STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	IN THE NINTH JUDICIAL CIRCUIT
LINDA A. GIBSON, formerly known as LINDA ANN AVINGER, individually and as Trustee of the Paul William Gibson Family Trust, and HERITAGE SEVEN, LLC,	Case No. 2010-CP-08-2134
Plaintiffs,	**ORDER**
vs.	
AMERIS BANK,	
Defendant.	

This matter came before this Court for trial on May 22 and 23, 2012 and August 14, 2012. Andrew K. Epting, Jr., George J. Kefalos, and John S. West appeared on behalf of Plaintiffs. Robert E. Stepp, William H. Jordan, and Tina Cundari appeared on behalf of Defendant, Ameris Bank.

I compliment all Counsel of record for ably presenting their case. During the course of this trial, I very carefully observed the demeanor and manner in which each witness testified. I noticed such things as their tone of voice, gestures, hesitation or readiness to answer questions, their sincerity, and other mannerisms, all of which assisted in my evaluation of their credibility. After a thorough review of the legal briefs and applicable law, the pleadings and considering the evidence presented, including three days of trial testimony, approximately 200 exhibits, and deposition testimony of several witnesses, and carefully listening to arguments from all Counsel, the Court expressly finds that Defendant (Ameris) is liable for the harm alleged. Judgment is entered in favor of Plaintiffs (Gibson) against Ameris Bank in the amount $2,913,886.00

PROCEDURAL HISTORY

This case began as a foreclosure action. On June 14, 2010, Ameris initiated foreclosure proceedings against Heritage Seven, LLC, an entity partially owned by Linda Gibson and of which Linda Gibson is the sole managing member, and Linda Gibson, individually and as Trustee of the Paul William

Gibson Family Trust, (collectively, "Gibson") for failure to pay two notes: one in the amount of $2,810,164.50 and the other in the amount of $50,071.96. Gibson personally guaranteed the loan. She borrowed the money to purchase and renovate a 48-unit apartment complex on Otranto Road, Berkeley County, South Carolina, and to pay property taxes that became due during the renovations.

On July 20, 2010, Gibson answered the foreclosure complaint and asserted counterclaims against Ameris for negligent misrepresentation, civil conspiracy, and equitable relief. On September 27, 2011, Gibson amended the counterclaim and asserted causes of action for negligent misrepresentation, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. These are the three causes of action that were tried before this Court.

On July 14, 2010, a month after Ameris initiated foreclosure, Ameris sold the mortgage loan to Galt Valley, LLC. [Def.'s Ex. 115]. Galt Valley and Plaintiffs settled the foreclosure action on December 1, 2010. [Pl's Ex.7]. As part of the settlement, the borrower, Gibson, executed deeds in lieu of foreclosure conveying the apartment complex and other real property that served as collateral for the loan to Galt Valley. In exchange, the notes were deemed satisfied, the loan documents were canceled, and all litigation pending between Gibson and Galt Valley was dismissed. The counterclaims asserted against Ameris still remained. The counterclaims against Ameris were tried before this Court and the Court's findings of fact and conclusions of law are set forth below.

FACTUAL BACKGROUND

The key people in this case are Linda A. Gibson (Gibson), Karl H. Zerbst, Jr. (Zerbst) and Benjamin R. Lanier (Lanier). However, others were also important players in this case and will be introduced later in this order. Gibson is a 63 year old widow with a high school education and limited business experience who inherited several properties from her parents and late husband. [Tr. 69-70, 72-73, 87-89]. Until Gibson's husband died in 2003, he handled all the business and financial aspects of their assets. Gibson's assets were primary real estate that was inherited from her husband and father. [Def.'s Exs. 5, 7, 11,17]

Zerbst was employed in the banking business for 26 years. He first met Gibson in 2004-2005 when he was employed at First Reliance Bank (Reliance) in Charleston, S.C. Zerbst left Reliance on October 4, 2007 and was officially hired by Ameris on January 11, 2008. Lanier was also employed by First Reliance where he was a credit analyst. Zerbst was his superior. Lanier left First Reliance on October 9-10, 2007 and began work at Ameris on October 11. 2007. Both Zerbst and Lanier played a major role in Gibson's purchase of the apartment complex and the financing of the apartments while they were employed both at First Reliance and at Ameris. Zerbst was Lanier's superior when they were employed at Ameris.

In 2004 after her husband's death, Gibson met Rolando Villavicencio (Villavicencio) and his wife at church. [Tr.111] Villavicencio was a real estate agent at ReMax and knew of Ms. Gibson's inexperience in the real estate field and finance. He assured her of his experience and competence in real estate, and persuaded Ms. Gibson to allow him to manage her properties. She trusted him and he took advantage of her trust for his benefit. Villavicencio, Zerbst and Lanier all played major roles in the purchasing of the shopping center and apartment complex by Ms. Gibson.

In December 2005, Villavicencio convinced Gibson to purchase a shopping center in Moncks Corner, SC for $2.4 million. [Def.'s Ex. 3; Tr. 73:10-19; 160:12-20]. Gibson hired ReMax and Villavicencio to manage the property for a ten-year term. [Def.'s Ex. 4; Tr. 179:1-7]. Villavicencio took Gibson to First Reliance Bank to arrange for the financing of the shopping center. Zerbst and Lanier both worked at First Reliance and assisted and advised Ms. Gibson in the financing of the shopping center. Mr. Lanier was the credit analyst for the shopping center transaction and Zerbst was his superior. In advising Ms. Gibson about this transaction, Zerbst and Lanier recommended to Gibson that she place a second mortgage on a home she owned on Isle of Palms for the down payment and she agreed. [Pl. Ex. 32]. At this point the shopping center was purchased with a hundred percent borrowed monies. It was during the time of the purchasing and financing of the shopping center that Ms. Gibson first began to seek advice from Zerbst and reposed her trust in him. [Tr.75, 119] He accepted her trust and from this time forward

advised her in all of her investment transactions. In fact, at the time of the trial Gibson had only been involved in two investment purchases and Zerbst, Lanier and Villavicencio were the key players in giving her advice regarding the purchase and financing of these investments. Although the shopping center transaction is not directly connected with the case tried before me, it does afford considerable and credible insight into the relationship between Gibson, Villavicencio, Zerbst and Lanier.

The case tried before me was a case against Ameris, the lender in Ms. Gibson's purchase of an apartment complex located on Otranto Road in Berkeley County. Gibson was informed by Villavicencio of the existence of the apartment complex. He was familiar with the apartment complex because he was the property manager and was the exclusive listing agent for the seller. [Ct. Ex. 3, Gibson Dep. 35:22-36:31; Def.'s Ex. 9]. Villavicencio represented to Ms. Gibson that the fair market value of the apartment complex was $2.8 million. [Tr. pgs.182-83, 185-86, 188-89] Villavicencio also told Gibson that he would handle everything, from helping her obtain financing, to overseeing the construction, to leasing and selling the renovated apartments, to managing the property. [Ct. Ex. 3, Gibson Dep. 51:10-25] Gibson signed a contract to purchase the apartments for $2.8 million.

In the fall of 2007, Villavicencio contacted Zerbst at First Reliance to have him assist in obtaining the loan for Gibson to purchase the apartment complex. As part of the loan application process, First Reliance ordered an appraisal which was completed on September 12, 2007 and showed the as-is value of the apartment complex as $2.8 million and the as-renovated value as $3.7 million. [Def.'s Ex. 13] The loan at Reliance was for $2.8 million and required $700,000 as a down payment, as structured by Zerbst. Gibson had no money to make the $700,000 down payment. Zerbst advised Gibson that if Reliance was going to finance the purchase she should get a loan on her beach house for the $700,000 down payment. [Tr.123; Pl. Ex. 67]

As previously noted, Zerbst left First Reliance on October 4, 2007 and Lanier left First Reliance on October 9-10. Lanier became employed at Ameris on October 11, 2007. Between October 16th and October 22nd, Lanier received a call from Zerbst requesting a meeting because he was having Gibson

leave Reliance and get her loan from Ameris. Lanier met with Zerbst and Villavicencio at the apartment complex and received a "nearly complete package" of loan documents from Zerbst [Tr. 479] Ms. Gibson was not present at this "strange" meeting. Immediately after this meeting, Lanier submitted a loan committee application for Gibson which was approved the next day by the state president for Ameris, John Hipp. Lanier admitted that the loan at Ameris was very similar to the loan structured by Zerbst while he was at First Reliance. [404-406]

Ms. Gibson paid $2.8 million in 2007 for the apartment complex which is double what the previous owner, AbesPro, paid for the property in 2003. [Tr. 525] The property sold on June 15, 2012 for $650,000 after being completely rehabilitated. Geoffrey Southard, a commercial real estate sales expert, who was retained by Ameris Bank and their successor Galt Valley, LLC, which paid Ameris $975,000 for the loan, testified that the property was never worth the price Ms. Gibson paid for it. [Tr. 525] Economic times have changed from November 2007 to date, but the apartment complex was never worth anywhere near what Ms. Gibson paid for it. Gibson personally guaranteed all of the debt, including the borrowed down payment for the Ameris debt. She stood to lose everything and, except for her own efforts at mitigation, would have.

Ameris' role in Ms. Gibson's misfortunes harmed not only Ms. Gibson, but cast Ameris' upper management, bank policy and culture in a very poor light.[1] Ms. Gibson's financial plight darkened as a result of the events the subject of this lawsuit,

Ameris' Regional Credit Officer and Senior Vice President Don Snipes wrote:

> As you may remember, we have some culpability in [Linda Gibson's] problems as we did not manage the construction loan as we should and have potentially aided in her former property manager at REMAX may have siphoned off some of the loan proceeds. She is currently in litigation with REMAX over this as the agent was representing them when this occurred, but we are a long way from any settlement. [Pl's Tr.Ex. 31]

[1] In 2007, Ameris sought to expand its operations in the then burgeoning Charleston real estate market in a number of ways. It hired employees and loan officers away from competitor banks, expecting and intending them to bring business and contacts to Ameris. It loosened its lending practices in order to make more loans; it ignored its own lending guidelines. It encouraged the excess that caused this problem.

Typically, suits against banks turn on whether the bank has legal duties to customers, and this is often a function of whether the bank is acting as a fiduciary. In this case, Ameris' own employees and former employees (whose conduct during the events was in a representative capacity) and Ameris' own expert testified to duties owed by the bank to the Plaintiff:

1. Ameris admitted a duty to tell Ms. Gibson that the project revenue would not carry the loan. [Tr. pg 612][2]
2. Ameris admitted a duty to warn a customer if it has reason to know the customer's representative is misusing the customer's funds. [Tr. 607, 416, Dep. Bogan pg 39]
3. Ameris admitted that, while it should not undertake to give investment advice because the bank has a vested interest in the transaction and that to do so creates lender liability, if the bank does so, the advice must be accurate. [Tr. Dep. Bogan 36-38]
4. Ameris admitted that banks have a duty not to mislead their customers and to be honest, accurate, and complete in their representations and in their accounting. [Tr. 606, Court Exhibit 2, Barksdale Dep. 93-94]

Often times the degree of a customer's sophistication is a factual issue. The parties to this suit agree Ms. Gibson is unsophisticated in financial matters. It was apparent to me that Ms. Gibson did not understand apartment rentals, debt service, capitalization rates, construction budgets, or for that matter much beyond managing household finance, which Ms. Gibson's life experience and lack of financial experience confirm. Ameris acknowledged that Gibson was a neophyte and unsophisticated. Zerbst a primary mover in these events stated:

> Q: It didn't take you long after meeting Linda Gibson to see that she was new at this, did it?

[2] A party is bound by its own evidence and that of his expert witness. *Benford v. Berkeley Heating Co.*, 258 S.C. 357, 365, 188 S.E.2d 841, 844 (1972).

A: I don't know if she was new, but she was not well experienced like many customers that I would meet with.

Q. I am going to hand you a copy of the deposition and ask you to turn to page 69 at line 8.

A. That was on line 10. Yes; I felt like Linda was new at this. That's correct. [Tr. 307-308]

Ameris Bank knew Linda Gibson was an unsophisticated investor (with millions of dollars of inherited real estate) who placed her trust in Ameris to advise her whether and how to purchase an apartment complex. Ameris breached this trust by encouraging Ms. Gibson to purchase the apartments with a financing structure doomed to fail.

While banks are not guarantors of an investment's success and while ordinarily they are not fiduciaries, Ameris concedes a duty not to mislead their customers or aid others in taking advantage of a customer. Ameris' actions here are a raw portrayal of what banking should not be. Berkeley County is not Wall Street and this Court is not so financially sophisticated as to understand the cause or extent of the financial upheaval of the last five years, but I do understand banking excess.[3] Ameris' upper management created an environment that fostered excess at the expense of their customers.

Ameris knew, as Zerbst and Lanier advised Gibson to borrow the $700,000.00 down payment needed to purchase the apartments, that the revenue generated by the apartments would not cover the borrowed down payment and the debt to Ameris. Lanier testified he did not know the down payment was borrowed and that had he known, it would have affected his recommendation of the loan.[4] Zerbst testified that Lanier most certainly knew the down payment was borrowed. [Tr.349-350] Lanier and Zerbst participated in the structuring of this loan and recommended it to Gibson. From the testimony, it was

[3] That Goldman Sachs might sell to its customers as sound investments subprime loans for transactional fees and at the same time short the investment believing in the investment's demise, is of the same quality as what happened here.

[4] Q. -- did you take the repayment of the $700,000 second mortgage into account when you did that cash flow analysis? A. No, sir, I did not. Q. If you had taken that repayment of the 700,000, it would have made a big difference in the landscape of the loan, wouldn't it? A. In the overall picture specific to the apartment complex, yes, sir. [Tr. 453-454]

obvious to me that Lanier and Zerbst understood Gibson's lack of sophistication, Villavicencio's overreaching, and the project's weakness.

Karl Zerbst testified that:

Q: And you knew that Linda Gibson was not a savvy real estate investor?

A: That is fair to say.

Q: And in fact you knew that Linda Gibson relied on the advice of others?

A: That's correct.

Q: And because of that you developed a personal relationship with her?

A: No, sir.

Q. Well, turn your attention to Page 69 where you were telling us at line 9—did you tell us: "I'm assuming certainly on this case, too, because Linda, I felt, was new at this and there was a personal connection I made with that. Maybe a bit more than the normal borrower?

A. Because we had – to answer that, where I was coming from there is that she had borrowed money at First Reliance on the shopping center and I knew that she was borrowing that money as well as the apartment loan.

Q: So it is true that you made a personal connection with –

A: I made a personal connection because this request was similar to the others.

Q: But also knowing that she was new at this, she lacked experience and she relied on the advice of others.

A: Yes, sir. [Tr. 309]

A: When Rolando called me initially and said that he had an apartment complex that he wanted to bring to me for financing for Linda Gibson, my first question to him: Well, does Linda know about it? Because I knew Rolando really handled the affairs, if you will for Linda. I know that from a previous conversation and a previous loan that was made. [Tr. 324]

Did Ameris want the loan to work? Yes. Did it have paperwork "justifying" its actions? Some. But it also had unencumbered collateral worth millions if the project failed. Did the bank believe that Ms. Gibson's net worth had risen in a short time from $15 million to over $52 million or that Ms. Gibson's net worth as of the date of the loan was over $52 million ? No. But if the loan failed, Ameris knew it was covered by other unimpaired collateral.

Ameris committed to this loan without an application and approved it in three days at its new branch in Charleston, a market it had just entered. [Dep. Court Exhibit 2, 74 and 83] Ameris used the bank's grand opening in Charleston, a nighttime gala, to have Ms. Gibson sign documents that obligated her legally when she neither understood nor could perform them, and it was at the gala that Ms. Gibson first learned her Klister Lane property would serve as additional collateral for the apartment debt. [Tr. 126-128, 476-477] Gibson's $2,800,000 loan was a splash for Ameris and its new Charleston team. This loan was never in Gibson's interest. The loan was structured by Zerbst and Lanier which required that she take two mortgages to purchase the apartments. This investment was not aided by the economic times that ensued following the purchase, but it failed because it was never viable and certainly not suitable for a 63 year old unemployed woman with no business experience.

Ameris "had a hand" in this project's failure and it was substantial. The bank's conduct was overreaching and egregious. Ameris violated its customer's trust and took advantage of her lack of sophistication.

FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

The complaint contains the following causes of action: (1) negligent misrepresentation, (2) breach of fiduciary duty, and (3) aiding and abetting breach of fiduciary duty. The Court finds and concludes that Gibson has proven the elements of each of these causes of action. Accordingly, judgment is entered in favor of Plaintiffs.

I **Zerbst was an agent of Ameris when Gibson purchased and financed the apartment complex.**

As an initial matter, the Court will address the issue of whether Zerbst was an agent of Ameris Bank at the time that Gibson made the decision to purchase the apartment complex and obtained the financing of the loan from Ameris Bank. The Court finds that Zerbst was an agent of Ameris during that time, despite Ameris' claim that Zerbst did not officially start working for them until January 11, 2008. Accordingly, the Court concludes as a matter of law that Ameris is liable for the conduct of Zerbst leading up to the purchasing and financing of the apartment complex.

A. Law

"Agency" is a consensual, fiduciary relationship whereby a person, the agent, acts on behalf of another, the principal, subject to the principal's control, in such a manner as to affect the legal relationship of the principal with third parties. *Restatement (Second) of Agency § 1*; *Peeples v. Orkin Exterminating Co.*, 244 S.C. 173, 135 S. E. 2d 845 (1964). The test to determine agency is whether the purported principal has the right to control the conduct of his alleged agent. *Fernander v. Thigpen*, 278 S.C. 140, 293 S.E.2d 424 (1982). "Creation of agency does not depend upon express appointment and acceptance; agency often arises from words and conduct of the parties that exhibit the characteristics of agency." *Bankers Trust of South Carolina v. Bruce*, 283 S. C. 408, 323 S. E. 2d 523 (Ct. App. 1984).

Agency may not be established solely by declarations and conduct of the alleged agent, but such declarations and conduct are evidence which can be considered in connection with other evidence that may establish the alleged agency. *Muller v. Myrtle Beach Golf & Yacht Club*, 303 S.C. 137, 399 S.E.2d 430 (Ct. App.1990), overruled on other grounds by *Myrtle Beach Hosp.Inc. v. City of Myrtle Beach*, 341 S.C.1, 532 S.E.2d 868 (2000); *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S. C. 75, 124 S.E.2d 602 (1962).

To establish an agency relationship, the relying party must show "(1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005).

"The relationship of agency need not depend upon express appointment and acceptance thereof." *Bankers Trust of South Carolina v. Bruce*, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984) (citing *Crystal Ice Co. v. First Colonial*, 273 S.C. 306, 257 S.E.2d 496 (1979)). Agency may be implied from the words and conduct of the parties and the circumstances of the particular case. *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 317 S.E. 2d 748 (Ct. App. 1984). A party asserting agency as a basis of liability must prove the existence of the agency by the greater weight of the evidence and must be clearly established by the facts. *McCall v. Finley*, 294 S.C. 1, 362 S.E. 2d 26 (Ct. App. 1987).

Ratification, as it relates to the law of agency, means the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent." *Barber v. Carolina Auto Sales*, 236 S.C. 594, 599, 115 S.E.2d 291, 294 (S.C. 1960) (quoting *Mebane v. Taylor*, 164 S.C. 87, 92-93, 162 S.E. 65, 67 (S.C. 1932)). Further, where there is evidence that an agent acted for the principal and the principal accepted the arrangements made on his behalf by the agent, the agency relationship was established. *See Jay Cee Fish Co. v. Cannarella*, 279 F. Supp. 67 (D.S.C. 1968).

B. Analysis

This case is unique in that the two major players, Zerbst and Lanier were employed with a competitor of Ameris, First Reliance Bank, but left and both became employed at Ameris. The conduct of Zerbst and Ameris' agents prior to his official hiring in January 2008 and the process of hiring Zerbst, are facts that led to my determining that an agency relationship existed between Ameris and Zerbst when Gibson finally decided to buy the apartment complex and the loan was structured and accepted by Ameris. Ameris argues that there was no proof that it had made any representations to a third party concerning Zerbst being an agent for the bank. The explanation for this is that Ameris would not represent to a third party that Zerbst was its agent because of the non-compete agreement between Zerbst and Reliance that it was trying to evade.

1. **Transfer of Gibson's loan from Reliance to Ameris**

Zerbst structured the loan for Gibson at Reliance early September 2007. [Pl. Ex. 67] While employed at Reliance Lanier was aware of the apartment loan for Gibson. [Tr. 457] As set forth herein above, Zerbst left First Reliance on October 4, 2007 and was "officially" hired by Ameris on January 11, 2008. Lanier left on or about October 9/10, 2007 and began working at Ameris on October 11, 2007.

Zerbst began talking with Mr. Bogan of Ameris about employment before he left First Reliance. After he left First Reliance and before he was "officially" hired, Zerbst was in constant contact with Ameris through Mr. Bogan and Lanier by email, phone calls and in person. Ameris suggests that the contacts between Ameris and Zerbst were not unusual but normal steps in the banks hiring process. When one takes into consideration the facts surrounding these contacts and other things Zerbst and Ameris were doing during this time frame, together with the entire hiring process of Zerbst by Ameris these communications are significant and consequential.

Prior to leaving Reliance, Zerbst spoke with an attorney about a covenant not to compete that he had given to Reliance. He tried to negotiate a resolution of the problem. [Tr. 328-331; Pl. Ex. 38] During this time of negotiations with Reliance, Zerbst's email production shows he was actively corresponding with Mr. Bogan of Ameris who was keeping the bank's attorney informed. [Pl. Ex. 39] Ameris' employee Lanier testified that Zerbst maintained an office in the Ameris building on Archdale Street and made calls and checked emails during the non-compete period. [Deposition of Lanier, Court Exhibit 7, pg 216]

Of significance, it was also during this time that Zerbst was working diligently with Lanier (who was now employed with Ameris) to have Gibson's loan moved from Reliance to Ameris. He represented to Ms. Gibson that Reliance was not going to give her a loan but assured her that Ameris would help her. He told her that he had given the loan documents from Reliance to Lanier at Ameris. [Tr.129] Zerbst also assured Gibson that he would ultimately be handing the matter for her at Ameris. [Tr. 137] Both of these assurances by Zerbst came to be true.

The testimony of Villavicencio corroborates Gibson's testimony. Villavicencio testified that Zerbst told him he had already left Reliance and was in the process of moving to Ameris. Villavicencio further testified that there was "an understanding between Carl Zerbst and Benji Lanier" in getting Ms. Gibson's loan moved from Reliance where the application was first taken to Ameris where the loan was underwritten and closed. He stated that it was Zerbst who structured the loan to include Ms. Gibson's borrowing the down payment.

Shortly after Lanier began to work at Ameris on October 11, 2007 (within 5 to 10 days) he received a phone call from Zerbst. [Tr.399; 464] Zerbst told Lanier that he was sending Gibson to him to process the loan application for the apartments through Ameris. [Tr.400; 401] Lanier was aware that the loan was initially being processed at Reliance when he and Zerbst were employed there. On the day or day after Lanier received the call, Zerbst made arrangements to have Lanier pick him up and travel to the apartment complex to meet with Villavicencio. As they traveled to the site, Zerbst was carrying a package with documents relating to Gibson's loan, but never handed the package to Lanier. When they arrived at the apartment complex, Zerbst made an elaborate show of delivering the package to Villavicencio who in turn told Lanier that he wanted Ameris to handle this transaction. [Tr.pgs 399-403] Gibson was not at this meeting.

Lanier never questioned the package transfer, despite the fact that he thought it seemed "staged." [Tr. 403; 9-14] He simply took the package from Zerbst and did as he requested. Lanier used information in that package as a guide for the loan application and the rental cash flow analysis at Ameris. [Tr. 404] He admitted that the loan application he put together at Ameris was very similar to the one structured by Zerbst at Reliance. [Tr. 406] In just under two weeks from this "staged" meeting, on November 2, 2007 Ameris made the loan as structured by Zerbst and Lanier. Zerbst's solicitation of Gibson's business for Ameris, his representations that he would take care of Gibson at Ameris, and his clear understanding with Lanier at Ameris regarding Gibson's loan are characteristic of Zerbst's agency relationship with Ameris.

It is without question that Lanier was an agent for Ameris during this time period. He knew Zerbst solicited Gibson's business for Ameris and he actively participated in the solicitation and conduct of Zerbst. From the time Lanier was hired at Ameris on October 11, it appears that Lanier followed the instructions of Zerbst as though he was Lanier's superior. Everything that Zerbst suggested to be done for Gibson was done by Lanier. It is noted that Zerbst was Lanier's superior at Reliance and after Zerbst was "officially" hired at Ameris. The evidence is overwhelmingly clear that Zerbst established this new contractual relationship between Ameris and Gibson with the direct help of Lanier, a loan officer at Ameris. Zerbst was working for and with Ameris on this transaction. Ameris through the actions of Lanier consciously or at least impliedly represented to Gibson and Villavicencio that Zerbst was an agent of Lanier. So with Ameris' collaboration and consent, Zerbst orchestrated the loan to be transferred to Ameris, and both he and Lanier were agents of Ameris when all of this occurred.

2. Gibson's loan structure, approval and closing at Ameris

Shortly after Lanier received the loan documents from Zerbst he began to prepare a loan committee application for Gibson's $2.8 million dollar loan with a $700,000 dollar down payment. The loan application was dated October 22, 2007 and submitted to Lanier's superiors including, John Hipp, who was at that time the state president for Ameris Bank. [Tr. 405-406] When Lanier submitted the loan application together with the apartment economic analysis on the 22nd to upper management at Ameris, it had not been signed or reviewed by Gibson. [Tr.407] On October 23rd at 3:40 PM Lanier emailed Hipp about the Gibson loan in response to some question from Hipp. [Tr.471] On the same day at 7:40 PM Hipp emailed Lanier stating "Thanks. I think we can draw a circle around this one quickly." [Pl. Ex. 29] Hipp made this quick approval of the $2.8 million dollar loan from a new customer before he received the information he had requested from Lanier. On October 24, 2007, Lanier emailed Hipp at 5:37 PM sending him responses to his questions. [Def. ex. 24] When questioned about this quick approval Lanier stated:

Q. Did you get the impression that your supervisors at the bank knew about this loan before you brought it to them?

A. I can't say for sure.

Q. But that is the impression you got?

A. Like I said, the loan got approved quickly.

Q. You didn't get much resistance from these supervisors at the bank on this loan, did you?

A. There wasn't a lot of questions asked in terms of rebuttals; . . .

Q. Even with the growth mode you normally would have expected more questions on a loan of this size with a new customer; a new customer who hadn't even filed an application?

A. I can't say that for sure, but if I was the approver I would have asked some questions. [Tr. 408]

Based upon my observation of Lanier's demeanor when responding to these questions, his answers to the questions, together with the quick approval of this loan by his supervisors, this Court is convinced that his supervisors were aware of this loan and were ready to approve it before he submitted the loan application to them. Lanier testified that he had never handled a loan of this magnitude so quickly. He described it as a unique situation because he was given the loan documents by Zerbst that were nearly complete and because it was approved so quickly. [Tr.478, 479, 482]

The circumstances of the execution of the loan documents were also highly irregular. The execution occurred at a nighttime gala on October 25, 2007 to celebrate the opening of Ameris Charleston office. Gibson's loan was the flagship loan in getting the Charleston office up and running. At the gala, Gibson consumed alcoholic beverages, and she felt pressured to sign the documents. The signing took place around 9:30 to 10 PM in the lobby of the new bank. [Tr. 126-28:479-80]. Gibson had no knowledge of the need for the Klister Lane property to be additional collateral for the loan until the night of the grand opening of the bank. She agreed to encumber the Klister Lane property and sign the documents because of the unusual circumstances of that night and because of her trust in Zerbst and Lanier, and Villavicencio. [Tr. 126-28, 476-77] In any event, the representations and actions put in

motion by Zerbst with respect to Ms. Gibson's loan were accepted by Lanier. He understood Ms. Gibson's inexperience and knew of Villavicencio's overreaching. Lanier pushed Ms. Gibson into signing loan documents at the after-hours grand opening of the bank in order to hurriedly move forward. Lanier was certainly Ameris' agent.

Further, South Carolina Courts have held that where there is evidence that an agent acted for the principal and the principal accepted the arrangements made on his behalf by the agent, the agency relationship was established. *See Jay Cee Fish Co. v. Cannarella*, 279 F. Supp. 67 (D. S. C. 1968). Zerbst not only sent Ms. Gibson to Ameris, he participated in structuring the loan, including advising Gibson to fund the down payment for the purchase of the apartments by placing a mortgage on her beach house. Ameris accepted the arrangement made by Zerbst for Ms. Gibson's loan and welcomed her business.

It is significant that, when first asked in discovery (early in the case) about the documents Ameris reviewed in order to process Ms. Gibson's loan, Ameris claimed it did not know, because: "Karl Zerbst handled the processing of the loan applications relevant to this case. Mr. Zerbst is no longer an employee of Ameris Bank, and Ameris therefore cannot ascertain what documents he may have reviewed." At a later time, possibly when the significance of the above answer became apparent, Ameris amended the answer to the interrogatories by asserting "Ameris has since determined that this information was incorrect because Mr. Zerbst did not begin working for Ameris until more than two (2) months after Gibson purchased the apartment complex..." I find the amendment to be disingenuous. Gibson has always maintained that Zerbst was acting as Ameris' agent before he became officially employed. The fact that Zerbst was not officially employed by Ameris until after the loan does not mean that he did not process the loan for Ameris before he formally joined its ranks. Ameris was unable to produce any witness to explain why the first answer was given or why the "mistake" was made.

3. Official hiring of Zerbst

I now turn to the process of hiring Zerbst by Ameris. Zerbst "officially" started worked for Ameris Bank on January 11, 2008 but there is sufficient evidence that he was working for them well before that date. Zerbst was pushing clients from First Reliance to Ameris, including Ms. Gibson. Zerbst also admitted he had several conversations with Ameris about employment and that Ameris "had a positive response to me if I could help them open up the market. That is where they were going – that is what excited me." The $2.8 million loan was a large loan in the Charleston market, and Zerbst delivered that loan to Ameris which was quickly approved. Zerbst was in constant contact with Ameris Bank by email, phone, and in-person with Mr. Bogan and Mr. Lanier before his formal hiring.

In addition, the procedures for hiring new employees that Ameris Bank requires were not followed in the hiring of Zerbst. The manner in which Mr. Zerbst was "officially hired" strongly suggests that it was just that – a formalizing of employment that had already occurred but was not yet announced to avoid problems with the non-compete agreement. Mr. Sturm, the president of Ameris South Carolina testified that potential employees of Ameris Bank "would go through a series of interviews with various folks." Such was not the case with Zerbst. He was interviewed by Bogan who remembered little to nothing about the hiring process. No other credible evidence was presented regarding any "series of interviews with various folks."

Those responsible for hiring Zerbst avoided directly discussing the hiring process. Bogan stated that he spoke with Zerbst, but when asked about when, and the content of his conversations, he was evasive and could recall nothing about when he interviewed Zerbst or what was said. In response to questions about Zerbst's hiring, Bogan most often responded "I don't recall." [Bogan deposition 23-26] When asked if he had any calendar or record that he could go back to help identify when he met with Zerbst, he stated: "No." It is noted that at one time, Ameris was in possession of Zerbst's 2007 day planner during the relevant times of this case but was claimed to be lost.

On January 9, 2008, Zerbst filled out and signed his application for employment. On the same day at 3:07 pm, Amy Bigham, executive assistant for Mr. Hipp, emailed Mr. Bogan that "Karl is good to go. I am working on the benefit summary sheet and can include it when I send the offer letter." Later that afternoon at 3:25 pm, Mr. Bogan responded to Ms. Bigham asking "will you please prepare an offer letter with the following terms...."

Although Mr. Sturm testified that a formal letter asking a potential employee to join Ameris Bank would not be issued until after a drug screening, this was not true for Zerbst. According to LacCorp's information, the date of collection of samples from Zerbst for screening was January 14, 2008. This was four days after Zerbst's employment letter was offered and three days after it was accepted on January 11, 2008. It is convincingly clear that Ameris and Zerbst were trying to keep Zerbst involvement with Gibson's loan under the radar in order to circumvent Zerbst's non-compete agreement.

Ameris argues that there is no evidence that Ameris had the right to control the activities of Zerbst at the time the loan originated and was approved and therefore he was not their agent until he was formally hired in January 2008. I reject that argument. Ameris had the ultimate control of this loan that was brought to them by Zerbst and structured by him and Lanier for its benefit. Ameris could have from the very beginning rejected the loan as structured. Instead, the representations and actions put in motion by Zerbst with respect to Ms. Gibson's loan were consented to, ratified, and accepted by Lanier, who was unquestionably an agent of Ameris during the relevant time period. As discussed above, that based on the testimony of Lanier and the other facts surrounding the loan, this Court finds that Lanier's superiors were aware of this loan prior to the loan commitment being presented to them. The greater weight of the evidence establishes that Ameris accepted and participated in Zerbst's solicitation and structuring of Gibson's loan with full knowledge of the facts and with little, if any, reviewing or questioning.

In a case styled *First Reliance Bank v. Karl H. Zerbst and Ameris Bank*; case no. 2008-CP-21-785, First Reliance sued Zerbst and Ameris for stealing First Reliance clients and alleged that Zerbst was essentially a ghostwriter on several loans for clients which began at First Reliance and ended up with

Ameris. First Reliance alleged Zerbst was working for Ameris in the fall of 2007 and claimed Zerbst and Ameris were keeping Zerbst's involvement under the radar in order to circumvent Zerbst's non-compete agreement. The case was ultimately settled with First Reliance.[5]

Conclusion

The evidence clearly establishes from the totality of the circumstances surrounding Zerbst and Lanier leaving First Reliance; the transfer of Gibson's loan to Ameris; the structuring of the loan and the manner it was approved; and the process of the officially hiring of Zerbst, that he was an agent of Ameris as early as October 11, 2007. Zerbst worked for and with Ameris to secure Gibson's business. Lanier was an agent of Ameris as of October 11th and he immediately followed Zerbst's instructions and demands relating to Ms. Gibson's loan. Lanier used the documents provided by Zerbst to prepare the loan committee application and the apartment economic analysis form that he submitted Bogan and Hipp for approval. It was very similar to the way the loan was structured at Reliance by Zerbst. Lanier never questioned anything that Zerbst asked of him. Ameris accepted and confirmed the actions of Zerbst all for the banks benefit. Mr. Lanier's actions support and justify Gibson's belief that Zerbst was an agent of Ameris.

II. The evidence established that Ameris had a fiduciary relationship with Ms. Gibson.

Ameris argues that there is not a single appellate court decision in South Carolina in which the court has found a fiduciary relationship existed between the bank and its customer. In reviewing the cases supporting the position of Ameris, the facts of those cases are clearly different and are not even close to the circumstances and facts of this case. The relationship between Zerbst / Ameris and Gibson was much more than a mere creditor – debtor relationship. There was no credible evidence presented to establish

[5] The parties' filings in the litigation between First Reliance and Mr. Zerbst and Ameris state that Ameris was in possession of Karl Zerbst's 2007 day planner, which presumably would have shown exactly when Karl Zerbst and Ameris met to discuss Mr. Zerbst employment. However, Ameris has failed to produce the 2007 calendar, claiming it has been lost. (Trial Transcript pgs 332-333). Based on the other evidence presented, it is likely that the 2007 calendar would contain further evidence that Mr. Zerbst was acting as Ameris' agent before he was formally employed by Ameris. As Ameris has been unable to produce the 2007 calendar, I find the Plaintiff is entitled to a presumption that the evidence contained in the 2007 calendar would be damaging to Ameris. *See Stokes v. Spartanburg Regional Medical Center*, 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006).

that Gibson ever negotiated any of the terms of the loan or the use of collateral to secure the loan. She simply followed the advice and recommendation of Zerbst, Lanier and Villavicencio. She learned of the additional collateral subject to the loan around 9:30 to 10 PM on the night of the Ameris' opening gala. Gibson imposed a special confidence and trust in Zerbst and Lanier which they induced and accepted. There is compelling evidence to establish this trust relationship. Because Zerbst and Lanier were agents of Ameris it had a fiduciary relationship with Gibson.

A. Law

"A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). To be a fiduciary relationship, the relationship must be more than casual. *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 330, 574 S.E.2d 502, 507 (Ct. App. 2002) (citing *Steele v. Victory Sav. Bank*, 294 S.C. 290, 368 S.E.2d 91 (Ct. App. 1988)). "Courts of equity have carefully refrained from defining the particular instances of fiduciary relationship in such a manner that other and perhaps new cases might be excluded and have refused to set any bounds to the circumstances out of which a fiduciary relationship may spring." *Island Car Wash, Inc.*, 292 S.C. at 599, 358 S.E.2d at 152; *see Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986) ("As a general rule, mere respect for another's judgment or trust in his character is usually not sufficient to establish such a [fiduciary] relationship. The facts and circumstances must indicate that one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party."). Thus, in order to determine whether a fiduciary relationship existed between Ameris Bank's agents, Mr. Lanier and Mr. Zerbst, and Ms. Gibson, this court must look to the particulars of the relationship between the parties.

The general rule in South Carolina is that a bank does not owe a fiduciary duty to its customers. *Burwell*, 288 S.C. at 40, 340 S.E.2d at 790; *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct.

App. 2003); *Rush v. S.C. Nat'l Bank*, 288 S.C. 560, 562, 343 S.E.2d 667, 668 (Ct. App. 1986). However, if a bank undertakes to advise its customer as a part of the services the bank offers, then a fiduciary relationship may exist between the bank and its customer. *Id.* "Such a relationship charges the bank with a duty to disclose material facts which may affect its customers' interest." *Burwell*, 288 S.C. at 40-41, 340 S.E.2d at 790. Yet, no fiduciary relationship between a bank and its depositor exists when the bank is unaware of any special trust reposed in it. *Id.*; *Steele v. Victory Sav. Bank*, 295 S.C. 290, 294, 368 S.E.2d 91, 93 (Ct. App. 1988).

B. Analysis

Shortly after her husband died in 2003, Gibson began to engage in business with Zerbst at Reliance. She initially met with Zerbst several times seeking information about rates and investing her money in the bank. [Tr.118] This was the beginning of special relationship between Ms. Gibson and Zerbst. In December 2005, after Villavicencio convinced Gibson to purchase a shopping center, he took her to Reliance to arrange for the financing of the shopping center. Both Zerbst and Lanier were employed at Reliance at this time. Lanier was the credit analyst for the transaction and Zerbst assisted in structuring the loan package. Gibson talked with Zerbst about whether or not the shopping center was a good investment for her. She trusted what he told her. [Tr.119] Both Zerbst and Lanier recommended to Gibson that she place a second mortgage on a home she owned on Isle of Palms to finance the loan and she agreed to do so. [Pl. Ex.32] This credit memo, together with the testimony of Gibson, is persuasive evidence that Zerbst was giving her advice. Relying on her conversations with Zerbst and the recommendations by him and Lanier, she closed on the shopping center. At this stage of his relationship with Gibson, Zerbst knew that Gibson trusted him and that she would follow his advice. This shopping center transaction gives substantial and credible insight into the personal and fiduciary relationship between Gibson and Zerbst and Lanier which carried over to their employment at Ameris.

In early 2007, Villavicencio suggested to Gibson that she purchase the apartment complex for $2.8 million. On May 7, 2007 Gibson signed a contract to purchase the apartments for the $2.8 million so

that Villacencio could try to put a deal together. The "contract" was unenforceable as it lacked consideration. And, while it was contingent on obtaining financing, it was silent on financing terms. The contract did not specify how much Ms. Gibson proposed to put as a down payment on the purchase nor how much she expected to finance and the financing terms. Villavicencio contacted Zerbst about the "contract" to discuss with him the financing of the apartments. At this time, Zerbst was still employed at First Reliance. He admitted that Gibson was inexperienced with real estate investments and relied on the advice of others and he had a personal connection with her. [Tr.309-310] When Villavicencio called Zerbst about Gibson buying the apartments Zerbst asked him if Gibson knew about it. He was concerned that Villavicencio might be doing something that Gibson did not know about. Knowing that Gibson was not a sophisticated investor and because of his prior relationship with Gibson [Tr. 310], Zerbst insisted that Villavicencio bring Gibson in for a meeting to discuss the purchase and financing of the apartments. [Tr.355]

At the time Gibson signed the contract she was not ready to close. She had doubts about borrowing the $2.8 million dollars and how she was going to pay it back because she didn't have that amount of money available. [Tr. 124] Unsure of how to obtain financing to purchase the apartments including the substantial down payment and how she would pay back the money back, she once again sought the advice of Zerbst. He advised Gibson that purchasing the apartments was a sound financial decision for her and a suitable investment as the rents generated by the apartments would cover the debt on the property. [Tr. 124, 140-142] Zerbst advised and recommended to Ms. Gibson that she fund the substantial down payment of $700,000 by placing a loan on her beach house and he structured the loan with this knowledge. Although, Zerbst denied that he recommended to Gibson that she refinance her beach house for the down payment, the testimony of Gibson was believable. Her testimony was supported by the fact that this was not the first time he recommended to her that she borrow money against this home for a down payment. [Pl. Ex.32] It is entirely reasonable and believable that he recommended to

Ms. Gibson that she refinance the beach home for the down payment on the apartments, just as he did for the shopping center.

She applied for a loan with Reliance in September 2007. [Def. Ex. 11 -12] At this time, in the sequence of facts presented to this Court, the greater weight of the evidence is convincing that the relationship between Zerbst and Ms. Gibson was much more than a casual one and more than a creditor and debtor relationship. He knew she trusted him and he accepted that trust. There is more credible evidence which establishes that this is a fiduciary relationship founded on trust and confidence reposed by Gibson on Zerbst.

Gibson testified that Zerbst told her there were problems at Reliance and they would not handle her loan. He told Ms. Gibson that he had given the documents to Lanier at Ameris and that she would be better served at Ameris [Tr. 129] This was not the truth. The loan was approved at Reliance. [286] She was also told that Zerbst would ultimately handle the loan for her at Ameris. [Tr. 137] Based on her relationship with Zerbst and Lanier, Gibson took her business to Ameris. They ended up handling Ms. Gibson's loan at Ameris. Zerbst's actions and words evidence his precognition that Ms. Gibson placed her trust in him and was relying on him, and he accepted that relationship of trust. If this was a mere debtor and creditor relationship, why would Zerbst take the actions and steps he took to get Ms. Gibson's loan to Ameris? He knew Ms. Gibson trusted him and Lanier. He accepted that trust and induced that confidence and used it to influence Ms. Gibson to move forward with her loan and to take it to Ameris.

Shortly before the closing of this loan with Ameris, Gibson again had a conversation with Zerbst concerning the purchase of the apartments and the loan. She was not sure this property was good for her and if she should invest in it. She asked him about the location of the apartments, the rent, and did he think it was a good sound investment for her. She wanted to make sure that she would not get into any financial problems. She made it clear that she was requesting financial advice from Zerbst. [Tr. 141-142; 220-224] The testimony of Gibson established the fact that she always had concern about the purchase and loan. It took from May of 2007 right up to the date of the closing for Villavicencio and Zerbst to

convince her that the apartments were a suitable investment for her. [124; 12-21] Zerbst admitted that he told Ms. Gibson that the loan would be safe for her because it was structured in such a way that the projected rents would cover the debt service. He assured her the rent from the apartments would be able to support the mortgage on the beach house and would also pay the mortgage to Ameris. [Tr. 317-318]

In responding to questions by Ameris' attorney about her asking Zerbst for financial advice Ms. Gibson had this to say:

Q. Did you tell Mr. Zerbst: I'm relying on you, Karl, to let me know whether this is a good deal so I can make a final decision whether to go through with this purchase or not? Did you let him know that?

A. In so many words, yes.

Q. Well, did you say that expressly? Not necessarily in those words, but did you tell him: I am relying on you to make a decision to purchase?

A. Mr. Stepp, I do not recall verbatim what I said to Mr. Zerbst at that phone call or any other phone call. It was basically - - basically, yes, that's what I had expressed to him many times. [Tr. 219:9-21]

This was not a situation where Ms. Gibson was determined to borrow the $2.8 million and purchase these apartments. No credible evidence was presented to establish that Ms. Gibson negotiated any of the terms of the loan, or the collateral that was to be used to secure the loan. In fact, she did not even know extra collateral was to be given until faced with that at around 9:30 to 10 PM on the night time grand opening of the bank when Lanier told her. She was simply trusting in Zerbst, Lanier and Villavicencio for advice and followed their recommendations. All three of these men knew this and encouraged her trust and accepted her trust and gave her advice. There is no question in my mind that Ms. Gibson placed her trust in Zerbst and was justified in so doing. Evidence establishes that Zerbst knew she sought his advice and he gave her advice not just an opinion. She took his advice and closed the loan.

Ameris relying on *Trotter v. First Fed. Sav.& Loan Ass'n,* 298 SC 85, 89, 378 S.E.2d 267,269 (Ct. App. 1989), argues that the relationship Gibson and Ameris was governed by the loan documents. That case states that usually the relationship between a depositor and the bank was defined by the written contractual agreement. The relationship between Gibson and Ameris was much more than one of a depositor and bank. The fact that Ameris is trying to hide behind mountains of documents, disclaimers, and appraisals adds to the egregiousness of their actions. As Ameris argues that Ms.Gibson is governed by the loan documents, they argue that the bank was not governed by these same documents. Ameris did not follow the terms of those same loan documents. For example, the construction loan agreement required an AIA request form before Ameris was permitted to disburse. Ameris ignored this requirement. Ameris disbursed monies to the project manager who had no ownership in project/property. "To date, there is $290,000 of advances that are not supported by invoices, AIA document or any other information in support of the work being completed." [Pl. Ex. 30]

Mr. Lanier's explanation was that this was a boilerplate agreement and the requirements of the agreement would only have to be followed at the banker's request. In other words, Ameris could pick and choose which portions of the documents would be enforceable to the detriment of Gibson. This explanation of the loan documents by Lanier is consistent with this Court's impression that some of the testimony of Ameris' witnesses was "boilerplate" testimony which Ameris would use whenever it needed to protect itself. This type of testimony was evident when several of Ameris' witnesses denied the agency relationship of Zerbst. It was evident when they denied the fiduciary relationship with Gibson and the pursuit of her loan and the structuring of the loan. This "boilerplate" type of testimony was evidenced when Ameris' witnesses described the hiring of Zerbst, and the referral of Ms. Gibson to the attorney they had chosen for her.

After being questioned about signing documents acknowledging that she did not rely on the bank in her decision making, Ms. Gibson's testimony is insightful and consistent with this court's view of the testimony: "I think when someone tells you what they feel about that situation and then, as you say, had

me sign papers releasing them of any obligation of anything they told me, that seems a little deceiving to me." [Tr. 225; 14-18] Based on the demeanor and manner in which the witnesses testified, I find that Gibson's testimony was much more sincere and credible than the rigid, matter of fact manner of testimony given by some of Ameris' witnesses. Based on the evidence presented in this case, this court will not allow Ameris to hide behind the written loan documents.

Zerbst was "officially" hired on January 11, 2008 and thereafter he continued to accept the trust and confidence Ms. Gibson reposed in him. In 2009, it became apparent that Ms. Gibson could not pay back her loan to Ameris. At the same time, Zerbst advised and convinced Ms. Gibson to hire his personal attorney to help her in her case against Villavicencio. Ms. Gibson followed Zerbst's recommendation and hired his attorney and paid a non refundable $20,000.00 retainer. [Tr. Pl. Ex. 14] and [Tr. 150; 338-340] Interestingly, Zerbst never told Ms. Gibson that her attorney was at that time also representing him as he and Ameris were being sued by Reliance over the alleged breach by Zerbst of his non-compete agreement with First Reliance.[Tr. 338-340]

Zerbst began to ask that Ms. Gibson put up additional collateral for the loan. She was hesitant and became suspicious of putting up more collateral for her loan with Ameris. Zerbst began talking with her lawyer and setting up meetings so he could be present with her and her attorney. [Tr. 152 -153] Several emails were presented to evidence this meeting. [Pl. Ex. 51, 52] One of the attorneys in the firm representing Ms. Gibson and Zerbst was also opening accounts at Ameris. Zerbst sought to discuss, in advance of the meeting, Ms, Gibson's "situation with the bank" when the attorney came in to open his accounts. [Tr. 53] The hiring of her attorney upon the advice of Zerbst further confirms that Gibson took his advice and Zerbst was knew she trusted him and relied on him and would do virtually anything he recommended.

As was typical, Ms. Gibson followed Zerbst advice and went to the meeting with her attorney set up by Zerbst. The meeting took place in August of 2009. When Ms. Gibson arrived at the Richter Firm, Zerbst was present as well as a representative of Joe Bartone, a tenant of Ms. Gibson's, who leased the

Klister Lane property. He had repeatedly sought to purchase the property from Ms. Gibson. Mr. Charpia, a member of the special assets branch of Ameris attended by speaker phone. [Tr. 117, 152-154]

During the meeting Ms. Gibson was asked to sell her property to Mr. Bartone and to sign over to Ameris additional collateral. Ms. Gibson testified:

> A: Well, as the conversation went in the meeting they had -- I think his name was Mr. Charpia, Special Assets. I believe Mr. Zerbst told me that he was on a speaker phone, and that was a conversation that all of us were listening to Mr. Charpia, and he was talking about my loan. And I felt all of these men that were sitting around that table -- I felt like they were requiring me to sell my property in order to pay that bank note, and I felt outnumbered and betrayed. That's what I felt.
>
> Q: Did you feel that your lawyer was representing you?
>
> A: I thought that Mr. Richter was my lawyer. And I really didn't understand the relationship or what all was going on between him and Mr. Zerbst, but I felt like Mr. Zerbst knew him well enough and that whatever was going on -- that he used that relationship in that meeting to try to get me to do what he wanted me to do for the bank. [Tr. 153-154]

As they were leaving the meeting, Zerbst told Ms. Gibson that the apartments were overpriced, the rents were not going to cover her payments, and that the loan was a mistake. [Tr. 157] The law firm withdrew from its representation of Ms. Gibson on or about November 13, 2009, claiming a conflict of interest.[Pl. ex. 61] It was then that Ms. Gibson found out that her attorney also represented Zerbst in the lawsuit where he and Ameris were being sued by Reliance over the alleged breach by Zerbst of his non-compete agreement with Reliance.

Up until this meeting, Ms. Gibson had accepted and followed all the advice Zerbst had offered her since 2004. When Ms. Gibson obtained new counsel and refused to sign over additional collateral to Ameris, Mr. Zerbst wrote:

> I met with Linda and her new attorney Robert Papa last Monday. He was to get back with me last week but did not although I did receive this email today. Larry Richter confirmed today that his firm no longer represents Linda. I wish he did for our benefit but I understand why he no longer does. [Pl. Ex. 35]

Zerbst testified that "our benefit" is the benefit of Ameris. It is reasonable to conclude that Zerbst knew Gibson would follow his advice and hire his attorney so that he could use his relationship with his attorney to help him persuade Ms. Gibson to sell or sign over additional unencumbered collateral to Ameris. [Tr. 348]

Conclusion

After carefully considering the demeanor and manner in which the parties testified regarding the relationship between Ms. Gibson and Zerbst together with the totality of the circumstances surrounding their relationship that began sometime in 2004 ended in 2009, the greater weight of the evidence establishes that this was a fiduciary relationship. It began when Zerbst was at Reliance and continued until the relationship was ended after the troubling meeting Gibson had with her attorney and employees of Ameris. This fiduciary relationship is founded on the trust and confidence Ms. Gibson reposed in Zerbst. He was aware of the special confidence Gibson placed in him. Therefore, in equity and good conscience, Zerbst was bound to act in good faith and with due regard to the interests of Ms. Gibson.

BREACH OF FIDUCIARY DUTY

One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation. *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004). If a bank undertakes to advise its customer as a part of the services the bank offers, then a fiduciary relationship may exist between the bank and its customer. *Id.* "Such a relationship charges the bank with a duty to disclose material facts which may affect its customers' interest." *Burwell*, 288 S.C. 40-41, 340 S.E.2d at 790. Ameris' expert witness admitted a duty to tell Ms. Gibson that the project revenue would not carry the loan. [Tr.612: 11-24] Ameris breached that duty. A party is bound by its own evidence and that of his expert witness. *Benford v.Berkeley Heating Co.*, 258 S.C.357, 365, 188 S.E.2d 841, 844 (1972).

Having assumed the duty of advising Ms. Gibson how to finance the project, Ameris, through its agents Zerbst and Lanier, was negligent and breached its duty in a number of ways. Zerbst admitted that

he told Ms. Gibson that the loan would be safe for her because it was structured in such a way that the projected rents would cover the debt service including the mortgage on the beach house. [Tr. 317-318] Ameris never should have recommended Ms. Gibson purchase the apartment complex. In fact, Zerbst later admitted to Ms. Gibson that he never should have made the loan because it was overpriced and the rents from the apartments would not cover the payments on the loan. [Tr. 157]

Ameris never should have recommended or permitted Ms. Gibson to borrow the down payment for the apartment complex which caused the purchase of the apartments to be with 100% borrowed money. Zerbst knew the down payment was being borrowed and the evidence shows that he recommended that and structured the loan in that manner. Lanier testified that he did not know the $700,000 was borrowed but if he had he known, it would have made a difference in this loan. When asked when preparing the apartment cash flow analysis that he submitted for loan approval he said the following;

Q. Did you take the repayment of the $700,000 second mortgage into account when you did that cash flow analysis?

A. No, sir, I did not.

Q. If you had taken that repayment of the $700,000, it would have made a big difference in the landscape of the loan, wouldn't it?

A. In the overall picture specific to the apartment complex, yes sir. [Tr. 453:15 – 454:2]

Zerbst testified that Lanier most certainly knew the down payment was borrowed. [Tr. 349:19-350:2] Don Snipes (regional credit officer and senior vice president of Ameris) testified that if he had known that the $700,000 cash injection / down payment was borrowed, he would have looked less favorable on the loan, it would have made a difference and he strongly doubted he would have made the loan. [Tr. 276:13-278:2] Zerbst later admits that he never should have made the loan because it was overpriced and the rents on the apartments would not cover the loan. [Tr. 157: 10-16] These bankers knew the loan as structured should not have been made and yet no one revealed this to Ms. Gibson.

Ameris' expert says the bank had the duty to tell Ms. Gibson that the project revenue would not carry the loan. Because of the fiduciary relationship with Gibson, Ameris had the duty to disclose this crucial material fact to her. Knowing that Ms. Gibson trusted and relied on their advice, instead of disclosing this fact to her, Zerbst and Lanier hid this material fact from her and advised her that this was a good investment. Ameris breached this duty to tell Ms. Gibson of this material fact which definitely affected her interest and thereby caused her damage.

Shortly after the loan closing, Ms. Gibson was admitted into the hospital and was ill for a period of four or five months. [Tr. 105] Following the purchase of the apartments, the renovation of the apartments began. Prior to Ms. Gibson being able to travel after her physical problems, she talked to Villavicecio who assured her everything was fine, on schedule and on budget. [Tr. 107; 1-6] She also talked to Lanier at Ameris. Based on this conversation, she believed everything was going fine with the renovations. When Ms. Gibson was able to view the progress of the work in late February early March 2008, she found that everything was completely opposite to what she had been told. [Tr. 107; 7-25] She called the bank about the accounting of the money and discovered that about half of the renovation money was gone and not one of the apartment buildings had been completed. [Tr. 108; 10-24] Ameris disbursed large sums to contractors or other vendors, including, ReMax. [Def. Ex. 42] Ms. Gibson was never made aware of the advances paid by Ameris, nor did Ameris ever request her approval before paying the draws. [Pl. Ex. 23, 22, 30]

Ameris failed to inspect the project to ensure the improvements and draw requests were consistent with the project costs. [Pl. Tr. Ex. 30; Tr. 383-394, 392-396]. Ameris never verified the contractor on the project and did not require a contract or AIA document or any other information in support of work being completed. [Pl. Ex. 30; Tr. 415] There are no disbursement requests in the Ameris

file as required by the loan agreement. Ameris' own records reflect that it paid $290,000 in construction draws that are not supported by invoices[6]. [Pl. Ex. 30]

That Ameris undertook to act as Ms. Gibson's fiduciary and breached its duty, is bolstered by Ameris' Regional Credit Officer and Senior Vice President Don Snipes' email of July 3, 2009 wherein he states:

> As you may remember, we have some culpability in her problems as we did not manage the construction loan as we should and have potentially aided in her former property manager at REMAX may have siphoned off some of the loan proceeds. She is currently in litigation with REMAX over this as the agent was representing them when this occurred, but we are a long way from any settlement. [Pl. Ex. 31]

Normally, a bank who agrees to inspect the property assumes no duty to supervise construction. *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2d 46 (S.C.1984). The only exception to this rule is where there is an independent obligation, either by undertaking or virtue of the relationship of the parties. *Id.* Again the Court finds this was not a simple debtor / creditor relationship. Snipes' email, discussing "culpability" demonstrates that Ameris undertook and recognized a duty to Ms. Gibson and a special relationship with her. Further, and merely cumulative as evidence, an internal memorandum placing Benji Lanier on probation for "lack in judgment" shows that Ameris recognized there had been a breach of the duties owed to Ms. Gibson. The internal memorandum states:

> The loan in the name of Heritage Seven, LLC was closed on November 2, 2007 for $2,800,000, by Benjie Lanier...the owner was never made aware of the advances...The owner, Linda Gibson, should have agreed to the advances by signing off on the request or Benjie requesting her approval before each advance was made...Benjie failed to inspect project to ensure improvements were consistent with project costs. To date, there is $290,000 of advances that are not supported by invoices, AIA document or any other information in support of work being completed. Benjie has knowledge that he must inspect the property when advances are made and request support by invoice or other information that work has been performed...owner is questioning where the funds have been used

[6] Ameris suggests that the project was viable and had the rehabilitation been successful, the building would have rented and carried the property. Were this so, Ameris by allowing $290,000.00 to go unaccounted for, prevented the construction, the lease up, and payment of the mortgage and therefore, caused the resulting damages, infra.

prior to her taking over the project...Other weaknesses observed is there is no signed contract, assignment of contract or due diligence by the loan officer to verify the validity of the contractor. [Pl. Ex. 30]

Zerbst testified that Lanier/ Ameris had control over the money that was to be disbursed. He also agreed that Lanier did not exercise that control properly. [Tr. 392; 21- 393; 4] When questioned about his concern as to where the advances were going, Zerbst admitted that all the money advanced by Lanier did not go into the project.

A. . . .I do have concern. . .because I was worried that the money didn't go into the project. In fact, it became apparent that not all the money did go into the project. [394; 15-19]

A. My concern, your Honor, was the money going into that project properly for the benefit of the bank and the borrower to get the project completed based on the dollars. [395;1-4]

Zerbst also admitted that Ms. Gibson should have agreed to the advances by signing off on the requests. [Tr. 395; 14-21] When asked why he put in writing that Lanier lacked judgment because the owner was not made aware of the advances, he answered as follows;

A. Because whenever there is a problem in fact about the work being performed, the owner should be notified of that through, in this case, the project manager or the bank lender in the case, and I couldn't show, looking into the files, that that in fact was done. [Tr.395; 25- 396; 1-5]

A. You would hope that the borrower - - and yes; Benjie in this case, Mr. Lanier should probably have in fact contacted the borrower, Linder Gibson, just to ensure that she was absolutely completely aware of those funds. [Tr. 396; 14-19]

Both Lanier and Zerbst knew of Ms. Gibson's hospitalization and knew she was a novice in this type of investment. They knew she relied on their help and advice and acceptance that reliance. Yet, Ameris failed to properly control the advances and failed to notify her that the money was not going into

the project. Ameris admitted that they had control over the money that was being advanced and did not exercise that control properly. [392; 21-393; 4]

AIDING AND ABETTING MR. VILLAVICENCIO

Gibson alleges that Villavicencio breached fiduciary duties owed to Ms. Gibson and that Ameris aided and abetted the breach. The Court agrees.

"The elements for the cause of action of aiding and abetting a breach of fiduciary duty are: (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages." *Vortex Sports & Emtm't, Inc. v. Ware's*, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008). "The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." *Id.*

The Court finds that the relationship between Ms. Gibson and Villavicencio was fiduciary in nature. Ms. Gibson testified that Villavicencio convinced her to purchase the apartment complex, that she was relying on him heavily, and that she regarded him as her financial advisor and her real estate agent. [Tr. 185:25-186:16]. Further, Villavicencio's testimony establishes that he advised Ms. Gibson in her real estate investments. He admitted that she trusted him and was justified in trusting him. He testified that she relied on his advice and her reliance was justifiable. [Tr. 623:9-624:5]

There is sufficient evidence that Villavicencio breached his fiduciary duty to Ms. Gibson. Ms. Gibson's testimony included a statement that said she discovered that Mr. Villavicencio stole "several hundred thousand dollars from her." [Tr. 72:4-8, 112:20-23] Villavicencio also mismanaged the money he received from Ameris Bank because when Ms. Gibson got out of the hospital to check on the project, she found that it was way behind schedule and that Villavicencio had not followed the agreement. Further evidence that Villavicencio breached his fiduciary duty to Ms. Gibson is that he lied about the market value of the property to Ms. Gibson and the soundness of the investment and he participated in the staged transfer of the loan documents to avoid Zerbst's non-compete agreement.

Courts have held that banks owe a duty of care to their customers. *See King v. Long Island*

Savings Bank, 111 F.3d at 259 (affirming district court decision that "[c]onced[ed] that banks do, in fact, owe a duty of care to their customers ..."); *Bank Brussels Lambert, S.A. v. Intermetals Corporation*, 779 F.Supp. 741, 747 (S.D.N.Y.1991)("it is true without question that [Bank Brussels Lambert, S.A.] had a duty to exercise reasonable skill and care in carrying out its activities for its customer ..."). *See also Long Island Savings Bank v. Savage*, 145 Misc.2d 731, 548 N.Y.S.2d 363 (N.Y.Sup.Ct.1988).

In a case with facts similar to the present case, the Court of Appeals for the Fifth Circuit held that banks owe its customers a duty to honest and complete information and to ensure that an individual purporting to act on the customer's behalf is actually authorized to do so. *See Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 235 (5th Cir. 2010) citing *Dubai Islamic Bank*, 126 F.Supp.2d at 667. The Fifth Circuit held that these duties exist separate and apart from any contractual obligations entered into by the parties. *Id.* In *Chaney*, the bank's customer, and insurance company, sued the bank for negligence after the bank allowed the customer's agent to make withdrawals from the customer's account without the customer's approval. The Fifth Circuit reasoned:

> Having decided that DSC owed the insurance companies a duty to determine if the redemptions from its accounts were actually authorized, we must ask whether there is a triable issue of fact as to whether DSC breached that duty. We conclude that there is. DSC took no steps to verify that LNS was authorized to make such extraordinary redemptions from the insurance companies' accounts; it chose, instead, to rely exclusively on representations made by Frankel. Clearly, an agent's representations as to the scope of its authority are not determinative, and a third party proceeds on the basis of those representations at its own risk. See Metro. Aluminum Mfg. Co. v. Lau, 61 Misc. 105, 112 N.Y.S. 1059, 1061 (N.Y.App. Term 1908) ("[T]hird parties dealing with an avowed agent ... do so at their own risk. They cannot rely upon the agent's assumption of authority, but are to be regarded as dealing with the power before them, and must at their peril observe that the act done by the agent is legally identical with the act authorized by the power."). DSC's insistence that Frankel's master contract authorized him to order the redemptions processed by DSC is similarly unavailing. Once the insurance companies are recognized as DSC's customers, a contract between DSC and LNS can hardly be used to satisfy tort duties owed from DSC to the insurance companies.

Chaney v. Dreyfus Serv. Corp., 595 F.3d 219, 235-36 (5th Cir. 2010). Ameris, much like Dreyfus Serv.

Corp., owed its customer, Linda Gibson, such duties. Ameris' representatives and expert agree such a duty exists. The bank concedes there is no written authorization allowing Villavicencio to receive her funds. [Tr. 386] Ameris took no steps to verify that Villavicencio had authority to receive Ms. Gibson's funds and did not require proper documentation of Villavicencio's draw requests. [Pl's Ex.30] In fact, Ameris' file does not even contain copies of the draw requests. It appears Villavicencio simply asked for checks to be written from Ms. Gibson's account and Ameris complied.

Ameris' own internal documents show that Ameris disbursed $378,000.00 out of Ms. Gibson's construction account without M. Gibson's knowledge or approval, and that of the $378,000.00, $290,000.00 was disbursed without any invoices or other backup documentation. [Pl's Ex.30] It seems incredible that Ameris would hand over Ms. Gibson's construction funds to Mr. Villavicencio without a written authorization signed by Ms. Gibson; however, Ameris conceded no such authorization exists. [Tr.386] Ameris' complete lack of supervision of the construction funds and its issuance of checks without the written knowledge or approval of Ms. Gibson and without reviewing any backup documentation for Villavicencio's draw requests allowed Mr. Villavicencio to embezzle Ms. Gibson's funds. Ameris concedes liability for its failure to supervise the loan in two internal memos; one written by Regional Credit Officer and Senior Vice President of Ameris, Don Snipes and the other written by Karl Zerbst himself. [See discussion above]

Consistent with the Fifth Circuit's holding in *Chaney v. Dreyfus Serv. Corp.*, Ameris' own banking expert, Mr. Barksdale, testified to several duties Ameris owed to Ms. Gibson. In particular, Mr. Barksdale testified that Ameris had a duty to tell Ms. Gibson that the project revenue would not carry the debt. [Tr. 612] He testified to several additional duties Ameris owed to Ms. Gibson: 1) not to lie; 2) not to steal; 3) not to mislead; 4) to give an accurate and complete accounting of funds; and 5) to warn Ms. Gibson if it had reason to know Villavicencio was misusing her funds or abusing her trust. [Tr. 607; Lanier pg 416, testimony of Bogan pg 39]

The project was not suitable for Ms. Gibson. According to Geoff Southard, the individual hired

by Ameris' successor Galt Valley to testify to the value of the apartments (Trial Transcript pgs 509, 520-522), the property was overvalued and the financing structured in a way that the rents would never carry the debt. Mr. Southard stated:

> "It seems incredible that Linda paid twice as much as the people she bought the property from. They paid $1.4million and she [sic] $2.8million. I'm certain that the rents didn't double."
>
> "Again, there is **NO WAY** that this property, in this location, in it's condition at the time was worth anything near the price paid. A look at the income/expense statements will reveal this."
>
> "My opinion, a 100% ***BAD BUY!*** At the price paid. No recovery would help this property."

(Plaintiff's Trial Exhibit 37, emphasis in original).

Despite these admissions, Ameris claims it should not be held liable to Ms. Gibson for aiding and abetting the Villavicencio because it did not knowingly participate in the misappropriation of Ms. Gibson's funds. Mr. Barksdale stated that after he reviewed the entire file he concluded that Villavicencio was a con artist. [Tr. 608] Zerbst admitted they had their suspicions about Villavicencio. [Tr. 324] Surely, they did. From the record it is apparent that Villavicencio excluded Ms. Gibson from much of the discussions with Ameris. Ameris obliged by dealing directly with Villavicencio in the transfer of the loan documents from First Reliance to Ameris, allowing the use of an appraisal meant for another bank at Villavicencio's request, and accepting a wildly inflated financial statement from Villavicencio. Lanier never contacted Ms. Gibson to verify her net worth as stated by Villavicencio, as he apparently suspended his judgment, despite the fact that he was the credit analyst on the loan Ms. Gibson obtained from Reliance less than two years prior to the application being submitted to Ameris. Her financial statement at that time showed her net worth to be around 15 million dollars.

These sophisticated bankers with the information available knew this low income housing project was inflated and should never have been purchased with 100% borrowed money. Villavicencio knew this and did not care for he was pursing his own self-interest and Ameris aided and abetted him in

his endeavors. This was apparent to Ameris, and the exculpatory paper and disclaimers cannot be allowed to obscure this fact.

South Carolina law holds that one is liable for harm resulting to a third person from the tortious conduct of another if one "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself" or "gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." See Restatement (Second) of Torts § 876(b) and (c) (1979) as cited by the South Carolina Supreme Court in *Future Group, II v. Nationsbank*, 324 S.C. 89, 97, 478 S.E.2d 45, 49 (S.C. 1996). Ameris gave Villavicencio substantial assistance in allowing this transaction to go forward and in the misguided decision to purchase and to purchase the property with 100% borrowed money and the misappropriation of Ms. Gibson's funds.

Interestingly, Ameris argues there was no proof presented to support the finding that Villavicencio breached his fiduciary duty to Ms.Gibson. Yet, they also argue that the amount of money Ms. Gibson recovered from Villavicencio in her breach of fiduciary duty claim against him should be set-off from any judgment rendered against Ameris in this case. The elements of aiding and abetting breach of fiduciary duty have been met. Villavicencio breached his duty to Ms. Gibson. Ameris Bank knowingly participated in the breach by disbursing funds without consent, as well as by their other actions described above. They went so far as to admit their "culpability." As for damages, Ms. Gibson has suffered over $1 million in actual damages because of Ameris Bank's actions.

NEGLIGENT MISREPRESENTATION

"In a claim for the tort of negligent misrepresentation where the damage alleged is a pecuniary loss, the essential elements include: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered

a pecuniary loss as the proximate result of his reliance upon the representation." *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 473-74, 581 S.E.2d 496, 504 (Ct. App. 2003) (citing *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292 (1996); *Koontz v. Thomas*, 333 S.C. 702, 511 S.E.2d 407(Ct. App. 1999).

A claim for negligent misrepresentation may be made when the misrepresented facts induced the plaintiff to enter a contract or business transaction. *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368, (Ct.App.2005).

"A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction." *Redwend* , 354 S.C. 459, 473-74, 581 S.E.2d 496, 504 (Ct. App. 2003) (citing *Winburn v. Insurance Co N.Am.*, 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct. App.). Evidence that the statement at issue was made in the course of the defendant's business, profession, or employment is sufficient to show the element of pecuniary interest, even though the defendant does not actually receive consideration for it. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 581 S.E.2d 161 (2003). As a preliminary matter, I find Ameris had a pecuniary interest in making the representations charged by Ms. Gibson.

Ms. Gibson charges Ameris with at least three material misrepresentations that she alleges induced her into purchasing the Otranto Apartments: (1) Karl Zerbst's statement that the rents would cover the debt on the property; (2) Ameris' structuring of the Gibson transaction to include borrowing the required down payment of $700,000 against another property owned by Ms. Gibson such that the purchase of the Otranto Apartments was purchased 100% borrowed money; and (3) Karl Zerbst's statement that purchasing apartments would be a "good deal" for her.

As previously detailed, Ameris' agents and expert have testified Ameris had a duty not to mislead and that if it undertook to give advice, the advice should be accurate, complete and honest [Tr. pgs 607-612; Bogan deposition pgs 36-38;]. Ameris concedes it had a duty not to conceal a material fact so as to mislead its customer.

The first and most basic requirement of a claim for negligent misrepresentation is that the alleged misrepresentation must be false. *Carolina Chloride, Inc. v. Richland Cnty.*, 394 S.C. 154, 163-64, 714 S.E.2d 869, 873 (2011). Without falsity, the statement is not actionable and does not give rise to liability in tort. *See id.*

The misrepresentations made by Zerbst to Gibson that she would have no shortfall between rents and the debt on the apartments and beach house and that the apartments were a good and suitable investment for her were false and were predicated upon misstatements of fact. Zerbst testified that based on the facts at his disposal, the rents from the apartments would pay for the debt on the apartments and the beach house. [Tr.317-318] However, Lanier and Snipes interpreted the same facts differently. Lanier stated if he knew Gibson borrowed the down payment it would have impacted his decision to move forward with the loan. Interestingly, Zerbst said Lanier did know about the borrowed down payment. Snipes (regional credit officer and senior vice president of Ameris) said if he had been the loan officer on the deal and knew that the apartments were being purchase with 100% borrowed money, he "strongly doubted" that he would have given the loan to Gibson. [Tr. 276:13-278:2] Zerbst admits that he never should have made the loan because it was overpriced and the rents on the apartments would not cover the loan. [Tr. 157: 10-16] Clearly these representations were false and were based on facts at the disposal of Ameris. The Court finds that Zerbst made these representations to induce Ms. Gibson to purchase the apartments and make the loan with Ameris.

Ameris claims that, independent of its agency argument, the misrepresentations claimed by Ms. Gibson are not actionable as they are statement of future events and/or opinions. Ordinarily, to be actionable, a statement must relate to a present or preexisting fact, and cannot be predicated on statements as to future events. *Davis v. Upton,* 250 S.C. 288, 291, 157 S.E.2d 567, 568 (1967). The false representation must be predicated upon misstatements of fact rather than upon an expression of opinion. *Winburn v. Ins. Co. of N. America,* 287 S.C. 435, 339 S.E.2d 142 (Ct.App.1985).

The distinction between a matter of fact and a matter of opinion is generally characterized by what is susceptible of exact knowledge when the statement is made. *Bishop Logging Co. v. John Deere Indus. Equipment Co.* 317 S.C. 520, 527, 455 S.E.2d 183, 187 (S.C.App.1995). For example, in *Gilbert v. Mid-South Machinery Co., Inc.*, 267 S.C. 211, 227 S.E.2d 189 (1976), the South Carolina Supreme Court held that a statement about the profitability of business was actionable as a statement of fact given the existence of business records when the statement was made. Here, like in *Gilbert v. Mid-South Machinery Co., Inc.*, the statements made to Ms. Gibson were based on existing business records, including Ms. Gibson's financial statements, rental data from the project, and projected debt service.

Further, even if the statements *were* about future events, they are actionable if made to "induce the signing of a paper or to make one act, as he otherwise would not have acted, to his injury." *Bishop Logging Co. v. John Deere Indus. Equipment Co.* 317 S.C. 520, 527, 455 S.E.2d 183, 187 (S.C.App.1995) quoting *Coleman v. Stevens,* 124 S.C. 8, 15-16, 117 S.E. 305, 307 (S.C. 1923). I find the misrepresentations claimed by Ms. Gibson are statements relating to preexisting facts and existing business records and are therefore actionable. Further these statements were made to induce Ms. Gibson to act, and but for these statements, she would not have moved forward with this transaction.

The second element of negligent misrepresentation is that "the defendant had a pecuniary interest in making the statement." *Redwend,* 354 S.C. at 473-74, 581 S.E.2d at 504. Here, Ameris made the statements to Ms. Gibson in order to solicit her business and have her take out a multi-million dollar loan with them. The evidence established that Ameris had a pecuniary interest in making all three statements to Ms. Gibson.

The third and fourth elements of negligent misrepresentation are the defendant must have owed a duty of care to communicate truthful information to the plaintiff and breach that duty. A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction. *Redwend,* 354 S.C. at 473-74, 581 S.E.2d at 504. Having previously determined that Ameris

had a pecuniary interest in the transaction, it follows that Ameris owed Ms. Gibson a duty to give accurate information to her.

Zerbst knew Ms. Gibson was an inexperienced and unsophisticated investor (with millions of dollars of inherited real estate). He knew she had trusted him since 2005. He knew Gibson relied on the advice of others. [Tr. 309; 1-11, 310; 4-11] He knew that Villavicencio was involved in the transaction and had some concerns about his involvement. [Tr.324; 17-24] Gibson asked him direct questions about the purchase and the loan. She talked to him about the location, the rents and if this was a good sound investment for her. She discussed if it was a piece of property that suited her and could she pay for it. She was getting information so she could make a decision about the purchase. It is unconscionable that a banker with 26 years experience would not, at the very least, tell Ms. Gibson that he cannot give her investment advice and that she should speak to someone else. Ameris' witnesses were quick to say they gave her no advice, but with all of her questions, never once did anyone at Ameris tell her they could and would not advise her. Instead, knowing that Ms. Gibson was seeking his advice and that she would follow his advice, Zerbst told her it was a good deal for her. He told her the rents would cover the debt. He arranged for the loan to go Ameris with the cooperation and consent of Ameris. This loan was important to Zerbst and he saw it as an opportunity to curry favor with his new bosses at Ameris. It was also a important for Ameris because they wanted to become a player in the Charleston market. Ameris had a pecuniary interest in getting Ms. Gibson's loan and it failed to exercise reasonable care information to Ms. Gibson.

Further, in this case, as set forth more fully above, Ameris had a fiduciary relationship with Ms. Gibson. "Such a relationship charges the bank with a duty to disclose material facts which may affect its customers' interest." *Burwell*, 340 S.E.2d at 790, 288 S.C. at 40-41. It is not a stretch to say that someone acting as a fiduciary with the duty to disclose material facts must communicate truthfully to the other party in the relationship. Ameris' own banking expert, William Barksdale, Jr., testified to several duties that Ameris owed to Ms. Gibson as set forth herein above. [Tr. 606, 612] Ameris Bank conceded in its

testimony that it had a duty to communicate truthful information to the plaintiff. I find these elements are fully satisfied by the facts and circumstances surrounding this transaction.

The fifth element of negligent misrepresentation is that a plaintiff must demonstrate that she justifiably relied on the statement. *Carolina Chloride, Inc. v. Richland Cnty.*, 394 S.C. 154, 714 S.E.2d 869 (2011). "A determination of justifiable reliance involves the evaluation of the totality of the circumstances, which includes the positions and relations of the parties." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 241, 692 S.E.2d 499, 508 (2010). "Reliance can be justified only if the relationship of the parties is such that the defendant occupies a superior position to the plaintiff with respect to knowledge of the truth of the statement made." *Harrington v. Mikell*, 321 S.C. 518, 522, 469 S.E.2d 627, 629 (Ct. App. 1996).

"Where there is no confidential or fiduciary relationship and an arm's length transaction between mature, educated people is involved, there is no right to rely." *Florentine Corp. Inc. v. PEDA I, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985). As previously discussed, I have carefully examined and evaluated the facts and circumstances in this case, including the positions and relations of the parties and determined that the greater weight of the evidence establishes that this was not an arm's length transaction and a fiduciary relationship exists between Ms. Gibson and Ameris. After seeing and hearing from the personalities involved in this case, it is very obvious to me who the dominant personalities were. Zerbst, Lanier and Villavicencio could easily persuade Ms. Gibson to purchase these apartments, make this loan and encumber her property. They did just that.

In an attempt to show that Gibson was not an unsophisticated or inexperienced investor, Ameris argues that this was not the first time she had been involved in a commercial transaction and the bank is correct. In March of 2005 she purchased a commercial shopping center. But the Court notes that Zerbst, Lanier and Villavicencio were also directly and influentially involved in that transaction. In fact, it was at this time that Ms. Gibson initially placed her trust in Zerbst, Lanier and Villavicencio. Again, Zerbst

testified that Ms. Gibson was new at borrowing money and that she did not have a lot of experience. He knew that she relied on others.

Additionally, Ameris argues that Ms. Gibson did not use diligence and reasonable efforts to protect her interests. She sought the advice of three different people whom she trusted, Zerbst, Lanier and Villavicencio. They persuaded her and misled her to invest in the apartments when she should not have. The representations of the transaction and the ability to service the debt in my estimation were recklessly made with the intent that they be relied upon, as they were. The inducement was self-serving, and Ms. Gibson was damaged in her reliance. Because there was a fiduciary relationship which creates a superior position, I find that Ms. Gibson was justified in relying on Ameris' statements.

Actual Damages

Ms. Gibson has asserted three causes of action: (1) negligent misrepresentation, (2) breach of fiduciary duty, and (3) aiding and abetting breach of fiduciary duty. Each of these causes of action sounds in tort. In a tort case "[a]ctual damages are such as will compensate the party for injuries suffered or losses sustained." *Mellen v. Lane*, 377 S.C. 261, 287, 659 S.E.2d 236, 250 (Ct. App. 2008) (citing *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964)). "Actual damages are awarded to a litigant in compensation for his actual loss or injury." *Id.* "The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred." *Id.* (citing *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000)). "The basic measure of actual damages is the amount needed to compensate the plaintiff for the losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position he would have been in if there had been no wrongful injury." *Id.* (citing *Rogers v. Florence Printing Co.*, 233 S.C. 567, 578, 106 S.E.2d 258, 264 (1958); *Hutchinson v. Town of Summerville*, 66 S.C. 442, 448, 45 S.E. 8, 10 (1903)).

1. The Beach House

To put Ms. Gibson in the position she would have been in had she never purchased the apartment complex, she is entitled to a return of the down payment for the apartment complex. Ms. Gibson's beach house is titled in the name of 3205 Palm Boulevard, LLC. This LLC refinanced the 3205 Palm Boulevard beach house to get the $700,000 to make the down payment on the apartment complex based on the advice of Mr. Villavicencio and Mr. Zerbst. Ms. Gibson has a 50% interest in the LLC, and personally guaranteed the debt, and has repaid the debt. Ms. Gibson is also personally responsible for paying the interest on the deficiency and has paid monthly interest at 3% in the amount of $1,125.00 per month since January of 2011 through September 30, 2012, totaling $23,625.00 [Plaintiff's Exhibit 3] Therefore, it is of no consequence that 3205 Palm Boulevard, LLC is not a party to this action because it lent Ms. Gibson the money to put a down payment on the apartment complex. Gibson personally guaranteed the debt and repaid it with interest. Therefore, Gibson is entitled to recover $723,625 dollars to put her in a position she would have been had she never purchased the apartment complex.

2. Klister Lane Property

Ms Gibson pledged a piece of property located on Klister Lane, containing a cell tower lot, as additional collateral for the purchase of the apartment complex. [Def.'s Ex. 26, 33; Tr. 89:17-25]. Ms. Gibson testified that after Ameris sold the loans to Galt Valley, she deeded the Klister Lane property to Galt Valley in connection with the settlement of the foreclosure action. [Def.'s Ex. 107; Tr. 90:1-5]. Ms. Gibson's expert witness Tommy Hartnett testified as to the value of the Klister Lane property. [Pl.'s Ex. 40; Tr. 247:25-248:5]. According to Mr. Hartnett, the appraisal performed by C.S. McCall & Co., LLC, dated March 8, 2010, which valued the Klister Lane property at $355,000.00 was proper. [Tr. 247:25-248:3]. This is the best evidence in the record concerning the value of the property. Mr. Hartnett testified: "I found Mr. McCall's appraisal of the tower to be properly done and his conclusions based on the information within that report properly reached. So I concurred in his value of $355,000." *Id.* The C.S. McCall appraisal is the only probative evidence before the Court concerning the value of the Klister Lane

property. Although Ms. Gibson introduced evidence that Galt valley sold the Klister Lane property in or around April of 2011 for $510,000 [Pl.'s Ex. 10; Tr. 255:17-256:9], the amount that the property sold for in 2011 is not probative of its value in 2007. As Mr. Hartnett conceded, there is no information in the record about the parties to the 2011 transaction, the circumstances under which the sale occurred, or whether the transaction was a fair market value transaction. [Tr. 257:23-259:5].

Finally, although Ms. Gibson introduced evidence concerning lost rental income on the Klister Lane property, C.S. McCall used an income approach in appraising the property, which takes rental income into account. [Tr. 259:6-20]. Accordingly, Ms. Gibson is entitled to the value as stated in the C.S. McCall appraisal which is $355,000.

3. Personal Funds Contributed by Gibson

Ms. Gibson is entitled to recover the funds she contributed to save the project because there is credible evidence that Mr. Zerbst represented that the $700,000 construction loan would be sufficient to complete the renovations and that Ms. Gibson would not have to use any of her own money to complete the project. Ms. Gibson testified that during the course of the apartment renovation, she injected $75,000 of her own money into the project in an effort to avoid the collapse of the project. In observing Ms. Gibson, this Court was impressed with her sincerity, her demeanor and the manner in which she testified. Her credibility was not in doubt. This is sufficient evidence to entitle Ms. Gibson to recover the $75,000 of her personal funds that she contributed to try to keep the project alive.

4. Attorneys' Fees

Ms. Gibson introduced a variety of evidence regarding attorneys' fees they allegedly incurred since 2008. [Pl. Ex. 5, 9, 11, 13, 15, 26; Tr. 85:13-88:1; 95:17-100:18; 101:7-102:2; 102:12-103:16; 104:4-16]. These fees fall into three separate categories: (1) attorneys' fees incurred in this case; (2) attorneys' fees incurred in other litigation; and (3) attorney fee paid to the Richter Law Firm.

a. This Case

It is well settled in South Carolina that "[a]ttorney's fees are not recoverable unless authorized by contract or statute." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 436, 673 S.E.2d 448, 458 (2009). "Under the 'American Rule,' the parties to a lawsuit generally bear the responsibility of paying their own attorneys' fees." *Layman v. State*, 376 S.C. 434, 451, 658 S.E.2d 320, 329 (2008) (citing *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561 (1986)).

Ms. Gibson seeks to recover $566,000 in attorneys' fee paid or owed pursuant to an agreement entered into between Plaintiffs and their attorneys in this case. [Tr. 95:17-100:18; Pl. Ex. 9]. According to the agreement, Gibson hired the attorneys for representation "in the defense of and pursuit of a counterclaim in a foreclosure action brought by Ameris Bank presently pending in Berkeley County, South Carolina, Case No. 2010-CP-08-2134," which is the present case. [Pl. Ex. 9]. Having introduced no evidence of any contract or statute that would entitle them to recover their attorneys' fees in this case, Ms. Gibson may not recover the $566,000 fee.

b. Other Cases

Ms. Gibson also seeks to recover attorneys' fees allegedly incurred in the case against her property manager, Rolando Villavicencio, as well as fees incurred in defending a foreclosure action filed against 3205 Palm Boulevard, LLC.

Under South Carolina law, a plaintiff may under limited circumstances recover attorneys' fees when the defendant's wrongful conduct has forced the plaintiff to protect her interests by bringing or defending an action against a third person. *See, e.g., Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 129, 414 S.E.2d 118, 119 (1992); *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971). Although some states consider such a recovery to be an exception to the American Rule, South Carolina employs an equitable indemnity analysis in considering whether a plaintiff may recover attorneys' fees when a defendant's tortious conduct forces the plaintiff into separate litigation with a third party. *Town of*

Winnsboro, 307 S.C. at 129, 414 S.E.2d at 119. In *Addy v. Bolton*, the South Carolina Supreme Court noted:

> In order to recover attorneys' fees under this principle, the plaintiff must show: (1) that the plaintiff had become involved in a legal dispute either because of a breach of contract by the defendant or because of the defendant's tortious conduct; (2) that the dispute was with a third party-not with the defendant; and (3) that the plaintiff incurred attorneys' fees connected with that dispute.

257 S.C. 28, 33, 183 S.E.2d 708, 709-10 (1971).

Moreover, under an equitable indemnity analysis, a plaintiff's ability to recover damages from a tortfeasor incurred as a result of the defendant's actions "is subject to the proviso that no personal negligence of [the plaintiff's] own has joined in causing the injury." *First General Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994); *Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). As explained in one case:

> Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not. If the second party is also at fault, he comes to court without equity and has no right to indemnity. The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault.

Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999) (citations omitted).

Here, Ms. Gibson meets all three requirements necessary for equitable indemnity. (1) The Plaintiffs were forced to sue Mr. Villavicencio and defend a foreclosure suit against 3205 Palm Boulevard, LLC because of Ameris' tortious conduct. (2) The disputes were with third party defendants and not Ameris Bank. (3) Gibson incurred attorneys' fees. Therefore, she would be entitled to the attorneys' fees from those cases under equitable indemnity had Ms. Gibson not been 20% at fault. As discussed below in the section entitled Comparative Negligence, I find that Gibson was 20% at fault, comparatively. Because of Ms. Gibson's comparative negligence, she is not entitled to recover the attorneys' fees under an equitable indemnity theory.

c. Attorney's Retainer Fee

Even though Mr. Zerbst, as agent for Ameris, willfully and wrongly used the trust that Gibson had reposed in him and steered her to his personal lawyer, there is no contract or statute entitling Gibson to recover the $20,000.00 attorney's fees. The request is denied.

Punitive Damages

Punitive damages are intended to "'deter the wrongdoer and others from committing like offenses in the future.'" *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 393, 134 S.E.2d 206, 210 (1964) (quoting *Bowers v. Charleston W.C. Ry. Co.*, 210 S.C. 367, 378, 42 S.E.2d 705, 709 (1947)). Punitive damages are allowed only when a defendant's conduct is so shocking that punishment is justified. *See, e.g., McGee v. Bruce Hosp. Sys.*, 344 S.C. 466, 545 S.E.2d 286 (2001); *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000). Stated differently, punitive damages are allowed when a defendant has acted in a "reckless, willful, or wanton" manner. *Clark*, 339 S.C. at 379, 529 S.E.2d at 534. A defendant acts willfully or with reckless indifference to the rights of others when the defendant acts in disregard of a high and excessive degree of danger about which he or she knows or which would be apparent to a reasonable person in his or her condition. *Carter v. R.L. Jordan Oil Co.*, 301 S.C. 84, 86, 390 S.E.2d 367, 368 (Ct. App. 1990). Also, there must be a present consciousness of wrongdoing to justify the assessment of punitive damages against the wrongdoer. *Martin v. Martin*, 262 S.C. 168, 174, 203 S.E.2d 385, 387 (1974). Lastly, punitive damages can only be awarded upon a finding of actual damages. *Carroway v. Johnson*, 245 S.C. 200, 204 139 S.E.2d 908, 910 (1965) (citing *Cook v. Atlantic Coast Line R. Co.*, 183 S.C. 279, 190 S.E. 923 (1937)).

There are eight factors that the trial court may consider in order to ensure that a punitive damages award is proper, and they are: (1) the defendant's degree of culpability; (2) the duration of the defendant's conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant and/or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and

(8) any other factors the court deems appropriate. *Gamble v. Stevenson*, 406 S.E.2d 350, 354, 305 S.C. 104, 111-112 (1991). "Upon completing its review, dedicated to the postulate that no award be grossly disproportionate to the severity of the offense, the trial court shall set forth its findings on the record." *Id.* Also, the amount of damages, actual or punitive, remains mostly within the discretion of the jury, as reviewed by the trial judge. *Id.* 406 S.E.2d at 355, 305 S.C. at 112 (citing *Fennell v. Littlejohn*, 240 S.C. 189, 125 S.E.2d 408 (1962)). The United States Supreme Court noted that the due process clause usually limits punitive damage awards to less than ten times the size of the compensatory damages award. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 410 (2003).

This case does not involve the isolated conduct of individuals in the lower levels of management of Ameris. This case is about Ameris' culture, policy and the conduct of upper management or lack thereof. This is the prime determinant in the award and amount of punitive damages. In addition the steering of Ms. Gibson to a lawyer in order to control her decision making is egregious and corrupts the role of counsel in our system of justice. The following is my review / analysis of the factors set forth in *Gamble* as they apply to this case.

1. Degree of Culpability

Ameris has a high degree of culpability. This was not an arms-length transaction. I repeat, I observed Ms. Gibson and all the other witnesses carefully. She was polite, sincere, gentle and credible. She has little to no business background or sophistication, a fact not seriously disputed by any witness to appear before the Court. She did not understand the financing, and had never run or managed construction or low income housing. Both Mr. Zerbst and Mr. Lanier knew that Ms. Gibson lacked experience in real estate and financial matters and relied on others to guide her. They clearly took advantage of her trust in them and together with Villavicencio convinced her that this deal and loan was good for her.

This disturbing meeting which was arranged by Mr. Zerbst, between Ms. Gibson, her attorney, to whom Mr. Zerbst referred her, and representatives of Ameris, confirmed the fact that Mr. Zerbst knew she

trusted and relied on him. Until this meeting, where Ms. Gibson felt out-numbered and betrayed, she had done everything suggested by Mr. Zerbst. [Tr. 154] However, this time she refused.

Mr. Zerbst knew that Mr. Villavicencio also had control and influence over Ms. Gibson and he was concerned that Villavicencio might do something that she didn't know about. [Tr. 324] Yet, Ameris did not even consult with Ms. Gibson when distributing funds for the project to Villavicencio. Ameris aided Mr. Villavicencio in causing harm to Ms. Gibson.

The fact that Ameris is trying to hide behind mountains of documents, disclaimers, and appraisals adds to the egregiousness of their actions. Ameris argues that Ms. Gibson is governed by the loan documents that she signed and yet Ameris did not follow the terms of those same loan documents. For example, the construction loan agreement required an AIA request form before Ameris was permitted to disburse. However, Ameris disbursed monies to the project manager who had no ownership in project/property. "To date, there is $290,000 of advances that are not supported by invoices, AIA document or any other information in support of the work being completed (Plaintiff's Exhibit 30)." The construction loan agreement required this AIA payment form before Ameris was permitted to disburse funds on the project. Yet, Ameris ignored this to requirement.

Mr. Lanier's explanation was that this was a boilerplate agreement the contents of which would only have to be followed at the banker's request. In other words, Ameris could pick and choose which portions of the documents would be enforceable to the detriment of Gibson. It is this Court's impression that some of the testimony of Ameris' witnesses was "boilerplate" testimony which Ameris would use whenever it needed to protect itself. This type of testimony was evident when discussing the fiduciary relationship with Gibson, the pursuit and construction of Gibson's loan, the hiring of Zerbst, and the referral of Ms. Gibson to her attorney.

After being questioned about signing documents acknowledging that she did not rely on the bank in her decision making, Ms. Gibson's testimony is insightful: "I think when someone tells you what they

feel about that situation and then, as you say, had me sign papers releasing them of any obligation of anything they told me, that seems a little deceiving to me."

Banks should not be allowed to insulate themselves through artifice and to allow Ameris to do so here is to countenance conduct that is all too familiar in the most recent banking crisis.

2. Duration of Defendant's Conduct

Ameris moved Ms. Gibson's loan over to them from Reliance in the fall of 2007. As late as November 2009, Ameris was attempting to solve their problem through a surrogate law firm, hoping to gain more influence over Ms. Gibson's decision to turn over additional collateral to Ameris and / or have her sell some of her other property for the benefit of Ameris.

3. Awareness or Concealment

Ameris was not only aware of what was occurring with Ms. Gibson's loan, it was the choreographer. Ameris also actively concealed the truth of Ms. Gibson's situation from her to try to get more collateral for the failing loan.

4. Similar Past Conduct

I am confident that Mr. Zerbst and Ameirs reached an accord prior to Ameris opening its Charleston bank in October 2007. What was not resolved was how to "get around" the non-compete agreement Mr. Zerbst had with Reliance. Ultimately, a Murrell's Inlet office was used, yet Mr. Zerbst worked out of the Charleston office during the time of the non- compete. [Deposition of Lanier, Court Exhibit 7, pg 216] Ameris' upper management and culture induced the causative events leading to Ms. Gibson's loss.

In the case styled *First Reliance Bank v. Karl H. Zerbst and Ameris Bank- 2008 – CP-21-785,* Reliance Bank sued Mr. Zerbst and Ameris for stealing First Reliance clients and alleged that Mr. Zerbst was essentially a ghost writer on several loans for clients which began at First Reliance and ended up with Ameris. After hearing the testimony in this case, the allegations of First Reliance have a ring of truth.

5. Deterrance

Ameris' conduct is similar in character and quality to the conduct witnessed in the market generally over the past five/six years. It is excessive and not reasonably related to the pursuit of sound and stable business practices. Ameris' conduct champions greed and must be deterred. It is the hope of this court that the awarding of punitive damages in this case will deter Ameris and others from committing like offenses in the future.

6. Relation to Harm Resulting

The award of punitive damages is directly related to the harm that resulted from the bank's conduct. Ameris coerced Ms. Gibson to take out a loan to buy and renovate an apartment complex which it knew would ultimately fail. The punitive damages are awarded for this behavior. Ms. Gibson nearly lost everything and testified that but for her faith, she would have taken her own life.

7. Ability to Pay

Ameris Bank does business in South Carolina, Georgia, Florida, and Alabama. Dr. Oliver Wood's report, which was uncontroverted, shows Ameris Bank is a bank with $3,000,000,000 in assets. Its stockholder equity in 2011 was $293,770,000. Its net weekly cash flow in 2011 was $887,808. Based on the Court's findings regarding Ameris Bank's conduct, the Court awards four weeks of Ameris Bank's net cash flow ($3,551,232) as an appropriate punitive damage award. This is approximately 3 times the amount of actual damages and is within the guidelines set forth by the United States Supreme Court.

8. Other Factor

Ameris Bank's effort to steer Ms. Gibson to the Richter Law Firm with their representatives present, in order to influence her decision making, corrupts the role of counsel. This conduct was intentional and hostile to Ms. Gibson and represents Ameris' conduct throughout this entire transaction. This conduct justifies the award of punitive damages in amount of $3,551,232.00.

intentional and hostile to Ms. Gibson and represents Ameris' conduct throughout this entire transaction. This conduct justifies the award of punitive damages in amount of $3,551,232.00.

COMPARATIVE FAULT

"In 1991, South Carolina abolished the doctrine of contributory negligence and adopted comparative negligence as its tort standard in *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991)." *Berberich v. Jack*, 709 S.E.2d 607, 611, 392 S.C. 278, 286 (2011). In *Nelson*, the South Carolina Supreme Court stated that, under comparative negligence "a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant." *Nelson*, 303 at 245, 399 S.E.2d at 784. "The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence." *Id.* South Carolina has adopted "a modified version of comparative negligence known as the 'less than or equal to' approach, by which the plaintiff in a negligence action could recover damages if his or her negligence is 50% or less or, stated another way, if the plaintiff's negligence does not exceed 50%." *Berberich*, 709 S.E.2d at 611, 392 S.C. at 286 (quoting *Singleton v. Sherer*, 377 S.C. 185, 205, 659 S.E.2d 196, 206 (Ct. App. 2008)). The Supreme Court in *Berberich*, held that:

> [U]nder our comparative negligence system, all forms of conduct amounting to negligence in any form, including, but not limited to, ordinary negligence, gross negligence, and reckless, willful, or wanton conduct, may be compared to and offset by any conduct that falls short of conduct intended to cause injury or damage. By this method, each party's relative fault in causing the plaintiff's injury will be given due consideration.

709 S.E.2d at 615, 392 S.C. at 293.

The Court finds that Ameris is 80% liable to Ms. Gibson and that Ms. Gibson is comparatively at fault for 20% of her damages. Ms. Gibson could have obtained her own appraisal prior to closing the loan but she did not. She simply relied on the appraisal accepted by Ameris. She did not independently determine if the rents from the apartment complex would pay for the loan and the loan on her beach house prior to purchasing the apartment complex. She just relied on the advice of Mr. Zerbst, Mr. Lanier, and Mr. Villavicencio. [Tr. 181:24-182:15; 185:12-18]. Accordingly, the Court finds that Gibson contributed

to the damages that she has suffered. The Court must compare Ms. Gibsons' negligence with Ameris' willful, wanton, and reckless conduct and reduce the total amount of damages, including punitive damages, by Ms. Gibson's comparative negligence. This Court will reduce Ms. Gibson recovery by 20%.

SET-OFF

In July 2008, Ms. Gibson sued Rolando Villavicencio, RPV Investments, LLC, and Re/Max Professional Realty. [Def. Ex. 60]. In August 2010, Plaintiffs amended their complaint to assert causes of action for negligent misrepresentation and breach of fiduciary duty, among others. [Def. Ex. 65]. In response to written discovery served in this case and in the case against Mr. Villavicencio, Ms. Gibson listed the exact same injuries. [*Compare* Def. Ex. 62 *and* Plaintiffs' Supplemental Answers to Defendant's Interrogatories, attached hereto as Exhibit A]. By agreement dated February 16, 2012, Plaintiffs settled their claims against Mr. Villavicencio et al. for the sum of $850,000. [Pl.Ex. 16].

South Carolina law provides that:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury...it reduces the claim against the other to the extent of any amount stipulated by the release of the covenant, or in the amount of the consideration paid for it, whichever is the greater.

S.C. Code Ann § 15-38-50 (2005).

The rationale for providing credit to a non-settling defendant is to prevent a double recovery to the plaintiff. *Truesdale v. South Carolina Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 747 (1975) (internal citation omitted), *overruled on other grounds, McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). "When the settlement is for the same injury, the non-settling defendant's right to a setoff arises by operation of law." *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (2012) (citing *Ellis v. Oliver*, 335 S.C. 106, 112, 515 S.E.2d 268, 272 (Ct. App. 1999)). The statute requires a set-off when the claims against the joint tortfeasors arose out of the same factual scenario. *Ellis*, 335 S.C. at 112, 515 S.E.2d at 272. "Under this circumstance, [s]ection 15-38-50 grants the court no discretion...in applying a set-off." *Smith*, 397 S.C. at 472, 724 S.E.2d at 190 (internal quotation marks omitted).

Here, Ameris is entitled to a set-off in the amount of $850,000. Ms. Gibson alleges that both Mr. Villavicencio and Ameris negligently misrepresented to her that the apartment complex was a suitable investment for her and that both Mr. Villavicencio's and Ameris' actions throughout the course of the renovation project caused Ms. Gibson's harm. The injury for which Ms. Gibson seeks to recover damages against Ameris is identical to the injury for which Plaintiffs recovered $850,000 against Mr. Villavicencio. [Def.'s Ex. 65]. To deny a set-off would result in a windfall for Ms. Gibson, in direct contradiction to S.C. Code Ann. § 15-38-50.

TOTAL DAMAGES

Ms. Gibson is entitled to recover the $700,000 down payment with $23,625.00 interest, the $355,000 for the Klister Lane property, and the $75,000 for personal funds contributed by Ms. Gibson directly to the project. That is a total of $1,153,625.00 actual damages. Ms. Gibson is also entitled to $3,551,232.00 in punitive damages. This brings Ms. Gibson's total damages to $4,704,857.00. This amount must be reduced by Ms. Gibson's 20% comparative fault which reduces the total by $940,971.00, for a new total of $3,763,886.00. Lastly, the total damages must be reduced by the $850,000 set-off, for a grand total of damages amounting to $2,913,886.00.

CONCLUSION

For the reasons stated above and based upon the testimony and evidence presented at trial, it is hereby ORDERED, ADJUDGED, AND DECREED that judgment in the amount of $2,913,886.00 be entered in favor of Ms. Gibson against Ameris Bank as to her claims for breach of fiduciary duty, negligent misrepresentation, and aiding and abetting breach of fiduciary duty.

IT IS SO ORDERED.

Robert E. Watson

The Honorable Robert E. Watson
Master In Equity

On this 8 day of August, 2013

Monks Corner, SC

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT Case No. 2010-CP-08-2134
Linda A. Gibson, formerly known as Linda Ann Avigner, Individually andas Trustee of the Paul William Gibson Family Trust and Heritage Seven, LLC, Plaintiffs, v. Ameris Bank, Defendant.	**ORDER DENYING AMERIS BANK'S MOTION TO ALTER OR AMEND**

This matter is before the Court on Defendant Ameris Bank's ("Ameris'") motion to alter or amend the Court's order dated August 8, 2013 finding Ameris liable to Plaintiffs and awarding Plaintiff judgment in the amount of $2,913,886.00, actual and punitive damages. After careful consideration of all the grounds raised by Ameris, I deny Ameris' motion and, with regard to certain of the evidentiary errors alleged by Ameris, find as follows.

a) Evidence and Testimony concerning the Internal Loan Policies and Procedures of Ameris (Motion to Alter or Amend ¶ 122):

Ameris argues the Court erred in allowing Plaintiffs to introduce evidence and testimony concerning the internal loan policies and procedures of Ameris, claiming a bank's internal policies do not create a duty to a borrower and may not be used to support a claim for tort liability against Ameris. However, having found Ameris assumed a duty of care with regard to Gibson and that the relationship between Gibson and Ameris went beyond that of creditor/debtor, it is the further function of the court to determine and formulate the standard of conduct to which the duty requires the defendant to conform. *Doe ex rel. Doe v. Wal-Mart Stores, Inc.* 393 S.C. 240, 711 S.E.2d 908 (2011). The court may consider relevant standards of

care from various sources in determining whether a defendant breached a duty owed to an injured person. *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006). "The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines." *Doe ex rel. Doe v. Wal-Mart Stores, Inc.* 393 S.C. 240, 247, 711 S.E.2d 908, 912 (2011) (internal citations omitted). Accordingly, it was appropriate to allow Plaintiffs to introduce evidence of Ameris' loan policies and procedures as evidence of the appropriate standard of care in this case and Ameris' deviation from the same.

b) The May 22, 2009 Memorandum (Pl's Ex. 30) Regarding Benjamin Lanier (Motion to Alter or Amend ¶ 123):

Ameris argues the Court erred in allowing Plaintiffs to introduce evidence and testimony concerning a May 22, 2009 internal memorandum regarding former Ameris employee, Benjamin Lanier. Ameris contends the memorandum reflects a disciplinary action taken against Lanier following the events at issue in this lawsuit and constitutes a subsequent remedial measure under Rule 407 of the South Carolina Rules of Evidence ("SCRE"). Rule 407, SCRE provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The parties were not able to proffer any South Carolina authority discussing disciplinary measures and whether they constitute subsequent remedial measures. However, even if the memo is considered a subsequent remedial measure, pursuant to Rule 407, the evidence may be

admissible to prove matters other than liability for negligence. *See e.g. Taylor v. Nix*, 307 S.C. 551, 416 S.E.2d 619 (1992) (subsequent recall of an automobile); *see also* Trial Handbook for South Carolina Lawyers § 13:10 (updated August 2013) (recognizing evidence of subsequent remedial measures may be introduced: (1) to rebut or impeach a witness; (2) to explain measurements, maps, photographs, and the like; (3) to show the conditions existing at the time of the accident;(4) to prove the cause of the injury; (5) to establish the defendant's control of the premises or instrumentality involved; and (6) to demonstrate the feasibility of taking certain precautions.). Thus, the Lanier memo was properly admitted to show the conditions existing at the time of the harm to Gibson and to establish Ameris' control of the instrumentality involved – in this case, Ameris' control over the construction funds and disbursements. (See Tr. 489 discussing admitting the evidence to show the bank had control over the construction loan advances).

Further, as the memo was cumulative to other evidence on these topics, Ameris was not prejudiced by the memo's admission in the non-jury trial. (See e.g. Tr. 392, testimony of Karl Zerbst "Q. Would you agree or disagree that Ameris Bank and in particular Mr. Lanier had control over the monies which were to be advanced? A. Yes, sir. I do agree.").

c) The July 3, 2009 "culpability" Memo (Pl. Ex. 31) of Don Snipes (Motion to Alter or Amend ¶ 124):

Ameris argues the Court erred in allowing Plaintiffs to introduce e-mail correspondence between two Ameris employees, Don Snipes and Jon Edwards, dated July 3, 2009 in which Snipes wrote "we have some culpability in [Gibson's] problems." Ameris claims that because Snipes is not an attorney he may not offer testimony regarding whether Ameris is liable to Plaintiffs. Contrary to Ameris' contention, the Snipes memo was not introduced, nor did the

Court rely on it, as a legal opinion or an admission that Ameris is legally responsible for the harm suffered by Plaintiffs. At trial, Plaintiff's counsel proffered the evidence to prove:

> MR. WEST: And if your Honor please, this, again, goes to the whole issue of whether or not there has been an assumption of a duty. (Tr.18)
>
> And so, your Honor, this is not intended to be a legal opinion. (Tr.19)

The memo was allowed as evidence of Ameris' recognition that it owed a duty to Plaintiffs. (See Tr. 20, Order pgs 4-5, 31).

Additionally, Ameris concedes the email "relates the failure of the bank to meet its own internal standards for how the loan should have been managed." (Ameris' Motion to Alter or Amend, pg 25). As is stated above, the standard of care may be established and defined by "a defendant's own policies and guidelines," and Ameris' admission that it deviated from its own policies and guidelines with regard to Plaintiffs' loan is evidence of Ameris' breach of the standard of care.

d) (Motion to Alter or Amend ¶ 35):

In regards to Ameris' alleged error number 35, I hereby amend my August 8, 2013 to remove the language "I find the amendment to be disingenuous" found on page 16 of the order. As I have expressed, I have great respect for the attorneys for the Defendants and have no intention of impugning their integrity.

IT IS SO ORDERED that Ameris' motion to alter or amend is denied.

The Honorable Robert E. Watson
Master in Equity

On this 30 day of May, 2014
Moncks Corner, SC