CASE NO. 2011-CA-00475

IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

BANCORPSOUTH BANK **PLAINTIFF/APPELLANT**

v.

SHELBY K. BRANTLEY, JR.; ROBERT CRUMPTON; NORMA S. BOURDEAUX; LANGSTON OXFORD PROPERTIES, L.P.; SUSAN BRYAN; and JOHN and LYNN ALBRITON

DEFENDANTS/APPELLLEES

On Appeal from the Chancery Court of Lafayette County
for the 18th Chancery District, State of Mississippi
Judge Glenn Alderson

BRIEF OF APPELLEES BOURDEUAX, LANGSTON, BRYAN AND ALBRITONS

Dana E. Kelly
P.O. Box 13926
Jackson, MS 39236
(601) 918-3206

Attorney for the Appellees
Bourdeaux, Langston,
Bryan and Albritons

IN THE SUPREME COURT FOR THE
STATE OF MISSISSIPPI

BANCORPSOUTH BANK	APPELLANT
V.	CASE NO. 2011-CA-00475
SHELBY K. BRANTLEY, JR., et al	APPELLEES

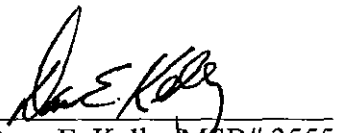
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. BancorpSouth Bank, Appellant
2. John J. Crow, Jr., Attorney for BancorpSouth Bank
3. Daniel Myles Martin, Attorney for BancorpSouth Bank
4. Les Alvis, former Attorney for BancorpSouth Bank
5. Norma S. Bourdeaux, Co-defendant
6. Langston Oxford Properties, L.P., Co-defendant
7. Susan M. Bryan, Co-defendant
8. Lynn M. Grenfell, former Co-defendant
9. John Albriton, Co-defendant
10. Lynn ALbriton, Co-defendant
11. Dana E. Kelly, Esq., Attorney for Appellees Norma S. Bourdeaux, John Albriton, Lynn Albriton, Lagnston Oxford Properties, L.P., Susan M. Bryan
12. Shane Langston, Esq., manager and co-counsel for Langston Oxford Properties, L.P.
13. Van Buren Property Owners Association
14. James B. Grenfell, spouse and co-counsel of Lynn M. Grenfell
15. Robert W. Crumpton, defendant
16. Shelby K. Brantley, Jr., defendant
17. G. Todd Burwell, Esq. Attorney for Shelby K. Brantley, Jr. and Robert W. Crumpton
18. Van Buren Group, LLC, defendant
19. Clairborne Frazier, defendant
20. Austin Frazier, defendant
21. C. E. Frazier, defendant
22. Mathena Wetlands, LLC, charged with payment of the judgment
23. Ergon-Frazier Development I, LLC, charged with payment of the judgment
24. W. Robert Jones III, Attorney, managing member of Ergon-Frazier Development I, LLC
25. Frazier Development, LLC, charged with payment of the judgment
26. Taylor, Covington & Smith, P.A., third party defendants
27. Watkins & Eager, PLLC, third party defendants

28. David W. Mockbee, Esq., Attorney for Taylor, Covington, & Smith, P.A. and Watkins & Eager, PLLC

This the 11th day of April, 2012.



Dana E. Kelly, MSB# 3555
Attorney for Appellees
Bourdeaux, Langston, Bryan & Albritons
P.O. Box 13926
Jackson, MS 39236
(601) 918-3206

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Miss. Rules of Civ. Pro.

Secondary Sources

STATEMENT OF THE ISSUES

1. Whether the trial court was correct in granting summary judgment based on the application of Credit Principle Doctrine of *Pongetti v. Bankers Trust Savings and Loan Ass'n,* 368 So. 2d 819 (Miss. 1979) in light of all evidence presented?

2. Whether the trial court was correct in finding that BancorpSouth ratified and waived the actions of Van Buren Group, LLC thereby releasing the Appellees from the operation of the Mortgage?

3. Whether the trial court was correct in ruling that BancorpSouth Bank did not come before the court with clean hands?

4. Whether the trial court was correct in applying the Credit Principle Doctrine of *Pongetti* in favor of the Appellee/Guarantors?

STATEMENT OF THE CASE

A. Procedural History

On October 1, 2007, the Appellant, BancorpSouth Bank, filed a complaint seeking declaratory judgment and judicial foreclosure on properties owned by its debtor-mortgagor Van Buren Group, LLC and third party purchasers for value of 5 properties previously purchased from the Van Buren Group, LLC. Docket 1.[1] An Amended Complaint was filed on October 17, 2007. R-Vol 1, p. 1-30. This complaint was filed at least three and one half years after BancorpSouth Bank had actual knowledge that the subject units had been sold by Van Buren Group, LLC to the Appellee/Purchasers.[2] On November 18, 2010, the Appellee third party purchasers filed a Motion for Summary Judgment. R-Vols. II, III & IV, p. 286-470. On November 29, 2010, Appellees Brantley and Crumpton, individual guarantors of the Van Buren Group, LLC indebtedness to BancorpSouth Bank, joined in the aforementioned Summary Judgment Motion. R-Vol. IV, p. 537-539. A hearing on the Summary Judgment was held before the Honorable Glenn Alderson on February 17, 2011 and the motion was granted in favor of the movants and guarantors on that day and was certified as a final judgment pursuant to Miss. Rule Civ. Proc. 54(b) by the order granting Summary Judgment. Cite

The Appellees urge this court to uphold the Chancellor's decision.

---

[1] Reference to the record are 1) by Record Volume and Page Number, 2) by Exhibit Number and 3) where the Exhibit contains additional Exhibits, by Exhibit__, exhibit __.

[2] BancorpSouth did not require the Appellees to file a responsive pleading in the lower court until late fall of 2009, ostensibly because it was pursuing its claims against the primary debtors and the foreclosure of Unit 309. Default judgments were entered against Van Buren Group, LLC, Frazier Construction, Inc., C.E. Frazier, Jr., Claiborne Frazier and Austin Frazier and a judgment was entered in favor of BancorpSouth against Holly Springs Realty, LLC which was the subject of an earlier appeal to this court. Docket 1.

B. Statement of the Facts:

In early 2001, Claiborne Frazier, Austin Frazier, C.E. Frazier, Jr. and various legal entities established by the Frazier's including Frazier Construction, Inc. and Frazier Development, LLC launched plans to acquire a piece of real estate in Oxford, Mississippi and construct a 30 unit condominium project. In connection with this venture, they formed an entity, Van Buren Group, LLC and acquired the subject property in that name. They approached BancorpSouth Bank requesting a construction loan for this project. Claiborne Frazier negotiated for this construction loan with BancorpSouth officer Bobby Little, who at that time ran the BancorpSouth branch on Highway 463 in Madison, Mississippi. R-VI, p. 780-783. On August 20, 2001, BancorpSouth issued its Commitment Letter for a $5,400,000 Construction Loan. R-VI, p. 784-793. That Commitment Letter contained conditions precedent to the closing and funding of the construction loan. Among those conditions precedent was the following:

> "Prior to funding, Borrower is to present evidence on the sale of 18 units through sales contracts and the collection of earnest money equal to 10% of the sales price. Should 18 units not be presold, Letters of credit will be accepted (subject to Bank's approval of Issuing bank) on the difference between the number of units presold and 18."

R-VI, p.787-793.

On August 23, 2001, Attorney Bobby Covington, representing the Van Buren Condominium issued his certification that 19 units had been contracted for. R-VI, p. 281-282. Included on the list of units sold were Unit 203 to John & Lynn Albriton, Unit 201 to James B. Grenfell and Unit 102 to Shane Langston, three of the Appellees in this matter. Each of the purchasers issued a deposit check to the law firm of Taylor, Covington and Smith. Thereafter, on September 5, 2001, the construction loan was closed

and initial funding provided. Among the loan documents were a Master Promissory Note in the sum of $5,400,000.00 and a Banker's Form No. 1 Land Deed of Trust in the sum of $5,400,000.00, R-VI, p.794-804, securing the loan with the property owned by the Van Buren Group, LLC. The Land Deed of Trust contained a "due on sale clause" which required the proceeds of any sale to be paid to the bank. (emphasis added) The Van Buren Group, LLC began construction of the project. Over the course of the next two years, the Van Buren Group, LLC, represented primarily by Claiborne Frazier, continued to market the project. By July of 2002, additional units had been contracted for, including Unit 207 to Larry and Susan Bryan. Exhibit 1, Exhibit 2.

Purchases by the Appellees

On November 20, 2002, Norma Bourdeaux entered into a Reservation Agreement for Unit 111 and issued her deposit check to the law firm of Taylor Covington and Smith. R-VI, p.847. In January of 2003, Mrs. Bourdeaux was contacted by Claiborne Frazier and informed that she would receive an $8000.00 discount from the purchase price if she would close before completion of construction. R-VI, p.841-842. She met with Claiborne Frazier at the project site on January 22, 2003 where she was presented a Purchase Agreement drafted by the Taylor, Covington and Smith law firm for Unit 111. R-VI, p.850-852. She executed the agreement and delivered her check for $181,000.00, the balance due under the contract with the discount, made payable to The Van Buren Group, LLC. R-VI, p.855.

Thereafter, Claiborne Frazier contacted John Albriton concerning closing. John & Lynn Albriton were purchasing Unit 303 of the Van Buren through utilization of a Section 1031 Exchange. They had entered into a Purchase Agreement on May 30, 2001.

R-VI, p.879-885. Mr. Frazier offered the Albritons a discount for early closing, which the Albritons agreed to. R-VI, p.887. On February 26, 2003, a closing was held at the law firm of Taylor, Covington and Smith wherein Unit 303 was sold to the Albritons utilizing an Exchange Deed. R-II, p. 173. Taylor, Covington & Smith prepared the HUD-1 Settlement Statement and disbursed the net closing proceeds to the Van Buren Group, LLC without issuing a check to BancorpSouth to remove any lien the bank might have. R-VI, p.892-897. During the month of March, 2003, BancorpSouth transferred officer Bobby Little and Ron Winford became the officer in charge of the Van Buren Group, LLC loan. Exhibit 2, p.5-7.

Upon learning that the Van Buren Group, LLC was offering a $5000.00 discount to close prior to construction completion, James Grenfell contacted Claiborne Frazier and agreed to close on Unit 201. Mr. Grenfell entered into a reservation agreement with the Van Buren Group, LLC to purchase Unit 201 for the total purchase price of $240,000.00, having deposited with the agreement a check in the amount of $1,000.00 payable to Taylor, Covington & Smith, P.A. cite. Subsequently, on May 30, 2001, he signed a Van Buren Purchase Agreement for Unit 201 and deposited an additional $23,000.00 made payable to Taylor, Covington and Smith, P.A. which represented 10% of the value of the Unit including the previous earnest money deposited with said law firm. Cite. Mr. Grenfell agreed to an early closing on Unit 201 in March of 2003 and made a check payable to Van Buren Group, LLC in the amount of $227,289.00 with the Warranty Deed to his wife Lynn Grenfell subsequently being filed. The Grenfells took possession of Unit 201 in June of 2003.

In May of 2003, Claiborne Frazier approached Larry Bryan about closing on Unit 207, again offering a discount for early closing. Mr. Bryan had initially issued his check for $24,900.00 to the Taylor, Covington and Smith law firm on July 10, 2002 when Susan Bryan contracted for the Unit. R-VII, p.917. On May 13, 2003, Susan Bryan executed Amendment No. 1 to the Purchase Agreement which provided for a $5000.00 discount for early closing. R-VII, p.921-922. On that same day, Larry Bryan issued his check for $228,100.00, representing the balance of the purchase price less discount to Van Buren Group, LLC. R-VII, p.925.

On June 2, 2003, Ronald S. Winford wrote a Memorandum to James Stringer in Credit Administration at BancorpSouth. R-III, 442-443. The memorandum addressed several outstanding credits of the Frazier's. First on the list was Van Buren Group, LLC. In that memorandum, Mr. Winford disclosed to Mr. Stringer that "the project is 91% complete with 27 of 30 Units sold."

In July of 2003, construction was nearing completion. As Units became available, additional closings began. Shane Langston was presented with drafts of closing documents prepared by Taylor, Covington and Smith by real estate agent Woods Caveat. Mr. Langston communicated with Taylor, Covington and Smith that he had established a legal entity, Langston Oxford Properties, LP to hold title to the property. He also informed Mr. Caveat that there were punch list items that would need to be completed prior to closing. R-VII, p.979. Van Buren Group, LLC addressed these punch list items and on August 18, 2003, Mr. Caveat presented Mr. Langston with an executed Warranty Deed, R-VII, p.987-989, prepared by Taylor, Covington and Smith along with an executed a HUD-1 statement prepared by Taylor Covington and Smith

showing among other things a fee paid for the filing of a Partial Release on the Deed of Trust held by BancorpSouth covering Langston's Unit 102. R-VII, p.999-1000. Also, on this same date Langston delivered to Mr. Caveat Mr. Langston's $220,565 check R-VII, p.1004, made payable to Van Buren Group, LLC for the balance of the purchase price plus another $22,953 check R-VII, p.1004, payable to Frazier Development for special additions to Unit 102.

The Albritons, Grenfells, Bryans, Langston and Norma Bourdeaux all paid in full for their condominium Units and took possession of their respective Units between June 2003 and November 2003.

Payments on the Van Buren Loan Combined with Credits for Bancorp South's Voluntary Releases of Units With No Consideration

As of March 5, 2004, the outstanding balance on the Van Buren Group, LLC promissory note with BancorpSouth was $1,530,763.80. R-VI, 835. Subsequent to that date, BancorpSouth received the following payments toward this outstanding balance:

Date	Amount	Source
June 23, 2004	$50,000.00	Sale of Unit 307
June 24, 2004	$212,752.01	Sale of Unit 211
July 26, 2004	$20,429.21	Van Buren payment
October 20, 2004	$36,274.47	Van Buren payment
May 11, 2005	$283,862.21	Sale of Unit 109
October 6, 2005	$69,895.76	Van Buren payment
March 11, 2008	$350,073.54	Unit 309 foreclosure[3]
TOTAL	$1,068,287.20	

R-VII, p.1045-46.

Further, it is uncontested that on October 9, 2004 BancorpSouth released Tim Ford's Unit 210, for which he paid $220,000, for no consideration; and on May 19, 2004 released John Lee's Units 305 and 306, for which he paid $399,000, for no consideration;

[3] BancorpSouth "charged off" the Van Buren loan in 2006.

and on June 23, 2004 released John Lee's Unit 307, for which he paid $300,000, for a consideration of $50,000. R-III, 344-347. The total purchase price of these 4 Units less the $50,000 received by BancorpSouth equal $869,000. This amount combined with the $1,068,287.20 collected after March 2004 totals $1,957,287.20 and is far greater than the $1,530,763.80 outstanding Van Buren debt that existed as of March 5, 2004.

If, for purposes of this judicial foreclosure action against the Appellees, BancorpSouth reduces its indebtedness by the above amount as it must under Mississippi law then there is no debt secured by the Units owned by the Appellees and the lower court's summary judgment prohibiting foreclosure should be affirmed. Pongetti v. Bankers Trust Savings and Loan Association, 368 So. 2d 819, 823 (Miss. 1979) (bank/mortgagee with notice of sale of property out of trust "**must deduct from the debt, before enforcing his lien against the property alienated, the value of the property released.**" (emphasis added)

On April 8, 2004, Ronald Winford as the loan officer in charge of the Van Buren loan wrote another memorandum to James Stringer in Credit Administration at BancorpSouth. Exhibit 1, exhibit 5. In that memorandum he noted that he and Mr. Stringer had met with Claiborne Frazier on April 1, 2004 and that **"[a]s of this memo, 25 of the 30 Units have been sold and delivered.**" (emphasis added) Winford's April 8, 2004 memorandum continued, "[t]wo of the five remaining Units are contracted and special changes/additions are being completed."

Mr. Winford as the loan officer in charge of the Van Buren loan had the responsibility to execute and deliver the Partial Releases of the Deed of Trust as each Unit sold. (Exhibit 6, p. 161) Importantly, as of the April 1, 2004 date that Mr. Winford

and Stringer met with Frazier and learned that "25 of the 30 Units had been sold and delivered" Mr. Winford had only executed and delivered 16 Partial Releases. Exhibit 1, exhibit 10; Exhibit 6, p. 26.) Each of these Partial Releases cancelling Bancorp South's encumbrance bore the signature of Winford and on their faces identified the released Units as Units 101,103,105, 106, 107, 110, 203, 204, 205, 206, 209, **210**, 301, 302, 310, and 311. Moreover, BancorpSouth has now (only since this litigation ensued) acknowledged that on October 9, 2003 Unit 210 referenced above, i.e., a Unit purchased by former BancorpSouth attorney and Speaker of the Mississippi House of Representatives Tim Ford on September 26, 2003 for $210,000, was voluntarily released for **NO CONSIDERATION**.

In other words, Mr. Winford and BancorpSouth on **April 8, 2004** had actual knowledge that Van Buren had sold 7 Units **out of trust**, 5 of which belonged to the Appellees. Neither Winford nor Stringer nor anyone else at BancorpSouth reported this criminal conduct to federal authorities as required under 12 U.S.C. §1818; and, neither Winford nor Stringer nor anyone else at BancorpSouth made any attempt to notify the Victims that the Van Buren Units that they had purchased were still encumbered by the Deed of Trust held by BancorpSouth; that each of the Victims had been defrauded.

In addition to the 16 Units for which BancorpSouth had delivered executed Partial Releases, Van Buren had "sold and delivered" as of April 1, 2004 the following nine other Units not released by BancorpSouth: Unit 102 (Langston), Unit 111 (Bourdeaux), Unit 201 (Grenfell), Unit 207 (Bryan), Unit 303 (Albriton), Units 305 & 306 (John Lee), Unit 202 (Lusco) and Unit 304 (Coghlan). In fact, BancorpSouth had received closing funds on Units 202 and 304 but had not released them from the Construction Deed of

Trust. Indeed, BancorpSouth only released Unit 202 (Lusco) and Unit 304 (Coghlan) in the fall of 2010 after depositions in this case had been taken and after the Victim parties notified Lusco and Coghlan that their properties were still encumbered by the Deed of Trust even though BancorpSouth had been paid the sale proceeds. cite

Despite Bancorp South's actual knowledge on August 23, 2001 that Victim Units 102, 201, 203 had been contracted for and the corresponding Appellees had paid 10% of the purchase price, R-II, 281-282[4], and by July, 2002 knew that unit 207 had been contracted for and 10% of the purchase price had been deposited with Taylor, Covington and Smith, P.A., and despite BancorpSouth's actual knowledge on June 2, 2003 that 27 of the 30 units had been contracted for, R-III, p. 442-443, and despite BancorpSouth's actual knowledge on April 8, 2004 that 25 of the 30 Units had been "sold and delivered", and despite Bancorp South's actual knowledge that it had only executed and delivered Partial Releases for 16 of these Units, BancorpSouth in an attempt literally to steal the Victims' Units claimed in the Chancery Court that it had no knowledge until August 2007 that the Victims had been cheated and had been sold Units out of trust.[5] That position, as a matter of law, must fail.

Simple Arithmetic

Simple arithmetic forecloses Bancorp South's attempt to suggest that in April 2004 it had no actual knowledge that the Victims' units had been sold out of trust. BancorpSouth as early as 2001 had a list of the contracted for sale prices of the Units.

---

[4] This August 23, 2001 letter is the document that BancorpSouth intentionally concealed from the Victims, i.e., one of the subjects of Langston's motion for sanctions in the lower court, a motion that remains pending before the Chancery Court.

[5] As of April 8, 2004, the five unsold Units were Units 104, 109, 211, 307 and 309. Units 211 and 307 were sold and closed in June of 2004. Unit 109 was closed in May of 2005 and Unit 104 was closed in June of 2005. Unit 309 was judicially foreclosed through this action.

Exhibit 1, exhibits 4 and 96. As the Units began to close in 2003 BancorpSouth began receiving the proceeds and principal reduction on the Van Buren debt. Exhibit 1, exhibit 10. Even a cursory review of these sales prices and sales proceeds show that the average sales price was in the range of $230,000 plus. This amount multiplied by the 25 units that BancorpSouth knew in April 2004 had been "sold and delivered" totals $5,768,000; to say the least, an amount significantly greater than the $5,400,000 original loan amount. Yet, Bancorp South's April 8, 2004 memorandum reflects that on this date the total outstanding balance on the Van Buren loan was $1,530,764!!

In fact, Executive Vice-President Stringer admitted that neither a calculator nor even a "pencil" was necessary; that with the information that he and Winford had right in front of them in April 2004 they could just "eyeball" the situation and know that 25 Units "sold and delivered" should have paid off the debt. (Exhibit 5, p. 24-26) He further stated that neither a pencil nor a calculator was required for BancorpSouth to know in April 2004 that with only 16 or 17 Partial Releases executed and delivered by Winford, many purchasers had bought and paid for their Units without being released from the Bank's Deed of Trust.

Moreover, loan officer in charge Winford, as evidenced by his memorandum to Executive Vice-President Stringer dated June 2, 2003, shows that BancorpSouth had knowledge that 27 of the 30 Units had been "sold"; that closing attorney Covington was "preparing Deed of Trust Release documents . . . in anticipation of condo closing in mid-June"; and that, "**I anticipate being paid out of this project by the end of August [2003].**" Exhibit 1, exhibit 7. (emphasis added) Though there were some delays, Winford followed up with his April 8, 2004 memorandum acknowledging that by this

date 25 of 30 had in fact been "sold and delivered" and the remaining two noted in the June 2, 2003 memorandum would be closing soon. This despite the following sworn testimony of loan officer Winford:

> Q. So it was your understanding that as each one of these units closed, bank was supposed to receive 100 percent of the sales proceeds less taxes and commission?
> A. Correct.

Exhibit 6, p.19.

BancorpSouth officers Winford and Stringer and, therefore, plaintiff BancorpSouth had actual knowledge that Van Buren had sold and delivered many, many Units out of trust. Further, this information combined with the knowledge they had on the John Lee transactions discussed below show without doubt that BancorpSouth had actual knowledge that the Appellees and other purchasers had been victimized.

Bancorp South's Dealings with Advisory Board Member John Lee

Bancorp South's dealings with its advisory board member John Lee in the purchase of 3 separate Units perhaps more than any other evidence show just how "unclean" Bancorp South's hands are in this matter. John Lee, Esq., as previously noted, is a prominent attorney and has long been an Advisory Board member for the Hattiesburg region of BancorpSouth. Mr. Lee by his own admission is a major shareholder of BancorpSouth and has so many accounts at the bank that "it would be too many to tell you." Exhibit 8, p.93

Lee, like Langston and the Grenfells and several other of the Victims, was identified on the July 2002 and November 2002 lists provided to BancorpSouth by Van Buren as a purchaser of Van Buren units. Exhibit 1, exhibits 2 and 3. He had contracted to purchase Units 305 and 306 for a total purchase price of $400,000.

Lee closed on Units 305 and 306 on February 19, 2004 after having paid the full balance of $400,000 purchase price. His Warranty Deed, like those of the Victims, showed no encumbrance by BancorpSouth. Exhibit 8, exhibit 9. In or around this time Lee had decided to purchase a third unit, Unit 307, for $300,000. In connection with the title work relating to this latter purchase, Lee for the first time discovered that Units 305 and 306 had not been released from the BancorpSouth Deed of Trust. R-VII, p.1024-1027. On April 13, 2004 Lee, quite upset upon learning of this problem, fired off a letter to Frazier demanding:

> In that we have already closed Units 305/306 [almost two months earlier] it is imperative that you obtain a Parcel (sic) Release for these Units immediately, and further obtain a Parcel (sic) Release as to Unit 307 in that we should finally close that Unit in the immediate future.

R-V, p. 699.

On the next day, April 14, 2004, Lee's letter was faxed by Frazier to Winford along with a transmittal letter indicating that the Partial Releases for 305 and 306 would be forthcoming. R-V, 698. Though Lee in his letter had complained that he had closed on Units 305 and 306 some two months earlier Frazier's letter to Winford made no mention of the whereabouts of the sale proceeds.[6]

Within a few weeks after this communication with Winford, Mr. Winford on May 3, 2004 with **NO CONSIDERATION** for BancorpSouth executed a Partial Release releasing Lee's Units 305 and 306.[7] R-VII, p.1036.

---

[6] This fax from Frazier to Winford was s not produced by BancorpSouth and is one of the discovery abuses subject to Langston's Motion for Sanctions in the lower court, a motion that remains pending before the Chancery Court.

[7] For reasons unexplained, Winford executed another Partial Release on May 19, 2004 for these same two Units. R-VII, p.1035.

Problems with Lee's purchases continued. Lee's purchase of Unit 307 closed on June 11, 2007 with the Warranty Deed showing no BancorpSouth encumbrance recorded. Exhibit 1, exhibit 10. Lee still owed $50,000 on the balance of the $300,000 purchase price but, having been burned before, would not release the final payment until BancorpSouth executed and delivered a Partial Release releasing Unit 307 from its Deed of Trust. After several broken promises from Frazier, Lee began communicating with his closing attorneys at Watkins & Eager (with whom Covington had now joined) and on June 22, 2004 forwarded a letter to Frazier clearly evidencing a suspicion of criminal conduct on the part of Frazier:

> Dear Claiborne:
>
> Despite your recent promises and representations, you still have not obtained a Partial Release of that certain Deed of Trust executed by Van Buren ....
>
> Last Wednesday, June 16, 2004, you assured me that you would obtain a Partial Release from the aforesaid Deed of Trust by Friday, June 18, 2004. . . .
>
> I have talked with Honorable Bobby Covington and Cedra Allison of Watkins & Eager . . . and I have been informed that **Ronald S. Winford** , President of the Madison County branch of Bancorp South indicates that you have not attempted to obtain a Partial Release for Unit 307 and that you have not tendered to Mr. Winford the $250,000 that I previously paid you as earnest money on February 24, 2004.
>
> ...
>
> As Manager of Van Buren Group, LLC you have clearly breached the aforesaid Purchase Agreement, and I am not accepting the Warranty Deed filed without my knowledge unless you provide me with the Certificate of Title showing that the subject property is free and clear of all liens and a Partial Release from aforesaid Deed of Trust . . .
>
> Accordingly, take the $250,000 that I tendered to you on February 24, 2004 to **Ronald S. Winford** at Bancorp South, Madison County, Mississippi and obtain a Partial Release from Deed of Trust ....

R-II, 284-285.

In fact, Mr. Lee's concerns with the conduct of Frazier were such that he undertook research regarding the criminal conduct of "false pretenses and disposing of ...property without the lien being paid. And, yes Frazier lied to me." Exhibit 8, p.81.

On the same day, June 22, 2004, Lee stepped across the street from his office in Hattiesburg, Mississippi and visited with Mr. David Bush, Senior Vice-President at BancorpSouth, and alerted Bush to the fact that he [Lee] had paid $250,000 for Unit 307 and that the money had not been tendered to BancorpSouth. R-VIII, p.1122. Lee's motivation for conveying this information to Bush was two-fold: a) Lee, as an advisory board member and major shareholder of BancorpSouth, was concerned that Frazier's conduct would adversely impact the Bank; and b) Lee hoped that his complaint could expedite the Bank's execution and delivery of a Partial Release on his Unit 307. R-VIII, p.1125.

Bush, after visiting with Lee immediately called and talked directly with Winford. Exhibit 8, p. 44-46. Moments later, Lee was instructed by Mr. Bush or someone in his office to take a check for $50,000 (which represented the balance of the $300,000 purchase price on Unit 307) directly to Winford in Madison, Mississippi and the he [Winford] would deliver a Partial Release to Lee.

The next day, June 23, 2004, Lee did as instructed. He and his attorney Rick Lambert, Esq., drove to Madison and met with Winford. Winford had the Partial Release in hand. Lee handed the $50,000 directly to Winford and Winford delivered the Partial Release. R-II, 283. Importantly, Lee expressed concern to Winford that BancorpSouth had not received the $250,000. Winford, responded that "Frazier's father, C. Frazier or

Claiborne Frazier, ever what his name was, his dad was going to make arrangements to take care of the bank . . .." Exhibit 8, p. 46-47.[8]

Amazingly and most incredibly, Winford denies knowledge of any of the above. Exhibit 6, p.34. He denies having knowledge that Van Buren sold any Units out of trust. He denies having knowledge of ever having met or spoken to John Lee or his attorney Rick Lambert. And while he admits that he received and reviewed the April 14, 2004 letter from Frazier with the attached April 13, 2004 letter from Lee demanding a Release on Units 305 and 306, he inexplicably denies having knowledge of Lee demanding a Partial Release for his Units 305, 306, or 307. (Compare testimony from Exhibit 8, p. 232-233 with testimony from Exhibit 8, p.34)

No one, not even his banking superiors Stringer or Barrentine, can accept Winford's testimony. Exhibit 4, p.16, exhibit E; Exhibit 5, p. 32-35, 72. In fact, Winford's superior Mr. James Stinger, Executive Vice-President, acknowledged the obvious: that if he or any other prudent banker had received Lee's April 13, 2004 letter, as Winford admitted that he did, then that banker would have known that Units had been sold out of trust without payment to the bank; and that criminal activity should have been suspected. Exhibit 5, p.32-35. Stringer further acknowledged that under such circumstances BancorpSouth had an **OBLIGATION** under federal banking laws to report that suspicious activity.

As a matter of fact, Bancorp South's Regional President Mr. David Barrentine acknowledged that had he been informed of the information contained in the April 8, 2004 memorandum from Winford to Stringer, i.e., 25 Units "sold and delivered", that this

[8] The documentation clearly supports Lee's testimony. His $50,000 check is dated June 22, 2004. (Bank Exhibit 65) The Partial Release is dated June 23, 2004. Exhibit 8, exhibit 18. And, BancorpSouth shows a $50,000 credit toward the Van Buren indebtedness on June 24, 20004. Exhibit 1, exhibit 9.

information combined with the Van Buren loan history showing only 16 payments to the Bank without doubt would have alerted him to "illegal" activity that must have been reported to federal authorities. Exhibit 4, p. 27-28, exhibit F. When asked why he personally did not suspect criminal activity in April 2004, Barrentine replied, ". . . I ---I did not see this memo [i.e., the April 8, 2004 memo] at this time." Exhibit 4, p. 29.

Regional President Barrentine, while denying that BancorpSouth had a "duty" to notify the Victims that they had been defrauded, acknowledged BancorpSouth "probably" would have communicated with the Victims during the course of their "investigation" in April 2004 had he been informed of the information known by Winford and Stringer as evidenced in the April 8, 2004 memorandum. Exhibit 4, p. 36-37.

Finally, to close the circle on the damage that Bancorp South's inactions caused the Victims, Executive Vice-President Stringer admits that in April 2004 Van Buren and its principals had sufficient assets to pay BancorpSouth and make the Appellees whole if the Appellees had known of the fraud and, like advisory board member John Lee, demanded delivery of their Partial Releases on the Deed of Trust. Exhibit 5, p. 31. Over the some 3 ½ years while BancorpSouth sat silent, however, the financial strength of the Fraziers "changed dramatically" for the worse.

Bancorp South's Dealings with its Former Attorney Tim Ford

As noted above, BancorpSouth on October 9, 2004 executed and delivered a Partial Release on Unit 210 to then Speaker of the Mississippi House of Representatives Tim Ford who was also a partner in the law firm of Riley, Caldwell and Ford, a firm that has represented BancorpSouth for years. R-VI, 752. Indeed, the successor to that firm,

Riley, Caldwell, Cork & Alvis, P.A. filed the instant proceeding on behalf of BancorpSouth.

Winford claimed that the release of Mr. Ford's Unit was a mistake because his Unit 210 closed on the "same day" as Unit 202 purchased by Mr. Matt Lusco in the name of Rebel, Ltd. Exhibit 6, p.36-37. To the contrary, Ford's sale closed on September 24, 2004 and Lusco's closed on September 17, 2004. Exhibit 1, exhibit 10. Lusco's sale proceeds of $269,177.95 was delivered to BancorpSouth and on September 19, 2004 applied to reduce the Van Buren indebtedness. So, since the loan was reduced by this $269,177 almost a week BEFORE Ford even purchased his Unit, Winford lied about the "mistake;" not to mention the fact that Ford's Unit 210 was purchased for $220,000 while Lusco's Unit 202 sold for $269,177.

Over the next three years, BancorpSouth continued to renew the Van Buren Group, LLC loan even though it included the loan on the "Adversely Classified Loans" list of the Bank noting the loan was "Delinquent," "Poor Performance," "Collection Problem," "Weak Financial Condition," and "No Current Financial Information." Exhibit 1, exhibits 35, 36, 37, 38. Incredibly, for three and one-half years, BancorpSouth did nothing to enforce the provisions of the Construction Loan Deed of Trust despite having full knowledge of the prior sale and delivery of the Appellees Units.

The first action BancorpSouth took was the instigation of the subject litigation seeking judicial foreclosure in September of 2007, three and one-half years after acknowledging in writing in the April 8, 2004 memorandum that the Appellees' Units had been "Sold and Delivered."

SUMMARY OF THE ARGUMENT

Summary Judgment is appropriate when the moving party demonstrates that there is no issue of genuine material fact and that the moving party is entitled to a judgment as a matter of law. *Harris v. Shields,* 568 So.2d 269,275 (Miss. 1990). Appellees assert that the application of the Credit Principle Doctrine enunciated in *Pongetti* does not require notice of the sale of the Appellees units. Nevertheless, if this Court determines that notice was required, the Appellees have established by clear and unambiguous documentary evidence produced by the Appellant that the Appellant had actual notice of the sale of the units purchased by the Appellees and that the bank took no action for at least three and one-half (3 ½) years after having that knowledge. Application of any of the following legal theories relieves Appellees' units from foreclosure by BancorpSouth Bank. 1) The Credit Principle Doctrine enunciated in *Pongetti*, 2) the Doctrine of Ratification and Waiver enunciated in *Ewing* and 3) the Doctrine of Clean Hands enunciated in *Cook.*

The Chancellor's decision should be affirmed.

ARGUMENT

Standard of Review:

The Court applies a de novo standard of review when reviewing an order granting summary judgment. *PPG Architectural Finishes, Inc. v. Lowery,* 909 So.2d 47, 49 (Miss. 2005) Although summary judgments must be viewed on appeal with caution, this Court has noted that summary judgment by a Chancellor is appropriate where "[n]o more proof could have been offered at trial." *Merritt v. Magnolia Federal Bank for Savings,* 573 So.2d 746, 749 (Miss. 1990)

The Chancellor's ruling in this case perfectly fits that maxim. Although the Appellees take the position that there is no requirement for notice of the sale of their units in order for the principle of credit application under *Pongetti* to apply, even if this Court determines notice is required, the documentary evidence presented at the hearing clearly establishes that BancorpSouth had notice. That documentation defeats that allegation that there is a genuine issue of material fact. It is not sufficient to claim a genuine issue of material fact, it is the burden of the litigant to establish the existence of one. *Gross v. Chevrolet Country, Inc.* 655 So.2d 873, 877 (Miss. 1995) The evidence presented at the hearing on the motion for summary judgment is precisely the same evidence that would be presented at trial.

I. THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT BASED ON THE CREDIT PRINICPLE DOCTRINE OF *PONGETTI*

The central issue around the granting of the Summary Judgment by the Chancellor is the application and interpretation of this Court's decision in *Pongetti v. Bankers Trust Savings and Loan Association*, 368 So. 2d 819, 823 (Miss. 1979). This is the most recognized opinion describing the effect that out of trust sales have on a mortgagee/creditor's remaining collateral:

> It is the general rule, subject to certain qualifications set out in succeeding subdivisions, that where a mortgagor or other lienee [i.e., Van Buren] has alienated [i.e., sold] a portion of the mortgaged premises, and the mortgagee [i.e., BancorpSouth] or other lienor, having notice of such alienation [i.e., Ford's Unit 210; Lee's Unit 305, 306, and 307] , releases the mortgage or other lien as to the portion retained by the mortgagor or lienee, such mortgagee or lienor must deduct from the debt, before enforcing his lien against the property alienated, the value of the property released.

Id. at 823.

In other words, since BancorpSouth had actual knowledge that Van Buren sold out of trust Lee's Units 305, 306 and 307 and Ford's unit 210, then as a matter of law it "**must deduct from the debt, before enforcing the lien against the property alienated, the value of the property released**" (emphasis added), i.e., $869,000 which represents the value of these 4 units less the $50,000 it received from Lee. As discussed above, this credit combined with the proceeds paid against the debt existing at the time the releases were given, extinguishes the debt for purposes of the judicial foreclosure against the Appellees.

Appellants argue that the bank must have known of the sales to the Appellees. However, a careful reading of the rule set forth above belies this argument. The only notice set forth in the rule is notice by the bank that it is releasing a parcel of property for

which it has not received consideration. The rule is clearly carved from equity in that the bank/mortgagee controls all of the information relative to its loan and the innocent purchasers of the units have no access to information regarding the loans of the bank to a third party debtor, here Van Buren Group, LLC.

Nevertheless, if this Court now concludes that notice of the sale of the Appellees units is necessary to invoke the credit principle doctrine of *Pongetti,* the bank's own documentary evidence establishes beyond a reasonable doubt that BancorpSouth had knowledge of the sales of the units at the time it issued releases of the Ford and Lee units. It is important to note that Appellant does not contend in this appeal nor did it contend in its opposition to the Summary Judgment that the credit, when applied, does not extinguish the debt for purposes of foreclosure.

Appellant further argues the effect of the doctrine of the Inverse Order of Alienation on the order of foreclosure. That doctrine only comes into play if the lower Court orders foreclosure. Since the Summary Judgment ruled that no foreclosure was allowed, argument about the Inverse Order of Alienation is premature and Appellees reserve their right to address that issue at the lower court if this case is reversed and returned for trial.

II. THE TRIAL COURT CORRECTLY FOUND THAT APPELLANT HAD RATIFIED AND WAIVED THE ACTIONS OF VAN BUREN GROUP, LLC THEREBY RELEASING THE APPELLEES FROM THE OPERATION OF THE MORTGAGE

In one of the Mississippi Court of Appeals' most recent pronouncement on the law of waiver

> A 'waiver' presupposes a full knowledge of a right existing, and an intentional surrender or relinquishment of that right. It contemplates something done designedly or knowingly, which modifies or changes existing rights, or varies or changes the terms and conditions of a contract. It is the voluntary surrender of a right. To establish a waiver, there must be shown an act or omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right alleged to have been waived.

Taranto Amusement Co., Inc. v. Mitchell Assoc., Inc., 820 So.2d 726, 729-30 (Miss.Ct.App. 2002) (citing *Ewing v. Adams*, 573 So.2d 1364, 1369 (Miss. 1990).

In *Ewing v. Adams*, the Mississippi Supreme Court defined waiver "to mean the relinquishment of a known right with knowledge of the existence of such right and a purpose to relinquish it." *Ewing* at 1369, quoting *Campbell Paint & Varnish Co. v. Hall*, 95 So. 641, 644 (Miss. 1923).

As evidenced by the above facts, BancorpSouth knew on or before April 8, 2004 that the Units belonging to the Appellees had been **"sold and delivered" (emphasis added)** without being released from the Construction Deed of Trust. Having knowledge that the nine Units referenced in the April 8, 2004 memo, including the five Units of the Appellees, had been "sold and delivered," without release of the Construction Deed of Trust, the Bank was required to take action. If the Bank felt that it had been defrauded by the Van Buren Group and Mr. Frazier and that the Units had been sold out of trust, the

Bank was required by law to file a suspicious activity report with the Office of the Comptroller[9] and move forward to prosecute a foreclosure on the Units in a timely manner invoking the due on sale clause of the Deed of Trust. Failure to do so ratified the sale of the Units out of Trust.

In his deposition, Winford was asked if BancorpSouth had filed a suspicious activity report as required by 12 U.S.C. §1818. Winford was instructed by the Bank's Counsel not to answer the question. Exhibit 6, p. 215-16. Therefore, the Appellees are entitled to a negative inference that the Bank did not file the required report which, along with the release of Units 305, 306 and 307 in favor of Mr. Lee and Unit 210 in favor of Speaker Tim Ford, clearly indicates the ratification of the sale and delivery of the Units to the Appellees outside of trust.

In the instant case, upon discovery at least by April of 2004 of nine (9) sales out of Trust, the Bank moved forward with renewal of the loan and took no action against the debtor Van Buren Group, LLC to require payment for the Units previously sold out of Trust. Subsequently, BancorpSouth Bank "charged off" the loan without taking any steps to require the Van Buren Group, LLC to present funds for the Units sold out of Trust. Indeed, BancorpSouth waited for over three and one-half years after having knowledge of the sales out of Trust before taking any action. The cornerstone of ratification and waiver is that once a party is **fully informed of all material facts**

[9] 12 U.S.C. 1818, as codified in 12 C.F.R. §353 requires that a bank file a suspicious activity report "[w]henever the bank detects any known or suspected federal criminal violation, or pattern of criminal violations, committed or attempted against the bank or involving a transaction or transactions conducted through the bank, where the bank believes it was either an actual or potential victim of a criminal violation or series of criminal violations, or that the bank was used to facilitate a criminal transaction, and the bank has a substantial basis for identifying one of the bank's directors, officers, employees, agents, or other institution-affiliated parties as having committed or aided in the commission of the criminal violation, regardless of the amount involved in the violation."

relating to the transaction, they must act. BancorpSouth did not act and must accept the consequences of its failure to act, as found by the Chancellor.

In *Turner v. Wakefield,* 481 So. 2d 846 (Miss. 1985) the Mississippi Supreme Court held as follows:

> Thus, stated in general terms, the law of this case is that, assuming the fact of fraud, a contract obligation obtained by fraudulent representation is not void, but voidable. **Upon discovery thereof,** the one defrauded must act promptly and finally to repudiate the agreement; **however a continuance to ratify the contract terms constitutes a waiver.**

Id. at 848-49. (emphasis added)

And in a case BancorpSouth is familiar with, *Barnes, Broom, Dallas and McLeod, PLLC v. Estate of Cappaert,* 991 So.2d 1209 (Miss. 2008), the Mississippi Supreme Court held that "[r]atification may be established through affirmative acts or **inaction**." Id. at 1212. (emphasis added) In that case, BancorpSouth acted as Executor of the Estate. Attorney Harris H. Barnes, III was asked to represent the Estate by the deceased's family accountant. For eleven months Mr. Barnes represented the estate and sent monthly statements to BancorpSouth as the Executor. When the Estate refused to pay his bills, Mr. Barnes sued and was awarded a judgment for his legal fees. The court found that "[i]n this case, Barnes provided the bank with statements every month, and BancorpSouth continued to allow Barnes to provide legal representation", thereby ratifying his employment. Id. Here, with full knowledge, the bank continued to renew the non performing loan of Van Buren Group, LLC until the spring of 2006 at which time it charged the loan off but continued to take no action until the fall of 2007, over three and one half (3 ½) years after the banks knowledge of the sale of the Appellees' units.

Appellant's argument concerning the Appellees' claim of failure to mitigate by having a non-judicial foreclosure of Unit 309 does not appear to have been part of the Chancellor's ruling and has no effect on the application of the credit principle doctrine set forth in *Pongetti* and therefore, Appellees will not address that issue here.

III. THE CHANCELLOR WAS CORRECT IN RULING THAT APPELLANT DID NOT COME BEFORE THE COURT WITH CLEAN HANDS

BancorpSouth chose to seek relief in the Chancery Court, a court of equity. It, therefore, must come to the Court with clean hands:

> The doctrine of clean-hands provides that "he who comes into equity must come with clean hands." *Cook v. Whiddon*, 866 So. 2d 494, 498 (¶13) (Miss. App. Ct. 2004) (citing *Thigpen v. Kennedy*, 234 So. 2d 744, 746 (Miss. 1970). "[T]he clean-hands doctrine prevents a complaining party from obtaining equitable relief in court when he is guilty of willful misconduct in the transaction at issue." *Id.* (citing *Bailey v. Bailey*, 774 So. 2d 335, 337 (¶6) (Miss. 1998).

Andres v. Andres, 22 So. 3d 314, 320 (¶25) (Miss. App. Ct. 2009).

Early applications of the clean hands doctrine by the Mississippi Supreme Court have stood for decades:

> [A] court of equity will not afford relief to one who seeks equity while guilty of misconduct **or of such acts as would perpetuate wrong and injustices to others**.

Cherry v. Bivens, 185 Miss. 329, 187 So. 525, 528 (Miss. 1939).

One of the oldest principles of equity is the principle that, "he who seeks equity must do equity." V.B. Griffith, *Mississippi Chancery Practice*, 2nd Ed., §43 (1949). This principle, if not established so long ago, may as well have been adopted for the actions and inactions of BancorpSouth as describe above.

Finally, a maxim of equity incorporated into the clean hands doctrine that is most applicable to the actions and inactions of BancorpSouth described above is the maxim, "he who seeks equity must be vigilant." *Cox v. Cox*, 976 So. 2d 869, 877 (Miss. 2008). The actions and inactions of Winford, Stringer and Barrentine as described above could hardly be classified as "vigilant." Had they vigilantly performed their banking duties the Appellees would have been alerted to the fraud of Frazier in early 2004 at a time when BancorpSouth acknowledges that the Fraziers had more than sufficient assets to satisfy the Van Buren indebtedness and cause Partial Releases to be delivered to each of the Victims. Exhibit 5, p. 31.

IV. APPLICATION OF THE CREDIT PRINCIPLE DOCTRINE TO THE GUARANTORS

Appellee/Guarantors Brantley and Crumpton have their own legal representation in this case and Appellees Langston, Bourdeaux, Bryan and Albritons reserve all argument on the issues relating to the guarantors to their counsel.

CONCLUSION

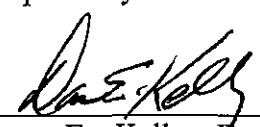
The Credit Principle Doctrine set forth in *Pongetti* provides that the Appellees are entitled to a credit against the Deed of Trust because of BancorpSouth's release of the Ford and Lee Condominum units without consideration. That doctrine, as written in *Pongetti*, does not require notice of the prior sales to the Appellees. Nevertheless, if this Court determines that there was a requirement of notice, the Chancellor clearly found through the documentary evidence produced that BancorpSouth had actual notice of the

transfer of the units, documentary evidence constructed contemporaneous with the events in question.

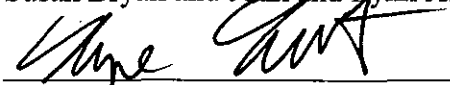
That same documentary evidence clearly evidences the failure of BancorpSouth to take action for a period of three and one-half (3 ½) years after discovery of the sale of the units thereby justifying a finding that the bank had waived its right to take action.

The Summary Judgment granted by the Chancellor in the lower court should be affirmed.

Respectfully submitted,



Dana E. Kelly, Esq., on behalf of Norma S. Bourdeaux, Langston Oxford Properties, L.P., Susan Bryan and John and Lynn Albriton



Shane F. Langston, Esquire, pro se counsel for Langston Oxford Properties, L.P.

Of Counsel for co-defendant Langston:

Dana E. Kelly, Esquire
Post Office Box 13926
Jackson, Mississippi 39236-3926

LANGSTON & LANGSTON, PLLC
Shane F. Langston, Esq. (MB[redacted])
201 N. President St.
Jackson, MS 39201

Of counsel for Norma S. Bourdeaux,
Susan Bryan, Lynn M. Grenfell and John and Lynn Albriton

Dana E. Kelly, Esquire
Post Office Box 13926
Jackson, Mississippi 39236-39

CERTIFICATE OF SERVICE

I, Dana E. Kelly, do hereby certify that I have this day, served via United States mail the above and foregoing document to the following:

John R. Crow, Jr., Esquire
203 Wagner Street
Water Valley, Mississippi 38965

G. Todd Burwell, Esquire
Latham & Burwell
618 Crescent Blvd., Suite 200
Ridgeland, Mississippi 39157

Honorable Glenn Alderson
Chancellor
P.O. Box 1240
Oxford, Mississippi 38655

Dated: April 11, 2012.

Dana E. Kelly, MSB#[redacted]
P.O. Box 13926
Jackson, MS 39236
(601) 918-3206