

**IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**DAVID E. FLEISHER**

**APPELLANT**

**VERSUS**

**CASE NO. 2010-CA-01594**

**SOUTHERN AGCREDIT, FLCA**

**APPELLEE**

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

**REPLY BRIEF OF APPELLANT/RESPONSE BRIEF OF CROSS-APPELLEE**

**ORAL ARGUMENT REQUESTED**

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## TABLE OF CONTENTS

TABLE OF CONTENTS .....	<u>i</u>
TABLE OF AUTHORITIES .....	<u>ii</u>
I. ARGUMENT .....	<u>1</u>
A. THE TRIAL COURT WAS CORRECT IN RULING THAT IT WOULD BE PREMATURE TO RENDER JUDGMENT AGAINST FLEISHER ON HIS GUARANTY OF THE MISSISSIPPI INVESTORS VIII NOTE .....	<u>1</u>
1. Southern AgCredit misinterprets the meaning and purpose of the MS VIII Guaranty. ....	<u>2</u>
2. Southern AgCredit did not present sufficient evidence of the actual indebtedness owed under the MS VIII loan. ....	<u>4</u>
3. The trial court’s “prematurity” ruling is logical and equitable given the facts of the case. ....	<u>7</u>
B. FLEISHER IS ENTITLED TO RAISE ON APPEAL SOUTHERN AGCREDIT’S LACK OF POST-FORECLOSURE EFFORTS TO SELL THE SECURED COLLATERAL .....	<u>9</u>
1. Fleisher is entitled to raise Southern AgCredit’s lack of post-foreclosure efforts in order to show that Southern AgCredit failed to meet its burden of proof to establish its damages in this cause. ....	<u>9</u>
2. The distinction between a suit on the deficiency balance and a suit for a deficiency is irrelevant because under the Guaranty, the deficiency balance became the indebtedness after foreclosure. ....	<u>11</u>
C. FLEISHER DOES NOT TAKE INCONSISTENT POSITIONS ON APPEAL BY NOT CONTESTING THE PURCHASE PRICES RECEIVED AT THE FORECLOSURES .....	<u>12</u>
D. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST FLEISHER BECAUSE THE FAIR MARKET VALUES WERE NOT SUPPORTED BY REASONABLE EVIDENCE. ....	<u>13</u>
1. Fleisher does not take an inconsistent position on appeal relating to the fair market values of the properties. ....	<u>14</u>
2. Fleisher stands by his argument that the record evidence did not support a deficiency award in this cause. ....	<u>15</u>
E. SOUTHERN AGCREDIT DID NOT ESTABLISH THE EXISTENCE OF DAMAGES IN THE COURT BELOW .....	<u>16</u>
II. CONCLUSION .....	<u>18</u>
CERTIFICATE OF SERVICE .....	<u>19</u>

## TABLE OF AUTHORITIES

### CASES

<u>Adams v. U.S. Homecrafters, Inc.</u> , 744 So.2d 736, 740 (Miss.1999) .....	10
<u>Allied Steel Corp. v. Cooper</u> , 607 So.2d 113, 118 (Miss. 1992) .....	12
<u>Bank of McLain v. Pascagoula Nat'l Bank</u> , 117 So. 124, 126 (Miss. 1928) .....	3
<u>Evans v. Clemons</u> , 872 So.2d 23, 29 (Miss. App. 2003) .....	10
<u>Hartman v. McInnis</u> , 990 So.2d 704, 711 (Miss. 2007) .....	10, 16
<u>Henry v. Moore</u> , 9 So.3d 1146, 1153 (Miss.App. 2008)(citing, <i>Royer Homes</i> , 857 So.2d at 753) . .....	2
<u>J.K. v. R.K.</u> , 946 So.2d 764, 777 (Miss. 2007) .....	7, 16
<u>Jones v. Miss. Farms Co.</u> , 76 So. 880, 884 (Miss. 1917) .....	2
<u>Lake Hillsdale Estates, Inc., v. Galloway</u> , 473 So.2d 461 (Miss. 1985) .....	10
<u>McKee v. McKee</u> , 568 So.2d 262, 266 (Miss. 1990) .....	2
<u>Medlin v. Hazlehurst Emergency Physicians</u> , 889 So.2d 496, 499 (Miss.2005) .....	7
<u>Miss. State Highway Comm'n v. Patterson Enters., Ltd.</u> , 627 So.2d 261, 263 (Miss.1993) .....	2
<u>Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.</u> , 857 So.2d 748, 751 (Miss. 2003) ...	2, 3
<u>Simmons v. Bank of Miss.</u> , 593 So.2d 40, 42-43 (Miss. 1992) .....	2
<u>Wade v. Selby</u> , 722 So.2d 698, 701 (Miss.1998) .....	3
<u>Wansley v. First Nat'l Bank of Vicksburg</u> , 566 So.2d 1218, 1225 (Miss. 1990) .....	10
<u>Warwick v. Gautier Utility Dist.</u> , 738 So.2d 212, 214 (Miss.1999) .....	2

## **I. ARGUMENT**

### **A. THE TRIAL COURT WAS CORRECT IN RULING THAT IT WOULD BE PREMATURE TO RENDER JUDGMENT AGAINST FLEISHER ON HIS GUARANTY OF THE MISSISSIPPI INVESTORS VIII NOTE**

The Appellee, Southern AgCredit, FLCA ("Southern AgCredit"), has cross-appealed from the trial court's decision that it would be premature to award Southern AgCredit a judgment against the Appellant, David E. Fleisher ("Fleisher"), based on his Guaranty of the promissory note issued to Mississippi Investors VIII, LLC ("MS VIII"). Southern AgCredit essentially argues that the trial court's ruling ignores the language of Fleisher's MS VIII Guaranty and renders the Guaranty meaningless. Southern AgCredit further opines that the trial court's decision is not supported by Mississippi law.

Fleisher, on the other hand, would show that the trial court's decision was correct given the circumstances of the case and that the ruling should be affirmed. Southern AgCredit completely misinterprets the meaning and purpose of the MS VIII Guaranty. It tries to persuade this Court that Fleisher is liable for his full percentage of the MS VIII loan, or \$3,150,000.00. However, the Guaranty clearly states that said figure is an initial amount guaranteed by Fleisher. By signing the Guaranty, Fleisher agreed to be responsible for the indebtedness of MS VIII evidenced by the note to Southern AgCredit. The indebtedness could be \$3,150,000.00. It could be more or it could be less depending on whether payments were made or were not made by MS VIII. Southern AgCredit failed to present sufficient evidence at the trial of this cause that would have established the actual indebtedness under the Mississippi VIII loan. Due to the lack of evidence, the trial judge could not make an informed decision as to the true debt owed from MS VIII and her decision to abstain from

granting judgment against Fleisher on the Guaranty should be affirmed.

**1. Southern AgCredit misinterprets the meaning and purpose of the MS VIII Guaranty.**

Southern AgCredit has misinterpreted the true meaning and purpose of the MS VIII Guaranty. Southern AgCredit contends that Fleisher guaranteed the specific amount of \$3,150,000.00 when he signed the Guaranty. However, pursuant to the language of the Guaranty, that figure was only an initial amount and does not necessarily represent the true indebtedness Fleisher agreed to be responsible for under the Guaranty as of the date of the trial.

Questions concerning the construction and interpretation of contracts are questions of law reviewed de novo. *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So.2d 748, 751 (Miss. 2003)(see also, *Warwick v. Gautier Utility Dist.*, 738 So.2d 212, 214 (Miss.1999); *Miss. State Highway Comm'n v. Patterson Enters., Ltd.*, 627 So.2d 261, 263 (Miss.1993)). “The general rule is the intention of the parties must be drawn from the words of the whole contract, and if, viewing the language used, it is clear and explicit, then the court must give effect to the contract unless it contravenes public policy.” *Jones v. Miss. Farms Co.*, 76 So. 880, 884 (Miss. 1917). The Court should look to the “four corners” of the contract whenever possible to determine how to interpret it. *McKee v. McKee*, 568 So.2d 262, 266 (Miss. 1990). “Therefore, when interpreting a contract, the court's concern is not nearly so much with what the parties may have intended but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy.” *Simmons v. Bank of Miss.*, 593 So.2d 40, 42-43 (Miss. 1992).

If the court is unable to clearly ascertain the parties' intent by the words of the contract, then the court should apply the discretionary canons of contract construction. *Henry v. Moore*, 9 So.3d

1146, 1153 (Miss.App. 2008)(citing, *Royer Homes*, 857 So.2d at 753). “Foremost among these canons is that when the language of an otherwise enforceable contract is subject to more than one fair reading, the reading applied will be the one most favorable to the non-drafting party.” *Id.* In other words, “any ambiguities in the contract will be construed against the party who drafted it.” *Id.* (citing, *Wade v. Selby*, 722 So.2d 698, 701 (Miss.1998)).

A guaranty is a type of contract defined as an undertaking or promise that is collateral to the primary or principal obligation and that binds the guarantor to performance in the event of nonperformance by the principal obligor. *Black’s Law Dictionary* 634 (5<sup>th</sup> Ed. 1979). As such, the above rules of construction and interpretation should be applied to a guaranty as in any other contract. *Bank of McLain v. Pascagoula Nat’l Bank*, 117 So. 124, 126 (Miss. 1928).

The MS VIII Guaranty does not give Southern AgCredit a vested right to a \$3,150,000.00 payment from Fleisher. Its true purpose is to guarantee whatever the indebtedness is under the MS VIII note. The relevant language of the Guaranty, which defines Fleisher’s obligations, states the following:

In acknowledgment of the fact that Mississippi Investors VIII, LLC, referred to in this Guaranty as “Borrower” (whether one or more) is or will become indebted to Creditor, and for valuable consideration, the receipt and adequacy of which are acknowledged, and in partial inducement for Creditor to make a loan to Borrower in the amount of \$9,000,000.00, **the undersigned Guarantor by execution of this Guaranty guarantees to Creditor the prompt payment at maturity, and at all times after maturity, a specified percentage as set forth herein of the Guaranteed Indebtedness as defined in Paragraph 1 of this Guaranty, on the following terms and conditions:**

Specified Percentage - The 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 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.

1. **The term “Guaranteed Indebtedness,” as used in this Guaranty, includes: that certain loan carried on the books of Creditor as Loan Number 863078, and shall include the following:**
  - (a) **All indebtedness of every kind and character, without limit in amount, whether now existing or arising after date of execution of this Guaranty, of Borrower to Creditor, relating to that certain promissory note in the original principal amount of \$9,000,000.00, by and between Mississippi Investors VIII, LLC as maker and the Land Bank South FLCA as payee.**

(R. at 446).

The above language in the Guaranty does not support Southern AgCredit’s position that Fleisher is liable to it for \$3,150,000.00. Said figure only represents the initial percentage amount attributable to Fleisher on the initial loan amount of \$9,000,000.00. It does not account for any payments made or not made by MS VIII following issuance of the loan nor does it account for any payments made by MS VIII during the pendency of MS VIII’s Chapter 11 bankruptcy.

The Guaranty clearly states that Fleisher guarantees “all indebtedness of every kind and character” arising under the MS VIII loan. So, in order to obtain a judgment of \$3,150,000.00 against Fleisher, Southern AgCredit must first prove that the actual indebtedness under the MS VIII loan is \$9,000,000.00. As will be shown below, Southern AgCredit failed to present sufficient evidence showing the actual indebtedness owed and therefore, cannot recover the amount requested of \$3,150,000.00 on appeal.

2. **Southern AgCredit did not present sufficient evidence of the actual indebtedness owed under the MS VIII loan.**

Southern AgCredit called Benjamin Elliot ("Elliot"), its chief operations and risk management officer, to testify in its case in chief. In relation to the MS VIII note, Elliot testified that it was a \$9,000,000.00 loan issued to MS VIII with the first payment due on January 1, 2007, being an interest payment only, and thereafter principal and interest payments due on the first of each following month until the balance was paid in full. (Tr. Trans. 52, lines 13-29). As to the Guaranty executed by Fleisher relating to the MS VIII note, Elliot testified that the initial dollar amount guaranteed was \$3,150,000.00, that demand was made on Fleisher to pay that amount, and that Fleisher did not make payment to Southern AgCredit following demand. (Tr. Trans. 57, lines 27-29; Tr. Trans. 58, lines 1-11). Finally, Elliot testified that Southern AgCredit had not foreclosed on the property securing the MS VIII note and that it sought the full percentage amount from Fleisher recited in the Guaranty of \$3,150,000.00. (Tr. Trans. 86, lines 19-29; Tr. Trans. 87, lines 1-2).

On cross examination, Elliot admitted that the loan balance on the MS VIII note was less than \$9,000,000.00. (Tr. Trans. 106, 23-29; Tr. Trans. 107, 1-12). He later stated that as of February 24, 2010, the principal balance on the loan was \$8,799,499.44 but did not know the amount of interest, costs and attorney's fees that were owed on the loan. (Tr. Trans. 131, lines 12-29; Tr. Trans. 132, lines 1-8).

Elliot testified about MS VIII's pending Chapter 11 bankruptcy. He stated that MS VIII had filed a plan of reorganization with the bankruptcy court and that Southern AgCredit had neither consented nor objected to the proposed plan. (Tr. Trans. 142, lines 2-19). He further testified that the plan of reorganization proposed to capitalize the principal balance with the unpaid and accrued interest that were not covered by the adequate protection payments already submitted by MS VIII in the bankruptcy, and to attempt to sell some of the property securing the MS VIII loan. (Tr. Trans.



143, lines 4-8).

After a brief re-direct examination, the trial judge questioned Elliot. Among other things, she inquired about the adequate protection payments made by the Mississippi Investors entities, including MS VIII, to Southern AgCredit in the bankruptcy on account of the four loans that are the subject of this lawsuit. (Tr. Trans. 220, lines 22-29; Tr. Trans. 221, lines 1-22). It should be noted that a detailed breakdown of the adequate protection payments were not presented for the trial court's review nor did Southern AgCredit provide the exact amount of indebtedness under the MS VIII note. Southern AgCredit proceeded in the court below and on appeal, on the premise that Fleisher signed the Guaranty which made him liable for his full initial percentage amount of \$3,150,000.00 regardless of the actual indebtedness owed under the MS VIII note.

Pursuant to Fleisher's interpretation of the Guaranty, he was initially liable to Southern AgCredit for his full percentage amount of \$3,150,000.00 when the loan of \$9,000,000.00 was made. However, that percentage amount could change depending on the actual indebtedness on the loan. This could best be explained by the following hypothetical. MS VIII made payments on the note for a period of time and then ceased making payments such that the outstanding indebtedness on the note was \$6,000,000.00. At that time, Fleisher would be liable for his percentage of the indebtedness (140% of 25% of \$6,000,000.00) which equals \$2,100,000.00.

Fleisher's interpretation is a far more logical interpretation in this situation as it accounts for and relates to the actual indebtedness on the loan. If the Court were to follow Southern AgCredit's interpretation, Fleisher's purported liability of \$3,150,000.00 would not be derived from the actual indebtedness but only from the initial indebtedness when the loan was made. Southern AgCredit provided no evidence at trial as to the actual indebtedness owed by MS VIII and therefore no

determination of Fleisher's percentage of that indebtedness can be adjudicated.

**3. The trial court's "prematurity" ruling is logical and equitable given the facts of the case.**

The trial court correctly found that it was premature to award Southern AgCredit a judgment based on the Guaranty of the MS VIII note. Aside from the fact that Southern AgCredit did not prove the actual indebtedness under the loan, the MS VIII bankruptcy certainly had the potential to affect Fleisher's liability to Southern AgCredit. The trial court recognized this, seeing the possibility for a "double recovery" by Southern AgCredit and rightfully decided not to grant judgment.

It is well settled that Mississippi does not endorse double recovery. *J.K. v. R.K.*, 946 So.2d 764, 777 (Miss. 2007). "Double recovery is a tort doctrine that prevents unjust enrichment by precluding a recovery of the same damages multiple times or beyond 100% of the judgment." *Id.* (See also, *Medlin v. Hazlehurst Emergency Physicians*, 889 So.2d 496, 499 (Miss.2005) holding that a plaintiff may only recover once for his damages). The inquiry to determine whether the theory of double recovery applies is simply whether the claimant is attempting to obtain payment of his or her monetary loss more than once. *Id.*

In the *J.K.* case, this Court was asked to determine whether a chancery court judgment for property distribution payments should be stayed due to pending federal litigation involving the same debt. In finding that the judgment should be stayed, this Court opined:

**"At this time the occurrence of J.K.'s double recovery is uncertain. As alternative relief, R.K. requests from this Court a stay of the execution of the judgment in chancery court until the appeal in the Fifth Circuit is resolved. We grant that request. The execution of the chancery court order should have been stayed until the Fifth Circuit issued a decision. If the district court award is affirmed, the chancery court must grant R.K. relief from its judgment in order to prevent double recovery, and conversely, upon reversal the chancery court must deny R.K. relief and require payment. Accordingly, the chancery**

court erred in its denial of relief to R.K. under Rule 60(b).”

*Id.* (emphasis added).

In the case at bar, Southern AgCredit had the potential to obtain “double recovery” at the time of trial due to MS VIII’s bankruptcy. The trial court found that “the evidence at trial was uncontroverted that (1) adequate protection payments are still being made by Mississippi Investors VIII on the loan and (2) that there was a pending proposed reorganization plan which included certain payments on the loan made to Mississippi Investors VIII and a continuation of the terms of the original note.” (R. at 1247). The trial court further noted,

“if a judgment were to be entered here in favor of Southern AgCredit and either the Bankruptcy Court approved some reinstatement of the loan or the Bankruptcy Court lifted the stay to allow foreclosure on the subject property, Fleisher would still have a valid and enforceable judgment against him for the full amount claimed by Southern AgCredit even though monies would be being received by Southern AgCredit from either a foreclosure or continuation of payments on the loan by Mississippi Investors VIII. This would be patently inequitable.”

(R. at 1247-48).

The trial court foresaw the possibility of Southern AgCredit receiving a double recovery if it were to grant judgment against Fleisher on the MS VIII loan and ruled that it would be “unconscionable to apply the terms of the guaranty to the [MS VIII] loan based on the evidence in this record at this time.” (R. at 1248). The trial court’s logic and reasoning was sound and practical given the facts of the case. This determination by the Court below, coupled with the fact that Southern AgCredit did not prove the overall indebtedness on the MS VIII loan, mandates that it would have been error for the trial to have granted judgment against Fleisher on the MS VIII loan. Therefore, this Court should deny Southern AgCredit’s appeal and affirm the trial court’s decision as to the MS VIII loan.

**B. FLEISHER IS ENTITLED TO RAISE ON APPEAL SOUTHERN AGCREDIT'S LACK OF POST-FORECLOSURE EFFORTS TO SELL THE SECURED COLLATERAL**

In its response brief, Southern AgCredit contends that Fleisher cannot argue for the first time on appeal that it made no efforts to market the property securing the loans to Mississippi Investors VII, LLC ("MS VII"), Mississippi Investors X, LLC ("MS X"), and Mississippi Investors XIV, LLC ("MS XIV") after foreclosure because Fleisher did not raise the issue at any time in the proceedings below. Southern AgCredit further asserts that even if Fleisher were allowed to argue the issue, the authorities cited by Fleisher are not on point as the cause of action was on the guaranties rather than to recover a deficiency against the primary obligors.

Fleisher would show that he is entitled to argue Southern AgCredit's lack of post-foreclosure efforts to market the properties on appeal is "part and parcel" of Fleisher's argument that Southern AgCredit failed to make a prima facie case on its right to assert the deficiency against the guarantors of the indebtedness under the MS VII, MS X, and MS XIV loans. Fleisher would also show that Southern AgCredit's attempt to distinguish between a guaranty suit and a deficiency suit is specious at best. After foreclosure, the deficiency is the indebtedness owed under loans and the right to proceed on the guaranty is controlled by the validity, enforceability and quantum of the underlying debt. Therefore, Fleisher's case law is on point and should be considered.

**1. Fleisher is entitled to raise Southern AgCredit's lack of post-foreclosure efforts in order to show that Southern AgCredit failed to meet its burden of proof to establish its damages in this cause.**

Fleisher maintains on appeal that Southern AgCredit failed to meet its burden of proof to establish its damages with certainty in the court below. As such, Fleisher is entitled to direct this Court's attention to the instances showing how Southern AgCredit failed to meet its burden.

The plaintiff carries the burden of proof to establish his damages. *Evans v. Clemons*, 872 So.2d 23, 29 (Miss. App. 2003)(citing *Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736, 740 (Miss.1999)). Damages must be proved with sufficient certainty as to remove them from the realm of mere speculation or conjecture. *Id.* A party will not be barred from recovering because he cannot provide a perfect measure of his damages. *Id.* The question is whether the judgment is based upon excessive speculation. *Id.*

With reference to the MS VII, MS X, and MS XIV loans, Fleisher asserts on appeal that Southern AgCredit failed to meet its burden to establish with certainty the indebtedness under each loan. The facts of this case show that Southern AgCredit foreclosed on the collateral securing each loan. After the foreclosures took place, any remaining deficiency that resulted, if any, is in fact the indebtedness owed under the loans and, pursuant to the Guaranties, Fleisher would be liable for that indebtedness. Therefore, it was necessary to perform a deficiency analysis because it is that deficiency indebtedness (and Southern AgCredit's right to pursue same) which is the debt that is guaranteed.

In arguing that Southern AgCredit did not sufficiently meet its burden, Fleisher cited to the *Hartman*<sup>1</sup> case, the *Wansley*<sup>2</sup> case, and the *Lake Hillsdale*<sup>3</sup> case. All of these cases concern deficiency balances after foreclosure. In interpreting the holdings of those cases, Fleisher has maintained that Southern AgCredit failed to meet its burden to prove its damages because it did not present any evidence of its attempts to collect the indebtedness out of the land following foreclosure.

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<sup>1</sup>*Hartman v. McInnis*, 990 So.2d 704, 711 (Miss. 2007).

<sup>2</sup>*Wansley v. First Nat'l Bank of Vicksburg*, 566 So.2d 1218, 1225 (Miss. 1990).

<sup>3</sup>*Lake Hillsdale Estates, Inc., v. Galloway*, 473 So.2d 461 (Miss. 1985)

This was not an attempt by Fleisher to assert a new defense in the matter on appeal as Southern AgCredit suggests. Fleisher merely addresses Southern AgCredit's shortfalls in pinpointing the amount of indebtedness owed on the loans. Therefore, Fleisher was completely within his rights to raise this issue on appeal as Southern AgCredit had the burden to establish its damages (the indebtedness) with reasonable certainty.

**2. The distinction between a suit on the deficiency balance and a suit for a deficiency is irrelevant because under the Guaranty, the deficiency balance became the indebtedness after foreclosure.**

Southern AgCredit goes to great lengths to inform this Court that its cause of action in the court below was a suit on the guaranties and not a suit for deficiencies. In making this distinction, Southern AgCredit argues that none of the cases cited by Fleisher are on point because their common theme is a deficiency against the primary obligor as opposed to a suit on the guaranty against the guarantor. See, Southern AgCredit's Brief at pgs. 25-26.

Fleisher does not disagree that the nature of Southern AgCredit's lawsuit was to enforce the guaranties. However, Fleisher does take issue with the distinction Southern AgCredit tries to make in arguing that Fleisher's authorities do not apply. By signing the guaranties associated with the MS VII, MS X and MS XIV loans, Fleisher agreed to be personally liable for the indebtedness attributable to the entities under the loans. When Southern AgCredit foreclosed on the properties securing the notes, it was required to give the entities a credit against the loan balances thereby reducing the indebtedness due from the entities. Southern AgCredit had the burden to prove the actual indebtedness which, for all practical purposes, would be the deficiency balance after foreclosure. In other words, after foreclosure, the deficiency balance became the indebtedness owed under each loan. Fleisher's liability and exposure can never be greater under the Guaranty than the

liability of the primary obligor on the Note.

Following foreclosure, it became necessary to perform a deficiency analysis to determine the resulting indebtedness under the loans. Fleisher has cited to *Hartman*, *Wansley*, and *Lake Hillsdale* as those cases lay out the legal framework for analyzing a deficiency claim after foreclosure on secured property. Therefore, Fleisher's authorities are on point since the cases outline the necessary procedure for determining the indebtedness under a loan after foreclosure on the secured property.

**C. FLEISHER DOES NOT TAKE INCONSISTENT POSITIONS ON APPEAL BY NOT CONTESTING THE PURCHASE PRICES RECEIVED AT THE FORECLOSURES**

Southern AgCredit next argues that Fleisher does not dispute the adequacy of the bid prices received at foreclosure and therefore, any issue of fair market values raised by Fleisher on appeal offers no basis to reverse the trial court's ruling. It further opines that Fleisher takes inconsistent positions on appeal by, on the one hand, not contesting the bid prices and on the other hand, arguing that Fleisher did not receive commercially reasonable credit for the collateral after foreclosure.

Southern AgCredit completely misses the point Fleisher makes in his Appellant's brief. Again, Southern AgCredit failed to prove the indebtedness owed under the loans to the Mississippi Investors entities. To accurately determine the indebtedness, a deficiency analysis was necessary after foreclosures took place on the secured properties. In his original brief, Fleisher directed this Court's attention to two separate analyses which relate to foreclosure law in Mississippi. First, is the fact that Fleisher was not seeking to have the foreclosures set aside. Under Mississippi law, absent any irregularity in the conduct of the foreclosure sale, it may not be set aside **unless the sales price is so inadequate as to shock the conscience of the court or to amount to fraud.** *Allied Steel Corp. v. Cooper*, 607 So.2d 113, 118 (Miss. 1992)(emphasis added). Fleisher does not challenge

the bid prices for the purpose of setting aside the sales themselves because, pursuant to Mississippi law, the actual prices bid were not so inadequate to overturn the foreclosures.

However, Fleisher does challenge the right of Southern AgCredit to a deficiency award after foreclosure. Under *Wansley*, the mortgagee has no right to a deficiency award until he satisfies the court that it would be equitable, in light of the sales price, to authorize a deficiency judgment. *Wansley v. First Nat'l Bank of Vicksburg*, 566 So.2d 1218, 1225 (Miss. 1990). "Something more than a difference between the price paid at foreclosure and the amount of the indebtedness must be demonstrated before the mortgagee is entitled to a deficiency judgment." *Id.* at 1224.

Southern AgCredit did not present sufficient evidence of its right to a deficiency after foreclosure which would support a finding of liability on the guaranties and that of a deficiency. Calling this Court's attention to the two separate and distinct analyses relating to foreclosure law is not taking inconsistent positions. A bid price can be adequate so that it withstands an attack on the validity of the foreclosure itself, but insufficient to support a deficiency award. Fleisher does not question the adequacy of the bid prices to validate the foreclosure sale itself. He does contest the propriety of a deficiency award given the facts and circumstances of this case. Therefore, these are not inconsistent positions as Southern AgCredit suggests.

**D. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST FLEISHER BECAUSE THE FAIR MARKET VALUES WERE NOT SUPPORTED BY REASONABLE EVIDENCE.**

Southern AgCredit contends that it provided substantial evidence in the trial court below to support the deficiency awards granted in this cause. In so arguing, it first asserts that Fleisher is taking inconsistent positions on appeal regarding the fair market values of the properties and then states that there was ample evidence in the record to determine the fair market values for the



collateral securing the loans.

Fleisher's position is not inconsistent on appeal. Second, Fleisher would again show that the evidence in the record did not support a deficiency award in this cause.

**1. Fleisher does not take an inconsistent position on appeal relating to the fair market values of the properties.**

Southern AgCredit remarks that Fleisher has taken inconsistent positions on appeal in relation to the fair market values of the properties. According to Southern AgCredit, the inconsistency appears in Fleisher's original brief where he first argues that Southern AgCredit failed to establish the fair market value of the properties (Fleisher brief at pg. 21) and then states that Southern AgCredit's established fair market values represent the "commercially reasonable value" and a "surplus actually exists". (Fleisher brief at pgs. 34-35). Southern AgCredit completely misunderstands Fleisher's argument on appeal.

Fleisher's argument on appeal is that Southern AgCredit did not meet its burden of proof to establish deficiencies in this cause. One of the bases for this contention was that Southern AgCredit failed to establish the fair market values of the properties it sold at foreclosure. *See*, Fleisher brief at pgs. 15-27. Fleisher then argued that the trial court erred by adding the bid prices received at foreclosure to the 2006 timber appraisals to calculate the deficiencies. In making this argument, Fleisher asserted that the fair market values at the time of the foreclosure should have been used to determine the deficiencies as opposed to the bid prices. *Id.* at pg. 33. As there were no 2010 appraisals provided by Southern AgCredit, Fleisher, "for the sake of argument", showed the Court how the deficiencies would have been calculated using the fair market values contained in the 2008 appraisals and the 2006 timber appraisals which consequently, created surpluses using those figures.

*Id.* at pgs. 33-34. Nevertheless, Fleisher steadfastly maintained that “the trial court erred in applying the 2010 bid prices and the 2006 timber values in assessing and finding deficiencies in this cause.” *Id.* at pg. 35. This does not constitute inconsistent positions as to Fleisher’s position that the fair market values of the secured properties were not established by Southern AgCredit as was required to meet its burden of proof.

**2. Fleisher stands by his argument that the record evidence did not support a deficiency award in this cause.**

Southern AgCredit maintains that there was ample evidence of record for the trial court to determine the fair market values for the collateral which in turn, led to the deficiency balances adjudged in this cause. In response, Fleisher would adopt and incorporate herein his position that the trial court erred in finding deficiencies in this cause.

Fleisher’s primary stance on appeal is that the trial court erred (1) by noting the errors in the 2008 appraisals and the lack of relevancy to the 2010 foreclosures, yet notwithstanding those errors, the Court relied on them to establish a deficiency, and (2) by utilizing the bid prices from the foreclosure sales and the 2006 timber appraisals to arrive at deficiencies. *See*, Fleisher brief at pgs. 27. As to his first assignment of error, Fleisher directed this Court’s attention to the glaring errors found in the 2008 appraisals (*i.e.*, no accounting for timber, no accounting for reduction in land size) which the trial judge referenced but nevertheless relied upon as basis for the deficiency determination. *Id.* at pg 28. As to his second assignment of error, Fleisher maintained that the trial court erred by creating its own values in determining the deficiencies against him by using the evidence of record. *Id.* at pg. 29.

The inconclusive evidence submitted by Southern AgCredit was not a sufficient basis to

establish deficiencies in this cause. The true fair market values of the properties at the time of the foreclosures in 2010 cannot be ascertained by taking the values recited in the 2008 appraisals and adding to that the values recited in the 2006 timber appraisals. In *Hartman*, this Court stated that to determine the commercially reasonable value of the collateral in satisfying the debt, the mortgagee **must** establish the fair market value of the property sold at foreclosure. *Hartman v. McInnis*, 990 So.2d 704, 711 (Miss. 2007). Southern AgCredit failed to do this and it was error for the court below to render judgment against Fleisher with no true showing of the fair market values of the properties as of the date of the foreclosure sale.

**E. SOUTHERN AGCREDIT DID NOT ESTABLISH THE EXISTENCE OF DAMAGES IN THE COURT BELOW**

Southern AgCredit maintains that Fleisher fails to offer any basis for this Court to reverse the amount of judgment awarded by the trial court. In so arguing, it states that “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” and further states that he “does not suggest how the amount should be determined.” *See*, Southern AgCredit brief at pg. 36. In support thereof, Southern AgCredit cites to the *J.K.* case which stands for the proposition that when the existence of damages has been established, the plaintiff will not be denied the damages awarded merely because a ‘measure of speculation and conjecture is required’ in determining the amount of the damages. *J.K.*, 30 So.3d at 299-300.

Fleisher provides a basis in law to reverse the trial court’s ruling on the premise that Southern AgCredit did not satisfy its burden to prove that the deficiencies after foreclosure were equitable. Fleisher does not need to provide this Court with a way to measure the damages because Southern

AgCredit carried the burden at the trial below and wholly failed to meet it. This notwithstanding, Fleisher would contend that an appraisal by a qualified appraiser conducted immediately prior to the foreclosure sale would have provided the Court with a basis for determining whether a deficiency judgment was appropriate.

By signing the personal guaranties, Fleisher agreed to be liable for the indebtedness attributable to MS VII, MS X, and MS XIV under the loan agreements that each entity entered into. After the entities defaulted, Southern AgCredit foreclosed on the properties securing the loans. The foreclosure sale proceeds reduced the amount of indebtedness owed under the loans because Southern AgCredit now owned the secured collateral. At this point, it was necessary to perform a deficiency analysis in order to determine the new, reduced indebtedness under the loans.

The Mississippi case law is clear that the notions of equity and fairness play a large role in the analysis of whether to grant or deny a deficiency award after foreclosure. *Wansley*, 566 So.2d at 1225. In *Hartman*, this Court stated that the mortgagee must show that it endeavored to collect the indebtedness out of the land; that when the foreclosing mortgagee buys at foreclosure, it must give the mortgagor fair credit for the commercially reasonable value of the collateral; and that to determine the commercially reasonable value, the mortgagee must establish the fair market value of the property sold at foreclosure. *Hartman*, 996 So.2d at 711.

Southern AgCredit failed to show that it would be equitable to award it deficiencies on the loan balances after the foreclosures. Southern AgCredit foreclosed in 2010 and became the record owner of the properties. The only evidence it provided for collecting the indebtedness out of the land was the bid prices received at the foreclosures and that it placed “for sale” signs on the properties after the foreclosures. As stated in *Wansley*, Southern AgCredit needed to show something more

than a difference between the bid price and the amount of indebtedness before it was entitled to a deficiency award. *Wansley*, 566 So.2d at 1224. Additionally, Southern AgCredit failed to establish the fair market values of the properties at the time of the foreclosures in 2010 so a determination could be made as to the commercially reasonable value of the collateral. It provided appraisals from 2008, timber appraisals from 2006, and supposed “benchmark updates” although these updates were through testimony only and no actual documentation was presented to the Court. These facts without more, do not establish the fair market values of the subject properties in 2010 so that a determination can be made as to the propriety of a deficiency award.

## **II. CONCLUSION**

This Court should uphold the trial court’s decision that it would be premature to render judgment against Fleisher on his Guaranty of the MS VIII loan. By signing the Guaranty, Fleisher agreed to be responsible for a percentage of the indebtedness under the MS VIII loan and Southern AgCredit failed to conclusively establish the actual indebtedness due under the loan. Furthermore, the fact that adequate protection payments were received from MS VIII on account of loan and that a plan of reorganization was pending in the MS VIII bankruptcy provided ample reason for the trial court to rule that it would be premature and inequitable at that point in time to adjudge Fleisher liable for the full initial amount of \$3,150,000.00.

This Court should reverse the trial court’s judgment as to Fleisher’s liability under the MS VII, MS X, and MS XIV loans. Southern AgCredit had the burden to prove the fair market value to be credited against the indebtedness due on MS VIII. It did not establish the indebtedness due. Therefore, this Court should reverse the trial court’s ruling as to Fleisher’s liability under his Guaranties of those loans.

This the 5<sup>th</sup> day of July, 2011.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, NICHOLAS VAN WISER, do hereby 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 REPLY BRIEF OF APPELLANT/RESPONSE BRIEF OF CROSS-APPELLEE to the following:

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Honorable Lisa P. Dodson

CIRCUIT COURT JUDGE

Post Office Box 1461

Gulfport, Mississippi 39502

THIS the 5<sup>th</sup> day of July, 2011.

  
NICHOLAS VAN WISER