

**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**

BRIEF OF APPELLANT

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 Court may evaluate possible disqualification or recusal.

1. David E. Fleisher, Appellant;
2. Nicholas Van Wiser, Esq., attorney for Appellant;
3. Dawn Elizabeth Larsh Norris, Esq., attorney for Appellant;
4. Dana Carl Matthews, Esq., attorney for Appellant;
5. Southern AgCredit, Appellee;
6. Jeffrey Monroe Williams, Esq., attorney for Appellee;
7. Matthew Robert Down, Esq., attorney for Appellee;
8. Hon. Lisa P. Dodson, Circuit Court Judge;
9. Robert T. Windham;
10. Mike Adkinson;
11. Lee Kennedy;
12. MS Investors I - XXI, LLC



NICHOLAS VAN WISER

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	<u>i</u>
TABLE OF CONTENTS	<u>ii</u>
TABLE OF AUTHORITIES	<u>iii</u>
STATEMENT OF ISSUES	<u>1</u>
STATEMENT OF THE CASE	<u>2</u>
A. NATURE OF CASE	<u>2</u>
B. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW	<u>2</u>
C. STATEMENT OF FACTS	<u>3</u>
SUMMARY OF ARGUMENT	<u>7</u>
ARGUMENT	<u>9</u>
A. STANDARD OF REVIEW	<u>9</u>
B. THE DEFICIENCY JUDGMENT STANDARD UNDER MISSISSIPPI LAW	<u>9</u>
C. SOUTHERN AGCREDIT DID NOT MEET ITS BURDEN OF PROOF TO ESTABLISH A DEFICIENCY AWARD IN THIS CAUSE.	<u>15</u>
1. Southern AgCredit failed to meet the “just and equitable” test outlined in <i>Hartman</i>	<u>15</u>
2. Southern AgCredit failed to establish the fair market value of the foreclosed properties thereby precluding a deficiency claim against Fleisher.	<u>21</u>
D. THE TRIAL COURT ERRED IN FINDING A DEFICIENCY JUDGMENT AGAINST FLEISHER	<u>27</u>
1. The trial court found numerous errors in the 2008 appraisals yet applied them when ruling on the deficiencies.	<u>27</u>
2. The trial court erred in using the bid prices at foreclosure and unsubstantiated timber values to create deficiencies in this matter.	<u>29</u>
CONCLUSION	<u>35</u>

TABLE OF AUTHORITIES

CASES

<i>Allied Steel Corp. v. Cooper</i> , 607 So.2d 113 (Miss. 1992)	<u>10</u>
<i>Biglane v. Under The Hill Corp.</i> , 949 So.2d 9 (Miss.2007)	<u>9</u>
<i>Corporate Mgmt., Inc. v. Greene County</i> , 23 So.3d 454 (Miss.2009)	<u>9</u>
<i>Estate of Davis v. O'Neill</i> , 42 So. 3d 520 (Miss. 2010)	<u>9</u>
<i>Federal Credit Company v. Boleware</i> , 142 So. 1 (Miss. 1932)	<u>10</u>
<i>Hartman v. McInnis</i> , 996 So.2d 704 (Miss. 2007)	<u>13, 15, 19, 21, 22</u>
<i>Haygood v. First Nat'l Bank of New Albany</i> , 517 So.2d 553 (Miss. 1977)	<u>10</u>
<i>Lake Hillsdale Estates, Inc. v. Galloway</i> , 473 So.2d 461 (Miss. 1985)	<u>12, 14, 22</u>
<i>Mississippi Valley Title Ins. Co. v. Horne Constr. Co.</i> , 372 So.2d 1270 (Miss. 1979)	<u>14</u>
<i>Myles v. Cox</i> , 217 So.2d 31 (Miss. 1968)	<u>10, 22</u>
<i>Rotenberry v. Hooker</i> , 864 So.2d 266 (Miss. 2003)	<u>9</u>
<i>Shutze v. Credithrift of America</i> , 607 So.2d 55 (Miss. 1992)	<u>32</u>
<i>Wansley v. First Nat'l Bank of Vicksburg</i> 566 So.2d 1218	<u>11, 14, 19, 32</u>

OTHER AUTHORITIES

<i>53 Miss.L.J.</i> 533 (1983)	<u>10</u>
<i>Black's Law Dictionary</i> , 414 (6 th ed. 1991)	<u>22</u>

STATEMENT OF ISSUES

1. Whether the Appellee met its burden of proof to establish with certainty that a deficiency claim existed against the Appellant?
2. Whether the trial court erred in finding that a deficiency judgment existed against the Appellant in favor of the Appellee?

STATEMENT OF THE CASE

A. NATURE OF CASE

This appeal arises from a judgment after bench trial granting the Appellee, Southern AgCredit, FLCA, f/k/a Land Bank South, FLCA (“Southern AgCredit”), a deficiency judgment against the Appellant, David E. Fleisher (“Fleisher”). The trial court found that Fleisher was individually liable for a deficiency under three personal guaranties he executed in relation to three loans made by Southern AgCredit.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

On February 20, 2009, Southern AgCredit filed its Complaint on Unconditional Guaranties (“Complaint”) alleging that Fleisher was indebted to Southern AgCredit under certain personal guaranties he executed in relation to four loans made to four separate LLC’s. *See*, Complaint on Unconditional Guaranties, [R. 2-20]. Fleisher filed his Answer to Southern AgCredit’s Complaint on April 13, 2009. *See*, Defendant’s Answer to Plaintiff’s Complaint, [R. 31-34].

Following discovery, both parties submitted Motions for Summary Judgment. On June 14, 2010, the trial court ruled on both Motions, partially granting Southern AgCredit’s Motion and denying Fleisher’s Motion. *See*, Order Granting Partial Summary Judgment, [R. 1204-1213]. The court essentially found that Fleisher was bound by the guaranties he executed in furtherance of the loans but also found questions of fact for trial as to what amounts, if any, he owed under the guaranties. *Id.*

The suit was tried in a two day trial beginning on June 29, 2010, before the Honorable Lisa P. Dodson in the Circuit Court of Stone County, Mississippi. The trial judge issued her ruling on August 30, 2010 which was subsequently filed of record with the Circuit Clerk of Stone County,

Mississippi on September 1, 2010. *See*, Judgment, [F-R.E. 2]. The court found that Fleisher was individually liable to Southern AgCredit under three of the personal guaranties he executed as to the secured loans issued by Southern AgCredit. *Id.* In so finding, the Court held that Southern AgCredit satisfied its burden of proof thereby allowing a deficiency judgment to be taken against Fleisher. *Id.*

On September 13, 2010, Southern AgCredit filed its Partial Motion for Reconsideration as to the Stay Imposed upon a Judgment against Defendant Fleisher based upon his Personal Guaranty for the Loan to Mississippi Investors VIII, LLC. *See*, Partial Motion to Reconsider, [R. 1263-1293]. Fleisher filed his Response in Opposition to Plaintiff's Partial Motion to Reconsider on September 22, 2010. *See*, Fleisher's Response, [R. 1294-1323].

On September 28, 2010, Fleisher timely filed his Notice of Appeal. *See*, Notice of Appeal, [R. 1330-1340]. Thereafter, Southern AgCredit filed its Notice of Cross-Appeal on October 11, 2010. *See*, Notice of Cross-Appeal, [R. 1341-1343]. The trial court then ruled on Southern AgCredit's Partial Motion to Reconsider, denying the Motion, which was filed of record on November 16, 2010. *See*, Order, [R. 1344].

C. STATEMENT OF FACTS

In the wake of the devastation and destruction caused by Hurricane Katrina, South Mississippi was in desperate need of housing. To address this need, four persons and their individually-owned Florida corporations came together to purchase and develop certain tracts of land located in Harrison, Stone, and George County, Mississippi. Those individuals are the Appellant herein, David Fleisher, William M. Adkinson ("Adkinson"), Lee F. Kennedy ("Kennedy") and Robert T. Windham ("Windham").

Fleisher, Adkinson, Kennedy and Windham decided to form a number of LLC's¹ to acquire and develop the various properties in Harrison, Stone and George County. Each individual had a solely-owned Florida corporation that was made a 25% member of each LLC. This cause of action revolves around four loans made by Southern AgCredit to four of the aforementioned LLC's and four personal guaranties executed by Fleisher in conjunction with those loans.

In 2006, four loans were issued by Southern AgCredit² to Mississippi Investors VII, LLC ("MS VII"), Mississippi Investors VIII, LLC ("MS VIII"), Mississippi Investors X, LLC ("MS X") and Mississippi Investors XIV, LLC ("MS XIV") in order to purchase certain undeveloped properties located in Stone and George County, Mississippi. *See*, MS LLC Promissory Notes, [R. 427-442]. The loans were secured by Deeds of Trust placed on each tract of land. Fleisher, Adkinson, Kennedy and Windham each signed Unconditional Agreements of Guaranty relating to the four loans which made them personal guarantors on each of the loans issued to the LLC's. *See*, Fleisher's Guaranties, [R. 5-16]. Each Guaranty contained the same language regarding the individual's liability which stated that the guarantor shall be liable for a specified percentage of the guaranteed indebtedness in an amount equal to 140% of the guarantor's 25% ownership interest in the LLC at the time of the making of the Guaranty. *Id.*

Southern AgCredit obtained appraisals for each of the properties in furtherance of making the loans. *See*, 2006 Appraisals, [F-R.E. 3; F-R.E. 4; F-R.E. 5]. The appraisals were performed by Michael Elliott, a Mississippi certified general real estate appraiser employed by Southern AgCredit

¹The four individuals formed twenty-one LLC's in all which were given the names Mississippi Investors I through Mississippi XXI, respectively.

²The loans were actually made by Southern AgCredit's predecessor-in-interest, Land Bank South, FLCA, which changed its name to Southern AgCredit, FLCA in 2009. The company will be referred to as Southern AgCredit throughout this Appeal Brief.

as its senior appraiser. *Id.* Joe Mallard, a registered forester employed with Southern AgCredit as a loan officer, provided timber cruises for each of the appraisals and prepared a detailed evaluation of the timber located on the properties. *Id.* The timber value was included in the amounts listed on each appraisal making up the market value of each of the properties. *Id.*

Following the acquisition of the properties, Fleisher and Kennedy sold their interests in the LLC's to Adkinson. *See*, Membership Interest Purchase Agreement, [R. 555-568]. In March 2008, Southern AgCredit obtained new appraisals on the properties secured under the loan agreements. *See*, 2008 Appraisals, [F-R.E. 6; F-R.E. 7; F-R.E. 8]. Again, Michael Elliott performed the appraisals. *Id.* However, timber cruises were not obtained for the new appraisals and none of the appraisals included any value for timber.

The four LLC's eventually defaulted on the loans and each filed bankruptcy. *See*, Bankruptcy Documents, [R. 455-461]. The Bankruptcy Court first ordered each LLC to make adequate protection payments on the loans. When the LLC's failed to make the adequate protection payments, the Bankruptcy Court lifted the automatic stay, thereby permitting the foreclosure of the properties securing the loans to MS VII, MS X and MS XIV. The properties were then sold at foreclosure in January 2010 and Southern AgCredit was the sole bidder purchasing each piece of property. *See*, Substituted Trustee's Deeds, [R. 575-597]. The stay was not lifted on the MS VIII property as the Debtor in Possession was able to propose a plan of reorganization in the Bankruptcy Court proceeding which was still pending at the time of trial.

Prior to the trial of this cause, partial summary judgment was entered in favor of Southern AgCredit finding that Fleisher had not been released from his obligations under his guaranties. *See*, Order Granting Partial Summary Judgment, [R. 1204-1213]. Following this determination by the

Court, Southern AgCredit proceeded to trial on its claims for the full amounts of the alleged deficiencies against Fleisher as to the loans made to MS VII, MS X and MS XIV.

Southern AgCredit alleged that the total deficiency as to the MS VII loan was \$1,494,668.00; the total deficiency as to the MS X loan was \$434,266.25; and the total deficiency as to the MS XIV loan was \$420,882.17. Southern AgCredit prayed for judgment as to the full amount of each deficiency despite the fact that the Guaranties executed by Fleisher only allowed for a specified percentage of recovery of 140% of his corporation's 25% interest in the LLC's.

With respect to the MS VIII loan, Southern AgCredit asked the Court to award the entire amount due on the loan because no foreclosure sale had been conducted as to the secured property. Southern AgCredit alleged that amount to be \$3,150,000.00 and sought the full amount of that balance irrespective of the specified percentage recited in the Guaranty.

In the court below, Fleisher maintained that he owed nothing to Southern AgCredit because the fair market value of the properties exceeded the amounts owed on each loan made to the four LLC's. Alternatively, Fleisher contended that if a deficiency were found to remain, he did not owe one hundred percent of any such deficiency. Fleisher asserted that he owed nothing at all on the MS VIII loan as the debtor's plan proposed payment in full of the loan in the Bankruptcy Court.

The trial judge ruled in favor of Southern AgCredit as to its deficiency claims regarding MS VII, MS X and MS XIV. *See*, Judgment at pgs. 24-25, [F-R.E. 2]. The trial judge found that Southern AgCredit met its burden of proof thereby allowing a deficiency judgment against Fleisher. *Id.*

The trial judge ruled that the MS VIII deficiency claim was premature. *Id.* at pg. 9. The trial judge found that the bankruptcy of MS VIII and the proposed plan of reorganization pending in that

court stood in the way of determining any deficiency judgment against Fleisher at the time of trial and denied any relief to Southern AgCredit as to the MS VIII loan. *Id.* For the purposes of this appeal, Fleisher does not call into question the trial court's ruling as to the MS VIII loan and appeals only against the court's rulings on the deficiency claims of MS VII, MS X and MS XIV.

SUMMARY OF ARGUMENT

Fleisher appeals from a final judgment of the Circuit Court of Stone County, Mississippi after a bench trial granting deficiency claims for Southern AgCredit. As such, an abuse of discretion standard of review is applied and the appellate court will not disturb the trial court's findings of fact absent an appellate determination that the trial judge abused her discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard. The appellate court reviews questions of law under a *de novo* standard.

Southern AgCredit, as the mortgagee claiming a deficiency, bears the burden of proof in establishing that a deficiency award would be just and equitable in light of the relevant facts and evidence. As Southern AgCredit was the purchaser at its own foreclosure sale, it was required at trial below to show the following:

1. That it attempted to collect the indebtedness from the property serving as collateral for the loan;
2. That the property was sold in a commercially reasonable fashion; and
3. That Southern AgCredit gave credit against the indebtedness to the debtor for the fair market value of the property.

Southern AgCredit completely failed to meet this burden.

Southern AgCredit failed to submit any proof showing any efforts to collect the indebtedness

out of the land, other than the statutory minimum of advertising once each week for three successive weeks in the *Stone County Enterprise*.³

Southern AgCredit submitted *no proof* from any source, expert or otherwise that the manner in which the sale was conducted was a commercially reasonable sale. There was no testimony 1) from brokers or agents of the usual and customary methods of marketing large tracts of property; 2) from marketing experts as to the best and highest use of the property; 3) from anyone as to the effect on the fair market value of the investment of over \$22,000,000 by Mike Adkinson in the property; or 4) the effect that investment had on the highest and best use of the property and of increasing the pool of prospective purchasers.⁴

Most significantly, Southern AgCredit completely failed to put before the court any testimony whatsoever to establish the fair market value of the properties *at the time of foreclosure in January, 2010*.

It is Fleisher's position before this Court that Southern AgCredit failed to give Fleisher fair credit for the fair market value of the collateral after foreclosure thereby precluding its deficiency judgment claims against Fleisher.

The trial court erred in finding a deficiency against Fleisher because Southern AgCredit failed

³ While the *Stone County Enterprise* is a valuable asset to the community of Stone County, its role as the *sole* advertising medium for the sale is hardly a stroke of marketing genius for attracting prospects for multi-thousand acre tracts of real estate.

⁴ It is critical to note that excluding the MS VIII loan, the property securing the remaining three loans comprised 2455.58 acres in Stone County, MS. This constitutes a huge tract of real estate that had been assembled by the four investors, and requires considerably more expertise in marketing than a single family residence in a subdivision in Suburbia. Adkinson testified about the funds expended in infrastructure, permits and planning that enhanced the value of the real estate. None of this was considered.

to meet the requisite burden of proof to justify that a deficiency judgment is equitable. It is respectfully submitted that it is impossible to calculate a deficiency which satisfies the three required elements set forth above from the facts and evidence submitted to the court below by Southern AgCredit. The trial court recognized this in its perceptive criticism of the “appraisals” submitted by Southern AgCredit at trial, but rather than dismissing the case out of hand for failure to meet this burden, the court essentially created its own methodology for determining value, and based its judgment upon that methodology. This approach is clearly erroneous by attempting to employ a legal standard not recognized by Mississippi law. Therefore, the trial court’s ruling should be overturned.

ARGUMENT

A. STANDARD OF REVIEW

Fleisher appeals from a final judgment of the Circuit Court of Stone County, Mississippi, following a bench trial granting deficiency claims for Southern AgCredit. This Court applies an abuse of discretion standard of review when reviewing a trial judge's findings of fact. *Estate of Davis v. O'Neill*, 42 So. 3d 520, 524 (Miss. 2010)(citing *Corporate Mgmt., Inc. v. Greene County*, 23 So.3d 454, 459 (Miss.2009); *Rotenberry v. Hooker*, 864 So.2d 266, 269 (Miss. 2003)). The Court will not disturb a trial judge's factual findings “when supported by substantial evidence unless ... the judge abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard.” *Id.* (quoting *Biglane v. Under The Hill Corp.*, 949 So.2d 9, 13-14 (Miss.2007)). On questions of law, this Court uses a *de novo* standard of review. *Id.*

B. THE DEFICIENCY JUDGMENT STANDARD UNDER MISSISSIPPI LAW

By way of clarification, there are two separate and distinct conceptual analyses which are

components of Mississippi foreclosure law into which “fair market value” comes into play. The first of these is the “bid price” at the foreclosure sale versus the “fair market value” when one is determining the validity of the foreclosure sale itself, with an eye as to whether the foreclosure should be set aside.

From the outset, it should be noted that Fleisher does not seek to have the foreclosures of the secured properties set aside. Mississippi courts adhere to the general rule that, absent any irregularity in the conduct of a 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)(citations omitted). The bid price must be so inadequate that it would be “impossible to state it to a man of common sense without producing an exclamation at the inequality of it.” *Id.* (quoting *Federal Credit Company v. Boleware*, 142 So. 1, 2 (Miss. 1932)).

The adequacy of the bid price when analyzing the sufficiency of a foreclosure sale is a question of law, left to the discretion of the judge within the parameters set forth by this Court. *Id.* at 120 (citing *Haygood v. First Nat’l Bank of New Albany*, 517 So.2d 553, 556 (Miss. 1977); *Myles v. Cox*, 217 So.2d 31, 35 (Miss. 1968). The threshold of unconscionability lies around forty percent of the fair market value of the property when determining whether the foreclosure sale should be set aside due to the inadequacy of the purchase price. *Id.* (citing 53 *Miss.L.J.* 533, 546 (1983)).

Fleisher 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.

The second analysis under Mississippi foreclosure jurisprudence in which “fair market

value” comes into play is when the court is seeking to determine whether a deficiency judgment is appropriate. The analysis for this test is conceptually and functionally distinct from that of the “validity of the foreclosure” analysis. It is the trial court’s use of the “validity of the foreclosure” analysis in formulating the court’s “entitlement to a deficiency” analysis to determine if any sums remained owing by Fleisher that is a fundamental error from which this appeal is taken.

Fleisher challenges Southern AgCredit’s right to a deficiency judgment. Fleisher would submit that Southern AgCredit fell woefully short of meeting the standard set forth under Mississippi law for a deficiency award in this matter and therefore, the lower court’s ruling should be overturned, as the court applied this incorrect analysis. The trial judge performed an in-depth analysis of the 2006 and 2008 appraisals offered by Southern AgCredit and essentially found those appraisals to be deficient, then “borrowed” the numbers from the foreclosure sale price and added a four year old timber cruise to come up with the “fair market value”. This was the second error.

A foreclosing creditor’s right to a deficiency judgment has found its way into the forum of Mississippi appellate court review on numerous occasions. As a result, a pattern of case law centering around the concepts of equitableness and fair market value have come to the forefront when evaluating whether a deficiency claim should be granted in any particular case.

In *Wansley v. First Nat’l Bank of Vicksburg* 566 So.2d 1218, 1225 (Miss. 1990), this Court was faced with a dispute arising out of a deficiency suit following a foreclosure sale by the creditor. This Court stated that the mortgagee has no right to a deficiency judgment until he satisfies the court that it would be equitable, in the light of the sales price, to authorize and render a deficiency judgment. *Id* at 1225. The Court also proclaimed that, “[s]omething more than a

difference between the price paid at the foreclosure and the amount of the indebtedness must be demonstrated before the mortgagee is entitled to a deficiency judgment.” *Id.* at 1224 (quoting *Lake Hillsdale Estates, Inc. v. Galloway*, 473 So.2d 461, 466 (Miss. 1985)).

This concept is critical in distinguishing between the “validity of foreclosure” standard, and the “entitlement to deficiency” standard. The validity of foreclosure standard is used to determine whether a debtor has been wrongfully deprived of his property. Since the debtor voluntarily pledged this property, and the Legislature has established the procedural mechanism for the sale, so that a creditor may take ownership and possession of the property, the standard for the percentage of the bid price versus the real value is decidedly low - in the thirty-five percent (35%) to forty percent (40%) range.

In determining the right to a deficiency judgment, however, equitable considerations arise which do not exist on a pure “validity of a foreclosure” analysis. Most significantly, when there is a lack of competitive bidding at the sale on the courthouse steps,⁵ and the creditor acquires the title to the collateral, it has a second chance to sell the property and to realize additional sums of money to be applied to the indebtedness. When there is active participation among bidders and the creditor is not the successful bidder, the market forces come much closer to assuring that the true value of the property has been realized for application to the debt, to the benefit of both debtor and creditor.

It is with the goal of reality and equity in mind that a creditor has the burden of proving 1) his attempts to effectuate repayment of the debt from the property *and* to ensure this fact, 2) that

⁵ Such a sale, in order to be legitimate and comply with statutory requirements for a valid foreclosure, is typically advertised in fine print, in the legal section of a local newspaper only, and posted on the bulletin board at the courthouse - hardly what anyone would consider even a *de minimus* marketing effort.

the sale of the property was conducted in a commercially reasonable manner.

When the creditor has the ability to seek to sell the property in a true marketplace environment, (as opposed to the artificial foreclosure sale environment) the actions undertaken to maximize the recovery are readily recognizable subject to expert delineation. The question is obviously “What would a normal property owner who desired to sell this property do to maximize the universe of interested purchasers and the maximize the exposure of the property to those purchasers’ highest dollars?”

The answer is readily apparent. The normal, “commercially reasonable” property owner will do the following, depending on the nature, size, complexity and cost of the property he is trying to sell:

3. Hire a real estate broker;
4. Hire an appraiser;
5. Retain the services of a marketing analyst;
6. Advertise in real estate publications and on-line marketing web-sites;
7. Examine the property to determine improvements, highest and best use, etc.; and
6. Contact prospective interested parties.⁶

The above analysis was resonated by this Court in its recent case of *Hartman v. McInnis*, 996 So.2d 704 (Miss. 2007), where the Court, citing numerous appellate decisions, addressed the standard that the foreclosing mortgagee must meet in order to obtain a deficiency award. The

⁶ Of course, not all of these would be economically feasible if one is selling a typical residential dwelling, but for larger commercial properties such as the ones under consideration by this Court, where thousands of acres and millions of dollars are at stake, the development of a cogent, cohesive marketing approach is not only critical, it is the **very essence of commercial reasonableness**. The exact marketing plan is something for the trier of fact to determine based upon the receipt of expert testimony as to the propriety of various marketing stratagems.

Court stated that “a deficiency decree usually depends on the facts and circumstances of each case, and, since the mortgaged premises constitute the primary fund for the payment of the mortgage debt, it is only where the mortgagee has endeavored to collect it out of the land that a just judgment for a deficiency can be entered.” *Id.* at 711 (Miss. 2007)(quoting *Wansley*, 566 So.2d at 1224). “Thus, the mortgagee first must show that it has endeavored to collect the indebtedness out of the land.” *Id.* (citing *Lake Hillsdale Estates, Inc.*, 473 So.2d at 466; *Mississippi Valley Title Ins. Co. v. Horne Constr. Co.*, 372 So.2d 1270, 1272 (Miss. 1979)).

Second, the mortgagee must show whether the value of the property satisfies the debt or creates a surplus. *Id.* Where the foreclosing mortgagee buys at foreclosure, it must give the mortgagor fair credit for the commercially reasonable value of the collateral. *Id.* (citing *Wansley*, 566 So.2d at 1221-22, 1224-25). 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. *Id.* (citations omitted).

From the above case law, it is clear that the burden of proof lies with the mortgagee to prove it is entitled to a deficiency award. The mortgagee must show that it endeavored to collect the indebtedness out of the land after foreclosure. Next it must show that the marketing and sale of the property met commercially reasonable standards. Finally, if the mortgagee is the purchaser at such a sale, it must show that it established the fair market value of the property so that an equitable determination can be made as to whether a deficiency or a surplus exists following the foreclosure sale. Only when a deficiency exists after the mortgagee has met its burden would a court be justified in granting a deficiency judgment.

Southern AgCredit fell woefully short of meeting its burden of proof in order to sustain a

deficiency award. As will be shown below, Southern AgCredit was not entitled to a deficiency judgment against Fleisher in this cause of action. Therefore, the trial court's ruling should be overturned.

C. SOUTHERN AGCREDIT DID NOT MEET ITS BURDEN OF PROOF TO ESTABLISH A DEFICIENCY AWARD IN THIS CAUSE.

Fleisher would respectfully contend that Southern AgCredit did not satisfy the requisite burden of proof in the court below in order to justify the award of a deficiency judgment after foreclosure on the secured properties. As set forth above, Southern AgCredit foreclosed on the properties as the secured lender *and* purchased the properties at the foreclosure sales. In seeking a deficiency following a foreclosure sale (at which the lender is the successful bidder), Southern AgCredit bears the burden of establishing that a deficiency judgment would be just and equitable given the facts and circumstances of the case. This "just and equitable" test is determined with reference to the three elements set forth by this Court in *Hartman v. McInnis*, 996 So.2d 704 (Miss. 2007):

1. That Southern AgCredit attempted to collect the indebtedness from the property serving as collateral for the loan;
2. That the property was sold in a commercially reasonable fashion; and
3. That Southern AgCredit gave credit against the indebtedness to the debtor for the fair market value of the property.

Id at 711.

Southern AgCredit wholly failed to meet this burden in the trial court below and therefore, its deficiency claims should fail.

1. **Southern AgCredit failed to meet the "just and equitable" test outlined in *Hartman*.**

As stated above, in order for Southern AgCredit to obtain a deficiency judgment, it must first show that it endeavored to take the indebtedness out of the land following foreclosure. Southern AgCredit put forth little, if any, evidence at trial that it tried to collect the indebtedness from the properties after foreclosure. Thus, it cannot maintain a deficiency claim against Fleisher.

The only evidence submitted by Southern AgCredit that it tried to recover the indebtedness out of the land came from the testimony of Benjamin Elliott ("Elliott")⁷. Elliott is the Chief Operations and Risk Management Officer for Southern AgCredit. On the subject of the MS VII property, Elliott testified as follows:

- Q. Since the banks obtained collateral for Mississippi VII at foreclosure, has Southern Ag tried to market the property?
- A. We've only put some signs out with a number that land's for sale. We've had very limited response to anything at this time. We have discussed the potential of marketing it with a realtor, but we haven't signed any kind of agreements or anything at this point.
- Q. Does the bank have an asking price it's seeking to –
- A. On this?
- Q. Right.
- A. We do. On this particular tract, the asking price has been \$3,500 per acre.
- Q. Would that be above or below what Southern AgCredit bid?
- A. It is above what we bid.

⁷Elliott is the son of Michael Elliott, the Senior Appraiser employed by Southern AgCredit who performed the 2006 and 2008 appraisals.

See, Testimony of Elliott, Tr. Trans. 71-72.

As to the MS X property, Elliott testified as to the bank's marketing of that property as follows:

Q. And since obtaining the property through foreclosure, has Southern Ag tried to market this particular property?

A. We have.

Q. The same way that you mentioned with VII?

A. Yes.

Q. And that's through signs, et cetera?

A. Yes. Just signs and general word of mouth down there.

Q. How much, if you will, is Southern Ag asking for that property?

A. We've asked \$2,500 an acre.

Q. Is that above or below the bid price?

A. It's above the bid price.

Q. Have there been any offers to purchase the property?

A. No.

Id. at 79.

Finally, in response to direct examination on the marketing of the MS XIV property, Elliott testified as follows:

Q. Since obtaining the collateral at foreclosure, has Southern Ag tried to market this property?

A. It has.

Q. Through the same process that you described earlier for VII and X?

A. That's correct.

Q. How much is Southern Ag asking?

A. I believe the asking price is 4250 on that tract.

Q. Is that above over[sic] below the bid price?

A. Above the bid price.

Id. at 86.

In the trial below, as noted by the trial judge, the only efforts to satisfy the indebtedness from the land were the initial foreclosure publications, and "posting a sign on the property".

This hardly satisfies the requirement. The real estate in question was thousands of acres.⁸ How many potential purchasers are going to go stalking through the millions of acres of forest lands in Mississippi looking for "For Sale" signs? Southern AgCredit made absolutely no showing of what it had done to develop a marketing plan, or even to make any effort at all to secure a purchaser at a reasonable price.

The danger of not holding a creditor to this standard is apparent: A creditor who can rely upon the "non-free market sale environment" foreclosure sale price to justify a deficiency judgment has the potential ability to collect a surplus - the deficiency judgment from the debtor (or in this case - guarantor) *plus* the added value when it properly markets and sells the foreclosed collateral. This is readily apparent from the above-quoted testimony of Southern AgCredit that the property was being marketed at a price per acre *above* that which Southern AgCredit bid at the foreclosure.

⁸ As noted elsewhere in the Appellant's brief, the actual acreage at issue is 2455.58 acres.

This screams of the very real probability of unjust enrichment at the least, and the possibility of a dual recovery. This is at the core of this Court's requirement that a creditor "show that it has endeavored to collect the indebtedness out of the land." *Hartman*, 996 So.2d at 711.

Southern AgCredit made no such showing. It posted a sign.

If Southern AgCredit posted a sign at Times Square - it might have been a reasonable effort. There was no testimony or offer of testimony in the trial below as to what constituted reasonable marketing efforts to recover the debt from the property.

Second, the mortgagee must show whether the value of the property satisfies the debt or creates a surplus. *Id.* As stated above, a true "bidding war" with multiple bidders ensures such a commercially reasonable sale. This Court has recognized that in situations where the foreclosing mortgagee buys at foreclosure, a second test must be employed - the creditor must give the mortgagor fair credit for the commercially reasonable value of the collateral. *Id.* (citing *Wansley*, 566 So.2d at 1221-22, 1224-25). 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. *Id.* (citations omitted).

What did Southern AgCredit do? It provided two year old appraisals that were severely criticized by the trial court:

The Court finds that the 2008 appraisals done by Southern ACredit are not alone sufficient to establish either fair market value or the commercially reasonable value of the properties. These appraisals occurred nearly two (2) years prior to the foreclosure sales.

See, Judgment at pg. 12, [F-R.E. 2].

The trial court repeatedly pointed out deficiencies in the appraisals. It noted that the two appraisals were virtually identical, except that the 2008 appraisals did not include reference to timber value.

Most glaring is the trial court's observation that *the appraiser was never called to testify!* The person who "walked the dirt" and formulated opinions as to fair market value - the core of the trial court's keystone fact finding determinations - did not testify and nor was he available to explain what each appraisal had to do with the fair market value of the property *in January of 2010 when the property was foreclosed!*

In point of fact, Elliot, the Southern AgCredit representative who testified, and introduced the appraisal *had never walked the property.*

As a result, the appraiser who gave values two and four years prior to the foreclosure was not there to be examined as to what consideration he had given to the \$22,000,000 in improvements that Mike Adkinson testified that he has put into the property. He was not present to address the many questions the trial judge herself had concerning the appraisals which Southern AgCredit presented as justification for a deficiency award. It is clear from the above testimony that Southern AgCredit did not attempt in any meaningful way to collect the indebtedness out of the foreclosed properties. Southern AgCredit's actions only consisted of putting a sign on the properties advertising the lands as "for sale". The record is completely devoid of any other actions taken by Southern AgCredit to market the property such as consulting and/or hiring a real estate broker to market the property, obtaining any marketing surveys or otherwise listing the property in any kind of online database or publication advertising the land for sale. Southern AgCredit called no broker or agent to testify about the listing of the property

in the MLS database or to testify about any interest in the property whatsoever. In point of fact, Southern AgCredit admitted that it only discussed marketing the property with an agent but had not signed any agreements to that effect.

Southern AgCredit foreclosed on the subject properties in January, 2010. Thereafter, Southern AgCredit's only attempt to sell the property consisted of placing "for sale" signs on the properties. From the date of foreclosure to the time of the trial Southern AgCredit took no meaningful action to collect the indebtedness out of the land by marketing the property with a realtor and listing the property on the various databases available to sell the property. Therefore, Southern AgCredit failed to meet the "just and equitable" test of a deficiency award analysis.

2. Southern AgCredit failed to establish the fair market value of the foreclosed properties thereby precluding a deficiency claim against Fleisher.

Southern AgCredit did not establish the fair market value of the properties at the time of foreclosure in January 2010. The determination of fair market value is a key factor in analyzing whether a deficiency claim is equitable and commercially reasonable. A debtor must be credited against his debt with the fair market value of the property. *Hartman*, 996 So.2d at 711. Because Southern AgCredit failed to demonstrate the fair market value of each property *at the time of foreclosure*, it cannot maintain deficiency claims against Fleisher. Compounding this error was Southern AgCredit's 1) reliance upon the 2008 appraisals and the fair market value letters, which the Court found to be defective as a result of the omission of a timber cruise, and 2) was clearly outdated for the purpose of determining the real credit that Southern AgCredit should give Fleisher on the debt based upon its realistic probabilities of recovery from the commercially reasonable sale of the property.

“Fair market value” is defined as “[t]he amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.” *Hartman*, 996 So.2d at 711 (citing *Black’s Law Dictionary*, 414 (6th ed. 1991)). To determine the adequacy of the purchase price at foreclosure, the mortgagee must establish fair market value of the property. *Lake Hillsdale Estates, Inc.*, 473 So.2d at 465. The mortgagee carries the burden to demonstrate fair market value so that it can be determined whether a deficiency exists. *Hartman*, 996 So.2d at 712. The determination of fair market value is a question of fact, and an appellate court will respect the trial judge’s findings of fact when they are supported by reasonable evidence in the record and are not manifestly wrong. *Myles*, 217 So.2d at 34.

Southern AgCredit did not provide sufficient information to show the fair market value of the properties at the time of foreclosure in 2010. At trial, Southern AgCredit maintained that the fair market value of each property was represented by the 2008 appraisals performed by Michael Elliott. It stated that the fair market value of the MS VII property was \$5,954,600.00 (*See*, Testimony of Elliott, Tr. Trans. 70); the fair market value of the MS X property was \$1,334,600.00 (*See*, Testimony of Elliott, Tr. Trans. 78); and the fair market value of the MS XIV property was \$2,204,600.00 (*See*, Testimony of Elliott, Tr. Trans. 85).

On direct examination, Elliott was asked whether the 2008 appraisals accurately represented the fair market value of the properties at the time of foreclosure in 2010. Elliott responded as follows:

- 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, and from the time when this appraisal was performed in March of 2008 to the current date based on our annual analysis, the overall market value in the area would not have indicated any kind of a significant change in the market value of these properties. So we did not order any appraisal.

Q. So just to understand, it would be a fair assumption the bank was comfortable with that appraisal as representing the fair market value at the time of foreclosure?

A. We were.

*See, Testimony of Elliott, Tr. Trans. 70.*⁹

The 2008 appraisals and the above testimony do not conclusively establish the fair market value of the properties at the time of foreclosure in 2010. First of all, the appraisals were performed in 2008 almost two years before the actual foreclosures. In the time period between the appraisals being performed and the foreclosures, numerous things could have taken place that either added to or detracted from the fair market value of the property. Second, Southern AgCredit did not put forth any evidence to support its contention that no significant change in the market values occurred between 2008 and 2010. Elliott testified to this at trial but offered no proof in support of that statement. He testified that Southern AgCredit performed an annual analysis as to the market values of the properties but offered no documentation showing the results of these analyses or other evidence showing that market values in the area had not changed significantly. Elliott essentially wanted the trial court to take his word for it, which is exactly what the trial court did. Elliott admitted that no appraisal was conducted in 2010 prior to the foreclosures.

⁹In this segment of Elliott's testimony, he is referring to the MS VII property. Elliott provides the same responses as to the fair market value of the MS X property (Tr. Trans. 78-79) and the MS XIV property (Tr. Trans. 85).

It is respectfully submitted that new appraisals should have been completed to provide a meaningful basis for the trial court to establish fair market value of the foreclosed properties.

Further, the 2008 appraisals were not indicative of the fair market value in 2010 because the appraisal failed to account for the timber on the foreclosed properties. Southern AgCredit had two appraisals performed on each of the subject properties. The first appraisal was performed by Michael Elliott in 2006 as part of the due diligence in making the loans. *See*, 2006 Appraisals, [F-R.E. 3, 4, 5]. Each of those 2006 appraisals contained a forestry supplement performed by Joe Mallard valuing the timber on the subject properties. *Id.* All three appraisals indicated that the highest and best use was “agricultural/timber”. *Id.* The 2006 appraisals calculated the fair market value of the properties by adding the value of the land and value of the timber together to get the overall fair market value of each property. The 2006 appraisals stated the following figures represented the fair market value of the properties:

MS VII Property

Land Value	\$6,304,365.00
<u>Timber Value</u>	<u>\$1,233,200.00</u>
Market Value	\$7,537,500.00

See, 2006 MS VII Appraisal at pg. 1, [F-R.E. 3].

MS X Property

Land Value	\$1,590,813.00
<u>Timber Value</u>	<u>\$ 107,500.00</u>
Market Value	\$1,698,500.00

See, 2006 MS X Appraisal at pg. 1, [F-R.E. 4].

MS XIV Property

Land Value	\$2,457,000.00
<u>Timber Value</u>	<u>\$ 43,000.00</u>
Market Value	\$2,500,000.00

See, 2006 MS XIV Appraisal at pg. 1, [F-R.E. 5].

In 2008, Southern AgCredit obtained a second round of appraisals again performed by Michael Elliott. *See*, 2008 Appraisals, [F-R.E. 6, 7, 8]. However, the 2008 appraisals did not include forestry supplements and no separate value was assessed for the timber on the properties. Nonetheless, Southern AgCredit maintained at trial that the 2008 appraisals accurately reflected the market value of the properties at the time of foreclosure in 2010.

The 2008 appraisals recited the following market values for of the properties:

MS VII Property

Land Value	\$5,964,600.00
<u>Timber Value</u>	<u>\$ 0.00</u>
Market Value	\$5,964,600.00

See, 2008 MS VII Appraisal at pg. 1, [F-R.E. 6].

MS X Property

Land Value	\$1,334,600.00
<u>Timber Value</u>	<u>\$ 0.00</u>
Market Value	\$1,334,600.00

See, 2008 MS X Appraisal at pg. 1, [F-R.E. 7].

MS XIV Property

Land Value	\$2,204,600.00
<u>Timber Value</u>	<u>\$ 0.00</u>
Market Value	\$2,204,600.00

See, 2008 MS XIV Appraisal at pg. 1, [F-R.E. 8].

As indicated above, Southern AgCredit did not call the appraiser, Michael Elliott, to testify as to his appraisals. Instead, Benjamin Elliott testified as to why no timber appraisals were done for the 2008 appraisals. As to the MS VII property, he stated that a significant amount

of timber had been harvested and that the property had moved from a timber production type property to a recreational type with no ongoing income stream for timber harvesting. *See*, Testimony of Elliott, Tr. Trans. 71. However, on cross-examination, Elliott ultimately admitted that he did not know how much of the merchantable or pre-merchantable timber had been harvested on the MS VII property. *Id.* at 156. Pertaining to MS X and MS XIV, Elliott testified that no timber appraisal was done due to the timber on the property being young, having very little value and it not being an ongoing timber production property. *Id.* at 79 and 85.

A portion of Southern AgCredit's failure to conclusively establish the fair market value of the properties at the time of foreclosure was its use of the 2008 appraisals containing no value for the timber on the properties. The glaring difference in the 2006 and 2008 appraisals is the fact that the 2006 appraisals contained forestry supplements valuing the timber on the property and the 2008 appraisals did not. The 2006 appraisals specified timber value on each property which were added to the land value to get the overall market value of the properties. The 2008 appraisals did not account for the timber in any way. The 2008 appraisals did not include a forestry supplement even though it stated that the highest and best use of the property was "timber/agriculture". Southern AgCredit could not effectively explain why it did not provide a forestry supplement to the 2008 appraisal and did not call the appraiser to testify as to his work or call anyone to testify as to the value of the property in 2010. Furthermore, there was conflicting testimony as to how much timber had actually been harvested from the property between 2006 and 2008 which could have been settled once and for all if a proper timber cruise had been completed on the property.

By not accounting for the timber value and not obtaining a 2010 appraisal on each

property, Southern AgCredit failed to meet its burden of establishing the fair market value of the properties. Thus, Southern AgCredit was not entitled to a deficiency judgment as to the MS VII, MS X and MS XIV loans.

D. THE TRIAL COURT ERRED IN FINDING A DEFICIENCY JUDGMENT AGAINST FLEISHER

The trial court erred in adjudicating deficiency judgments against Fleisher. As stated above, Southern AgCredit had the burden of establishing that deficiencies existed in this cause but miserably failed to meet its burden. Nevertheless, the trial court still entered deficiency judgments in favor of Southern AgCredit finding that deficiencies existed after foreclosure.

This was error for two primary reasons:

1. The trial court noted the errors in the appraisals and the lack of pertinency to the January 2010 foreclosure, yet relied upon them anyway; and
2. The court utilized the bid prices from the foreclosure sales and determined the deficiency by adding a four year old timber cruise from the 2006 appraisal to the foreclosure bid prices.

Therefore, the trial court's ruling was clearly erroneous and should be overturned.

1. **The trial court found numerous errors in the 2008 appraisals yet applied them when ruling on the deficiencies.**

The judgment handed down by the trial court found many errors and unexplained statements in the 2008 appraisals. Yet, when making its ruling as to the deficiencies, the trial court relied on these very appraisals to establish the fair market value of the respective properties. Fleisher asserts that the trial court erred in relying on the 2008 appraisals because the appraisals were completely undependable to establish the fair market value of the properties.

As to the 2008 MS VII appraisal, the trial judge found the following errors: that the appraisal recited the same acreage (1507.5) as that of the 2006 appraisal even though a 6.28 tract had been sold in 2007; like the 2006 appraisal, it recited the same language pertaining to the age of the pre-merchantable pine plantation (7 to 8 year old pine plantation) even though two years had passed since the 2006 appraisal; the 2008 appraisal stated that a forestry supplement was attached, but did not include one and in fact, no forestry supplement was done in 2008 to catalog the timber on the property; and that it was unclear whether the appraiser was assuming that a purchaser would not be interested in the timber or whether he was stating that the value of the timber was little to nothing. *See*, Judgment at pgs. 13-14, [F-R.E. 2].

The trial court found that the 2008 MS X appraisal actually stated two different values for the land. Under the Sales Comparison Approach the appraisal valued the land at \$1,334,575.00 and under the Cost Approach valued the land at \$1,334,600.00. ¹⁰ *Id.* at 16. The trial court also found that the 2008 appraisal did not value the timber on the property. *Id.* at 16-17.

Pertaining to the 2008 MS XIV appraisal, the trial court again found that the appraisal did not account for the aging of the timber on the property in the two years following the 2006 appraisal. *Id.* at 18. The trial court also took issue with the language of the 2008 appraisal which stated “[no] timber value has been considered due to its not being a consideration when it sold and would be a minor consideration if the Subject sells.” The court found this to be contradictory to the 2006 appraisal which contained a timber value and included a forestry supplement. *Id.*

¹⁰ The Court in pointing out this difference rather laconically observed that there was no explanation for the \$25.00 difference. Clearly the court below was very suspicious of both appraisals.

In view of the glaring errors in the appraisals delineated in painstaking detail by the trial judge, Fleisher maintains that it was error to then utilize those appraisals in ascertaining the fair market value of the properties.

2. The trial court erred in using the bid prices at foreclosure and unsubstantiated timber values to create deficiencies in this matter.

The trial court essentially created its own values in determining the deficiencies against Fleisher. Southern AgCredit failed to establish the fair market value of the collateral so that a deficiency could be realized but the trial court nevertheless determined the existence of a deficiency by taking the bid prices at foreclosure and adding to it unsubstantiated timber values from the 2006 appraisals. The trial court then subtracted that figure from the overall indebtedness asserted by Southern AgCredit to arrive at the deficiencies. Fleisher asserts that this was manifestly wrong and thus, the deficiency judgment against him should be overturned.

First, as to MS VII, the trial court found the commercially reasonable value of the property for which Fleisher should be given credit for to be \$6,098,095.78. *See*, Judgment at pg. 21, [F-R.E. 2]. It should be noted that the court provided this figure through its own interpretation of the facts presented at trial although it was Southern AgCredit's burden to establish. The trial court arrived at this figure by taking the winning bid price at foreclosure and adding that to the timber values represented in the 2006 appraisal. *Id.* None of this methodology is keyed to the concept that Fleisher is entitled to a credit for the value that Southern AgCredit is reasonably anticipated to recover upon a commercially reasonable marketing and sale of the property.

The trial court then completely changed the overall indebtedness on the loan due to

unaccounted for timber sales prior to foreclosure. Southern AgCredit maintained that the overall principal indebtedness on the MS VII loan equaled \$5,826,006.29. However, evidence at trial indicated that timber sales in the amount of \$23,095.89 were not deducted from the overall indebtedness of the loan. *See*, Judgment at pg. 21, [F-R.E. 2]. The trial court subtracted the timber sales figure from Southern AgCredit's statement of indebtedness to get the principal debt balance of \$5,802,910.40. From there, the court added the interest, costs and attorney's fees to get the total indebtedness on the MS VII loan.

Principal Debt Balance	\$5,802,910.40
Interest	\$ 493,718.56
Default Interest	\$ 73,742.34
<u>Attorney Fees/Costs</u>	<u>\$ 26,792.48</u>
Total Indebtedness	\$6,397,163.78

The trial court then subtracted its figure of commercially reasonable value from the overall indebtedness on the loan to get the deficiency.

Total Indebtedness	\$6,397,163.78
<u>Bid Price & Timber Value</u>	<u>-\$6,098,095.78</u>
Deficiency on MS VII Loan	\$ 299,068.00

Id.

The guaranty Fleisher executed had specific language as to his liability under the MS VII loan. That language essentially stated that Fleisher guaranteed a specified percentage of the indebtedness in the amount of 140% of Guarantor's ownership interest in MS VII, LLC which is agreed to be 25% as of the date of the guaranty. *See*, MS VII Guaranty, [R. 5-7]. The trial court concluded that Fleisher was responsible for 140% of 25% of the deficiency amount granting judgment in favor of Southern AgCredit in the amount of \$104,673.80 as to the MS VII indebtedness. *See*, Judgment at pg. 21, [F-R.E. 2].

Next, the trial court found a deficiency as to the MS X loan. It again added the bid price and 2006 timber value together to get its own figure of commercially reasonable value, then subtracted that number from the overall indebtedness alleged by Southern AgCredit.

Total Indebtedness	\$1,553,090.91
<u>Bid Price & Timber Value</u>	<u>-\$1,226,324.66</u>
Deficiency on MS X Loan	\$ 326,766.25

Id. at 23.

The court then applied the language in the MS X Guaranty (140% of 25%) and arrived at the deficiency of \$114,368.19 as due and owing from Fleisher. *Id.*

Finally, the trial court found a deficiency regarding the MS XIV loan using the same methodology. It subtracted its own figure of the commercially reasonable value of the property from the total indebtedness to arrive at the deficiency.

Total Indebtedness	\$2,274,134.47
<u>Bid Price & Timber Value</u>	<u>-\$1,896,252.30</u>
Deficiency on MS XIV Loan	\$ 377,882.17

Id.

Using the percentage recited in the MS XIV Guaranty, it calculated the deficiency owed by Fleisher to be \$132,258.76. *Id.* at 24.

The “cafeteria approach” employed by the trial judge of picking and choosing which components from the flimsy showing of proof provided by Southern AgCredit to build its own figure for a “commercially reasonable value” for the properties is error. Fleisher would respectfully submit for this Court’s determination that the trial court was manifestly wrong in combining the foreclosure bid prices and four year old 2006 timber values to calculate the commercially reasonable value of the collateral.

In *Shutze v. Credithrift of America*, 607 So.2d 55, 66 (Miss. 1992) the Court stated that the sales price as related to the legality of the foreclosure “has nothing whatsoever to do with the separate and distinct question of what, if any, deficiency judgment may be allowed.” *Schutze*, 607 So.2d 55, 66 (Miss. 1992)(quoting *Wansley*, 566 So.2d at 1224). The Court went on to say that for purposes of deficiency judgment, the terms of the foreclosure or other dispositions must be commercially reasonable and that, particularly where the foreclosing creditor buys at foreclosure, it must give the debtor fair credit for the commercially reasonable value of the collateral. *Id.*

The case law is clear that the bid price at foreclosure is not the benchmark for which a deficiency claim is judged. However, the trial court based the substantial part of its commercially reasonable value assessments on the bid prices. This represents a confusion of the concepts of “validity of foreclosure” analysis with “right to deficiency” analysis. The trial court did not cite to any other actions taken by Southern AgCredit in crediting the debtor with the commercially reasonable value of the collateral and used only the bid prices established by Southern AgCredit along with unsubstantiated timber values to arrive at the deficiencies. Thus, the trial court erred in applying the bid prices to the commercially reasonable value of the collateral.

The trial court erred in applying the 2006 timber appraisals to get the commercially reasonable value of the collateral. The trial court’s use of the 2006 timber values to arrive at the commercially reasonable value of the properties at the time of foreclosure in 2010 is utterly inconceivable. There is absolutely no way that those values would indicate the true value of the timber on the property in 2010. At trial, there was limited testimony concerning the removal of

timber on the property. Southern AgCredit testified that a large section of timber was harvested from the MS VII property and no timber was removed from the MS X and MS XIV properties. Fleisher's witness, Adkinson, testified that only 270 to 300 acres out of 1200 acres were removed from the MS VII property and no timber was removed from the others.

In addition to the above referenced discrepancies, Mike Adkinson provided un rebutted and unchallenged testimony that the Mississippi State University Agriculture Department's report stumpage values had increased substantially since 2006. *See*, Judgement at p.7 [F-R.E. 2]. This testimony, plus the self-evident fact that over a four year period of time the value of a stand of timber increases through growth makes clear that the use of the 2006 timber cruise had little or no application to arriving at a true measure of fair market value.

The 2006 timber value for MS VII cannot be relied upon. Elliot had never walked the property to see how much timber had been cut. As noted by the trial judge, the 2006 values do not account for the aging of the timber from 2006 to 2010 which would affect the overall value of the timber on each property. Southern AgCredit admitted that no timber cruises were performed on the property in 2008 or in 2010 to account for the value of the timber on each property. It only provided the timber evaluations attached to the 2006 appraisals. The 2006 values do not represent the values of the timber at the time of foreclosure in 2010. As such, the trial court erred in applying these values in its deficiency assessments.

Fleisher asserts that the fair market value of the property must be used when determining whether a deficiency or surplus exists after foreclosure. In this particular case, no appraisals were obtained for the year of foreclosure in 2010 to show the current fair market value of the properties. However, for the sake of this argument, Fleisher will assume that the fair market

values of the 2008 appraisals coupled with the 2006 timber values represent the 2010 overall fair market values of the properties. When calculating the commercially reasonable value in this manner, a surplus actually exists over and above the indebtedness on the loans.

MS VII

2008 Appraisal Land Value	\$5,954,600.00
<u>2006 Appraisal Timber Value</u>	<u>\$1,233,200.00</u>
Total Value Received	\$7,187,800.00

The above calculation shows the commercially reasonable value of the collateral Southern AgCredit received after foreclosure. By subtracting the total loan indebtedness from that figure, a surplus is created.

Total Value Received	\$7,187,800.00
<u>MS VII Total Indebtedness</u>	<u>-\$6,397,163.78</u>
MS VII Surplus	\$ 790,636.22

MS X

2008 Appraisal Land Value	\$1,334,600.00
<u>2006 Appraisal Timber Value</u>	<u>\$ 107,500.00</u>
Total Value Received	\$1,442,100.00

Again, the difference between the total loan indebtedness and the commercially reasonable value creates a surplus.

Total Value Received	\$1,442,100.00
<u>MS X Total Indebtedness</u>	<u>-\$1,118,824.66</u>
MS X Surplus	\$ 326,275.34

MS XIV

2008 Appraisal Land Value	\$2,204,600.00
<u>2006 Appraisal Timber Value</u>	<u>\$ 43,000.00</u>
Total Value Received	\$2,247,600.00

In this particular instance, the difference between the loan indebtedness and the

commercially reasonable value of the collateral does create a deficiency, albeit a nominal one.

Total Value Received	\$2,247,600.00
<u>MS XIV Total Indebtedness</u>	<u>-\$2,274,134.47</u>
MS XIV Deficiency	- \$26,534.47

Even though the calculation above does produce a deficiency as to the MS XIV loan, taking all three values together shows that Southern AgCredit received a surplus on the loans. Southern AgCredit's value received as to the MS VII (\$790,636.22) and MS X (\$326,275.34) loans equaled \$1,116,911.56. Subtracting the MS XIV deficiency from that amount leaves a \$1,090,372.09 surplus obtained by the bank on the loans collectively thereby extinguishing any deficiency against Fleisher in this matter.

The trial court erred in applying the 2010 bid prices and the 2006 timber values in assessing and finding deficiencies in this cause. The fair market value is the cornerstone for evaluating such an award. Southern AgCredit failed to provide any evidence as to the 2010 fair market value and only relied upon the values set forth in the 2008 appraisals. Southern AgCredit had the burden to establish deficiencies in this cause and wholly failed to meet that burden. Therefore, the trial court erred in granting deficiencies in this matter and the ruling should be overturned.

CONCLUSION

Southern AgCredit was not entitled to a deficiency judgment in this cause. It wholly failed to meet its burden of proof to establish a deficiency judgment. It failed to show that it took the indebtedness out of the land and failed to establish fair market value of the properties prior to foreclosure. The trial court erred in granting a deficiency judgment for Southern AgCredit. It relied on faulty 2008 appraisals, bid prices and 2006 timber evaluations to arrive at a deficiency

judgment against Fleisher even though the foreclosure was conducted in 2010. Therefore, this Court should grant Fleisher's appeal and overturn the trial court's ruling and render a judgment in favor of Fleisher.

Respectfully submitted, this the 2nd day of March, 2011.

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BY: BYRD & WISER

By: 

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CERTIFICATE OF SERVICE

On the 2nd day of March, 2011 an original and four copies of the Brief of Appellant, David E. Fleisher, and four copies of the Appellant's Record Excerpts were served by Federal Express, postage pre-paid, as follows:

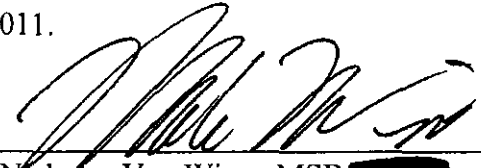
Ms. Kathy Gillis, Clerk
Supreme Court of Mississippi
P. O. Box 249
Jackson MS 39205-0249.

A copy of the Brief of Appellant, Michael D. Mayer, along with a copy of the Record Excerpt, was served upon each of the following by U.S. Mail, postage pre-paid:

Hon. Lisa P. Dodson
Circuit Court Judge
Post Office Box 1460
Gulfport, Mississippi 39506

Jeffrey M. Williams, Esq.
Matthew Robert Down, Esq.
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Counsel for Appellee, Southern AgCredit FLCA

SO CERTIFIED, this the 2nd day of March, 2011.



Nicholas Van Wiser, MSB
COUNSEL FOR APPELLANT