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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.

**RETURN TO MOTION TO FILE PORTIONS OF THE
RECORD ON APPEAL UNDER SEAL**

Respondent-Appellant, above-named, submits his return, *see* Rule 204(e) of the South Carolina Appellate Court Rules (SCACR), to Appellants/Respondents BB&T Corporation, Branch Banking & Trust Company, and Sterling Capital Management, LLC's (Appellants) motion to file portions of the record on appeal under seal. Appellants have not met their heavy burden of overcoming the presumption of public disclosure and access that is inherent in our judicial process and proceedings, because they have not

identified any current or meaningful interests that would be impaired through disclosure. As discussed below, the factors which guide the Court's consideration of a motion to seal weigh heavily in favor of unrestricted public access to cases submitted to a public trial, which particularly includes this case's proceedings and records. Because no legitimate reason exists for sealing portions of the Record in this case, Appellants' motion should be denied.

STANDARD

In Order No. 2014-04-15-02, this Court set out the procedure and standard for a party seeking to seal all or portions of the Record in an appeal pending in the appellate Courts. As noted by the Court in its Order, an appellate determination to seal all or portions of the Record is made independent of any evaluation and/or order conducted by a lower court or administrative tribunal in the matter. *Id.* The standard for sealing all or portions of the Record is discussed in *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006), and *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991), which sets forth 12 factors that a Court may consider, including: (1) ensuring the parties' right to a fair trial or hearing; (2) the need for witness cooperation; (3) the reliance of the parties upon expectations of confidentiality of the proceeding; (4) the public or professional significance of the proceeding; (5) the perceived harm to the parties from disclosure; (6) why alternatives other than sealing the documents are not available to protect legitimate private interests; and (7) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents; (8) public interest in the proceeding; (9) the private or public status of the litigants and case generally; (10) whether release would enhance the

public's understanding of an important historical event; (11) whether the public already has access to information contained in the records; (12) whether a particular decision will sustain or offend the fundamental interests of public access, and any other relevant factors. *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. at 12, 630 S.E.2d at 470 (citing *Davis*, 304 S.C. at 505-06, 405 S.E.2d at 603-04).

ARGUMENT

Appellants have not met their burden of demonstrating that sealing a portion of the Record in this case is warranted. Rather, given the breaches of trust that were exposed and the multiple demonstrated efforts by Appellants at concealing their conduct, along with the public interest that is inherent in a finding of a violation of the South Carolina Unfair Trade Practices Act (UTPA),¹ the *U-Drive-It* factors weigh heavily in favor of denying Appellants' motion and attempt to conceal their actions from public view.

1. Ensuring the parties' right to a fair trial or hearing.

This factor is normally relevant to a trial court's consideration of a motion to seal an underlying proceeding in order to protect the interests of a litigant or witness at trial, or to ensure a fair presentation of the evidence. Here, a trial on the merits has already been completed. During the trial, the exhibits Appellants seek to seal were used freely with no restriction on their use or access to the courtroom by the public during the proceedings; so a fair and public trial has been achieved. At the conclusion of the trial, the jury rendered a verdict adverse to Appellants; this motion to seal is nothing more than Appellants' effort at

¹ S.C. Code Ann. § 39-5-10 *et seq.*

damage control to shield from public view the documents supporting the jury's verdict. This factor weighs in favor of denying Appellants' motion.

2. The need for witness cooperation.

Similar to Factor No. 1, the trial has already been completed and was not impeded by witness cooperation. The fact that witness cooperation is no longer an issue requiring consideration in an appeal weighs in favor of denying Appellants' motion and ensuring public access to these proceedings.

3. The reliance of the parties upon expectations of confidentiality of the proceeding.

Because the trial was open to the public, as it should have been, and neither the parties nor the trial court conditioned the use of the exhibits at issue during the trial, no expectation of confidentiality can legitimately be asserted on appeal, as broadly requested by Appellants. Each of the parties produced documents in discovery which they designated as confidential under the terms of a confidentiality order entered by the trial court. The vast majority of the documents designated as confidential were so-designated by Appellants, including, for no justifiable reason, all E-mails that were produced by the Corporate Defendants.² During the trial, Mr. Maybank desired to have unfettered access and use of all documents produced in discovery, including those designated as confidential by Appellants. Appellants agreed and proposed that the parties have unlimited access to documents designated as confidential, subject to evidentiary rules for introduction of same, during the

² As the Court can see from Appellants' provision of these exhibits as Exhibit A to the motion for its *in camera* review, all of the E-mails Appellants seek to seal are over 6 years old, and some as many as 11 years old.

trial. Specifically, in a pre-trial hearing before the trial court, counsel for the Appellants described their proposal that was ultimately adopted in the following manner:

(Counsel for Appellants): All right. So we all know we have a lot of documents marked confidential. Neither side wants to stop the flow of the trial. Now, they have designated some documents as confidential. They would like the tax returns marked confidential. We, of course, have a large amount of documents that we have concerns about. **From our perspective we are -- we view the risk of information being discussed in open court being exposed to someone in the gallery, we view that risk as being very small, that there's going to be someone in the gallery listening out for confidential information and then running out the door and using it.**

(Trial Court): What type of confidential information? Is it privacy? What is it? I mean, I don't ---

(Counsel for Appellants): It's a lot of different things. Some of it's privacy for customers through third parties. Some of it's social security numbers and account numbers. Some of it is business processes. Some of it is pricing. Some of it is policy manuals. We wouldn't want the whole thing handed over. **So, but the risk of there being someone interested enough in listening to this trial and actually caring about this confidential information, we think that risk is so small that during the trial we don't want to stop the trial because a confidential document's going to be discussed or put into evidence. We just want to keep rolling.**

See Ex. 1, June 5, 2014 Hearing Transcript at 21 (emphasis added).

After trial, Appellants moved to seal certain of the exhibits which were designated as confidential and introduced at trial and Mr. Maybank did not oppose Appellants' motion, as post-trial motions had not yet been ruled upon.

Based on Appellants' own representations, they view the risk of someone being interested in or caring about the information contained in the documents that they designated as confidential and seek to seal on appeal as "small." Moreover, because no steps were taken

to close the proceedings below,³ there could have been no expectation of confidentiality during the trial and none should attach to this appeal.

4. The public or professional significance of the proceeding.

Appellants' mischaracterization of the public significance of this appeal and its direct impact on current and former clients of Appellants is characteristic of the misrepresentations and deliberate concealment of pertinent facts Appellants employed against Mr. Maybank and other clients which the jury and the trial court found to be violative of the UTPA.⁴ Indeed, an adverse effect on the public interest is the *sine qua non* of an unfair and deceptive trade practice under the UTPA, *see Crary v. Djebelli*, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998), particularly here, where the evidence demonstrated a public banking institution providing fiduciary services to the public was deceiving clients it served as fiduciary.

Were it not for this lawsuit, Appellants' unfair and deceptive statements and practices towards Mr. Maybank and other customers almost certainly would have remained successfully hidden. Unbelievably, Appellants cite this proposition as a reason *supporting* their efforts to overcome the presumption against public access to these court records. *See* Motion at 3 ("But for this lawsuit, the public would have been completely unaware of any of the events which were addressed at trial."). However, it is precisely because Appellants sought to conceal their unfair and deceptive actions from the public

³ Which is rare and requires specific findings of fact regarding its reasonableness. *See, e.g., Island Packet v. Kittrell*, 365 S.C. 332, 343, 617 S.E.2d 730, 735 (2005). In short, Appellants recognized there was no valid reason to shield from public view the documents in this case at the public trial below, and thus acquiesced to public access during the trial and waived their claim to confidentiality during the proceeding.

and their customers that all of the facts of this case *should* be available to the public.⁵ Through this motion to seal, Appellants now seek the Court's blessing to continue their efforts at concealment.

5. The perceived harm to the parties from disclosure.

Contrary to Appellants' vague assertions,⁶ no harm to Appellants would result from this case's compliance with the standard open records procedures and strong preference for public access to judicial proceedings and court records. This Court held in *U-Drive-It* that serving the fundamental interests of public access, "especially the goal of bringing the truth to light" outweighed a general assertion to a right of privacy. 369 S.C. at 13, 630 S.E.2d at 471. However, as discussed above, Appellants have not met their heavy burden of overcoming this presumption, because they have failed to identify or demonstrate any harm

⁴ Appellants' contention that the matters at issue in this appeal concern only the private investing decisions and the personal banking and investment accounts for a single individual is simply not true and is belied by the very documents which Appellants seek to seal. In order to prove a violation under the UTPA, which Mr. Maybank did, an adverse effect on individuals other than Mr. Maybank was required and was proven by Mr. Maybank through a demonstration of Appellants' unfair and deceptive business practices in at least three significant ways. *See* Ex. 2, Order and Final Judgment, dated November 10, 2014 at 3-6.

⁵ For instance, one of the bases on which the trial court confirmed the jury's verdict under the UTPA was for sending a deceptive letter to its customers which misrepresented the reason behind a refund of fees charged by Appellants to its clients. Ex. 2, Order at 4, 19. Although Appellants represented that the refund was undertaken "as a reflection of their corporate values," in reality, the refund resulted from criticism of BB&T Asset Management's fee practices by the Securities and Exchange Commission following an audit. Appellants' letter sought to conceal this fact and mislead at least 130 their clients. *Id.* Appellants' efforts here are merely an extension of those efforts at concealment.

⁶ Appellants speak only in generalities and provide no concrete or specific examples of the perceived harms.

that would result from allowing public access, even going so far as to state that they viewed the risk of interest in these proceedings to be “small” during the jury trial below. Beyond Appellants’ failure to meet their burden, Mr. Maybank is aware of no harm that was incurred by Appellants as result of the public access to the trial and Appellants have identified none in their motion. Instead, Appellants assert only a general right of privacy, citing the fact that they designated these documents as confidential when they produced them during discovery. *But see U-Drive-It, supra.*

This is particularly true in light of the nature of the documents Appellants seek to seal. Significantly, Appellants only seek to seal certain exhibits, but do not seek to seal or otherwise redact the transcript of the trial proceedings in which these exhibits were introduced and discussed at length, or the appellate briefs which have already been filed and are available for public access. Moreover, 10 of the 26 exhibits Appellants seek to seal are merely E-mails, many of them internal, and most of which are 7-9 years old, which contain no confidential or other private personal information whatsoever.⁷ Additionally, as discussed above, Appellants’ complaint regarding the information of clients who are not parties to this litigation is misplaced in the context of the jury’s verdict (and required proof) under the UTPA.

In sum, Appellants have identified no specific harm, because there is none, that will flow from the Court’s adherence to the standard rule of public access; therefore Appellants

⁷ These include Agreed Exhibits 30 and 31, Plaintiff’s Exhibit 107, and Defendants’ Exhibits 10, 167, 177, 178, 182, 188, and 214.

have not met their burden of overcoming the presumption in favor of the standard rule and this factor does not inure to Appellants' benefit.

6. Why alternatives other than sealing the documents are not available to protect legitimate private interests.

Beyond the fact that Appellants have not met their burden of demonstrating the appropriateness of sealing these exhibits, Appellants have further failed to demonstrate that the protections of personal identifying information which are already in place are inadequate. To that end, Appellants are already required to comply with this Court's Order No. 2014-04-15-02, which requires redaction of personal identifying information, including social security numbers and financial account information. Compliance with these mandates will adequately protect from public access the information that Appellants have identified. Moreover, there is no legitimate private interest in the documents Appellants seek to seal, other than hiding as much as possible from public view the unfair and deceptive nature of Appellants' conduct. Instead, Appellants' conduct deserves to be exposed, not hidden. Appellants attempt to avoid this factor through a conclusory statement that no alternatives are available; however, this factor actually weighs in favor of denial of Appellants' motion, as compliance Order No. 2014-04-15-02 will provide an appropriate level of protection while adhering to the standard rule of public access.

7. Why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.

As discussed above, given the issues raised in this appeal, the public interest is best served by the Court's traditional, unlimited access to these court proceedings and records. In their motion, Appellants claim "numerous state and federal privacy laws" demonstrate that

“maintaining the confidentiality of personal information is of high importance in today’s society,” *see* Motion at 4; however, Appellants fail to cite a single law or decision of this Court that supports the proposition advanced. Assuming Appellants’ compliance with Order No. 2014-04-15-02, the intent of these unnamed privacy laws will be fulfilled through the protections and procedures already required by the Court.

The only other category of documents Appellants identify are the mid-year and annual performance evaluations of certain “current and former” employees of Appellants. First, this representation is inaccurate, as none of the identified performance evaluations relate to current BB&T employees. However, Appellants fail to overcome the presumption of accessibility where these exhibits reflect praise being lavished on these employees by their supervisors in BB&T for being company leaders in the recommendation and sale of alternative investment schemes, through division initiatives, to their clients. While these practices are damaging to Appellants, they are not to the former employees, who were simply following the instructions and initiatives of their employers. The public interest is best served by access to these documents to demonstrate, as was done at trial, that the hallmark duty of a fiduciary was breached by putting Appellants’ interests above their client’s.

8. Public interest in the proceeding.⁸

This factor is similar to factor No. 4 (The public or professional significance of the proceeding), discussed above, and weighs in favor of denial of Appellants' motion. Further, this Court has already considered the public interest of the issues involved in this case in considering and granting Mr. Maybank's motion to certify the appeal for its immediate consideration.⁹ As discussed above and in the motion for certification, the issues presented by this appeal are of significant public interest because they involve significant breaches of fiduciary duties by a public banking institution against an elderly and financially vulnerable client, as well as unfair and deceptive business practices that Appellants have sought to conceal.¹⁰ The types of breaches and actions which the jury found Appellants committed can lead to significant and devastating client losses, particularly where the client's irreplaceable retirement assets are at issue, as were Mr. Maybank's. As found by the trial court in confirming the jury's award of punitive damages against Appellants, these types of verdicts are likely to deter Appellants and others similarly situated from comparable conduct and will likely encourage better training of employees and improved suitability

⁸ Although this Court in *U-Drive-It* indicated five additional factors that a court may consider in reaching a decision as to whether to seal a court record, Appellants did not address the factors in its motion. 369 S.C. at 12, 630 S.E.2d at 470. This is likely because each of these additional factors weigh in favor of denying Appellants' motion. Mr. Maybank believes these additional factors merit the Court's consideration.

⁹ See Rule 204(b), SCACR; S.C. Code Ann. §14-8-210(b) (collectively providing that certification of an appeal for review by this Court is appropriate where a case involves an issue of significant public interest or a legal principle of major importance).

¹⁰ The trial court found Appellants' employment of these unfair and deceptive business practices to be both knowing and deliberate, *see* Ex. 2, Order at 1, 19, and while

of investment advice, resulting in better protection of a client's irreplaceable assets. Ex. 2, Order at 10. The type of behavior proved in this case, including "[t]he potential harm to a senior citizen [by the] self-serving and deceitful investment advice [of trusted advisors,] can be catastrophic, leading to financial ruin and a life of dependency in a person's twilight years." *Id.* at 10. The disclosure of these practices also has the potential to deter the conduct of other fiduciaries in a similar role, as "[c]orporations managing money for South Carolina's elderly citizens must know that their conduct and advice must be faithful, prudent, trustworthy, non-conflicted, and free from deceit, tricks and misrepresentations." *Id.* at 10. Consequently, a significant public interest in this proceeding exists and supports the denial of Appellants' motion.

9. The private or public status of the litigants and case generally.

Mr. Maybank is a private citizen, but through this case seeks to right a wrong perpetrated against him and further expose the actions taken by his fiduciaries against him and other clients. Appellants are public companies who are actively involved in the fiduciary management of client assets and who seek, through good will and marketing, to expand their client base, particularly in the arena of wealth management of financial assets of elderly and retiring individuals. These facts weigh heavily in favor of public access to these court records.

Mr. Maybank understands Appellants' desire to shield from public view their deceit, no valid reason has been provided that supports doing so in this case.

10. Whether release would enhance the public's understanding of an important historical event.

While characterizing Appellants' actions as an "historical event" might be hyperbolic, without question the public's understanding of the events and issues in Mr. Maybank's case would be enhanced. Thus this factor also weighs in favor of public access and denial of Appellants' motion.

11. Whether the public already has access to information contained in the records.

The public does not have direct access to the information contained in the records, although certain of that information is described and/or quoted in publicly available documents which are already filed in this case and available to the public, including the trial court's Order and the parties' respective briefs. Further public access and availability of the documents themselves would benefit the public and inform potential clients of improper conduct that should be carefully avoided. Likewise, the wealth management community should be fully informed of conduct that injures clients and violates legal standards of conduct.

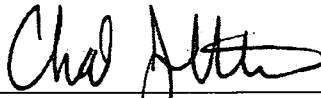
12. Whether a particular decision will sustain or offend the fundamental interests of public access, and any other relevant factors.

A decision by this Court to deny Appellants' motion to seal these documents would, without question, sustain the fundamental interests of public access to court records and proceedings. This is particularly true, as discussed herein throughout, where issues of unfair and deceptive business practices should be exposed publicly to alert elderly individuals of behavior that may expose their retirement assets to great risk.

CONCLUSION

For the reasons discussed above, Mr. Maybank respectfully requests that this Court exercise its discretion and deny Appellants' request to seal portions of the Record on Appeal in this case.

Respectfully submitted,



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*Attorneys for Respondent-Appellant
Francis P. Maybank*

September 17, 2015
Columbia, South Carolina

Exhibit 1

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

FRANCIS P. MAYBANK,)
)
 PLAINTIFF,)
)
 -VS-)
)
 BB&T CORPORATION, ET AL.,)
)
 DEFENDANTS.)
 _____)

2011-CP-23-08578

TRANSCRIPT OF RECORD

JUNE 5, 2014
GREENVILLE, SOUTH CAROLINA

BEFORE:

THE HONORABLE EDWARD W. MILLER

APPEARANCES:

ATTORNEYS FOR PLAINTIFF:

MITCHELL WILLOUGHBY, ESQUIRE
JAMES BANNISTER, ESQUIRE
CHAD JOHNSTON, ESQUIRE

ATTORNEYS FOR DEFENDANTS:

WILLIAM BROWN, ESQUIRE
LARRY KRISTINIK, ESQUIRE

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

1 **MR. KRISTINIK:** All right. So we all know we have a lot
2 of documents marked confidential. Neither side wants to stop
3 the flow of the trial. Now, they have designated some
4 documents as confidential. They would like the tax returns
5 marked confidential. We, of course, have a large amount of
6 documents that we have concerns about.

7 From our perspective we are -- we view the risk of
8 information being discussed in open court being exposed to
9 someone in the gallery, we view that risk as being very small,
10 that there's going to be someone in the gallery listening out
11 for confidential information and then running out the door and
12 using it.

13 **THE COURT:** What type of confidential information? Is it
14 privacy? What is it? I mean, I don't ---

15 **MR. KRISTINIK:** It's a lot of different things. Some of
16 it's privacy for customers through third parties. Some of
17 it's social security numbers and account numbers. Some of it
18 is business processes. Some of it is pricing. Some of it is
19 policy manuals. We wouldn't want the whole thing handed over.

20 So, but the risk of there being someone interested enough
21 in listening to this trial and actually caring about this
22 confidential information, we think that risk is so small that
23 during the trial we don't want to stop the trial because a
24 confidential document's going to be discussed or put into
25 evidence. We just want to keep rolling.

1 **THE COURT:** Okay.

2 **MR. KRISTINIK:** If we turn around and see someone, if we
3 see a news reporter writing down everything in here, then we
4 would like to come to Your Honor at that point in time, if we
5 have concerns, but we think that's very unlikely.

6 **THE COURT:** Okay.

7 **MR. KRISTINIK:** Okay? So, but at the end of each day
8 there's going to be a stack of exhibits marked into evidence
9 that will be in the custody of the Court. And what we would
10 suggest is that from the start of trial until the conclusion
11 of it that Your Honor, if you don't already have this, have a
12 rule in place that non-parties and non-court personnel are not
13 allowed to mess with the exhibits.

14 **THE COURT:** Well, that's in place.

15 **MR. KRISTINIK:** Shouldn't be touching the exhibits anyway
16 during the ---

17 **THE COURT:** They're locked up every night.

18 **MR. KRISTINIK:** Okay. So after, once the trial is over,
19 after the jury verdict comes back and once broader access may
20 be given to those exhibits, that's when I'll come back to Your
21 Honor for a request to seal and to meet the standards required
22 to do so.

23 **THE COURT:** Okay.

24 **MR. KRISTINIK:** So we'll just postpone all of that until
25 the trial is over.

Exhibit 2

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF GREENVILLE) FOR THE THIRTEENTH JUDICIAL CIRCUIT

FRANCIS P. MAYBANK,
 and JANE H.P. MAYBANK, as
 TRUSTEE for 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, and
 STERLING CAPITAL
 MANAGEMENT, LLC, Successor in
 merger to BB&T ASSET
 MANAGEMENT LLC

Defendants.

Civil Action No. 2011-CP-23-857

ORDER AND FINAL JUDGMENT

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMER
 2014 NOV 19 AM 4 49

This matter is before the Court on post-trial motions of Plaintiff Francis P. Maybank and Defendants BB&T Corporation, Branch Banking and Trust Company (“BB&T Bank”), and Sterling Capital Management, LLC (referred to as its predecessor entity, “BB&T Asset Management”) (collectively referred to as “BB&T” or “Defendants”).

Background and Summary

This case was tried before a jury for two weeks beginning June 16, 2014. After deliberating Friday, June 27 and Monday, June 30, the jury awarded Mr. Maybank actual damages of \$3,100,000 and punitive damages of \$5,000,000 for breach of contract, breach of

fiduciary duty, constructive fraud, negligent misrepresentation, and a violation of the South Carolina Unfair Trade Practices Act (“UTPA”), S.C. Code Ann. §§ 39-5-10 *et seq.* The jury did not return a verdict for any claims of the Francis P. Maybank Family Insurance Trust. I observed the jury and found the panel to be attentive, thoughtful, diligent, and deliberate in its consideration of the evidence presented during this lengthy trial.

Plaintiff moved post-trial for attorneys’ fees and costs and to treble actual damages under the UTPA, and for prejudgment interest. Defendants moved substantively for judgment notwithstanding the verdict (“JNOV”), new trial absolute, or, in the alternative, new trial *nisi remittitur*. Defendants also sought to require Mr. Maybank to elect a remedy. Following an August 19, 2014 hearing, I took the issues under advisement.

After careful review of the verdict and the parties’ post-trial motions and argument of counsel, I deny Defendants’ motions for JNOV, new trial absolute, and new trial *nisi remittitur*. I find that the award of punitive damages in the amount of \$5,000,000 is appropriate. I treble the actual damage award of \$3,100,000 to \$9,300,000 because I find Defendants’ conduct, which the jury found to be an unfair and deceptive business practice in violation of the UTPA, was knowing and willful. I find that no election is required because Defendants’ unfair and deceptive conduct in violation of the UTPA was separate and distinct from that supporting the common law causes of action for which punitive damages were awarded. I therefore find Plaintiff is entitled to both treble and punitive damages. I award \$2,654,295 in attorneys’ fees and \$245,011 in costs. I deny the motion for prejudgment interest.

Analysis
Motion for Judgment Notwithstanding the Verdict

I deny Defendants’ motion for JNOV because the evidence supports the jury’s verdict in favor of Mr. Maybank. “A motion for JNOV may be granted *only if no reasonable jury could*

have reached the challenged verdict.” Gastineau v. Murphy, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998) (emphasis added). In ruling on the motion, I view the evidence and the reasonable inferences in the light most favorable to the non-moving party. *RTF Mgmt. Co., LLC v. Tinsely & Adams LLP*, 399 S.C. 322, 732 S.E.2d 166 (2012). To the extent a ground for relief in the JNOV motion is not addressed below, I expressly deny relief on that ground.

I. South Carolina Unfair Trade Practices Act.

I find that the evidence showed actions by Defendants other than the sale of a security, that Defendants’ activities are not exempt from the UTPA, and that Defendants failed to prove their entitlement to any exemption under the UTPA.

A. Legal background.

UPTA’s prohibitions do not apply to “[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law.” S.C. Code Ann. § 39-5-40(a). This exemption requires a case-by-case analysis of the alleged misconduct. *See Ward v. Dick Dyer*, 304 S.C. 152, 155, 403 S.E.2d 310, 312 (1991) (“The exemption is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes.”). Section 39-5-40 also imposes “the burden of proving exemption . . . upon the person claiming the exemption.”

B. Discussion.

I find that the jury’s verdict that Defendants violated the UTPA was supported by at least three separate instances of unfair and deceptive business practices by Defendants, none of which involved a public offering, registration, or sale of a security, and all of which are separate from the bases of liability for the common law causes of action.

I first find that the jury reasonably could conclude that Defendants violated the Act by their admitted misuse of their form Wealth Management Agreement (“WMA”). There was evidence that Defendants knew when they presented the WMA to Mr. Maybank that it contained deliberate misrepresentations and that BB&T would not fulfill the promised duties, which were the basis of the bargain and the crux of the fiduciary relationship. The evidence also showed that Defendants presented the same form document to all clients of the Wealth Management Division from at least 2006 into 2009. BB&T’s corporate representative admitted that Defendants did not notify Mr. Maybank or any customer that the WMA would not be fulfilled as promised.

I further find that the evidence showed Defendants misled Mr. Maybank and approximately 130 other customers regarding a fee refund. Although BB&T’s letter claimed that the fee refund was “a reflection of [BB&T’s] corporate values,” Ex. 50, evidence showed that the fee refund resulted from criticism by the Securities and Exchange Commission (“SEC”) of charging transaction-based “broker-esque” fees by BB&T Asset Management, which was not a registered broker-dealer. The jury reasonably could have concluded that Defendants’ statements unfairly, deliberately, and deceptively hid the truth about BB&T’s actions, and was designed to lull clients into complacency, discouraging investigation of BB&T’s business practices and allowing BB&T to possibly avoid civil liability.

I also find that the evidence showed that Defendants knowingly misrepresented that an individualized assessment of Mr. Maybank’s financial situation had been performed. *See* Ex. 7 (August 11, 2006 General Counsel “Approval Letter”). Although Mr. Maybank relied upon the Approval Letter, believing it to be specifically tailored for him, the letter was merely a “fill-in-the-blank” form letter extolling the suitability of the variable prepaid forward contract (“VPFC”) for concentrated positions in BB&T stock, no matter the client’s financial situation. *Cf.* Ex. 91.

I find Defendants' use of this form letter deliberately, unfairly, and deceptively misrepresented the services provided to Mr. Maybank and other customers because promising specialized or individualized treatment while actually providing only stock services violates the UTPA. See *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 270-71, 536 S.E.2d 399, 407 (Ct. App. 2000).

I find the jury verdict was supported by evidence that Defendants knowingly and deliberately engaged in unfair and deceptive practices in each of these three ways and that Defendants failed to meet their burden to prove that each of these practices involved a security or securities transaction and was authorized under laws administered by any regulatory body or permitted by any other South Carolina law.

I further reject Defendants' argument based upon a generalized banking industry exemption to the UTPA. *Ward*, 304 S.C. at 155, 403 S.E.2d at 312.¹ However, the UTPA exemption only excludes "from the UTPA those actions or transactions which are allowed or authorized by a regulatory agency or other statutes." See *Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996) (citing *Ward*). I further find that Defendants' unfair and deceptive practices were not authorized by any federal or state securities acts or regulations. I also find that Defendants' argument fails to acknowledge that they were not registered to sell securities as broker-dealers; that they presented no evidence that the VPFC was a registered security much less that it was an initial public offering of a security; and that the jury rejected Plaintiffs' claim for recovery under the Uniform Securities Act.

Defendants waived any argument that BB&T Asset Management and BB&T Bank are exempt from the UTPA by operating in regulated industries because they did not move for a

¹ *Ward* involved an exemption to the UTPA, but not for the banking industry. The Court overruled its prior holding in *State ex rel. McLeod v. Rhoades*, 275 S.C. 104, 267 S.E.2d 539 (1980), which had applied a general activity test.

directed verdict on this ground. *See In re McCracken*, 346 S.C. 87, 93, 551 S.E.2d 235, 238 (2001). I further find that Defendants' argument is based upon an erroneous interpretation of the record and the stipulated fact that these Defendants were not registered as broker-dealers with the SEC or the State of South Carolina. I also find that, even under Defendants' general regulation theory, their unfair and deceptive business practices as exposed in this case were not authorized or required by banking regulations. I find Defendants failed to meet their burden to present evidence proving an exemption from the UTPA and that Defendants presented no evidence that the two VPFCs sold to Mr. Maybank were initial public offerings of securities or were even securities as contemplated by the exemption recognized in *Rhoades* and *Ward*. Finally, the jury rejected any argument that Defendants were entitled to an exemption, and I concur with that finding.

II. Punitive Damages.

Prior to addressing Defendants' argument that a so-called exculpatory clause insulates them from punitive damages, I will first evaluate Defendants' arguments for JNOV on the common law causes of action and the propriety of the jury's award of punitive damages.

A. Common Law Causes of Action.

Defendants contend that judgment should be entered in their favor on the common law claims of breach of contract, breach of fiduciary duty, constructive fraud, and negligent misrepresentation. I find that there is ample evidence from which this very reasonable and thoughtful jury could have rendered its verdict. I further find that, for each element on the causes of action submitted to the jury, there was sufficient evidence upon which a reasonable jury could return a verdict for Mr. Maybank on these causes of action. I therefore deny Defendants' motion.

B. *Review of the Jury's punitive damages award.*

I must consider whether punitive damages are warranted and, if so, whether the amount is appropriate based on (1) the degree of reprehensibility of Defendants' conduct; (2) the disparity between actual or potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages award and civil penalties authorized or imposed in comparable cases. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 587-89, 686 S.E.2d 176, 185-86 (2009). I find the punitive damages award is constitutional and proper.

1. Reprehensibility.

In evaluating reprehensibility, "perhaps the most important indicium of the reasonableness," I must consider whether (1) the harm was physical or economic; (2) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit rather than mere accident. *Id.* at 587, 686 S.E.2d at 185. I find ample, clear and convincing evidence supporting the jury's finding of reprehensibility. The harm was economic, and Defendants demonstrated indifference to and/or reckless disregard for Mr. Maybank's financial health and well-being, as well as the safety of his irreplaceable retirement assets.

I find clear and convincing evidence of Mr. Maybank's financial vulnerability as a 74-year old, soon-to-be retiree, which was known to Defendants who were acting as his advisor and fiduciary. Defendants' conduct was not an isolated incident but instead involved repeated acts of indifference to Mr. Maybank and others. Defendants' representatives were financially incentivized to sell alternative investment strategies, which they viewed as a fee-generating

“revenue opportunity” for BB&T.² BB&T sold Mr. Maybank a strategy based upon a VPFC which was speculative, costly, and unsuitable, and anchored by a complex derivative product that actually increased risk, rather than minimizing it. BB&T further increased the risk by using the cash generated to fund a 100% equity “Aggressive Growth” portfolio. Defendants’ self-serving strategy moved Mr. Maybank’s assets from a non-fee generating account to accounts that provided Defendants and their incentivized employees with an up-front fee of \$32,614 as well as a stream of annual management fees.

The evidence showed that, in 2009, Defendants compounded their initial flawed and self-serving advice by recommending the roll-over of the first VPFC into a second VPFC, which they presented to clients as the “ideal choice.” Instead, the roll-over was “ideal” only for Defendants, as it generated additional up-front transaction and annual management fees. For their faithless and self-serving advice, Defendants charged Mr. Maybank a fee of \$43,655. Mr. Maybank was locked into Defendants’ self-serving scheme of fee-producing, costly roll-overs that over time would deplete a client’s assets. I find that Defendants’ conduct was not isolated, but part of a scheme to generate fees and bonuses for Defendants and its representatives without regard to the best interests of Mr. Maybank, their principal to whom they owed fiduciary duties.

² Defendants’ internal sales practices were demonstrated at trial. For example, Exhibits 55, 89, 92, 100, 103, 104, and 106, taken together, show that Defendants initiated a sales program to generate revenue through the sale of alternative (derivative) products and associated strategies, while the needs and best interests of Mr. Maybank were sacrificed by untrained, bonus-driven representatives incentivized to sell products. Exhibit 92 in fact calls it a “revenue opportunity”:

Pre-Paid Variable Forwards

- Revenue Opportunity
- Up-front fee of 50-100 basis points
- Annual management fees up 1% or more
- This could generate well over \$100K over 3 years

See also Ex. 100 (same). These exhibits, along with other exhibits and testimony in the record, support the reasonable conclusion that the motivation to sell the VPFC strategy was for the substantial revenues that it generated, not because it was in Mr. Maybank’s best interest.

Based on these examples and the record as a whole, I find that the evidence shows that Defendants acted with malice, trickery, or deceit rather than mere accident. I find that the jury could have reasonably found that Defendants, notwithstanding their position as Mr. Maybank's fiduciary, breached their duties in at least one or more of the following ways:

- i. By failing to perform an individualized analysis of the suitability of the investment strategy for Mr. Maybank;
- ii. By failing to perform a thorough financial analysis or to develop a comprehensive financial plan;
- iii. By failing to advise Mr. Maybank about the significant conflict of interest against providing advice about BB&T Corporation stock;
- iv. By failing to advise Mr. Maybank about the reasonable amount of annual revenue to be generated by BB&T's investment strategy and to counsel him about restricting his spending to the assured income level;
- v. By misrepresenting that BB&T had expertise in VPFCs and the associated strategy;
- vi. By permitting untrained and misinformed representatives to sell a product and strategy which they were unqualified to sell;
- vii. By failing to explain that the strategy substantially increased Mr. Maybank's investment risk;
- viii. By failing to explain that the strategy placed the client into a never-ending cycle of periodic and costly roll-overs;
- ix. By failing to fully explain the true costs of this complex strategy and the derivative contract upon which it was based;
- x. By misrepresenting to Mr. Maybank that his best interests were being served when, in actuality, the strategy was nothing more than a fee-driven sales program for Defendants and their representatives;
- xi. By failing to place Mr. Maybank's best interest ahead of the interest of BB&T; and
- xii. By representing that the VPFC and associated strategy would protect Mr. Maybank's retirement savings, when in actuality it substantially increased the risk of loss.

I concur and find that Defendants' conduct was reprehensible and warrants the imposition of punitive damages as awarded by the jury.

2. **Ratio between actual and punitive damages.**

The ratio between the award of \$5 million in punitive damages and the award of \$3.1 million in actual damages is 1.61 to 1. This ratio is at the low, or readily sustainable, end of the reasonableness spectrum. See, e.g., *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 720 S.E.2d 473 (Ct. App. 2011) (upholding a 7.69 to 1 ratio where improper safeguards by bank permitted co-

conservator to steal a child's funds); *Mitchell*, 385 S.C. at 593-94, 686 S.E.2d at 188 (ratio of 9.2 to 1 in insurance bad faith case).³ Based on the Defendants' conduct, I find the ratio of punitive to actual damages to be both reasonable and proportionate to the harm suffered by Mr. Maybank.

I further consider "the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." *Id.* at 588, 686 S.E.2d at 185. I find that a \$5,000,000 punitive damages award is likely to deter Defendants from similar conduct in the future and will likely encourage better training of employees, result in improved suitability analysis and increased competence of investment advice, and lead to true protection of a client's irreplaceable retirement assets. Further, I find that the award is reasonably related to the financial harm likely to result from such conduct, which can be significant and large as seen in Mr. Maybank's case. The potential harm to a senior citizen of self-serving and deceitful investment advice can be catastrophic, leading to financial ruin and a life of dependency in a person's twilight years. Corporations managing money for South Carolina's elderly citizens must know that their conduct and advice must be faithful, prudent, trustworthy, non-conflicted, and free from deceit, tricks, and misrepresentations. Finally, based on the record, including but not limited to the testimony and evidence of Mr. Maybank's expert witness Dr. Oliver Wood, I find that Defendants have the ability to pay the punitive damages award.

³ South Carolina courts have upheld ratios across the spectrum in cases involving "merely" economic harm. *See, e.g., Jenkins v. Few*, 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2012) (3.6 to 1 ratio for conversion, trespass, and civil conspiracy); *Duncan v. Ford Motor Co.*, 385 S.C. 119, 682 S.E.2d 877 (Ct. App. 2009) (ratio of 5.087 to 1 upheld against vehicle manufacturer when defective switch destroyed owners' home and personal belongings); *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003) (upholding a 9.9 to 1 ratio on an intentional interference with contract claim); *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (affirming a 28 to 1 ratio for breach of contract and bad faith insurance claim).

3. *The difference between punitive damages and civil penalties.*

Lastly, I find that there are no comparable civil penalties that are applicable to Defendants' breaches of their fiduciary duties, misrepresentations, and fraudulent actions to Mr. Maybank. See, e.g., *Cody P.*, 395 S.C. at 632, 720 S.E.2d at 484. As discussed above, I find consideration of the punitive awards in comparable cases to be appropriate. Like *Cody P.*, this case involves economic harm caused by a bank's failure to safeguard a client's funds. The reprehensibility is greater here because the bank in *Cody P.* merely failed to prevent misconduct by a third party; the harm in this case was caused by Defendants' own intentional and deliberate misconduct, which was found by the jury to be grossly negligent, reckless, and/or willful and to constitute constructive fraud, breaches of fiduciary duty, and breaches of the contract. The ratio here is lower than in *Cody P.*, which upheld a 7.69 to 1 ratio despite a lack of any findings of intentional wrongdoing by that bank defendant. I therefore find that the award of punitive damages by this jury is reasonable, especially in comparison with comparable cases.

4. *Conclusion.*

I find that the punitive damages award by this jury is supported by clear and convincing evidence; that Defendants' conduct is reprehensible; and that the award is directly proportionate to the harm caused by Defendants. I therefore affirm the award of punitive damages.

C. *The exculpatory clause does not apply.*

I find that the exculpatory clause contained in the WMA does not preclude the award of punitive damages. In pretrial proceedings, Defendants' corporate representative, Mr. Ross Walters, admitted that the WMA had been incorrectly drafted by their lawyers, that it had been tendered to Mr. Maybank despite these errors, and that no one had explained or disclosed the errors to Mr. Maybank, even though Defendants were then his fiduciary. Defendants'

counterclaim for reformation also constituted an admission of the errors in the contract. I denied Plaintiff's motion for partial summary judgment because the real terms of the parties' agreement were in doubt based on Defendants' own admissions and actions. At trial, the question of the real and enforceable terms of the contract remained hotly contested. Consequently, I found that the determination of the terms of the WMA was a question of fact for the jury to decide. The jury considered the contract, the evidence of record, argument of counsel, and the Court's charges and rejected Defendants' version of the events and characterizations of their conduct. The jury also awarded punitive damages and therefore determined that the exculpatory clause did not preclude an award of such damages.

I further find that, as a matter of law, the exculpatory clause is inapplicable to Defendants' misconduct under the common law causes of action of breach of fiduciary duty, constructive fraud, and negligent misrepresentation.⁴ The exculpatory clause applies only "with respect to [Bank and Investment Advisor's] services under this Agreement." I find that the services as described in Sections I, II, and III of the contract do not include making misrepresentations or material omissions of relevant information or failing to disclose or concealing material information. Thus, as a matter of law, I find that the common law causes of

⁴ While Defendants argue that the exculpatory clause is unambiguous and its terms are derived from the clear intent of the parties, I note that the clause is in the very same form agreement that Defendants sought to reform by mutual mistake. When it came to their admitted breach of the WMA, Defendants contended that certain language in the contract should be amended to support their favored construction even though they drafted the erroneous contract. Defendants' counterclaim for reformation is denied because there is no evidence of mutual mistake. Although they had the burden of proving mutual mistake by clear and convincing evidence, Defendants failed to prove that they were entitled to reformation. *See Crosby v. Protective Life Ins. Co.*, 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct. App. 1987). Defendants own actions demonstrate that the contract terms and applications are in doubt, and the rules of contract construction therefore require the exculpatory clause to be narrowly interpreted in favor of the client and against BB&T, which drafted the contract. *See McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993).

action of breach of fiduciary duty, constructive fraud, and negligent misrepresentation arise outside of the “services” set forth in the WMA. Defendants provided no authority for the proposition that they may be relieved from intentional, reckless, and fraudulent conduct.

I find that BB&T Corporation and Mr. Maybank are not in equal bargaining positions, particularly where there is a form agreement drafted and presented by a multi-billion dollar fiduciary to an individual client. South Carolina courts have gone to “extremes” to avoid enforcing exculpatory clauses where the parties have substantially different bargaining power. *Cooke v. Allstate Mgmt. Corp.*, 741 F. Supp. 1205, 1207 (D.S.C. 1990); *see also Anthony v. Atlantic Group, Inc.*, 909 F. Supp. 2d 455 (D.S.C. 2009). I find that enforcement of the exculpatory clause in the WMA would be against public policy. I therefore deny Defendants’ motion to construe the so-called exculpatory clause so as to bar the jury’s award of punitive damages.

I further find that the exculpatory clause is unenforceable here because BB&T was Mr. Maybank’s fiduciary when the misconduct occurred and the WMA was executed. As his fiduciary, BB&T had an absolute duty of disclosure and the obligation to ensure that Mr. Maybank understood the terms of the entire WMA, including the exculpatory clause. Further, Mr. Maybank had an absolute right to rely upon BB&T’s representations and to expect that his fiduciary would fully disclose any terms adverse to his interests, which they admittedly failed to do. *See Regions Bank v. Schmauch*, 354 S.C. 648, 672-74, 582 S.E.2d 432, 444-46 (Ct. App. 2003) (fiduciaries have absolute obligation of disclosure of material facts and, clients have right to rely upon the representations by their fiduciaries). The evidence demonstrated that Mr. Maybank was not provided a copy of the WMA—and, necessarily, the exculpatory clause—until nearly two weeks after the failed investment strategy was set into motion through the first VPFC,

and even then the adverse terms of the exculpatory clause were not discussed with him. When presented with the full contract, and all of the evidence and circumstances surrounding the execution of the WMA, the jury found that punitive damages were warranted. I find that the exculpatory clause is unenforceable based on the jury's findings and my own weighing of the evidence.

III. BB&T Corporation.

A. *The Court properly exercised jurisdiction over BB&T Corporation.*

This Court properly exercised personal jurisdiction over BB&T Corporation. "A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's ... transacting any business in this State ... [or] entry into a contract to be performed in whole or in part by either party in this State." S.C. Code Ann. § 36-2-803(A)(1), (7). BB&T Corporation's General Counsel expressly authorized the investment strategy recommended to Mr. Maybank in South Carolina, which permitted Mr. Maybank to continue to hold a concentrated position in BB&T stock even though it was a conflict of interest for BB&T Corporation to make representations and give advice regarding its own stock.⁵ Without the approval and validation of the transaction by BB&T Corporation, the strategy would not have been implemented and the fee opportunity would have been lost for Defendants.⁶ I therefore reject Defendants' argument that BB&T Corporation was "a mere

⁵ BB&T Corporation knowingly and willingly authorized, approved, and facilitated an investment relationship with a South Carolina resident involving the ownership of and dividends from BB&T Corporation stock. That alone establishes minimum contacts sufficient to support exercising personal jurisdiction over BB&T Corporation. *Fields v. INA Filtration Corp.*, 292 S.C. 614, 618, 358 S.E.2d 160, 163 (Ct. App. 1987) ("The length and duration of the nonresident's activity in this State need only be minimal when the plaintiff lives in this State and the cause of action arose out of the defendant's activities in this State").

⁶ Defendants ignore the Corporation's critical role in establishing duties to clients and customers of its subsidiaries. BB&T Corporation promulgated a Code of Ethics governing its

holding company for other BB&T entities and that none of its employees had any direct involvement with Mr. Maybank,” and instead find that the character and circumstances of the corporation’s actions and the State’s interest weigh in favor of exercising personal jurisdiction.

B. Defendant waived any objections to the exercise of jurisdiction over BB&T Corporation.

BB&T Corporation waived its right to seek dismissal. The defense of personal jurisdiction “may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct.” *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). Simply articulating the defense in an answer without promptly advancing it may waive that defense. *Yeldell v. Tutt*, 913 F.2d 533, 539 (8th Cir. 1990). BB&T Corporation made only a perfunctory defense under Rule 12(h)⁷ by stating in the Answer that it “reserves its objection based on the Court’s lack of *in personam* jurisdiction.” See Ans. 1st Am. Compl. p.1. BB&T Corporation then fully participated in litigating this case without advancing that objection or otherwise moving for dismissal at any time until shortly before trial. See *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 62 (2d Cir. 1999) (defendant forfeited defense of personal jurisdiction by not moving to assert it until four years after filing answer). I find that BB&T Corporation waived the defense by “provid[ing] no more than a bald assertion in [the] answer that the court lacked personal jurisdiction” and then proceeded to participate in discovery, make court appearances, and file numerous pleadings without ever again presenting the defense. I therefore deny Defendants’ motions for JNOV, new trial, and new trial *nisi remittitur* on this ground.

subsidiaries intended to enhance the operations of the corporation and its subsidiaries by ensuring that these entities “continue to earn our client’s trust and respect by always upholding the highest standards of ethical and professional conduct in all that we do.” See Ex. 6, BB&T Code of Ethics, § I (“The Code applies equally to all employees of BB&T and its subsidiaries.”).

⁷ Rule 12(h), SCRPC, merely “specifies the minimum steps that a party must take in order to preserve [the] defense, not the outer limits of a possible waiver.” *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998).

IV. Statute of Limitations

The statute of limitations does not bar Mr. Maybank's causes of actions and Defendants' motion on this ground is denied. "The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide." *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) (citation omitted).

V. Insufficient Evidence of Damages

Defendants argue that Mr. Maybank did not present sufficient evidence on damages. However, the jury clearly found damages were warranted based on the testimony of Mr. Maybank as well as his expert witnesses, Dr. Craig McCann and Professor John Freeman. Although Defendants may disagree with the weight given to the evidence, my responsibility is limited to determining if any evidence existed to support the verdict. I deny Defendants' motion on this ground because I find the damages are fully supported by ample evidence.

VI. Grounds for JNOV

Defendants argue over 40 additional grounds⁸ in their motion for JNOV, *see* Mot. pp.18-24, Nos. 12-54, that I find forfeited because they were neither advanced in Defendants' 31 page written directed verdict motion nor argued orally to the Court. "[A] motion for JNOV must be based on the same grounds as those raised in a motion for a directed verdict motion made at the close of all the evidence." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012). However, I further have considered each of these issues to the extent the substance can be gleaned from the conclusory arguments and I find that they do not warrant granting JNOV. I therefore deny Defendants' motion on these and all other additional grounds.

⁸ Regardless of the number, I deny each of the additional grounds as meritless.

Motion for New Trial Absolute

Although a new trial absolute may be granted if the verdict is excessive or inadequate, “[t]he jury’s determination of damages ... is entitled to substantial deference.” *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993). I have considered the testimony and reasonable inferences therefrom most favorable to Mr. Maybank as the nonmoving party. I deny Defendants’ motion because I find the evidence presented at trial fully supports the jury’s verdict and further find that the verdict is neither grossly excessive nor the result of passion, caprice, prejudice, partiality, corruption, or some other improper motive.⁹

I. Challenges to the Court’s evidentiary rulings.

I find that Defendants have not established that any of the challenged evidentiary rulings were erroneous because, in each instance, the evidence was relevant and properly admissible. *State v. Douglas*, 367 S.C. 498, 508, 626 S.E.2d 59, 64 (Ct. App. 2006). I further find that Defendants failed to show the challenged rulings were unfairly prejudicial. *See Fields v. Reg’l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). I therefore deny the motion on these grounds.

II. Challenges to the Court’s Jury Instructions.

Defendants also assign error to the Court’s compilation and delivery of jury charges following the close of evidence. I find that Defendants made no valid contemporaneous objections. *See Murray v. Bank of Am., N.A.*, 354 S.C. 337, 346, 580 S.E.2d 194, 199 (Ct. App. 2003). I further find that, after careful review, the instructions adequately charge the applicable law in this case. I therefore deny Defendants’ motion on this ground.

⁹ Defendants assert, by my count, 54 distinct grounds in support of their motion for new trial absolute. To the extent a ground is not specifically discussed, it is denied. Additionally, to the extent a ground is identical to one raised in the JNOV motion, I expressly incorporate those rulings to the extent applicable in denying the motion for new trial absolute.

III. Challenges to the Jury Verdict Form.

I find that Defendants' challenge to various parts of the jury verdict form is without merit and has been waived. The verdict form I ultimately adopted and submitted to the jury was, with minor exception, the form proposed by Defendants. The return of a general verdict for a total amount of damages on all causes of action means that each cause of action independently supports the entire award of actual damages. I find that Defendants waived any objection related to the verdict form and deny their motion on this ground. *See Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995).

IV. Thirteenth Juror Doctrine.

Defendants also seek to have this Court grant a new trial as the thirteenth juror. I decline to interfere with the jury's verdict because I find that the record fully supports the verdict. I observed the jury to be very diligent, thoughtful and attentive in its work. After two weeks of receiving testimony and documentary evidence, listening attentively to arguments of counsel and jury charges, and deliberating for two days, the jury found Defendants' conduct was in violation of law, reprehensible, and otherwise deserving of punishment. Defendants' motion for a new trial on this ground is denied.¹⁰

New Trial Nisi Remittitur

I deny Defendants' motion for a new trial *nisi remittitur* because I find there is no compelling reason to reduce the jury's verdict. Based on the evidence, applicable law, and the arguments of the parties, I find that the jury's verdict is fully supported by the evidence and is not excessive, arbitrary, or capricious. Having closely observed the evidence and the jury over the course of the two week trial, I find the verdict was based on neither emotion nor improper

¹⁰ Because I find no merit to Defendants' motion for new trial absolute, I deny relief on any and all grounds raised in that motion not specifically discussed in this Order.

sentiment and was supported by the evidence of record. I accept and concur with the jury's finding that Defendants' conduct was reprehensible, which justifies and supports the award of actual and punitive damages. I therefore deny the motion for new trial *nisi remittitur*.

Treble Damages under the Unfair Trade Practices Act

Mr. Maybank moves to treble the jury's award of actual damages on the UTPA verdict because Defendants' conduct was willful or knowing. S.C. Code Ann. § 39-5-140(a). Conduct is willful if a reasonable person could have ascertained that their conduct violated the UTPA. *State ex rel. Medlock v. Nest Egg Soc. Today, Inc.*, 290 S.C. 124, 128, 348 S.E.2d 381, 384 (Ct. App. 1986). Relying on and incorporating here the evidence discussed above, which I find supports the jury's verdict under the UTPA, I further find that, having observed the testimony at trial and reviewed the evidence, Defendants' conduct in employing an unfair or deceptive method, act, or practice in commerce was both willful and knowing. I therefore treble the actual damages of \$3,100,000 to \$9,300,000.

Election of Remedies

Defendants moved to require Mr. Maybank to elect between recovery of punitive damages awarded by the jury on the common law causes of action and treble damages under the UTPA. I find no election is required because, as stated, the evidence supported at least three theories for relief under the UTPA that were separate and distinct from the theories supporting the common law claims: 1) BB&T's presentation of a deceptive and misleading form contract that the Bank had no intention of fulfilling as written; 2) use of a form letter purporting to provide Mr. Maybank with personalized research and analysis of the investment strategy but that in fact was a generic, fill-in-the-blank form document in which Defendants pre-cleared the use of these risky investment strategies; and 3) Defendants' deceptive letter to at least 130 clients in

which it misrepresented that a fee refund was made to reflect BB&T's corporate values when in actuality it obscured its legal liability for having charged those fees at all. In contrast, the jury found for Mr. Maybank on the common law causes of action of breach of fiduciary duty, constructive fraud, and negligent misrepresentation and awarded \$5 million in punitive damages on those claims.¹¹ Each of these causes of action was based on a breach of the professional duties, trusted advisor status, and fiduciary duties undertaken by Defendants as Mr. Maybank's fiduciary and was fully supported by evidence admitted at trial. The jury found that Defendants' conduct was reprehensible and warranted punishment based on evidence that Defendants provided imprudent, unsuitable, uninformed, deceitful, and reckless advice and made misrepresentations to Mr. Maybank while acting as his fiduciary.

Taken in the light most favorable to the non-moving party, the record supports a reasonable conclusion that Defendants' liability under the UTPA is separate from that for the common law causes of action. *See Taylor*, 324 S.C. at 218, 479 S.E.2d at 44-45 ("Election of remedies is not applicable where there are two separate causes of action, each based on different facts.") (citing *Jones v. Winn-Dixie Greenville*, 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995) (holding that "the principle [of election of remedies] has no application where two separate causes of action, each based on different facts, exists.")). Moreover, the UTPA by its clear and unambiguous language is "cumulative and supplementary to all powers and remedies otherwise provided by law." S.C. Code Ann. § 39-5-160. I find that the common law causes of action for which punitive damages were awarded were based on evidence demonstrating Defendants'

¹¹ The verdict form differentiated the causes of action for which punitive damages could be awarded from those that could not, including the UTPA cause of action, providing in pertinent part as follows: "12. If you answer Yes to Questions 2 [Breach of Fiduciary Duty], 3, 6, 7, 8 [Constructive Fraud], or 9 [Negligent Misrepresentation], do you find by clear and convincing evidence that the acts of the defendant(s) warrant payment of punitive damages" The jury also was instructed as to the standards for imposing punitive damages.

imprudent, unsuitable, and risky investment advice to Mr. Maybank, representations to him that the recommended strategy would protect his assets and was well-researched and tailored to his specific investment needs. In contrast, Defendants' practice of presenting the false and deceptive contracts and letters to Mr. Maybank, while deliberately hiding their falsity, is an independent, separate unfair and deceptive business practice. I therefore deny Defendants' motion to require election because, based on the facts and Defendants' actions in this case, there is no double recovery for a single wrong. *Taylor*, 324 S.C. at 218, 479 S.E.2d at 44-45.¹²

I deny Defendants' motion for election of remedies on all other grounds. Many of these grounds were not raised at trial. For instance, although pled in their Answer, Defendants waived their arguments on the economic loss rule by failing to raise it in any of their eight summary judgment motions, or during trial in their 31-page motion for directed verdict. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (post-trial motion cannot be used to raise an issue that could have been raised at trial). Regardless, I reject their argument on the economic loss rule, which in South Carolina is primarily limited to the products liability arena. See *Kennedy v. Columbia Lumber Mfg. Co.* 299 S.C. 335, 345-46, 384 S.E.2d 730 (1989). Moreover, even Defendants' cited authority expressly rejects the economic loss rule when Defendants owe an independent duty. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 56, 463 S.E.2d 85, 89 (1995). Defendants acted to become Mr. Maybank's fiduciary and well knew that he would suffer economic losses if they breached their duties to him.

¹² See also, e.g., *Freeman v. A. & M. Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532, 536 (Ct. App. 1987) (upholding both punitive and treble damages).

I also reject Defendants' argument that the claims for constructive fraud and negligent misrepresentation are inconsistent. I expressly instructed the jury that Mr. Maybank was not entitled to multiple damages based on the number of causes of action:

The plaintiff has asserted multiple causes of action against the defendant. In other words, the plaintiff believes he is entitled to recover against the defendant under multiple, different legal theories. If you find that the plaintiff has met their burden of proof as to more than one cause of action and you consider awarding damages, you should not increase the amount of actual damages simply based on the number of different causes of action, if any, upon which you find the plaintiff has prevailed.

Following these instructions, the jury in this case returned a verdict against Defendants for \$3.1 million on all causes of action on a verdict form proposed by Defendants. I therefore deny Defendants' motion on this ground.¹³ I also deny Defendant's motion to require Mr. Maybank to elect a single cause of action on which to proceed because I find that there is no possibility of double recovery of actual damages in this case. *See Taylor*, 324 S.C. at 203, 479 S.E.2d at 44-45 (election of remedies is the act of choosing between inconsistent remedies allowed by law on the same set of facts).¹⁴

Motion for Attorneys' Fees and Costs under the Unfair Trade Practices Act

Mr. Maybank has moved for an award of attorneys' fees of \$3,317,868.70 and costs of \$306,264.10. *See* S.C. Code Ann. § 39-5-140(a). In rendering my decision, I have relied upon my own knowledge and observations in the case as well as the affidavits submitted by Mr.

¹³ This conclusion is not changed by the fact that the jury returned a single award of \$3.1 million on five causes of action, including the UTPA violation. The jury's award of a single amount of actual damages is not indicative of a finding that no distinct damages flow from the jury's determination of a violation of the UTPA. To the contrary, a general verdict form is indicative of the fact that any or all of the causes of action returned by the jury sustain the full amount of the actual damages. The question is not whether there is a separate award of damages for that violation, but whether separate facts and actions of the Defendants support each of the treble and punitive damage awards.

¹⁴ To the extent not expressly addressed in this Order, Defendants' arguments nevertheless are denied.

Maybank, including the affidavit of Professor John Freeman.¹⁵ Although Plaintiff's request for attorneys' fees and costs is reasonable, I nevertheless find it appropriate to reduce the total hours and costs by 20% in order to limit the fees to the UTPA claim. I therefore award as reasonable and appropriate attorneys' fees of \$2,654,295 and costs of \$245,011.¹⁶

I. Introduction and background.

The specific award of attorneys' fees and costs is left to the discretion of this Court, and must be determined using a lodestar analysis. *Layman v. State*, 376 S.C. 434, 444, 457-58, 658 S.E.2d 320, 325, 332-33 (2008). This analysis requires determining a reasonable hourly rate and hours worked and then considering any exceptional circumstances justifying an enhancement of the lodestar figure. *Id.* at 458-61, 658 S.E.2d at 33-35. This requires considering the following: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services. *Id.* at 458, 658 S.E.2d at 333 (citing *Jackson*, 326 S.C. at 308, 486 S.E.2d at 760).

I start with my familiarity with this extremely complicated case and the fine, well-prepared, and knowledgeable counsel representing both sides. The parties appeared before me on four separate occasions to resolve pre-trial issues and dispositive motions, with most hearings lasting several hours. These motions involved substantial written submissions, which I observed

¹⁵ I find Professor Freeman's affidavit to be appropriate and consistent with the parameters of expert testimony established by the case law. *See, e.g., Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (Ct. App. 2008). Professor Freeman is qualified to render an opinion assisting the Court in exercising its discretion. *See* Rule 702, SCRE. I therefore deny the motion to strike Professor Freeman's affidavit.

¹⁶ Defendants filed two additional post-trial motions beyond the deadline of July 10, 2014, seeking to compel the submission of additional documentation from Mr. Maybank in support of his request for attorneys' fees and costs under the UTPA, as well as to postpone consideration of the motion for attorneys' fees, costs, and treble damages. I have considered these motions, find them to be without merit, and therefore deny them.

to be of the highest quality. The trial itself lasted two weeks, during which time I closely observed Mr. Maybank's counsel first-hand. Finally, the parties appeared before me on August 19 to argue post-trial motions. I have reviewed the fee affidavit of Plaintiff's counsel detailing the hours worked by each attorney and submitting their current hourly market rates. I also have reviewed the cost affidavit detailing the costs and expenses paid and advanced in the litigation.

II. Reasonableness factors.

A. *The nature, extent, and difficulty of the case.*

I find that the nature, extent, and difficulty of this case weighs heavily in favor of awarding attorneys' fees. Although this case was extremely difficult to litigate, involving complex investment products and strategies, both sides were represented by excellent attorneys who were strong advocates for their clients. Plaintiffs in investment litigation, like here, are often single individuals bringing claims against well financed, multi-billion dollar institutions with the very best defense lawyers available. The difficulty of an individual plaintiff litigating against a multi-billion dollar corporate entity is enormous. Moreover, as true here, the subject matter of investment cases is often quite complicated, providing counsel with the enormous challenge of explaining the issues and investment strategies and products in clear and understandable ways. Due to these factors, litigating this jury trial required substantial experience, knowledge, and expertise by Mr. Maybank's counsel, requiring them to know and understand the complicated legal and factual issues involved and to present those issues in a manner comprehensible to lay persons. Mr. Maybank's counsel were excellent in this regard.

B. *The time necessarily devoted to the case.*

Advancing this case to trial involved successfully gaining remand to this court following Defendants' removal to federal court, extensive discovery including 32 depositions, review of

60,000 pages of discovery, and responding to eight substantive motions for summary judgment. In light of this immense and time-intensive task, I find that the time identified by Plaintiff's counsel was fairly expended in the development of the core set of facts that supported all of the claims.¹⁷ According to Mr. Willoughby's affidavit, almost 6,700 hours have been devoted to handling Mr. Maybank's case through June 30, 2014, excluding post-trial issues. As was their right, Defendants vigorously defended each point and issue in this case. In light of the comprehensive, "challenge every issue" defense employed by Defendants, which I observed firsthand, I find Mr. Maybank's counsel were required to invest time and resources in mounting an effective response. I therefore find the time devoted by Mr. Maybank's counsel in litigating this case was necessary, essential, and reasonable. The fact that Mr. Maybank's counsel produced a successful result weighs heavily in favor of the requested attorneys' fees.

However, the UTPA verdict is the only one for which attorneys' fees and costs are recoverable. Plaintiff's counsel asserts and Professor Freeman opined that the amount of fees allocable to this cause of action cannot be separately determined because all of the causes of action are based upon a core set of intertwined facts and no deduction to the fee request is warranted based on the amount of time expended by Mr. Maybank's counsel. *See Hensley v. Eckhart*, 461 U.S. 424, 435 (1983) (noting that, in litigation based on "a common core of facts," an attorney's time "will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis") and *Austin*, 387 S.C. at 57, 691 S.E.2d at 153 (declining to dissect a counsel's fee affidavit where violations under the statutory claim were

¹⁷ Defendants were Mr. Maybank's trusted fiduciary. As a consequence, all of their activities were inextricably intertwined. I find that it was necessary to conduct discovery and extensive pretrial work to understand all facets of the parties' lengthy and complex fiduciary relationship and delineate which acts and conduct of Defendants constituted violations of which causes of action.

based on the same body of evidence underlying the claims for fraud and constructive fraud). I find that the causes of action are based upon a core set of common and intertwined facts.¹⁸ However, out of an abundance of caution, I find that a 20% reduction in the number of hours will fairly reflect the time expended by Plaintiffs' counsel in investigating, developing, advancing, and litigating the UTPA claim while at the same time protecting Defendants against being charged for work that did not serve to develop the UTPA claim. *See Layman*, 376 S.C. at 460, 658 S.E.2d at 333 (reducing total hours by percentage). The implementation of this reduction is set forth below.

C. Professional standing of counsel.

Both Mr. Willoughby's firm and Mr. Bannister's firm have high standing and regard in the legal community and are respected members of the South Carolina Bar and the Richland and Greenville County Bars, respectively. I saw first-hand the high level of written and oral advocacy demonstrated by Mr. Maybank's counsel throughout this complex case. Litigating and trying this case involved the command of thousands of documents, numerous lay and expert witnesses, the experience and expertise of knowing the specialized area of investment strategies and products and the law related thereto, and the ability to conduct effective legal combat with a team of highly skilled attorneys for the defense. Despite the complexities of this case, Plaintiff's counsel litigated it with an exceptionally high degree of competence and skill. I therefore find

¹⁸ As an example that the work on the UTPA claim continued throughout the pendency of this case from start to finish, a key document that formed one of the foundations of the UTPA claim as presented to the jury was not produced by Defendants until late on the Friday before the trial began on Monday, June 16, 2014. Ex. 91

the professional standing of Mr. Maybank's counsel militates heavily in favor of the award of attorneys' fees.¹⁹

D. Contingency of compensation.

The fee arrangement in this case was blended, with a reduced hourly fee coupled with a contingency if beneficial results were obtained. This blended fee recognizes the significant risk and difficulty of litigating such a complex case. Although this arrangement required Mr. Maybank to bear a significant portion of ongoing litigation expenses, the law firms shared a substantial portion of the entire burden. The "contingency of compensation" factor is *not* a check to see whether a contingency contract exists, but rather to consider whether the plaintiff can pay the fees if a beneficial result is not obtained. *See Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991) ("In making this determination, the abilities of the parties to pay, their respective financial conditions, and the effect of the attorney's fees on each party's standard of living are also to be considered."). Because this case involved substantial financial losses by Mr. Maybank, there was a substantial risk that he would be unable to pay even the reduced rate as the case progressed through protracted litigation²⁰ Consequently, Plaintiff's counsel bore a significant risk in light of the complexity of the issues and the uncertainty of success. Plaintiff's counsel also incurred a significant opportunity risk because they devoted substantial time and effort to this case at reduced rates versus those that could be obtained on

¹⁹ As with most issues in this case, Defendants did not concede the professional standing of Mr. Maybank's counsel.

²⁰ Mr. Maybank testified that Mr. David Fisher, a senior executive with Defendants, ridiculed and attempted to intimidate him for even contemplating making a claim, saying words to the effect of "You are an embarrassment to yourself, it will be expensive, and it will end badly." From the time devoted to this case as reflected in Mr. Willoughby's affidavit, BB&T indeed made sure it was most expensive to litigate this case.

other work. I find that the risk to Plaintiffs' counsel of not being fully and fairly compensated was substantial and that this factor weighs in favor of awarding attorneys' fees.

E. *Beneficial results obtained.*

Plaintiff's counsel obtained beneficial results for Mr. Maybank, which is "the most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) . The success achieved was a direct result of the facts developed and the legal theories advanced by seasoned and experienced counsel with expertise in investment strategies and products. Counsel's trial advocacy with the jury was exceptional and their professionalism toward this Court and their respect for the judicial process noteworthy. The effective presentation by Mr. Maybank's counsel coupled with well-developed evidence of deception and unfair business practices resulted in one of the largest jury verdicts in Greenville County to date. I find that the fifth factor heavily militates in favor of the reasonable attorneys' fee awarded herein.

F. *Customary legal fees for similar services.*

I find that the legal fees requested in this case are in line with the legal fees customarily charged for similar services in this type of litigation in Greenville and this State. Moreover, for the reasons detailed below, I find this case exhibits the type of exceptional circumstances warranting the application of a multiplier to the fee request.

III. *Hours worked, billing rates, and propriety of a multiplier.*

The amount of time devoted to this case by Mr. Maybank's counsel is entirely reasonable given the complexity and difficulty of the issues involved in this case and the comprehensive defense. I find that the rates submitted by Mr. Willoughby and his team are reasonable, customary, and appropriate in Greenville and in this State given the complexity of this case and

investment-related cases in general, as well as the professional standing of Mr. Maybank's counsel. The reasonableness of the rates is supported by the expert testimony of Professor Freeman, who opined that the current hourly rates charged by Mr. Maybank's counsel are actually *below* fair market levels for the specialized type of legal work involved in this case. I find that this evidence militates in favor of the use of a multiplier, as discussed below.

IV. Calculation of fee award.

With these findings in mind, I calculate the lodestar fee²¹ in this case as follows:

	Hourly Rate	Hours Expended	20% Reduction	Adjusted Hours	Totals
<u>Willoughby & Hoefler, P.A.</u>					
Mitchell Willoughby	\$500.00	1,792.10	(358.42)	1,433.68	\$716,840.00
Elizabeth Zeck	\$400.00	691.80	(138.36)	553.44	\$221,376.00
ElizabethAnn Loadholt Carroll	\$400.00	514.10	(102.82)	411.28	\$164,512.00
Tracey C. Green	\$400.00	76.80	(15.36)	61.44	\$24,576.00
Chad N. Johnston	\$300.00	2,361.90	(472.38)	1,889.52	\$566,856.00
John W. Roberts	\$300.00	103.30	(20.66)	82.64	\$24,792.00
Andrew MacLeod	\$300.00	25.70	(5.14)	20.56	\$6,168.00
<u>Bannister, Wyatt & Stalvey, LLC</u>					
Bruce Bannister	\$325.00	90.00	(18.00)	72.00	\$23,400.00
Jim Bannister	\$450.00	20.75	(4.15)	16.60	\$7,470.00
Alex Stalvey	\$300.00	46.00	(9.20)	36.80	\$11,040.00
Luke Burke	\$250.00	12.50	(2.50)	10.00	\$2,500.00
Total Fee Award for Attorneys					\$1,769,530.00

I find that enhancing the lodestar calculation of \$1,769,530 in attorneys' fees with a multiplier is necessary in order to reflect the exceptional circumstances in recovering damages under the UTPA in this case. See *Layman*, 658 S.E.2d at 334 (citing *Blum v. Stenson*, 465 U.S.

²¹ Mr. Willoughby's fee affidavit lists Attorney Luke Burke's hourly rate as \$400.00; however, based on the attachment B to the fee affidavit, the Court finds that the listed rate was a scrivener's error and the rate should be \$250.00, which is reflected in the lodestar calculation.

886, 897 (1984) (recognizing that an enhanced lodestar award may be justified “in some cases of exceptional success”).

Based on my familiarity with the nature, extent, and difficulty of this complex case, I find the quality of service rendered by Mr. Maybank’s counsel was superb and that the success achieved was “exceptional.” In undertaking this difficult case in the face of a substantial risk of receiving compensation, Mr. Maybank’s counsel exposed unfair and deceptive business practices by Defendants against clients whom they served as trusted fiduciary as well as their misrepresentations to conceal those acts. I find all of these factors constitute significant and exceptional circumstances that warrant applying a multiplier of 1.5 to the current hourly rates to reflect the difficulty and exceptional circumstances of this case:

Base Attorneys’ Fees:	\$1,769,530.00
Multiplier:	x 1.5
Total Attorneys’ Fees:	<u>\$2,654,295.00</u>

I therefore find that, based on the exercise of my informed discretion, Plaintiff is entitled to attorneys’ fees of \$2,654,295 as a reasonable and a fair reflection of the exceptional circumstances involved in recovering damages under the UTPA.

V. Award of costs.

Mr. Maybank also is entitled to costs reasonably incurred in litigating and trying the UTPA claim. See S.C. Code Ann. § 39-5-140(a). Mr. Maybank’s counsel submitted a cost affidavit detailing the costs and expenses actually paid and advanced in pursuit of the litigation, requesting costs of \$306,264.10. This Court has broad discretion to award costs to the prevailing party. *Peterson v. Nat’l R.R. Passenger Corp.*, 365 S.C. 391, 402, 618 S.E.2d 903, 908 (2005). Extending beyond the recovery of costs allowed as a matter of course to a prevailing party, fee-



shifting statutes like the UTPA contemplate reimbursement of all reasonable expenses incurred. *See Layman*, 376 S.C. at 461, 658 S.E.2d at 334.

After reviewing the affidavit and costs claimed by Mr. Maybank, I find the costs and expenses incurred, while significant, were reasonable in the context of this case. As Professor Freeman testified, expenses such as expert witness fees, online research, electronic document hosting fees, and trial preparation expenses are common, if not required, in cases of this size and complexity. The copying charges, while substantial, also are reasonable given that this case involved more than 60,000 pages of documents. Because the facts supporting the substantive claims were largely intertwined and developed throughout the lengthy discovery process, I find that no reduction of the costs and expenses is required due to Mr. Maybank's failure to win on every claim advanced. I also note that the costs of the expert witness of the Family Insurance Trust have already been excluded due to the lack of success in recovering damages for the trust. However, I find that the total amount should be further reduced by 20% to limit costs to the UTPA claim alone. I therefore award \$245,011 ($\$306,264 \times (1 - .20)$) in costs and expenses as reasonable and appropriate.

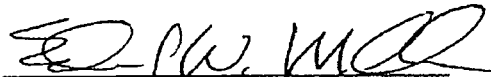
Prejudgment Interest

Mr. Maybank also has moved for an award of prejudgment interest based on the jury's award of actual damages under S.C. Code Ann. § 34-31-20(A). I find that Mr. Maybank's damages were not a sum certain as required by S.C. Code Ann. § 34-31-20(A) and I therefore deny Mr. Maybank's motion for prejudgment interest on that ground.

NOW, THEREFORE, based upon the foregoing findings and conclusions, IT IS
HEREBY ORDERED, ADJUDGED AND DECREED that

1. Defendants' motions for Judgment Notwithstanding the Verdict, New Trial Absolute, New Trial *Nisi Remittitur*, and Election of Remedies are DENIED;
2. All other motions advanced by Defendants are also DENIED.
3. Plaintiff's motions for Treble Damages and for Attorneys' Fees and Costs are GRANTED.
4. Plaintiff's motion for prejudgment interest is DENIED.
5. Judgment in favor of Plaintiff Francis P. Maybank is hereby ENTERED against all Defendants in the amount of Seventeen Million, One Hundred Ninety Nine Thousand, Three Hundred Six Dollars (\$17,199,306).

AND IT IS SO ORDERED.



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

Greenville, South Carolina

This 10 day of ~~October~~, 2014

NOVEMBER

A Certified Copy
Paul B. Wiseman
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 11/10/14

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.

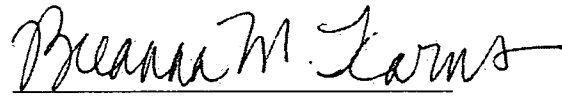
BB&T Corporation, Branch Banking and Trust Company,
Successor in merger to Branch Banking and Trust Company of SC,
and Sterling Capital Management, LLC, *Successor in merger to*
BB&T Asset Management, LLC, Appellants-Respondents.

PROOF OF SERVICE

This is to certify that I, a paralegal of Willoughby & Hoefler, P.A., have caused to be served this day one (1) copy of the **Return to Motion to File Portions of the Record on Appeal Under Seal** via by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

C. Mitchell Brown, Esquire
D. Larry Kristinik, Esquire
Michael J. Anzelmo, Esquire
Brian P. Crotty, Esquire
Nelson Mullins Riley & Scarborough LLP
1320 Main Street, 17th Floor
Columbia, SC 29201

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

A handwritten signature in cursive script that reads "Breanna M. Karns". The signature is written in black ink and is positioned above a horizontal line.

Breanna M. Karns

Columbia, South Carolina
This 17th day of September, 2015.