

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-8578

**RECEIVED**

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**SC Court of Appeals**

Francis P. Maybank and Jane H.P. Maybank,  
as trustee for the Francis P. Maybank Family  
Insurance Trust, .....

Plaintiffs,

Of whom Francis P. Maybank is ..... Respondent-Appellant,

v.

BB&T Corporation, Branch Banking and Trust  
Company, Successor in merger to Branch  
Banking and Trust Company of SC, and  
Sterling Capital Management, LLC, Successor  
in merger to BB&T Asset Management, LLC, ... Appellants-Respondents.

RETURN TO MOTION FOR CERTIFICATION

BB&T Corporation, Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of SC ("BB&T"), and Sterling Capital Management, LLC, successor in merger to BB&T Asset Management, LLC ("BB&TAM"), hereby submit their Return to the Respondent-Appellant's Motion for Certification.

## **INTRODUCTION**

The Respondent-Appellant, Francis P. Maybank, asks this Court to take jurisdiction over this appeal on the grounds that the case presents significant issues of public interest and involves legal principals of major importance. Mr. Maybank further asserts that the litigation conduct of the Appellants-Respondents and the length of the litigation also warrant certification. The Appellants-Respondents disagree with Mr. Maybank's characterization of the facts, claims, and defense strategy as well as his basis for seeking certification. The Court may wish to take jurisdiction on some other basis, as § 14-8-210(b) gives the Court great discretion and recognizes that certification for review by the Supreme Court can occur "in other cases the court considers appropriate." S.C. Code Ann. § 14-8-210(b) (Law. Co-op. Supp. 2014). But the reasons articulated by Mr. Maybank do not form a legitimate basis for certification. This case is certainly important to the litigants, and it is of great importance to the Appellants-Respondents due to the significant legal errors committed by the trial court and the sums at issue. The case, however, does not present a significant issue of public interest or a novel legal issue, nor does it present any unusual delay that would be considered exceptional when compared to similar litigation.

## **FACTUAL BACKGROUND**

This appeal involves a judgment in favor of the Respondent-Appellant, Frank Maybank, a former Wall Street portfolio manager who served for five years as a vice president and wealth advisor at BB&T. By 2001, Mr. Maybank had accumulated significant wealth during his over 40 year career as a money manager. As a multi-millionaire and a career investment professional, Mr. Maybank was and is anything but

financially vulnerable or ignorant. He and his wife owned no less than four homes, owned millions of dollars worth of stock, and operated a horse racing business. He sought to avoid high estate taxes by passing on his wealth to his children and grandchildren during his lifetime. Mr. Maybank succeeded in doing so by transferring to his children a \$1.5 million home on Meeting Street in Charleston and a 160 acre farm in the Upstate. He also generously funded the college and graduate school educations of his children and private school tuition for his grandchildren and continued to pay many of the other expenses of his adult children. In doing this, however, he reduced his own liquid assets and accumulated a large margin debt with his brokerage account of over \$2.7 million. Margin interest was accruing at the level of \$19,000 per month. This was his situation at the time he decided to seek BB&T's assistance with his investments.

While employed by BB&T, Mr. Maybank became aware of investment products known as prepaid forward contracts and their use as a means of hedging the risk of concentrated stock positions. In August of 2006, he instructed that BB&T assist him with entering into a prepaid contract related to his \$10 million holding of BB&T stock. Under the contract, Mr. Maybank sold his BB&T stock for 76% of its current market value, but he was permitted to retain title and continue to receive over \$400,000 of annual dividend payments. After three years, the contract would mature, and he would be required to either deliver his shares to the buyer or unwind the contract. No taxable event would occur until the shares were delivered at the end of the three-year term.

After Mr. Maybank entered into his prepaid contract in August of 2006, he applied the sale proceeds to completely payoff his margin debt and to create a new diversified portfolio of \$4.6 million. When his prepaid contract was going to mature in

2009 (requiring him to deliver the stock), Mr. Maybank approached BB&T and asked to enter into a second contract, effectively extending the time he could hold onto the BB&T stock for another two years and allowing him to continue to receive its substantial dividend payments. This transaction was completed in January of 2009. Five months later, BB&T, like nearly all other banks in America at that time, was forced to greatly reduce its dividends. The dividend payments were reduced by 68%. This had the effect of cutting Mr. Maybank's annual dividend income from over \$400,000 a year to \$132,000 a year. Despite the substantial decrease in the dividends in 2009, Mr. Maybank wanted to continue owning the stock into the future and negotiated on his own with Deutsche Bank (with no assistance from BB&T or BB&TAM) three additional prepaid contracts until he finally decided to terminate the last contract in December of 2012 and deliver the shares to Deutsche Bank. This left him with approximately \$1.9 million in his brokerage account as well as a 185 acre farm in Abbeville worth over \$1 million.

### **ARGUMENT**

In arguing for certification to this Court, Mr. Maybank asserts that the Appellants-Respondents purportedly “contested nearly every issue in this case” and that this strategy “contributed to the fact that the case below was not tried until two and one-half years after the complaint was filed.” (Mot. at 4). This contention is not supported by the record. A review of the record demonstrates that it was Mr. Maybank's litigation strategy and the conduct of his own counsel that contributed significantly to the trial not occurring until 2014. A few of the key events affecting the length of the litigation are summarized below:

- The Appellants-Respondents removed the case to federal court in January of 2012. Mr. Maybank filed a motion to remand, arguing that he had viable claims for breach of fiduciary duty, fraud, and other claims individually against BB&T employees, Anthony Mahfood and Ross Walters, both South Carolina residents and non-diverse defendants. Briefing was completed on April 9, 2012. The federal court was not able to reach the motion, however, for four months and did not issue a ruling until August 3, 2012. (8/3/12 Order) [Exh. “A”]. Although it remanded the case, the federal court recognized that the removal was in good faith and rejected Mr. Maybank’s request for fees and costs associated with the motion to remand. (*Id.* at 13) (“Defendants had an objectionably reasonable basis for removing the case to federal court.”). A year and a half later, shortly before trial, Mr. Maybank filed an amended complaint dropping from the suit both Mr. Mahfood and Mr. Walters after having argued strenuously to the federal court that he had claims against them. In Mr. Maybank’s motion to remand, his counsel argued:

Contrary to the assertions advanced by the Defendants in the removal of this action (Removal), dkt.#1, Walters and Mahfood are not sham defendants, rather, as is detailed in the complaints, these individuals played an integral role in the recruitment of Mr. Maybank to entrust his financial assets with the Bank, and then crafted and oversaw the implementation of the failed investment “strategy” which ruined what took Mr. Maybank fifty years to build and accumulate.

(Maybank Motion to Remand at 2) [Exh. “B”].<sup>1</sup> Once trial was approaching, however, Mr. Maybank dropped from the suit these individuals who he previously asserted to the federal court “played an integral role” in the events. (*Id.*)

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<sup>1</sup> Because the exhibits to the motion were voluminous, only the motion (without the exhibits) is being included herewith as Exhibit “B.”

- This case involved the gathering and production of thousands of pages of electronically stored emails and other documents (“ESI”). To facilitate the search for ESI, counsel for the Appellants-Respondents wrote to Mr. Maybank’s counsel on September 10, 2012 outlining proposed ESI search parameters. (9/10/12 Letter from Kristinik to Willoughby) [Exh. “C”]. It took Mr. Maybank’s counsel *over seven months* before he responded with his comments in a letter dated April 15, 2013. (4/15/13 Letter from Willoughby to Kristinik) [Exh. “D”]. ESI search term negotiations continued with counsel for Mr. Maybank making additional suggestions for the search parameters in July of 2013. (7/3/13 Letter from Willoughby to Kristinik) [Exh. “E”]. Depositions could not commence until after the ESI gathering and production was complete.

- On December 3, 2013, nearly two years into the case, Mr. Maybank submitted a motion to amend his Complaint to add as a party plaintiff Jane H.P. Maybank, the trustee of the Francis P. Maybank Family Insurance Trust. (Maybank Motion to Amend) [Exh. “F”].<sup>2</sup> The purpose was to allow the Trust to assert claims related to the liquidation of \$4 million of life insurance policies held in the name of the Trust. By moving forward with an amended pleading adding a new party, Mr. Maybank triggered Rule 40(b) providing for 180 days between the time of trial and the service of a pleading adding a new party. Significant discovery was required to assess and prepare a defense regarding these new claims. There was no reason the claims of the Trust could not have been asserted back in December of 2011 when the original Complaint was filed. Moreover, these claims were found to be without merit as the jury rejected all of the claims of the Trust when it returned its verdict at trial.

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<sup>2</sup> Because the exhibits to the motion were voluminous, only the motion (without the exhibits) is being included herewith as Exhibit “F.”

- On December 10, 2012, four months after the remand back to state court, the parties executed and submitted a joint request for the transfer of the case to the Business Court. (12/10/12 Joint Motion) [Exh. “G”]. Although counsel for the Appellants-Respondents proposed the transfer to the Business Court in August of 2012, shortly after the remand by the federal court, counsel for Mr. Maybank was slow to agree to the transfer, requiring multiple communications from counsel for Appellants-Respondents. (10/15/12 Email from Kristinik to Willoughby; 9/20/12 Email from Kristinik to Willoughby) [Exhs. “H” and “I”]. The transfer was later ordered on February 25, 2013. (2/25/13 Order) [Exh. “J”]. A total of only 16 months had passed from the time the case was first transferred to the Business Court to the time that the trial was completed in June of 2014.

- Mr. Maybank was slow in responding to written discovery requests. The Appellants-Respondents served their first set of discovery requests on October 22, 2012. After requesting several extensions [Exhs. “K”, “L,” “M,” and “N”], Mr. Maybank served his objections and answers to interrogatories on February 11, 2013, and he served his written objections and responses to requests for production on April 15, 2013 (nearly six months after the requests were served).

In his motion for certification, Mr. Maybank also contends that the conduct of the Appellants-Respondents during the case and their “‘contest every issue’ defense strategy” made it “very expensive for Mr. Maybank to litigate.” (Maybank Memo. in Supp. Mot. at 7-8). The record shows, however, that it was the decisions and conduct of Mr. Maybank’s counsel that contributed significantly to the expense of the litigation, and, in many instances, to unnecessary and unproductive work.

- On May 6, 2014, the month before trial, Mr. Maybank's counsel noticed the deposition of Kelly King, the CEO of BB&T, and John Allison, the former CEO of BB&T. (5/6/14 Deposition Notices) [Exh. "O"]. These two individuals had nothing to do with Mr. Maybank's customer relationship and had no relevant knowledge. The Appellants-Respondents were forced to file a motion for protective order, and the trial court granted the motion, finding no reason for these depositions. (5/30/14 Order) [Exh. "P"].

- The Appellants-Respondents requested the clawback of a privileged document under the terms of the trial court's Confidentiality Order. (10/4/13 Letter from Kristinik to Willoughby) [Exh. "Q"]. Counsel for Mr. Maybank, however, refused and required the Appellants-Respondents to file a motion to compel the return of the document. (11/1/13 Letter from Willoughby to Kristinik) [Exh. "R"]. After a hearing, the Court ruled that the draft memorandum to legal counsel was in fact privileged and ordered Mr. Maybank's counsel to return the document. (5/21/14 Order) [Exh. "S"]. The trial court also ordered that certain requests to admit served by Mr. Maybank be stricken because they were based on his counsel's use of the privileged document in violation of the provisions of the Confidentiality Order. The trial court explained:

[A]fter having notice of the privileged nature of the document, Plaintiff used the memorandum at issue to formulate requests for admissions and served those requests for admissions upon the Defendant. Pursuant to Paragraph 6(d) of the Confidentiality Order, the receiving party was required to sequester the privileged information and was prohibited from making any use of the document or information which was the subject of the request for return or destruction based upon the privilege. Plaintiff failed to honor his responsibilities under Paragraph 6(d) of the Confidentiality Order.

(*Id.* at 2).

- During the deposition of Jim Willis, a member of the executive management of BB&TAM, Mr. Willis was asked about reports on the status of this lawsuit that were provided to the Trust Committee of the defendant entities. Mr. Willis was instructed not to answer on the basis of privilege. Counsel for Mr. Maybank forced the Appellants-Respondents to file a motion for protective order to preserve the objection. After a hearing, the trial court granted the motion, finding that the information regarding the status and strategy of the lawsuit was “derived solely from internal or external counsel [and] is [a] privileged communication.” (5/28/14 Order at 2) [Exh. “T”].

- Mr. Maybank filed a motion for summary judgment on his breach of contract claim on December 11, 2013. The trial court denied the motion. (5/28/14 Order at 3) [Exh. “T”]. Mr. Maybank, however, filed a second summary judgment motion on May 11, 2014 raising the same grounds with respect to the breach of contract claim. The trial court again found no merit in the motion and denied it for a second time. (6/6/14 Order at 2) [Exh. “U”].

- When the federal court issued its remand order, it denied Mr. Maybank’s request for attorneys’ fees and costs associated with the removal. (8/12/12 Order) [Exh. “A”]. Mr. Maybank’s counsel filed a motion for reconsideration on August 31, 2012, which was fully briefed, then denied by the federal court on August 20, 2013. (8/20/13 Order) [Exh. “V”]. The federal court was compelled to write a 16 page order addressing the numerous arguments raised by Mr. Maybank and ultimately rejected Mr. Maybank’s contention that the Appellants-Respondents had engaged in abusive tactics intended to delay the litigation. (*Id.* at 16). The federal court concluded an award of fees and costs

to Mr. Maybank was inappropriate because there was an objectively reasonable basis for removing the case. (*Id.* at 7-8) (“Defendants’ arguments, though not ultimately persuasive on the issue of fraudulent joinder, were supported by reasonably analogous case law and a reasonable reading of the relevant statutes.”).

- On April 10, 2014, Mr. Maybank filed a motion seeking an order from the trial court finding that the Appellants-Respondents waived their confidentiality designations to thousands of pages of documents. The trial court denied this motion, refusing to find waiver and finding that some of the documents “contain[ed] the personal identifying information and financial information of third-party customers of Defendants.” (5/28/14 Order at 3) [Exh. “T”]. There was no advantage to be obtained by the order sought by Mr. Maybank, as he already had complete access to the confidential documents at issue and could use them at trial as needed.

### **CONCLUSION**

Based on the foregoing reasons, the Court should reject the grounds asserted by the Respondent-Appellant in his motion and supporting memorandum and, instead, consider whether to certify and the timing of same in light of any appropriate factors the Court deems pertinent in the exercise of its discretion.

***Signature Page Attached***

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Columbia, South Carolina

February 2, 2015

# **Exhibit A**

8/3/12 Order

**UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
GREENVILLE DIVISION**

|                                         |   |                                    |
|-----------------------------------------|---|------------------------------------|
| Francis P. Maybank,                     | ) |                                    |
|                                         | ) | Civil Action No. 6:12-cv-00214-JMC |
| Plaintiff,                              | ) |                                    |
|                                         | ) |                                    |
| v.                                      | ) | <b>OPINION AND ORDER</b>           |
|                                         | ) |                                    |
| BB&T Corporation, Branch Banking and    | ) |                                    |
| Trust Company, Successor in merger to   | ) |                                    |
| Branch Banking and Trust Company of SC, | ) |                                    |
| Sterling Capital Management, LLC,       | ) |                                    |
| Successor in merger to BB&T Asset       | ) |                                    |
| Management LLC, Ross Walters, and       | ) |                                    |
| Anthony Mahfood,                        | ) |                                    |
|                                         | ) |                                    |
| Defendants.                             | ) |                                    |
|                                         | ) |                                    |

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Plaintiff Francis P. Maybank (“Maybank”) brought this action against defendants BB&T Corporation, Branch Banking and Trust Company, and Sterling Capital Management, LLC (collectively, “BB&T”), Ross Walters (“Walters”), and Anthony Mahfood (“Mahfood,” and together with BB&T and Walters, “Defendants”) alleging several causes of action arising from Defendants’ provision of financial investment advice to Maybank. Maybank alleges that he lost a substantial amount of money in several investments he made as a result of following two strategic investment plans created by Walters and Mahfood. Maybank initially filed suit against Defendants in state court. Defendants removed the case to federal court on the ground that Maybank fraudulently joined Mahfood and Walters. Currently before the court is Maybank’s Motion to Remand [Doc. 15] under 28 U.S.C. § 1447 and Motion for Costs and Expenses [Doc. 34] pursuant to 28 U.S.C. § 1447(c) and Rule 54(d)(2) of the Federal Rules of Civil Procedure.

For the reasons stated herein, the court grants Maybank's Motion to Remand and denies his Motion for Costs and Expenses.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Maybank owned his own trust and asset management company for many years. In 2001, BB&T acquired Maybank's company through a stock exchange. Pursuant to the acquisition agreement and to provide for a smooth transition for Maybank's clientele, Maybank worked for BB&T until 2006. Maybank and defendants Walters and Mahfood became familiar with one another over the five years of working together.

In preparation for his retirement, Maybank alleges that he engaged Walters and Mahfood to devise an investment plan that reflected Maybank's goals of diversification, steady income, tax sheltering, and the ability to protect his wealth for his heirs. He contends, however, that the plan was actually very aggressive, risky, and involved a complex system of derivative trading with BB&T's stock – a plan which he characterizes as an uncommon investment approach for someone beginning retirement. According to Maybank, diversification and low-risk investments were not objectives of the devised plan. Defendants claim that, despite Maybank's current complaints regarding the performance of his investments, the plan implemented by Defendants achieved many of Maybank's investment goals including the provision of tax sheltering opportunities and steady dividend income before the downturn of the economy.

Maybank moves to remand this case to South Carolina state court pursuant to 28 U.S.C. § 1447 on the ground that this court lacks subject matter jurisdiction because there is not complete diversity, as plaintiff Maybank and defendants Walters and Mahfood are all residents of South Carolina.

### LEGAL STANDARD

Federal courts are courts of limited jurisdiction. The party invoking federal jurisdiction has the burden of proving the jurisdictional requirements for diversity jurisdiction. *See Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 298 (4th Cir. 2008) (holding that in removing case based on diversity jurisdiction, party invoking federal jurisdiction must allege same in notice of removal and, when challenged, demonstrate basis for jurisdiction). Federal courts may exercise original diversity jurisdiction only if no plaintiff and no defendant are citizens of the same state. *See Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 388, 118 S. Ct. 2047, 2052 (1998). Because federal courts are forums of limited jurisdiction, any doubt as to whether a case belongs in federal or state court should be resolved in favor of state court. *See Auto Ins. Agency, Inc. v. Interstate Agency, Inc.*, 525 F. Supp. 1104, 1106 (D.S.C. 1981) (citing *Penn Sec. Co. v. Home Indem. Co.*, 418 F. Supp. 292, 294 (M.D. Pa. 1976); *Anderson v. Union Pac. Coal Co.*, 332 F. Supp. 605, 608 (D. Wyo. 1971)).

“Joinder designed solely to deprive federal courts of jurisdiction is fraudulent and will not prevent removal.” *Anderson v. Home Ins. Co.*, 724 F.2d 82, 84 (8th Cir. 1983) (citing *Tedder v. F.M.C. Corp.*, 590 F.2d 115, 117 (5th Cir. 1979)). The party seeking removal based on alleged fraudulent joinder by the non-moving party must prove “that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or [t]hat there has been outright fraud in the plaintiff’s pleading of jurisdictional facts.” *Mayes v. Rapoport*, 198 F.3d 457, 464 (4th Cir. 1999) (quoting *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993)) (alterations in original). A claim need not ultimately succeed to defeat removal; only a possibility of a right to relief need be asserted. *Id.* (citing 14A Charles A. Wright et al., *Federal Practice & Procedure* § 3723 (2d ed.1985)).

When there is uncertainty, the court is obliged to resolve all issues of fact and law in the plaintiff's favor. *Marshall*, 6 F.3d at 232-33. "This standard is even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir. 1999). Indeed, because a claim of fraudulent joinder presents a jurisdictional inquiry, it must be resolved before the court makes any determination of the adequacy of the allegations in the complaint for claim dismissal purposes. *See Brantley v. Vaughan*, 835 F. Supp. 258, 261-62 (D.S.C. 1993) (discussing *Batoff v. State Farm Ins. Co.*, 977 F.2d 848 (3d Cir. 1992)).

"[I]n determining whether an attempted joinder is fraudulent, the court is not bound by the allegations of the pleadings, but may instead consider the entire record, and determine the basis of joinder by any means available." *Mayes*, 198 F.3d at 464 (citations omitted). However, the court's subject matter jurisdiction over an action removed from state court is determined as of the time of the removal. Therefore, the court generally does not consider post-removal amendments of the complaint in determining the propriety of removal. *See Pinney v. Nokia, Inc.*, 402 F.3d 430, 443 (4th Cir. 2005) ("Because amendment occurred after removal, we look at the original complaints rather than the amended complaints in determining whether removal was proper.") (citing *Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939)).

## DISCUSSION

### **Fraudulent Joinder of Walters and Mahfood**

Maybank requests this court to remand this case to South Carolina state court because there is not complete diversity among the parties and thus this court lacks subject matter jurisdiction. Defendants oppose the motion and assert that Walters and Mahfood were fraudulently joined simply to defeat federal jurisdiction. Defendants contend that Maybank

cannot possibly establish any of his alleged claims for breach of fiduciary duty, negligence, violation of the South Carolina Uniform Securities Act of 2005 (“Securities Act”), or violation of the South Carolina Unfair Trade Practices Act (“SCUTPA”) against either Walters or Mahfood; therefore, the only legitimate defendants in the case are the BB&T entities, all foreign corporations.<sup>1</sup>

#### **A. Breach of Fiduciary Duty**

Generally, a fiduciary duty arises where a party entrusts special confidence in another such that the latter is bound to act in good faith and with due regard to the interests of the party entrusting said confidence. *See SSI Medical Services v. Cox*, 310 S.C. 493, 500, 392 S.E.2d 789, 794 (1990). To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will act not in his or her own behalf but in the interest of the party so reposing. *Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004). The relationship cannot be created by the unilateral actions or expectations of one party. *See Steele v. Victory Bank*, 295 S.C. 290, 294-95, 368 S.E.2d 91, 94 (Ct. App. 1988) (citing 36A C.J.S. Fiduciary (1961)).

South Carolina courts have not addressed whether an investment advisor owes a fiduciary duty to a client. However, numerous courts in other jurisdictions have acknowledged the fiduciary nature of the relationship between an investment advisor and a client. *See McGraw v. Wachovia Securities, L.L.C.*, 756 F. Supp. 2d 1053, 1078 (N.D. Iowa 2010 (noting that “a fiduciary duty exists between a broker or financial advisor and a customer or other individual if the individual entrusts the broker/advisor to select and manage his or her investments”)) (citations

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<sup>1</sup> Defendants do not argue that Maybank committed any fraud in pleading any jurisdictional facts concerning Walters and Mahfood.

omitted); *Pension Comm. of the Univ. of Montreal Pension Plan v. Bank of America Sec., LLC*, 716 F. Supp. 2d 236, 242 n.26 (S.D.N.Y. 2010) (commenting that “under New York law, a defendant's fiduciary duty to a plaintiff is often inferred from a contract between the two parties. However, once that fiduciary duty is established, the relationship the contract establishes imposes ‘a duty to act with care and loyalty independent of the terms of the contract.’”); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cheng*, 697 F. Supp. 1224, 1227 (D.D.C. 1988) (finding that a stockbroker may be held to a level of trust and confidence sufficient to establish a breach of fiduciary duty claim); *Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 337 F. Supp. 107 (N.D. Ala. 1971) (recognizing that “[w]here the broker-dealer is also an investment advisor” the broker “does occupy a fiduciary relationship” with the client); *Johnston v. CIGNA Corp.*, 916 P.2d 643, 647 (Colo. Ct. App. 1996) (“In general, an investment advisor owes a fiduciary duty to his or her customers.”). Although not directly on point, the Supreme Court of South Carolina has previously found that a financial institution owes a fiduciary duty to its customer where the institution goes beyond the mere provision of transactional services and actually engages in an advisory role with respect to the customer. See *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986). This court does not find it unreasonable to presume that South Carolina state courts may extend this proposition to individual investment or financial advisors who provide advice to a client and not merely the execution of discreet transactions at the direction of the client. But, it is not appropriate for this court to make that determination in this case. “Because all legal uncertainties are to be resolved in the plaintiff's favor in determining whether fraudulent joinder exists, a truly “novel” issue such as this cannot be the basis for finding fraudulent joinder.” *Hartley*, 187 F.3d at 425. Accordingly, the court finds that Maybank did

not fraudulently join Walters and Mahfood because there remains a possibility that South Carolina state courts would recognize the existence of a fiduciary duty in this case.

Defendants argue that the court should assert jurisdiction over this case and deny Maybank's request to remand based on their argument that as employees of BB&T, Walters and Mahfood, can only serve BB&T's interests as its agents. In support of their argument, Defendants attempt to analogize the relationship that financial advisors share with clients to one that a real estate agent shares with a buyer. These relationships are distinct. A real estate agent serves the interest of the seller, attempting to secure the highest possible selling price, or the buyer, attempting to secure the lowest possible purchase price. It is clear that a real estate agent can never serve these two different "masters" at the same time in a fiduciary capacity because the interests are mutually exclusive. *See McCallum v. Grier*, 86 S.C. 162, 168, 68 S.E. 466, 468-69 (1910) (noting that a real estate broker employed by a seller cannot act as an agent for the buyer because their interest are inconsistent); *Harrington v. Mikell*, 321 S.C. 518, 521, 469 S.E.2d 627, 629 (Ct. App. 1996) (holding that, because broker was agent for seller, "a fiduciary relationship did not exist between [buyer] and [broker]").

Defendants also try to draw comparisons between the instant circumstance and the relationship of an insurance agent with a customer by relying on an unpublished opinion from this District wherein the court found that an agent of an insurance company did not have any independent liability for a breach of fiduciary duty. *See Sullivan v. New York Life Ins.*, No. 3:09-1937-JFA (D.S.C. Jan. 19, 2010). *Sullivan* involved a dispute arising from an agent's failure to execute the plaintiff's instructions to invest in the investment products offered by the insurance company which the agent represented. The agent's responsibility to the customer was that of a

mere conduit engaged to complete transactional services. It did not concern allegations of breach of fiduciary duty arising from an advisory relationship.

Neither of the circumstances relied upon by Defendants is applicable here. In the instant matter, Walters and Mahfood were not executing transactions with Maybank on behalf of BB&T, their employer, as a real estate agent would between buyer and seller or as an insurance agent would when selling his or her company's products to a customer. Instead, Maybank alleges that they served as his advisors and were tasked with the responsibility to recommend a financial strategy appropriate for him based on their expertise. These facts are sufficiently distinct from the prior cases addressed by the South Carolina courts to prevent their clear application here. The court cannot say that no claim for breach of fiduciary duty lies in these facts because South Carolina has not yet passed on the issue.

Based on the record before the court, and “[r]esolving all issues of fact and law in the plaintiff’s favor,” *Marshall*, 6 F.3d at 233, the court finds that it may be possible for Maybank to pursue a claim for breach of fiduciary duty against Walters and Mahfood. Accordingly, the case is appropriately remanded to state court.

#### **B. South Carolina Uniform Securities Act**

The South Carolina Uniform Securities Act of 2005 provides for the enforcement of civil liability for certain violations of the Securities Act. *See* S.C. Code. Ann. § 35-1-509(a) (Supp. 2010).<sup>2</sup>

Section 509(b) allows a buyer to pursue a claim against

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<sup>2</sup> Maybank’s complaint does not specify which subsection of Section 509 Maybank intends to use to impose liability against Walters and Mahfood. However, Maybank contends that he could assert liability against Walters and Mahfood under Sections 509(b) and 509(f) of the Securities Act. Accordingly, the court will address whether Maybank could possibly have a claim against Walters or Mahfood pursuant to these subsections.

the person [who] sells a security in violation of Sections 35-1-301 or 35-1-501 or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission.

S.C. Code Ann. § 35-1-509(b).

Section 509(f) provides that

A person that receives directly or indirectly any consideration for providing investment advice regarding securities to another person and that employs a device, scheme, or artifice to defraud the other person or engages in an act, practice, or course of business that operates or would operate as a fraud or deceit on the other person, is liable to the other person.

S.C. Code Ann. § 35-1-509(f).

Additionally, Section 509(g) makes certain other “persons . . . liable jointly and severally with and to the same extent as persons liable under subsections (b) through (f). S.C. Code Ann. § 35-1-509(g). This provision specifically extends liability to “an individual who is an employee, or a person occupying a similar status or performing a similar function, of a person liable under subsections (b) through (f) and who materially aids the conduct giving rise to the liability” and “a person that is a broker-dealer, agent, investment adviser, or investment adviser representative that materially aids the conduct giving rise to the liability under subsections (b) through (f).” S.C. Code Ann. § 35-1-509(g)(3) and (4).

Defendants contend that Maybank does not have a colorable claim against Walters or Mahfood under either subsection b or f. Specifically, Defendants contend that Walters and Mahfood could not be liable under Section 509(b) because it only applies to sellers and Defendants contend that none of them actually sold the security at issue. Defendants interpret

this provision too strictly. In fact, Defendants do not cite any authority for their interpretation of the word “sells.”

The South Carolina Securities Act does not define “seller” and South Carolina courts have not defined the term in the context of the Securities Act. However, in interpreting the use of the term in similar provisions of the Federal Securities Act of 1933, the United States Supreme Court has explained that “[t]he statutory terms [“offer” and “sell”], which Congress expressly intended to define broadly, ... are expansive enough to encompass the entire selling process, including the seller/agent transaction.” *Pinter v. Dahl*, 486 U.S. 622, 643 (1988) (citing *United States v. Naftalin*, 441 U.S. 768, 773 (1979)) (alterations in original). The court further noted that “[a] natural reading of the statutory language would include in the statutory seller status at least some persons who urged the buyer to purchase.” *Id.* at 644. Because the term “sells” as used in Section 509(b) is not clearly defined by South Carolina law, the court cannot accept Defendants’ interpretation, particularly without any reliable authority, as the basis for finding that Maybank could not possibly hold Walters and Mahfood liable under the statute as a seller.

The court must also reject Defendants’ arguments concerning the application of Section 509(f). Defendants assert that Walters and Mahfood are exempt from liability under this subsection because Section 509(f) “does not apply to a broker-dealer or its agents if the investment advice regarding securities that is provided is solely incidental to transacting business as a broker-dealer and no special compensation is received for the investment advice.” S.C. Code Ann. § 509(f)(2). Defendants arguments presupposes that the BB&T entity employing Walters and Mahfood are broker-dealers. As defined in the statute, a “[b]roker-dealer” means a person engaged in the business of effecting transactions in securities for the account of others or

for the person's own account,” but expressly excludes a bank or financial institution engaged in specific activities described in the Federal Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(4) and (5). *See* S.C. Code Ann. § 35-1-102(4). Based on the current record in this case, the court cannot conclude that the exception is applicable here.

Defendants further argue that Walters and Mahfood could not be liable under this section of the Securities Act because they did not receive any special consideration for providing investment advice in connection with Maybank’s purchase of the securities at issue. If the broker-dealer exception is not applicable here, Defendants have not demonstrated that no colorable claim exists against Walters and Mahfood for violations of Section 509(f). As provided in the statute, liability attaches to any “person that receives directly or indirectly consideration for providing investment advice.” *Id.* The statute does not indicate what constitutes direct or indirect consideration, and Defendants have not cited any authority explaining what constitutes indirect and direct compensation under Section 509(f). Defendants only offer conclusory arguments that Walters and Mahfood never received direct or indirect compensation for advising Maybank. Additionally, Defendants ignore that Walters and Mahfood could be jointly liable for a violation of Section 509(f) by the BB&T entities if Walters and Mahfood are found to have materially aided in BB&T’s conduct. *See* S.C. Code Ann. § 35-1-509(g)(3) and (4). Therefore, Defendants have failed to meet the heavy burden of proving there is no possibility of Maybank having a State Securities Act claim against the individual defendants. Accordingly, the court cannot find that Maybank fraudulently joined Walters and Mahfood, and this case should be remanded.

Because the court grants Maybank’s request for remand on the grounds that he has a possibility of pursuing claims against Walters and Mahfood for breach of fiduciary duty and

violations of the Securities Act, the court need not address the propriety of the remaining claims against the individual defendants.

### **Plaintiff's Motion for Costs and Expenses**

After filing his Motion to Remand, Maybank filed a subsequent motion seeking an award of the attorney's fees he incurred in his efforts to remand this case to state court on the grounds that Defendants' removal of this action to federal court lacked an objectively reasonable basis and was made solely for the purpose of delay.

A court "may require payment of just costs and any actual expense, including attorney fees" for cases remanded by the district court for lack of subject matter jurisdiction. 28 U.S.C. § 1447(c). The Supreme Court of the United States has held that "[a]bsent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). The Supreme Court found that fee shifting was appropriate in some cases, noting that:

[t]he process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources. Assessing costs and fees on remand reduces the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff. The appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied.

*Martin*, 546 U.S. at 140.

This court acknowledges the burdens of removing and later remanding the same case; however, this specific situation does not warrant an award of attorney's fees. As discussed in detail above, many of the claims made by Maybank and the arguments made by Defendants have

not been addressed by South Carolina courts. Accordingly, Defendants had an objectionably reasonable basis for removing the case to federal court. Therefore, the court denies Maybank's request for costs and expenses.

### **CONCLUSION**

Based on the record and the arguments of the parties, the court finds Maybank could possibly establish a state law cause of action against Walters and Mahfood and, therefore, this court lacks subject matter jurisdiction over this case. Accordingly, the court **GRANTS** Plaintiff's Motion to Remand [Doc. 15], and this action is hereby **REMANDED** to the Court of Common Pleas in Greenville County, South Carolina for further proceedings. The court further **DENIES** Plaintiffs' Motion for Costs and Expenses [Doc. 34].

**IT IS SO ORDERED.**

A handwritten signature in black ink, reading "J. Michelle Childs". The signature is written in a cursive, flowing style.

United States District Judge

August 3, 2012  
Greenville, South Carolina

# **Exhibit B**

Maybank Motion to Remand

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
GREENVILLE DIVISION**

FRANCIS P. MAYBANK,

Plaintiff,

V.

BB&T CORPORATION,  
BRANCH BANKING AND TRUST COMPANY,  
Successor in merger to BRANCH BANKING  
AND TRUST COMPANY OF SC,  
STERLING CAPITAL MANAGEMENT, LLC,  
Successor in merger to BB&T ASSET  
MANAGEMENT LLC,  
ROSS WALTERS, and  
ANTHONY MAHFOOD,

Defendants,

No. 6:12-cv-00214-JMC

**PLAINTIFF  
FRANCIS P. MAYBANK  
MOTION TO REMAND**

Pursuant to 28 U.S.C. § 1447(c) Plaintiff Francis P. Maybank hereby files this motion and supporting memorandum of his motion to remand (Motion) this action to the Court of Common Pleas for Greenville County, State of South Carolina.

## INTRODUCTION

This action is the result of a very long, arduous and trying period in the life of Francis P. Maybank. As detailed in the Complaint filed in the Court of Common Pleas for Greenville County, South Carolina, as well as the Amended Complaint filed with this Court, Mr. Maybank saw the fruits of a lifetime's worth of hard work, ingenuity and success disappear before his eyes in a few short years, due to the imprudent and risky investment strategies devised and recommended to him by his fiduciary investment advisors Ross Walters and Anthony Mahfood, in conjunction with their employer and affiliated companies, BB&T Corporation, Branch

Banking and Trust Company (BB&T), and Sterling Capital Management, LLC (Corporate Defendants or Bank). Mr. Maybank did not undertake this lawsuit carelessly or without regard to the causes of action alleged and the entities and individuals named. Contrary to the assertions advanced by the Defendants in the removal of this action (Removal), dkt.#1, Walters and Mahfood are not sham defendants, rather, as is detailed in the complaints, these individuals played an integral role in the recruitment of Mr. Maybank to entrust his financial assets with the Bank, and then crafted and oversaw the implementation of the failed investment “strategy” which ruined what took Mr. Maybank fifty years to build and accumulate.

#### **FACTUAL AND PROCEDURAL HISTORY**

Mr. Maybank was born in Charleston, South Carolina, on September 30, 1932. As of the filing of this action, Mr. Maybank is seventy-nine (79) years old. After graduating from college in 1955, Mr. Maybank joined the United States Army and served on active duty as an infantryman for two years, attaining the rank of sergeant. While he completed the remaining years of his military commitment in the United States Army Reserve, and for the next twenty years, Mr. Maybank began working in the financial services industry in New York City, New York. Eventually, Mr. Maybank desired to return to South Carolina, and in 1980, he moved to Greenville and continued to work in the financial services industry in this State.

In 1988, Mr. Maybank formed the Southeastern Trust Company (“Southeastern”), a trust and asset management company based in Greenville, South Carolina that provided trust services and asset management to individuals, businesses, charities and other organizations. As a direct result of Mr. Maybank’s diligent efforts, prudent management and successful business practices, over the next twelve years Mr. Maybank’s company grew to four offices (one each in Greenville, Anderson, Columbia, and Charleston) with more than \$700 million in client assets under

management. In 2001, Defendant BB&T contacted Mr. Maybank and expressed an interest in acquiring Southeastern. Negotiations were successful, and later that year, BB&T acquired Southeastern, bringing in the principals and employees of Southeastern as BB&T employees in order to facilitate the successful transition of Southeastern's clientele—and the \$700 million in assets under management—to BB&T's Wealth Management Division.

As a condition of BB&T's purchase of Southeastern, the Bank required Mr. Maybank to stay on as an employee of BB&T for a term of five years, in what was then known as the BB&T Trust Department. BB&T did not provide cash consideration for its acquisition of Southeastern. Instead, in exchange for Mr. Maybank's interest in Southeastern, BB&T agreed to an exchange of its shares for those of Southeastern at a share exchange ratio. This arrangement resulted in BB&T exchanging its stock for the stock of Southeastern. As a result of the exchange, BB&T had no cash outlay to complete the transaction, other than costs such as legal and accounting fees. For his shares of Southeastern, Mr. Maybank received approximately 246,000 shares of common stock in BB&T.

In or about the summer of 2006, as Mr. Maybank's five-year employment contract with BB&T was drawing to a close, Mr. Maybank was contemplating total retirement to spend his remaining time with his family enjoying the fruits of his more than fifty years of work. Having worked in the BB&T Wealth Management/Trust Department in the preceding five years, Mr. Maybank had come to regard the Department as a prudent, safe, financially knowledgeable and trustworthy institution that was skilled and experienced in the management of funds, assets and wealth and would provide services and advice to its customers in accordance with each customer's particular needs and best interests. Mr. Maybank also came to regard Walters and Mahfood, individually, as highly trained, knowledgeable advisors who, as fiduciaries to their

Wealth Management clients, provided superior service and support to their clients' needs. Accordingly, Mr. Maybank approached Walters and Mahfood regarding his pending retirement and sought their advice and counsel regarding the management of his assets going forward. The BB&T Wealth Management/Trust Department and Walters and Mahfood were already Mr. Maybank's fiduciaries, as the Bank had sought and accepted the role of trustee under the Irrevocable Trust Agreement created by Mr. Maybank as grantor of an existing insurance trust (Insurance Trust). As a result of those existing fiduciary duties, as well as the new fiduciary relationships the Bank, Walters and Mahfood sought to establish with him, Mr. Maybank understood that Defendants, including Walters and Mahfood, would be obligated to advise him with undivided loyalty, with his best interests in mind, and with competent, non-conflicted advice.

The Defendants, including Walters and Mahfood, represented themselves as highly trained, thoroughly knowledgeable, and dedicated to being champions for their clients' interests, and claimed to specialize in working with each client to develop an individualized, client-centric and conservative investment strategy tailored to the client's investment objectives, risk tolerance and investment horizon, tax status, and overall financial situation and needs. Defendants, including Walters and Mahfood, further represented to Mr. Maybank that they would craft a comprehensive solution to his pending retirement, tailored to his individual needs and provide prudent, holistic management of his assets and insurance needs. Mr. Maybank needed and expressly sought the safety and security of fiduciary management of his irreplaceable assets, because in his retirement he intended to delegate investment responsibilities and the management of his assets to professional fiduciaries.

Defendants, including Walters and Mahfood, devised a comprehensive investment strategy for Mr. Maybank, which they represented would accomplish certain of Mr. Maybank's goals in retirement: paying off debt, ensuring stable and secure income during his lifetime, and protecting his ability to provide for his heirs. The strategy devised and implemented by Walters and Mahfood, was further represented as being a strategy that would diversify Mr. Maybank's concentrated position in BB&T stock, while maintaining a stream of dividend income upon which Mr. Maybank intended to live throughout his retirement. Walters and Mahfood further represented that the strategy they devised and recommended would postpone, or avoid altogether, a taxable event. Based on the representations of Defendants, including Walters and Mahfood, as his fiduciaries, Mr. Maybank entrusted his investment assets and financial well-being to Defendants.

Rather than the prudent, conservative and appropriate investment strategy that they had promised, the plan devised and recommended by Walters and Mahfood was aggressive, excessively risky and completely inappropriate for a retired person like Mr. Maybank. Additionally, instead of recommending that Mr. Maybank reduce his BB&T stock holdings and develop a diversified and prudent portfolio to generate income during his retirement, Walters and Mahfood devised and implemented an investment strategy based in part upon derivatives trading with the BB&T stock. This strategy required the execution of a highly complex derivative product known as a Variable Prepaid Forward Contract ("VPFC"). Defendants' stated purpose for the derivative transaction was to raise cash to create a diversified portfolio, which would be placed with Defendants for management. Defendants' scheme maximized the placement of Mr. Maybank's assets in fee-generating accounts at BB&T and was designed to benefit Defendants at Mr. Maybank's expense. While Walters and Mahfood recognized the speculative nature of this

scheme, they nonetheless advised Mr. Maybank that the long-term retention of his concentrated holding of BB&T stock and the use of the VPFC derivative product was not speculative but was instead an appropriate defensive strategy suitable for a retired person. Walters and Mahfood further advised Mr. Maybank that this strategy would allow him to reduce the risk of his concentrated position, protect him from an extraordinary reduction in the overall value of his investment portfolio and resulting net worth, maintain long-term share ownership of the BB&T stock, and help him achieve important diversification goals.

Unbeknownst to Mr. Maybank, the strategy was a ticking time bomb that would destroy his financial well being if BB&T decreased its dividend and/or if the share price of BB&T stock was substantially reduced. These risks and others were not explained to Mr. Maybank and he had no knowledge of any potential problem until the first quarter of 2009. Even then he was not aware of the full scope of the problem until much later as the recklessness and imprudence of the strategy continued to emerge to reveal the unvarnished truth that the strategy devised and implemented by Defendants, including Walters and Mahfood, had destroyed his life's work and life's savings through an ill-conceived, incompetently devised, recklessly risky, and inherently conflicted strategy that paid them handsome fees while destroying his financial well-being. Defendants, including Walters and Mahfood, knew but did not disclose to Mr. Maybank the speculative nature of VPFCs, including, but not limited to: the riskiness of VPFCs, the unsuitability of VPFCs for a person in Mr. Maybank's position and station in life; the tax implications of the VPFCs; the full costs and fees associated with the VPFC, embedded or otherwise; and Mr. Maybank's options at the end of the VPFC and implications of those options on Mr. Maybank's BB&T stock position and dividend income, including early termination/roll-over costs.

On or about August 11, 2006, solely upon the advice given by Walters, Mahfood and the Bank, Mr. Maybank executed a three year VPFC (“VPFC No.1”) which by its terms would expire on August 11, 2009. In furtherance of the wealth management scheme designed by Defendants, Defendants first applied the proceeds of VPFC No.1 to satisfy Mr. Maybank’s outstanding obligations, paying off the margin debt owed to BB&T subsidiary Scott & Stringfellow. The remaining proceeds were entrusted to Defendants for management (Investment Account). Under the wealth management plan designed by Walters and Mahfood, the stated reason for the purchase of the VPFC was to raise cash from which to create a diversified portfolio for Mr. Maybank. The BB&T stock associated with the VPFC already over-exposed Mr. Maybank to the risks inherent in traditional investments in marketable equity securities. Despite this overexposure, Defendants, including Mahfood as Mr. Maybank’s designated wealth manager, nonetheless approved and implemented a strategy in the Investment Account involving a one hundred percent (100%) equity concentration in aggressive growth stocks. At no time did Defendants advise Mr. Maybank that the strategy implemented for him was not the diversified portfolio promised by Defendants when they sold him the VPFC, but was instead doubly exposed to market risk, which was unsuitable and inappropriate for an investor of his age and with his need for a reliable source of income.

With financial markets in turmoil, in or about January 2009, and in anticipation of VPFC No. 1 terminating in August 2009, Mr. Maybank reiterated to Walters and Mahfood his need to meet his investment objective of on-going retirement income for the remainder of his life. However, because of the negligent, reckless, grossly negligent, imprudent and incompetent strategy devised and implemented by Walters and Mahfood, Mr. Maybank had no other option but to roll VPFC No. 1 into a second VPFC No. 2. Consequently, in January of 2009, upon the

advice of Defendants, Mr. Maybank executed VPFC No. 2. In recommending and preparing the roll-over transaction, Walters and Mahfood failed to advise or in any way inform Mr. Maybank of the magnitude of the fees and costs involved in the premature termination/early roll-over of VPFC No.1 prior to its scheduled termination date or of the tax consequences of doing so. Only after executing VPFC No. 2, and thereafter being charged an early roll-over fee of approximately \$1.3 million, as well as receiving notice that the roll-over may have triggered a tax liability of up to \$1 million, did Mr. Maybank come to realize that there were problems with the plan devised and implemented by Walters, Mahfood and the Bank, but the seriousness of the problems were not fully apparent until much later. The plan devised and implemented by his fiduciaries has caused Mr. Maybank to be virtually wiped out financially. At seventy-nine years of age, a lifetime of work and achievement has been robbed of Mr. Maybank by the very people in whom Mr. Maybank placed the utmost trust and care.

As a result, on December 22, 2011, Mr. Maybank brought an action in the Court of Common Pleas of Greenville County, South Carolina against his fiduciary investment advisors Ross Walters and Anthony Mahfood, as well as their employer and affiliated companies, BB&T Corporation, Branch Banking and Trust Company, and Sterling Capital Management, LLC. Despite the clear duties owed by the individual Defendants for their actions, omissions and representations made to Mr. Maybank in their fiduciary capacities as wealth management and investment advisors to Mr. Maybank, Defendants removed this action to this Court via their January 23, 2011 Notice of Removal, asserting the fraudulent joinder of Walters and Mahfood and jurisdiction in this Court solely on the basis of 28 U.S.C.A. §§ 1441(b), 1446, and 1332(a) (diversity). Thereafter, on February 15, 2012, both the Corporate Defendants and, separately, the individual Defendants, filed their respective Answers to Mr. Maybank's Complaint. See dkt.#12

(Corporate Defendant Answer); dkt.#13 (Individual Defendant Answer). On February 22, 2012, prior to filing the within Motion to Remand, Mr. Maybank filed an Amended Complaint under Rule 15(a)(1)(B), of the Federal Rules of Civil Procedure (FRCP), as a matter of right, dkt.#\_\_.

As articulated in section II, below, of this memorandum, Mr. Maybank believes that the Court must consider the Amended Complaint in determining whether a cause of action against Walters and Mahfood exist, sufficient to remand this action to state court. However, Mr. Maybank believes the original Complaint filed in the Court of Common Pleas of Greenville County, independently and conclusively establishes that Mr. Maybank met his pleading burden against Walters and Mahfood and, conversely, that Defendants have failed to meet their heavy burden in proving fraudulent joinder in this matter. In order to facilitate the Court's analysis, we will structure the within argument to first show that remand of this matter to state court is proper under the original Complaint. Thereafter, and without duplicating our analysis of the issues already covered, we will address the additional causes of actions alleged in the Amended Complaint.

### **STANDARD**

The removing defendant bears the onerous burden of proving that the nondiverse party's joinder is fraudulent. Mayes, 198 F.3d 457, 464. "In order to establish that a nondiverse defendant has been fraudulently joined, the removing party must establish either: 'that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleading of jurisdictional facts.'" Marshall v. Manville Sales Corp., 6 F.3d 229, 232 (4<sup>th</sup> Cir. 1993) (emphasis in original; quotation omitted). "The burden on the defendant claiming fraudulent joinder is heavy: the defendant must show that the plaintiff cannot establish a claim against the

nondiverse defendant even after resolving all issues of fact and law in the plaintiff's favor." Id. at 232-33; see also Mayes, 198 F.3d at 464 (court is bound to resolve all issues of fact and law in plaintiffs' favor). The Fourth Circuit Court of Appeals has explained "that '[t]his standard is even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6).'" Mayes at 464 (quoting Hartley v. CSX Transp., Inc., 187 F.3d 422, 424 (4th Cir. 1999)). Further, "[a] claim need not ultimately succeed to defeat removal; only a *possibility* of a right to relief need be asserted." Marshall, 6 F.3d at 233. (emphasis added). Moreover, in order to determine whether a party's joinder is fraudulent, "the court is not bound by the allegations of the pleadings, but may instead 'consider the entire record, and determine the basis of joinder by any means available.'" Mayes at 464 (citing AIDS Counseling and Testing Centers, 903 F.2d 1000, 1004 (4th Cir. 1990) (quoting Dodd v. Fawcett Publications, Inc., 329 F.2d 82, 85 (10th Cir. 1964))).

### **ARGUMENT**

Simply put, Defendants have not, and cannot, meet their burden of proving fraudulent joinder. Instead, Defendants cite non-applicable case law, make unsupported conclusory statements, and fail to disclose a contrary recent order issued in 2010 by Judge Seymour remanding a case removed by the same BB&T Bank as here, while ignoring Mr. Maybank's well-pled causes of action which are supported by detailed factual descriptions of the actions, inaction, misstatements, falsehoods, and omissions by Walters and Mahfood, the individual Defendants and South Carolina citizens. Consequently, Mr. Maybank requests this Court recognize the serious allegations of liability pled against Walters and Mahfood, reject Defendants' fraudulent joinder defense, and remand this case to the Court of Common Pleas in

Greenville County, giving Mr. Maybank the opportunity to prove his case in the court of his choosing and the only court with jurisdiction over the claims alleged.

“The ‘fraudulent joinder’ doctrine permits removal when a non-diverse party is (or has been) a defendant in the case. Mayes, 198 F.3d at 461 (citing Poulos v. Naas Foods, Inc., 959 F.2d 69 (7th Cir. 1992); Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1287 (11th Cir. 1998) (noting that “[f]raudulent joinder is a judicially created doctrine that provides an exception to the requirement of complete diversity”)). If joinder is fraudulent, the federal court may assume jurisdiction over a case even if, *inter alia*, there are non-diverse named defendants at the time the case is removed. Mayes at 461 (citing Marshall, 6 F.3d at 232–33; Cobb v. Delta Exports, Inc., 186 F.3d 675, 677 (5th Cir. 1999)). “This doctrine effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain non-diverse defendants, assume jurisdiction over a case, dismiss the non-diverse defendants, and thereby retain jurisdiction.” Id. (citing Cobb, 186 F.3d at 677–78).

Corporate defendant BB&T is well aware of these principles,<sup>1</sup> as another judge of this Court recently rejected a virtually identical removal attempt based upon a purportedly fraudulent joinder argument made by BB&T. See Exhibit 1, Unpublished Decisions, Kerr v. Branch Banking and Trust Company, C/A No. 2:10-0104-MBS (D.S.C. June 21, 2010) (Seymour, J.). In Kerr, South Carolina plaintiffs brought suit in the South Carolina state court against BB&T (an out-of-state corporation) and its South Carolina BB&T employee. The Bank removed, arguing that the non-diverse individual defendant had been fraudulently joined. Plaintiffs moved to

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<sup>1</sup> Only eighteen months ago, another judge of this Court rejected similar claims of fraudulent joinder advanced by one of the defendants in this case, Branch Banking & Trust Co. After the underlying dispute was remanded to state court, BB&T was ordered to pay nearly \$40,000 in costs and attorneys fees to plaintiffs in the removed case. See Kerr v. Branch Banking & Trust Co. 2011 WL 1131314 (March 28, 2011, Seymour, J.).

remand and this motion was granted. As Judge Seymour succinctly stated, the issue in the motion to remand

“is whether [the non-diverse individual defendant] can be held individually liable for *any* of the torts alleged against him by Plaintiffs, i.e., negligent misrepresentation, fraudulent misrepresentation, negligence, and violation of the SCUTPA.

Id. at 5 (emphasis added). In Kerr, as here, the non-diverse individual defendant made the allegedly negligent and/or fraudulent misrepresentations which gave rise to plaintiffs’ claims.

Id. at 6-8. Again, as here, BB&T argued that these acts could not give rise to individual liability.

However, “[t]he [Kerr] court disagree[d]” with BB&T’s

contention that, regardless of any alleged statements made by [the non-diverse individual defendant], he possessed no duty to Plaintiffs so that he may be held liable for a cause of action grounded in negligence.

Id. at 8 (emphasis added). In reaching this conclusion, Judge Seymour relied upon the South Carolina case of Winburn v. Insurance Co. of North America, 339 S.E.2d 143 (S.C. 1985), in which an insured brought an action for fraud and negligence against an insurer and its adjuster, based upon certain representations made by the adjuster.

The South Carolina Supreme Court noted that:

The recovery of damages may be predicated upon a negligently-made false statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation. *A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction.* . . . “The fact that the information is given in the course of the defendants business, profession or employment is a sufficient indication that he has a pecuniary interest in it, even though he receives no consideration for it at the time.” Restatement (Second) of Torts § 552, Comment d, at 129-30 (1977); see Prosser and Keaton, The Law of Torts § 107 at 747 (5th ed. 1984).

Id. at 147 (emphasis added).

Kerr at 8. Judge Seymour thus found that the non-diverse individual defendant employed by BB&T

possessed a pecuniary interest in his relationship with the various Plaintiffs. He was the account manager for [plaintiff's] and employed by BB&T. Therefore, [the individual defendant] possessed a duty to Plaintiffs to use due care in giving them information. Whether the duty was breached is not an issue for the court. Rather, for purposes of remand, the court concludes that Plaintiffs have a possibility of a right to relief against [the individual defendant] grounded in negligence.

Id.

Here, non-diverse individual defendant Mahfood was the account manager assigned to Mr. Maybank and defendant Walters was Mahfood's supervisor and also participated in the management of Mr. Maybank's accounts. Both are alleged to have personally made many misrepresentations directly to Mr. Maybank concerning the services to be provided to him, which Mr. Maybank further alleges were the proximate causes of his losses. See, e.g. Original Complaint ¶¶56, 57, 107; Amended Complaint ¶¶58, 59, 84.I., 89, 95.I, 103.I, 110.I, 121, 143-45, 155-57, 159, 166. Like the employee in Kerr, Mahfood and Walters possessed pecuniary interests related to Mr. Maybank's relationship with their employer, BB&T. Thus, as BB&T knows from the Kerr decision, the personal involvement of its employees in the allegedly tortious conduct is sufficient to create the "possibility of a right to relief" sufficient to defeat claims of fraudulent joinder.

Instead of addressing the analysis applied in Kerr, which clearly requires remand, Defendants attempt to confuse the issue of an agent's personal liability for his own torts by reliance upon an insurance law case. See Sullivan v. Sullivan, 3:09-cv-1937-JFA (D.S.C. 2010) (initial order denying remand), attached as Exh. B to Removal. However, South Carolina law is well settled that insurance agents, absent special circumstances, do not owe a fiduciary

responsibility to their customers. See Pitts v. Jackson Nat. Life Ins. Co., 352 S.C. 319, 331, 574 S.E.2d 502, 508 (Ct. App. 2002); see also Gordon v. Fidelity & Cas. Co. of N.Y., 238 S.C. 438, 120 S.E.2d 509 (1961) (finding no relationship of trust and confidence existed between the insurance applicant and the insurance agent); O'Connor v. Bhd. of R.R. Trainmen, 217 S.C. 442, 60 S.E.2d 884 (1950) (holding no relation of trust and confidence existed between the insurance applicant and the soliciting agent where they had not known each other prior to the transaction and the agent did nothing in preventing the applicant from reading the application). Thus, nothing in Sullivan contradicts the “agent’s liability for his own misrepresentations and/or tortious actions” approach taken in Kerr. Significantly, Sullivan was ultimately remanded, after plaintiffs demonstrated that the non-diverse individual was arguably personally involved in the alleged conversion of their funds. See Sullivan v. Sullivan, 3:09-cv-1937-JFA (D.S.C. 2011) (subsequent order granting remand).

As noted in Kerr and Sullivan, remand is required if plaintiff shows the “possibility of a right to relief” on *any* cause of action asserted against *any* non-diverse defendant. The Kerr analysis is sufficient to demonstrate that an employee’s personal misrepresentations are enough to defeat assertions of fraudulent joinder. However, in the interests of completeness, Mr. Maybank provides the following analysis of four (4) of the causes of action asserted in the original Complaint against Mahfood and Walters, the non-diverse defendants. As will be demonstrated, Mr. Maybank has alleged far more than a mere “possibility of a right to relief” against each of these non-diverse defendants. Accordingly, Defendants have not and cannot meet their burden of proof that Walters and Mahfood were fraudulently joined in this case; thus, the case must be remanded to state court.

### **I. Original Complaint**

**a. Breach of Fiduciary Duty**

Mr. Maybank alleges viable claims for breach of fiduciary duty against his investment advisors, Walters and Mahfood, in their individual capacities. As discussed *supra*, Walters and Mahfood were the Bank representatives who were personally involved in making both representations and recommendations to Mr. Maybank in connection with the assets he entrusted to their employer, the Bank. Although defendants argue that no fiduciary duty can attach to individual employees who provide investment advice and services, this is clearly *not* the law. Many, many cases recognize that individual investment professionals share liability with their employers. For example, in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cheng the court found that “Grace [the stockbroker who interacted with plaintiffs] can be held individually liable for breach of fiduciary duty despite the fact that he was acting throughout as an agent for Merrill Lynch.” 697 F. Supp. 1224, 1227 (D.D.C. 1988). The court noted that “[i]t is certainly true that the enhanced duties of a fiduciary may be imposed on a broker in his dealings with a client,” *id.* at 1226, and further held that “the Chengs’ allegation of a relationship of trust and confidence surrounding the obligations allegedly breached by Grace [were] sufficient to state a cause of action for breach of fiduciary duty.” *Id.* at 1227.

Likewise, in Gochnauer v. A.G. Edwards & Sons, Inc., 810 F.2d 1042 (11th Cir. 1987), the court ruled that a A.G. Edwards stockbroker, breached his fiduciary duty to his investor clients when he “advised them and assisted them in hiring [an unlicensed investment advisor he had not investigated] and in establishing the speculative option trading account.” *Id.* at 1046. The court stated that “[t]he law is clear that a broker owes a fiduciary duty of care and loyalty to a securities investor” and further noted that agents employed to make, manage, or advise on investments have fiduciary obligations. *Id.* at 1049. In Gochnauer, the broker, his supervisor

and A.G. Edwards (the company) were each found to have breached their own separate fiduciary duties of care owed to their investor clients. Id. at 1048.

Similarly, in Baker v. Wheat First Securities, 643 F. Supp. 1420 (S.D.W. Va. 1986), the plaintiffs alleged that their stock broker, a Wheat First employee, breached his fiduciary duty to them by, *inter alia*, buying stock that was unsuited to their investment objectives. The court that a fiduciary relationship existed between the plaintiff investors and their stock broker, because it is “well established . . . that an agent does owe a fiduciary duty to his principal. And, of course, a stock broker is an agent of his client.” Id. at 1429. See also Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (Investment Advisers Act of 1940 establishes “federal fiduciary standards” to govern the conduct of investment advisers); In re Black, 1997 WL 607449 (Bkrcty. E.D. Va. 1997) (investment advisors with whom funds are placed for investment may be a fiduciary in an express trust relationship to the investor); In re Richards, 1990 WL 1232910 (Bkrcty. N.D. Cal. 1990) (evidence that investment advisor never told client that investments in index options put entire portfolio at risk sufficient to sustain judgment against advisor for breach of fiduciary duty and negligence).

The Fourth Circuit Court of Appeals applying South Carolina law has recognized claims for, *inter alia*, breach of fiduciary duty, negligence, breach of contract, negligent misrepresentation, and constructive fraud against both the individual investment advisor **and** his investment company. In Parmenter v. Rollins Financial Counseling Inc., 2006 WL 1791332 (4<sup>th</sup> Cir. 2006), the Fourth Circuit Court of Appeals affirmed judgment for an investment client against her investment advisor **and** the investment advisory company. The client prevailed against **both** defendants on each of the following claims: breach of fiduciary duty, negligence,

breach of contract, negligent misrepresentation, constructive fraud, and violation of the Investment Advisers Act of 1940. Id.

The Fourth Circuit's recognition of the South Carolina claims for breach of fiduciary duty against an individual investment advisor requires rejection of Defendants' argument that Bank employees owe fiduciary duties only to the Bank and not to their investor-clients. Defendants' argument is premised upon a very old case addressing a very different factual scenario in which a real estate agent was prohibited from simultaneously serving "two masters." McCallum v. Grier, 68 S.E. 466 (1910) (a real estate broker cannot simultaneously be the agent of the buyer and seller). This case is not controlling over the recent case law addressing the specific relationship between investors and their fiduciary investment advisors.

Indeed, BB&T's argument for removal is contrary to its own internal policies, which recognize that its employees' primary and highest fiduciary obligation is to the client and not to the Bank. The BB&T Code of Ethics is a binding admission by defendants which conclusively establishes that employees who act in a trustee or investment advisor capacity have independent fiduciary obligations to their clients. The BB&T Code of Ethics, attached hereto as Exhibit 2, provides:

### 3. Fiduciary Obligations

BB&T acts as a fiduciary in certain financial related transactions with its clients, including serving as a trustee and investment advisor. **If you are responsible for performing fiduciary services on behalf of BB&T, you have legal duty to act in the best interests of BB&T's client. This means that you, as BB&T's representative, must always put the client's interests ahead of your own interest and that of BB&T.** As a fiduciary representative, you are further obligated to promptly disclose to the client an actual or potential conflict of interest.

BB&T Code of Ethics IV.B.3. Fiduciary Obligations (page 5) (emphasis added). Under the BB&T Code of Ethics, the fiduciary duty attaches even if the individual employee is

“performing fiduciary services *on behalf of BB&T*” and that the individual employee’s separate fiduciary obligation to the client trumps any agency obligations that employee might otherwise owe to BB&T. Since the Bank’s legalistic removal argument is at odds with its own stated policies, as well as controlling law, it must be rejected as incorrect.

Nor does the unpublished decision in the Sullivan case control here. As discussed *supra*, Sullivan involved the attempted assertion of fiduciary duties claims against an insurance agent, which were rejected as insufficient to support a claim against the non-diverse agent. However, it is well settled in South Carolina that insurance agents, absent special circumstances, do not owe a fiduciary responsibility to their customers. See Pitts v. Jackson Nat. Life Ins. Co., 352 S.C. 319, 331, 574 S.E.2d 502, 508 (Ct. App. 2002); see also Gordon v. Fidelity & Cas. Co. of N.Y., 238 S.C. 438, 120 S.E.2d 509 (1961) (finding no relationship of trust and confidence existed between the insurance applicant and the insurance agent); O’Connor v. Bhd. of R.R. Trainmen, 217 S.C. 442, 60 S.E.2d 884 (1950) (holding no relation of trust and confidence existed between the insurance applicant and the soliciting agent). As is established by the many cases cited *supra*, the law is to the contrary for individual investment professionals who *are* recognized as fiduciaries to the clients who entrust them with assets for investment.

For these reasons, Defendants cannot meet their extremely difficult burden of showing that Mr. Maybank has no possibility whatsoever of a right to relief on his breach of fiduciary claims against Walters and Mahfood, thus requiring remand of this case.

#### **b. Negligence**

The same case law which recognizes that individual investment professionals may breach their fiduciary duties also recognize negligence claims arising from improper performance of their obligations to their clients. See e.g. Parmenter, 2006 WL 1791332 (affirming judgment for

investment client against investment advisor *and* investment advisory company based upon, *inter alia*, negligence for mismanagement of client's account); Cheng, 697 F. Supp. at 1227 ("[i]t is clear from the case law that a stockbroker can be held liable to his client for negligence"). In Cheng, the investors alleged that their broker "failed to properly apprise himself of their financial situation," and consequently failed "to advise and direct them on a financially prudent course." Id. at 1225. Such claims sound in negligence. Similarly, Thropp v. Bache Halsey Stuart Shields, Inc. recognized claims for negligent mismanagement of investment accounts. 650 F.2d 817 (6th Cir. 1981). The court found that "[a]s a fiduciary, a broker stands in a special relationship to a client and owes him a duty to use reasonable care and to act in good faith." Id. at 819. Further, the court stated:

An agent's negligence may give rise to a breach of fiduciary duty. Inherent in every agency relationship is the agent's obligation to use the skills and diligence necessary to protect the client's interest. The District Court recognized [stockbroker's] duty to exercise due care, noting that 'every agent must possess a competent degree of skill to enable him to perform the duties he assumes, and if he undertakes such duties without the requisite skill, or is guilty of negligence whereby money of his principal is lost, he is liable in damages . . . .

Id. at 820 (quoting 3 Ohio Jur.3d Agency § 104 at 161-62). The court held that the stockbroker owed his client "a duty to protect the assets she had entrusted to its care" and that such "duty flow[ed] from the fiduciary and contractual relationship shared by the parties." Id. at 822. See also Levy v. Bessemer Trust Co., 1997 WL 431079 (S.D.N.Y. 1997) (plaintiff stated claim for negligence where advisors failed to know of and advise her as to availability of downside price protection for stock or to arrange other protective strategies).

Timmons v. Starkey, 380 S.C. 590, 671 S.E.2d 101, 106 (Ct. App. 2008), a case cited by Defendants, is not to the contrary. That case interpreted and applied an arbitration clause to a dispute arising out of the wrongful withdrawal of funds by an individual broker who was the

investor/client's daughter with her mother's power of attorney. Although the court found that the investor's claims against the brokerage firm arose from the parties' contractual relationship, the court specifically noted that "[n]one of [plaintiff's] claims include any allegations of improper management of her account, such as churning or making improper investments, prior to [the daughter's] removal of funds from the account." *Id.* at 597, n.5. Mismanagement of the investment accounts by *inter alia* Mahfood and Walters is a central element of Mr. Maybank's negligence claim which allege that they created, recommended, and implemented a risky and flawed management and investment strategy that was imprudent, aggressive, uninformed, conflicted, negligent, and reckless for Mr. Maybank. *See* Original Complaint, ¶¶92-98.

For these reasons, Defendants cannot meet their extremely difficult burden of showing that Mr. Maybank has no possibility whatsoever of a right to relief on his negligence claims against Walters and Mahfood, the communicators about and the implementers of the allegedly negligent investment strategies, thus requiring remand of this case.

### **c. State Securities Act Violations**

Mr. Maybank alleges viable claims under the South Carolina Securities Act against his investment advisors, Walters and Mahfood, in their individual capacities.<sup>2</sup> The standard for asserting securities fraud under the Act is found in S.C. Code Ann. § 35-1-501, which provides:

It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:  
(1) to employ a device, scheme, or artifice to defraud;

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<sup>2</sup> Mr. Maybank acknowledges that Defendants have raised a statute of limitations defense with respect to VPFC No. 1; however, it is not necessary for the purposes of this motion to respond to Defendants' defense. Under this Court's standard of review, a motion to remand does not delve into questions on the merits, and Defendants' defense merely reinforces the fact that questions of law and fact exist that are sufficient to support this Court's remand of the Complaint to state court. *See Mayes*, 198 F.3d at 464 (holding that in analyzing fraudulent joinder, the court is bound to resolve all issues of fact and law in the plaintiffs' favor).

- (2) to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

Thus, the Act imposes an individual duty on all “persons” in connection with the offer, sale, or purchase of a security, directly or indirectly. The requirements of that duty include, employing a scheme to defraud, making untrue statements of material fact or omitting a statement of material fact that causes them to be misleading, and to engage in activities that would operate as a fraud upon another person. Mr. Maybank has alleged, with particularity, the actions, statements and omissions that Walters and Mahfood made to him in devising, recommending and implementing their fraudulent, reckless, and imprudent investment strategy. These allegations include, but are not limited to: Original Complaint ¶59 (“Defendants did not disclose, explain, otherwise provide Mr. Maybank with complete and accurate explanations of the negative implications of participating in a VPFC . . .”); ¶62 (“Despite [] overexposure, Defendants nonetheless approved and impletement a strategy in the Investment Account involving a one hundred percent (100%) equity concentration in aggressive growth stocks”; ¶65 (“Defendants did not explain . . . that this highly complex derivative product [VPFC] would eventually force the investor to choose amongst several unattractive and very expensive options . . .”); ¶69 (“Defendants knew (but did not explain to Mr. Maybank) that Mr. Maybank could not afford to retain the BB&T stock as an income source by buying out VPFC No. 1 . . .”); ¶¶70-72; ¶81 A-K; and ¶07 (“Defendants ... misrepresented the risk of the products and Investment Account to Mr. Maybank and thereby defrauded him.”).

S.C. Code Ann. § 35-1-509 creates civil liability for violations of section 501 of the Act. Mr. Maybank seeks relief under section 509(b) which plainly provides that: “[a] person is liable

to the purchaser if the person sells a security in violation of Sections 35-1-301 or 35-1-501 or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made . . . .” Defendants do not contest that the Complaint alleges facts sufficient to establish Walters’ and Mahfood’s statutory liability under section 509(b) for the untrue statements of material fact or omissions made in connection with the offer, sale, or purchase of the VPFCs, directly or indirectly, the holding of Mr. Maybank’s BB&T stock, and/or the purchase of additional investments made contrary to the plan sold to Mr. Maybank, thus establishing the possibility of a right to relief under the State Securities Act.

Defendants attack plaintiff’s right to recover only under section 509(f) which arguably limits recovery to a “person that receives directly or indirectly any consideration for providing investment advice regarding securities.” Section 509(f) is merely the codification of the common law “pecuniary interest” requirement which is intended to exclude from liability only individuals who act in a completely gratuitous fashion. Cf. Winburn v. Insurance Co. of North America, 339 S.E.2d 143 (S.C. 1985) (pecuniary interest requirement met whenever advice is given in course of business, profession or employment). While Walters may deny that he and/or Mahfood shared *directly* in commissions from the sale of the 2009 VPFC, see Ross Walters Affidavit, dkt.#1-3,<sup>3</sup> he does not deny that he and Mahfood were compensated either directly or indirectly by BB&T for providing investment advice regarding the sale or purchase of securities for clients, including Mr. Maybank.

More importantly, however, there is no South Carolina case law interpreting or applying the “directly or indirectly any consideration” requirement of section 509(f). Thus, the possibility

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<sup>3</sup> Mr. Walters’ affidavit only establishes that there may be a question of fact about the receipt of compensation or income from the sale of the 2009 VPFC. The allegations of the Complaints must control.

exists that general employment compensation is sufficient to meet the section 509(f) requirement. When plaintiff's allegations involve novel issues of state law, the federal court cannot say that plaintiffs are prevented as a matter of law from asserting the possibility of a statutory right to relief against individual defendants. See Exhibit 1, Unpublished Decisions, Kerr (June 21, 2010 Order) at 10 (rejecting BB&T's attempted reliance upon novel statutory requirement).

For these reasons, Defendants cannot meet their extremely difficult burden of showing that Mr. Maybank has no possibility whatsoever of a right to relief on *his* statutory securities claims against Walters and Mahfood, thus requiring remand of this case.

#### **d. South Carolina Unfair Trade Practices Act**

Mr. Maybank's cause of action under the South Carolina Unfair Trade Practices Act (SCUTPA), under S.C. Code Ann. § 39-5-10 *et seq.* (1976) (as amended), is clearly set forth in the complaint as an alternative pleading, in the event that the VPFCs, recommended to and executed by Mr. Maybank upon the advice and representations of Walters and Mahfood, were deemed *not* to be "securities" under South Carolina law. In the Removal, Defendants do not contend that the specific allegations made against Walters and Mahfood are untrue, including, *inter alia*, that their unfair acts and practices in recommending and implementing the investment scheme, devised by Walters and Mahfood, was designed to make Mr. Maybank keep his large block of BB&T stock, rather than diversifying, and instead trapped him in a financial death spiral. See Original Complaint, ¶114. Instead, Defendants contend that a cause of action related to securities is not cognizable under SCUTPA. However, taking Mr. Maybank's allegations as true, as the Court is required to do in this context, Mr. Maybank has merely pled a cause of action under SCUTPA in the alternative and in the event that VPFCs are deemed not to be

securities. Consequently, Mr. Maybank has properly pled in the alternative and Defendants' argument with respect to this SCUTPA claim is wholly without merit.

## **II. Amended Complaint (Additional Causes of Action)**

### **a. Consideration of the Amended Complaint in this Motion**

On February 22, 2012, Mr. Maybank filed an amended Complaint in this matter. Under Rule 15(a)(1)(B), FRCP, a party may amend its pleading once as a matter of right within either: “(A) 21 days after serving it; or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.” Because the initial complaint in this matter was a pleading to which a responsive pleading is required, upon the filing of Defendants' respective answers, Mr. Maybank is permitted by the rules to file an Amended Complaint as a matter of course, without obtaining the consent of the opposing party or the Court. Furthermore, because the Amended Complaint only asserts several additional causes of action that arose out of the same conduct, transactions and occurrences set forth in the original pleadings, and does not allege new factual conduct or occurrences not covered under the original Complaint, Rule 15(c), FRCP provides that Mr. Maybank's Amended Complaint relates back to the date of the original pleading.

The filing of an amended pleading supercedes the original pleading. See Young v. City of Mount Ranier, 238 F.3d 567, 572 (4th Cir. 2001) (“[A]n amended pleading ordinarily supersedes the original and renders it of no legal effect.”) (quoting Crysen/Montenay Energy Co. v. Shell Oil Co. (In re Crysen/Montenay Energy Co.), 226 F.3d 160, 162 (2d Cir.2000)) (further citing 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1476 (2d ed. 1990) (“A pleading that has been amended ... supersedes the pleading

it modifies.... Once an amended pleading is interposed, the original pleading no longer performs any function in the case....”); Brown v. Sikora & Associates, Inc., 311 F. App’x 568, 572 (4th Cir. 2008) (citing Young); see also McCoy v. City of Columbia, CIV.A. 3:10-132, 2010 WL 3447476 (D.S.C. 2010) (citing Ohio River Valley Env. Coalition, Inc. v. Timmermeyer, 2003 WL 21259832, at \*3 (4th Cir. 2003) (finding that once an amended pleading is interposed, the original complaint “no longer performs any function in the case”)); Monster Daddy LLC v. Monster Cable Products, Inc., 2010 WL 4853661 (D.S.C. 2010) (citing Young).

Thus, while Defendants are correct that a determination as to the appropriateness of removal is determined at the time of removal, see Removal, dkt.#1 at 4 (citing Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 262 (5th Cir. 1995)), when the Complaint upon which removal was based has been superceded—here as a matter of right under Rule 15(a)—a Court reviewing a motion to remand the action back to state court must look to the only surviving pleading. Remand is proper based on consideration of an amended complaint. See Winner’s Circle of Las Vegas, Inc. v. AMI Franchising, Inc., 916 F.Supp. 1024 (D.Nev. 1996). In Winner’s Circle, the court held that an amended complaint, filed as a matter of right, required remand based on lack of diversity jurisdiction, where the amended complaint added claims for fraud and conversion against a nondiverse defendant.<sup>4</sup> Since the Amended Complaint here only adds additional claims based on the same factual foundation set forth in the original Complaint, the Amended Complaint, and not the superseded original state court Complaint, is the proper basis upon which to decide the motion to remand.

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<sup>4</sup> The Winner’s Circle amended complaint involved a much broader change in that it added a nondiverse defendant to the action, which implicates 28 U.S.C.A. § 1447(e). Here, however, Mr. Maybank’s Amended Complaint merely adds detail to the allegations and adds certain causes of action against the existing non-diverse defendants, based on the same factual foundation pled in the original Complaint.

Similarly, in Mencer v. Kraft Foods Global, Inc., an amended complaint, filed as a matter of right under Rule 15(a) operated to eliminate a federal question cause of action pled in the original complaint. 695 F.Supp.2d 667, 672 (S.D. Ohio 2010). The Mencer court expressly held that the rule requiring jurisdiction to be determined at the time of removal did *not* preclude a plaintiff's absolute Rule 15(a) right to amend. Id.; c.f. Naples v. New Jersey Sports & Exposition Auth., 102 F.Supp.2d 550, 552 (D.N.J. 2000) (acknowledging that Rule 15(a) amendment as matter of right can effectively extinguish basis for federal court jurisdiction); See also Chinn v. Belfer, 2002 WL 31474189 at \*7 (D. Or. 2002) (citing Naples, 102 F Supp2d 550; Grynberg Prod. Co. v. British Gas PLC, 149 F.R.D. 135, 137 (E.D. Tex. 1993) (plaintiff may amend to eliminate the basis for federal jurisdiction); and Mayes, 198 F.3d 457, n.11 (discussing a plaintiff's use of Rule 15(a)'s amendment as a matter of right to join a nondiverse defendant subsequent to removal). This rule has been applied by courts in this District and the Fourth Circuit.<sup>5</sup> See Kerr v. Branch Banking & Trust Co., C/A No. 2:10-0104-MBS (D.S.C. June 21, 2010) (Seymour, J.) (deciding motion to remand based upon amended complaint filed after removal with defendants' consent).

The case cited by Defendants is not to the contrary, as it did not involve an amendment as a matter of right. See Cavallini, 44 F.3d 256. Cavallini was an appeal from the denial of a *motion* to amend, filed well after the Rule 15(a) deadline for amendments as of right. Id. at 264. Therefore, in Cavallini, there was no active pleading in federal court in which the plaintiff could

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<sup>5</sup> In Mayes, although it is not readily apparent, the court analyzed and relied upon the amended complaint filed by the plaintiff as a matter of right under Rule 15(a) in determining whether to grant plaintiff's motion to remand. 198 F.3d at 464 ("By her amended complaint, [plaintiff] claimed ...."). Similar to the situation in this case, the plaintiff filed an Amended Complaint as a matter of course pursuant to Rule 15(a), subsequent to the case's removal to federal court. Id. at 462, n.11. Relying on the amended complaint, rather than the original complaint, in its analysis of the motion to remand, the court held that the defendant had not met its burden of removal and granted plaintiff's motion to remand. Id. at 464-66.

assert factually-supported claims against and seek recovery from a non-diverse defendant. Not surprisingly, in the absence of such a “live” pleading, the Cavallini, court refused to allow an amendment to state a claim against the non-diverse defendant which would have divested the federal court of jurisdiction. Cavallini, 44 F.3d at 265. Indeed, post-Cavallini decisions have limited its applicability to non-Rule 15(a) attempts to amend. See Mills Group Ltd. v. Oceanografia, S.A. de C.V., 2009 WL 3756931 (S.D. Tex. 2009) (Cavallini inapplicable to amended complaint filed as a matter of right); El Chico Restaurants, Inc. v. Aetna Cas. & Sur. Co., 980 F. Supp. 1474, 1483, n.8 (S.D. Ga. 1997) (distinguishing between amendments made as a matter of right that add a new defendant, and those that amend the allegations in a complaint). Consequently, the holding of Cavallini is of little import in this case, because Mr. Maybank was entitled to file an Amended Complaint as a matter of right, without the need for leave of court or consent of Defendants.

Nor does this case present any danger of forum shopping or evasion of federal jurisdiction. Defendants do not dispute that the actions, inactions, misstatements, misrepresentations and omissions that support Mr. Maybank’s claims all arose in Greenville, South Carolina. Further, the individual defendants who allegedly acted, failed to act, made false or negligent misrepresentations and/or other omissions, are non-diverse South Carolinians who owed fiduciary duties to interacted significantly with Mr. Maybank in his dealings with them and their employer. Similarly, there is no hint of any federal cause of action in this dispute: Mr. Maybank has only alleged state causes of action against the Defendants in both the original and Amended Complaints. As the master of his complaint, Mr. Maybank is entitled to plead in such a manner and against the proper defendants who perpetrated this tragedy in his life. Complete diversity does not exist in this case, based on the cognizable causes of actions properly pled

against Walters and Mahfood. Simply put, no factors are present to suggest manipulation, and even if the court were to conduct a balancing analysis, Mr. Maybank suggests that fairness to his right to bring an action in the forum of his choosing should far outweigh the attempt of this out-of-state corporation to disregard the obvious breaches of its resident South Carolina employees' duties to a South Carolina customer.

As discussed herein above, the burden of proving fraudulent joinder lies squarely on the removing party. See Mayes, 198 F.3d at 464. Consequently, the below analysis does not intend to shift Defendants' burden onto Mr. Maybank. Under Rule 8, FRCP, a pleading is sufficient where it alleges a claim of relief in "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a)(2), FRCP. Mr. Maybank's Amended Complaint far surpasses the minimum standard set forth in Rule 8 and instead pleads, with particularity, the elements making up each of the causes of action alleged and facts sufficient to support each of those elements. Accordingly, Mr. Maybank would further show that remand is proper based on the following:

**i. Breach of Oral and/or Implied Contract**

A cause of action for breach of an oral contract has the same elements required of a written contract. A cause of action for breach of contract implied in fact must also set forth the same elements required of a contract, including assent to be bound, consideration and mutuality. See Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 322 S.E.2d 474 (Ct. App. 1984). Further, a contract implied in fact manifests itself by the conduct of the parties, rather than words, written or otherwise. Id. n.11. Here, Mr. Maybank has alleged, based on representations and recommendations given him by Walters and Mahfood, that the Wealth Management Division of the Bank, and specifically Walters and Mahfood, would tailor investment strategies

to Mr. Maybank's investment objective, risk tolerance and investment horizon, tax status, and overall financial situation and needs. See Amended Complaint, ¶89. Based on the these oral promises and representations, which amounted to an offer of services to Mr. Maybank, Mr. Maybank accepted the offer of investment management services offered by Walters and Mahfood, and through his conduct and words manifested his intent and asset to be bound thereby. See Amended Complaint, ¶90. In consideration for the investment advice given by Walters and Mahfood, including the investment strategy devised and ultimately implemented by the pair, Mr. Maybank transferred all of his irreplaceable assets into the fiduciary management and care of Walters, Mahfood and their employer and affiliated companies (Defendants). See Amended Complaint, ¶91. For the consideration given, the parties mutually agreed to the investment management duties imposed on Walters and Mahfood including, but not limited to, the duty to advise Mr. Maybank honestly, fairly, competently, and prudently, and in accordance with his needs, goals and best interests. See Amended Complaint, ¶¶92-94. Having set forth the elements of an oral and/or implied in fact contract between Walters and Mahfood and Mr. Maybank, Mr. Maybank further pled the breach of that contract in one or more of the particulars provided in Amended Complaint ¶95. For these reasons, Defendants cannot meet their extremely difficult burden of showing that Mr. Maybank has no possibility whatsoever of a right to relief on his breach of oral and/or implied contract against Walters and Mahfood, thus requiring remand of this case.

## **ii. Aiding and Abetting a Breach of Fiduciary Duty**

Under South Carolina law, a cause of action for aiding and abetting a breach of fiduciary duty requires a showing of: (1) a breach of fiduciary duty owed to the plaintiff; (2) the defendant's knowing participating in the breach; and (3) damages. Vortex Sports & Entm't, Inc.

v. Ware, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008) (citing Future Group, II v. Nationsbank, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996)). As discussed herein above, Walters and Mahfood owed Mr. Maybank a fiduciary duty based on their relationship as investment advisor, expressly undertaken, to Mr. Maybank. The role of an investment advisor as a fiduciary to his or her clients is a matter of well-settled law in this and other jurisdictions. See discussion, supra, Section I.a. Moreover, BB&T's own Code of Ethics irrefutably establishes that the relationship between Walters and Mahfood, and Mr. Maybank, was intrinsically fiduciary in nature. Id.

Furthermore, in the Amended Complaint, Mr. Maybank has alleged that the ongoing breaches of the fiduciary duties owed to Mr. Maybank were known to all Defendants, as the unsuitable investment strategy implemented by Defendants was devised, recommended and sanctioned by Walters and Mahfood. See Amended Complaint, ¶139. Additionally, all Defendants made the conscious decision amongst themselves not to disclose the patent conflicts of interests that existed with the devised strategy; therefore each Defendant aided and abetted all other Defendants breaching the fiduciary duties owed to Mr. Maybank. Id. Accordingly, Mr. Maybank has set forth a cause of action against Walters, Mahfood and the Corporate Defendants for aiding and abetting a breach of fiduciary duty, and therefore this case must be remanded to state court.

### **iii. Fraudulent Misrepresentation**

Mr. Maybank has also properly pled a cause of action for fraudulent misrepresentation against Walters and Mahfood. In South Carolina, in order to recover in an action for fraud and deceit, based upon misrepresentation, a plaintiff must show: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity;

(5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury. M. B. Kahn Const. Co., Inc. v. S. Carolina Nat. Bank of Charleston, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980). Mr. Maybank has well-pled all elements of this cause of action. As set forth in the Amended Complaint, Walters and Mahfood represented to Mr. Maybank that they, and other Bank employees, were all highly trained, thoroughly knowledgeable, and dedicated to championing client interests, and that they all specialized in working with clients to develop an individualized, client-centric and conservative investment strategy tailored to the investment objectives, risk tolerance and investment horizon, tax status, and overall financial situation and needs of that particular client. See Amended Complaint, ¶143. Walters and Mahfood further represented that they had special expertise in VPFCs, including the experience of conducting an exhaustive search of the marketplace for VPFCs to find the best available VPFC to advance the comprehensive investment goals and strategy established by BB&T, see Amended Complaint, ¶144, and that the investment strategy devised and implemented by Defendants would reduce the risk of Mr. Maybank's concentrated position, protect him from an extraordinary reduction in the overall value of his investment portfolio and resulting net worth, maintain long-term share ownership of the BB&T stock, and achieve important diversification goals. see Amended Complaint, ¶145. As evidenced by Mr. Maybank's investment profile, including his age, retirement goals and tolerance to risk, Defendants' representations, including those made by Walters and Mahfood, were demonstrably false, ill-conceived and imprudent, reckless, willful, and fraudulent and made in bad faith. The representations were material to Mr. Maybank's decision to entrust his investment assets to Defendants. See Amended Complaint, ¶146-47.

In conceiving and implementing this entirely unsuitable investment strategy, Walters and Mahfood knew that the strategy was risky and imprudent or exhibited reckless disregard or gross incompetence for the truth and/or falsity of their representations. See Amended Complaint, ¶148. Given the fiduciary relationship that existed between Walters and Mahfood and Mr. Maybank, Mr. Maybank had a right to rely, and ultimately did so without knowledge of the falsity of the misrepresentations, which has proximately caused the damages alleged in this suit. See Amended Complaint, ¶¶149-152. For these reasons, Defendants cannot meet their burden of showing that Mr. Maybank has no possibility whatsoever of a right to relief on his fraudulent misrepresentation claim against Walters and Mahfood, thus requiring remand of this case.

#### **iv. Constructive Fraud**

Similarly, Mr. Maybank has properly pled a cause of action for constructive fraud against Walters and Mahfood. The elements of a constructive fraud are the same as those set forth in a cause of action for fraudulent misrepresentation, with the exception that an intent to deceive, or actual dishonesty of purpose, is not an element of the cause of action. See Designer Showrooms, Inc. v. Kelley, 304 S.C. 478, 480-81, 405 S.E.2d 417, 419 (Ct. App. 1991). Instead, it is sufficient to plead that an individual knew or should have known the falsity of their representation. See Giles v. Langford & Gibson, Inc., 285 S.C. 285, 288, 328 S.E.2d 916, 918 (Ct. App. 1985) (“An allegation that the defendant ought to have known the falsity of the misrepresentation is sufficient to support an action for constructive fraud.”). Therefore, in the alternative to his cause of action against Walters and Mahfood for actual fraud, Mr. Maybank has also alleged that the pair should have known the falsity of their representations to Mr. Maybank with respect to the unsuitable investment strategy conceived and implemented by them. See Amended Complaint, ¶159. For these reasons, Defendants cannot meet their burden of showing

that Mr. Maybank has no possibility whatsoever of a right to relief on his constructive fraud claim against Walters and Mahfood, thus requiring remand of this case.

#### **v. Fraud in the Inducement**

Mr. Maybank has also properly pled a cause of action against Walters and Mahfood for fraud in the inducement. In South Carolina, to establish a claim of fraud in the inducement, a plaintiff must prove the nine elements of fraud, listed and discussed above in Mr. Maybank's cause of action for fraudulent misrepresentation, as well as three additional elements: "(1) that the alleged fraudfeasor made a false representation relating to a present or preexisting fact; (2) that the alleged fraudfeasor intended to deceive him; and (3) that he had a right to rely on the representation made to him." Moseley v. All Things Possible, Inc., 388 S.C. 31, 36, 694 S.E.2d 43, 45 (Ct. App. 2010) (citing Darby v. Waterboggan of Myrtle Beach, Inc., 288 S.C. 579, 584, 344 S.E.2d 153, 155 (Ct.App.1986)). Therefore, in addition to the allegations of fraud on the part of Walters and Mahfood detailed above, Mr. Maybank also alleged that the pair made false representations with respect to the goal of the investment strategy, which included a VPFC, being diversification and risk reduction, as well as that Mahfood, in particular, had special expertise in VPFCs, which were both present facts. See Amended Complaint, ¶¶166-67. Furthermore, Mr. Maybank has properly alleged that the misrepresentations of Walters and Mahfood were intended to both deceive him and encourage his entrustment of his life assets to Defendants' management. See Amended Complaint, ¶168. Finally, as his fiduciaries, Mr. Maybank had a right to rely upon the representations made by Walters and Mahfood. See Amended Complaint, ¶169. For these reasons, Defendants cannot meet their burden of showing that Mr. Maybank has no possibility whatsoever of a right to relief on his fraud in the inducement claim against Walters and Mahfood, thus requiring remand of this case.

#### **vi. Negligent Misrepresentation**

Finally, Mr. Maybank has properly pled a cause of action for negligent misrepresentation, in the alternative, against Walters and Mahfood. Recovery for negligent misrepresentation is “based upon negligent conduct and predicated upon a negligently made false statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation,” which induces him or her to enter a contract or business transaction. Gruber v. Santee Frozen Foods, Inc., 309 S.C. 13, 20, 419 S.E.2d 795, 799 (Ct. App. 1992); see also Evans v. Rite Aid Corporation, 324 S.C. 269, 478 S.E.2d 846 (1996). A well-pled cause of action for negligent misrepresentation must allege: (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 on the representation. Hurst v. Sandy, 329 S.C. 471, 481, 494 S.E.2d 847, 852 (Ct. App. 1997). Mr. Maybank has sustained this burden where, in the Amended Complaint, he has alleged: false representations with respect to the suitability of the investment strategy devised and implemented by Walters and Mahfood, see Amended Complaint, ¶¶174-76; that the fees generated through the accounts and securities recommended by Walters and Mahfood constituted a pecuniary interest in making the false representations, Amended Complaint ¶177; a duty imposed on Walters and Mahfood based on the fiduciary role they undertook as his investment advisor, Amended Complaint ¶178; that Walters breached their fiduciary duties, Amended Complaint ¶¶ 103, 179; that Mr. Maybank was justified in his reliance on his fiduciaries for investment advice, Amended Complaint ¶180; and that Mr. Maybank has suffered pecuniary loss as a proximate result of

relying on the misrepresentations of Defendants, Amended Complaint ¶181. For these reasons, Defendants cannot meet their burden of showing that Mr. Maybank has no possibility whatsoever of a right to relief on his negligent misrepresentation claim against Walters and Mahfood, thus requiring remand of this case.

### **CONCLUSION**

Defendants must show that Mr. Maybank does not have even the mere possibility of the right to relief under any cause of action pled, a heavy burden and one which they cannot meet. In his original Complaint, Mr. Maybank conclusively demonstrated to the Court, in its analysis of the causes of action therein, that remand of this case to state court is proper and required, based on settled case law. Notwithstanding remand being required under the original Complaint, the Amended Complaint is now the complaint of record and Mr. Maybank has also demonstrated more than a mere possibility of liability against Walters and Mahfood under the additional causes of action alleged therein. Thus, Defendants cannot prove that Walters and Mahfood were fraudulently joined in this action. Accordingly, jurisdiction is properly in the Court of Common Pleas of Greenville County, and Mr. Maybank respectfully requests this Court grant its motion to remand this matter for proceedings in state court.

Respectfully submitted,

s/ Chad N. Johnston

Mitchell Willoughby, Fed. Bar No. 4702

Elizabeth Zeck, Fed. Bar No. 6627

ElizabethAnn Loadholt Felder, Fed. Bar No. 7046

Chad Johnston, Fed. Bar No. 10813

**WILLOUGHBY & HOEFER, P.A.**

930 Richland Street

Post Office Box 8416

Columbia, SC 29202-8416

February 22, 2012  
Columbia, South Carolina

(803) 252-3300  
Attorneys for the Francis P. Maybank

# **Exhibit C**

9/10/12 Letter from Kristinik to  
Willoughby

# Nelson Mullins

## **Nelson Mullins Riley & Scarborough LLP**

Attorneys and Counselors at Law

1320 Main Street / 17th Floor / Columbia, SC 29201

Tel: 803.799.2000 Fax: 803.255.9077

www.nelsonmullins.com

D. Larry Kristinik

Tel: 803.255.9531

Fax: 803.255.9077

[larry.kristinik@nelsonmullins.com](mailto:larry.kristinik@nelsonmullins.com)

September 10, 2012

### **VIA EMAIL**

Mitchell Willoughby, Esquire

WILLOUGHBY & HOEFER, P.A.

930 Richland Street

Post Office Box 8416

Columbia, SC 29202

RE: Francis P. Maybank v. BB&T Corporation, et al.

Civil Action No. 6:12-cv-00214-JMC

Our File No. 04490/01520

Dear Mitch:

Following up on our telephone conversation about discovery, this letter outlines our proposed parameters for gathering Electronically Stored Information ("ESI") in the Maybank case. As we discussed, BB&T has identified three areas which it believes are appropriate for placing scope limitations in an effort to minimize the gathering of irrelevant material and to reduce the expense of discovery. These areas are the date range, document custodians, and search terms. Our proposal for each is outlined below:

### **DATE RANGE**

We propose limiting electronic searches for emails and other ESI to those documents created between April 1, 2006 and December 31, 2010.

### **DOCUMENT CUSTODIANS**

We propose that electronic searches for emails and other ESI be limited to documents created, received, or sent by or stored in electronic files maintained by the following individuals:

Ross Walters

Anthony Mahfood

Shawn Gibson

Kristopher Kapoor

Mitchell Willoughby, Esquire  
September 10, 2012  
Page 2

G. Alston Gore  
Brian Boughner  
Nathan Deal  
David Fisher  
Judy Schoemer  
Frank Maybank

### SEARCH TERMS

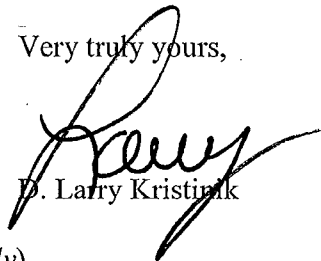
We propose that the searches for ESI be limited to the following terms: (Frank or Francis) w/20 Maybank AND the following terms "variable prepaid," VPFC, PPVF, and Maybank's BB&T account numbers

We believe that the above proposals represent reasonable limitations on the scope of the gathering of ESI. For example, many of your discovery requests already include a date range of 2006 to 2010 (e.g., Requests for Production 12, 21, 22). Additionally, all of the individual custodians identified in your discovery requests are included in our proposal. (e.g., Requests for Production 9, 10, 11).

There are other issues we will need to discuss, including production format, handling of duplicates, and a clawback provision for privileged documents. We can discuss these issues during our next call.

Please contact me once you have had the opportunity to consider these ESI proposals.

Very truly yours,



D. Larry Kristink

DLK:dlk

cc: Jack Slosson, Esquire (*via email only*)  
Chad Johnston, esquire (*via email only*)

## **Exhibit D**

4/15/13 Letter from Willoughby  
to Kristinik

**WILLOUGHBY & HOEFER, P.A.**

ATTORNEYS & COUNSELORS AT LAW  
930 RICHLAND STREET  
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COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY  
JOHN M.S. HOEFER  
RANDOLPH R. LOWELL  
TRACEY C. GREEN  
BENJAMIN P. MUSTIAN  
ELIZABETH ZECK\*  
ELIZABETHANN LOADHOLT CARROLL  
CHAD N. JOHNSTON  
JOHN W. ROBERTS

AREA CODE 803  
TELEPHONE 252-3300  
TELECOPIER 256-8062

April 15, 2013

\*ALSO ADMITTED IN TX

**VIA EMAIL and FIRST CLASS MAIL**

D. Larry Kristinik, Esquire  
Nelson Mullins Riley & Scarborough LLP  
1320 Main Street, 17<sup>th</sup> Floor  
Columbia, SC 29201

RE: *Francis P. Maybank v. BB&T Corporation et al.*; C/A No. 2011-CP-23-8578

Dear Larry:

This letter will respond to your query regarding discovery of electronically stored information ("ESI"), as well as some other outstanding discovery issues.

**Test Production.** It has been our experience with ESI that an essentially unrestricted test production from a limited number of custodians is the best way to develop an adequate list of search terms. We would therefore propose that BB&T temporarily provide plaintiff's counsel with access to certain files of electronic documents to allow experimentation with the performance of various search terms before proposing revised search terms to be used by BB&T in an electronic search that is designed to return responsive documents.

We therefore request that BB&T produce *all* electronic documents that have been collected for litigation for the date ranges indicated below, for the following custodians: Anthony Mahfood, Ross Walters, Brian Boughner, Kristopher Kapoor, Nathan Deal and John Wofford ("Test Documents"). BB&T may screen the Test Documents for privileged documents before providing them to us and our vendor. We agree that the inadvertent disclosure of any privileged document shall not constitute a waiver of privilege. We will promptly return or destroy any document among the Test Documents that BB&T subsequently identifies as privileged and that were inadvertently produced. We will treat all Test Documents as "Confidential" under the terms of the Confidentiality Agreement dated May 16, 2012. After examination of the Test Documents, we will propose additional or different search terms from those previously proposed by BB&T.

(continued ...)

**Date Range:** Your proposed date range is too narrow. We note that documents already produced by BB&T indicate that variable prepaid forwards (“VPF”) were being marketed by BB&T as early as September 2004 (*see, e.g.* BB&T 1134). We therefore propose an extended date range of January 2004 to December 2010.

**Document Custodians:** In addition to the custodians proposed by BB&T, we would include the following individuals, all of whom are shown either sending or receiving information relating to Frank Maybank and his accounts in the documents produced by BB&T to date:

Jenny Poythress  
Linda Williams  
Nancy K Johnson  
Kate Tekker  
Pam Taylor  
Stephanie Rutter  
Jerry Lane  
Sandy Peeler  
Kim Johnson  
Michael Lackey  
Steven Iannini  
Edgar Norris  
Clark Anderson  
Ralph Borrello  
John Wofford

**Search terms:** As indicated above, we believe that the search terms should be developed based upon examination of a test production.

However, even with the limited information currently available, we believe that the search terms you previously proposed are too limited. We envision the ESI search generating three basic categories of documents relevant to this dispute. The first category contains documents relating to Frank Maybank and his accounts, including but not limited to the VPFCs. Search terms that will identify these documents include Maybank account numbers, as you proposed; please provide us with a list of the account numbers you propose to search. However, an examination of the emails already produced in this case indicate that Mr. Maybank’s name must also be used as a search term to pull all relevant documents. We would therefore add the following as search terms:

(Frank or Francis) w/20 Maybank  
Maybank  
Frank

Although his first or last names in isolation will undoubtedly yield some irrelevant “hits”, such terms are necessary to ensure that a complete data set is generated. *See, e.g.*, BB&T-011127

(email using only "Frank" to refer to Mr. Maybank) & BB&T-01114 (email using only "Maybank" to refer to Mr. Maybank).

The second category contains documents relating to VPFCs, including but not limited to those involving VPFCs sold to Frank Maybank. We are entitled to ascertain what the BB&T employees knew or understood about these products. Search terms that will identify these documents include "variable prepaid," "prepaid variable," VPFC, PPVF, VPF, and PVF.

The third category of documents relate to the most important security owned by Mr. Maybank: the stock of BB&T itself. A search for the name of this stock would contain a vast number of irrelevant hits, in addition to documents relevant to the following requests for production, which defendants concede are relevant to this dispute. Here are a few of plaintiff's outstanding production requests which seek documents relating to BB&T's stock:

19. Copies of all materials prepared or circulated by Defendants to their employees, agents or representatives, which contained information, advice or directions regarding the purchase or sale of [BB&T stock].
21. Copies of notes, transcripts, outlines, summaries, etc., of any conference calls held between 2006 and 2010, inclusive, discussing [BB&T stock], including conference calls of Defendants' brokers and institutional clients.
22. Copies of any document, in any format, reflecting, stating, or referring to the rating (buy, hold or sell) between 2006 and 2010, inclusive, for [BB&T stock] (including any changes in such recommendations).

We note that these requests would encompass materials/documents relating to BB&T's dividends, their history and any predictions or projections about their continued or future payment, as well as any documents/materials providing or including guidance, recommendations or advice to employees, agents or representatives about their ability to advocate, suggest or recommend the purchase, holding or selling of BB&T's stock related to its historical and expected payment of dividends.

Since your client has greater knowledge about the organization of its own sales materials and calls, we invoke your obligation under the South Carolina Rules of Civil Procedure to fully cooperate in electronic discovery and seek your input into the formulation of search terms that will identify documents responsive to these critical requests without pulling every document created by BB&T.

Finally, certain other categories of obviously relevant documents seem to be more properly produced outside the ESI process. These include materials relating to employee compensation (*see* RFP ##26, 39, 41-42, 54-59, compliance manuals (*see* RFP ##27, 51-52), model portfolios (*see* RFP # 25). We believe that these documents are readily identifiable by your client and should already have been produced. We therefore request that documents responsive to these requests be promptly provided to us.

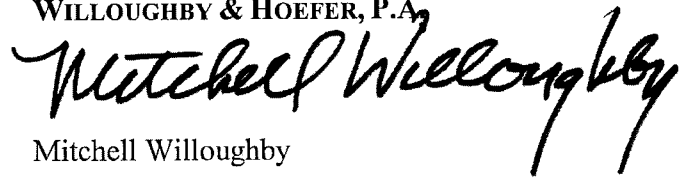
D, Larry Kristinik, Esquire  
April 15, 2013  
Page 4 of 4

---

Thank you in advance for your attention to these discovery issues.

Sincerely,

WILLOUGHBY & HOEFER, P.A.

A handwritten signature in black ink that reads "Mitchell Willoughby". The signature is written in a cursive, flowing style with a large, prominent 'M' and 'W'.

Mitchell Willoughby

MW/cgc

cc: Mr. Francis P. Maybank

## **Exhibit E**

7/3/13 Letter from Willoughby  
to Kristinik

**WILLOUGHBY & HOEFER, P.A.**

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

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COLUMBIA, SOUTH CAROLINA 29202-8416

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BENJAMIN P. MUSTIAN  
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AREA CODE 803  
TELEPHONE 252-3300  
TELECOPIER 256-8062

July 3, 2013

\*ALSO ADMITTED IN TX

**VIA EMAIL and FIRST CLASS MAIL**

D. Larry Kristinik, Esquire  
John S. Slosson, Esquire  
Nelson Mullins Riley & Scarborough LLP  
1320 Main Street, 17<sup>th</sup> Floor  
Columbia, SC 29201

RE: *Francis P. Maybank v. BB&T Corporation et al.*; C/A No. 2011-CP-23-8578

Dear Larry and John:

Part 1 – Compromise ESI Production

Thank you for John's July 1, 2013 letter addressing the discovery of electronically stored information ("ESI") which has been outstanding for quite some time.

While we have concerns about the scope of the "compromise" ESI searches you propose, we appreciate your acknowledgement that we may "reserve the right to review the documents produced as a result of these [compromise] searches" and to then submit "follow up search requests based on information reviewed that suggests additional relevant documents may exist."

We have a few suggested modifications to the proposed ESI custodians/searches which we believe should be easily acceptable for this initial ESI search. These are as follows:

I. Account number searches:

The following numbers are unfamiliar to us:

255\ -5533 OR 5125601601 OR 0005125601601 OR 519\ -4778602

Please let us know what accounts these represent and/or why they are included in Search 2.

(continued ...)

Further review of the documents already produced by the parties indicates that Search 2 should be expanded to include the following account numbers:

BB&T Account #1199000223  
BB&T Account #9020370405  
Scott & Stringfellow Account #19547740  
Scott & Stringfellow Account #29194891  
BB&T Wealth Management Credit Line Account #9020370405-7002

Searches should also be conducted for documents relating to Mr. Maybank's insurance trust. We have identified the following insurance policy numbers, which should also be added to Search 2:

Transamerica Life #60031953  
Transamerica Life #65038260  
Banner Life #17B207560  
American General Life #UM0010596L  
Lincoln Universal Life Policy #JJ7000536  
Lincoln Universal Life Policy #JJ7001291

## II. Insurance Trust Custodians

The original custodian lists did not include any BB&T personnel who were involved in the management of the insurance trust. We suggest adding as custodians the following individuals whose names appear on previously produced documents relating to the insurance trust:

Joy B. Letchworth  
Cecilia R. Irby  
Meredith L. Shivar  
Sandy Radford

## III. Use of fmaybank

For Search 3, in addition to the search parameters you propose, also include: fmaybank in subject OR fmaybank in email body OR fmaybank in searchable attachment.

Subject to the understanding that we retain the right to seek additional ESI searches after review of the initial ESI production, we ask that you proceed to conduct the proposed compromise ESI searches outlined in your July 1<sup>st</sup> letter (modified as set forth *supra*) as soon as possible. Also, please advise if the above suggestions are acceptable and when we may expect to receive the ESI production.

(continued ...)

Part 2 –Additional Suggestions to Consider for the Initial ESI Search

However, we would also ask you to consider the following expansions of the compromise ESI searches.

I. Additional custodians:

You have expanded the original list of custodians by the addition of four proposed in my April 15<sup>th</sup> letter: Michael Lackey, Steven Iannini, Clark Anderson and John Wofford. However, you provided no rationale for why you failed to include the following individuals as document custodians, even though they appear as senders and recipients of relevant documents already produced by BB&T:

Jenny Poythress  
Linda Williams  
Nancy K Johnson  
Kate Tekker  
Pam Taylor  
Stephanie Rutter  
Jerry Lane  
Sandy Peeler  
Kim Johnson

Please explain why these individuals (who were involved in providing services to Mr. Maybank) should **not** be added as custodians.

II. Searches based upon Maybank's First Name

We understand your concern about searching for "Frank" without other qualifiers. In order to capture relevant documents relating to Maybank's own accounts, we suggest that the following additional qualifiers be added as Search 4:

(Frank or Francis) within 20 AND  
rollover or roll-over or unwind  
"insurance trust"; or  
divers! or concentrate!  
tax! or  
conflict; or  
dividend within 3 BB&T

(continued ...)

III. Inclusion of Maybank as custodian

Searches of the ESI generated by Maybank himself as a document custodian might not actually generate that many documents as it is our understanding that Mr. Maybank was not a very active email user. Alternatively, production from the Maybank custodial database could be appropriated limited using the same additional qualifiers set forth *supra* for Frank/Francis searches to narrow the production to documents more likely to be relevant to the issues in this case.

IV. BB&T Dividend

Finally, we note that your July 1<sup>st</sup> letter does not address the issue set forth on page 3 of our April 15<sup>th</sup> letter: documents relating to representations concerning BB&T's own stock, which would be responsive *inter alia* to Plaintiff's RFPs 19, 21, 22. Given the difficulty of formulating an appropriately limiting search for such documents, we specifically sought your input. In the absence of any such assistance from you, we suggest the addition of a Search 5: BB&T w/3 dividend. If this proposal is unacceptable to you, please confer with us to assist in designing a more appropriate search.

We ask you to consider including these suggestions in the initial ESI search, if they can be incorporated without delaying that search; if you are unwilling to include them at this time, we respectfully request that you proceed promptly to complete the initial ESI production with the understanding of the rights that we have reserved as set forth *supra*.

Thank you in advance for your attention to these discovery issues.

Sincerely,

WILLOUGHBY & HOEFER, P.A.

  
Mitchell Willoughby

MW/cgc

cc: Mr. Frank Maybank

# **Exhibit F**

Maybank Motion to Amend

|                                        |   |                                     |
|----------------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA                | ) | IN THE COURT OF COMMON PLEAS        |
|                                        | ) |                                     |
| COUNTY OF GREENVILLE                   | ) | FOR THE THIRTEENTH JUDICIAL CIRCUIT |
|                                        | ) |                                     |
|                                        | ) |                                     |
| FRANCIS P. MAYBANK,                    | ) | Civil Action No. 2011-CP-23-8578    |
|                                        | ) |                                     |
| Plaintiff,                             | ) |                                     |
|                                        | ) |                                     |
| vs.                                    | ) |                                     |
|                                        | ) | <b>FRANCIS P. MAYBANK'S</b>         |
|                                        | ) | <b>MOTION FOR LEAVE</b>             |
|                                        | ) | <b>TO AMEND COMPLAINT</b>           |
| <b>BB&amp;T CORPORATION,</b>           | ) |                                     |
| <b>BRANCH BANKING AND TRUST</b>        | ) |                                     |
| <b>COMPANY, Successor in merger to</b> | ) |                                     |
| <b>BRANCH BANKING AND TRUST</b>        | ) |                                     |
| <b>COMPANY OF SC,</b>                  | ) |                                     |
| <b>STERLING CAPITAL</b>                | ) |                                     |
| <b>MANAGEMENT, LLC, Successor in</b>   | ) |                                     |
| <b>merger to BB&amp;T ASSET</b>        | ) |                                     |
| <b>MANAGEMENT LLC,</b>                 | ) |                                     |
| <b>ROSS WALTERS, and</b>               | ) |                                     |
| <b>ANTHONY MAHFOOD,</b>                | ) |                                     |
|                                        | ) |                                     |
| Defendants.                            | ) |                                     |
|                                        | ) |                                     |

---

PLEASE TAKE NOTICE that Plaintiff Francis P. Maybank, by and through his undersigned counsel, will move before the Honorable Edward W. Miller, Thirteenth Judicial Circuit, Greenville County Courthouse, Greenville, South Carolina, in ten (10) days or as soon thereafter as counsel may be heard in the above-captioned case for an Order granting leave to file a Second Amended Complaint against Defendants BB&T Corporation, Branch Banking and Trust Company, Sterling Capital Management, LLC, and Ross Walters. This motion is filed in compliance with this Court's Scheduling Order of August 6, 2013, which provides that "[a]ny motions to join other parties or otherwise amend the pleadings shall be filed by December 3, 2013."

Counsel for the Plaintiffs affirms pursuant to Rule 11 of the South Carolina Rules of Civil Procedure that they have consulted with opposing counsel in an attempt to resolve the matters

contained herein but as of the date of this filing, were unable to reach any agreement as to the matters raised by this motion.

Pursuant to Rules 15 and 17 of the South Carolina Rules of Civil Procedure, Plaintiff respectfully moves this Court for leave to file the proposed Second Amended Complaint, a copy of which is attached as Exhibit A to this Motion. In support of this Motion, Plaintiff would respectfully show that this proposed pleading makes the following substantive changes:

1. Drops individual Defendant Anthony Mahfood as a party to this case. Since the First Amended Complaint was filed in February 2012, Mahfood has left the employ of BB&T. More important, deposition testimony from Mahfood himself and from other BB&T witnesses have demonstrated that Mahfood was a managed employee, with all of his actions orchestrated, managed, approved and supervised by the Defendant Walters and the corporate Defendants. Rule 15(a) and (b) both provide that leave to amend to conform pleadings to evidence “shall be freely given” when justice so requires and/or when the presentation of the merits of the action will be subserved thereby. The remaining Defendants cannot show that they will be prejudiced in any way by the removal of Mahfood as a named Defendant in this case, as the corporate Defendants remain liable for his acts and omissions as their agent and employee under *respondeat superior* and individual Defendant Ross Walter’s personal liability is likewise unaffected.
2. Adds as plaintiff Jane H.P. Maybank in her capacity as Trustee for the Francis P. Maybank Family Insurance Trust (“Maybank Insurance Trust”). This change is made in an excess of caution to address any objection that Defendants may have to Mr. Maybank asserting claims for damages to the Maybank Insurance Trust. Such claims were asserted by Mr. Maybank in both the Original and Amended Complaints previously filed in this case. Rule 17 of the

South Carolina Rules of Civil Procedure requires that every action be prosecuted in the name of the real party in interest, but also provides that

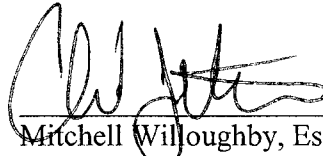
No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

As trustee of an express trust, Ms. Maybank is incontrovertibly an appropriate party to assert claims on behalf of the Maybank Family Trust and her joinder will eliminate any potential real-party-in-interest objections.

**WHEREFORE**, Plaintiff respectfully requests an order granting leave to immediately file the Second Amended Complaint, with the joinder of Plaintiff Trustee Jane Maybank being deemed to have the same effect as if the action had been commenced in her name, and providing such other and further relief to Plaintiff as is just, fair and equitable or otherwise available by rule, law or equity.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mitchell Willoughby', is written over a horizontal line.

Mitchell Willoughby, Esquire  
Elizabeth Zeck, Esquire  
ElizabethAnn Loadholt Carroll, Esquire  
Chad Johnston, Esquire

**WILLOUGHBY & HOEFER, P.A.**

930 Richland Street

Post Office Box 8416

Columbia, SC 29202-8416

(803) 252-3300

mwilloughby@willoughbyhoefer.com

ezeck@willoughbyhoefer.com

ecarroll@willoughbyhoefer.com

cjohnston@willoughbyhoefer.com

Attorneys for Francis P. Maybank

December 3, 2013  
Columbia, South Carolina

# **Exhibit G**

12/10/12 Joint Motion

**WILLOUGHBY & HOEFER, P.A.**

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

P.O. BOX 8416

COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY  
JOHN M.S. HOEFER  
RANDOLPH R. LOWELL  
TRACEY C. GREEN  
BENJAMIN P. MUSTIAN  
ELIZABETH ZECK\*  
ELIZABETHANN LOADHOLT FELDER  
CHAD N. JOHNSTON  
JOHN W. ROBERTS

AREA CODE 803  
TELEPHONE 252-3300  
TELECOPIER 256-8062

December 11, 2012

\*ALSO ADMITTED IN TX

**VIA FIRST CLASS MAIL**

The Honorable Edward W. Miller  
Greenville County Courthouse  
305 E. North Street, Suite 219  
Greenville, SC 29601

RE: *Francis P. Maybank, Plaintiff, vs. BB&T Corporation, Branch Banking And Trust Company, Successor In Merger To Branch Banking and Trust Company of SC, Sterling Capital Management, LLC, Successor In Merger To BB&T Asset Management LLC, Ross Walters, and Anthony Mahfood, Defendants;*  
Civil Action No. 2011-CP-23-8578

Judge Miller:

Attached for your consideration is a joint Motion and Order for Case Assignment to the Business Court Pilot Program.

By copy of this letter I am filing a copy of this motion with the Honorable Clerk of Court for inclusion in the case file.

Should there be any questions, please advise.

Very truly yours,

**WILLOUGHBY & HOEFER, P.A.**

  
Mitchell Willoughby

MW/cgc  
enclosure

cc: Honorable Paul B. Wickensimer, Clerk of Court (w/enclosures)  
D. Larry Kristinik, Esquire (w/enclosures)

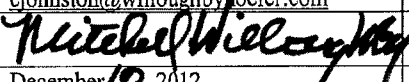
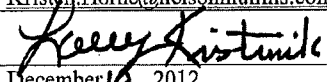
|                           |   |                                      |
|---------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA,  | ) | IN THE CIRCUIT COURT                 |
|                           | ) |                                      |
| COUNTY OF GREENVILLE      | ) | MOTION AND ORDER FOR CASE ASSIGNMENT |
| Francis P. Maybank,       | ) | TO THE BUSINESS COURT                |
|                           | ) | PILOT PROGRAM                        |
| vs.                       | ) |                                      |
| BB&T Corporation, et al., | ) |                                      |
| Plaintiff                 | ) |                                      |
| Defendants.               | ) | CASE NO. 2011-CP-23-8578             |

1. As counsel for a party who has appeared in this action, we move for an order of the Chief Justice assigning this case to the Business Court Pilot Program of the South Carolina Circuit Courts. We certify that as of the date of this Motion, no more than 180 days have passed (exclusive of time the matter was pending in Federal Court) since the commencement of this action. In addition, we certify that all parties have been notified of this request.

2. The principal claim or claims made in the above-referenced matter are made under the following Titles of the South Carolina Code and the matter is appropriate for assignment to the Business Court Pilot Program. (Note: Please check all that are applicable, and attach a description of the claims made in the above-referenced lawsuit. Exhibit 1 is attached hereto and incorporated herein by this reference.)

- ☐ Title 33—South Carolina Business Corporation Act of 1988;
- ☒ Title 35—South Carolina Uniform Securities Act of 2005;
- ☐ Title 36, Chapter 8—South Carolina Uniform Commercial Code: Investment Securities;
- ☐ Title 39, Chapter 3—Trade and Commerce: Trusts, Monopolies, and Restraints of Trade;
- ☐ Title 39, Chapter 8—Trade and Commerce: The South Carolina Trade Secrets Act;
- ☐ Title 39, Chapter 15—Trade and Commerce: Labels and Trademarks; or
- ☐ Other Appropriate Matter determined by the Chief Justice.

3. Insert name and contact information of moving party or parties (this is a joint motion):

|            |                                                                                                                                                                                                                                                            |      |              |            |                                                                                                                                                                                                                                                                          |      |              |
|------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|--------------|------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|--------------|
| Party:     | Francis P. Maybank, Plaintiff                                                                                                                                                                                                                              |      |              | Party:     | BB&T Corporation; Branch Banking and Trust Company; Sterling Capital Management, LLC; Ross Waters; and Anthony Mahfood, Defendants                                                                                                                                       |      |              |
| Name:      | Mitchell Willoughby<br>Elizabeth Zeck<br>Chad N. Johnston                                                                                                                                                                                                  |      |              | Name:      | D. Larry Kristinik<br>William S. Brown<br>Kristen E. Horne                                                                                                                                                                                                               |      |              |
| Address:   | Willoughby & Hoefer, P.A.<br>P.O. Box 8416, Columbia, SC 29202                                                                                                                                                                                             |      |              | Address:   | Nelson Mullins Law Firm<br>P.O. Box 10084, Greenville SC 29603                                                                                                                                                                                                           |      |              |
| Phone:     | 803-252-3300                                                                                                                                                                                                                                               | Fax: | 803-256-8062 | Phone:     | 864-250-2300                                                                                                                                                                                                                                                             | Fax: | 864-232-2925 |
| Email:     | <a href="mailto:mwilloughby@willoughbyhoefer.com">mwilloughby@willoughbyhoefer.com</a><br><a href="mailto:ezeck@willoughbyhoefer.com">ezeck@willoughbyhoefer.com</a><br><a href="mailto:cjohnston@willoughbyhoefer.com">cjohnston@willoughbyhoefer.com</a> |      |              | Email:     | <a href="mailto:larry.kristinik@nelsonmullins.com">larry.kristinik@nelsonmullins.com</a><br><a href="mailto:william.brown@nelsonmullins.com">william.brown@nelsonmullins.com</a><br><a href="mailto:Kristen.Horne@nelsonmullins.com">Kristen.Horne@nelsonmullins.com</a> |      |              |
| Signature: |                                                                                                                                                                         |      |              | Signature: |                                                                                                                                                                                      |      |              |
| Date:      | December 10, 2012                                                                                                                                                                                                                                          |      |              | Date:      | December 10, 2012                                                                                                                                                                                                                                                        |      |              |

4. Indicate whether the non-moving party or parties ☒ consents, ☐ does not oppose, ☐ opposes; ☐ position on assignment is unknown.

Recommendation of the Business Court Judge: ☐ Recommends ☐ Declines to Recommend

Signature of Business Court Judge

Date

Assignment to the Business Court Pilot Program for Greenville County is hereby ☐ **ORDERED** ☐ **DENIED.**

It is further ☐ **ORDERED** ☐ **DENIED** that exclusive jurisdiction over this case be assigned to the Honorable Judge Edward W. Miller to hear and handle all pretrial motions and other matters pertaining to this case.

And it is SO ORDERED.

This      day of \_\_\_\_\_, 2012  
Columbia, South Carolina

\_\_\_\_\_  
Jean Hoefer Toal, Chief Justice

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

FRANCIS P. MAYBANK,  
Plaintiff,

vs.

BB&T CORPORATION, BRANCH  
BANKING AND TRUST COMPANY,  
Successor in merger to BRANCH  
BANKING AND TRUST COMPANY  
OF SC, STERLING CAPITAL  
MANAGEMENT, LLC, Successor in  
merger to BB&T ASSET  
MANAGEMENT LLC, ROSS  
WALTERS, and ANTHONY MAHFOOD)  
Defendants.

) IN THE COURT OF COMMON PLEAS  
) FOR THE THIRTEENTH JUDICIAL CIRCUIT  
)  
)

Civil Action No. 2011-CP-23-8578

**EXHIBIT 1 TO MOTION AND ORDER  
FOR CASE ASSIGNMENT TO THE  
BUSINESS COURT PILOT PROGRAM**

Plaintiff Frank Maybank filed a complaint against defendants BB&T Corporation, Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, Sterling Capital Management, LLC, Successor in merger to BB&T Asset Management LLC, Ross Walters, and Anthony Mahfood on December 22, 2011 in the Greenville County Court of Common Pleas. In his Complaint, Mr. Maybank alleges claims for *inter alia*, breaches of contract, breaches of fiduciary duty, breach of contract accompanied by fraudulent act, and violations of the South Carolina Uniform Securities Act of 2005, arising out of agreements between the parties and the sale, advice about, and management of financial products and assets, including complex variable pre-paid forward contracts. The claims involve millions of dollars of financial products and asserted losses.

On January 23, 2012, Defendants BB&T Corporation, Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, and Sterling Capital Management, LLC, Successor in merger to BB&T Asset Management LLC removed this action to federal court, alleging that the individual South Carolina defendants Ross Walters and Anthony Mahfood were not proper parties. On February 22, 2012, Mr. Maybank filed a Motion to Remand and an Amended Complaint. Defendants filed Answers to the Amended Complaint on March 14, 2012. Thereafter, the Motion to Remand was granted by the federal court and the case remanded to the Greenville County Court of Common Pleas on August 3, 2012. Although Defendants are responding to written discovery, no depositions have been taken nor have any dispositive motions been filed as of the date of the filing of this motion. A scheduling order has not yet been entered.

The allegations of the Complaint involve matters of business, agency, contract, fiduciary duties and securities law and would benefit from assignment to a single judge to manage the litigation and try the case, handling all pretrial, trial and post-trial matters at the circuit court level.

The case is presently designated to be tried by a jury and the parties understand that assignment to the Business Court is made preserving the parties' substantive and procedural rights under law, equity and the South Carolina Rules of Civil Procedure, including without limitation the right to a jury trial. This Motion for Assignment is contingent upon those rights being preserved.

## **Exhibit H**

10/15/12 Email from Kristinik  
to Willoughby

## **Tonya Macaulay**

---

**From:** Larry Kristinik <larry.kristinik@nelsonmullins.com>  
**Sent:** Monday, October 15, 2012 9:47 AM  
**To:** Mitchell Willoughby  
**Cc:** Chad Johnston; Kristen Horne; Jack Slosson; William Brown; Tonya Macaulay  
**Subject:** Maybank--Application for Assignment to Business Court and Case Description for Same  
**Attachments:** Description of Claims for Motion for Assignment to Business Court (Maybank) - 4813-5021-5441 v .docx; Motion and Order for Case Assignment to the Business Court Pilot Program - 4850-6226-9712 v 2.docx

Mitch,

I wanted to follow up with you one last time regarding our request for your consent to have the case assigned to the Business Court in Greenville County. Please let me know by the end of the day tomorrow whether you can provide your client's consent. Attached is a draft of our application and the required case description. I am available today and tomorrow if you would like to have a call to discuss.

Thanks.

--Larry

**D. Larry Kristinik** | Partner | NELSON MULLINS RILEY & SCARBOROUGH LLP  
Columbia, South Carolina | 803.255.9531

# **Exhibit I**

9/20/12 Email from Kristinik to  
Willoughby

## **Tonya Macaulay**

---

**From:** Larry Kristinik <larry.kristinik@nelsonmullins.com>  
**Sent:** Thursday, September 20, 2012 9:49 AM  
**To:** Mitchell Willoughby  
**Cc:** Kristen Horne; William Brown; Jack Slosson; Tonya Macaulay  
**Subject:** Maybank--Business Court

Mitch,

I wanted to follow up on our previous discussion about applying to have the case assigned to the business court. Have you and your client had the chance to discuss and reach a decision?

Thanks.

--Larry

**D. Larry Kristinik** | Partner | NELSON MULLINS RILEY & SCARBOROUGH LLP  
Columbia, South Carolina | 803.255.9531

# **Exhibit J**

2/25/13 Order

rec'd 2/28/2013  
04490/01520

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER  
STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE  
2013 FEB 25 P 4: 02  
IN THE COURT OF COMMON PLEAS

**JUDGMENT IN A CIVIL CASE**

**CASE NO: 2011CP2308578**

**Francis P Maybank vs. Bb&T Corporation**

**CHECK ONE:**

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: \_\_\_\_\_
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: \_\_\_\_\_
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order; ☐ Statement of Judgment by the Court:  
Dated at Greenville, South Carolina, this .

*Court Reporter:*

**PRESIDING JUDGE -**

This judgment was entered on the 25th day of February, 2013, and a copy mailed first class this 25th day of February, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Mitchell Willoughby PO Box 8416 Columbia, SC  
292028416

D. Larry Kristimik

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

Paul B. Wickensimer Greenville County Clerk Of Court  
- Clerk of Court

STATE OF SOUTH CAROLINA,

COUNTY OF GREENVILLE

Francis P. Maybank,

vs.

BB&T Corporation, et al.,

Plaintiff

Defendants.

IN THE CIRCUIT COURT

**MOTION AND ORDER FOR CASE ASSIGNMENT  
TO THE BUSINESS COURT  
PILOT PROGRAM**

2013 FEB 25 P 4: 02

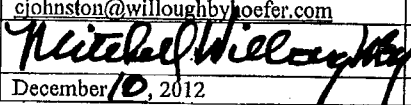
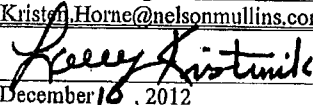
CASE NO. 2011-CP-23-8578

1. As counsel for a party who has appeared in this action, we move for an order of the Chief Justice assigning this case to the Business Court Pilot Program of the South Carolina Circuit Courts. We certify that as of the date of this Motion, no more than 180 days have passed (exclusive of time the matter was pending in Federal Court) since the commencement of this action. In addition, we certify that all parties have been notified of this request.

2. The principal claim or claims made in the above-referenced matter are made under the following Titles of the South Carolina Code and the matter is appropriate for assignment to the Business Court Pilot Program. (Note: Please check all that are applicable, and attach a description of the claims made in the above-referenced lawsuit. Exhibit 1 is attached hereto and incorporated herein by this reference.).

- ☐ Title 33—South Carolina Business Corporation Act of 1988;
- ☒ Title 35—South Carolina Uniform Securities Act of 2005;
- ☐ Title 36, Chapter 8—South Carolina Uniform Commercial Code: Investment Securities;
- ☐ Title 39, Chapter 3—Trade and Commerce: Trusts, Monopolies, and Restraints of Trade;
- ☐ Title 39, Chapter 8—Trade and Commerce: The South Carolina Trade Secrets Act;
- ☐ Title 39, Chapter 15—Trade and Commerce: Labels and Trademarks; or
- ☐ Other Appropriate Matter determined by the Chief Justice.

3. Insert name and contact information of moving party or parties (this is a joint motion):

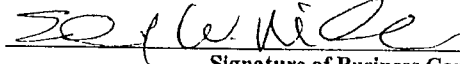
|            |                                                                                                  |                   |            |                                                                                                                                    |                   |
|------------|--------------------------------------------------------------------------------------------------|-------------------|------------|------------------------------------------------------------------------------------------------------------------------------------|-------------------|
| Party:     | Francis P. Maybank, Plaintiff                                                                    |                   | Party:     | BB&T Corporation; Branch Banking and Trust Company; Sterling Capital Management, LLC; Ross Waters; and Anthony Mahfood, Defendants |                   |
| Name:      | Mitchell Willoughby<br>Elizabeth Zeck<br>Chad N. Johnston                                        |                   | Name:      | D. Larry Kristinik<br>William S. Brown<br>Kristen E. Horne                                                                         |                   |
| Address:   | Willoughby & Hoefer, P.A.<br>P.O. Box 8416, Columbia, SC 29202                                   |                   | Address:   | Nelson Mullins Law Firm<br>P.O. Box 10084, Greenville SC 29603                                                                     |                   |
| Phone:     | 803-252-3300                                                                                     | Fax: 803-256-8062 | Phone:     | 864-250-2300                                                                                                                       | Fax: 864-232-2925 |
| Email:     | mwilloughby@willoughbyhoefer.com<br>ezeck@willoughbyhoefer.com<br>cjohnston@willoughbyhoefer.com |                   | Email:     | larry.kristinik@nelsonmullins.com<br>william.brown@nelsonmullins.com<br>Kristen.Horne@nelsonmullins.com                            |                   |
| Signature: |               |                   | Signature: |                                                |                   |
| Date:      | December 10, 2012                                                                                |                   | Date:      | December 10, 2012                                                                                                                  |                   |

4. Indicate whether the non-moving party or parties ☒ consents, ☐ does not oppose, ☐ opposes; ☐ position on assignment is unknown.

Recommendation of the Business Court Judge:

☒ Recommends

☐ Declines to Recommend



Signature of Business Court Judge

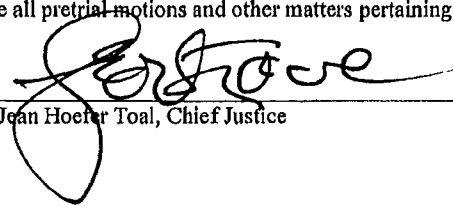
2/4/13  
Date

Assignment to the Business Court Pilot Program for Greenville County is hereby ☒ ORDERED ☐ DENIED.

It is further ☒ ORDERED ☐ DENIED that exclusive jurisdiction over this case be assigned to the Honorable Judge Edward W. Miller to hear and handle all pretrial motions and other matters pertaining to this case.

And it is SO ORDERED.

This 12<sup>th</sup> day of Feb, 2013  
Columbia, South Carolina

  
\_\_\_\_\_  
Jean Hofer Toal, Chief Justice

## **Exhibit K**

Email requesting extension to  
respond to written discovery  
requests

## Tonya Macaulay

---

**From:** Mitchell Willoughby <mwilloughby@willoughbyhoefer.com>  
**Sent:** Wednesday, November 21, 2012 3:42 PM  
**To:** Larry Kristinik  
**Cc:** William Brown; Jack Slosson; Kristen Horne; Tonya Macaulay; Chad Johnston; Elizabeth Zeck  
**Subject:** RE: Maybank

Larry,

Thank you for the courtesy. Happy Thanksgiving to you and your team as well. Regards,

Mitch

---

**From:** Larry Kristinik [<mailto:larry.kristinik@nelsonmullins.com>]  
**Sent:** Wednesday, November 21, 2012 2:44 PM  
**To:** Mitchell Willoughby  
**Cc:** William Brown; Jack Slosson; Kristen Horne; Tonya Macaulay  
**Subject:** Maybank

Mitch,

This confirms I have granted your request today for a 30 day extension to respond to BB&T's discovery requests. Per our call, you will be in touch with me next week about what the date for the new deadline will be.

I will check with William Brown's schedule for a meeting with Judge Miller next Thursday (11/29) and get back to you.

Have a relaxing Thanksgiving. Talk with you next week.

--Larry

**D. Larry Kristinik** | Partner | NELSON MULLINS RILEY & SCARBOROUGH LLP  
Columbia, South Carolina | 803.255.9531

## **Exhibit L**

Email requesting extension to  
respond to written discovery  
requests

## **Tonya Macaulay**

---

**From:** Larry Kristinik  
**Sent:** Tuesday, January 08, 2013 2:10 PM  
**To:** Mitchell Willoughby  
**Cc:** Chad Johnston; Elizabeth Zeck; William Brown; Jack Slosson; Kristen Horne; Tonya Macaulay  
**Subject:** Maybank--Deposition of Ralph Borrello

Mitch,

The Defendants request that you postpone the deposition of Ralph Borrello until some point in time after your client has provided us with his written responses to BB&T's interrogatories and requests for production. It is clear from the documents you provided to us last night that you intend to ask Mr. Borrello about topics far outside of the fee rebate letter dated November 29, 2012. For example, you have included the BB&T Code of Ethics, affidavits from one of the individual defendants, and numerous pages from the BB&T website. I assume you are planning to inquire into these documents because you perceive some relevancy to your client's claims. For this reason, we believe it is important that your client respond to BB&T's discovery requests which explore those claims. These requests were served back on October 22, 2012. Your client's responses were originally due on November 26, 2012, but you requested and we granted you a thirty day extension. You asked for another extension, which we were agreeable to, but you and I never reached a firm agreement on the new deadline. I did, however, ask you in December to provide your responses prior to the deposition of Mr. Borrello.

If you will agree to limit the scope of Mr. Borrello's deposition to the November 29, 2012 letter and the rebate of the fees, then we could agree to go forward with the deposition as planned. Absent that, we would ask that you agree to postpone the deposition and work with us to reschedule it sometime in the future after your client has properly responded to our written discovery requests. If we do not have an agreement by the end of the day as to the above issues, then I will be filing a motion for protective order with the Court.

Thank you for your attention to this matter, and please call me should you wish to discuss.

--Larry

**D. Larry Kristinik** | Partner | NELSON MULLINS RILEY & SCARBOROUGH LLP  
Columbia, South Carolina | 803.255.9531

## **Exhibit M**

Email requesting extension to  
respond to written discovery  
requests

## Tonya Macaulay

---

**From:** Larry Kristinik  
**Sent:** Monday, February 11, 2013 4:36 PM  
**To:** Mitchell Willoughby  
**Cc:** Chad Johnston; Elizabeth Zeck; Jack Slosson; William Brown; Kristen Horne; Tonya Macaulay  
**Subject:** RE: Maybank v. BB&T\*

Call me now. I just finished another call. 255-9531

---

**From:** Mitchell Willoughby [<mailto:mwilloughby@willoughbyhoefer.com>]  
**Sent:** Monday, February 11, 2013 4:23 PM  
**To:** Larry Kristinik  
**Cc:** Chad Johnston; Elizabeth Zeck; Jack Slosson; William Brown; Kristen Horne; Tonya Macaulay  
**Subject:** RE: Maybank v. BB&T\*

Larry:

Do you have time to speak this afternoon? We have completed Plaintiff's responses to Defendants' interrogatories and will be providing those responses to you later today. While we will also provide some documents responsive to Defendants' Request to Produce, our work on this discovery request is not complete and we will need additional time. I will be pleased to speak with you about this if you have time for me to call. Please advise.

Mitch

---

**From:** Larry Kristinik [<mailto:larry.kristinik@nelsonmullins.com>]  
**Sent:** Tuesday, February 05, 2013 5:18 PM  
**To:** Mitchell Willoughby  
**Cc:** Chad Johnston; Elizabeth Zeck; Jack Slosson; William Brown; Kristen Horne; Tonya Macaulay  
**Subject:** RE: Maybank v. BB&T\*

Monday, 2/11 is fine. Extension granted.

--Larry

**D. Larry Kristinik** | Partner | NELSON MULLINS RILEY & SCARBOROUGH LLP  
Columbia, South Carolina | 803.255.9531

---

**From:** Mitchell Willoughby [<mailto:mwilloughby@willoughbyhoefer.com>]  
**Sent:** Tuesday, February 05, 2013 4:59 PM  
**To:** Larry Kristinik  
**Cc:** Chad Johnston; Elizabeth Zeck  
**Subject:** RE: Maybank v. BB&T\*

Larry:

While we have made progress on responding to your outstanding discovery, we have not been able to complete our work by today. I would respectfully request the courtesy of a further extension until Monday, February 11. Please advise if the requested extension is acceptable to you. Regards,

Mitch

---

**From:** Lisa Whitehurst [<mailto:lisa.whitehurst@nelsonmullins.com>] **On Behalf Of** Larry Kristinik  
**Sent:** Thursday, January 31, 2013 6:15 PM  
**To:** Mitchell Willoughby  
**Cc:** Larry Kristinik; Chad Johnston; Kristen Horne; Tonya Macaulay  
**Subject:** Maybank v. BB&T\*

Please see attached letter.

#### Confidentiality Notice

This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure.

If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately either by phone (800-237-2000) or reply to this e-mail and delete all copies of this message.

To ensure compliance with the requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including the attachments) is not intended or written to be used, for the purpose of (a) avoiding penalties under the Internal Revenue Code or (b) promoting, marketing or recommending to another party any transaction or tax-related matter[s]. To provide you with a communication that could be used to avoid penalties under the Internal Revenue Code will necessarily entail additional investigations, analysis and conclusions on our part.

## **Exhibit N**

Email requesting extension to  
respond to written discovery  
requests

## Tonya Macaulay

---

**From:** Larry Kristinik  
**Sent:** Friday, April 12, 2013 10:44 AM  
**To:** 'Mitchell Willoughby'  
**Cc:** Elizabeth Zeck; Chad Johnston; William Brown; Jack Slosson; Kristen Horne; Tonya Macaulay  
**Subject:** RE: Maybank--Extension

Yes, granted.

---

**From:** Mitchell Willoughby [<mailto:mwilloughby@willoughbyhoefer.com>]  
**Sent:** Friday, April 12, 2013 10:43 AM  
**To:** Larry Kristinik  
**Cc:** Elizabeth Zeck; Chad Johnston; William Brown; Jack Slosson; Kristen Horne; Tonya Macaulay  
**Subject:** RE: Maybank--Extension

Larry:

Unfortunately I have had other matters that have delayed me from completing this discovery response. May we have the courtesy of through Monday, April 15? Thanks for your consideration.

Mitch

---

**From:** Mitchell Willoughby  
**Sent:** Wednesday, April 10, 2013 3:47 PM  
**To:** 'Larry Kristinik'  
**Cc:** Elizabeth Zeck; Chad Johnston; William Brown; Jack Slosson; Kristen Horne; Tonya Macaulay  
**Subject:** RE: Maybank--Extension

Thanks, Larry, I appreciate the courtesy.

Mitch

---

**From:** Larry Kristinik [<mailto:larry.kristinik@nelsonmullins.com>]  
**Sent:** Wednesday, April 10, 2013 3:44 PM  
**To:** Mitchell Willoughby  
**Cc:** Elizabeth Zeck; Chad Johnston; William Brown; Jack Slosson; Kristen Horne; Tonya Macaulay  
**Subject:** Maybank--Extension

Mitch,

I received your voice mail requesting an extension in which Mr. Maybank can respond to our discovery requests. This email is to confirm that the Defendants grant the Plaintiff a two day extension until Friday, April 12, 2013 in which to provide discovery responses.

--Larry

**D. Larry Kristinik** | Partner | NELSON MULLINS RILEY & SCARBOROUGH LLP  
Columbia, South Carolina | 803.255.9531

## Confidentiality Notice

This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure.

If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately either by phone (800-237-2000) or reply to this e-mail and delete all copies of this message.

To ensure compliance with the requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including the attachments) is not intended or written to be used, for the purpose of (a) avoiding penalties under the Internal Revenue Code or (b) promoting, marketing or recommending to another party any transaction or tax-related matter[s]. To provide you with a communication that could be used to avoid penalties under the Internal Revenue Code will necessarily entail additional investigations, analysis and conclusions on our part.

# **Exhibit O**

5/6/14 Deposition Notices

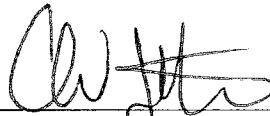
|                                 |   |                                     |
|---------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS        |
|                                 | ) |                                     |
| COUNTY OF GREENVILLE            | ) | FOR THE THIRTEENTH JUDICIAL CIRCUIT |
|                                 | ) |                                     |
| FRANCIS P. MAYBANK,             | ) | Civil Action No. 2011-CP-23-8578    |
|                                 | ) |                                     |
| Plaintiff,                      | ) |                                     |
|                                 | ) |                                     |
| vs.                             | ) |                                     |
|                                 | ) |                                     |
| BB&T CORPORATION,               | ) |                                     |
| BRANCH BANKING AND TRUST        | ) |                                     |
| COMPANY, Successor in merger to | ) | NOTICE OF DEPOSITION OF             |
| BRANCH BANKING AND TRUST        | ) | JOHN A. ALLISON, IV                 |
| COMPANY OF SC,                  | ) |                                     |
| STERLING CAPITAL                | ) |                                     |
| MANAGEMENT, LLC, Successor in   | ) |                                     |
| merger to BB&T ASSET            | ) |                                     |
| MANAGEMENT LLC,                 | ) |                                     |
| ROSS WALTERS, and               | ) |                                     |
| ANTHONY MAHFOOD,                | ) |                                     |
|                                 | ) |                                     |
| Defendants.                     | ) |                                     |
|                                 | ) |                                     |

**TO: THE ABOVE-CAPTIONED DEFENDANTS AND THEIR ATTORNEY,  
D. LARRY KRISTINIK**

YOU WILL PLEASE TAKE NOTICE that, pursuant to the South Carolina Rules of Civil Procedure, the attorney for Plaintiff Francis P. Maybank ("Plaintiff") will take the oral deposition of John A. Allison, IV. The deposition will be taken before a Notary Public.

The deposition will be taken at the law offices of Willoughby & Hoefer, PA, Columbia, South Carolina commencing at 1:00 p.m. on Monday, May 19, 2014. The deposition will continue thereafter, from day to day, until completed. The deposition may be videotaped.

Respectfully submitted,



Mitchell Willoughby, Esquire  
Elizabeth Zeck, Esquire  
ElizabethAnn Loadholt Carroll, Esquire  
Chad Johnston, Esquire

**WILLOUGHBY & HOEFER, P.A.**

930 Richland Street

Post Office Box 8416

Columbia, SC 29202-8416

(803) 252-3300

[mwilloughby@willoughbyhoefer.com](mailto:mwilloughby@willoughbyhoefer.com)

[ezeck@willoughbyhoefer.com](mailto:ezeck@willoughbyhoefer.com)

[ecarroll@willoughbyhoefer.com](mailto:ecarroll@willoughbyhoefer.com)

[cjohnston@willoughbyhoefer.com](mailto:cjohnston@willoughbyhoefer.com)

Attorneys for Francis P. Maybank

May 6, 2014  
Columbia, South Carolina

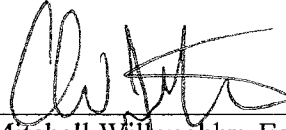
|                                 |   |                                     |
|---------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS        |
|                                 | ) |                                     |
| COUNTY OF GREENVILLE            | ) | FOR THE THIRTEENTH JUDICIAL CIRCUIT |
|                                 | ) |                                     |
| FRANCIS P. MAYBANK,             | ) | Civil Action No. 2011-CP-23-8578    |
|                                 | ) |                                     |
| Plaintiff,                      | ) |                                     |
|                                 | ) |                                     |
| vs.                             | ) |                                     |
|                                 | ) |                                     |
| BB&T CORPORATION,               | ) |                                     |
| BRANCH BANKING AND TRUST        | ) |                                     |
| COMPANY, Successor in merger to | ) | NOTICE OF DEPOSITION OF             |
| BRANCH BANKING AND TRUST        | ) | KELLY S. KING                       |
| COMPANY OF SC,                  | ) |                                     |
| STERLING CAPITAL                | ) |                                     |
| MANAGEMENT, LLC, Successor in   | ) |                                     |
| merger to BB&T ASSET            | ) |                                     |
| MANAGEMENT LLC,                 | ) |                                     |
| ROSS WALTERS, and               | ) |                                     |
| ANTHONY MAHFOOD,                | ) |                                     |
|                                 | ) |                                     |
| Defendants.                     | ) |                                     |
|                                 | ) |                                     |

**TO: THE ABOVE-CAPTIONED DEFENDANTS AND THEIR ATTORNEY,  
D. LARRY KRISTINIK**

YOU WILL PLEASE TAKE NOTICE that, pursuant to the South Carolina Rules of Civil Procedure, the attorney for Plaintiff Francis P. Maybank ("Plaintiff") will take the oral deposition of Kelly S. King. The deposition will be taken before a Notary Public.

The deposition will be taken at the law offices of Willoughby & Hoefer, PA, Columbia, South Carolina commencing at 9:00 a.m. on Monday, May 19, 2014. The deposition will continue thereafter, from day to day, until completed. The deposition may be videotaped.

Respectfully submitted,



Mitchell Willoughby, Esquire  
Elizabeth Zeek, Esquire  
ElizabethAnn Loadholt Carroll, Esquire  
Chad Johnston, Esquire

**WILLOUGHBY & HOEFER, P.A.**

930 Richland Street

Post Office Box 8416

Columbia, SC 29202-8416

(803) 252-3300

mwilloughby@willoughbyhoefer.com

ezeck@willoughbyhoefer.com

ecarroll@willoughbyhoefer.com

cjohnston@willoughbyhoefer.com

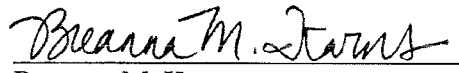
Attorneys for Francis P. Maybank

May 6, 2014  
Columbia, South Carolina

|                                 |   |                                     |
|---------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS        |
|                                 | ) |                                     |
| COUNTY OF GREENVILLE            | ) | FOR THE THIRTEENTH JUDICIAL CIRCUIT |
|                                 | ) |                                     |
| FRANCIS P. MAYBANK,             | ) | Civil Action No. 2011-CP-23-8578    |
|                                 | ) |                                     |
| Plaintiff,                      | ) |                                     |
|                                 | ) |                                     |
| vs.                             | ) |                                     |
|                                 | ) |                                     |
| BB&T CORPORATION,               | ) |                                     |
| BRANCH BANKING AND TRUST        | ) |                                     |
| COMPANY, Successor in merger to | ) | CERTIFICATE OF SERVICE              |
| BRANCH BANKING AND TRUST        | ) |                                     |
| COMPANY OF SC,                  | ) |                                     |
| STERLING CAPITAL                | ) |                                     |
| MANAGEMENT, LLC, Successor in   | ) |                                     |
| merger to BB&T ASSET            | ) |                                     |
| MANAGEMENT LLC,                 | ) |                                     |
| ROSS WALTERS, and               | ) |                                     |
| ANTHONY MAHFOOD,                | ) |                                     |
|                                 | ) |                                     |
| Defendants.                     | ) |                                     |
|                                 | ) |                                     |

This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day **Notice of Deposition of John A. Allison, IV** and **Notice of Deposition of Kelly S. King** by hand-delivery and addressed as follows:

D. Larry Kristinik  
Nelson Mullins Riley & Scarborough LLP  
1320 Main Street, 17<sup>th</sup> Floor  
Columbia, SC 29201

  
Breanna M. Karns

Columbia, South Carolina  
This 6th day of May 2014.

# **Exhibit P**

5/30/14 Order

BUS

FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2011CP2308578

|                    |                                                                                                                                           |                                                                                                                                                                          |
|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Francis P. Maybank | BB&T Corporation<br>Branch Banking And<br>Trust Company of SC<br>BB&T Asset<br>Management LLC<br>Anthony Mahfood                          | Branch Banking and<br>Trust Company<br>Sterling Capital<br>Management LLC<br>Ross Walters<br>FILED-CLERK OF COURT<br>GREENVILLE, S.C.<br>AUL B. WICKES<br>MAY 30 PM 3:14 |
| PLAINTIFF(S)       |                                                                                                                                           | DEFENDANT(S)                                                                                                                                                             |
| Submitted by:      | Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant<br><input type="checkbox"/> Self-Represented Litigant |                                                                                                                                                                          |

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);  
☐ Rule 43(k), SCRPC (Settled); ☐ Other: \_\_\_\_\_
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: \_\_\_\_\_
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant's Motion for Protective Order Related to Proposed Depositions of the CEO and Former CEO of BB&T is hereby GRANTED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

ENTERED COMPUTER

### INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|----------------------------------------------|------------------------------------------|----------------------------------------------------------|
|                                              |                                          |                                                          |
|                                              |                                          |                                                          |
|                                              |                                          |                                                          |
|                                              |                                          |                                                          |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Ed / W. M. M. M.  
Circuit Court Judge

2130

Judge Code

5/22/14  
Date

### For Clerk of Court Office Use Only

This judgment was entered on \_\_\_\_\_, and a copy mailed first class or placed in the appropriate attorney's box on \_\_\_\_\_, to attorneys of record or to parties (when appearing pro se) as follows:

**Mitchell Willoughby** PO Box 8416 Columbia, SC 29202-8416

**Bruce Wyche Bannister** Bannister & Wyatt, LLC P.O. Box 10007 Greenville, SC 29603

**D. Lawrence Kristinik III** PO Box 11070 Columbia, SC 29211

**William Stevens Brown V Nelson Mullins Riley & Scarborough LLP** P.O. Box 10084 Greenville, SC 29603-0084

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

\_\_\_\_\_  
**Paul B. Wickensimer** Greenville County Clerk Of Court - Clerk of Court

Court Reporter

## **Exhibit Q**

10/4/13 Letter from Kristinik to  
Willoughby

# Nelson Mullins

Nelson Mullins Riley & Scarborough LLP  
Attorneys and Counselors at Law  
1320 Main Street / 17th Floor / Columbia, SC 29201  
Tel: 803.799.2000 Fax: 803.255.9077  
www.nelsonmullins.com

D. Larry Kristinik  
Tel: 803.255.9531  
Fax: 803.255.9077  
larry.kristinik@nelsonmullins.com

October 4, 2013

## VIA EMAIL

Mitchell M. Willoughby, Esquire  
WILLOUGHBY & HOEFER, P.A.  
930 Richland Street  
Columbia, SC 29202-8416

RE: Francis P. Maybank v. BB&T Corporation, et al.  
Civil Action No. 2011-CP-23-8578  
Our File No. 04490/01520

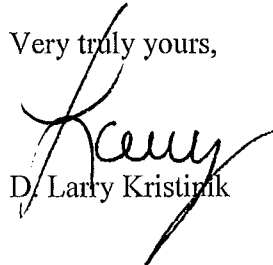
Dear Mitch:

Pursuant to Paragraph 6(c) of the Confidentiality Order entered by the Court, we are requesting that you return or destroy all copies of the memorandum dated October 15, 2010 and authored by Jim Willis, Nate Deal, and Josh Wein. We have found two copies of this memorandum in our document productions to you. They are bates numbered BB&T\_01256 – 01260 and BB&T\_18748 – 18749. Should there be other copies of this memorandum in our document productions, we would ask that those also be returned or destroyed. You recently marked this memorandum as an exhibit to the deposition of Ross Walters, and so it will be necessary for that to be addressed as well.

The version of this memorandum referenced above was a draft that was not addressed to anyone. We learned last week that the final version of this memorandum was sent to Brent Peters in his capacity as legal counsel for BB&T. Accordingly, the draft and final versions of the memorandum are protected by the attorney-client privilege and/or the work product doctrine.

Thank you for your cooperation with this request.

Very truly yours,



D. Larry Kristinik

DLK:dlk

## **Exhibit R**

11/1/13 Letter from Willoughby  
to Kristinik

**WILLOUGHBY & HOEFER, P.A.**

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

P.O. BOX 8416

COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY  
JOHN M.S. HOEFER  
RANDOLPH R. LOWELL  
TRACEY C. GREEN  
BENJAMIN P. MUSTIAN  
ELIZABETH ZECK\*  
ELIZABETHANN LOADHOLT CARROLL  
CHAD N. JOHNSTON  
JOHN W. ROBERTS  
ANDREW J. D'ANTONI

AREA CODE 803  
TELEPHONE 252-3300  
TELECOPIER 256-8062

November 1, 2013

\*ALSO ADMITTED IN TX

**VIA ELECTRONIC AND FIRST CLASS MAIL**

D. Larry Kristinik, Esquire  
Nelson Mullins Riley & Scarborough LLP  
1320 Main Street, 17<sup>th</sup> Floor  
Columbia, SC 29201

RE: *Francis P. Maybank v. BB&T Corporation et al.*; C/A No. 2011-CP-23-8578

Dear Larry:

We are in receipt of your letter dated October 4, 2013, in which you seek to invoke Paragraph 6(c) of the Consent Confidentiality Order entered by Judge Miller on August 6, 2013, with respect to a memorandum dated October 15, 2010, as well as drafts thereof, authored by Jim Willis, Nate Deal, and Josh Wein. We note and appreciate that you graciously granted us two, one-week extensions to the fourteen (14) day time period set forth in Paragraph 6(d) of the Order in which we are required to respond or otherwise comply with your request. According to your letter, the basis for your request is that the final version of the memorandum was sent to Brent Peters in his capacity as legal counsel for BB&T.

Having reviewed your request and the grounds specified in your October 4, 2013 letter, Mr. Maybank respectfully exercises his right under the August 6, 2013 Order and objects to your request for the subject documents' return and/or destruction. In doing so, we note that in the two separate productions of the memorandum and draft, produced on September 13, 2012 and September 17, 2013, respectively, neither of the versions of the memorandum are addressed to Brent Peters or any other legal counsel of BB&T; in fact, the memorandum is addressed to no one. Further, the content of the memorandum is exclusively factual and contains neither legal conclusions nor seeks legal advice, and the memorandum contains no indication that it was drafted at the request of Mr. Peters or other legal counsel.

Even if the final version of the memorandum was sent to Mr. Peters in his capacity as legal counsel for BB&T, the Rules and case law are clear that the mere provision of a document to legal counsel is insufficient for either attorney-client privilege or the work product doctrine to attach.

(continued ...)

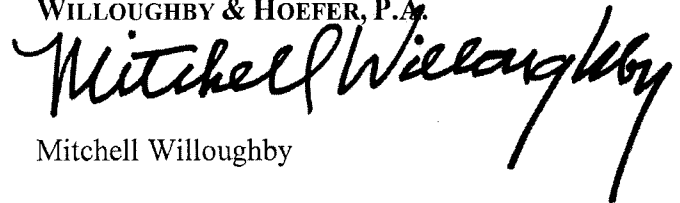
D. Larry Kristinik, Esquire  
November 1, 2013  
Page 2 of 2

---

If you should have any questions regarding our objection, please advise.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.

A handwritten signature in black ink that reads "Mitchell Willoughby". The signature is written in a cursive, flowing style. The first name "Mitchell" is written in a larger, more prominent script, and "Willoughby" follows in a similar but slightly smaller script. The signature is positioned to the right of the typed name "Mitchell Willoughby".

Mitchell Willoughby

MW/cgc

cc: Mr. Francis P. Maybank

# **Exhibit S**

5/21/14 Order

**FORM 4**

**STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE  
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2011CP2308578**

**Francis P Maybank**

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL D. WICKENBARGER

2014 MAY 21 PM 1:35

**Bb&T Corporation**

**Branch Banking And  
Trust Company Of Sc  
Bb&T Asset  
Management Llc  
Anthony Mahfood**

**Branch Banking And  
Trust Company  
Sterling Capital  
Managment Llc  
Ross Walters**

**PLAINTIFF(S)**

**DEFENDANT(S)**

**Submitted by:**

**Attorney for:** ☐ Plaintiff ☐ Defendant  
☐ Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);  
☐ Rule 43(k), SCRPC (Settled); ☐ Other: \_\_\_\_\_
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: \_\_\_\_\_
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

**ORDER INFORMATION**

**This order** ☐ ends ☐ does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|----------------------------------------------|------------------------------------------|----------------------------------------------------------|
|                                              |                                          |                                                          |
|                                              |                                          |                                                          |
|                                              |                                          |                                                          |
|                                              |                                          |                                                          |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

5/21/2014

Circuit Court Judge

Judge Code

Date

**For Clerk of Court Office Use Only**

This judgment was entered on **21th day of May, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **21th day of May, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

**Mitchell Willoughby** PO Box 8416 Columbia, SC 29202-8416

**Bruce Wyche Bannister** Bannister & Wyatt, LLC P.O. Box 10007 Greenville, SC 29603

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**D. Lawrence Kristinik III** PO Box 11070 Columbia, SC 29211

**William Stevens Brown V Nelson Mullins Riley & Scarborough LLP** P.O. Box 10084 Greenville, SC 29603-0084

**ATTORNEY(S) FOR THE DEFENDANT(S)**

Court Reporter

**Paul B. Wickensimer** Greenville County Clerk Of Court - Clerk of Court

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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BUS

FILED-CLERK OF COURT  
STATE OF SOUTH CAROLINA )  
GREENVILLE CO. S.C. )  
COUNTY OF GREENVILLE )  
PAUL D. WICKENS )  
IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT

2014 MAY 21 PM 12 35  
Francis P. Maybank, Civil Action No. 2011-CP-23-8578

Plaintiff,

vs.

BB&T Corporation, Branch Banking  
and Trust Company, Successor in  
merger to Branch Banking and Trust  
Company of SC, Sterling Capital  
Management, LLC, Successor in merger  
to BB&T Asset Management LLC, Ross  
Walters and Anthony Mahfood,

Defendants.

**ORDER**

Defendants' Motion to Compel Return of Privileged Memorandum and Plaintiff's Motion to Compel Responses to Requests for Admission were heard by the Court on April 24, 2014. These two motions are related. The Court hereby grants the Defendants' Motion to Compel Return of Privileged Memorandum, denies Plaintiff's Motion to Compel Responses to Requests for Admission, and strikes the Plaintiff's Request to Admit served on November 1, 2013.

The memorandum at issue in the Motion to Compel Return of Privileged Memorandum is a draft memorandum sent to Brent Peters, counsel for Branch Banking and Trust ("BB&T") and for BB&T Asset Management LCC ("BB&T AM"). The Memorandum was prepared by Nate Deal, who at the time of the preparation was an employee of BB&T AM. The affidavits of David Fisher and Jim Willis indicate that the memorandum was prepared to assist Mr. Peters in his legal assessment and understanding of the situation at issue in this case so that he could provide legal advice to the Defendants. These affidavits further identify that at the time the communications were made and the memorandum was prepared, BB&T was aware that Mr.

#1  
EU

Maybank had retained counsel for the purpose of representing him in presenting the Complaint at issue in this case.

During the discovery process, because it was a draft memorandum, the document was inadvertently produced in discovery. When the inadvertent production was realized in late September of 2013, counsel for the Defendants promptly wrote to Plaintiff's counsel a letter dated October 4, 2013, requesting the return of the privileged memorandum and any copies thereof. Paragraph 6(c) of the Confidentiality Order previously entered by the Court provided for the return or destruction of inadvertently produced documents. Plaintiff's counsel refused to return or destroy the document. In fact, after having notice of the privileged nature of the document, Plaintiff used the memorandum at issue to formulate requests for admissions and served those requests for admissions upon the Defendant. Pursuant to Paragraph 6(d) of the Confidentiality Order, the receiving party was required to sequester the privileged information and was prohibited from making any use of the document or information which was the subject of the request for return or destruction based upon the privilege. Plaintiff failed to honor his responsibilities under Paragraph 6(d) of the Confidentiality Order.

The Court notes that the circumstances of the disclosure of the memorandum and the length of time prior to Defendants' realizing that an inadvertent disclosure had occurred caused concern to the Court and some hesitancy in its ruling. Nevertheless, the Court concludes that the memorandum is subject to protection under the attorney/client privilege and the work product doctrine; therefore, pursuant to the clawback provision of the Confidentiality Order, the Court grants Defendants' Motion to Compel Return of Privileged Memorandum and orders the return of the memorandum at issue and any and all copies of that memorandum.

Additionally, the Court strikes Plaintiff's Requests for Admission, which were formulated using the memorandum and served after Plaintiff was on notice of the request for return of the privileged document. Therefore, Plaintiff's Motion to Compel Responses to Requests for Admission is Denied.

**AND IT IS SO ORDERED.**

  
The Honorable Edward W. Miller  
Circuit Court Judge, Thirteenth Judicial Circuit

Greenville, South Carolina

 May 21, 2014

# **Exhibit T**

5/28/14 Order

FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE  
IN THE COURT OF COMMON PLEAS

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL D. WICKENHED

JUDGMENT IN A CIVIL CASE  
CASE NUMBER: 2011CP2308578

Submitted by: Francis P. Maybank

Bb&T Corporation

Branch Banking And

DECISION BY THE COURT

2014 MAY 28 PM 3:22

Branch Banking And  
Trust Company Of Sc  
Bb&T Asset  
Management Llc  
Anthony Mahfood

Trust Company and a  
Sterling Capital  
Management Llc (Vol. Nonsuit);  
Ross Walters

ACTION DISMISSED

Rule 43(k), SCRPC

ACTION STRICKEN

Rule 40(j), SCRPC

DISPOSITION OF APPEAL

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant

☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ JURY VERDICT: This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ ACTION DISMISSED (CHECK REASON):

☐ Rule 12(b), SCRPC;

☐ Rule 41(a), SCRPC (Vol. Nonsuit);

☐ Rule 43(k), SCRPC (Settled);

☐ Other:

☐ ACTION STRICKEN (CHECK REASON):

☐ Rule 40(j) SCRPC;

☐ Bankruptcy;

☐ Binding arbitration, subject to right to restore to confirm, vacate or

☐ Other:

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):

☐ Affirmed; ☐ Reversed;

☐ Remanded;

☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

The judgment information above is complete. Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|----------------------------------------------|------------------------------------------|----------------------------------------------------------|
|                                              |                                          |                                                          |
|                                              |                                          |                                                          |
|                                              |                                          |                                                          |
|                                              |                                          |                                                          |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

5/28/2014

Circuit Court Judge

Judge Code

Date

**For Clerk of Court Office Use Only**

This judgment was entered on **28th day of May, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **28th day of May, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

**Mitchell Willoughby** PO Box 8416 Columbia, SC 29202-8416

**Bruce Wyche Bannister** Bannister & Wyatt, LLC P.O. Box 10007 Greenville, SC 29603

**D. Lawrence Kristinik III** PO Box 11070 Columbia, SC 29211

**William Stevens Brown V Nelson Mullins Riley & Scarborough LLP** P.O. Box 10084 Greenville, SC 29603-0084

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

**Court Reporter**

**Paul B. Wickensimer** **Greenville County Clerk Of Court - Clerk of Court**

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

CIRCUIT COURT OF COMMON PLEAS

IN RE: [REDACTED]

FILE NO. [REDACTED]

DATE OF ENTRY: [REDACTED]

BY: [REDACTED]

CLERK OF COURT

Michael B. Bannister  
Bannister & Wyatt, LLC  
P.O. Box 10007  
Greenville, SC 29603

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

William Stevens Brown  
V Nelson Mullins Riley & Scarborough LLP  
P.O. Box 10084  
Greenville, SC 29603-0084

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 STATE OF SOUTH CAROLINA  
 COUNTY OF GREENVILLE  
 IN THE COURT OF COMMON PLEAS  
 THIRTEENTH JUDICIAL CIRCUIT

Francis P. Maybank and Jane H.P.  
 Maybank, as trustee of the Francis P.  
 Maybank Family Insurance Trust,

Plaintiffs,

vs.

BB&T Corporation, Branch Banking  
 and Trust Company, Successor in  
 merger to Branch Banking and Trust  
 Company of SC, Sterling Capital  
 Management, LLC, Successor in merger  
 to BB&T Asset Management LLC, ,

Defendants.

Civil Action No. 2011-CP-23-8578

**ORDER**

The parties appeared before the Court on April 24, 2014, at a hearing to address pending motions. Motions that were heard at this hearing and are addressed in this Order are: (1) Plaintiff's Motion for Leave to Amend the Complaint, (2) Defendants' Motion for Leave to Amend Answer and Add Counterclaim for Reformation, (3) Defendants' Motion for Protective Order Relating to Jim Willis' Deposition, (4) Plaintiff's Motion for Partial Summary Judgment, (5) Defendants' Motion Pursuant to Rule 56(f), (6) Plaintiff's Motion to Amend the Consent Confidentiality Order and Declare ESI Document Protections Waived, (7) Defendants' Motion for Relief from Contemporaneous Certification of ESI Documents, and (8) Defendants' Motion to Confirm Confidentiality of Documents.<sup>1</sup>

<sup>1</sup> By Order dated May 21, 2014, the Court has already ruled on the Defendant's motion to compel the return of privileged material and the Plaintiff's motion to compel responses to requests for admission, which were also heard at the April 24, 2014 hearing.

#1  
 2014

### MOTIONS TO AMEND

In reviewing and analyzing the information and arguments submitted by the parties on the first two motions, both seeking amendments to pleadings, the Court finds that there is no prejudice to either party in allowing the proposed amendments. Under the standards for Rule 15, the Court grants the Plaintiff's Motion for Leave to Amend the Complaint and grants Defendants' Motion for Leave to Amend Answer and Add Counterclaim for Reformation. The Court expressly withholds any decision at this time on the merits of the amended pleadings, including, but not limited to whether the addition of Jane H.P. Maybank, as trustee of the Francis P. Maybank Family Insurance Trust, relates back to the filing of the original Complaint and will consider this and other merits issues at a future time in this action.

### MOTION FOR PROTECTIVE ORDER

During the deposition of Jim Willis, an employee and member of executive management of Defendant Sterling Capital Management, LLC, Mr. Willis was asked about and testified that reports on the status of this lawsuit were provided in meetings of the Trust Committee and Trust Management Committee at which various officers and directors and member of executive management of the Defendant entities were present. Counsel for the Defendants objected on the grounds of privilege and instructed Mr. Willis not to answer this line of inquiry. The information provided at these meetings was derived solely from information provided by either internal counsel or external counsel for the Defendants. The Court finds that this information regarding the status and strategy for this pending lawsuit, derived solely from internal or external counsel for the Defendants, is privileged communication. As such, the Court grants the Defendants' Motion for Protective Order regarding inquiries into reports provided at the meetings of

executive management providing the information from counsel on the status and strategy of this case.

#### MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff filed a Motion seeking partial summary judgment as to Mr. Maybank's claim for breach of contract against Branch Bank & Trust Company ("BB&T"). Based upon the evidence and argument provided to and considered by the Court, and viewing the facts and inferences in the light most favorable to the non-moving party, the Court denies Plaintiff's Motion for Partial Summary Judgment at this stage, but reserves the right to revisit this issue at a later time. The Court further rules that Defendants' motion pursuant to Rule 56(f) is moot.

#### MOTIONS ON CONFIDENTIALITY ORDER

The parties filed three motions related to the Confidentiality Order and confidentiality designations made by Defendant. During the hearing, the Court and the parties discussed a compromise resolution of the Plaintiff's motion to amend the confidentiality order and reached a consensus. Accordingly, the Court instructed the parties to work together to prepare an amended confidentiality order.

Defendant has filed a motion to confirm confidentiality designations. The Plaintiff argued that there has been a waiver of the confidentiality designations with respect to several thousand pages of documents, some of which contain the personal identifying information and financial information of third-party customers of Defendants. The Court concludes that there has been no waiver of confidentiality with respect to the documents at issue. Accordingly, the Court grants Defendants' motion in part finding that there has been no waiver. Plaintiff is permitted to challenge the confidentiality designations in the future if he so chooses. The Court was made aware that Plaintiff submitted correspondence to Defendants raising confidentiality issues with

respect to a list of several thousand of Defendants' documents, and the Court instructed Defendants to respond to that correspondence within fourteen (14) days of the date of the hearing.

Defendants also filed a motion for relief from the obligation to submit an attorney certification with respect to their confidentiality designations relating to their production of emails and other electronically stored information. Over 18,000 pages of ESI documents are at issue. Defendants assert that it would be burdensome and unnecessary to have to provide an attorney certification to so many documents when they have a good faith belief that a very high percentage is deserving of confidential status. The Court grants Defendants' motion and rules that, with respect to the ESI document production at issue, Defendants need not provide the attorney certification normally required under the Confidentiality Order. The Court instructs, however, that the parties should continue to adhere to the requirement of an attorney certification with respect to all future document productions where documents have been designated as confidential.

#### CONCLUSION

For the reasons explained above, the Court rules as follows on the motions considered during the April 24, 2014 hearing:

- (1) The parties' respective motions to amend their pleadings are **GRANTED**.
- (2) The Defendants' motion for protective order relating to the deposition of Jim Willis is **GRANTED**.
- (3) The Plaintiff's motion for partial summary judgment is **DENIED**.
- (4) The Defendants' motion pursuant to Rule 56(f) is **DENIED** as moot.

- (5) The Plaintiff's motion to amend the confidentiality order is moot as the parties have complied with the Court's instructions and are submitting a revised consent confidentiality order to the Court.
- (6) The Defendants' motion to confirm confidentiality designations is **DENIED** in part and **GRANTED** in part so that there has been no waiver of any confidentiality designations, but allowing Plaintiff to later challenge confidentiality designations and requiring timely responses to the specific challenges presented.
- (7) The Defendants' motion for relief from the requirement of an attorney certification of confidentiality designations with respect to their ESI document production is **GRANTED** in part.

**AND IT IS SO ORDERED.**

  
The Honorable Edward W. Miller  
Circuit Court Judge, Thirteenth Judicial Circuit

Greenville, South Carolina

5/28, 2014

# **Exhibit U**

6/6/14 Order

1505

FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE  
IN THE COURT OF COMMON PLEAS

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENS

JUDGMENT IN A CIVIL CASE  
CASE NUMBER **2011CP2308578**

Francis P. Maybank

2014 JUN 6 PM 4 18

BB&T Corporation  
Branch Banking And  
Trust Company of SC  
BB&T Asset  
Management LLC  
Anthony Mahfood

Branch Banking and  
Trust Company  
Sterling Capital  
Management LLC  
Ross Walters

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant  
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);  
☐ Rule 43(k), SCRCP (Settled); ☐ Other: \_\_\_\_\_
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: \_\_\_\_\_
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court:

1. Defendant's First Motion for Summary Judgment as to Securities Act Claims is hereby **DENIED**.
2. Defendant's Second Motion for Summary Judgment as to Request for Consequential and Punitive Damages is hereby **DENIED**.
3. Defendant's Third Motion for Summary Judgment as to Insurance Related Damages by Francis Maybank and all Claims asserted by Jane H.P. Maybank for the Francis P. Maybank Family Trust is hereby **DENIED**.
4. Defendant's Fourth Motion for Summary Judgment as to tax damages is hereby **GRANTED**.
5. Defendant's Fifth Motion for Summary Judgment as to Managed Portfolio Damages is hereby **DENIED**.
6. Defendant's Sixth Motion for Summary Judgment and Motion to Dismiss Related to BB&T Corporation is hereby **DENIED**.
7. Defendant's Seventh Motion for Summary Judgment as to Unfair Trade Practices Act Claims is hereby **DENIED**.
8. Defendant's Eighth Motion for Summary Judgment as to Breach of Contract Accompanied by a Fraudulent Act is hereby **DENIED**.

9. Defendant's Motion to Amend Scheduling Order is hereby **DENIED**.  
10. Plaintiff's Motion for Summary Judgment is hereby **DENIED**.

### ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

| INFORMATION FOR THE PUBLIC INDEX                                                                                                                                                                             |                                          |                                                          |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------|----------------------------------------------------------|
| Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below. |                                          |                                                          |
| Judgment in Favor of<br>(List name(s) below)                                                                                                                                                                 | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|                                                                                                                                                                                                              |                                          |                                                          |
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If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

ED. / W. Miller  
Circuit Court Judge

2130

Judge Code

6/6/14  
Date

### For Clerk of Court Office Use Only

This judgment was entered on 6/6/14, and a copy mailed first class or placed in the appropriate attorney's box on 6/6/14, to attorneys of record or to parties (when appearing pro se) as follows:

Mitchell Willoughby PO Box 8416 Columbia, SC 29202-8416

Bruce Wyche Bannister Bannister & Wyatt, LLC P.O. Box 10007 Greenville, SC 29603

D. Lawrence Kristinik III PO Box 11070 Columbia, SC 29211

William Stevens Brown V Nelson Mullins Riley & Scarborough LLP P.O. Box 10084 Greenville, SC 29603-0084

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

# **Exhibit V**

8/20/13 Order

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
GREENVILLE DIVISION**

|                                         |   |                                    |
|-----------------------------------------|---|------------------------------------|
| Francis P. Maybank,                     | ) |                                    |
|                                         | ) | Civil Action No. 6:12-cv-00214-JMC |
| Plaintiff,                              | ) |                                    |
|                                         | ) | <b>OPINION AND ORDER</b>           |
| v.                                      | ) |                                    |
|                                         | ) |                                    |
| BB&T Corporation, Branch Banking and    | ) |                                    |
| Trust Company, Successor in merger to   | ) |                                    |
| Branch Banking and Trust Company of SC, | ) |                                    |
| Sterling Capital Management, LLC,       | ) |                                    |
| Successor in merger to BB&T Asset       | ) |                                    |
| Management LLC, Ross Walters, and       | ) |                                    |
| Anthony Mahfood,                        | ) |                                    |
|                                         | ) |                                    |
| Defendants.                             | ) |                                    |
|                                         | ) |                                    |

---

This matter is before the court on Plaintiff Francis P. Maybank's ("Maybank") Motion to Alter or Amend Order Denying Motion for Costs and Expenses (Attorney's Fees) ("the Motion") [Dkt. No. 48]. For the reasons discussed below, the court denies the Motion.

**PROCEDURAL BACKGROUND**

Maybank brought this action against Defendants BB&T Corporation, Branch Banking and Trust Company, and Sterling Capital Management, LLC (collectively, "BB&T"), Ross Walters ("Walters"), and Anthony Mahfood ("Mahfood," and together with BB&T and Walters, ("Defendants")), alleging several causes of action arising from Defendants' provision of financial investment advice to Maybank. Maybank alleges that he lost a substantial amount of money in several investments he made as a result of following two strategic investment plans created by Walters and Mahfood, who were employees of BB&T in its Wealth Advisors Division.

Maybank initially filed suit against Defendants in state court. Defendants removed the case to federal court, pursuant to the court's diversity jurisdiction, alleging that Maybank had fraudulently joined Mahfood and Walters in the action below in order to preemptively defeat diversity. This court granted Maybank's Motion to Remand [Dkt. No. 15] the action to state court but denied his request for fees associated with the removal action. *Maybank v. BB&T Corp., Branch Banking & Trust Co.*, Civil Action No: 6:12-cv-00214-JMC, 2012 WL 3157006 (D.S.C. Aug. 3, 2012).

Maybank timely filed the instant Motion, asserting that the court applied the incorrect standard in concluding that removal of this action was objectively reasonable such that attorney's fees were not warranted. Maybank further argues that failing to award attorney's fees created a manifest injustice since Maybank was forced to endure the costs and delay associated with litigating an improper removal. Defendants filed their Response in Opposition [Dkt. No. 49] to the motion and Maybank filed a Reply [Dkt. No. 50]. On March 27, 2013, Maybank submitted<sup>1</sup> a Supplement [Dkt. No. 55] to his Motion asserting that newly discovered evidence, not available to him at the time of this court's prior ruling, refutes Defendants' fraudulent joinder arguments. On April 23, 2013, the court held a hearing in which both parties argued their positions regarding the instant Motion and the new evidence contained in the Supplement.

### STANDARD

A court may alter or amend its judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure if the movant shows: (1) an intervening change in the controlling law; (2) new evidence that was not available at the time of the ruling; or (3) that there has been a clear error of

---

<sup>1</sup> The Supplement was originally submitted to the parties and the court via email because Maybank believed the deposition testimony attached to the Supplement included information Defendants wished to keep confidential. The court subsequently directed Maybank to file his Supplement with the confidential sections redacted.

law or a manifest injustice. *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 407 (4th Cir. 2010). Maybank's Motion to Alter or Amend [Dkt. No. 48] alleges that the court made a clear error of law and that Maybank has suffered a manifest injustice. Maybank's later-filed Supplement [Dkt. No. 55] puts forth new evidence that he alleges was not available at the time of the court's ruling on his motion.

## DISCUSSION

### **Clear Error of Law**

Maybank asserts that the court's decision not to award attorney's fees constitutes a clear error of law and has resulted in a manifest injustice.

"An order remanding a case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). A court "may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005) (citation omitted). The United States Supreme Court has held:

[t]he appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied.

*Id.* at 140. Whether or not to award attorney's fees under this section is left to the sound discretion of the court. *Id.* at 136.

Here, Defendants removed the case on the basis of diversity, arguing that Maybank fraudulently joined Defendants Walters and Mahfood in an effort to defeat the complete diversity that existed between Maybank and the other foreign BB&T entities in this case. "To show

fraudulent joinder, the removing party must demonstrate either ‘outright fraud in the plaintiff’s pleading of jurisdictional facts’ or that ‘there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.’” *Hartley v. CSX Transp., Inc.* 187 F.3d 422, 424 (4th Cir. 1999) (internal citations omitted).

In this case, Defendants asserted that Maybank could not establish the causes of action in his complaint against Walters and Mahfood. The court found that Defendants failed to meet the heavy burden of demonstrating that Maybank had “no possibility” of establishing a claim against Walters and Mahfood in state court. Specifically, the court found that courts in other jurisdictions have recognized a fiduciary duty owed by an investment advisor to the client. The court also stated that it was not unreasonable to presume that South Carolina courts could extend to individual financial advisors the holding in *Burwell v. S.C. Nat’l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986), in which the South Carolina Supreme Court found that a financial institution owes a fiduciary duty to its customer if it goes beyond the provision of transactional services and engages in an advisory role. The court also distinguished Defendants’ case law supporting the theory that Walters and Mahfood could not be personally liable for a breach of fiduciary duty because they were agents who owed a duty solely to their employer/principle, BB&T. Though the court found Defendants’ arguments insufficient for the purposes of succeeding on their fraudulent joinder claim, the court also found that those arguments were objectively reasonable such that denial of attorney’s fees was appropriate.

The court similarly found flaws in Defendants’ assertions that no claim against Walters and Mahfood was possible under sections 35-1-509(b) and 509(f) of the South Carolina Securities Act, S.C. Code Ann. § 35-1-509 (Supp. 2010). The court rejected Defendants’ narrow reading of the statutes, noting that South Carolina courts had not sufficiently defined the relevant

terms upon which some of Defendants' arguments were based. The court ultimately rejected Defendants' assertion that Walters and Mahfood were exempt from liability under 509(f)'s "broker-dealer" exception<sup>2</sup> because it could not conclude from the record before it whether or not the exception was applicable. Therefore, the court found remand appropriate, but declined to find Defendants' arguments objectively unreasonable.

Maybank argues clear legal error in the court's determination not to award attorney's fees to him, pointing to the following passage of the court's Order: "Many of the claims made by Maybank and the arguments made by Defendants have not been addressed by South Carolina courts. Accordingly, Defendants had an objectively reasonable basis for removing the case to federal court." *Maybank*, 2012 WL 3157006, at \*7. Maybank argues that "the very existence of any novel claims in the plaintiff's complaint" not only precludes a finding of fraudulent joinder, but also "precludes any objectively reasonable removal based on fraudulent joinder." Plaintiff's Reply in Support of Motion to Alter or Amend [Dkt. No. 50 at 4]. Maybank's theory is based on the Fourth Circuit's decision in *Hartley v. CSX Transp., Inc.*, in which the court held that a "truly 'novel' issue . . . cannot be the basis for finding fraudulent joinder." 187 F.3d at 425. The very fact that courts may differ in their resolutions of [an issue] shows there is a possibility of recovery." *Id.* In other words, if a plaintiff joins a defendant under a novel issue of law, a court cannot find fraudulent joinder because the matter has not been judicially determined, thus recovery is possible. "[T]here need be only a slight possibility of a right to relief" on the

---

<sup>2</sup> Section 509(f)(2) excludes from liability under 509(f) "a broker-dealer or its agents if the investment advice regarding securities that is provided is solely incidental to transacting business as a broker-dealer and no special consideration is received for the investment advice regarding securities." S.C. Code Ann. § 509(f)(2) (Supp. 2010). The statute defines a broker-dealer as "a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account," but expressly excludes a bank or financial institution engaged in specific activities described in the Federal Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(4) and (5). See S.C. Code Ann. § 35-1-102(4) (Supp. 2010).

plaintiff's underlying claims for a court to remand the case. *Id.* at 426. "Once the court identifies this glimmer of hope for the plaintiff, the jurisdictional inquiry ends." *Id.* Maybank argues that, because his claims raise novel issues that have not been addressed by South Carolina courts, Defendants' removal was necessarily doomed to fail under *Hartley*, and therefore could not be objectively reasonable for the purposes of § 1447(c).

The court finds that Maybank interprets *Hartley* too broadly. First, *Hartley* does not address the issue of attorney's fees under § 1447(c). Moreover, this interpretation conflates the standard for deciding the validity of a fraudulent joinder claim – whether a plaintiff has any possibility of recovery – with the standard for determining the propriety of attorney's fees – whether a defendant had an objectively reasonable basis for seeking removal. The ultimate success of Defendants' fraudulent joinder claim does not dictate the court's decision to award Maybank attorney's fees; the language of § 1447(c) explicitly leaves the decision to award attorney's fees to the sound discretion of the court. *See Martin*, 546 U.S. at 136 ("The word 'may' clearly connotes discretion. The automatic awarding of attorney's fees to the prevailing party would pretermitt the exercise of that discretion.") (internal quotations omitted). Instead, the relevant inquiry is whether the arguments Defendants made in support of their removal motion were reasonable, coherent and supported by legal authority. *See New Jerusalem Rebirth & Restoration Ministries, Inc. v. Meyer*, Civil No. 1:11cv312, 2012 WL 2704251, at \*5-6 (W.D.N.C. July 6, 2012) (ordering remand but declining to award attorney's fees because Defendants' fraudulent joinder arguments, which included an untested application of a state statute, were nevertheless supported by reasonable legal authority and were thus objectively reasonable); *Kerr v. Branch Banking and Trust Co.*, Civil Action No. 2:10-cv-0104-MBS

(D.S.C. August 16, 2010)<sup>3</sup> (ordering remand and awarding attorney's fees where the court found that Defendants' fraudulent joinder argument, which relied on a novel issue of state law, "lacked adequate support from case law and South Carolina statutes" and therefore lacked an objectively reasonable basis for seeking removal) [Dkt. No. 34-1, at 14-16].

Here, Defendants' arguments, though not ultimately persuasive on the issue of fraudulent joinder, were supported by reasonably analogous case law and a reasonable reading of the relevant statutes. While Maybank's claim raised a novel issue regarding whether an investment advisor owed a fiduciary duty to his clients, Defendants' position relied on established South Carolina legal authority. Defendants' denial of liability under the Securities Act relied on a statutory exception, which the court found may have exempted Walters and Mahfood from liability if BB&T qualified as a broker-dealer. Further, Defendants argue convincingly that to impose Maybank's interpretation of *Hartley* would require a removing party to have a factually on-point case in every instance to support its removal action. Such a requirement, Defendants assert, would chill a party's statutorily-granted right to seek relief in a federal forum.

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<sup>3</sup> In his Motion for Costs and Expenses (Attorney's Fees) [Dkt. No. 34], Maybank asserted that the *Kerr* decision involved virtually identical fraudulent joinder arguments and that the court's decision in that case should have put Defendants on notice that their fraudulent joinder arguments were not objectively reasonable in this case. However, as Defendants point out, the issue in *Kerr* turned on the court's finding that a BB&T employee could be liable for negligent misrepresentation, an issue not before the court here. In deciding to award attorney's fees, the court found Defendants' argument that the BB&T employee could not be liable for negligent misrepresentation as a result of a South Carolina statute, which had no precedential decisions interpreting it, presented a novel issue of state law and thus required remand. The court further stated that it had located South Carolina precedent that could establish that the individual defendant in that case owed the plaintiff a duty of care. Ultimately, the court in *Kerr* decided to award fees on the ground that "Defendants' basis for their fraudulent joinder argument lacked adequate support from the case law and South Carolina statutes" [Dkt. No. 34-1 at 15] and not because the presence of novel issues required an award of fees. The instant case is distinguishable from *Kerr* because the court did not locate clear South Carolina precedent holding that investment advisors like Walters and Mahfood owed a fiduciary duty of care to a client.

Additionally, Defendants contend that the underlying issue of whether Walters and Mahfood owe a fiduciary duty to Maybank is not novel given their reading of established principles of agency law in South Carolina, under which an agent cannot serve two masters. Furthermore, Defendants made a reasonable argument that even if South Carolina recognized a fiduciary relationship between an investment advisor and its client, such a duty would conflict in this case given the duty Walters and Mahfood owed to BB&T as employees/agents. Though the court determined that the case law cited by Defendants was distinguishable because the cases cited examined real estate and insurance agents rather than investment advisors, the court also determined that Defendants' arguments were objectively reasonable.

Ultimately, the court applied the Supreme Court's reasoning set out in *Martin v. Franklin Capital Corp.*, which states that the objectively reasonable analysis under § 1447(c) should "recognize Congress' desire to deter removals intended to prolong litigation and impose costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied." 546 U.S. at 133. The court found Defendants' arguments were objectively reasonable under that standard. For the reasons stated above, the court does not find that its decision not to award attorney's fees was based on a clear error of law.

### **Manifest Injustice**

Maybank claims that the court's failure to award attorney's fees creates a manifest injustice because the litigation surrounding remand delayed the resolution of this case by more than eight months and because it has resulted in an additional \$65,000.00 in attorney's fees to litigate both the remand and the attorney's fees motions. The court is not convinced, nor has Maybank provided any legal authority supporting the proposition, that a manifest injustice

necessarily results when a party expends funds to litigate an issue of removal, even if it is successful on a motion to remand. Both parties have expended funds in litigating this issue, and such costs are a natural consequence of litigation.

Maybank also contends, citing *Kerr*, that Defendants' removal in this case is part of a pattern of abusive tactics and procedural gamesmanship. The court is not convinced. First, Maybank argues that if Defendants had researched the issues in this case, they would have known that there were novel issues of law upon which it could not have reasonably believed it would succeed. As discussed above, Defendants did not view the issues as novel and this court found that Defendants' reliance on the analogous case law cited and their interpretation of the applicable statutes were objectively reasonable.

Maybank's comparison of this case to the *Kerr* case, in which BB&T unsuccessfully removed a case based on allegations of fraudulent joinder and in which the plaintiff was awarded fees, is unpersuasive because as discussed above, *supra* note 3, *Kerr* and this case are factually distinguishable. Therefore, Maybank's claim that Defendants should have known their fraudulent joinder claim would fail is not compelling. Further, the presence of one procedurally similar case does not necessarily establish a pattern of abusive behavior. For these reasons, the court does not find manifest injustice in its decision not to award attorney's fees to Maybank.

#### **New Evidence**

To prevail on a Rule 59(e) motion to alter or amend the judgment on the basis of newly discovered evidence, a party must demonstrate that

(1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.

*Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989). In this case, the issue is whether the new evidence demonstrates that Defendants had reason to believe that their removal of this case to this court was not legally proper such that the court should amend its original order and award attorney's fees to Maybank.

Maybank submits new evidence in the form of documents and deposition testimony. Specifically, Maybank submits a letter he received from BB&T Wealth Advisors Sales and Service Manager Ralph Borello on November 28, 2012, along with a refund check in the amount of \$79,682.19 for two separate fees charged in 2006 and 2009 by a BB&T subsidiary called BB&T Asset Management, Inc. *See* Refund Letter [Dkt. No. 55-1]. Upon seeking clarification from Defendants' counsel regarding the nature of the refund, Maybank learned that the fees were "associated with the variable prepaid forward contracts" ("VPFC") that Maybank had purchased, which are some of the investment vehicles at issue in this case. *See* Emails Between Counsel [Dkt. No. 55-2]. Maybank subsequently deposed Borello to provide additional context regarding the decision to issue refunds.<sup>4</sup> *See* Borello Deposition [Dkt. No. 55-3]. Borello testified that BB&T was not required to make the refund but did so because it more accurately reflected the company's current billing practices. Borello's testimony also described the employee compensation scheme used in BB&T's Wealth Advisors Division as one in which customers' investments generate funds for BB&T and that such funds are placed into wealth generating accounts from which members of the Wealth Advisors Division are compensated. All of this information<sup>5</sup> leads Maybank to contend that Walters and Mahfood, as employees of BB&T's

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<sup>4</sup> Borello was not employed by BB&T at the time of the relevant events in this case.

<sup>5</sup> In his Supplement, Maybank also included a letter from BB&T's general counsel responding to Maybank's request for a pre-litigation settlement conference. *See* General Counsel Letter [Dkt.

Wealth Advisors Division, received at least an indirect benefit for the investment advice Maybank received, thereby making Defendants' denial of liability under section 35-1-509(f) of the South Carolina Securities Act untenable.

Section 35-1-509(f) provides:

[a] person that receives directly or indirectly any consideration *for providing investment advice* regarding securities to another person and that employs a device, scheme, or artifice to defraud the other person or engages in an act, practice, or course of business that operates or would operate as a fraud or deceit on the other person, is liable to the other person.

S.C. Code Ann. § 35-1-509(f) (Supp. 2010) (emphasis added).

Defendants' argument supporting their fraudulent joinder claim has consistently been that Walters and Mahfood could not be liable under 509(f) because they did not personally give investment advice to Maybank and therefore were not persons who received "consideration for providing investment advice" as required by the statute. S.C. Code Ann. § 35-1-509(f) (Supp. 2010). First, Defendants note that Maybank's original complaint, filed on December 22, 2011, on which the Notice of Removal was based, failed to allege a specific violation of section 35-1-509 and failed to plead that Walters and Mahfood received consideration for investment advice given. Defendants interpreted the complaint to allege a violation of 509(f) but asserted that no

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No. 55-4]. This letter is not newly discovered evidence as Maybank received this letter on October 25, 2010, before the court's previous order. The letter asserted that Maybank had no colorable claim against BB&T and further stated that BB&T found "no basis whatsoever for any liability to Mr. Maybank." *Id.* Maybank offers this letter as additional evidence that BB&T charged fees for investment advice related to the investment vehicles at issue in this case while Defendants pursued their removal action on the grounds that Walters and Mahfood gave no advice and received no compensation for any such advice. While the letter stands in stark contrast to the newly provided letter stating that BB&T had incorrectly charged fees, the letter does not address whether Walters and Mahfood gave advice, which is the relevant issue here.

such violation was possible under the statute since neither Walters nor Mahfood gave investment advice or received compensation for it.<sup>6</sup>

Defendants' position regarding Maybank's South Carolina Securities Act claim was based on the Affidavit of Ross Walters [Dkt. No. 1-1], which was attached to their Notice of Removal [Dkt. No. 1].<sup>7</sup> In that affidavit, Walters denies that he or Mahfood ever gave investment advice or personally received directly or indirectly any compensation or consideration for providing any investment advice [Dkt. No. 1-1]. Walters also asserts that Mahfood, as the relationship manager, merely facilitated the introduction of Maybank to Nate Deal, an employee of BB&T Asset Management in Raleigh, North Carolina, who discussed the VPFCs with Maybank. *Id.* In a second Affidavit of Ross Walters [Dkt. No. 38-1] attached to Defendants' Response in Opposition to Plaintiff's Motion for Attorney's Fees [Dkt. No. 38], Walters further clarifies that neither he nor Mahfood served as an investment advisor or provided

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<sup>6</sup> Maybank amended his complaint on February 22, 2012, and specifically alleged that "Defendants, including Walters and Mahfood, were compensated either directly or indirectly for investment advice and services provided." Amended Complaint [Dkt. No. 16]. Because courts generally analyze the propriety of removal based on the original complaint rather than amended complaints, *see Pinney v. Nokia, Inc.*, 402 F.3d 430, 443 (4th Cir. 2005), the court also analyzes whether Defendants' fraudulent joinder allegation was objectively reasonable based on the original complaint.

<sup>7</sup> Defendants cite *Griggs v. State Farm Lloyds*, 181 F.3d 694 (5th Cir. 1999) for the proposition that the court may consider Walters' affidavits and other summary judgment-type evidence when reviewing a fraudulent joinder claim. In analyzing a party's fraudulent joinder claim, the court is also obliged to resolve "any contested issues of material fact, and any ambiguity or uncertainty in the controlling state law, in [the plaintiff's] favor." *Id.* at 699. Having resolved the fraudulent joinder issue in Maybank's favor, the court is now interested in whether Defendants had a legitimate belief that their removal action was objectively reasonable. The deposition testimony from Walters denying that neither he nor Mahfood personally gave investment advice to Maybank supports Defendants' contention that neither man could be liable under section 509(f). The court need not resolve the issue of whether Walters or Mahfood gave such advice, but need only consider whether such testimony supports Defendants' claim that they had a legitimate belief that their arguments in support of removal were objectively reasonable.

investment advice to Maybank at any time, but merely introduced Maybank and coordinated meetings with other professionals working in various BB&T entities. Affidavit of Ross Walters [Dkt. No. 38-1, at 1]. Walters asserts that the Policies and Procedures of the Wealth Advisor's Division of which he and Mahfood were apart prohibit wealth advisors from offering investment advice, opening brokerage accounts, reviewing or approving any client brokerage accounts, executing transactions for the purpose or sale of any security or inducing or attempting to induce the purchase or sale of any specific security. Affidavit of Ross Walters [Dkt. No. 38-1, at 2].<sup>8</sup>

Maybank contests this assertion via an affidavit attached to Maybank's Reply to Defendants' Response to the Motion for Attorney's Fees [Dkt. No. 40]. He asserts that Walters and Mahfood were his "fiduciaries, as they sought to perform and either actually performed or supervised the performance of wealth management planning as well as the execution of discretionary financial services on my behalf." *See* Affidavit of Francis P. Maybank [Dkt. No. 40-5].<sup>9</sup>

The new evidence does not, as Maybank claims, rebut the deposition testimony given by Walters denying that either he or Mahfood personally gave investment advice to Maybank. At most, it demonstrates that funds generated by Maybank's investments funded accounts from

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<sup>8</sup> Walters asserts that these policies have not been materially changed with regard to these prohibitions since 2006. Borello's testimony confirms that the policy existing since October 2010 when he became employed by BB&T is that wealth advisors make no investment recommendations, are not brokers and cannot execute transactions.

<sup>9</sup> Maybank's attorney also asserts that he told counsel for Defendants, several days prior to the removal action being filed, that upon information and belief Walters and Mahfood were proper Defendants because Maybank believed them to be his fiduciaries who had developed and implemented the investment and wealth management strategies for Maybank's assets. *See* Willoughby Affidavit [Dkt. No. 34-2].

which BB&T Wealth Advisors were compensated.<sup>10</sup> However, a person is liable under 509(f) if that person receives consideration for providing investment advice. The new evidence does not establish that Walters and Mahfood gave investment advice. Had Maybank's new evidence demonstrated that Walters and Mahfood in fact gave investment advice, such evidence would have shown Defendants' arguments in support of removal to be based on a falsehood, which would have necessarily rendered their fraudulent joinder argument objectively unreasonable. Because the new evidence does not establish that Walters and Mahfood gave investment advice to Maybank, the court is not required to alter its prior decision not to award attorney's fees to Maybank.

In analyzing the propriety of Defendants' fraudulent joinder claim, the court also recognized that, if Walters and Mahfood could be liable under 509(f), they might also be exempt from liability under the "broker-dealer" exception in section 509(f)(2).<sup>11</sup> See S.C. Code Ann. § 509(f)(2) (Supp. 2010); see also *supra* note 2. Ultimately, because the record was insufficient to demonstrate that the BB&T entity employing Walters and Mahfood was a broker-dealer as

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<sup>10</sup> The notion that this method of employee compensation might constitute direct or indirect consideration for the purposes of establishing liability under 509(f) was previously before the court in Maybank's memorandum supporting his Motion for Remand [Dkt. No. 15, at 22-23]. In considering this argument and evaluating the law and the facts in the light most favorable to Maybank, the court presumed that Maybank could show that Walters and Mahfood gave investment advice and received some consideration for that advice as a result of the method of employee compensation used by BB&T's Wealth Advisors Division. Specifically, the court found that, because direct or indirect consideration is not defined in the statute, a South Carolina state court could find that salaries and commissions paid by BB&T to Walters and Mahfood could constitute such indirect consideration for purposes of 509(f). Accordingly, if a state court could find that such compensation did give rise to liability and that Walters and Mahfood gave investment advice, this court was unable to conclude that there was no possibility of liability, and therefore found remand necessary.

<sup>11</sup> The court stated: "If the broker dealer exception is not applicable here, Defendants have not demonstrated that no colorable claim exists against Walters and Mahfood for violations of Section 509(f)." *Maybank*, 2012 WL 3157006, at \*6.

defined by the statute, *see supra* note 2, the court could not definitively rule that the exception would apply such that Maybank would have no possibility of recovery under the statute. This finding necessitated remand. Nevertheless, Defendants' argument that Walters and Mahfood were exempt from liability under 509(f)(2) was a legitimate argument and one the court found to be objectively reasonable in support of Defendants' removal action.

Finally, Maybank also believes that the refund BB&T issued to customers of its Wealth Advisors Division constitutes further evidence of what he alleges to be Defendants' procedural gamesmanship and demonstrates that Defendants continued to pursue their removal action despite having knowledge that inappropriate fees were charged for services related to Maybank's purchase of VPFCs. Maybank asserts this is additional evidence that Defendants' removal action was intended solely to prolong the litigation and impose additional costs on Maybank.

Maybank assumes that BB&T's investigation, through which the improper fees were discovered, and the decision to issue the refunds was prompted by his lawsuit. However, the evidence included in Maybank's supplement regarding the decision to issue the refunds comes from Borello's testimony and the letter accompanying the refund check, both of which state that the decision to refund the fees was based on BB&T's current billing practices and that the refund was entirely voluntary, i.e. not something for which BB&T was legally liable. Therefore, the new evidence does not conclusively establish a connection between the refunds and Maybank's lawsuit. Even if it did, such a connection does not undermine Defendants' fraudulent joinder arguments since the relevant issue for removal with regard to liability under 509(f) is whether claims could be made specifically against Walters and Mahfood for giving investment advice, not whether fees were charged for advice given by other BB&T employees.

Thus, the court finds that Maybank's pleadings and his purported new evidence are insufficient to establish that Defendants lacked an objectively reasonable basis for seeking removal. Further, the new evidence does not establish that Defendants engaged in abusive tactics designed to prolong litigation that could warrant an award of attorney's fees to Maybank. Therefore, the new evidence does not require the court to amend its prior judgment denying attorney's fees to Maybank.

### **CONCLUSION**

For the reasons stated above, the court **DENIES** Plaintiff Francis P. Maybank's Motion to Alter or Amend Order Denying Motion for Costs and Expenses (Attorney's Fees) [Dkt. No. 48].

**IT IS SO ORDERED.**

August 20, 2013  
Greenville, South Carolina

  
United States District Judge

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-8578

**RECEIVED**  
FEB 02 2015  
**SC Court of Appeals**

Francis P. Maybank and Jane H.P. Maybank,  
as trustee for the Francis P. Maybank Family  
Insurance Trust, ..... Plaintiffs,

Of whom Francis P. Maybank is the,..... Respondent/Appellant,

v.

BB&T Corporation, Branch Banking and  
Trust Company, Successor in merger to  
Branch Banking and Trust Company of SC,  
and Sterling Capital Management, LLC,  
Successor in merger to BB&T Asset  
Management, LLC, ..... Appellants/Respondents.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants/Respondents, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy to the following address(es):

Pleadings: Appellants/Respondents Return to Motion for Certification

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February 2, 2015

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February 2, 2015

The Honorable Daniel E. Shearouse  
Clerk of Court  
South Carolina Supreme Court  
1231 Gervais Street  
Columbia, SC 29201

RE: Francis P. Maybank v. BB&T Corporation, et al.  
Civil Action No. 2011-CP-23-8578  
Appellate Case No. 2014-002638  
Our File No. 04490/01520

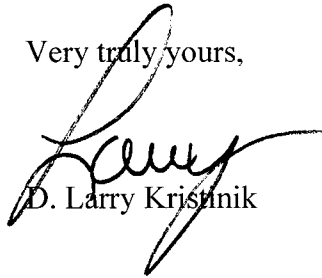
Dear Mr. Shearouse:

Enclosed please find the original and seven copies of Appellants/Respondents Return to Motion for Certification in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record we are serving them with a copy of this return.

With warm regards, I remain

Very truly yours,



D. Larry Kristinik

DLK:lpw  
Enclosures

cc: (all w/enc.)  
The Honorable Jenny Abbott Kitchings  
Mitchell Willoughby, Esquire  
Chad Johnston, Esquire  
Elizabeth Zeck, Esquire  
Bruce W. Bannister, Esquire

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FEB 02 2015  
**SC Court of Appeals**