IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DAVID E. FLEISHER	**APPELLANT**
VERSUS	**NO. 2010-CA-01594**
SOUTHERN AGCREDIT, FLCA	**APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF STONE COUNTY, MISSISSIPPI CIVIL ACTION NO. 2009-0027

RESPONSE AND CROSS APPEAL BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this 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. SOUTHERN AGCREDIT, FLCA; Plaintiff/Appellee

2. JEFFREY M. WILLIAMS (MS Bar #100410), RICHARD D. MITCHELL (MS Bar # 3381), MATTHEW R. DOWD (MS BAR #101928) and JEFFREY P. HUBBARD (MS Bar #2830); WELLS, MOORE, SIMMONS & HUBBARD, PLLC, Highland Bluff North, 4450 Old Canton Road, Suite 200 (39211), Post Office Box 1970, Jackson, Mississippi 39215-1970; Attorneys for Appellee

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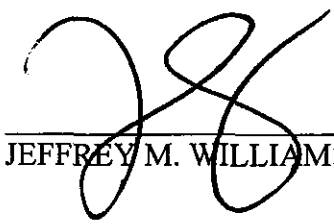

JEFFREY M. WILLIAMS

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ORAL ARGUMENT

Oral argument will be helpful to the Court in fully understanding the distinction of this case as being a suit against a guarantor versus a strict deficiency suit between a mortgagor and mortgagee. Fleisher has attempted to apply fair market value standards set forth in mortgage deficiency suits to his liability as a guarantor and this looks to be novel issue of law in Mississippi.

STATEMENT OF THE CASE

I. Parties and Nature of the Case

The parties to this case are Southern Agcredit, FLCA, f/k/a Land Bank South, FLCA ("Southern Ag") and David E. Fleisher ("Fleisher"). Southern Ag filed suit against Fleisher seeking a judgment against him based upon four (4) separate personal guaranties for four (4) separate defaulted loans to four (4) Mississippi companies called Mississippi Investors VII, LLC, Mississippi Investors VIII, LLC, Mississippi Investors X, LLC and Mississippi Investors XIV, LLC. Circuit Court Judge Lisa Dodson, after a bench trial, ruled that it was premature to award Southern Ag a judgment against Fleisher for his guaranty of the loan to Mississippi Investors VIII, but otherwise awarded Southern Ag a judgment against him for his guaranties of the Mississippi Investors VII, X and XIV loans. Fleisher appealed the final judgment against him. Southern Ag cross-appealed the prematurity ruling.

II. Course of Proceedings and Disposition in the Court Below

Southern Ag filed suit against Fleisher seeking a judgment based upon his four personal guaranties. Subsequent to suit being filed for breach of the guaranties and prior to trial, Southern Ag was able to foreclose upon the real property securing the loans to Mississippi Investors VII, LLC, Mississippi Investors X, LLC and Mississippi Investors XIV, LLC. Southern Ag was unable to foreclose upon the collateral securing the loan made to Mississippi Investors VIII, LLC prior to Fleisher's appeal. However, Southern Ag was able to foreclose upon it after the notice of appeal was filed.

After the close of discovery, both parties filed motions for summary judgment. In his motion for summary judgment, Fleisher argued that he was not liable under his personal guaranties, because (1) he sold his interests in the borrowing entities and (2) alternatively, Southern Ag had no deficiency on the loans it was able to foreclose upon, because he claimed that the fair market values exceeded the

debt. (R. at 772-783). In its motion for summary judgment, Southern Ag argued that it was entitled to a judgment against Fleisher, because Fleisher (1) executed the guaranties, (2) admitted the minimum amounts he initially guaranteed, (3) admitted the loans were in default, (4) admitted that a demand was made upon him to pay in accordance with his guaranties and (5) admitted that he did not pay, as agreed, in his guaranties. (R. at 419-426).

As to the amount Southern Ag sought to recover in its motion for summary judgment, Southern Ag only sought to hold Fleisher liable for the amount of the established deficiencies, which were less than the initial, minimum amounts guaranteed by Fleisher for the loans to Mississippi Investors VII, LLC, Mississippi Investors X, LLC and Mississippi Investors XIV, LLC, but continued to ask for the full initial guaranteed amount for the loan to Mississippi Investors VIII, LLC.[1] (R. at 419-426). Broken down by guaranty, Southern Ag asked the trial court to award it a judgment against Fleisher in the amount of $1,494,668.00 (Mississippi Investors VII, LLC deficiency), plus $454,266.25 (Mississippi Investors X, LLC deficiency), plus $420,882.17 (Mississippi Investors XIV, LLC deficiency) and $3,150,000.00 (Mississippi Investors VIII, LLC initial, minimum amount guaranteed). (R. at 419-426). Southern Ag sought the full initial amount guaranteed on Mississippi Investors VIII, LLC, because the collateral securing that loan had not been foreclosed upon due to a pending bankruptcy. (R. at 419-426).

In his response to Southern Ag's motion for summary judgment, Fleisher argued that he was not liable under his personal guaranties, because (1) he sold his interests in the borrowing entities, (2)

[1] As Southern Ag will clarify later in its Brief, Fleisher personally guaranteed specific, minimum amounts for the four (4) loans at issue. This fact distinguishes Fleisher's guaranties from those that do not have specific amounts. Thus, under the guaranties signed by Fleisher, Southern Ag was entitled to a judgment for the minimum amounts. However, with the respect to the collateral for the three (3) loans for which Southern Ag was able to foreclose upon during the pendency of this case, Southern Ag asked for less in damages than it was entitled to recover so as to give Fleisher credit for the bid prices paid by Southern Ag at foreclosure.

that there was no debt owed under the loans after Southern Ag foreclosed upon the collateral for Mississippi Investors VII, LLC, Mississippi Investors X, LLC and Mississippi Investors XIV, LLC, (3) that if Southern Ag were to foreclose upon the Mississippi Investors VIII, LLC collateral in the future, the fair market value for that collateral would exceed any debt owed under the loans, and finally (4) that Southern Ag engaged in predatory lending. (R. at 650-672).

After oral argument and additional requested briefing, on June 15, 2010, the trial court entered an Order Granting Partial Summary Judgment With Findings of Fact and Conclusions of Law in favor of Southern Ag. (R. at 1204-1214). In this order, Judge Dodson rejected Fleisher's allegations of predatory lending and the sale of his interests in the borrowing entities as relieving him from his obligations under the guaranties. (R. at 1204-1214). In short, Judge Dodson found, as a matter of law, that the guaranties were unambiguous, that Fleisher was bound by the unambiguous terms, and that Fleisher guaranteed minimum specific amounts. (R. at 1204-1214). Furthermore, the trial court ruled that based upon the unambiguous language of the guaranty, the pending bankruptcy proceeding for Mississippi Investors VIII, LLC **"does not prevent Southern AgCredit from proceeding herein related to the Guaranty of the loan made to Mississippi Investors VIII."** (R. at 1213) (emphasis added). The court summarized its ruling in stating that

> there is not a genuine issue of material fact which would preclude summary judgment in this matter as to the validity of the four (4) Guaranties and Fleisher's obligation to pay Southern AgCredit pursuant thereto . . . . There are genuine issues concerning the amounts, if any, owed by Fleisher pursuant to the Guaranties, including the related matters of the fair market value of the real property, the reasonableness of the foreclosure sale amounts, the calculation of interest on the loans, and credit for the adequate protection payments.

(R. at 1212).

A bench trial was held before Judge Dodson and on September 1, 2010, a Final Judgment with Findings of Fact and Conclusions of Law was entered by the trial court against Fleisher on his liability

for the guaranties of the loans to Mississippi Investors VII, LLC, Mississippi Investors X, LLC and Mississippi Investors XIV, LLC. (R. at 1299-1323). However, the court refused to grant a judgment against Fleisher for his guaranty of the loan to Mississippi Investors VIII, LLC, because it opined that this claim was "premature" due to the fact that this company was still in bankruptcy. (R. at 1307).

Thereafter, Southern Ag filed a Partial Motion to Reconsider asking Judge Dodson to reconsider her refusal to render a judgment against Fleisher for his guaranty of the Mississippi Investors VIII, LLC loan. (R. at 1264-1268). This was the only issue Southern Ag asked the trial court to reconsider. Southern Ag's motion to reconsider was denied and to date, the trial court has yet to adjudicate Fleisher's liability for his guaranty of the Mississippi Investors VIII loan. (R. at 1344).

III. The Judgment

The trial court entered a judgment against Fleisher on September 1, 2010 as follows:

A. judgment 5822 for the guaranty of the loan to Mississippi Investors VII, LLC in the amount of $104,673.80;

B. judgment 5823 for the guaranty of the loan to Mississippi Investors X, LLC in the amount of $114,368.19;

C. judgment 5824 for the guaranty of the loan to Mississippi Investors XIV, LLC in the amount of $132,258.76;

D. costs; and

E. post judgment interest at 8% per annum.

(R. at 1292-1293).

IV. Statement of the Facts

Fleisher was at one time, by and through his entities, a member of, and also an officer of, four (4) companies called Mississippi Investors VII, LLC, Mississippi Investors VIII, LLC, Mississippi

Investors X, LLC, and Mississippi Investors XIV, LLC. Mississippi Investors VII, LLC signed a Note and borrowed $6,000,000.00 from Southern Ag on November 17, 2006. (SA-R.E.5). Mississippi Investors VIII, LLC signed a Note and borrowed $9,000,000.00 from Southern Ag on September 27, 2006. (SA-R.E.6). Mississippi Investors X, LLC signed a Note and borrowed $1,438,000.00 from Southern Ag on August 28, 2006. (SA-R.E.7). Mississippi Investors XIV, LLC signed a Note and borrowed $2,116,000.00 from Southern Ag on August 28, 2006. (SA-R.E.8).

At the time the loans were made, Fleisher, through his entities, owned 25% of each of these companies. In conjunction with the four Promissory Notes, Fleisher signed four (4) personal guaranties styled as an UNCONDITIONAL AGREEMENT OF GUARANTY. These personal guaranties were expressly acknowledged as being Absolute and Continuing. (SA-R.E.9-12). As an inducement for Southern Ag to loan $6,000,000.00 to Mississippi Investors VII, LLC, Fleisher signed an UNCONDITIONAL AGREEMENT OF GUARANTY personally guaranteeing a minimum amount of $2,100,000.00. (SA-R.E.9). As an inducement for Southern Ag to loan $9,000,000.00 to Mississippi Investors VIII, LLC, Fleisher signed an UNCONDITIONAL AGREEMENT OF GUARANTY personally guaranteeing a minimum amount of $3,150,000.00. (SA-R.E.10). As an inducement for Southern Ag to loan $1,438,000.00 to Mississippi Investors X, LLC, Fleisher signed an UNCONDITIONAL AGREEMENT OF GUARANTY personally guaranteeing a minimum amount of $503,300.00. (SA-R.E.11). As an inducement for Southern Ag to loan $2,116,000.00 to Mississippi Investors XIV, LLC, Fleisher signed an UNCONDITIONAL AGREEMENT OF GUARANTY personally guaranteeing a minimum amount of $740,600.00. (SA-R.E.12). These amounts were guaranteed minimums, because Fleisher likewise promised to guarantee and pay any costs, attorneys' fees, and expenses incurred as a result of any default by the borrowing entities. (SA-R.E.9-12).

Mississippi Investors VII, LLC, Mississippi Investors VIII, LLC, Mississippi Investors X, LLC, and Mississippi Investors XIV, LLC each defaulted under the terms of the Promissory Notes. (SA-R.E.16 pp. 57, 59, 90) (R. at 455-461, 656). In addition to defaulting on the payments under the Notes, Mississippi Investors VII, LLC, Mississippi Investors VIII, LLC, Mississippi Investors X, LLC, and Mississippi Investors XIV, LLC each defaulted by filing for bankruptcy. (R. at 455-461).

Under the guaranties signed by Fleisher for the four (4) Promissory Notes, Fleisher promised that

> in the event of default by Borrower in payment of the entire or any part of the Guaranteed Indebtedness when the Guaranteed Indebtedness becomes due, either by its terms or as a result of the exercise of any power to accelerate, Guarantor will, on demand and without further notice of any kind, pay Guarantor's Specified Percentage of the amount due to Creditor, and it will not be necessary for Creditor, in order to enforce such payment by Guarantor, first to institute suit or exhaust its remedies against Borrower or others liable on such indebtedness, or to enforce its rights against any security that shall ever have been given to secure the Guaranteed Indebtedness.

(R. at 5-6, 8-9, 11-12, and 14-15) (SA-R.E.9-12) (emphasis added).

The specified percentages were set forth in the guaranties as follows:

> [t]he specified percentage guaranteed by the Guarantor herein shall be 140% of Guarantor's effective ownership interest in **Mississippi Investors VII, LLC**, which is agreed by the parties to be 25% as of the date of this Guaranty. The initial Guaranteed Indebtedness set forth in Paragraph 1, *infra*, is agreed to be $6,000,000.00, so that the initial dollar amount of Guarantor's guaranty shall be $2,100,000.00, however in the event that the actual indebtedness increases beyond the initial Guaranteed Indebtedness due to interest accrual, *etc.*, the actual guaranty amount hereunder shall be calculated as a percentage of that amount as set forth herein.

(R. at 5) (SA-R.E.9) (emphasis added);

> [t]he specified percentage guaranteed by the Guarantor herein shall be 140% of Guarantor's ownership interest in **Mississippi Investors VIII, LLC**, which is agreed by the parties to be 25% as of the date of this

> Guaranty. The initial Guaranteed Indebtedness set forth in Paragraph 1, *infra*, is agreed to be $9,000,000.00, so that the initial dollar amount of Guarantor's guaranty shall be $3,150,000.00, however in the event that the actual indebtedness increases beyond the initial Guaranteed Indebtedness due to interest accrual, *etc.*, the actual guaranty amount hereunder shall be calculated as a percentage of that amount as set forth herein.

(R. at 8) (SA-R.E.10) (emphasis added);

> [t]he specified percentage guaranteed by the Guarantor herein shall be 140% of Guarantor's ownership interest in **Mississippi Investors X, LLC**, which is agreed by the parties to be 25% as of the date of this Guaranty. The initial Guaranteed Indebtedness set forth in Paragraph 1, *infra*, is agreed to be $1,438,000.00, so that the initial dollar amount of Guarantor's guaranty shall be $503,300.00, however in the event that the actual indebtedness increases beyond the initial Guaranteed Indebtedness due to interest accrual, *etc.*, the actual guaranty amount hereunder shall be calculated as a percentage of that amount as set forth herein.

(R. at 11) (SA-R.E.11) (emphasis added); and

> [t]he specified percentage guaranteed by the Guarantor herein shall be 140% of Guarantor's ownership interest in **Mississippi Investors XIV, LLC**, which is agreed by the parties to be 25% as of the date of this Guaranty. The initial Guaranteed Indebtedness set forth in Paragraph 1, *infra*, is agreed to be $2,116,000.00, so that the initial dollar amount of Guarantor's guaranty shall be $740,600.00, however in the event that the actual indebtedness increases beyond the initial Guaranteed Indebtedness due to interest accrual, *etc.*, the actual guaranty amount hereunder shall be calculated as a percentage of that amount as set forth herein.

(R. at 14) (SA-R.E.12) (emphasis added).

Under the guaranties signed by Fleisher for the Promissory Notes, the Guaranteed Indebtedness included:

> [a]ll indebtedness of every kind and character, without limit in amount, whether now existing or arising after the date of execution of this Guaranty, . . . [i]nterest on any of the indebtedness . . . [a]ny or all costs, attorneys' fees, and expenses incurred by [Southern Ag] because of Borrower's default in payment of any such indebtedness . . . .

(R. at 5, 8, 11 and 14) (SA-R.E.9-12).

The guaranties also stated that

> [i]f Guarantor becomes liable for any indebtedness owing by Borrower to [Southern Ag] other than under this Guaranty, that liability will not be in any manner impaired or affected by this Guaranty, and the rights of [Southern Ag] under this Guaranty will be cumulative of any and all other rights that [Southern Ag] may ever have against Guarantor. The exercise by [Southern Ag] of any right or remedy under this Guaranty or under any other instrument, or at law or in equity, will not preclude the concurrent or subsequent exercise of any other right or remedy.

(R. at 5, 8, 11 and 14) (SA-R.E.9-12) (emphasis added).

Furthermore, the guaranties clearly stated that

> Guarantor agrees that her [sic] obligations under the terms of this guaranty will not be released, diminished, impaired, reduced or affected by the occurrence of anyone or more of the following events: . . .
> (d) The . . . bankruptcy . . . of Borrower . . . or any party at any time liable for the payment of any or all of the Guaranteed Indebtedness . . .
> (f) Any neglect, delay, omission, failure, or refusal of [Southern Ag] to take or prosecute any action for the collection of any of the Guaranteed Indebtedness or to foreclose or take or prosecute any action with any instrument or agreement evidencing or securing all or any part of the Guaranteed Indebtedness . . .

(R. at 6, 9, 12 and 15) (SA-R.E.9-12) (emphasis added).

Despite these obligations and promises to pay on demand, Fleisher refused to pay the amounts set forth in the guaranties after the Mississippi Investors entities' default and upon demand by Southern Ag. (R. at 17-20).

Fleisher refused to pay upon demand, and as agreed by him, despite admitting in his deposition to:

(1) signing the guaranties,

(2) acknowledging the initial minimum amounts he guaranteed,

(3) acknowledging his corresponding obligation to pay for costs, attorneys' fees, and expenses incurred as a result of any default by the Mississippi Investors entities, and

(4) acknowledging that the loans at issue were in default.

(R. at 466-484). Thus, based upon Fleisher's admissions, he was in breach of his guaranties and liable for the full initial, minimum amounts he guaranteed.

Because Fleisher refused to pay the amounts he personally guaranteed, Southern Ag filed suit for Fleisher's breach of the guaranties and to hold him liable thereunder. Southern Ag was not able to foreclose upon the collateral securing the Notes guaranteed by Fleisher at the time suit was filed. Yet after suit was filed, but before trial, deficiencies were eventually established for the Mississippi Investors VII, X, and XIV Notes on January 14 and 15, 2010, through foreclosure of the collateral securing these respective Notes. (R. at 1077-1099). Based upon Southern Ag's ability to foreclose upon these properties, Southern Ag chose, in all fairness to Fleisher as a guarantor, to give Fleisher credit for its bid prices at foreclosure. Thus and again, at the summary judgment stage and at trial, Southern Ag asked for a judgment less than the $2,100,000.00, $503,300.00 and $740,600.00 minimum amounts he obligated himself to pay in the event of any default on the respective Mississippi Investors VII, X, and XIV Notes. (R. at 971, 975). However, Fleisher was still ultimately obligated to pay up to the initial minimum amounts he guaranteed under the terms of the guaranties.

At summary judgment and trial, Southern Ag sought less in damages then it was entitled to recover under the guaranties due to the ability to foreclose upon the collateral for Mississippi Investors VII, X and XIV. Because it had not been able to foreclose upon the collateral for Mississippi Investors VIII, LLC at the time of trial, Southern Ag continued to seek a judgment against Fleisher for the full minimum amount of $3,150,000.00 he personally guaranteed and for his breach of the corresponding guaranty. Southern Ag called Ben Elliott to testify on its behalf. (SA-R.E.16 pp. 44-88). Fleisher did

not testify in his defense. Rather, Fleisher called co-guarantor Mike Adkinson as his only witness. (SA-R.E.16 pp. 240-329).

SUMMARY OF THE ARGUMENT

Southern Ag is Entitled to a Judgment against Fleisher for his Guaranty of the Mississippi Investors VIII, LLC Loan

Based upon the trial court's ruling that: (1) Fleisher was obligated under the personal guaranty for the loan to Mississippi Investors VIII, LLC, (2) that the guaranty was unambiguous, (3) that the guaranty was enforceable against Fleisher, (4) that Fleisher guaranteed a minimum specific amount, (5) that the bankruptcy of Mississippi Investors VIII, LLC did not prevent Southern Ag from proceeding against Fleisher, (R. at 1204-1214), (6) Fleisher's admissions, and (7) the unambiguous language of the guaranties, Southern Ag is, as a matter of law, entitled to a judgment against Fleisher for the full initial amount of his personal guaranty for the Mississippi Investors VIII Note. The trial court erred in refusing to award a judgment against Fleisher on the basis of "prematurity," because Fleisher's contractual liability under the guaranty is not predicated upon or limited by any other remedies available to Southern Ag, nor is the guaranty limited by the bankruptcy of the borrowing entity. (R. at 8-10).

The Trial Court Correctly Awarded Southern Ag Judgments against Fleisher for his Guaranties of the Mississippi Investors VII, X and XIV Loans

It is difficult to comprehend Fleisher's arguments as to why the trial court should be reversed when, for example, in one paragraph he says that he "does not challenge the adequacy of the bid prices at foreclosure to support a valid foreclosure, nor does he otherwise seek to have the foreclosures set aside," Fleisher Brief at p. 10, but then makes an assertion that "Southern AgCredit submitted *no proof* . . . that the manner in which the sale was conducted was a commercially reasonable sale." Fleisher Brief at p. 8. Moreover, Fleisher's primary argument on appeal as to why he thinks the trial court

should be reversed was never raised in the court below. Fleisher additionally makes arguments on appeal that are inconsistent with the positions he advanced before the trial court. If this were not enough, Fleisher fails to offer any basis, much less sufficient factual or legal basis, to reverse the judgment rendered against him.

ARGUMENT

STANDARD OF REVIEW

A. FINDINGS OF FACT STANDARD OF REVIEW

The findings of fact by a circuit court judge, sitting without a jury, will not be reversed on appeal where they are supported by substantial, credible, and reasonable evidence. *City of Laurel v. Williams*, 21 So. 3d 1170, 1179 (Miss. 2009) (citations omitted). This Court has also stated the well-settled standard of review of a judgment from a bench trial as follows: "'[a] circuit court judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor,' and his findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence.'" *Id.*

Furthermore, this court has long recognized "that the trial judge, sitting in a bench trial as the trier of fact, has the sole authority for determining the credibility of the witnesses." *Thompson ex rel. Thompson v. Lee County Sch. Dist.*, 925 So. 2d 57, 62 (Miss. 2006) (citation omitted). "Where there is conflicting evidence, this Court must give great deference to the trial judge's findings." *Id.*

B. AWARD OF DAMAGES STANDARD OF REVIEW

The Mississippi Supreme Court has also reiterated that "it is primarily the province of the jury [and the judge in a bench trial] to determine the amount of damages to be awarded and the award will not normally be set aside unless so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." *Callahan v. Ledbetter*,

992 So. 2d 1220, 1230 (Miss. Ct. App. 2008). A "trial court's decision as to damages will not be disturbed so long as the ruling is supported by substantial, credible, and reasonable evidence." *Id.*

C. THE TRIAL COURT ERRED IN REFUSING TO AWARD SOUTHERN AG A JUDGMENT AGAINST FLEISHER FOR HIS BREACH OF HIS GUARANTY OF THE MISSISSIPPI INVESTORS VIII NOTE

Fleisher breached his unambiguous and enforceable guaranty of the Mississippi Investors VIII Note and because of this breach, Southern Ag is entitled to a judgment against Fleisher for at least the full minimum amount he personally guaranteed. Consequently, the trial court erred as a matter of law and/or abused its discretion in refusing to award Southern Ag a judgment against Fleisher on the basis that a judgment against Fleisher was premature. The court opined that it was premature due to the pending bankruptcy of Mississippi Investors VIII. (R. at 1307). The trial court's ruling of prematurity essentially rendered the guaranty meaningless and failed to give effect to the contract upon its clear terms.

As a starting point, in its order granting partial summary judgment in favor of Southern Ag, (R. at 1204-1214), the trial court found, as a matter of law, that the guaranties were unambiguous, that Fleisher admitted to signing and being bound by the unambiguous terms, and that Fleisher guaranteed minimum specific amounts. (R. at 1204-1214). The trial court further ruled that based upon the unambiguous language of the guaranty, the pending bankruptcy proceeding for Mississippi Investors VIII, LLC "does not prevent Southern AgCredit from proceeding herein related to the Guaranty of the loan made to Mississippi Investors VIII." (R. at 1213). Thus, based upon these findings of fact and conclusions of law, which were based upon the trial court's analysis of the terms of the guaranty and other evidence presented at the summary judgment stage, this Court should reverse and render a judgment in favor of Southern Ag in at least the minimum amount guaranteed by Fleisher for the Mississippi Investors VIII loan.

Additionally and/or alternatively, the language of the guaranty for which the trial court ruled was unambiguous and enforceable states that "the initial dollar amount of Guarantor's guaranty shall be $3,150,000.00." (R. at 8). The guaranty states that "the rights of [Southern Ag] under this Guaranty will be cumulative of any and all other rights that [Southern Ag] may ever have against Guarantor. The exercise by [Southern Ag] of any right or remedy under this Guaranty or under any other instrument, or at law or in equity, will not preclude the concurrent or subsequent exercise of any other right or remedy." (R. at 8). The guaranty states that Fleisher's obligations and liability will not be released, diminished, impacted, reduced or affected by the bankruptcy of Mississippi Investors VIII. (R. at 9). Furthermore, the guaranty states that Fleisher's obligations and liability will not be released, diminished, impacted, reduced or affected by Southern Ag's inability or failure to foreclose on the Mississippi Investors VIII collateral. (R. at 9). Therefore, if for no other reason, based upon the language of the guaranty itself, Southern Ag is entitled to a judgment against Fleisher and this Court should reverse and render in favor of Southern Ag for at least the initial guaranteed amount of $3,150,000.00.[2]

[2] It is important for the Court to recognize that Southern Ag sued Fleisher to hold him liable for specific initial amounts he guaranteed, plus other consequential damages, for each of his guaranties. Fleisher never disputed in this litigation that he signed the guaranties, never disputed that he understood what the guaranties obligated him to do, never disputed the initial minimum amounts he guaranteed, never disputed that the entities defaulted on the loans, never disputed that demand was made upon him and never disputed that he did not pay upon demand. Consequently, based upon the unambiguous, understood and agreed language of the guaranties, Southern Ag was also entitled to a judgment against Fleisher, at a minimum, for the initial amounts he guaranteed for the Mississippi Investors VII, X and XIV loans.

Yet, so as to give Fleisher credit towards the prices it bid at foreclosure, all after suit was filed against Fleisher, Southern Ag asked that the Court award it a judgment in an amount less than it was otherwise entitled to under the guaranties. The reduced amount sought as damages by Southern Ag equaled the established deficiencies after foreclosure. Southern Ag's reduction in the amount of damages sought for Fleisher's breach of his guaranties was equitable by any measure. This is especially true, because Fleisher's agreed minimum liability was not contractually diminished in any way by Southern Ag's ability or inability to foreclose on collateral.

Importantly, there has never been a finding of fact or conclusion of law by the trial court of inequitable conduct by Southern Ag so as to deny it a judgment against Fleisher for any of his guaranties, much less the guaranty of the Mississippi Investors VIII Note. Rather, as set forth in the trial court's final judgment, the only reason why it refrained from awarding Southern Ag a judgment, on the grounds of prematurity, was a concern over what amounts were owed to Mississippi Investors VIII. (R. at 1277). The trial court clarified its concerns over the amounts owed by Mississippi Investors VIII in a discussion and acknowledgment of Mississippi Investors VIII being in bankruptcy with the future potential for interest only, adequate protection payments being made and/or a reorganization plan being approved. (R. at 1277). Yet, and again, Fleisher's unambiguous and enforceable guaranty was not limited in any way by Mississippi Investors VIII's bankruptcy, was not limited by any inability of Southern Ag to foreclose on collateral and was not limited by any other right granted to Southern Ag through the guaranty and corresponding Note.

It is well settled in Mississippi that the same rules of construction are applied to a guaranty as in any other contract. *See Bank of McLain v. Pascagoula Nat'l Bank*, 117 So. 124, 126 (Miss. 1928). A guaranty should be given a fair and reasonable interpretation in accordance with the intentions of the parties. *See EAC Credit Corp. v. King*, 507 F.2d 1232, 1237 (5th Cir. 1975) (applying Mississippi law and recognizing that if the words of guaranties are so narrowly construed so as to defeat their purpose, then guaranties would become too unsafe to rely upon). Moreover and more recently, the court of appeals reiterated that "pursuant to Mississippi law, a 'court is obligated to enforce a contract executed by legally competent parties where the terms of the contract are clear and unambiguous.'" *Knight Properties, Inc. v. State Bank & Trust, Co.*, 2011 WL 590910, *5 (Miss. Ct. App. Feb. 22, 2011) (internal citations omitted) (upholding a grant of summary judgment against the guarantor based upon the default of the borrowing entity). Thus, the trial court abused its

discretion and erred as a matter of law in refusing to award a judgment against Fleisher by ignoring the intent of the parties and essentially re-writing the guaranty.

Yet, in case this Court had any doubts or needed clarity on Southern Ag's position, Southern Ag points the Court to the *Knight Properties* case which involved a situation where State Bank pursued a judgment against the guarantor, but did not attempt to foreclose on the real property securing the loan. *Id.* at *1-2. The guarantor, Chad Knight, argued that State Bank could not pursue a claim against him on his guaranty, without foreclosing on the collateral. *Id.* at *2-4. The court of appeals rejected this argument and upheld the grant of summary judgment based upon the unambiguous language of the guaranty that expressly permitted State Bank to pursue a judgment against the guarantor, regardless of whether an action had been commenced to foreclose or whether there was any other impairment of the collateral. *Id.* at *5. Applied to this case, Southern Ag clearly has the contractual right to recover a judgment against Fleisher under the express terms of the guaranty of the loan to Mississippi Investors VIII and is not precluded or impaired in any way by either the bankruptcy of Mississippi Investors VIII or any ability / inability of Southern Ag to foreclose upon the collateral.

Added to this, at the summary judgment stage, Southern Ag submitted Fleisher's deposition testimony where he admitted to the minimum amounts he guaranteed, admitted the loans were in default and admitted that he did not pay upon demand. (R. at 466-484). The trial court considered this testimony in partially granting Southern Ag's motion for summary judgment[3] and denying Fleisher's motion for summary judgment. (R. at 1204-1213).

[3] Southern Ag points out that it was entitled to summary judgment as to all amounts it sought for all of the guaranties at the summary judgment stage based upon the undisputed proof of the Notes, defaults, demands and minimum amounts guaranteed.

At trial, Southern Ag entered into evidence the Note for Mississippi Investors VIII, the default, which was never in dispute, the guaranty, the demand made upon Fleisher to pay and testimony from Southern Ag's representative, Ben Elliott, which additionally proved that Fleisher failed to pay upon demand. (SA-R.E.6, 10 and 16 pp. 57, 60). Fleisher did not testify on his behalf at trial and he did not offer any evidence to refute the default on the loan or to dispute his breach of the guaranty agreement. Thus, based upon the specific guaranty placed at issue, which identified an admitted, uncontested initial amount guaranteed, the Note at issue, the default on the Note, the demand made upon Fleisher and Fleisher's failure to pay, Southern Ag was entitled to summary judgment at a minimum, but even if not summary judgment, then a judgment pursuant to Miss. R Civ. P. 52.[4]

Furthermore, even had Fleisher's guaranty of the Mississippi Investors VIII loan not identified a specific minimum amount guaranteed, under Mississippi law, Southern Ag's only general burden of proof for a prima facie case to recover a judgment against Fleisher for his guaranty was to introduce the Note, the guaranty and sworn transcript of the account. *See generally U.S. v. Irby*, 517 F.2d 1042, 1043 (5th Cir. 1975) (arising out of the District Court of the Southern District of Mississippi). Yet, as a matter of this specific contract interpretation and enforcement, Southern Ag did not have to put on evidence of the total loan obligation owed, because the guaranty identified a specific minimum amount of liability and Fleisher was liable for that amount. Southern Ag met its burden through evidence of the Note, guaranty, default and refusal to pay.

[4] Rule 52(a) of the Mississippi Rules of Civil Procedure provides that "the court may, and **shall** upon the request of any party to the suit or when required by these rules, find the facts specially and state separately its conclusions of law thereon and **judgment shall be entered accordingly**." Miss. R. Civ. P. 52(a) (emphasis added). The trial court's ruling as to Mississippi Investors VIII, LLC was effectively that it was holding its ruling in abeyance pending further proceedings in the bankruptcy court as to Mississippi Investors VIII, LLC. The result is that no judgment has been entered in favor of either party as to the guaranty of the Mississippi Investors VIII Note.

If this were not enough to reverse and render on this issue, the trial court's refusal to award Southern Ag a judgment against Fleisher for his guaranty of the Mississippi Investors VIII Note essentially defeats the purpose of the guaranty itself on a basis that completely ignores the language and intent of the guaranty. The trial court's "premature" ruling likewise runs counter to its ruling, as a matter of law, that the guaranty was unambiguous and enforceable. The trial court's refusal to award Southern Ag a judgment on this particular guaranty was apparently based upon an equitable argument raised by Fleisher for which Southern Ag can find no specific Mississippi authority on point. A trial court has discretion, yet this discretion is not limitless. *See generally Magee v. Magee*, 734 So. 2d 1034, 1041 (Miss. Ct. App. 1998).

Being unable to find any Mississippi Supreme Court authority supportive of the trial court's prematurity ruling, Southern Ag points out that Judge Starret, sitting in the United States District Court for the Southern District of Mississippi, has rejected the same equitable argument made by Fleisher. *See Placid Ref. Co., LLC v. Stinson*, 2009 WL 4938911 (S.D. Miss. Dec. 14, 2009). This is the closest case on point that Southern Ag could find.

In the *Placid* case, the defendant, Stinson, signed a personal guaranty of the debt incurred by his company, Stinson Petroleum Co., Inc. ("Stinson Petroleum"), to the plaintiff, Placid Refining Co., LLC ("Placid"). *Id.* at *1. Stinson Petroleum defaulted on the debt and later filed bankruptcy. *Id.* Placid filed suit against Stinson individually based on his personal guaranty of the Stinson Petroleum debt. *Id.* One of the defenses raised by Stinson was that Placid's claim being pursued under the personal guaranty should have been held in abeyance until a resolution of the bankruptcy, which is essentially what the trial court did in this case. *Id.* at *4. Regarding this defense, the court found as follows:

The fact that Placid is also pursuing its rights in the bankruptcy has no bearing on the

> present liability of Mr. Stinson. If Placid recovers against Stinson personally and is actually paid, its bankruptcy claim will become moot. Likewise, if Placid receives any moneys through the bankruptcy proceeding, Stinson would be entitled to a credit therefor. Any other interpretation would defeat the obvious purpose of the personal guaranty.

Id. (emphasis added). Accordingly and/or alternatively, applying the sound logic of the United States District Court for the Southern District of Mississippi in *Placid*, this Court should reverse and render a judgment in favor of Southern Ag for at least the initial guaranteed amount of $3,150,000.00.

D. FLEISHER NEVER RAISED AN ISSUE AT THE TRIAL COURT LEVEL OF SOUTHERN AG'S POST FORECLOSURE EFFORTS TO MARKET THE SECURED COLLATERAL AND THEREFORE FLEISHER IS PRECLUDED FROM RAISING IT FOR THE FIRST TIME ON APPEAL

Fleisher's primary argument on appeal as to why he maintains that Southern Ag was not entitled to a judgment against him for his guaranties of the Mississippi Investors VII, X and XIV loans is that Southern Ag must "take the indebtedness out of the land following foreclosure." Fleisher Brief at p. 16. (emphasis added). In terms of taking the indebtedness out of the land, Fleisher refers to post foreclosure efforts of hiring consulting real estate brokers, obtaining market surveys, listing the property on on-line databases and publicly advertising the property for sale. Fleisher Brief at p. 20.

Fleisher generally cites to *Hartman v. McInnis*, 996 So. 2d 704 (Miss. 2007), *Wansley v. First Nat'l Bank of Vicksburg*, 566 So. 2d 1218 (Miss. 1990), and *Lake Hillsdale Estates v. Galloway*, 473 So. 2d 461 (Miss. 1985) in creating a "just and equitable test." Fleisher Brief at pg. 21. However, this new found position was never raised by Fleisher before the trial court.

Fleisher's Answer does not raise this as an Affirmative Defense. (R. at 32-34). Fleisher did not raise it in response to Southern Ag's motion for summary judgment (R. at 650-672) or in his own motion for summary judgment. (R. at 772-783). Fleisher did not raise this issue at oral argument on

the motions for summary judgment. (SA-R.E.14 pp. 1-43). Likewise, Fleisher did not raise this issue in arguments at trial. (SA-R.E.16 pp. 44-374). In fact, Fleisher never argued that he was not liable under his guaranties because Southern Ag did not adequately market the properties after foreclosure. He argues this as a defense for the first time on appeal.

It is well settled that a "[f]ailure to raise an issue in a trial court causes operation of a procedural bar on appeal." *Richmond v. EBI, Inc.*, 53 So. 3d 859, 864 (Miss. Ct. App. 2011). Accordingly, Fleisher is barred from claiming that Southern Ag is not entitled to a judgment against him due to Southern Ag's post foreclosure marketing efforts and the trial court should not be reversed as to the judgment rendered for the Mississippi Investors VII, X and XIV guaranties, because Fleisher never argued that Southern Ag must first adequately market and sell collateral before it can recover a judgment against him on his guaranties.

Yet, if the Court were to disagree that Fleisher is barred from arguing for the first time on appeal that he is not liable due to the post foreclosure marketing efforts by Southern Ag, then his position still fails as a matter of law. First, Fleisher's argument fails because none of the cases cited by Fleisher concern suits to enforce guaranties and further, they do not concern guaranties containing specified minimum, initial guaranteed amounts. Thus, this case is factually distinct from *Hartman*, *Wansley*, and *Lake Hillsdale Estates*. These cases do not say that a mortgagee cannot recover a judgment against a guarantor under the clear terms of the contract, without the mortgagee first endeavoring to collect the debt from collateral. Moreover, these cases do not say that a mortgagee cannot recover a judgment against a guarantor, unless it adequately markets collateral that has been foreclosed upon.

In fact, none of the cases cited by Fleisher are on point, because Southern Ag sued Fleisher on his guaranties and this is not a suit for a deficiency against the borrowing Mississippi Investors

entities, which are the primary obligors. All of the aforementioned cases relied upon by Fleisher concern deficiency suits against the primary obligors. Southern Ag tried to make this point to the trial court in arguing that because Fleisher guaranteed more than the deficiency amounts, Fleisher was liable for the full measure of Southern Ag's calculated deficiencies on the Mississippi Investors VII, X and XIV loans. However, because Fleisher defended the case from a standpoint of the necessity of establishing fair market values for deficiencies against obligors, Southern Ag put on evidence of the appraised fair market values. Yet, Southern Ag calls to the Court's attention that it is has been generally recognized that any requirement of "an appraisal of the foreclosed real property security before the court may issue a deficiency judgment has no application to an action against a guarantor, where the [requirement] has to do solely with actions for recovery of deficiency judgments on the principal obligation." 55 AM. JUR. 2D Mortgages §691 (2011).

Continuing with an analysis of the inapplicability of the cases cited by Fleisher, in the *Lake Hillsdale Estates* case, the borrowing entity, Lake Hillsdale Estates, filed suit against the trustee for the mortgagee asserting that the trustee breached a duty in selling the property for inadequate consideration, because the value of the collateral exceeded the indebtedness and exceeded the sales price at foreclosure. *Lake Hillsdale Estates*, 473 So. 2d at 463. The complaint was dismissed and the trial court made no finding as to the value of the collateral at the time of foreclosure. *Id.* After dismissing the complaint, the court granted a deficiency judgment upon motion for directed verdict, on the face of the cross-bill, for the difference between the bid price and the indebtedness. *Id.* at 466.

On appeal, the Mississippi Supreme Court considered the issue of whether the trial court erred in refusing to set aside the foreclosure sale for inadequacy of consideration. *Id.* at 465. Despite having no finding as to the fair market value at the time of sale, the supreme court held that "[a]bsent

that value, this Court cannot find that the sale price was such that shocks the conscience of the court." *Id.*

The supreme court also considered whether the trial court erred in granting a deficiency decree based upon the face of the cross-bill, without any evidence being presented at trial. *Id.* at 466. In so doing, the court cited to *Mississippi Valley Title Ins. Co. v. Home Constr. Co., Inc.*, 372 So. 2d 1270 (Miss. 1979). *Id.* at 466. The court recited the endeavor "to collect it out of the land" language in *Mississippi Valley* relied upon by Fleisher and in the same quotation, recited that "[a]ccordingly, no right to a deficiency judgment vests until plaintiff satisfies equity that it would be equitable, in light of the sales price, to authorize a deficiency judgment." *Id.* (emphasis added). Because the mortgagee was granted a judgment upon motion for directed verdict, the court held that the judgment was premature. *Id.* The case was reversed and remanded to the extent that the lender put on no evidence. *Id.* Therefore, the *Lake Hillsdale Estates* case is factually and procedurally distinct from this case and in no way suggests that a mortgagee cannot recover a judgment against a guarantor due to alleged insufficient marketing efforts post foreclosure.

The *Wansley* case does not relieve Fleisher either. Like, *Lake Hillsdale Estates*, the *Wansley* case does not involve a suit against a guarantor, nor a guaranty similar to the ones Fleisher was found liable under. Furthermore, in the *Wansley* case, the borrowers filed a suit to set aside the trustee's deeds from a foreclosure where First National Bank of Vicksburg was the lone bidder. *Wansley,* 566 So. 2d at 1219. The bank cross claimed, in part, for a deficiency judgment based upon the difference between the debt and the bid price it paid at foreclosure. *Id.* The Wansley's took issue with whether the trustee was truly independent and likewise disputed the bid price paid at foreclosure by the bank. *Id.*

Considering *Lake Hillsdale Estates*, other cases, and Mississippi Code governing foreclosure upon personal property held as collateral, the court opined that secured creditors authorized to foreclose must foreclose in a commercially reasonable manner. *Id.* at 225. *Wansley* focused upon the foreclosure process itself. Thus, *Wansley* does not apply to suits against guarantors, nor does it establish any post foreclosure burden upon foreclosing mortgagees so as to absolve Fleisher from his liability under the guaranties at issue.

Finally, like *Lake Hillsdale Estates* and *Wansley*, the *Hartman* case does not involve a guarantor's liability under a guaranty and does not remotely consider any dispute over post foreclosure efforts by a mortgagee. The *Hartman* case, in relevant part to Fleisher's arguments, dealt with the issue of whether the bank's bid prices represented the fair market values. *Id.* at 710. Reciting the general foreclosure language set forth in *Wansley* and *Lake Hillsdale Estates*, the court agreed that due to the bank's assessment of fair market value prior to foreclosure through "eyeballing" properties, there was insufficient evidence from which to determine whether a deficiency existed. *Id.* at 716. The case was reversed and remanded for a new hearing. *Id.* In contrast, Southern Ag had appraisals and further checked their validity through benchmarks prior to foreclosure. *Hartman* is factually unrelated to this case. Moreover, the plaintiffs, mortgagors in *Hartman* did not raise any issue of the bank's post foreclosure marketing efforts as a bar to a deficiency and it was not before the supreme court on appeal. In light of the aforementioned cases relied upon by Fleisher, it is clear that he offers no Mississippi precedent supporting his argument that Southern Ag is not entitled to a judgment against him because of alleged inadequate post foreclosure marketing efforts.

Added to this, "as a general rule, in the absence of statutes to the contrary, the measure of the liability of a guarantor of a mortgage debt, after the foreclosure of the mortgage and the bidding in of

the property by the mortgagee, is the amount of the deficiency on the foreclosure, including appropriate allowances for taxes, insurance, commissions, attorney's fees, and costs, rather than the mortgagee's ultimate loss after reselling the mortgaged property." 55 AM. JUR. 2D Mortgages §691 (2011). "The guarantor of a mortgage has no right to a reduction of his or her liability to the mortgagee where the mortgagee resells the property at a profit following the foreclosure. The same principle applies where the guarantor subsequently acquires the mortgaged property, that is, the guarantor need not account to the mortgagor for any profit made on a resale." 55 AM. JUR. 2D Mortgages §691 (2011). As such, what happens after foreclosure is not relevant to the extent of a guarantor's liability, does not operate to increase or reduce the liability, and this makes sense from the standpoint of achieving finality of judgments. This makes even more sense when applied to Fleisher's specific guaranties, because these guaranties specifically state that his obligations were not limited in any respect by Southern Ag's foreclosure rights, inability to foreclose or unwillingness to foreclose. Fleisher's post foreclosure argument should be rejected.

E. BECAUSE FLEISHER DOES NOT CONTEST THE ADEQUACY OF SOUTHERN AG'S BID PRICES AND DOES NOT SEEK TO HAVE THE FORECLOSURES SET ASIDE, HE FAILS TO OFFER ANY COGNIZABLE REASON TO REVERSE THE TRIAL COURT

Should the Court feel the need to go further in its analysis, Fleisher has conceded on appeal that he no longer contests the adequacy of Southern Ag's purchase prices for the properties securing the loans to Mississippi Investors VII, X and XIV and does not contest the foreclosures, much less contest the foreclosures for any equitable reasons. Because he does not contest the adequacy of the bid prices paid by Southern Ag at these three (3) foreclosures or the foreclosure process, this Court need not go any further in its analysis. These concessions moot any issue of the fair market values.

To the extent that Fleisher raised the defense before the trial court, Southern Ag, as the mortgagee, was only arguably required to prove that its purchase price was adequate and in order to

prove that its purchase price was adequate, it was required to establish the fair market value. *See Hartman*, 996 So. 2d at 711. Therefore, if Fleisher does not dispute the adequacy of Southern Ag's bid price, then any issue of fair market values raised by Fleisher on appeal offers no basis for this Court to reverse the trial court's findings of fact, conclusions of law, or corresponding judgment.

Even if the Court were to disagree with this reasoning, the Court should nonetheless uphold the judgment rendered against Fleisher due to his internally inconsistent positions. On one hand, Fleisher admits that Southern Ag's bid prices were adequate. Fleisher Brief at p. 10. Then in an effort to persuade this Court to reverse, Fleisher turns around and argues that Southern Ag failed to give him, as a guarantor, "commercially reasonable" credit for the collateral Southern Ag foreclosed upon while this suit was pending against him. Fleisher Brief at p. 19. This makes no sense and is further compounded by Fleisher's reliance upon Mississippi deficiency case law for mortgagors / mortgagees setting forth that in order for a court to determine the adequacy of a bid price, which is a question of law, Southern Ag was required to establish the fair market value, a question of fact. Fleisher Brief at p. 22. Had Fleisher conceded before the trial court that he did not contest the adequacy of the bid prices and was not raising this as a defense to his liability as a guarantor, then there would have been no need for Southern Ag to put on any evidence of its established fair market values.

Fleisher has now completely changed his legal position regarding the adequacy of the bid prices in pursuing this appeal. The crux of Fleisher's defense of this case and legal argument before the trial court was that Southern Ag had to bid its established fair market values at foreclosure and the failure to so bid relieved him from any liability under his guaranties. Be that as it may, Fleisher's agreement that Southern Ag's bid prices were adequate disposes of any other issue he attempts to

raise on appeal pertaining to the fair market values established by Southern Ag and this Court should uphold the judgment against Fleisher.

F. THE TRIAL COURT'S AWARD OF A JUDGMENT AGAINST FLEISHER SHOULD NOT BE REVERSED BECAUSE ITS DETERMINATION OF THE FAIR MARKET VALUES WAS SUPPORTED BY REASONABLE EVIDENCE

However, should the Court disagree that the issue of fair market values is not dispositive based upon Fleisher's admission that Southern Ag's bid prices were adequate, Southern Ag emphasizes again that the "findings of fact by a circuit court judge, sitting without a jury, will not be reversed on appeal where they are supported by substantial, credible, and reasonable evidence." *City of Laurel,* 21 So. 3d at 1179. Likewise, the "trial judge, sitting in a bench trial as the trier of fact, has the sole authority for determining the credibility of the witnesses." *Thompson ex rel. v. Thompson,* 925 So. 2d at 62.

Fleisher asserts that Southern Ag did not establish the fair market values for the Mississippi Investors VII, X and XIV collateral with "certainty" and therefore, Southern Ag is not entitled to a judgment against him. Fleisher Brief at pp. 21-27. Yet, a review of Fleisher's brief reveals that his entire argument is based upon the fact that he disagrees with the trial court's findings of fact as to the fair market values. Fleisher does not assert the trial court's findings of fact were not supported by substantial, credible, and reasonable evidence.

Fleisher's disagreement with the trial court's findings of fact is insufficient, as a matter of law, for this Court to reverse the trial court's findings on fair market values. This Court has repeatedly acknowledged that "[i]f there is substantial supporting evidence in the record, this Court will not reverse a trial court's findings, even if this Court disagrees with those findings." *University Med. Center v. Martin*, 994 So. 2d 740, 747 (Miss. 2008). Likewise, this Court has stated that "[t]he reviewing court must examine the entire record and must accept, 'that evidence which supports or

reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's findings of fact.'" *Id.*

There are multiple reasons why Fleisher's argument as to the fair market values should be rejected and the award of a judgment against him upheld. This Court should first note, as Southern Ag pointed out to the trial court during motion argument and at trial, that in Fleisher's motion for summary judgment, he took the position that there were no genuine issues of material fact as to the fair market values. (R. at 772-783) (SA-R.E.14 pp. 18-20, 30). Fleisher relied upon and agreed with Southern Ag's established fair market values in arguing that he was not liable under the guaranties, because Southern Ag's appraisals showed fair market values exceeding the loan balances. (R. at 663-665) (SA-R.E.16 pp. 352-363, SA-R.E.14 pp. 18-20). Yet, so as try to avoid a grant of Southern Ag's motion for summary judgment, Fleisher took the inconsistent position that he disputed them and only a trier of fact could determine the fair market values. (R. at 670-671).

Fleisher now on appeal continues to take an inconsistent position over Southern Ag's established fair market values in an effort to try to convince this Court to reverse. Fleisher asks the Court to reverse and render because Southern Ag "failed to establish the fair market value of the foreclosed properties thereby precluding a deficiency claim." Fleisher brief at p. 21. Then, Fleisher turns around and asks the Court to reverse and render, because Southern Ag's established fair market values represent the "commercially reasonable value" and a "surplus actually exists." Fleisher brief at p. 34-35. Taken together, Southern Ag once again asks that Fleisher be judicially estopped from taking inconsistent positions. "The doctrine of judicial estoppel precludes a party from asserting a position, benefitting from the position and then later in litigation retreating from that position." *See generally Dockins v. Allred,* 849 So. 2d 151, 155 (Miss. 2003).

Additionally, the judgment against Fleisher should be upheld, because there was ample

evidence in the record for the trial court to determine the fair market values for the collateral Southern Ag foreclosed upon. Southern Ag testified that prior to foreclosing on the Mississippi Investors VII, X and XIV collateral, it established the fair market values by checking the 2008 appraisals against its "benchmark updates." (R. pp. 69-70, 77-79) (SA-R.E.16 pp. 184-85). In pertinent part, Southern Ag testified,

> Q. Did Southern AgCredit consider whether or not that appraisal, even though it was done in 2008, still represented the market value for that property in 2010 on the date of foreclosure?
> A. We did. We continually looked at this loan situation and the underlying collateral. And we actually have an annual update that we perform in each of our areas about collateral values. We call them bench markup dates [sic], and from the time when this appraisal was performed in March of 2008 to the current date based upon our annual analysis, the overall market value in the area would not have indicated any kind of a significant change in the market values of these properties. So we did not order any appraisal.
>
> Q. So just to understand, it would be a fair assumption that the bank was comfortable with that appraisal as representing the fair market value at the time of foreclosure?
> A. We were.

(SA-R.E.16 p. 70). The appraisals relied upon and cross checked through Southern Ag's benchmark were also received into evidence and considered by the trial court without objection. (SA-R.E.16 pp. 13-14).

Notably, Fleisher did not offer any appraisals to contradict Southern Ag's appraised fair market values and the trial court recognized that absence in its findings of fact and conclusions of law. (R. at 1305). All that Fleisher offered by way of any evidence of fair market values was the lay opinion testimony of co-guarantor, Mike Adkinson, who admitted that he was also being sued by Southern Ag over the same guaranties, same loans and had a financial interest in the outcome of Fleisher's trial. (SA-R.E.16 pp. 269-271). Adkinson offered testimony as to fair market values, but the trial court

aptly recognized that the appraisals he based his lay opinions upon, were not offered at trial and Adkinson could not recall the "as is" figures from the appraisals. (R. at 1306).

The trial court also noted that Adkinson's testimony regarding timber values, to the extent that Fleisher attempted to make issue thereof, was not based upon a timber cruise, but rather a Mississippi State University general report multiplied by timber amounts. (R. at 1307).

Based upon the foregoing, the trial court correctly noted in its findings of fact and conclusions of law that (1) "there was no evidence presented which contradicted [the testimony of Southern Ag credit's representative]," (2) the "per acre values assessed in the 2008 appraisals were not attacked except by Adkinson's opinions," (3) "Adkinson's testimony was not supported by any documentation, (4) Adkinson's "values were not the 'as is' appraisals," (5) the "per acre values in the 2008 appraisals appear to be in line with the comparable sales listed for 2008," (6) "the per acre values in 2008 are only slightly less than those in the 2006 appraisals," (7) "Fleisher presented no credible evidence to rebut the per acre values of the 2008 appraisals," and (8) "Adkinson could not testify to the value of the properties 'as is' and it is undisputed that the properties have not actually been developed." (R. at 1310), (SA-R.E.16 pp. 269-271). Moreover, the trial court reasonably considered the credibility of the witnesses and found Adkinson's credibility on values to be less reliable.

After making these findings, the trial court took into account the timber values on the collateral. To the benefit of Fleisher, the trial court added the timber values to the 2008 established appraised fair market values for each piece of collateral. (R. at 1314-1317). Even with these timber values added, the trial court concluded that Southern Ag's bid prices were "adequate and reasonable." (R. at 1314-1317). Moreover and to even more of a benefit to Fleisher, the trial court added the timber values from the 2006 appraisals to the bid prices paid by Southern Ag in reaching the finding of fact and/or conclusion of law of the "commercially reasonable value" for which it gave Fleisher credit. (R.

at 1318).

The trial court's more than equitable application and addition of timber values to Southern Ag's bid prices is further evidenced by the fact that Mike Adkinson testified that in purchasing the collateral by and through Mississippi Investors VII, X and XIV, he did not give any separate consideration to the timber for value. Adkinson testified,

> Q. Just a couple of more questions, Your Honor. There was some questions that were asked yesterday of Southern Ag that had to do with timber values and all that in terms of fair market value and all that. When you actually negotiated the purchase prices for the contracts or buying the collateral early on, did you assign some timber values with those properties when you actually negotiated the contracts or did you just view the properties as a value as a whole?
> A. As a whole.

(SA-R.E.16 p. 316). Thus, even though the borrowing Mississippi Investors entities and primary obligors on the Notes did not consider the timber as adding a separate value on the collateral, the trial court gave Fleisher this benefit in reducing the amount of the judgment. Had the trial court not added the timber values, the judgment would have been the difference between Southern Ag's bid price and the total loan obligation established by Southern Ag.

So, it is surprising that Fleisher asks this Court to reverse the trial court's addition of the timber values to Southern Ag's bid prices, because the addition lowered the total amount of the judgment that the trial court awarded. Yet, if this Court agrees that the trial court should not have added the timber values, especially where the borrowing entities did not give any separate consideration to timber values in negotiating at arm's length, then Southern Ag submits that the judgment awarded should reflect the difference between the bid price and the total loan obligation established by Southern Ag at trial.

G. FLEISHER FAILS TO OFFER ANY BASIS FOR THIS COURT TO REVERSE THE AMOUNT OF THE JUDGMENT AWARDED BY THE TRIAL COURT

In a parting shot at the trial court, Fleisher claimed that the trial court employed a "cafeteria approach" of subtracting the bid price, plus the timber values, from the total loan obligation to reach the deficiency amounts for the Mississippi Investors VII, X and XIV loans. Fleisher brief at p. 31. Fleisher then goes on to criticize the trial court's methodology for reaching the "commercially reasonable value" for which it felt Fleisher was entitled to be given credit for under the facts of the case. Fleisher brief at pp. 31-33.

However, Southern Ag points out the obvious to this Court, which is that in criticizing the trial court's methodology for calculating the judgment, Fleisher does not explain how he contends the award should be calculated. Fleisher simply criticizes the trial court and then asks this Court to reverse without providing any reason why, as a matter of law, he thinks the amount of the award is incorrect. Further, Fleisher does not suggest how the amount should be determined. In other words, Fleisher says he does not like the way the trial court calculated the amount of the award, so therefore he should not be held liable for any amount. Fleisher's argument should be soundly rejected.

It is well settled in Mississippi that "[w]here the existence of damages has been established, the plaintiff will not be denied the damages awarded by a [fact finder] merely because a 'measure of speculation and conjecture is required' in determining the amount of the damages." *J.K v. R.K.*, 30 So. 3d 290, 299-300 (Miss. 2009). Similarly, this court has long recognized that a "party will not be able to escape liability because of a lack of a perfect measure of damages. *Progressive Cas. Ins. Co. v. All Care, Inc.*, 914 So. 2d 214, 221 (Miss. Ct. App. 2005) (emphasizing that sufficient proof "is that which is a reasonable basis for computation of damages and the best evidence obtainable under the circumstances of the case that will enable the trier of fact to arrive at a fair approximate estimate

of the loss").

Accordingly, to the extent that Fleisher asks this Court to reverse Judge Dodson on the basis of either the amount or calculation of the award, in light of the evidence considered by her in conjunction with Mississippi case law, Fleisher fails to offer any justification for reversing. The trial court had ample, sufficient evidence upon which to calculate the amount of deficiencies. Furthermore, even if the trial court were wrong, as suggested by Fleisher, in how it calculated the award, the trial court is not expected to be perfect, nor is there a requirement for exactness under Mississippi law.

H. ALTERNATIVELY, IF THIS COURT WERE TO REVERSE AS TO THE AMOUNT OF THE CALCULATED JUDGMENT AWARDED BY THE TRIAL COURT, THEN ANY SUCH REVERSAL SHOULD RESULT IN A GREATER JUDGMENT FOR SOUTHERN AG

Additionally and alternatively, even if Fleisher were correct in his argument that the trial court used an incorrect methodology in calculating the award, Southern Ag points out to the Court that its review of Mississippi case law suggests that in the absence of fraud, other inequitable conduct associated with the foreclosure process, or an inadequate bid price in relation to the established fair market value, the generally accepted method for determining mortgage deficiencies is to subtract the bid price from the total loan obligation.

Going as far back as the 1940's, the supreme court stated with clarity that "in the absence of allegations of facts constituting fraud, as well as clear and convincing proof thereof, the price at which property is sold under a foreclosure in pais is the full measure of credit that the grantors in a deed of trust may legally demand." *Home Owners Loan Corp. v. Wiggins*, 195 So. 339, 341 (Miss. 1940) (emphasis added) (reversing a verdict in favor of the debtor as to a deficiency). In the *Home Owners* case, the debtors made the same argument that Fleisher made before the trial court and now on appeal

as to no liability because of fair market value exceeding the debt. Fleisher brief at pp. 33-35; (R. at 650-671, 772-782); (SA-R.E.16 pp. 329-373). The debtors in *Home Owners* argued that they were not liable for any deficiency because they asserted that

> the property conveyed by their deed of trust and sold by the trustee to the [lender] was worth at the time of sale, at a fair case market value, a sum equal to or in excess of the entire indebtedness then due; hence the [lender] was not entitled to recover a deficiency judgment in any sum whatsoever of the fair market value of the collateral exceeded the indebtedness.

Id. at 340. In reversing, the court emphasized that because there were no facts to "render the sale fraudulent, so as to entitle the defendants to recoupment for the difference between the sales price at which the property sold and its reasonable market value at the time sale," the mortgagee was entitled to a peremptory instruction for "the balance due on the indebtedness after crediting the net proceeds of the sale have been clearly established . . . ." *Id.* at 341. (emphasis added).

Even in *Hartman*, the primary case relied upon by Fleisher for his fair market value exceeding the debt defense, the supreme court stated that it was "unable to determine whether the foreclosure sale price represented fair market value and thus, whether the difference between the sales price and the indebtedness accurately represents the deficiency." 996 So. 2d at 713. (emphasis added).

Thus, if this Court is inclined to reverse the trial court's award of damages as urged by Fleisher, because the award was allegedly based upon an incorrect calculation of the total amount of the deficiency, then any reversal should not be on the basis that Fleisher is not liable. Rather, any reversal of the trial court's award of damages should result in a greater judgment against Fleisher consistent with *Home Owners* case and Mississippi law, because the trial court reduced the amount of

the judgment by including the timber values in the deficiency calculations. The calculation of the deficiency should have been limited to subtracting the bid prices from the total loan obligations.

CONCLUSION

Because Fleisher guaranteed specific initial amounts for each loan at issue and because Fleisher was obligated to pay, at a minimum, the initial amounts set forth in each guaranty without regard to whether Southern Ag foreclosed on the collateral or not, the trial court erred in ruling that it was premature to award Southern Ag a judgment against Fleisher for his breach of the Mississippi Investors VIII guaranty. Likewise, based upon Fleisher's guaranties, as well as the additional evidence offered at trial, Judge Dodson correctly awarded Southern Ag a judgment against Fleisher for his Mississippi Investors VII, X and XIV obligations. Therefore, Southern Ag respectfully requests that this Court reverse and render a judgment against Fleisher for his guaranty of the loan to Mississippi Investors VIII, but yet uphold the judgment against Fleisher for his Mississippi Investors VII, X and XIV guaranties.

This the 4th day of May, 2011.

Respectfully submitted,
SOUTHERN AGCREDIT, FLCA

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CERTIFICATE OF SERVICE

I, JEFFREY M. WILLIAMS, do hereby certify that I have this date caused to be served via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing RESPONSE AND CROSS APPEAL BRIEF OF APPELLEE to the following:

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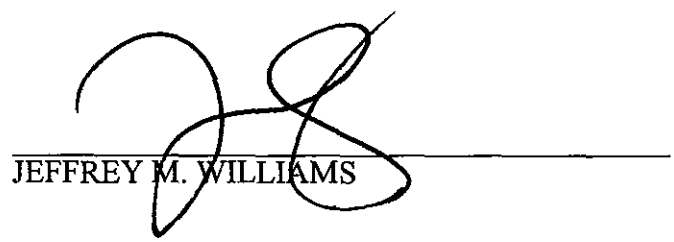
This the 4th day of May 2011.



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