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THE STATE OF SOUTH CAROLINA
In The Court of Appeals
No. 2012-205647

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APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

SC Court of Appeals

Roger M. Young, Circuit Court Judge

Cases 2009-CP-10-07515, 2009-CP-10-07517,
2009-CP-10-07518 and 2010-CP-10-09959

2009-CP-10-07515

James J. Kerr, Crayton Walters, and J.T. Main, LLC, ... Appellants,

v.

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

2009-CP-10-07517

Ron Konersmann, ... Appellant,

v.

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

2009-CP-10-07518

John Voytko, ... Appellant,

v.

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

2010-CP-10-09959

Patricia Konersmann, ... Appellant,

v.

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

RECORD ON APPEAL – VOLUME II OF II

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-7517

Ron Konersmann Appellant

v.

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

NOTICE OF APPEAL

Plaintiff/Appellant Ron Konersmann appeals the Judgment of the Honorable Roger M. Young, dated June 14, 2012 and filed on June 15, 2012, granting Respondents' Motion to Dismiss, in the form of an Order Amending Order Granting Defendants' Motion to Dismiss Amended Complaint with Prejudice Dated November 16, 2011 (attached hereto as Exhibit A). Plaintiff/Appellant received written notice of entry of this Judgment on June 25, 2012 (mailed on June 19, 2012). Plaintiff/Appellant previously filed an appeal from the Court's November 16, 2011 Order, which was amended by the Order at issue in this Notice of Appeal, following a Rule 59(e) motion to alter or amend. That appeal is pending in the South Carolina Court of Appeals at Appellate Case No. 2012-205647.

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July 16, 2012

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

JAMES J. KERR, CRAYTON WALTERS,
and J.T. MAIN, LLC,

Civil Action No. 2009-CP-10-07515

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,

**ORDER AMENDING ORDER
GRANTING DEFENDANTS' MOTIONS
TO DISMISS AMENDED COMPLAINT
WITH PREJUDICE
DATED NOVEMBER 16, 2011**

Defendants.

RON KONERSMANN,

Civil Action No. 2009-CP-10-7518

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,

Civil Action No. 2009-CP-10-7518

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.

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

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

I. FACTS

This is a lender liability case in which Plaintiffs in each of the three captioned cases allege that Defendant BB&T failed to fund the financing needs of Skywaves Corporation I. ("Skywaves"), a company in which each Plaintiff was an investor. Plaintiffs John Voytko and Ron Konersmann were also officers in Skywaves.

Plaintiffs' allegations do not pertain to any alleged relationship they had with BB&T but, instead, to the relationship between BB&T and Skywaves. Defendant BB&T is a banking institution with branch offices in Charleston, South Carolina, and Defendant Edahl is one of its employees. Skywaves is a company that developed a structural product, specifically cell tower units, for use in the wireless telecommunications industry. To support the manufacture of these individual cell tower units, Skywaves entered into a certain factoring agreement with BB&T in the Spring of 2005 whereby BB&T would purchase certain receivables of Skywaves at a discount and payment of those receivables would then be made to BB&T.

In January of 2008, BB&T declared a default by Skywaves under the factoring agreement. Plaintiffs contend the default was improper, as BB&T, acting through its employee Defendant Edahl, promised that BB&T "would fund all [Skywaves'] financial needs." Plaintiffs claim the improper default caused Skywaves to go into bankruptcy and resulted in the loss of their investment in Skywaves and the loss of the salaries for Plaintiffs Voytko and Konersmann.

Plaintiffs are not customers of BB&T. BB&T did not lend any money to Plaintiffs. Plaintiffs are not debtors in this case. Plaintiffs had no direct relationship with BB&T whatsoever. All of Plaintiffs' allegations pertain to the relationship between Skywaves and BB&T, and all of Plaintiffs' alleged injuries arise out of Skywaves' bankruptcy filing. Plaintiffs have filed proofs of claim against Skywaves in the bankruptcy proceeding.



In their Amended Complaints, Plaintiffs assert four claims for: (1) negligent misrepresentation; (2) fraudulent misrepresentation; (3) negligence; and (4) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").¹ Defendants moved to dismiss all four claims pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

II. LEGAL ANALYSIS

South Carolina Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim for failure to state facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6); *Fleteau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (2003). The question is whether the pleadings, taken in the light most favorable to the plaintiff, articulate a valid claim for relief. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). A Rule 12(b)(6) motion "must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (1997). The Court dismisses these cases because there is no possibility that Plaintiffs will be able to establish liability on the part of either Defendant under any of the claims as alleged in the Amended Complaints.

A. Section 37-10-107 of the South Carolina Code Bars All of the Plaintiffs' Claims Against Defendants.

All of Plaintiffs' claims against Defendants are statutorily barred, as a matter of law. Many states, including South Carolina, have enacted specialized statutes concerning loan and credit agreements. These statutes bar enforcement of oral lending agreements and bar fraud and other tort claims based on alleged oral misrepresentations and other non-written conduct concerning these loan agreements. See S.C. Code § 37-10-107.

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

¹ Plaintiffs Kerr, Walters and J.T. Main, LLC have only asserted three claims for negligent misrepresentation, fraudulent inducement and negligence/lender liability.

(1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

(a) to lend or borrow money;

(b) to defer or forbear in the repayment of money; or

(c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

(2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:

(a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;

(b) promissory or equitable estoppel;

(c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or

(d) negligent misrepresentation.

S.C. Code Ann. § 37-10-107.

All of Plaintiffs' claims are all based upon alleged statements, promises, or representations made by BB&T or Edahl to Skywaves that BB&T "would fund all [Skywaves'] financial needs." Each of the claims is based upon alleged representations made by Defendants to Skywaves.

Plaintiffs make general reference to representations made "in writing;" but Plaintiffs have not alleged any material terms or conditions of any agreement with Defendants nor have Plaintiffs specifically alleged that any such agreement was in fact received by them. Plaintiffs have made a number of allegations regarding writings purportedly between BB&T and Skywaves, but Plaintiffs, although investors in Skywaves, cannot rely on such writings to defeat

the plain wording of Section 37-10-107 which, as stated above, requires in pertinent part that "the party seeking to maintain the action or defense [receive] a writing from the party to be charged..." S.C. Code Ann. § 37-10-107(1)(c).

Because Plaintiffs have not alleged or otherwise provided anything in writing to evidence the material terms and conditions of the alleged promises or representations made to them, their claims fail as a matter of law. *See Carolina First Bank v. Lucas*, Case No. 03-CP-10-1907, 2004 WL 5208410 (S.C. Com. Pl. Jun. 14, 2004); *see also Robertson v. First Union Nat'l Bank*, Case No. 99-CP-10-288, 2000 WL 35722762 (S.C. Com. Pl. Aug. 8, 2000). Specifically, Plaintiffs have not alleged that they "received a writing from the party to be charged [i.e. BB&T] containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing." S.C. Code Ann. § 37-10-107(1)(c). Accordingly, as a matter of law, Plaintiffs cannot "maintain an action for legal . . . relief . . . based upon [BB&T's or Edahl's alleged] failure to lend . . . money [to Skywaves.]" S.C. Code Ann. § 37-10-107(1)(a). Under these circumstances, Plaintiffs cannot establish their claims against Defendants, as a matter of law.

1. The Choice of Law Provision in the Security and Factoring Agreement Between Skywaves and BB&T Does Not Apply to Plaintiffs' Claims Against Defendants.

Plaintiffs contend that S.C. Code Ann. § 37-10-107 does not apply to the tort claims they have asserted against Defendants. In support of their argument, Plaintiffs cite to a provision in the Factoring and Security Agreement ("Agreement") between Skywaves and BB&T that the Agreement is governed by North Carolina law. Plaintiffs are not parties to the Agreement and, thus, any choice of law provisions contained therein do not apply in these cases. Moreover, the relevant provision in the Agreement pertains to claims arising "under" the Agreement. In the

case at hand, Plaintiffs are contending that an agreement existed outside of the Agreement, and that certain promises were made by Defendants outside the Agreement regarding funding of Skywaves. Under the circumstances, there is no basis for Plaintiffs to rely upon a choice of law provision in a contract to which they were not parties. South Carolina law governs Plaintiffs' claims against Defendants and dictates that the claims be dismissed, as a matter of law.

2. Plaintiffs' Allegations and Claims Arise from an Alleged Failure to Loan Money Such that Section 37-10-107 Applies.

Plaintiffs also contend that because the relationship between BB&T and Skywaves was pursuant to a factoring agreement, it was not a "typical" loan transaction and that S.C. Code Ann. § 37-10-107 does not apply. Plaintiffs ignore, however, that the very allegations in their Amended Complaints, to wit, that the factoring agreement was modified by BB&T such that BB&T agreed to loan money to Skywaves. Specifically, Plaintiffs allege there was no "need for Skywaves to either invoice or manufacture the product. In this way, BB&T agreed to advance the costs of manufacturing." Moreover, although Plaintiffs attempt to characterize a factoring agreement as an atypical loan transaction, a key purpose of the statute is to protect financial institutions and other lenders from claims that are inconsistent with the written agreements outlining the terms of the transaction. Because the statutes within Title 37 should "be liberally construed and applied to promote [Title 37's] underlying purposes and policies," any question regarding the applicability of section 37-10-107 to the alleged agreement in the Amended Complaint is resolved in Defendant's favor. See S.C. Code Ann. § 37-10-102(1).

3. Section 37-10-107 Bars Fraud Claims.

Plaintiffs contend that because section 37-10-107 does not expressly exclude a claim for fraud, their fraud claims are not barred. To that end, Plaintiffs focus on subsection 2(d) of the statute, which bars any action based on "negligent misrepresentation." Plaintiffs argue that

because the drafters of the statute specifically singled out actions based on "negligent misrepresentation," but not "intentional misrepresentation," an action based on fraud would not be precluded by the statute. However, South Carolina state and federal trial courts have found that fraud claims are barred by section 37-10-107. See e.g. *Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina*, C.A. No. 2:98-158-23 (S.C. Com. Pl. April 12, 1999) (citing *Derrick v. Branch Banking and Trust Company of South Carolina*, 96-CP-42-2095 (S.C.Ct.Cm. P. 9/8/98)). This Court agrees and finds that section 37-10-107 bars Plaintiffs' fraud, negligence and unfair trade practices claims.

4. Section 32-3-10(5) Does Not Apply to the Alleged Agreement in the Amended Complaint and Is Not Inconsistent with Section 37-10-107.

Section 37-10-107 provides that "in the event of a conflict between this section and any other provision of law of this State relating to the requirements of a signed writing, the provisions of the other provision of law shall control." S.C. Code § 37-10-107(4). According to Plaintiffs, S.C. Code § 32-3-10(5), which is a more general statute of frauds, "may" be applicable to the dispute and, thus, creates a conflict with section 37-10-107 such that section 32-3-10(5) applies.

Even if section 32-3-10(5) somehow applies in this case, it is not inconsistent with section 37-10-107. The two statutes can be read and construed together. In South Carolina, "[i]f the provisions of the two statutes can be construed so that both can stand, this Court will so construe them." *In the Interest of Shaw*, 265 S.E.2d 522, 524 (S.C. 1980) (citing *City of Spartanburg v. Blalock*, 223 S.C. 252, 75 S.E.2d 361 (1953)). Further, "where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Wilder v. South Carolina Hwy.*

Dep't, 90 S.E.2d 635 (S.C. 1955); *see also Ramsey v. County of McCormick*, 412 S.E.2d 408, 410 (S.C. 1991). As the more specific statute on this issue, S.C. Code § 37-10-107 is to be considered a qualifier of section 32-3-10(5).

B. Plaintiffs Fail to Allege Any Conduct on the Part of Either Defendant That Would Support Their Claims.

Notwithstanding that all of Plaintiffs' claims are barred under S.C. Code Ann. § 37-10-107, this Court alternatively dismisses the claims because while Skywaves may have been a customer of Defendant BB&T, Plaintiffs were not. Defendants did not owe any duty to Plaintiffs and, therefore, Plaintiffs cannot establish their claim for negligence or lender liability.

C. Plaintiffs Cannot Sustain a Claim Against Either Defendant for Violation of the South Carolina Unfair Trade Practices Act.

Finally, Plaintiffs, as investors, have not pled sufficient allegations against Defendants to support a claim for violation of the SCUTPA. Investor claims are generally a federally regulated arena. "Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States" are generally exempt from the provisions of the SCUTPA. S.C. Code Ann. § 39-5-40(a).

Additionally, to be actionable under the SCUTPA, the unfair or deceptive act or practice must have an impact upon the public interest. *Noack Enterprises, Inc. v. Country Corner Interiors*, 351 S.E.2d 347 (S.C.Ct.App. 1986). Here, Plaintiffs merely offer a conclusion of law that the "unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition." Absent from the Amended Complaints are any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition.

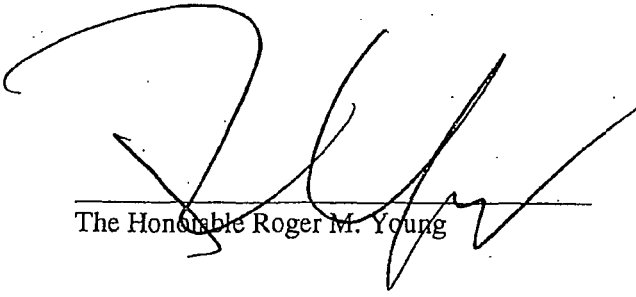
At most, the Amended Complaints allege, in sum, that Defendants promised to but then refused to fund the financing needs of Skywaves. These allegations do not comprise "unfair or

deceptive acts” that are actionable under the SCUTPA because business relationships that affect only the parties to the complained-of transaction are not actionable under the SCUTPA. See *Noack Enterprises, Inc.* 351 S.E.2d at 349-50.

III. CONCLUSION

For the reasons set forth herein, it is hereby ORDERED that Defendant BB&T’s and Defendant Edahl’s Motions to Dismiss are GRANTED and all claims against them are dismissed with prejudice.

AND IT IS SO ORDERED.



The Honorable Roger M. Young

6/14, 2011
Charleston, South Carolina

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-10-7518

John Voytko 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 John Voytko appeals the Judgment of the Honorable Roger M. Young, dated June 14, 2012 and filed on June 15, 2012, granting Respondents' Motion to Dismiss, in the form of an Order Amending Order Granting Defendants' Motion to Dismiss Amended Complaint with Prejudice Dated November 16, 2011 (attached hereto as Exhibit A). Plaintiff/Appellant received written notice of entry of this Judgment on June 25, 2012 (mailed on June 19, 2012). Plaintiff/Appellant previously filed an appeal from the Court's November 16, 2011 Order, which was amended by the Order at issue in this Notice of Appeal, following a Rule 59(e) motion to alter or amend. That appeal is pending in the South Carolina Court of Appeals at Appellate Case No. 2012-205647.

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July 16, 2012

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Branch Banking and Trust Company of SC, a/k/a BB&T, and James Edahl*

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

JAMES J. KERR, CRAYTON WALTERS,
and J.T. MAIN, LLC,

Civil Action No. 2009-CP-10-07515

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,

**ORDER AMENDING ORDER
GRANTING DEFENDANTS' MOTIONS
TO DISMISS AMENDED COMPLAINT
WITH PREJUDICE
DATED NOVEMBER 16, 2011**

Defendants.

RON KONERSMANN,

Civil Action No. 2009-CP-10-7518

Plaintiff,

vs.

BRANCH BANKING AND TRUST
COMPANY, successor in merger to BRANCH
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JOHN VOYTKO,

Civil Action No. 2009-CP-10-7518

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a/k/a BB&T, and JAMES EDAHL,

Defendants.

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

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

I. FACTS

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In January of 2008, BB&T declared a default by Skywaves under the factoring agreement. Plaintiffs contend the default was improper, as BB&T, acting through its employee Defendant Edahl, promised that BB&T "would fund all [Skywaves'] financial needs." Plaintiffs claim the improper default caused Skywaves to go into bankruptcy and resulted in the loss of their investment in Skywaves and the loss of the salaries for Plaintiffs Voytko and Konersmann.

Plaintiffs are not customers of BB&T. BB&T did not lend any money to Plaintiffs. Plaintiffs are not debtors in this case. Plaintiffs had no direct relationship with BB&T whatsoever. All of Plaintiffs' allegations pertain to the relationship between Skywaves and BB&T, and all of Plaintiffs' alleged injuries arise out of Skywaves' bankruptcy filing. Plaintiffs have filed proofs of claim against Skywaves in the bankruptcy proceeding.



In their Amended Complaints, Plaintiffs assert four claims for: (1) negligent misrepresentation; (2) fraudulent misrepresentation; (3) negligence; and (4) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").¹ Defendants moved to dismiss all four claims pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

II. LEGAL ANALYSIS

South Carolina Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim for failure to state facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6); *Fleteau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (2003). The question is whether the pleadings, taken in the light most favorable to the plaintiff, articulate a valid claim for relief. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). A Rule 12(b)(6) motion "must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (1997). The Court dismisses these cases because there is no possibility that Plaintiffs will be able to establish liability on the part of either Defendant under any of the claims as alleged in the Amended Complaints.

A. Section 37-10-107 of the South Carolina Code Bars All of the Plaintiffs' Claims Against Defendants.

All of Plaintiffs' claims against Defendants are statutorily barred, as a matter of law. Many states, including South Carolina, have enacted specialized statutes concerning loan and credit agreements. These statutes bar enforcement of oral lending agreements and bar fraud and other tort claims based on alleged oral misrepresentations and other non-written conduct concerning these loan agreements. See S.C. Code § 37-10-107.

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

¹ Plaintiffs Kerr, Walters and J.T. Main, LLC have only asserted three claims for negligent misrepresentation, fraudulent inducement and negligence/lender liability.

(1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

(a) to lend or borrow money;

(b) to defer or forbear in the repayment of money; or

(c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

(2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:

(a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;

(b) promissory or equitable estoppel;

(c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or

(d) negligent misrepresentation.

S.C. Code Ann. § 37-10-107.

All of Plaintiffs' claims are all based upon alleged statements, promises, or representations made by BB&T or Edahl to Skywaves that BB&T "would fund all [Skywaves'] financial needs." Each of the claims is based upon alleged representations made by Defendants to Skywaves.

Plaintiffs make general reference to representations made "in writing;" but Plaintiffs have not alleged any material terms or conditions of any agreement with Defendants nor have Plaintiffs specifically alleged that any such agreement was in fact received by them. Plaintiffs have made a number of allegations regarding writings purportedly between BB&T and Skywaves, but Plaintiffs, although investors in Skywaves, cannot rely on such writings to defeat

the plain wording of Section 37-10-107 which, as stated above, requires in pertinent part that "the party seeking to maintain the action or defense [receive] a writing from the party to be charged..." S.C. Code Ann. § 37-10-107(1)(c).

Because Plaintiffs have not alleged or otherwise provided anything in writing to evidence the material terms and conditions of the alleged promises or representations made to them, their claims fail as a matter of law. *See Carolina First Bank v. Lucas*, Case No. 03-CP-10-1907, 2004 WL 5208410 (S.C. Com. Pl. Jun. 14, 2004); *see also Robertson v. First Union Nat'l Bank*, Case No. 99-CP-10-288, 2000 WL 35722762 (S.C. Com. Pl. Aug. 8, 2000). Specifically, Plaintiffs have not alleged that they "received a writing from the party to be charged [*i.e.* BB&T] containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing." S.C. Code Ann. § 37-10-107(1)(c). Accordingly, as a matter of law, Plaintiffs cannot "maintain an action for legal . . . relief . . . based upon [BB&T's or Edahl's alleged] failure to lend . . . money [to Skywaves.]" S.C. Code Ann. § 37-10-107(1)(a). Under these circumstances, Plaintiffs cannot establish their claims against Defendants, as a matter of law.

1. The Choice of Law Provision in the Security and Factoring Agreement Between Skywaves and BB&T Does Not Apply to Plaintiffs' Claims Against Defendants.

Plaintiffs contend that S.C. Code Ann. § 37-10-107 does not apply to the tort claims they have asserted against Defendants. In support of their argument, Plaintiffs cite to a provision in the Factoring and Security Agreement ("Agreement") between Skywaves and BB&T that the Agreement is governed by North Carolina law. Plaintiffs are not parties to the Agreement and, thus, any choice of law provisions contained therein do not apply in these cases. Moreover, the relevant provision in the Agreement pertains to claims arising "under" the Agreement. In the

case at hand, Plaintiffs are contending that an agreement existed outside of the Agreement, and that certain promises were made by Defendants outside the Agreement regarding funding of Skywaves. Under the circumstances, there is no basis for Plaintiffs to rely upon a choice of law provision in a contract to which they were not parties. South Carolina law governs Plaintiffs' claims against Defendants and dictates that the claims be dismissed, as a matter of law.

2. Plaintiffs' Allegations and Claims Arise from an Alleged Failure to Loan Money Such that Section 37-10-107 Applies.

Plaintiffs also contend that because the relationship between BB&T and Skywaves was pursuant to a factoring agreement, it was not a "typical" loan transaction and that S.C. Code Ann. § 37-10-107 does not apply. Plaintiffs ignore, however, that the very allegations in their Amended Complaints, to wit, that the factoring agreement was modified by BB&T such that BB&T agreed to loan money to Skywaves. Specifically, Plaintiffs allege there was no "need for Skywaves to either invoice or manufacture the product. In this way, BB&T agreed to advance the costs of manufacturing." Moreover, although Plaintiffs attempt to characterize a factoring agreement as an atypical loan transaction, a key purpose of the statute is to protect financial institutions and other lenders from claims that are inconsistent with the written agreements outlining the terms of the transaction. Because the statutes within Title 37 should "be liberally construed and applied to promote [Title 37's] underlying purposes and policies," any question regarding the applicability of section 37-10-107 to the alleged agreement in the Amended Complaint is resolved in Defendant's favor. *See* S.C. Code Ann. § 37-10-102(1).

3. Section 37-10-107 Bars Fraud Claims.

Plaintiffs contend that because section 37-10-107 does not expressly exclude a claim for fraud, their fraud claims are not barred. To that end, Plaintiffs focus on subsection 2(d) of the statute, which bars any action based on "negligent misrepresentation." Plaintiffs argue that

because the drafters of the statute specifically singled out actions based on "negligent misrepresentation," but not "intentional misrepresentation," an action based on fraud would not be precluded by the statute. However, South Carolina state and federal trial courts have found that fraud claims are barred by section 37-10-107. See e.g. *Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina*, C.A. No. 2:98-158-23 (S.C. Com. Pl. April 12, 1999) (citing *Derrick v. Branch Banking and Trust Company of South Carolina*, 96-CP-42-2095 (S.C.Ct.Cm. P. 9/8/98)). This Court agrees and finds that section 37-10-107 bars Plaintiffs' fraud, negligence and unfair trade practices claims.

4. Section 32-3-10(5) Does Not Apply to the Alleged Agreement in the Amended Complaint and Is Not Inconsistent with Section 37-10-107.

Section 37-10-107 provides that "in the event of a conflict between this section and any other provision of law of this State relating to the requirements of a signed writing, the provisions of the other provision of law shall control." S.C. Code § 37-10-107(4). According to Plaintiffs, S.C. Code § 32-3-10(5), which is a more general statute of frauds, "may" be applicable to the dispute and, thus, creates a conflict with section 37-10-107 such that section 32-3-10(5) applies.

Even if section 32-3-10(5) somehow applies in this case, it is not inconsistent with section 37-10-107. The two statutes can be read and construed together. In South Carolina, "[i]f the provisions of the two statutes can be construed so that both can stand, this Court will so construe them." *In the Interest of Shaw*, 265 S.E.2d 522, 524 (S.C. 1980) (citing *City of Spartanburg v. Blalock*, 223 S.C. 252, 75 S.E.2d 361 (1953)). Further, "where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Wilder v. South Carolina Hwy.*

Dep't, 90 S.E.2d 635 (S.C. 1955); *see also Ramsey v. County of McCormick*, 412 S.E.2d 408, 410 (S.C. 1991). As the more specific statute on this issue, S.C. Code § 37-10-107 is to be considered a qualifier of section 32-3-10(5).

B. Plaintiffs Fail to Allege Any Conduct on the Part of Either Defendant That Would Support Their Claims.

Notwithstanding that all of Plaintiffs' claims are barred under S.C. Code Ann. § 37-10-107, this Court alternatively dismisses the claims because while Skywaves may have been a customer of Defendant BB&T, Plaintiffs were not. Defendants did not owe any duty to Plaintiffs and, therefore, Plaintiffs cannot establish their claim for negligence or lender liability.

C. Plaintiffs Cannot Sustain a Claim Against Either Defendant for Violation of the South Carolina Unfair Trade Practices Act.

Finally, Plaintiffs, as investors, have not pled sufficient allegations against Defendants to support a claim for violation of the SCUTPA. Investor claims are generally a federally regulated arena. "Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States . . ." are generally exempt from the provisions of the SCUTPA. S.C. Code Ann. § 39-5-40(a).

Additionally, to be actionable under the SCUTPA, the unfair or deceptive act or practice must have an impact upon the public interest. *Noack Enterprises, Inc. v. Country Corner Interiors*, 351 S.E.2d 347 (S.C.Ct.App. 1986). Here, Plaintiffs merely offer a conclusion of law that the "unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition." Absent from the Amended Complaints are any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition.

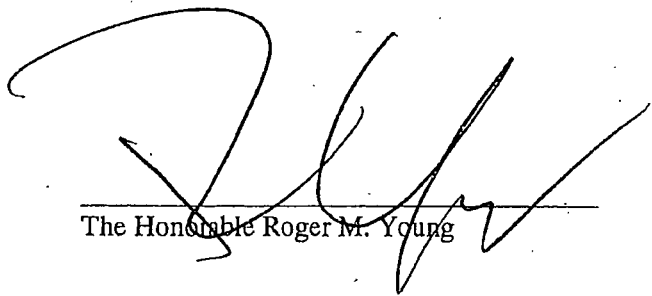
At most, the Amended Complaints allege, in sum, that Defendants promised to but then refused to fund the financing needs of Skywaves. These allegations do not comprise "unfair or

deceptive acts” that are actionable under the SCUTPA because business relationships that affect only the parties to the complained-of transaction are not actionable under the SCUTPA. *See Noack Enterprises, Inc.* 351 S.E.2d at 349-50.

III. CONCLUSION

For the reasons set forth herein, it is hereby ORDERED that Defendant BB&T’s and Defendant Edahl’s Motions to Dismiss are GRANTED and all claims against them are dismissed with prejudice.

AND IT IS SO ORDERED.



The Honorable Roger M. Young

6/14, 2011
Charleston, South Carolina

10-9959

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.: 2010-CP-10-9959

BY

[Handwritten signature]

JULIE J. ARMSTRONG
CLERK OF COURT

2012 JUL 17 AM 11:55

FILED

Patricia Konersmann,.....Appellant

v.

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

NOTICE OF APPEAL

Plaintiff Patricia Konersmann appeals the Judgment of the Honorable
Roger M. Young dated June 14, 2012 and filed on June 15, 2012 (Exhibit A).
Appellants received written notice of entry of this Judgment on June 28, 2012.

July 16, 2012

ANDREW K. EPTING, JR., LLC

By *[Handwritten signature]*
Andrew K. Epting, Jr.

Michelle N. Endemann
46A State Street, Charleston, SC 29401
843-377-1871; Fax: 843-377-1310
Attorneys For Appellant Patricia Konersmann

Counsel of Record for Respondents:
Molly Hughes Cherry, Esquire
Nexsen Pruet, LLC
PO Box 486, Charleston, SC 29402
843-720-1724; 843-414-8209

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Franz X. Meier,

Plaintiff,

vs.

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

Defendants.

Civil Action No. 2010-CP-10-9926

ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS WITH
PREJUDICE

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

Patricia 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.

Civil Action No. 2010-CP-10-9959

This matter came before the Court on March 27, 2012, on the Motions to Dismiss of Defendant Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T ("BB&T") and Defendant James Edahl ("Edahl"). Plaintiffs and Defendants were represented by counsel at the hearing, and the Court fully considered all evidence presented and the arguments of counsel. For the reasons that follow, the Court grants Defendants' Motions to Dismiss with prejudice.

R

FACTS

This is a lender liability case in which Plaintiffs in both of the cases allege that Defendant BB&T failed to fund the financing needs of Skywaves Corporation I ("Skywaves"), a company in which Plaintiffs were investors and shareholders.

Plaintiffs' allegations do not pertain to any alleged relationship they had with BB&T but, instead, to the relationship between BB&T and Skywaves. Defendant BB&T is a banking institution with branch offices in Charleston, South Carolina, and Defendant Edahl is one of its employees. Skywaves is a company that developed a structural product, specifically cell tower units, for use in the wireless telecommunications industry. To support the manufacture of these individual cell tower units, Skywaves entered into a certain factoring agreement with BB&T in the Spring of 2005 whereby BB&T would purchase certain receivables of Skywaves at a discount and payment of those receivables would then be made to BB&T.

BB&T declared a default by Skywaves under the factoring agreement and stopped the factoring arrangement. Plaintiffs contend the default was improper, as BB&T, acting through its employee Defendant Edahl, promised that BB&T was fully committed to provide all of Skywaves' short-term and long term financial needs for growth. Plaintiffs claim Skywaves went into bankruptcy, resulting in the loss of their investment in Skywaves.

Plaintiffs are not customers of BB&T. BB&T did not lend any money to Plaintiffs. Plaintiffs are not debtors in this case. Plaintiffs had no direct relationship with BB&T whatsoever. All of Plaintiffs' allegations pertain to the relationship between Skywaves and BB&T, and all of Plaintiffs' alleged injuries arise out of Skywaves' bankruptcy filing.

In their Complaints, Plaintiffs assert four claims for: (1) negligent misrepresentation; (2) fraudulent misrepresentation; (3) lender liability/negligence; and (4) violation of the South

Carolina Unfair Trade Practices Act ("SCUTPA").¹ Defendants moved to dismiss all claims pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

LEGAL ANALYSIS

South Carolina Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim for failure to state facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6); *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (2003). The question is whether the pleadings, taken in the light most favorable to the plaintiff, articulate a valid claim for relief. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). A Rule 12(b)(6) motion "must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (1997). The Court dismisses these cases because there is no possibility that Plaintiffs will be able to establish liability on the part of either Defendant under any of the claims as alleged in the Complaints.

A. Section 37-10-107 of the South Carolina Code Bars All of the Plaintiffs' Claims Against Defendants.

All of Plaintiffs' claims against Defendants are statutorily barred, as a matter of law. Many states, including South Carolina, have enacted specialized statutes concerning loan and credit agreements. These statutes bar enforcement of oral lending agreements and bar fraud and other tort claims based on alleged oral misrepresentations and other non-written conduct concerning these loan agreements. See S.C. Code § 37-10-107.

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

- (1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

¹ Plaintiff Patricia Konersmann has only asserted three claims for misrepresentation, fraud and negligence/lender liability.

- (a) to lend or borrow money;
 - (b) to defer or forbear in the repayment of money; or
 - (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.
- (2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:
- (a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;
 - (b) promissory or equitable estoppel;
 - (c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or
 - (d) negligent misrepresentation.

S.C. Code Ann. § 37-10-107.

All of Plaintiffs' claims are all based upon alleged statements, promises, or representations made by BB&T or Edahl to Skywaves that BB&T would fund Skywaves' financial needs. Each of the claims is based upon alleged representations made by Defendants to Skywaves.

Plaintiffs have not alleged any material terms or conditions of any agreement with Defendants, nor have Plaintiffs specifically alleged that any such agreement was in fact received by them. Moreover, Plaintiffs have not made any allegations regarding writings purportedly between either of them and either Defendant. The plain wording of Section 37-10-107 requires in pertinent part that "the party seeking to maintain the action or defense [receive] a writing from the party to be charged..." S.C. Code Ann. § 37-10-107(1)(c).

Because Plaintiffs have not alleged or otherwise provided anything in writing to evidence the material terms and conditions of the alleged promises or representations made to them, their claims fail as a matter of law. See *Carolina First Bank v. Lucas*, Case No. 03-CP-10-1907, 2004 WL 5208410 (S.C. Com. Pl. Jun. 14, 2004); see also *Robertson v. First Union Nat'l Bank*, Case No. 99-CP-10-288, 2000 WL 35722762 (S.C. Com. Pl. Aug. 8, 2000). Specifically, Plaintiffs have not alleged that they "received a writing from the party to be charged [*i.e.* BB&T] containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing." S.C. Code Ann. § 37-10-107(1)(c). Accordingly, as a matter of law, Plaintiffs cannot "maintain an action for legal . . . relief . . . based upon [BB&T's or Edahl's alleged] failure to lend . . . money [to Skywaves.]" S.C. Code Ann. § 37-10-107(1)(a). Under these circumstances, Plaintiffs cannot establish their claims against Defendants, as a matter of law.

1. The Choice of Law Provision in the Security and Factoring Agreement Between Skywaves and BB&T Does Not Apply to Plaintiffs' Claims Against Defendants.

Plaintiffs contend that S.C. Code Ann. § 37-10-107 does not apply to the tort claims they have asserted against Defendants. In support of their argument, they cite to a provision in the Factoring and Security Agreement ("Agreement") between Skywaves and BB&T that the Agreement is governed by North Carolina law. Plaintiffs are not parties to the Agreement and, thus, any choice of law provisions contained therein do not apply in this case. Moreover, the relevant provision in the Agreement pertains to claims arising "under" the Agreement. In the case at hand, Plaintiffs are contending that an agreement existed outside of the Agreement, and that certain promises were made by Defendants outside the Agreement regarding funding of Skywaves. Under the circumstances, there is no basis for Plaintiffs to rely upon a choice of law

provision in a contract to which they were not parties. South Carolina law governs Plaintiffs' claims against Defendants and dictates that the claims be dismissed, as a matter of law.

2. Plaintiffs' Allegations and Claims Arise from an Alleged Failure to Loan Money Such that Section 37-10-107 Applies.

Plaintiffs also contend that because the relationship between BB&T and Skywaves was pursuant to a factoring agreement, it was not a "typical" loan transaction and that S.C. Code Ann. § 37-10-107 does not apply. Plaintiffs ignore, however, that the very allegations in their Complaints, to wit, that the factoring agreement was modified by BB&T such that BB&T agreed to loan money to Skywaves. Moreover, although Plaintiffs attempt to characterize a factoring agreement as an atypical loan transaction, a key purpose of the statute is to protect financial institutions and other lenders from claims that are inconsistent with the written agreements outlining the terms of the transaction. Because the statutes within Title 37 should "be liberally construed and applied to promote [Title 37's] underlying purposes and policies," any question regarding the applicability of section 37-10-107 to the alleged agreement in the Complaints is resolved in Defendants' favor. See S.C. Code Ann. § 37-10-102(1).

3. Section 37-10-107 Bars Fraud Claims.

Plaintiffs contend that because section 37-10-107 does not expressly exclude a claim for fraud, her fraud claims are not barred. To that end, Plaintiffs focus on subsection 2(d) of the statute, which bars any action based on "negligent misrepresentation." Plaintiffs argue that because the drafters of the statute specifically singled out actions based on "negligent misrepresentation," but not "intentional misrepresentation," an action based on fraud would not be precluded by the statute. However, South Carolina state and federal trial courts have found that fraud claims are barred by section 37-10-107. See *e.g. Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina*, C.A. No. 2:98-158-23 (S.C. Com. Pl. April 12, 1999)

(citing *Derrick v. Branch Banking and Trust Company of South Carolina*, 96-CP-42-2095 (S.C.Ct.Cm. P. 9/8/98)). This Court agrees and finds that section 37-10-107 bars Plaintiffs' fraud, negligence and unfair trade practices claims.

4. Section 32-3-10(5) Does Not Apply to the Alleged Agreement in the Amended Complaint and Is Not Inconsistent with Section 37-10-107.

Section 37-10-107 provides that "in the event of a conflict between this section and any other provision of law of this State relating to the requirements of a signed writing, the provisions of the other provision of law shall control." S.C. Code § 37-10-107(4). According to Plaintiffs, S.C. Code § 32-3-10(5), which is a more general statute of frauds, "may" be applicable to the dispute and, thus, creates a conflict with section 37-10-107 such that section 32-3-10(5) applies.

Even if section 32-3-10(5) somehow applies in this case, it is not inconsistent with section 37-10-107. The two statutes can be read and construed together. In South Carolina, "[i]f the provisions of the two statutes can be construed so that both can stand, this Court will so construe them." *In the Interest of Shaw*, 265 S.E.2d 522, 524 (S.C. 1980) (citing *City of Spartanburg v. Blalock*, 223 S.C. 252, 75 S.E.2d 361 (1953)). Further, "where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Wilder v. South Carolina Hwy. Dep't*, 90 S.E.2d 635 (S.C. 1955); see also *Ramsey v. County of McCormick*, 412 S.E.2d 408, 410 (S.C. 1991). As the more specific statute on this issue, S.C. Code § 37-10-107 is to be considered a qualifier of section 32-3-10(5).

B. Plaintiffs Fail to Allege Any Conduct on the Part of Either Defendant That Would Support Their Claims.

Notwithstanding that all of Plaintiffs' claims are barred under S.C. Code Ann. § 37-10-107, this Court alternatively dismisses the claims because while Skywaves may have been a customer of Defendant BB&T, Plaintiffs were not. Defendants did not owe any duty to Plaintiffs and, therefore, Plaintiffs cannot establish their claim for negligence or lender liability.

C. Plaintiffs Cannot Sustain a Claim Against Either Defendant for Violation of the South Carolina Unfair Trade Practices Act.

Finally, Plaintiff Meier, as an investor, has not pled sufficient allegations against Defendants to support a claim for violation of the SCUTPA. Investor claims are generally a federally regulated arena. "Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States . . . " are generally exempt from the provisions of the SCUTPA. S.C. Code Ann. § 39-5-40(a).

Additionally, to be actionable under the SCUTPA, the unfair or deceptive act or practice must have an impact upon the public interest. *Noack Enterprises, Inc. v. Country Corner Interiors*, 351 S.E.2d 347 (S.C.Ct.App. 1986). Here, Plaintiff Meier merely offers a conclusion of law that the unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition. Absent from the Complaint are any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition.

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

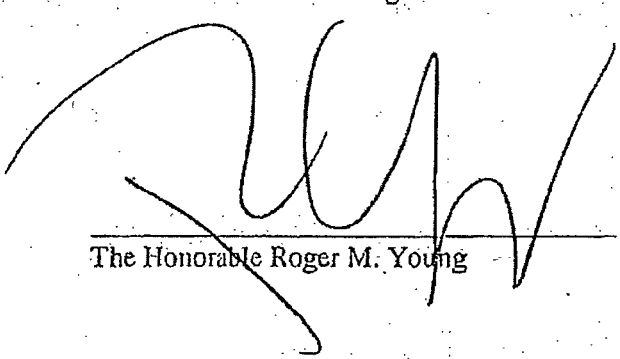


III. CONCLUSION

For the reasons set forth herein, it is hereby ORDERED that Defendant BB&T's and Defendant Edahl's Motions to Dismiss are GRANTED and all claims against them are dismissed with prejudice.

AND IT IS SO ORDERED.

6/14, 2012
Charleston, South Carolina



The Honorable Roger M. Young

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.)

August 15, 2011

Charleston, SC

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.)

* * * * *

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

1 (August 15, 2011.)

2 THE COURT: We got four cases and basically
3 each of one of them is today BB&T filing motions to
4 dismiss amended complaint on each of them. Can we at
5 least agree that's why we're here?

6 MS. CHERRY: Yes, Your Honor. As a practical
7 matter, the motions to dismiss are on behalf of both
8 defendants, BBB&T and Edahl, Your Honor. There were two
9 defendants in each case, and I should clarify, the motion
10 with respect to the Skywaves case by BB&T is only a
11 partial motion to dismiss, Your Honor.

12 THE COURT: We could start by pretending that
13 I know what I'm doing here, but I don't know what the
14 factoring agreements are and you all probably do, but
15 I've had a chance to read this a little bit, and I'm not
16 exactly sure factually that I understand it, so maybe it
17 would be good to make sure I do before we get into the
18 merits of the argument, okay?

19 MS. CHERRY: Certainly, Your Honor, and as I
20 indicated, if I may proceed --

21 THE COURT: You may.

22 MS. CHERRY: For the record, Molly Cherry,
23 and Rick Mendoza here on behalf of both defendants,
24 BB&T and James Edahl. And as Your Honor has pointed out,
25 these cases, in essence, arise out of a factoring

1 agreement that was entered into between Skywaves
2 Corporation, which is one plaintiff in one of the cases,
3 and BB&T, and, Your Honor, for purposes setting the
4 stage, if you will, or the background of the players at
5 issue in all of these cases, obviously BB&T, as everyone
6 knows is a bank that has a branch here in Charleston, and
7 Jim Edahl is an employee at the branch here in
8 Charleston.

9 BB&T has a commercial lending department. It
10 has a factoring division as well, Your Honor. There are
11 other plaintiffs involved in this case other than
12 Skywaves. Skywaves is the actual customer of BB&T. One
13 plaintiff, Mr. Voytko was the CFO of Skywaves, and he
14 also invested in Skywaves.

15 THE COURT: Who was?

16 MS. CHERRY: Mr. Voytko. Mr. Voytko has no
17 direct relationship with BB&T, no direct contract with
18 BB&T, and for purposes of these lawsuits is not a
19 customer of BB&T. Mr. Konersmann, Your Honor, Ron
20 Konersmann, is another plaintiff in the third lawsuit
21 we're here about, if you will, Your Honor, and
22 Mr. Konersmann was also an officer in Skywaves and an
23 investigator in Skywaves. Mr. Konersmann is, for purpose
24 of these lawsuits, a customer of BB&T, he doesn't have a
25 direct relationship or direct contract with BB&T.

1 Mr. Konersmann and Mr. Voytko, their lawsuits
2 are as employees and investors in Skywaves which, again,
3 is the only customer of BB&T that we're here about, and
4 then finally, Your Honor, there is a fourth lawsuit that
5 has been brought by James Kerr. Mr. Walters and J.T.
6 Main, LLC, these three plaintiffs have brought one
7 lawsuit as investors in Skywaves.

8 And, Your Honor, for purposes of the ease of
9 discussion, and unless the Court prefers otherwise, it
10 may be a little easier to refer to the Skywaves case and
11 then the other three cases as the investor cases, just to
12 distinguish them for purposes of the legal arguments
13 because there are -- despite the plaintiffs having filed
14 an omnibus brief, there actually are distinct arguments
15 with respect to Skywaves as the customer of BB&T, and as
16 I mentioned at the outset, BB&T has only filed a partial
17 motion to dismiss the Skywaves case.

18 So at the end of the day, even if BB&T's
19 partial motion to dismiss against Skywaves is granted,
20 Skywaves still would have some claims pending against
21 BB&T. BB&T has moved to dismiss all of the claims in the
22 investor lawsuits, for separate and distinct reasons, and
23 Mr. Edahl individually has moved to dismiss everybody's
24 claims in all of the lawsuits against him.

25 But, Your Honor, the crux of everyone's

1 claims in all of these lawsuits arises out of the
2 agreement between Skywaves, the customer, and BB&T, this
3 factoring agreement. And I'm sure plaintiff's counsel
4 will correct me if I get some of the facts wrong, but for
5 purposes of the motion to dismiss, taking the facts in
6 the complaints as true, the salient facts for the
7 purposes of these motions, Your Honor, are that Skywaves
8 developed a product for use in the wireless
9 communications industry, and they needed financing for
10 that product and they entered into an agreement with
11 BB&T, in essence, to enable them to make that product.

12 THE COURT: What was the product?

13 MS. CHERRY: If I understand it correctly, a
14 device that goes in the bottom of the cell phone towers
15 that is supposed to, I think, more effectively help the
16 telecommunications industry. I don't know all the
17 details in terms of how the device works, but I do know
18 there were some patents pending with respect to that.

19 MR. KEFALOS: I could explain that, if you're
20 interested, as a footnote right now. You drive by the
21 cell towers and you see little round building that are
22 sort of stucco. Skywaves built those buildings, and what
23 they did is instead of having each vendor provide a
24 different part that goes into a wireless communication
25 thing, Skywaves took all of those different vendors,

1 installed them in these buildings, and integrated all
2 their processings and then took and drop shipped the
3 things at a tremendous savings to the wireless people,
4 dropped them at the foot of their cell tower, and all
5 they had to do was plug them in. They took off like
6 gangbusters and were doing great for a while.

7 THE COURT: Okay.

8 MS. CHERRY: So, Your Honor, the factoring
9 agreement, basically, involved BB&T purchasing accounts
10 receivable at a discount, and when the product is
11 delivered and paid, then the money was to go to BB&T.
12 Just in terms of the cycle of how that agreement
13 initially worked, in a nutshell, Your Honor, so it's the
14 purchase of the AR, and then the money goes to BB&T as
15 opposed to back to Skywaves.

16 THE COURT: Kind of like buying a membership
17 to the gym, right?

18 MS. CHERRY: To some extent, yes, Your Honor,
19 but part of the allegations by Skywaves is that that
20 agreement and the way that agreement worked was modified
21 over a period of time, and I don't -- for purposes of
22 today, the actual modification of that agreement or how
23 it may have worked is not at issue. What is at issue is
24 that there was a financial agreement between BB&T and
25 Skywaves.

1 And when I say it's not at issue today, it is
2 at the heart of the issue, Your Honor, in terms of the
3 dispute between the parties, because at the end of the
4 day, Skywaves contends that BB&T promised to meet its
5 financial needs at present and in the future and
6 improperly stopped doing that, in essence, and improperly
7 called a default under their relationship, and Skywaves
8 is claiming -- and, again, Your Honor, I'm paraphrasing,
9 but they're claiming that as a result of that, they
10 ultimately petitioned for bankruptcy.

11 They went bankrupt, and they are blaming that
12 on BB&T and their employee, Mr. Edahl. They're claiming
13 that Mr. Edahl, in fact, is the individual that
14 represented the changes in the agreement and represented
15 that the funding would continue.

16 And so at the end of the day, they're
17 claiming but for that, they would not have gone into
18 bankruptcy, in a nutshell.

19 THE COURT: Well, usually these parties go
20 along in making money and are happy with that. When
21 they're in the business of making money, everything is
22 going fine. So what happened? Why did BB&T stop wanting
23 to do business with Skywaves?

24 MS. CHERRY: And, Your Honor, this is a
25 disputed point, and it's not the issue on the motions to

1 dismiss, but at the end of the day, BB&T agrees that
2 there were some modifications to the agreement, but
3 ultimately, from BB&T's perspective, there were some
4 fraudulent documentations submitted in terms of what the
5 bank was advancing money off of.

6 And they went in and had an audit conducted
7 and for that and a host of other reasons called a default
8 under the factoring agreement, as they were entitled to
9 do.

10 What happened at that point, from BB&T's
11 perspective, is, in fact, that the officers of Skywaves
12 acknowledged that there had been wrongful conduct and
13 acknowledged a right to call a default under the
14 agreement. Suffice it to say that the plaintiffs wholly
15 disagree with that characterization, Your Honor. I
16 don't -- I do want to clarify for the Court, this is a
17 dispute between the parties in terms of the reason for
18 the default and the proprietary of the default, and that,
19 in fact, is what the parties are ultimately fighting
20 over.

21 BB&T actually has internally looked at it,
22 and external auditors looked at what transpired, and
23 there were, in January of 2008, a number of itemized
24 issues under the factoring agreement, and the default was
25 called at that point.

1 The parties did, in fact, engage in
2 negotiations after that point to see if there was
3 something that could be worked out, but, ultimately, a
4 workable solution did not arise between the parties, Your
5 Honor, which ultimately Skywaves ended up filing for
6 bankruptcy. They were not sound enough to continue their
7 business and didn't find other financing for it, and
8 again, Your Honor, I think those, at the end of the day,
9 are the issues in dispute, and I think, Your Honor, the
10 crux of this lawsuit, which, in fact, is part of the
11 reason BB&T's motion to dismiss with respect to the
12 Skywaves case is only a partial motion to dismiss.

13 Although we wholly disagree with the
14 plaintiff's characterization of the deterioration of the
15 relationship, we recognize, at the motion to dismiss
16 stage, that there is sufficient allegations at this stage
17 in the complaint to satisfy their burdens to at least
18 allege to survive a motion to dismiss.

19 THE COURT: Of what cause of action?

20 MS. CHERRY: We did not move to dismiss their
21 brief of contract cause of action, Your Honor, and their
22 promissory estoppel cause of action, and there was one
23 other contract they claim, Your Honor, that we didn't
24 move to dismiss, if you'll bear with me, because they had
25 eight -- Skywaves had eight causes of action against

1 BB&T. Breach of the covenant of good faith and fair
2 dealing, Your Honor, was the third cause of action that
3 BB&T did not move to dismiss.

4 Skywaves, in fact, asserted breach of
5 contract, breach of contract accompanied by fraudulent
6 acts, promissory estoppel, breach of the covenant of good
7 faith and fair dealing, negligent misrepresentation,
8 fraudulent misrepresentation, negligence in violation of
9 the South Carolina Unfair Trade Practices Act.

10 Now, Your Honor, the other -- the investor
11 plaintiffs did not assert the contract claims against
12 BB&T and Edahl. Instead, they asserted similar tort
13 claims for negligent misrepresentation, and some
14 plaintiffs have called it negligent misrepresentation,
15 some plaintiffs have called it negligent inducement, some
16 it's not clear if it's negligent inducement or fraudulent
17 inducement, so we've addressed both in our motions to
18 dismiss, and then they have asserted a violation of the
19 Unfair Trade Practices Act and a straight negligence
20 claim.

21 So the investor plaintiffs, Your Honor, had
22 asserted three what I'm calling noncontract based claims,
23 and if I may point out, Your Honor, as well, Skywaves did
24 not obviously assert the contract based claims against
25 Mr. Edahl. Those are only against BB&T, but Skywaves did

1 assert their claims for negligence, negligent
2 misrepresentation, fraudulent misrepresentation in
3 violation of the Unfair Trade Practices Act against Mr.
4 Edahl.

5 But, again, Your Honor, it all arises out, if
6 you will, of the leading up to and including the
7 deterioration of the financing arrangement between
8 BB&T and Skywaves. And, Your Honor, as I mentioned, at
9 the end of day, the motions to dismiss, I think
10 conceptually it may be easier to look at the investor
11 lawsuits. The motion to dismiss is based on a legal
12 argument with respect to those tort claims that the
13 investors in Skywaves have asserted against BB&T and
14 Mr. Edahl. In fact, all parties have cited to it, Your
15 Honor. It's section 37-10-107, and the statute in South
16 Carolina very clearly bars these investor claims.

17 And, Your Honor, if I may quote directly, the
18 statute says that no person may maintain an action for
19 legal relief, based upon a failure to perform an alleged
20 promise, undertaking, commitment, or agreement to lend
21 money or to renew, modify, or amend a loan of money or
22 any provision with respect to a loan of money unless the
23 party seeking to maintain the action, in this case, the
24 investors who are seeking to maintain the action, have
25 received a writing from the party to be charged.

1 These investors are charging BB&T with an
2 agreement to continue lending money under whatever
3 modified arrangement they may be alleging in their
4 agreement, and although the parties dispute what that
5 modification was, at the end of the day for purposes of
6 this statute, it doesn't matter because the statute
7 specifically says, Whoever is maintaining the action has
8 to have received a writing outlining those terms.

9 These investor plaintiffs have not, and, Your
10 Honor, if you think about this conceptually, there is a
11 reason for this. Skywaves is in bankruptcy. These
12 investors have proofs of claim in the bankruptcy.
13 Skywaves has brought this lawsuit outside of the
14 bankruptcy to pursue it as a potential asset in the
15 bankruptcy.

16 Notwithstanding our disagreement over the
17 merits of Skywaves' claims, if anybody here today has a
18 claim, it is Skywaves. Skywaves was the customer of
19 BB&T. In essence, these investors are trying to bring a
20 derivative claim on behalf of Skywaves. More tellingly,
21 Your Honor, if Voytko and Konersmann, part of their
22 claims in these lawsuits, is that they lost their
23 salaries as employees of Skywaves.

24 That makes no sense whatsoever. I mean, if
25 they're allowed to proceed with these lawsuits, any

1 employee of any company that ever went bankrupt is going
2 to be able to sue the lender for the company. The South
3 Carolina statute expressly bars the claims the investor
4 plaintiffs are trying to bring in this case..

5 Your Honor, there were a couple of points
6 that plaintiff's counsel have made or arguments they have
7 made to contend that the South Carolina code section
8 37-10-137 doesn't bar their claims, and the first
9 argument that the plaintiffs are making is that the
10 factoring agreement between Skywaves and BB&T has a
11 choice of law provision that says North Carolina law
12 applies, but at the end of the day, Your Honor, these
13 investor plaintiffs, they aren't parties to that
14 agreement. They are trying to claim that BB&T had to do
15 X, Y, and Z and they promised they would do X, Y, and
16 Z and we were relying on those representations that they
17 would commit to lend this money, to do this financially.

18 You can't have it both ways. The South
19 Carolina statute is going to bar those claims unless they
20 meet the requirements of the statute. They can't rely on
21 a choice of law provision and agreement to which they
22 were not a party, and it makes no sense to say that that
23 choice of law provision is going to bar the application
24 of South Carolina law with respect to their claims.

25 Your Honor, they also state that with respect

1 to -- they attempt to distinguish that statute and say
2 while maybe it bars the claims against BB&T, it certainly
3 doesn't bar the claims against Edahl because there was no
4 agreement between Edahl and Skywaves and that the law
5 relating to the statute of frauds says that it only
6 pertains to the two parties at issue.

7 But, Your Honor, in fact, the case law that
8 they cite talks about parties to an agreement and they're
9 privy, and, in essence, Your Honor, acknowledges that if
10 it is not going to allow a claim against BB&T, then it's
11 illogical to suggest it's going to allow a claim against
12 an employee of the party they're trying to charge with
13 this obligation.

14 I'm just -- there isn't any case law directly
15 on point, but, instead, the plaintiffs are just relying
16 on general South Carolina law relating to statutes of
17 fraud, but I think in that context, the case law applies
18 to parties and their privies, and I think in this case a
19 strong argument can be made that the employee of the
20 company is either, for all intents and purposes, the same
21 as the company or privy of the company. So I'm not
22 convinced that that would bar -- that would prevent the
23 South Carolina statute from barring the claim against
24 Mr. Edahl as well.

25 Additionally, and to the extent they want to

1 charge Mr. Edahl, they haven't received any writing from
2 Mr. Edahl either. The investor plaintiffs haven't
3 received any writing in this case, whether from BB&T or
4 Edahl.

5 Your Honor, also, there was an argument that
6 the statute itself talks about loans of money and the
7 investor plaintiffs distinguish a factoring agreement
8 from a loan, but, Your Honor, as a practical matter, the
9 allegations in the complaint are alleging that this
10 original factoring agreement eventually evolved into, in
11 essence, a line of credit, which is a loan of money, and
12 the plaintiff's own allegations are that the agreement
13 evolved to the point that it really is a loan.

14 Even if those allegations weren't there, Your
15 Honor, South Carolina code section 37-10-102 says that
16 statutes to be interpreted broadly to accomplish the
17 goals, the underlying goals, and purposes of the
18 statutes, and I think that would just be a hyper
19 technical interpretation of this lender liability statute
20 of frauds to suggest that it wouldn't apply in this
21 context.

22 And then finally, Your Honor, the plaintiffs
23 are alleging that the lender liability statute of frauds
24 doesn't bar fraud claims because it specifically
25 delineates negligent misrepresentation; however, Your

1 Honor, we've cited in our brief actually the Lands End
2 case which is a South Carolina federal court case,
3 finding that this statute bars a fraud claim and it cites
4 a South Carolina Court of Common Pleas case in support of
5 that as well.

6 And, Your Honor, I think there are a number
7 of other very specific arguments pertaining to the
8 substance of the cause of action and the applicability of
9 the statute overall, but I think it might be more prudent
10 to let the plaintiffs argue their specific points and
11 then, if I may, just address them in turn to the extent
12 the Court has questions about them.

13 THE COURT: All right.

14 MR. COOKE: For the court reporter, I'm Dawes
15 Cooke with the firm Barnwell Whaley Patterson Helms
16 representing all plaintiffs, and I'll let other counsel
17 introduce themselves.

18 MR. DUFFY: Brian Duffy with Duffy and Young.
19 I'm on the papers representing Mr. Konersmann and
20 Mr. Voytko, but we're going to divide the argument by
21 substance rather than by party.

22 MR. KEFALOS: I'm George Kefalos. I
23 represent Skywaves.

24 MR. COOKE: Your Honor, we sacrificed
25 probably some clarity for the sake of less paper by

1 filing consolidated responses to all the motions, and it
2 maybe requires a little more work to sort out which
3 grounds are being asserted by the plaintiffs, but I think
4 Molly has already explained that to you.

5 But we did, rather than file separate
6 responses to each motion, we put them all together, and
7 we're going to try to save some time by dividing the
8 arguments, and generally I'm going to talk about the
9 statute of frauds issue and Mr. Duffy is going to talk
10 about the substantive cause of action and why those
11 should survive.

12 In broad summary, first of all, Your Honor,
13 we contend that this is a 12(b)6 motion to dismiss and
14 that there are at least two important issues that need to
15 be factually developed before you can interpret the
16 statute of frauds.

17 The first question is, what was this
18 agreement, factoring agreement? Was it the loan? Did it
19 ever become a loan? Is it something other than a loan?
20 Strictly speaking, a factoring agreement is not a loan.
21 It's a situation where they purchased an asset of their
22 customer at a discounted rate and pay the money up front
23 and then the asset pays itself directly to the bank.

24 For example, accounts receivable, they may
25 purchase accounts receivable to allow cash flow, and so

1 they'll -- we've got an order, we've got a customer who
2 owes us \$100,000. We might sell that account receivable
3 to the bank. They give us the money, and then they go
4 collect the account receivable from the customer, and
5 that works well because sometimes the agreements with our
6 customers are they don't pay us until the product is
7 delivered and installed and some other events have
8 occurred. We need the money sooner so we can build the
9 product for them.

10 The facts -- and then the second fact that we
11 think needs to be developed more is what were the
12 writings that we're relying on? If Your Honor finds that
13 the statute of frauds applies as interpreted by BB&T,
14 we've alleged in the complaint, and it's in paragraphs 8,
15 9, 18, 19, 20, 21, specifically, that there were
16 writings. The original factoring agreement was written,
17 signed by both parties. The modifications were in
18 writing, most in the form of e-mail. We've cited both
19 federal and state law that says e-mail can be the same as
20 a signed agreement.

21 We have alleged that Mr. Edahl at one point
22 said that, you know, we've all agreed to these
23 modifications. We're not going to do a formal agreement
24 because we don't want you to have to go hire lawyers to
25 paper it up, essentially.

1 So we believe at a very minimum, even without
2 agreeing with us on any of our legal arguments, that the
3 Court should deny the 12(b)6 motions so that those
4 allegations can be fleshed out so that you can see if the
5 statute applies.

6 I do want to talk a little bit about the bank
7 statute of frauds, which is at section 37-10-107, and I
8 almost brought a big board, but I thought you could
9 probably call it up on your computer and you would be
10 looking at it because it's a very oddly worded statute,
11 so much so that after we read it, we still don't all
12 agree on how you interpret it.

13 And I even went back to the action joint
14 resolution I was so convinced there was a typographical
15 error in it, but I know I'm not supposed to ask you
16 questions, but do you have it available there?

17 THE COURT: I can pull it up.

18 MS. CHERRY: Your Honor, I actually have a
19 paper copy of it. I just printed it off.

20 MR. COOKE: That's fine.

21 THE COURT: I'll tell you what: Why don't
22 you let me have that, because I follow along on the
23 realtime and frankly to do both at the same time is not
24 possible.

25 MR. COOKE: Section 37-10-107, if you read it

1 literally, it says, item one, no person may maintain an
2 action for legal or equitable relief or defense based
3 upon a failure to perform an alleged promise undertaking
4 except to offer commitment or agreement, colon, A, to
5 lend or borrow money. And then there is a B, and then
6 there is a C, so there were three different things that
7 you cannot do under the statute, if you read it
8 literally: One is to maintain an action for legal or
9 equitable relief or defense based on an agreement to lend
10 or borrow money.

11 Well, that would be news to most people in
12 the world. We think that you can bring suit on an
13 agreement to lend money, but the statute must mean more
14 than that.

15 THE COURT: It does. It says involving a
16 case where the principal amount is in excess of \$50,000
17 unless it's in writing.

18 MR. KEFALOS: But, you see, that's the
19 curious part. That's where I was convinced there was a
20 typographical error, because I thought there must be a
21 break after \$50,000 and that unless must be in a separate
22 paragraph so that it would modify A, B, and C, but it's
23 not. If you go to the original language in joint
24 resolution, it's written just like it is here, which
25 means all that language only modifies item C, which is to

1 renew, modify, amend. The prohibitions against A and
2 B are absolute. They're not conditioned on the existence
3 of a writing.

4 So you're scratching your head, and then you
5 go to the next section, two, and what does it say? It
6 says failure to comply with subsection one precludes an
7 action or defense based on any of the following legal or
8 equitable theories, and then it's got A, B, C, D, E, the
9 various defenses, promissory equitable estoppel and
10 implied agreement based on course of dealing or
11 performance; C is an interesting one we're going to talk
12 about in a minute, partial performance, except to the
13 extent the partial performance may be explained only by
14 reference to the alleged promise and the accepted offer.

15 So digest that for a minute. Isn't that an
16 odd way to work the statute in? Instead of saying that
17 you may bring an action to lend or borrow money but you
18 can't raise these various defenses. It says you can't
19 bring that. You can't bring that action, but if you do,
20 failure to comply with subsection one, what is that
21 supposed to mean? Normally, you wouldn't even get that
22 far, because Molly would stand up and say, Judge, it says
23 no person may maintain an action and they did, so they're
24 not allowed to do that. But section two contemplates
25 that you have failed to comply with that section, and if

1 you do, you still get to bring a lawsuit but you don't
2 get to raise these various legal theories.

3 So that is odd enough, but you don't need to
4 solve that for purposes of this 12(b)6 motion because we
5 have alleged in numerous places in the complaint that
6 there were writings signed by BB&T that memorialize this
7 agreement.

8 We've also alleged there was partial
9 performance and that the partial performance did meet the
10 requirements of Section 2(c), because it may be explained
11 only by reference to the alleged promise undertaking
12 except to offer commitment or agreement. Specifically,
13 in our complaint, we allege that as Mr. Kefalos indicated
14 that things were just going great for Skywaves.

15 In paragraph number 12, it says that they had
16 won two General Dynamics contracts. They have won a \$12
17 million Navy Coast Guard project. They have won a \$20
18 million New York state police contract, that they were
19 increasing the number of requests for quotations and,
20 they decided they needed to go out and get a larger
21 source of financing, because you have to have the money
22 to make the product before you can sell it and send the
23 people a bill and have them pay it, and so you need a
24 bigger, better factoring agreement.

25 And so they went out. They had proposals

1 from Hunt Capital and Wachovia and BB&T, and the
2 complaint alleges that Mr. Edahl, from BB&T, came and
3 said, We want to be your bankers. You guys are going to
4 make it big, and we're going to bend some of the rules.
5 We're going to do things for that are sort of outside our
6 underwriting guidelines, and we're going to expand your
7 capabilities under your factoring agreements. We're
8 going to change some of the requirements, and those were
9 all listed in the complaint as well.

10 So that reliance, that is, the reliance and
11 the partial performance, we allege that Skywaves agreed
12 to that and said, Okay, we're going to turn down Hunt
13 Capital. We're going to turn down Wachovia. We're going
14 to bank with you. So that reliance, that partial
15 performance was exactly as it says in subsection C. It
16 can be explained only by reference to the alleged promise
17 undertaking except for offered commitment or agreement.

18 THE COURT: I'm struggling with the concept
19 of -- even if everything that you're saying is true as
20 between Skywaves and BB&T having an agreement and there's
21 exceptions, like can you get around the various parts of
22 the statute, where is it in the law that investors in a
23 company that that had an agreement with another company
24 get to sue directly? Shareholders, investors --

25 MR. COOKE: I'm going to let Mr. Duffy

1 explain that, but let me just say my little piece on
2 that.

3 Their complaints allege that they were
4 induced to invest by those specific representations, by
5 Mr. Edahl, that they went to a meeting, they traveled to
6 a meeting with him in which he sat down and explained to
7 them how he was going to -- how he and BB&T were going to
8 be their banker and their complaints allege that in
9 reliance upon those representations, they made their
10 investments in the company.

11 Now, before I say anything wrong, I'm going
12 to allow Mr. Duffy to elaborate on that.

13 THE COURT: All right.

14 MR. DUFFY: Your Honor, that's exactly right.
15 There's too narrow of a view to suggest that those tort
16 claims arise out of a factoring agreement, and that
17 really is kind of theme that permeates a lot of the
18 briefing from the bank is that, hey, all we have is one
19 customer and we have a standard debtor/creditor
20 relationship and there is no duty to anyone else, but,
21 Your Honor, to answer your specific question about where
22 does the duty arise for the investors, that is from --
23 let's see, the allegations, and, really, the paragraphs
24 are different in all four complaints, but, essentially,
25 it is about the representations made.

1 There are several allegations regarding how
2 BB&T got Skywaves as a client to start with, but once
3 that happened and they needed this new capital call, or
4 had big expansion plans, BB&T's representative,
5 Mr. Edahl, went, travelled to McBee, South Carolina, to
6 make a presentation to investors, and it's based on what
7 he said to the investors, which isn't, hey, we're the
8 banker, it was, based on our review of the company, the
9 company is going to do well. This is well positioned.
10 It has these different markets to hit. We are fully
11 committed to being a partner, and we're going to
12 structure something outside of the ordinary course.

13 Well, our investors relied on those
14 representations, which we allege were known to be false
15 at the time or were negligently made, and that --

16 THE COURT: In what way? Because you can't
17 normally base a fraud claim on a future act. It has to
18 be something that presently exists, and that's the basis
19 for the fraud, not that, I think you're going to make a
20 lot of money in the future, if you do something in the
21 future.

22 MR. DUFFY: They said that what they would
23 provide is the equivalent of the private equity
24 financing, which was false, but that is what they told
25 the investors who then sunk their money into the company.

1 THE COURT: What does that mean, we're going
2 to provide you with private equity financing?

3 MR. DUFFY: Everybody knows the Hunt Brothers
4 from Texas put money in whatever promising businesses
5 there are. Well, Hunt had proposed this private equity
6 firm, had proposed a multi million dollar investment in
7 this company.

8 THE COURT: And these people thought BB&T was
9 going to invest in their company?

10 MR. DUFFY: BB&T said, Don't do that. We can
11 meet your financing needs. We can create new, outside of
12 the ordinary course of business relationship to take you
13 public. That's exactly what was said.

14 Your question is, is it reasonable to rely on
15 that? That is a whole different factual issue, Your
16 Honor, but the duty is there based upon the
17 representations --

18 THE COURT: No, my question wasn't whether it
19 was reasonable to rely on that, it was whether or not it
20 was a false statement about something that existed at
21 that point in time.

22 MR. DUFFY: Yes, Your Honor.

23 THE COURT: You can't base a fraud claim on a
24 future act.

25 MR. DUFFY: Your Honor, what I'm saying is

1 they represented something that was false at the time.

2 THE COURT: What is it that they promised
3 they would do that was not true at the time they said it?

4 MR. DUFFY: They said that -- first of all,
5 they're both negligent misrepresentations and fraudulent.

6 THE COURT: What did they say?

7 MR. DUFFY: They said that they were, in
8 paragraph 41 -- again, there, that they were a partner of
9 the company.

10 THE COURT: They were a partner of the
11 company?

12 MR. DUFFY: They were there in the partnering
13 growth. They were an equivalent means of financing as
14 private equity. That was the present time of what these
15 people were trying to decide, is where --

16 THE COURT: That gets back to the point.
17 These guys thought that BB&T was going to invest in their
18 company, when you're saying, We're going to be partners?
19 I mean, that's kind of like saying something nice about
20 you. We're going to be partners in the sense that we're
21 all going to work together, which is always true as long
22 as they're making money. But to sit there and go, You
23 think I'm going to buy equity in your company? That's --
24 they actually thought that BB&T was going to become a
25 partner and they were going to have to form a

1 partnership, governed by partnership law, other than just
2 a generic, Hey, we're going to be partners as long as the
3 good times roll kind of partners.

4 MR. DUFFY: Your Honor, they indicated they
5 had the flexibility and ability to provide financing that
6 they couldn't -- that we're saying they couldn't then do.

7 THE COURT: That's different now. Let's go
8 to that in just a second, but that first statement about
9 being partners, are you suggesting that they really did
10 believe that BB&T was going to invest in their company?

11 I don't know that they could, under banking
12 law, invest in a company, but they honestly believe that
13 BB&T was going to become an equity partner in Skywaves?

14 MR. DUFFY: No, but they were committed to
15 the financing it in a way that was different.

16 THE COURT: Now, again, that's something
17 that's different.

18 MR. DUFFY: I'm trying to explain to you what
19 I mean -- they say partner. I can't tell you what they
20 meant by it or not. All I'm telling you is that you have
21 the representative from a company -- from the bank,
22 coming to make a pitch to investors for the company.
23 That's odd to start with, and then you say you're going
24 to be the partner, meaning here we are, close
25 relationship, we want to do it all for you and that we

1 can do and will do what a private equity group could do
2 for you?

3 And I'm saying, Your Honor, that we have
4 alleged that was false at the time, negligently made at
5 the time. They had a pecuniary interest in doing it and
6 that created a duty and the representations to make them
7 fair, honest, accurate representations.

8 THE COURT: They ended up signing an
9 agreement with them, correct? I mean, BB&T and these
10 folks entered into a factoring agreement. That's what I
11 heard, right? So they entered into a financing
12 agreement.

13 MR. DUFFY: They already had a factoring
14 agreement. What they were saying is we are going to do
15 more, which I understand is the future part, but they
16 represented what their ability was --

17 THE COURT: At the time of this pitch, we'll
18 be partners and all that, the kumbaya meeting, that's
19 all -- they had already signed a factoring agreement?

20 MR. DUFFY: Yes, and the point of this
21 meeting was they were luring, inducing, investors into
22 the company.

23 THE COURT: They had already invested -- how
24 can you have an agreement with a company that doesn't
25 exist? Did this company exist or not, and at the time

1 BB&T and Skywaves entered into this factoring agreement,
2 did Skywaves exist and who owned it?

3 MR. DUFFY: Yes. Skywaves existed when they
4 initially in 2005 had their financing agreement.

5 THE COURT: And did these plaintiffs, Voytko,
6 Konersmann and these other folks that are investor
7 plaintiffs now, were they owners in Skywaves at the time
8 that the factoring agreement was entered into?

9 MR. DUFFY: Not all of them, for sure some of
10 them in a much smaller level than they ultimately were
11 off the growth plan that BB&T supported and induced
12 others to invest in. That was 2007, Your Honor. That
13 was after the company had been going. There had been a
14 relationship with the bank. This is an additional -- and
15 that's kind of what's hard to grasp about part of the
16 case.

17 THE COURT: That's what I'm having real
18 trouble grasping, because how you can say I'm induced to
19 invest in a company when I'm already invested in it?

20 MR. DUFFY: They then invested in the growth,
21 Your Honor, in hundreds of thousands of dollars, and
22 several of them had not previously invested.

23 THE COURT: They invested in the growth.
24 What does that mean? They think it's going to grow.
25 Everybody is going to make money off it.

1 MR. DUFFY: Your Honor, the reason there was
2 an investment and a need was because of the overwhelming
3 response they had got, and they needed capital to fund
4 the growth. So they had gone out and they had secured --
5 they sought proposals. They got proposals from a variety
6 of people, including BB&T.

7 BB&T then went and made a pitch to other
8 people rather than, you know, big, I'm going to be in
9 charge Hunt Capital people to say, Here is who we are and
10 what we can do, which we say was inaccurate, and that
11 induced additional investment from some people who had
12 never previously invested.

13 THE COURT: So what did they say -- all
14 right. They had already talked to outside investors.
15 You said the Hunt Brothers. That name -- I know a little
16 bit about it, but I don't know anything in real depth
17 about it, except I think they tried to corner the civil
18 market at one time, if that's the same Hunt Brothers.

19 So they said, We don't want to do business
20 with somebody who is actually going to own part of
21 Skywaves, correct?

22 MR. DUFFY: No. In fact, they didn't say
23 that. That's what BB&T pitched. Here is your advantage.
24 We can be as flexible in doing this, but you don't have
25 to give away the equity that you would --

1 THE COURT: That gets back to the first point
2 I'm trying to make. These folks really didn't think
3 BB&T was going to become partners in the sense that
4 lawyers recognize partners, all right? They don't become
5 equity investors because they were saying, You don't want
6 an equity investor. They're just going to take you over
7 like the Hunt Brothers would. We're basically going to
8 offer you some kind of financing and partners in the
9 sense that these guys were talking about is just a
10 feel-good term.

11 MR. DUFFY: And I don't mean to get hung up
12 on partnership term.

13 THE COURT: Well, I'm getting hung up on it
14 because you're alleging fraud, and that is -- we got to
15 talk about what, again, it is that they said was
16 fraudulent, what they knew or should have known was not
17 true at the time they made it, so I need to segregate
18 those issues, and when you said, We're going to be
19 partners, I said stop. That means something, in lawyer
20 world, and that means we're going to become equity
21 investors.

22 But now you're saying that's not true.
23 That's not what I meant, that's not what they meant, and
24 they understood that is not what they meant, that
25 BB&T was not going to become an equity investor because

1 part of BB&T's pitch was, You don't want an equity
2 investor. They'll take you over to run the show like the
3 Hunt Brothers.

4 In other words, your fraud claim is just
5 about a special financing that we can offer you that
6 exists without becoming an equity investor; is that
7 right?

8 MR. DUFFY: Generally speaking, yes, although
9 we are at 12(b)6, and I don't want to concede what people
10 are thinking.

11 THE COURT: I'm just trying to get my head
12 around what the deal is here.

13 MR. DUFFY: In essence, that's correct, and
14 the point is --

15 THE COURT: You didn't specify what your
16 fraud is enough, I don't think. So we got to focus on
17 that.

18 MR. DUFFY: Their fraud is they
19 misrepresented what they were ready, willing, and able to
20 do.

21 THE COURT: Okay. But that involves special
22 financing, not buying into a new company.

23 MR. DUFFY: Yes.

24 THE COURT: I think we've chased that rabbit
25 enough that if you want to go back to talk about the

1 special financing, talk about what true at the time they
2 said it, involving the special financing.

3 Did they say we're going to give you
4 something that is better than buying into your company?

5 MR. DUFFY: Your Honor, they represented,
6 according to our allegations, that they basically had
7 done their review of the company, understood the growth,
8 the growth cycle, shortened long-term capital needs, and
9 specifically told these people that they didn't need a
10 large bank or an equity investor.

11 THE COURT: What is not true about that?

12 MR. DUFFY: Because apparently they did,
13 because you have someone who doesn't -- they're
14 representing they had the capacity to be flexible with
15 their financing arrangements in the same way and be able
16 to carry them to an idea, which is how I suspect the
17 reason BB&T wanted to do this to start with is because
18 they wanted to hitch this on a rising star, like Edahl
19 did, so they were making representations that they
20 couldn't and knew they shouldn't make that they knew at
21 the time they couldn't live up to.

22 And so they advised people, taking on an
23 additional duty, by the way, under the cases, we've done
24 the review. Here is where you are. Here is how great
25 you're going to do. We're going to do something outside

1 the ordinary course, again, undertaking a duty beyond the
2 debtor-creditor relationship, and that you don't need --
3 that we are the equivalent of your other options, which
4 we have alleged that they're not. They weren't. They
5 made misrepresentations at the time, Your Honor. They
6 were -- other -- there are several others. I would be
7 happy to read them.

8 BB&T was fully committed to providing short
9 and long term financial needs for growth, act as a
10 partner, which I mentioned --

11 THE COURT: That kind of statement is so
12 vague. I mean that, would be -- unless they specifically
13 said something like, Well, we're going to loan you \$10
14 million, to say, We're going to provide your financial
15 needs in the future, I mean, you're going to have to meet
16 certain -- I don't think you get to walk in and say,
17 Well, in my mind they were going lend me \$10 million, and
18 maybe in their mind it only meant a million or maybe it
19 was 10 million and 100 million.

20 That's kind of so vague that it's not
21 actionable, I don't think, to just say we're committed to
22 meeting your short and long term financing needs. You
23 don't leave yourself that open within parameters.
24 Everybody knows you're going to have to provide documents
25 that aren't false and things like that.

1 MR. DUFFY: I think it sounds to me that what
2 you're describing is when a company comes in and says,
3 Here is what we want, and they say, Okay. We can work
4 with you. That's different than sending a representative
5 to someone who is not even a client to make a pitch to
6 induce people to invest money.

7 It's totally different than whatever your
8 client relationship is with Skywaves. You went there and
9 made representations to people about what you -- what you
10 analyzed, what you said you analyzed, and you people
11 relied on your analysis to make -- of the capability of
12 both the company and the bank to make that investment.

13 THE COURT: Yeah, but they don't -- are you
14 certain that it's the law that you get to go and make a
15 pitch to somebody and say, Look, we want to be your bank,
16 all right? And we want to be your lender, and we want to
17 loan you money.

18 Now, based on saying something that vague,
19 the people then get to say, My goodness, you had no
20 intention of loaning us money because later on you asked
21 us for financial statements and you asked us for proof of
22 contracts that we told you really existed and that sort
23 of thing. At some point in time, I mean, banks just
24 aren't in the business of loaning people money based on
25 sales pitches. There is always the follow-up where they

1 say, You know what? We're going to need to see your
2 lease. We're going to need to see your last year's tax
3 return. We're going to need a financial statement.
4 We're going to need this or need that. They don't say,
5 We're going to cart blanche finance your dream.

6 MR. DUFFY: Right, and what you're describing
7 is exactly what I'm saying is different. That is
8 describing what you can do for a client in that back and
9 forth. This is a different situation where they've
10 undertaken different duties to different people.

11 It's not anymore a deal with a bank, working
12 with a client. They've gone to outside people for the
13 purpose of telling them, This is good. Invest in this
14 group because we're here and look what we will do, what
15 we're able to do, and those people aren't going to have
16 the -- BB&T said, We've already done the analysis. Here
17 is where we are and here is what we're able to do, and
18 they weren't able to do it when they said.

19 THE COURT: Maybe that needs to be where we
20 circle back to the requirement of what BB&T said to these
21 folks and whether or not that needed to be in writing,
22 because, again, you're saying BB&T came in, made this
23 pitch, and they said they're going to do these things for
24 us, and based on that, we're going to rely on that.
25 Well, again, I'm suggesting that it's a little different

1 for anyone, whether sophisticated investor or not, but I
2 really don't think it's the law either that you get to
3 come in, make a sales pitch that is kind of broad, and
4 say, We want to be your bank.

5 I don't get those calls every day, maybe you
6 guys do, but banks don't come in and say, I want to be
7 your bank and this is what I can do. What they do is
8 they come in and typically say, We want to be your bank.
9 We want to be your bank especially, on a level like this
10 and put down in writing, This is what we're going to do
11 for you.

12 And you're saying all of this was done based
13 on a salesman from BB&T coming in and there was nothing
14 in writing?

15 MR. DUFFY: No, Your Honor. What I'm trying
16 to do is say that that all relates to a different point
17 of Skywaves and BB&T, whatever they were working on.
18 There are writings. We have alleged it and we have them,
19 that is there.

20 What we're talking about over here is totally
21 different than a bank coming to do a sales pitch for a
22 client. The bank is coming, giving advice about an
23 investment. That is entirely different than an ordinary
24 debtor/creditor relationship you're trying to create as a
25 salesman for the bank. You've already got the client.

1 What are you doing, going out and trying to induce people
2 to invest in the company? That is taking on additional
3 duties that under -- let's see -- the cases for the
4 different duties --

5 THE COURT: This is where it just gets -- I
6 mean, it's so out of the realm of what is normal that I'm
7 having trouble getting my head around that a bank would
8 come in and have a set down meeting with investors and
9 investors-to-be of a company and say, we want to do
10 business with this company, and you're saying that those
11 investors get to say that sales pitch to become that
12 company's bank then becomes the basis for a fraud claim,
13 for the investors to sue the potential lender when a deal
14 down the road doesn't materialize and it wasn't in
15 writing.

16 It was just kind of vague, we want to be your
17 bank and we gave you very strong, good feelings that
18 we're going to invest in your -- we want to handle your
19 company's financial wellbeing for the purposes of this
20 factoring agreement, and based on that, an investor gets
21 to sue the bank and that that is a claim that exists
22 outside of the bank's claim against -- or the company's
23 claim against the bank for some sort of agreement, breach
24 of contract. I mean, I'm just struggling with that,
25 because as you've said, they're not fighting the fact

1 that you, at this point, have stated the basis of a
2 breach of contract claim with BB&T insofar as Skywaves is
3 concerned.

4 They ultimately don't think you would be able
5 to prove it, but you've alleged enough to get past it.
6 This is a different breed of cat to be able to say the
7 people that attended that meeting on the basis of wearing
8 two hats, employees of the company and people will decide
9 whether or not I guess they wanted to invest more time or
10 money into that company get to set down and then sue that
11 bank for what got said at that meeting when the contract
12 to do that got breached later is one thing, and then the
13 other would be to say, well, there's something you said
14 in that meeting that was false at the time and you knew
15 it was false, we relied on it, and it was significant
16 enough and material enough and specific enough that we
17 get to sue you down the road for it.

18 Now, I'm telling you, that's a tough nut to
19 crack. I think he wants to rescue you. I think you were
20 doing a good job on handling this.

21 MR. KEFALOS: This meeting, there were
22 certain representations of fact that were made. In a
23 typical factoring agreement, the way this -- in fact, the
24 way this factoring agreement began, BB&T would buy the
25 invoices, that is, the invoices for the products were

1 already built, 85 percent of the cost, and that was
2 memorialized in writing.

3 Orders continued to pour in. Skywaves
4 couldn't meet the orders, so BB&T says, Well, I'll tell
5 you what we'll do: Instead of waiting for the product to
6 be finished and you issue an invoice to buy it, we'll
7 start to buy your purchase orders from you, okay?

8 This was not memorialized with a new writing.
9 This was memorialized through the course of conduct and a
10 series of e-mails. The products continued to -- the
11 orders continued to roll in, so BB&T and Skywaves
12 couldn't keep up with the orders, so BB&T says, I'll tell
13 you what. Instead of buying your invoices or your
14 purchase orders, we'll now start buying your site plans.

15 In other words, when the New York state
16 police identify on a map where they're going to be
17 building in the next six months, we'll buy those from
18 you, so coming to the meeting with these investors, some
19 of whom were principals in the company and some of whom
20 weren't, the BB&T representative says, We're going to be
21 buying the site plans from you, so we'll be able to get
22 the money up front before you even start to put your
23 parts together, and that will allow you to figure your
24 process.

25 The representative also said, but we need

1 some more cash equity. We need to show some balance, and
2 we need you fellows to come up with some money to put
3 into the company so that the balance sheets looks better.

4 Based on those representations, that is, the
5 promise -- the representation and effect in the course of
6 dealing that BB&T was going to be buying the map plans,
7 these investors made their investment. Later on we found
8 out that was false because when the BB&T sent their
9 representative from the home office down to look at the
10 way things were operating and he says, Well, you guys are
11 submitting maps and getting paid on it, and he said,
12 Well, yeah, that is what our agreement was, he said, We
13 never do that. We never, under any circumstances, would
14 go ahead and fund a purchase order or buy a factor based
15 on a map that someone later says they're going to
16 develop.

17 So we learned at that point that what had
18 been promised before as being flexibility on BBT's was,
19 in fact, not true. They didn't have the authority. They
20 didn't have the right, and they didn't have the ability
21 to do this kind of flexible lending.

22 Now, this is an interesting e-mail process,
23 because the only formal written agreement is the 85
24 percent of the invoice. As the system evolved and as
25 BB&T moved down to purchasing the purchase orders and

1 purchasing based on the map locations, BB&T writes and
2 says -- writes to Skywaves and says, Look, we don't have
3 the forms or the paperwork that match up with what we're
4 doing, and rather than hire lawyers to draw new
5 paperwork, we've just let our letters serve as the
6 memorial of this agreement.

7 Skywaves says, Fine. We'll go ahead and
8 continue to act on that basis, and Skywaves did until
9 people from the home office, from BB&T came down and
10 said, Well, we never authorized this. This is not the
11 way we do business.

12 They accused Skywaves of committing fraud and
13 having committed some misconduct and pulled the plug on
14 the financing when this was the financing that had been
15 arranged all along by the BB&T representatives.

16 Anyway, I digress. The point I was making is
17 when the BB&T rep went to the investors, he said, We are
18 funding presently and will continue to fund based on
19 these map locations. We need you guys to put some money
20 into it to improve the balance sheet, and we will
21 continue on. Based on and in reliance of that
22 representation, these various investors --

23 THE COURT: Let me stop you. When they went
24 to them and said, We'll start doing financing on the
25 maps, they didn't do financing on the maps; is that

1 right?

2 MR. KEFALOS: That's right.

3 THE COURT: And it was subsequent to that
4 that some auditor, or somebody else up the food chain,
5 came down and said, Hey, somebody screwed up, and we
6 don't do that, and we're not going to do this anymore.

7 MR. KEFALOS: Yeah. They called a default,
8 saying you have been submitting false applications for
9 money.

10 THE COURT: Well, I guess maybe then when you
11 talk about that whole fraud, material element of fraud,
12 being a false statement at the time it was made --
13 because it sounded like maybe Edahl, he thought it was
14 true, and, in fact, it actually did come to fruition that
15 that is the way they financed them for a while until some
16 higher up found out and said, Wait a minute, wait a
17 minute. This was not done properly.

18 But how could Edahl be sued for -- how could
19 Edahl's statement be basis for a fraud claim if Edahl
20 thought he could do it and it turned out he did it for a
21 while?

22 MR. KEFALOS: Well, maybe Edahl thought he
23 could do it. Maybe he thought he could do better, but
24 that is something that needs to be fleshed out later. The
25 fact is when the higher ups came down and said nobody had

1 any authority to approve this, this is wrong, this is not
2 the way we do business at BB&T, that made what Edahl said
3 false.

4 THE COURT: No, it made it wrong. It may
5 have been false -- false in the sense of fraud. If Edahl
6 believed it was true, he was just mistaken. If what I'm
7 hearing is right, it's because it sounded like, in fact,
8 it became the method of financing thereafter until later
9 on down the road.

10 MR. KEFALOS: And it may be true, and that is
11 one part of what we have to look at, when we get into
12 discovery. Did Edahl believe this? Was he mistaken, or
13 was he going outside the party line? Edahl made promises
14 and representations about the method of funding based on
15 these map locations.

16 THE COURT: Okay.

17 MR. DUFFY: And to pick up on your point,
18 whether he thought it at the time or not, it was
19 negligent in making it that way. This company wouldn't
20 allow it. They should have investigated that beforehand.
21 That is clearly a negligent misrepresentation that you
22 have a duty to take reasonable care in making some
23 representations when you have a pecuniary interest in it.
24 The Winburn case establishes that. It establishes that
25 he individually had that duty if he has a pecuniary

1 interest, and it also says if you assume in the course of
2 your employment that establishes a pecuniary interest, so
3 he had a duty not to just go up and travel, make a pitch
4 of something they wanted to do. He had to know when he
5 said that they were able to do it that they were able to
6 do it, and they were, whether fraudulently, whether it
7 intended to mislead him, or whether he just misled them
8 negligently is something we can find out in discovery,
9 but it was something that he represented they were able
10 to do that they weren't.

11 And that was true at the time, because once
12 it got up to the people that make the decisions, they cut
13 it off. It's not that they didn't try to do, so that is
14 not really the point of whether -- of the nature of his
15 representation. And, Your Honor, to pick up on the issue
16 that we were struggling with, I think it helps to look at
17 the Murray versus Bank of America case where a duty --
18 there was a duty created to a non-client who just came in
19 when a fraudulent account had been opened in her name,
20 came to the bank and said, That's not my account, please
21 close it. You've got my information, and they didn't
22 close it for another month, and they were held liable
23 with a duty to her and negligence. She wasn't even a
24 client.

25 Now, here, the bank intentionally went to

1 other people and said these things that we contend and
2 allege were false when said, that they were negligently
3 made or fraudulently made, and that certainly creates a
4 duty again to take reasonable care in your
5 representations. Under Winburn, it also has a duty of
6 disclosure, Your Honor, which is another part of the case
7 under a case I would be happen to hand up to you,
8 Consolidated Insurance Benefits versus Conseco Medical
9 Insurance. It's a district of South Carolina case that's
10 a very interesting parallel to this one because they
11 say -- they go through the analysis, say, Okay there is
12 no fiduciary duty there, in that situation, but what
13 happened was there was a course of dealings with an
14 insurance broker and essentially a provider of nationwide
15 health care programs, and they convinced this broker to
16 just use ours. It would be exclusive for us, and then
17 when they had financial trouble, the broker went to seek
18 advice from these -- from the head office who made these
19 assurances to him about the financial capabilities which
20 were not accurate, and that created this duty of
21 disclosure, that you have to report when it becomes -- in
22 fact, you weren't financially sound and you pulled the
23 plug and didn't do this kind of work anymore that you
24 convinced these people to do exclusively with you, and so
25 it's -- the point is, that as this relationship went

1 along for a little while, they never -- the bank never
2 even told -- never disclosed that we're not going to
3 do -- you know, we need to make something different. We
4 need to make changes. They just pulled the rug out from
5 underneath them, a breach in this duty to disclose which
6 under the Consolidated Financial case and under the South
7 Carolina National Bank -- another South Carolina case
8 along that line which they've undertaken by taking on
9 something they concede that was outside their ordinary
10 course of business, that they've gone and made pitches
11 to -- and given advice, which is, again, beyond the scope
12 of the ordinary business, for their benefit, for their
13 own benefit, that they had a pecuniary interest in.

14 And that creates additional duties for the
15 bank to both the -- to both Skywaves under, again, the
16 cases that are cited in the briefs, Your Honor, Burwell
17 versus South Carolina National Bank and Cowburn vs.
18 Leventis recognizes that you have that duty when you
19 undertake to advise, in that case a client, about
20 something that is beyond the scope of your contract duty.

21 Your Honor, the oft-cited Winburn case on a
22 negligent misrepresentation that we have the pecuniary
23 interest, they have the duty to take reasonable care,
24 which we have alleged Edahl did not and as Mr. Kefalos
25 explained, it's clear that he did not exercise reasonable

1 care in making these representations for the specific
2 purpose of inducing in investments into Skywaves, which
3 BB&T already had a relationship with.

4 Your Honor, there are a couple other points
5 I'll address briefly that the bank has raised in the
6 motion to dismiss. Some of them are about the unfair
7 trade practices claims. One of the points is it's not
8 applicable here because the bank is heavily regulated. I
9 expect you've seen that before, the Ward vs. Dick Dyer
10 Associates, South Carolina case in 1991. Supreme Court
11 said that's not what it means. It means if the
12 regulations specifically permits or allows the act that's
13 done, then you can't have an unfair trade practice, but
14 just because the industry is regulated doesn't mean you
15 can't have an unfair trade practice.

16 Same point they allege that we haven't made
17 specific allegations about protecting the public
18 interest, Casey Outdoor Advertising case makes clear the
19 potential for repetition, which we've alleged is
20 sufficient to establish the impact on the public
21 interest.

22 Again, the same issue for an unfair trade
23 practices claim for Mr. Edahl saying you can't have
24 unfair trade practice claim against him, which is really
25 against the company, but in Plowman vs. Bagnal 316

1 S.C. 283, the South Carolina Supreme Court made clear if
2 the facts are done by the individual then that claim can
3 lie against the individual. Certainly, you know, if
4 you've lost a job, maybe it's harder to prove than as a
5 potential for repetition, but that something that would
6 need to be addressed after a 12(b)6 motion.

7 Your Honor, the breach of contract
8 accompanied by fraudulent act, there is a question here
9 also about allegations of fraud. Fraud in this instance
10 under Connor vs. City of Forest Acres means an act with
11 dishonesty in fact or unfair dealing, and that is exactly
12 what has been alleged, Your Honor.

13 Let's see. Paragraphs 55 and 56 -- again,
14 Your Honor, it's what we've discussed, that they
15 understood the needs, basically showing that they made
16 then analysis already that Skywaves did not need a large
17 bank or additional capital funding for its broker, that
18 it was essentially good investment, position for success,
19 they wanted to take them to an IPO that they would
20 provide funding to all the financial needs, and they
21 would do that through something outside of the ordinary
22 course of business that was devised exclusively for
23 Skywaves.

24 And Your Honor, the other representations
25 made at that meeting -- let's see. Based on their own

1 comprehensive review, BB&T believed Skywaves would be a
2 significant infrastructure supplier. That is
3 representing to investors, Here we have expertise. We've
4 done this review. This is a good investment, then the
5 representation was we are fully committed to providing
6 short- and long-term funding, would act as a partner, and
7 the commitment is going to be unique and the equivalent
8 of funding offered by Hunt Capital and by Wachovia, which
9 it wasn't. They weren't able to do it at the time, and
10 he should have known it if he didn't.

11 I'll be happy to answer any questions now.

12 THE COURT: It looks like Mr. Cooke wants to
13 say something.

14 MR. COOKE: Briefly, on that point, again,
15 this is a 12(b)6 and I think it's probably helpful to the
16 Court to have this dialogue, but we do have to look at
17 the what the complaint alleges, and the part that
18 Mr. Duffy just paraphrased is from paragraph 61 of the
19 complaint. It says -- and, bear in mind, BB&T had
20 already been Skywaves' banker for two years at this
21 point. The original factoring agreement was entered into
22 in 2005. This meeting occurred in July 2007.

23 Mr. Edahl wasn't some guy with a loud suit
24 and, you know, a slick way about him. He was already the
25 relationship manager between BB&T and Skywaves. His job

1 was to serve them and to keep them as a client.

2 Under the allegations of this complaint, we
3 may never be able to prove it, but what we would intend
4 to prove is that he oversold his authority. He made
5 representations that were not true and that he knew they
6 weren't true, and that is what we allege in the
7 complaint.

8 Paragraph 61 is all the things that Mr. Duffy
9 just said. Paragraph 66 says, however, defendant's
10 representations were untrue when made. Number 67 says,
11 In point of fact, at the time defendants made the above
12 detailed representations, they had no intention of
13 fulfilling their promises to Skywaves, and that invokes
14 the case as well, and I'm sure Your Honor knows that an
15 exception to the rule that says it has to be a present
16 fact is that if you had no intention or you did not have
17 the ability to fulfill your promises, then that could
18 become a fraud.

19 We've made in our brief some other arguments
20 that I don't think you need to get to. North Carolina
21 law applies. There is a provision in this statute of
22 frauds that says that if there is another statute of
23 frauds that is inconsistent with this one, then you use
24 the other one, but for our purposes, I think all we need
25 to say at this point in 12(b)6 is that further

1 development have made all the allegations in the
2 complaint very comprehensive, but further development
3 needs to be made as to the nature of the agreement
4 between the parties, and is it a loan? In other words,
5 does it come under the statute of frauds, or is it
6 something else, factoring agreement, and, second, do they
7 meet the writing requirements?

8 We've alleged in numerous paragraphs that
9 there was a writing. The original one was written and
10 actually literally signed, and that the parties entered
11 into what was the legal equivalent of signed agreements
12 by signing letters and e-mails and agreeing that that
13 would be the form agreement with the parties.

14 And now we have a third thing that needs to
15 be disputed, and that is what exactly was the
16 representation and does it rise to the level of negligent
17 misrepresentation or fraud and was the reliance
18 reasonable, or was it just puffery?

19 THE COURT: All right. Well, we've let them
20 gang up on you, Ms. Cherry, and you usually don't let
21 them do that, but I will let you respond.

22 MS. CHERRY: Just very briefly. As Mr. Cooke
23 had said, to the extent there may be some details or
24 specific questions that the Court has, I think we -- all
25 parties attempted, Your Honor, to address nuances that --

1 or discreet issues that may have come up, and I believe
2 we all filed our brief, so to the extent there is
3 something that I don't address, I would request -- my
4 hope is that it is addressed and if the Court has a
5 lingering question that it is addressed in the briefs.

6 But the overarching response, Your Honor, to
7 all of the arguments that have been made is to go back to
8 the very beginning and what we said at the outset.

9 Looking at the allegations in the
10 pleadings -- and I will submit to the Court there have
11 been some things said this afternoon that are actually
12 not alleged in the pleadings, but I do think paragraphs
13 53 through 61 in Skywaves' complaint pretty consistently
14 represents the allegations of all of the plaintiffs.

15 And, Your Honor, just for point of
16 clarification, there is no allegation that BB&T was
17 acting as a legal partner, and I think opposing counsel
18 concedes as much, in terms of at least at this stage
19 that's not the allegation, the specific is BB&T would act
20 as a partner in managing Skywaves' growth, but in context
21 of all the allegations, it is in terms of providing
22 Skywaves short-term, long-term financing needs, all of
23 these representations pertain to BB&T's alleged promises
24 to fund Skywaves, which is where we were at the very
25 beginning, Your Honor, notwithstanding the disagreement

1 among the parties in terms of exactly what that agreement
2 was.

3 At the end of the day, it's an alleged
4 promise to fund their financing needs. And that's the
5 very cause of action, causes of action, by these
6 investors that the South Carolina statute bars. At most,
7 Your Honor, taking all of these allegations as true, the
8 only party who has potential claims against BB&T --
9 again, Your Honor, acknowledging that we don't agree with
10 the merits of those claims, but the claims themselves at
11 this stage, are Skywaves, which is precisely why
12 BB&T only filed a partial motion to dismiss, recognizing
13 the stage where we are, legitimately, is a matter of law,
14 BB&T couldn't move to dismiss those and exact to prevail,
15 but with respect to these investor claims against BB&T,
16 based upon alleged representations by one of its
17 employees to meet the future financing needs of Skywaves,
18 as a matter of law, cannot lie against BB&T and Edahl,
19 not just because of the statute, but because they are
20 claims of future performance, future promise.

21 And I will note, Your Honor, to the extent
22 that the plaintiffs are trying to argue that that created
23 some type of fiduciary relationship, the South Carolina
24 statute specifically says that it doesn't allow a claim
25 on an alleged fiduciary relationship.

1 And I would beg to differ with counsel's
2 argument that the provisions in subsection C of the
3 statute, unless the parties seeking to maintain the
4 action has received writing, doesn't apply to sections A,
5 B, or C. The phrase or is used, meaning A or B or C,
6 unless the parties seeking to maintain the action have
7 received a writing.

8 Again, Your Honor, these are investor claims
9 that have no basis in this Court against BB&T or Edahl,
10 based upon the statutory law and the case law in South
11 Carolina. There is no duty to those individual
12 plaintiffs as a matter of law under the circumstances
13 alleged, no right to rely. And, Your Honor, again, the
14 representations themselves would not give rise to a
15 negligent or fraudulent inducement claim because they are
16 alleged promises of future funding or future performance.

17 And at the final point under the unfair trade
18 practices act, the allegations in the complaint make
19 clear that this is a dispute based upon an agreement by
20 the parties, and I think the case law in South Carolina
21 establishes that if it is a circumstance that involves
22 the parties in and of themselves, that doesn't give rise
23 to an impact on the public interest, such that the
24 defendant's motion to dismiss should be granted as well,
25 Your Honor, on that cause of action.

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

A handwritten signature in dark ink, appearing to read 'A. Haffenden', is written over a horizontal line.

Circuit Court Reporter

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.

Exhibit C

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

shall remain located at the address first above written, and Client will promptly notify BB&T in writing (including by way of Electronic Transmission) at least 30 days prior to any change of address; (b) ~~Client is able to pay, does pay and will continue to pay its debts as they mature in the Ordinary Course of Business;~~ (c) the financial statement last provided BB&T accurately states Client's financial condition and there has not been any material adverse change in the financial condition or business prospects of Client since the date of such financial statement; (d) Client has never carried on business under or used any name other than (if none, so state): None; (e) there are no actions, suits or legal proceedings of any kind or nature (whether civil or criminal) now pending (or, to Client's knowledge, threatened) against Client, the adverse result of which would in any material respect affect the property or financial condition, or threaten the continued operations, of Client; (f) Client shall not create or suffer to exist any Lien, other than a Permitted Lien, upon any of the Collateral or any of its Inventory, whether or not constituting Collateral; (g) Client shall immediately notify BB&T of any disputes or claims concerning any Account and of any returns, reposessions or rejections of Goods sold by Client; (h) Client shall not reroute or reassign 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.

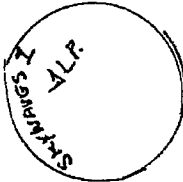
IN WITNESS WHEREOF, Client has signed, sealed and delivered this Factoring and Security Agreement on the date first written above.

ATTEST:

SKYWAVES I CORPORATION
("Client")

Joe Phelan
Secretary

(CORPORATE SEAL)



By: *Ron Kuesner*
Title: CEO

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

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

By: *[Signature]*
Title: SVP



Branch Banking & Trust Co.

March 2, 2007

1962 Sam Rittenberg Boulevard
Charleston, SC 29407
(843) 852-5067
Fax (843) 852-5066

James J. Edahl
Senior Vice President

Mr. John Voytko
Chief Financial Officer
Skywaves Corporation
4280 Pace Street
Charleston, SC 29405

Re: Line of credit renewal

Dear John:

On behalf of BB&T I am pleased to present the following summary renewal terms for our existing line of credit to Skywaves I Corporation:

Amount: \$3,5000,000. Sub-limit of \$2,000,000 for purchase order financing. All existing contracts are eligible to be financed.

Advance Rates: 85% of qualified invoices, 60% of qualified purchase orders.

Interest Rate: The prime rate of BB&T plus 1% adjusted daily as the prime rate may change from time to time.

Fees: .45% of each invoice financed capped at \$3,000 a month.

Repayment: Interest monthly, principal at maturity of 4/5/08.

Other: All other existing terms and conditions will remain the same.

Assuming Skywaves 2007 budget previously submitted to BB&T is achieved, we will consider further changes in the structure of the line as to rates and terms once the final year 2007 financial statements become available.

I have enjoyed working with you, Ron, and the Skywaves team over the last two years as you have successfully grown your business. We at BB&T look forward to continuing to assist you as you continue to build the company.

Very truly yours,

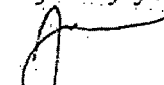

Jim Edahl
Senior Vice President

Exhibit D

0509

John Voytko

From: Morris, Castlen [Castlen.Morris@BBandT.com]
Sent: Tuesday, March 20, 2007 12:43 PM
To: John Voytko
Cc: Edahl, James
Subject: SkyWavesAmendment3.20.07.doc
Follow Up Flag: Follow up
Flag Status: Red
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

Exhibit E

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
No. 2012-205647

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

Roger M. Young, Circuit Court Judge

Cases 2009-CP-10-07515, 2009-CP-10-07517,
2009-CP-10-07518 and 2010-CP-10-09959

2009-CP-10-07515

James J. Kerr, Crayton Walters, and J.T. Main, LLC, ... Appellants,

v.

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

2009-CP-10-07517

Ron Konersmann, ... Appellant,

v.

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

2009-CP-10-07518

John Voytko, ... Appellant,

v.

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

2010-CP-10-09959

Patricia Konersmann, ... Appellant,

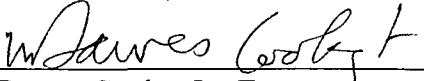
v.

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

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Record on Appeal complies with Rule 210(g), SCACR.

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