than agreements.
Q. So is your answer to my question no, you do not have an e-mail expressly stating that?
A. That would be correct.
Q. Do you have anything in writing expressly stating that SkyWaves does not have to

instruct customers who on accounts that have been factored must remit payment directly to BB&T?
A. What I do have is when we agreed on -- I am sure you have the e-mails, but there were attempts on Castlen's and my part to come up with wording that would identify an invoice as being factored but was something less than, or different from what was stated in this agreement.
Q. And as I understand it, you said, "We made clear we could not abide by the requirement to notify customers to remit payment to BB&T"?
A. Yes.
Q. Tell me who "we" is.
A. It would have been Ron and myself.
Q. Okay. And tell me to whom you made that clear.
A. To Jim Edahl.
Q. Anyone other than Jim?
A. To Castlen and to Steve May. He would have been -- I think he had like a lead role in the factoring, or maybe it was a regional guy out of Charlotte.
Q. And as I understand it, the explanation that you gave me for SkyWaves not abiding by that requirement was that they, meaning SkyWaves'

customers, could not accommodate two addresses for remitting payment in their systems?
A. As I understood, talking with them, yes. I couldn't speak to that authoritatively because I am not an employee of those companies, and the other part to that was just the confusion that it would create because it is not like I am sending an invoice to you. You are like one location. For example, all of these companies are -- they're nationwide, and they have regional operations. So depending on what their systems were, even though you send it to one location through their systems, they would be approved by different areas, and you would have many people involved with it.
Q. Okay. Well, you say understand in talking with them. Tell me -- at this point, as I understand it, you have told me the only customers at issue were Nextel and you said you thought Alltel?
A. ATT.
Q. ATT.
A. Or Cingular at the time. Their wireless division, I think it started as Cingular, went to AT&T and went back to Cingular, but it was

through their different reorgs.
Q. Tell me who -- you don't necessarily have to give me a name, just give me a title -- tell me who at Nextel you talked with about whether they could accommodate in their system two different addresses for payment depending on whether the invoice had been factored.
A. It most likely would have been an AP person, accounts payable person.
Q. Okay. And how about at Cingular ATT?
A. It probably would either have been an AP person -- usually the people we dealt with that ordered the shelters, they didn't have any -- they didn't have any control over what the finance side did.
Q. Okay. In your career as a CFO, or in any position -- it looks like you have had a number of financial positions in different companies -- were you ever responsible for accounts payable?
A. Yes.
Q. Okay. And when you in that position would pay an invoice, would you look on the invoice to determine who you were supposed to pay?
A. The standard practice is when you set up a new vendor, first of all, the vendor should be

approved so you know you are not paying Molly's sister for something but you are paying the right person for it, and then they are set up in the system as -- there could easily be the same remit to as the company's address, or the company's address could be region northeast, but the remit to would be their corporate headquarters or processing center somewhere else. So, generally speaking, you would have an address for a company and one remit to address.
Q. Is it hard to look at an invoice to determine where payment is to be made?
A. When you are a company processing. thousands a day with people that are just instructed to enter the invoice in, then, yes, it would be.
Q. Did SkyWaves issue thousands of invoices a day?
A. We did not.
Q. So if a customer of SkyWaves remitted payment directly to SkyWaves on an account that had been factored, who owned that money? Who did that money belong to on a factored account?
A. Ultimately the bank would have loaned us money and ultimately would have been paid back.

Q. Okay. That is not my question, Mr. Voytko. Who owned it? Who owned that account receivable on a factored account?
A. BB&T would have.
Q. Okay. So if a customer paid SkyWaves on an account owned by BB&T, what was SkyWaves required to do with that money?
A. Okay. As you know, there was a gap between March 20th of 2005, when we first started using the factoring agreement, or using the factoring line of credit. Part of that was because of the cost, part of it was because we did not need to factor it because we had adequate cash flow, and in some of these correspondence, there was some disappointment on BB&T's side that we did not use it more frequently and with more vendors, so as we started to use it, one of the things that -- an agreement that we worked out with Mr. Edahl was that as the money came in, we would remit it to the bank, but if there was -- but the ultimate agreement was, as long as it was received within 60 days of the customer due date, everything would be fine.
Q. Okay. And tell me with whom this agreement that you have just described, with whom

A. Okay.
Q. He asks about getting Cingular and Nextel to electronically remit payments to BB&T. Do you see that?
A. Yes.
Q. Did you make any effort to determine whether Cingular and Nextel could electronically remit payments directly to BB&T?
A. I did.
Q. And what were the results of those efforts?
A. As I recall, we were able to get AT&T to do so after a lot of work. I don't recall whether Nextel was able to accommodate that.
Q. Okay. So AT&T ultimately didn't have any problem with distinguishing between a factored or nonfactored invoice in electronically remitting payments to BB&T?
A. Well, this obviously was much later in the process, and I don't know when exactly I was able to get that set up, but systems were evolving at this time that made it in some cases easier to accommodate.
Q. Okay. And we see on this e-mail again Mr. Morris is asking about affixing BB&T's payment

notification language on invoices. Do you see that?
A. Yes.
Q. Did you respond to his inquiry about whether the original invoices contained the notification?
A. As I recall, I don't remember the exact time, but what we did do is, we agreed to, instead of affixing the stamp on it, was to put that in the body of the invoice, some language to the effect that it was a factored invoice.
Q. Okay. Well, he is not asking to notify that it was a factored invoice. He is asking whether it contains payment notification.
A. I would have to look at the copy of the invoice. We did not use the label, as a direct answer to your question, but we did agree to some language on the invoice that he was -- he agreed to and had accepted it.
Q. Okay. And when you say label, as I understand it, is this just a sticker that SkyWaves could put on factored invoices?
A. Uh-huh, yes.
Q. So it wasn't an automatic invoice form? So if it was a factored invoice, you would just put

BB&T's payment sticker on it?
A. We could, but in terms of -- you are getting back to this, you know, address and being able to remit, and I know it is hard to accept that in a payment processing, invoice processing scenario, where you have lots of high volume, people just are process and proactive driven. They are not looking at each invoice for intricacies which might require special handling.
Q. Sure. And I guess that sort of begs the question then, if the customer is going to ignore the instruction, what's the problem with putting the sticker on the invoice?
A. The confusion it would create, which would delay getting payment.
Q. Well, if the customer is ignoring it, what confusion is that going to create?
A. I can't control that. I don't know what may happen to it if I send it that way.
Q. Did you ever have a customer say, "This is confusing to us, don't stick these stickers on the invoice telling me to pay BB&T"?
A. Well, considering we didn't use the stickers, that probably didn't happen.
Q. So as I understand it, you didn't want

to put the stickers on the invoices because of confusion to the customer in terms of to whom payment should be made?
A. Yes.
Q. Okay. Well, if that was the concern and the reason for not putting the sticker on the factored invoice, why did SkyWaves then need 60 days to turn around and remit this payment that belonged to BB&T?
A. Because as part of the agreement that we had with Mr. Edahl was that it allowed us to better -- or I'll use the term smooth out our cash-flow needs so that what we tried to always do was balance between cash needs and costs because with factoring came a very high cost of money, and when we had -- which is why you see a variance between the number of days that the invoice may have been held, and we used the funds for operating purposes. First of all, there was no restriction on how the funds could be used, and secondly, that in managing overall cash-flow needs of the company, we -- I would look at what our needs were and then act accordingly in terms of trying to minimize the cost of financing for the company without running into huge spikes up and down in terms of our needs

and availability.
Q. So you were using BB&T's money twice?
A. I don't think I would say twice. It was just the first time. But I might just add to that, that all during that time, the company, BB&T, was earning interest on the money that we paid up until the very end.
Q. It was their money to begin with, right?
A. It was loaned to us, yes, and we paid for the right -- for the use of those funds.
Q. Well, and I am trying to -- you keep using the word "loan," and I just want to go back to, as I understand it, BB&T was purchasing something. They were purchasing SkyWaves' accounts receivable, correct?
A. Yes, but we were paying for that money. Even though you say they purchased it, it didn't absolve us of paying interest on those funds while they were being deployed by the bank.
Q. Sure, but if you had given the money to the bank, they could have earned their interest on it some other way. I mean, you are acting like -- never mind.
(DFT. EXH. 15, OCTOBER 2006 E-MAILS,

was marked for identification.)
Q. I am going to hand you what I marked as Exhibit 15. This is another e-mail exchange between you and Mr. Morris. And this appears to be a communication -- if we look at the front page, down at the bottom -- let's start with Mr. Morris's communication to you, and this is in October of 2006 regarding -- subject line: Cingular payment. Do you see that?
A. I do.
Q. Okay. And he references receiving payment on October 10th, to be applied to one invoice. Do you see that?
A. Yes.
Q. And then he asks you specifically, "What information do you have on the following Cingular invoices that are past due?" Do you see that?
A. Yes.
Q. And it looks like he is giving due dates for five different Cingular invoices.
A. Uh-huh. Yes.
Q. And then up at the top, you make reference to having received one and then asking about sending payment to you. Do you see your

response?
A. Yes.
Q. Okay. And from this exchange, is there any discussion or any question about who owns the accounts for these invoices?
A. There doesn't appear to be any discussion regarding ownership, that I see, unless I am missing something. Help me out.
Q. Sure. You don't disagree -- well, do you agree with me that the amounts due on these invoices belong to BB&T?
A. I really don't understand your question.
Q. Okay. Castlen Morris is communicating directly with you in October of 2006 asking where the payment on these invoices is, isn't he?
A. Yes.
Q. Does he in here anywhere say you can use this money for 60 days, but I need you to pay it back to me?
A. Well, you know, first of all, when you look at this, you are talking about invoices that are well past 60 days, okay? Which, number one, means I have already paid him back for the money on these. If the amounts factored are not repaid

within 60 days of the due date, the company, being SkyWaves, paid the money back to BB&T out of our other operating funds. So any of these that are five and six, probably even seven, by October 12ish would have probably been more than 60 days past due, so I would have already repurchased these from him using other funds.
Q. Okay. Well, with that thought, let's look at number 1714.
A. Yes.
Q. So he is asking about invoice number 1714 due on May 28th of '06.
A. Okay.
Q. And so by your explanation that you have just given, as of July 28th, or thereabouts, of '06, that one would have been 60 days past due, correct?
A. Uh-huh. Yes.
Q. And you are telling me that SkyWaves would have paid from its operating account, would have paid money to BB&T such that nothing was due anymore on that invoice?
A. Yes.
Q. Okay.
A. And by operating account, I mean the

same account that all of the BB&T money rotated. We only had one account.
Q. Okay. So by that, I take it to mean you did not segregate and have a separate account for factored invoices?
A. That is correct.
Q. So you commingled all money that came in?
A. Yes.
Q. Okay. Now, if you --
A. And to add to the process here, the reason he wanted that money to come back to him was just so he could close it out in the system and show that there wasn't a write-off, which ultimately if you were to analyze the history -- in fact, I think if we wrote off $10,000 in three years, that was a lot. I mean, we got paid for everything, and we remitted what we were required to remit to the bank.
Q. Okay. Do you have anything in writing with Castlen that says -- well, let me just use this as an example. Your response to Castlen, why didn't you remind him that you had already paid off 1714 because it was more than 60 days due?
A. It wasn't necessary because -- it just

wasn't germane to this conversation right here. I mean, I am basically -- according to the way that the procedure was set up, and since I already paid him back, I didn't have to remit that, but he wanted to do it just to complete the cycle, and I acquiesced to that.
(A recess transpired.)
BY MS. CHERRY:
Q. Mr. Voytko, I was asking you about what we have marked as Exhibit 15, and I want to make sure I understand. I think you said, with regard to -- I was asking about invoice number 1714.
A. Yes.
Q. And you had indicated it was already 60 days past due, and you had already paid it off.
A. Yes.
Q. Out of operating -- SkyWaves' operating account; is that correct?
A. Yes.
Q. How did you track whether a particular invoice had been paid to BB&T?
A. Well, when we made the assignment to BB&T, there would be -- they maintained -- they being the bank -- maintained like an accounts receivable ledger, so that was one way that it was

tracked. And that was the primary way I think we did it sometime from -- 2006 is probably about right. From there, we had -- they put in their system and you could see an aging report and everything. That is where you had visibility about customer, by each individual invoice.
Q. So then, and again based on what you were explaining, that would mean invoice number 1705 that is indicated is also due on May 28th, '06. Do you see that?
A. Yes.
Q. So is it your testimony that SkyWaves as of October of 2006 would have paid on that invoice as well?
A. Yes.
Q. And then also 1735-1 as well, correct?
A. Yes.
Q. And also on 1750-1, correct?
A. Yes.
Q. So then, what did you understand Castlen and Morris's inquiry to be about these invoices if, as you have testified, these have already been paid?
A. He was wanting to clear those out on his ledger. So what would happen is, he would --

if let's say when they went over the 60 days, he would just debit my account. So I would not -- so that is how it would be cleared off, and then it would get a status in their system that said something like -- and I guess I am surmising this because through our conversations of how I understood it to be, it would kind of designate that invoice as something the client purchased back. So what he wanted to do was get those payments so that it could then be applied to the invoice and appear as it in fact was paid by the client, by our client, our customer, and if I was on his side of the shop, I would view that as, you know, you are tracking your customer history of their paying their invoices, whether or not they are paying or not.
(DFT. EXH. 16, 10/24/06 E-MAIL, was marked for identification.)
Q. I hand you what we have marked as Exhibit 16, Mr. Voytko, and this appears to be -- and this is an e-mail from you to Jim Edahl dated October 24th, 2006.
A. Yes.
Q. And it references monthly balance sheets and cash-flow statements that were

A. I agree with you, yes, there was a limit, and that limit was exceeded in 2006.

(DFT. EXH. 18, 11/13/06 E-MAIL, was marked for identification.)

Q. I am going to hand you what we have marked as Exhibit 18, Mr. Voytko. This is an e-mail from Castlen Morris to you, dated November 13th, 2006. Do you see this?

A. Yes, I see it.

Q. And he makes reference to the remaining Cingular invoices. Do you see that?

A. Yes.

Q. As 60 days past due, and says "which means they are ineligible for borrowing."

A. Yes.

Q. What does that mean?

A. That means that -- this is in reference to what I referred to before as buying back the invoices. So they have exceeded the 60 days, and now the bank would no longer borrow money -- I am sorry, loan us money against those, so in order to bring it back into formula, he would debit my account -- credit my account for $80,000, and he would take that 80,000 and apply it to the invoices in his system.

Q. Okay. What happens if SkyWaves doesn't have $80,000?

A. Well, in this situation we had $80,000, so I can't speculate on what would happen if we didn't at that time.

Q. My question is not limiting it to that point in time. What would happen if under the scenario you have described, SkyWaves owed the bank $80,000 and had not paid it or didn't have the money to pay it?

A. Okay, if that were to have happened, then I would expect that we would have a conversation about how and when that would be then made up.

Q. Mr. Morris is also asking you on November 13th of 2006 -- now, this is two or three weeks after your October e-mail to Jim with monthly balance sheets and cash-flow statements. Several weeks later, Castlen Morris is asking any update on the August, September, and now October financials. Do you see that?

A. Yes.

Q. Okay. Did you have in November of 2006 the August, September, and October financials, actual financials, for SkyWaves?

A. Well, I would not have had October's because it is only two weeks after, not even two weeks, and I would have responded to him with an update telling him, and I can't remember what I would have responded to him at that time.

(DFT. EXH. 19, 11/19/06 E-MAIL, was marked for identification.)

Q. I am handing you what we have marked as Exhibit 19, which I believe is your response to Mr. Morris and Jim Edahl. On November 19th of 2006 you are sending what you have called August 2006 financials. Do you see that?

A. I see that, uh-huh.

Q. Now, when we look at the attachment, the only attachment to this e-mail is aging A/R detail as of August 31 of 2006.

A. Yes.

Q. Okay. Did you have August 2006 balance sheets for SkyWaves as of November 19th of 2006?

A. Well, if I would have sent him this and in this attachment financial package would have been included -- would have been the income statement, balance sheet, cash flow, and this aging, because my attachment says package, then yes, I would say that based on what you have shown

me here, that I would have had those to send to him because I am also copying Ron and Jim Edahl as well.

Q. Great. And, Mr. Voytko, this came out of your document production, and this is what was attached to the back of it, and so --

A. Okay, let me try to fill maybe that gap. When I put together the spreadsheet, you can put numerous tabs, and when this was printed out, I don't know who printed it out and maybe they only printed out one tab, so there could have been three other tabs within the file that would have had the information you wanted or that you are looking for.

Q. Sure. Where is September's? Mr. Morris has asked about September and October, and I realize you are telling me that as of November 19th, you wouldn't have had October's, but as I understand it, you likely would have had September's, given your six-week window?

A. Yeah, that should have followed fairly closely.

Q. I have your electronic files in the office. When I take a break, I'll look and see --

A. I hope it is there.

Q. I don't think it is, but I'll look.

Maybe it is.
MR. KEFALOS: What were we looking for? I've found it here.
MS. CHERRY: Sure. Does it have the balance sheet and income statement --
MR. KEFALOS: Balance sheet, income statement, cash-flow statement, AP aging --
MS. CHERRY: For August of '06?
MR. KEFALOS: Yes, August of '06, and A/R aging for August of '06.
MR. MENDOZA: For the transcript, we may want to note that Mr. Kefalos is looking at his computer.
MR. KEFALOS: Off the record.
(Off-the-record conference.)
(DFT. EXH. 20, 1/11/07 E-MAIL, was marked for identification.)
Q. Mr. Voytko, I am going to hand you what we have marked as Exhibit Number 20. This is an e-mail from Mr. Morris to you in January of '07, and he is attaching an updated purchase order spread, and I want to ask you if you will flip to this attachment, is this the spreadsheet to monitor purchase orders and purchase order fundings?
A. Yes.

Q. So was this the format of the document that you and Mr. Morris were using in terms of monitoring, if you will, when a purchase order was submitted for financing?
A. Yes.
Q. And then he asks -- that he was trying to follow how long a purchase order stays funded.
A. Yes.
Q. Do you have an idea of how long, in terms of amount of time, it would take for a purchase order to convert to an invoice?
A. It varied depending on the vendor and the activity. It was not uncommon that a PO that we might have gotten and factored let's just say in July, that the customer may have had an issue with the site or something else that they didn't call for that particular shelter, but they went and built a whole bunch more, and then what we might get is another purchase order that said cancel this one, replace it with this one, and then we want to ship this one immediately. So then that would bring this one up and ship out right away. So, I mean, I have seen them on the list for six months, maybe more, and then in some cases they would turn within 30 days, or some, if it was a real rush,

they might take one that they had requested earlier and just have it shipped out right away. So it varied.
Q. So did SkyWaves have any purchase orders that didn't convert to an invoice either vis-a-vis a new purchase order from the same customer? Just purchase orders that never resulted in an invoice?
A. If there was, it was a very small number, and by small, I mean less than five. It was almost certain -- I am not going to say a hundred percent, because you might find one that I missed on, but they generally replaced them. If they weren't going to use them, they replaced them with something else.
Q. How did you track -- as I understand it, a purchase order would be funded at a certain rate?
A. Uh-huh.
Q. And then once it converted to an invoice, there was additional percentage of financing available?
A. Yes.
Q. Okay. So how did you track when a purchase order converted to an invoice?

A. Well, when it did, there were two ledgers set up at this time. There was ledgers 7702, and then I think the other one was maybe 7700. So what Castlen would do is he would take the money from this ledger, and he would say like paid off 1/12/2007. So what he is basically doing is removing this money -- and you can see the zeros there -- so he took this 24,665, I am thinking because it's in the row of similar-type shelters, and then he would move that over to the invoice ledger and add on the 15 percent -- the additional increase, whatever it was. In '07, latter '07, it was an additional 20 percent, I think. So then that money would reside over here until it was paid off.
Q. Okay. So how would -- so invoice number under Nextel, looking at the first one, purchase order 429076, when an invoice was issued for that purchase order, would the purchase order number show up on the invoice?
A. Yes.
Q. Okay. I am trying to figure out how to match the two of them up.
A. Uh-huh.
Q. So did SkyWaves have any monitoring

Q. And then in paragraph 3, he references electronic payment remittances for invoices. Do you see that?
A. I do.
Q. And he is asking when you expect to have Nextel, Verizon, and General Dynamics remitting electronically. Did you have discussions with Mr. Morris about those three customers of SkyWaves remitting payments electronically?
A. Yes, I did.
Q. Okay. What were those discussions with Mr. Morris about?
A. Well, with respect to General Dynamics, I think we were successful with getting those to remit to him electronically. Verizon, we never did, and Nextel -- Nextel, I can't -- I don't think we did any Nextel. I can't recall that.
(DFT. EXH. 26, 2/20/07 E-MAIL, was marked for identification.)
Q. I hand you what we have marked as Exhibit 26, Mr. Voytko, and this is an e-mail from you to Mr. Morris on February 20th of 2007, and you are asking Mr. Morris to "please advance as much as you can today given our limit." Do you see that?
A. I do.

Q. So in that regard you understood that there were limits to what Mr. Morris may be able to advance, correct?
A. Yes.
Q. Okay. And I just want to ask, if you flip to the second page of this exhibit, it's the first page of the attachment, and it is captioned Assignment of Accounts Receivable. Do you see that?
A. I do.
Q. Is that your signature on this document?
A. Yes.
Q. So was this how it worked, you would get assigned accounts to BB&T?
A. Yes.
Q. And then the advances would come through?
A. Yes, the remaining advance.
Q. Okay. And when you say remaining advance, that is based on the difference between what had already been advanced under the purchase order and what the advance rate was for the invoice?
A. Yes.

(DFT. EXH. 27, 3/20/07 E-MAIL, was marked for identification.)
Q. Mr. Voytko, I am going to hand you what we have marked as Exhibit Number 27, and this is an e-mail from Castlen Morris to you dated March 20th of 2007, and he is sending you an attachment which is an amendment to the factoring agreement, the March 22nd, 2005, factoring agreement.
A. Yes.
Q. And it looks like he is asking you to have Ron Konersmann sign it and return it to him. Do you see that?
A. Yes.
Q. And in this attachment, it looks like it is increasing the maximum credit amount?
A. Yes.
Q. From that two one fifty to three million five. Do you see that?
A. I do.
Q. Okay. And it looks like it's changing the factoring commission from a percentage to just a flat dollar amount?
A. Yes.
Q. And then as I see it, the advance percentage on invoices is increasing to 85 percent;

is that correct?
A. That's correct.
Q. Okay. Now, in this cover e-mail from Castlen, it looks like he is saying he is not including the purchase order sub-limit or the purchase order advance rate as part of this document. Then it goes on to say he was comfortable letting Jim Edahl's proposal letter of March 2nd of '07 function in that capacity. Do you see that?
A. I see that.
Q. Did you understand that there was a sub-limit to purchase order financing?
A. Yes.
(DFT. EXH. 28, 3/2/07 LETTER, was marked for identification.)
Q. I am going to hand you what we have marked as Exhibit 28, Mr. Voytko, and ask you if this is the March 2, 2007, letter to you from Jim that Mr. Morris is referencing in his e-mail?
MR. KEFALOS: What's the date of that?
A. March 2nd. It appears to be, yes.
Q. Okay. And then Exhibit 28, Mr. Edahl has indicated a two-million-dollar sub-limit for purchase order financing. Do you see that?

A. I do.
(DFT. EXH. 29, 3/14/07 LETTER, was marked for identification.)
Q. I am going to hand you what we have marked as Exhibit 29, Mr. Voytko, and this is a March 14th, 2007, letter from Mr. Edahl to you, and it looks like this is increasing the advance rate on purchase orders from 60 percent to 65 percent. Do you see that?
A. I do.
Q. Okay. So at this point in time, on March 20th of 2007, as I understand it, the advance rate on invoices is 85 percent, and the advance rate on purchase orders is 65 percent?
A. Correct.
Q. And the overall limit is 3.5 million, with a sub-limit of two million for purchase order financing?
A. Yes.
(DFT. EXH. 30, 3/20/07 E-MAIL, was marked for identification.)
Q. I am going to hand you what we have marked as Exhibit 30, and that looks to be your response to Mr. Morris on March 20th of '07, returning the signed amendment to the factoring

agreement; is that correct?
A. Yes.
Q. I want to ask you if you will go back and look at the March 2nd of '07 letter that Mr. Edahl sent to you. It is Exhibit 28. At the penultimate paragraph in that letter that starts with, "Assuming SkyWaves' 2007 budget," do you see that?
A. I see that.
Q. Was SkyWaves' 2007 budget that was previously submitted to BB&T achieved?
A. It was not.
Q. Did you ever submit 2007 year-end financials to BB&T?
A. I did.
Q. Okay. When did you do that?
A. It would have been mid-January of '08.
(DFT. EXH. 31, 3/23/07 E-MAIL, was marked for identification.)
Q. I hand you what we have marked as Exhibit 31, Mr. Voytko. This is an e-mail from you to Jim Edahl on March 23rd of 2007, enclosing a Capital Projects listing. And it mentions that you discussed it with Mr. Edahl. What is this Capital Projects listing? Why were you sending this to

him?
A. This was our -- the equipment that we needed to ramp up for production that we were expecting to come starting in late '07 and 2008 and beyond, and we had also approached Jim about separate equipment loans so that it would not restrict and use up the factoring line, which -- since this was specific, and I believe that he did get approval for an equipment line, of which we only used a portion of.
Q. Okay. This pricing, where do those numbers come from?
A. They would have come from manufacturers, suppliers.
Q. So you would have been looking at either based on conversations you had with them or estimates that they sent to you in order to fill in the pricing numbers?
A. Right. What would have happened is, since, as I said before, I am not the engineer, but Ron in working with the engineers and the company would determine what a concrete pump system would be worth, and they would contact the vendors, decide what we wanted, and then that would be the price that I would use.

(DFT. EXH. 32, 3/27/07 E-MAIL, was marked for identification.)
Q. I hand you what we have marked as Exhibit 32, Mr. Voytko. This is another e-mail from Castlen Morris to you. This one is dated March 27th of 2007. He is asking about a General Dynamics invoice.
A. Yes.
Q. And he makes a reference, "I am not aware that their contract allows for any 'bill and hold' invoicing." What does that mean?
A. Okay. Well, a couple of our vendors would -- they would give us the purchase order, we would build the shelter, and then they would say, "We don't need it for another couple of months, but we are willing to pay you now for it, so if you invoice me, I will pay it without having it shipped to my location." And that's what bill and hold means. It would be less expensive for them to pay for it and not to have to pay for storage somewhere else but remain at our plant, and then when they were ready for it, a truck would come, and away it goes.
Q. Then if you look in the second paragraph, he makes reference again, "BB&T's full

it says about two days ago he sent you an e-mail noting the delay between when the check was written and when it was received from the bank. So this would have been an e-mail to you towards the end of August of '07, correct?

A. Yes.

Q. And it indicates that he asked you about the delay and whether Verizon had held the check. Am I reading that correctly?

A. You are accurate.

Q. And you have noted that your response was that there is usually a 10-day delay between the check date and when we, SkyWaves, receive and deposit the payment. Then you go on to say the payment is then sent to BB&T along with a check to retire the receivable. Do you see that?

A. Yes.

Q. Is that what you told Castlen Morris?

A. I would say it is based on what I had noted here.

Q. Okay. Then we go on to the third paragraph. "In this case approximately six weeks had passed before the payment was sent to the bank. He asked why there was such a long delay and whether we were having cash problems. I replied

that cash was always tight and that I held onto the payment longer than I usually did." Is that what you told Mr. Morris?

A. Yes.

Q. Was cash always tight at SkyWaves?

A. Considering we were a startup business with growth and then some of the delays in the programs that we have documented here, I would not say always -- I mean always is a general term to say in a startup business cash is going to be tight. In this case, as I have noted, it was a little tighter than usual.

Q. Okay. And you are telling Mr. Morris that you held onto the payment longer than you usually did?

A. Yes. As I mentioned when we first started talking about the holding onto the payments and utilizing those, this was part of the cash management between -- the decision whether to hold onto it longer, as you would perhaps in an asset base lending situation, or turning it over so you can save money on interest. So this was part of that balancing strategy that we had been using for the entire agreement.

Q. And there is nothing in here about you

reminding Mr. Morris that you could use the money for 60 days, is there?

A. I haven't read the whole thing here, and what you have recovered, I did not remind him of that.

Q. Well, take your time and read it, and point out to me if you do somewhere in here.

A. (The witness complied.)

I don't think I did, but in our conversation on the phone, I would have mentioned that to him.

Q. And then you have another notation down here from September 17th of '07. Do you see that?

A. Yes.

Q. And it looks like you say that you had a conversation with Castlen yesterday. That would be September 16th, '07, correct?

A. Yes.

Q. About sending remittances to the bank for outstanding invoices. What does remittance mean?

A. That would mean a form of payment to the bank. That is what a remittance would be.

Q. Is that word used in the factoring agreement between SkyWaves and BB&T?

A. Actually, I don't know. I am sorry.

Q. All right. You go on to say, "We reviewed the aging report and identified the payments that have been received and need to be forwarded to the bank." Is that an accurate recount of your discussion with Castlen Morris on September 16th of 2007?

A. That would be -- yes, and those would be ones that would be approaching the 60-day time period.

Q. Then you make a reference that you sent an assignment and an advance on Friday that Castlen held off processing until you and he had this conversation, the one that you have referenced in the paragraph above, correct?

A. Yes.

Q. And it indicates you made a commitment to resolving those issues; is that correct?

A. Yes.

Q. Okay. And then in the third paragraph, you note that Mr. Morris reiterated that the payments received cannot be held, and it could result in a cancellation of the contract. Do you see that?

A. I see that.

Q. Then if you flip to the second page, it looks like on November 27th, you forward this to Mike Burke.
A. Okay.
Q. So does that refresh your memory approximately when you started interacting with Mr. Burke?
A. Well, I knew it was after Thanksgiving, yeah, but you are right, because as I recall, I'm not sure who I found out about Mike Burke coming on board, whether it was from Jim or from the folks at the office up there.
Q. But it looks like, in terms of working with Mike, you are forwarding him the assignment of the accounts, and you are asking for an advance, like you did with Castlen?
A. Yes.
Q. And to the best of your knowledge, did Mr. Burke process the assignment that you forwarded to him?
A. I believe he did, yes.
Q. Okay.
(DFT. EXH. 54, 12/7/07 E-MAIL, was marked for identification.)
Q. I am going to hand you what we have

marked as Exhibit 54, Mr. Voytko, and this looks like you are attaching an assignment to Mr. Burke and asking for advances on it. Do you see that?
A. Yes.
Q. Okay. And to the best of your knowledge, did Mr. Burke process this assignment and request for your advance?
A. As far as I know, yes.
Q. So at this point are you communicating with Mr. Burke like you did with Mr. Morris?
A. Yes.
Q. So you send him the assignments and request the advance?
A. Yes.
Q. Okay.
(DFT. EXH. 55, 12/14/07 E-MAIL, was marked for identification.)
Q. I hand you what we have marked as Exhibit 55, and this is another assignment, and you indicate to Mr. Burke that these are straight 85 percent advance. And you say both shelters have been invoiced, so there is nothing on the PO ledger?
A. Yes.
Q. What does that mean?

A. It means we did not take an advance on the particular purchase order for this.
Q. Okay. Just so I understand, if you did take an advance on a purchase order, then that just cut into, if you will, what was available to advance on the invoice?
A. Yes.
Q. Okay.
A. Right, because I would have already had 65 percent of it.
Q. Okay. I just want to make sure I understand how it worked. So when a purchase order came into play, you got 65 percent, and when it converted to an invoice, you got another 20 percent?
A. That's correct.
Q. And then if there was no purchase order and it was a straight invoice, you got 85 percent?
A. Yes.
Q. Okay.
(DFT. EXH. 56, 12/14/07 E-MAILS, was marked for identification.)
Q. I hand you Exhibit 56, and this is Mr. Burke's response to you on December 14th and requested the straight 85 percent advance, and he

indicates that he doesn't have any availability to advance until the past due gets cleared or we get more sales. Do you see that?
A. I do.
Q. He is telling you he didn't have any availability at this point to advance you any money, correct?
A. Yes.
Q. Okay. And we saw that had happened before with Castlen Morris, correct?
A. Yes, and -- well, early '07, coming off of '06, yes.
(DFT. EXH. 57, 1/17/08 PRESENTATION, was marked for identification.)
Q. I am going to hand you what we have marked as Exhibit 57, and ask you if you recognize this, Mr. Voytko.
A. I do.
Q. Okay. And tell me what this is. I can read the title. It says it is a presentation for Jim Edahl and Mike Burke. Is that what this was used for, to your knowledge?
A. Yes, this was used for a presentation to both of them when they made their visit to SkyWaves on the 17th, and it was the first time

that Mr. Burke had been at the facility.
Q. Okay. Were you involved in making this presentation to Mr. Edahl and Mr. Burke?
A. Yes.
Q. Okay. Did you help prepare this presentation to Mr. Edahl and Mr. Burke?
A. Yes.
Q. Okay. And if you look towards the back of this presentation, it has a 2008 income statement.
A. Yes.
Q. I am assuming that as of January 17th of 2008, this is a forecast?
A. Yes, it is.
Q. Okay. Did you prepare this forecast?
A. I was one of many that did, yes.
Q. Now, as of January 17th, 2008, did you have SkyWaves' year-end --
A. I did.
Q. Financials prepared?
A. I did.
Q. Okay. Did you review those in putting together the 2008 income statement?
A. Yes.
Q. And tell me again what the purpose of

the presentation to Mr. Burke and Mr. Edahl was for.
A. Well, it was to orient Mr. Burke with the company. He did not -- we had not any previous interaction with him, and we felt it was important that he understand the product, who our customers were and what the company was all about, and this also was an opportunity to present or look forward into 2008 and beyond based upon the updates or the results of the sales meeting that was just completed earlier in the month when all of our sales reps got together and laid out what they had expected to get based on conversations with the various market managers and all of the telecom companies as well as General Dynamics, and I think there is a list of the customer contacts in here as well.
(DFT. EXH. 58, JANUARY '08 and DECEMBER '07 E-MAILS, was marked for identification.)
Q. I am going to hand you Exhibit 58, just going back a little bit in time. This looks like it is a communication between you and Mike Burke on January 8th of '08 about a missing payment. Do you see that? And then you are asking about processing an assignment that you sent the day before. So as

of January 8th of 2008, you were still working with Mr. Burke under advances for the invoices or purchase orders that you sent to him.
A. Yes.
Q. Okay.
A. Yes, that was a few days before this presentation.
Q. The presentation?
A. Uh-huh.
Q. Tell me, how long did the presentation to Mr. Edahl and Mr. Burke last?
A. If I can back up for just a second. Did you have a question on this particular exhibit?
Q. No, other than I asked you, as of January 8th of 2008, you are still communicating with Mr. Burke about getting advances under the agreement with BB&T.
A. That is correct.
Q. Okay. And as of January 8th, 2008, what was the limit to the amount of financing?
A. Well, the overall limit would not have changed, and the exact where we were in accordance to the line, I don't recall exactly at this point.
Q. Okay. But the overall limit being three and a half million?

A. Yes.
Q. And what was the purchase order sub-limit?
A. Two million, I think.
Q. Okay.
A. So you are wanting to go --
Q. No, I have already asked you about Exhibit 57.
A. Okay.
Q. Do you remember when you provided the 2007 year-end actual financial statements to BB&T?
A. I believe it was around the time of this presentation because I made, I'll say, a concerted effort, I wanted to get those done, so we had them not just to be able to do the forecasting but also to be able to get those into everyone's hands.
(DFT. EXH. 59, 2007 PROFIT & LOSS, was marked for identification.)
Q. And I am going to hand you, Mr. Voytko, Exhibit Number 59 and ask you if this is SkyWaves' actual P&L for 2007.
A. Yes, I believe it is.
Q. And did you prepare this document?
A. Yes, I would have.

Q. Okay. And if you would, let's see, if you'll take Exhibit 59, and let's look at -- I just want to ask, so at the end of 2007, what was SkyWaves' net income?
A. It was a loss of about a million four.
Q. Okay. And if you look in this 2008 projected income statement that you presented to Jim Edahl and Mike Burke, what is the net income that you have identified for SkyWaves for January?
A. 1.5 million.
Q. Okay.
A. Oh, January, I am sorry.
Q. For January.
A. January is a loss of 95,000.
Q. Okay. Can you help me understand how you get from an actual net income of approximately 1.4-million-dollar loss to this figure that you use in the January projected income statement?
A. Well, the 1.4 is for a full year, and this is just one month in January. So how I get there is by you look at your top line sales of 400,000 versus actual of 136. So, I mean, that is the driver and turns this month positive, and it would be more comparable to, you know, looking at a month's worth of activity versus a whole year.

Q. Okay. How about let's look at the original.
A. At the bottom of 43?
Q. Well, 44 is what I want to ask about. As I understand it, you prepared 44, but you said you prepared 44 without any actual numbers?
A. Yes.
Q. Okay. And in Exhibit 44, which is your forecast for what SkyWaves' net income would be at year-end, what did you forecast it as?
A. We will assume this is the very first forecast. We projected an income of 1.4 million.
Q. Okay. Plus 1.4?
A. Yes, positive 1.4.
Q. And the actuals that I am looking at here on Exhibit 59 show us that it's actually the exact opposite, correct?
A. Yes.
Q. So it is a negative 1.4?
A. Yes.
Q. Okay. And just in the revised forecast for '07 that you sent to Jim at BB&T in September of '07, so as of September of '07, what are you projecting to the bank that SkyWaves' net income would be?

A. A negative loss of 120,000.
Q. Okay. So we have got three more months, and we actually end up with -- well, let me ask you this: You talked about material differences. Would you consider a negative 1.4 million to be a material difference from 120,000 negative?
A. Yes, it is.
Q. Okay.
A. But just to add, the purpose of forecast was to update based on new sets of facts, and so that's different from when you report financial information that is actual and is meant to be relied on by investors. So just to clarify that.
Q. Sure. Well, let me ask you this: In this exhibit that we looked at, 43, in September of '07, you are revising the forecast that you are sending to the bank, correct?
A. Yes.
Q. And you identified in your notes six reasons why you revised the forecast.
A. Yes.
Q. Okay. So you are looking at six reasons that you think are going to require you to

revise your forecast of where SkyWaves is going to end up at the end of the year?
A. Yes.
Q. You have this information as of September of '07?
A. Yes.
Q. And as of September of '07, you had given to the bank your actual numbers through June of '07, correct?
A. Yes.
Q. Okay. Did you understand that at some point BB&T notified SkyWaves of a default under the factoring agreement?
A. Can you rephrase that or restate that question?
Q. Do you understand that at some point in 2008 BB&T notified SkyWaves of a default under the factoring agreement?
A. I am aware.
Q. Okay. Were you the one who was notified?
A. No.
Q. Okay. How did you come to understand that BB&T had notified SkyWaves of the default?
A. Mr. Konersmann had received a phone

the other, General Dynamics, and all of those, as we would have done business, would have generated cash.

Q. So are you suggesting that the line should be restarted and the existing balance owed to the bank should be ignored?

A. No, not at all.

Q. Okay. So let's just say as of January 2008, you agree with me that whatever -- wherever SkyWaves was on its limit, that exists. So if there was no more availability under SkyWaves' line, why is that not a problem?

A. Well, first of all, there was still availability under the line. The line was not maxed out.

Q. Okay. Tell me how much availability SkyWaves had in January of 2008 under its PO supplement.

A. I don't have my numbers in front of me. I can't recall the exact numbers, but in -- for practical matters, in less than approximately six weeks, we recovered every invoice that was there, and ran through production over 1.2 million dollars' worth of business that it was returned to the bank. If we had done nothing else but did that

to continue turning the money -- I mean, that is what lending and doing business is all about -- we would have generated profits from that, and those profits could have gone towards building that shelter that was already advanced on. The only time we get really in trouble is when they say, "I want all of these now," then if we had that problem, then we have to seek perhaps a private equity company or an angel-type investor, but that money is going to be expensive, and that party wanted a piece of equity. That would be an alternative. We never got to the point of having to face that dilemma because, as you know, in the end of January, our line was pulled, and we basically had access to zero.

Q. When did the factoring agreement with BB&T end by its own terms?

A. March.

Q. Of 2000?

A. It would have been March of 2008, yes.

Q. So as of January of 2008, had SkyWaves entered into any discussions with other lenders?

A. We had not, and that's because in 2007, in March, when we did the last renewal, we explored other options. We had other options that were

viable, and the bank stood up and said, "Pick us, we will see you through to the end." And we relied on that.

Q. And was the bank obligated to renew the factoring agreement when it expired in March of '08?

A. As far as I know, they were not obligated.

(DFT. EXH. 61, HISTORICAL & PROJECTED INCOME STATEMENT 2002-2009, was marked for identification.)

Q. Okay. Let me hand you what I am marking Exhibit 61, and, Mr. Voytko, this is a historical and projected income statement from '02 to '09 for SkyWaves, and I wanted to just ask, did you prepare this document?

A. Yes, I would have prepared it.

Q. Okay. And if I take this projected income statement from '02 to '09, as I understand it, you were there in '05, correct? You were at SkyWaves in 2005, correct?

A. Yes.

Q. And you prepared actual financial statements for SkyWaves in 2005, correct?

A. Yes.

Q. And you were there in '06, correct?

A. Yes.

Q. And you prepared actual financial statements for SkyWaves in '06, correct?

A. Yes.

Q. And you were there in '07, correct?

A. Yes.

Q. And you prepared actual financial statements for SkyWaves in '07?

A. Yes.

Q. Okay.

A. I would just like to add that this was probably three or four years prepared before the company checked out.

Q. Sure.

A. You are accurate in the questions that you asked me.

(DFT. EXH. 62, 1/25/08 LETTER, was marked for identification.)

Q. I know you indicated that Mr. Konersmann conveyed to you that a default was going to be called under the factoring agreement. I am going to hand you what we have marked as Exhibit 62 and ask you if you recognize this document.

A. Yes, I do.

the factoring line, how it worked.
Q. And tell me --
A. Exactly?
Q. Exactly what you said. Don't summarize. Tell me what you told Mr. Hennessy.
A. We would have explained that as purchase orders came in, we got advances on those. As those were completed, they were turning in the purchase orders. We had the 60-day rule, and we would call it in formula, that had been agreed upon, and we were consistent in three years in how we handled that. And essentially based on the information he may have had or may not have had, I would think he chose to believe anything we said.
Q. And I am asking you to tell me specifically what you told him. Anything else that you recall telling Mr. Hennessy?
A. Well, on these other points, we would have talked about the payables, the payables of that approximately 37 percent, and about 25 percent represented payables with an investor who was one of our vendors who had agreed to give us extended terms.
Q. And who was that?
A. That was Structured Tech, which was

owned by Franz Meier, who is a large investing company.
Q. So you told Mr. Hennessy that 25 percent of the 37 percent of the payables that were over 60 days were payables to a company owned by Franz Meier and that he had agreed to extend the repayment terms?
A. Yes.
Q. Okay.
A. And then the good faith belief in that portion would have been a rebuttal through the investors bringing more money into the company, and then we asked him, here again based upon what Jim had told us, me personally and through Ron, that I understood that the bank was willing to work with us. So we spent hours and weeks working on, you know, just suggestions in trying to come up with a plan that would be acceptable to the bank.
Q. Did you have any more discussions with Mr. Hennessy after this meeting that you and Mr. Konersmann had with him?
A. There were several. There were several.
Q. Okay. Several meetings with Mr. Hennessy in which you participated or several

discussions that you had with Mr. Hennessy?
A. Well, I never had a one-on-one with Mr. Hennessy. He was involved with the Hewlette presentation, which I helped prepare. There were other initiatives I know where other investors tried to come up with some ideas in terms of how to help the company. I was involved with the proposal by General Dynamics to fund their purchase orders. They were willing to serve as our factoring agent, but the terms that the bank had proposed to do that, to give them assurances that they would get their product, were just prohibitive in terms of their demands in segregating product and everything, and they were not able to gain confidence that the bank wouldn't reverse their position and take their money at the end of the day.
I was much involved with a presentation that we gave to Hunt Capital. They had asked to speak with Mr. Hennessy that very weekend. We were talking like Wednesday and Thursday. They wanted to speak to him on Friday, Saturday. He refused to take their calls. So there was some, you know, efforts to do that.
And then the other context, I exchanged

some e-mails with him regarding the production and payroll schedules that we were working on, trying to keep the money -- or to keep the company alive long enough to get alternative financing. And I am sure it has been talked about, but there were -- let's see, I was first, Franz was second, and Patty was third in terms of putting in money right after the bank shut it off, otherwise the company would have been out of business on January 25th, or two days later, something like that, and none of the 1.2 million that was recovered would have been recovered. So all of that was based on good faith that the bank was going to work with us. So a lot of people put in a lot of personal money to try to keep it going, and all of those were futile.
Q. Let me ask, you mentioned that you were involved in a presentation to Hunt Capital.
A. Yes.
Q. Was this in 2008?
A. Yes.
Q. Okay. And you made a passing reference that Mr. Hennessy refused to take phone calls from Hunt Capital?
A. Yes.
Q. Were you present when Hunt Capital made

information would have been confidential. I don't know if we would have supplied it either, like, for example, some employee details, but some would have been easy, and some would have been difficult. It would have been very time consuming, and as I recollect the time, there was 30 hours a week -- 30 hours' worth of week to do in a day, so we had to choose priorities.

Q. Now, as I understand it from looking at Exhibit Number 4, Mr. Meier was a shareholder, was he not?

A. He was.

Q. So you made reference to not giving him that information because some of it was confidential. Would he not have had a right to it as a shareholder in the company?

A. Not necessarily, because they take payroll information, for example. That is not something that you just share with even an investor. You know, to use the example, if you owned a hundred shares in IBM, I doubt you would be able to walk into their HR department and ask to see payroll files.

Q. Now, you indicated in response to paragraph number 2 that 25 percent of the payables

over 60 days were to Mr. Meier, correct?

A. Yes, uh-huh.

Q. What about the other 12 percent?

A. They would have been various vendors.

Q. Okay. Do you disagree that 12 percent was over 60 days due and owing?

A. I would agree that is accurate.

(DFT. EXH. 65, MARCH 2008 E-MAILS, was marked for identification.)

Q. I am going to hand you what we have marked as Exhibit 65, Mr. Voytko, and this is an e-mail communication between you and Mr. Burke. If you look on the back page, on March 11th of 2008, you are telling Mr. Burke that the following Verizon payments have been mailed to your attention in Atlanta, and it has got four invoice numbers. Do you see that?

A. Yes.

Q. And the amount is off to the right. Did SkyWaves receive those payments directly from Verizon?

A. Yes.

Q. And upon receipt of those payments, did you turn around and send them to Mike Burke?

A. I did, because we didn't have a bank

account at the time.

Q. Okay. When you say "we didn't have a bank account at the time," what do you mean?

A It was frozen. The bank, by pulling the credit line, had pulled all of our other access to accounts, and the account was for all intents and purposes closed.

Q. Now, I am just reading your response to Mr. Burke, because it looks like he is asking you did you receive these directly, or are you just telling me they are on the way, and your response is that you received them directly, but you end your e-mail by saying, "I experienced similar issues when attempting to changes the remit to address in the past."

A. That should be change.

Q. Sure.

A. I think what this is referring to is Mike Burke tried to change the address to get them sent to BB&T, and he was not able to, as I stated before.

MS. CHERRY: Let's take a break for a minute.

(A recess transpired.)

BY MS. CHERRY:

Q. I am going to ask you a little bit more, Mr. Voytko. You were talking about the balance sheet for SkyWaves as of December 31 of '07. Do you have a copy of SkyWaves' balance sheet as of December 31, 2007?

A. There is one, yes, and I am not sure if it is in anything that we have, but there is one -- there would be in the one in the file that you have.

Q. In terms of the documents that you produced?

A. Yes.

Q. And did you ever give anyone at BB&T a copy of SkyWaves' 2007 balance sheet?

A. I recall giving that to Jim Edahl. I cannot tell you the exact date of that.

Q. Did you give it to Mike Hennessy?

A. I don't remember if I did or not.

Q. Okay. Now, as I understand it, SkyWaves eventually filed bankruptcy; is that correct?

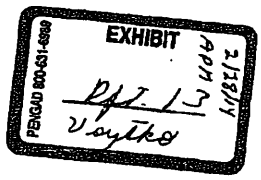
A. Yes.

Q. Do you remember when that was?

A. That would have been in April, I believe.

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1005



From:	John Voytko
To:	Morris, Castlen
Cc:	Edahl, James; Ron Konersmann </O=SKYWAVESCORP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=Ron>
Subject:	RE: Nextel Partners and Cingular
Date:	Monday, March 27, 2006 12:15:00 PM

Castlen,

Today I received payment for Invoice #1671 and #1674 from Nextel Partners. Please relay this information to Bryan Watts.

Please call me Wednesday to discuss your note below.

Best regards,

John S. Voytko
Chief Financial Officer
Skywaves Corporation

john@skywavescorp.com

(843) 308-9757 Office
(843) 224-2020 Cell

From: Morris, Castlen [mailto:Castlen.Morris@BBandT.com]
Sent: Saturday, March 25, 2006 1:03 PM
To: John Voytko
Cc: Edahl, James
Subject: Nextel Partners and Cingular

John:

Jim Edahl approached me late Friday afternoon to discuss the logistics of trying to set up Cingular on a similar purchase order financing scenario as we have done for Nextel Partners. Towards that end, among other things, we discussed the collection activity concerns of which you and I spoke on Friday. I wanted to share with you what we think SkyWaves and BB&T should do, on a collaborative basis, to manage any necessary collection activity. That said, realizing your concerns, if you have not already done so, please make your appropriate contacts at Nextel aware of the factoring relationship between SkyWaves and BB&T. See if your contacts can put us together with a specific individual(s) in their corporate accounts payable area so that we can call them and only them as needed on a particular invoice. By contacting specific Nextel people who are aware of the SkyWaves/BB&T relationship and our purpose in calling, it should not be alarming/distressing/irritating to anyone in the Nextel organization. It truly hinges on your disclosure of the SkyWaves/BB&T relationship to Nextel and their understanding of it. Our inquiry to Nextel would be to find out scheduled payment date(s) on past due invoices. This would happen when invoices reach 10-15 days past due. Assuming that Nextel pays according to terms, no collection calls would be expected as we would receive their checks directly before invoices even reach 10-15 days past due.

The same process would need to occur with Cingular, assuming that Jim and I are successful in establishing a purchase order program for them.

Quite honestly, the financing program that we have put together for you on Nextel and, hopefully, Cingular, is a great departure from what we would do for a "typical" client. Attribute that to the high regard that we at BB&T hold for SkyWaves, its people, and its mission. In order for this type of

program to continue, we ask for your trust in understanding how our business model needs to function as we are trusting how your model needs to function. Direct communication with your customers does not undermine that trust but helps position us to continue to grow our relationship in ways heretofore impossible.

Please contact Jim and/or myself with any questions. Thanks.

Castlen Morris
BB&T Commercial Finance
317 W. High St.
11th Floor Market Square Tower
High Point, NC 27260
336-889-3355, x-204
336-889-9917 (fax)

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From:	Morris, Castlen
To:	John Voytko </O=SKYWAVESCORP/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=JOHN>
Cc:	Edahl, James
Subject:	SkyWavesAmendment3.20.07.doc
Date:	Tuesday, March 20, 2007 5:40:59 AM
Attachments:	SkyWavesAmendment3.20.07.doc

<<SkyWavesAmendment3.20.07.doc>>

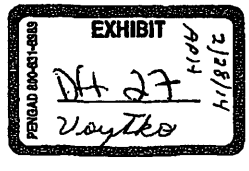
John:

Please print the attached amendment, have Ron sign, and send back to me. I will forward an original for all parties to sign.

Per our conversation this morning, no further commission charges will be assessed against SkyWaves' ledger for the balance of March. Beginning April, the charge will only be $3,000 per month for each successive month. I did not include the new $2,000,000 PO sub-limit or the 65% PO advance rate in the amendment as this is typically not part of BB&T's standard contract (it is something out of the ordinary for SkyWaves exclusively). I didn't want to potentially expose SkyWaves to any legal fees for counsel to create a document. At this point, I am comfortable letting Jim Edahl's proposal letter of March 2, 2007 function in that capacity.

Thanks.

Castlen



1009

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

1010

Acknowledged this _____day of _____, 2007.

SkyWaves 1 Corporation

By:_____
Ron Konersmann
Chief Executive Officer

1011

14

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
SKYWAVES I CORPORATION
Plaintiff,
vs CASE NO. 2009-CP-10-7516
BRANCH BANKING AND TRUST
COMPANY, Successor in merger
to BRANCH BANKING AND TRUST
COMPANY OF SC, a/k/a BB&T,
and JAMES EDAHL,
Defendants.
VIDEOTAPED 30(b)(6)
DEPOSITION OF BRANCH BANKING AND TRUST COMPANY
BY RUSSELL S BOGUE and
MICHAEL J. HENNESSY

DATE. January 6, 2015

TIME 1:16 PM

LOCATION. Andrew K. Epting, Jr., LLC
46-A State Street
Charleston, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY SANDRA K BJERKE, RDR, CRR, CBC

A WILLIAM ROBERTS, JR. & ASSOCIATES

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AND TRUST COMPANY OF SC, a/k/a BB&T
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BY: J.W. NELSON CHANDLER
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(843) 577-5650
nelson@corriganchandler.com

ALSO PRESENT:
Ron Konersmann
Douglas Browne, Videographer

(INDEX AT REAR OF TRANSCRIPT)

(EXH. 1, Notice of Rule 30(b)(6) Deposition of Defendant Branch Banking and Trust Company dated 11-20-14, marked for identification.)
(EXH. 2, Proof of Claim by BB&T Originally Filed 5-29-08, marked for identification
THE VIDEOGRAPHER: We are now on the record. Today's date is January 6th, 2015. The time is approximately 1:16 PM.
This is the video deposition of Russell Bogue taken by counsel for the plaintiff. The location today is 46-A State Street in Charleston, South Carolina.
My name is Douglas Browne, legal videographer representing A. William Roberts, Jr. & Associates.
This deposition is taken in the matter of SkyWaves I Corporation versus Branch Banking and Trust, et al., Case No. 2009-CP-10-7516
Counsel present, please introduce yourselves for the record.
MR. EPTING: Drew Epting, counsel for SkyWaves.
MR. LINTON: I'm John Linton, counsel for SkyWaves.
MR. KEFALOS: George Kefalos, counsel

for SkyWaves.
MS. CHERRY: Molly Cherry, counsel for BB&T.
MR. CHANDLER: Nelson Chandler, counsel for James Edahl.
THE VIDEOGRAPHER: Would the court reporter please swear in the witness and we may begin.
RUSSELL S. BOGUE
being first duly sworn, testified as follows:
EXAMINATION
BY MR. EPTING:
Q. Good afternoon, Mr. Bogue. Let me show you what's been marked as Exhibit 1.
MR. EPTING: And, Molly, there you are.
BY MR. EPTING:
Q. As I understand counsel, your counsel, Mr. Bogue, you are here to answer questions only with regard to subject matter 11.
A. That's correct.
Q. Is that correct?
A. That's correct.
Q. All right. And let me do this. I want to now give you what is marked as Exhibit 2. And let me explain what you have. This is the proof of

claim and the two amendments to the proof of claim that were filed by BB&T in the bankruptcy.
I'm not asking you to agree or disagree. I'm simply saying that this is the series of proof of claims. It is complete. And the questions that I'm going to be asking you relate only to the attachment which is the factoring agreement.
So Exhibit 2 I'm saying to you but not asking you to accept is the full proof of claim filed by BB&T, but my questions relate only to the factoring agreement that is part of Exhibit 2, okay?
A. (Witness moves head up and down.)
MR. EPTING: All right. Let me give Nelson a copy of this. And, Nelson, the last two pages are the two amendments to the document.
MR. CHANDLER: Thank you.
MR. EPTING: Surely.
BY MR. EPTING:
Q. Mr. Bogue, tell me a little bit about yourself since I don't know who you are, anything about you or why you might know the answers to question No. 11.
A. I am associate general counsel for

Branch Banking and Trust Company. So as part of my duties in the legal department I'm involved in commercial lending matters.
Q. Is that your specialty, commercial lending matters?
A. I don't know that I have a specialty per se, but I spend a lot of time working on commercial lending matters.
Q. All right. And are you on the transactional side or on the litigation side?
A. Both.
Q. Both. Okay. And how long have you been with the bank?
A. I joined the bank in February of 2008.
Q. Okay. So 2008. Where were you before 2008?
A. I was with several law firms in private practice.
Q. Okay. And can you tell me what law firms those were?
A. Yes. I started practice with Carlton Fields Law Firm in Tampa, Florida. I then moved to Smith Helms Mulliss & Moore in Tampa, Florida. I then moved to Holland & Knight in Tampa, Florida and Atlanta, Georgia. I then moved to Hunton &

Williams in Atlanta. And I then moved to DLA Piper in Atlanta and then joined the bank.
Q. Okay. And in your private practice life, was your field banking and commercial lending?
A. Yes.
Q. Okay. Let me ask you to turn to Exhibit 2. And in particular, a document called Factoring and Security Agreement. Have you seen a document like this before?
A. Yes.
Q. All right. Is this a standard form agreement?
A. It appears to be, yes.
Q. All right. And on what do you base that?
A. Primarily because there are blanks that are filled in with information. And typically, if it was a pure custom document you wouldn't see underlines with amounts filled in.
Q. Okay. Are you familiar with this particular agreement?
A. Not particularly familiar, no.
Q. But you have seen the BB&T standard form factoring and security agreement at some point

in your past.
A. I have, but not many of them.
Q. Okay. All right. I want to ask you: Is it your experience that BB&T is deliberate in their use of words in provisions in their standard form documents?
A. I'm not sure I know what you mean by deliberate.
Q. Do they choose their words in their provisions carefully?
A. Yes.
Q. And do they intend to honor the agreements as they are drawn?
MS. CHERRY: Object to the form.
THE WITNESS: Yes.
BY MR. EPTING:
Q. And if a provision is in this agreement, would it be BB&T's intent to follow that provision?
A. Unless it's somehow modified or changed, yes.
Q. All right. And could I ask you to turn to Page 13. And in particular, Paragraph 25.
A. I see it.
Q. All right. It says:

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.
Did I read that right?
A. Yes, you did.
Q. And is it BB&T's intent, as expressed in that provision, that the internal laws of North Carolina govern this agreement?
MS. CHERRY: I'm going to object to the form to the extent, Drew, the -- this is what I got into. As it pertains to this litigation, I'm going to object to any questions specifically about this litigation. The topic, as listed, is general and general form documents.
And I just want to be mindful that I'm not waiving any attorney-client privilege as to this litigation, and I'm going to object to specific questions about documents at issue in this litigation.
If you want to ask about form documents, that's the topic that's identified, and I will allow the witness to answer in that regard.
BY MR. EPTING:

Q. In using this provision, is it your intent that North Carolina law apply?
A. Yes, with regard to any substantive issues or legal issues that would arise under the agreement.
Q. All right. And can I ask you to explain to me, if you know, what is intended by internal law of the state of North Carolina?
A. I don't know what that means.
Q. Okay.
MR. EPTING: That's all the questions I have. Thank you very much.
THE WITNESS: Thank you.
THE VIDEOGRAPHER: This concludes the video deposition of Russell Bogue. The time is approximating 1:25 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.)
(Off-the-record conference.)
THE VIDEOGRAPHER: We are now on the record. Today's date is January 6th, 2015. The time is approximately 1:27 PM.
This is the video deposition of Michael J. Hennessy taken by counsel for the plaintiff.

The location today is 46-A State Street in Charleston, South Carolina.
My name is Douglas Browne, legal videographer representing A. William Roberts, Jr. & Associates.
This deposition is taken in the matter of SkyWaves I Corporation versus Branch Banking and Trust, et al., Case No. 2009-CP-10-7516.
Counsel present, please introduce yourselves for the record.
MR. LINTON: John Linton, Duffy & Young for the plaintiff.
MR. EPTING: Drew Epting, SkyWaves.
MR. KEFALOS: George Kefalos, SkyWaves.
MS. CHERRY: Molly Cherry for BB&T.
MR. CHANDLER: Nelson Chandler for James Edahl.
THE VIDEOGRAPHER: Would the court reporter please swear in the witness and we may begin.
MICHAEL J. HENNESSY
being first duly sworn, testified as follows:
EXAMINATION
BY MR. LINTON:
Q. Mr. Hennessy, we obviously have met

have to remit funds to satisfy the terms of the agreement?
A. It's not written on the purchase order agreement because that's a subagreement under the main factoring line.
Q. So there was no time limit.
MS. CHERRY: Object to the form.
THE WITNESS: For what? I'm confused.
BY MR. LINTON:
Q. When a purchase order was submitted and the bank funded that purchase order, later that same purchase order was converted to an invoice. Was there any time limit upon which BB -- excuse me -- SkyWaves was required to make payment to BB&T?
A. On the invoice itself?
Q. Right.
A. Well, the invoice is now property of BB&T's. So the payment is immediate to BB&T.
Q. Well, I was asking you --
A. It's not SkyWaves' invoice. It's BB&T's. Payments should come directly to BB&T.
Q. But how long did SkyWaves have under the purchase order agreement to secure funds and remit them to BB&T?

MS. CHERRY: Object to the form.
THE WITNESS: I'm not understanding your question. Because once a purchase order converts to an invoice, it's no longer a purchase order. It's an invoice. That invoice is owned by BB&T, and all funds must be remitted immediately to BB&T.
BY MR. LINTON:
Q. All right. But how long does the customer have to pay SkyWaves, whether it's paid directly to SkyWaves or it's paid directly to the bank?
A. Oh, I would think it's net 30, but there's a callback provision in the factoring agreement.
Q. But it could be 60 on some?
A. I'm not sure.
Q. All right. So that I understand your testimony, are you saying that your understanding of the accommodation made by Mr. Edahl is that site plans from General Dynamics could be drawn upon through December 31st, 2007?
A. Underneath the purchase order sublimit.
Q. Right, of $2 million.
A. Correct.

Q. Okay. And when were those funds contractually -- excuse me. Yeah. For those loans that were made on the site plans, the advances, when were they due to be paid to the bank from SkyWaves?
A. There is not a due date on them. Normal course of business was they would convert from purchase orders to invoices within 60 to 90 days, and I'm assuming that was the expectation.
Q. What's the basis of that assumption?
A. Just previous conversations during my investigation with Jim Edahl.
Q. So it's based exclusively upon what Mr. Edahl would have told you.
A. Correct.
Q. All right. For those site plan advances, if there was no clear understanding, certainly the obligation to refund and pay those over to BB&T would have been by April 5th, 2008, when the line of credit expired; is that right?
MS. CHERRY: Object to the form.
THE WITNESS: I would imagine at -- I mean, I guess so, because there's nothing else in writing.
BY MR. LINTON:

Q. Okay. Now, were there any other terms of the agreement for site plan funding? We've covered that it was restricted to General Dynamics' site plans; right?
A. Correct.
Q. We've covered that it was limited to the $2 million component of the $3 1/2 million line of credit; correct?
A. Right.
Q. We've covered that there was no time limit to convert a site plan to a purchase order by a contract obligation; right?
A. Correct.
Q. And we've determined that SkyWaves was authorized to have advances from that site plan funding through December 31st, 2007.
A. Correct.
Q. All right. Is it your contention that SkyWaves violated any of the terms of that agreement?
A. No, not now.
Q. Has it ever been?
A. I didn't know about the site plan financing when I first met with SkyWaves.
Q. I think the simple question of has it

ever been could be answered yes or no.
A. No.
Q. Do you mean to tell me that the bank did not assert that SkyWaves had drawn down funds on the site plan funding improperly?
MS. CHERRY: Object to the form.
BY MR. LINTON:
Q. You weren't aware of that?
A. I was aware of that.
Q. Okay. And were you aware the bank claimed fraud against SkyWaves?
A. In the conversation held with Ron Konersmann, I was aware of that.
Q. I'm asking you if you were aware that the bank had asserted fraud against SkyWaves for breach of the site plan funding agreement.
MS. CHERRY: Object to the form.
MR. LINTON: What is objectionable about that, Molly?
MS. CHERRY: The basis for calling fraud. You said based on breach of a contract.
BY MR. LINTON:
Q. All right. Let me ask you this: You're familiar with Mr. Licata's letter of February 11th, 2008?

A. Mr. Licata's letter?
Q. Licata. Excuse me.
A. I -- not off the top of my head. I'd have to see a copy of it if you have one, but...
Q. Well, do you recall that he had said -- I'll read it to you from this deposition notice.
MR. LINTON: Which one is it, Molly?
MS. CHERRY: 8.
BY MR. LINTON:
Q. That the funds obtained upon purchase order 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.
That was written by Mr. Licata in a letter of February the 11th, 2008.
A. Yes.
Q. Okay. Were you familiar with that letter at the time?
A. Yes.
Q. Okay. Do you consider that what I've just read you from Mr. Licata's letter was BB&T asserting that SkyWaves had committed fraud in obtaining funding based on site plans?

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

anyone from SkyWaves?
A. That was it. I handed them the site plan and asked if they had pushed those off and -- and gave those to the bank under the auspices that they were in fact purchase orders when in fact they were not purchase orders, and the answer to that was yes, we did.
Q. Was there any other so-called fraud that they admitted to at that time?
A. No.
Q. And that was your meeting of January 25th, 2008?
A. Yes.
Q. That was the same day as the default letter?
A. I'm not sure the day of the default letter.
Q. I'm going to hand you and mark this as Exhibit 1, the default letter. I think you signed it; is that right?
A. I did.
MR. LINTON: Okay. Could we mark that?
THE WITNESS: Yeah, that's the same day.
BY MR. LINTON:

Q. Right.
A. Yes, sir.
Q. In a construction loan is there typically a requirement for certification of completion of a percentage of construction before there's an additional draw?
A. Yes.
Q. Okay. And that's typical.
A. Typical.
Q. Okay. I'm going to go ahead and be specific. Have we covered every term of the accommodation for the site plan funding that you are aware of?
A. I believe so.
Q. Okay. And the entirety of the understanding of the specifics of that accommodation were based on Mr. Edahl's testimony; is that right?
A. I'm sorry. Say that again?
Q. Okay. Is the entirety of your knowledge of the terms and conditions of the accommodation for the site plan funding that we've been talking about Mr. Edahl's testimony?
A. And Ron Konersmann's deposition, yes.
Q. Okay. What is it in Ron Konersmann's

deposition that you claim establishes part of the terms and conditions of the accommodation for the site plan funding?
A. I believe he said it was short term in nature, to end in December, and he might have even said it was under the $2 million sublimit.
Q. Okay. Is there anything else?
A. I'm not sure if he mentioned the General Dynamics, but I know Jim did.
Q. Um-hum. Do you consider an accommodation a change to a contract?
MS. CHERRY: Object to the form.
THE WITNESS: No. I consider it -- usually it's short term in nature. They most certainly always are. And it's done to -- knowing that it's -- at the end of the day it's to help the client but not expose the bank to any undue risk.
BY MR. LINTON:
Q. I believe you said you thought that this accommodation lasted from March through December 2007; is that right?
A. Correct.
Q. Okay. Is that what you refer to as short term?
A. That's a little bit longer than a

normal accommodation, but...
Q. Well, what is the maximum length of time, within reason, that an accommodation would be extended for circumstances like SkyWaves? A year?
A. Well, three to six months, usually.
Q. Well, you've already testified in this case you thought it was from March through December 31st, 2007, which I think is nine months.
A. That's why I thought it was a little bit long.
Q. A little bit long, but not out of the -- it wouldn't cause you any angst.
MS. CHERRY: Object to the form.
BY MR. LINTON:
Q. Would it cause you any angst?
A. This accommodation causes me great angst.
Q. Well, in retrospect. Would -- would it have caused you any angst if you had known about it in March of 2007 when it was made?
A. I would have stopped it had I known about it in March of 2007.
Q. Why?
A. Because you can't factor an unsecured anything. I don't know what you're factoring.

Q. So --
A. It's a permanent working capital loan, which is what he needed, or additional capital from investors.
Q. I got you. And I think you've covered that in your own deposition.
A. (Witness moves head up and down.)
Q. So what you're telling me is if I was in charge I would not have agreed to the written purchase order change that was authorized in March of 2007.
A. I didn't say anything about purchase orders. I was talking specifically about the site plan financing.
Q. Okay. We've gone over -- well, let me confer just a second.
THE WITNESS: I need a glass of water.
MS. CHERRY: Sure. Can we --
MR. KEFALOS. I'll get it. Anyone else?
MS. CHERRY: Johnny, do you mind just a minute? George was getting some water for --
MR. LINTON: Oh, yeah. Sure. Of course.
THE VIDEOGRAPHER: Do we want to go off

recommendation, or do you know?
A. No, it wouldn't. It would have been just a general loan review.
Q. Why would they be having a general loan review?
A. We have them all the time. Every -- every loan in the bank gets reviewed at least yearly. And if you're a watch list 6 credit, which this one was prior to -- if you're -- a risk rate of 6 prior to the watch list, it gets reviewed semiannually.
Q. And if you're a lower risk than 6 --
A. You're in my world.
Q. Pardon me?
A. Then you come into problem loan administration.
Q. So if you're rated a 5, how often do you get reviewed routinely by the bank?
A. Once a year.
Q. Once a year. When did SkyWaves get reviewed for its credit rating in 2007?
A. It would have been the -- I think the November ABL report is what triggered it when the November ABL -- I think it was November. ABL report came in. That would have triggered the

review.
Q. What is an ABL report?
A. Asset-based lending report that comes from the third party.
Q. Well, who is the third party in this case?
A. I don't remember her name. It's on the report.
Q. You mean like an auditor?
A. Yeah, that's right.
Q. Okay. This wasn't an asset-based lending loan, was it?
A. No, but factoring kind of falls under asset-based lending.
Q. Okay. Here's what I want to try to understand: I'm going to give you a little bit of an overview so perhaps we can keep this as short as possible. I want to try to understand what the objective of a problem loan administrator is such as yourself when you go on site. Not go on site. When you are reviewing an account, the overall objective and then how you go about achieving it.
MS. CHERRY: Johnny, can you tell me what -- I mean, I think you're moving outside the topics that we're here about.

MR. LINTON: It's about the course that they would have taken. I think -- obviously, the course they would take would depend on what their policy is on how they approach these things.
MS. CHERRY: Not necessarily. I mean, you're not going to ask the witness what the course of action would have been and then go into those questions? I mean, I've --
MR. LINTON: Okay.
MS. CHERRY: I'm not sure -- you're asking about him in his role at the bank, and he's here as the corporate representative of the bank.
MR. LINTON: Well, that's because y'all identified the same person was involved rather than somebody else.
MS. CHERRY: Sure. Sure. Right. And so my point is: If I had identified someone else who didn't have his background, they probably wouldn't be able to answer that question, and I still think I would have complied with the obligations under No. 3. So I'm allowing some leeway. I'm just saying we're moving off the designated topics.
BY MR. LINTON:
Q. What is your opinion about what course

of action you would have taken -- you being the bank. Anytime I say you I'm referring to the bank because that's who you're here today for, okay?
A. Yes.
Q. All right. What is the most probable course of action you would have taken if you had known about the accommodation that had been made by Mr. Edahl and that in fact Mr. Edahl had misrepresented what actually had happened?
A. What's the time frame?
Q. Whenever you started on this account until the letter of default. So about a three-week period there, maybe four.
A. The actions wouldn't have made any difference because the default is not based upon an accommodation that was made. The default is based upon the financial condition of SkyWaves. I don't know -- a default would have been called anyway.
Q. You don't know or --
A. No. I mean, I -- a default would have been called.
Q. Now, what do you base that on?
A. Because they were in default of their loan agreement, so a default would have been called.

Q. Okay. On behalf of the bank, when a problem loan administrator is given an assignment, what is your objective?
A. To try and restructure a credit, if possible. And if not, perform an orderly liquidation that's in the best benefit of the client or the bank and then the client.
Q. Okay. So if you had known that the site plan accommodation had been approved by Mr. Edahl and administered by the bank and you were given this assignment in January 2008, okay?
A. Yes.
Q. All right. Would you have considered SkyWaves was in default on the site plan funding program?
A. No.
Q. Okay. And I can imagine that -- Ms. Cherry can object if she wishes -- that part of the function of the site plan -- excuse me -- of the problem loan administrator is to see what accommodation can be reached to the benefit of the debtor that does not cause any additional risk to the bank; would that be fair?
MS. CHERRY: Object to the form.
THE WITNESS Yes.

BY MR. LINTON:
Q. Okay. Well, why don't you just tell us, on behalf of the bank, based on bank policy, what were you trying to do when you went to SkyWaves in January 2008?
A. I was trying to discover, one, what caused the monumental losses, where the financing moneys had gone to and why there were no shelters built and was there any way to not take a complete and total loss on this credit.
Q. Did you consider the fact that shelters had been built, as you've just testified to, a material breach of any agreement?
A. No.
Q. All right. I want to ask you, on behalf of the bank --
MR. EPTING: Johnny, could we take a break?
MR. LINTON: Yep.
MR. EPTING: I mean, is it a reasonable time to?
MR. LINTON: If you need one it is.
THE VIDEOGRAPHER: We will now go off the record. The time is approximately 2:37 PM.
(EXH. 3, Letter to SkyWaves I

Corporation from Mr. Hennessy dated 1-25-08, marked for identification.)
(A recess transpired from 2:37 until 2:48.)
THE VIDEOGRAPHER: We are now back on the record. The time is approximately 2:48 PM.
BY MR. LINTON:
Q. What is the bank's normal protocol for a problem loan administrator regarding a determination of the facts surrounding a problem loan?
A. Well, every problem loan is different, so that's really a hard question to answer because we could be working on a construction loan one minute and the operating company the next. So the protocol would be different for each one.
Q. Well, let me ask you this then: What is the bank's protocol for a loan such as SkyWaves?
A. Okay. So we would normally read the file, speak to the account officer. This one, this case, we would have also had a conversation with Castlen Morris, gathered other information from reading the file, reviewed the loan documents, asked whatever pertinent questions.
At the same time it would have been

assigned to the attorney, and the attorney would have done his due diligence. And then we would have set up a transition meeting with the account officer.
Q. Was the bank more active than normal in the administration of problem loans because of the circumstances that were in existence in January 2008?
MS. CHERRY: Object to the form.
THE WITNESS: I'm -- are you saying were we more busy in 2008 than we are today?
BY MR. LINTON:
Q. No. I'm asking you were the demands upon problem loan administration as it may have impacted the SkyWaves account greater in 2008 than is normal?
A. The demands upon -- upon a problem loan administrator?
Q. Right.
A. Sure, it was more busy in 2008 than it is today.
Q. Okay. You've mentioned a number of factors, that it's the bank's policy regarding information that should be assembled and evaluated as part of a problem loan.

form to the extent that's a question.
MR. LINTON. Okay.
BY MR. LINTON:
Q. As the bank administering this loan, was the bank aware of the impact that its default letter and Mr. Licata's letter of February the 11th would have upon the realistic opportunity for SkyWaves to approach another lender or equity investors?
A. Yes.
Q. And would that be that they will not be able to successfully approach a lender or equity investor if they disclose that they're in default by their existing bank and that bank has accused them of fraud regarding the taking of a million point two million dollars?
MS. CHERRY: Object to the form.
THE WITNESS: Well, I don't believe they could have ever gone to another commercial lender just based upon their financials.
BY MR. LINTON:
Q. Let's don't talk about that, all right?
A. But an equity --
Q. Let's answer the question.
MR. LINTON: Molly.

THE WITNESS: You asked me both. You asked me if a commercial lender and an equity investor. I'm saying --
BY MR. LINTON:
Q. I didn't ask you anything about the financial condition. I asked you if, based upon a disclosure that a bank has accused us of fraud, that we defrauded them out of a million two hundred thousand dollars and our bank has put us in default, would that substantially eliminate the possibility, realistic possibility of getting a loan from a commercial bank or an equity investor, from an arm's-length, third-party equity investor?
MS. CHERRY: Object to the form.
THE WITNESS: It would severely hinder them.
BY MR. LINTON:
Q. Severely hinder them. Have you ever heard of anybody doing that, any bank or any sophisticated equity investor?
A. Okay. No bank would do it, but I don't know about a sophisticated equity investor, if they would pay attention to it or not.
Q. That's fair enough. Mr. Hennessy, if the risk to the bank was about a hundred thousand

or less, based on this existing financial arrangement with SkyWaves, and SkyWaves had paid off the balance of the remits that were due and paid its payables, how much additional cash would you have required for them to operate, try to get substitute financing and tell them that the whole line will be due April 5th, when it comes up for renewal this bank does not want to take the kind of risks that we have assumed?
MS. CHERRY: Object to the form.
MR. LINTON: Okay.
BY MR. LINTON:
Q. Go ahead.
A. Okay. So back in that time frame, even though he got his default letter, we continued to fund different aspects of this company. That's the first issue. We did not cut off funding 100 percent. We continued to fund.
In March, when there was absolutely no equity injection into the company and no viable plan was given to us, I had no choice but to charge this loan off because I had no carrying value for collateral.
Q. Mr. Hennessy, my question --
A. So you would have needed 3 to $5

million like we talked about time and time again. It was said in a meeting you need millions of dollars of injection. We talked to Ron Hewlette about millions and millions of dollars of injection. This went on for months. It's not just one day. This started the conversation.
Q. You're referring to the default letter?
A. Correct. And then it went on for two months, as you well know.
Q. Prior to the default letter, it's my understanding from your testimony -- so correct me if I'm wrong -- at the meeting on January the 25th you told Mr. Konersmann in order for us to proceed with this loan you will need to get 3 1/2 to $5 million cash into this SkyWaves account; is that right?
A. I don't believe there was -- I don't believe those words were ever used in order to proceed with this loan. Because this loan was unsecured. In order to keep the company viable, he would need that money.
Q. Was that what was going to be needed in order for a default to be averted?
A. That's what they were trying to raise and do, yes.

Q. Was $3 1/2 million to $5 million cash going to be required by BB&T in order for a default letter not to be issued?
MS. CHERRY: Object to the form.
THE WITNESS: The default was going to be called by me no matter what because the company was in default.
BY MR. LINTON:
Q. Don't you attempt, as part of a problem loan administrator, to arrive at a plan to continue with the customer before you write a default letter?
MS. CHERRY: Object to the form.
THE WITNESS: Not all the time, no.
BY MR. LINTON:
Q. I didn't ask you about all the time.
MS. CHERRY: You did.
MR. LINTON: Okay. Maybe I did. I apologize if I did.
BY MR. LINTON:
Q. Is it BB&T's policy and practice to attempt a solution to a default -- to a problem loan before issuing a default letter?
A. No, not all the time.
Q. When is it?

A. If a default exists, almost every single problem loan administrator calls that default, and then we work through the issues if we can. But you don't ever waive a default until you call it.
Q. I didn't ask you about waiving it.
A. I understand.
Q. But what you're telling me is it's the policy of the BB&T problem loan administration to declare a default, if one exists, before it attempts a solution and a workout.
A. You say policy. It's not a policy.
Q. In practice is what I'm talking about.
A. Practice, that's correct.
Q. Once you declare a default such as the one on January the 25th, have we agreed that it makes it much more difficult for the debtor to go to another lender to take it out?
A. I thought we agreed he couldn't go to another lender based upon his financial condition of the company.
Q. See, please listen to my question, and maybe I --
A. You said lender.
Q. I said other lender. What I'm talking

about is this: When you issued the letter of January the 25th, the default letter, was the bank aware that that would make it exceedingly more difficult for SkyWaves to approach another lender and secure any takeout financing?
MS. CHERRY: Object to the form.
THE WITNESS: It would make it harder, yes.
BY MR. LINTON:
Q. Much harder. Do you agree with that?
A. It would make it harder.
Q. How much harder?
A. I think that they had a harder problem convincing a lender to lend money into a company.
MR. LINTON: Molly, could you ask the witness to be responsive?
THE WITNESS: The default, it would make it harder, yes.
MR. LINTON: Sure.
MS. CHERRY: Johnny, I think that the witness is entitled to clarify anything he disagrees with in your question and answer your question.
MR. LINTON: Right.
MS. CHERRY: And so I think the witness

is clarifying where he disagrees with your question. I can continue to object to the form. If you do not feel like the witness has answered your question you can ask it again.
MR. LINTON: He -- I will say this: I believe that on a number of occasions he's answered the question and then he adds to his answer unresponsive testimony that was not asked about but was on his mind because he wants to make an argument rather than answer the question.
MS. CHERRY: I think the witness is allowed to answer the question as he sees fit. If you disagree or don't like his answer, then you can take it up with the court when the testimony is before the court. I think that's the appropriate time if you object to a portion of his answer, Johnny.
BY MR. LINTON:
Q. When you declared the default, were you aware of the amount of cash by equity or subordinated loans that existing shareholders had made to the company in 2007?
A. Yes.
Q. How much was that?
A. I don't recall the account number off

A. I gave the company almost no value at all.
Q. Okay. When you did that, were you aware that a sophisticated investor, Hunt Capital, had a letter of intent to put $4 million equity in SkyWaves in March of 2007?
MS. CHERRY: Object to the form.
THE WITNESS: March of 2007?
BY MR. LINTON:
Q. Right.
A. I think I knew that Hunt Capital had done something and Wachovia was involved, but I don't -- I don't recall the exact details.
Q. Well, I guess I know you're speaking for yourself. Was there anybody else in the bank that had any knowledge that the bank relied upon about the Hunt Capital investment?
MS. CHERRY: I'm going to allow the -- I think you're finishing up. I'm going to allow the question.
THE WITNESS: I think we all knew about the Hunt Capital investment, and if it -- if I worked for Hunt Capital, since we're all -- I would have looked at it, but it would have been based upon SkyWaves' projections for 2007, which never

materialized.
BY MR. LINTON:
Q. Okay. Was the bank aware that the Hunt Capital letter of intent to invest $4 million cash valued the enterprise at $11 1/2 million?
MS. CHERRY: Object to the form.
THE WITNESS: I don't recall that, seeing that, no.
BY MR. LINTON:
Q. Okay. Was the bank aware that a sophisticated investor invested $500,000 in July of 2007 and that on a per share basis that would have valued the company at $13 million?
MS. CHERRY: Object to the form.
THE WITNESS: So that would have been -- I think it was one of the guarantors that did that.
BY MR. LINTON:
Q. No. It was a new investor.
A. Oh. I know there was some capital contribution. I just didn't know the details behind it.
Q. Okay. So was the bank aware that a sophisticated investor in July of 2007 had invested $500,000 equity in SkyWaves and that based on the

per share cost of that the company would have had a $13 million value?
MS. CHERRY: Object to the form.
THE WITNESS: No.
BY MR. LINTON:
Q. Okay. When you're assessing the value of a company like SkyWaves as a problem loan, would it be significant to know what value sophisticated investors have put on the company within the last year?
A. Would it be of value? It might be -- it might be an issue of concern, but I'm -- I would still go back to the overall financial stability of the company and the company's ability to make money, which it really hadn't shown in several years that it had the ability to make money.
Q. Well, that would be true in the two investors that I just asked you about: one entering into a letter of intent to put 4 million into the company and one who actually put $500,000 into the company equity. Would that make any difference to you?
A. Oh, I would welcome the capital injection because the company needed it. But, I mean, in reference to me to, what, not issue a

default letter? In reference to me to do what?
Q. To determine what forbearance agreement terms would be appropriate to reduce the bank's risk and permit SkyWaves to secure other financing.
A. So not acting upon the defaults until maturity? Is that what we're talking about?
Q. That's fine, um-hum.
A. We did that.
Q. You continued to make all advances under any line of credit to the bank -- to SkyWaves?
A. No, but we didn't act upon the events of default. We didn't -- we didn't close the bank -- we didn't close SkyWaves down.
Q. Did you advance any more moneys on invoices?
A. No.
Q. Did you advance any of the remaining hundred thousand dollars or up to a hundred thousand dollars on the purchase order line?
A. I'm sorry. I misquoted. We did advance money for payroll and possibly some invoices to complete one or two Verizon shelters. So there was some money that was advanced.
Q. Fairly limited?

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STATE OF SOUTH CAROLINA **COUNTY OF CHARLESTON** **SKYWAVES I CORPORATION,** **Plaintiff,** **v.** **BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC a/k/a BB&T, and JAMES EDAHL,** **Defendants.**	**IN THE COURT OF COMMON PLEAS** **NINTH JUDICIAL CIRCUIT** **CASE NO.: 2009-CP-10-7516** **AFFIDAVIT OF RON KONERSMANN**

I, Ron Konersmann, being first duly sworn, declare as follows:

1. I am over the age of 18, and have personal knowledge of all facts contained herein and, if called upon to testify with respect thereto, could and would competently do so.

2. I was deposed in 2013 and provide this affidavit with additional information. I am a graduate of Notre Dame and have an MBA I served as an enlisted soldier in the United States Marine Corp.

3. At all relevant times, I was CEO of Skywaves and the major stock holder.

4. In late 2006, our Board, recognizing the growth potential of the company, requested that I raise capital investment. I was introduced to Hunt Capital. We made a presentation and Hunt conducted a due diligence. Hunt Capital presented Skywaves with an offer to purchase 30% of the company for $4 million dollars in March 2007. The letter of intent is attached hereto as Exhibit 1.

5. I advised James Edahl of the proposal, and he advised me that accepting that offer of capital was imprudent because he could design a loan package that would provide the

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equivalent liquidity and that we knew him and BB&T. In his words, why take a chance with a partner you don't know.

6. Shortly thereafter, Mr. Edahl designed a program that doubled our credit line to 3.5 million and reduced our costs of funds. I explained to him that the timing of Skywaves' cash flow was uncertain, specifically mentioning the very large potential contract with General Dynamics. He assured me that he could tweak his proposal to work for us and that BB&T was a far better partner through its capital markets division to go to an initial public offering.

7. When the delays with the General Dynamics contract persisted, Mr. Edahl confirmed by early July that Skywaves could access 2.0 million of a 3.5 million dollar loan based on potential sites General Dynamics had identified.

8. Mr. Edahl met with a potential investor in McBee, the Martin brothers, who was leery of investing with a company that was factoring, but based upon the assurances Mr. Edahl made, Mr. Martin invested $500,000. Based on the value of all outstanding shares, the transaction valued the company at $13 million, not including discount for minority share and lack of marketability.

9. At no time did Mr. Edahl express any dissatisfaction with Skywaves or its performance. He understood any projections that were not realized were due to delays beyond our control.

10. A comparison of Skywaves' operating costs for 2006 and 2007 reveal that $810,000.00 more was spent in 2007 based on growth and building in capacity to handle that growth. Mr. Edahl fully encouraged that build up and was aware of the company financials.

11. In late 2007, both November and December, Mr. Edahl stated that because shareholders had put in additional capital and converted loans to equity, Skywaves was in a

stronger position at the end of 2007 than March when BB&T had doubled the credit lines because the contracts that would expand revenues immensely were on the horizon.

12. In late December, 2007, Mr. Edahl suggested we put together a pro forma for a three year plan that would be used as part of the effort to have an initial public offering. We put together a plan by early January, 2008 and shared it with him.

13. On January 17, 2008, I had a routine meeting with the new administrator for the bank and Mr. Edahl. The next day Mr. Edahl called to say the bank is declaring a default because of funds obtained from BB&T based on the General Dynamics site plans. I was shocked as that was an integral part of our agreement. If Mr. Edahl had told me in July, 2007 that the bank was not going to permit access to those funds, Skywaves would have pursued one of the avenues discussed in the memorandum in opposition to summary judgment.

14. Mr. Edahl was summarily removed from the account and Michael Hennessey took over. He was very accusatory, claimed Skywaves had defrauded the bank, and that he would put us in jail.

15. At no time did the bank remove the default declared by Mr. Edahl.

FURTHER AFFIANT SAYETH NOT.

Ron Konersmann

April 7, 2015
Charleston, South Carolina

SWORN BEFORE ME THIS
7 Day of April, 2015.

Notary Public of South Carolina
My Commission Expires: 11/27/22

LIANE MARCOTULLI
My Commission Expires
NOTARY PUBLIC
11-27-2022
SOUTH CAROLINA

EXHIBIT 1

03/22/07

PRELIMINARY, NON-BINDING TERM SHEET

POSSIBLE INVESTMENT IN SKYWAVES CORPORATION

This Term Sheet is intended as a proposal only and is not binding on Hunt Growth Capital, L.P. ("Hunt") or any of its affiliates. Neither Hunt nor any of its affiliates shall have any obligation under or in respect of this Term Sheet unless and until definitive legal documentation with respect to the transactions contemplated hereby is executed by Hunt or its affiliates.

Company:	SkyWaves Corporation, a Delaware corporation (the "Company").
Key Management:	Ron Konersmann, Jim Phillips, Jeff Ward, John Voyko, and Jeff Kramer (collectively the "Key Managers").
Hunt Investor:	A special purpose affiliate of Hunt (the "Hunt Investor").
Type of Security:	Series A Participating Preferred Stock (the "Series A Stock").
Investment Amount:	A total of $4,000,000 (the "Investment") payable in cash at closing.
Use of Proceeds:	The Investment will be used as working capital for the Company and for the procurement of manufacturing-related capital equipment. No portion of the proceeds of the Investment shall be paid, directly or indirectly, to Existing Shareholders or any combination thereof.
Closing Date:	May 31, 2006 or as soon thereafter as practicable.
Valuation:	A pre-money enterprise value of $11,550,000. Based on the current fully diluted shares outstanding of 6,500,000 plus the creation of an incentive stock option pool to compensate and incent the Key Managers (the "Incentive Stock Option Plan") representing 10% of the pro forma fully diluted outstanding shares of Common Stock after giving effect to the Investment and the current debt minus cash ("Net Debt") of $1,387,208, this computes to a per share price of $1.50 (the "Original Purchase Price").
Purpose of the Company:	The purpose of the Company will continue to be to design and manufacture concrete shelters, to provide telecom-related integration services, and to engage in any and all such activities related thereto. Any change in the Company purpose shall require the written consent of the Hunt Investor.
Management of the Company:	Subject to the limitations summarized in this term sheet, the Key Managers will generally be responsible for all management decisions affecting the Company, except for specified major

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decisions and any decisions which could result in direct liability for the Hunt Investor. Major decisions will cover a variety of matters, including without limitation, (i) the purchase or sale of assets by the Company (other than in the ordinary course of business), (ii) acquisitions of other entities, (iii) the borrowing of funds or the settlement of claims by the Company in excess of a certain permitted dollar amount, (iv) the making of capital expenditures in excess of a certain permitted dollar amount, (v) taking additional capital contributions or the issuance of any additional equity interests, (vi) mergers or other business combinations, (vii) new product lines, (viii) all compensation of senior management, (ix) all transactions with related parties and (x) all other material transactions.

The size of the Company's Board of Directors shall be set at five (5) members and will be initially constituted as follows:

Two (2) directors shall be elected by the holders of Series A Preferred voting as a single class and shall initially be Michael Bierman and Matthew Golden (the "Preferred A Directors").

Two (2) directors (the "Common Directors") of whom one shall be elected by holders of Common Stock and one such person shall be the CEO.

The one (1) remaining director (the "Outside Director") shall be a person completely independent from the Company, the Key Managers and the Hunt Investor having relevant industry experience, and shall be mutually acceptable to the Common Directors, and the Preferred A Directors.

Annual Business Plans:

Each year the Key Managers will propose an annual business plan ("Annual Plan") for review and approval by the Hunt Investor.

In the event that an Annual Plan is not approved prior to the commencement of any fiscal year of the Company, the prior approved Annual Plan and the associated executive salaries shall continue as the approved Annual Plan for such fiscal year until a new Annual Plan is approved by the Hunt Investor.

Liquidation Preference:

In the event of any liquidation or winding up of the Company, the holders of the Series A Stock shall be entitled to receive one times the Original Purchase Price, plus the Series A Dividends (hereinafter defined) (the "Liquidation Amount"), in preference to the holders of Common Stock.

After the payment of the aforesaid amount, the remaining assets or property distributable upon such liquidation shall be divided pro rata among the holders of the Common Stock and the Preferred Stock.

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A sale, conveyance or other disposition of all or substantially all of the property or business of the Company, or a merger or consolidation with or into any other corporation (collectively, an "Acquisition" of the Company), other than (i) a consolidation with a wholly-owned subsidiary of the Company; (ii) a merger effected exclusively to change the domicile of the Company, (iii) an equity financing in which the Company is the surviving corporation, will be deemed to be a liquidation for purposes of the liquidation preference.

Employee Options: Grant of options or sale of Common Stock to employees will be pursuant to an Incentive Stock Option Plan administered by the Board of Directors. Vesting under any such plans shall provide that options or stock shall not vest until one year after grant, and shall vest thereafter on a quarterly basis over a minimum of four years.

The repurchase option shall provide that upon termination of the employment of the shareholder, with or without cause, the Company or its assignee (to the extent permissible under applicable securities law qualifications) retains the option to repurchase at cost any unvested shares held by such shareholder.

Dividends: The Series A Stock will be entitled to preferential dividends at the rate of 12% per annum of the Series A Stock Original Purchase Price per share, as adjusted, which shall be cumulative, accrue daily and compound annually, plus dividends on an as converted basis, when, as and if declared on the Common Stock (collectively, the "Series A Dividends"). Dividends on the Series A Stock shall be paid senior to any other series of capital stock. For any other dividends or similar distributions, the Series A stock shall participate with Common Stock on a pro rata basis.

Limitations on Transfers of Interests: Direct or indirect transfers of Company interests in the Company by the Key Managers will require the consent of the Hunt Investor, except for specified transfers to affiliates, family members or trusts for estate planning purposes, so long as such transferee(s) execute an agreement binding it to the same transfer restrictions as those affecting the Managing Member. In no event shall the Key Managers ever own less than 33% of the Company.

Hunt Investor will be permitted to transfer, without consent, its interest to descendents of Ruth Ray Hunt; such persons' spouses; entities such persons or their spouses control; or trusts for the benefit of such person or their spouse.

Limitation on Conflicts of Interest: Ron Konersmann will agree that he will devote his full time and attention to the business and affairs of the Company and avoid conflicts of interest for as long as Hunt retains an ownership interest in the Company (and in certain circumstances, during later periods)1031

(the "Substantial Commitment Test"). In light of the diverse business interest and relationships of Hunt, there will not be similar, corresponding restrictions on Hunt and its affiliates.

Status of Ron Konersmann: In connection with specified special events, including the death or disability of Ron Konersmann, Ron Konersmann's breach of the Definitive Agreement, breach by Ron Konersmann of employment, non-competition or non-solicitation agreements entered into with the Company or the Company's bankruptcy, the Hunt Investor will have the option to assume management of the Company.

Hunt Investor Liquidity Rights: The Definitive Agreement will contain standard unwind provisions, including a provision pursuant to which the Hunt Investor may cause the Company to redeem its interest or offer to sell its interest in the Company at a specified price to the other stockholders which will obligate the other stockholders to sell their interests if the other stockholders do not buy the Hunt Investor's interest or liquidate. The rights specified in the prior clause may not be exercised during the first three years following closing. At any time and from time to time following the fifth anniversary of the closing, the Hunt Investor shall have the right to cause the Company (either stock or assets) to be sold to a bona fide third party purchaser. Notwithstanding the foregoing, should Ron Konersmann no longer be satisfying the Substantial Commitment Test (including but not limited to reasons relating to death or disability), the Hunt Investor shall be free to exercise any Company unwind provisions irrespective of time prohibitions listed herein.

Employment Agreements: Hunt will require the Key Managers to execute employment, non-competition and non-solicitation agreements in form and substance acceptable to Hunt.

Key Man Insurance: The Company shall pay the costs for a key man term life insurance policy for the benefit of the Company on the life of Ron Konersmann in an amount not less than $5,000,000. Such policy shall remain in effect for so long as the Hunt Investor owns an interest in the Company.

Special Conditions to Closing: The following will have occurred prior to closing:

(a) The Company shall have received a lease renewal option and an option to purchase the Company's manufacturing facility, and associated capital equipment used in the shelter manufacturing process, in Charleston, SC on terms and conditions satisfactory to Hunt;

(b) Ron Konersmann shall have executed a voting agreement with existing common shareholders which will give him the right to vote on behalf of a minimum of 51% of the common shareholders containing such terms and conditions satisfactory to the Hunt Investor; and

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(c) There shall not have occurred any material adverse change in the business, assets (including intangible assets), financial condition or results of operations of the Company.

Conduct of the Business: Prior to the closing of the proposed Investment, the Company shall be operated solely in the ordinary course of business consistent with past practices and, without Hunt's prior written consent, the Company will not make or enter into any material acquisition, contract or letter of intent binding the Company to make any dividend or share repurchase, bonus, discharge or hire any key employee or enter into employment agreements with existing employees, borrowing, increase in compensation or capital expenditures, asset sale, or affiliate transaction except non-material transactions in the ordinary course of business.

Confidentiality: The signatories will not, and will cause the management of the Company, and their representatives not to, disclose to any person other than principals and representatives of the current shareholders the existence or the terms of this proposal.

Exclusivity: So long as Hunt is proceeding in good faith with the proposed Investment, neither the Company nor the Key Managers shall negotiate with any other parties concerning a proposed financing, sale (whether by sale of stock or assets), recapitalization, merger, combination, etc. This exclusivity will remain in full force and effect until terminated upon delivery of written notice to the other party terminating discussions; provided, however, that such notice shall not be delivered by the Company until after 90 days following the execution of this letter.

Expenses: The Company will pay the reasonable fees and expenses, not to exceed $50,000, incurred by Hunt Investor in connection with the proposed transaction.

Non-binding Proposal: It is understood and agreed that this is a non-binding proposal and does not contain all matters upon which an agreement must be reached in order for the proposed Investment to be consummated and creates no binding rights or other obligations in favor of any party, except for the binding rights and obligations referred to in the paragraphs labeled Conduct of Business, Confidentiality, Exclusivity and Non-binding Proposal. A binding agreement with respect to the Investment will result only from the execution of the Definitive Agreement, which any proposed party thereto may or may not execute in its respective sole and absolute discretion. This letter shall be governed by and interpreted in accordance with the laws of the State of Texas.

Counterparts: This letter may be executed in counterparts, which, taken together, shall represent a fully executed letter. 1033

Expiration: This non-binding term sheet will expire at 5:00 p.m. (Dallas, Texas time) on Friday, March 30, 2007, unless a fully executed copy of this letter is received by Hunt prior to such time. Upon execution hereof, Hunt shall commence formal due diligence and preparation of formal legal documents (the "Definitive Agreement"), subject in all respects, to satisfactory completion in Hunt's sole discretion.

We are very enthusiastic about partnering with management to grow and develop the Company. Upon signing of this letter, we are prepared to move forward expeditiously.

Sincerely,

HUNT GROWTH CAPITAL, L.P.

By: Hunt Growth Capital, L.L.C., its general partner

By: Michael T. Bierman
Name: MICHAEL T. BIERMAN
Title: Manager

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

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

VIDEO DEPOSITION OF: MICHAEL BURKE

DATE: December 18, 2013

TIME: 9:04 a.m.

LOCATION: Nexsen Pruet
701 Green Valley Road
Greensboro, NC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: LISA A. WHEELER, RPR, CRR

APPEARANCES OF COUNSEL:
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ATTORNEYS FOR THE DEFENDANTS BRANCH BANKING AND TRUST COMPANY, successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL:
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ALSO PRESENT Mike Hennessy
Russell Bogue

THE VIDEOGRAPHER John Girdler

(INDEX AT REAR OF TRANSCRIPT)

(Commencing at approximately 9:04 a.m.)

* * * * * * * * * * * *

STIPULATION

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

* * * * * * * * * * * *

THE VIDEOGRAPHER: We're going on the record. The time on the monitor is 9:04 a.m. This is the video deposition of Mike Burke taken by the Plaintiff in the matter of SkyWaves I Corporation, Plaintiff, versus Branch Banking & Trust Company, et al, Defendants, under the jurisdiction of the Court of Common Pleas for the Ninth Judicial Circuit, County of Charleston, Case Number 2009-CP-10-7516.

This deposition is being held at Nexsen Pruet, 701 Green Valley Road, Suite 100, Greensboro, North Carolina, on Wednesday, December 18th, 2013. My name is John Girdler. I'm the

video specialist. The court reporter is Lisa Wheeler. We're from A. William Roberts, Jr. & Associates.

Counsel will now state their appearances for the record and the court reporter will swear in the witness.

MR. KEFALOS: This is George Kefalos on behalf of SkyWaves.

MR. LINTON: John Linton on behalf of SkyWaves.

MS. CHERRY: Molly Cherry on behalf of the Defendants BB&T and Jim Edahl.

MR. MENDOZA: Rick Mendoza on behalf of the Defendants BB&T and Jim Edahl.

MICHAEL BURKE

being first duly sworn, testified as follows:

EXAMINATION

BY MR. KEFALOS:

Q. Mr. Burke, my name's George Kefalos. I'm one of the lawyers representing SkyWaves and we've just met. I want to ask you some questions about what you might know about this case. Do you feel well enough to answer my questions today?

A. I will do my best.

Q. And -- and will you give me full and

complete answers to my questions today?

A. Yes.

Q. And if you don't understand a question, will you ask me to explain it so that I know if you give an answer you believe you've understood the question?

A. I will.

Q. Good. Tell me a little bit about yourself. Where do you live currently?

A. I currently live outside of Atlanta in a suburb, Smyrna, Georgia.

Q. How long have you been there?

A. I've only been in Smyrna for a year-and-a-half. I moved to Acworth, Georgia, which is maybe 15 miles north of Atlanta in 1986. I moved from Chicago to Atlanta for work.

Q. What brought you from -- what sort of work brought you from Chicago to Atlanta?

A. I was working for Heller Financial at the time in factoring and they closed the factoring office in Chicago, expanded the Atlanta office because most of the clients we handled out of Chicago were in the southeast so we were closer to them.

Q. All right. You -- are you married?

arrangement not be linked to the sale of any particular product, repayment of the asset-based loan?

A. I believe it's still based on payment because that is how your loan is -- is reduced. And it doesn't have to be a product. It could be a service.

Q. Well, sure. And there's obviously going to be a payment schedule on an asset-based loan, but I'm looking to see what the difference is. In a -- in a asset-based loan BB&T will look at the customer, determine what their line of credit or their creditworthiness should be and make a loan. The loan has to be paid back according to a certain schedule.

A. Right.

Q. And the schedule does not depend on the sale of any particular product or any service; it's just the money is used for the operations and it has to be repaid by schedule.

MS. CHERRY: Object to the form.

BY MR. KEFALOS:

Q. Is that generally accurate?

A. I don't -- I would like you to repeat that if you could.

Q. Well, what I'm interested in knowing is can you -- is it fair to say that a factoring loan, the repayment is linked to a particular product that BB&T, for example, would have a lien on while the repayment of an asset-based loan is not linked to the -- a particular product that BB&T might have a lien on?

MS. CHERRY: Object to the form.

A. The repayment of a factoring loan is based on our purchase of the receivables. I don't know how the difference would be with an asset-based loan.

Q. Well, you know that an asset-based loan would be -- well, let me ask you this: Would an asset-based loan be sort of a general line of credit?

MS. CHERRY: Object to the form.

A. I'm not sure what you would mean by general line of credit It's a line of credit I believe that is based on certain criteria.

Q. The criteria would be what?

A. The assets that you're lending against, receivables or receivables and inventory and what is eligible on those receivables and the performance of those receivables.

Q. Okay. Well, is there a difference between an asset-based loan and a factor -- factoring agreement?

A. Be -- in the agreements, yes, I'm sure there are. I -- again, I am not an asset-based lender so I --

Q. Okay.

A. -- I can't give you details on that but I can tell you what a factoring agreement is like.

MR. KEFALOS: Let's take a break so we can get those exhibits.

MR. MENDOZA: Yeah.

THE VIDEOGRAPHER: We're going off the record at 9:25 a.m.

(Whereupon, there was a recess in the proceedings from 9:25 a.m. to 9:27 a.m.)

(BURKE EXHIBIT 1, E-mail Message from Walter Denning to James Edahl, et al, September 7, 2007, Subject: Otranto Station, was marked for identification.)

THE VIDEOGRAPHER: We're going back on the record at 9:27 a.m.

BY MR. KEFALOS:

Q. I've handed you what we've marked as Exhibit Number 1 which is a memo from Mr. Denning

to Mr. Edahl dated September 7th, 2007. Have you seen -- had you seen that when you first came on to work on the SkyWaves account?

A. I don't recall seeing this but I could have and I don't remember. There was a lot of paper involved that I had to go through on SkyWaves.

Q. Sure. Let me hand you what we'll mark as Exhibit Number 2.

(BURKE EXHIBIT 2, Memorandum from Jim Edahl to Walt Denning, September 20, 2007, Re: Skywaves, was marked for identification.)

MR. KEFALOS: Would you pass that over to Molly?

THE WITNESS: Sure.

BY MR. KEFALOS:

Q. Have you seen Exhibit Number 2 which is a memo dated September 20, 2007 from Jim Edahl to Walt Denning?

A. I don't recall. I can't say that I've seen this or not.

Q. Do you remember taking stock of the SkyWaves account when you first came on in -- was it November of 2007?

A. It was the end of November, right.

Q. Yeah. And had you reviewed the -- what had been the projected revenues and earnings when you first came on?
A. I don't believe I did when I first came on.
Q. When would you have done that?
A. I don't recall.
Q. Well, do you remember what your thinking was about the SkyWaves account when you looked -- when you first came on? Did it look like it was a viable account? Did it look like there was any problem or trouble with the account?
A. My initial impression was that it was a different structure and I know at some point I saw financial information and recall the company was, I believe, showing losses at that time.
Q. Yeah. Were you at all concerned in November of '07 that the company would not be able to succeed?
A. I don't recall having that concern at that time and it was a lot to look at and, I think, assimilate so I was more concerned initially on what my role was in managing the collateral of the loan.
Q. Would you look at the last paragraph on

the first page of Exhibit 2. Mr. Edahl writes, 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 would be in a position to convert to more traditional ABL financing for the operation.
Do you know what that means?
A. I have to assume that Mr. Edahl was feeling that the company would progress to a better financial condition and it could be moved from factoring to ABL.
Q. To ABL?
A. That's an assumption on my part though.
Q. Sure. And he goes on to say, while this goal has been delayed it appears that just with the contract work in hand with General Dynamics we'll be able to accomplish this goal in 2008.
Was that your impression at the time you came on board?
A. At the time I came on board I didn't have any impression of the financial set.
Q. Okay. When did you first learn that BB&T was loaning money to SkyWaves on purchase orders and not on invoices?

MS. CHERRY: Object to the form.
A. It had to be very shortly after I started because I had to manage the account. So if they needed any funding on purchase orders, they would have come to me.
Q. Would anybody have told you about the arrangement before you came on board?
A. I had a short period of time to work with Castlen. I believe I actually took vacation days from my previous job to go up, meet him and visit some clients and discuss clients that I would be handling. I don't recall if we discussed SkyWaves at that time or not.
Q. So you don't remember if Mr. Castlen Morris told you about the unusual nature of the lending relationship with SkyWaves?
MS. CHERRY: Object to the form.
A. Could you repeat the last part? I'm sorry.
Q. Do you remember whether Mr. Morris told you of the unusual nature of the lending relationship between BB&T and SkyWaves?
MS. CHERRY: Object to the form.
A. I don't remember what he told me. I know I did talk to Castlen at some point near the

beginning of the relationship about the account, but I don't recall exactly when we spoke about it.
Q. Okay. What was your reaction when you learned that BB&T was loaning against purchase orders?
MS. CHERRY: Object to the form.
A. I was surprised.
Q. And why were you surprised?
A. Because purchase order financing is something I have never done. There are companies that specialize in that and I just thought that that was a different thing for a bank to be doing.
Q. You didn't like it?
A. I'm not saying that I didn't like it. It was just out of the ordinary.
Q. Let's take a look at this --
MR. KEFALOS: Let's mark this as Exhibit Number 3, March 26, '08.
(BURKE EXHIBIT 3, Memorandum from Tol Broome to File, March 26, 2008, Re: Skywaves I Corporation, was marked for identification.)
BY MR. KEFALOS:
Q. This is a memo dated March 26th, 2008 from Tol Broome to the file. Have you seen this before?

A. Again, I can't say for sure. I feel like I have, but I've seen so much paper.
Q. And who was Tol Broome?
A. Tol Broome at the time I believe was the president of the commercial finance group at BB&T.
Q. In his -- the first numbered paragraph Mr. Broome writes, BB&T is not equipped to finance purchase orders anywhere in the bank if we're relying on the purchase orders for repayment.
Do you see that?
A. Yes, sir.
Q. Would you agree with that?
A. I would agree that we in the factoring group weren't equipped to do it, but I can't speak for any other part of the bank.
Q. What's the problem with purchase order factoring from your standpoint?
A. It has to be monitored. There's more risk involved. There are different kinds of purchase order financing. You have purchase order financing for finished goods, purchase order financing for work in process, but it's a different risk that you are taking there.
Q. And with the purchase order financing

versus an invoice financing, a purchase order does not have a product yet for a lien to attach, does it?
A. In -- in the -- could you repeat that? I missed the last part. I'm sorry.
Q. I'm looking at the difference between purchase order financing and lien -- or invoice financing. In invoice financing there's a finished product and an invoice has been issued. Purchase order --
A. Right.
Q. And -- and that gives BB&T some level of security, the fact that there's a product and an invoice that's been issued?
A. Correct.
Q. Now in purchase order financing there's -- there's no product and no invoice yet that has been issued?
A. To my understanding that's correct.
Q. Good. And -- and with a purchase order there's really no way of knowing or booking when the invoice is supposed to be paid?
A. I don't know if that's correct since I've not done purchase order financing or been involved with it other than this case. I would --

would not know if the purchase order states any information about when the project -- the product will be completed and shipped to let you know when an invoice would be created. I don't know that.
Q. Well, in the SkyWaves case there was no indication when the purchase order was given when the product would be completed, shipped and when the invoice would be issued?
A. I don't -- I don't remember what information was on the purchase order so that's hard for me to answer right now.
Q. Okay. All right. When you came on board did you understand that this funding purchase orders had been going on for some time?
A. Once I started handling the account and inquired about it, then I was aware of that.
Q. And could you see that the funding of these purchase orders had become the course of dealing between BB&T and SkyWaves?
MS. CHERRY: Object to the form.
A. By course of dealing what exactly do you mean?
Q. Well, it had been going on for a while and this was the way the funding was being handled.
A. It -- it had been going on for a while,

yes.
Q. All right. And could you see that SkyWaves had come to rely on purchase order funding as part of its business operations?
MS. CHERRY: Object to the form.
A. My opinion looking at the receivables and the amount of purchase orders was that they were relying on that.
Q. Good. And you coming in at that time in November of 2007 under the circumstances that this had been going on for some time and SkyWaves had come to rely on it, do you think that it would have been fair to pull the purchase order funding without giving SkyWaves a reasonable opportunity to get alternate funding?
MS. CHERRY: Object to the form.
A. I'm not sure if I know how to answer that. If a client is in violation of a loan for some reason, there could be justification to pull that line of credit. We were financing purchase orders here and my concern was not the continuation of financing purchase orders but it appeared a block of -- I'm not sure what to call them -- that weren't purchase orders.
Q. Sure. We'll get to that in a minute

but I'm interested in the -- your thinking about the purchase orders. And my -- my question is really not a legal question. It's a moral question. I want to know whether you think it would have been fair for you to come in in November of '07 knowing that this has been -- this had been the course of dealing with SkyWaves and BB&T and knowing that SkyWaves had come to rely on the purchase order funding as part of its operation, would it have been fair for BB&T to just unilaterally stop the purchase order funding without giving SkyWaves an opportunity to get an alternate source of funding?

MS. CHERRY: Object to the form.

A. I don't believe that was the case. Again, I'm not sure how to answer it. I don't believe that was -- I don't believe that was the case at the time.

Q. No. I'm asking a hypothetical --

A. Is it fair --

Q. -- really because I'm asking you -- when you came in in 2007 in November and you saw this operation had been going on for a while you didn't like it.

Do you think that it would have been

fair for BB&T to unilaterally stop it without giving SkyWaves an opportunity to get an alternate source of purchase order funding?

MS. CHERRY: Object to the form.

A. First of all, I would say I don't believe I've said I don't like it. I think it was unusual.

Q. Uh-huh.

A. And, again, I have a hard time answering that because I don't believe -- I don't believe that's an answerable question. We were not -- there are times in a loan where you have to say, I'm sorry, we can't fund you anymore. Maybe some -- something arises to cause that. If a company continues to lose money and our job is to protect the bank's assets also, there comes a time where you have to say, I'm sorry, we can't fund you anymore. There's all different circumstances that come into play in that.

Q. Sure. I mean, you're -- what you're talking about is there might be defaults that come into play that allow BB&T or would justify BB&T to say we're not going to fund anymore. I'm asking you not about the defaults, not about other circumstances. I'm just asking about the purchase

order funding. This is a voluntary relationship, isn't it?

MS. CHERRY: Object to the form.

BY MR. KEFALOS:

Q. BB&T has the right to cancel the relationship at any time, doesn't it?

A. I still have a hard time with that. We -- at the time -- and I'm not sure if we said we're not -- I believe maybe we did say we're not going to do purchase order fin -- financing anymore, but our concern was that we had been fan -- financing items that were not purchase orders so I would not want to continue to finance. Then I'm way undercollateralized so --

Q. You're talking about financing items that weren't purchase orders. When did you first learn that BB&T was loaning money to SkyWaves without either purchase orders or invoices but on site plans?

A. First of all, I don't believe I heard the term site plans until some point when legal issues were starting to come up and I read that. I met, excuse me, with Ron Konersmann, John Voytko and Jim Edahl sometime in January, I want to say the 17th or 19th, to discuss my concern about a

number of items that looked like purchase orders we had advanced on that we were not getting invoices on. In that meeting I asked Ron and John repeatedly if these were valid purchase orders and after asking several times Mr. Konersmann told me they were not.

Q. Was Mr. Edahl present at the time?

A. Yes.

Q. And what was your reaction when you learned that BB&T was funding money -- providing money to SkyWaves without a valid purchase order?

A. I was very shocked, very concerned and had an empty feeling in my stomach.

Q. Yeah. Did you understand that these -- we call them site plans today. What did you call them back then?

A. I didn't call them anything. I had never heard that and in that meeting Mr. Konersmann and Mr. Voytko never brought that up.

Q. Did they -- Mr. Voytko did tell you that this had been approved by BB&T, didn't he?

A. I don't believe he ever did and it did not come up at that meeting.

Q. Yeah. What was the problem with funding these site plans?

A. You're basically providing equity financing that you're going to be getting a purchase order so my concern as a lender is I'm looking at a company that's losing money on receivables. It's manufacturing a product that we're financing a PO so they could buy inventory, but if you have to finance future POs and they're still losing money, that's telling me that they don't have anything in inventory to put into production when they get a valid purchase order. So the financial viability of the company then became a very high concern to me.

Q. What -- what did you mean when you said you're basically providing equity financing?

A. There wasn't an asset that you were lending on so you are giving a company -- basically you're an investor. You're giving the company money that's unsecured.

MR. LINTON: Capital. Capital. Capital.

BY MR. KEFALOS:

Q. It -- it's like a capital investment?

A. I think that could be similar.

Q. Yeah. Let me hand you what we'll mark as Exhibit 4.

(BURKE EXHIBIT 4, E-mail String, January 22, 2008, Subject: SkyWaves, was marked for identification.)

BY MR. KEFALOS:

Q. And I direct your attention to the memo at the bottom of the page. This is an e-mail from you to Phil Allard and Jim Edahl --

A. Yes.

Q. -- dated January 22, 2008? And if you look at the bottom of that first page, the last couple of sentences, do you see where it says -- this is your writing, isn't it?

A. Yes.

Q. -- John was sure -- that is, John Konersmann -- or John Voytko? John Voytko?

A. Right. Right.

Q. John was sure they had discussed this with BB&T as part of the request for funding but, again, I see no evidence of this in our files.

So did Mr. Voytko, in fact, tell you that they got an approval for this site plan funding from BB&T?

MS. CHERRY: Object to the form.

A. This was the first time I heard anything related to this, but he's saying that he

was sure they discussed it with BB&T but I'm not sure that he told me it was approved --

Q. Okay.

A. -- and that I believe -- I believe later on or at some point he had told me too, I recollect, that they would try to get purchase orders for these -- what turned out to be site plan financing.

Q. Okay. And these site plan financings were not enforceable contracts, were they?

MS. CHERRY: Object to the form.

A. I -- I don't know what a site plan would have been.

Q. And you mention here that you see no evidence of this in our files. Did you review the files to see whether there was any documentation of an agreement by BB&T to --

A. I looked through everything that I had received from Castlen Morris. I don't believe I had let's say all the documents. What I believe I was able to see would be the CAR reports or the credit memos where the line would be changed or increased or we agreed to do more financing, but I could find no evidence of collateral more -- that we were going to advance on this type of

collateral.

Q. Would you have expected to find some kind of documentation in the file had BB&T really agreed to this?

A. I would have, yes.

Q. And this whole idea of site plan funding does not fit into a factoring model, does it?

A. It does not and neither does PO financing.

Q. Okay. There's no contract with --

MS. CHERRY: Object to --

BY MR. KEFALOS:

Q. -- site plan financing?

MS. CHERRY: Object to the form.

A. I -- I can't answer that. We have a factoring contract that deals with the receivables. Any other form of lending would have been documented separately, whether it be inventory, purchase orders, a line of credit. The factoring contract generally and as far as I know just deals with the receivables.

Q. Did you ever see any evidence of purchase order financing that was memorialized in the file?

the lack of documentation? Do you think that he was trying to hide the nature of the agreement he made with SkyWaves?

A. I can't say that he would be doing that. It could have been that he or some other people thought that these were very close to purchase orders or could be interpreted as purchase orders and that it was okay to fund on them.

Q. Uh-huh. But you knew that they were not purchase orders?

A. I was told by Mr. Konersmann and Mr. Voytko that they were not purchase orders.

Q. Now looking back at the last six months did it look to you like this site plan funding had become a course of dealings between SkyWaves and BB&T?

MS. CHERRY: Object to the form.

A. When you say the last six months --

Q. Six months before January of '08.

A. What -- what I looked at were -- I think everything was General Dynamics beginning with WST, the site plan information. It was a large block that -- I believe everyone was 53,000 maybe 925 Dollars and I believe they had been financed between July and I want to say October.

They stuck out like a sore thumb to me because other purchase orders from General Dynamics were different. They were -- looked more like a physical purchase order as I saw from Verizon and Nextel. I saw other purchase orders previous to these being paid, other purchase orders after being paid. This one block never seemed to go away. That was my concern that I brought up in the meeting on January 17th or 19th.

Q. So these you say stuck out like a sore thumb.

A. Yes.

Q. Does that mean that anybody could have looked at it and realized that there was something unusual about those loans?

MS. CHERRY: Object to the form.

A. I don't know if anybody could have, but by the time -- as time kept passing and I inherited the account and after, you know, several weeks of handling it, other purchase orders I would get invoices for. I never received anything on that and I was concerned about that.

Q. Right. Did it --

A. At some -- at some point you have to ask, why am I not getting invoices on these?

Q. Sure. Did it look to you like SkyWaves had come to rely on this site funding as part of its business operations?

MS. CHERRY: Object to the form.

A. That's difficult to answer because it seemed like it took place over a period of time and it may have stopped. I don't recall it continuing so --

Q. Uh-huh.

A. -- I don't know if they were relying on that anymore or not.

Q. Do you remember Mr. Edahl's deposition saying that he believed that this agreement that he made to fund site plans represented a contract between BB&T and SkyWaves?

A. I don't remember that in the deposition.

Q. Do you think it would have been fair in December of 2007 to pull the site plan funding without giving SkyWaves an opportunity to get alternate funding?

MS. CHERRY: Object to the form.

A. Is it fair? There are times when that is the best decision to do financially on a company. There -- every situation is different.

Some things you feel you can work out; some things you have to say we're calling the loan so it could have been fair at that time.

Q. It could have been fair you think to unilaterally pull the site plan funding without giving BB&T (sic) an opportunity to obtain alternate funding?

A. I don't know if we just pulled, if those were your words, funding on the site plan part but, again, I would say there are times when you have to say, we're not going to finance this anymore and, again, I don't recollect if we gave them notice or we -- I think we sent a default letter and would expect to get paid. Every situation is different.

Q. There -- it is and there are other reasons that came up later. But I'm asking about in December of 2007 we know that there's been a course of dealings between BB&T and SkyWaves to fund these sites. BB&T has advanced $1.2 Million on account of these sites. Mr. Edahl testifies that he made an agreement that's enforceable on behalf of BB&T.

And I'm asking you do you think as a factors man that under those circumstances it would

you found a formal modification of any kind of loan or factoring agreement.

MS. CHERRY: Object to the form.

A. Again, there was no modification of the factoring agreement to deal with anything other than receivables. And I did see, and I think it's in that time line that I submitted to Mr. Broome, various reports, credit approvals from the bank changing the structure with advanced rate, increasing the line, adding more to the number of accounts we would do purchase order financing on. I hope that answers your question.

Q. Well, what it -- it sort of does but I'm looking at -- you have answered it. Before your January meeting with Mr. Edahl and SkyWaves at the plant did you ever ask Mr. Edahl about that block of late cases?

A. I don't remember.

Q. Do you remember when you first noticed them?

A. I can't say when but, again, I took over the account January 19th or 20th. We had that meeting with Sky T- not January, I'm sorry. November.

Q. November. Then right after --

A. I --

Q. -- that would have been the Thanksgiving holiday.

A. Right.

Q. So you wouldn't have had a whole lot of time, would you, at that point?

A. Right. And I probably had 30 or 40 accounts to get used to handling. This would have been probably the most intricate. And I've forgotten exactly what I was supposed to answer. I'm sorry.

Q. I'm interested in knowing when you first realized that there was a block of business that was not producing invoices.

A. Okay. It -- again, it all happened so fast and I probably worked with the account for eight weeks, but it would have been sometime at the end of November or beginning of December or sometime before that meeting as I was getting used to handling the account and watching the purchase orders move. At some point I noticed that I had no activity on this one block and I can't tell you when that was.

Q. But do you remember asking anybody about that before that January meeting?

A. I cannot say specifically that I remember talking to anybody about that. I know Phil Allard and I had a conversation that we were concerned about the account and I needed to get over there and visit with them.

Q. And you would have had this conversation sometime in December before -- before the January 17 meeting?

A. It was probably closer to January -- sometime in January before the meeting because I don't think we would have waited too long to go visit and I set up the visit and made sure we understood what the situation was.

Q. So you saw sometime before the January meeting that there was a block of -- of advances that didn't generate invoices and you talked to Mr. Allard about it and you decided to go and find out what was happening?

A. Again, I'm not sure exactly what Phil and I talked about, but we were concerned and at some point before the meeting I was getting concerned that there were no receivables coming in to reduce those advances and Jim Edahl and I scheduled that meeting and went up and met with them.

Q. Those advances wouldn't have had the advances on the site plans -- the things that we know now as site plans, wouldn't have had a purchase -- or an invoice due date on them, would they?

A. I don't remember exactly what was on there. It was a sheet of paper and I couldn't tell you exactly what's on the other purchase orders. I believe they had numbers that I could match up when I got a receivable. I could look at the receivable. It would give me information on the purchase order. I could match up that purchase order I advanced on and clear that, but the General Dynamics group, nothing ever seemed to happen on that.

Q. Did you ever review the General Dynamic -- General Dynamics contract?

A. I don't believe I had ever seen that.

Q. Would you refer your attention back to what was marked as Exhibit 3. This is the memo from Tol Broome to the file dated March 26th, 2008. I think we talked about the last sentence in Paragraph Number 2 where Mr. Tol Broome writes that we were essentially providing venture capital. Did we talk about that?

A. Would I talk about that?
Q. Did we talk about that?
A. I don't believe we did.
Q. All right. Did -- do you -- do you agree with him that Sky -- that BB&T was essentially providing venture capital to SkyWaves?
A. Yes, I do. I think at one point I had referred to it as equity financing.
Q. Okay. And that's like getting an interest in the company, equity financing?
A. We didn't get any interest in the company, but it's almost as if you would do equity financing and get an interest in the company. We just didn't get an interest.
Q. Uh-huh. Now looking at the documents in hindsight can you say that this loan and factoring agreement did not start out as equity financing?
A. I would say that, yes, I believe it started out strictly as a factoring arrangement on receivables.
Q. On the invoices?
A. Yes.
Q. Okay. And that soon changed from factoring invoices to factoring purchase orders?

A. It --
MS. CHERRY: Object to the form.
A. It -- that facility was added at some point and without seeing a date I can't tell you when that was.
Q. Sure. And there was -- you found no formal written confirmation of this change in the agreement, did you?
MS. CHERRY: Object to the form.
A. I have -- or had copies of the credit reports and the memos signed off by the appropriate people authorizing the steps into purchase order financing.
Q. Sure. And that's what I call the course of dealing. But I'm asking whether you found a formal modification of the loan and factoring agreement to provide for purchase order financing.
MS. CHERRY: Object to the form.
A. I don't believe we had copies of that --
Q. Uh-huh.
A. -- of those actual contracts, agreements other than the factoring agreement because that came from our group. If we did, I

don't remember ever seeing that.
Q. Well, this purchase order financing would have been a breach of the factoring agreement, wouldn't it be?
MS. CHERRY: Object to the form.
A. It had nothing to do with the factoring agreement. The factoring agreement only dealt with receivables. It wouldn't -- the factoring agreement is completely separate from the purchase order financing. It's part of the overall loan agreement, but the factoring agreement, the factoring contract only deals with receivables.
Q. Okay. So this purchase order financing was not part of the factoring agreement to factor invoices?
A. I believe that would be correct.
Q. In -- under the original factoring agreement SkyWaves was not to receive any direct payments from customers?
A. If they received any payments directly from the customers, they are required according to the agreement to turn them over to BB&T and inform they received it.
Q. Sure. But before you get to the part about turning it over, it was supposed to be set up

so that SkyWaves would not get payments directly from customers, wasn't it?
A. It's supposed to be -- the invoices are supposed to be marked payable and owned by BB&T to our lockbox.
Q. Sure. And at some point you discovered that SkyWaves had been, in fact, receiving payments directly from customers for some time?
MS. CHERRY: Object to the form.
A. At some point we did discover that, yes.
Q. How -- that was a breach of the factoring agreement, wasn't it?
MS. CHERRY: Objection.
A. It's a breach of the agreement if they don't turn the re -- the payment over to us.
Q. We'll get to that. That's the second part of this --
A. Okay.
Q. -- receivable. Doesn't the factoring agreement require that SkyWaves make sure that the checks from the customers go directly to BB&T?
A. That's a situation that they cannot always have control over.
Q. Sure. But in this case SkyWaves was

receiving some checks directly from customers?
A. We did discover that, yes.
Q. Okay. And that, of course, is a technical breach of the factoring agreement, just receiving the money from the customers?
A. Just receiving the money you're asking?
Q. Yes.
A. No, that's not. I'm dealing with a client now selling Amazon.com shoes. Amazon will not pay us until we have a three-party agreement signed. They will pay us until further notice by all the parties directs them to change it. Some customers you have to have a separate agreement on, some customers will continue to send to the client, but the issue is the client needs to turn over any money they receive to BB&T.
Q. And you discovered that SkyWaves was receiving payments directly from customers and not turning the money immediately over to BB&T?
A. At some point, and I read it recently, it might have been in the audit we did in January, the field exam, that we found out they received I think about 320, $340,000 from Verizon and had not turned that money over to us.
Q. And did you believe that that

constituted a breach of the factoring agreement?
A. By not turning it over to us, yes.
Q. Uh-huh. And did you learn that this had been going on for some time?
A That prompted me to have our cash processing people pull some other large payments going back I believe several months in time to see where the money came from and we found instances where we were getting wire transfers, I believe, or maybe checks from SkyWaves instead of the customers and then I believe I also later found an e-mail from Castlen Morris that he had talked to SkyWaves about having that stopped so that led me to believe that this had been happening to some degree in the past.
Q. And the bank records would have revealed that this had been going on for some time?
MS. CHERRY: Object to the form.
A. The bank records. I don't know how to answer that.
Q. Well, you reviewed the documents. You had your staff pull the invoices and you saw from a review of the invoices that this had been going on for some time, didn't you?
MS. CHERRY: Object to the form.

A. I had asked people in cash processing to look back, pull some large payments so they could discover that, right. I don't consider that bank records though. That's payment history coming from the customers really.
Q. And what would happen when SkyWaves received this money from its customers, it would deposit it into BB&T accounts?
A. I don't know. I can't answer that. I don't know where it was deposited.
Q. Well, isn't that how you realized that this had been going on for some time, because you saw the money being deposited into the BB&T account?
A. No. We discovered it by -- and it might be a -- just a matter of terminology here. We discovered it that we were receiving payments into our factoring lockbox from SkyWaves or wire transfers to our system, our people and factoring from SkyWaves. But if they were receiving payment and depositing them in a BB&T checking account someplace or another bank's checking account, we might not have seen that unless somebody advised us of that.
Q. So the factoring operation wouldn't

necessarily have been privy to the banking side, the bank accounts?
A. Correct.
Q. Now did your review show that when John Voytko would send a check from SkyWaves on account of a payment he had received from a company, would he also include a copy of the invoice with the check?
A. I don't know because I don't think I saw any instance of that until the end with the Verizon money that I had asked them to send to us so I -- I can't answer that. I don't know how that -- I don't know what he did in the instances in the past.
Q. You didn't have an opportunity or a -- an interest in examining the historical record?
A. My interest was only to see if they were receiving money and not turning it over to us. If they received the money and didn't return it and didn't immediately turn it over to us but sent us a copy of the invoice or the payment history, I'm still concerned about it because they didn't give us the money as they should have.
Q. Sure. Well, what I'm interested in finding out is did BB&T have an opportunity to know

think I did see that --
Q. Will you look at the bottom of the first page that's maybe the third sentence, I advised him, meaning Mr. Konersmann, that the only way we would be willing to work with them is to see a plan that indicated we can go forward reducing our exposure.
Do you see that?
A. Yes.
Q. So you were trying to work something out with SkyWaves?
A. I was offering -- and, again, since I was still fairly new at the bank I'm not sure if my involvement in this had ended or not yet, but I know a lot of lenders and I believe there's a lender for almost anybody and if I could help them find something that would help BB&T and help their business, I would have done my best to do so.
Q. Well, at this point you knew of the backlog of orders and potential orders that SkyWaves had, didn't you?
MS. CHERRY: Object to the form.
A. I'm sorry. You said about the back order?
Q. Yeah.

A. I believe so because it says here on the 23rd I received a call from Ron. He's explaining he's working hard and getting confirmation of the Dynamics orders and actually getting confirmed POs. So they were still admitting to me they were not confirmed POs.
Q. Sure. And you knew their growth potential?
A. I can't say that I do.
Q. Uh-huh. Did you think that SkyWaves had a chance of working out -- working out this problem without BB&T canceling its funding?
A. I believe there's always a chance of working that out. It's -- it's the worst loan in the world but somebody comes up and says, I'll give you cash collateral, I can find a lender for that.
Q. Uh-huh. Now you mention here about a plan that reduces our exposure. What did you have in mind?
A. I'm not sure exactly what I was thinking at that point, but in general if I have a situation where maybe we are undercollateralized or it's a loan we want to move out, if we could do something with them to reduce the loan exposure, it's easier to find another lender for somebody.

Q. On the second page you mention that you are -- you told him that you're going to call some equity groups that may be willing to put money into his company. Do you see that?
A. I did -- I did -- yes.
Q. Okay. You thought that SkyWaves might be a good investment for some people?
MS. CHERRY: Object to the form.
A. Again, there -- I always feel that there's potential for anybody and SkyWaves had shown us projections. I believe they gave us a package at the meeting that Jim Edahl and I had with them where they showed that they were going to have a large increase in volume and be profitable. If that was accurate, there might be something out there who would take the chance or the opportunity, however you look at it, to invest money in the company.
Q. Did you make any calls to equity investors?
A. I don't remember and right about that time I think my involvement -- active involvement with the account ended so I don't remember if I did.
Q. Let me hand you what's -- what we'll

mark as Exhibit 8.
(BURKE EXHIBIT 8, Memo from Jim Edahl to File, January 23, 2008, Re: Skywaves I Corp, was marked for identification.)
BY MR. KEFALOS:
Q. Have you ever seen this before? This is a memo from Jim Edahl dated January 23, 2008 to the file.
A. I believe I've seen this, yes.
Q. Did you see it at the time?
A. Pardon me?
Q. Did you see it at the time, that is, back in January of 2008?
A. I don't recall when I saw it.
Q. At the -- at the -- at the bottom of the memo it says, he, meaning Ron Konersmann, asked for a week or two to give him time to meet with the board and others to help formulate a plan.
Did Mr. Konersmann ask you for a week or two to try to formulate a plan?
A. I don't believe I ever had another conversation with Mr. Konersmann after that meeting in his office.
Q. Did you know that he had asked for some time to work out a plan?

Q. He was a director.
A. I don't recall that name.
Q. Are you familiar with the proposal made by Mr. Meier to work out of the lending agreement with BB&T?
A. I only remember generalities of one proposal. I don't know who it was from.
Q. And that was the one that would result in a seven-figure loss?
A. I believe it was an amount like that, yes.
Q. Uh-huh. All right. Do you remember that SkyWaves asked to restructure the loan and advance another $500,000 guaranteed by Mr. Meier?
A. That sounds familiar vaguely but, again, I would not have been involved in it but I may have read something about that at some point.
Q. Do you know why that was not acceptable?
A. No, I do not.
Q. Are you familiar with a -- the proposal made by Precision Mine Repair?
A. Again, I don't know who made proposals. I re -- remember vaguely that one that I described, but I wasn't involved in any of the proposals or

any of the decisions at that time.
Q. Were you aware of the Hunt Capital Group's interest in SkyWaves?
A. I have the same answer. I -- I don't recall.
Q. Do you know whether SkyWaves had any viable investor to come in and take BB&T out?
A. I do not know.
Q. If SkyWaves had an investor who was willing to take BB&T out, would B -- would you have continued to fund for a reasonable time until that could take place?
A. I can't answer that because I was not as familiar with the financials or the ongoing discussions. I just wasn't involved in that so --
Q. Okay.
A. -- I don't believe I can answer that question.
MR. KEFALOS: Let's take a break for a couple minutes.
THE VIDEOGRAPHER: We're going off the record at 11:28 a.m.
(Whereupon, there was a recess in the proceedings from 11:28 a.m. to 11:33 a.m.)
THE VIDEOGRAPHER: We're going back on

the record at 11:33 a.m.
BY MR. KEFALOS:
Q. Was the factoring operation moved from High Point to Atlanta with your joining BB&T?
A. When I joined BB&T the account executives, Castlen Morris and there was another person, I can't remember his name right now, Jim somebody, they -- the account executives up there did not report to Phil Allard and shortly after I joined being in Atlanta replacing Castlen I think Phil wound up with responsibility of managing all of the account executives. We have one up there now and three of us in Atlanta.
Q. What -- where is Phil Allard? Is he in High Point?
A. He's in Atlanta.
Q. Oh, he's in Atlanta.
A. Yes, sir.
Q. Is anybody left in High Point?
A. Bob Niebauer is our sole account executive up in High Point.
Q. And where was Mr. Allard previously based? Was he in High Point?
A. No. He was all -- when he joined BB&T he joined in Atlanta.

Q. In Atlanta. And you were brought down to the Atlanta office?
A. Well, I -- I lived in Atlanta. I just moved over from another company.
Q. Okay. You were talking earlier about the first time you saw the $1.2 Million that had been advanced you were shocked, upset and had a feeling of your stomach falling?
A. Yes.
Q. Now your -- you didn't know at that time about Mr. Edahl's agreement to fund these site plans?
A. I had not heard of any agreement to finance site plans.
Q. You didn't learn about that until you read Mr. Edahl's deposition?
A. Correct. It was, again, not brought up by anybody in that meeting.
Q. And you read Mr. Edahl's deposition a couple months ago?
A. I -- maybe a month ago, yes.
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.

Q. That's all the questions that I have. Have you given me full and complete answers to the questions I've asked today?

A. I have.

Q. Have you felt well enough to answer my questions?

A. I'm sorry?

Q. Have you felt well enough to answer my questions?

A. Yes.

Q. And have you understood the questions that you've answered?

A. I believe I have.

MR. KEFALOS: Thank you.

MS. CHERRY: And I have -- I have no questions for the witness.

THE VIDEOGRAPHER: We're going off -- going off the record at 11:36 a.m.

(WHEREUPON, the deposition was concluded at 11:36 a.m.)

(The witness, after having been advised

of his right to read and sign this transcript, does not waive that right.)

SIGNATURE OF DEPONENT

DEPONENT: MICHAEL BURKE
DEPOSITION DATE: DECEMBER 18, 2013
REPORTER: LISA A. WHEELER
CASE CAPTION: SKYWAVES I CORPORATION vs. BRANCH BANKING AND TRUST COMPANY, successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T and JAMES EDAHL

(Please return both Signature of Deponent pages)

I, the undersigned, SKYWAVES I CORPORATION, do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

SIGNATURE OF DEPONENT (CONTINUED)

DEPOSITION DATE: DECEMBER 18, 2013
REPORTER. LISA A. WHEELER
CASE CAPTION. SKYWAVES I CORPORATION vs. BRANCH BANKING AND TRUST COMPANY, successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T and JAMES EDAHL

PAGE	LINE	CHANGE	REASON

_____
Michael Burke Date

I, Lisa A Wheeler, Notary Public for the State of North Carolina at Large, do hereby certify that the deponent was advised of his or her right to read and sign said deposition both verbally and in writing. If the deponent fails to execute and return foregoing Signature of Deponent pages within the thirty (30) days allowed pursuant to the Rules of Civil Procedure, the original transcript may be filed with the court.

_____
Lisa A Wheeler, RPR, CRR
My Commission expires
June 7, 2013

22

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

SKYWAVES I CORPORATION, CASE NO 2009-CP-10-7516

Plaintiff,

vs

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

VIDEOTAPED DEPOSITION OF CASTLEN MORRIS

Tuesday, May 6, 2014
10:10 a.m - 1 14 p.m.

Nexsen Pruet, LLC
701 Green Valley Road, Suite 100
Greensboro, North Carolina

Reported By:
Rebecca Ely, CR
Notary Public, State of North Carolina

APPEARANCES:

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(Appearance by video-teleconference)

VIDEOGRAPHER. Brad Cartner

ALSO PRESENT: Mike Hennessy/Senior Vice President, BB&T

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Deposition taken before Rebecca Ely, Court Reporter and Notary Public in and for the State of North Carolina at Large, in the above cause.

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VIDEOGRAPHER: Good morning We are now on the record. Today's date is May the 7th, 2014 The time on the video monitor is approximately 10:10 a.m. This is the videotaped deposition of Castlen Morris The location is Nexsen Pruet, LLC, 701 Green Valley Road, Greensboro, North Carolina

My name is Brad Cartner, legal videographer, representing A. William Roberts, Jr. and Associates. The deposition is taken in the matter of Skywaves I Corporation versus Branch Banking and Trust, et al., Case Number 2009 dash -- I believe that's CP or CD I'm sorry. Dash 10 dash 7516.

Counsel, please introduce yourselves for the record

MR. KEFALOS: This is George Kefalos I'm one of the lawyers representing Skywaves.

MR. LINTON: John Linton, one of the lawyers representing Skywaves.

MS. CHERRY: Molly Cherry representing BB&T.

MR. CHANDLER: And Nelson Chandler remotely representing James Edahl.

VIDEOGRAPHER: The court reporter today, also

representing A. William Roberts, Jr. and Associates, is Rebecca Ely. Will the reporter please swear in the witness.

THEREUPON,

CASTLEN MORRIS

having been first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

VIDEOGRAPHER: Please begin.

EXAMINATION

BY MR. KEFALOS:

Q. Mr. Morris, my name is George Kefalos. We met a few minutes ago. I'm one of the lawyers that represents Skywaves, and I want to ask you some questions about what you might know about this case.

Do you feel well enough to answer my questions today?

A. Yes.

Q. Will you give me full and complete answers to my questions today?

A Best as I can.

Q. And if you don't understand a question, will you ask me to rephrase it or repeat it so that I know that when you give an answer you've understood the question?

A Most definitely.

Q. Good. Now, tell me, first, did you do anything in

preparation for this deposition today?

A. No. The only preparation was to meet with Molly. She went over the format of the deposition, who would be in attendance and who does what. And she also provided me the transcript or records of a deposition of John Voytko, that he would be making for a more efficient meeting. Other than that, no.

Q Did you review any BB&T documents?

A No.

Q. Did Molly, or Ms. Cherry, tell you what the nature of the claim was?

A. I do not know the nature of the claim.

Q. All you did was read Mr. Morris's deposition?

A. I --

Q. Or Mr. Voytko's deposition.

A. I fast read it. I do not know the nature of the claim.

Q. Tell me a little bit about your personal background. Where are you from and where do you live, where do you go to school, that sort of thing.

A. I live here in High Point, North Carolina.

Q. How long have you been here?

A. Since 1973. I attended -- I graduated from Wake Forest in Winston-Salem.

Q What year was that?

A. '88.

Q What degree did you take?

A. Economics. That puts me at age 48.

Q. Where are you from originally?

A. Georgia.

Q. And did you take employment after you graduated from Wake Forest?

A. Correct.

Q. Where did you work?

A I started working for Wachovia Bank.

Q. What were you doing for Wachovia?

A. I was in management training going into their, at that point in time, retail banking/small business banking program.

Q. And that was in '84, did you say?

A. That would be in '88. '88.

Q. Thank you. And then you stated Wachovia And where did you move from Wachovia?

A. I went to work for a small called community bank called Triad Bank.

Q. Okay When was that?

A. 1994 to 1996, for about two years.

Q. What did you do for the community bank?

A. I was – I ran the branch offices. I did consumer lending, small business lending, construction lending, a jack of all trades, so to speak.

to get that bill and hold letter, that's our privilege to do so.
Q. I see.
A. And that would be a more conservative approach than what Mr. Denning is saying here, which I don't know Mr. Denning but I assume he would eagerly agree with that.
Q. Eagerly agree that he --
A. Because we were being more conservative --
Q. You were being more conservative than he was.
A. We were being more conservative, yes.
Q. So you have not met Mr. Denning?
A. I have not personally met Mr. Denning, no.
Q. Okay. But you knew he was in charge of this overall operation?
A. Yes. And I was aware of his reputation as a higher up credit administration officer within BB&T.
Q. And you mentioned earlier that he wasn't down in weeds all the time.
A. Well, as his role as credit administration officer, he would give the approval of the structure as presented by the banker loan officer at his level of authority. You know, he's not going to sit there and review invoices and bills of lading.
Q. Sure. But he'll make decisions about general operating procedure?
A. He would. And if we wanted to, I think if we wanted to augment that, if we saw something from our vantage point that

would strengthen the overall functioning of the relationship, I would -- I wouldn't say the word "guess," but I would guess that he would take our recommendation under advisement and let us implement them as we saw fit.
Q. So if you made a change in the -- or if you saw a change that needed to be made in the relationship with Skywaves, you could make that recommendation to Mr. Denning and he would approve that?
MS. CHERRY: Object to the form.
MR. KEFALOS: You can answer.
MS. CHERRY: You can answer.
THE WITNESS: If we saw a need for a change in the relationship, my practice would be to go to the banking officer --
BY MR. KEFALOS:
Q. Who was that in this case?
A. Jim Edahl.
And I would coordinate with him and we would decide on how to elevate it to Mr. Denning's level.
Q. I see. Well, you knew that Mr. Denning had approved the financing and purchase orders, which was out of the ordinary.
A. Uh-huh.
Q. And Mr. Denning had approved the waiver of this bill and hold language in the contracts.

A. I honestly -- I couldn't remember until you put this e-mail in front of me, but I take this e-mail to mean that he didn't require it be in the agreement. He didn't prohibit us from asking for it on our own.
Q. I understand, but what I'm interested in knowing is he was involved in that decision.
A. I'm sure he was involved in some manner or another, yes. I can't 100 percent tell you that, but I assume he was, yes.
(Exhibit 6 marked for identification.)
BY MR. KEFALOS:
Q. I'm going to hand you what's been marked as Exhibit No. 6, and it is an e-mail it looks like from you to John Davis, and there's a note at the top that says 9/14/06.
A. Uh-huh.
Q. Do you recognize this or do you recall this?
A. It looks to be an e-mail from me to John Davis. It looks like it -- the copy does not identify a time and date of sending. I guess that's why the handwritten day -- that's not my handwriting. I don't know where that came from but--
Q. What I'm interested in knowing is what did you mean when you said in that first sentence "The approved structure that Jim Edahl got is definitely out of the box from what I'm used to."
A. My meaning there was that -- in factoring we loan

moneys, we advance moneys, funds on invoices and those invoices are our collateral. Purchase orders are not invoices. Purchase orders are not collateral. Loaning on purchase orders was an out-of-the-box structure. I'm quite flexible for Skywaves, but it's out of the box compared to I loan on invoices that have been sent to the customer, not on purchase orders.
Q. Loaning on purchase orders is not factoring, is it?
A. I would not say it's factoring, no.
Q. It's more like an --
A. It's unsecured lending.
Q. Unsecured lending.
A. It's unsecured lending.
Q. And in the case of purchase orders, there's no time required for the repayment.
A. There may or -- oh, there may or may not be. I mean, a purchase order calls for, you know, product to be billed or what have you. There is no promise to pay -- to my knowledge, there is no promise to pay on a purchase order. The promise to pay comes from the rendering of the invoice.
Q. Well, I'm talking about Skywaves' obligation when -- Skywaves' obligation. When BB&T loans money on a purchase order, there's no specific date identified in this loan agreement on the purchase order when the money has to be repaid.
A. I would agree with that. When the invoice was created -- when the purchase order migrated to an invoice, at

that point in time we would repay the invoice -- I'm sorry, we would repay the purchase order.

Q. I got you. Why was this program developed for Skywaves, this out-of-the-box program?

A. I cannot give you an answer for that. I do not know why.

Q. Do you remember any conversations with Mr. Edahl or anybody at BB&T about how the bank viewed Skywaves' future?

A. I think the bank was very optimistic on Skywaves' future, so that could have been why. I never clearly understood the reason for allowing this flexibility.

Q. But you saw the flexibility occur and you guess that it was because the bank really thought a lot of Skywaves at the time?

MS. CHERRY: Objection to form.

You can answer.

BY MR. KEFALOS:

Q. Let me -- I didn't explain to you at the beginning, but you're supposed to answer my questions, unless you're ordered not to. An objection is simply for the record, and it's not to prevent you from answering the question.

A. I've never been in a deposition, so I'm just listening. I'm taking it all in. So do you want to ask that question again.

Q. Well, the question is why -- what you understood the

reason to be and was that because the bank was so confident of Skywaves' future that it was developing this flexible lending model for Skywaves.

MS. CHERRY: Object to the form.

THE WITNESS: The -- first off, there was not a program. The bank did not create a program to administer to any number of clients that, you know, my understanding or my assumption was that there was a high regard for Skywaves. My -- my assumption was that there was a high regard for Skywaves' management, was, you know, competent in terms of their experience in the market to get a start-up mature and that they thought it was a good financing opportunity to, you know, help it get mature.

BY MR. KEFALOS:

Q. Would you say that this financing program was tailor-made for Skywaves?

A. As far as my experience is concerned, yes. I cannot say if it was tailor-made within BB&T as a whole.

Q. Okay. Now, you talked about -- we talked a minute ago about the future. Do you remember any discussions with Mr. Edahl about the possibility that the bank would take Skywaves public eventually?

A. I remember no commentary about that.

(Exhibit 7 marked for identification.)

BY MR. KEFALOS:

Q. I'm going to give you what's been marked Exhibit 7. This is, again, a log from Mr. Edahl, but I'd like to direct your attention to an entry that looks like it takes place a couple of weeks before this memo we just looked at. This is dated October 5, 2006. It says, "Castlen Morris and I met --

A. Okay.

Q. -- with Ron and John" -- do you see that?

Skywaves picked up a second General Dynamics contract.

A. Okay.

Q. Skywaves has business in hand that should produce about 14 million in sales in 2007 and a million -- what does PBT stand for?

A. I'm assuming that -- to me it stands for profit before tax.

Q. Okay.

A. But that may not be the intent of the writer.

Q. Then it says, the next to the last sentence, "Will begin to get capital markets involved due to the potential to grow to 35 million in sales with existing clients."

A. Okay.

Q. Do you remember that conversation with Mr. Edahl?

A. No. I'm not saying it didn't happen. I don't remember it.

Q. And if that happens, they'll need additional capital, and the note goes on. The 35 million, do you understand that to

mean the value of the company?

A. No. My interpretation of the sentence is that the company will have $35 million in annual sales.

Q. I see.

A. That does not mean value of company to me.

Q. Okay And then the next note is "If that happens, they'll need additional capital." Do you remember talking with Mr Edahl about how to raise the additional capital?

A. No, because I have no experience in that area.

Q. Do you remember Mr. Edahl talking to you about or commenting about the possibility of taking Skywaves public and raising capital that way?

A. I don't remember that, no.

(Exhibit 8 marked for identification.)

BY MR. KEFALOS

Q. I'm going to give you a document marked Exhibit 8, which is a two-page document from Mr Edahl to Mr. Denning dated October 6, 2006, about the same time, and a copy to you, and ask you if you can remember that.

A. Do I remember this document? No. But it's obviously a call report or an update provided to Mr Denning.

Q. What's a call report?

A. Just notes regarding your meeting, like -- like here or like -- like right here

Q What are those exhibits that you're referring to?

A. Relative to $2 million it's not. It's 5 percent.
Q. That was February 9th. I'm going to show you something that is February 13th. This is a -- it looks like it's a fax from Mr. Edahl to you dated February 13, 2007.
(Exhibit 10 marked for identification.)
BY MR. KEFALOS:
Q. What I'm interested in knowing is that Mr. Edahl tells you that "I guess an alternative to raising the purchase order advance rate is to make sure John is submitting all the POs he has from all customers and having a higher PO sublimit under the line." Do you know what he's referring to there?
A. My thoughts are that if, to use your percentage, if we're advancing 65 percent on a purchase order, if we're not able to drive that advance rate higher, then the customer should be submitting what purchase orders they can within the limitations allowed to maximize their access to funding.
Q. Well, I'm interested in knowing what, if any, relationship this fax has to the previous Exhibit No. 9, which is decreasing the overall line.
A. I'm not helping you there. I can't remember.
Q. Does it look like Sky -- or it looks like the bank was trying to figure out how to get Skywaves more money?
A. Based on Jim Edahl's memo here, it appears that we were trying to work within the current framework or structure to, you know, make sure that Skywaves was doing what they can to

maximize their availability to the funds.
Q. Do you remember if Skywaves was short of cash at the time?
A. I do not remember that specifically at this point in time.
Q. Well, does this suggest that you're trying to find ways to get them cash?
A. Within the existing framework that's been approved.
Q. Sure. Because Skywaves needed the cash to grow?
A. 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.
(Exhibit 11 marked for identification.)
BY MR. KEFALOS:
Q. I'm going to hand you what's been marked as Exhibit 11, and this is a -- it looks like a draft of a letter that came out about two weeks after that last memo. It is from Mr. Edahl to Mr. Voytko dated March 2, 2007. Are you familiar with this?
A. I mean, I'm sure I've seen it before, but I don't remember it from this presentation here, no, but I'm sure I've seen it before.
Q. Sure. And this one appears to be changing the financing around a little bit, doesn't it?
A. Yeah, it appears to. Yeah.

Q. It's taking the purchase order limit from 1.5 to 2 million dollars. And look at --
A. Okay.
Q. -- Exhibit Number 9.
A. Uh-huh.
Q. So it's raising it, raises the purchase order.
A. Okay.
Q. That makes it easier for Skywaves to raise money.
MS. CHERRY: Object to the form.
THE WITNESS: That allows Skywaves more access to liquidity for their working capital purposes.
BY MR. KEFALOS:
Q. And it's going to advance 85 percent of invoices, and originally it was proposed to be 65 percent of -- or 60 percent of purchase orders but I tell you it was changed to 65 percent.
A. Okay.
Q. And then the fees were .45 percent of each invoice capped at 3,000 a month. No matter how many invoices BB&T factored, the most that you could charge for factoring these invoices was $3,000 a month.
A. That sounds consistent, yes.
Q. And then the letter goes on to say "Assuming Skywaves budget in 2007, previously submitted, is achieved, we will consider further changes in the structure of the line and the rates." Do you know what changes were considered?

A. No, I don't remember. I don't remember what changes would have been considered.
(Exhibit 12 marked for identification.)
BY MR. KEFALOS:
Q. I'm going to give you a document that's marked Exhibit 12. It's a -- it looks like it's an e-mail from -- or a memo from you to Rich -- Rick --
A. Rick Benner.
Q. Rick Benner and Phil Allard.
A. Phil Allard.
Q. Allard. Dated March 8, 2007, and so a couple of days after this Exhibit 11 took place.
A. Okay.
Q. Now, I think I've highlighted some of these sections here for you. There's a line in the middle of this paragraph that says "Due to competitive pressure, Jim wanted to cap the commission at $2,000 a month, which I strongly disagree."
What is the competitive pressure you were talking about there?
A. I'm sure it was other lenders, other banks, possibly wanting to migrate the relationship from BB&T to their bank.
Q. Other banks wanted to get Skywaves' business?
A. I assume that, yes.
Q. And you disagreed with reducing the cap on commissions.

which is a memo from you to Mr. Voytko dated August 28, 2007.
A. Uh-huh.
THE COURT REPORTER: Could you repeat that date, George.
MR. KEFALOS: August 28, 2007.
THE COURT REPORTER: Thank you.
MS. CHERRY: George, will you hold on one minute. Thank you.
BY MR. KEFALOS:
Q. Now, this says that -- this is a memo from you to Mr. Voytko. It says "We received the Skywaves check and Verizon check today."
A. Uh-huh. Check copy.
Q. Check copy today.
A. Uh-huh.
Q. It's amazing that the Verizon check is dated May 24, 2007, and they held it so long.
A. Uh-huh.
Q. When did you actually receive the check.
A. Uh-huh.
Q. Now, when Skywaves would send you a check in payment, would they customarily include the invoices which the check covered and a copy of the check they received from their customer?
A. Some -- I can't remember. Sometimes they would and

sometimes they wouldn't. I liked -- I like to have the check copy. I think probably in this instance I asked for it because I wanted to know what was taking Verizon so long to pay.
Q. Sure. And in this case you found that the Verizon check was -- Verizon to Skywaves was dated May 24, 2007, but Skywaves didn't forward it to you until August 28, 2007.
A. Okay. Yeah.
Q. It's almost three months --
A. Uh-huh.
Q. -- past the time that Skywaves received the check.
You ask him "When did you actually receive the check?" Do you remember whether he responded?
A. I don't remember if he -- John was pretty good about responding to me, but I don't remember if he responded or what his response was. You may very well have it in your possession. I don't know.
Q. Yeah. We'll talk about it in a second. That's next.
A. Okay.
Q. Why hadn't this been picked up on the audit that had taken place the month before?
A. I -- I can't give you an answer to that. You'd have to ask the field examiner.
Q. Well, is this something that should have been picked up during the July audit?
A. I -- I don't know. The check may not have come in in

time and it may have been an open invoice at the time the field examiner was there.
Q. Well, if the check had come in shortly after it was dated, May 24, 2007, and deposited into Skywaves' account and not forwarded immediately to the bank, should the audit have picked it up?
A. I would hope so.
(Exhibit 17 marked for identification.)
BY MR. KEFALOS:
Q. I'm going to show you what we'll mark as Exhibit 17. I know that you've never seen this before but --
A. Maybe I have.
Q. Maybe you have. It comes from Skywaves' account, Skywaves' files. It might have been part of Mr. Voytko's deposition.
A. Uh-huh.
Q. This is a memo to the file that Mr. Voytko wrote, two memos.
A. I've not seen this before.
Q. But the one is dated September 1, 2007.
A. Uh-huh
Q. And it says "Here are my notes with my discussion with Castlen yesterday regarding the Verizon payment that was sent to the bank this week." Exhibit 16 talks about the Verizon --
A. Okay.

Q. -- payments.
And it goes on to say "About two days ago he sent me an e-mail noting the delay between when the check was written and when it was received from the bank. He asked me about the delay and if Verizon had held the check, and I stated there's usually a 10-day delay between the check date and when we receive and deposit the check."
In this case it was approximately six weeks before the payment was sent to the bank. So Skywaves held this check for six weeks?
A. Uh-huh.
Q. And this -- if you look at the last paragraph of that first memo it said, "This check that Skywaves held was $350,000." Do you see that?
A. Uh-huh.
Q. He said that you asked him whether they were having cash problems and he replied that cash was always tight. Do you remember this conversation?
A. I don't, but I had that conversation with all my clients. I mean. why do you borrow money? To smooth out the cash flow cycles.
Q. Sure. Well, here -- and it goes on to say "He stated," that is Mr. Voytko, said that you said this could be viewed as a violation of the factoring --
A. Uh-huh.

Q. -- agreement and would also reflect negatively on him as well.
A. Uh-huh.
Q. Did you -- was that a violation of the factoring agreement?
A. We -- first off, I've not seen this, but in reading that I could have very well have shared that commentary with him, because when a client receives funds from its customer, it is preferably that you not even deposit the funds. They should take the check and resend it to us, don't even deposit it.
Q. That's right.
A. Oftentimes it does get deposited. So, indeed, then they cut us a check. That's why I think probably in the first -- the last deposit I asked for a copy to verify that. But, yes, technically-speaking, failure to remit cash proceeds could be a violation of contract.
Q. Well, this would have been a pretty big violation of the contract.
MS. CHERRY: Object to the form.
THE WITNESS: Could be.
BY MR. KEFALOS:
Q. $350,000 held six weeks past the time that it was due?
A. I would say so, yes.
Q. Did you do anything to document this violation anywhere besides -- anywhere?

A. I can't remember if I had discussion with my boss or if I had discussion with Mr. Edahl, if I put a note in the local file or what. I do not remember. There could be notes. Oftentimes there are collectors' notes in the main frame and that might be sufficient enough to document this. I don't remember.
Q. And those collectors' notes in the main frame would have been kept as part of BB&T's ordinary course of business?
A. They would have been kept for a period of, like, 90 days and then they would have been deleted.
Q. Oh, really?
A. Uh-huh.
Q. You wouldn't have a record of them?
A. No. After about 90 days or so AS400 deleted them out completely.
Q. Why is that?
A. Space. We had a staff of 12 collectors that were making hundreds of phone calls a day per person and documenting, you know, in sentence format conversations with customers. It was a space -- it was a space limitation issue.
Q. Well, aside from documenting the telephone conversation, would you have put anything in the file to document, hey, these guys kept $350,000 --
A. I could -- I could have or I might not have or might not have gotten to it at that point in time.

Q. There is another note here in that same -- in that earlier -- the first memo.
A. The first -- the first -- the first section.
Q. Yeah.
THE VIDEOGRAPHER: Gentlemen, you're talking over each other and I know the court reporter's having a little trouble with that. Please be aware.
THE WITNESS: I'm sorry. Okay.
BY MR. KEFALOS:
Q. In the next to the last paragraph it says "In addition, he noted that," Mr. Voytko's saying you noted, "that we would pay interest on the borrowed funds regardless of being a PO advance or an outstanding invoice and that it would be better reflected as a PO advance." Do you see that?
A. I see it.
Q. Why would it be better reflected as a PO advance?
A. I cannot give you an answer to that, because he was the one that composed it and he may be misunderstanding something or I may not be reading his sentence correctly. He didn't consult with me in the writing of this, so I don't understand this -- I don't understand this comment.
Q. Do you know what it means to be paying interest on the borrowed funds regardless of being a PO advance or an outstanding invoice?
A. Yeah. Whenever we advanced funds, be it supported by

a purchase order or supported by an invoice, there was an interest charge for the time the funds were out there, so that part I understand. The rest of the sentence I don't understand.
Q. Okay. Going down to the next entry on this Exhibit 17, there's a memo that's dated September 17th. "I had a conversation with Castlen yesterday about sending remittances to the bank for outstanding invoices. We reviewed the aging report and identified the payments that had been received and needed to be forwarded to the bank."
So did you talk with him and he explained to you that he had actually received payments and had yet to forward them to --
A. Based on this right here, I would say, yes, I did talk to him.
Q. "I propose to send check stubs for the oldest items and then process wire transfers to complete the process for about $250,000." Do you see that?
A. Uh-huh, I do.
Q. So on the 17th you learned that there was another $250,000 that was -- had not been sent?
MS. CHERRY: Object to the form.
THE WITNESS: Okay.
BY MR. KEFALOS:
Q. Is that correct?
A. Sounds correct

Q. In the third paragraph, "He reiterated that payments not received cannot be held and it could result in a cancellation of the contract." Do you remember if you told him that?
A. I'm sure in my conversation with him, as with every client, I would have reiterated if you get money from your customer you need to send it to us. You don't need to be holding it.
Q. Now, we know that you first found 350,000 that had been held --
A. Uh-huh.
Q. -- past due. That's a yes?
A. I'll say yes.
Q. And then now when you found another $250,000 that had been held past due, did you report this to anybody?
A. I can't remember if I did report it in writing or if I had it oral -- you know, oral reporting or discussion.
Q. Is it something that you would have reported?
A. Not necessarily if I could get it corrected or, you know, get it -- get the funds to clear the invoices. It would not necessarily have been something I would have reported.
Q. Let's look at Exhibit 18.
A. I could have, but might not have either.
(Exhibit 18 marked for identification.)
BY MR. KEFALOS:

Q. Now, the next exhibit is a two-page exhibit and it includes a -- I'll tell you what. I'll hand it to you -- a cover memo from Mr. Voytko to you --
A. Uh-huh.
Q. -- that says "FYI" and then it has an attachment to it and the attachment is the second page. Do you see that?
A. The check copy?
Q. Yes.
Now, this is another late payment, isn't it?
A. I don't know if it's late or not. I mean, if I -- if I asked them to give me a copy, I was probably trying to determine that.
Q. Uh-huh. This is a check that was sent July 10th or cut --
A. Uh-huh.
Q. -- on July 10, 2007, from Verizon to Skywaves for $259,000. Do you see that?
A. Yes.
MS. CHERRY: I'm sorry. Can I -- how do I know this is an attachment to this?
MR. KEFALOS: Well, take my word for it. It's a hyperlink contained in that attachment.
MS. CHERRY: So -- but it's got no --
MR. KEFALOS: It's got no reference. All it is is a hyperlink.

MS. CHERRY: Okay.
MR. KEFALOS: So, take my word for it that it's part of the document We can confirm it later.
MS. CHERRY: Okay.
BY MR. KEFALOS:
Q. So we -- you found out on at least September 18th that Skywaves had received a check in July and not paid that check until September 18th?
A. I'm going to assume that's the case. I don't know -- I don't know if they received it in July or if they received it at a later point. I would assume they received it in close proximity to the date it was -- it was created.
Q. Okay.
A. So I assume what you say is correct.
Q. Good. Well, the next exhibit might clarify it or might help confirm the attachment. That was 18. Let's talk about 19.
(Exhibit 19 marked for identification.)
BY MR. KEFALOS:
Q. 19 is your e-mail of September 19, 2007, following this September 18, 2007. Now, the -- your e-mail, which is No. 19, says you received the wire.
A. Okay.
Q. And you were advancing Skywaves' checking account today for 39.8, 15 percent of the wire. Now, if you'll look

back at the check, which I included with that earlier e-mail the day before, that check is for $259,400. And 15 percent of $259,409 is 38,900.
A. Okay. I don't dispute that.
Q. So you -- this is another evidence of late payment, or receiving the money, holding it and not remitting it promptly.
A. I would say so.
Q. This is 200 -- this is a quarter of a million dollars.
And you say nothing in this e-mail to him about the delay; is that right?
A. Correct. I don't see anything in here about a delay.
Q. In fact, you just acknowledged receipt of the money.
A. Correct.
Q. Did you make any written record of this in the file?
A. I can't remember.
Q. Now, this is -- this is, what, the third one now --
A. Uh-huh.
Q. -- in about a month. 350, 250, 250, that they'd been holding for six to eight weeks each.
A. Uh-huh.
Q. Did you report any of this?
A. I can't remember. We had -- as a matter of our internal protocol, we had weekly staff meetings where we discussed how certain accounts were performing.
Q. Uh-huh.

A I could have brought it up then to my management team. I can't remember if I -- if I put anything in writing in the file or not.

Q. Well, that's a pretty serious breach now. We've got over a quarter -- three quarters of a million dollars that you've discovered has been held, at least not in accordance -- not paid in accordance with the written agreement.

A Uh-huh.

MS CHERRY: Object to the form.

BY MR. KEFALOS:

Q. Is that right?

A. Sure. Okay.

Q Did Mr. -- you talked to Mr. Voytko about it Did he ever explain to you that he understood that Skywaves could hold the money it received for up to 60 days?

A. No I would never have communicated that to him.

Q. No, I mean --

A He didn't ask it.

Q. Yeah, I'm not asking whether you had agreed, but did he ever tell you that Skywaves under the agreement with BB&T was entitled to hold the money for up to 60 days?

A. I do not remember him saying that to me, no.

Q Well, we do know that Mr. Edahl made agreements directly with Skywaves that you weren't aware of.

MS CHERRY: Object to the form.

THE WITNESS: I was not aware of a presentation that Mr. Edahl made to Mr. Denning. I do not know if that resulted in an agreement to Skywaves or not. I assume that it did, but I don't know that for certain.

BY MR. KEFALOS:

Q. Okay. Well, did you talk to Mr. Denning about this?

A. No.

Q. You didn't report it to Mr. Edahl and you didn't speak with Mr. Denning and you made no record of it in the file?

MS. CHERRY: Object to the form

THE WITNESS: I don't know if I made a record or not. You can assume I didn't or not. I don't know. I don't remember.

BY MR. KEFALOS:

Q. Where would it have gone if you had made a record in the file?

A. It probably would have gone into a local file that I had kept there at the factoring offices.

Q. Uh-huh Now, you mentioned earlier that the delay in remitting the money wouldn't have caused you a lot of concern if Skywaves had then paid it.

A. Obviously when a client gets funds I want them to be remitted as quickly as possible.

Q. Sure.

A And with Skywaves there had been consistent -- I don't

want to use the word "problems," but we weren't able to get their customers to always remit every payment to us.

Q. Sure.

A. Preferably. that's what we want. But -- so the fact that he received the checks wasn't necessarily out of the ordinary.

Q. No, but the fact that he received the check and held it for 60 days might have been some reason for concern.

A. That could be, yes.

Q. But as long as they -- that is, Skywaves then paid that money, you felt no need to report --

A. If they could provide me evidence that they got the money from the customer, because I didn't -- what I was trying to -- one thing that I was trying to do here was to make sure there was no fraudulent invoicing. So if Skywaves could send me monies and they could send me verification, you know, then I could be reasonably comfortable that they weren't creating a fraudulent invoice.

Q. And you found no evidence that Skywaves was creating fraudulent invoices, did you?

A. I did not see any evidence of a fraudulent invoice.

Q. Well, what I'm interested in knowing is we talked about the three different late remittances.

A. Uh-huh.

Q. And we talked about how you didn't make any record in

the file of those late remittances, six weeks, eight weeks late. And you mention that it wasn't important as long as when you brought it to their attention they paid it.

A. I didn't say it wasn't important.

Q. Okay.

A. But --

Q. It wasn't -- in your idea, it wasn't something that you needed to document.

A. That could be a fair comment.

Q. As long as Skywaves paid it when you brought it to their attention.

A. That could be a fair comment.

(Exhibit 20 marked for identification.)

BY MR. KEFALOS:

Q. I'm going to hand you what's been marked Exhibit No. 20. This is an e-mail from you to Mr. Voytko dated September 20, 2007.

A. Uh-huh.

Q. Here you identified, it looks like, eight invoices that had been paid to Skywaves but Skywaves hadn't remitted to the bank --

A Uh-huh.

Q. -- promptly.

A. Uh-huh.

Q. Is that a yes?

Q. Okay. So it's not identified as a purchase order.
A. I do not see purchase order there, correct.
Q. In fact, if you go across the top, there's an area that says "POR submitted" and "PO received." Do you see that? Then it says -- across the top of the column, and then it says "shelter ready" --
A. Yeah.
Q. -- "material ready" --
A. I see it, yes.
Q. And under -- I guess do you know what POR submitted means? Does that mean purchase order submitted or is that PDR? Well, look at the PO received, meaning the -- under where it says "purchase order received."
A. Yes.
Q It says "no."
A. I see that.
Q. No, no, no, no, no, no, no, no. So there's no purchase order. And, in fact, there's a section that says shelter ready, no, no, no, no, no, no, no. And material ready, no. Hall tower ready. No. Generator available, no.
This is clearly not a purchase order, is it?
A. I -- no, I would say it's not a purchase order.
Q. But you were advancing monies on the basis of this site schedule.
A. I was advancing monies based on this as a summary of

purchase orders. That was my understanding of what the document was.
Q. Did you talk to Mr. Edahl about what this document was?
A. I can't clearly remember, but I don't think I did. I don't know
Q. Did your auditors have the information sufficient to check whether these were, in fact, purchase orders?
A. I do not remember. I would think they would have had that, but I can't be certain.
Q. They should have been able to tell whether these were purchase orders or not.
A. I would assume they could dig through it, but I'm not certain of that
Q. I mean, they should have been able to tell if these were not purchase orders.
A. I would --
MS. CHERRY. Object to the form.
THE WITNESS: I would think -- I would think so, yes. I mean, I can sit here and say these aren't -- these aren't purchase orders in the form that I'm used to seeing, that's correct.
BY MR. KEFALOS:
Q. Okay. But they were given instructions -- that is, your auditors were given instructions about what to look for

when conducting their quarterly audits.
A. I -- I believe so. I mean, I'm not the one giving the instructions, they come from the audit department, but, yes.
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. (Witness nods head.)
Q. That's yes?
A I'm sorry. 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. And each one of these things could have been considered a significant breach of the agreement.
MS. CHERRY: Object to the form.
THE WITNESS: Each one could have been considered a violation of the agreement, a breach, yes.
BY MR. KEFALOS:
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.
Q. You mentioned earlier that you had a local file.
A. Uh-huh.
Q. Would that have been something that BB&T would have kept or is that something that you would have kept separately?
A. That probably would have been destroyed years ago. Probably when I -- when I left the company, they probably would have destroyed it.
Q. At that point in September when you knew of these things that could have been considered breaches of the agreement, were you aware of the customer contracts that BB&T had lined up for the future?
A. I'm not sure I'm understanding your question:
Q. Well, you were aware, for example, of the site -- or of the number of contracts that was lined up for General Dynamics that were identified in the site plan, weren't you?
A. Yeah. I mean, yeah, as I saw this, this was a lot of business, a lot of shelters.
Q. And did you feel pretty good about the fact that these shelters were going to be supported, were going to come through?
A. I handled them in what I considered a standard course

of manner. To be -- to be honest with you, I never agreed -- I say agreed. I never was comfortable in funding purchase orders to begin with --

Q. Yeah

A -- so if it would have been Castlen Morris National Bank, I would not have done the transaction.

Q. Sure. But I'm asking you about these orders that were outstanding. Did you feel pretty comfortable that they were going to come through and materialize as actual sales?

A. Yes, that's a fair statement. I would have expected them to become shelters and put in place and all that, yes.

Q. Of course. when they -- when they converted to sales, they were going to generate a lot of income to pay these loans.

A. They would have generated a lot of invoices that would have created additional availability. That would have flowed to the bottom of the income statement, i.e., a lot of income to pay the loans or whatever you do with the profits.

Q. And -- and, as of the time that you left in November, were you comfortable that Skywaves would be able to survive if these contracts came through as they were projected?

A. I wasn't -- I didn't feel I was in a position to make that determination. I didn't see that there was enough -- there wasn't enough historical evidence to make me feel comfortable. In looking at this list of sites I felt like the opportunity sure was -- was good.

Q. Yeah. Now, did you have any kind of exit interview with anybody at BB&T when you left?

A. No.

Q. You have any kind of meeting with Mr. Edahl or Mr. Denning to pass on the --

A. No.

Q. -- file to the next person?

A. No.

Q. Did you meet with anybody who was going to take over from your position?

A. I did -- I did meet with the gentleman that replaced me, a fellow named Mike --

Q. Burk.

A. -- Burk. Michael Burk?

Q. Yes.

A. The last few days of my employment at BB&T were spent going on site to the larger accounts that I worked with to introduce him in person to those accounts.

Q. And you took him to Skywaves?

A. No.

Q. You did not?

A. No.

Q. Was Skywaves not one of your larger accounts?

A No.

Q No kidding

A. No.

Q. Three and a half million dollars line of credit was not considered a big account?

A. No.

Q. Did you ever mention to Mr. Burk or anybody about Skywaves' record of not paying the money that they got promptly to the bank?

A. I wouldn't -- I don't remember mentioning that to Mr Burk, no.

Q. Did you ever talk to anybody about the fact that Skywaves wasn't complying with the terms in the letter of the written agreement and that you let it go?

A. No I did not -- there may have been some conversation, but, no. As -- to the point that Skywaves could produce for me payment and evidence that they received payment, no.

Q. Okay. And we were talking earlier about why you weren't more concerned about this delay in remittance and you were telling me about the number -- the turnover, the volume. You were explaining that there was so much happening; can you elaborate on that? Explain to me why you weren't worried about the delay in payment.

A. I'm not -- if I communicated to you that I wasn't worried, then that's an error on my part.

Q. Well, then, let me ask you why it was that you didn't

call a default.

A. Because, as I said to you just a minute ago, if they could rectify the situation, then I felt we could keep moving forward. Because this was -- this was not unusual to happen with a client. I had 30 clients that I administered. It is not unusual for every client to get payments directly.

Now, granted, not every client had payments this large.

Q. Yeah.

A. Okay? But it was not unusual. And the working relationship that I had developed with Mr. Voytko, you know, their ability to produce for me the funds and to produce for me the copies of the customers' checks were sufficient in my mind to keep moving forward and not -- and not call a violation.

Q. Were you at all concerned about them hitting a wall on this? Do you know what I mean by that? But that if they were using money that should have been remitted to the bank to produce new shelters, were you worried there'd come a time when there wouldn't be enough coming in to pay off the --

A. Yes. That's why I wanted to -- I'll ask them to give me copies of payments the customers actually made to make sure that the fund -- the funds were, you know what I'm saying, live or real funds --

Q. Yeah.

A. -- that they actually came from the customer and there

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

SKYWAVES I CORPORATION,
Plaintiff,
vs.
BRANCH BANKING AND TRUST COMPANY, successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL,
Defendants.

VIDEOTAPED
DEPOSITION OF: FRANK CAPLE
DATE: December 2, 2013
TIME. 1:17 p.m
LOCATION: Nexsen Pruet
701 Green Valley Road
Greensboro, NC
TAKEN BY: Counsel for the Plaintiff
REPORTED BY: LISA A. WHEELER, RPR, CRR

A WILLIAM ROBERTS, JR. & ASSOCIATES
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(Appearances continued on next page)

APPEARANCES: (Continued)

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ALSO PRESENT: Mike Hennessy

THE VIDEOGRAPHER: David Gibson

(INDEX AT REAR OF TRANSCRIPT)

(Commencing at approximately 1:17 p.m.)

* * * * * * * * * * *

STIPULATION

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

* * * * * * * * * * *

THE VIDEOGRAPHER: We are now on the record. Today's date is December 2nd, 2013. The time is approximately 1:17 p.m. This is the video deposition of Frank Caple taken by counsel for the Plaintiff. The location is Nexsen Pruet, LLC, 701 Green Valley Road, Suite 100, Greensboro, North Carolina, 27408.

My name is David Gibson, legal videographer representing A. William Roberts, Jr. & Associates. This deposition is taken in the matter of SkyWaves I Corporation versus Branch Banking & Trust, et al, Case Number 2009-CP-10-7516.

Counsel, please introduce yourselves

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for the record.
MR. KEFALOS: This is George Kefalos. I represent SkyWaves.
MR. LINTON: John Linton of Duffy & Young.
MS. SHAW: Kristie Shaw, contract attorney.
MR. MENDOZA: Okay. I'm Rick Mendoza. I represent BB&T and Jim Edahl.
THE VIDEOGRAPHER: Would the court reporter please swear in the witness.
FRANK CAPLE
being first duly sworn, testified as follows:
EXAMINATION
BY MR. KEFALOS:
Q. Mr. Caple, my name is George Kefalos and we haven't formally met.
MR. KEFALOS: Somebody's standing in front of the camera.
BY MR. KEFALOS:
Q. I want to ask you some questions about what you might know about this litigation. Do you feel well enough to answer my questions today?
A. I do.
Q. Will you give me full and complete

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answers to my questions today?
A. I will.
Q. And if you don't understand a question, will you ask me to repeat it?
A. Yes.
Q. Tell me a little bit about yourself. How old are you?
A. I am 50 years old.
Q. And where do you live?
A. I live in -- I live in Fairview, Texas, at the moment.
Q. How long have you been in Fairview, Texas?
A. I've been in Fairview, Texas, since the 1st of August of this year.
Q. And where did you live before that?
A. I lived in Winston-Salem, North Carolina.
Q. How long were you in Winston-Salem?
A. Approximately three years.
Q. And where were you before that?
A. Charleston, South Carolina.
Q. How long were you in Charleston?
A. Approximately four years.
Q. And before that?

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A. I was in Florence, South Carolina.
Q. And how long were you with -- in Florence?
A. I was in Florence for approximately four years.
Q. Where are you from originally?
A. I'm from Myrtle Beach, South Carolina.
Q. In all of these places you were living were you employed by BB&T?
A. Yes, I was.
Q. You're still employed by BB&T?
A. That is correct.
Q. Are you married?
A. I am married.
Q. Children?
A. No children.
Q. Can you tell me a little bit about your educational background. What sort of college degree do you have?
A. I have a Bachelor of Science.
Q. In what?
A. Business administration.
Q. Where did you go to school?
A. I attended the Citadel.
Q. When did you graduate?

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A. 1985.
Q. Did you do any graduate study?
A. I did not.
Q. Have you taken continuing education courses in the banking industry?
A. No.
Q. Have you attended seminars in the banking industry?
A. No.
Q. Now you work at BB&T today, is that correct?
A. That is correct.
Q. How long have you been at BB&T?
A. I joined BB&T in 1990.
Q. What did you do before you joined BB&T?
A. I worked for Citizens & Southern National Bank.
Q. And how long were you with C&S?
A. I was with them for five years.
Q. So your entire work life has been in banking?
A. Correct.
Q. What's your position at BB&T?
A. I'm a regional loan administrator.
Q. What was the position you held in 2006,

Q. How did you learn what factoring was about?
A. I didn't need to.
Q. You could supervise a factored account without knowing how factoring worked?
A. Coapproval was handled by the factoring group.
Q. Who was the factoring group?
A. At that time I -- I don't have recollection who the individuals were.
Q. Where were they located?
A. I -- I -- I don't know. I don't know if it was in Winston-Salem or if it was in High Point.
Q. Okay. Let me ask you about e-mails. Do you use e-mails at BB&T?
A. I do.
Q. What's the policy about keeping e-mails?
A. E-mails are to be retained.
Q. Were you privy to e-mails back in 2006, '7 and '8?
A. Yes.
Q. Okay. Regarding the SkyWaves account?
A. Yes.

Q. And where would those e-mails be today?
A. I would -- they -- they should be on the server.
Q. Looking at your personnel file I noted that you had taken a course in banking ethics. Do you remember that?
A. Banking ethics?
Q. Ethics, yes.
A. Possibly through the BB&T University, yes. I took a lot of courses.
Q. Oh, so -- I'm sorry.
A. Through -- through our internal training we had -- we take numerous courses.
Q. Well, when I asked you earlier about whether you had continuing education programs, you told me that you didn't.
A. I took it that you were saying outside of -- outside of BB&T.
Q. Okay. So you did, in fact, engage in various continuing education programs within BB&T?
A. Correct.
Q. And this is called the BB&T University?
A. It's -- it's -- BB&T University is the entity that -- that administers any training that occurs within BB&T.

Q. All right. You have spent your life in banking. Do you consider yourself a banking professional?
A. I consider myself an experienced banker.
Q. You certainly know more than the average person about banking?
A. I -- I do know -- because of the experiences that I've had over my career, yes, I -- I do know --
Q. Do you not feel comfortable calling yourself a professional?
A. I -- I have no problem calling myself a professional because this is the profession that I've take -- that I've undertaken.
Q. Now as a professional with, what, 25 years' experience in the industry do you think that you know the standards of behavior that are generally accepted in the banking industry?
A. I know the standards of behavior that are accepted by BB&T within -- within our policy and guidelines.
Q. Good. Well, would you agree that a banker should be honest with his customer?
A. A banker should always be honest.

Q. And would you agree that a banker should treat his customer fairly and reasonably?
A. Correct.
Q. And would you agree that a banker should never mislead his customer?
A. Correct.
Q. And would you agree that a banker should never intentionally cause unnecessary harm to his customer?
A. Correct.
Q. Would you agree that a banker should never mislead the bank or his supervisor?
A. Yes.
Q. And would you agree that a banker should have actual authority from the bank before he speaks for the bank?
A. Yes.
Q. Would you agree that a banker should never speak for the bank without having authority to do so?
A. Yes.
Q. Do you think a customer should be able to trust that his banker has the authority to speak on the bank's behalf?
A. Yes.

lending protocol and procedure with regard to the funding of site plans?

MR. MENDOZA: Object to the form.

A. Here again, the -- you know, BB&T Factors were the ones who originated this credit facility. It -- it was never within my authority to approve doing, you know, even the purchase order financing from the very get-go.

Q. Who was the representative from BB&T Factors at the time? Was that Mr. Burke?

A. At the point of origination?

Q. No. At the time this January issue about default came up.

A. I believe it was -- it was Mr. Burke because Mr. Morris had left the bank I believe at that point.

Q. And prior to Mr. Burke there was Mr. Morris who was the representative of the BB&T factoring --

A. That's my under --

Q. -- operation?

A. That's my understanding, yes.

Q. Now are you aware that BB&T conducted quarterly audits of the SkyWaves account?

A. I'm aware that -- that -- that it is

typical that field exams are completed.

Q. And these audits typically track SkyWaves' sales, invoices, purchase order, loans and income?

A. They -- they -- they typically track numerous different things.

Q. Including the sales and invoices, purchase orders and income?

A. That's very possible, yes.

Q. These audits are supposed to track the money that BB&T loaned to SkyWaves to make sure that the proceeds received were properly applied?

A. I would have to defer to the auditor to answer that question.

Q. Well, I'm asking you about your understanding of what the audit does.

A. My understanding is the audit does a snapshot of, you know, where -- where the company is at that point in time when the field examiner is conducting their audit based on numerous different metrics.

Q. And the snapshot includes a picture of the money that's come in to SkyWaves and the money that's supposed to be remitted to BB&T?

A. I believe that's correct.

Q. Do you know whether these audits showed that BB&T was getting funding for site plans?

A. I -- I don't -- I do not know that.

Q. Do you agree that the bank was not set up to fund site plans?

A. I don't know what -- what the bank was set up to do since it was a factoring arrangement.

Q. Would you agree that the idea of site plan funding is pretty radical?

A. I would agree that there -- there is -- is increased risk in doing so, yes.

Q. And would you agree that -- or -- or have you ever seen in your 25 years with the bank the bank fund site plan factoring?

A. I have not.

Q. It's a -- so as far as you know it's never been done before?

A. I'm not aware of -- of it being done.

Q. And do you know that it's a violation of BB&T's factoring guidelines?

A. I do not --

MR. MENDOZA: Object to the form.

A. I do not because I'm not familiar with their guidelines.

Q. Do you find it odd that Mr. Edahl could

have approved this radical funding plan that had never been done before in July 2007, had supervised it for July, August, September, October, November and December and then forgotten that he had approved it in January?

A. Yes.

Q. Would you agree that -- that funding of site plans is such an unusual agreement that it's hard to believe Mr. Edahl forgot he approved it?

A. Yes.

Q. In fact, if you had approved such an unusual funding arrangement in July and supervised it for six months, you wouldn't have forgotten about it by January, would you?

A. No.

Q. Are you at all interested in talking to Mr. Edahl about how it was that he could have forgotten that he gave approval to factor site plans?

A. That -- that is not my responsibility at this point with the bank.

Q. Are you at all interested in knowing how it is he could have forgotten it?

A. I would be interested, yes.

Q. Looking back does it occur to you that

watchlist loan comments. Looks to be dated 2/12/08.

(CAPLE EXHIBIT 6, Watchlist Loan Comments, was marked for identification.)

BY MR. KEFALOS:

Q. Do you see that?

A. Yes.

Q. And that's marked Exhibit 6?

A. Correct.

Q. Do you -- have you seen this before?

A. I have not seen this document. It's very probable that I would have seen it back in this time frame.

Q. Do you know who authored this document?

A. Oh, I believe it was authored by Mike Hennessy.

Q. And what is a watchlist loan comment?

A. It's a -- it's a document that is completed on a monthly basis which identifies anything that may have changed or be happening with an account that's classified on our watchlist.

Q. What is a watchlist?

A. Watchlist is -- is a credit -- is a -- is a credit that has been deemed to be unacceptable from a risk standpoint. It's been downgraded to --

to other especially-mentioned or substandard -- there are different classifications. Once it -- once it is classified as a risk grade of a seven, it -- it is on the watchlist.

Q. If you look at the first sentence in the progress status down below -- the first line, second sentence, the CEO and the CFO readily acknowledged false purchase orders factoring.

Do you see that?

A. Yes.

Q. Did you have anything to do with gathering that information leading to that conclusion?

A. I know that -- I know there were, you know, different events over a course of time, meetings that were held where those individuals could have -- have made that admission.

Q. Were you present at any of those meetings?

A. I was present in -- in several different meetings but, you know, specifically the meeting that -- you know, the comments that appear here were derived from -- you know, I don't -- I don't know specifically if I was in that meeting.

Q. Well, did Mr. Konersmann and Mr. Voytko

ever admit or acknowledge to you false PO factoring?

A. What I do know is that they admitted that they didn't have the -- when -- they didn't have the materials on hand to complete the units that were tied to those POs.

Q. Does this relate -- when you talk about the units, are you talking about the site --

A. I would not --

Q. -- plan funding?

A. No. I'm talking about the -- the construction of a shelter.

Q. Well, tell me how that would work then. A purchase order comes in and SkyWaves submits it to BB&T for factoring. BB&T advances a certain amount of money to SkyWaves, right?

A. Again, that's a question for our factoring group who established the relationship as it relates to --

Q. I'm asking what you -- what you understand about it.

A. My understanding would be -- is that the purchase order is delivered. We advance funds. The purpose of those funds are to construct the unit such that it could then be an invoice to

whomever the end user is and for the end user to remit payment to pay for that unit and the funds from -- from that remission should pay down the line of credit, you know, based upon what's been -- been remitted.

Q. Did you understand the purchase order --

MR. MENDOZA: Excuse me. I think -- George, I think that David's saying that he needs to change tape right now. Is that --

MR. KEFALOS: Okay. We'll take a break and change the tape.

THE VIDEOGRAPHER: We will now go off the record. The time is approximately 3:07 p.m. and this concludes Video Number 1 in the video deposition of Frank Caple.

(Whereupon, there was a recess in the proceedings from 3:07 p.m. to 3:09 p.m.)

THE VIDEOGRAPHER: We are now back on the record. Today's date is December 2nd, 2013. The time is approximately 3:09 p.m. This is Video Number 2 in the video deposition of Frank Caple.

BY MR. KEFALOS:

Q. Mr. Caple, did you ever talk to Mr. Denning about whether SkyWaves was in default

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

SKYWAVES I CORPORATION,
Plaintiff,
vs.
BRANCH BANKING AND TRUST COMPANY, successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T, and JAMES EDAHL,
Defendants.

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

A WILLIAM ROBERTS, JR. & ASSOCIATES
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ALSO PRESENT: Russell Bogue
Michael Hennessy

THE VIDEOGRAPHER: John Girdler
(INDEX AT REAR OF TRANSCRIPT)

(Commencing at approximately 11:20 a.m.)

STIPULATION

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

THE VIDEOGRAPHER: We're going on the record. The time on the monitor is 11:20 a.m. This is the video deposition of Tol Broome taken by the Plaintiff in the matter of SkyWaves I Corporation, Plaintiff, versus Branch Banking & Trust Company, et al, Defendants, under the jurisdiction of the Court of Common Pleas for the Ninth Judicial Circuit, County of Charleston, Case Number 2009-CP-10-7516.

This deposition is being held at Nexsen Pruet, 701 Green Valley Road, Suite 100, Greensboro, North Carolina, on Thursday, December 19th, 2013. My name is John Girdler. I'm the

video specialist. The court reporter is Lisa Wheeler. We're from A. William Roberts, Jr & Associates.

Counsel will now state their appearances for the record and the court reporter will swear in the witness.

MR. LINTON: Johnny Linton for the Plaintiff.

MR. KEFALOS. George Kefalos for SkyWaves.

MS. CHERRY: Molly Cherry for Defendants BB&T and Jim Edahl.

MR. MENDOZA: Rick Mendoza for Defendants BB&T and Jim Edahl.

TOL BROOME
being first duly sworn, testified as follows:

EXAMINATION

BY MR. LINTON

Q. Mr. Broome, Johnny Linton and I'm going to be asking you some questions. If I don't phrase my question where it's clear, please ask me to rephrase it so that we're communicating accurately with each other.

A. Okay.

Q And will you give me complete answers

specialized lending?
A. That's right.
Q. Okay. And was SkyWaves a specialized lending customer?
A. Yes.
Q. Okay.
A. Commercial finance was a part of specialized lending.
Q. Okay. Did you have anything to do with this 2007 commercial finance corporate plan?
A. Yes.
Q. You were the architect of it?
A. Yes.
Q Okay. Did it differ in any material substance from the 2006 plan?
A. I couldn't answer that without seeing the 2006 plan.
Q. Okay. Well, let's go to the -- Page 2, the mission statement. And I can give you a chance to read that if you --
A. Okay. Okay.
Q. Now what is the purpose of this mission statement?
A. To reinforce the bank's overall focus on putting our clients first and then to state how

we would in a specialized environment like commercial finance execute on that mission.
Q I notice in here it refers to the fact that you're providing professional sales and risk management direction to your customers.
A Yes
Q Is that equivalent to saying that you're giving advice to your customers?
A. Yes.
Q. All right. And who in commercial finance would have been giving advice to SkyWaves in 2007?
A. 2007?
Q. Right.
A. That primarily would have come through the account executive, Castlen Morris.
Q. Okay Who did he report to?
A. I believe he reported to Phil Allard if I -- my memory's correct.
Q. All right. Do you know the circumstances under Mr Morris's departure from the bank in around November of 2007?
A. He took a position with another factoring company.
Q. Do you know if that was entirely

voluntary?
A. As far as I know he just left.
Q. In your review of the -- of the file that you were asked to conduct did you ever interview Mr. Morris?
A. No
Q. Now he had left the bank?
A. That's right.
Q. So far as you know he left on good terms?
A. Yes.
Q. And he had been with the bank for many years?
A. I'm not sure how many but I --
Q. Some number of years?
A. Right.
Q. Okay. And he was the manager who at least from the commercial finance standpoint would have had the -- the closest relationship with SkyWaves, is that --
A. Yes.
Q. And is there a reason that you wouldn't have interviewed him to find out what he knew and -- and when he knew it?
A. He was no longer with the bank.

Q. Did that prevent you from talking to him?
A. In a confidential collection matter, yes.
Q. So you think it would have been improper for anybody from the bank to talk to him regarding --
A. It would have been --
Q. -- this matter?
A. -- improper for -- for me with what I had been charged to do to talk to him.
Q. Well, would it be improper for anybody who was being requested by you to collect the facts to talk to him?
MS. CHERRY: Object to the form.
BY MR. LINTON
Q. Go ahead.
A. Yeah, I would say so. I mean, it was a -- it was a confidential bank matter that -- that needed to be within the bank.
Q. Okay. Did you ask to receive a copy of Mr. Morris's file so that you could review what he had?
A. The credit file?
Q. Any file on SkyWaves. As you were

initiative or something like that?
A. I don't know. It may have been just what we said in this document Onboarding was sort of a all-encompassing term that we used for, you know, putting a new client relationship on the books
Q Mr. Broome, would there be a similar mission statement for the BB&T banking network similar to what you have here in Exhibit 1?
A. The -- the banking network would probably have just had the bank's overall mission statement.
Q. Okay. Is that any significantly different statement than what you have?
A. It has -- lists the four constituencies of clients, associates, communities and shareholders.
Q Now in the mission statement that you have, Exhibit 1, if I'm getting the testimony correct, Castlen Morris would have been an account executive who would have been under this BB&T Commercial Finance, right?
A. Yes.
Q. And he was the principal contact with commercial finance and SkyWaves?

A. That's right.
Q. All right And the mission statement says that -- that they're to provide professional sales and risk management direction, which I believe you've testified means that they're giving advice to the -- to the client about how the products that you are offering could benefit the client, is that right?
MS. CHERRY: Object to -- object to the form. You can answer.
BY MR. LINTON:
Q. How did you see Mr. Morris's role with SkyWaves? What advice was he supposed to be giving them and -- and feedback to them?
MS. CHERRY: Object to the form.
BY MR LINTON:
Q. Was Mr. Morris supposed to be giving any advice to SkyWaves?
A. Yes, to the extent that he would be asked questions about financial services that may help the company, he -- he would be giving -- potentially giving advice. He also -- the -- the mission statement also refers to providing sales and risk management internally at -- at the bank.
Q. Of course, internally at the bank

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

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

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

A. No.
Q. Did you seek to find out in your conversation with Mr. Dennings, why did you approve this purchase order financing, it seems to be inappropriate to me?
A. I don't recall.
Q. And you had no discussion with Mr. Edahl, did you?
A. I did not.
Q. Just as the mission statement for the commercial finance sets forth that you expect advice to be given by the factoring folks, would you expect advice regarding the proper financing platform to be given by Mr. Edahl to the customer?
MS. CHERRY: Object to the form.
A. Not necessarily because the client had asked for a certain type of financing. In his role as a salesperson he's trying to advocate -- balance the client's needs with the bank's practices and he had the concurrence of a credit officer to provide that type of financing which, again, was a -- yes, it was an exception to policy but it is acceptable at BB&T to make exceptions to policy.
Q. From your investigation are you aware that it was Mr. Edahl who suggested this platform

for financing and not the client?
MS. CHERRY. Object to the form. You can answer.
A. I'm -- I'm not aware of that, no.
Q. Number 2 your observation is based on the financing that was provided you were essentially providing venture capital, is that correct?
A. That was intended to be a comparative comment.
Q. I understand. And why did you consider financing of purchase orders under the approved arrangement to be essentially providing venture capital?
A. Because the -- there was a lack of equity in the business which is also documented here and purchase orders are much further away from cash than -- than what -- what I felt like was appropriate.
Q. Number 3 when you refer to statement quality you said, we should have followed policy and required reviews at first. What kind of review are you referring to?
A. It's a quality financial statement opinion that the CPA provides that's not -- it's

the level below a full audit.
Q. Now was that something that would have been required by BB&T policy?
A. It was -- yes, it was in our policy but it was -- again, a credit officer could make exceptions to those pol -- that policy
Q. Did you see any documentation where a credit officer had authorized deviation from that policy?
A. To the extent that -- that the credit had been approved by the credit officer with that knowledge, yes
Q. Was there any protocol written with the credit -- credit approval of how we're going to administer this such as audits are going to be required, we want financials provided by a outside CPA? Was any of that written in the protocol?
A. I don't recall.
Q. Would that be in the standard protocol for factoring?
A. Yes. The policies of the bank were applicable to factoring as well.
Q. Okay. I'm trying to understand how there was communication between the bank and factoring in this case so that the factoring

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Steven B. Licata

From: Hennessy, Michael [MHennessy@BBandT.com]
Sent: Friday, January 18, 2008 2:49 PM
To: Steven B. Licata
Subject: FW: Skywaves

Michael J. Hennessy
BB&T's Business Loan Admin.
200 West 2nd St 6th Floor
Winston Salem, NC 27101
Office 336-733-2557
Fax 336-733-2196
Cell 336-575-0889
MHennessy@BBandT.com

From: Edahl, James
Sent: Friday, January 18, 2008 2:25 PM
To: Hennessy, Michael
Cc: Denning, Walter; Caple, Frank; Burke, Mike
Subject: Skywaves

Mike, I have spoken by telephone today with Ron Konersmann, President, and John Voytko, CFO to formally tell them the over advance has put them in default of the commercial finance loan and that they will be getting written notice of same shortly. Could you please send me a form Notice letter? I would like to get it out ASAP. Thanks.

Jim Edahl
Senior Vice President
Charleston, SC
843-720-5152
jedahl@bbandt.com

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STATE OF SOUTH CAROLINA
COUNTY OF MECKLENBURG

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
2009-CP-10-7516

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

VIDEO
DEPOSITION OF: MICHAEL HENNESSY

DATE: December 18, 2013

TIME: 1:14 p.m.

LOCATION: Nexsen Pruet
701 Green Valley Road
Greensboro, NC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: LISA A. WHEELER, RPR, CRR

APPEARANCES OF COUNSEL:
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ALSO PRESENT: Russell Bogue
THE VIDEOGRAPHER: John Girdler
(INDEX AT REAR OF TRANSCRIPT)

(Commencing at approximately 1:14 p.m.)
* * * * * * * * * * * *

STIPULATION

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

* * * * * * * * * * * *

THE VIDEOGRAPHER: We're going on the record. The time on the monitor is 1:14 p.m. This is the video deposition of Mike Hennessy taken by the Plaintiff in the matter of SkyWaves I Corporation, Plaintiff, versus Branch Banking & Trust Company, et al, Defendants, under the jurisdiction of the Court of Common Pleas for the Ninth Judicial Circuit, County of Charleston, Case Number 2009-CP-10-7516.

This deposition is being held at Nexsen Pruet, 701 Green Valley Road, Suite 100, Greensboro, North Carolina, on Wednesday, December 18th, 2013. My name is John Girdler. I'm the

video specialist. The court reporter is Lisa Wheeler. We're from A. William Roberts, Jr. & Associates.

Counsel will now state their appearances for the record and the court reporter will swear in the witness.

MR. LINTON: Johnny Linton for the Plaintiffs.

MR. KEFALOS: George Kefalos for SkyWaves.

MS. CHERRY: Molly Cherry for the Defendants BB&T and Jim Edahl.

MR. MENDOZA: Rick Mendoza for the Defendants BB&T and Jim Edahl.

MICHAEL HENNESSY

being first duly sworn, testified as follows:

EXAMINATION

BY MR. LINTON:

Q. Mr. Hennessy, we've met before at earlier depositions.

A. We have.

Q. If I ask you a question you don't understand, please ask me to rephrase it so we're communicating accurately with each other.

A. I will.

Q. All right, sir. And as Mr. Kefalos said in the earlier deposition, if you'll give me complete answers, I'll appreciate it.

A. I will.

Q. All right, sir. Now I've gone through your personnel file so it's not my practice to spend a lot of time going through all the background of somebody, but why don't you go ahead and just relate to us when you rejoined I believe it was BB&T.

A. I was with BB&T from '03 to '06 roughly. I left -- I'm sorry, '02 to '05. I left, came back in June of '06 back into problem loan administration, specifically in charge at that point in time of South Carolina with an overflow in Georgia. South Carolina -- I shortly gave up control of South Carolina, probably a little over a year, year-and-a-half later, because Georgia was having such problems. I'm now back in charge -- I'm the group leader for North Carolina/South Carolina.

Q. Yes, sir. And in 2008 were -- what was your title?

A. I was the problem loan administrator.

Q. Loan administrator. Is there any

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reflects, why an account officer feels one way and why a client feels something differently. But ultimately I would have to tell you that the documents would -- would reflect, you know, the le -- the -- what the legal stance of the bank might be.

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

A. Sure.

Q. Okay. And to know the history of the relationship?

A. Yes.

Q. Okay. But -- and did you make an effort -- well, strike that please.

When did you first become involved in this matter?

A. January of '08.

Q. Right. Prior to that did you have any dealings at all with SkyWaves?

A. No.

Q. All right. And when -- do you recall the first meeting that you had, face-to-face meeting, with --

A. I do.

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Q. Okay. And you -- do you recall what you wanted to know from SkyWaves about the relationship?

A. I do.

Q. All right. And what -- what was that?

A. Do you want me to tell you the meeting? Is that what you're after?

Q. Sure.

A. Okay. So --

Q. Strike that. I really was interested in what your objective was in that meeting by way of factual development.

A. To understand SkyWaves' current financial position, what their -- what their intentions were going forward and how they intended to get from where they were financially to where they expected to be.

Q. Did you want to know how they had gotten where they were?

A. Absolutely.

Q. Okay. And you mentioned that the first priority for you in pursuing an endeavor like this is to get the documentation, study it to understand what the documentation says and then to see if there's any oral modifications?

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A. I -- I --

MS. CHERRY: Object to the form.

A. I have rarely run into an oral modification.

Q. Okay. When you say rarely, you mean you can count it on one hand?

A. I can't even think of the last time that it may have happened.

Q. Okay.

A. I'm not saying it hasn't happened. Just can't think of the last time that it has happened.

Q. All right. Well, can you even think of one time that it ever happened?

A. Right off the top of my head right now as we speak, no.

Q. Okay. Is that just while you've been working at BB&T or your whole banking career?

A. Probably my whole banking career.

Q. Okay. Have you ever been involved in your work with BB&T where a loan officer exceeded his authority?

A. Yes.

Q. Okay. And does that happen, you know, rarely or would you say it happens --

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A. Rarely.

Q. Rarely. Less than five times in your banking career?

A. Five to ten times, I guess.

Q. Okay. All right. So let's get back to the meeting. What were you trying to determine about the relationship, that is, the -- any claim that the bank had that the debtor had not followed the -- the loan?

A. No. The ongoing viability. What -- what triggered me first was the ongoing viability of the company.

Q. Uh-huh.

A. I -- I did not believe, and I've been doing this for 25 years, that this was a viable entity.

Q. And what information did you have to reach that conclusion and when did you reach it?

A. I had all of their financial information through November of '07. Could have been December of '07 but certainly November of '07. I had their '07 projections. I had their '06 projections and actuals. I had the -- the enhanced financing that we had done from factoring which is probably the most riskiest lending a bank can do.

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Q. Okay.
A. I don't remember -- I mean, it's been -- I haven't seen it in five years, but it was a spreadsheet.
Q. It was not a contract, was it?
A. No.
Q. Like a purchase order where you have a contract?
A. No.
Q. Okay. Where did you get the site plan from?
A. Mike Burke I think sent it to us.
Q. And so when you reviewed the site plans, you concluded that there was a purchase order backing up those site plans?
A. That was my understanding.
Q. From Edahl?
A. Correct.
Q. Okay. You attended Edahl's deposition?
A. I did.
Q. Okay. Is your -- do you understand from his testimony that -- that that was not the case?
A. No.
Q. You think he supports that in his

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testimony?
A. I -- to be honest with you, without something being in writing I -- I don't know. Alls I know is when I asked Ron Konersmann and John Voytko that exact question, they told me that they submitted those site plans to the bank as purchase orders so that's what I understood them to be up until James Edahl conversation. But what verbal agreement James Edahl and Ron Konersmann and/or John Voytko reached, I -- I can't -- I can't tell you. I don't have any idea.
Q. Let me ask you this: Prior to Mr. Edahl's deposition did you have any forewarning that he was going to testify he agreed to site plan funding?
A. No.
Q. Did it come as a shock to you when you heard him testify?
A. It was -- it was an eye opener.
Q. What does it take to shock you?
A. I've been in this business a long time.
Q. Well, okay. That's a fair enough answer. When -- you say an eye opener. Is it something that's never occurred before in your problem loan administration?

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A. What, that -- that --
Q. Where -- where a bank officer says, I did agree orally to site plan financing.
MS. CHERRY: Object to the form.
A. You know, that's -- I don't think that that's really ever occurred especially after the -- the e-mails and the -- and the memos that were written. I can't say that's occurred. Can't say it hasn't but nothing comes to mind right now that -- that is screaming that it's -- that it has.
Q. I'm not sure I'm understanding you, Mr. Hennessy. Are you saying you don't believe Mr. Edahl agreed to fund on site plans that were not purchase orders?
A. No. What I'm saying to you is that I don't understand how -- how -- how James Edahl has now said that we did but the numerous e-mails and memos in the file --
Q. Are contrary to that?
A. Contrary.
Q. I understand.
A. That's what I -- I don't understand.
Q. Okay. All right. Would this be an example of an oral modification to a loan?
MS. CHERRY: Object to the form.

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A. I have earthly -- no earthly idea because that would call a legal question and I can't -- I mean, I don't know.
Q. I think you previously answered but maybe I'm wrong that you weren't aware of any oral modifications to loan agreements in the past. Is that --
A. I said I couldn't recall any. Not that they hadn't happened but I couldn't recall any --
Q. Okay.
A. -- right off the top of my head.
Q. Okay. Based on what you've reviewed of Mr. Edahl's testimony, would you acknowledge that this was an oral modification?
MS. CHERRY: Object to the form.
A. I -- I don't know what it takes to make an oral modification to a written contract so -- so, I mean, if -- if James Edahl says that he agreed to finance site plans, that could be one small portion of a much larger conversation that we're talking about. So I don't know if there were other stipulations that were in that conversation that said I will but they have to be followed up with purchase orders within two days or a week or whatever. I don't know what the oral modification

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was and I don't even know if it did, legally whether that actually modifies anything or not because I -- I would have to ask my attorney that.
Q. Do you recall in -- hearing Mr. Edahl testify that he said that Mr. Dennings had approved the site plan financing?
A. Correct. No. Mr. Dennings (sic) approved the site plan financing?
Q. Right.
A. Oh, yes. Yes. Yes. That's correct. He did say that. Right.
Q. All right. Did -- have you asked Mr. Edahl about how could you have approved this site plan financing and not told me about it in 2008?
A. After his deposition?
Q. Right.
A. No, I've not spoken with Mr. Edahl.
Q. Before his deposition.
A. I didn't know about it until after his deposition.
Q. Okay. And how about Mr. Dennings, have you asked him whether he, in fact, approved the site plan financing?
A. No.

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Q. Can you explain to me why there wouldn't be any documentation of the site plan financing agreed to by Mr. Edahl?
A. I -- it's as much a shock to me as it is to everybody else. I don't know.
Q. Okay. In 2008 when you were considering the viability of SkyWaves did you consider this Million Two site plan financing that had been funded to be a breach by SkyWaves?
A. Yes.
Q. Okay. And you considered that they were not entitled to that because they didn't have a -- a purchase order to back it up, is that correct?
A. I -- we had the conversation. If I'm anything, I'm blunt in my conversations with my clients because I want to be as clear and as concise as I possibly can and I asked them for an explanation why I had a site plan that was PO financing but no POs. And I asked them, did you submit this site plan as a purchase order to the bank? Yes, we did. Do you have site plans? No, we do not. Did you submit this fraudulently for funding? Yes, we did. They acknowledged they submitted to me a fraudulent statement that they

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passed off as a purchase order when, in fact, they never existed.
Q. Why would they need to do that if Mr. Edahl had agreed to have the site plan funding?
A. I -- I'm telling you the way that the facts were at the time. I don't know what has -- what it's come to now, but as the facts are at the time, I went down there with the demand letter in hand, with the information from Mike Burke, with the information from Jim Edahl and I asked them after touring the plant those specific questions to include the -- the reluctance on their part to put our address on the factored invoices. 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.
Q. What does that mean?
A. I would have had to change my whole stance.
Q. In what way?
A. Well, if the bank has entered into an oral contract, if the bank had, in fact, given SkyWaves 60 days to -- on an invoice that they don't own -- which I don't understand how you do

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that because in a factored relationship you don't own the invoice. So I would have had to go -- retreat and said, okay, gone back in and gone back to the attorney and figured out where the bank is legally and what obligations we have to SkyWaves.
Q. Uh-huh.
A. But nobody said that to me. The purchase order financing line was almost completely maxed out. There was no more room under the purchase order financing line to continue financing activities and I didn't see any way in order to protect the bank. Funding more money into this existing situation is not protecting the bank.
Q. Who was present at the meeting?
A. Jim Edahl -- at the first meeting Jim Edahl, Frank Caple, John Voytko, Ron Konersmann. I want to say his COO or some -- one of those. Either the C -- chief operating officer or chief manufacturing officer, one of those were there.
Q. Okay. And this was at SkyWaves?
A. Yes.
Q. How long did that meeting take?
A. Two-and-a-half hours.
Q. What other subjects did you discuss at that meeting?

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A. Second or third time.
Q. Yeah.
A. Yeah.
Q. And so afterwards you and must -- Edahl must have had some discussion about, Jim, have you seen this kind of conduct before in them or, you know, how did we get so far down the road? Do you --
A. Correct.
Q. Well, what did he say?
A. He was -- he was a little flabbergasted. He was -- he had been to the site, and I don't remember the date, maybe September or a little earlier. He hadn't been back except for Mike Burke. He was absolutely shocked that the warehouse was empty, that there were no buildings being built. I think that's what started the cascade was Jim's discovery that there were no buildings being built, that he was out of -- you know, we're -- we're factoring an unsecured line at this point in time, that he was out of compliance in this over -- in an overadvance situation because at the time he believed and I think may still today that buildings were supposed to be built.
Q. Mr. Hennessy, were you more shocked

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when Mr. Konersmann in management said, we submitted false, fraudulent documents for the site plan financing or more shocked when Mr. Edahl told you -- or you heard him testify that he, in fact, had approved financing for the -- the site financing?
A. Which is -- was I more shocked at?
Q. Right.
A. I -- I probably think Jim Edahl just because it's not in his -- I've known Jim, I don't know, eight years, ten years. You know, he's a pretty level-headed guy so for him to not remember, whatever, come up with this disclosure at the tenth hour, no, I was pretty shocked.
Q. When you --
A. But I still believed the fact that site financing was approved but buildings were supposed to still be built.
Q. Well, how would you know that? Where's the documentation?
A. Well, I don't. I'm just --
Q. Don't you --
A. -- saying what I believe --
Q. -- go to documentation first?
A. -- what I -- what I believe.

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Q. Don't you always go to documentation to find out the truth?
A. Absolutely.
Q. All right. And Mr. Edahl has said that it was approved but -- but now there's an issue about what was approved. Do you have any documentation to say that they had to use those funds for a specific shelter?
A. No. It was an oral modification between Jim and Ron Konersmann so I don't know what was ever approved.
Q. Well, according to Mr. Edahl it was an oral modification between him and Mr. Dennings and SkyWaves, wasn't it, on behalf of the bank?
A. Mr. Dennings --
MS. CHERRY: Object to the form.
A. He says Mr. Dennings approved some sort of a -- some sort of an approval for site plan financing, but I don't know what the conversation was between Jim or Walt or Jim and SkyWaves. I -- I don't know what was approved.
Q. But you do know this: That $1,200,000 was advanced --
A. Correct.
Q. -- on those site plans? And you do

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know that the -- the agreement between General Dynamics and SkyWaves was not an enforceable purchase order? You knew -- you know that, don't you?
MS. CHERRY: Object to the form.
A. I -- I -- I do now.
Q. Okay.
A. And I gave SkyWaves ample opportunity in our initial meeting to tell me about all there was to say and nobody said a word to me about it.
Q. Did you give Mr. Edahl ample opportunity since he had made the deal on behalf of the bank to --
MS. CHERRY: Object to the --
BY MR. LINTON:
Q. -- tell you that?
MS. CHERRY: Object to the form.
A. Absolutely. And you can see his memos from the day. There's not a mention of it.
Q. Why do you think he covered that up?
MS. CHERRY: Object to the form.
A. I don't think he covered it up.
Q. Okay.
A. I'm not -- I'm not sure what the situation is that made him forget but -- I don't --

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BB&T

Branch Banking & Trust Co.

2575 Atlanta Plaza
950 E Paces Ferry Rd.
Atlanta, GA 30326
(404) 442-5000
Fax (404) 442-5087

January 25, 2008

Skywaves I Corporation
4280 Pace Street
North Charleston, SC 29405
Attention: President
Via Facsimile – 843-308-9767

Re: Factoring and Security Agreement dated March 22, 2005 between Skywaves I Corporation ("Skywaves") and BB&T Factors Corporation (now known as Branch Banking and Trust Company, through merger) ("BB&T) (the "Agreement")

Dear Sir:

As you are aware, BB&T has recently completed a routine audit of the books of Skywaves as allowed and required by the Agreement. As a result of the findings of that audit you are hereby notified that Skywaves is in default of the Agreement due to its breach of the terms thereof. In particular, but not by way of limitation, the default consists of the following:

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

At this time, as a result of the default and/or in exercise of rights granted to it in the Agreement (regardless of the existence of a default), BB&T will make no further Advances (as defined in the Agreement). Additionally, BB&T is hereby demanding payment of the Obligations due under the Agreement (including any Advances outstanding).

You are further advised that, at the present time, BB&T is exercising its rights to terminate its further performance under the Agreement. This action, together with

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BB&T's election to provide further Advances, for the present time, terminates any obligation that BB&T might have to provide any additional funding to Skywaves.

Should you have any questions regarding this matter, do not hesitate to contact me at the number below.

Sincerely,

Michael J. Hennessy
Senior Vice President
Business Loan Administration
200 West 2nd St, 6th Floor
Winston-Salem, NC 27102
Office 336-733-2557
Fax 336-733-2196
Cell 336-575-0889

37

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

SKYWAVES I CORPORATION,

Plaintiff,

vs.

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

Defendants.

Civil Action: 2009-CP-10-07516

AFFIDAVIT OF RONALD KONERSMANN

JULIE ... CLERK OF COURT
2015 APR 23 AM 9:25

1. I am Ronald Konersmann, I am over 18 years of age and I have personal knowledge of the things contained herein.

2. I was deposed in 2013 and give this affidavit to supplement my testimony.

3. On March 25, 2008 I had lunch with Mike Hennessey at the East Bay Deli. Mr. Hennessey was the BB&T bank Executive who wrote the default letter in late January 2008, declaring Skywaves to be in default of the funding agreement with BB&T.

4. Between the time of the default letter and the lunch with Mr. Hennessey Skywaves had continued in operation, producing and shipping shelters at the rate of approximately $200,000 a week. In this manner Skywaves had reduced the BB&T debt by approximately $1 million.

5. I toured the plant with Mr. Hennessey and viewed the operations and the inventory. Mr. Hennessey told me he had completed his review of Skywaves financial position and was convinced that Skywaves was viable and if permitted to continue operations, was capable of paying the BB&T debt in full. Mr. Hennessey was excited and his mood was optimistic and upbeat.

6. He told me that he would recommend that BB&T reinstate the line of credit and permit Skywaves to continue in business. Mr. Hennessey told me he had a conference call scheduled for the next day with everyone involved in the Skywaves matter during which time he would work out the details for reinstating the line of credit.

7. Mr. Hennessey returned to the plant the next day. Mr. Hennessey's mood had changed; he was somber and sounded tired and demoralized. Without explaining what had happened in his conference call that morning, he told me that there was nothing he could do to change BB&T's position and that it was out of his hands. I thanked him for trying and then he left to drive back to North Carolina.

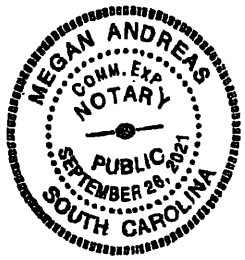
FURTHER AFFIANT SAYETH NOT.

Ron Konersmann

April 21 2015
Charleston South Carolina

Sworn to me this 21 day of April 2015,

Notary Public of South Carolina
My Commission Expires: 9/26/2021



CERTIFICATE OF SERVICE

I hereby certify that the foregoing **AFFIDAVIT OF RON KONERSMANN** has been served upon each of the parties to this action by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

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Co-Counsel for Plaintiff

BY

2015 APR 23 AM 9:25
JULIE [illegible]
CLERK OF COURT

This 23rd day of April, 2015.

DUFFY & YOUNG, LLC

77003

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7516

RECEIVED
AUG 24 2015
SC Court of Appeals

Skywaves I Corporation.....Appellant

v.

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

---

NOTICE OF APPEAL

Plaintiff/Appellant Skywaves I Corporation appeals the following orders:

(a) ORDER GRANTING IN PART DEFENDANT BB&T'S MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANT EDAHL'S MOTION MOTION (sic) FOR SUMMARY JUDGMENT[;] DENYING PLAINTIFF'S MOTION TO RECONSIDER; DENYING PLAINTIFF'S MOTION TO AMEND THE COMPLAINT; AND DENYING PLAINTIFF'S MOTION FOR COMMISSION OF (sic) ISSUANCE OF A SUBPOENA TO DEPOSE JOHN ALLISON, which the Honorable Roger M. Young signed and filed on or about July 23, 2015 in this matter (attached hereto as Exhibit A).

(b) ORDER GRANTING DEFENDANT BB&T AND DEFENDANT EDHAL'S (sic) MOTION TO STRIKE PLAINTIFF'S DEMAND FOR JURY TRIAL, which the Honorable Roger M. Young signed and filed on or about February 9, 2015 in this matter (attached hereto as Exhibit B).

(c) ORDER denying Plaintiff's Motion to Strike and granting Defendants' Motion to Amend Answers, which the Honorable Roger M. Young signed

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on March 13, 2014 and filed on March 17, 2014 (attached hereto as Exhibit C).

Plaintiff/Appellant received written notice of entry of the most recent order appealed from on July 23, 2015.

August __, 2015

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1091

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Roger M. Young, Circuit Court Judge

RECEIVED
AUG 24 2015
SC Court of Appeals

Case No. 2009-CP-10-7516

Skywaves I Corporation.....Appellant

v.

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

PROOF OF SERVICE

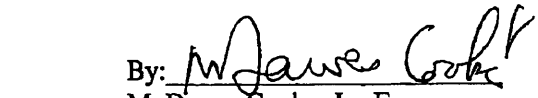
I certify that I have served the Notice of Appeal on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on April 21st, 2015, addressed to their attorneys of record:

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BARNWELL WHALEY PATTERSON & HELMS LLC | 75 YEARS 1938-2013

Attorneys for businesses & professionals since 1938

John W. Fletcher, Esquire
jfletcher@barnwell-whaley.com

RECEIVED
AUG 24 2015
SC Court of Appeals

August 21, 2015

VIA U.S. MAIL
The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

RE: Skywaves I Corporation vs. Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/ka BB&T, and James Edahl
C/A No.: 2009-CP-10-7516
BWPH File No.: 3496.001

Dear Ms. Armstrong,

Enclosed for filing is a Notice of Appeal in the above-referenced matter.

Sincerely,

M. Dawes Cooke, Jr.
John W. Fletcher

MDCjr/JWF/jgc
Enclosure

cc: Molly Hughes Cherry, Esquire
Julio E. Mendoza, Esquire
J.W. Nelson Chandler, Esquire
The Honorable Jenny Abbott Kitchings

0
M. Dawes Cooke, Jr.
B.C. Killough*
Randell C. Stoney, Jr.
Phillip S. Ferderigos
K. Michael Barfield
David S. Cox

William C. Helms, III*

* Registered patent attorney
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Alissa D. Fleming
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RECEIVED
AUG 24 2015
SC Court of Appeals

August 21, 2015

VIA FEDERAL EXPRESS
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Skywaves I Corporation vs. Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a,/ka BB&T, and James Edahl
C/A No.: 2009-CP-10-7516
BWPH File No.: 3496.001

Dear Ms. Kitchings,

Enclosed for filing is a Notice of Appeal in the above-referenced matter. Also enclosed are the following:

(1) Proof of Service of the Notice of Appeal on the Respondents;
(2) A copy of the Order Granting in Part Defendant BB&T's Motion for Summary Judgment; Granting Defendant Edahl's Motion Motion (sic) for Summary Judgment[;] Denying Plaintiff's Motion to Reconsider; Denying Plaintiff's Motion to Amend the Complaint; and Denying Plaintiff's Motion for Commission of (sic) Issuance of a Subpoena to Depose John Allison;
(3) Order Granting Defendant BB&T and Defendant Edhal's (sic) Motion to Strike Plaintiff's Demand for Jury Trial;
(4) Order denying Plaintiff's Motion to Strike and granting Defendants' Motion to Amend Answers; and,
(3) A filing fee of $100.00.

Sincerely,

M. Dawes Cooke, Jr.
John W. Fletcher

MDCjr/JWF/jgc
Enclosures

M. Dawes Cooke, Jr.
B.C. Killough*
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K. Michael Barfield
David S. Cox

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www.barnwell-whaley.com

cc: Molly Hughes Cherry, Esquire
Julio E. Mendoza, Esquire
J.W. Nelson Chandler, Esquire

30130

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City CHARLESTON State SC ZIP 29401-1584

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Roger M. Young, Circuit Court Judge

RECEIVED
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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

AMENDED AND SUPPLEMENTAL NOTICE OF APPEAL

Plaintiff/Appellant Skywaves I Corporation appeals the following orders:

(a) ORDER GRANTING IN PART DEFENDANT BB&T'S MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANT EDAHL'S MOTION MOTION (sic) FOR SUMMARY JUDGMENT[;] DENYING PLAINTIFF'S MOTION TO RECONSIDER; DENYING PLAINTIFF'S MOTION TO AMEND THE COMPLAINT; AND DENYING PLAINTIFF'S MOTION FOR COMMISSION OF (sic) ISSUANCE OF A SUBPOENA TO DEPOSE JOHN ALLISON, which the Honorable Roger M. Young signed and filed on or about July 23, 2015 in this matter (attached hereto as Exhibit A).

(b) ORDER GRANTING DEFENDANT BB&T AND DEFENDANT EDHAL'S (sic) MOTION TO STRIKE PLAINTIFF'S DEMAND FOR JURY TRIAL, which the Honorable Roger M. Young signed and filed on or about February, 2015 in this matter (attached hereto as Exhibit B).

(c) ORDER denying Plaintiff's Motion to Strike and granting Defendants' Motion to Amend Answers, which the Honorable Roger M. Young signed

on March 13, 2014 and filed on March 17, 2014 (attached hereto as Exhibit C).

(d) ORDER GRANTING BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T'S PARTIAL MOTION TO DISMISS AMENDED COMPLAINT AND JAMES EDAHL'S MOTION TO DISMISS AMENDED COMPLAINT WITH PREJUDICE, which the Honorable Roger M. Young signed on October 26, 2011 and filed on November 8, 2011 (attached hereto as Exhibit D).

(e) ORDER GRANTING SKYWAVES MOTION TO RECONSIDER, which the Honorable Roger M. Young signed on June 14, 2012 and filed on June 15, 2012 (attached hereto as Exhibit E).

Plaintiff/Appellant received written notice of entry of the most recent order appealed from on July 23, 2015.

August 24, 2015

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
AUG 25 2015
SC Court of Appeals

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

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7516

Skywaves I Corporation.....Appellant

v.

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

PROOF OF SERVICE

I certify that I have served the Amended and Supplemental Notice of Appeal on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on August 24, 2015, addressed to their attorneys of record:

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AUG 28 2015

SC Court of Appeals

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

---

NOTICE OF CROSS APPEAL

Defendant/Respondent Branch Banking & Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("Defendant BB&T") cross appeals the following order:

(a) ORDER GRANTING IN PART DEFENDANT BB&T'S MOTION FOR SUMMARY JUDGMENT, GRANTING DEFENDANT EDAHL'S MOTION MOTION [sic] FOR SUMMARY JUDGMENT; DENYING PLAINTIFF'S MOTION TO RECONSIDER; DENYING PLAINTIFF'S MOTION TO AMEND THE COMPLAINT; AND DENYING PLAINTIFF'S MOTION FOR COMMISSION OF [sic] ISSUANCE OF A SUBPOENA TO DEPOSE JOHN ALLISON (attached hereto as Exhibit A).

Defendant BB&T/Respondent received Appellant's Notice of Appeal on August 25, 2015, and Appellant's Amended and Supplemental Notice of Appeal on August 25, 2015.

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SC Court of Appeals

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

PROOF OF SERVICE

I certify that I have served a copy of the NOTICE OF CROSS APPEAL on all counsel of record by placing the same in the United States mail, first class postage prepaid, on 28th day of August, 2015:

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

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

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

I. PROCEDURAL HISTORY AND BACKGROUND

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

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

A. Procedural History

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

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

B. Factual Background

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

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

1. **Factoring Invoices Under the Factoring Agreement**

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

2. **BB&T Authorizes Advances Based on Purchase Orders**

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

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

the parties' relationship continued into 2007.

3. BB&T Authorizes Advances Based on Site Plans

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

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

4. BB&T Terminates the Agreement

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

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

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

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

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

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

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

II. ANALYSIS

A. DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

1. Legal Standard

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

2. Governing Law

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

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

3. **Substantive Claims**

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

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

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

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

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

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

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

c. **North Carolina Does Not Recognize Claims of Promissory Estoppel**

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

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

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

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

i. **The Economic Loss Doctrine**

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

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

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

ii. **Elements of the Tort Claims**

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

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



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

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

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

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

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

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

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

C. PLAINTIFF'S MOTION TO AMEND COMPLAINT

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

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

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

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

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

2. **The Amendments Are Barred Because of Undue Delay**

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

3. **The Amendments Are Futile**

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

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

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

D. PLAINTIFF'S MOTION TO STRIKE

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

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

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

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

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

III. CONCLUSION

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

IT IS SO ORDERED.

The Honorable Roger M. Young

7/22, 2015

Charleston, South Carolina

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

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF CHARLESTON 2009-CP-10-7515
2009-CP-10-7516
2009-CP-10-7517
2009-CP-10-7518

JAMES J. KERR, CRAYTON WALTERS, and J.T. MAIN, LLC,

Plaintiffs,

vs.

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.

August 15, 2011

Charleston, SC

* * * * * *

SKYWAVES 1 CORPORATION,

Plaintiff,

vs.

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

Defendants.

* * * * * *

RON KONERSMANN,

Plaintiff,

vs.

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

Defendants.

* * * * * *

JOHN VOYTKO,

Plaintiff,

vs.

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

Defendants.

B E F O R E:

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

A P P E A R A N C E S:

Molly Cherry, Esquire
M. Dawes Cooke, Jr., Esquire
George J. Kefalos, Esquire
Brian C. Duffy, Esquire

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter 1124

(August 15, 2011.)

THE COURT: We got four cases and basically each of one of them is today BB&T filing motions to dismiss amended complaint on each of them. Can we at least agree that's why we're here?

MS. CHERRY: Yes, Your Honor. As a practical matter, the motions to dismiss are on behalf of both defendants, BBB&T and Edahl, Your Honor. There were two defendants in each case, and I should clarify, the motion with respect to the Skywaves case by BB&T is only a partial motion to dismiss, Your Honor.

THE COURT: We could start by pretending that I know what I'm doing here, but I don't know what the factoring agreements are and you all probably do, but I've had a chance to read this a little bit, and I'm not exactly sure factually that I understand it, so maybe it would be good to make sure I do before we get into the merits of the argument, okay?

MS. CHERRY: Certainly, Your Honor, and as I indicated, if I may proceed --

THE COURT: You may.

MS. CHERRY: For the record, Molly Cherry, and Rick Mendoza here on behalf of both defendants, BB&T and James Edahl. And as Your Honor has pointed out, these cases, in essence, arise out of a factoring

agreement that was entered into between Skywaves Corporation, which is one plaintiff in one of the cases, and BB&T, and, Your Honor, for purposes setting the stage, if you will, or the background of the players at issue in all of these cases, obviously BB&T, as everyone knows is a bank that has a branch here in Charleston, and Jim Edahl is an employee at the branch here in Charleston.

BB&T has a commercial lending department. It has a factoring division as well, Your Honor. There are other plaintiffs involved in this case other than Skywaves. Skywaves is the actual customer of BB&T. One plaintiff, Mr. Voytko was the CFO of Skywaves, and he also invested in Skywaves.

THE COURT: Who was?

MS. CHERRY: Mr. Voytko. Mr. Voytko has no direct relationship with BB&T, no direct contract with BB&T, and for purposes of these lawsuits is not a customer of BB&T. Mr. Konersmann, Your Honor, Ron Konersmann, is another plaintiff in the third lawsuit we're here about, if you will, Your Honor, and Mr. Konersmann was also an officer in Skywaves and an investigator in Skywaves. Mr. Konersmann is, for purpose of these lawsuits, a customer of BB&T, he doesn't have a direct relationship or direct contract with BB&T.

Mr. Konersmann and Mr. Voytko, their lawsuits are as employees and investors in Skywaves which, again, is the only customer of BB&T that we're here about, and then finally, Your Honor, there is a fourth lawsuit that has been brought by James Kerr. Mr. Walters and J.T. Main, LLC, these three plaintiffs have brought one lawsuit as investors in Skywaves.

And, Your Honor, for purposes of the ease of discussion, and unless the Court prefers otherwise, it may be a little easier to refer to the Skywaves case and then the other three cases as the investor cases, just to distinguish them for purposes of the legal arguments because there are -- despite the plaintiffs having filed an omnibus brief, there actually are distinct arguments with respect to Skywaves as the customer of BB&T, and as I mentioned at the outset, BB&T has only filed a partial motion to dismiss the Skywaves case.

So at the end of the day, even if BB&T's partial motion to dismiss against Skywaves is granted, Skywaves still would have some claims pending against BB&T. BB&T has moved to dismiss all of the claims in the investor lawsuits, for separate and distinct reasons, and Mr. Edahl individually has moved to dismiss everybody's claims in all of the lawsuits against him.

But, Your Honor, the crux of everyone's

claims in all of these lawsuits arises out of the agreement between Skywaves, the customer, and BB&T, this factoring agreement. And I'm sure plaintiff's counsel will correct me if I get some of the facts wrong, but for purposes of the motion to dismiss, taking the facts in the complaints as true, the salient facts for the purposes of these motions, Your Honor, are that Skywaves developed a product for use in the wireless communications industry, and they needed financing for that product and they entered into an agreement with BB&T, in essence, to enable them to make that product.

THE COURT: What was the product?

MS. CHERRY: If I understand it correctly, a device that goes in the bottom of the cell phone towers that is supposed to, I think, more effectively help the telecommunications industry. I don't know all the details in terms of how the device works, but I do know there were some patents pending with respect to that.

MR. KEFALOS: I could explain that, if you're interested, as a footnote right now. You drive by the cell towers and you see little round building that are sort of stucco. Skywaves built those buildings, and what they did is instead of having each vendor provide a different part that goes into a wireless communication thing, Skywaves took all of those different vendors

installed them in these buildings, and integrated all their processings and then took and drop shipped the things at a tremendous savings to the wireless people, dropped them at the foot of their cell tower, and all they had to do was plug them in. They took off like gangbusters and were doing great for a while.

THE COURT: Okay.

MS. CHERRY: So, Your Honor, the factoring agreement, basically, involved BB&T purchasing accounts receivable at a discount, and when the product is delivered and paid, then the money was to go to BB&T. Just in terms of the cycle of how that agreement initially worked, in a nutshell, Your Honor, so it's the purchase of the AR, and then the money goes to BB&T as opposed to back to Skywaves.

THE COURT: Kind of like buying a membership to the gym, right?

MS. CHERRY: To some extent, yes, Your Honor, but part of the allegations by Skywaves is that that agreement and the way that agreement worked was modified over a period of time, and I don't -- for purposes of today, the actual modification of that agreement or how it may have worked is not at issue. What is at issue is that there was a financial agreement between BB&T and Skywaves.

And when I say it's not at issue today, it is at the heart of the issue, Your Honor, in terms of the dispute between the parties, because at the end of the day, Skywaves contends that BB&T promised to meet its financial needs at present and in the future and improperly stopped doing that, in essence, and improperly called a default under their relationship, and Skywaves is claiming -- and, again, Your Honor, I'm paraphrasing, but they're claiming that as a result of that, they ultimately petitioned for bankruptcy.

They went bankrupt, and they are blaming that on BB&T and their employee, Mr. Edahl. They're claiming that Mr. Edahl, in fact, is the individual that represented the changes in the agreement and represented that the funding would continue.

And so at the end of the day, they're claiming but for that, they would not have gone into bankruptcy, in a nutshell.

THE COURT: Well, usually these parties go along in making money and are happy with that. When they're in the business of making money, everything is going fine. So what happened? Why did BB&T stop wanting to do business with Skywaves?

MS. CHERRY: And, Your Honor, this is a disputed point, and it's not the issue on the motions to

dismiss, but at the end of the day, BB&T agrees that there were some modifications to the agreement, but ultimately, from BB&T's perspective, there were some fraudulent documentations submitted in terms of what the bank was advancing money off of.

And they went in and had an audit conducted and for that and a host of other reasons called a default under the factoring agreement, as they were entitled to do.

What happened at that point, from BB&T's perspective, is, in fact, that the officers of Skywaves acknowledged that there had been wrongful conduct and acknowledged a right to call a default under the agreement. Suffice it to say that the plaintiffs wholly disagree with that characterization, Your Honor. I don't -- I do want to clarify for the Court, this is a dispute between the parties in terms of the reason for the default and the proprietary of the default, and that, in fact, is what the parties are ultimately fighting over.

BB&T actually has internally looked at it, and external auditors looked at what transpired, and there were, in January of 2008, a number of itemized issues under the factoring agreement, and the default was called at that point.

The parties did, in fact, engage in negotiations after that point to see if there was something that could be worked out, but, ultimately, a workable solution did not arise between the parties, Your Honor, which ultimately Skywaves ended up filing for bankruptcy. They were not sound enough to continue their business and didn't find other financing for it, and again, Your Honor, I think those, at the end of the day, are the issues in dispute, and I think, Your Honor, the crux of this lawsuit, which, in fact, is part of the reason BB&T's motion to dismiss with respect to the Skywaves case is only a partial motion to dismiss.

Although we wholly disagree with the plaintiff's characterization of the deterioration of the relationship, we recognize, at the motion to dismiss stage, that there is sufficient allegations at this stage in the complaint to satisfy their burdens to at least allege to survive a motion to dismiss.

THE COURT: Of what cause of action?

MS. CHERRY: We did not move to dismiss their brief of contract cause of action, Your Honor, and their promissory estoppel cause of action, and there was one other contract they claim, Your Honor, that we didn't move to dismiss, if you'll bear with me, because they had eight -- Skywaves had eight causes of action against

BB&T. Breach of the covenant of good faith and fair dealing, Your Honor, was the third cause of action that BB&T did not move to dismiss.

Skywaves, in fact, asserted breach of contract, breach of contract accompanied by fraudulent acts, promissory estoppel, breach of the covenant of good faith and fair dealing, negligent misrepresentation, fraudulent misrepresentation, negligence in violation of the South Carolina Unfair Trade Practices Act.

Now, Your Honor, the other -- the investor plaintiffs did not assert the contract claims against BB&T and Edahl. Instead, they asserted similar tort claims for negligent misrepresentation, and some plaintiffs have called it negligent misrepresentation, some plaintiffs have called it negligent inducement, some it's not clear if it's negligent inducement or fraudulent inducement, so we've addressed both in our motions to dismiss, and then they have asserted a violation of the Unfair Trade Practices Act and a straight negligence claim.

So the investor plaintiffs, Your Honor, had asserted three what I'm calling noncontract based claims, and if I may point out, Your Honor, as well, Skywaves did not obviously assert the contract based claims against Mr. Edahl. Those are only against BB&T, but Skywaves did

assert their claims for negligence, negligent misrepresentation, fraudulent misrepresentation in violation of the Unfair Trade Practices Act against Mr. Edahl.

But, again, Your Honor, it all arises out, if you will, of the leading up to and including the deterioration of the financing arrangement between BB&T and Skywaves. And, Your Honor, as I mentioned, at the end of day, the motions to dismiss, I think conceptually it may be easier to look at the investor lawsuits. The motion to dismiss is based on a legal argument with respect to those tort claims that the investors in Skywaves have asserted against BB&T and Mr. Edahl. In fact, all parties have cited to it, Your Honor. It's section 37-10-107, and the statute in South Carolina very clearly bars these investor claims.

And, Your Honor, if I may quote directly, the statute says that no person may maintain an action for legal relief, based upon a failure to perform an alleged promise, undertaking, commitment, or agreement to lend money or to renew, modify, or amend a loan of money or any provision with respect to a loan of money unless the party seeking to maintain the action, in this case, the investors who are seeking to maintain the action, have received a writing from the party to be charged. 1134

These investors are charging BB&T with an agreement to continue lending money under whatever modified arrangement they may be alleging in their agreement, and although the parties dispute what that modification was, at the end of the day for purposes of this statute, it doesn't matter because the statute specifically says, Whoever is maintaining the action has to have received a writing outlining those terms.

These investor plaintiffs have not, and, Your Honor, if you think about this conceptually, there is a reason for this. Skywaves is in bankruptcy. These investors have proofs of claim in the bankruptcy. Skywaves has brought this lawsuit outside of the bankruptcy to pursue it as a potential asset in the bankruptcy.

Notwithstanding our disagreement over the merits of Skywaves' claims, if anybody here today has a claim, it is Skywaves. Skywaves was the customer of BB&T. In essence, these investors are trying to bring a derivative claim on behalf of Skywaves. More tellingly, Your Honor, if Voytko and Konersmann, part of their claims in these lawsuits, is that they lost their salaries as employees of Skywaves.

That makes no sense whatsoever. I mean, if they're allowed to proceed with these lawsuits, any

employee of any company that ever went bankrupt is going to be able to sue the lender for the company. The South Carolina statute expressly bars the claims the investor plaintiffs are trying to bring in this case.

Your Honor, there were a couple of points that plaintiff's counsel have made or arguments they have made to contend that the South Carolina code section 37-10-137 doesn't bar their claims, and the first argument that the plaintiffs are making is that the factoring agreement between Skywaves and BB&T has a choice of law provision that says North Carolina law applies, but at the end of the day, Your Honor, these investor plaintiffs, they aren't parties to that agreement. They are trying to claim that BB&T had to do X, Y, and Z and they promised they would do X, Y, and Z and we were relying on those representations that they would commit to lend this money, to do this financially.

You can't have it both ways. The South Carolina statute is going to bar those claims unless they meet the requirements of the statute. They can't rely on a choice of law provision and agreement to which they were not a party, and it makes no sense to say that that choice of law provision is going to bar the application of South Carolina law with respect to their claims.

Your Honor, they also state that with respect

to -- they attempt to distinguish that statute and say while maybe it bars the claims against BB&T, it certainly doesn't bar the claims against Edahl because there was no agreement between Edahl and Skywaves and that the law relating to the statute of frauds says that it only pertains to the two parties at issue.

But, Your Honor, in fact, the case law that they cite talks about parties to an agreement and they're privy, and, in essence, Your Honor, acknowledges that if it is not going to allow a claim against BB&T, then it's illogical to suggest it's going to allow a claim against an employee of the party they're trying to charge with this obligation.

I'm just -- there isn't any case law directly on point, but, instead, the plaintiffs are just relying on general South Carolina law relating to statutes of fraud, but I think in that context, the case law applies to parties and their privies, and I think in this case a strong argument can be made that the employee of the company is either, for all intends and purposes, the same as the company or privy of the company. So I'm not convinced that that would bar -- that would prevent the South Carolina statute from barring the claim against Mr. Edahl as well.

Additionally, and to the extent they want to

charge Mr. Edahl, they haven't received any writing from Mr. Edahl either. The investor plaintiffs haven't received any writing in this case, whether from BB&T or Edahl.

Your Honor, also, there was an argument that the statute itself talks about loans of money and the investor plaintiffs distinguish a factoring agreement from a loan, but, Your Honor, as a practical matter, the allegations in the complaint are alleging that this original factoring agreement eventually evolved into, in essence, a line of credit, which is a loan of money, and the plaintiff's own allegations are that the agreement evolved to the point that it really is a loan.

Even if those allegations weren't there, Your Honor, South Carolina code section 37-10-102 says that statutes to be interpreted broadly to accomplish the goals, the underlying goals, and purposes of the statutes, and I think that would just be a hyper technical interpretation of this lender liability statute of frauds to suggest that it wouldn't apply in this context.

And then finally, Your Honor, the plaintiffs are alleging that the lender liability statute of frauds doesn't bar fraud claims because it specifically delineates negligent misrepresentation; however, You

Honor, we've cited in our brief actually the Lands End case which is a South Carolina federal court case, finding that this statute bars a fraud claim and it cites a South Carolina Court of Common Pleas case in support of that as well.

And, Your Honor, I think there are a number of other very specific arguments pertaining to the substance of the cause of action and the applicability of the statute overall, but I think it might be more prudent to let the plaintiffs argue their specific points and then, if I may, just address them in turn to the extent the Court has questions about them.

THE COURT: All right.

MR. COOKE: For the court reporter, I'm Dawes Cooke with the firm Barnwell Whaley Patterson Helms representing all plaintiffs, and I'll let other counsel introduce themselves.

MR. DUFFY: Brian Duffy with Duffy and Young. I'm on the papers representing Mr. Konersmann and Mr. Voytko, but we're going to divide the argument by substance rather than by party.

MR. KEFALOS: I'm George Kefalos. I represent Skywaves.

MR. COOKE: Your Honor, we sacrificed probably some clarity for the sake of less paper by

filing consolidated responses to all the motions, and it maybe requires a little more work to sort out which grounds are being asserted by the plaintiffs, but I think Molly has already explained that to you.

But we did, rather than file separate responses to each motion, we put them all together, and we're going to try to save some time by dividing the arguments, and generally I'm going to talk about the statute of frauds issue and Mr. Duffy is going to talk about the substantive cause of action and why those should survive.

In broad summary, first of all, Your Honor, we contend that this is a 12(b)6 motion to dismiss and that there are at least two important issues that need to be factually developed before you can interpret the statute of frauds.

The first question is, what was this agreement, factoring agreement? Was it the loan? Did it ever become a loan? Is it something other than a loan? Strictly speaking, a factoring agreement is not a loan. It's a situation where they purchased an asset of their customer at a discounted rate and pay the money up front and then the asset pays itself directly to the bank.

For example, accounts receivable, they may purchase accounts receivable to allow cash flow, and so

they'll -- we've got an order, we've got a customer who owes us $100,000. We might sell that account receivable to the bank. They give us the money, and then they go collect the account receivable from the customer, and that works well because sometimes the agreements with our customers are they don't pay us until the product is delivered and installed and some other events have occurred. We need the money sooner so we can build the product for them.

The facts -- and then the second fact that we think needs to be developed more is what were the writings that we're relying on? If Your Honor finds that the statute of frauds applies as interpreted by BB&T, we've alleged in the complaint, and it's in paragraphs 8, 9, 18, 19, 20, 21, specifically, that there were writings. The original factoring agreement was written, signed by both parties. The modifications were in writing, most in the form of e-mail. We've cited both federal and state law that says e-mail can be the same as a signed agreement.

We have alleged that Mr. Edahl at one point said that, you know, we've all agreed to these modifications. We're not going to do a formal agreement because we don't want you to have to go hire lawyers to paper it up, essentially.

So we believe at a very minimum, even without agreeing with us on any of our legal arguments, that the Court should deny the 12(b)6 motions so that those allegations can be fleshed out so that you can see if the statute applies.

I do want to talk a little bit about the bank statute of frauds, which is at section 37-10-107, and I almost brought a big board, but I thought you could probably call it up on your computer and you would be looking at it because it's a very oddly worded statute, so much so that after we read it, we still don't all agree on how you interpret it.

And I even went back to the action joint resolution I was so convinced there was a typographical error in it, but I know I'm not supposed to ask you questions, but do you have it available there?

THE COURT: I can pull it up.

MS. CHERRY: Your Honor, I actually have a paper copy of it. I just printed it off.

MR. COOKE: That's fine.

THE COURT: I'll tell you what: Why don't you let me have that, because I follow along on the realtime and frankly to do both at the same time is not possible.

MR. COOKE: Section 37-10-107, if you read it

literally, it says, item one, no person may maintain an action for legal or equitable relief or defense based upon a failure to perform an alleged promise undertaking except to offer commitment or agreement, colon, A, to lend or borrow money. And then there is a B, and then there is a C, so there were three different things that you cannot do under the statute, if you read it literally: One is to maintain an action for legal or equitable relief or defense based on an agreement to lend or borrow money.

Well, that would be news to most people in the world. We think that you can bring suit on an agreement to lend money, but the statute must mean more than that.

THE COURT: It does. It says involving a case where the principal amount is in excess of $50,000 unless it's in writing.

MR. KEFALOS: But, you see, that's the curious part. That's where I was convinced there was a typographical error, because I thought there must be a break after $50,000 and that unless must be in a separate paragraph so that it would modify A, B, and C, but it's not. If you go to the original language in joint resolution, it's written just like it is here, which means all that language only modifies item C, which is to

renew, modify, amend. The prohibitions against A and B are absolute. They're not conditioned on the existence of a writing.

So you're scratching your head, and then you go to the next section, two, and what does it say? It says failure to comply with subsection one precludes an action or defense based on any of the following legal or equitable theories, and then it's got A, B, C, D, E, the various defenses, promissory equitable estoppel and implied agreement based on course of dealing or performance; C is an interesting one we're going to talk about in a minute, partial performance, except to the extent the partial performance may be explained only by reference to the alleged promise and the accepted offer.

So digest that for a minute. Isn't that an odd way to work the statute in? Instead of saying that you may bring an action to lend or borrow money but you can't raise these various defenses. It says you can't bring that. You can't bring that action, but if you do, failure to comply with subsection one, what is that supposed to mean? Normally, you wouldn't even get that far, because Molly would stand up and say, Judge, it says no person may maintain an action and they did, so they're not allowed to do that. But section two contemplates that you have failed to comply with that section, and if

you do, you still get to bring a lawsuit but you don't get to raise these various legal theories.

So that is odd enough, but you don't need to solve that for purposes of this 12(b)6 motion because we have alleged in numerous places in the complaint that there were writings signed by BB&T that memorialize this agreement.

We've also alleged there was partial performance and that the partial performance did meet the requirements of Section 2(c), because it may be explained only by reference to the alleged promise undertaking except to offer commitment or agreement. Specifically, in our complaint, we allege that as Mr. Kefalos indicated that things were just going great for Skywaves.

In paragraph number 12, it says that they had won two General Dynamics contracts. They have won a $12 million Navy Coast Guard project. They have won a $20 million New York state police contract, that they were increasing the number of requests for quotations and, they decided they needed to go out and get a larger source of financing, because you have to have the money to make the product before you can sell it and send the people a bill and have them pay it, and so you need a bigger, better factoring agreement.

And so they went out. They had proposa1145

from Hunt Capital and Wachovia and BB&T, and the complaint alleges that Mr. Edahl, from BB&T, came and said, We want to be your bankers. You guys are going to make it big, and we're going to bend some of the rules. We're going do things for that are sort of outside our underwriting guidelines, and we're going to expand your capabilities under your factoring agreements. We're going to change some of the requirements, and those were all listed in the complaint as well.

So that reliance, that is, the reliance and the partial performance, we allege that Skywaves agreed to that and said, Okay, we're going to turn down Hunt Capital. We're going to turn down Wachovia. We're going to bank with you. So that reliance, that partial performance was exactly as it says in subsection C. It can be explained only by reference to the alleged promise undertaking except for offered commitment or agreement.

THE COURT: I'm struggling with the concept of -- even if everything that you're saying is true as between Skywaves and BB&T having an agreement and there's exceptions, like can you get around the various parts of the statute, where is it in the law that investors in a company that that had an agreement with another company get to sue directly? Shareholders, investors --

MR. COOKE: I'm going to let Mr. Duffy

explain that, but let me just say my little piece on that.

Their complaints allege that they were induced to invest by those specific representations, by Mr. Edahl, that they went to a meeting, they traveled to a meeting with him in which he sat down and explained to them how he was going to -- how he and BB&T were going to be their banker and their complaints allege that in reliance upon those representations, they made their investments in the company.

Now, before I say anything wrong, I'm going to allow Mr. Duffy to elaborate on that.

THE COURT: All right.

MR. DUFFY: Your Honor, that's exactly right. There's too narrow of a view to suggest that those tort claims arise out of a factoring agreement, and that really is kind of theme that permeates a lot of the briefing from the bank is that, hey, all we have is one customer and we have a standard debtor/creditor relationship and there is no duty to anyone else, but, Your Honor, to answer your specific question about where does the duty arise for the investors, that is from -- let's see, the allegations, and, really, the paragraphs are different in all four complaints, but, essentially, it is about the representations made.

There are several allegations regarding how BB&T got Skywaves as a client to start with, but once that happened and they needed this new capital call, or had big expansion plans, BB&T's representative, Mr. Edahl, went, travelled to McBee, South Carolina, to make a presentation to investors, and it's based on what he said to the investors, which isn't, hey, we're the banker, it was, based on our review of the company, the company is going to do well. This is well positioned. It has these different markets to hit. We are fully committed to being a partner, and we're going to structure something outside of the ordinary course.

Well, our investors relied on those representations, which we allege were known to be false at the time or were negligently made, and that --

THE COURT: In what way? Because you can't normally base a fraud claim on a future act. It has to be something that presently exists, and that's the basis for the fraud, not that, I think you're going to make a lot of money in the future, if you do something in the future.

MR. DUFFY: They said that what they would provide is the equivalent of the private equity financing, which was false, but that is what they told the investors who then sunk their money into the company.

THE COURT: What does that mean, we're going to provide you with private equity financing?

MR. DUFFY: Everybody knows the Hunt Brothers from Texas put money in whatever promising businesses there are. Well, Hunt had proposed this private equity firm, had proposed a multi million dollar investment in this company.

THE COURT: And these people thought BB&T was going to invest in their company?

MR. DUFFY: BB&T said, Don't do that. We can meet your financing needs. We can create new, outside of the ordinary course of business relationship to take you public. That's exactly what was said.

Your question is, is it reasonable to rely on that? That is a whole different factual issue, Your Honor, but the duty is there based upon the representations --

THE COURT: No, my question wasn't whether it was reasonable to rely on that, it was whether or not it was a false statement about something that existed at that point in time.

MR. DUFFY: Yes, Your Honor.

THE COURT: You can't base a fraud claim on a future act.

MR. DUFFY: Your Honor, what I'm saying is

they represented something that was false at the time.

THE COURT: What is it that they promised they would do that was not true at the time they said it?

MR. DUFFY: They said that -- first of all, they're both negligent misrepresentations and fraudulent.

THE COURT: What did they say?

MR. DUFFY: They said that they were, in paragraph 41 -- again, there, that they were a partner of the company.

THE COURT: They were a partner of the company?

MR. DUFFY: They were there in the partnering growth. They were an equivalent means of financing as private equity. That was the present time of what these people were trying to decide, is where --

THE COURT: That gets back to the point. These guys thought that BB&T was going to invest in their company, when you're saying, We're going to be partners? I mean, that's kind of like saying something nice about you. We're going to be partners in the sense that we're all going to work together, which is always true as long as they're making money. But to sit there and go, You think I'm going to buy equity in your company? That's -- they actually thought that BB&T was going to become a partner and they were going to have to form a

partnership, governed by partnership law, other than just a generic, Hey, we're going to be partners as long as the good times roll kind of partners.

MR. DUFFY: Your Honor, they indicated they had the flexibility and ability to provide financing that they couldn't -- that we're saying they couldn't then do.

THE COURT: That's different now. Let's go to that in just a second, but that first statement about being partners, are you suggesting that they really did believe that BB&T was going to invest in their company?

I don't know that they could, under banking law, invest in a company, but they honestly believe that BB&T was going to become an equity partner in Skywaves?

MR. DUFFY: No, but they were committed to the financing it in a way that was different.

THE COURT: Now, again, that's something that's different.

MR. DUFFY: I'm trying to explain to you what I mean -- they say partner. I can't tell you what they meant by it or not. All I'm telling you is that you have the representative from a company -- from the bank, coming to make a pitch to investors for the company. That's odd to start with, and then you say you're going to be the partner, meaning here we are, close relationship, we want to do it all for you and that

can do and will do what a private equity group could do for you?

And I'm saying, Your Honor, that we have alleged that was false at the time, negligently made at the time. They had a pecuniary interest in doing it and that created a duty and the representations to make them fair, honest, accurate representations.

THE COURT: They ended up signing an agreement with them, correct? I mean, BB&T and these folks entered into a factoring agreement. That's what I heard, right? So they entered into a financing agreement.

MR. DUFFY: They already had a factoring agreement. What they were saying is we are going to do more, which I understand is the future part, but they represented what their ability was --

THE COURT: At the time of this pitch, we'll be partners and all that, the kumbaya meeting, that's all -- they had already signed a factoring agreement?

MR. DUFFY: Yes, and the point of this meeting was they were luring, inducing, investors into the company.

THE COURT: They had already invested -- how can you have an agreement with a company that doesn't exist? Did this company exist or not, and at the time

BB&T and Skywaves entered into this factoring agreement, did Skywaves exist and who owned it?

MR. DUFFY: Yes. Skywaves existed when they initially in 2005 had their financing agreement.

THE COURT: And did these plaintiffs, Voytko, Konersmann and these other folks that are investor plaintiffs now, were they owners in Skywaves at the time that the factoring agreement was entered into?

MR. DUFFY: Not all of them, for sure some of them in a much smaller level than they ultimately were off the growth plan that BB&T supported and induced others to invest in. That was 2007, Your Honor. That was after the company had been going. There had been a relationship with the bank. This is an additional -- and that's kind of what's hard to grasp about part of the case.

THE COURT: That's what I'm having real trouble grasping, because how you can say I'm induced to invest in a company when I'm already invested in it?

MR. DUFFY: They then invested in the growth, Your Honor, in hundreds of thousands of dollars, and several of them had not previously invested.

THE COURT: They invested in the growth. What does that mean? They think it's going to grow. Everybody is going to make money off it.

MR. DUFFY: Your Honor, the reason there was an investment and a need was because of the overwhelming response they had got, and they needed capital to fund the growth. So they had gone out and they had secured -- they sought proposals. They got proposals from a variety of people, including BB&T.

BB&T then went and made a pitch to other people rather than, you know, big, I'm going to be in charge Hunt Capital people to say, Here is who we are and what we can do, which we say was inaccurate, and that induced additional investment from some people who had never previously invested.

THE COURT: So what did they say -- all right. They had already talked to outside investors. You said the Hunt Brothers. That name -- I know a little bit about it, but I don't know anything in real depth about it, except I think they tried to corner the civil market at one time, if that's the same Hunt Brothers.

So they said, We don't want to do business with somebody who is actually going to own part of Skywaves, correct?

MR. DUFFY: No. In fact, they didn't say that. That's what BB&T pitched. Here is your advantage. We can be as flexible in doing this, but you don't have to give away the equity that you would --

THE COURT: That gets back to the first point I'm trying to make. These folks really didn't think BB&T was going to become partners in the sense that lawyers recognize partners, all right? They don't become equity investors because they were saying, You don't want an equity investor. They're just going to take you over like the Hunt Brothers would. We're basically going to offer you some kind of financing and partners in the sense that these guys were talking about is just a feel-good term.

MR. DUFFY: And I don't mean to get hung up on partnership term.

THE COURT: Well, I'm getting hung up on it because you're alleging fraud, and that is -- we got to talk about what, again, it is that they said was fraudulent, what they knew or should have known was not true at the time they made it, so I need to segregate those issues, and when you said, We're going to be partners, I said stop. That means something, in lawyer world, and that means we're going to become equity investors.

But now you're saying that's not true. That's not what I meant, that's not what they meant, and they understood that is not what they meant, that BB&T was not going to become an equity investor because

part of BB&T's pitch was, You don't want an equity investor. They'll take you over to run the show like the Hunt Brothers.

In other words, your fraud claim is just about a special financing that we can offer you that exists without becoming an equity investor; is that right?

MR. DUFFY: Generally speaking, yes, although we are at 12(b)6, and I don't want to concede what people are thinking.

THE COURT: I'm just trying to get my head around what the deal is here.

MR. DUFFY: In essence, that's correct, and the point is --

THE COURT: You didn't specify what your fraud is enough, I don't think. So we got to focus on that.

MR. DUFFY: Their fraud is they misrepresented what they were ready, willing, and able to do.

THE COURT: Okay. But that involves special financing, not buying into a new company.

MR. DUFFY: Yes.

THE COURT: I think we've chased that rabbit enough that if you want to go back to talk about the

special financing, talk about what true at the time they said it, involving the special financing.

Did they say we're going to give you something that is better than buying into your company?

MR. DUFFY: Your Honor, they represented, according to our allegations, that they basically had done their review of the company, understood the growth, the growth cycle, shortened long-term capital needs, and specifically told these people that they didn't need a large bank or an equity investor.

THE COURT: What is not true about that?

MR. DUFFY: Because apparently they did, because you have someone who doesn't -- they're representing they had the capacity to be flexible with their financing arrangements in the same way and be able to carry them to an idea, which is how I suspect the reason BB&T wanted to do this to start with is because they wanted to hitch this on a rising star, like Edahl did, so they were making representations that they couldn't and knew they shouldn't make that they knew at the time they couldn't live up to.

And so they advised people, taking on an additional duty, by the way, under the cases, we've done the review. Here is where you are. Here is how great you're going to do. We're going to do something outside

the ordinary course, again, undertaking a duty beyond the debtor-creditor relationship, and that you don't need -- that we are the equivalent of your other options, which we have alleged that they're not. They weren't. They made misrepresentations at the time, Your Honor. They were -- other -- there are several others. I would be happy to read them.

BB&T was fully committed to providing short and long term financial needs for growth, act as a partner, which I mentioned --

THE COURT: That kind of statement is so vague. I mean that, would be -- unless they specifically said something like, Well, we're going to loan you $10 million, to say, We're going to provide your financial needs in the future, I mean, you're going to have to meet certain -- I don't think you get to walk in and say, Well, in my mind they were going lend me $10 million, and maybe in their mind it only meant a million or maybe it was 10 million and 100 million.

That's kind of so vague that it's not actionable, I don't think, to just say we're committed to meeting your short and long term financing needs. You don't leave yourself that open within parameters. Everybody knows you're going to have to provide documents that aren't false and things like that.

MR. DUFFY: I think it sounds to me that what you're describing is when a company comes in and says, Here is what we want, and they say, Okay. We can work with you. That's different than sending a representative to someone who is not even a client to make a pitch to induce people to invest money.

It's totally different than whatever your client relationship is with Skywaves. You went there and made representations to people about what you -- what you analyzed, what you said you analyzed, and you people relied on your analysis to make -- of the capability of both the company and the bank to make that investment.

THE COURT: Yeah, but they don't -- are you certain that it's the law that you get to go and make a pitch to somebody and say, Look, we want to be your bank, all right? And we want to be your lender, and we want to loan you money.

Now, based on saying something that vague, the people then get to say, My goodness, you had no intention of loaning us money because later on you asked us for financial statements and you asked us for proof of contracts that we told you really existed and that sort of thing. At some point in time, I mean, banks just aren't in the business of loaning people money based on sales pitches. There is always the follow-up where they

say, You know what? We're going to need to see your lease. We're going to need to see your last year's tax return. We're going to need a financial statement. We're going to need this or need that. They don't say, We're going to cart blanche finance your dream.

MR. DUFFY: Right, and what you're describing is exactly what I'm saying is different. That is describing what you can do for a client in that back and forth. This is a different situation where they've undertaken different duties to different people.

It's not anymore a deal with a bank, working with a client. They've gone to outside people for the purpose of telling them, This is good. Invest in this group because we're here and look what we will do, what we're able to do, and those people aren't going to have the -- BB&T said, We've already done the analysis. Here is where we are and here is what we're able to do, and they weren't able to do it when they said.

THE COURT: Maybe that needs to be where we circle back to the requirement of what BB&T said to these folks and whether or not that needed to be in writing, because, again, you're saying BB&T came in, made this pitch, and they said they're going to do these things for us, and based on that, we're going to rely on that. Well, again, I'm suggesting that it's a little different

for anyone, whether sophisticated investor or not, but I really don't think it's the law either that you get to come in, make a sales pitch that is kind of broad, and say, We want to be your bank.

I don't get those calls every day, maybe you guys do, but banks don't come in and say, I want to be your bank and this is what I can do. What they do is they come in and typically say, We want to be your bank. We want to be your bank especially, on a level like this and put down in writing, This is what we're going to do for you.

And you're saying all of this was done based on a salesman from BB&T coming in and there was nothing in writing?

MR. DUFFY: No, Your Honor. What I'm trying to do is say that that all relates to a different point of Skywaves and BB&T, whatever they were working on. There are writings. We have alleged it and we have them, that is there.

What we're talking about over here is totally different than a bank coming to do a sales pitch for a client. The bank is coming, giving advice about an investment. That is entirely different than an ordinary debtor/creditor relationship you're trying to create as a salesman for the bank. You've already got the client.

What are you doing, going out and trying to induce people to invest in the company? That is taking on additional duties that under -- let's see -- the cases for the different duties --

THE COURT: This is where it just gets -- I mean, it's so out of the realm of what is normal that I'm having trouble getting my head around that a bank would come in and have a set down meeting with investors and investors-to-be of a company and say, we want to do business with this company, and you're saying that those investors get to say that sales pitch to become that company's bank then becomes the basis for a fraud claim, for the investors to sue the potential lender when a deal down the road doesn't materialize and it wasn't in writing.

It was just kind of vague, we want to be your bank and we gave you very strong, good feelings that we're going to invest in your -- we want to handle your company's financial wellbeing for the purposes of this factoring agreement, and based on that, an investor gets to sue the bank and that that is a claim that exists outside of the bank's claim against -- or the company's claim against the bank for some sort of agreement, breach of contract. I mean, I'm just struggling with that, because as you've said, they're not fighting the fact

that you, at this point, have stated the basis of a breach of contract claim with BB&T insofar as Skywaves is concerned.

They ultimately don't think you would be able to prove it, but you've alleged enough to get past it. This is a different breed of cat to be able to say the people that attended that meeting on the basis of wearing two hats, employees of the company and people will decide whether or not I guess they wanted to invest more time or money into that company get to set down and then sue that bank for what got said at that meeting when the contract to do that got breached later is one thing, and then the other would be to say, well, there's something you said in that meeting that was false at the time and you knew it was false, we relied on it, and it was significant enough and material enough and specific enough that we get to sue you down the road for it.

Now, I'm telling you, that's a tough nut to crack. I think he wants to rescue you. I think you were doing a good job on handling this.

MR. KEFALOS: This meeting, there were certain representations of fact that were made. In a typical factoring agreement, the way this -- in fact, the way this factoring agreement began, BB&T would buy the invoices, that is, the invoices for the products were

already built, 85 percent of the cost, and that was memorialized in writing.

Orders continued to pour in. Skywaves couldn't meet the orders, so BB&T says, Well, I'll tell you what we'll do: Instead of waiting for the product to be finished and you issue an invoice to buy it, we'll start to buy your purchase orders from you, okay?

This was not memorialized with a new writing. This was memorialized through the course of conduct and a series of e-mails. The products continued to -- the orders continued to roll in, so BB&T and Skywaves couldn't keep up with the orders, so BB&T says, I'll tell you what. Instead of buying your invoices or your purchase orders, we'll now start buying your site plans.

In other words, when the New York state police identify on a map where they're going to be building in the next six months, we'll buy those from you, so coming to the meeting with these investors, some of whom were principals in the company and some of whom weren't, the BB&T representative says, We're going to be buying the site plans from you, so we'll be able to get the money up front before you even start to put your parts together, and that will allow you to figure your process.

The representative also said, but we need

some more cash equity. We need to show some balance, and we need you fellows to come up with some money to put into the company so that the balance sheets looks better.

Based on those representations, that is, the promise -- the representation and effect in the course of dealing that BB&T was going to be buying the map plans, these investors made their investment. Later on we found out that was false because when the BB&T sent their representative from the home office down to look at the way things were operating and he says, Well, you guys are submitting maps and getting paid on it, and he said, Well, yeah, that is what our agreement was, he said, We never do that. We never, under any circumstances, would go ahead and fund a purchase order or buy a factor based on a map that someone later says they're going to develop.

So we learned at that point that what had been promised before as being flexibility on BBT's was, in fact, not true. They didn't have the authority. They didn't have the right, and they didn't have the ability to do this kind of flexible lending.

Now, this is an interesting e-mail process, because the only formal written agreement is the 85 percent of the invoice. As the system evolved and as BB&T moved down to purchasing the purchase orders and

purchasing based on the map locations, BB&T writes and says -- writes to Skywaves and says, Look, we don't have the forms or the paperwork that match up with what we're doing, and rather than hire lawyers to draw new paperwork, we've just let our letters serve as the memorial of this agreement.

Skywaves says, Fine. We'll go ahead and continue to act on that basis, and Skywaves did until people from the home office, from BB&T came down and said, Well, we never authorized this. This is not the way we do business.

They accused Skywaves of committing fraud and having committed some misconduct and pulled the plug on the financing when this was the financing that had been arranged all along by the BB&T representatives.

Anyway, I digress. The point I was making is when the BB&T rep went to the investors, he said, We are funding presently and will continue to fund based on these map locations. We need you guys to put some money into it to improve the balance sheet, and we will continue on. Based on and in reliance of that representation, these various investors --

THE COURT: Let me stop you. When they went to them and said, We'll start doing financing on the maps, they didn't do financing on the maps; is that

right?

MR. KEFALOS: That's right.

THE COURT: And it was subsequent to that that some auditor, or somebody else up the food chain, came down and said, Hey, somebody screwed up, and we don't do that, and we're not going to do this anymore.

MR. KEFALOS: Yeah. They called a default, saying you have been submitting false applications for money.

THE COURT: Well, I guess maybe then when you talk about that whole fraud, material element of fraud, being a false statement at the time it was made -- because it sounded like maybe Edahl, he thought it was true, and, in fact, it actually did come to fruition that that is the way they financed them for a while until some higher up found out and said, Wait a minute, wait a minute. This was not done properly.

But how could Edahl be sued for -- how could Edahl's statement be basis for a fraud claim if Edahl thought he could do it and it turned out he did it for a while?

MR. KEFALOS: Well, maybe Edahl thought he could do it. Maybe he thought he could do better, but that is something that needs to fleshed out later. The fact is when the higher ups came down and said nobody had

any authority to approve this, this is wrong, this is not the way we do business at BB&T, that made what Edahl said false.

THE COURT: No, it made it wrong. It may have been false -- false in the sense of fraud. If Edahl believed it was true, he was just mistaken. If what I'm hearing is right, it's because it sounded like, in fact, it became the method of financing thereafter until later on down the road.

MR. KEFALOS: And it may be true, and that is one part of what we have to look at, when we get into discovery. Did Edahl believe this? Was he mistaken, or was he going outside the party line? Edahl made promises and representations about the method of funding based on these map locations.

THE COURT: Okay.

MR. DUFFY: And to pick up on your point, whether he thought it at the time or not, it was negligent in making it that way. This company wouldn't allow it. They should have investigated that beforehand. That is clearly a negligent misrepresentation that you have a duty to take reasonable care in making some representations when you have a pecuniary interest in it. The Winburn case establishes that. It establishes that he individually had that duty if he has a pecuniary

interest, and it also says if you assume in the course of your employment that establishes a pecuniary interest, so he had a duty not to just go up and travel, make a pitch of something they wanted to do. He had to know when he said that they were able to do it that they were able to do it, and they were, whether fraudulently, whether it intended to mislead him, or whether he just misled them negligently is something we can find out in discovery, but it was something that he represented they were able to do that they weren't.

And that was true at the time, because once it got up to the people that make the decisions, they cut it off. It's not that they didn't try to do, so that is not really the point of whether -- of the nature of his representation. And, Your Honor, to pick up on the issue that we were struggling with, I think it helps to look at the Murray versus Bank of America case where a duty -- there was a duty created to a non-client who just came in when a fraudulent account had been opened in her name, came to the bank and said, That's not my account, please close it. You've got my information, and they didn't close it for another month, and they were held liable with a duty to her and negligence. She wasn't even a client.

Now, here, the bank intentionally went to

other people and said these things that we contend and allege were false when said, that they were negligently made or fraudulently made, and that certainly creates a duty again to take reasonable care in your representations. Under Winburn, it also has a duty of disclosure, Your Honor, which is another part of the case under a case I would be happen to hand up to you, Consolidated Insurance Benefits versus Conseco Medical Insurance. It's a district of South Carolina case that's a very interesting parallel to this one because they say -- they go through the analysis, say, Okay there is no fiduciary duty there, in that situation, but what happened was there was a course of dealings with an insurance broker and essentially a provider of nationwide health care programs, and they convinced this broker to just use ours. It would be exclusive for us, and then when they had financial trouble, the broker went to seek advice from these -- from the head office who made these assurances to him about the financial capabilities which were not accurate, and that created this duty of disclosure, that you have to report when it becomes -- in fact, you weren't financially sound and you pulled the plug and didn't do this kind of work anymore that you convinced these people to do exclusively with you, and so it's -- the point is, that as this relationship went

along for a little while, they never -- the bank never even told -- never disclosed that we're not going to do -- you know, we need to make something different. We need to make changes. They just pulled the rug out from underneath them, a breach in this duty to disclose which under the Consolidated Financial case and under the South Carolina National Bank -- another South Carolina case along that line which they've undertaken by taking on something they concede that was outside their ordinary course of business, that they've gone and made pitches to -- and given advice, which is, again, beyond the scope of the ordinary business, for their benefit, for their own benefit, that they had a pecuniary interest in.

And that creates additional duties for the bank to both the -- to both Skywaves under, again, the cases that are cited in the briefs, Your Honor, Burwell versus South Carolina National Bank and Cowburn vs. Leventis recognizes that you have that duty when you undertake to advise, in that case a client, about something that is beyond the scope of your contract duty.

Your Honor, the oft-cited Winburn case on a negligent misrepresentation that we have the pecuniary interest, they have the duty to take reasonable care, which we have alleged Edahl did not and as Mr. Kefalos explained, it's clear that he did not exercise reasonable

care in making these representations for the specific purpose of inducing in investments into Skywaves, which BB&T already had a relationship with.

Your Honor, there are a couple other points I'll address briefly that the bank has raised in the motion to dismiss. Some of them are about the unfair trade practices claims. One of the points is it's not applicable here because the bank is heavily regulated. I expect you've seen that before, the Ward vs. Dick Dyer Associates, South Carolina case in 1991. Supreme Court said that's not what it means. It means if the regulations specifically permits or allows the act that's done, then you can't have an unfair trade practice, but just because the industry is regulated doesn't mean you can't have an unfair trade practice.

Same point they allege that we haven't made specific allegations about protecting the public interest, Casey Outdoor Advertising case makes clear the potential for repetition, which we've alleged is sufficient to establish the impact on the public interest.

Again, the same issue for an unfair trade practices claim for Mr. Edahl saying you can't have unfair trade practice claim against him, which is really against the company, but in Plowman vs. Bagnal 316 1172

S.C. 283, the South Carolina Supreme Court made clear if the facts are done by the individual then that claim can lie against the individual. Certainly, you know, if you've lost a job, maybe it's harder to prove than as a potential for repetition, but that something that would need to be addressed after a 12(b)6 motion.

Your Honor, the breach of contract accompanied by fraudulent act, there is a question here also about allegations of fraud. Fraud in this instance under Connor vs. City of Forest Acres means an act with dishonesty in fact or unfair dealing, and that is exactly what has been alleged, Your Honor.

Let's see. Paragraphs 55 and 56 -- again, Your Honor, it's what we've discussed, that they understood the needs, basically showing that they made then analysis already that Skywaves did not need a large bank or additional capital funding for its broker, that it was essentially good investment, position for success, they wanted to take them to an IPO that they would provide funding to all the financial needs, and they would do that through something outside of the ordinary course of business that was devised exclusively for Skywaves.

And Your Honor, the other representations made at that meeting -- let's see. Based on their own

comprehensive review, BB&T believed Skywaves would be a significant infrastructure supplier. That is representing to investors, Here we have expertise. We've done this review. This is a good investment, then the representation was we are fully committed to providing short- and long-term funding, would act as a partner, and the commitment is going to be unique and the equivalent of funding offered by Hunt Capital and by Wachovia, which it wasn't. They weren't able to do it at the time, and he should have known it if he didn't.

I'll be happy to answer any questions now.

THE COURT: It looks like Mr. Cooke wants to say something.

MR. COOKE: Briefly, on that point, again, this is a 12(b)6 and I think it's probably helpful to the Court to have this dialogue, but we do have to look at the what the complaint alleges, and the part that Mr. Duffy just paraphrased is from paragraph 61 of the complaint. It says -- and, bear in mind, BB&T had already been Skywaves' banker for two years at this point. The original factoring agreement was entered into in 2005. This meeting occurred in July 2007.

Mr. Edahl wasn't some guy with a loud suit and, you know, a slick way about him. He was already the relationship manager between BB&T and Skywaves. His job

was to serve them and to keep them as a client.

Under the allegations of this complaint, we may never be able to prove it, but what we would intend to prove is that he oversold his authority. He made representations that were not true and that he knew they weren't true, and that is what we allege in the complaint.

Paragraph 61 is all the things that Mr. Duffy just said. Paragraph 66 says, however, defendant's representations were untrue when made. Number 67 says, In point of fact, at the time defendants made the above detailed representations, they had no intention of fulfilling their promises to Skywaves, and that invokes the case as well, and I'm sure Your Honor knows that an exception to the rule that says it has to be a present fact is that if you had no intention or you did not have the ability to fulfill your promises, then that could become a fraud.

We've made in our brief some other arguments that I don't think you need to get to. North Carolina law applies. There is a provision in this statute of frauds that says that if there is another statute of frauds that is inconsistent with this one, then you use the other one, but for our purposes, I think all we need to say at this point in 12(b)6 is that further

development have made all the allegations in the complaint very comprehensive, but further development needs to be made as to the nature of the agreement between the parties, and is it a loan? In other words, does it come under the statute of frauds, or is it something else, factoring agreement, and, second, do they meet the writing requirements?

We've alleged in numerous paragraphs that there was a writing. The original one was written and actually literally signed, and that the parties entered into what was the legal equivalent of signed agreements by signing letters and e-mails and agreeing that that would be the form agreement with the parties.

And now we have a third thing that needs to be disputed, and that is what exactly was the representation and does it rise to the level of negligent misrepresentation or fraud and was the reliance reasonable, or was it just puffery?

THE COURT: All right. Well, we've let them gang up on you, Ms. Cherry, and you usually don't let them do that, but I will let you respond.

MS. CHERRY: Just very briefly. As Mr. Cooke had said, to the extent there may be some details or specific questions that the Court has, I think we -- all parties attempted, Your Honor, to address nuances that --

or discreet issues that may have come up, and I believe we all filed our brief, so to the extent there is something that I don't address, I would request -- my hope is that it is addressed and if the Court has a lingering question that it is addressed in the briefs.

But the overarching response, Your Honor, to all of the arguments that have been made is to go back to the very beginning and what we said at the outset.

Looking at the allegations in the pleadings -- and I will submit to the Court there have been some things said this afternoon that are actually not alleged in the pleadings, but I do think paragraphs 53 through 61 in Skywaves' complaint pretty consistently represents the allegations of all of the plaintiffs.

And, Your Honor, just for point of clarification, there is no allegation that BB&T was acting as a legal partner, and I think opposing counsel concedes as much, in terms of at least at this stage that's not the allegation, the specific is BB&T would act as a partner in managing Skywaves' growth, but in context of all the allegations, it is in terms of providing Skywaves short-term, long-term financing needs, all of these representations pertain to BB&T's alleged promises to fund Skywaves, which is where we were at the very beginning, Your Honor, notwithstanding the disagreement

among the parties in terms of exactly what that agreement was.

At the end of the day, it's an alleged promise to fund their financing needs. And that's the very cause of action, causes of action, by these investors that the South Carolina statute bars. At most, Your Honor, taking all of these allegations as true, the only party who has potential claims against BB&T -- again, Your Honor, acknowledging that we don't agree with the merits of those claims, but the claims themselves at this stage, are Skywaves, which is precisely why BB&T only filed a partial motion to dismiss, recognizing the stage where we are, legitimately, is a matter of law, BB&T couldn't move to dismiss those and exact to prevail, but with respect to these investor claims against BB&T, based upon alleged representations by one of its employees to meet the future financing needs of Skywaves, as a matter of law, cannot lie against BB&T and Edahl, not just because of the statute, but because they are claims of future performance, future promise.

And I will note, Your Honor, to the extent that the plaintiffs are trying to argue that that created some type of fiduciary relationship, the South Carolina statute specifically says that it doesn't allow a claim on an alleged fiduciary relationship.

And I would beg to differ with counsel's argument that the provisions in subsection C of the statute, unless the parties seeking to maintain the action has received writing, doesn't apply to sections A, B, or C. The phrase or is used, meaning A or B or C, unless the parties seeking to maintain the action have received a writing.

Again, Your Honor, these are investor claims that have no basis in this Court against BB&T or Edahl, based upon the statutory law and the case law in South Carolina. There is no duty to those individual plaintiffs as a matter of law under the circumstances alleged, no right to rely. And, Your Honor, again, the representations themselves would not give rise to a negligent or fraudulent inducement claim because they are alleged promises of future funding or future performance.

And at the final point under the unfair trade practices act, the allegations in the complaint make clear that this is a dispute based upon an agreement by the parties, and I think the case law in South Carolina establishes that if it is a circumstance that involves the parties in and of themselves, that doesn't give rise to an impact on the public interest, such that the defendant's motion to dismiss should be granted as well, Your Honor, on that cause of action.

If the Court has any specific questions, I would welcome the opportunity to address them.

THE COURT: I think that's all I have for today. I think what I would like y'all to do is submit me proposed orders within two weeks, and I'll go back and look at this.

In light of understanding the fact situation a little bit better, I'm going to reread these briefs. I'll let y'all know. Okay? So two weeks from today, whatever that is.

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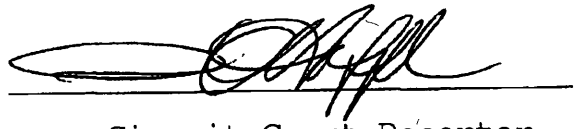
(Whereupon, the proceedings were concluded.)

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I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 15th of August 2011.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

February 10, 2012



Circuit Court Reporter

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF CHARLESTON 2009-CP-10-7516

SKYWAVES I CORPORATION, Plaintiff, -vs- BB&T COMPANY, Successor in Merger to Branch Banking and Trust Company of SC, a/k/a BB&T, and JAMES EDAHL, Defendants.	)	TRANSCRIPT OF RECORD January 12, 2015 Charleston, South Carolina

B E F O R E:

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

A P P E A R A N C E S:

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John England, Esquire
Julio E. Mendoza, Jr., Esquire
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Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

(Monday, January 12, 2015.)

THE COURT: All right. I guess there is a motion to strike, a demand for a jury trial, and filings going both ways on this, so I guess plaintiff made the motion to strike; is that right?

MR. MENDOZA: Your Honor, Rick Mendoza for BB&T. It was BB&T's motion to strike the jury demand, and then Mr. Edahl, the other defendant, has joined in too.

And, Your Honor, just by housekeeping, Mr. Chandler and I are kind of splitting issues some so that we don't duplicate the arguments, so if you'll address principally the standing Mr. Edahl also has with respect to the jury trial waiver provision.

THE COURT: All right. Feel free to go ahead then.

MR. MENDOZA: Thank you, Your Honor. Your Honor, Branch Banking & Trust Company, BB&T, filed its motion to strike the jury trial demand based upon jury trial waiver provisions in six documents signed by Skywaves, the plaintiff in this case.

Your Honor, I say six documents because I emphasize six times Skywaves signed a waiver of its right to a jury trial. The jury trial waiver provisions are applicable to the causes of action that the plaintiff has

alleged in its amended complaint. And Your Honor may recall that you previously dismissed two of the causes of action so there are now, I believe, six causes of action remaining.

Your Honor, the jury trial waiver provisions are quoted in full in the memorandum that BB&T filed with the Court. Your Honor, we filed that memorandum on December 22nd. We also filed a reply to the plaintiff's memorandum in opposition to our motion. We filed it this morning. We received the plaintiff's memorandum on Thursday afternoon. We were unable to get our reply prepared in time to file on Friday, and, Your Honor, I would like to address some points that were raised in the plaintiff's memorandum in opposition because, as I read their objection, they don't take issue with the fact that the jury trial waivers were conspicuous, that they're unambiguous, nor to they take issue with these being knowing waivers of the right to a jury trial by the documents that are executed.

Your Honor, the plaintiff instead has noted that it brought its actions under the factoring agreement, as we refer to it, and it's Exhibit C. Your Honor, there were joint exhibits submitted by the parties previously, and it is Exhibit C in those exhibits.

The factoring agreement, Your Honor, includes

a choice of law provision that states that substantive law matters will be decided under North Carolina law, and, Your Honor, I'll be more specific to actually quote the provision. Again, Your Honor, it's Exhibit C if you would like to look at that sometime later, but the choice of law provision is paragraph 25 -- it's actually titled applicable law.

It says, This agreement shall not become effective until accepted by BB&T in High Point North Carolina, and here is the pertinent 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.

This same document includes a jury trial waiver provision, Your Honor, and the plaintiffs take the position that because the factoring agreement includes this choice of law provision for North Carolina law and there is a statute, a North Carolina general statute, I think it's 22(b), but anyway, Your Honor, in North Carolina one cannot waive jury trial, the right to a jury trial; however, Your Honor, as we have set forth in the reply, North Carolina law is not applicable with respect to the question of the jury trial, and there are a couple reasons why.

I referred to the choice of law provision a few minutes ago as being substantive. When you look at the authorities on this particular question -- and of course, it's not the first time it's ever arisen. Your Honor, it's summed up in the restatement of contracts that the right to a jury trial is a matter of a local forum. It is a procedural right, it's not a substantive right, and the Courts have recognized this distinction that you may have a choice of law provision which provides that substantive legal issues will be decided under that other state, I think they refer to it as a foreign state, but the other state, in this case North Carolina law, but that isn't a procedural matter.

That it's for the local forum to apply its procedures and, Your Honor, there are a couple points I would like to make in regard to that before I even move on to another. One is that when you read the provision that I just stated, it's very clear that the applicable law provision, paragraph 25 of the factoring agreement, clearly intended that the substantive law matters because it says all acts, transactions, rights, and liabilities under this agreement. Nowhere is there any reference to procedural matters, such as a jury trial, and, in fact, this very document includes a waiver of right to a jury trial.

So the choice of law provision and the factoring agreement clearly is intended to be limited to substantive legal matters, and it makes sense, Your Honor, also, because when you look at it, the right to a jury trial doesn't determine, you know, what law will be applied to the issues, it just determines the method in which the case will be tried, and that's what several commentators have noted.

The local forum determines the right to determine what method will be used for the trial, whether it's jury or nonjury. Your Honor, of course, as you're aware, in South Carolina -- well, the Courts of South Carolina recognize that the party may validly waive its right to a jury trial, and we've cited the Supreme Court decisions in our reply, and I'm sure Your Honor knows as well.

We included a case that was decided in Richland County just less than a month ago where the Court forced BB&T provision for a jury trial waiver and documents. I've been addressing, though, the question of whether the factoring agreement -- we maintain the factoring agreement provisions of their own would warrant striking the plaintiff's jury trial demand, based on the jury trial waiver provision in it, and then also the choice of law provision being limited to substantive

legal matters, but, Your Honor, there are five other jury trial waivers under documents that provide that South Carolina law is controlling, and we have included those provisions and they're essentially the same, and it is very conspicuous and unambiguous, and, Your Honor, there is one aspect I would like to quote.

In reading it, it says: The unsigned hereby waive right to trial by jury of any matters or claim arising out of, and, of course, the five different documents, it cites the document, and then it carries on, or out of the conduct of the relationship between the undersigned and BB&T. Each of those five other waivers provide that the right to a jury trial is waived as to any claim the other party might assert, or BB&T would assert, that arose out of the relationship between the parties.

In fact, Your Honor, those other five documents were just of that nature. They arise out of a relationship. They pertained to funding or loans that BB&T was providing in conjunction with the funding under the factoring agreement to Skywaves. The other jury trial waivers were essentially belt suspenders because we maintained the waiver provision factoring agreement was sufficient, but, Your Honor, if it weren't, we've got five other jury trial waivers, and they all say the same

thing; essentially, Skywaves has waived its right to a jury trial on any issues arising out of the relationship it had with BB&T.

Your Honor, there were a couple points that the plaintiff made in its memorandum in opposition to our motion, or relating to the fact that well, those other provisions don't really apply because those notes have been satisfied and we never -- BB&T never called those loans in default, didn't file proof of claim.

Well, Your Honor, that's not actually a valid reason to ignore those other provisions because none of those things matter. When you look at those provisions -- and again, we've included them in the full provision and memorandum we filed in December, but they're also in the joint exhibits we've given exhibit numbers, but, Your Honor, there is no condition that the waiver of the rights of jury trial waiver is not conditioned on anything. So long as this indebtedness is outstanding, it's not limited in time.

In fact, the actual language is that the undersigned hereby waive, hereby waive -- we're stating that is immediate. When the document is executed, the waiver occurred. Those provisions aren't limited in time, and particularly when it goes on to say that it's applicable to any claims that arise out of the

relationship between the parties. Certainly the other five provisions have continued efficacy and are applicable too.

So, Your Honor, we come back around to the fact that the plaintiff, six times, waived its right to a jury trial on any merits between the parties. The waiver conditions are conspicuous, they're unambiguous, and we maintain there is no basis on which they can properly survive on jury trial on any of the matters in this case at this time, and I mentioned earlier with regard to all the causes of action as they stated in their memorandum, their claims are all based in one matter, or, in other words, on the factoring agreement, so it's not like there could be some claim outside of it.

But even then as I say that, the labor provisions say any claim arising out of the relationship, so, Your Honor, we maintain that the jury trial demand be stricken.

THE COURT: So it's your position, basically, that North Carolina law controls the outcome of this case except for the jury provision, and we're to ignore that statute?

MR. MENDOZA: Well, Your Honor, yes, I say it controls substantive matters. The other are procedural matters that are particular to our Courts, the court

system, but we maintain the jury trial demand as a procedural matter, and we have cited in this request this morning authorities including the restatement, Your Honor, for the provision.

THE COURT: All right. Are you speaking?

MR. CHANDLER: Judge, Nelson Chandler, and I represent codefendant James Edahl who has been sued individually, and rather than rehash the arguments about the applicability and the enforceability of the jury trial waivers, we rely on the arguments advanced by BB&T with respect to the enforceability of the waivers. I'm here to address the extent to which that waiver also applies to my client, Mr. Edahl.

By way of background, the plaintiffs in this case are the borrowers and the defendant is the bank. My client, Mr. Edahl, was an officer/employee/agent of the bank at all relevant times during this -- during the underlying events, and he's been sued as the agent of the bank in connection with the claims at issue.

The plaintiff's position is simple as to my client, and it is that he was not a party to the factoring agreement, or for any of the other five agreements, and therefore he has no standing and cannot assert the jury trial waiver provision as to the claims against him.

Judge, first off, this is not a case where my client is the only defendant. BB&T, who admittedly was a party to all these agreements, has also moved to strike the jury trial waiver -- moved to strike the jury trial demand as to the entire case, and we join in that motion. So the issue is before the Court with the party with admitted standing to raise that issue, but even if my client -- even if they sued only Mr. Edahl and not the bank, it's our position that Mr. Edahl would still have standing to raise, invoke, and rely upon the jury trial waiver in the document signed by Skywaves and, Judge, I've cited a case in my brief, and I'll just hand it up to the Court. This is outside of this jurisdiction. I have two copies here.

This issue has not been addressed squarely in South Carolina one way or the other, Judge, but looking to other jurisdictions for guidance, the leading case on the subject appears to be the Third Circuit opinion in Criscinda, a 2007 case, and in that opinion, the Court looked at this very issue. That opinion actually arose out of the dispute as a result of merger between Mercedes and Chrysler, and the Chrysler folks sued the Mercedes folks over some misrepresentations they alleged that occurred as a result of that merger and they also sued some of the officers of the company, and the officer

the company moved to strike the jury demand.

And the Court looked at the issue and determined that where a corporate principal has entered into an agreement with a valid jury trial waiver, an agent of that corporate principal, even if he's a non-signatory, may raise and rely upon the jury trial waiver. And since that time, Judge, we've cited at least, you know, eight or nine cases that have looked back at Crisicinda and followed its reasoning, including one, at least in the Fourth Circuit there is a case I've attached as well from the district of Maryland.

In that case they looked at the common law and determined that the Fourth Circuit would do the same thing, and also allowed an agent of a corporate principal to invoke and rely upon a jury trial waiver in a document signed by the corporate principal.

And the rationale there is basically a corporation can only act through its agents and employees, and if you could get around the jury trial waiver simply by suing the agent of the company, the jury trial waiver would really be of no practical effect whatsoever, and, of course, jury trial waivers are recognized under South Carolina law, so we believe that this opinion -- and I'm not really aware of any -- I'm not aware of any contrary law out there deciding that.

Criscinda was wrongly decided or anything like that.

Finally, Judge, this would be a bit of a tougher call if the plaintiff or if BB&T were trying to enforce the jury trial waiver against my client, because he was not a signatory to the agreement. That would be a little bit of a tougher decision. South Carolina Supreme Court has actually decided that you can enforce an arbitration provision against an agent of a company or against a non-signatory of an arbitration agreement, but, anyway -- we don't have that here, but, anyway, that would be a more difficult decision.

In our case, all we're trying to do is hold Skywaves to the decision it signed, so we are a non-signatory to this agreement. We're not a party to those agreements, but we're trying to hold plaintiffs, who did sign the agreement, to that agreement to the extent they have to honor it with BB&T.

THE COURT: All right.

MR. CHANDLER: Thank you, Judge.

MR. EPTING: Judge, it's a small number of this bench that I would ask this question of: Have you had much time to look at the briefs that have been filed?

THE COURT: One just got handed to me prior to walking in. I think I saw yours over the weekend, but I don't -- I read one of them over the weekend. I just

got one of them, okay, so -- don't worry.

MR. EPTING: It may help, Judge, just a little bit of background. Judge, I at one time was talking to a jurist who told me he believed in the concept of KISS: Keep it simple, stupid, and I believe it's pretty good advice.

So what we have in this case is Skywaves had three loans with BB&T: A $400,000 loan in 2005 that had a promissory note and a loan agreement, and that was, Judge, related the purchase of some property. It had a 2007 promissory note, loan agreement, and security agreement, so those are the five agreements, except for the factoring agreement, which was also executed in 2005.

So we've got a $400,000 loan, we have a $475,000 loan, the 2007 loan, 475,000, and then we have the moneys that were withdrawn under the factoring agreement. So the first brief filed by BBB&T goes through the reference to the five waiver provisions in the five documents, excluding the factoring agreement, but, Judge, each of those agreements is inapplicable.

Mr. Mendoza says what has that got to do with it, that they aren't being sued by it? They aren't. The answer concedes they're not being sued upon, when BB&T, Judge, filed their claim in bankruptcy, the only document that they claim they were owed money on was the factoring

agreement, and both the 400,000 and the $475,000 loans have been paid in full, but somehow BB&T says these documents have some applicability, and a jury trial waiver provision still prevails.

So I suppose, Judge, what that means is that if Mr. Konersmann, who is in the courtroom, were hit by a BB&T vehicle that somehow these documents survive and he would have waived a trial by jury. I think that's ridiculous. Those agreements aren't applicable here at all. The only document that is in dispute as a claim or as a defense is the factoring agreement.

So the factoring agreement, Judge -- and what I would like to do is pass this up to Your Honor, if you would like. We'll start on paragraph 29, and in this case, in paragraph 29, there is some language about whether it's conspicuous or not, but that's not really our point in our argument.

You'll notice it says to the fullest extent permitted by law, and it goes on to, Trial by jury and the right to trial by jury on any issue in any way pertaining to this agreement or in any transactions or occurrences arising hereunder or governed hereby, so that's what the waiver says in this document.

We then go, Judge, to paragraph 25, and it says this agreement shall not become effective until

accepted by BB&T in High Point, North Carolina, and then it says, 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.

So what we know, Judge, is this is a North Carolina contract, and that provision -- that provision, 25, is repeated in two riders to the factoring agreement which is pages two and three to the document that I handed you up. Coincidentally, Judge, everything I am giving to you has been sent to you and has been filed.

So we have this as a North Carolina contract because it was executed and accepted in North Carolina, and we have an agreement that North Carolina law applies.

THE COURT: Let me ask you this: If you brought this lawsuit in North Carolina, your position would be unequivocally that those paragraphs do not have any weight whatsoever because there's a statute that says, you can't waive them, no matter what it says.

MR. EPTING: Right.

THE COURT: No matter how express it appears to be and highlighted, doesn't matter. There's a statute. You can't waive it. We get a jury.

MR. EPTING: Right.

THE COURT: That's your position?

MR. EPTING: Right.

THE COURT: Okay.

MR. EPTING: And, Judge, what I would like to do is pass up to you a case called Lister and ask if you will refer with me to page 10 of this case. And referring, Judge, to the bottom of the second column and running over through the first paragraph on the next page, and I am not going to read it, but, rather, just ask if you wouldn't mind reading it, and then I would like to address a few things raised by the case.

THE COURT: Okay.

MR. EPTING: And, Judge, since it came up several times in remarks made by Mr. Mendoza, if you would go over to the right-hand column of the second page, page 11, and you see under most significant relationship, midway in the page, second column, it states, South Carolina has not adopted the modern choice of law test found in the restatement.

THE COURT: You said 11. That's on page 10 of the one you handed up to me.

MR. EPTING: Sorry, Judge, 10. So in this case, Judge, South Carolina law would say we would look for validity and the interpretation of a contract to the law of the state where the contract was made. So in the absence, Judge, of a forum selection clause, which we

have in this case, South Carolina rules say you would go to North Carolina law to determine the interpretation or validity of a provision, and so while we've got the forum selection clause that says North Carolina law applies, you get to the same place when it came to the validity of some provision in the contract, because North Carolina law would still apply under South Carolina choice of law provisions, and it would invalidate the waiver of a jury trial.

And, Judge, I don't think there is any dispute about this --

THE COURT: I'm not sure I follow that. If South Carolina's law is we look to the contract and the contract says North Carolina law applies and we apply that to contractual terms, then you lose your right to a jury trial because you've waived it, and the only thing that gets you a jury trial is to apply the procedural statute that says you can't waive it. Whether you're in North Carolina or anywhere else, it remains to be seen.

MR. EPTING: Well, I'm not sure, Judge, if I would agree with that, but I don't know that it makes any difference in this case.

THE COURT: Well, as I understand, the only thing that is saving you or gives you any argument to stand on is that that North Carolina statute -- 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.

THE COURT: Okay. So I guess it really boils down to, tell me why I have to follow that statute that says you can't waive your right to a jury trial?

MR. EPTING: Because that's what the contract says you would do, is apply the law of North Carolina, and in North Carolina, that provision is void.

THE COURT: So that's really what it boils down to.

MR. EPTING: It really does, Judge.

THE COURT: Your position is that statute -- that provision of the contract applies to procedural rules and statutes of North Carolina as well as substantive law provisions of North Carolina.

MR. EPTING: Absolutely, Judge, but one thing, I think that the Court -- the suggestion that this is a procedural rule of a jury trial is erroneous, because think of it this way, Judge: First of all, Judge, it's a constitutional right. South Carolina law says it's a substantive provision.

The case that Mr. Chandler handed up to you

says that it is a fundamental right, but leaving that aside, Judge, if you apply the procedural law of South Carolina, what would you apply? We'd be entitled to a jury trial, right? If this truly were procedural --

THE COURT: If it truly were procedural, then I would only look to the contract which you waived it, because I wouldn't be concerned with -- well, for instance, I have no idea what the law is on in North Carolina about how long it takes to -- a defendant has the right to answer, but let's just assume it's 45 days as opposed to 30, right?

Because this contract says North Carolina law applies, you file, sue them in South Carolina, and after 31 days after you've served them you haven't heard, you move for an entry of default, but North Carolina, they had 45 days, in my hypothetical, they come in and move to set it aside, saying, Well, wait a minute. They sued us. This contract says North Carolina law applies in North Carolina. We have 45 days to answer a complaint, because under your argument, that's what I would have to follow.

MR. EPTING: No, I wouldn't make that argument, Judge, because I would say that that truly is a procedural rule. But all I'm saying to you is, in your example, you're assuming that it's a statute that says it's 30 days, correct, that you answer in 30 days? If

you go -- if, in fact, this is procedural, then you would go to the procedural law of South Carolina, which says we would be entitled to a jury trial, I mean, if it truly were procedural, Judge. It can't be procedural because they're relying on a contractual provision that says you've waived your trial by jury.

If we truly went to procedural law of South Carolina, we would be entitled to a jury trial to start with, so they can't even get there except for this provision. And then their own document says that you look to North Carolina law, and in North Carolina, this provision is void.

THE COURT: Okay.

MR. EPTING: And, Judge, addressing Mr. Chandler's argument in just a moment, you know, you decided -- I call it Skywaves I. We called it the investor suit, and I think I quoted it, Judge, the Supreme Court in the case that you ruled in concerning the investors ruled that the investors had no claim because they were a third party to the agreement between the bank and Skywaves and could not serve, so in this case, Mr. Edahl has no right to an argument that there is a waiver because he's not a party to this agreement, and it is only this agreement and this provision that he could rely on.

We're suing Mr. Edahl in tort.

THE COURT: For what?

MR. EPTING: Well, Judge, it's right interesting. Since we were last here, of course, Mr. Edahl -- we tried to raise this before you, Judge, before the case was decided in the Supreme Court.

Mr. Edahl told some of his superiors, not all of them, that this was financing -- that the factoring agreement was financing based upon invoices and then purchase orders and so that the amount of money that Skywaves could withdraw was on the basis of, first, invoices and later purchase orders.

And so on this basis, the bank called this loan and put this company out of business. Mr. Edahl swore to that in his first deposition. So at some point in time, Mr. Edahl decided that was a lie. So Mr. Edahl recanted, under oath, his entire testimony and confirmed that the agreement was what we said the agreement was every time we've been in here, and that was that they were funding on the basis of the site plans that we were getting from Verizon, AT&T, and General Dynamics so we are suing Mr. Edahl for the misrepresentation in his tort because it appears, at least to some extent, he has misled some of his superiors at the bank, and so we don't know at this time, Judge, if the bank agrees that

Mr. Edahl is their agent or not, agent for all purposes. So Mr. Edahl doesn't get the benefit of this provision, in any event.

Judge, I have a case I'm going to hand up to you. It's called Comer vs. Hurd. It is a case exactly like this. What is the Court to do when the contract provision provides for the applicable law and the applicable law says that provision is void? And, in this case, the Court decides that it must accept the law because in matters of validity and interpretation of the provision of the contract, the law where the contract is made would govern it. May I?

Incidentally, the right that the jury trial is provisional, I don't know what provision it is, but I think it's part of our constitution. It's a substantive right. We cite the case that says it's a substantive right.

THE COURT: Go ahead.

MR. EPTING: George wanted me to make this point, Judge: It is a question of what does the agreement say, and the agreement says that all matters, all rights -- uses the word all rights -- arising under the agreement are determined under North Carolina law. All liabilities are determined under North Carolina law, and so they're saying one of the rights they have is this

contract provision that we waived a jury trial right. You know, that's part of the contract, and that part of the contract is determined by North Carolina law, under the terms of the agreement.

THE COURT: I don't suppose I could convince you to take a nonsuit and refile in North Carolina.

You want to reply?

MR. MENDOZA: Yes, Your Honor. I'll try to be brief.

Your Honor mentioned earlier how the number of days to answer the agreement is on point. This is a procedural matter, the right to a jury trial. Whether the Court applies North Carolina law to issues and causes of action or whether a jury finds it, North Carolina law will apply to the determination of the legal issues, the substantive law matters.

And, Your Honor, if there is any doubt, again, and it's been out loud a couple times, but I'll read it again, the applicable law provision in this factoring agreement states all acts, transactions, rights, and liabilities under this agreement. No reference to the right to a jury trial, no procedural matters.

We recognize that the right to a jury trial is certainly an important right under the constitution,

as all due process matters are, but that doesn't mean that is a substantive issue, and I think Mr. Epting misspoke when he said there is a case they cited saying the right to a jury trial is a substantive legal issue.

I think what he's referring to is a quote by the Supreme Court, South Carolina Supreme Court, saying it's a substantial right, not substantive, but substantial right, and we recognize it is, but as, you know, we already mentioned, in South Carolina, our courts enforce waivers of jury trial, the right to a jury trial where certain requirements are met regarding the conspicuousness of the provision and also whether it's ambiguous or unambiguous.

Those aren't the issues. Your Honor, I would also note that the case that Mr. Epting passed up, Lister v. Nations Bank of Delaware again, we maintain that that is, again, substantive law.

I did want to briefly also say, Your Honor, the position that Mr. Epting took with regard to the other documents, as I said in my opening, those waiver of jury trial provisions and the five other documents are effective. There is no limitation on them, and they were made immediate at that time. The provision said hereby waived, and I also note that Mr. Epting and the plaintiff includes no citation of authority or no specific

references to language in their objection, or the plaintiff's memorandum, I should say, that they filed in opposition to our motion to strike the jury trial provision. Those provisions remain operative because they say they include claims arising out of relationship.

Also, Your Honor, it's notable that what causes of action, negligence, by its very nature, involves relationship of parties, and therefore it goes beyond just the factoring agreement.

Your Honor, I said I'll be brief, and I will, but I do want to say, and Mr. Chandler may have comment about it. We maintain that the description of Mr. Edahl's testimony just given is not accurate. We maintain -- first off, it was not his testimony that BB&T called the loan in default, the factoring agreement in default based on the funding, the site plan -- the site plans, Your Honor.

We have repeatedly taken the position, and I believe Mr. Edahl's testimony -- we can always -- when the time comes, it's not really before the Court today, go directly to the transcripts of the depositions, but it was not his testimony that the bank called the default on that basis. That's what we know the plaintiff hopes to persuade someone. But, Your Honor, we have steadfastly maintained that that was not the basis, and we have

documents to prove otherwise.

And then, Your Honor, he did not recant his testimony. Mr. Edahl did not recant his testimony. He corrected a point about his testimony, but, again, that's not really before you today. I just felt I could not leave that unaddressed.

Your Honor, if you have any questions -- I said I would be brief. If you have any questions, I'll be happy to try to address them.

THE COURT: Looks like y'all gave me something to read about and think about for a little while.

MR. MENDOZA: Thank you, sir.

MR. EPTING: Judge, one thing I forgot to mention, the case that I tendered, there is a discussion in there --

THE COURT: The Lister case or the --

MR. EPTING: No, Your Honor, the latter case.

THE COURT: The one out of Georgia?

MR. EPTING: Yes. In that case, the argument that is being made is that there is a federal procedural right, and so the party advancing either waiver is effective argues the federal common law as to a jury trial, and the federal judge rejects the notion that you're entitled to some sort of procedural device in

federal court but, rather, says, no, you entered into this agreement, and the applicable law is the one you chose, and I'm going to apply it. You don't get the procedural law in this forum.

THE COURT: All right. Did you want to say something else?

MR. EPTING: I'm sorry.

MR. CHANDLER: That's all right, Mr. Epting.

Just very briefly, three points, Judge: First, Mr. Epting mentioned the investor case where the Supreme Court held that the investors themselves didn't have standing to sue BB&T because they weren't parties to the contract with BB&T.

That's an accurate statement of the Supreme Court's opinion, but it has no bearing whatsoever on this very different issue about whether Mr. Edahl can enforce the jury trial waiver in the contract. This is not about whether Mr. Edahl can sue BB&T as it was in the investor case. This is an entirely different point, so that is entirely irrelevant to the argument before the Court.

Secondly, we believe that -- we disagree strongly with the characterization of Mr. Edahl's testimony, and all that addresses, through the substantive issues in the case that we didn't need to get into here today, so I don't need to address any of that.

The bottom line is that they have sued Mr. Edahl in tort. There is a tort claim against Mr. Edahl, and the tort claims are just as covered as the contractual claims in terms of the jury trial waiver, so those points, we don't feel, make any difference in the outcome.

And finally, Judge, plaintiffs allege that Mr. Edahl was acting at all times as an agent and employee of the bank, and we admit he was acting at all times as an agent and employee of the bank, and that's why he's involved in this case. All of this arises out of his conduct as an employee of the bank dealing with Skywaves in his capacity as relationship manager for BB&T, and I believe BB&T has also admitted that in their answer, but I'm not sure, really, whether they've admitted it or not is irrelevant. Again, we admitted it, and plaintiffs allege it, so that's the only three points I wanted to make.

Thank you.

THE COURT: Mr. Kefalos, do you want to say anything?

MR. KEFALOS: I do. I have been listening to the arguments, and I have an observation. I think Mr. Epting touched on it, and I'm not sure it's on him. It's not so much, it seems to me, a question of whether

the waiver of the jury trial is a procedural or substantive issue, it's more a question under Livingston -- or Lister, I'm sorry, Lister -- as to whether that provision purporting to waive a jury trial is valid in North Carolina, because irrespective of the choice of laws provision, South Carolina would say, you look to the state of formation to determine the validity, interpretation, formation of the provisions of the contract.

So irrespective of the choice of laws, South Carolina would say, Is this provision valid in North Carolina? And, if it's not, it doesn't make any difference whether it affects the substantive or procedural right, it is an invalid provision in this contract. That's under the Lister case, and that's the only thing I'd like to say.

THE COURT: One thing that does come to mind is BB&T is a big bank and they presumably drafted this contract. Why would they put in a contract that waives the right to a jury trial when they know that there is a statute in North Carolina that says you can't waive your right to a jury trial?

MR. MENDOZA: Well, Your Honor, the plaintiff took the 30(b)6 deposition of a bank representative just this past week, and his testimony was it was intended to

address substantive law, the applicable law, and the jury trial waiver, of course, and it emphasized there would be no right to a jury trial.

Certainly, if the action had been brought in North Carolina, then the North Carolina statute would govern, but it was not.

MR. ENGLAND: Your Honor --

THE COURT: You get a chance now.

MR. ENGLAND: I was involved in the 30(b)6 deposition, and what Mr. Mendoza said is correct, but on that same paragraph, in choice of law, it says in the internal laws of South Carolina, and the witness said he didn't know what that meant. That in itself created an ambiguity.

We really do think that one of the earlier questions that you asked is certainly the starting point, is a right to a jury trial -- if a right is considered substantive or fundamental such that it would not be waived under the normal procedural -- waiver of a procedural right. All these other arguments are certainly on our side, I believe, are correct, but that's the starting point that resolves the issue.

Molly, does the bank admit that Mr. Edahl was the agent of the bank for all purposes in this litigation? I thought it had been denied, but I could be

mistaken.

MS. CHERRY: Just so I can stand up and speak, I don't have the answer in front of me, and I don't know -- the reality is, I think I've told you before, that we responded, that we haven't denied that he did it and that the bank honored it, and the bank did honor it and that he was an employee of the bank.

I don't remember what we put in the answer, and I don't think that issue is before Court. He was an employee of the bank, he was acting as an employee of the bank, and we're not denying that.

MR. ENGLAND: I just don't want the record to be such that Your Honor -- you know, the employee is saying, I've admitted I was an agent. I thought the bank denied it. I may be wrong, but I know I was worried about it at one point, and, of course, the bank accused Skywaves of fraud based upon Mr. Edahl's conduct that he has now repudiated and admitted under oath that it was untruthful and he knew it was untruthful when he made it.

That's in the deposition, but the agency becomes somewhat important in this case, and he said he had lied because he was out to save his job at the time, and those are virtually direct quotes, Your Honor.

THE COURT: All right. Well, y'all have given me something to read and think about, so I'll read

it and think about it and let you know what I decide.

MR. EPTING: Judge, one thing. This has nothing to do with that motion.

We have a few more depositions that we need to take, and I would want to lay out that there are just some general discovery disputes over documents that remain, and they fall, Judge, in two categories: There is something called a serious incident report? Is that what the name of it is?

MS. CHERRY: That's true, it is.

MR. EPTING: A serious incident report, and; there are three of those, and then this period of time, Judge, from January to March of '08 in which documents are being withheld. The witness that is involved in that period of time is Steve Mercato, and we want to take his deposition, but we want to make sure we have all documents that are relevant to his deposition before going forward.

I'm convinced we could brief this on a motion. I think probably we can, to some extent, agree on some of these documents as privileged and not privileged, but, eventually, I think it's going to require the Court to weigh in, in camera, and so --

THE COURT: I don't weigh in on privilege versus not privileged. I don't weigh in on

admissibility, and, as I understand the law and the rules in In Re: Anonymous member of the bar is you produce it unless you have a protective order that says you don't have to. You answer the question unless you say we are going to assert a privilege and seek a protective order within five days.

MR. EPTING: Well -- and you know what, Judge, actually, that may be the quickest way forward. Rather than trying to figure out what documents are and are not privileged in advance of the deposition, maybe the thing to do is just that. Of course the problem is we don't have the documents to cross-examine him, but maybe that's the way to tee it up.

MS. CHERRY: And, Your Honor, just for purposes of the record, I'm not entirely sure what documents Drew is talking about. There is a suspicious incident report at issue and an amended one, so that's two, and -- so I just don't want there to be any representation of a certain volume or number of documents that have been withheld.

I've had discussions with him about serves, Your Honor, and about Mr. Mercato's deposition, but I was also under the impression that we were going to get our arms around what the issues were and, to the extent we can brief them, brief them to the Court.

So I'm not prepared to address that substantively before the Court. I just didn't want there to be any misunderstanding on the record.

THE COURT: Okay. I'll let you know something as soon as I figure it out. Thanks.

- - -

(Whereupon, the proceedings were concluded.)

- - -

I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 12th of January 2015.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

April 19, 2015

Amanda K. Haffenden

Circuit Court Reporter



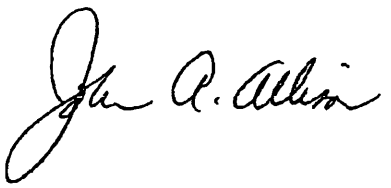
THE BB&T PHILOSOPHY

FOREWORD

In a rapidly changing and unpredictable world, individuals and organizations need a clear set of fundamental principles to guide their actions At BB&T we know the content of our business will, and should, experience constant change Change is necessary for progress However, the context, our fundamental principles, is unchanging because these principles are based on basic truths

BB&T is a mission-driven organization with a clearly defined set of values We encourage our employees to have a strong sense of purpose, a high level of self-esteem and the capacity to think clearly and logically

We believe that competitive advantage is largely in the minds of our employees as represented by their capacity to turn rational ideas into action towards the accomplishment of our mission



John A Allison
Chairman and Chief Executive Officer
BB&T Corporation

Pet. App. 1513

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Pet. App. 1514

BB&T VISION

TO CREATE THE BEST FINANCIAL INSTITUTION POSSIBLE

"The Best of The Best"

BB&T MISSION

TO MAKE THE WORLD A BETTER PLACE TO LIVE BY:

- Helping our CLIENTS achieve economic success and financial security,
- Creating a place where our EMPLOYEES can learn, grow and be fulfilled in their work,
- Making the COMMUNITIES in which we work better places to be, and thereby
- Optimizing the long-term return to our SHAREHOLDERS, while providing a safe and sound investment

Pet. App. 1515

BB&T PURPOSE

OUR ULTIMATE PURPOSE IS TO CREATE SUPERIOR LONG-TERM ECONOMIC REWARDS FOR OUR SHAREHOLDERS.

This purpose is defined by the free market and is as it should be Our shareholders provide the capital that is necessary to make our business possible They take the risk if the business is unsuccessful They have the right to receive economic rewards for the risk which they have undertaken

However, our purpose, to create superior long-term economic rewards for our shareholders, can only be accomplished by providing excellent service to our clients, as our CLIENTS are our source of revenues

To have excellent client relations, we must have outstanding EMPLOYEES to serve our clients To attract and retain outstanding employees, we must reward them financially and create an environment where they can learn and grow

Our economic results are significantly impacted by the success of our COMMUNITIES The community's "quality of life" impacts its ability to attract industry for growth

Therefore, we manage our business in a long-term context, as an integrated whole, with the ultimate objective of rewarding the SHAREHOLDERS for their investment, while realizing that the cause of this result is quality client service Excellent service will be delivered by motivated employees working as an integrated team These results will be impacted by our capacity to contribute to the growth and well-being of the communities we serve

Pet. App. 1516

VALUES

Excellence is an art won by training and habituation We are what we repeatedly do Excellence then is not an act, but a habit — Aristotle

The great Greek philosophers saw values as guides to excellence in thinking and action In this context, values are standards which we strive to achieve Values are *practical habits* that enable us as individuals to live, be successful and achieve happiness For BB&T, our values enable us to achieve our mission and corporate purpose

To be useful, values must be consciously held and be consistent (non-contradictory) Many people have conflicting values which prevent them from acting with clarity and self-confidence

There are 10 primary values at BB&T These values are consistent with one another and are integrated To fully act on one of these values, you must also act consistently with the other values Our focus on values grows from our belief that ideas matter and that an individual's character is of critical significance

Values are important at BB&T

Pet. App. 1517

1. REALITY (FACT-BASED)

What is, is If we want to be better, we must act within the context of reality (the facts) Businesses and individuals often make serious mistakes by making decisions based on what they "wish was so," or based on theories which are disconnected from reality The foundation for quality decision making is a careful understanding of the facts

There is a fundamental difference between the laws of nature (reality), which are immutable, and the man made The law of gravity is the law of gravity The existence of the law of gravity does not mean man can not create an airplane However, an airplane must be created within the context of the law of gravity At BB&T, we believe in being "reality grounded "

2. REASON (OBJECTIVITY)

Mankind has a specific means of survival, which is his ability to think, i e , his capacity to reason logically from the facts of reality as presented to his five senses A lion has claws to hunt A deer has swiftness to avoid the hunter. Man has his ability to think There is only one "natural resource" — the human mind

Clear thinking is not automatic. It requires intellectual discipline and begins with sound premises based on observed facts You must be able to draw general conclusions in a rational manner from specific examples (induction) and be able to apply general principles to the solution of specific problems (deduction) You must be able to think in an integrated way, thereby avoiding logical contradictions

We cannot all be geniuses, but each of us can develop the mental habits which ensure that when making decisions we carefully examine the facts and think logically without contradiction in deriving a conclusion We must learn to think in terms of what is essential, i e , about what is important Our goal is to objectively make the best decision to accomplish our purpose

Rational thinking is a learned skill which requires mental focus and a fundamental commitment to consistently improving the clarity of our mental processes At BB&T, we are looking for people who are committed to constantly improving their ability to reason

3. INDEPENDENT THINKING

All employees are challenged to use their individual minds to their optimum to make rational decisions In this context, each of us is *responsible* for what we do and who we are In addition, *creativity* is strongly encouraged and only possible with independent thought

We learn a great deal from each other Teamwork is important at BB&T (as will be discussed later) However, each of us thinks alone Our minds are not physically connected In this regard, each of us must be willing to make an independent judgment of the facts based on our capacity to think logically Just because the "crowd" says it is so, does not make it so

In this context, each of us is *responsible* for our own actions Each of us is responsible for our personal success or failure, i e , it is not the bank's fault if someone does not achieve his objectives

All human progress by definition is based on *creativity*, because creativity is the source of positive change Creativity is only possible to an independent thinker Creativity is not about just doing something different It is about doing something BETTER To be better, the new method/process must be judged by its impact on the whole organization, and as to whether it contributes to the accomplishment of our mission

There is an infinite opportunity for each of us to do whatever we do better. A significant aspect of the self-fulfillment which work can provide comes from creative thought and action

Pet. App. 1520

4. PRODUCTIVITY

We are committed to being producers of wealth and well-being by taking the actions necessary to accomplish our mission The tangible evidence of our productivity is that we have rationally allocated capital through our lending and investment process, and that we have provided needed services to our clients in an efficient manner resulting in superior *profitability*

Profitability is a measure of the differences in the economic value of the products/services we produce and the cost of producing these products/services In a long-term context and in a free market, the bigger the profit, the better This is true not only from our shareholders' perspective (which would be enough justification), but also in terms of the impact of our work on society as a whole Healthy profits represent productive work At BB&T we are looking for people who want to create, to produce, and who are thereby committed to *turning their thoughts into actions* that improve economic well-being

Pet. App. 1521

5. HONESTY

Being honest is simply being consistent with reality To be dishonest is to be in conflict with reality, which is therefore self-defeating A primary reason that individuals fail is because they become disconnected from reality, pretending that facts are other than they are

To be honest does not require that we know everything Knowledge is always contextual and man is not omniscient However, we must be responsible for saying what we mean and meaning what we say.

Pet. App. 1522

6. INTEGRITY

Because we have developed our principles logically, based on reality, we will always act consistently with our principles Regardless of the short-term benefits, acting inconsistently with our principles is to our long-term detriment We do not, therefore, believe in compromising our principles in any situation

Principles provide carefully thought-out concepts which will lead to our long-term success and happiness Violating our principles will always lead to failure BB&T is an organization of the highest integrity

7. JUSTICE (FAIRNESS)

Individuals should be evaluated and rewarded objectively (for better or worse) based on their contributions toward accomplishing our mission and adherence to our values Those who contribute the most should receive the most

The single most significant way in which employees evaluate their managers is in determining whether the manager is just Employees become extremely unhappy (and rightly so) when they perceive that a person who is not contributing is over-rewarded or a strong contributor is under-rewarded

If we do not reward those who contribute the most, they will leave and our organization will be less successful Even more important, if there is no reward for superior performance, the average person will not be motivated to maximize his productivity

We must evaluate whether the food we eat is healthy, the clothes we wear attractive, the car we drive functional, etc , and we must also evaluate whether relationships with other people are good for us or not

In evaluating other people, it is critical that we judge based on essentials At BB&T we do not discriminate based on nonessentials such as race, sex, nationality, etc We do discriminate based on competency, performance and character We consciously reject egalitarianism and collectivism Individuals must be judged individually based on their personal merits, not their membership in any group

Pet. App. 1524

8. PRIDE

Pride is the psychological reward we earn from living by our values, i e , from being just, honest, having integrity, being an independent thinker, being productive and rational

Aristotle believed that "earned" pride (not arrogance) was the highest of virtues, because it presupposed all the others Striving for earned pride simply reinforces the importance of having high moral values

Each of us must perform our work in a manner as to be able to be justly proud of what we have accomplished BB&T must be the kind of organization with which each employee and client can be proud to be associated

9. SELF-ESTEEM (SELF-MOTIVATION)

We expect our employees to earn positive self-esteem from doing their work well We expect and want our employees to act in their rational, long-term self-interest We want employees who have strong personal goals and who expect to be able to accomplish their goals within the context of our mission

A necessary attribute for self-esteem is self-motivation. We have a strong work ethic We believe that you receive from your work in proportion to how much you contribute If you do not want to work hard, work somewhere else

While there are many trade-offs in the content of life, you need to be clear that BB&T is the best place, all things considered, for you to work to accomplish your long-term goals When you know this, you can be more productive and happy

Pet. App. 1526

10. TEAMWORK/MUTUAL SUPPORTIVENESS

While independent thought and strong personal goals are critically important, our work is accomplished within teams Each of us must consistently act to achieve the agreed-upon objectives of the team, with respect for our fellow employees, while acting in a mutually supportive manner

Our work at BB&T is so complex that it requires an integrated effort among many people to accomplish important tasks. While we are looking for self-motivated and independent thinking individuals, these individuals must recognize that almost nothing at BB&T can be accomplished without the help of their team members One of the responsibilities of leadership in our organization is to ensure that each individual is rewarded based on their contribution to the success of the total team We need outstanding individuals working together to create an outstanding team

Our values are held consciously and are logically consistent To fully execute on any one value, you must act consistently with all 10 values At BB&T values are practical and important!

Pet. App. 1527

THE ROLE OF EMOTIONS

Often people believe that making logical decisions means that we should be unemotional and that emotions are thereby unimportant In fact, emotions are important However, the real issue is how rational are our emotions Emotions are mental habits which are often developed as children Emotions give us automatic responses to people and events, these responses can either be very useful or destructive indicators Emotions as such are not means of decision or of knowledge, the issue is How were your emotions formed? The real question is Are we happy when we should be happy, and unhappy when we should be unhappy, or are we unhappy when we should be happy?

Emotions are learned behaviors The goal is to "train up" our emotions so that our emotions objectively reinforce the best decisions and behaviors toward our long-term success and happiness Just because someone is unemotional does not mean that they are logical

Pet. App. 1528

1. CLIENT-DRIVEN

"WORLD CLASS" CLIENT SERVICE ORGANIZATION

- Our clients are our PARTNERS
- Our goal is to create WIN/WIN RELATIONSHIPS
- "You can tell we want your business"
- "It is easy to do business with BB&T"
- "Respect the individual, value the relationship"

We will absolutely never, ever, take advantage of anyone, nor do we want to do business with those who would take advantage of us Our clients are long-term partners and should be treated accordingly One of the attributes of partnerships is that both partners must keep their agreements We keep our agreements When our partners fail to keep their agreements, they are terminating the partnership

There are an infinite number of opportunities where we can get better together, where we can help our clients achieve their financial goals and where our client will enable us to make a profit in doing so

2. QUALITY ORIENTED

- Quality must be built into the process

In every aspect of our business we want to execute and deliver quality It is easier and less expensive to do things correctly than to fix what has been done incorrectly

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Pet. App. 1530

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- Quality must be built into the process

In every aspect of our business we want to execute and deliver quality It is easier and less expensive to do things correctly than to fix what has been done incorrectly

3. EFFICIENT

- "Waste not, want not"
- Design efficiency into the system

4. GROWING BOTH OUR BUSINESS AND OUR PEOPLE

- Grow or die
- Life requires constant, focused thought and actions towards one's goals

5. CONTINUOUS IMPROVEMENT

- Everything can be done better
- Fundamental commitment to INNOVATION

Every employee should constantly use their reasoning ability to do whatever they do better everyday All managers of systems/processes should constantly search for better methods to solve problems and serve the client.

6. OBJECTIVE DECISION MAKING

- Fact-Based and Rational

Pet. App. 1532

BB&T MANAGEMENT STYLE

- Participative
- Team Oriented
- Fact-Based
- Rational
- Objective

Our management process, by intention, is designed to be participative and team oriented We work hard to create consensus When people are involved in the decision process, better information is available to make decisions The participant's understanding of the decision is greater and, therefore, execution is better

However, there is a risk in participative decision making the decision process can become a popularity contest Therefore, our decision process is disciplined Our decisions will be made based on the facts using reason The best objective decision will be the one which is enacted

Therefore, it does not matter who you know, who your friends are, etc , it matters whether you can offer the best objective solution to accomplishing the goal or solving the problem at hand

Pet. App. 1533

BB&T MANAGEMENT CONCEPT

- Hire excellent people
- Train them well
- Give them an appropriate level of authority and responsibility
- Expect a high level of achievement
- Reward their performance

Our concept is to operate a highly autonomous, entrepreneurial organization. In order to execute this concept, we must have extremely competent individuals who are "masters" of BB&T's philosophy and who are "masters" in their field of technical expertise.

By having individuals who are "masters" in their field, we can afford to have less costly control systems and be more responsive in meeting the needs of our clients.

Pet. App. 1534

ATTRIBUTES OF AN OUTSTANDING BB&T EMPLOYEE

- Purpose
- Rationality
- Self-Esteem

Consistent with our values, successful individuals at BB&T have a sense of purpose for their lives, i e , they believe that their lives matter and that they can accomplish something meaningful through their work We are looking for people who are rational and have a high level of personal self-esteem People with a strong personal self-esteem get along better with others, because they are at peace with themselves

Pet. App. 1535

Since we build on the facts of reality and our ability to reason, we are capable of achieving both success and happiness

We do not believe that "realism" means pessimism On the contrary, precisely because our goals are based on and consistent with reality, we fully expect to accomplish them

BB&T'S OBLIGATIONS TO ITS EMPLOYEES

We will do our best to

- COMPENSATE employees fairly in relation to internal equity and market-comparable pay practices — performance-based compensation
- Provide a comprehensive and market-competitive BENEFIT program
- Create a place where employees can LEARN and GROW — to become more productive workers and better people
- TRAIN employees so they are competent to do the work asked of them. (Never ask anyone to do anything they are not trained to do.)
- EVALUATE and RECOGNIZE performance objectively, fairly and consistently based on the individual's contribution to the accomplishment of our mission and adherence to our values
- Treat each employee as an INDIVIDUAL with dignity and respect

Pet. App. 1537

VIRTUES OF AN OUTSTANDING CREDIT CULTURE

Just as individuals need a set of values (virtues) to guide their actions, systems should be designed to have a set of attributes which optimize their performance towards our goals In this regard, our credit culture has seven fundamental virtues

1. Provides fundamental insight to help clients achieve their economic goals and solve their financial problems: We are in the high-quality financial advice business

2. Responsive: The client deserves an answer as quickly as possible, even when the answer is no

3. Flexible (Creative): We are committed to finding better ways to meet the client's financial needs

4. Reliable: Our clients are selected as long-term partners and treated accordingly BB&T must continue to earn the right to be known as the most reliable bank.

5. Manages risk within agreed-upon limits: Clients do not want to fail financially, and the bank does not want a bad loan

6. Ensures an appropriate economic return to the bank for risk taken: The higher the risk, the higher the return The lower the risk, the lower the return This is an expression of justice

7. Creates a "premium" for service delivery: The concept is to provide superior value to the client through outstanding service quality A rational client will fairly compensate us when we provide sound financial advice, are responsive, creative and reliable, because these attributes are of economic value to the client

Pet. App. 1538

CREATE A HIGH PERFORMANCE FINANCIAL INSTITUTION THAT CAN SURVIVE AND PROSPER IN A RAPIDLY CHANGING, HIGHLY COMPETITIVE, GLOBALLY INTEGRATED ENVIRONMENT

ACHIEVING OUR GOAL

The key to maximizing our probability of being both independent and prosperous over the long term is to create a **SUPERIOR EARNINGS PER SHARE (EPS) GROWTH RATE** without sacrificing the fundamental quality and long-term competitiveness of our business and without taking unreasonable **RISK**

While being fundamentally efficient is critical, the "easy" way to rapid EPS growth is to artificially cut cost. However, not investing for the future is long-term suicide, as it destroys our capability to compete

The intelligent process to achieve superior EPS growth is to grow revenues by providing (and selling) superior quality service while systematically enhancing our margins, improving our efficiency, expanding our profitable product offerings and creating more effective distribution channels

Pet. App. 1539

THE "WORLD STANDARD" REVENUE DRIVEN SALES ORGANIZATION

At BB&T, selling is about identifying our clients' legitimate financial needs and finding a way to help the client achieve economic goals by providing the right products and services

Effective selling requires a disciplined approach in which the BB&T employee asks the client about financial goals and problems and has a complete understanding of how our products can help the client achieve objectives and solve financial problems

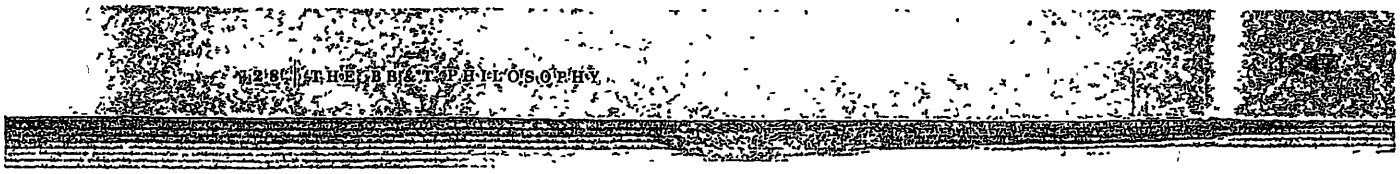
It also requires exceptional execution by support staffs and product managers, since service and sales are fundamentally connected and creativity is required in product design and development

"WORLD STANDARD" CLIENT SERVICE COMMUNITY BANKS

BB&T operates as a series of "Community Banks " The "Community Bank" concept is the foundation for local decision making and the basis for responsive, reliable and empathetic client service

By putting decision making closer to the client, all local factors can be considered and we can ensure that the client is being treated as an individual

To operate in this decentralized decision making fashion, we must have highly trained employees who understand BB&T's philosophy and are "masters" of their areas of responsibility



COMMITMENT TO EDUCATION/LEARNING

Competitive advantage is in the minds of our employees We are committed to making substantial investments in employee education to create a "knowledge-based learning organization" founded on the premise that knowledge (understanding), properly applied, is the source of superior performance

We believe in systematized learning founded on Aristotle's concept that "excellence is an art won by training and habituation " We attempt to train our employees with the best knowledge/methods in their fields and to habituate those behaviors through consistent management reinforcement The goal is for each employee to be a "master" of his or her role, whether it be a computer operator, teller, lender, financial consultant or any other job responsibility

Pet. App. 1542

OUR PASSIONS

TO CREATE THE BEST FINANCIAL INSTITUTION POSSIBLE.

TO CONSISTENTLY PROVIDE THE CLIENT WITH BETTER VALUE THROUGH RATIONAL INNOVATION AND PRODUCTIVITY IMPROVEMENT.

At BB&T we have two powerful passions Our fundamental passion is our Vision To Create The Best Financial Institution Possible — The "World Standard" — The "Best of the Best" We believe that the best can be objectively evaluated by rational performance standards in relation to the accomplishment of our mission

To be the best of the best, we must constantly find ways to deliver better value to our clients in a highly profitable manner This requires us to keep our minds focused at all times on innovative ways to enhance our productivity

Pet. App. 1543

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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

Roger M. Young, Circuit Court Judge

Appellate Case No. 2015-001809

Skywaves I Corporation, ...Appellant/Respondent,

v.

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

and James Edahl, ...Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal and Sealed Supplement to Record on Appeal contain all material proposed to be included by any of the parties and not any other material.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Skywaves I Corporation, Appellant/Respondent,

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,

Of which Branch Banking and 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.

Appellate Case No. 2015-001809

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. Op. 5557
Heard March 5, 2018 – Filed May 2, 2018

AFFIRMED IN PART, REVERSED IN PART, AND DISMISSED IN PART

M. Dawes Cooke Jr. and John William Fletcher, both of Barnwell, Whaley, Patterson & Helms, LLC; John P. Linton Sr. and Brian C. Duffy, both of Duffy & Young, LLC; Andrew K. Epting Jr., of Andrew K. Epting Jr.,

LLC; and George J. Kefalos, of George J. Kefalos, PA, all of Charleston, for Appellant/Respondent.

Kirsten Elena Small, of Nexson Pruet, LLC, of Greenville; Julio E. Mendoza Jr., of Nexsen Pruet, LLC, of Columbia; and Molly Hughes Cherry, of Nexsen Pruet, LLC, of Charleston, all for Respondent/Appellant.

J.W. Nelson Chandler, of Chandler & Dudgeon LLC, of Charleston, for Respondent.

KONDUROS, J.: This cross-appeal arises out of a suit brought by Skywaves I Corporation (Skywaves) against Branch Banking and Trust Company (BB&T) and James Edahl. Skywaves brought suit against BB&T for breach of contract and breach of contract accompanied by fraudulent acts and against both BB&T and Edahl for negligent misrepresentation, negligence, and violation of the South Carolina Unfair Trade Practices Act (SCUTPA).[1] Skywaves appeals the circuit court's orders (1) granting BB&T's and Edahl's motions to strike its demand for a jury trial, (2) granting summary judgment to BB&T and Edahl as to its claims for negligence and negligent misrepresentation, (3) dismissing its SCUTPA claim, and (4) denying its motion to strike BB&T's and Edahl's answers. BB&T appeals the circuit court's order denying it summary judgment as to Skywaves' claims for breach of contract and breach of contract accompanied by fraudulent acts. We affirm in part, reverse in part, and dismiss in part.

FACTS/PROCEDURAL HISTORY

Skywaves is a South Carolina corporation that develops technology for the wireless telecommunications industry; specifically, Skywaves manufactures structures for sheltering equipment at the base of cell phone towers. Ronald Konersmann, a businessman who has been involved with manufacturing infrastructure for the telecommunications industry since 1982, is Skywaves' founder and Chief Executive Officer (CEO), and John Voytko, a licensed certified professional accountant, is Skywaves' Chief Financial Officer (CFO). BB&T is a banking institution with branches in several states including North and South

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[1] S.C. Code Ann. §§ 39-5-10 to -560 (1985 & Supp. 2017) ("Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.").

Carolina. Edahl is a resident of South Carolina and was an officer at BB&T at the time of the events leading to the action.

On March 22, 2005, Skywaves entered into a factoring agreement (the Agreement) with BB&T.[2] Under the Agreement, BB&T agreed to purchase Skywaves' accounts receivable for eighty percent of the face value of the invoice up to a maximum of $1.5 million. Once Skywaves sold a receivable to BB&T, BB&T became vested with all of Skywaves' rights in the account, including the right to payment. Every factored invoice was required to "state plainly on the face thereof that the [a]ccount . . . has been assigned and sold to, [and] is owned by and is payable to BB&T only." If a customer sent payment on a factored invoice to Skywaves, BB&T required Skywaves to hold the payment "as the property of BB&T, without commingling [the payment] with any funds or property of [Skywaves]," and immediately turn the payment over to BB&T. BB&T also required Skywaves to make several covenants and warranties regarding its financial status, including its ability to pay its debts as they matured in the ordinary course of business.

The Agreement was for a one-year term subject to renewal if not terminated by BB&T or Skywaves. BB&T could terminate the Agreement at any time with sixty days' written notice and could terminate the Agreement without notice "after the occurrence of any [e]vent of [d]efault." Events of default included violation of the financial covenants, such as Skywaves' inability to pay its debts as they accrued in the ordinary course of business; Skywaves' failure to comply with any portion of the Agreement or any other agreement it had with BB&T; and "for any other reason [BB&T] deem[ed] itself insecure." The Agreement also provided, "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." The Agreement stated in bold writing, immediately prior to the signature page, Skywaves waived its right to "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." Finally, the Agreement set forth "*the entire understanding between the parties . . . supersed[ing] all prior and*

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[2] Skywaves and BB&T also entered into a 2005 loan agreement, a 2005 promissory note, a 2005 security agreement, a 2007 promissory note, and a 2007 security agreement. In each document, Skywaves waived its right to a jury trial on any claim related to the documents or "the conduct of the relationship between" BB&T and Skywaves. Moreover, all of these documents provided South Carolina law would govern any claims arising out of the documents.

contemporaneous agreements and understandings, inducements and conditions, whether express or implied, oral or written," and provided it "supersede[d] any course of performance and/or usage of the trade inconsistent with any of the terms hereof." (emphasis added).

From the outset, Skywaves contended some of its customers were unable or unwilling to make payments on factored invoices directly to BB&T, and it informed BB&T of this issue. Skywaves alleged it and BB&T orally agreed payments on factored invoices could flow through Skywaves and Skywaves could delay remittance of such payments to BB&T for up to sixty days. No writing reflects the alleged modifications to the Agreement, and on several occasions, BB&T told Skywaves to put the required notification on factored invoices and expressed concern regarding overdue payments on factored invoices. For example, on June 5, 2006, BB&T informed Skywaves "over $150,000 [of payments on factored invoices from Cingular and Nextel were thirty plus] days past due." On August 31, 2007, BB&T contacted Skywaves and asked why it had been holding payments from Verizon on factored invoices for six weeks and reminded Skywaves holding payments "could be viewed as a violation of the [Agreement]." A December 14, 2007 email from BB&T to Skywaves indicated $43,125 worth of accounts were over sixty days past due. Additionally, Skywaves' CFO Voytko admitted Skywaves intermingled the payments it received on the factored invoices, which belonged to BB&T, with Skywaves' funds and used the payments for operating purposes and cash flow.

From 2005 to 2006, Skywaves and BB&T occasionally amended the Agreement via written modifications in order for BB&T to fund Skywaves' working capital needs as those needs developed and expanded. Initially, on June 1, 2005, BB&T reduced the minimum monthly commission required under the Agreement because Skywaves did not begin factoring invoices until late 2005. Next, on May 11, 2006, BB&T and Skywaves executed a written amendment to the factoring agreement, increasing Skywaves' line of credit from $1.5 million to $1.75 million and reducing the minimum monthly commission. Additionally, early in 2006, BB&T began advancing money to Skywaves based on purchase orders it received from Nextel.

In early 2007, Skywaves won several lucrative government contracts, and as a result, its Board of Directors determined the company required more capital to meet the increased demand for its products than BB&T had provided at that time. Skywaves therefore solicited funding proposals from various entities, including Wachovia and Hunt Capital (Hunt). In particular, Hunt sent Skywaves a

preliminary, nonbinding term sheet, which was dated March 22, 2007, offering to purchase thirty percent of Skywaves' stock for $4 million.

Edahl, BB&T's relationship manager for Skywaves, assured Skywaves BB&T was familiar with Skywaves' financial needs and could provide for those needs without Skywaves diluting its stock by working with Hunt. Thus, Skywaves decided to obtain the needed funding from BB&T, and BB&T created a unique financing arrangement for Skywaves. On March 2, 2007, BB&T sent a letter to Skywaves, stating the Agreement had been renewed and it had increased Skywaves' line of credit to $3.5 million with a $2 million sublimit for purchase order financing. Under the renewal, BB&T would advance eighty-five percent of the value of an invoice to Skywaves and sixty percent of the value of a purchase order. On March 14, 2007, BB&T sent another letter to Skywaves, clarifying the purchase order advance rate was actually sixty-five percent. BB&T and Skywaves executed a written amendment, making the changes contemplated in the March 2 and March 14 letters. Under the amendment, BB&T would advance funds on the purchase order of any customer.

In the spring of 2007 and again in July 2007, Skywaves asked Edahl if BB&T would advance funds to it on the basis of site plans—potential sites where it anticipated placing shelters if ordered by customers. Konersmann stated Edahl agreed to factor site plans, and Edahl admitted he agreed to factor specific site plans—namely those related to Skywaves' contract with General Dynamics—at the same advance rate as purchase orders.[3] BB&T had never factored site plans before, an arrangement to factor site plans is not reflected in the Agreement or any written amendment to the Agreement, and Edahl's supervisor stated Edahl did not receive approval from him to factor site plans. BB&T advanced funds until January 2008 to Skywaves based on the General Dynamics site plans.

On January 17, 2008, Michael Burke, the new account executive for Skywaves' factoring line, went with Edahl to Skywaves' warehouse. During the visit, Skywaves provided BB&T its 2007 year-end financial statements, which showed Skywaves had not had a profitable month since January 2007 and had closed 2007 with a net loss of $1,388,349.43. Also during the visit, Burke asked Konersmann and Voytko about "a number of items that looked like purchase orders [BB&T] had advanced on that [it was] not getting invoices on." Konersmann and Voytko told Burke the items were not purchase orders, and Burke "was very shocked, very

[3] General Dynamics was one of Skywaves' customers and had a contract with the state of New York to deliver shelter units to New York's cell towers.

concerned" to learn BB&T was funding money to Skywaves without valid purchase orders. Edahl, out of fear of losing his job, denied knowledge of the site plan factoring and told his superiors at BB&T, in an email sent January 22, 2008, "As we discussed Friday, neither you or I had any idea that the [General Dynamics-New York State] purchase orders funded from July through October were not documented and funded exactly like the other purchase orders."

A January 2008 field audit by BB&T revealed Skywaves had received $320,000 to $340,000 from Verizon on factored invoices and had not turned this money over to BB&T. The audit also revealed that as of January 25, 2008, thirty-seven percent of Skywaves' payables were more than sixty days overdue. Skywaves stated its overdue debts were all to one creditor, StructuredTech, which was owned by a Skywaves' investor who agreed to give Skywaves an extension of time to pay. However, Skywaves admitted the amount owed to StructuredTech only accounted for twenty-five percent of Skywaves' payables.

On January 18, 2008, Edahl informed Skywaves its "over advance ha[d] put [it] in default of the commercial finance loan and that [it] w[ould] be getting written notice of the same shortly." On January 25, 2008, BB&T sent Skywaves written notice it had defaulted under the terms of the Agreement, BB&T refused to honor any further financial commitments, and BB&T was terminating the Agreement. In particular, BB&T asserted Skywaves defaulted because it had received payments for factored accounts and did not immediately turn the payments over to BB&T; Skywaves was not paying its debts in the ordinary course of business; and BB&T had the good faith belief Skywaves' ability to pay BB&T and perform the obligations of the Agreement were impaired.

In response, Skywaves hired an attorney, Earle Hewlette, who wrote to BB&T on Skywaves' behalf, asking BB&T to utilize a rescue plan to save the company and expressing Skywaves' "regret for the mistakes made in the past in dealing with [BB&T]." In its reply to Hewlette's email, BB&T did not agree to utilize the rescue plan. Additionally, BB&T listed eight instances of Skywaves holding payments owed to BB&T in violation of the Agreement, and two of these instances involved Skywaves holding payments for over sixty days. Due to the absence of funding, Skywaves filed for bankruptcy in April 2008.

On December 3, 2009, Skywaves filed this action against BB&T and Edahl for (1) breach of contract, (2) breach of contract accompanied by fraudulent acts, (3) negligent misrepresentation, (4) fraudulent inducement, and (5) lender liability. Skywaves subsequently filed an amended complaint, asserting claims against

BB&T for (1) breach of contract, (2) breach of contract accompanied by fraudulent acts, (3) promissory estoppel, and (4) breach of the covenant of good faith and fair dealing. It also asserted claims against both BB&T and Edahl for (1) negligent misrepresentation, (2) fraudulent misrepresentation, (3) negligence, and (4) violation of SCUTPA. In its amended complaint, Skywaves alleged, "The unfair acts and practices of [BB&T and Edahl] have an impact on the public interest, [and] have a potential for repetition."

In their answers to the amended complaint, BB&T and Edahl both admitted Edahl was an officer of BB&T and worked at the Charleston branch, but they denied 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." In 2015, BB&T clarified it did "not deny that Mr. Edahl was its employee, and thus its agent, in the financing provided under the . . . Agreement." Additionally, in their answers, BB&T and Edahl denied Skywaves' allegations they agreed to modify the Agreement to provide for the advancement of capital based on site plans and that this modification was memorialized in numerous writings, including emails, letters, and other documents.

BB&T filed a partial motion to dismiss Skywaves' claims for negligent misrepresentation, fraudulent misrepresentation, negligence, violation of the SCUTPA, and breach of contract accompanied by fraudulent acts. Edahl filed a motion to dismiss all of Skywaves' claims against him. At the hearing on the motions to dismiss, BB&T and Edahl argued the lender liability statute of frauds, set forth in section 37-10-107 of the South Carolina Code (2015), barred Skywaves' claims.[4] Skywaves argued the case needed to proceed to trial to determine whether section 37-10-107 was applicable. Skywaves also argued BB&T's representations it could provide Skywaves with adequate financing was a present act that could constitute fraud. Additionally, Skywaves argued its relationship with BB&T exceeded the typical bank-customer relationship because BB&T, through Edahl, advised Skywaves and advised others to invest in Skywaves. Finally, Skywaves argued its allegation that BB&T's conduct had a potential for repetition was "sufficient to establish the impact on the public

[4] Section 37-10-107 provides, "No person may maintain an action for legal or equitable relief . . . based upon failure to perform an alleged . . . agreement . . . to lend or borrow money . . . unless the party seeking to maintain the action . . . has received a writing from the party to be charged . . . ."

interest," as required to have a claim under SCUTPA. After the hearing,[5] the circuit court dismissed all of Skywaves' claims against Edahl and also dismissed Skywaves' claims against BB&T for (1) breach of contract accompanied by fraudulent acts, (2) negligent misrepresentation, (3) fraudulent misrepresentation, (4) negligence, and (5) violation of SCUTPA. Skywaves filed a motion to reconsider the dismissal. Skywaves also filed a notice of intent to appeal the order. The circuit court granted Skywaves' motion to reconsider, modifying its order to allow Skywaves to proceed on its claims for breach of contract accompanied by fraudulent acts against BB&T and on its claims for negligence and negligent misrepresentation against BB&T and Edahl. Skywaves then filed a motion to withdraw its appeal as moot, and this court dismissed the appeal.

During Edahl's first deposition on September 19, 2013, he indicated he did not remember agreeing to site plan financing until he heard Konersmann's deposition testimony the week prior to his deposition. Edahl also testified no written modification to the Agreement was made reflecting his oral agreement with Skywaves to factor site plans. He stated that based on the oral agreement, he believed BB&T was obligated to finance site plans and in fact did finance some site plans.

On January 17, 2014, Skywaves filed a motion to strike both BB&T's and Edahl's answers on the ground they were sham pleadings because in their answers, BB&T and Edahl both denied the existence of an oral modification to the Agreement to include site plan factoring and had not amended their answers following Edahl's admission he agreed to site plan factoring. BB&T and Edahl filed motions to amend their answers to address Edahl's new testimony as to site plan factoring. After a hearing, the circuit court denied Skywaves' motion to strike and granted BB&T's and Edahl's motions to amend. At that point, BB&T and Edahl amended their answers to admit that as of March 2007, BB&T and Skywaves "memorialized certain written modifications to the . . . Agreement . . . to allow for factoring of invoices and purchase orders. [BB&T and Edahl] further admit[ted] an agreement to finance site plans, to a limited extent, with certain limitations on the amounts being factored." However, both Edahl and BB&T continued to deny the site plan funding modification was written.

On February 11, 2014, Edahl provided an affidavit, wherein he stated he "was aware in January 2008 that [he] had agreed to treat certain site plans of General

[5] The hearing involved BB&T's and Edahl's motions to dismiss Skywaves' claims, as well as the claims of Konersmann, Voytko, and three Skywaves investors.

Dynamics the same as purchase orders with respect to the funding under [the Agreement]." During his second deposition on November 21, 2014, Edahl testified he initially denied he had approved site plan factoring out of fear he would lose his job, and he admitted he had approved site plan financing. Furthermore, he stated Skywaves relied on his recommendation to fund its growth with purchase order and site plan financing. Based on Edahl's admission he agreed to site plan factoring, BB&T employee Michael Hennessey admitted in a deposition that Skywaves did not breach the site plan funding accommodation.

Several BB&T employees testified in depositions BB&T makes recommendations and gives advice to its customers; seeks to develop trust with its customers; has a duty to understand its customers' needs; and should treat its customers fairly and not mislead them. A BB&T employee also testified a bank customer is entitled to believe what their relationship manager tells them on behalf of BB&T. Moreover, in its philosophy, BB&T describes itself as a "high-quality financial advice business" and providing "professional sales and risk management direction."

BB&T and Edahl both filed motions for summary judgment and motions to strike Skywaves' demand for a jury trial. On January 12, 2015, the circuit court held a hearing on the motions to strike the demand for a jury trial. At the hearing, BB&T argued the right to a jury trial is a procedural issue and is accordingly governed by the law of the forum, in this case South Carolina. It contended the choice of law provision in the Agreement applied only to substantive issues, not procedural issues. BB&T stated South Carolina allows parties to waive the right to a jury trial in contracts, and therefore, Skywaves waived its right to a jury trial by signing the Agreement, which contained a jury trial waiver. BB&T also maintained its other agreements with Skywaves were governed by South Carolina law and contained jury trial waivers. Edahl agreed with BB&T's arguments and contended the waivers signed by Skywaves were also enforceable as to Skywaves' claims against him because he was BB&T's agent and employee. Skywaves argued the Agreement was governed by North Carolina law, which does not allow for jury trial waivers. Specifically, Skywaves asserted the issue at stake was substantive because it dealt with determining the validity of a contract provision, and thus, North Carolina law applied. Skywaves contended Edahl could not rely on the waiver provision because he was not a party to the Agreement.

After the hearing, the circuit court granted BB&T's and Edahl's motions to strike Skywaves' demand for a jury trial, finding the right to a jury trial was a procedural right, South Carolina law applied, and South Carolina law allows parties to contractually waive the right to jury trial. Skywaves filed a motion to reconsider

the order granting BB&T's and Edahl's motions to strike the demand for a jury trial. Skywaves then filed a motion to amend its amended complaint, alleging a claim for violation of the North Carolina Unfair Trade Practices Act. Skywaves also filed a second motion to strike BB&T's and Edahl's answers, arguing because BB&T and Edahl "knowingly took [] false positions, unsupported by the evidence, for years in this litigation," the court should apply the doctrines of unclean hands and judicial estoppel to strike BB&T's and Edahl's answers.

Following a hearing,[6] the circuit court filed an order (1) granting in part BB&T's motion for summary judgment; (2) granting Edahl's motion for summary judgment; (3) denying Skywaves' motion to amend its amended complaint; (4) denying Skywaves' motion to strike the answers of BB&T and Edahl; and (5) denying Skywaves' motion to reconsider the order striking its demand for a jury trial. In particular, the circuit court denied BB&T summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by fraudulent acts. However, the court granted summary judgment to BB&T on Skywaves' claims for promissory estoppel and breach of the covenant of good faith and fair dealing. The court also granted BB&T and Edahl summary judgment as to Skywaves' claims for negligence and negligent misrepresentation because (1) the economic loss doctrine barred the claims, (2) Skywaves could not establish the elements of negligence and negligent misrepresentation, and (3) the lender liability statute of frauds barred the claims. The court denied Skywaves' motion to strike because it found no evidence was presented that BB&T's or Edahl's answers were "manifestly false or made in bad faith." This appeal followed.

LAW/ANALYSIS

I. Skywaves' Appeal

A. Strike of Demand for a Jury Trial

Skywaves argues the circuit court erred by holding it waived its constitutional right to a jury trial by signing the Agreement, which contained a jury trial waiver. It maintains the jury trial waiver was unconscionable and void under North Carolina law, which was the governing law of the Agreement. Skywaves contends the question of the validity of a jury trial waiver in a contract is a substantive legal issue and the issue should therefore be governed by North Carolina law. We agree the circuit court erred by striking Skywaves' demand for a jury trial.

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[6] The transcript of this hearing was not included in the record on appeal.

"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." *Nucor Corp. v. Bell*, 482 F. Supp. 2d 714, 728 (D.S.C. 2007); *see also Team IA, Inc. v. Lucas*, 395 S.C. 237, 248, 717 S.E.2d 103, 108 (Ct. App. 2011) ("Choice of law clauses are generally honored in South Carolina."); *Livingston v. Atl. Coast Line R. Co.*, 176 S.C. 385, 391, 180 S.E. 343, 345 (1935) ("[C]ontracts 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."). "However, a choice-of-law clause in a contract will not be enforced if application of foreign law results in a violation of South Carolina public policy." *Nucor Corp.*, 482 F. Supp. 2d at 728; *see also Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 33, 644 S.E.2d 663, 673 (2007) ("This [c]ourt will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution."). "[T]he fact that the law of two states may differ does not necessarily imply that the law of one state violates the public policy of the other." *Nash v. Tindall Corp.*, 375 S.C. 36, 41, 650 S.E.2d 81, 84 (Ct. App. 2007) (alteration in original) (quoting *Boone v. Boone*, 345 S.C. 8, 13-14, 546 S.E.2d 191, 191 (2001)).

Under North Carolina law, "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. § 22B-10 (2017). Conversely in South Carolina, "[a] party may waive the right to a jury trial by contract." *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 332, 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)). "[T]he right to a trial by jury is a substantial right, and we 'strictly construe' such waivers." *Id.* (quoting *Twillman*, 351 S.C. at 64, 566 S.E.2d at 866). However, "[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.* at 332-33, 755 S.E.2d at 443 (alteration in original) (quoting *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003)).

We find the circuit court erred by striking Skywaves' demand for a jury trial. Although the circuit court found the right to a jury trial is a procedural issue, the issue here is not the question of the right to a jury trial but rather, the enforceability of a contract provision. *See Green v. U.S. Auto. Ass'n Auto & Prop. Ins. Co.*, 407 S.C. 520, 523-25, 756 S.E.2d 897, 899-900 (2014) (finding the issue in the case was not parental immunity, which had been abolished in South Carolina, but the enforceability of a contract provision and holding the "family member exclusion

[policy] contained in the Florida automobile [insurance] policy at issue . . . [was] not void as against [South Carolina] public policy"). Because this is a question of contract validity, and South Carolina courts generally uphold choice of law provisions, we find North Carolina law applies to determine the validity and enforceability of the contractual waiver of the right to a jury trial.[7] *See Nucor Corp.*, 482 F. Supp. 2d at 728 ("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."). Thus, the contractual waiver of the right to a jury trial is void and unenforceable. N.C. Gen. Stat. § 22B-10 ("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.").

Furthermore, North Carolina's policy of finding contractual jury trial waivers unenforceable is not void as against South Carolina public policy. *See Nash*, 375 S.C. at 41, 650 S.E.2d at 84 ("[T]he fact that the law of two states may differ does not necessarily imply that the law of one state violates the public policy of the other." (alteration in original) (quoting *Boone*, 345 S.C. at 13-14, 546 S.E.2d at 191). South Carolina's public policy regarding contracts focuses on holding parties to their contract provisions and the effect of those provisions. *See Blackburn*, 407 S.C. at 332-33, 755 S.E.2d at 443 ("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." (alteration in original) (quoting *Regions Bank*, 354 S.C. at 663, 582 S.E.2d at 440)). Therefore, South Carolina public policy would support holding BB&T and Edahl to their choice of law provision, which has the effect of voiding the jury trial waiver. Thus, we find the jury trial waiver is unenforceable, and the circuit court erred in striking Skywaves' demand for a jury trial.[8] Accordingly, we reverse the circuit court's decision on this issue.

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[7] Furthermore, we note that under North Carolina choice of law principles, the result would be the same. *See Tanglewood Land Co. v. Byrd*, 261 S.E.2d 655, 656 (N.C. 1980) ("[T]he interpretation of a contract is governed by the law of the place where the contract was made."); *id.* ("[However], whe[n] parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect.").

[8] We recognize Skywaves waived its right to a jury trial in several other agreements with BB&T, which stated they were governed by South Carolina law. However, the Agreement provided it "supersed[ed] all prior or contemporaneous agreements" of the parties and "any course of performance and/or usage of the trade inconsistent with the terms [of the Agreement]." Thus, because the issues in

B. Grant of Summary Judgment as to Negligence and Negligent Misrepresentation

Skywaves argues the circuit court erred by granting summary judgment as to its tort claims because it presented evidence (1) Edahl and BB&T owed a duty to Skywaves; (2) Edahl and BB&T breached that duty; (3) Skywaves justifiably relied on BB&T and Edahl; and (4) Skywaves' reliance on Edahl and BB&T proximately caused Skywaves damages. In its reply brief, Skywaves contends the two-issue rule does not apply here because the economic loss doctrine and the lender liability statute of frauds in section 37-10-107 were not implicated in its appeal. We disagree.

"Under the two[-]issue rule, whe[n] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). "It should be noted that although cases generally have discussed the 'two[-]issue' rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of [circuit] courts." *Id.* at 346, 692 S.E.2d at 904 (quoting *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 332 S.C. 417, 420 n.1, 472 S.E.2d 253, 255 n.1 (1996)). "[A]n unappealed ruling, right or wrong, is the law of the case." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012).

We affirm the grant of summary judgment to BB&T and Edahl on Skywaves' claims for negligence and negligent misrepresentation based on the two-issue rule. The circuit court granted summary judgment on Skywaves' claims for negligence and negligent misrepresentation on the grounds that (1) the economic loss doctrine barred the claims, (2) the lender liability statute of frauds barred the claims, and (3) Skywaves could not prove the elements of the claims. However, Skywaves only appealed the ground that it could not prove the elements of negligence and negligent misrepresentation. Because Skywaves did not appeal the grounds of the economic loss doctrine or the lender liability statue, these grounds became the law of the case. *See Jones*, 387 S.C. at 346, 692 S.E.2d at 903 ("Under the two[-]issue rule, whe[n] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will

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this case pertain to the Agreement, the choice of law provisions in the other documents are irrelevant.

become the law of the case."); *see also Lewis*, 398 S.C. at 329, 730 S.E.2d at 285 ("[A]n unappealed ruling, right or wrong, is the law of the case."). Accordingly, we affirm the grant of summary judgment on Skywaves' claims for negligence and negligent misrepresentation.

C. Dismissal of SCUTPA Claim

Skywaves argues the circuit court erred by dismissing its SCUTPA claim for failing to make any allegations BB&T and Edahl's conduct affected the public interest. Skywaves maintains it presented evidence BB&T and Edahl's conduct created a potential for repetition because their conduct—undertaking to provide advice—was part of BB&T's institutional procedures. We disagree.

> When a court is considering a motion to dismiss and matters outside the pleadings are presented to and not excluded by the court, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, [SCRCP,] and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Martin v. Companion Healthcare Corp., 357 S.C. 570, 574, 593 S.E.2d 624, 627 (Ct. App. 2004) (quoting Rule 12(b), SCRCP). "An appellate court reviews the granting of summary judgment under the same standard applied by the [circuit] court." *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998).

> A [circuit] court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Id. (quoting Rule 56(c), SCRCP). "Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ." *NationsBank v. Scott Farm*, 320 S.C. 299, 302-03, 465 S.E.2d 98, 100 (Ct. App. 1995). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Id.* at 303, 465 S.E.2d

at 100. "In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial." *Id.* "Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings." *Id.*

Under SCUTPA, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. § 39-5-20(a) (1985). In order to be actionable under SCUTPA, the unfair or deceptive act or practice must have an impact on the public interest. *See Novack Enters., Inc. v. Cty. Corner Interiors Inc.*, 290 S.C. 475, 477-78, 351 S.E.2d 347, 349 (Ct. App. 1986). "An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace." *Id.* at 479, 351 S.E.2d at 349-50.

> An impact on the public interest may be shown if the acts or practices have the potential for repetition. The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.

Singleton v. Stokes Motors, Inc., 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004).

We find the circuit court did not err by granting the motion to dismiss Skywaves' SCUTPA claims. Initially, in *Kerr v. Branch Banking & Trust Co.*, the supreme court found despite filing motions to dismiss, the plaintiffs—which included Skywaves—provided materials outside of the pleadings and the trial court relied on those materials, converting the motions to dismiss into motions for summary judgment. 408 S.C. 328, 329 n.1, 759 S.E.2d 724, 725 n.1 (2014). Similarly, we must evaluate this issue under the applicable standard for summary judgment, rather than the standard for a motion to dismiss. *See Martin*, 357 S.C. at 574, 593 S.E.2d at 627 ("When a court is considering a motion to dismiss and matters outside the pleadings are presented to and not excluded by the court, 'the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, [SCRCP,] and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.'" (quoting Rule 12(b),

SCRCP)); *Wells*, 331 S.C. at 301, 501 S.E.2d at 749 ("An appellate court reviews the granting of summary judgment under the same standard applied by the [circuit] court.").

Viewing the evidence in the light most favorable to Skywaves, we find no genuine issue of material fact exists as to whether Edahl and BB&T's conduct affected the public interest. *See Wells*, 331 S.C. at 301, 501 S.E.2d at 749 ("A [circuit] court should grant a motion for summary judgment when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" (quoting Rule 56(c), SCRCP)); *NationsBank*, 320 S.C. at 303, 465 S.E.2d at 100 ("In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party."); *Novack Enters., Inc.*, 290 S.C. at 477-78, 351 S.E.2d at 349 (providing in order to be actionable under SCUTPA, the unfair or deceptive act or practice must have an impact on the public interest); *see also Singleton*, 358 S.C. at 379, 595 S.E.2d at 466 ("An impact on the public interest may be shown if the acts or practices have the potential for repetition. The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.").

Here, Skywaves provided no evidence to the circuit court BB&T had engaged in violations in the past. Moreover, Skywaves provided no evidence to the circuit court BB&T's institutional procedures—giving advice to customers—created a potential for repetition of unfair and deceptive acts. Instead, on this point, Skywaves relied on its pleadings, which stated "unfair acts and practices of [BB&T and Edahl] have an impact on the public interest, have potential for repetition." Because Skywaves relied solely on the mere allegations in its complaint and did not provide further evidentiary support, BB&T and Edahl were entitled to summary judgment on the SCUTPA claim. *See NationsBank*, 320 S.C. at 303, 465 S.E.2d at 100 ("Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings.").

Additionally, the majority of Skywaves' argument to the circuit court detailed how BB&T and Edahl treated Skywaves differently than a normal bank customer by

giving it advice and asking others to invest in Skywaves, causing BB&T and Edahl to have a fiduciary duty to Skywaves that is not normally owed by a bank to a customer. By arguing BB&T treated Skywaves differently from any other customer, Skywaves admitted BB&T and Edahl's treatment of it was not a standard company procedure with the potential for repetition. Accordingly, the circuit court did not err in dismissing Skywaves' SCUTPA claim, and we affirm the circuit court's dismissal of the claim.[9]

D. Motion to Strike BB&T's and Edahl's Answers

Skywaves argues the circuit court erred by not granting its motion to strike BB&T's and Edahl's answers and entering default against them as a sanction for their deceitful conduct. In particular, Skywaves asserts BB&T and Edahl lied in their answers about Edahl's position as an agent of BB&T and the nature of the relationship between BB&T and Skywaves. Skywaves asserts BB&T and Edahl continued to perpetuate this fraud on the court by denying the existence of the site plan financing modification even after Edahl admitted he agreed to site plan financing. Additionally, Skywaves asks this court to strike BB&T's and Edahl's answers through the doctrines of unclean hands or judicial estoppel. We disagree. "A motion to strike is addressed to the sound discretion of the [circuit court] and will not be disturbed in the absence of a clear showing of prejudicial error." *S.C. Dep't of Health & Envtl. Control v. Fed-Serv Indus., Inc.*, 294 S.C. 33, 39, 362 S.E.2d 311, 314-15 (Ct. App. 1987). "The imposition of sanctions is generally entrusted to the sound discretion of the [c]ircuit [c]ourt." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997) (quoting

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[9] Even if Skywaves' motion to dismiss had not been converted to a motion for summary judgment, the circuit court did not err in dismissing Skywaves' SCUTPA claim because Skywaves merely stated BB&T and Edahl's conduct satisfied the public interest requirement of SCUTPA without alleging any particularized facts. *See Grimsley v. S.C. Law Enf't Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) ("On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the [circuit] court." (quoting *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009))); *id.* ("If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper."); *Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (providing that even under the liberal standard applicable on a motion to dismiss, a mere conclusory allegation, unsupported by any particularized allegations of fact, is insufficient).

Downey v. Dixon, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987)). "A [circuit] court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters will be interfered with by the [c]ourt of [a]ppeals only if an abuse of discretion has occurred." *Id.* "The burden is upon the party appealing from the order to demonstrate the [circuit] court abused its discretion." *Id.* "An abuse of discretion may be found whe[n] the appellant shows that the conclusion reached by the [circuit] court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Id.*

"In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *McNair v. Fairfield County.*, 379 S.C. 462, 467, 665 S.E.2d 830, 832-33 (Ct. App. 2008) (quoting *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999)). "Therefore, the sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Griffin Grading & Clearing, Inc.*, 334 S.C. at 198, 511 S.E.2d at 719. "Whe[n] the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience[,] or gross indifference to its rights to justify the sanction." *Id.* at 198-99, 511 S.E.2d at 719.

We find the circuit court did not abuse its discretion by denying Skywaves' motion to strike BB&T's and Edahl's answers. In its motion to strike, Skywaves asserted BB&T and Edahl consistently lied and engaged in deceitful conduct by refusing to admit Edahl was an agent of BB&T and by denying the existence of the site plan factoring agreement. However, BB&T and Edahl both admitted Edahl was an employee of BB&T, and BB&T's and Edahl's refusal to admit 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," does not constitute deceitful conduct. If BB&T and Edahl had admitted this statement instead of refusing it, they would have conceded all of Edahl's actions involving Skywaves were within the scope of his employment, including the authorization of site plan financing without the approval of his supervisors at BB&T. Moreover, in its amended complaint Skywaves alleged the parties modified the Agreement to include site plan factoring and these modifications were memorialized in writing. In their original answers, BB&T and Edahl denied these allegations outright, but after Edahl admitted he agreed to site plan factoring, both BB&T and Edhal amended their answers to reflect the Agreement was orally modified to include

limited site plan factoring. The record on appeal contains no writing memorializing the agreement to factor site plans, and Edahl testified this modification was not memorialized in writing. Thus, we find Edahl and BB&T were not acting in bad faith or perpetuating fraud on the court by denying Skywaves' allegation they made a written modification to the Agreement to include factoring site plans. Therefore, we find the circuit court did not abuse its discretion in denying Skywaves' motion to strike BB&T's and Edahl's answers. *See Griffin Grading & Clearing, Inc.*, 334 S.C. at 198-99, 511 S.E.2d at 719 ("Whe[n] the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience[,] or gross indifference to its rights to justify the sanction.").

Additionally, Skywaves cites to several cases in support of its argument South Carolina courts have been more open to striking the answer of a defendant in recent years. *See Barnette v. Adams Bros. Logging*, 355 S.C. 588, 595, 586 S.E.2d 572, 576 (2003) (holding the circuit court did not abuse its discretion by dismissing one of the plaintiff's actions "[g]iven [plaintiff's] persistent refusal to comply with the trial court's orders"); *McNair*, 379 S.C. at 464-67, 665 S.E.2d at 831-33 (holding the circuit court did not abuse its discretion by striking the defendant's answer because the defendant failed to (1) produce documents requested during discovery, (2) coherently organize the documents it did produce, and (3) provide complete responses to interrogatories, and the court told defendant to correct the discovery issues several times and warned the defendant "it was inclined to strike [defendant's] answer"); *QZO, Inc. v. Moyer*, 358 S.C. 246, 257-58, 594 S.E.2d 541, 548 (Ct. App. 2004) (holding the circuit court did not abuse its discretion by striking appellant's answer in response to appellant's intentional defiance of the trial court's temporary restraining order and his willful destruction of evidence); *Griffin Grading & Clearing, Inc.*, 334 S.C. at 199-200, 511 S.E.2d at 719 (affirming the circuit court's order striking defendant's answer when defendant "admitted at oral argument that the failure to comply with certain discovery in this case was 'indefensible'" and had failed to comply with four prior orders from the court); *Halverson v. Yawn*, 328 S.C. 618, 620-21, 493 S.E.2d 883, 884-85 (Ct. App. 1997) (affirming the circuit court's order striking appellant's complaint because plaintiff failed to comply with the court's order to comply with discovery and presented no evidence showing she complied with the order). However, unlike the defendants in the cited cases, BB&T and Edahl never violated a court order. Thus, the cases cited by Skywaves are factually and legally distinguishable from this case. Accordingly, the circuit court did not err in denying Skywaves' motion to strike, and we affirm as to this issue.

II. BB&T's Appeal

BB&T argues the circuit court erred in denying its motion for summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by fraudulent acts. BB&T maintains this court has jurisdiction over the denial of its motion for summary judgment because this case, which has been pending since 2009, needs resolution and because the denial of summary judgment is closely related to the issues raised in Skywaves' appeal. We disagree.

"A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial." *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). "The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict." *Id.* "[I]t is unnecessary to make findings of fact and conclusions of law in denying motions for summary judgment." *Id.* at 478 n.1, 443 S.E.2d at 380 n.1.

In *Olson v. Faculty House of Carolina, Inc.*, this court stated denials of motions for summary judgment are generally not immediately appealable but acknowledged the exception that "courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily appealable when these appeals are companion to issues that are reviewable." 344 S.C. 194, 216, 544 S.E.2d 38, 49 (Ct. App. 2001), *aff'd*, 354 S.C. 161, 580 S.E.2d 440 (2003). In particular, this court noted *Garrett v. Snedigar*, 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987), which stated the appeal of a denial of a motion for summary judgment was properly before the court because the issue of whether the circuit court erred in granting summary judgment was properly before the court. *Olson*, 344 S.C. at 216-17, 544 S.E.2d at 50. However, this court also noted "the continued viability of *Garrett* is debatable given the recent decisions of *Silverman v. Campbell*, 326 S.C. 208, 486 S.E.2d 1 (1997)[,[10]] and *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994).[[11]]" *Olson*, 344 S.C. at 218, 544 S.E.2d at 51. This court then declined to address the denial of summary judgment "[b]ecause of the dissonance in the precedent in

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[10] In *Silverman*, the supreme court refused to consider the denial of a motion for summary judgment but did consider another issue raised by the appellants. 326 S.C. at 211, 486 S.E.2d at 2.

[11] In *Ballenger*, the supreme court found appeals of the denial of summary judgment are not appealable, even after final judgment. 313 S.C. at 476-77, 443 S.E.2d at 380.

regard to the appealability of the denial of a motion for summary judgment." *Id.* at 219, 544 S.E.2d at 51.

The supreme court granted certiorari to review the decision reached by this court in *Olson*. *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 163, 580 S.E.2d 440, 441 (2003). The supreme court held "the denial of a motion for summary judgment is not appealable, even after final judgment," overruled *Garrett* and other cases cited by this court to the extent they were inconsistent with the supreme court's holding, and affirmed this court's refusal to consider the denial of summary judgment. *Id.* at 168, n.8, 580 S.E.2d at 444, n.8. *But see Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 371, 628 S.E.2d 902, 918 (Ct. App. 2006) (dismissing an appeal from the denial of summary judgment but recognizing an appellate court "may entertain appeals from interlocutory orders not ordinarily appealable when they are companion to reviewable issues").

Based on the supreme court's decision in *Olson* to affirm this court's refusal to consider a denial of summary judgment and to overrule *Garrett*, we find the supreme court did not intend for the exception allowing orders that are not immediately appealable to be reviewed on appeal when accompanied by a related, immediately-appealable order to apply to orders denying motions for summary judgment. Thus, the circuit court's order denying BB&T summary judgment as to Skywaves' claims for breach of contract and breach of contract accompanied by fraudulent acts is not appealable. *See Olson*, 354 S.C. at 168, 580 S.E.2d at 444 ("[T]he denial of a motion for summary judgment is not appealable, even after final judgment."). Consequently, we dismiss BB&T's appeal.

CONCLUSION

We affirm the circuit court's orders (1) granting summary judgment to BB&T and Edahl on Skywaves' claims of negligence and negligent misrepresentation; (2) dismissing Skywaves' SCUTPA claim; and (3) denying Skywaves' motion to strike BB&T's and Edahl's answers. Additionally, we dismiss BB&T's appeal of the circuit court order denying summary judgment to BB&T on Skywaves' claims for breach of contract and breach of contract accompanied by fraudulent acts. Further, we reverse the circuit court's order granting BB&T's and Edahl's motions to strike Skywaves' demand for a jury trial on Skywaves' claims against BB&T for breach of contract and breach of contract accompanied by fraudulent acts. Accordingly, the circuit court is

AFFIRMED IN PART, REVERSED IN PART, AND DISMISSED IN PART.

LOCKEMY, C.J., and WILLIAMS, J., concur.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Roger M. Young, Circuit Court Judge

RECEIVED
MAY 17 2018
SC Court of Appeals

Appellate Case No. 2015-001809

Skywaves I Corporation, ...Appellant/Respondent,

v.

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

And

James Edahl, ... Respondent,

RESPONDENT/APPELLANT'S PETITION FOR REHEARING

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INTRODUCTION

Respondent/Appellant Branch Banking & Trust Company ("BB&T") respectfully requests rehearing of two issues decided by the Court in its opinion issued May 2, 2018 (No. 5557). First, BB&T seeks rehearing as to the Court's dismissal of BB&T's cross-appeal of the order denying summary judgment on the claims of Appellant/Respondent Skywaves I Corporation ("Skywaves") for breach of contract and breach of contract accompanied by a fraudulent act (together, "the contract claims"). Second, BB&T seeks rehearing as to the Court's reversal of the order striking Skywaves' demand for a jury trial.[1]

BACKGROUND

The Court's Opinion accurately states the undisputed facts, which are as follows. In March 2005, Skywaves entered into a factoring agreement (the "Factoring Agreement") with BB&T, pursuant to which BB&T agreed to purchase, at 80 percent of face value, invoices for telecommunications structures built by Skywaves and shipped to customers. BB&T was entitled to terminate the Factoring Agreement upon the occurrence of an "Event of Default" such as violation of Skywaves' financial covenants, including its inability to pay its debts as they came due in the ordinary course of business; Skywaves' failure to comply with its obligations under the Factoring Agreement; and BB&T "for any other reason deem[ing] itself insecure or the Collateral impaired." (R. p. 412, Factoring Agreement ¶ 12).

Skywaves never fully met its obligation to have its customers make payments directly to BB&T, asserting that some customers were unable or unwilling to do so. At the same time, Skywaves claimed that BB&T had authorized it to retain misdirected payments for up to 30 days. This claim was not supported by any documentary evidence and, in fact, was

[1] If the Court grants rehearing as to the contract claims and concludes that BB&T is entitled to summary judgment, the jury-waiver issue will become moot.

affirmatively contradicted by BB&T's repeated admonitions and warnings that Skywaves' chronic failure to promptly remit payments could be treated as a violation of the Factoring Agreement.

The Factoring Agreement was modified several times over the course of the parties' relationship, including by increasing Skywaves' maximum credit, decreasing the minimum monthly commissions owed to BB&T, and increasing the amount BB&T paid Skywaves for each invoice. In 2006, BB&T agreed to Skywaves' request for advancement of funds based on purchase orders. In mid-2007, BB&T accommodated Skywaves' request for advancement of funds against certain site plans for structures to be ordered and built in the future pursuant to a government contract.

Despite BB&T's ongoing support, Skywaves' business was failing. In every quarter of 2007, Skywaves failed to meet—or even come close to—its financial projections, even after revising the projections *downward* mid-year. Skywaves' revised financial projections estimated that it would end 2007 with a net profit of $1.4 million. Instead, in January 2018 Skywaves informed BB&T that it had actually ended 2007 with a net *loss* of ($1.4 million)—$2.8 million *less* than its revised projection. This was not the only evidence that Skywaves was in deep financial trouble. It is undisputed, for example, that a January 2018 field audit showed that Skywaves had failed to remit to BB&T $340,000 paid by Verizon on factored invoices and that Skywaves was not paying its bills in the ordinary course of business.

On January 25, 2008, BB&T notified Skywaves that it was in default of the Factoring Agreement. (R. pp. 454-455, Default Letter). The default letter identified three events of default, all based on the January field audit and each an independently sufficient basis for a default under the terms of the Factoring Agreement:

1. ... in violation of Paragraph 8 of the Agreement, [Skywaves] has received payment of Accounts (as defined in the Agreement) and has failed to immediately turn those payments over to BB&T as required by the Agreement;

2. ... Skywaves may not be paying its debts as they mature in the ordinary course of business (with approximately 37% of its payables over 60 days);

3. ... BB&T has a good faith belief that the prospects of payment to it or performance of the Obligations (as defined in the Agreement) is impaired.

(*Id.*). Skywaves ultimately declared bankruptcy.

Skywaves filed suit against BB&T in late 2009, nearly a decade ago, asserting numerous claims. With the exception of the contract claims, all of Skywaves' claims have failed as a matter of law.

ARGUMENT

I. THE COURT SHOULD GRANT REHEARING AND REVIEW THE DENIAL OF SUMMARY JUDGMENT ON THE CONTRACT CLAIMS

After Skywaves appealed the orders striking the jury demand and granting summary judgment to BB&T on the tort claims, BB&T cross-appealed the denial of summary judgment on the contract claims. This Court dismissed the cross-appeal, reasoning that in *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003) ("*Olson II*"), the South Carolina Supreme Court abolished the exception permitting review of otherwise-unappealable orders in conjunction with review of closely related, appealable orders. Slip Op. at 21. Rehearing is warranted because the Court read the decision in *Olson II* too broadly.

In *Olson II*, the Supreme Court granted certiorari to review this Court's decision in *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001) ("*Olson I*"). The opinion in *Olson I* recognized "that generally, the denial of a motion for summary

judgment is not immediately appealable," *Id.* at 216, 544 S.E.2d at 49, but also cited several cases in which the Court of Appeals held that a denial of summary judgment or non-appealable order was properly before the Court because it was accompanied by an appealable issue, *see id.* at 216-18, 544 S.E.2d at 49-50. Three of the cases cited as examples were *Garrett v. Snedigar*, 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987), *Anthony v. Padmar, Inc.*, 307 S.C. 503, 415 S.E.2d 828 (Ct. App. 1992), and *Tanner v. Florence City–County Bldg. Comm'n*, 333 S.C. 549, 553, 511 S.E.2d 369, 371 (Ct. App. 1999). The Court also observed, however, that recent decisions by the Supreme Court cast doubt on the continuing viability of the rule. *See Olson I*, 344 S.C. at 218-19, 544 S.E.2d at 51. In the course of its discussion, the Court also noted, but did not apply, the rule articulated in *Davis v. Lunceford*, 287 S.C. 242, 335 S.E.2d 798 (1985), in which the South Carolina Supreme Court had held that "reviewing the denial of summary judgment was proper to resolve protracted litigation." *Olson I*, 344 S.C. at 218, 544 S.E.2d at 50. Ultimately, the Court in *Olson I* declined to review the denial of summary judgment in view of its doubts regarding the continued viability of *Garrett* and similar cases. *Id.* at 219, 544 S.E.2d at 51.

In *Olson II*, the Supreme Court affirmed the Court of Appeal's refusal to review the denial of summary judgment and specifically overruled *Garrett*, *Anthony*, and *Tanner*. *See Olson II*, 354 S.C. at 168 & n.8, 580 S.E.2d at 444 & n.8. Notably, however, the Supreme Court distinguished, but did not overrule, *Davis*.

The *Olson II* Court's treatment of *Davis* indicates that the rule against appellate review of a denial of summary judgment is not absolute. Certainly, *Olson II* makes clear that a denial of summary judgment is not properly before the Court simply because it is accompanied by a reviewable order. The continuing viability of *Davis*, however, makes it

equally clear that this Court has the *discretion* to review an otherwise-unappealable order in conjunction with its review of an appealable order, when doing so will advance the resolution of long-pending litigation. *See Davis*, 287 S.C. at 243, 335 S.E.2d at 799 (accepting appeal of denial of summary judgment "[b]ecause of the need for final resolution" in a long-pending medical malpractice action.

Discretionary review of the denial of summary judgment on the contract claims is warranted to bring finality to the parties' dispute. The events giving rise to this litigation occurred more than a decade ago, in 2007 and early 2008, and the case has been pending since December 2009. The circuit court has dismissed or granted summary judgment on all of the numerous tort claims asserted by Skywaves, leaving only the contract claims. As explained in BB&T's briefs, however, those claims also fail as a matter of law. Therefore, reviewing—and reversing—the denial of summary judgment on those claims will fully resolve this litigation.

The exercise of discretion is also appropriate because the denial of summary judgment is "closely connected" to the issues raised in Skywaves' appeal. *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002). As our Supreme Court recognized in a related case, this litigation "at its core ... revolves around the contractual relationship between BB&T and its customer, Skywaves." *Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 726 (2014). And, as the circuit court recognized in its summary judgment order, all of Skywaves' claims allege a single wrong committed by BB&T: a failure "to honor its obligations to capitalize [Skywaves'] needs." (R. p. 58, Order). In granting summary judgment on Skywaves' claims for negligence and negligent misrepresentation, the circuit court found no evidence that BB&T lied or that Skywaves

justifiably relied on BB&T's alleged representations. These same allegations are central to Skywaves' contract claims.

Finally, the issues have been fully briefed. Consequently, no party will be prejudiced by the Court's consideration of the merits.

For these reasons, BB&T asks the Court to grant rehearing and to rule on the merits of BB&T's cross-appeal of the denial of summary judgment on the contract claims.

II. THE COURT SHOULD GRANT REHEARING AND AFFIRM THE ORDER STRIKING SKYWAVES' DEMAND FOR A JURY TRIAL

BB&T also seeks rehearing as to the Court's reversal of the order striking Skywaves' demand for a jury trial.[2] Rehearing is warranted because the Court misapprehended the binding force of the jury-waiver provision, under which Skywaves *and* BB&T "knowingly, intelligently and expressly waive[d] ... trial by jury and the right to trial by jury," and the Factoring Agreement's choice-of-law provision, specifying North Carolina law. (R. p. 416, Factoring Agreement ¶ 25 (choice of law), ¶ 29 (jury waiver)). Skywaves contended, and the Court agreed, that the jury-waiver provision is unenforceable under N.C. Gen. Stat. § 22B-10, which provides that contractual jury waivers are "unconscionable as a matter of law."

As BB&T explained in its brief, the right to a jury trial is procedural and thus is governed by the law of the forum, *i.e.*, South Carolina. As a general rule, "[t]he 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). This rule applies regardless of the existence of a contractual choice-of-law provision, because such provisions apply only to substantive issues, while procedural issues are governed by the law of the forum. *See* 17A Am. Jur. 2d

[2] Of course, the Court does not need to reach this issue if it agrees with BB&T that it is entitled to summary judgment on all of Skywaves' claims.

Contracts § 264 (citing *Terrace Group v. Vermont Castings, Inc.*, 753 A.2d 350 (R.I. 2000)); 43 Am. Jur. 2d *Insurance* § 331 (citing *Burge v. Mid-Continent Cas. Co.*, 933 P.2d 210 (N.M. 1996)). North Carolina courts have recognized and applied this principle. *See, e.g.*, *Taylor v. Abernethy*, 174 N.C. App. 93, 103, 620 S.E.2d 242, 250 (2005) (holding that the law of the forum governs procedural issues even if another state's law governs substantive issues). Accordingly, South Carolina law governs the enforceability of the jury trial waiver in the Factoring Agreement.

Matters related to the right to a jury trial are inherently procedural. The law of the forum determines, for example, the number of jurors, the procedures for impaneling a jury, what questions are decided by the jury, and whether or not a civil verdict must be unanimous. In a case pending in a South Carolina court, all of these matters are determined under South Carolina law, even if the elements of the plaintiff's claims are governed by the law of another state. If the parties, by agreement, decide that the jury should function differently—for example, by agreeing that the case will be tried by four jurors instead of six, *see* S.C. Code Ann. § 14-9-180—they are making an agreement regarding procedural rights governed by South Carolina law. By the same token, an agreement to waive trial by jury in a South Carolina forum is an agreement for the waiver of a South Carolina procedural right.

Rehearing is warranted even if one accepts the Court's view that the issue here is more about the enforceability of a contract than it is about the procedural right to a jury trial. Slip Op. at 11. Skywaves is unfairly attempting to use the Factoring Agreement as both a sword and a shield. It is seeking damages for BB&T's alleged breach of the Factoring Agreement while simultaneously repudiating the jury waiver provision. At least one court has refused to countenance such tactics. *See James River Mgmt. Co. v. Kehoe*, 2010 WL

431473, at *4 (E.D. Va. Feb. 5, 2010) (refusing to apply N.C. Gen. Stat. § 22B-10 because "[i]t would be inequitable to allow James River to retain the benefits of the Employment Agreement without having, at the same time, to live with its other provisions").

The jury waiver provision is clear and conspicuous. It appears in the Factoring Agreement 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. Moreover, the jury waiver is unambiguous and bilateral. In simple and direct terms, the provision states that Skywaves and BB&T waive "trial by jury and the right to trial by jury on any issue in any way pertaining to this agreement." (R. p. 416, Factoring Agreement ¶ 29).

As BB&T explained in its Final Respondent's Brief of Respondent/Appellant, there can be no doubt that Ronald Konersmann, who executed the Factoring Agreement as Skywaves' founder and CEO, was fully capable of understanding the waiver. Konersmann not only holds an MBA from the University of Notre Dame (R. pp. 328-329, Konersmann Dep. 27:11-28:5), he also had substantial prior experience with factoring agreements. (R. pp. 334-335, Konersmann Dep. 122:10–123:2).

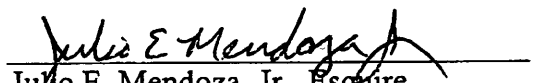
For these reasons, and if the Court does not grant rehearing and reverse the denial of summary judgment on the contract claims, BB&T asks the Court to grant rehearing and affirm the order striking Skywaves' demand for a jury trial.

CONCLUSION

For the reasons set forth above, BB&T respectfully asks the Court to grant rehearing and to exercise its discretion to review the circuit court's denial of BB&T's motion for summary judgment on Skywaves' claims for breach of contract and breach of contract

accompanied by a fraudulent act. Further, the Court should reverse the circuit court and remand with instructions for the circuit court to enter summary judgment in BB&T's favor on those claims, finally resolving nearly a decade of litigation. Alternatively, the Court should grant rehearing on the jury-waiver issue, and should affirm the circuit court's order striking Skywaves' demand for a jury trial.

Respectfully submitted,



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Columbia, South Carolina
May 17, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Roger M. Young, Circuit Court Judge

RECEIVED
MAY 17 2018
SC Court of Appeals

Appellate Case No. 2015-001809

Skywaves I Corporation, ... Appellant/Respondent,

v.

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

And

James Edahl, ... Respondent,

PROOF OF SERVICE

I, Julio E. Mendoza, Jr., Esquire, hereby certify that on the 17th day of May, 2018, I served a copy of the RESPONDENT/APPELLANT'S PETITION FOR REHEARING, submitted by Respondent/Appellant Branch Banking and Trust Company, Successor in Merger to Branch Banking and Trust Company of SC, a/k/a BB&T, on counsel for the Appellant/Respondent and on counsel for Respondent James Edahl via United States Mail, postage prepaid, and addressed as follows:

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NEXSEN|PRUET

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Member
Admitted in SC

May 17, 2018

RECEIVED
MAY 17 2018
SC Court of Appeals

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *Skywaves I Corporation v. Branch Banking and Trust Company, et al.*
Appellate Case No. 2015-001809

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Respondent/Appellant's Petition for Rehearing, with proof of service attached to the petition, in the above-referenced appellate case. Also enclosed is an additional copy of the petition, to provide a "clocked-in" copy of the document for my firm's files. Please file the petition and provide a "clocked-in" copy to me.

Thank you for your assistance. Please do not hesitate to contact me if you need any further information.

With best regards,

Julio E. Mendoza, Jr.

cc: Counsel of Record

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The South Carolina Court of Appeals

Skywaves I Corporation, Appellant/Respondent,

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,

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

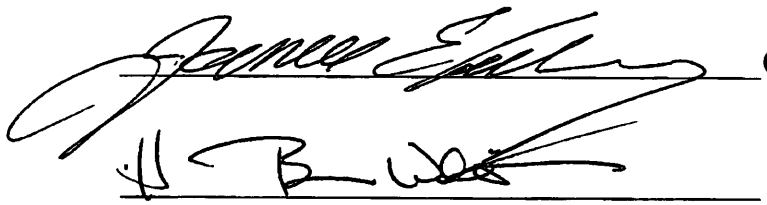
And

Of Whom James Edahl is the Respondent.

Appellate Case No. 2015-001809

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.

J.

J.

Columbia, South Carolina

FILED
June 21, 2018

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The Honorable Roger M. Young, Sr.