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.

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1. **Did the trial court err in dismissing Plaintiffs' Complaints pursuant to Section 37-10-107 where Plaintiffs' Complaints and other documents submitted to the trial court encompassed a written agreement between underpinning Plaintiffs' tort claims?**

   SUGGESTED ANSWER: YES.

2. **Did the trial court err in dismissing Plaintiffs' Complaints pursuant to Section 37-10-107 where Plaintiffs' Complaints were premised upon tort and did not allege claims "based upon a failure to perform" an agreement to which the Plaintiffs and Defendants were parties?**

   SUGGESTED ANSWER: YES.

3. **Did the trial court err in dismissing Plaintiffs' Complaints pursuant to Section 37-10-107 where Plaintiffs' Complaints alleged a business relationship beyond a traditional agreement to "lend or borrow money"?**

   SUGGESTED ANSWER: YES.

4. **Did the trial court err in dismissing Plaintiffs' Complaints pursuant to Section 37-10-107 where the Factoring and Security Agreement selected North Carolina Law?**

   SUGGESTED ANSWER: YES.

5. **Did the trial court err in dismissing Plaintiffs' Complaints pursuant to Section 37-10-107 where any relevant agreement was controlled by a different statute of frauds?**

   SUGGESTED ANSWER: YES.

6. **Did the trial court err in dismissing Plaintiffs' Complaints pursuant to Section 37-10-107 where the Plaintiffs' Complaint alleged part performance within the scope of the statute?**

SUGGESTED ANSWER: **YES.**

7. **Did the trial court err in dismissing Plaintiffs' Complaints pursuant to Section 37-10-107 as to Plaintiffs' tort claims, aside from negligent misrepresentation, where the statute did not expressly include such claims within its scope?**

   SUGGESTED ANSWER: **YES.**

8. **Did the trial court err in dismissing Plaintiffs' negligence claims for failure to allege a duty of care?**

   SUGGESTED ANSWER: **YES.**

STATEMENT OF THE CASE

I. Background Facts Common to All Cases

Accepting as true the facts alleged in Plaintiffs' Complaints in these lawsuits, the facts underlying this dispute are as follows:

Skywaves I Corporation ("Skywaves") is a South Carolina Corporation with its principal place of business in South Carolina. (*See, e.g.,* R. at p.71 ¶ 7). Defendant Branch Banking and Trust Company ("BB&T") is a corporation doing business in South Carolina. (*See, e.g.,* R. at p.70 ¶ 3). Defendant James Edahl ("Edahl") is a citizen and resident of South Carolina. (*See, e.g.,* R. at p.70 ¶ 4).

Skywaves developed an innovative product for the wireless telecommunications industry, with a customer base including Verizon, AT&T, Sprint/Nextel, as well as federal and state government entities. (*See, e.g.,* R. at p.71 ¶ 10). On or about March 22, 2005, Skywaves and BB&T entered into a written factoring agreement, under which BB&T purchased certain receivables of Skywaves at a discount and agreed to collect such receivables on Skywaves' behalf. (*See, e.g.,* R. at p.71 ¶ 11).

From 2005 through 2007, Skywaves and BB&T occasionally amended the factoring agreement via written modifications. (*See, e.g.,* R. at p.71 ¶ 12). From 2005 through 2007, BB&T funded Skywaves' working capital needs via the factoring agreement. (*See, e.g.,* R. at pp.71-72 ¶ 13). During that time period, BB&T also provided a designated relationship manager who assisted Skywaves in raising additional capital through investors. (*See, e.g.,* R. at p. 72 ¶ 14).

In early 2007, Skywaves' Board of Directors determined that it needed expanded financial commitments to provide capital infusion, beyond that which BB&T was providing under the factoring agreement, to meet the increasing number of Requests for Quotations it received after winning two General Dynamics contracts: a $12 million contract with the Navy/Coast Guard and a $20 million multi-year homeland security

initiative with the New York state SWN Police. (*See, e.g.,* R. at p. 72 ¶ 15). In this regard, Skywaves solicited proposals for expanded financial commitments from various entities. (*See, e.g.,* R. at p.72 ¶ 16). Skywaves received a proposal for a working capital investment from Hunt Capital. (*See, e.g.,* R. at p.72 ¶ 17). Skywaves also received a proposal to modify and expand the existing factoring agreement with BB&T. (*See, e.g.,* R. at p.72 ¶ 18).

Defendant BB&T, primarily through Defendant Edahl, made numerous representations, including that: (a) BB&T understood Skywaves' short- and long-term capital needs; (b) Skywaves did not need a large bank or additional capital funding to grow; (c) Defendants believed Skywaves was strategically positioned for success; (d) Defendants wanted to take Skywaves to a sale or stock IPO; and (e) BB&T would provide capital funding for Skywaves' financial needs. (*See, e.g.,* R. at p.75 ¶ 36). Defendant BB&T, acting primarily through Defendant Edahl, represented that if Skywaves would continue its relationship with BB&T, BB&T would devise a funding program tailored specifically for Skywaves, beyond their ordinary contract and course of business with other customers. (*See, e.g.,* R. at p.75 ¶ 37). The Complaints make clear that, in an effort to secure Skywaves' continued business, BB&T, acting primarily through Defendant Edahl, undertook the unusual role of advising investors and potential investors as to an investment in Skywaves, as described more fully herein.

In reasonable and foreseeable reliance upon BB&T's representations, Skywaves elected not to pursue the capital investment or funding proposals of Wachovia or Hunt Capital. (*See, e.g.,* R. at p.72 ¶ 19). In reasonable and foreseeable reliance upon BB&T's representations, Skywaves elected to use BB&T to raise additional operating capital, through modifications of the existing factoring agreement. (*See, e.g.,* R. at p.72 ¶ 20). Between March and December of 2007, Skywaves and BB&T exchanged a series of emails, letters and documents, which memorialized the relevant and material terms of a new and expanded factoring agreement (or a modification of the prior agreement). (*See,*

e.g., R. at pp.72-73 ¶ 21). Under this modified factoring agreement, BB&T agreed, among other things, to provide capital infusions based on invoices, purchase orders, contracts and site plans. (*See, e.g.*, R. at p.73 ¶ 22).

Skywaves received numerous writings from BB&T containing the material terms and conditions of this promise, undertaking, accepted offer, commitment, or agreement, and BB&T (or its duly authorized agent) signed those writings to the extent the law requires. (*See, e.g.*, R. at p.73 ¶ 23). For example, BB&T sent numerous email messages confirming the relevant terms of the modifications to the existing factoring agreement. (*See, e.g.*, R. at p.73 ¶ 24).

On January 25, 2008 BB&T breached the terms and conditions of its factoring agreements — as modified — with Skywaves by asserting a Skywaves default and by refusing to honor its further commitments to Skywaves. (*See, e.g.*, R. at p.73 ¶ 25). At that time, BB&T completely ended its business relationship with Skywaves. (*See, e.g.*, R. at p.73 ¶ 26). Subsequently, BB&T continued to refuse to honor its obligations under the original factoring agreement and modifications thereto. (*See, e.g.*, R. at p.73 ¶ 27). BB&T's conduct ultimately caused Skywaves to petition for Bankruptcy protection, without the ability to reorganize and continue as an active business entity. (*See, e.g.*, R. at p.73 ¶ 28).

The instant lawsuits concern several investors in Skywaves and arises in the general factual background of the business relationship between Skywaves and BB&T. These investors have filed several lawsuits alleging, *inter alia*, that, in their efforts to secure investments in Skywaves to enable it to continue the relationship, Defendants fraudulently induced them to invest money in Skywaves. Specifically, Plaintiffs allege that, before and in July of 2007, Defendant Edahl traveled to MacBee, South Carolina on behalf of BB&T for the purpose of making a presentation to potential Skywaves lenders and investors. (*See, e.g.*, R. at pp. 76-77 ¶ 41). Again, in this regard, Defendants undertook a role and thus duties outside of the ordinary lender/borrower relationship.

During the presentation, Defendant Edahl made numerous misrepresentations to Skywaves and its potential lenders and investors, including Plaintiffs. (*See, e.g., id.*). Specifically, Defendants falsely stated that:

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

(b) BB&T was fully committed to providing all of Skywaves' short-term and long-term financial needs for growth;

(c) BB&T would act as a partner in managing Skywaves' growth;

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

(e) BB&T would commit to funding [Skywaves'] growth based on invoices, purchase orders, contracts and site plans.

(*See, e.g.,* R. at pp.76-77 ¶ 41(a)-(e)). Plaintiffs allege that they relied on Defendants' material misrepresentations, which induced them to purchase equity positions in and/or lend money to Skywaves. (*See, e.g.,* R. at p.77 ¶ 42). Although the misrepresentations at issue in this lawsuit did relate, indirectly, to the relationship between BB&T and Skywaves, these cases were **not** filed to enforce any contract between those entities. To the contrary, this lawsuit stems entirely from torts committed against Plaintiffs by Defendants.

II. Procedural History

A. The Four Lawsuits at Issue

Plaintiffs commenced the four lawsuits giving rise to the instant appeal on December 3, 2009 and December 3, 2010 in Court of Common Pleas of Charleston County, South Carolina against BB&T and Edahl (collectively, "Defendants").

1. *Kerr* Lawsuit (2009-CP-10-7515)

This lawsuit was filed on behalf of Appellants James J. Kerr, Crayton Walters and J.T. Main, LLC (collectively "Kerr Plaintiffs") against Defendants. The Kerr Plaintiffs allege that Messrs. Kerr and Walters are directors of Skywaves and that all Kerr Plaintiffs are investors in Skywaves. (*See* R. at p.60 ¶ 8). The Kerr Plaintiffs alleged that Defendants' conduct damaged them when Skywaves was forced into Chapter 7 liquidation, as follows: (a) J.T. Main, LLC lost its $500,000 equity investment in Skywaves; (b) James J. Kerr lost the principal amount of $250,000 loaned to Skywaves; and (c) Crayton Walters lost the principal amount of $150,000 loaned to Skywaves. (*See* R. at p.66 ¶¶ 43-45).

The Amended Complaint in this action asserted causes of action sounding in (1) negligent misrepresentation and/or fraudulent inducement and (2) negligence/lender liability. (*See generally* R. at pp.59-69).

2. *Ron Konersmann* Lawsuit (2009-CP-10-7517)

This lawsuit was filed on behalf of Appellant Ron Konersmann against Defendants. Mr. Konersmann alleges that he is the Chief Executive Officer of Skywaves and an investor therein. (*See* R. at p.71 ¶ 7). Mr. Konersmann alleges that Defendants' conduct caused him to lose at least $870,000.00 in compensation, which he was forced to forego in an effort to maintain the continued operations of Skywaves after Defendants' conduct forced Skywaves into Chapter 7 liquidation. (*See* R. at p.77 ¶ 48). In addition, Mr. Konersmann alleges that he lost his equity investment of $269,980.00 in Skywaves. (*See* R. at p.77 ¶ 47).

The Amended Complaint in this action asserted causes of action sounding in (1) negligent misrepresentation; (2) fraudulent misrepresentation; (3) negligence; and (4) violations of the South Carolina Unfair Trade Practices Act. (*See generally* R. at pp.70-82).

3. *Voytko* Lawsuit (2009-CP-10-7518)

This lawsuit was filed on behalf of Appellant John Voytko against Defendants. Mr. Voytko alleges that he is the Chief Financial Officer of Skywaves and an investor therein. (*See* R. at p.84 ¶ 7). Mr. Voytko alleges that Defendants' conduct caused him to lose his equity investment in Skywaves of at least $66,703.46. (*See* R. at p.90 ¶ 47). In addition, Mr. Voytko alleges that he has lost at least $33,000.00 in salary, $4,048.13 in unreimbursed expenses, and other compensation, which he was forced to forego in an effort to maintain the continued operations of Skywaves after the Defendants unilaterally terminated the funding and eventually forced Skywaves into Chapter 7 Bankruptcy liquidation. (*See* R. at p.90 ¶ 48).

The Amended Complaint in this action asserted causes of action sounding in (1) negligent misrepresentation; (2) fraudulent misrepresentation; (3) negligence; and (4) violations of the South Carolina Unfair Trade Practices Act. (*See generally* R. at pp.83-95).

4. *Patricia Konersmann* Lawsuit (2010-CP-10-9959)

This lawsuit was filed on behalf of Appellant Patricia Konersmann against Defendants. Mrs. Konersmann alleges that she is an investor in Skywaves and a lender to that company. (*See* R. at p.108 ¶ 4). Mrs. Konersmann alleges that she lost $228,730.00 in investments in and loans to Skywaves. (*See* R. at p.116 ¶ 51).

The *Patricia Konersmann* action, which was filed a year after the other lawsuits, was not removed to federal court and was not part of those proceedings. The Complaint in this action asserted causes of action sounding in (1) negligent misrepresentation and/or fraudulent inducement and (2) negligence/lender liability. (*See generally* R. at pp.108-

17).

B. The Proceedings Below

On January 14, 2010, Defendants removed the *Kerr, Ron Konersmann and Voytko* cases to the United States District Court for the District of South Carolina, baselessly arguing that — although complete diversity did not exist (as Plaintiffs and Edahl are South Carolina citizens) — the District Court should disregard Defendant Edahl's citizenship under the doctrine of "fraudulent joinder." On June 21, 2010, the Honorable Margaret B. Seymour entered an Order granting Plaintiffs' motions to remand the Removed Actions to this Court. (*See* R. at pp.1-10).

At the time they removed these cases, BB&T and Edahl also filed Motions to Dismiss the original Complaints. In response, on February 12, 2010, Plaintiffs in the *Kerr, Ron Konersmann* and *Voytko* cases, amended their Complaints to rectify any perceived deficiencies. (*See generally,* R. at pp.59-95). The filing of the Amended Complaints mooted Defendants' original Motions to Dismiss. On February 26, 2010 (before the district court remanded the three removed lawsuits), Defendants BB&T and Edahl filed Motions to Dismiss Plaintiffs' Amended Complaints in those cases in federal court:

- *James J. Kerr, et al. v. Branch Banking & Trust Co.*, Civil Action: 2:10-CV-00104-MBS (R. at pp.96-99);
- *Ron Konersmann v. Branch Banking & Trust Co.*, Civil Action: 2:10-CV-00110-MBS (R. at pp.100-03);
- *John Voytko v. Branch Banking & Trust Co.*, Civil Action: 2:10-CV-00109-MBS (R. at pp.104-07).

Because the district court remanded those actions to this Court, it did not rule upon Defendants' Motions to Dismiss the Amended Complaints in the Removed Actions.

The trial court heard oral arguments on Plaintiffs' Motions to Dismiss in the *Kerr, Ron Konersmann* and *Voytko*. On November 1, 2011, the trial court entered an Order

Granting Defendants' Motions to Dismiss Amended Complaint with Prejudice in the *Kerr, Ron Konersmann* and *Voytko* cases. (*See* R. at pp. 11-26). Plaintiffs then filed motions to reconsider these orders noting, among other things, that numerous of the pleadings filed in the federal lawsuits were not yet technically in the state court file. (*See* R. at pp.288-96). Out of an abundance of caution, Plaintiffs also filed notices of appeal near that time in the *Ron Konersmann, Kerr* and *Voytko* cases. (*See* R. at pp.297-353).

On June 15, 2012, the trial court filed its "Order Amending Order Granting Defendants' Motions to Dismiss the Amended Complaint with Prejudice Dated November 16, 2011 (sic)" in the *Kerr, Ron Konersmann* and *Voytko* cases. (*See* R. at pp.27-35). On the same date, the Court also filed an "Order Granting Defendants' Motion to Dismiss with Prejudice" in the *Patricia Konersmann* case.[1] (*See* R. at pp.36-44). Defendants had filed a Motion to Dismiss the Complaint in the *Patricia* Konersmann case on January 5, 2011. (*See* R. at pp.118-19). For ease of reference, these Orders — which are at issue in this appeal — shall be referred to herein as the "Orders."

In the Orders, the Honorable Roger M. Young dismissed the Plaintiffs' actions with prejudice on the following grounds:

(a) S.C. Code § 37-10-107 bars Plaintiffs' claims because Plaintiffs did not allege the existence of a writing that they "received."

(1) The choice of law provision in the factoring agreement between Skywaves and BB&T does not apply to Plaintiffs' claims.

(2) S.C. Code § 37-10-107 applies because Plaintiffs' claims concern an alleged failure to loan money.

(3) S.C. Code § 37-10-107 can apply to preclude fraud claims, even though that statute only expressly refers to negligent misrepresentation claims.

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[1] This Order was also entered in an action captioned *Franz X. Meier v. Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, a/k/a BB& and James Edahl*, 2010 CP-10-9926. The *Meier* lawsuit is not involved in this consolidated appeal.

(4) S.C. Code § 37-10-107 applies to Plaintiffs' claims, not S.C. Code § 32-3-10(5), and the two statutes are not inconsistent.

(b) Plaintiffs did not allege facts sufficient to support the existence of a negligence duty of care from Defendants to Plaintiffs.

(c) Plaintiffs cannot state a claim under the South Carolina Unfair Trade Practices Act, because (i) investor claims are generally regulated by federal law; and (ii) Plaintiffs fail to allege that the Defendants' conduct either adversely affected the public interest or had the potential for repetition.

On or about July 17, 2012, Plaintiffs filed the instant Notices of Appeal from the Orders. (*See* R. at pp.392-435). Those Notices of Appeal have all been consolidated by Order of this Court.

For the reasons set forth herein, Plaintiffs respectfully submit that Judge Young's holdings were erroneous under the governing standard of review. As a result, this Court should reverse the trial court's grant of Defendants' Motions to Dismiss.

ARGUMENTS

I. Standard of Review

The standards governing the analysis of a Motion to Dismiss in South Carolina are well-settled:

> "On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper. *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008).

Grimsley v. South Carolina Law Enforcement Div., 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) (reversing grant of motion to dismiss). "'The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action.'" *See Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 568, 703 S.E.2d 197, 199 (2010).

For the reasons that follow, applying the foregoing standards, this Court should determine that the trial court erred in granting the Defendants' Motions to Dismiss Plaintiffs' Complaints.

II. The Trial Court Erred in Dismissing Plaintiffs' Complaints Pursuant to South Carolina Code § 37-10-107

The bulk of the trial court's analysis concluded that that Plaintiffs failed to state a claim upon which relief could be granted, because their claims failed pursuant to S.C. Code § 37-10-107 (the "Lender Liability Statute"). The Lender Liability Statute is a statute of frauds applicable to actions seeking to enforce agreements to lend or borrow money. The Lender Liability Statute provides, in relevant part:

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

commitment, or agreement:

(a) to lend or borrow money;

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

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

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

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

(b) promissory or equitable estoppel;

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

(d) negligent misrepresentation. . . .

(4) In the event of a conflict between this section and any other provision of law of this State relating to the requirement of a signed writing, the provisions of the other provision of law shall control.

S.C. Code § 37-10-107(1), (2) & (4). For the reasons discussed in subsections A through G below, under the appropriate standard of review, the trial court erred in dismissing these actions pursuant to the Lender Liability Statute. Plaintiffs' Complaints allege sufficient facts to state a claim against Defendants.

A. The Trial Court Erred in Dismissing Plaintiffs' Complaints Pursuant to Section 37-10-107, Because Plaintiffs' Complaints Contain Sufficient Allegations of a Writing Satisfying the Lender Liability Statute

As discussed in detail in subsections II.B through II.G, *infra,* for various reasons Section 37-10-107 simply does not apply to this case. However, even if the Court determines that the Lender Liability Statute *does* apply, the trial court erred in dismissing

Plaintiffs' claims, because the Complaints sufficiently allege writings sufficient to satisfy the Lender Liability Statute.

Assuming it applies, the Lender Liability Statute states that a party may not maintain an action based on a failure to perform an agreement to lend or borrow money "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." *See* S.C. Code § 37-10-107(1)(c).

In a nutshell, Plaintiffs' contend that BB&T, through its employees and by oral representations, changed the existing factoring agreement so that BB&T was no longer required to fund on the basis of Skywaves' accounts receivable, but rather was required to fund on the basis of Skywaves' **purchase orders**. Plaintiffs' allege the existence of numerous written communications and documents memorializing this agreement. Moreover, the actual documents submitted to the trial court — which were signed by Defendant Edahl on behalf of BB&T — established that BB&T had, indeed, made such a promise. Under these circumstances, Plaintiffs sufficiently alleged their causes of action and should have been permitted to engage in discovery regarding those claims.

The only contractual relationship alleged in Plaintiffs' Complaints was that between BB&T and Skywaves. The Complaints contain ample allegations of writings that BB&T signed containing the material terms of the parties' agreement:

> 11. On or about March 22, 2005, Skywaves and BB&T entered into a written factoring agreement, whereby BB&T purchased certain receivables of Skywaves at a discount and agreed to collect such receivables on Skywaves' behalf.
>
> 12. From 2005 through 2007, Skywaves and BB&T occasionally amended the terms of the factoring agreement via written modifications. . . .
>
> 21. Between March and December of 2007, Skywaves and BB&T exchanged a **series of emails, letters and documents, which memorialized the relevant and material terms of a new and expanded factoring agreement (or a modification of the prior agreement).**

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

23. Skywaves received numerous writings from BB&T containing the material terms and conditions of this promise, undertaking, accepted offer, commitment, or agreement. BB&T, or its duly authorized agent, signed those writings to the extent required by the law.

24. For example, BB&T sent numerous email messages confirming the relevant terms of the modifications to the existing factoring agreement.

(*See* R. at p.71-73 ¶¶ 11-12, 21-24 (emphasis added); *accord* R. at p.63 ¶ 31 ("Between March and December 2007 Skywaves exchanged a series of emails, letters and documents with BB&T that memorialized the new and expanded factoring agreement, which provided for, among other things, financing based on invoices, purchase orders, contracts and site plans. For example, BB&T sent numerous email messages confirming the relevant terms of the modifications to the existing factoring agreement."); R. at pp. 84-86 ¶ ¶¶ 11-12, 21-24; R. at p.112 ¶ 27).

Plaintiffs could prove at trial, consistent with these allegations, a case that would satisfy the Lender Liability Statute. Thus, Plaintiffs' Complaints contain more than sufficient factual allegations concerning the existence of documents setting forth the terms and conditions of the agreements at issue in this case. In light of these allegations of written documents confirming and memorializing the agreement between BB&T and Skywaves (including e-mail correspondence), Plaintiffs' claims withstand the Defendants' Rule 12(b)(6) Motions to Dismiss. *See Payoutone v. Coral Mortg'g Bankers*, 602 F. Supp. 2d 1219, 1226 (D. Colo. 2009) ("[T]he multiple emails to which the amended complaint refers may serve to satisfy the writing requirement under the credit agreement statute of frauds. Therefore, in making all inferences in Payout's favor, I conclude that the amended complaint's reference to the emails serves, in this procedural posture at least, to meet the writing requirement in the credit agreement statute of frauds.").

In addition to these allegations in Plaintiffs' Complaints, Plaintiffs presented to

the trial court certain of the documents referenced in the Complaints that confirm that the Lender Liability Statute was satisfied.[2] As alleged in the Complaints, on March 22, 2005, Skywaves and BB&T entered into a Factoring and Security Agreement. (*See* R. at pp.495-508). Under that Factoring and Security Agreement, BB&T agreed to factor Skywaves' "Accounts"[3]:

> 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.

(*See* R. at p.499 ¶¶ 2-3). This Factoring and Security Agreement was the original agreement between BB&T and Skywaves.

In March of 2007, the parties amended, modified or changed their agreement through a number of writings. (*See* R. at pp.71-73 ¶¶ 11-12, 21-24 (emphasis added);

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[2] While consideration of documents outside of the First Amended Complaint might normally not occur under Rule 12(b)(6), Plaintiffs posited that the trial court could consider documents referenced in the First Amended Complaints. Defendants did not successfully object to the consideration of these documents in the trial court's analysis of the Motions to Dismiss.

[3] As used in the Factoring and Security Agreement, "'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." (*See* R. at p.495 ¶ 1(a)).

accord R. at p.63 ¶ 31; R. at pp. 84-86 ¶ ¶¶ 11-12, 21-24; R. at p.112 ¶ 27). For example, on March 2, 2007, Defendant Edahl wrote and signed a letter to Plaintiff Voytko of Skywaves memorializing the parties' agreement, including financing premised upon purchase orders:

> 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 (sic). 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 lime.
>
> 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 88&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.

(*See* R. at p.509 (emphasis added)). In an email dated March 20, 2007, Defendant BB&T confirmed that Mr. Edahl's letter would constitute an enforceable writing:

> 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.

(*See* R. at p.510 (emphasis added)).

The writings discussed above — which are alleged and referenced in Plaintiffs' Complaints and are consistent with the allegations of those pleadings — are only some of the writings that Skywaves received from BB&T setting forth the terms and conditions of the parties' agreement. Such writings — and others like them — are sufficient to satisfy the Lender Liability Statute and illustrate that, contrary to Defendants' assertions, the parties did document their relationship with writings confirming the changing terms of the agreement. These documents support the allegations of Plaintiffs' Complaints concerning the existence of documents that satisfy the allegedly applicable Lender Liability Statute of frauds.

In the court below, Defendant Edahl argued that the Lender Liability Statute could not be satisfied because Plaintiffs did not "receive" a writing that he signed. The relevant portion of the Lender Liability Statute requires that "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." *See* S.C. Code § 37-10-107(1)(c). Contrary to Defendant Edahl's arguments, this provision does not require that Plaintiffs have received a writing that **he** signed to support tort claims asserted against him.

In this case, the "party to be charged" with the factoring agreement (if anyone) at issue is BB&T, not Edahl. Edahl's tort liability is only indirectly related to BB&T's contract with Skywaves. Plaintiffs do not allege that Edahl ever had an enforceable agreement. As set forth below, Plaintiffs have sufficiently alleged that Skywaves received a writing that BB&T — the party to be charged with enforcement of the agreement — signed in satisfaction of the Lender Liability Statute of frauds.

Defendant Edahl has not cited any authority establishing that "the party to be charged" as used in the Lender Liability Statute, is intended to mean that a third-party (non-contracting party) is insulated from tort liability for his malfeasance simply because it did not sign the agreement. Such a result is not consonant with the plain language of the Lender Liability Statute. Notably, the Lender Liability Statute requires that "the party to be charged," not "the party sued" or "the defendant," sign the writing at issue If the legislature intended — as Defendant Edahl contended below — that only a person who signs a writing under the Lender Liability Statute may be sued in tort, it would have said so. Defendant Edahl can cite to no authority applying the South Carolina Lender Liability Statute — or any other similarly-worded statute — to require that a non-contracting party sued in tort sign a writing memorializing agreement as a prerequisite to suit.

Moreover, in the trial court, Defendants argued that the Lender Liability Statute precluded a claim because the Plaintiffs did not "receive" a writing. However, as discussed herein, the Plaintiffs are not seeking to *enforce* the agreement between Skywaves and BB&T. While that agreement is relevant to their claims, Plaintiffs' claims sound solely in tort and are based on Defendants misstatements and inducements. This tortious conduct is well outside that agreement. The bottom line is that there is, under the Lender Liability Statute, an enforceable agreement between BB&T and Skywaves to fund based upon purchase orders. This contract is indirectly relevant to the tort claims asserted by the individual investors in these cases.

Therefore, for the foregoing reasons, this Court should reverse the trial court's granting of Defendants' Motions to Dismiss these actions.

B. The Trial Court Erred in Dismissing Plaintiffs' Complaints Pursuant to Section 37-10-107, Because Plaintiffs' Complaints Do Not Allege Claims "Based Upon a Failure to Perform" an Agreement to Which They Were Parties with Defendants

The trial court erred in dismissing Plaintiffs' claims under Section 37-10-107,

because that statute does not apply to Plaintiffs' claims in the first instance. Specifically, the individual Plaintiffs in this case are not asserting claims based upon a failure to perform an agreement — involving a loan or otherwise — between themselves and either Defendant. To the contrary, they are asserting tort claims that are independent of the contract claims that Skywaves possesses. Plaintiffs' complaints articulate how the Defendants' stepped outside of their ordinary contractual role and instead advised Plaintiffs' as to the potential investment in Skywaves. Plaintiffs' claims in this case are based wholly in tort based on their representations directly to the individual plaintiffs and are not dependent on the enforcement of any agreement between the parties to these lawsuits. While a factoring agreement between Defendant BB&T and non-party Skywaves is tangentially related to the claims alleged, this is not an action to enforce that agreement.

As Plaintiffs allege the facts in their Complaints, the Lender Liability Statute of frauds embodied in Section 37-10-107 is simply not — or, at the very least, might not be — applicable to the claims alleged in this case. It was error for the trial court to dismiss Plaintiffs' Complaints on that basis.

In relevant part, South Carolina Code Section 37-10-107(1) provides that:

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

This section is a statute of frauds, requiring that certain agreements be in writing to

support the assertion of certain causes of action. Essentially, the Lender Liability Statute applies where a plaintiff brings an action to enforce an agreement to lend or borrow money against the other party to that agreement. In this regard, the Lender Liability Statute only applies where both the plaintiff and defendant are parties to the agreement at issue and one of the parties seeks to have the Court enforce an agreement within the ambit of this Section.

Under South Carolina law, "[i]t is well settled that the protection afforded by the statute of frauds is a personal privilege of the parties to the agreement [citation omitted], and a stranger to an oral contract cannot avail himself of the fact that the statute of frauds renders the contract unenforceable." *See Hatcher v. Harleysville Mut. Ins. Co.*, 266 S.C. 548, 553, 225 S.E.2d 181, 183 (1976) (*citing Walker v. Preacher*, 188 S.C. 431, 199 S.E. 675 (1938)); *accord Hobgood v. Pennington*, 300 S.C. 309, 315 n.1, 387 S.E.2d 690, 693 n.1 (Ct. App. 1989) ("The statute of frauds is not pertinent to this case because a stranger to an oral contract cannot avail himself of the fact that the statute of frauds renders the contract unenforceable."); *see also, Tupper v. Dorchester County*, 326 S.C. 318, 324, 487 S.E.2d 187, 190 (1997) ("[T]he purpose of the statute of frauds is to protect the promisor . . . .").

It is well-established, black-letter law that the purpose of a statute of frauds is to protect a party against whom contract enforcement is sought:

> It is the intent and purpose of the Statute of Frauds to give to **the party to an oral contract, against whom the enforcement of the contract is sought** by the other party, the right to assert the Statute as a defense to his or her own liability. A third party should not be able to assert the invalidity of such transactions unless he or she is an assignee or successor to a party to the contract. The defense of the Statute is a personal one available only to a party to the contract to which the Statute is alleged to apply and his representatives and privies. Its benefits cannot be claimed by one who is not a party or privy to the oral contract and is not sought to be charged personally on the contract.

See Williston on Contracts § 27:12 (4th ed.) (emphasis added); *accord* Restatement (Second) of Contracts § 144 ("Only a party to a contract or a transferee or successor of a

party to the contract can assert that the contract is unenforceable under the Statute of Frauds."). Stated otherwise:

> The statute of frauds is designed to give **to a party to an oral contract against whom the enforcement of the contract is sought by the other party** the right to avail himself or herself of the provisions of the statute as a defense to liability. Thus, the statute is intended to protect the party against whom enforcement of the contract is sought. The statute, when asserted by such party as a defense, is a defense to an action against him or her either for the enforcement of the oral contract or for damages for its breach. The defense is a personal one. It can be interposed only by a party to an oral contract who is sought to be charged thereon, and such party's privies. The defense of the statute of frauds is not available to strangers to the agreement or to the public at large.

See 73 Am. Jur. 2d, Statute of Frauds § 484 (emphasis added).

This well-settled law is consistent with the general rule that statutes of frauds are not typically designed to protect tortfeasors:

> **Tortfeasors and fraudulent intermeddlers will not be permitted to use the statute of frauds as a defense to a wrongful act or as a means of consummating a fraudulent design.** Under this rule, one who . . . **commits other such tortious acts cannot defend** upon the ground that the plaintiff's right or interest exists only by virtue of a contract unenforceable under the statute of frauds, where the other party to the contract has not rescinded or repudiated the contract upon the ground that he or she is not bound by the contract. . . . If fulfillment of contracts with third persons is prevented by false and fraudulent representations of the defendant, an action will lie although the contract is within the statute of frauds, where it plainly appears that the contract would have been performed except for such representations.

See 73 Am. Jur. 2d, Statute of Frauds § 492 (emphasis added); *accord Greenfield v. Heckenbach*, 144 Md. App. 108, 140, 797 A.2d 63, 82 (Md. Ct. App. 2002) ("We agree with the Greenfields that the statute of frauds does not bar a tort suit for either fraud or negligent misrepresentation because **those counts are not based 'on ... [the] contract'** between the parties but are based on misrepresentations that induced the contract") (emphasis added).

In the instant case, Plaintiffs' claims against Defendants are not contractual, although they do stem from the properly-memorialized contract between BB&T and

Skywaves. Plaintiffs do not seek to enforce any agreement between the parties in a breach of contract claim. The nature of Plaintiffs' claims is made clear in their Complaints. Plaintiffs allege that Defendants' misrepresentations tortiously induced Plaintiffs to invest and expend moneys into Skywaves:

> 41. Before and in July 2007, Defendant Edahl traveled to MacBee, South Carolina on behalf of BB&T for the purpose of making a presentation to potential Skywaves lenders and investors. During the presentation, Defendant Edahl told Skywaves and its potential lenders and investors:
>
> (a) That based on Defendants' own comprehensive review, BB&T believed that Skywaves would grow to become a significant infrastructure supplier to the telecommunication and military markets and;
>
> (b) That BB&T was fully committed to providing all of Skywaves short-term and long-term financial needs for growth;
>
> (c) That BB&T would act as a partner in managing Skywaves growth;
>
> (d) That BB&T's commitment to finance Skywaves' growth was unique to Skywaves, and was the equivalent of the funding offered by Wachovia or Hunt Capital; and
>
> (e) That BB&T would commit to funding Skyway's (sic) growth based on invoices, purchase orders, contracts and site plans. . . .
>
> 44. The Plaintiff relied on all of these material representations by these Defendants when he was induced to purchase equity positions and to make loans to Skywaves.
>
> 45. However, Defendants' representations were untrue when made.
>
> 46. In point of fact, at the time Defendants made the above-detailed representations, they had no intention of fulfilling their promises to Skywaves and the Plaintiff.
>
> 47. As a direct and proximate result of these Defendants' representations and inducements Plaintiff lost his $269,980.00 equity investment Skywaves when Skywaves was forced into Chapter 7 Bankruptcy liquidation.
>
> 48. As a direct and proximate result of these Defendants' representations and inducements the Plaintiff, as Chief Executive Officer,

> lost at least $870,000.00 in compensation, which he was forced to forego in an effort to maintain the continued operations of Skywaves after the Defendants unilaterally terminated the funding and eventually forced Skywaves into Chapter 7 Bankruptcy liquidation.

(*See* R. at pp.76-77 ¶¶ 41, 44-48; *see also* R. at pp.65-66 ¶¶ 37-45; R. at pp.89-90 ¶¶ 41-48; R. at pp.113-115 ¶¶ 33-40). These allegations form the basis for claims sounding in both fraudulent misrepresentation and negligent misrepresentation. In addition, in connection with their negligence claims, Plaintiffs allege that the Defendants engaged in tortious conduct by the Defendants in various ways, including inducing Plaintiffs to invest in Skywaves. (*See e.g.,* R. at pp.79-80 ¶¶ 60-68; *accord* R. at pp.67-68 ¶¶ 48-60; R. at pp.91-93 ¶ 58-68; R. at pp.115-16 ¶¶ 42-52).

At oral argument, Plaintiffs pressed their allegations that the Defendants' torts occurred outside of a normal banking relationship between BB&T and Skywaves. Judge Young's comments reflected that — rather than applying the standard applicable to a Rule 12(b)(6) motion to dismiss — he was, in essence, determining that he simply did not accept Plaintiffs' allegations as true. (*See generally* R. at pp.460-76). As set forth above, Plaintiffs made sufficient allegations of tortious conduct beyond a simple loan arrangement. Judge Young's skepticism regarding Plaintiffs' ultimate ability to prove those allegations at trial was not a proper basis to grant Defendants' Motions to Dismiss.

The crux of these lawsuits is that Defendants — Defendant Edahl acting as an agent of BB&T — made false statements to the Plaintiffs, who were investors in (or capitalized) Skywaves. These representations induced Plaintiffs to invest in or otherwise capitalize Skywaves. Although Defendants' misrepresentations tangentially implicated the Skywaves-BB&T relationship, this is not an action to enforce that agreement between those parties. Plaintiffs have not asserted any contractual or quasi-contractual causes of action against Defendants. To the contrary, this lawsuit is based exclusively upon Defendants' tortious conduct directed toward Plaintiffs. Plaintiffs' recovery in these cases is in no way dependent upon this Court enforcing an agreement against Defendants.

Instead, Plaintiffs wish only to assert claims that Defendants violated duties that South Carolina common law or statute imposed on Defendants. Unlike the archetypal "statute of frauds" case, this is not an action between parties on opposite sides of a contract. This is not a seller suing an employer or a vendor suing a vendee. Plaintiffs do not wish to have this Court hold BB&T to the terms of its agreement with Skywaves. There is a separate lawsuit in which Skywaves is seeking that relief.

In fact, Plaintiffs are not claiming that they were parties to any agreement to lend or borrow money with anyone. They are not seeking to enforce a promise to loan money against anyone, as they do not allege that they were parties to such an agreement. They are alleging that they were victims of tortious conduct. They are claiming that, because of Defendants' tortious conduct, they were induced to act in a certain way. There is nothing in the language of the Lender Liability Statute that would indicate that it is intended to preclude third-party tort claims simply because Defendants happened to commit a tort in the vicinity of a loan agreement with a third-party. Rather, the Lender Liability Statute is plainly designed to prevent borrowers from suing lenders upon a promise to lend money without proper documentation. Nothing in the Lender Liability Statute or any case interpreting it would support or mandate its application to the tort claims of plaintiffs who do not allege themselves to be parties to a loan agreement. It would be illogical and absurd to apply a statute of frauds to a person or entity who never claimed to be a party to such an agreement.

Moreover, this Lender Liability Statute of frauds, by its terms, does not apply to the claims against Edahl, because those claims sound in tort and are not "based upon" an agreement to which he was a party. While this lawsuit does, in an offhand manner, concern an agreement between BB&T and Skywaves, there is no contract whatsoever to which Defendant Edahl was a party. Contrary to Defendant Edahl's arguments below, Section 37-10-107(1) cannot be construed to require that he sign a writing, because the claims against him in these cases are not "based upon" any allegations that **he** breached

an agreement with anyone.

Section 37-10-107(1) can only be construed to apply to a claim **by a contractual party against another party to that contract seeking enforcement of such contract**. Although the Lender Liability Statute precludes certain enumerated tort causes of action (such as negligent misrepresentation), it is apparent that this limitation can only be read to apply to tort claims against a party **against whom contract enforcement is sought**. In other words, the Lender Liability Statute could, theoretically, apply to certain tort claims between Skywaves and BB&T. It could not apply to the claims involved in these appeals. Any other construction would undermine well-settled contract law and run contrary to logic and the plain meaning of the Lender Liability Statute.

There is no indication that the Lender Liability Statute was intended to eviscerate the common law or preclude tort claims against non-contracting parties. Defendants' construction of Section 37-10-107(1) would essentially prevent a non-contracting party from ever being sued for tortious conduct, simply because he had the fortune to commit his torts in the context of a loan arrangement (as opposed to some other form of contract). This is plainly not a proper construction of the Lender Liability Statute. *See Carolina Power & Light Co. v. Town of Pageland*, 321 S.C. 538, 543, 471 S.E.2d 137, 140 (1996) ("If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.").

Therefore, for the foregoing reasons, this Court should reverse the trial court's granting of Defendants' Motions to Dismiss these actions.

C. The Trial Court Erred in Dismissing Plaintiffs' Complaints Pursuant to Section 37-10-107, Because Plaintiffs' Complaints Do Not Allege an Agreement to "Lend or Borrow Money"

The trial court further erred in granting the Defendants' Motions to Dismiss pursuant to Section 37-10-107, because Plaintiffs' Complaints allege that the relationships — between Plaintiffs and/or Skywaves on one hand and Defendants on the other that — could be construed as something other than a traditional agreement to "lend or borrow money." To the contrary, the allegations make clear that the relationship was much more complicated than a "lending" relationship, involving Defendants in the ongoing business of Skywaves. Because the allegations of the Complaint can encompass an agreement beyond one merely to lend or borrow money, Section 37-10-107 does not apply and does not require dismissal. At the very least, the pleadings are sufficient to state a claim and permit Plaintiffs to engage in discovery in support of their claims.

Under its express terms, the South Carolina Lender Liability Statute only requires writings to evidence agreements to "lend or borrow money" or modifications to "loans of money." As alleged in Plaintiffs' Complaints, BB&T and Skywaves — the only parties engaged in an actual contractual relationship — had a factoring agreement relationship. This relationship is the contractual relationship that is relevant to, but does not create, Plaintiffs' claims. This factoring arrangement was not a traditional "loan" transaction, where a lender provides money and a borrower agrees to repay at an agreed time.

Rather, Skywaves sold certain receivables to BB&T in order to obtain working capital; BB&T generally collected these receivables from Skywaves' customers and earned administrative fees:

> 11. On or about March 22, 2005, Skywaves and BB&T entered into a written factoring agreement, whereby BB&T **purchased certain receivables of Skywaves at a discount and agreed to collect such receivables on Skywaves' behalf**. . . .
>
> 13. From 2005 through 2007 BB&T funded the working capital needs of Skywaves via the factoring agreement.

> 14. During that time period, BB&T also provided a designated relationship manager who assisted Skywaves in raising additional capital through investors. . . .
>
> 20. In reasonable and foreseeable reliance upon BB&T's representations, Skywaves elected to use BB&T to raise additional operating capital, through modifications of the existing factoring agreement.
>
> 21. Between March and December of 2007, Skywaves and BB&T exchanged a series of emails, letters and documents, which memorialized the relevant and material terms of a new and expanded factoring agreement (or a modification of the prior agreement).
>
> 22. Under this modified factoring agreement, BB&T agreed, among other things, to **provide capital infusions based on invoices, purchase orders, contracts and site plans**.

(*See* R. at pp.71-73 ¶¶ 11, 13-14, 20-22 (emphasis added); *accord* R. at p.60-62 ¶¶ 10-21; R. at pp. 84-86 ¶ ¶¶ 11, 13-14, 20-22; R. at pp.109-11 ¶¶ 6-17). This was not a simple loan arrangement, where a bank lent money and was repaid with interest over time. Rather, this was an ongoing business relationship between BB&T and Skywaves, where the two became almost joint venturers. Plaintiffs relied upon Defendants' expertise and knowledge to assist them in determining whether to invest in Skywaves.

This arrangement was unique and designed to provide Skywaves with sufficient working capital through various imaginative means. BB&T and Skywaves were working together to find creative ways to capitalize Skywaves' operations. Plaintiffs posit that the parties' agreement was not a traditional "loan" of money as the Lender Liability Statute contemplates. Plaintiffs' Complaints do not allege a simple agreement to lend or borrow money between any parties. As a result, consistent with the allegations of the Complaints, Section 37-10-107 might not apply to the claims asserted in this case.

Therefore, for the foregoing reasons, this Court should reverse the trial court's granting of Defendants' Motions to Dismiss these actions.

D. The Trial Court Erred in Dismissing Plaintiffs' Complaints Pursuant to Section 37-10-107, Because the Factoring and Security Agreement Between BB&T and Skywaves Selects North Carolina Law

The trial court further erred in dismissing this action because, under the provisions of the factoring agreement (the only imaginable agreement that could implicate the Lender Liability Statute), North Carolina law applies to that agreement, not South Carolina law. As a result, Defendants could not show that Plaintiffs failed to state a claim upon which relief could be granted.

While Defendants argued below (and the trial court held) that South Carolina Code § 37-10-107 applies to this case, this is inconsistent with the parties' (BB&T and Skywaves) apparent choice of law in the Factoring and Security Agreement — the original agreement between BB&T and Skywaves and the genesis of the subsequent modified agreement between Skywaves and BB&T. As alleged in the Complaints, the relationship between Skywaves and BB&T was formed in the Factoring and Security Agreement and was changed over time via amendments to or modifications of the original Factoring and Security Agreement. The March 22, 2005 Factoring and Security Agreement is the initial agreement between Skywaves and BB&T and is part of the underpinning for Plaintiffs' tort claims. Specifically, Plaintiffs alleges that the parties modified that agreement in various ways, culminating in a final agreement that BB&T eventually wrongfully repudiated.

The Factoring and Security Agreement provides that North Carolina law, not South Carolina law, governs:

> All acts, transactions, rights, and liabilities under this Agreement shall be governed in all respects by, and construed in accordance with, the internal laws of the State of North Carolina.

(*See* R. at p.507 ¶ 25).[4] North Carolina law is the law BB&T elected to govern its own

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[4] Plaintiff agrees with the position taken by Defendants before the trial court that, even if North Carolina law governs the contractual issues under this provision, Plaintiff's tort claims are

contract form. Defendants cannot suggest that they could not foresee North Carolina law would govern the parties' agreement (and the validity thereof). As such, it is clear that the parties to the agreement intended that North Carolina law would control issues relating to the Factoring and Security Agreement (including it validity and enforceability).

North Carolina law does not have a lender liability statute of frauds similar to South Carolina's Lender Liability Statute. In fact, the North Carolina statute of frauds that might arguably apply here provides:

> No commercial loan commitment by a bank, savings and loan association, or credit union for a loan in excess of fifty thousand dollars ($50,000) shall be binding unless the commitment is in writing and signed by the party to be bound. As used in this section, the term "commercial loan commitment" means an offer, agreement, commitment, or contract to extend credit primarily for business or commercial purposes and does not include charge or credit card accounts, personal lines of credit, overdrafts, or any other consumer account.

See N.C. Gen. Stat. Ann. § 22-5. This statute stands in sharp contrast to the Lender Liability Statute, which contains detailed requirements that are absent from its North Carolina counterpart. *See* S.C. Code § 37-10-107(1), (2) & (4).

Of particular note, the North Carolina statute differs from (and is much less stringent than) the South Carolina Lender Liability Statute, in several key respects:

(a) The North Carolina statute only indicates the satisfaction of the writing requirement is necessary for a "commercial loan commitment . . . [to be] binding." On the other hand, South Carolina prohibits a party from "maintain[ing] an action" without a complying writing.

(b) The South Carolina statute requires, for a satisfactory writing, that the party seeking enforce the agreement receive 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

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still governed by South Carolina law. *See Mosteller Mansion, LLC v. Mactec Eng'g & Consulting of Ga., Inc.*, 2008 WL 2096769, at *3 (N.C. Ct. App. May 20, 2008) ("Mosteller argues that the law of North Carolina governs all of its claims, notwithstanding the contractual choice of law provision. We agree with Mosteller that the law of North Carolina governs the resolution of its tort claims, as, under North Carolina law, the law of the state where a tort was committed controls the substantive issues of the claim.").

duly authorized agent, has signed the writing. The North Carolina statute only requires that the loan commitment be in writing signed by the party to be charged to be binding.

(c) The South Carolina statutes prohibits (in the absence of a writing) claims premised upon an implied agreement based on course of dealing or performance or on a fiduciary relationship, promissory or equitable estoppel, part performance (under some circumstances) and negligent misrepresentation. The North Carolina statute contains no such prohibitions.

The North Carolina statute does not require that the plaintiff "receive" a writing signed "by the party to be charged" as a condition to maintaining an action. Rather, the North Carolina statute only states that a loan commitment must be in a signed writing to be binding.

The North Carolina statute would not preclude Plaintiffs' claims. First, and foremost, (if it applies) the North Carolina statute only controls to determine whether an agreement is "binding." The statute does not require that any particular party "receive[]" the writing. North Carolina law does not condition the assertion of a claim upon the presence of a writing signed by the party sued. North Carolina law does not preclude claims premised upon part performance, estoppel, misrepresentation or other theories. Moreover, the North Carolina statute would not preclude Plaintiffs' claims, as it does not prohibit **tort** claims in the absence of writing. Plaintiffs do not seek to bind Defendants to an agreement in a breach of contract action; rather, Defendants have been sued because of their tortious conduct. Defendants cannot cite to any North Carolina authority that would preclude the tort claims asserted against them here in the absence of a writing.

In any event, there is the potential that, following discovery, North Carolina law might govern any relevant contractual relationship. In this regard, the trial court's dismissal of these claims was premature.

Therefore, for the foregoing reasons, this Court should reverse the trial court's granting of Defendants' Motions to Dismiss these actions.

E. The Trial Court Erred in Dismissing Plaintiffs' Complaints Pursuant to Section 37-10-107, Because Any Agreement Between BB&T and Skywaves Is Controlled by a Different Statute of Frauds

In addition to the foregoing, the trial court erred in dismissing Plaintiffs' Complaints under the Lender Liability Statute, because another South Carolina statute of frauds controls.

Even if the South Carolina lender liability statute of frauds could apply, Plaintiffs might be able to establish, consistent with their Complaints, that such statute does not control because another statute of frauds is the effective and controlling statute. As a result, the trial court erred in dismissing Plaintiffs' claims.

Under the lender liability statute of frauds, "[i]n the event of a conflict between this section and any other provision of law of this State relating to the requirement of a signed writing, **the provisions of the other provision of law shall control**." *See* S.C. Code § 37-10-107(4) (emphasis added). In this case, another statute of frauds may be applicable to the agreement between BB&T and Skywaves, displacing the Lender Liability Statute:

> No action shall be brought whereby . . . [t]o charge any person upon any agreement that is not to be performed within the space of one year from the making thereof; [u]nless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

See S.C. Code § 32-3-10(5).

The March 22, 2005 Factoring and Security Agreement between Skywaves and BB&T provides for a minimum term of one year and one day. (*See* R. at pp.495-508). This Factoring and Security Agreement created the relationship between BB&T and Skywaves that underpins the tort claims Plaintiffs assert in these appeals. By its terms, that agreement cannot be performed within one year, as its term is one year and one day. There is at least a plausible possibility that the statute of frauds governing this case, if any, should be Section 32-3-10(5), not the Lender Liability Statute. This potentiality is

extremely important, since Section 32-3-10(5), unlike Section 37-10-107, is worded differently and does not preclude the assertion of part performance, fraud and estoppel as theories of recovery. Therefore, even if Plaintiffs failed to satisfy that statute of frauds, they could assert claims sounding under those theories (as they have in their Complaints).

Therefore, for the foregoing reasons, this Court should reverse the trial court's granting of Defendants' Motions to Dismiss these actions.

F. The Trial Court Erred in Dismissing Plaintiffs' Complaints Pursuant to Section 37-10-107, Because Plaintiffs' Complaints Sufficiently Allege Part Performance Within the Statute

The trial court also erred in dismissing Plaintiffs' Complaints, because those Complaints contain allegations of "part performance" under the statute.

The South Carolina lender liability statute of frauds provides that the absence of a writing that complies "with subsection (1) precludes an action or defense based on any of the following legal or equitable theories: . . . 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**." *See* S.C. Code § 37-10-107(2)(c) (emphasis added). Under the plain language of this provision, notwithstanding other provisions of the statute, a party may assert part performance where the part performance can only be explained by reference to the alleged promise. Plaintiffs' Complaints contain sufficient allegations to support a part performance argument under that subsection.

Specifically, Plaintiffs' Complaints are replete with allegations that Skywaves continued to perform under an agreement with BB&T until BB&T wrongfully terminated the agreement in 2008. For example, Plaintiffs allege:

> 19. In reasonable and foreseeable reliance upon BB&T's representations, Skywaves elected not to pursue the opportunities for capital investment or funding proposed by Wachovia or Hunt Capital.
>
> 20. In reasonable and foreseeable reliance upon BB&T's representations,

> Skywaves elected to use BB&T to raise additional operating capital, through modifications of the existing factoring agreement. . . .

(*See* R. at p.72 ¶¶ 19-20; *see also* R. at p.62 ¶¶ 20-21; R. at p.85 ¶¶ 19-20; R. at pp.110-11 ¶¶ 16-17). Plaintiffs further allege that BB&T did not terminate the parties' relationship until January 25, 2008. (*See e.g.,* R. at p.73 ¶¶ 25-26). It is certainly possible, consistent with the allegations of Plaintiffs' Complaints, that Plaintiffs could show that both parties to the contractual arrangement (or at least Skywaves) partially performed the agreement up to the time of termination. Moreover, in light of the allegations concerning Defendants' representations, it is plausible that this part performance was the sole result of the parties' agreement or belief that such an agreement existed.

Therefore, for the foregoing reasons, this Court should reverse the trial court's granting of Defendants' Motions to Dismiss these actions.

G. The Trial Court Erred in Dismissing Plaintiffs' Complaints Pursuant to Section 37-10-107, Because That Statute Does Not Apply to Plaintiffs' Tort Claims, Aside from Negligent Misrepresentation

In addition to the foregoing, the trial court erred in dismissing Plaintiffs' Complaints, because the South Carolina lender liability statute of frauds does not preclude intentional fraud claims. Section 37-10-107 provides, in relevant part, that:

> Failure to comply with subsection (1)[, the statute of frauds writing requirement,] **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 § 37-10-107(2) (emphasis added).

Plaintiffs' Complaints specifically assert tort causes of action sounding in fraudulent misrepresentation, negligence/lender liability and violation of the South Carolina Unfair Trade Practices Act. These causes of action are excluded from the list of causes of action precluded under the statute. Had the legislature intended for the statute to bar those causes of action, it could have included them in the above-referenced list. Under basic statutory interpretation principles, the omission of those causes of action implies that the legislature intended to exclude them. "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000). Thus, the South Carolina statute does not bar any of Plaintiffs' claims that are not specifically enumerated in that statute. To the extent Plaintiffs' Complaints seek to allege causes of action that are not specifically enumerated in the Lender Liability Statute, that statute would not bar them.

Therefore, for the foregoing reasons, this Court should reverse the trial court's granting of Defendants' Motions to Dismiss these actions.

III. The Trial Court Erred in Dismissing Plaintiffs' Negligence/Lender Liability Claim, Because the Complaints Sufficiently Allege a Duty of Care

In addition to its misapplication of the South Carolina lender liability statute, the trial court improperly held that Plaintiffs failed to allege sufficient facts to support a duty of care in the context of their negligence cause of action.

South Carolina requires that a duty of care exist as a element of a negligence cause of action:

> In order to establish a claim for negligence the plaintiff must prove the following elements: 1) a duty of care owed by the defendant to the plaintiff; 2) a breach of that duty by the defendant's negligent act or omission; 3) the plaintiff was damaged; and 4) the damages proximately resulted from the breach of the duty. *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002). "An essential element in a cause of action for negligence is the existence of a legal

> duty of care owed by the defendant to the plaintiff." *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). The issue of whether the law recognizes a particular duty is an issue of law to be decided by the court. *Ellis by Ellis v. Niles*, 324 S.C. 223, 479 S.E.2d 47 (1996).
>
> Duty is generally defined as "the obligation to conform to a particular standard of conduct toward another." *Shipes v. Piggly Wiggly St. Andrews*, 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977). Ordinarily, the common law imposes no duty on a person to act. *Carson v. Adgar*, 326 S.C. 212, 486 S.E.2d 3 (1997). An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance. *Id.*

See Murray v. Bank of America, N.A., 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct. App. 2003).

> "The common law ordinarily imposes no duty on a person to act. If an act is voluntarily undertaken, however, the actor assumes the duty to use due care." *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997). The Restatement (Second) of Torts § 314 (1965) also embodies this principle and provides that, as a general rule, an individual is under no duty to provide aid or protection to another even if the individual realizes or should realize that action on his part is necessary to protect the other party. *Cf. Rogers v. South Carolina Dep't of Parole & Community Corrections*, 320 S.C. 253, 255, 464 S.E.2d 330, 332 (1995) ("Generally, one has no duty to control the dangerous conduct of another or to warn a potential victim of such conduct."). However, an affirmative legal duty to act may be created by statute, contract, relationship, status, property interest, or some other special circumstance. *Carson v. Adgar*, 326 S.C. 212, 486 S.E.2d 3 (1997); *Wyatt v. Fowler*, 326 S.C. 97, 484 S.E.2d 590 (1997).

See Hubbard v. Taylor, 339 S.C. 582, 588-89, 529 S.E.2d 549, 552 (Ct. App. 2000).

As pointed out above, Plaintiffs have made numerous allegations that Defendants undertook duties to advise them regarding investing in Skywaves. Plaintiffs have also alleged that Defendants undertook to properly assist Skywaves in its efforts to capitalize its business:

> 58. Defendants undertook to tailor a funding program outside its ordinary course of business lending relationships and unique to Skywaves.
>
> 59. Defendants undertook to provide funding for Skywaves in a manner that would be similar to a capital based lending program or a capital investment proposed by Hunt Capital.

> 60. This method of operation gave BB&T a unique power and influence over the day to day operations of Skywaves and gave rise to a special relationship between the parties, whereby Defendants had a fiduciary duty or other duty of care to Skywaves and the Plaintiff. Plaintiff, by virtue of his position as Chief Executive Officer of Skywaves, was aware of this special relationship which, along with the representations referenced in this Complaint, induced him to invest in Skywaves.
>
> 61. Plaintiff relied on Defendants' financial expertise, representations and advice that induced him to make investments in Skywaves.
>
> 62. Plaintiff believed Defendants' representations that BB&T was committed to helping Skywaves grow, committed to providing Skywaves with the best financial services and advice, and that BB&T's services would be superior to the services available from Wachovia or other financial sources.
>
> 63. Defendants knew that Plaintiff relied on BB&T to provide sound financial advice and information to Skywaves to potential investors and that Skywaves had entrusted its future existence and growth to BB&T's care. . . .
>
> 66. These activities by Defendants were in breach of the special trust and relationship established with Skywaves and its duties to the Plaintiff as an investor when it deprived Skywaves of the operating capital needed to sustain its manufacturing business.

(*See* R. at pp.79-80 ¶¶ 58-63, 66 (emphasis added); *see also* R. at pp.67-68 ¶¶ 48-55; R. at pp.91-92 ¶¶ 58-63, 66; R. at pp.115-16 ¶ 42-49). Several of the Plaintiffs have further alleged that, "[h]aving undertaken to provide financial advice to the Plaintiffs concerning the funding of Skywaves in the manner aforementioned, BB&T had the duty to do so carefully, so as to provide the Plaintiffs proper advice concerning the real risks of investing in or lending money to Skywaves." (*See* R. at pp.67-68 ¶ 54; R. at p.116 ¶ 48).

At this stage of the case, those allegations are more than sufficient to pass muster under Rule 12(b)(6). Moreover, as discussed in prior sections, Plaintiffs allege that Defendants made numerous specific fraudulent or negligent misrepresentations to Plaintiffs as investors in Skywaves to induce Plaintiffs to invest in Skywaves. Such inducements could also form a basis for negligence liability. These allegations are

sufficient to plead facts that could result in a finding that a duty of care exists flowing from Defendants to Plaintiffs. There is sufficient factual dispute to warrant discovery and further investigation into whether a duty of care exists.

Essentially, Defendants posited that, since BB&T is a bank and Skywaves its "customer," no duty of care could flow to Plaintiffs. In the trial court, Defendants cited *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986), for the proposition that banks typically do not owe fiduciary duties to their customers. However, *Burwell* expressly observes that "a fiduciary relationship ***may be created*** between a bank and a customer if the bank undertakes to advise the customer as a part of the services the bank offers. Such a relationship charges the bank with a duty to disclose material facts which may affect its customers' interest." *See Burwell*, 288 S.C. at 40-41, 340 S.E.2d at 790.

As discussed above, Plaintiffs have alleged that Defendants undertook to advise and guide Skywaves with regard to the management and financing of its business operations. More importantly, Plaintiffs allege that Defendants undertook to make representations to them concerning their investments in Skywaves. Plaintiffs allege that Defendants did not simply act as "bankers." Plaintiffs' Complaint is consistent with a conclusion that the Defendants had much more than a banker-customer relationship with Defendants and Skywaves and undertook a duty of care flowing to Plaintiffs. As a result, it is possible that, after discovery is conducted, the evidence will support the finding of a duty of care flowing to Plaintiffs. In any event, the Complaints include sufficient allegations to withstand Defendants' Motions to Dismiss.

Therefore, for the foregoing reasons, this Court should reverse the trial court's granting of Defendants' Motions to Dismiss these actions.

CONCLUSION

For all of the reasons set forth herein, this Court should reverse the trial court's grant of Defendants' Motions to Dismiss Plaintiffs' Complaints in these matters.

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March 26, 2013

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,

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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 Appellants' Consolidated Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

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