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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2014-002638

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.

Initial Appellant's Brief of Respondent-Appellant Francis P. Maybank

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

Rules

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in failing to award Respondent-Appellant, Francis P. Maybank, statutory prejudgment interest on the jury's actual damages award by finding that the damages were not a sum certain, when Mr. Maybank's measure of recovery was at any time ascertainable by calculation and therefore capable of being reduced to certainty?

STATEMENT OF THE CASE

Respondent-Appellant Francis P. Maybank ("Mr. Maybank") commenced the action underlying this appeal on December 22, 2011, in the Court of Common Pleas for Greenville County against Appellants-Respondents BB&T Corporation, Branch Banking and Trust Company ("BB&T Bank"), and Sterling Capital Management, LLC ("Sterling" or "BB&T Asset Management"[1]) (collectively hereinafter referred to as "Appellants"). **(R. p.)** (Original Complaint). Appellants removed the action to the United States District Court for the District of South Carolina on January 23, 2012. **(R. p.)** (Notice of Removal). Upon Mr. Maybank's motion, the district court remanded the case to state court on August 3, 2012. **(R. p.)** (Order Remanding Case). On December 10, 2012, the parties jointly moved for assignment of the case to the South Carolina Business Court Pilot Program. **(R. p.)** (Joint Motion for Case Assignment to Business Court). On February 12, 2013, this Court ordered that the case be transferred to the jurisdiction of the Business Court Pilot Program for Greenville County and it was simultaneously assigned to the Honorable Edward W. Miller, presiding Business Court Judge. **(R. p.)** (Order Assigning Case to Business Court).

Extensive discovery and motions practice ensued.[2]

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[1] Sterling is the successor in merger to BB&T Asset Management and is a wholly-owned subsidiary of BB&T Corporation. **(R. p.)** (BB&T Answer to Second Amended Complaint). While Sterling is the legal entity that exists today, at the time of the conduct giving rise to this case, Mr. Maybank was dealing with BB&T Asset Management as one of his fiduciaries. In addition to the Appellants, two employees of BB&T Bank, Ross Walters and Anthony Mahfood, who were assigned by BB&T Bank as Mr. Maybank's Wealth Management Advisors, were originally named as parties defendant, but subsequently dismissed from the case. **(R. p.)** (Original Complaint).

[2] Thirty-two (32) depositions were taken of twenty-seven (27) witnesses (several witnesses testified both individually and as the Rule 30(b)(6) designee of one of the

The case was tried before a Greenville County jury beginning on June 16, 2014. **(R. p.)** (Order and Final Judgment). On June 30, 2014, the jury returned a verdict in favor of Mr. Maybank[3] and awarded actual damages against Appellants of $3,100,000 and punitive damages of $5,000,000 for the causes of action of breach of contract, breach of fiduciary duty, constructive fraud, negligent misrepresentation, and a violation of the South Carolina Unfair Trade Practices Act[4] ("UTPA"). **(R. p.)** (Jury Verdict; Order and Final Judgment).

Following the verdict, Mr. Maybank moved for an award of attorneys' fees and costs and to treble the jury's award of actual damages under the UTPA. **(R. p.)** (Maybank Post-Trial Motions; Order and Final Judgment). Mr. Maybank also moved for the entry of prejudgment interest by the trial court pursuant to S.C. Code Ann. § 34-31-20(A), which is the subject of the within cross-appeal. **(R. p.)** (Maybank Motion for Prejudgment Interest; Order and Final Judgment). Appellants moved in the alternative for judgment notwithstanding the verdict ("JNOV"), new trial absolute, or new trial *nisi remittitur*. **(R. p.)** (BB&T Post-Trial Motions; Order and Final Judgment). Appellants

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Appellants). Additionally, the parties collectively produced more than 60,000 pages of documents in paper and electronic form. **(R. p.)** (Affidavit of John P. Freeman). Appellants submitted ten (10) separate motions for summary judgment and seven (7) motions *in limine*. **(R. p.)** (BB&T Motions for Summ. Judg.; BB&T Motions *in limine*).

[3] The underlying action also sought damages for the loss of insurance policies which were held in trust ("Insurance Trust") and over which BB&T Bank served as fiduciary Trustee. **(R. p.)** (Second Amended Complaint). Mr. Maybank's daughter, Jane Maybank, is the current Trustee of the Insurance Trust and was a party-plaintiff in the case in that capacity. **(R. p.)** (*Id.*). The jury did not return a verdict in favor of the Insurance Trust. **(R. p.)** (Jury Verdict).

[4] S.C. Code Ann. §§ 39-5-10 *et seq.*

also moved for an order requiring Mr. Maybank to elect a remedy. **(R. p.)** (BB&T Motion for Election of Remedies; Order and Final Judgment).

In response to Mr. Maybank's post-trial motions, Appellants filed three additional motions[5] consisting of (1) a motion to compel the submission of additional information by Mr. Maybank related to his motion for attorneys' fees and costs under the UTPA, **(R. p.)** (BB&T Motion to Compel), (2) a motion to delay consideration of Mr. Maybank's motion for attorneys' fees and costs, **(R. p.)** (BB&T Motion to Delay), and (3) a motion to strike the affidavit of the expert witness submitted by Mr. Maybank in support of his motion for an award of attorneys' fees and costs. **(R. p.)** (BB&T Motion to Strike).

The trial court held a hearing on all of the post-trial motions on August 19, 2014, and took them under advisement. **(R. p.)** (Post-Trial Hearing Transcript). On November 10, 2014, the trial court issued the Order and Final Judgment now on appeal. **(R. p.)** (Order and Final Judgment). Therein, the trial court denied Appellants' motions for JNOV, new trial absolute, and new trial *nisi remittitur*;[6] it further set forth the results of its requisite analysis of the jury's punitive damages award of $5,000,000, which it found appropriate. *Id.* at 6-14. The trial court's Order and Final Judgment also confirmed the jury's verdict that a violation of the UTPA had occurred and was supported by the

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[5] The parties also filed respective responses in opposition to each of the post-trial motions, and Appellants filed an additional memorandum in support of their Motion for JNOV, new trial absolute, or new trial *nisi remittitur*. **(R. p.)** (Post-Trial Motions, Memoranda, and Responses).

[6] The Order and Final Judgment also denied Appellants' three additional post-trial motions to (1) compel the submission of additional information related to Mr. Maybank's motion for attorneys' fees and costs under the UTPA, **(R. p.)** (Order and Final Judgment), (2) delay consideration of Mr. Maybank's motion for attorneys' fees and costs, (*Id.*), and (3) strike the affidavit of Mr. Maybank's expert witness on the issue of an award of attorneys' fees and costs. (*Id.*).

evidence. *Id.* at 3-6. In so doing, the trial court found Appellants' conduct to be both willful and knowing and therefore granted Mr. Maybank's motion to treble the award of actual damages of $3,100,000 to $9,300,000. *Id.* at 19. The trial court also granted in part Mr. Maybank's motion for attorneys' fees and costs under the required lodestar analysis, reducing his request by twenty percent (20%) and awarding attorneys' fees of $2,654,295 and costs of $245,011 as being reasonable and appropriate. *Id.* at 22-31. Finally, the trial court denied Appellants' motion for election of remedies finding, based on the evidence presented at trial, that Appellants' conduct which supported the jury's verdict of a violation of the UTPA was separate and distinct from the conduct supporting the common law causes of action for which punitive damages were awarded. *Id.* at 19-22. With respect to the issue that is the subject of the within cross-appeal, the trial court denied Mr. Maybank's motion for entry of prejudgment interest. *Id.* at 31. The trial court's Order and Final Judgment entered judgment against Appellants in the amount of $17,199,306. *Id.* at 32.

On November 18, 2014, Appellants filed a motion pursuant to Rule 67, SCRCP, for leave to deposit the amount of the judgment plus interest accrued from the date of the trial court's Order and Final Judgment and thereby toll the running of post-judgment interest. **(R. p.)** (BB&T Motion for Leave to Deposit Amount of Judgment). While Mr. Maybank did not oppose Appellants' motion, he asserted to the trial court (and still contends) that post-judgment interest runs from the time of the verdict until such time as a deposit permitted by the trial court is made. **(R. p.)** (Order Granting Leave to Deposit Amount of Judgment). The trial court granted Appellants' motion to deposit the judgment

amount, with interest calculated only for the period of November 10 through November 20, 2014, consistent with Appellants' request.[7] *Id.*

On November 20, 2014, Appellants filed a Rule 59(e), SCRCP, motion to alter or amend the trial court's Order and Final Judgment. **(R. p.)** (BB&T Motion to Alter or Amend). Mr. Maybank responded on December 2, 2014. **(R. p.)** (Maybank Opposition to Motion to Alter or Amend). By way of a Form 4 Order entered December 4, 2014,[8] the trial court denied Appellants' motion to alter or amend. **(R. p.)** (Order Denying Motion to Alter or Amend).

On December 9, 2014, Appellants filed and served a notice of appeal in the Court of Appeals, challenging Orders of the trial court entered June 6, 2014, November 10, 2014, and December 4, 2014, respectively, as well as the jury verdict rendered on June 30, 2014. **(R. p.)** (Notice of Appeal). On December 16, 2014, Mr. Maybank filed and served a notice of cross-appeal in the Court of Appeals, challenging the single issue of the trial court's order denying his motion for prejudgment interest. **(R. p.)** (Notice of Cross-Appeal). The amount of prejudgment interest at issue in this cross-appeal is $1,060,475. *See* n.46, *infra.*

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[7] It is Mr. Maybank's contention that, under the plain language of S.C. Code Ann. § 15-37-30 and applicable case law, post-judgment interest runs from the date of the verdict, not the entry of a subsequent post-trial order and, by failing to fully comply with the requirement that the full amount of the judgment and accrued interest be deposited as a condition precedent to the cessation of the running of post-judgment interest, statutory post-judgment interest in the amount of 7.25% continues to accrue. **(R. p.)** (Order Granting Leave to Deposit Amount of Judgment at 2). The trial court noted Mr. Maybank's position and reserved judgment on the issue until such time as a motion for distribution of the funds deposited is made. *Id.*

[8] It appears the trial court actually signed the Form 4 Order on December 3, 2014. **(R. p.)** (Order Denying Motion to Alter or Amend).

On January 21, 2015, Mr. Maybank filed and served his motion for certification of this appeal from the Court of Appeals and supporting memorandum pursuant to Rule 204(b), SCACR. The Appellants filed and served a return on February 2, 2015, asserting that no basis for certification had been demonstrated by Mr. Maybank, but did not oppose certification of this appeal. On February 9, 2015, Mr. Maybank submitted his reply. On March 5, 2015, this Court granted Mr. Maybank's motion for certification.

STATEMENT OF FACTS

This case is a cautionary tale of egregious financial mismanagement by financial institutions that served as Mr. Maybank's fiduciary financial advisor and wealth manager. At its heart, this case demonstrates the marketing scheme and strategy used by Appellants to sell their fiduciary services to current and new clients of high net worth, later exploiting that trusted position by incentivizing their employees to sell complex, risky, and unsuitable investment strategies without providing those employees with the training and expertise necessary to ensure that their clients' best interests were paramount to those of the fiduciary financial institution. This appeal is the result of nearly three years of litigation brought to rectify Appellants' misconduct. **(R. p.)** (Original Complaint).

Today, BB&T Bank[9] is among the largest banks in the United States, although that was not always the case. BB&T Bank achieved its status as one of the largest banking operations primarily by engaging in systematic and continuous acquisitions and mergers of similar and smaller-sized financial institutions, which rapidly increased its asset base, physical locations, and number of employees in a short amount of time.[10] But

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[9] Appellant BB&T Corporation is the corporate parent and holding company of BB&T Bank. BB&T Bank is the largest asset of BB&T Corporation and comprises approximately ninety-eight percent (98%) of its assets. **(R. p.)** (Trans. p.1008-10).

[10] By 1994, BB&T Bank had become the largest bank in North Carolina with assets of over $10 billion and serving 138 cities in North and South Carolina. **(R. p.)** (Trans. p.174). Competition was fierce, however, and BB&T Bank soon lost its status as the top bank in North Carolina to the larger, nationally known Bank of America. *Id.* In 1995, with its regional position lost, BB&T Bank executed a merger with another large, North Carolina-based bank, Southern National Bank. **(R. p.)** (Pltf's Exh. 76, 2005 BB&T Annual Review; Trans. p.175). As its desire to grow larger and keep pace with rivals grew, BB&T Bank went on a buying spree, acquiring smaller banks in Virginia, Maryland, West Virginia and Georgia. *Id.* The buying spree continued into the 2000 to 2005 time frame as BB&T Bank expanded into Tennessee, Kentucky and Florida. *Id.* During the period of 1980 to 2005, BB&T Bank acquired 72 independent banking and

the expansion of BB&T Corporation's holdings was not limited to retail banking, however.

As it grew, BB&T Corporation sought to broaden the services that could be sold to customers[11] in order to compete with larger, full-service banks that offered clients brokerage and wealth management services. **(R. p.)** (Trans. p.175). Among its many acquisitions, in 1999, BB&T acquired the Scott & Stringfellow brokerage firm, which allowed BB&T Bank access to more sophisticated financial products to sell to its clients. *Id.*

As part of its growth initiative, and most pertinent to the instant appeal, in 2001 BB&T Bank also acquired Southeastern Trust Company ("Southeastern"), which was an independent trust company based in Greenville, South Carolina. Southeastern was an old-school, conservative, independent trust company. **(R. p.)** (Trans. p.175-76). At the time of the acquisition, BB&T stated that Southeastern was one of the most highly regarded

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thrift organizations, 77 insurance agencies, and 28 nonbank financial services companies. *Id.* From 1994 to 2005, a period of just over 10 years, BB&T Bank increased its assets by $100 billion to nearly $110 billion, an increase that saw BB&T Bank add the equivalent of its 1994 total assets to its bottom line each year for ten straight years. *Id.* By the end of 2005, BB&T Bank was operating more than 1,400 branches in 11 states and the District of Columbia with nearly 28,000 employees. *Id.*

[11] In 1999, the regulatory barrier to direct affiliations between banks and security brokerage companies was removed by the Federal Financial Services Modernization Act of 1999. *See* Gramm–Leach–Bliley Financial Modernization Act, PL 106–102, November 12, 1999, 113 Stat 1338 (1999) (H.R. Conf. Rep. No. 434, 106th Cong., 1st Sess. (1999)) (Title I, § 101, repealing Section 20 of the Banking Act of 1933 (12 U.S.C. 377) (commonly referred to as the "Glass–Steagall Act"), thereby permitting a Financial Holding Company to underwrite, deal and make a market in securities, or own a full-service securities broker-dealer). The new law permitted banking institutions to engage in a full range of financial and brokerage services and directly cross-sell products to their customers across affiliated entities.

fiduciary and asset management companies in the Southeast. **(R. p.)** (Trans. p.176). As part of the acquisition, BB&T hired all of Southeastern's employees, including its founder, Mr. Maybank. *Id.* Also as part of this acquisition, Mr. Maybank was required to sign a 5-year employment contract to work for BB&T Bank's Trust Department, promote BB&T's services to Southeastern's existing customers, and oversee their transition to BB&T Bank. *Id.* Rather than pay cash for Mr. Maybank's company, BB&T Bank exchanged Mr. Maybank's shares in Southeastern for 246,000 shares of BB&T stock, issued by the corporate parent, BB&T Corporation. *Id.* Mr. Maybank received no direct remuneration for his shares of Southeastern. *Id.* At the time of BB&T's acquisition of Southeastern, Mr. Maybank was nearly seventy (70) years old.[12]

Mr. Maybank's role with BB&T Bank during his 5-year employment contract was significantly different than his role throughout his career up to that point, including with Southeastern. No longer charged with managing assets as a trust officer, Mr. Maybank was instructed by BB&T Bank that his new role with the Bank would primarily be in client relations, that is, aiding with the transition of clients of Southeastern to the BB&T Bank system. **(R. p.)** (Trans. p.176-77, 294-96, 406). BB&T Bank assigned no clients to Mr. Maybank, he no longer managed money or client assets, and as a result, starting in 2001, Mr. Maybank no longer kept abreast of the financial markets and its trends. *Id.* In short, his skill to manage money deteriorated over time.

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[12] When BB&T Bank acquired Southeastern, it also undertook Southeastern's existing fiduciary obligations to its clients. **(R. p.)** (Trans. p.176). These included the obligation to act as the Corporate Trustee of the Insurance Trust, a trust created by Mr. Maybank in 1993 to provide for his children upon his death. *Id.* Thus in 2001 when BB&T Bank acquired Southeastern, it undertook the duties of being a fiduciary to Mr. Maybank and the Insurance Trust, the highest duty recognized by law. *Id.*

In the mid-2000's, the banking industry was in a state of flux and transition, and BB&T Bank was not immune from those changes. Interest rates declined, banking industry income from traditional sources, such as loans and depository accounts, was subject to instabilities. **(R. p.)** (Pltf's Exh. 76, 2005 BB&T Annual Review). Commercial banks like BB&T Bank began to look to other non-traditional banking sectors to generate income, primarily through the expansion of services into new, fee-generating products and investment-related services. **(R. p.)** (Pltf's Exh. 76, 2005 BB&T Annual Review; Trans. p.175). Like many commercial banks, BB&T Bank was looking to generate new income through the provision of "holistic" wealth management services to clients, creating new departments and offering new services that provided cross-selling opportunities across different divisions for new and existing bank customers. *Id.*

Following the trends and as part of its growth aspirations, in 2004, BB&T Bank created a brand new division to house these new and burgeoning services, the BB&T Wealth Management Division. **(R. p.)** (Pltf's Exh. 76, 2005 BB&T Annual Review; Trans. p.177). The BB&T Trust Department, the division of BB&T Bank into which Mr. Maybank and Southeastern were merged, was rebranded as the Wealth Management Division. Trust clients became Wealth Management clients. Also in 2004, BB&T Bank and BB&T Asset Management began to market "alternative investment strategies" to clients with high net worth and highly concentrated stock positions. **(R. p.)** (Pltf's Exh. 76, 2005 BB&T Annual Review; Trans. p.177-78). These alternative investment strategies were promoted internally through a division initiative as an ideal cross-selling opportunity and revenue generator for BB&T Bank and BB&T Asset Management. **(R. p.)** (Agreed Exh. 55, 2006 Mahfood Year-End Review; Agreed Exh. 56, 2009 Mahfood

Year-End Review; Review; Pltf's Exh. 76, 2005 BB&T Annual Review; Pltf's Exh. 106, 2006 Walters Year-End Review; Pltf's Exh. 107, Gibson Marketing E-mail); Trans. p.177-79). These alternative investments were risky and speculative, complex, extremely costly to the client/investor, and often involved derivative options such as puts, calls, and swaps, or some multi-option combination of several derivatives at a time. **(R. p.)** (Trans. p.876-941).

One such strategy, a complex option-based derivative product called a variable prepaid forward contract ("VPFC"), became BB&T Bank and BB&T Asset Management's preferred recommendation to clients with highly concentrated stock positions. **(R. p.)** (Trans. p.180, 194, 307, 313). From Appellants' perspective, VPFCs were perfect fee-generating vehicles: clients—or potential clients—with concentrated stock positions are sold a VPFC, from which Appellants would earn a one-time, transaction-based advisory fee for the advice and recommendation in selling the VPFC; then, with substantial cash proceeds generated by the VPFC in the form of a prepaid loan to the client (guaranteed by the underlying concentrated position of stock), Appellants funded an investment account which they managed, for which they charged additional annual management fees for their investment advice. **(R. p.).**

In the summer of 2006, having largely fulfilled his employment obligation to BB&T Bank, Mr. Maybank was nearly 74 years old and desired to retire after more than fifty years of full employment. **(R. p.)** (Trans. p.298). Because Mr. Maybank had served as a fiduciary to clients throughout most of his life and run a successful trust company that owed fiduciary duties to all of its clients, he knew the value, more than most, of a trusted advisor to individuals who need the safety and security of a financial advisor that

puts a client's best interest above its own, especially during the individual's retirement years—a time when individuals are the most financially vulnerable. **(R. p.)** (Trans. p.280-84).

During his years with BB&T, Mr. Maybank came to believe Appellants were responsible, capable, and knowledgeable, and would honor their fiduciary obligation to manage the assets under their control in the best interest of their clients. **(R. p.)** (Trans. p.298-99). Aware of Mr. Maybank's intentions to retire at the end of his 5-year employment contract in November 2006, Appellants sought the role of Mr. Maybank's fiduciary wealth management advisor. **(R. p.)** (Trans. p.305-07). BB&T Bank, in particular, sought to expand its role beyond that of trusted fiduciary and advisor to Mr. Maybank and the Insurance Trust, seeking instead to manage all of Mr. Maybank's substantial financial assets. BB&T Bank encouraged its clients generally, and Mr. Maybank specifically, to trust its approach to wealth management, including an adherence, so they said, to a corporate philosophy based on high moral obligations to its clients. **(R. p.)** (Trans. p.298-99; 305-07). BB&T Bank sold Mr. Maybank on the fact that, if he turned over his financial life to Appellants, which he ultimately did,[13] then Appellants would craft a comprehensive solution tailored to his individual needs and provide prudent and suitable management of his financial assets and generate income[14] sufficient to meet his current and future needs. *Id.* As an elderly person dependent upon

[13] Mr. Maybank also made BB&T Bank the personal representative of his estate upon his death. It is not an overstatement to say that Mr. Maybank placed his entire financial livelihood in the hands of his fiduciary, BB&T. **(R. p.)** (Trans. p.347-48).

[14] Following his retirement, Mr. Maybank's primary source of regular income would be earnings from his financial assets. **(R. p.)** (Trans. p.313-14, 344-45).

income from his investments to live in retirement, Mr. Maybank needed and wanted the safety and security of fiduciary management of his irreplaceable assets. **(R. p.)** (Trans. p.305-08).

At that time, Mr. Maybank particularly desired Appellants' advice concerning his concentrated position in BB&T stock, which constituted the bulk of his liquid financial assets, and which was then free from the sales restrictions imposed as part of the Southeastern sale. **(R. p.)** (Trans. p.426-27). In 2006, and throughout the time in which Mr. Maybank was employed by BB&T Bank, his 246,000 shares of BB&T stock from the sale of Southeastern were placed in a brokerage account of the BB&T affiliate, Scott & Stringfellow. The account and the BB&T Corporation shares therein were not being actively traded, (and thus Appellants were not earning brokerage fees from Mr. Maybank's accounts). **(R. p.)** (Trans. p.305-08). Because of his relationship with, and the high regard in which he held BB&T Bank, and relying upon its promise to provide trustworthy and prudent investment services, Mr. Maybank chose BB&T Bank to act as his trusted fiduciary in the management of his assets in retirement. *Id.* In accepting its role and duty as fiduciary, BB&T Bank agreed to provide Mr. Maybank with comprehensive investment advice and prudent, holistic management of his financial assets. *Id.*

To consummate the new fiduciary relationship between Mr. Maybank and Appellants, BB&T Bank initially required Mr. Maybank to execute a Concentrated Stock Risk Management Addendum[15] ("Addendum") on July 10, 2006. **(R. p.)** (Agreed Exh. 3,

[15] The document was styled and named an Addendum to the BB&T Wealth Management Agreement, although Mr. Maybank was not provided the full Wealth

Addendum; Trans. p.320-321). Appellants saw Mr. Maybank as an ideal candidate for its fee-generating alternative investment initiative. However, rather than providing conservative, individualized, and prudent financial advice in the client's best interest as promised, Appellants instead recommended and sold to Mr. Maybank an investment strategy designed around a VPFC, their preferred, one-size-fits-all recommendation to clients with highly concentrated positions of stock. Thus, from the outset, Mr. Maybank's interests were made secondary to Appellants' division initiative to generate income for themselves. **(R. p.)** (Agreed Exh. 55, 2006 Mahfood Year-End Review; Pltf's Exh. 106, 2006 Walters Year-End Review).

Mr. Maybank had no prior experience with or knowledge of VPFCs, but instead relied solely upon the advice of his fiduciaries. **(R. p.).** Although Mr. Maybank had been in the trust management services industry for many years, his experience predated Wall Street's invention of VPFCs and the derivative options of which VPFCs are comprised. Mr. Maybank's experience in managing trusts and investments was "plain vanilla" stocks and bonds. **(R. p.)** (Trans. p.321-23). In fact, Mr. Maybank testified that he had never once bought or sold an option, or any other derivative product, for himself or any client in all of his years in the industry. *Id.* That is, until such time as Appellants sold Mr. Maybank a VPFC, along with the aggressive strategy associated with it.

Appellants represented that they had special expertise in VPFCs and recommended VPFCs to Mr. Maybank as a way to avoid risk, protect the receipt of

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Management Agreement until a month later. **(R. p.)** (Agreed Exh. 3, Addendum; Trans. p.315-321). Through discovery, Mr. Maybank came to learn that the Addendum was the necessary paperwork for BB&T Asset Management to charge Mr. Maybank an up-front, transaction-based fee for its so-called "expertise," advice, and recommendation in selling VPFC No.1 to Mr. Maybank in August 2006. *Id.*

dividends from his BB&T Corporation stock, address outstanding debt issues, delay taxable events, and generate cash proceeds to create a diversified portfolio managed, of course, by BB&T. **(R. p.)** (Trans. p.305-06, 313-24, 329, 356). While BB&T Bank provided its employees with sales presentations and materials[16] on alternative investments and VPFCs, **(R. p.)** (Pltf's Exh. 92, Revenue Opportunity Power Point; Pltf's Exh. 100, Version No.2 of Revenue Opportunity Power Point); Trans. p.308, 326-27), those sales presentations were inadequate and failed to educate and train BB&T employees about the speculative and risky nature of VPFCs, their enormous associated fees and costs, and the need to conduct careful suitability analyses before recommending or selling VPFCs and the associated investment strategy as prudent or suitable for their clients. Appellants' employees were untrained, misinformed, and lacked the expertise to understand and explain to Mr. Maybank the speculative and risky nature of VPFCs and their embedded costs and fees, in total disregard of their fiduciary duties to put his interests above their own. **(R. p.)** (Trans. p.179, 308, 1051-52, 1075, 1163-64, 1534-35, 1591-93, 1617). Appellants also failed to explain that the VPFC investment strategy devised and recommended by Appellants essentially trapped Mr. Maybank in a series of costly roll-overs into new VPFCs that would decimate his irreplaceable assets over time.

Prior to the execution of the investment strategy and the initial VPFC, Appellants presented Mr. Maybank with what purported to be an individualized assessment of his

[16] Appellants' internal sales presentations showed that Appellants viewed VPFCs as "revenue opportunities" for the Bank and its employees, capable of generating substantial fee revenue upfront, as well as over the life of the VPFC, for Appellants and their employees, who were incentivized by bonuses to sell VPFCs. **(R. p.)** (Pltf's Exh. 92, Revenue Opportunity Power Point; Pltf's Exh. 100, Version No.2 of Revenue Opportunity Power Point).

financial situation. **(R. p.)** (Agreed Exh. 7, August 11, 2006, General Counsel "Approval Letter"). This General Counsel Approval Letter was ostensibly prepared based on an internal, BB&T restriction contained in the BB&T Code of Ethics, **(R. p.)** (Agreed Exh. 6, BB&T Code of Ethics), which prohibited the use of BB&T Corporation stock by BB&T employees[17] in any transaction which was deemed to be speculative, including, but not limited to, transactions in derivative option products like VPFCs.[18] The Approval Letter was ostensibly drafted by Mr. Maybank's fiduciary Wealth Management Advisor, Anthony Mahfood, and directed to BB&T Corporation Executive Vice President, Secretary and General Counsel, Patricia Oliver. **(R. p.)** (Agreed Exh. 7, Approval Letter). The Approval Letter requested the Corporation's approval of a VPFC investment strategy specifically developed for and recommended to Mr. Maybank. *Id.* BB&T Corporation, by and through its General Counsel Oliver, sanctioned the VPFC investment strategy recommended to Mr. Maybank through the Approval Letter, which included Oliver's signature and handwritten note in return to Mr. Mahfood stating that "[t]his approval by General Counsel is conditioned on Mr. Maybank not purchasing additional shares of BB&T Corporation with proceeds from the prepaid variable forward transaction." *Id.*

Beyond simply seeking (and receiving) the BB&T Corporation General Counsel's

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[17] In August 2006, Mr. Maybank was still an employee of BB&T Bank, as his employment agreement ran through November 2006.

[18] Although Appellants did not disclose it to Mr. Maybank, there existed a substantial and inherent conflict of interest in Appellants advising Mr. Maybank, or anyone, regarding their own company's stock. **(R. p.)** (Trans. p.683-88). In fact, Appellants had a prohibition against such a conflict of interest, *see id.*, but nonetheless advised Mr. Maybank to hold his heavily concentrated position of BB&T stock as a part of an investment strategy designed to raise additional investment funds, akin to a margin account, **(R. p.)** (Trans. p.335-36), for which Appellants earned substantial management fees over the life of their fiduciary relationship with Mr. Maybank. *Id.*

approval of Mr. Maybank's VPFC strategy and transaction, the Approval Letter was also provided to Mr. Maybank as a part of the discussions and recommendations centered around the initial VPFC,[19] verifying to him that Appellants had conducted an individualized analysis regarding the prudency of the strategy for Mr. Maybank's specific situation. **(R. p.)** (Trans. p.328-33, 40). The Approval Letter summarizes the selling points used by Mr. Maybank's fiduciaries for the strategy and made the following representations:

- At 74, Mr. Maybank is contemplating his retirement in the next several years and is endeavoring to **reduce his investment and retirement risk exposure** through a prepaid variable prepaid forward contract.
- **A prepaid variable forward may** allow Mr. Maybank to **reduce the risk of his concentrated position in BB&T**, while raising cash to create a diversified portfolio.
- Mr. Maybank will receive a cash advance up front to create a diversified portfolio according to his investment need and objectives.
- Mr. Maybank **will continue to collect future BB&T dividends** and will retain voting rights, two important benefits of BB&T share ownership.
- Implementation of this [VPFC] **will protect Mr. Maybank from an extraordinary reduction in the overall value of his investment portfolio and resulting net worth.**
- [A VPFC] will also help [Mr. Maybank] achieve **important diversification goals we have discussed throughout the financial planning process**.
- Neither we nor Mr. Maybank consider this transaction to be "speculative" as outlined in BB&T's Code of Ethics.

(R. p.) (Agreed Exh. 7, Approval Letter) (emphasis added). The Approval Letter was drafted in a manner that represented it was specifically tailored to Mr. Maybank and his

[19] The Approval Letter signed by Mr. Mahfood and BB&T's General Counsel was executed and provided to Mr. Maybank prior to the VPFC trade, as evidenced by the dated copy in Mr. Maybank's files and introduced at trial. **(R. p.)** (Agreed Exh. 7, Approval Letter). According to his testimony, Mr. Maybank relied upon the representations contained in the Approval Letter in deciding to enter the VPFC. **(R. p.)** (Trans. p.328-33, 40). Mr. Maybank testified that he believed BB&T had thoroughly researched these products and determined that this investment strategy was prudent for his specific situation, as represented to him in the Approval Letter. *Id.*

retirement needs. *Id.* Consistent with the oral promises made to Mr. Maybank, the representations contained in the letter confirmed Mr. Maybank's understanding that BB&T Bank had fully researched and developed the VPFC strategy with Mr. Maybank's specific retirement needs in mind and that the strategy would achieve the goals of diversifying his concentrated holdings of BB&T Corporation stock, generating the income needed in retirement, and protecting him from the loss of his hard earned assets.[20] **(R. p.)** (Trans. p.328-33, 40). The Approval Letter led Mr. Maybank—and would lead any other reader—to believe that the Appellants had diligently and prudently provided the services that they expressly undertook to perform for Mr. Maybank as his fiduciary.

However, the testimony and documents introduced at trial demonstrated that the representations contained in the Approval Letter were false. The putative author of the letter, Mr. Mahfood, testified that he did not draft the letter, but understood that it was simply a necessary part of the paperwork required to execute the recommended strategy because Mr. Maybank was an employee of BB&T at the time and his concentrated position was in BB&T Corporation stock. **(R. p.)** (Trans. p.1307-08, 1360-62). Notwithstanding the representations Mr. Mahfood made in the letter he signed, he testified that he had not conducted any analysis to confirm any of the promises and representations that the Approval Letter stated were done for Mr. Maybank.[21] **(R. p.)**

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[20] Appellants also advised Mr. Maybank that purchasing a VPFC would postpone any tax liability on his shares of BB&T Corporation stock so long as the shares were pledged to the VPFC or any subsequent roll-over. **(R. p.)** (Trans. p.313, 368).

[21] Further, Mr. Mahfood testified that by sending the Approval Letter to BB&T General Counsel Oliver, he intended for her to rely upon the representations contained in the letter and approve the VPFC strategy for implementation with Mr. Maybank. **(R. p.)** (Trans. p.1360-62).

(Trans. p.1340). Moreover, Mr. Mahfood testified that he was, in fact, prohibited by BB&T Bank policy from performing any such analysis or from making any recommendation or providing any wealth management advice, notwithstanding his title as Mr. Maybank's Wealth Management Advisor. **(R. p.)** (Trans. p.1338-40).

This was not, however, the only infirmity in the Approval Letter. Late in the afternoon on Friday, June 13, 2014, **one business day before the trial of this case was set to begin on the following Monday**, Appellants made a "supplemental" production of an additional 100 documents. Among these documents produced on the eve of trial was a generic copy of the General Counsel Approval Letter, dated February 1, 2006 ("Form Approval Letter"). **(R. p.)** (Pltf's Exh.91, Form Approval Letter). This copy was not specific to any customer, let alone Mr. Maybank, but was a form letter that had been drafted in order to pre-clear the use of VPFCs with BB&T employees who owned BB&T Corporation common stock. *Id.* The Form Approval Letter is a verbatim copy of the General Counsel Approval Letter supposedly written specifically for Mr. Maybank, except that there are "Mr. Client" placeholders for the client's name, and other blanks for the information related to the client's holding of BB&T stock. *Id.* However, the representations regarding the reasonableness and the suitability of a VPFC for "Mr. Client" are the same as what was represented to Mr. Maybank; essentially, Appellants had determined VPFCs were appropriate for *every* holder of a concentrated position of BB&T Corporation stock and were using these Form Approval Letters to market VPFCs

as the preferred solution to concentrated positions.[22] *Compare* Agreed Exh. 7, Approval Letter *to* Pltf's Exh.91, Form Approval Letter.

Considering the information that was made available to him at the time, including the representations contained in the Approval Letter that he believed to be true, and relying upon the advice and recommendations of his fiduciaries, Mr. Maybank executed an initial VPFC on August 11, 2006 ("VPFC No.1"), which was a three-year contract set to expire on August 11, 2009. **(R. p.)** (Agreed Exh.9, VPFC No.1). Although Mr. Maybank pledged $9,318,364 in BB&T Corporation stock to the VPFC,[23] the upfront

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[22] Thus, up until the very eve of trial, Appellants continued to foist upon Mr. Maybank the false impression that they had actually done the things represented in the Approval Letter to have been done for him. Appellants' use of a deceptive, fill-in-the-blank letter to make consequential misrepresentations to its fiduciary client, and others, is one of three examples identified by the trial court as supporting the jury's verdict under the UTPA claim. **(R. p.)** (Order and Final Judgment).

[23] Briefly, a VPFC is comprised of two over-the-counter derivative option products called a put and a call. **(R. p.)** (Trans. p.884-889). The combination of the two together creates what is known as a collar around a stock position. *Id.* A VPFC is a combination of a collar and a deferred interest loan that is set for a contractual period (*e.g.*, one, two, or three years). *Id.* The last component of a VPFC is a concentrated position of a single issuer's stock, that is pledged to the VPFC by the customer in return for loan proceeds that are some percentage less than the total value of the stock pledged; using Mr. Maybank's VPFC No.1 as an example, although Mr. Maybank pledged $9,318,364 worth of BB&T Corporation stock to the contract, he received only $7,116,434 in upfront proceeds. **(R. p.)** (Agreed Exh. 9, VPFC No.1; Trans. p.337). The difference, $2,201,930, was the cost of VPFC No.1 to Mr. Maybank, although he did not realize or understand that fact until this litigation. **(R. p.)** (Trans. p.337). No adequate explanation of this cost was ever provided to Mr. Maybank, although testimony indicated that it is comprised of the cost of the option products (put and call) contained in the VPFC, along with interest of the loan proceeds and fees to the product issuer (*e.g.*, Bear Stearns). **(R. p.)** (Trans. p.884-89). Regardless of the derivation of the component parts of the cost, it represented a bottom-line cost and lost value to Mr. Maybank. **(R. p.)** (Trans. p.921). Even more staggering, at the end of the VPFC contract term, if Mr. Maybank desired to keep his BB&T Corporation stock, he would need to pay the full value of the stock he pledged to the contract—$9,318,364—to the counterparty, even though he received only $7,116,434 in upfront proceeds, or else lose the stock. **(R. p.)** (Trans. p.884-89).

proceeds that he received in return was only $7,120,000. BB&T charged Mr. Maybank $32,614 for the advice and recommendation to enter VPFC No.1. **(R. p.)** (Agreed Exh. 11, Wiring Instructions for Fee; Agreed Exh. 12, Bear Stearns Statement showing fee).

Of the $7,120,000 in upfront loan proceeds generated under VPFC No.1, approximately $2,470,000 million was immediately applied by Appellants to margin debt accrued by Mr. Maybank, some of which dated back to capital infusions made by Mr. Maybank into Southeastern. **(R. p.)** (Trans. p.287-88, 329, 422, 471). This left approximately $4,650,000 of the $9,318,364 in value that Mr. Maybank put into VPFC No.1. **(R. p.)** (Trans. p.924).

But the VPFC was only one part of a larger investment strategy devised and implemented by Appellants on Mr. Maybank's behalf. Appellants also sought to actively manage a portfolio for Mr. Maybank. Continuing with their standard contracting procedures[24] and following the execution of VPFC No.1 and receipt of the upfront loan proceeds, on August 23, 2006, Appellants presented Mr. Maybank with BB&T's form Wealth Management Agreement ("WMA") as a condition of BB&T Bank expanding its role as fiduciary to Mr. Maybank in conjunction with BB&T Asset Management. BB&T's form WMA promised that BB&T Bank[25] would, *inter alia*:

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[24] Appellants had previously presented Mr. Maybank with the Addendum, **(R. p.)** (Agreed Exh. 3, Addendum), which stated that it was an "Addendum to Wealth Management Agreement ... between Bank, Investment Adviser, and Client." Appellants presented the Addendum to Mr. Maybank prior to the document to which it pertained (the WMA), in order to charge the $32,614 transaction fee for the advice and recommendation of the VPFC to Mr. Maybank.

[25] BB&T's form WMA was a tri-party agreement between the client, BB&T Bank, and BB&T Asset Management. BB&T Bank and BB&T Asset Management were given separate and distinct duties and obligations to the client under the WMA. **(R. p.)** (Agreed Exh. 14, WMA).

A. Gather information from the Client regarding the Client's investment objectives, risk tolerance and investment horizon, tax status, financial situation and needs;
B. Make recommendations to the Client regarding an investment program and investment guidelines for the Account; and
C. Coordinate and supervise the services of the Investment Advisor and Custodian for the Account.

(R. p.) (Agreed Exh. 14, WMA; Trans. p.337-42).

However, BB&T Bank knew at the time that it presented the form WMA to Mr. Maybank that it contained errors, misstatements, and deliberate misrepresentations.[26] **(R. p.)** (Video Deposition Testimony of Ross Walters). BB&T Bank also knew at the time it presented the form WMA to Mr. Maybank that it did not intend to fulfill, and in fact could not and would not fulfill, the promised duties and obligations as described in the WMA, although those duties and obligations were central to the fiduciary relationship that BB&T Bank induced Mr. Maybank to establish. *Id.* Unbeknownst to Mr. Maybank at the time,[27] BB&T Bank was restricted by internal Bank policy (based on their regulated status), **(R. p.)** (Video Deposition Testimony of Ross Walters; Trans. p.1417), from fulfilling the duties and obligations, which it had contracted to perform as an integral part of its fiduciary relationship with Mr. Maybank. Rather, BB&T Bank intended to assign those duties and obligations to the other BB&T entity which was a signatory to the WMA, BB&T Asset Management, without Mr. Maybank's knowledge or permission (contrary to the terms of the WMA). Notwithstanding the fact that Appellants knew of

[26] Mr. Maybank did not manage assets for any clients of Appellants; therefore he was unfamiliar with the WMA and did not use it as a part of his job and duties for Appellants.

[27] These facts were only discovered through depositions in this case. **(R. p.)** (Video Deposition Testimony of Ross Walters).

the errors contained in the WMA, they presented the agreement to all Wealth Management customers during the period from at least 2006 until November of 2009 as a condition of their provision of fiduciary wealth management services to those clients. Most damaging, however, despite knowledge of the misrepresentations contained in the Wealth Management Agreement, Ross Walters, BB&T Bank's corporate representative in his Rule 30(b)(6) deposition, testified that Defendants did not provide Mr. Maybank, or any other customer, with notice that the Wealth Management Agreement would not be fulfilled as written.[28] **(R. p.)**, (Video Deposition Testimony of Ross Walters).

Appellants compounded their unsuitable advice to enter into the VPFC strategy by recommending the implementation of an overly risky investment strategy for the investment account funded by the upfront loan proceeds from VPFC No.1, over which Appellants served as portfolio manager with sole investment discretion. **(R. p.)** (Agreed Exh. 15, Investment Objectives, signed but undated; Agreed Exh. 16, Investment Objectives, signed and dated; Trans. p.341-42). Appellants recommended an investment portfolio of 100% equities, with an investment guideline of "aggressive growth." *Id.* Appellants represented to Mr. Maybank that this was the proper way to invest loan

[28] This failure took place despite the fact that BB&T Bank was already serving as Mr. Maybank's fiduciary in two respects at the time the presented him with the form WMA. First, dating back to 2001, BB&T Bank had served as Trustee of the Insurance Trust, and thus was a fiduciary to both Mr. Maybank and the Insurance Trust. Second, Appellants undertook further fiduciary obligations to Mr. Maybank on July 10, 2006, on the date they presented him with the Addendum to the WMA, **(R. p.)** (Agreed Exh. 3, Addendum), in order to sell him VPFC No.1 and charge the upfront transaction fee. Thus, at the time it presented Mr. Maybank with the WMA, BB&T Bank already had an absolute duty of disclosure and an obligation to ensure that Mr. Maybank understood the terms of the WMA and any material changes thereto. Appellants' deceptive actions with respect to their providing the form WMA to Mr. Maybank (and other Wealth Management clients) is the second of three examples identified by the trial court as supporting the jury's verdict under the UTPA claim. **(R. p.)** (Order and Final Judgment).

proceeds from a VPFC, notwithstanding Mr. Maybank's age and status as a soon-to-be-retired individual.[29] In sum, rather than reducing risk and protecting Mr. Maybank's assets, the VPFC strategy actually increased Mr. Maybank's overall investment risk exponentially, leading to destruction of his retirement savings. **(R. p.)** (Trans. p.897-98).

After Appellants sold VPFC No. 1 to Mr. Maybank in 2006, financial conditions changed substantially. BB&T Corporation stock, which had been valued at approximately $42/share when the VPFC was sold, fell to below $30/share by the end of 2008. Mr. Maybank's investment account, which had been aggressively invested, suffered huge losses during this same time period. Mr. Maybank was deeply concerned about protecting his remaining income stream, namely the dividends paid by the BB&T Corporation stock pledged to the VPFC; so he asked his fiduciary wealth managers for advice about his VPFC. **(R. p.)** (Trans. p.331, 354, 356). Specifically, the discussions involved the pending expiration of VPFC No.1 in August 2009, whether Mr. Maybank should roll over VPFC No.1 into a second VPFC, and whether such a roll-over, if executed, should occur early or at VPFC No.1's expiration. **(R. p.)** (Trans. p.331, 353-54). Based on the understanding that he had developed from Appellants' representations about VPFCs, Mr. Maybank erroneously believed that the dividends from the BB&T Corporation stock could be protected at the contractual levels in the VPFC through an early roll-over. **(R. p.)** (Trans. p.331, 354, 356). Consequently, with financial markets in turmoil and based on Appellants' flawed advice and recommendation, on or about January 20, 2009, Appellants sold Mr. Maybank a second VPFC ("VPFC No.2), **(R. p.)** (Agreed Exh. 39,

[29] In fact, Mr. Maybank testified that he relied upon Appellants' advice and expertise in VPFCs and believed that this was the preferred investment strategy associated with a VPFC. **(R. p.)** (Trans. p.341-42, 479).

VPFC No.2), but did not advise Mr. Maybank of the significant additional costs and fees associated with terminating VPFC No.1 early and rolling that contract into VPFC No.2. **(R. p.)** (Trans. p.353-54). Not until after the VPFC No.2 transaction was completed, did Appellants shockingly disclose to Mr. Maybank that he had incurred costs and fees of almost $1.3 million from the roll-over. **(R. p.)** (Trans. p.362-63).

The desired goal of protecting Mr. Maybank's dividend income through the early roll-over also proved to be false, but the enormous cost of $3,500,000 for VPFC No. 1 and VPFC No. 2 combined was very real, previously known to Appellants but not disclosed to Mr. Maybank, and ruinous to Mr. Maybank's financial livelihood.[30] Although a dividend was paid at the contractual level for first quarter 2009, beginning in second quarter 2009, BB&T Corporation dropped its dividend by nearly 70% to just 15¢/share, **(R. p.)** (Pltf's Exh. 80, BB&T Corporation 2009 Annual Review). As a result, Mr. Maybank received total dividend income of only $230,000, rather than the expected amount of $827,200 during the life of VPFC No.2.

From 2009, Mr. Maybank's financial assets continued to be further decimated by Appellants' mismanagement and unsuitable investment strategy. Without any consistent

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[30] Appellants' failure to properly advise Mr. Maybank regarding the dividend in the lead-up to the roll-over was inexplicably incompetent, in addition to the substantial conflict of interest inherent in Appellants' advising a fiduciary as to their own company's stock. Under the terms of VPFC No.2, Mr. Maybank was to receive approximately $827,200 in dividends over the life of the VPFC No.2. **(R. p.)** (Agreed Exh. 39, VPFC No.2). Thus Appellants' failure to recognize and advise Mr. Maybank of the $1.3 million additional cost of VPFC No.2, incurred for the purpose of protecting only $827,200 in dividend payments (even if the dividends had not been reduced), is incomprehensible and grossly imprudent advice for a fiduciary wealth manager. For the advice and recommendation to enter VPFC No.2, BB&T charged Mr. Maybank an additional $43,655 advisory fee. **(R. p.)** (Agreed Exh. 38, Wealth Management Account Statement Reflecting Fee; Agreed Exh. 40, VPFC No.2 Fee Documentation).

source of income other than the reduced BB&T Corporation dividend, Mr. Maybank was locked into Appellants' VPFC investment strategy, with no way of escape. In short order, Mr. Maybank's financial assets were so devastated by Appellants' failed advice that he no longer met the minimum criteria for BB&T's Wealth Management services; so his Wealth Management relationship was terminated by BB&T Bank in 2010.[31] **(R. p.)** (Trans. p.370-71). Because of BB&T Corporation's slashed dividend payment, as well as losses suffered in the managed account, Mr. Maybank no longer had the income necessary to meet the premium obligations of the insurance policies in the Insurance Trust.[32] Observing Mr. Maybank's severely compromised financial situation and knowing that the Trust over which it served as fiduciary Trustee was on the brink of collapse, BB&T Bank severed its relationship with Mr. Maybank completely and resigned as Trustee of the Insurance Trust. **(R. p.)** (Agreed Exh. 48, BB&T Bank Resignation as Trustee of Insurance Trust; Trans. p.377-79). Financially devastated by BB&T's mismanagement and with no means of making the annual premium payments on the policies held by the Insurance Trust, the insurance policies were lost shortly thereafter. *Id.*

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[31] Not free of Appellants' investment strategy, however, Mr. Maybank had no financial choice or viable exit possibility from the seemingly never-ending cycle of costly roll-overs. To exit, meant he lost the stock and the dividend income he depended upon to survive. So, in a desperate attempt to salvage the situation, Mr. Maybank was forced to roll over his VPFCs three additional times before his funds were exhausted and the last VPFC expired in 2013. **(R. p.)** (Trans. p.520-21).

[32] In 2007, after the institution of the VPFC strategy, Appellants had sold Mr. Maybank an additional $2,000,000 in life insurance policies to put into the Insurance Trust, over which BB&T Bank served as fiduciary Trustee. **(R. p.)** (Agreed Exh. 21, Lincoln National Policy No.1; Agreed Exh. 22, Lincoln National Policy No.2; Trans. p.344-45). The additional policies almost doubled the annual premium expense to Mr. Maybank for the policies in the Insurance Trust from $70,000 annually, to $135,000 annually. *Id.*

In August 2010, Mr. Maybank requested a meeting with Bank personnel to address the significant losses that he had sustained as a result of the Appellants' failed investment strategy. Mr. Maybank first met with Ross Walters, head of the Wealth Management Division in Greenville, South Carolina, and later with David Fisher, Head of the Wealth Management Division for all of BB&T. **(R. p.)** (Trans. p.372-75). In those meetings, Mr. Maybank explained that he believed he had been damaged by Appellants' bad advice and wealth mismanagement by approximately $3,500,000 and requested that BB&T Bank review his file and recompense him in the amount of his losses. *Id.* Although he was promised that they would look into the matter, they instead referred it to the legal department. *Id.* When Mr. Maybank later called Mr. Fisher to follow up on their conversation, Mr. Fisher told Mr. Maybank that he was "disgracing himself," that any attempt by Mr. Maybank to pursue a claim for his losses against BB&T Bank "would cost [Mr. Maybank] a lot of money" and "would be useless," and that if Mr. Maybank ultimately pursued a claim against BB&T Bank it "would end badly" for Mr. Maybank. *Id.*

Notwithstanding the effort at intimidation, in December 2011, Mr. Maybank filed this lawsuit; however, Appellants' deceptive and unfair business practices still did not cease. In late 2012, Mr. Maybank and approximately 130 other Wealth Management clients received a letter and a refund for advisory fees charged in conjunction with sales under the alternative investment initiative. The letter included the following statement:

> Recently, as a part of a review of client accounts we discovered that a fee was charged to your account that we wish to refund to you. While we are not required to rebate these fees, we choose to do so as a reflection of our corporate values. ... This fee would not have been charged under our current billing practices ... Thank you for the trust and confidence you have placed in BB&T Wealth.

(R. p.) (Agreed Exh. 50, Fee Refund Letter). Unbeknownst to Mr. Maybank, this statement was false and the letter as a whole was deliberately designed to be deceptive and misleading. The actual impetus for the fee refund was the criticism of BB&T Asset Management's fee practices by the Securities and Exchange Commission ("SEC"). **(R. p.)** (Video Deposition Testimony of David Fisher). The SEC had criticized BB&T Asset Management's practice of charging upfront, transaction-based "broker-esque" fees for selling alternative investments, including VPFCs, when BB&T Asset Management lacked a requisite broker-dealer license. *Id.* Although Appellants had a duty of truthful and full disclosure to Mr. Maybank and other customers, they did not fulfill that duty and instead deceptively misled customers into thinking Appellants were being good corporate citizens and fiduciaries, when the truth behind those deceptive statements was something altogether different.

In deliberately attempting to deceive its clients through an unfair and deceptive practice,[33] Appellants were motivated to conceal from their clients the truth about their business practices. Were it not for Mr. Maybank's lawsuit, and the revelations of the true reasons behind the fee refund which were revealed through discovery, Appellants' unfair and deceptive statements to Mr. Maybank and other customers would have remained hidden from view. **(R. p.)** (Video Deposition Testimony of David Fisher; Ralph Borrello).

Appellants were correct about one thing: seeking justice through litigating his

[33] The refund letter constitutes the third and final example identified by the trial court as supporting the jury's verdict under the UTPA claim. **(R. p.)** (Order and Final Judgment).

case was extremely difficult and costly to Mr. Maybank. Appellants mounted a comprehensive and well-funded defense, aimed at contesting every issue, delaying resolution of the claims advanced, and making this case extremely difficult for Mr. Maybank to litigate against one of the largest financial institutions in the country with every resource at its disposal. **(R. p.)** (Order and Final Judgment). At the time this action was filed, Mr. Maybank was seventy-nine (79) years old; he will be eighty-three (83) years old later this year. **(R. p.)** (Trans. p.278). His action against Appellants was tried over two weeks in June 2014 before a jury of Greenville County citizens who rendered a just and true verdict against Appellants for their mismanagement, self-serving and imprudent advice, and deceptive business practices. **(R. p.)** (Order and Final Judgment).

STANDARD OF REVIEW

Generally, when the relief sought is provided by statute, the cause of action will be characterized as one at law. *Harvey v. S.C. Dep't of Corr.*, 338 S.C. 500, 507, 527 S.E.2d 765, 769 (Ct. App. 2000). Entitlement to prejudgment interest arises under S.C. Code Ann. § 34-31-20(A). Questions of statutory interpretation are questions of law, which this Court is free to decide without any deference to the court below. *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (citing *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011)).

The award, or denial, of prejudgment interest will not be disturbed on appeal unless the trial court committed an abuse of discretion. *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 435, 673 S.E.2d 448, 457-58 (2009) (citing *Jacobs v. Am. Mut. Fire Ins. Co.*, 287 S.C. 541, 544, 340 S.E.2d 142, 143 (1986)). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005). Where the trial court's failure to award statutory prejudgment interest is characterized by an error of law that is not supported by the evidence, prejudgment interest may be awarded on appeal. *Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 133-35, 631 S.E.2d 252, 258-59 (2006).

ARGUMENT

I. The trial court erred in failing to award Respondent-Appellant Mr. Maybank statutory prejudgment interest on the jury's actual damages because Mr. Maybank's measure of recovery was at any time ascertainable by calculation and therefore capable of being reduced to certainty.

The trial court erred in denying Mr. Maybank prejudgment interest on the jury's actual damages award of $3,100,000, which represents the economic loss he suffered at the hands of Appellants. Following the jury's verdict and Mr. Maybank's post-trial motion, the trial court determined that Mr. Maybank is not entitled to prejudgment interest because "Mr. Maybank's damages were not a sum certain as required by S.C. Code Ann. § 34-31-20(A)."[34] **(R. p.).** (Order and Final Judgment at 31). However, as demonstrated at trial, Mr. Maybank's damages were capable of being calculated to a "sum certain" at the time his claim arose (and at any particular point in time).

"South Carolina law permits prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable and if the sum is certain *or capable of being reduced to certainty.*" *Bickerstaff v. Prevost,* 380 S.C. 521, 524-25, 670 S.E.2d 660, 662 (Ct. App. 2008) (emphasis added). "The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." *Butler Contracting*, 369 S.C. at 133, 631 S.E.2d at 259 (2006). In other words, "[i]n liquidated-damages cases, the amount is usually a sum certain, or at least the amount is capable of ascertainment by

[34] S.C. Code Ann. § 34-31-20(A) provides: "In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum."

computation." *Lewis v. Congress of Racial Equality,* 275 S.C. 556, 560, 274 S.E.2d 287, 289 (1981).

Significantly, "[t]he fact that the sum due is disputed does not render the claim unliquidated for purposes of an award of prejudgment interest." *Boykin Contracting, Inc. v. Kirby*, 405 S.C. 631, 642, 748 S.E.2d 795, 801 (Ct. App. 2013); *see also Smith-Hunter Constr. Co., Inc. v. Hopson*, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005); *Babb v. Rothrock*, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993). As further explained by this Court, "[t]he right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party. It is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable." *Butler Contracting*, 369 S.C. at 133-34, 631 S.E.2d at 259.

a. Prejudgment interest is appropriate on the damages awarded Mr. Maybank.

The issue of whether prejudgment interest may be awarded for breach of fiduciary duty claims appears to be a novel issue in South Carolina.[35] Accordingly, it is proper for

[35] Mr. Maybank is aware of only one published opinion that discusses the issue of prejudgment interest for a claim of breach of fiduciary duty. *See Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 641 S.E.2d 53 (Ct. App. 2007). Although the court of appeals reversed the entry of prejudgment interest on the fiduciary claim, it did so on the basis that the opinion also reversed the trial court's valuation of the underlying damages award, and thus there were no actual damages on which to award prejudgment interest. *Keane*, 372 S.C. at 59-60, 641 S.E.2d at 147-48. The court took no position on the issue of whether prejudgment interest would be appropriate on an upheld award of damages based on a breach of fiduciary duty. *Id.* Moreover, the broader issue of whether South Carolina permits an award of prejudgment interest generally in tort claims appears unresolved as well. *See, e.g., Vaughn Dev., Inc. v. Westvaco Dev. Corp.*, 372 S.C. 576, 642 S.E.2d 757 (Ct. App. 2007) (discussing current state of prejudgment interest awards in tort actions in South Carolina); *see also EllisDon Const., Inc. v. Clemson Univ.*, 391 S.C. 552, 557 n.3, 707 S.E.2d 399, 402 n.3 (2011), Pleicones, J., *concurring* (stating that a determination of whether a party is entitled to prejudgment interest against the state on a tort action "is a question best left for another day").

this Court to look to other jurisdictions for guidance on this issue. *See Clea v. Odom*, 394 S.C. 175, 714 S.E.2d 542 (2011). A review of cases in other jurisdictions involving breach of fiduciary claims reveals that the weight of authority from those courts which have considered the issue tends to fall on the side of allowing such interest to be awarded. For example, in *The Woodward School for Girls, Inc. v. City of Quincy*, a case involving, *inter alia,* assertions of breach of fiduciary duties by the trustee of a charitable trust, including allegations that trust assets were invested improperly, the Supreme Judicial Court of Massachusetts determined that the beneficiary was entitled to prejudgment interest.[36] 13 N.E.3d 579 (Mass. 2014). Similarly, in *McDermott v. Party City Corp.*, the United States District Court for the Eastern District of Pennsylvania noted that prejudgment interest is available for breach of fiduciary duty claims in Pennsylvania and amended the judgment to include prejudgment interest. 11 F. Supp.2d 612, 633 (E.D. Penn. 1998). Likewise, in *In re Joy Recovery Tech. Corp.*, a case involving a breach of fiduciary duty by misappropriation of corporate assets, the United States Bankruptcy Court for the Northern District of Illinois noted that "there is ample authority in Illinois supporting award of prejudgment interest in cases where breach of fiduciary duty is found[]" and consequently awarded such interest. 291 B.R. 111, 114 (2003). Additionally, the Supreme Court of Utah in *Smith v. Fairfax Realty, Inc.*, awarded

[36] The court noted that, although by statute in Massachusetts, Mass. Gen. L. ch. 231, § 6B, prejudgment interest is permitted in tort actions from the date of commencement of the action, in breach of trust cases, prejudgment interest typically runs from the last date of the breach. *The Woodward School for Girls*, 13 N.E.3d at 599-600 & n.37 (Mass. 2014).

prejudgment interest under what the court described as the *Fell*[37] standard, but also noted that "[s]ome jurisdictions apply the rule that a fiduciary who breaches his duties should not be allowed to benefit from his misconduct and therefore must account for interest on any money or property the fiduciary misappropriated." 82 P.3d 1064, 1068 (2003).[38]

Other courts have held that, while the general rule is that prejudgment interest is not recoverable in tort actions, an exception exists when a defendant's conduct confers a benefit upon the defendant, as is the case in fiduciary breaches. *Rois v. H.C. Sharp Co.*, 203 S.W.3d 761 (Mo. Ct. App. 2006). In *Rois*, the Missouri Court of Appeals determined that a former employee's breach of fiduciary duty,[39] which consisted of his diversion of profits from his employer to his separately owned business, conferred a benefit on him, thereby entitling his former employer to prejudgment interest on its counterclaim for breach of fiduciary duty. *Id.*[40] The court also addressed the fiduciary's argument that the

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[37] The *Fell* standard refers to *Fell v. Union Pacific Railway Co.*, 88 P. 1003, 1007 (1907) and its holding that "Utah courts award prejudgment interest in cases where 'damages are complete' and can be measured by 'fixed rules of evidence and known standards of value.'" *Smith*, 82 P.3d. at 1068.

[38] *See also*, *Josephson v. Marshall*, 2002 WL 1315604 at * 4 (S.D.N.Y. 2002); *McCoy v. Goldberg,* 810 F.Supp. 539 (S.D.N.Y. 1993); *Quintel Corp., N.V. v. Citibank, N.A.*, 606 F. Supp. 898 (S.D.N.Y. 1985); *In re Estate of Wernick*, 535 N.E.2d 876 (Ill. 1989).

[39] The Missouri Court of Appeals noted that it affirmed the judgment on the employer's counterclaim for breach of fiduciary duty in a separate memorandum. *Rois*, 203 S.W.2d at 766.

[40] The *Rois* court relied upon, *inter alia*, its earlier opinion in *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746 (Mo. App. 1990), in which the court recognized an exception to general rule prohibiting awards of prejudgment interest on tort claims in circumstances where a defendant's tortious conduct confers a benefit upon the defendant. In *Vogel*, the court found that a broker had breached a fiduciary duty to its investor-clients by "churning" their investment accounts in order to generate higher commissions,

damages were not liquidated because they were not definite, certain, or readily ascertainable. *Id.* at 761. The court again looked to its opinion in *Vogel* for the proposition that, in situations involving a breach of fiduciary duty, once the trial court (or jury in the case of Mr. Maybank) determined the breaches, the measure of damages is readily ascertainable and thus liquidated.

b. Mr. Maybank's damages were ascertainable and capable of being reduced to a certainty.

In this case, the trial court held that Mr. Maybank's claim for prejudgment interest was not a "sum certain" and denied the claim, although Mr. Maybank had properly pled for and continually maintained a claim for prejudgment interest from the outset of this litigation. **(R. p.)** (Original Complaint; Second Amended Complaint). The trial court erred in this regard, as an award of prejudgment interest is appropriate on, *inter alia*, a finding of a breach of fiduciary duty and the jury's ascertainment of a sum certain owing to Mr. Maybank as a result of the unsuitable advice and egregious mismanagement of his fiduciaries, which consisted solely of economic harm.

The measure of Mr. Maybank's damages was explained, in detail, by Mr. Maybank's economics expert on the issue of the damage resulting from Appellants' failed investment strategy involving VPFCs. Dr. Craig McCann[41] holds both a Chartered

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thereby conferring a benefit upon the broker justifying an award of prejudgment interest. *Vogel*, 801 S.W.2d at 757-58 (discussed by the *Rois* court, 203 S.W.3d at 765).

[41] Dr. McCann was qualified by the court, without objection from defendants, as an expert witness "on the evaluation of prudence and appropriateness of alternative investment strategies, including Variable Pre-Paid Forward Derivative Contracts and on damage calculations." **(R. p.)** (Trans. p.884). Dr. McCann also testified at trial regarding his extensive education and work experience in the financial and investment fields. **(R. p.)** (Trans. p.876-84). Dr. McCann was imminently qualified to opine on the measure and calculation of damages and showed through his analysis and calculations that Mr.

Financial Analyst ("CFA") designation and a Ph.D. in Economics from the University of California at Los Angeles, **(R. p.)** (Trans. p.877), and serves as an expert consultant to the SEC in the valuation of complex derivative contracts. **(R. p.)** (Trans. p.880-82). He testified that he calculated the amount of damages Mr. Maybank incurred from VPFCs No.1 and No.2, as well as the portfolio managed by Appellants during the time that Appellants were advising Mr. Maybank. **(R. p.)** (Agreed Exh. 72, Dr. McCann Damages Analysis and Summary; Trans. p.908-14). Dr. McCann further testified that, contrary to the representations by Appellants to Mr. Maybank that a VPFC was a proper way to reduce his overall investment risk, a VPFC actually significantly increased Mr. Maybank's leverage rate[42] and caused his investment position to be "off the charts risky." **(R. p.)** (Trans. p.897-98).

Instead of a VPFC, Dr. McCann testified that someone of Mr. Maybank's age and retirement horizon should have been invested in a minimum of seventy percent (70%) low risk, investment grade bonds (and thirty percent (30%) equities), or a portfolio of one-hundred percent (100%) bonds. **(R. p.)** (Trans. p.898-99, 909-14). According to Dr. McCann, these asset allocations, or something in between, would have been suitable and prudent for a man 74 years of age heading into retirement and would have provided Mr.

Maybank's actual damages were capable of ascertainment by computation on any given day, a fact that was further demonstrated by the jury's adoption of Dr. McCann's methods in arriving at the award of actual damages.

[42] Dr. McCann explained that, although billed as a hedge against a concentrated position, a VPFC actually increases a person's investment risk by borrowing money, at a significant cost and expense, against a stock position and then re-investing the loan proceeds in more equities, leveraging up the investor's exposure and risk to the market. **(R. p.).**

Maybank with the returns and distributions that would have met his needs with a fraction of the risk. **(R. p.)** (Trans. p.898-99).

Dr. McCann's testimony was that Mr. Maybank's damages were capable of ascertainment by calculation. Thus, in August 2010, when Mr. Maybank met with Ross Walters and David Fisher to demand to be made whole for the losses he sustained as a result of the failed investment strategy, the damages were an amount that could have been calculated. **(R. p.)** (Pltf's Exh. 98, Dr. McCann Summary Exhibit; Trans. p.909-14).

For the reasonable investment objective of seventy percent (70%) bonds and twenty percent (30%) equities, Dr. McCann ascertained by calculation that Appellants' mismanagement and imprudent advice resulted in damages to Mr. Maybank in the amount of $2,861,302. **(R. p.)** (Pltf's Exh. 98, Dr. McCann Summary Exhibit). Dr. McCann testified that these damages were calculated to a reasonable degree of economic certainty. **(R. p.)** (Trans. p.913). For the reasonable investment objective of one-hundred percent (100%) bonds, Dr. McCann ascertained by calculation that Appellants' mismanagement and imprudent advice resulted in damages to Mr. Maybank in the amount of $3,362,185, **(R. p.)** (Pltf's Exh. 98, Dr. McCann Summary Exhibit), which he also calculated to a reasonable degree of economic certainty. **(R. p.)** (Trans. p.913-14).

Dr. McCann further testified that these ascertainable damages were "the direct result of BB&T's imprudent advice and recommendations to Mr. Maybank," as opposed to Mr. Maybank's spending[43] or market factors. **(R. p.)** (Trans. p.915). Dr. McCann's calculations representing Mr. Maybank's damages were presented to the jury through his

[43] The loss calculation accounts for, and does not attribute responsibility to Appellants for, Mr. Maybank's expenditures. **(R. p.)** (Trans. p.909).

testimony, his expert report (which was admitted into evidence) **(R. p.)** (Agreed Exh. 72, Dr. McCann Damages Analysis and Summary; Pltf's Exh. 93, Dr. McCann Backup Data for Analysis and Summary), and a demonstrative exhibit presented during his testimony (a copy of which was also admitted into evidence). **(R. p.)** (Pltf's Exh. 98, Dr. McCann Summary Exhibit). Dr. McCann's testimony clearly demonstrated to the jury that Mr. Maybank's measure of damages for the devastating losses he sustained as a result of Appellants' imprudent and failed investment strategy was fixed at the time he demanded compensation from BB&T in August of 2010.[44] On that date, according to the expert testimony of Dr. McCann, Mr. Maybank's measure of recovery was ascertainable and capable of being reduced to certainty, as he explained to the jury in his testimony at trial. Therefore, in accordance with South Carolina law, Mr. Maybank's measure of recovery was capable of being reduced to certainty at the time his claims arose and on any day thereafter.

Moreover, the jury itself found Mr. Maybank's measure of recovery capable of ascertainment by computation, as evidenced by its verdict of $3,100,000 in actual damages. As Dr. McCann calculated, based on two reasonable investment objectives, Mr. Maybank's damages were ascertained to be $2,861,302 and $3,363,185. **(R. p.)** (Pltf's Exh. 98, Dr. McCann Summary Exhibit). It is clear that the jury utilized Dr. McCann's method of calculating Mr. Maybank's damages and found the most appropriate

[44] As described above, Mr. Maybank requested a meeting and met Ross Walters, head of the Wealth Management Department in Greenville in August of 2010, and later with David Fisher. During those meetings Mr. Maybank described his losses and requested remuneration from BB&T Bank, stating that he "wanted BB&T to pay him for his losses." **(R. p.)** (Trans. p.1414). This request constitutes a demand of Appellants under the statute.

calculation to be the amount of $3,100,000, roughly a split between the two reasonable scenarios testified to by Dr. McCann. The jury's actual damages award is indicative of the fact that the jury determined Appellants' proper investment course and strategy for Mr. Maybank would have been an investment allocation of approximately eighty-five percent (85%) bonds and fifteen percent (15%) equities, the midpoint of the two investment scenarios presented by Dr. McCann.

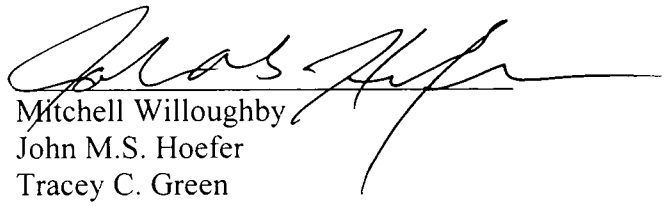
Consequently, Mr. Maybank's damages were capable of ascertainment by calculation and were so-calculated by the jury. Most respectfully, Mr. Maybank asserts the trial court erred in denying the recovery prejudgment interest under S.C. Code Ann. § 34-31-20. Mr. Maybank contends the trial court's order should be reversed on this limited point and issue, and Mr. Maybank respectfully requests this Court enter an award of prejudgment interest in the amount of $1,060,475 on the jury's actual damages award.[45]

CONCLUSION

For the reasons explained above, the trial court erred in failing to award Mr. Maybank statutory prejudgment interest on the jury's award of actual damages and should be reversed on that single issue.

[45] Applying the legal rate of interest of eight and three-fourths percent per annum, as set forth in S.C. Code Ann. § 34-31-20(A), to the jury's award of $3.1 million in actual damages, the per diem rate of legal interest is $743.15. The evidence presented at trial supports an award of prejudgment interest for 1,427 days, the number of days which elapsed from the time Mr. Maybank made a demand of BB&T Bank for remuneration on August 3, 2010, until the jury's verdict on June 30, 2014. **(R. p.)** (Maybank Motion for Prejudgment Interest). Accordingly, Mr. Maybank is entitled to prejudgment interest in the amount of $1,060,475. This amount would then be entitled to accumulate post-judgment interest thereafter.

Respectfully submitted,



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