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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-8578
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.

RECORD ON APPEAL – VOLUME IV

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)))	IN THE COURT OF COMMON PLEAS 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-23-8578 **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL ABSOLUTE, OR, IN THE ALTERNATIVE, FOR NEW TRIAL *NISI REMITTITUR*** FILED-CLERK OF COURT GREENVILLE CO. S.C. PAUL B. WICKENSIMER 2014 AUG 15 PM 3 55

The Defendants, BB&T Corporation, Branch Banking and Trust Company ("BB&T"), and Sterling Capital Management, LLC ("BB&T Asset Management") (collectively "Defendants"), hereby submit their Memorandum in Support of Motion for Judgment Notwithstanding the Verdict, New Trial Absolute, or, in the Alternative, for New Trial *Nisi Remittitur*.

I. INTRODUCTION

The purpose of this memorandum is to provide supporting argument and case citations for certain key grounds set forth in the Defendants' post trial motion filed on July 10, 2014. Not every ground in the motion has been included in this memorandum, and the Defendants rely on the original motion and oral argument to support all grounds. The Defendants do not waive, and

expressly reserve, each and every ground set forth in the motion, including those grounds not briefed herein.

There are four grounds of particular significance and which are dispositive of many other issues raised in the Defendants' post-trial motion. Below is a summary of those grounds:

(1) **The Securities Exemption to the UTPA.** The Court should grant JNOV in favor of the Defendants as to Mr. Maybank's claim based on the Unfair Trade Practices Act because all conduct and transactions relating to securities are exempt from the application of the UTPA. Granting JNOV on this claim in favor of the Defendants would eliminate Plaintiff's attorneys' fees and treble damages claims.

(2) **BB&T Corporation.** The Court should grant JNOV in favor of BB&T Corporation because the Court lacks personal jurisdiction over this entity and because no employee of BB&T Corporation was involved in any conduct which could form the basis of any of Mr. Maybank's claims. Because the net worth of BB&T Corporation was presented to the jury, the punitive damages verdict is tainted and a new trial must be granted in favor of the remaining two Defendants.

(3) **The Punitive Damages Waiver Provision.** Paragraph F.1 of the Wealth Management Agreement contains a provision expressly waiving any right of Mr. Maybank to recover punitive damages. Accordingly, the Court should grant JNOV in favor of the Defendants as to the award of punitive damages.

(4) **The Lack of Qualifications of Professor Freeman.** Mr. Maybank offered numerous expert opinions from Professor John Freeman criticizing nearly every aspect of the prepaid transactions. Professor Freeman, however, had no prior experience whatsoever regarding variable prepaid forward contracts, and this case was the first in which he had every considered or commented on these types of transactions. It was error for the Court to qualify him as an expert with respect to prepaid contracts, and a new trial should be granted on this basis.

Based on these grounds, and others, the Court should grant JNOV in favor of the Defendants as to all claims, or, failing that, grant a new trial on the five claims on which Mr. Maybank prevailed at trial. Alternatively, the Court should grant a new trial nisi remittitur.

In the event the Court concludes that a new trial is necessary, it should order that only the five claims on which Mr. Maybank prevailed should be tried. The jury has already found against the Maybank Family Insurance Trust on all claims, and the jury found against Mr. Maybank on his claims for alleged violation of the South Carolina Securities Act, fraudulent

misrepresentation, aiding and abetting breach of fiduciary duty, and breach of contract accompanied by a fraudulent act.

II. ARGUMENT

A. Judgment Notwithstanding the Verdict Should Be Granted in Favor of the Defendants as to the Plaintiffs' UTPA Claim.

The South Carolina Supreme Court made it clear in *State ex rel. McLeod v. Rhoades*, 275 S.C. 104, 267 S.E.2d 539 (1980), and *Ward v. Dick Dyer and Associates, Inc.*, 304 S.C. 152, 403 S.E.2d 310 (1991), that securities transactions fall with the exemption set forth in § 39-5-40(a) of the Unfair Trade Practices Act. The Plaintiffs' claims are based on the two prepaid forward contracts executed in 2006 and 2009 and the managed portfolio account maintained with BB&T. There can be no question that the prepaid transactions and the managed portfolio account involve securities and are therefore exempted from the UTPA. As is clear from the testimony and trial exhibits of the Plaintiffs' securities expert, Craig McCann, the Plaintiffs' entire damages theory is based on these events. Moreover, the fact that Mr. Maybank asserted a claim based on the South Carolina Securities Act, (Pls.' 2d Am. Compl. ¶¶ 110-118), and tried to offer at trial the testimony of Tracy Meyers[1] (the Deputy Securities Commissioner) demonstrates that this is a securities case that falls within the UTPA exemption.[2] For these reasons, and others discussed below, the Court should grant JNOV in favor of the Defendants as to the Plaintiffs' UTPA claim.

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[1] The Plaintiffs proffered Ms. Meyers for the stated reason that she is the state regulator who oversees these types of transactions. Even if *Rhoades* and *Dick Dyer* were not as clear as they are, the presence of a regulator who claims authority over the transactions (and who Plaintiffs claim has authority to regulate the transactions) demonstrates that this is regulated activity exempt from the UTPA.

[2] Mr. Maybank alleges in Paragraph 112 of the Second Amended Complaint in support of the Securities Act Claim that "untrue statements and omissions of Defendants were made . . . to Mr. Maybank in connection with the offer, sale, or purchase *of a security*, either directly or indirectly, including, but not limited to, the VPFCs[.]" (Pls.' 2d Am. Compl. ¶ 112) (emphasis added).

For the Court to hold otherwise would be an erroneous *de facto* ruling that prepaid contracts and managed portfolio accounts are unregulated and that any unlicensed or unregistered person can engage in these transactions and accounts on behalf of others.

1. Whether Alleged Activities Fall Within the Securities Exemption Is an Issue to Be Determined by the Court, Not the Jury.

The securities exemption has its origin in subsection (a) of § 39-5-40 which provides, "Nothing in this article shall apply to: (a) Actions 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) (Law. Co-op 1985). The decisions from the South Carolina appellate courts make it clear that whether the UTPA exemption provision applies is appropriate for resolution by the court and need not be submitted to the jury for determination. *See, e.g., InMed Diagnostic Services, L.L.C. v. MedQuest Assocs., Inc.*, 358 S.C. 270, 279, 594 S.E.2d 552, 556–57 (Ct. App. 2004) (reversing jury verdict, stating, "We therefore hold the circuit court erred in declining to hold that, as a matter of law, the regulatory exemption of section 39-5-40 of the UTPA applies to this lawsuit and bars InMed's UTPA claim."); *Miller v. Fairfield Communities, Inc.*, 299 S.C. 23, 28, 382 S.E.2d 16, 20 (Ct. App. 1989) (affirming summary judgment and stating, "We agree with the trial court that to the extent the Millers' complaint is an employer-employee relations matter it is not covered by the Unfair Trade Practices Act.").

In this case, it is the Court, not the jury, that must make the determination as to whether the actions and transactions that form the basis of the claims involve securities. It is beyond the province of the jury to assess whether the exemptions set forth in § 39-5-40 are applicable.[3]

[3] There is no practical means of charging the jury on the application of subsection (c) of § 39-5-40, which provides: "This article does not supersede or apply to unfair trade practices covered and regulated under Title 38, Chapter 57, §§ 38-57-10 through 38-55-320." S.C. Code Ann. §

Treatment of this issue as one for determination by the Court is consistent with decisions addressing other South Carolina civil liability statutes that contain exemptions or exceptions. *See Holley v. Mount Vernon Mills, Inc.*, 312 S.C. 320, 440 S.E.2d 373 (1994) (affirming summary judgment as to employee's claim of religious discrimination, finding that exemption to statutory liability for textile manufacturers was applicable); *Cole v. South Carolina Electric and Gas, Inc.*, 355 S.C. 183, 584 S.E.2d 405 (Ct. App. 2003), *aff'd as modified*, 362 S.C. 445, 608 S.E.2d 859 (2008) (affirming trial court's decision, as a matter of law, that exemption to partial immunity under Recreational Use Statute was not applicable because parking fee did not constitute a charge for entry for persons in vehicle).

Additionally, whether the present case is exempted from the UTPA is especially appropriate for determination by the Court because the key issue - whether securities are involved - is a question of law. The South Carolina Supreme Court has characterized the determination of whether a financial instrument or contract falls within the definition of "security" as a question of law. *See Majors v. S.C. Sec. Comm'n*, 373 S.C. 153, 159, 644 S.E.2d 710, 713 (2007) ("The issue in this case involves a decision of whether TLA's sale of TLCs constitutes the sale of securities. We find this is a novel question of law, such that we are free to decide the issue with no particular deference to the lower court."). Other courts also uniformly characterize the determination of whether an investment or a contract constitutes a security as being a question of law for the court to decide. *See, e.g., Ahrens v. American-Canadian Beaver Co.*, 428 F.2d 926, 928 (10th Cir. 1970) (holding it was a question of law whether contracts were securities and thus reversing trial court, which had allowed jury to decide the question); *Aventa*

39-5-40(c) (Law. Co-op. 1985). Only by charging the jury with the entire statutory scheme within the insurance trade practices act could the jury be able to make a determination as to the applicability of this particular exemption from the UTPA.

Learning, Inc. v. K12, Inc., 830 F. Supp. 2d 1083, 1097 (W.D. Wash. 2011) ("Whether or not an investment scheme or contract constitutes a security is a question of law.") (citations omitted).

2. Activities and Conduct Regulated Under the South Carolina Securities Act and the Accompanying Securities Regulations Are Exempt from the Application of the UTPA.

It is well established under South Carolina law that securities transactions and related activities are exempt from the UTPA through the operation of § 39-5-40(a). The Supreme Court first recognized this in *State ex rel. McLeod v. Rhoades*, 275 S.C. 104, 267 S.E.2d 539 (1980). In *Rhoades*, the Attorney General commenced an action under the UTPA asserting unfair and deceptive acts and practices with respect to "the public offering and sale of the stock of Cartridge Televisions, Inc., from July, 1971 to July, 1973." *Id.* at 105, 267 S.E.2d at 540. The court concluded that the complaint did not state a viable claim under the UTPA because § 39-5-40(a) exempts securities transactions. The court explained:

> In this action, appellants have shown that the transactions complained of *are regulated* by the Securities and Exchange Commission and under the South Carolina Uniform Securities Act. Violation of these regulations subjects an offender to liability. We, therefore, believe that securities transactions fall within the exemption provided at Section 39-5-40.

Id. at 107, 267 S.E.2d at 541 (emphasis added). Later, in *Ward v. Dick Dyer and Associates, Inc.*, 304 S.C. 152, 403 S.E.2d 310 (1991), the South Carolina Supreme Court adopted a more restrictive approach to the regulated entity exemption set forth in 39-5-40. The court, however, still retained a broad view of the exemption as it applied to securities transactions:

> We note that the sale of securities is a unique transaction. Each public offering is subject to strict regulation and must comply with stringent requirements. Very few, if any, other business transactions are subject to the strict scrutiny which is placed upon securities. Therefore, we choose to follow the vast majority of jurisdictions in holding that securities transactions remain exempt from claims under the UTPA.

Id. at 155, 403 S.E.2d at 312.

The securities exemption is very broad and applies to any activities regulated under the Securities Act. As explained in *Rhoades*, the exemption for securities applies to any transactions "regulated by the Securities and Exchange Commission and under the South Carolina Uniform Securities Act." *Rhoades*, 275 S.C. at 107, 267 S.E.2d at 541. The breadth of the securities exemption is analogous to the exemption from the UTPA for insurance related activities. Under the insurance exemption, any act or practice *regulated* by the South Carolina Insurance Trade Practices Act is exempted from the application of the UTPA. *See Trustees of Grace Reformed Episcopal Church v. Charleston Ins. Co.*, 868 F. Supp. 128, 130–31 (D.S.C. 1994) (granting summary judgment on grounds that "all unfair trade practices regarding the insurance business are regulated by the Insurance Trade Practices Act, §§ 38–57–10 et seq. , and are exempt from the coverage of SCUTPA."). Similarly, any activities, conduct, or transactions covered by the South Carolina Securities Act, § 35-1-101 *et seq.*, or by the regulations promulgated thereunder are exempt from the UTPA.

The Securities Act was drafted very broadly, beginning with the definition of security which captures within it not just stocks and bonds but also any type of "investment contract," and the Legislature went to great effort to enumerate over a dozen types of transactions that qualify as securities. *See* S.C. Code Ann. § 35-1-102(29) (Law. Co-op. Supp. 2013). Moreover, the regulations promulgated under the Securities Act were drafted very broadly to ensure that no aspect of the securities industry would be left unregulated. For example, § 13-502 of the state securities regulations addresses the conduct and activities of registered investment advisors such as BB&T Asset Management, Inc. and requires that RIAs adhere to "high standards of commercial honor and just and equitable principals of trade in the conduct of their business." S.C. Reg. § 13-502 (West 2011). The regulation then delineates specific prohibited conduct, but makes it clear that the list is not all inclusive. Subsection (21) of this regulation prohibits "[e]mploying any device, scheme, or artifice to defraud or

engaging in any act, practice or course of business which operates or would operate as a fraud or deceit." *Id.* § 13-502(21). Accordingly, the Court should conclude that the activities and conduct about which Mr. Maybank complains and bases his lawsuit all fall within the Securities Act and accompanying regulations and, therefore, are exempt from the application of the UTPA.

3. Variable Prepaid Forward Contracts Constitute "Securities" Under the Definition Set Forth in § 35-1-102(29).

There can be no question that the prepaid forward contracts that form the basis of Mr. Maybank's claims qualify as securities under the definition set forth in the Securities Act. Indeed, Mr. Maybank asserted in his Complaint a claim under the Securities Act and presented expert testimony to support the claim. Mr. Maybank concedes in Paragraph 120 of his Second Amended Complaint that the only reason he pled the UTPA claim was in the event that "the VPFCs or any other product or service recommended or sold to or performed for Mr. Maybank are not considered 'securities' under South Carolina law," (Pls.' 2d Am. Compl. ¶ 120), thus showing that his lawyers consider this case to be a securities case first. As explained by multiple expert witnesses and former employees during trial, a variable prepaid forward contract involves the sale of stock at a future date, while allowing the investor to still benefit from future appreciation and hedge the risk of a sharp drop in stock value. The "collars" around the stock price are established through the use of embedded options (puts and calls). The investor's risk is minimized through the contract "floor," but the investor is still exposed to risk that dividends will not be paid or will be reduced, or that either dividends or stock appreciation will reach negotiated contract caps.

In subsection (29) of § 35-1-102 of the Securities Act, a "security" is broadly defined to include any "investment contract" as well as puts, calls, and options. The definition provides:

> (29) "Security" means any note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of

> interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; *investment contract*; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; *put, call*, straddle, *option*, or privilege on a security, certificate of deposit, or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, an interest or instrument commonly known as a "security"; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. The term:
>
> > (A) includes both a certificated and an uncertificated security;
> >
> > (B) does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a sum of money either in a lump sum or periodically for life or other specified period;
> >
> > (C) does not include an interest in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act of 1974;
> >
> > (D) includes an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor and a "common enterprise" means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors; and
> >
> > (E) "Investment contract" may include, among other contracts, an interest in a limited partnership and a limited liability company and shall include an investment in a viatical settlement or similar agreement.

S.C. Code Ann. § 35-1-102(29) (Law. Co-op. Supp. 2013) (emphasis added).

The definition of "security" applies to much more than simply publicly traded instruments like stocks and bonds. It applies to any contract that bears the basic characteristics of a security. For example, in *McGaha v. Mosley*, 283 S.C. 268, 322 S.E.2d 461 (Ct. App.

1984), the court found that the definition of security in the prior version of the Securities Act applied to a written agreement assigning a 10% interest in a franchise agreement. The court concluded that this arrangement qualified as a "security," explaining:

> We have no difficulty concluding the written assignment of an interest in the profits under the franchise agreement was a "security" as defined by Section 35–1–20(12). It gave McGaha an interest in Southeastern's profits under a franchise agreement with Energymizers of America. Thus, it was on its face a "certificate of interest or participation in [a] profit-sharing agreement," which the Act defines as a "security."

Id. at 273, 322 S.E.2d at 464.

A prepaid contract is a form of an investment contract. The subject of the contract is BB&T stock, in involves options in the form of embedded puts and calls, it has a provision addressing the payment of dividends, it can involve the final disposition of the stock, and there is risk and benefit that are dependent on the movement of the stock price. The very fact that options are part of the contract standing alone requires a finding that prepaid contracts are securities because "options," "puts," and "calls" are expressly delineated within the definition of "security" in § 35-1-102(29). For these reasons, the Court should find as a matter of law that Mr. Maybank's variable prepaid forward contracts constitute "securities" under the South Carolina Securities Act. Other courts around the country have uniformly concluded that a prepaid contract is a "security" for purposes of application of the securities laws.[4] *See, e.g., Anschutz Co. v. Comm'r*, 664 F.3d 313, 315-16 (10th Cir. 2011) (holding entry into VPFC constituted sale of shares of stock and defining VPFC as "a species of forward contract" in which "the shareholder

[4] "[I]n construing the state act, [the Court] may look for guidance to cases construing its federal counterpart." *Majors v. S.C. Securities Com'n*, 373 S.C. 153, 163, 644 S.E.2d 710, 715 (2007); *Carver v. Blanford*, 288 S.C. 309, 310, 342 S.E.2d 406, 406 (1986) ("[F]ederal case law will be looked to for guidance in interpreting the Uniform Securities Act.").

pledges shares of appreciated stock to the counterparty, which is granted a security interest in the pledged shares"); *Kline v. First W. Gov't Sec.*, 24 F.3d 480, 482 (3rd Cir. 1994) ("A 'forward contract' is a contract to purchase or sell a specified security, at a designated interest rate, on a fixed future date."); *Donaghue v. Patterson Cos.*, No. 13-civ-2033, 2013 U.S. Dist. Lexis 181959 (S.D.N.Y. Dec. 31, 2013) (applying federal securities law to VPFC and concluding that execution of VPFC constitutes purchase or sale of a security). Accordingly, the Court should find that the prepaid contracts are securities and thus, the UTPA does not apply.

4. The Allegations Relating to the Wealth Management Agreement Fall Within the Securities Exemption to the UTPA.

Mr. Maybank spent much effort during trial arguing that the Defendants breached the Wealth Management Agreement. The allegations and evidence relating to the Wealth Management Agreement cannot support a UTPA claim. As an initial matter, a mere breach of contract, even if intentional, can never support a UTPA claim. *See D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 549, 730 S.E.2d 340, 351 (Ct. App. 2012) ("A mere breach of contract, without more, does not constitute a violation of the unfair trade practices act, even if done intentionally."). Moreover, the Wealth Management Agreement falls within the securities regulations and is also within the securities exemption to the UTPA.[5]

The Wealth Management Agreement is the operative agreement that allowed for the opening of the managed portfolio account, and it is inextricably intertwined with that securities account. The managed portfolio account held Mr. Maybank's stock positions while he was a client with BB&T and BB&T Asset Management. This account would not exist but for the Wealth Management Agreement, and it was that agreement which delegated discretionary

[5] Notably, there is no allegation in the Second Amended Complaint that any representations or breaches related to the Wealth Management Agreement constitute a violation of the UTPA. (Pls.' 2d Am. Compl. ¶¶ 119–126).

authority to buy and sell investments in the account to BB&T Asset Management. Also, as explained below with respect to the punitive damages waiver, the Concentrated Stock Risk Management Addenda that apply to the prepaid transactions are part of the Wealth Management Agreement and must be read together with it. Doing so requires the conclusion that the prepaid transactions, which are indisputably securities transactions, are subject to the terms of the Wealth Management Agreement. There can be no doubt that the Wealth Management Agreement is a contract intended to govern the investing relationship of Mr. Maybank with BB&T and BB&T Asset Management.

The securities regulations provide further confirmation that the Wealth Management Agreement is a regulated activity. Multiple subsections of S.C. Reg. § 13-502 establish rules for and otherwise regulate "advisory agreements" and "investment advisory contracts." S.C. Reg. § 13-502(11), (16), (18), (19) (West 2011). There can be no question that the Wealth Management Agreement qualifies as an advisory agreement or contract. It is regulated by the express terms of S.C. Reg. § 13-502, and, therefore, any alleged breach or other wrongdoing related to it is exempted from the application of the UTPA under § 39-5-40(a) and the *Rhoades* decision.

5. The Allegations Relating to the August 11, 2006 Memorandum to Pat Oliver Fall Within the Securities Exemption to the UTPA.

Mr. Maybank relied heavily at trial on a memorandum from Anthony Mahfood to Pat Oliver dated August 11, 2006, marked as Agreed Exhibit 7. This memorandum, like the Wealth Management Agreement and addenda, are inextricably intertwined with the securities transactions in this case. The memorandum to Ms. Oliver was required by the BB&T Code of Ethics because the first prepaid contract involved an employee of BB&T and BB&T stock was the subject of the transaction. In this situation, it was necessary to inform Ms. Oliver before proceeding with the transaction. Without this

memorandum and Ms. Oliver's signature at the bottom, the prepaid transaction could not have gone forward.

6. The One-Time Advisory Fee Falls Within the Securities Exemption to the UTPA.

Mr. Maybank presented the testimony of Professor Freeman in support of his argument that the on-time advisory fee charged by BB&T Asset Management for each prepaid transaction was improper because BB&T Asset Management was not registered as a broker dealer. Mr. Maybank contended that this was a violation of the South Carolina Securities Act, but the jury found against him on this issue. Absent a Securities Act violation, there cannot be anything improper about the charging of a one-time advisory fee that was fully disclosed in the Concentrated Stock Risk Management Addenda. Under no circumstances could the charging of these fees support a UTPA claim because they would indisputably fall within the securities exemption in § 39-5-40(a) and the *Rhoades* decision. In addition to applicable provisions of the Securities Act, S.C. Reg. § 13-502 has multiple subsections directly addressing the charging of "advisory fees." S.C. Reg. § 13-502(8), (10), (11), (16) (West 2011). Accordingly, advisory fees are regulated securities activities and are exempt from the application of the UTPA.

7. There Is No Evidence of Damages Unrelated to the Prepaid Contracts and the Managed Portfolio Account.

Under § 39-5-140 of the UTPA, the Plaintiffs must prove an "ascertainable loss of money . . . *as a result* of the use or employment by anther person of an unfair or deceptive method, act or practice[.]" S.C. Code Ann. § 39-5-140(a) (Law. Co-op. 1985). Thus, a UTPA claim cannot survive if there is no evidence to support a finding of actual damages proximately caused by the alleged unfair or deceptive conduct. *See Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 318 S.C. 471, 482, 458 S.E.2d 431, 438 (Ct. App. 1995) (affirming trial court conclusion that

there was no viable UTPA claim based on fact that jury "found the [claimants] suffered no actual damages as a proximate result of the unfair act.").

Mr. Maybank's damages expert, Craig McCann, offered damages figures *related only to the prepaid transactions and the managed portfolio account.* There is no evidence in the record showing damages related to any activities which are separate and apart from the prepaid transactions and the managed portfolio account.

Agreed Exhibit 72 includes the damages reports generated by Dr. McCann. Exhibits 8 and 9 of these reports (Maybank 8948 – 8951) calculate damages related to the Managed Portfolio account, and estimate those damages to be in the range of $877,141 to $1,405,565. Exhibits 3 and 4 to his reports (Maybank 8955 – 8956) calculate damages related to the prepaid transactions and estimate those damages to be in the range of $1,956,620 to $1,984,161. He offers no other damages calculations. They relate exclusively to the managed portfolio account and the prepaid transactions. Because the evidence of damages relates exclusively to securities transactions, Mr. Maybank has no viable argument that any non-securities activities, if any, could support his UTPA claim. Accordingly, the Court should rule as a matter of law that the UTPA claim is inapplicable under the securities exemption and, on this basis, grant JNOV in favor of the Defendants as to the UTPA claim.

B. BB&T Corporation Is Entitled to JNOV, and a New Trial Should Be Granted to the Other Defendants Due to Prejudice Resulting from the Improper Inclusion of BB&T Corporation at Trial.

BB&T Corporation was named as a defendant in this case and claims against it were presented to the jury. BB&T Corporation, however, is a mere holding company for other BB&T entities, and none of its employees had any direct involvement with Mr. Maybank. There is no evidence that would support a verdict against BB&T Corporation as to any of Mr. Maybank's

claims. Additionally, BB&T Corporation has no presence in South Carolina that could confer personal jurisdiction over it in a South Carolina court. The law is well settled that a parent corporation is not liable for the actions of its separately incorporated subsidiaries, nor can personal jurisdiction be conferred on a parent corporation based solely on the activities of its subsidiaries. Accordingly, the Court should grant JNOV in favor of BB&T Corporation as to all of Mr. Maybank's claims. The Court should also grant a new trial to BB&T and Sterling Capital because the improper inclusion of BB&T Corporation at the trial of this case resulted in prejudice to the other Defendants, namely, the admission of evidence of the $21 billion net worth of BB&T Corporation tainted the jury's punitive damages award.

1. No Evidence Was Presented to Support any of the Five Claims Against BB&T Corporation Upon Which Mr. Maybank Prevailed at Trial.

There is no evidence in this case of any involvement on the part of any employee of BB&T Corporation with the Plaintiff's client relationship. All business activities related to the Plaintiff's prepaid contracts and managed portfolio account were handled by employees of either Branch Banking & Trust Company or BB&T Asset Management, Inc. Indeed, the Second Amended Complaint fails even to make a single allegation of wrongdoing specific to BB&T Corporation, instead comingling all the Defendants together under the term "Defendants" or combining the three corporate entities under the labels "BB&T" or "the Bank." (Pls.' 2d Am. Compl. ¶¶ 6, 10).

South Carolina law is clear that a parent corporation cannot be liable for the conduct of its subsidiary entities simply because one owns the stock of the other. *See Jones v. Enter. Leasing Co. SE*, 383 S.C. 259, 678 S.E.2d 819 (Ct. App. 2009) (granting summary judgment in favor of parent company finding there could be no liability for alleged torts of subsidiary). As stated in *Mid-South Management Co. v. Sherwood Dev. Co.*, 374 S.C. 588, 649 S.E.2d 135 (Ct.

App. 2007), "It is generally recognized that a corporation is an entity that is separate and distinct from, and its debts are not the individual debts of, its officers and stockholders." *Id.* at 597, 649 S.E.2d at 140. Only when a plaintiff can come forward with substantial evidence to "pierce the corporate veil" and show that corporate separateness should be ignored can a parent corporation be liable for the actions of a subsidiary entity. "Courts are generally reluctant to disregard the corporate entity" and a showing of "injustice or fundamental unfairness" is required. *Mid-South Management Co. v. Sherwood Dev. Co.*, 374 S.C. 588, 597, 649 S.E.2d 135, 140 (Ct. App. 2007). In the present case, there is no evidence in the record that would support a finding that the corporate separateness of BB&T Corporation and its subsidiaries should be disregarded. Indeed, the Plaintiff does not even attempt to allege in his Complaint (or either of the amendments) that the corporate veil should be pierced.

The only name of an employee of BB&T Corporation on any document in this case related to Mr. Maybank is Pat Oliver. Ms. Oliver was the General Counsel of BB&T Corporation at the time of Mr. Maybank's first prepaid transaction. BB&T's Code of Ethics required General Counsel acknowledgment of any transaction involving a BB&T employee and BB&T stock. Ms. Oliver signed the bottom of a memorandum sent to her on August 11, 2006 by Anthony Mahfood. The memorandum, marked as Agreed Exhibit 7, explained the basic terms of the first prepaid transaction and requested Ms. Oliver's approval. Ms. Oliver provided her approval, with the caveat that Mr. Maybank not be permitted to purchase additional BB&T stock with the proceeds from the transaction, a condition to which Mr. Maybank adhered. No aspect of her conduct could support a claim. Ms. Oliver owed no duties to Mr. Maybank, nor did she make any recommendations or otherwise design any part of his investing strategy. She was merely part of the internal process at BB&T to ensure that employees of subsidiaries did not

trade speculatively in BB&T stock. There is no evidence that any aspect of her approval was for the purpose of providing advice or service to Mr. Maybank or any other customer.

A review of the evidence in light of the elements of each of the five causes of action upon which a verdict was returned in favor of Mr. Maybank confirms that BB&T Corporation is entitled to JNOV.

Breach of Contract. It is undisputed that BB&T Corporation is not a party to any agreement with Mr. Maybank. A review of the Wealth Management Agreement (including the second one executed in 2009) and the two Concentrated Stock Risk Management Addenda demonstrate that there is no contract with BB&T Corporation upon which Mr. Maybank based any of his claims. Only BB&T and BB&T Asset Management are named as parties to those agreements. Those agreements have integration clauses which prevent the possibility of the existence of any other agreement between Mr. Maybank and BB&T Corporation relating to his investing relationship with the subsidiary companies. Significantly, no BB&T entity was ever a party to any of the prepaid forward contracts.

Unfair Trade Practices Act. The UTPA claim fails as a matter of law because of the securities exemption discussed more fully above. Additionally, there was no action taken by any employee of BB&T Corporation which could be characterized as unfair or deceptive. No BB&T Corporation employee, not even Pat Oliver, communicated directly with Mr. Maybank.

Breach of Fiduciary Duty. There was no evidence of a fiduciary relationship between BB&T Corporation and Mr. Maybank. Mr. Maybank never had any direct communications, written or verbal, with BB&T Corporation with respect to his prepaid transactions or the managed portfolio account. All of his communications were exclusively with employees of BB&T and BB&T Asset Management. There is no evidence upon which the jury could have

based a finding of a fiduciary relationship between Mr. Maybank and BB&T Corporation. Additionally, because no BB&T Corporation employees were involved with Mr. Maybank's transactions or accounts, BB&T Corporation could not have been in breach of any purported fiduciary duties.

Constructive Fraud and Negligent Misrepresentation. Claims for constructive fraud and negligent misrepresentation require, at a minimum, a finding that there has been a misrepresentation of fact. There is no evidence of any misstatement, written or verbal, made to Mr. Maybank by any employee of BB&T Corporation, nor was there any evidence that Mr. Maybank relied on any such statement or that a misstatement made by BB&T Corporation caused damages to Mr. Maybank.

There is thus no evidence in this case of any involvement on the part of any employee of BB&T Corporation with Mr. Maybank's client relationship. All business activities related to the Mr. Maybank's prepaid contracts and managed portfolio account were handled by employees of either Branch Banking & Trust Company or BB&T Asset Management. The Court should therefore grant JNOV in favor of BB&T Corporation.

2. JNOV Should Be Granted in Favor of BB&T Corporation Because No Evidence Was Presented During Trial to Establish Personal Jurisdiction Over BB&T Corporation.

"It is the plaintiff's burden to show that the court has personal jurisdiction over the defendant." *Fassett v. Evans*, 364 S.C. 42, 47, 610 S.E.2d 841, 843 (Ct. App. 2005). Mr. Maybank failed to satisfy this burden during trial. There is no evidence in the record showing that BB&T Corporation conducted any business activities in South Carolina sufficient to confer personal jurisdiction in this state. Even the Second Amended Complaint fails to make a single allegation specific to BB&T Corporation suggesting any activities in South Carolina. Instead,

the Second Amended Complaint alleges that "BB&T Corporation is a financial holding corporation organized under the laws of the State of *North Carolina* with its principal place of business in Winston-Salem, *North Carolina*" and that "BB&T Corporation is a citizen and resident of the State of *North Carolina*." (Pls.' 2d Am. Compl. ¶ 3) (emphasis added).

a. Personal Jurisdiction Cannot Be Exercised Over a Parent Corporation Based on the Activities or Presence of Subsidiaries.

South Carolina case law is well established that the courts of this state lack personal jurisdiction over foreign bank holding companies like BB&T Corporation.[6] The South Carolina Court of Appeals addressed this specific issue in *Builder Mart of America, Inc., v. First Union Corp.*, 349 S.C. 500, 562 S.E.2d 352 (Ct. App. 2002).[7] In *Builder Mart*, an order of default was entered against First Union Corporation, a bank holding company organized under the laws of North Carolina with its principal and only place of business in Charlotte, North Carolina. First Union Corporation owned 100% of the stock of First Union National Bank of North Carolina, the entity that made a loan to the plaintiff.

The Court of Appeals first held that a bank holding company's registration with the South Carolina Board of Financial Institutions did not confer personal jurisdiction on the circuit court. *Id.* at 506, 563 S.E.2d at 355. The court also rejected the plaintiff's attempt to confer general

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[6] BB&T Corp. is registered as a bank holding company with the South Carolina Board of Financial Institutions. *See* 2012 Annual Report of the State Board of Financial Institutions at 26, available at http://www.bofi.sc.gov/Annual%20Reports/BOFI2012AnnualReport.pdf.

[7] The last sentence of the opinion in *Builder Mart* was later overruled by the South Carolina Supreme Court in *Farmer v. Monsanto Corp.*, 353 S.C. 553, 579 S.E.2d 325 (2003). In that sentence, the *Builder Mart* court stated that it was unnecessary for it to address the argument based on the South Carolina Door Closing Statute and described that argument as affecting the court's "subject matter jurisdiction." The court in *Farmer* clarified that subject matter jurisdiction is not at issue when the Door Closing Statute defense is raised. Nothing in the *Farmer* opinion affected any aspect of the discussion in *Builder Mart* regarding personal jurisdiction.

personal jurisdiction based on First Union Corporation's purported "unified marketing and advertising strategy and its holding itself out to the general public as a single entity, rather than separate subsidiary corporations." *Id.* at 510, 563 S.E.2d at 357. Finally, the court rejected the argument that the activities of the subsidiary entity could confer personal jurisdiction. The court explained:

> Even assuming for the sake of argument that the courts of South Carolina could exercise jurisdiction over FUNB(NC) because of its actions, that fact alone would not be sufficient to extend jurisdiction over First Union. Although FUNB(NC) is a subsidiary of First Union, the companies are separate legal entities operating under separate boards of directors with separate employees, assets, and places of business. "'As a general rule, a parent or holding corporation is not liable on the contracts of its subsidiary. The mere fact of the ownership of a majority of all the stock of its subsidiary does not render the parent corporation liable on the contracts of the subsidiary.'" Furthermore, "[t]he mere acquisition and control of a domestic subsidiary's capital stock does not subject the foreign parent to the jurisdiction of that State's courts."

Id. at 508, 562 S.E.2d at 356 (citations omitted).

Any argument Mr. Maybank might assert in favor of jurisdiction over BB&T Corporation is squarely foreclosed by the decision in *Builder Mart.* Not only was there no evidence presented at trial to support a finding of personal jurisdiction over BB&T Corporation, Mr. Maybank did not even attempt to plead any jurisdictional facts specific to BB&T Corporation. BB&T Corporation is a mere holding company with no activities or operations located in or directed toward South Carolina, and, for this reason, there is no personal jurisdiction, and the Court should grant JNOV in favor of BB&T Corporation. *See Burrows v. General Motors Co.*, No. 4:12-cv-02823, 2013 U.S. Dist. Lexis 109182 (D.S.C. July 31, 2013) (granting holding company's motion to dismiss for lack of personal jurisdiction).

b. There Is No Evidence that Would Support a Finding of Jurisdiction Under the South Carolina Long-Arm Statute.

"The determination of whether a court may exercise personal jurisdiction over a nonresident involves a two-step analysis. The trial court must (1) determine whether the South Carolina long-arm statute applies and (2) whether the nonresident's contacts in South Carolina are sufficient to satisfy due process." *Delta Apparel, Inc. v. Farina*, 406 S.C. 257, 269, 750 S.E.2d 615, 621-22 (Ct. App. 2013). "[I]n order for the courts to have statutory authority to exercise jurisdiction, the nonresident defendant's conduct must meet the requirements of South Carolina's long-arm statute." *White v. Stephens*, 300 S.C. 241, 387 S.E.2d 260 (1990). The long-arm statute is codified in § 36-2-803 and provides as follows:

> (A) 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:
>
> (1) transacting any business in this State;
>
> (2) contracting to supply services or things in the State;
>
> (3) commission of a tortious act in whole or in part in this State;
>
> (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
>
> (5) having an interest in, using, or possessing real property in this State;
>
> (6) contracting to insure any person, property, or risk located within this State at the time of contracting;
>
> (7) entry into a contract to be performed in whole or in part by either party in this State; or
>
> (8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

> (B) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

S.C. Code Ann. § 36-2-803 (Law. Co-op. Supp. 2013).

There was no evidence presented at trial that would support a finding of any of the activities delineated in § 36-2-803(A). There was no evidence that BB&T Corporation was a party to the Wealth Management Agreement or any other contract relating to Mr. Maybank's customer relationship, thereby negating a finding of jurisdiction under subsections (2) and (7). Subsections (6) and (8) are inapplicable because BB&T is not an insurance company, nor were "goods" involved in this case. Subsection (5) does not apply because there is no evidence that BB&T Corporation owns or has any interest in any real property in South Carolina. The case does not involve injury or death, thereby negating a finding of jurisdiction under subsection (4).

Subsection (1) requires evidence of "[t]ransacting any business in this state." S.C. Code Ann. § 36-2-803(A)(1) (Law. Co-op. Supp. 2013). There is no evidence that BB&T Corporation transacted any business in South Carolina with respect to Mr. Maybank's customer relationship. As explained above, the South Carolina Court of Appeals has already held in *Builder Mart of America, Inc., v. First Union Corp.*, 349 S.C. 500, 562 S.E.2d 352 (Ct. App. 2002), that the fact that a bank holding company was registered with the South Carolina Board of Financial Institutions did not confer personal jurisdiction on the circuit court. *Id.* at 506, 563 S.E.2d at 355. There was no evidence presented at trial showing any other activity by BB&T Corporation which could be construed as "transacting business" in South Carolina. It is indisputable that all business activities with respect to Mr. Maybank's customer relationship were performed by either BB&T or BB&T Asset Management, the subsidiaries of BB&T Corporation.

While BB&T Corporation did have in place a Code of Ethics that applied to its subsidiaries, the establishment of these policies do not qualify as a business activity directed

toward South Carolina, and the establishment of the policies does not constitute the transaction of business with Mr. Maybank. The Code of Ethics is a general policy not dependent on the state of location of the employees of subsidiaries. Moreover, as made clear from subsection (B) of § 36-2-803, to confer jurisdiction, the enumerated act must be one that could support a cause of action for Mr. Maybank. The Code of Ethics, standing alone, could not support any of the claims of Mr. Maybank.

Finally, Mr. Maybank offered no evidence which could support a finding under subsection (3) of the "commission of a tortious act in whole or in part in this State" on the part of BB&T Corporation. The only act by an employee of BB&T Corporation specific to Mr. Maybank was when Pat Oliver signed the August 11, 2006 memorandum from Anthony Mahfood providing notice about the transaction and seeking General Counsel approval. Ms. Oliver owed no duty to Mr. Maybank, nor was the purpose of the memorandum to protect Mr. Maybank's interests. The memorandum was a required by the Code of Ethics only because Mr. Maybank was an employee and the transaction involved BB&T stock. The act of signing the memorandum by Ms. Oliver cannot support a finding of the "commission of a tortious act in whole or in part in this State" on the part of BB&T Corporation.

Because Mr. Maybank has failed to present evidence at trial satisfying the provisions of the long-arm statute, the Court lacks the statutory power to exercise personal jurisdiction over BB&T Corporation. *See, e.g., Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 151, 723 S.E.2d 835, 839 (Ct. App. 2012) (affirming dismissal of complaint where plaintiff failed to satisfy § 36-2-803, stating, "[plaintiff] has failed to allege any facts that show [defendants] (1) have regular transactions of business or solicitation, (2) engage in a persistent course of conduct, (3) derive substantial revenue, or (4) consume goods or services rendered in South Carolina.").

c. Exercising Personal Jurisdiction Over BB&T Corporation Would Not Comport with Constitutional Due Process Requirements.

Mr. Maybank also failed to present any evidence that would support a finding of personal jurisdiction under the due process minimum contacts analysis. "The determination of whether the requirements of due process are satisfied involves a two-prong analysis: (1) the 'power' prong, in which minimum contacts provide courts the 'power' to adjudicate the action; and (2) the 'fairness' prong, which requires the exercise of jurisdiction to be 'reasonable' and 'fair.'" *Moosally v. W.W. Nortan & Co., Inc.*, 358 S.C. 320, 331, 594 S.E.2d 878, 884 (Ct. App. 2004). To satisfy the "power prong," a court must find that the defendant "directed its activities to residents of South Carolina and that the cause of action arises out of those activities." *Id.* at 331-32, 594 S.E.2d at 884. "It is essential in each case that there be some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.* at 332, 594 S.E.2d at 884.

There was no evidence presented at trial regarding any activities or physical presence of BB&T Corporation in South Carolina. There is a complete absence of evidence of BB&T Corporation purposefully directing any activities toward South Carolina or otherwise attempting to avail itself of the benefits of the laws of the State of South Carolina. BB&T Corporation, as a holding company with no operations in South Carolina, could not have had a reasonable expectation of being hailed into the courts of this state, especially with respect to Mr. Maybank's customer relationship being handled exclusively by employees of subsidiary companies. The record simply does not support a finding of sufficient minimum contacts on the part of BB&T Corporation necessary for the exercise of personal jurisdiction to comport with due process. *See Moosally v. W.W. Nortan & Co., Inc.*, 358 S.C. 320, 594 S.E.2d 878 (Ct. App. 2004) (declining to find personal jurisdiction based on activities of defendant outside of South Carolina).

d. BB&T Corporation's Objection to the Court's Exercise of Personal Jurisdiction Has Been Preserved.

BB&T Corporation has taken steps throughout this litigation to preserve, and not waive, its objection to the Court's exercise of personal jurisdiction. With its Answer to each version of the Complaint, BB&T Corporation has complied with Rule 12(h)(1). Rule 12(h)(1) provides in pertinent part that "[a] defense of lack of jurisdiction over the person . . . is waived . . . (B) if it is neither made by motion under this rule *nor included in a responsive pleading* . . . ." S.C. R. Civ. P. 12(h)(1) (emphasis added). BB&T Corporation complied with Rule 12(h)(1) in a timely manner, including the assertion in each responsive pleading a defense specifically pointing out the Court's absence of a basis for personal jurisdiction. In fact, in each Answer filed by the Defendants, the lack of personal jurisdiction over BB&T Corporation was asserted in three separate locations: (1) in the reservation of jurisdictional objections prominently presented on the first page, (2) in a responsive paragraph denying the jurisdictional allegations, and (3) in the listing of affirmative defenses at the end of the pleading.

Notably, the Plaintiffs did not file their final amended version of the Complaint until May 22, 2014, over two and a half years into the case and after discovery was nearly completed. BB&T Corporation of course was permitted to file a responsive pleading and, in that pleading, again preserved its defense of lack of personal jurisdiction pursuant to Rule 12(h)(1). This defense was asserted in multiple places, including in Paragraph 175 under the affirmative defenses section of the Second Amended Complaint. Once the Plaintiffs chose to amend their Complaint so late in the case, it provided BB&T Corporation with yet another opportunity to assert any and all defenses with no threat of waiver. The Plaintiffs made no attempt to strike from the Defendants' most recent Answer the defense of lack of personal jurisdiction over BB&T Corporation and allowed this issue to proceed to trial.

BB&T Corporation also preserved its defense by filing a motion in compliance with the dispositive motion deadline in the scheduling order. Although the Court denied the motion under the lower pre-trial *prima facie* standard, South Carolina law is clear that the issue of personal jurisdiction then becomes one to be presented during trial, requiring the trial court to make a second determination based on a full presentation of evidence. *See Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993) (dismissing appeal of denial of motion under Rule 12(b)(2) as interlocutory, and stating, "[The defendant] still may show that there is a lack of personal jurisdiction at trial, and may still be entitled to other procedural relief based on the evidence.").

Moreover, BB&T Corporation was not an active participant in discovery. No Rule 30(b)(6) deposition of BB&T Corporation was ever taken, and BB&T Corporation successfully opposed the request for the depositions of its current and former CEOs. BB&T Corporation did not serve its own independent discovery requests, nor did it to do anything more in responding to discovery directed to it other than to state that its employees had no involvement with the customer relationship with Mr. Maybank. For all of the above reasons, BB&T Corporation has properly preserved its objection and defense based on the Court's lack of personal jurisdiction, negating any finding of waiver in this case.

3. The Inclusion of BB&T Corporation During Trial Tainted the Punitive Damages Verdict, and, Therefore, the Other Defendants Are Entitled to a New Trial.

As explained above, BB&T Corporation should have been dismissed from the case before trial. By allowing trial to proceed with BB&T Corporation continuing as a Defendant, Mr. Maybank's counsel was able to present expert testimony about the $21 billion net worth of BB&T Corporation. Mr. Maybank's counsel recognized the value of putting such an enormous figure before the jury, and he argued during closing argument that the jury should award 1% of

the net worth of BB&T Corporation as punitive damages. None of that would have occurred had BB&T Corporation been dismissed earlier in the case.

The result of leaving BB&T Corporation in the case along with its $21 billion net worth was that the jury's punitive damages verdict was tainted. There can be no question that the huge net worth of BB&T Corporation played into the size of the punitive damages verdict. Indeed, the jury was specifically instructed to take into account the ability to pay of the Defendants when assessing an award of punitive damages.[8] The South Carolina Supreme Court has recognized that, when a judgment against one defendant is reversed, the judgment against any other defendants should also be reversed when there is a verdict that includes punitive damages. The court explained in *Gray v. Green Const. Co., Inc.*, 263 S.C. 554, 211 S.E.2d 871 (1975):

> "Although the early common-law rule was different, in most jurisdictions today, a judgment against multiple tortfeasors may be reversed as to one such defendant without affecting the judgment as to the others. *** However, even under the 'modern' rule, the courts will not enter such a partial reversal where substantial justice requires a reversal as to all defendants, as where it appears that a different verdict would possibly have been rendered against the remaining defendant if that defendant had been sued alone or if the jury had realized that the remaining defendant would be solely liable. *Where the verdict awards punitive damages, the courts have taken the view that on reversal of the judgment or setting aside of the verdict as to one of several defendant tortfeasors, it must also be set aside as to the others.*"

Id. at 559, 211 S.E.2d at 874 (*quoting* 5 Am. Jur. 2d Appeal and Error § 950) (emphasis added).

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[8] The Court instructed the jury as follows:

> Finally, any award of punitive damages must be limited to punishment and, thus, may not effect economic bankruptcy. To this end, the Defendant's ability to pay any punitive damages award should be considered. However, the economic bankruptcy factor is not an absolute bar to an award of punitive damages.

Additionally, under § 15-33-125 of the South Carolina Code, the Court is not permitted to grant a new trial as to the punitive damages verdict alone. Under the circumstances, the Court is required to order a new trial absolute as to liability and damages. Accordingly, BB&T and Sterling are both entitled to a new trial absolute as to both liability and damages.[9]

C. The Court Should Grant JNOV in Favor of the Defendants as to the Award of Punitive Damages Because Such Damages Are Barred by the Terms of the Wealth Management Agreement.

The Defendants are entitled to JNOV as to the jury's award of punitive damages based on the provision in the Wealth Management Agreement expressly waiving any right of Mr. Maybank to recover punitive damages.[10] While the agreement allows Mr. Maybank to recover his alleged losses attributable to negligence or willful misconduct, the recovery of punitive damages is barred. Mr. Maybank sought to enforce other terms of the Wealth Management Agreement during the trial, and he cannot now avoid the provisions which are unfavorable to his position. Contractual provisions limiting the remedies available to litigants have often been enforced by the South Carolina appellate courts and most recently in *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013).

As an initial matter, Mr. Maybank has waived any right to challenge the enforceability of this provision. At no time during the trial did Mr. Maybank seek a ruling as to the enforceability of the provision, and he further permitted evidence of the provision to be admitted into evidence.

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[9] Such new trial should be limited to the five claims on which the jury returned a verdict in favor of Mr. Maybank.

[10] This same provision also prevents an award of treble damages under the Unfair Trade Practices Act. The South Carolina Supreme Court has equated treble damages under the UTPA with common law punitive damages. *See Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 208, 391 S.E.2d 249, 251 (1990) ("We hold that an award of both treble and punitive damages constitutes double recovery, and is impermissible."). Accordingly, punitive damages and treble damages should be treated equally under the terms of the agreement.

Mr. Maybank also did not request any special charge to be given to the jury as to the enforceability of the provision. Accordingly, on this basis alone, the Court should strike the punitive damages verdict without any further analysis.

1. Mr. Maybank Expressly Waived any Right to Recover Punitive Damages in the Wealth Management Agreement.

Mr. Maybank entered into the Wealth Management Agreement with BB&T and BB&T Asset Management on August 23, 2006. (Wealth Mgmt. Agr.) [Agreed Exh. 14]. Paragraph F.1. on page 5 of this agreement contains a provision barring consequential and punitive damages:

> F. Limitation of Liability and Indemnification. Client agrees:
>
> 1. Bank and Investment Advisor shall not be liable with respect to their services under this Agreement except for any loss attributable to their negligence or willful misconduct. *In no event shall Bank or Investment Advisor be liable for any incidental, indirect, special, consequential or punitive damages.*

(Wealth Mgmt. Agr. at 5) (emphasis added). Accordingly, Mr. Maybank waived any right to recover punitive damages. A similar provision was also included in the subsequent Wealth Management Agreement executed by Mr. Maybank on November 2, 2009, and which was introduced at trial as Agreed Exhibit 42.

Damage limitation provisions similar to, and even more restrictive, than the one in the Wealth Management Agreement have previously been upheld by the courts of this state. *See, e.g., Pride v. Southern Bell Tel. & Tel. Co.*, 244 S.C. 615, 619–22, 138 S.E.2d 155, 157–58 (1964) (holding not violative of public policy for defendant to contractually limit liability for negligence to amount paid by plaintiff for placement of advertisement that was negligently published); *see also S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc.*, 283 S.C. 182, 191, 322 S.E.2d 453, 458 (Ct. App. 1984) (noting that exculpatory clause can insulate defendant from liability for negligence so long as clause uses explicit language indicating that was intent of the parties); *Seaside Resorts, Inc. v. Club Car, Inc.*, 308 S.C. 47,

416 S.E.2d 655 (Ct. App. 1992) (noting that limitation on consequential damages is enforceable if made part of parties' contract); *Fanczi Screw Co. v. Orix Fin. Servs.*, 114 Fed. Appx. 548, 553 (4th Cir. 2004) (vacating jury award of punitive damages based on contractual provision that "prohibited the award of any damages other than actual damages"); *Eaton Corp. v. Trane Carolina Plains*, 350 F. Supp. 2d 699, 705-06 (D.S.C. 2004) (granting defendant's motion for partial summary judgment on consequential damages, which were expressly excluded by contract on which parties' relationship was based).

More recently in *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013), the South Carolina Supreme Court upheld a provision barring the recovery of any damages against the defendant, with the exception of the fee paid for services. The clause at issue provided as follows:

> **LIMIT OF LIABILITY**: [ ]It is understood and agreed that should [Palmetto] and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of it's [sic] obligations, including but not limited to negligence, [ ]breach of contract or otherwise, the the [sic] liability of [Palmetto] and/or it's [sic] agents or employees shall be limited to a sum equal to the amount of the fee paid by the client for this inspection and report.

Id. at 142 n.1, 739 S.E.2d at 883 n.1 (alterations in original). The court affirmed summary judgment in favor of the defendant, holding that the above provision was neither unconscionable nor did it violate public policy.

Here, the limitation of liability provision in the Wealth Management Agreement is narrowly tailored to exclude only certain specified damages. It makes no attempt to insulate BB&T or BB&T Asset Management from liability for their negligence or willful misconduct. Indeed, the provision expressly provides that Mr. Maybank can still hold them liable for such conduct. Mr. Maybank, however, can seek only the actual losses attributable to alleged misconduct and has expressly waived any right to recover punitive damages. Under the precedent of the *Gladden* case, the Court should

enforce Paragraph F.1. and grant JNOV in favor of the Defendants as to the jury's verdict on punitive damages.

2. The Concentrated Stock Risk Management Addenda Make the Provisions of the Wealth Management Agreement Applicable to Both the Managed Portfolio Account as Well as the Prepaid Transactions.

The punitive damages waiver is set forth within the Wealth Management Agreement. The Wealth Management Agreement is a contract of broad application intended to govern all aspects of the investing relationship between Mr. Maybank, BB&T, and BB&T Asset Management. There can be no dispute as to the fact that the terms of this agreement apply to both the managed portfolio account and the prepaid transactions.[11] This is a matter of contract construction to be performed by the Court. *See Hope Petty Motors v. Hyatt*, 310 S.C. 171, 175, 425 S.E.2d 786, 789 (Ct. App. 1992) ("[T]he construction of contracts is a question of law for the court.").

Mr. Maybank executed two separate Concentrated Stock Risk Management Addenda prior to the consummation of each prepaid transaction. [Exhs. 3 and 35]. These addenda provided key disclosures and terms governing the relationship between Mr. Maybank, BB&T, and BB&T Asset Management for the services provided related to the prepaid transactions. Each addendum expressly provides in the very first sentence that it is an "Addendum to Wealth Management Agreement" between "Bank, Investment Advisor, and Client." There is absolutely no ambiguity or room for interpretation. The addenda and the Wealth Management Agreement

[11] In this case, the award of punitive damages can relate only to the services of BB&T and BB&T Asset Management provided with respect to the managed portfolio account and the prepaid forward contracts. Punitive damages are recoverable only if there are actual damages. *See Broach v. Carter*, 399 S.C. 434, 444, 732 S.E.2d 185, 190 (Ct. App. 2012) ("Punitive damages are predicated on the existence of actual damages"). The only evidence of actual damages was the testimony and reports of Craig McCann. It is clear from that evidence that Mr. Maybank's actual damages were limited to alleged losses related to either the managed portfolio account or the prepaid forward contracts. [Agreed Exh. 72].

are one in the same and must be read together. Indeed, Mr. Maybank readily acknowledged during cross examination at trial that the Wealth Management Agreement applied to the prepaid transactions.[12]

Even the Plaintiffs' own pleading acknowledges that the Wealth Management Agreement governs the entire relationship that Mr. Maybank had with the Defendants as an investment client. In Paragraph 83 of the Second Amended Complaint, the Plaintiffs state that the Wealth Management Agreement "formalized the relationship between the parties." (Pls.' 2d Am. Compl. ¶ 83).

It is immaterial that the Concentrated Stock Risk Management Addendum for each prepaid was executed at a different time than the Wealth Management Agreement.[13] The South Carolina Supreme Court in *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977), explained the proper construction of multiple writings when determining what contract terms apply:

> [W]here the instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction comprising the contract will be

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[12] Mr. Maybank's trial testimony was consistent with his deposition testimony. During Mr. Maybank's deposition, he was asked about the scope of the Wealth Management Agreement, and he testified, "I believe it also would have applied to the prepaid variable." (1/30/14 Maybank's Dep. at 527:5 to 528:19) [Cited pages attached as Exhibit "A"].

[13] When asked during his deposition about the fact that the first prepaid was completed before the execution of the Wealth Management Agreement, Mr. Maybank testified:

> Q. But wasn't the prepaid variable forward contract executed before this?
>
> A. It was part of a whole – you – you see this thing had to be done second because the – the money for this account came out of the prepaid variable. *They're inextricably linked.*

(1/30/14 Maybank's Dep. at 528:25 to 529:5) (emphasis added).

> considered as a whole. *This is true even though the transaction consumed more than one day; the date of the writings constituting such transaction is immaterial.* Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated.

Id. at 88–89, 232 S.E.2d at 24 (emphasis added). Relying on *Klutts*, the court in *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004), stated, "The date of the writings constituting the transaction is not material. . . . where one of the contracts explains, amplifies, or limits the other, those provisions will be given effect between the parties so that the whole agreement, as actually contracted by the parties, may be effectuated." *Id.* at 92, 594 S.E.2d at 492–93.

There can be no doubt from the express language of the Concentrated Stock Risk Management Addenda that the parties intended each addendum to be a part of the total contractual relationship of the parties as reflected in the Wealth Management Agreement. The addenda supplied key terms to the provision of the Defendants' services with respect to the prepaid transactions. Those addenda terms are supplemented by the terms of the Wealth Management Agreement, including the damages limitation provision in Paragraph F.1.[14]

3. Paragraph F.1. Is Effective to Waive Punitive Damages Regardless of the Cause of Action Asserted.

Paragraph F.1. should be construed to apply to all five of the causes of action for which the jury returned a verdict in favor of Mr. Maybank. These causes of action include breach of

[14] The addendum for the second prepaid transaction, marked as Agreed Exhibits 35, states at the top that it is an addendum to the Wealth Management Agreement dated January 15, 2009. This is the same date as the date that Mr. Maybank had signed the addendum, as indicated on the bottom of the form. Since there was only one Wealth Management Agreement at that time (the one dated August 23, 2006), there can be no question as to the Wealth Management Agreement to which the addendum applied.

fiduciary duty, constructive fraud, breach of contract, negligent misrepresentation, and alleged violation of the UTPA.

The scope of the damages limitation provision is a matter of contract construction for the Court. There is no ambiguity present. The provision applies to any liability "with respect to [the Defendants'] services under this Agreement." (Wealth Mgmt. Agr. at 5). A review of the Second Amended Complaint shows that every one of the Plaintiffs' causes of action is dependent on allegedly improper services provided by the Defendants. But for Mr. Maybank approaching the Defendants to seek services and but for the provision of those services, there would have been no relationship of the parties and no basis for any alleged claims. Moreover, the express language of the damages limitation provision contemplates tort claims in addition to contract claims, as shown by the references to "negligence," "willful misconduct," and "punitive damages." (*Id.*) In the face of such a broadly worded provision, the Court should rule that it applies to all five causes of action at issue to bar the punitive damages award.[15] *See Carlson v. South Carolina State Plastering, LLC*, 404 S.C. 250, 262, 743 S.E.2d 868, 875 (Ct. App. 2013) ("[W]e find the arbitration clause in the purchase agreement was not intended to apply to claims arising in contract only and encompasses the [plaintiffs]' tort claims as well."); *see also Landers v. Federal Deposit Ins. Corp.*, 402 S.C. 100, 739 S.E.2d 209 (2013) (holding that tort claims of slander and intentional infliction of emotional distress fell within scope of clause requiring

[15] There is a rule of narrow construction applicable to *exculpatory clauses* that bar *all* liability, but this rule should not be applied to Paragraph F.1. because it allows for liability for actual losses, and in that manner is distinguishable from an exculpatory clause. *See South Carolina Elec. and Gas Co. v. Combustion Engineering, Inc.*, 283 S.C. 182, 322 S.E.2d 453 (Ct. App. 1984) (providing for narrow interpretation of exculpatory clause barring *all liability* after expiration of one-year warranty period); *Cooke v. Allstate Mgmt. Corp.*, 741 F. Supp. 1205, 1207 (D.S.C. 1990) (applying narrow interpretation to exculpatory clause in residential lease providing that defendants would not be liable for "*any loss*, injury or damage to person or property . . . arising out of the failure of any appliance . . . or caused by any casualty or catastrophe[.]") (omissions in original, emphasis added).

arbitration of "any controversy or claim arising out of or relating to this contract, or breach thereof.").

4. The Damages Limitation Provision Is Enforceable and Not Violative of Public Policy.

It is anticipated that Mr. Maybank will argue that Paragraph F.1. is unenforceable as being violative of public policy. To the extent that the Court does entertain a challenge to the enforceability of Paragraph F.1., it is a question of law for the Court to decide. *See Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012) ("Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court."). The starting point for any analysis of a contract provision is that it is "[t]he [c]ourt's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). In the absence of a case from the South Carolina Supreme Court holding that punitive damages waivers are invalid, this Court should adhere to the above bedrock principal of South Carolina law and enforce the agreed terms of the parties, thereby recognizing the fundamental right of freedom of contract.

It is rare for the South Carolina Supreme Court to void a type of contract provision based on public policy. There is certainly no justification for doing so here, especially when the provision at issue allows a meaningful recovery. By its express terms the provision *allows* suit for losses attributable to either negligent or willful misconduct. Paragraph F.1 states: "Bank and Investment Advisor shall not be liable with respect to their services under this Agreement *except for any loss attributable to their negligence or willful misconduct.*" (Wealth Mgmt. Agr. ¶ F.1) (emphasis added). There is no attempt to bar all liability for services provided. Meaningful remedies in the form

of actual losses are still recoverable if liability is proven. Indeed, Paragraph F.1. has no impact on the $3.1 million actual damages verdict returned by the jury.[16]

Moreover, the courts of South Carolina look to the legislature for guidance when determining the public policy of the state. *See McNeil v. South Carolina Dept. of Corrections*, 404 S.C. 186, 191, 743 S.E.2d 843, 846 (Ct. App. 2013) ("The primary source of the declaration of the public policy of the state is the General Assembly"). The South Carolina Securities Act demonstrates no public policy reason for punitive damages to be available in the present case. In 35-1-509 of the Act, which provides for civil liability, there is no provision for either punitive damages or multiplying damages. Investors can recover only their actual losses, prejudgment interest, and attorneys' fees. The legislature instead conferred power upon the Securities Division of the Office of the Attorney General to enforce the provisions of the Securities Act and to promulgate regulations for that purpose. To the extent that conduct needs to be prevented in the future, the Securities Division has the authority and power to enjoin conduct and impose monetary penalties.

Decisions from courts in other jurisdictions illustrate that when a mere damages limitation is involved, such a provision is enforceable with no consideration needing to be given to public policy considerations. For example, in *Baumgardner v. Bimbo Food Bakeries Distrib.*, 697 F. Supp. 2d 801 (N.D. Ohio 2010), the defendant filed a motion to dismiss the plaintiff's request for punitive damages because a clause in the contract barred punitive damages. The district court found no issue in enforcing the punitive damages limitation and granted the defendant's motion to dismiss. The court explained:

> As set forth above, Paragraph 11.2 of the Distribution Agreement explicitly precludes punitive damages. Under longstanding New

[16] The availability of suit and remedies in the form of actual losses is the distinguishing factor that renders irrelevant any case authorities that invalidate *exculpatory clauses* that seek to bar *any and all liability*, rather than merely limiting the remedies.

> York precedent, "[p]arties to contracts have the right to insert any stipulations that may be agreed to; provided that they be neither unconscionable, nor contrary to public policy." New York courts allow parties to limit their liability, "subject only to the requirement that the limitation be not so obscured as to make it probable that it would escape plaintiff's attention." Moreover, New York law "dictate[s] that unambiguous contract terms should be enforced according to their terms."
>
> Here, the Distribution Agreement sets forth, in bolded print and in a separately enumerated paragraph, that "in no event shall either party be liable to the other for any consequential, incidental, indirect or special damages, including lost profits and punitive damages." Baumgardner has not alleged that this term is ambiguous, or was obscured to make it probable that it would escape his attention. The Court will not ignore this express term of the agreement. Thus, his claim for punitive damages fails as a matter of law for the additional reason that the contract between the parties expressly precludes the recovery of punitive damages.
>
> Therefore, for the foregoing reasons, BFBD's Rule 12(b)(6) motion to dismiss is GRANTED with respect to Baumgardner's punitive damages claim.

Id. at 818-19. Other courts reach the same conclusion. *See, e.g., Wachovia Bank, Nat'l Ass'n v. Preston Lakes Homes, LLC*, 750 F. Supp. 2d 682, 692 (W.D. Va. 2010) ("Wachovia also moves to dismiss Preston Lake's claims for consequential and punitive damages on the basis of a waiver contained in the Loan Agreements. The court finds that Preston Lake validly waived its rights to seek these types of damages, and therefore dismisses these claims."); *Youtie v. Macy's Retail Holding, Inc.*, 653 F. Supp. 2d 612, 630 (E.D. Pa. 2009) (analyzing employment agreement and holding, "both parties are sophisticated and the limitation of liability is reasonable in that it does not bar all liability, merely exemplary and punitive damages. Thus, defendants are not entitled to exemplary damages."); *Valve Corp. v. Sierra Entm't Inc.*, 431 F. Supp. 2d 1091, 1101 (W.D. Wash. 2004) (holding that "[p]laintiff may not recover special incidental, consequential, or punitive damages" because the claims are subject to the limitation of liability provision); *DynCorp v. GTE Corp.*, 215 F. Supp. 2d 308, 313 (S.D.N.Y. 2002) (dismissing plaintiff's claim

for punitive damages by enforcing provision stating, "Notwithstanding anything to the contrary elsewhere in [the Purchase] Agreement, no party (or its Affiliates) shall, in any event, be liable to the other party (or its Affiliates) for any consequential, special or punitive damages"); *Amoco Oil Co. v. Gomez*, 125 F. Supp. 2d 492, 511 (S.D. Fla. 2000) (granting summary judgment, disallowing any request for punitive damages and other types of damages excluded under contract language).

Under these circumstances, the Court has the duty to enforce the damages limitation provision as agreed to by the parties. *See McPherson v. J. E. Sirrine & Co.*, 206 S.C. 183, 206, 33 S.E.2d 501, 509 (1945) ("'It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves'"). Hence, the punitive damages award cannot stand.

5. Mr. Maybank Cannot Satisfy the High Burden of Establishing Unconscionability.

In the absence of a public policy basis for voiding Paragraph F.1., Mr. Maybank can avoid the effect of this provision only by a showing of unconscionability. As explained by the South Carolina Supreme Court in *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013), "Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract." *Id.* at 145, 739 S.E.2d at 884.

Mr. Maybank could never satisfy the high burden of establishing unconscionability sufficient to void Paragraph F.1., nor does he even plead that the provision is unconscionable in the Second Amended Complaint (or any prior version). Mr. Maybank is extraordinarily financially sophisticated, and after 20 years on Wall Street, started his own registered investment advisory firm with $200

million in assets under management. He was employed in the investment industry for over 40 years (including 5 years with BB&T) before signing the Wealth Management Agreement. He was certainly capable of reading and understanding the terms of the Wealth Management Agreement, and he testified during trial that he was given the opportunity to sit down and read through the Wealth Management Agreement before signing it. Nor is there anything unusual about a provision limiting the available remedies, but still allowing claims for alleged negligence or willful misconduct as well as any direct losses related to the services provided. Any attempt by Mr. Maybank to argue unconscionability is without merit and should be disregarded by the Court. This is a question for determination by the Court. *See Wells Fargo Bank, NA v. Smith*, 398 S.C. 487, 730 S.E.2d 328 (Ct. App. 2012) (holding common law unconscionability is an equitable concept that requires determination by the Court, not the jury).

D. The Court Should Grant JNOV or, Failing that, a New Trial Absolute Because the Jury Should Not Have Been Allowed to Consider Losses in the Managed Portfolio Account as an Element of Damages.

The jury's verdict improperly provides Mr. Maybank with a windfall recovery with respect to actual damages. His damages expert, Craig McCann, has offered two damages calculations that cannot co-exist in this case. Dr. McCann nevertheless adds them together under the collective umbrella of "investment losses" and estimates those losses in the range of $2.8 million to $3.3 million. A component of these damages is made up by Dr. McCann's market adjusted loss calculation for the managed portfolio account in the range of $877,141 to $1,405,565.

The flaw with including managed portfolio damages is that, under the liability theory presented by Mr. Maybank and his purported experts, the managed portfolio account that gives rise to these damages would have never existed. The Court should grant JNOV in favor of the Defendants as to this component of Mr. Maybank's actual damages. Eliminating this element of

damages also requires a new trial as to liability and damages because the verdict as to both actual and punitive damages was tainted by evidence of managed portfolio damages and because, under § 15-33-125 of the South Carolina Code, there cannot be a new trial on damages alone.

Dr. McCann made clear during his testimony at trial his position that Mr. Maybank should never have entered into a variable prepaid forward contract at all, and that instead, the Defendants should have recommended an outright sale of Mr. Maybank's 220,000 shares of BB&T stock.[17] Similarly, Professor Freeman testified that the prepaid transactions should never have been recommended to Mr. Maybank as a solution for his concentrated position. Without the initial prepaid transaction, however, the $4.6 million used to fund the managed portfolio account at BB&T would not have existed.

In Exhibits 3 and 4 of his report, marked as Agreed Exhibit 72, Dr. McCann calculates the alleged losses relating to the prepaid contracts. He concludes that, had Mr. Maybank not entered into the prepaid contracts, he would have avoided losses in the range of $1,984,161 to $1,956,620. The underlying assumption necessary for Mr. Maybank to recover these amounts as actual damages is that Mr. Maybank would not have entered into the prepaid contracts and that he would have had an alternative portfolio (presumably created from a stock sale) invested in

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[17] During his deposition, Dr. McCann testified consistently with his trial testimony:

> Q. . . . In your opinion, what should BB&T and BB&T Asset Management – what should they have recommended to Mr. Maybank that he do back in August of 2006?
>
> A. . . . [T]hey should have started by developing [a] comprehensive financial plan . . . . Having done that, I think that the very strong recommendation that would come out of that would be *to sell the concentrated stock position, pay the capital gains tax and diversify into a[n] appropriately allocated portfolio of stocks and bonds.*

(McCann Dep. 81:4-20) [Cited pages at Exh. "B"].

either 100% bonds or 70% bonds.[18] An undeniable result of that assumption is that the managed portfolio account with BB&T would never have been opened because it could only be funded through a prepaid transaction. Additionally, Mr. Maybank would never have had two portfolio accounts.

Mr. Maybank could have done a stock sale and opened a portfolio account or he could have entered a prepaid contract and opened a portfolio account, but he could never have done both. Dr. McCann gave his opinion that the only reasonable alternative for Mr. Maybank was to sell his stock. Thus, Dr. McCann is confined to calculate damages based only on that hypothetical, to the exclusion of calculating damages based on the actual portfolio created from the proceeds of the first prepaid contract.

Despite this flaw in Mr. Maybank's damages methodology, Dr. McCann calculated how much better Mr. Maybank's *actual* managed portfolio account (that started with the $4.6 million in proceeds from the first prepaid contract) would have performed if it had been invested more heavily in bonds. Dr. McCann concludes that by more conservatively investing in his actual portfolio account with BB&T, Mr. Maybank's account would have performed better by between $877,141 and $1,405,565. (McCann Report, Agreed Exhibit 7, at Exh. 8 and Exh. 9). This second damages analysis involving the actual managed portfolio is completely irrelevant under Mr. Maybank's theory of the case. When Mr. Maybank takes the position that there should not have been a prepaid contract, he is also committing to the position that the actual portfolio account that began with $4.6 million *should have never existed.*

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[18] As shown in Column (4) and footnote 1 of Exhibit 3 to Dr. McCann's report (contained in Agreed Exhibit 72), Dr. McCann's analysis shows how a hypothetical "diversified portfolio" would have performed had there been a stock sale and if the proceeds from the stock sale had been invested in either 100% bonds or 70% bonds.

The Defendants' position relies on the simple and undeniable principle that once a plaintiff has selected the path he intends to pursue, he is confined to damages arising from that path and cannot lump in additional damages from scenarios that cannot co-exist. This principle is well illustrated in South Carolina jurisprudence related to fraud damages. As explained by the South Carolina Supreme Court in *Turner v. Carey*, 227 S.C. 298, 87 S.E.2d 871 (1955), when a party believes they have made a purchase or otherwise entered into a contract through fraudulent inducement, they can either affirm the contract "and bring an action at law for fraud and deceit . . . to recover damages," or the party "may rescind the sale and recover the consideration paid." *Id.* at 305, 87 S.E.2d at 874. The court in *Turner* made it clear, however, that "[t]he two remedies are inconsistent, the one being based on the continued existence of the sale, the other on its abrogation, and the purchaser cannot in the one form of action secure the relief appropriate to the other." *Id.*

The decision in *Fields v. Yarborough Ford, Inc.*, 307 S.C. 207, 414 S.E.2d 164 (1992), illustrates how the election to affirm a contract eliminates a party's ability to seek damages that would be recoverable under the alternative scenario in which the contract is rescinded based on the fraud. In *Fields*, the claimant alleged that the other party made misrepresentations when selling a pickup truck. After learning of the misrepresentation, the claimant continued to drive the truck, but later filed suit. The court first noted the general rule that "A plaintiff induced to enter a contract by fraud must elect between two remedies: he can elect to affirm the contract and bring an action to recover damages sustained by reason of the fraud or, alternatively, he may elect to rescind the contract and recover the consideration paid[.]" *Id.* at 211, 414 S.E.2d at 166. The court reversed the jury verdict in favor of the claimant, concluding that there were no recoverable damages under the methodology available when the claimant chose to affirm the

purchase contract. The court rejected the claimant's attempt to argue that rescission related damages would allow his claim to survive. The court explained:

> The other damages claimed by the Fields, the value of the trade-in, the cost of the accessories, and the installment payments, did not proximately result from the deceptive act. Instead, these losses resulted from the Fields own conduct in keeping the truck after they knew it did not have the engine they wanted and in returning the truck to the dealer because they could not afford it. These expenses would have been recoverable only if the Fields had returned the truck because they elected to rescind the contract. However, the Fields do not contend that they returned the truck in an effort to rescind. The counterclaim makes no mention of a demand for rescission and there was no evidence of rescission presented at trial. The trial judge specifically determined that the Fields had elected to sue in tort, affirm the contract, and bring an action for damages and that the Fields had not elected to rescind.
>
> * * *
>
> Thus, it is clear that the Fields elected to affirm the contract and seek damages resulting from the fraud. Consequently, they are not entitled to recover the consideration paid (the value of the trade-in and the installment payments) plus incidental damages (the cost of the accessories), because these are damages awarded to a plaintiff who elects to rescind. *The "two remedies [an action for damages and an action for rescission] are inconsistent, the one being based on the continued existence of the sale, the other on its abrogation, and the purchaser cannot in the one form of action secure the relief appropriate to the other.*"

Id. at 211-12, 414 S.E.2d at 166-67 (emphasis added).

Similarly, in the present case, Mr. Maybank has staked his position that he should never have been advised to enter in to the prepaid transaction in August of 2006 and instead should have been advised to sell his shares of BB&T stock. He has elected to pursue damages resulting from the allegedly imprudent advice to enter into a prepaid contract, which is exactly what Dr. McCann attempts to calculate in Exhibits 3 and 4 of his report.

The alleged advice to enter into the prepaid transaction cannot be both accepted and rejected. Those two scenarios cannot co-exist, much as affirmance of the sale and a rescission of

the sale could not co-exist in the *Turner* and *Fields* cases. Mr. Maybank has chosen to reject the advice to enter into a prepaid transaction and, thus, has elected to pursue the damages calculated by Dr. McCann in Exhibits 3 and 4 of his expert report. The $877,141 to $1,405,565 in damages calculated by Dr. McCann in Exhibits 8 and 9 of his report related to the allegedly poor management of the diversified portfolio constitute the alternative damages that are not recoverable by Mr. Maybank.

In light of this issue, the Court should grant JNOV in favor of the Defendants as to the component of Mr. Maybank's actual damages based on managed portfolio losses. Eliminating this component of damages also requires a new trial as to liability and damages because the verdict as to both actual and punitive damages was tainted by evidence of managed portfolio damages and because, under § 15-33-125 of the South Carolina Code, there cannot be a new trial on damages alone.[19]

E. The Court Should Grant a New Trial Absolute Due to Several Prejudicial Evidentiary Errors Committed During Trial.

Several evidentiary errors occurred during the trial of this case. When the erroneous admission or exclusion of evidence is prejudicial to the losing party, it cannot be considered harmless and a new trial is required. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010). In this context, "[p]rejudice is a reasonable probability that the fact-finder's determination was influenced by the challenged evidence or the lack thereof." *Hill v. South*

[19] Among other things, the jury was charged to take into account the compensatory damages award as one of the factors to consider when assessing punitive damages. The jury charge as to punitive damages stated in pertinent part: "Any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused, including the compensatory damage award made by you." The managed portfolio damages would have increased the jury's compensatory damage award, and thus would have naturally led the jury to increase the punitive damages award.

Carolina Dept. of Health and Environmental Control, 389 S.C. 1, 14, 698 S.E.2d 612, 619 (2010).

1. Professor John Freeman Lacked the Experience, Training, and Education Necessary to Be Qualified as an Expert with Respect to Variable Prepaid Forward Contracts.

Professor Freeman was offered as an expert witness with respect to variable prepaid forward contracts, and, after being qualified by the Court, he proceeded to offer numerous opinions characterizing prepaid contracts as unreasonably risky and inappropriate for consideration as an option by Mr. Maybank. Professor Freeman, however, had no prior experience with prepaid contracts, and this case was in fact his first that involved a prepaid contract.

The South Carolina Supreme Court has made it clear that trial courts have a gatekeeping role with respect to expert testimony sought to be admitted under Rule 702. *See State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009). "The qualification of a witness as an expert and admissibility of his testimony are matters largely within the discretion of the trial judge; however, the exercise of this discretion will be reversed where an abuse of discretion has occurred." *Payton v. Kearse*, 329 S.C. 51, 60–61, 495 S.E.2d 205, 211 (1998).

Under Rule 702, a witness can be qualified as an expert only if the witness has gained specialized "knowledge, skill, experience, training, or education" in the subject matter in which opinions are to be offered. S.C. R. Civ. P. 702. "[E]xpert testimony receives additional scrutiny relative to other evidentiary decisions," and "[t]rial courts should be cautious in conferring an expert label upon a witness because juries may accord excessive or undue weight to 'expert' testimony." *Watson v. Ford Motor Co.*, 389 S.C. 434, 446-49, 699 S.E.2d 169, 175-76 (2010). Thus, when "executing its gatekeeping duties, the trial court must . . . find that the proffered

expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." *Id.*

Here, Professor Freeman had only a general knowledge of securities and lacked any prior experience with the specific security at issue in this case. Never before had he been involved in a case or had any experience with variable prepaid forward contracts. The decision in *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010), illustrates that general experience in the field is insufficient and that prior experience with the *specific* matter at issue is required when that subject matter is unique and specialized.

In *Watson*, the South Carolina Supreme Court found that a witness lacked sufficient qualifications to offer expert opinions as to automotive cruise control systems. The record showed that the witness had worked for decades in the automotive industry as a trainer, consultant, software developer, and writer and was currently conducting seminars to train automobile technicians who focus on brake systems in vehicles. *Id.* at 176, 699 S.E.2d at 447. But the witness had no prior experience with cruise control systems. He had never taught or published papers on cruise control systems, and had no professional experience with these systems prior to the case. *Id.* As explained by the Court, "it appears he merely studied the Explorer's system just before trial, which he indicated in his testimony to the jury: 'This is how I taught myself the [Explorer's] cruise control, or speed control system.'" *Id.* at 176, 699 S.E.2d at 448. The South Carolina Supreme Court concluded that, while the witness may have been qualified to serve as an expert for certain components, his qualification to testify about cruise control systems had not been established. *Id.*

The decision in *Securities and Exchange Commission v. Tourre*, 950 F. Supp. 2d 666 (S.D.N.Y. 2013), applies the principles set out in *Watson* in the context of securities litigation

and illustrates that mere general knowledge about securities is insufficient to qualify a witness as an expert in a particular, specialized investment. In *Tourre*, the SEC contended that the defendant made misleading disclosures with respect to the sale of synthetic collateralized debt obligations ("CDOs"). The proffered expert acknowledged during his deposition that "aside from talking about CDOs in his class, his exposure to the CDO industry [was] entirely in the context of providing expert services subsequent to the financial crisis in 2007." *Id.* at 677. He had never "analyzed a CDO outside the context of providing expert services," and had "never been employed by a financial institution, a collateral manager, a portfolio selection agent, or any institution with any involvement with CDOs." *Id.* He had "never structured a CDO, marketed a CDO or invested in a CDO," nor had he "surveyed CDO market participants during the relevant time period." *Id.*

The trial court concluded that the proffered expert "simply has no specialized knowledge, expertise, or training in CDO structuring, marketing or investing" and was not qualified to render an opinion under Rule 702. The court explained:

> [The witness] not qualified to present this opinion. He has no experience in the CDO industry apart from acting as an expert witness, yet he intends to opine about what information would and would not matter to CDO investors. He has no education, expertise, or experience in this area upon which to make such a statement. He does not meet the basic requirements of Rule 702 or Daubert. The Court has specifically considered—and rejected—the possibility that [the witness]'s area of expertise is sufficiently proximate to the subject of his proposed testimony to overcome his lack of experience with the structuring or marketing of CDOs. He does appear to have expertise in the general area of structured finance, but that is so broad a category as to become meaningless when particularized here to synthetic CDOs, a very specific type of security. [The witness] also has expertise in reading and talking about finance generally; he has a degree in business administration and lectures on topics of finance. But those qualifications are, again, too general to allow defendant to present him to a jury as a true expert on synthetic CDOs.

Id. at 677-78 (citations omitted).

Here, as in *Watson* and *Tourre*, Professor Freeman has no prior experience with the specific subject matter in which he was proffered as an expert. The Plaintiffs wanted Professor Freeman to offer opinions specific to prepaid variable forward contracts, but he had only a general background in securities and no knowledge or experience particular to prepaid contracts. During voir dire by counsel for the Defendants, Professor Freeman was asked many questions about whether he had any prior experience with prepaid contracts. Under oath, he conceded the following:

- This was the first case in which he had been asked to serve as an expert on the topic of prepaid contracts
- All his knowledge about prepaid contracts was learned through reading materials after he was retained as an expert for this case
- He has never assisted an investor with the execution of a prepaid contract
- He has never given advice to an investor as to whether they should enter into a prepaid contract
- He has never written any articles about prepaid contracts
- He has never taught a course about prepaid contracts
- He has never designed a training program to educate investment advisors about prepaid contracts
- He has never prepared any written materials that were to be used for a training program about prepaid contracts
- Prior to this case, he had never read any articles or publications addressing the appropriate disclosure of the costs of prepaid contracts
- He has never attended any courses that discussed the appropriate level of disclosure of costs required for prepaid contracts
- He has never worked as an employee of a bank, broker dealer, registered investment advisor, investment bank, or wealth management business
- He has never worked as a broker, an investment advisor, or a portfolio manager

- He has never taken the Series 7 exam, nor has he held any license through the NASD or FINRA or held the Chartered Financial Analyst or Certified Financial Planner designations

Without any specific knowledge, experience, or training about prepaid contracts, Professor Freeman was not qualified to offer opinions about them at trial. Professor Freeman offered opinions about the disclosures, cost, and suitability of prepaid contracts. He was no better equipped to do so than any other college professor or lawyer would be. Under Rule 702 and *Watson*, Professor Freeman should not have been allowed to offer any opinions about prepaid contracts.

There can be no question that Professor Freeman's opinions were prejudicial to the Defendants. Among other things, Professor Freeman testified that the cost of prepaids was extraordinarily high and that such cost made the prepaid contract an unsuitable alternative for Mr. Maybank. Professor Freeman had no prior experience with assessing the cost of prepaid contract. This was demonstrated by the fact that he omitted any consideration of tax consequences, dividends, income generated from prepaid proceeds, or appreciation of the BB&T stock after the execution of the second prepaid. This resulted in a grossly inflated cost of $3.5 million that Professor Freeman presented to the jury. Professor Freeman was critical of every aspect of a prepaid contract, and testified that it was far too risky for Mr. Maybank, ignoring the fact that it actually provided significant hedging protection and would guarantee that Mr. Maybank would never lose more than 24% of the value of his stock, even if the stock value when to zero. Professor Freeman was the Plaintiffs' primary witness on fiduciary duties, and relied heavily on his criticism of prepaid contracts to support his opinions that the Defendants had breached their purported fiduciary duties. The claim for breach of fiduciary duty was one of the claims on which the Plaintiffs prevailed. Simply put, Professor Freeman was a critical liability

witness for the Plaintiffs, and his opinions were designed to greatly influence the jury. The only means of correcting this prejudicial error is to grant a new trial absolute.

2. Taking into Account the Cumulative Effect of Many Other Evidentiary Errors Requires a New Trial.

There were multiple evidentiary errors committed during trial, in some instances inadmissible evidence being allowed to be presented to the jury, and in other instances admissible evidence being excluded. Among others, the following evidentiary errors occurred during trial:

- Jane Maybank Gregorieff was permitted to testify during her direct examination over the objection of the Defendants about efforts to manage the expenses of one of her aunts. This testimony was irrelevant and highly prejudicial and should not have been permitted. Mr. Maybank's own mishandling of his expenses was a critical issue in this case.

- The Court improperly excluded from evidence an email from Clark Anderson to Frank Maybank dated July 24, 2006. This email was marked as Defendants' Exhibit No. 4. Through the direct testimony of Anthony Mahfood, the Defendants laid the proper foundation for the authentication of the email and the admission of this email by way of the business records exception to the hearsay rule. The email was also admissible to show notice to Mr. Maybank regarding certain aspects of the prepaid transaction (*i.e.*, a purpose unrelated to showing the truth of the matter asserted). The email had significant relevance in that it showed that the Defendants, through Clark Anderson, were analyzing and answering the questions of Mr. Maybank and providing information to him about the prepaid transaction prior to its execution, and it further showed Mr. Maybank's knowledge about prepaid transactions.

- Professor Freeman offered several opinions characterizing the alleged breach of the Wealth Management Agreement as a breach of fiduciary duty. Such opinions simply added

an expert gloss to the alleged breach of contract and were not of assistance to the finder of fact, as required by Rule 702. The fact that this was prejudicial is demonstrated by the jury's verdict in favor of Mr. Maybank on both the breach of contract claim and the breach of fiduciary duty claim.

- Over the objection of the Defendants, the Plaintiffs were allowed to admit into evidence a presentation regarding concentrated stock positions prepared by Shawn Gibson while he was employed by Scott & Stringfellow. The presentation clearly indicates that it was a Scott & Stringfellow document. The Plaintiffs focused on part of the presentation describing solutions for concentrated stock positions as being *a revenue opportunity*. The document was marked as Plaintiffs' Exhibit No. 92. This document was both irrelevant to the case, highly prejudicial to the Defendants, and confusing and misleading to the jury. *See* S.C. R. Evid. 402, 403. Among other things, the part of the document describing prepaids as a revenue opportunity would have likely caused the jury to believe that BB&T had too much of a focus on profit, even though the document was not created by BB&T and did not represent its views.

- The Plaintiffs were allowed to cross examine defense expert, Robert Thorne, regarding a consent order entered into by Morgan Keegan and Mr. Thorne's prior work with Morgan Keegan, all of which was irrelevant to the case, highly prejudicial to the Defendants, and confusing and misleading to the jury. *See* S.C. R. Evid. 402, 403. The consent order addressed alleged severe misconduct on the part of Morgan Keegan, and the intent of the cross examination was clearly to associate Mr. Thorne with this misconduct and/or to show his tacit approval of such misconduct. This area of inquiry was an improper attempt at impeachment of Mr. Thorne.

- The Plaintiffs were allowed to cross examine defense expert, Paul Merolla, regarding the bankruptcy of Drexel Burnham, all of which was irrelevant to the case, highly

prejudicial to the Defendants, and confusing and misleading to the jury. *See* S.C. R. Evid. 402, 403. As with Mr. Thorne, this was an attempt to associate Mr. Merolla with the alleged misconduct of a third party entity and was an improper means of trying to impeach a witness.

- The Plaintiffs were permitted, over the objection of the Defendants, to cross examine Ross Walters regarding his 2013 performance evaluation, all of which was irrelevant to the case, highly prejudicial to the Defendants, and confusing and misleading to the jury. *See* S.C. R. Evid. 402, 403. The document was marked as Plaintiffs' Exhibit No. 108. The events in the 2013 evaluation occurred over three years after the Mr. Maybank's second prepaid transaction, which was executed in January of 2009. Accordingly, the evaluation had no relevance, and because of its strong criticisms of Mr. Walters (about matters completely unrelated to Mr. Maybank), it would have had an unduly prejudicial effect.

- A sales report related to a prepaid transaction for Effie Bowers was admitted by the Plaintiffs over the objection of the Defendants. This document was marked as Plaintiffs' Exhibit No. 103. The document was irrelevant to the case, highly prejudicial to the Defendants, and confusing and misleading to the jury. *See* S.C. R. Evid. 402, 403. The document would have caused the jury to believe that the Defendants and their employees were overly focused on profit rather than client service.

- There was also an error made with respect to a jury charge. The Defendants requested that the Court charge the jury that the damages limitation provision in Paragraph F.1. of the Wealth Management Agreement was enforceable, but the Court refused to read this charge. This was prejudicial because Paragraph F.1. bars the recovery of punitive damages, but the jury nevertheless awarded punitive damages.

Any one of these errors standing alone is sufficiently prejudicial to require a new trial. Further, the cumulative prejudice caused by these errors when taken into consideration together requires a new trial. *See Lynch v. Carolina Self Storage Ctrs., Inc.*, 2014 S.C. App. Lexis 49 *28 (S.C. Ct. App. Mar. 26, 2014) (stating that cumulative error doctrine applies when "a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial.") (*quoting State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)); *see also Kozlowski v. Hampton Sch. Dist.*, 77 Fed. Appx. 133, 154 (4th Cir. 2003) (holding that cumulative effect of erroneous rulings required a new trial); *United States v. de Cruz*, 82 F.3d 856, 868 (9th Cir.1996) (holding that even where individual evidentiary rulings are considered harmless errors, "cumulative error" doctrine requires court to determine whether cumulative effect of harmless errors was enough to prejudice a party's substantial rights).

F. The Court Should Vacate the Award of Punitive Damages Because the Standard for Such an Award Was Not Satisfied and Because the Post Verdict Review Under *Fortis* Mandates that the Award Be Vacated.

The jury's $5,000,000 punitive damage award is unsupported by the evidence, grossly excessive, and violates the Defendants' constitutional right to procedural and substantive due process. The Court should grant JNOV in favor of the Defendants because there was an absence of clear and convincing evidence that any of the Defendants had acted is a reckless, willful, or wanton manner. Alternatively, the Court should conduct a post verdict review under the decision in *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), and conclude that the award must be vacated for its failure to comply with the mandates of due process. Failing those remedies, the Court should remit the award to a ratio of no more than 1:1 on the basis that the actual damages award is already substantial.

1. There Is an Absence of Clear and Convincing Evidence Showing that the Defendants Acted in a Reckless, Willful, or Wanton Manner.

Punitive damages exist to punish a defendant for conduct which is "willful, wanton, or undertaken in reckless disregard of plaintiff's rights." *Kuznik v. Bees Ferry Assoc.*, 342 S.C. 579, 611, 538 S.E.2d 15, 32 (Ct. App. 2000). This high threshold must be established with "clear and convincing evidence." S.C. Code Ann. § 15-33-135 (Law. Co-op. 2005). The standard for punitive damages was explained in *Cohen v. Allendale Coca-Cola Bottling Co.*, 291 S.C. 35, 351 S.E.2d 897 (Ct. App. 1986):

> Conduct is willful, wanton, or reckless when it is committed with a *deliberate intention* under such circumstances that a person of ordinary prudence would be *conscious* of it as an invasion of another's rights. It is the *present consciousness of wrongdoing* that justifies the assessment of punitive damages against the tortfeasor.

Id. at 40, 351 S.E.2d at 900 (citation omitted) (emphasis added). Punitive damages are not proper when the evidence demonstrates ordinary or gross negligence. *See Lengel v. Tom Jenkins Realty, Inc.*, 286 S.C. 515, 519-20, 334 S.E.2d 834, 837 (Ct. App. 1985); *Cohen*, 291 S.C. at 40, 351 S.E.2d at 900 (reversing punitive damage award because there was "no proof of a present consciousness of wrongdoing on Allendale's part"); F.P. Hubbard & R.L. Felix, *The South Carolina Law of Torts* 595 (3d ed. 2004) (noting that "punitive damages are not awarded for negligence, whether simple or 'gross'").

Here, the testimony of the current and former employees of BB&T and BB&T Asset Management demonstrate that they subjectively believed that the prepaid contracts were a reasonable option for Mr. Maybank and that these transactions squarely fit his needs of hedging the risk of holding a concentrated position, continuing to receive the substantial dividend, and paying off his $2.4 million margin debt. Expert testimony from Brian Teachey demonstrated that, had Mr. Maybank done nothing back in August of 2006, he would have experienced dozens

of margin calls as the value of his BB&T stock plummeted, leaving him with just a fraction of his liquid assets by the end of 2010. There is no question that the prepaid contracts put Mr. Maybank in a better position than had he done nothing. Indeed, with the additional income generated by the managed portfolio account, Mr. Maybank's total income, including his BB&T dividend, increased during 2007 and 2008. It was only the dividend cut in June of 2009 and Mr. Maybank's excessive spending that derailed his financial situation.

The core dispute in this case is whether Mr. Maybank should have been encouraged to sell his BB&T stock rather than enter into a prepaid transaction. Putting aside the fact that Mr. Maybank could not have afforded to give up the $400,000 annual dividend, and thus would never have sold the BB&T stock, this dispute turns on the exercise of professional judgment and thus is a question of whether mere negligence has occurred. While there were benefits to selling the stock in terms of achieving diversification, Mr. Maybank also would have immediately incurred a tax liability of $1.6 million, lost the dividend, and lost the ability to pass along a stepped up basis to his heirs. The decision by the employees of BB&T and BB&T Asset Management to assist Mr. Maybank in moving forward with a prepaid transaction does not demonstrate a conscious disregard for Mr. Maybank's rights, but, at most, reflects the exercise of their professional judgment.

Mr. Maybank's attack on the conduct of the Defendants focused on four items, none of which were supported by the evidence. *First*, he contended that he was deceived when he was not informed that BB&T Asset Management would be performing some of the duties under the Wealth Management Agreement. It is undisputed, however, that he knew that Kris Kapoor, who signed the agreement as a representative of BB&T Asset Management, was going to be managing his portfolio account. *Second*, Mr. Maybank argued that there was a conflict of

interest because BB&T stock was involved, but he indisputably was aware of the purported conflict. Moreover, he never presented evidence that the purported conflict made any material difference to the advice he received. *Third*, Mr. Maybank contended that the August 11, 2006 memorandum to Pat Oliver contained misrepresentations, but that memorandum was never meant to influence Mr. Maybank and a careful review demonstrates that it contains no inaccuracies despite opposing counsel's attempts to twist the language used. *Fourth*, Mr. Maybank complained that BB&T Asset Management charged an advisory fee, but that fee had been voluntarily discounted and there was no evidence that the desire to generate a fee was placed ahead of Mr. Maybank's interests. Despite Mr. Maybank's efforts to dress up the facts and contrive claims of egregious conduct where none existed, the case is really one about the exercise of professional judgment and whether the prepaid transactions were one of the reasonable options available to Mr. Maybank in August of 2006.

Based on the lack of clear and convincing evidence that the Defendants acted in a reckless, willful, or wanton manner, the Court should grant JNOV in favor of the Defendants as to Mr. Maybank's request for punitive damages.[20] *See, e.g., Cartee v. Lesley*, 290 S.C. 333, 337-

[20] To the extent that Mr. Maybank attempts to rely on the alleged conduct of company employees to support the punitive damages award, such evidence is insufficient under the "complicity rule." It is necessary that Mr. Maybank have offered evidence of grossly inadequate company policies or the involvement of high level management in the handling of Mr. Maybank's customer relationship. There is no such evidence in this case. The complicity rule, recognized in § 909 of the Restatement (Second) of Torts, prohibits an award of punitive damages purely on imputed or vicarious liability resulting from the alleged wrongdoing of employees. *See, e.g., Scott v. Ameritex Yarn*, 72 F. Supp. 2d 587, 590 (D.S.C. 1999) (holding that award of punitive damages against employer which did not engage in wrongdoing runs afoul of "the very principles underlying common law limitations on vicarious liability for punitive damages—that it is improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously."); *Briner v. Hyslop*, 337 N.W.2d 858, 865 (Iowa 1983) ("[I]f an employer is only vicariously liable and could have done nothing to prevent the misconduct of its employee, it seems of little value to award punitive damages against the employer.").

38, 350 S.E.2d 388, 390 (1986) (affirming directed verdict where statutory violation, although generally sufficient to present issue of recklessness to the jury, did not establish that the defendant's recklessness proximately caused the injuries); *Richards v. Great Atlantic & Pacific Tea Co.*, 226 S.C. 119, 128, 83 S.E.2d 917, 921 (1954) ("On the other hand, we think that there was insufficient evidence of recklessness, wilfulness and wantonness on the part of appellants to submit the issue of punitive damages. Upon careful consideration of the record we are constrained to agree with appellants' contention that their conduct amounted, as a matter of law, to no more, at most, than simple negligence."); *Cubbage v. Roos*, 181 S.C. 188, 202-03, 186 S.E. 794, 800 (1936) ("[there] is some testimony that this respondent was consciously violating the law, yet this would not preclude the trial judge from holding, as a matter of law, that the only reasonable inference to be drawn from all of the testimony was that the respondent Roos was not willfully, recklessly, and wantonly, or consciously in the sense of intentionally, violating the statute."); *West v. Morehead*, 396 S.C. 1, 13, 720 S.E.2d 495, 502 (Ct. App. 2011) (reversing denial of directed verdict motion as to punitive damages awarded against media defendant in defamation action); *Nesbitt v. Lewis*, 335 S.C. 441, 449, 517 S.E.2d 11, 16 (Ct. App. 1999) (reversing award of punitive damages awarded to victim of dog attack where there was no evidence of willfulness, wantonness, or recklessness); *Scoggins v. McClellion*, 321 S.C. 264, 271, 468 S.E.2d 12, 16 (Ct. App. 1996) (affirming trial court's dismissal of punitive damages claim in tort action for failure to establish willful, wanton, or reckless conduct).

2. There Is No Evidence of Reckless, Willful, or Wanton Conduct on the Part of BB&T Corporation, Which Requires JNOV in Favor of BB&T Corporation and a New Trial for the Other Defendants.

As explained above, BB&T Corporation was a mere holding company, and its employees had no involvement with the customer relationship with Mr. Maybank. The act of Pat Oliver approving the memorandum from Anthony Mahfood could never support a finding of reckless,

willful, or wanton conduct, especially since that approval was for the purpose of avoiding speculative trading by employees. Accordingly, the Court must grant JNOV in favor of BB&T Corporation as to the punitive damages claim. Because the issue of punitive damages against BB&T Corporation should never have been presented to the jury, the jury's punitive damages verdict was tainted by the fact that the $21 billion net worth of BB&T Corporation was presented during trial. This in turn requires that a new trial be granted as to the other two defendants, BB&T and Sterling Capital. Under § 15-33-125, the new trial must be as to both liability and damages.

3. The Post-Verdict Review Under *Fortis* Requires the Court to Vacate the Punitive Damages Award as Violative of the Defendants' Due Process Rights.

"Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of North America v. Gore*, 517 U.S. 559, 568 (1996). The state's interests in awarding punitive damages must remain consistent with the principle of penal theory that "the punishment should fit the crime." *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004). Nevertheless, "while states possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards." *State Farm v. Campbell*, 538 U.S. 408, 416 (2003). "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.* at 417.

In *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), the South Carolina Supreme Court articulated the test to be used in conducting post-judgment review of a punitive damage award, stating:

> We have said in the past that trial courts must consider both the *Gamble* and *Gore* factors . . . . However, considerations of judicial economy weigh in favor of a less burdensome and duplicative analysis . . . . With these considerations in mind, we articulate the

> following test for our courts in conducting a post-judgment review of punitive damage awards.

Id. at 587, 686 S.E2d at 185. First, the court should consider "the degree of reprehensibility of the defendant's conduct." *Id.* Second, the court should consider "the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award," known as the ratio. *Id.* at 587-88, 686 S.E2d at 186. Third, the court "should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* Applying these factors demonstrates that the $5 million punitive damages verdict is unconstitutional and must be vacated or, failing that, significantly reduced. The Defendants address each factor *seriatim* below.

a. The Degree of Reprehensibility.

Courts reviewing a punitive damages award are required to consider the degree of reprehensibility of the defendant's conduct. *Fortis*, 385 S.C. at 587, 686 S.E2d at 185. The factors to be considered include whether: (1) the harm caused was physical as opposed to 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.[21] *Id.* "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Campbell*, 538 U.S. at 419.

[21] The court noted that "this analysis adequately encompasses-and obviates the need for-the first four factors of the *Gamble* review, which include the defendant's degree of culpability, the duration of the conduct, the defendant's awareness or concealment, and the existence of similar past conduct." *Id.*

Here, none of the five factors suggest a degree of reprehensibility that would warrant a multi-million punitive damages award. The alleged harm to Mr. Maybank was economic only. Physical injury is not at issue. Indisputably, the purported wrongdoing did not involve any safety issues and did not endanger the health of others. Mr. Maybank also was not a target with financial vulnerability. Quite the contrary, he was a multimillionaire (and still is), who had over $10 million in investments and several million dollars of real estate, including multiple homes. He was a Harvard graduate, who was highly sophisticated and had over 20 years of experience as a Wall Street money manager. He in fact was a wealth advisor at BB&T at the time of the first prepaid transaction and was fully aware of the policies and practices of the BB&T organization. He certainly would not fit within the definition of financial vulnerability.

Moreover, the prepaid transactions at issue were isolated events. BB&T had only a handful of clients that had entered into prepaid contracts. Repeated wrongdoing was certainly not involved, as evidenced by the fact that BB&T and BB&T Asset Management refused to assist with additional rolls of the prepaid in mid 2009 and in 2010 (see Nate Deal testimony). Finally, there was no intentional malice, trickery, or deceit involved. The prepaid transactions and the activity in the managed portfolio account represent the exercise of professional judgment and were conducted with full written disclosures to Mr. Maybank (Agreed Exhibits 3 and 35 and Defendants' Exhibits 2, 199, 200, and 201). There was no motive for the Defendants to try to trick Mr. Maybank. Profit certainly was not the motive, as demonstrated by the fact that BB&T substantially discounted the fees for Mr. Maybank for both his August 2006 prepaid transaction and for his managed portfolio account.[22] The testimony during trial from the Defendants'

[22] The jury's verdict supports the conclusion that there was no intentional trickery or deception. As indicated on the verdict form, the jury found in favor of the Defendants on the causes of

current and former employees showed that they believed the prepaid transaction was of great benefit to Mr. Maybank and offered substantial protection from the risk of a sharp drop in the price of BB&T stock. Taking these factors into consideration leads to the conclusion that there was no reprehensible conduct on the part of the Defendants.

b. Disparity Between Alleged Harm and the Amount of the Punitive Damages Verdict.

The disparity between the $5,000,000 punitive damages verdict and the jury's actual damages verdict of $3,100,000 weighs in favor of vacating the punitive damages verdict. As the United States Supreme Court has instructed, "[F]ew awards exceeding a *single-digit* ratio between punitive and compensatory damages . . . will satisfy due process." *State Farm v. Campbell*, 538 U.S. 408, 425 (2003) (emphasis added). Moreover, where, as here, "compensatory damages are *substantial*, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* (emphasis added).[23]

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action for fraudulent misrepresentation and breach of contract accompanied by a fraudulent act, both of which have intent as a required element of the claim.

[23] Numerous cases have recognized as being "substantial" compensatory damages of much less than the $3.1 million assessed in the present. *See, e.g., Fresh v. Entm't U.S.A. of Tenn., Inc.*, 340 F. Supp. 2d 851, 859 (W.D. Tenn. 2003) (compensatory damages award of $179,402 was "significant" and "substantial" even where the case involved physical harm to plaintiff); *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662, 671 (N.M. 2002) ("An actual damages award of $100,000 is substantial in itself and thus a lower ratio" of punitive damages is appropriate.); *see also Kendrick v. Broadcast Media Group LLC,* No. 2:02CV1034-N, 2006 WL 2709846, at *6 (M.D. Ala. Sept. 20, 2006) ("[t]he relief granted to plaintiff . . . was substantial: $100,000 in compensatory damages, $30,000 in punitive damages, and $16,071.81 in back pay"); *Ford v. Nylcare Health Plans of Gulf Coast, Inc.,* 190 F.R.D. 422, 427 (S.D. Tex. 1999) ("damages . . . more than $100,000 . . . are substantial"), *aff'd,* 301 F.3d 329 (5th Cir. 2002); *Guzman v. Bevona,* No. 92 CIV. 1500 RPP, 1996 WL 374144, at *3 (S.D.N.Y. July 3, 1996) ("compensatory damages of $100,000 . . . conferred a substantial benefit"); *WB Music Corp. v. Rykodisc, Inc.,* No. CIV.A.94-2902, 1995 WL 631690, at *4 (E.D. Pa. Oct. 26, 1995) ("damages in excess of $100,000" are "substantial"); *Laurie Marie M. v. Jeffrey T.M.,* 559 N.Y.S.2d 336, 339 (N.Y. App. Div. 1990) ($100,000 to $150,000 is "substantial compensatory damages"), *aff'd,* 77 N.Y.2d 981 (1991).

"The Supreme Court has reserved the upper echelons of constitutional punitive damages—a 9 to 1 ratio—for conduct done with the most vile of intentions." *Baker v. Exxon Mobil Corp. (In re Exxon Valdez)*, 472 F.3d 600, 614 (9th Cir. 2006) (citations omitted); *see also Casumpang v. Int'l Longshore & Warehouse Union,* 411 F. Supp. 2d 1201, 1220-22 (D. Haw. 2005) (1 to 1 ratio appropriate because the damages were substantial).

In the present case, the $3.1 million actual damages award was very substantial.[24] In light of the pronouncement in *State Farm v. Campbell*, a 1:1 ratio would be considered the maximum constitutional award under these circumstances. With the complete absence of reprehensibility on the part of the Defendants, the Court should simply disregard multipliers of actual damages in their entirety as the proper gauge of constitutionality. A punitive damages award of much less than the actual damages award would serve the deterrent function. Measuring punitive damages against the fees earned by the Defendants related to the prepaid transactions with Mr. Maybank is a more appropriate guidepost. For both transactions, Mr. Maybank paid combined one-time advisory fees of $76,269 (Agreed Exhibit 51). These fees have already been refunded to Mr. Maybank. (Agreed Exhibit 50). In light of the lack of reprehensibility, the purposes of punitive damages would be satisfied with an award that is a single digit multiple of the fees earned by the Defendants.

c. Difference Between Punitive Damages Award and Comparable Civil Penalties.

Lastly, the court "should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Fortis*, 385 S.C. at 588, 686 S.E.2d at 186. Here, the difference between the punitive damages awarded and the

[24] As explained above in this brief, the managed portfolio damages of between $877,141 to $1,405,565 were improperly allowed to be considered by the jury, meaning that the actual damages award must necessarily be less than $2 million.

comparable civil penalty imposed for similar alleged conduct further demonstrates that the jury's punitive damages award is excessive. The jury found in favor of Mr. Maybank on the claims of breach of contract, breach of fiduciary duty, violation of the South Carolina Unfair Trade Practices Act, constructive fraud, and negligent misrepresentation. These causes of action all focused upon allegations that the Defendants placed Mr. Maybank in an unsuitable investment product and/or failed to disclose material information relating to the transactions. As explained above, all of the alleged conduct and transactions involved securities. Thus, the South Carolina Uniform Securities Act, S.C. Code Ann. §§ 35-1-101 *et seq.*, provides the most analogous example of comparable civil penalties for such conduct.

Section 35-1-604(d) of the Securities Act provides that "the Securities Commissioner may impose a civil penalty in an amount not to exceed ten thousand dollars for each violation." S.C. Code Ann. § 35-1-604(d) (Law. Co-op. Supp. 2013). In the case at hand, there were two transactions at issue: (1) the August 2006 prepaid contract; and (2) the January 2009 prepaid contract. Accordingly, the comparable civil penalty for the conduct that is the subject of this action is, at most, $20,000.

The amount of comparable civil penalty is further evidenced by recent penalties imposed by or requested of the South Carolina Securities Commissioner that limited the penalty to, at most, $10,000 per violation. *See In re McGee*, S.C. Securities Commissioner File No. 11061, Notice of Intent to Seek Censure and Civil Penalty, dated 6/10/13 (requesting civil penalty of $10,000 for each violation for unsuitability and incomplete disclosure violations); *In re House*, S.C. Securities Commissioner File No. 10067, Order to Cease and Desist, dated 8/24/11 (imposing civil penalty of $5,000 per violation for material misstatements); *In re Curb Appeal Properties, Inc.*, S.C. Securities Commissioner File No. 12051, Order to Cease and Desist, dated

2/14/13 (imposing civil penalty of $10,000 per violation for material misstatements and omissions); *In re Thomason*, S.C. Securities Commissioner File No. 12001, Order to Cease and Desist, dated 11/27/13 (imposing civil penalty of $10,000 per violation for misleading disclosures) [Copies attached as Exhibit "C"].

Here, the jury's punitive damages verdict of $5,000,000 is 250 times the amount of the comparable civil penalty. It is grossly disproportionate to the comparable civil penalties and is clearly excessive. Accordingly, none of the *Fortis* guidelines support the constitutionality of the punitive damages verdict in this case, and, on this basis, the Court should vacate the verdict.

G. Under the Thirteenth Juror Doctrine, the Court Should Grant a New Trial Because the Evidence Does Not Justify the $8.1 Million Verdict Against the Defendants.

This Court, as the "Thirteenth Juror," should grant a new trial because the evidence does not justify the verdict. The thirteenth juror doctrine "entitles the trial judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002). As the thirteenth juror, the trial judge hangs the jury by refusing to agree with the jury's unanimous verdict and casting his or her vote against it, resulting in a verdict which is no longer unanimous. *Id.* The Court may grant a new trial, sitting as the thirteenth juror, when it is convinced that a new trial is necessary on the basis of the facts. *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 722 (Ct. App. 1996). Under the doctrine, a new trial may be granted where the court merely finds that "the verdict is unsupported by the evidence," that "the verdict is inconsistent and reflects the jury's confusion," or that "justice has not prevailed." *Id.* at 404, 477 S.E.2d at 722-23; *see also Trivelas v. S.C. Dep't of Transp.*, 357 S.C. 545, 552 593 S.E.2d 504, 508 (Ct. App. 2004) (granting new trial where "the evidence does not justify the verdict"); *Norton*, 350 S.C. at 480, 567 S.E.2d at 855 (granting new trial when

court "disapprov[es] of the verdict on factual grounds"); *McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 631, 578 S.E.2d 746, 747 (Ct. App. 2003) (characterizing use of doctrine as "granting a new trial upon the facts").

The trial court's discretion in granting or denying a new trial under the thirteenth juror doctrine is "'founded upon the facts, the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of them.'" *Vinson*, 324 S.C. at 404, 477 S.E.2d at 723 (quoting *Fallon v. Rucks*, 217 S.C. 180, 189, 60 S.E.2d 88, 92 (1950)). Consequently, the Court is entitled to "weigh the evidence and rely on his or her view of the circumstances." *Sorin Equip. Co. v. The Firm, Inc.*, 323 S.C. 359, 364, 474 S.E.2d 819, 822 (Ct. App. 1996). The Court need not provide any reasons for its exercise of this Thirteenth Juror power aside from a finding that the Court disapproves and rejects the verdict based on the facts and evidence. *See Howard v. Roberson*, 376 S.C. 143, 654 S.E.2d 877 (Ct. App. 2007). Further, this Court's exercise of its Thirteenth Juror power will not be disturbed on appeal in the absence of a misuse of the power, such as using the power to decide a legal point. *See Trivelas v. South Carolina Dept. of Transp.*, 357 S.C. 545, 593 S.E.2d 504 (Ct. App. 2004) (holding that a circuit court's order granting a new trial upon the facts will not be disturbed unless its decision is wholly unsupported by the evidence or the conclusion reached was controlled by an error of law).

The Court has already declared a mistrial once in this case, and it is now appropriate for the Court to again order a new trial. Early in the first week of trial, after the Plaintiffs' failed attempt to present the surprise testimony of Tracy Meyers, the Deputy Securities Commissioner, the Court found that it was in the public interest to declare a mistrial and to retry the case at a later time. This would have resolved two difficult issues: (1) The proffered testimony of Ms. Meyers could have been handled in an appropriate manner by both parties, and (2) the

Defendants would have received the critical time needed to make up for the temporary loss of their primary securities expert and to give the Defendants the opportunity to depose Lloyd Bowers and Alan Rothschild.

The Thirteenth Juror doctrine is also particularly appropriate here because the verdict returned after the two-week presentation of evidence demonstrates that the jury was both confused and misunderstood or ignored several key legal and factual issues. Among others, the below points were clearly misunderstood by the jurors or the jurors lacked an appreciation for the importance of the below facts:

- The prepaid contract was a reasonable option for Mr. Maybank back in August of 2006. It hedged Mr. Maybank's risk by guaranteeing that he would never receive any less than 76% of the value of his stock, no matter how much value it lost. It also allowed him to retain the dividends and to generate over $300,000 of income off the upfront proceeds. These benefits greatly offset any perceived costs.

- Mr. Maybank was aware of the economic impact and cost of the prepaid transactions. He received in advance of each one illustrations showing the cost of the transaction. In fact, before the second transaction, he received several illustrations showing the out of pocket cost to him. He also consulted with his tax advisors prior to each prepaid transaction.

- Mr. Maybank understood how prepaid contracts worked. He felt comfortable enough to recommend one to his close friend Effie Bowers. He correctly predicted that rolling the prepaid in January of 2009 would cost him less, which it did. He also successfully rolled the prepaid on three additional occasions, all on his own and with no assistance of an investment advisor.

- While Mr. Maybank's experts suggested that he should have simply sold his stock in 2006, this was never a realistic option for Mr. Maybank. At all times, he was spending far more than he made, and he could never have afforded to give up the $400,000 a year dividend that the BB&T stock was paying. The fact that he would never have agreed to sell the stock was confirmed when he purchased 4,000 more shares the very month after the prepaid transaction.

- Mr. Maybank was invested in the managed portfolio account exactly the way he wanted to be. He had several meetings with Kris Kapoor to discuss the investment objective, and they agreed upon a 100% equity portfolio diversified across ten different industry sectors. Mr. Maybank confirmed this plan by signing off on a written investment objective form.

- The damages analysis by Craig McCann ignored taxes, future appreciation of over $800,000, and the many withdrawals made by Mr. Maybank. These financial factors were critical to any attempt to accurately compare a stock sale to the prepaid transactions.

- McCann's damages analysis depended on a finding that Mr. Maybank would have agreed to be invested in at least 70% bonds. The undisputed evidence showed that Mr. Maybank had never had more than 2% bonds in any of his brokerage accounts at any one time. Even after the lawsuit was filed, and Mr. Maybank was aware of his allegations, he continued to invest at Charles Schwab in 100% equities.

- The dividend cut is the real reason Mr. Maybank had a cash flow problem develop in 2009 and 2010. If the BB&T dividend had continued at the same level, then Mr. Maybank would have had the cash he needed to meet expenses for both himself and his wife, as well as his children and grandchildren. Mr. Maybank knew there was a possibility of a dividend cut, and he was asking Mike Lackey about it in January of 2009. BB&T of course had the right to cut its dividend, and in fact had to cut its dividend due to the global financial meltdown.

For these reasons, the Court should conclude that the evidence does not justify the verdict, and then exercise its authority as the Thirteenth Juror and grant a new trial.

H. The Court Should Grant a New Trial *Nisi Remittitur* Due to the Excessiveness of the Jury's Verdict.

Failing any of the relief requested above, the Court should grant new trial *nisi remittitur* because the damages awarded by the jury are clearly excessive compared to the evidence presented at trial. This Court "may grant a new trial *nisi remittitur* when it finds the verdict is merely inadequate or excessive." *Howard v Roberson*, 376 S.C. 143, 654 S.E. 2d 877, 883 (2007). "The trial court has wide discretionary power to reduce the amount of a verdict which in his or her judgment is excessive." *See, e.g., Rush v. Blanchard*, 310 S.C. 372, 381, 426 S.E.2d 802, 806 (1993) (affirming trial court's remittitur); *RRR, Inc. v. Toggas*, 378 S.C. 174, 183, 662 S.E. 2d 438, 442 (Ct. App. 2009) ("[T]he circuit court . . . has the power to grant a new trial *nisi* when it finds the amount of the verdict to be merely inadequate or excessive"); *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 837, 529 S.E.2d 758, 762 (Ct. App. 2000) (affirming trial court's

granting of motion for remittitur on grounds that amount awarded by jury was "merely excessive"). "Indeed, when the verdict indicates the jury was unduly liberal in determining damages, the trial court alone has the power to grant a new trial *nisi remittitur*. *Becker*, at 637, 529 S.E.2d at 762. "The consideration of a motion for a new trial *nisi remittitur* requires the court to consider the adequacy of the verdict in light of the evidence presented." *Waring v. Johnson*, 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000). Additionally, a trial court's decision to grant a new trial *nisi remittitur* "will not be disturbed on appeal . . . 'unless it clearly appears that the exercise of discretion was controlled by a manifest error of law.'" *Becker*, at 637, 529 S.E.2d at 762.

The Court should grant a new trial *nisi remittitur* for two reasons. First, the actual damages verdict is excessive. As explained above, the jury should never have been allowed to consider the managed portfolio damages in the range of $877,141 to $1,405,565. This requires that the award be no more than the $1,956,620 to $1,984,161 range of purported damages relating to the prepaid contracts. Moreover, no evidence was presented which would support a finding that Mr. Maybank would have been willing to invest in a portfolio with at least 70% bonds. In fact, the evidence showed the contrary, in that he had never had more than 2% bonds in any of his brokerage accounts. This completely undercuts the damages figures offered by Dr.. McCann. Even if it is assumed that a stock sale was better than a prepaid contract and that there could be liability, the proper comparison of the two options, performed by expert Robert Thorne, shows that the difference was only $468,926. (Defendants' Exhibit 173). Accordingly, in the absence of granting JNOV or new trial absolute in favor of the Defendants, the actual damages verdict should be reduced by the Court to a point within the range of $468,926 to $1,984,161.

Second, the punitive damages verdict was excessive. If there is to be any punitive damages award, the Court should reduce the amount to a single digit multiple of the actual fees charged to Mr. Maybank for the prepaid transactions in the amount of $76,269.

III. CONCLUSION

Based on the foregoing reasons, the Court should grant JNOV in favor of the Defendants, and, failing that, grant a new trial absolute. In the alternative, the Court should grant a new trial *nisi remittitur*.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Attorneys for Defendants BB&T Corporation, Branch Banking and Trust Company, and Sterling Capital Management, LLC

Greenville, South Carolina

August 15, 2014

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified via electronic mail and by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Pleadings:

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL ABSOLUTE, OR, IN THE ALTERNATIVE, FOR NEW TRIAL *NISI REMITTITUR*

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FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL E. WICKENSIMER
2014 AUG 15 PM 3 53

Susan Zeigler
Administrative Assistant

August 15, 2014

EXHIBIT A

State of South Carolina)
)
County of Greenville)

Francis P. Maybank,) 2011-CP-23-8578
)
Plaintiff,)
)
v.) Video Deposition
) of
BB&T Corporation, Branch) Frank Maybank
Banking and Trust Company,)
Successor in merger to)
Branch Banking and Trust)
Company of SC, Sterling)
Capital Management, LLC,)
Successor in merger to BB&T)
Asset Management LLC, Ross)
Walters, and Anthony)
Mahfood,)
)
Defendants.)

Date: Thursday, January 30, Friday, January 31 and Monday, February 3, 2014

Start: 9:52 a.m. Thursday, January 30

Location: Willoughby & Hoefer, PA, 930 Richland Street, Greenville, South Carolina.

Reported by
Angela M. Barrett

See, there's a different number up at the top.
Q Okay.
A That's not signed by Judy, I don't think, or by Kris or anybody. I don't know who did that.
Q Does -- does this Wealth Management Agreement, was it intended to govern your managed portfolio account with BB&T?
A That's my understanding, yes.
Q Does it apply to any other accounts that you may've had?
A At the time this thing was executed there was a whole package of relationships that were -- I was getting from the bank.
Q Well, let's look at this -- at the second paragraph.
MR. WILLOUGHBY: (To Mr. Kristinik) What page?
MR. KRISTINIK: Of the first page.
Q It says "Bank, through its wealth management division will act as wealth manager (the wealth manager)" --
A Uh-huh.
Q -- "of those assets of client designated to be subject to this agreement (the account)."
A Uh-huh.

Q So is it your understanding that the purpose of this agreement was to govern the relationship and -- and -- or -- and -- and the management of your managed portfolio account with BB&T?
A Could you repeat that?
Q Yeah. Let me ask that again.
Is it your understanding that the account that this agreement was meant to govern, was your managed portfolio account with BB&T?
A Yes. But I'm not sure that was the only thing because there's all kinds of other stuff in here. I don't know. I'll let my attorney tell you what else is in here. I think there was a lot of stuff besides this -- just this portfolio.
Q But sitting here today, you can't think of another account that this may have applied to other than your managed portfolio account?
A I believe it also would have applied to the prepaid variable --
Q Well, that --
A -- but I would let my attorneys and expert witnesses --
Q Wasn't the --
A -- cover that.
Q But wasn't the prepaid variable forward contract

executed before this?
A It was part of a whole -- you -- you see this thing had to be done second because the -- the money for this account came out of the prepaid variable. They're inextricably linked.
Q Do you know if the word "prepaid variable" appears anywhere in this document?
A I'm going to -- I think a lot of things that -- the bank was given a lot of discretion, and I'll let my attorney and expert witnesses testify to that.
Q You had --
A You see, there -- there would be no money to manage without the prepaid variable?
Q This was executed in 2006, so you had been working at BB&T for several years before you signed this agreement.
A Uh-huh.
Q Did you have some familiarity with this agreement before signing it?
A I -- I never had supervised anybody else signing one of these.
Q Had you ever read one before, or parts of one before, that other customers had signed?
A No. Was not my job.
Q Where was this executed? Was it in the BB&T office

EXHIBIT B

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

FRANCIS P. MAYBANK,
Plaintiff,
-vs-
BB&T CORPORATION, BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, STERLING CAPITAL MANAGEMENT, LLC, Successor in merger to BB&T ASSET MANAGEMENT LC, ROSS WALTERS, AND ANTHONY MAHFOOD.
Defendants.

Civil Action No. 2011-CP-23-8578

Friday, February 7, 2014
Fairfax, Virginia

DEPOSITION OF CRAIG J. MCCANN, PhD, CFA

The deposition of CRAIG J. MCCANN, PhD, CFA was taken on Friday, February 7, 2014, commencing at 9:25 a.m., at the offices of Securities Litigation & Consulting Group, 3998 Fair Ridge Drive, Suite 250, before CHERYL NICHOLSON, Stenotype Reporter and Notary Public in and for the Commonwealth of Virginia.

Q. Your opinions are, obviously, critical of BB&T's involvement with the prepaid transaction for Mr. Maybank.

In your opinion, what should BB&T and BB&T asset management -- what should they have recommended to Mr. Maybank that he do back in August of 2006?

A. It's hard to imagine a worst thing they could have recommended to him than this strategy.

But they should have started by developing the comprehensive financial plan that they contracted with him to develop.

My understanding is that that was in fact not done. Having done that, I think that the very strong recommendation that would come out of that would be to sell the concentrated stock position, pay the capital gains tax and diversify into a appropriately allocated portfolio of stocks and bonds.

Now, doing that, making that recommendation and carrying it out, might have required more than just stating it the way I stated it. It might require some education about the risks of BB&T stock, the risk of

EXHIBIT C

ADMINISTRATIVE PROCEEDING

BEFORE THE

SECURITIES COMMISSIONER OF SOUTH CAROLINA

IN THE MATTER OF:	
James Rodney McGee, II	NOTICE OF INTENT TO SEEK CENSURE AND CIVIL PENALTY
	File No. 11061
Respondent.	

WHEREAS, the Securities Division of the Office of the Attorney General of the State of South Carolina (the "Division"), pursuant to authority granted in the South Carolina Uniform Securities Act of 2005 (the "Act"), S.C. Code Ann. §§ 35-1-101 to 35-1-703 (Supp. 2012), received information regarding alleged activities of James Rodney McGee, II ("McGee" or "Respondent") which, if true, could constitute violations of the Act; and

WHEREAS, the information led the Division to open and conduct an investigation of Respondent pursuant to S.C. Code Ann. § 35-1-602; and

WHEREAS, in connection with the investigation, the Division has determined that evidence exists to support the following findings and conclusions:

1. Respondent McGee is a citizen and resident of Greenville County, South Carolina, with a last known address of [redacted]
2. McGee is currently, and at all times relevant, was registered with the Division as an investment adviser representative.
3. From on or about January 2007, through on or about June 2010, McGee was employed by a registered investment adviser firm called Congaree Capital Management, LP.
4. McGee was the founder or director of one or more portfolios, hedge funds, or similar investment vehicles, for which he served as portfolio manager.

5. In his roles as investment adviser representative and as portfolio manager, McGee invested funds on behalf of investors grouped together as shareholders or limited partners of a single fund as well as on behalf of individual investors with their own separate accounts.
6. On information and belief each fund managed by McGee had its own investment contract, as did each individual account managed by McGee.
7. One fund for which McGee served as portfolio manager was called Congaree Offshore Capital, Ltd. (the "Offshore Fund"), a company incorporated in the Cayman Islands.
8. McGee served as director of the Offshore Fund since its organization.
9. The Offshore Fund began taking investors in or around June 2009.
10. The Offshore Fund had a stated investment objective of "first and foremost capital preservation and the prudent assessment of risk."
11. The Offshore Fund afforded McGee total discretion to make investment decisions.
12. The Offshore Fund's private offering circular highlighted options as one of the investment strategies it may employ. The private offering circular discussed the structural characteristics and operational mechanics of put and call options strategies as well as the risks associated therewith. This discussion of options in the private offering circular concluded by stating that the use of uncovered options, which to that point had remained unmentioned, is highly specialized and entails greater than ordinary investment risks.
13. In addition to conducting securities activities via the Offshore Fund, McGee also engaged in investment adviser activities in South Carolina.
14. Pursuant to South Carolina law, investment advisers must maintain investment advisory agreements with their clients. S.C. Code Regs. § 13-408(10).
15. Upon request, an executed investment advisory agreement dated February 11, 2008, for Client A was provided to the Division.
16. By signing the Investment Advisory Agreement, Client A gave McGee discretion to make investment decisions on his behalf.

17. The Investment Advisory Agreement incorporated the client's investment objectives for the account, upon which McGee stated in the agreement that he would base his investment decisions.

18. McGee managed Client A's Individual Retirement Account ("IRA"), for which his listed investment objectives were "growth and preservation of capital."

19. During late July 2009, McGee convinced Client A to roll over his IRA account, totaling about $5,400,000, into the Offshore Fund.

20. At the time of McGee's solicitation of Client A's IRA funds for investment into the Offshore Fund, Client A's IRA was invested in a diversified portfolio of stocks and money market funds that did not include any use of options.

21. On or around August 12, 2009, McGee deposited roughly $6,000,000 of new funds into the Offshore Fund.

22. On or around August 13, 2009, McGee spent roughly $5,700,000 buying put options called "Put Spy Option Sep 100."

23. All or a significant portion of Client A's money was used to fund the Offshore Fund's purchase of a single position of put options. These put options were uncovered or "naked," which increased the risk of the position even more. The put options expired worthless only a few weeks later.

24. On or around December 24, 2009, Client A received an email from McGee stating the following: (i) his investment strategy failed; (ii) the Fund went from a book of 23 million dollars of long equity positions and 8.5 million dollars of short equity positions at the end of May 2009, to less than $70,000.00 total in December 2009; (iii) McGee overreacted to the market and became focused on how to profit using options, and; (iv) the options tactic "ruined" McGee and the Fund.

25. As an investment adviser representative, McGee is bound to maintain a fiduciary duty to his clients. Such a duty is implied in the Investment Company Act of 1940, and is further discussed by the United States Supreme Court as far back as 1963 in *S.E.C. v. Capital Gains Research Bureau*, 375 U.S. 180 (1963).

26. In order to satisfy his fiduciary duty to his clients, McGee is required to put his clients' interests above his own, to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser to render advice which was not disinterested, and employ utmost good faith and full and fair disclosure of all material facts as well as an affirmative obligation to employ reasonable care to avoid misleading. *Id.*

27. A less stringent, but still necessary standard to which investment professionals must adhere is known as the suitability standard. The South Carolina Code of Regulations states that an investment adviser representative must not recommend a transaction to a client without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other information known or acquired by the adviser after reasonable examination of the client's records. S.C. Code Regs. § 13-502 A (1).

28. An investment adviser representative's failure to adhere to his fiduciary duty and failure to make suitable recommendations in compliance with South Carolina regulations subjects such a person to discipline under S.C. Code Ann. § 35-1-412(d)(2).

29. The Offshore Fund's own private offering circular stated that uncovered, or naked, options are highly specialized and entail greater than ordinary investment risks. However, there was no further disclosure of the highly speculative nature of uncovered options, or the potentially devastating effects of such a risky strategy in a fund with the stated goal of "capital preservation and the prudent assessment of risk."

30. Furthermore, Respondent failed to disclose to his clients that his strategy had devolved into over-concentrating the Offshore Fund into a single uncovered put option. Such a strategy is substantially different from what Client A was used to in his IRA and what the offering circular indicated Client A could expect from the Offshore Fund.

31. Such non-disclosure, incomplete disclosure, or deceptive practices violate S.C. Code Regs. § 13-502(B), and are grounds for denial, suspension or revocation of registration, imposition of administrative fines, or such other action authorized by statute.

32. Based on the foregoing analysis, Respondent's placement of client funds, especially IRA monies, into a single uncovered put option without first disclosing such a strategy, violated the suitability standard as well as his fiduciary duty to his clients.

WHEREAS, based on the foregoing, the Division has determined that Respondent has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of the Act or a rule adopted or order issued under the Act as follows:

a. Placing a transaction or transactions in client accounts that are unsuitable for the investment objectives and/or financial situation and needs of the client or clients, especially as it relates to investing IRA monies in a fund that over-concentrated its investment in a single naked put option;

b. Failing to uphold his fiduciary duty to his clients by engaging in activities including, but not necessarily limited to, the following:

    a. Failing to fully disclose the extent of the risk associated with diverging from his prior investment strategy to essentially risk the entire value of the Offshore Fund on a single naked put option;

    b. Failing to place the interests of his clients ahead of his own;

    c. Failing to employ utmost good faith and full and fair disclosure of all material facts, and/or;

    d. Failing to employ reasonable care to avoid misleading clients.

CENSURE AND CIVIL PENALTY

WHEREAS, pursuant to S.C. Code Ann. § 35-1-412(c) of the Act, if the Securities Commissioner finds that the order is in the public interest and subsection (d)(1) through (6), (8), (9), (10), or (12) and (13) authorizes the action, an order under this chapter may censure, impose a bar, and/or impose a civil penalty in an amount not to exceed $10,000 for each violation, on a registrant.

NOW THEREFORE, the Division requests that the Commissioner issue an order that Respondent:

a. Is hereby censured for failing to comply with the Act and the rules and regulations adopted thereunder; and

b. Pay a civil penalty of $10,000 if this Order becomes effective by operation of law, or, if Respondent seeks a hearing and a hearing officer or any other legal authority resolves the matter, pay a civil penalty in an amount not to exceed $10,000 for each violation of the Act by Respondent and the actual cost of the investigation or proceeding.

REQUIREMENT OF ANSWER AND NOTICE OF OPPORTUNITY FOR HEARING

Respondent is hereby notified that he has the right to a hearing on the matters contained herein. To schedule such a hearing, Respondent must file with the Securities Division, Post Office Box 11549, Rembert C. Dennis Building, Columbia, South Carolina, 29211-1549, attention: Thresechia Navarro, within thirty (30) days after the date of service of this Order to Cease and Desist a written Answer specifically requesting a hearing.

In the written Answer, Respondent, in addition to requesting a hearing, shall admit or deny each factual allegation in this Order, shall set forth specific facts on which Respondent relies, and shall set forth concisely the matters of law and affirmative defenses upon which Respondent relies. Respondent shall state if he is without knowledge or information sufficient to form a belief as to the truth of an allegation.

Failure by Respondent to file a written request for a hearing in this matter within the thirty-day (30) period stated above shall be deemed a waiver by that Respondent of the right to such a hearing. Failure of Respondent to file an Answer, including a request for a hearing, shall result in this Order, including the stated civil penalty and assessed fees, becoming final as to Respondent by operation of law.

CONTINUING TO ENGAGE IN ACTS DETAILED BY THIS ORDER AND/OR SIMILAR ACTS MAY RESULT IN THE DIVISION'S FILING ADDITIONAL ADMINISTRATIVE ACTIONS AND/OR SEEKING FURTHER ADMINISTRATIVE FINES. WILLFUL VIOLATION OF THIS ORDER COULD RESULT IN CRIMINAL PENALTIES UNDER S.C. CODE ANN. § 35-1-508 OF THE ACT.

IT IS SO ORDERED, This the 10th day of June, 2013.

By: _____

Andrew J. MacLeod
Assistant Attorney General
Securities Division
Rembert C. Dennis Building
1000 Assembly Street
Columbia, S. C. 29201

(803) 734-9916

STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
SECURITIES DIVISION

CERTIFICATE OF SERVICE AND
AFFIDAVIT OF COMPLIANCE
File Number 11061

I hereby certify that I served upon the individual/entity listed below a copy of the document indicated below and dated June 10, 2013, by serving a copy of said document upon the Securities Commissioner of the State of South Carolina and by placing a copy of said document in the United States mail, certified mail, return receipt requested, first class postage prepaid and addressed to:

James Rodney McGee, II
[redacted]

Document(s): Notice of Intent to Seek Censure and Civil Penalty

Mailed June 10, 2013 from Columbia, South Carolina.

I further hereby certify, swear and affirm that, service of the above-listed entity is in compliance with Section 35-1-611, Code of Laws of South Carolina.

By: _____
Thresechia P. Navarro
South Carolina Attorney General's Office
Securities Division
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-4731

Subscribed and sworn to before me on
this 10 day of June, 2013.

_____
Notary Public for South Carolina

My commission expires: 7-2-18

ADMINISTRATIVE PROCEEDING

BEFORE THE

SECURITIES COMMISSIONER OF SOUTH CAROLINA

IN THE MATTER OF:	)	
	)	**ORDER TO CEASE AND DESIST**
Robert Dunnell House,	)	
	)	
	)	**File No. 10067**
Respondent.	)	
	)	

WHEREAS, the Securities Division of the Office of the Attorney General of the State of South Carolina (the "Division"), pursuant to authority granted in the South Carolina Uniform Securities Act of 2005 (the "Act"), S.C. Code Ann. § 35-1-101 to 35-1-703 (Supp. 2011), on or about December 10, 2010, received information regarding alleged activities involving Robert D. House ("House" or the "Respondent") which could constitute violations of the Act;

WHEREAS, the information led the Division to open and conduct an investigation into the activities of the Respondent pursuant to S.C. Code Ann. § 35-1-602 and this investigation is ongoing;

WHEREAS, the Act became effective on January 1, 2006;

WHEREAS, the Uniform Securities Act (the "Prior Act"), S.C. Code Ann. §§ 35-1-10 to 35-1-590 (Supp. 2004), governs all actions or proceedings initiated based on conduct occurring before January 1, 2006;

NOW THEREFORE, in connection with the investigation, the Division has determined that the Respondent has engaged in and may be about to engage in acts or practices constituting violations of the Act and the Prior Act and hereby includes in this Order to Cease and Desist

("Order") a statement of the reasons for the Order, a statement of the civil penalty sought as a result, and a notice that a hearing will be scheduled if Respondent requests a hearing.

FACTUAL HISTORY

1. Respondent House is a Georgia resident with a last known home address of [redacted]
2. During the relevant time period Respondent represented that he maintained a place of business at 2525 Banegher Way, Suite 100, Duluth, Georgia 30097.
3. During the period beginning no later than on or about August, 1999, and ending no earlier than on or about December, 2001, Respondent offered investments in InterBank Funding Corporation ("IBF"), and its two wholly-owned subsidiaries, to South Carolina residents.
4. The investments offered in IBF were evidenced by "notes," pursuant to which IBF promised to pay the investors returns in exchange for the use of the investors' money for a specified period of time.
5. In connection with the offers, Respondent told potential investors that IBF would invest their money in commercial real estate and use it as collateral on loans made to clients.
6. Among the persons Respondent solicited were a number of retirees from the Owens Corning manufacturing facility in the Anderson, South Carolina area.
7. These Owens Corning retirees already had established and funded company retirement plans.
8. In his solicitations, Respondent told potential Owens Corning investors the IBF investment would greatly increase their retirement savings, was "safe and secured," and was insured "up to $500,000."

9. Respondent also told potential investors that if they invested with him for five years they would earn a 12% return which was guaranteed.

10. Respondent further promised investors they would be repaid their entire principal investment at the end of a five-year term.

11. Respondent was aware many of the individuals he solicited were unsophisticated investors who did not qualify under the offering terms to purchase IBF notes and/or who were persons for whom the IBF notes were not suitable investments.

12. At least seventeen of the Owens Corning retirees invested with Respondent by moving some or all of their company retirement plan funds after being given the representations above.

13. Respondent did not disclose to investors that the notes he was offering had a high risk of loss associated with them.

14. Respondent did not disclose to investors that the notes he was offering actually were not safe, secure, or guaranteed.

15. Respondent led investors to believe their investments were backed up by commercial real estate holdings when, in fact, they were not.

16. Respondent failed to provide one or more investors with a prospectus, private placement memorandum, or similar document prior to his receipt of funds from the investor(s).

17. Prior to investing, Respondent required one or more individuals to sign a Subscription Agreement ("Agreement") indicating the individual's experience.

18. Respondent submitted one or more applications to purchase IBF notes which were refused because the applying investor failed to meet income, net worth and/or suitability standards.

19. Respondent then falsified information, including information relating to investor income, assets, and experience on one or more of the Agreements in order to qualify investors who would not otherwise qualify to purchase the IBF investment.

20. One or more investors represent that had they known the statements Respondent made in his sales presentation about the safety of the investment and its secured nature were false, they would not have invested in the IBF notes.

21. For a period of time after investing money with Respondent, investors received timely monthly interest payments in the proper amounts.

22. In or around the spring of 2002, the interest payments from IBF to the investors stopped.

23. Shortly thereafter, IBF advised investors that the company was bankrupt.

24. The investments in IBF evidenced by notes and offered and sold by Respondent House constitute "securities."

APPLICABLE LAW AND DETERMINATION

1. The Commissioner has jurisdiction over this matter pursuant to Section 35-1-180 of the Act.
2. In connection with the offer or sale of securities in or from South Carolina, the Respondent violated Section 35-1-1210 of the Prior Act by making untrue statements of material fact.
3. Based on the foregoing, the Division has determined that Respondent has engaged, is engaging, and/or is about to engage in an act, practice, or course of business constituting a violation of the Act or the Prior Act.

CEASE AND DESIST ORDER

NOW THEREFORE, pursuant to S.C. Code Ann. § 35-1-604(a)(1) of the Act, IT IS HEREBY **ORDERED** that the Respondent:

a. Cease and desist from engaging in any aspect of securities business in or from the State of South Carolina; and

b. Pay a civil penalty in the amount of forty thousand ($40,000.00) dollars if this Order becomes effective by operation of law, or, if Respondent seeks a hearing and any legal authority resolves this matter, pay a civil penalty in an amount not to exceed five thousand ($5,000.00) dollars for each violation of the Prior Act by the Respondent, and the actual cost of the investigation or proceeding.

REQUIREMENT OF ANSWER AND NOTICE OF OPPORTUNITY FOR HEARING

Respondent is hereby notified that he has the right to a hearing on the matters contained herein. To schedule a hearing, the Respondent must file with the Securities Division, Post Office Box 11549, Rembert C. Dennis Building, Columbia, South Carolina 29211-1549, attention: Thresechia Navarro, within thirty (30) days after the date of service of this Order a written Answer specifically requesting that a hearing be held to consider rescinding the Order.

In the written Answer, the Respondent, in addition to requesting a hearing, shall admit or deny each factual allegation of the Order, shall set forth specific facts on which the Respondent relies, and shall set forth concisely the matters of law and affirmative defenses upon which the Respondent relies. If the Respondent is without knowledge or information sufficient to form a belief as to the truth of an allegation, he shall so state.

Failure by the Respondent to file a written request for a hearing in this matter within the thirty (30) day period stated above shall be deemed a waiver by the Respondent of his right to such a hearing. Failure of the Respondent to file an Answer, including a request for a hearing, shall result in this Order, including the stated civil penalty, becoming final as to the Respondent by operation of law.

CONTINUING TO ENGAGE IN ACTS DETAILED BY THIS ORDER AND/OR SIMILAR ACTS MAY RESULT IN THE DIVISION'S FILING ADDITIONAL ADMINISTRATIVE ACTIONS AND/OR SEEKING FURTHER ADMINISTRATIVE FINES.

WILLFUL VIOLATION OF THIS ORDER COULD RESULT IN CRIMINAL PROSECUTION. REGARDING MATTERS DESCRIBED HEREIN, THIS ORDER DOES NOT PRECLUDE THE FILING OF PRIVATE CAUSES OF ACTION OR THE FILING OF CRIMINAL CHARGES UNDER S.C. CODE ANN. § 35-1-508 OR ANY OTHER APPLICABLE CODE SECTION.

SO ORDERED, this 24th day of August, 2011.

Tracy A. Meyers
Senior Assistant Attorney General
Securities Division
Office of the Attorney General
Rembert C. Dennis Building
1000 Assembly Street, Suite 501
Columbia, S. C. 29201

ADMINISTRATIVE PROCEEDING

BEFORE THE

SECURITIES COMMISSIONER OF SOUTH CAROLINA

IN THE MATTER OF:	)	
	)	ORDER TO CEASE AND DESIST
Curb Appeal Properties, Inc. and	)	
Richard Van Blarcom (a/k/a "Rick Van Blarcom"),	)	File No. 12051
	)	
	)	
Respondents.	)	

WHEREAS, the Securities Division of the Office of the Attorney General of the State of South Carolina (the "Division"), pursuant to authority granted in the South Carolina Uniform Securities Act of 2005 (the "Act"), S.C. Code Ann. §§ 35-1-101 to 35-1-703 (Supp. 2011), received information regarding alleged activities of Curb Appeal Properties, Inc. and Richard Van Blarcom (collectively, the "Respondents") which, if true, could constitute violations of the Act; and

WHEREAS, the information led the Division to open and conduct an investigation of the Respondents pursuant to S.C. Code Ann. § 35-1-602; and

WHEREAS, in connection with the investigation, the Division has determined that evidence exists to support the following findings and conclusions:

1. Respondent Curb Appeal Properties, Inc. ("Curb Appeal") is a North Carolina corporation with the last known address of 1200 Clifton Street, Raleigh, North Carolina 27604.
2. Respondent Richard Van Blarcom ("Van Blarcom"), during the time period of the events described herein, was Curb Appeal's Vice President and Registered Agent.
3. Van Blarcom's last known address is [redacted]
4. Van Blarcom was an authorized signatory on Curb Appeal's corporate bank account.
5. The only other signatory on Curb Appeal's corporate bank account was Van Blarcom's wife who also held the title of President of Curb Appeal.

6. By October of 2007, the Respondents had begun to offer and sell promissory notes issued by Curb Appeal (the "Promissory Notes") to South Carolina investors.

7. Van Blarcom sold at least six Promissory Notes to at least five South Carolina investors.

8. In connection with the offer and sale of the Promissory Notes, Van Blarcom told one or more South Carolina investors that Curb Appeal was in the acquisition and due diligence stage in the development of a residential community named "Heritage Manor" in Onslow County, North Carolina.

9. In connection with the offer and sale of the Promissory Notes, Van Blarcom told one or more South Carolina investors that Curb Appeal needed their investment to meet certain cash-on-hand requirements asked for by third party sources of financing. Van Blarcom stated that the money would be "show money" and would not be spent. Rather, the money would solely be used to secure other financing.

10. In connection with the offer and sale of the Promissory Notes, Van Blarcom stated to at least one South Carolina investor that the money would be deposited into an escrow account and the money would not leave that account. Van Blarcom stated further that once the financing was obtained, the money would be released from escrow and returned to the investor along with a return on the investment.

11. According to the Promissory Notes, the principal and interest owed would be paid upon the Promissory Note's maturity. Specifically, one Promissory Note promised to pay the South Carolina investor $50,000 at the end of three years on a principal investment of $25,000, and another Promissory Note promised to pay a South Carolina investor $67,500 on $50,000 principal at the end of four months.

12. As a result of the representations above, made by Van Blarcom, the known South Carolina investors invested approximately $595,000 in the Promissory Notes.

13. Contrary to Van Blarcom's statements and representations, the investors' funds were deposited into Curb Appeal's corporate bank account.

14. Investors' funds were then used for various expenditures including personal expenses made by and for Van Blarcom and his wife.

15. Upon information and belief, the Respondents did not acquire the proposed land, make any significant progress towards acquiring financing, or begin the development of Heritage Manor.

16. Upon maturity, the Respondents did not honor the Promissory Notes, and the South Carolina investors did not receive the amounts due.

17. The Respondents utilized agents to locate and solicit potential investors and sell the Promissory Notes. These agents represented Curb Appeal, the issuer, in effecting or attempting to effect purchases or sales of the Promissory Notes. These agents were paid commissions on the successful sale of the Promissory Notes.

18. At no time relevant to the events described herein, were the Promissory Notes registered with the Division or a federal covered security, and no exemption from registration has been claimed.

19. At no time relevant to the events described herein, were Van Blarcom and one or more other agents employed by the Respondents registered with the Division to sell securities in or from the State of South Carolina.

20. Pursuant to S.C. Code Ann. Section 35-1-301, it is unlawful for a person to offer or sell a security in this State unless the security is registered, a federal covered security, or exempt from registration under S.C. Code Ann. Sections 35-1-201 through 35-1-203.

21. Pursuant to S.C. Code Ann. Section 35-1-102(2), an agent is an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities, or represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities.

22. Pursuant to S.C. Code Ann. Section 35-1-402(a), it is unlawful for an individual to transact business as an agent in this State unless registered or exempt from registration.

23. Pursuant to S.C. Code Ann. Section 35-1-402(d), it is unlawful for a broker-dealer or an issuer engaged in offering, selling, or purchasing securities in South Carolina to employ an agent who is neither registered nor exempt from registration.

24. Pursuant to S.C. Code Ann. Section 35-1-501, it is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

    a. to employ a device, scheme, or artifice to defraud;

    b. to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

    c. to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

25. On at least six occasions, Van Blarcom offered and sold unregistered securities in the State of South Carolina, in violation of S.C. Code Ann. Section 35-1-301.

26. On at least six occasions, Van Blarcom acted as an agent by representing the issuer, Curb Appeal, in effecting or attempting to effect the sales of securities in the State of South Carolina while Van Blarcom was not properly registered with the Division, in violation of S.C. Code Ann. Section 35-1-402(a).

27. Van Blarcom employed one or more agents to offer and sell securities while said agents were not properly registered with the Division, in violation of S.C. Code Ann. Section 35-1-402(d).

28. On at least nine occasions, Van Blarcom, in connection with the offer and sale of the security at issue, made material misstatements; omitted to state material facts necessary in order to make other statements made, in light of the surrounding circumstances under which they were made, not misleading; and engaged in acts or practices that operated as a fraud upon investors, in violation of S.C. Code Ann. Section 35-1-501.

29. On at least six occasions, Curb Appeal offered and sold unregistered securities in the State of South Carolina, in violation of S.C. Code Ann. Section 35-1-301.

30. On at least seven occasions, Curb Appeal employed agents to offer and sell securities while said agents were not properly registered with the Division, in violation of S.C. Code Ann. Section 35-1-402(d).

31. On at least nine occasions, Curb Appeal, acting by and through its agents, in connection with the offer and sale of the security at issue, made material misstatements; omitted to state material facts necessary in order to make other statements made, in light of the surrounding circumstances under which they were made, not misleading; and engaged in acts or practices that operated as a fraud upon investors, in violation of S.C. Code Ann. Section 35-1-501.

CEASE AND DESIST ORDER

WHEREAS, pursuant to S.C. Code Ann. § 35-1-604(a)(1), if the Securities Commissioner determines that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of the Act or a rule adopted or order issued under the Act or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of the Act or a rule adopted or order issued under the Act, the Securities Commissioner may issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary or appropriate to comply with the Act; and

WHEREAS, pursuant to S.C. Code Ann. § 35-1-604(b), an order issued under Section 35-1-604(a) is effective on the date of issuance and must include a statement of any civil penalty or costs of investigation the Division will seek, a statement of the reasons for the order, and notice that a hearing will be scheduled if one is requested.

NOW THEREFORE, pursuant to S.C. Code Ann. § 35-1-604(a), IT IS HEREBY ORDERED that Curb Appeal Properties, Inc. and Richard Van Blarcom each:

a. Immediately cease and desist from transacting business in this State in violation of the Act and, in particular, Sections 35-1-301, 35-1-402(a), 35-1-402(d), and 35-1-501 thereof; and

b. Pay a civil penalty in an amount of $10,000 for each of the twenty-two (22) violations of the Act committed by that Respondent and detailed in this Order.

REQUIREMENT OF ANSWER AND

NOTICE OF OPPORTUNITY FOR HEARING

The Respondents are hereby notified that they each have the right to a hearing on the matters contained herein. To schedule such a hearing, a Respondent must file with the Securities Division, Post Office Box 11549, Rembert C. Dennis Building, Columbia, South Carolina, 29211-1549, attention: Thresechia Navarro, within thirty (30) days after the date of service of this Order to Cease and Desist a written Answer specifically requesting a hearing. If a Respondent requests a hearing, the Division, within fifteen (15) days after receipt of a request in a record from a Respondent, will schedule the hearing.

In the written Answer, the Respondent, in addition to requesting a hearing, shall admit or deny each factual allegation in this Order, shall set forth specific facts on which the Respondent relies, and shall set forth concisely the matters of law and affirmative defenses upon which the Respondent relies. A Respondent without knowledge or information sufficient to form a belief as to the truth of an allegation shall so state.

Failure by a Respondent to file a written request for a hearing in this matter within the thirty-day (30) period stated above shall be deemed a waiver by that Respondent of the right to such a hearing. Failure of a Respondent to file an Answer, including a request for a hearing, shall result in this Order, including the stated civil penalty and any assessed fees, becoming final as to that Respondent by operation of law.

CONTINUING TO ENGAGE IN ACTS DETAILED BY THIS ORDER AND/OR SIMILAR ACTS MAY RESULT IN THE DIVISION'S FILING ADDITIONAL ADMINISTRATIVE ACTIONS AND/OR SEEKING FURTHER ADMINISTRATIVE FINES. WILLFUL VIOLATION OF THIS

ORDER COULD RESULT IN CRIMINAL PENALTIES UNDER S.C. CODE ANN. § 35-1-508 OF THE ACT.

IT IS SO ORDERED, This the 14 day of February, 2013.

By: _____

Jordan Crapps
Assistant Attorney General
Securities Division
Rembert C. Dennis Building
1000 Assembly Street
Columbia, S. C. 29201

(803) 734-9916

ADMINISTRATIVE PROCEEDING
BEFORE THE
SECURITIES COMMISSIONER OF SOUTH CAROLINA

IN THE MATTER OF: **Daniel Y. Thomason, Sr.,** **Daniel Y. Thomason, Jr.,** **and Citizens Financial Services Inc.,** **Respondents.**	**ORDER TO CEASE AND DESIST** **File Number: 12001**

WHEREAS, the Securities Division of the Office of the Attorney General of the State of South Carolina (the "Division") has been authorized and directed by the Securities Commissioner of South Carolina (the "Securities Commissioner") to administer the provisions of S.C. Code Ann. § 35-1-101, *et seq.*, the South Carolina Uniform Securities Act of 2005 (the "Act"); and

WHEREAS, the Division received information regarding alleged activities of Daniel Y. Thomason, Sr. ("Thomason, Sr."), Daniel Y. Thomason, Jr. ("Thomason, Jr."), and Citizens Financial Services, Inc. ("Citizens Financial") (collectively, "Respondents") which, if true, would constitute violations of the Act; and

WHEREAS, the information led the Division to open and conduct an investigation of the Respondent pursuant to S.C. Code Ann. § 35-1-602; and

WHEREAS, the Division has determined the following:

I. JURISDICTION

1. The Commissioner has jurisdiction over this matter pursuant to S.C. Code Ann. § 35-1-601(a).

II. RESPONDENTS

2. Citizens Financial Services, Inc. is a South Carolina corporation with an address of 218 South Main Street, Fountain Inn, South Carolina.

3. Daniel Y. Thomason, Sr. is a South Carolina resident with an address of [redacted]

4. Daniel Y. Thomason, Jr. is a South Carolina resident with an address of [redacted]

III. FINDINGS OF FACT

5. Citizens Financial operated as a consumer loan business in Fountain Inn, South Carolina between 1988 and 2012.

6. Citizens Financial is owned and was operated by Thomason, Sr. and Thomason, Jr.

7. Citizens Financial financed its lending operations primarily through the sale of investments styled as promissory notes (the "Securities"), sold on its behalf by Thomason, Sr. and Thomason, Jr.

8. Between 2009 and 2012, Thomason, Sr. and Thomason, Jr. sold Securities to at least ten (10) South Carolina investors (the "Investors").

9. Thomason, Sr. and Thomason, Jr. each made misstatements and omissions in connection with their offer and sale of Securities to the Investors.

10. Thomason, Jr. told at least one (1) Investor that the Securities were "very secure" and "much like a C/D [certificate of deposit]," when they were not.

11. Thomason, Sr. told at least one (1) Investor that the proceeds of the Securities would only be used for "car loans," when they were not.

12. Citizens Financial's business bookkeeping records for the years 2009, 2010, 2011, and 2012 (the "Records") note that the Records were not prepared in accordance with Generally Accepted Accounting Principles, due to a lack of information provided to an outside accounting firm by Citizens Financial, Thomason, Sr., and Thomason, Jr.

13. The Records show that Citizens Financial operated at a loss in 2009, 2010, 2011, and 2012.

14. Thomason, Sr. and Thomason, Jr., in addition to receiving salaries from Citizens Financial, made significant personal expenditures with funds belonging to Citizens Financial. These personal expenditures included car payments and purchases of groceries, other household items, and ongoing cash withdrawals from Citizens Financial's daily cash drawer and materially contributed to Citizens Financial's deteriorating financial condition between 2009 and 2012.

15. One (1) or more Investors were not informed that the proceeds from the sale of Securities would finance Thomason Sr. and Thomason, Jr.'s personal expenditures.

16. Investors were not adequately informed of the deteriorating financial condition of Citizens Financial.

17. Because of mounting losses, Citizens Financial was forced to cease operations.

18. On March 5, 2012, Citizens Financial filed for bankruptcy protection under Chapter 7 of the United States Bankruptcy Code.

19. On October 29, 2013, Thomason Sr. was interviewed by the Securities Division. During this interview Thomason Sr. stated that all the Securities were individually renewed on an annual basis. Thomason, Sr. would secure the permission of the Investors to renew the Securities for an additional year while omitting to state any information regarding the deteriorating financial condition of Citizens Financial to the Investors.

20. On November 19, 2013, Thomason, Jr. was interviewed by the Securities Division. During this interview, Thomason, Jr. denied making any representations to Investors, denied having offered and sold Securities, and denied any involvement in the management of Citizens Financial.

IV. CONCLUSIONS OF LAW

21. The South Carolina Uniform Securities Act of 2005, S.C. Code Ann. § 35-1-101, *et seq.*, governs the offer and sale of securities within the State of South Carolina.

22. Pursuant to S.C. Code Ann. § 35-1-102(29), promissory notes and investment contracts are securities.

23. The Securities sold by Respondents are securities as defined by the Act.

24. Pursuant to S.C. Code Ann. § 35-1-505, it is unlawful for a person to make or cause to be made, in a record that is used in an action or proceeding or filed under this chapter, a statement that, at the time and in the light of the circumstances under which it is made, is false or misleading in a material respect, or, in connection with the statement, to omit to state a material fact necessary to make the statement made, in the light of the circumstances under which it was made, not false or misleading.

25. Respondent Thomason, Jr. made or caused to be made, in a record that is used in an action or proceeding or filed under this chapter, a statement that, at the time and in the light of the circumstances under which it is made, is false or misleading in a material respect, or, in connection with the statement, to omit to state a material fact necessary to make the statement made, in the light of the circumstances under which it was made, not false or misleading.

26. Pursuant to S.C. Code Ann. § 35-1-501, it is unlawful for a person in connection with the offer or sale of a security in South Carolina: (1) to employ a scheme, device, or artifice to defraud; (2) to make an untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading; or (3) to engage in an act, practice or court of business that operates or would operate as a fraud or deceit upon another person.

27. Respondents sold securities within the State of South Carolina (1) while employing a scheme, device, or artifice to defraud; (2) through the making of untrue statements of material fact or to omitting to state a material fact necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading; and (3) by engaging in an act, practice, or course of business that operated as a fraud or deceit upon another person.

V. ORDER

WHEREAS, pursuant to S.C. Code Ann. §35-1-604(a)(1), if the Securities Commissioner determines that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of the Act or a rule adopted or order issued under the Act, the Securities Commissioner may issue an order directing the person to cease and

desist from engaging in the act, practice, or course of business or to take other action necessary or appropriate to comply with the Act; and

WHEREAS, pursuant to S.C. Code Ann. § 35-1-604(b), an order issued under Section 35-1-604(a) is effective on the date of issuance and must include a statement of any civil penalty or costs of investigation the Division will seek, a statement of the reasons for the order, and notice that a hearing will be scheduled within fifteen (15) days if one is requested; and

WHEREAS, by reason of the foregoing, it is in the public interest, for the protection of investors, and consistent with the purposes of the Act that Respondents be ordered to cease and desist from engaging in the above enumerated practices which constitute a violation of the Act and pay an appropriate civil penalty for their wrongdoing;

NOW THEREFORE, pursuant to S.C. Code Ann. § 35-1-604(a)(1), it is hereby **ORDERED** that

a. Respondents and every successor, affiliate, control person, agent, servant, and employee of Respondents, and every entity owned, operated, or indirectly or directly controlled by or on behalf of the Respondents **CEASE AND DESIST** from transacting business in this State in violation of the Act, in particular, S.C. Code Ann. § 35-1-501; and

b. Thomason, Sr. pay a civil penalty in the amount of **Twenty Five Thousand Dollars ($25,000)** if this Order becomes effective by operation of law, or, if Thomason, Sr. seeks a hearing and any legal authority resolves this matter, pay a civil penalty in an amount not to exceed **Ten Thousand Dollars**

($10,000) for each violation of the Act by Thomason, Sr., and the actual cost of the investigation or proceeding; and

c. Thomason, Jr. pay a civil penalty in the amount of **Twenty Five Thousand Dollars ($25,000)** if this Order becomes effective by operation of law, or, if Thomason, Jr. seeks a hearing and any legal authority resolves this matter, pay a civil penalty in an amount not to exceed **Ten Thousand Dollars ($10,000)** for each violation of the Act by Thomason, Jr., and the actual cost of the investigation or proceeding.

IT IS FURTHER ORDERED that, pursuant to S.C. Code Ann. § 35-1-604(a)(2) and (3), any exemption from registration with the Division that Respondents may claim to rely upon under S.C. Code Ann. §§ 35-1-201(3)(C), (7), or (8); 35-1-202; 35-1-401(b)(1)(D) or (F); or 35-1-403(b)(1)(C), has been and is **PERMANENTLY REVOKED**.

THIS ORDER DOES NOT PREVENT THE DIVISION OR ANY OTHER LAW ENFORCEMENT AGENCY FROM SEEKING SUCH OTHER CIVIL OR CRIMINAL REMEDIES THAT ARE AVAILABLE UNDER THE ACT, INCLUDING REMEDIES RELATED TO OFFERS OR SALES OF SECURITIES BY THE RESPONDENTS WHICH ARE NOT SET FORTH ABOVE.

ENTERED at Columbia, South Carolina, this 27th day of November, 2013.

ALAN WILSON
SECURITIES COMMISSIONER

By: _____
IAN P. WESCHLER
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

REQUIREMENT OF ANSWER AND NOTICE OF OPPORTUNITY FOR HEARING

Respondents are hereby notified that each has the right to a hearing on the matters contained herein. To schedule such a hearing, a Respondent must file with the Securities Division, Post Office Box 11549, Rembert C. Dennis Building, Columbia, South Carolina 29211-1549, attention: Thresechia Navarro, within thirty (30) days of the date of service of this Order a written Answer specifically requesting that a hearing be held to consider rescinding the Order. If requested by a Respondent, a hearing shall be scheduled within fifteen (15) days.

In his written Answer, a Respondent, in addition to requesting a hearing, shall admit or deny each factual allegation of the Order, shall set forth concisely the matters of law, specific facts, and affirmative defenses, if any, upon which the Respondent relies. If a Respondent is without knowledge or information sufficient to form a belief as to the truth of an allegation, he shall so state.

STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
SECURITIES DIVISION

CERTIFICATE OF SERVICE AND
AFFIDAVIT OF COMPLIANCE
File Number 12001

I hereby certify that I served upon the individual/entity listed below a copy of the document indicated below and dated November 27, 2013, by serving a copy of said document upon the Securities Commissioner of the State of South Carolina and by placing a copy of said document in the United States mail, certified mail, return receipt requested, first class postage prepaid and addressed to:

Citizens Financial Services, Inc.
218 South Main Street
Fountain Inn, SC 29644

Document(s): Order to Cease and Desist

Mailed November 27, 2013 from Columbia, South Carolina.

I further hereby certify, swear and affirm that, service of the above-listed entity is in compliance with Section 35-1-611, Code of Laws of South Carolina.

By: Thresechia P. Navarro
Thresechia P. Navarro
South Carolina Attorney General's Office
Securities Division
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-4731

Subscribed and sworn to before me on
this 27th day of November, 2013.

Notary Public for South Carolina

My commission expires: 6/8/2020

STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
SECURITIES DIVISION

CERTIFICATE OF SERVICE AND
AFFIDAVIT OF COMPLIANCE
File Number 12001

I hereby certify that I served upon the individual/entity listed below a copy of the document indicated below and dated November 27, 2013, by serving a copy of said document upon the Securities Commissioner of the State of South Carolina and by placing a copy of said document in the United States mail, certified mail, return receipt requested, first class postage prepaid and addressed to:

Daniel Y. Thomason, Jr.
[redacted]

Document(s): Order to Cease and Desist

Mailed November 27, 2013 from Columbia, South Carolina.

I further hereby certify, swear and affirm that, service of the above-listed entity is in compliance with Section 35-1-611, Code of Laws of South Carolina.

By: Thresechia P. Navarro
Thresechia P. Navarro
South Carolina Attorney General's Office
Securities Division
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-4731

Subscribed and sworn to before me on
this 27th day of November, 2013.

Notary Public for South Carolina

My commission expires: 6/8/2020

STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
SECURITIES DIVISION

CERTIFICATE OF SERVICE AND
AFFIDAVIT OF COMPLIANCE
File Number 12001

I hereby certify that I served upon the individual/entity listed below a copy of the document indicated below and dated November 27, 2013, by serving a copy of said document upon the Securities Commissioner of the State of South Carolina and by placing a copy of said document in the United States mail, certified mail, return receipt requested, first class postage prepaid and addressed to:

Daniel Y. Thomason, Sr.
[redacted]

Document(s): Order to Cease and Desist

Mailed November 27, 2013 from Columbia, South Carolina.

I further hereby certify, swear and affirm that, service of the above-listed entity is in compliance with Section 35-1-611, Code of Laws of South Carolina.

By: Thresechia P. Navarro

Thresechia P. Navarro
South Carolina Attorney General's Office
Securities Division
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-4731

Subscribed and sworn to before me on
this 27th day of November, 2013.

Notary Public for South Carolina

My commission expires: 6/8/2020

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS 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-23-8578 **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PREJUDGMENT INTEREST**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL D. MORGENSTERN
2014 AUG 15 PM 3 54

The Defendants, identified as BB&T Corporation, Branch Banking and Trust Company, successor in merger to Branch Banking and Trust Company of South Carolina, and Sterling Capital Management, LLC, successor in merger to BB&T Asset Management LLC (collectively "Defendants"), submit this Memorandum in Opposition to Motion for an Order Awarding Prejudgment Interest (the "Motion") submitted on July 10, 2014, by Plaintiff Francis P. Maybank ("Maybank").

INTRODUCTION

Following trial in Greenville County, the jury awarded Maybank 3.1 million dollars in actual damages on his claims for breach of contract, breach of fiduciary duty, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), constructive fraud, and negligent misrepresentation, as well as 5 million dollars in punitive damages. The jury did not award any damages, actual or punitive damages, to the Trust on any claim. {*See* Verdict Form at 4-5, June

30, 2014.} Additionally, the jury found for Defendants on Plaintiffs' claims for breach of contract accompanied by a fraudulent act, violation of the Uniform Securities Act (the "Securities Act"), aiding and abetting breach of a fiduciary duty, and fraudulent misrepresentation.[1]

Thereafter, Maybank filed the Motion with the Court requesting over one million dollars in prejudgment interest. {Mot. for Order Awarding Prejudgment Interest at 3, July 10, 2014.} Defendants oppose Maybank's Motion on the following grounds:

(1) Maybank is not entitled to prejudgment interest because the amount of damages awarded was not a sum certain or capable of being reduced to certainty;

(2) There is no statute, which allows Maybank to recover prejudgment interest.

a. The South Carolina Unfair Trade Practices Act does not provide for prejudgment interest. *See* S.C. Code § 39-5-10 *et seq.*

b. Although the South Carolina Uniform Securities Act does provide for prejudgment and post-judgment interest, *see* S.C. Code § 35-1-603 (b)(2)(D), Plaintiffs did not recover under this claim.

(3) Paragraph F.1. of the Wealth Management Agreement expressly waives Mr. Maybank's right to remedies other than actual losses, and this provision would include prejudgment interest.

Therefore, for the above-stated reasons, Defendants request this Court deny Maybank's Motion for an order awarding prejudgment interest.

ARGUMENT

I. Maybank Is Not Entitled to Prejudgment Interest Because the Amount of Damages Awarded Was Not a Sum Certain or Capable of Being Reduced to Certainty.

[1] Additionally, the Plaintiffs abandoned two claims: (1) negligence, gross negligence, recklessness and/or willful and wanton misconduct; and (2) fraud in the inducement.

Maybank is not entitled to an award of prejudgment interest because the amount of damages recovered was not a sum certain or capable of being reduced to certainty. In contrast to Plaintiffs' argument that the damages were ascertainable, Plaintiffs' own evidence and testimony at trial proves otherwise. At trial, Plaintiffs provided extensive testimony on alternative investment strategies and damages calculations for each strategy. Plaintiffs' own closing argument included ranges of possible damages the jury could choose to award if they found it appropriate. Far from certain, Maybank's damages were not liquidated or capable of being ascertained at the time Maybank's claim arose. Therefore, Maybank is not entitled to prejudgment interest, and the Court should deny Maybank's Motion.

"The law permits the award of prejudgment interest when a monetary obligation is a sum certain, or is capable of being reduced to certainty, accruing from the time payment may be demanded either by the agreement of the parties or the operation of law." *Historic Charleston Holdings, LLC v. Mallon, LLC,* 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009); *see* S.C. Code Ann. § 34–31–20(A) (Supp.2009) ("In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum."). "Generally, prejudgment interest may not be recovered on an unliquidated claim in the absence of agreement or statute." *Charleston Holdings, LLC,* 381 S.C. at 435, 673 S.E.2d at 457. "The fact that the amount due is disputed does not render the claim unliquidated for purposes of awarding prejudgment interest." *Id.* "Rather, the proper test is 'whether [or not] the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.' " *Id.* (quoting *Butler Contracting, Inc. v. Court Street, LLC,* 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006)).

"A claim is liquidated if the sum claimed is certain or capable of being reduced to a certainty." *Sundown Operating Co., Inc. v. Intedge Indus., Inc.*, No. 2007-UP-091, 2007 WL 8325994, at *3 (S.C. Ct. App. Feb. 23, 2007) (quoting *Builders Transp., Inc. v. S.C. Prop. & Cas. Ins. Guar. Assoc.*, 307 S.C. 398, 406, 415 S.E.2d 419, 424 (Ct. App. 1992)). Liquidated damages "are damages the amount of which has been made certain and fixed either by the act and agreement of the parties or by operation of law to a sum which cannot be changed by the proof." *Id.* (quoting 22 Am.Jur.2d *Damages* § 482 (2003)).

In *Sundown Operating Co.*, the plaintiff claimed he was entitled to prejudgment interest on damages from a fire caused by an electric fryer in a restaurant and pub. *Id.* at *1. The master denied the plaintiff's request for prejudgment interest. *Id.* at *2. On appeal, the Court of Appeals held that the plaintiff was not entitled to prejudgment interest because the damages were "simply not of the type that can be made certain or cannot be changed by proof." *Id.* at *4. The court stated, "In order to determine the damages to be awarded, the master had to consider the testimony of fact witnesses, expert witnesses and exhibits admitted into evidence. There was no fixed formula used for determining the amount of [the plaintiff's] damages." *Id.* The court further noted that at the time the claim arose, the conditions were not fixed for determining the amount of damages and many of the damages "did not even arise until after the date of the fire, such as the lost profits and revenues, loan and interest charges, legal and permit fees, storage charges, and rental income." *Id.* Accordingly, the court held the plaintiff was not entitled to an award of prejudgment interest. *Id.*

Similarly, in *Charleston Holding, LLC*, the Supreme Court of South Carolina held that the master erred in awarding prejudgment interest on the distribution of proceeds from the sale of properties because the sum was not liquidated. *Charleston Holdings, LLC,* 381 S.C. at 435, 673

S.E.2d at 457. The court found that the record revealed disagreement between the parties over the method of accounting for and dividing the proceeds between the parties. In light of the dispute, the court found that "the measure of recovery for prejudgment interest was unliquidated at the time the parties' claims to proceeds arose," and therefore, the plaintiff was not entitled to prejudgment interest. *Id.* at 436, 673 S.E.2d at 458.

Additionally, in *Austin v. Stokes-Craven Holding Corp.*, the Supreme Court of South Carolina found the plaintiff was not entitled to prejudgment interest because his damages were not liquidated at the time the claim arose because the damages could not have been ascertained without first determining the retail value of the truck at the time it was sold to plaintiff. 387 S.C. 22, 58–59, 691 S.E.2d 135, 154 (2010). During the trial, the plaintiff presented an expert witness who inspected and appraised the plaintiff's truck and testified that the truck had "zero retail value" at the time the plaintiff purchased it. *Id.* at 40, 691 S.E.2d at 144. The plaintiff argued the damages were "capable of ascertainment" and that he was entitled to prejudgment interest because the defendant had rejected his demand to return the purchase price for the truck and that the jury's damages award was equal to the purchase price. *Id.* at 58, 691 S.E.2d at 153–54. The court rejected the plaintiff's argument and found that the plaintiff's damages were not liquidated, because the damages could not have been ascertained without the actual retail value. *Id.* at 58–59, 691 S.E.2d at 154.

The holdings in *Sundown Operating Co.*, *Charleston Holding, LLC*, and *Austin* are relevant to the instant case and support the finding that Maybank is not entitled to prejudgment interest. Here, the amount of damages was hotly contested by both parties who presented extensive expert testimony on this issue. Plaintiffs' own expert testimony and closing argument involved alternative damages theories that Plaintiffs claimed were equally viable and reasonable.

Just like the holdings in those three cases, the amount of damages is not a sum certain or capable of being reduced to certainty at the time the claim arose and Maybank is not entitled to prejudgment interest. Therefore, the Court should deny Maybank's Motion.

At trial, the Plaintiffs provided expert testimony by Dr. Craig A. McCann who opined that BB&T should have advised Maybank to sell his BB&T stock and invest in a portfolio with 30% stocks / 70% bonds or 100% bonds. In connection with this testimony, McCann provided damages calculations based on his two hypothetical investment strategies. McCann testified that under the 30% stocks / 70% bonds investment strategy, Maybank's damages would have been $2,861,302, but under the 100% bonds investment strategy, Maybank's damages would have been $3,362,185. {*Id.*} McCann's damages methodology required the jury to assess how conservative Mr. Maybank was willing to be with his liquid assets, and then match that to a figure within the range provided by McCann. A great deal of evidence was presented by both sides as to the level of risk that was appropriate in light of Mr. Maybank's investing history, financial sophistication, and expressed objectives. Subsequently, Plaintiffs' counsel presented the jury with a "range" of possible actual damages during the closing argument. The alternative investment theories presented by Plaintiffs and the questions of fact that the jury had to necessarily decide prove that the damages were not a sum certain or capable of being reduced to certainty at the time the claim arose.

Moreover, the fact that the jury selected a number within Plaintiffs' proposed "range" does not establish that the damages were a sum certain at the time the claim arose. Importantly, the South Carolina Supreme Court's holding in *Austin* expressly rejects the Plaintiffs' argument that the jury's damages award demonstrates the damages were "ascertainable." *Austin*, 387 S.C.

at 58–59, 691 S.E.2d at 154 (holding the damages were not liquidated and could not have been ascertained without the actual retail value of the truck).

Furthermore, like *Sundown Operating Co.*, a substantial amount of Plaintiffs' damages did not arise until after Maybank's claim arose. In *Sundown Operating Co.*, the court found that because some of the damages arose after the claimed injury, that demonstrated that the damages could not be a sum certain and plaintiff was not entitled to prejudgment interest. *Sundown Operating Co., Inc. v. Intedge Indus., Inc.*, No. 2007-UP-091, 2007 WL 8325994, at *3 (S.C. Ct. App. Feb. 23, 2007) (noting the damages for lost profits and revenues, loan and interest charges, legal and permit fees, storage charges, and rental income arose after the date of the fire). Similarly, in the instant case, the Plaintiffs' claimed damages, which included the costs of entering into subsequent prepaid variable forward contracts and the opportunity costs of not investing in alternative investments, occurred long after Plaintiffs' claim for bad financial advice arose. Consequently, Plaintiffs' damages were not a sum certain or capable of being reduced to certainty at the time Plaintiffs' claim arose. Thus, Maybank is not entitled to prejudgment interest and the Court should deny Maybank's Motion.

II. There is No Statute, Which Allows Maybank to Recover Prejudgment Interest.

Furthermore, Maybank cannot recover prejudgment interest under any statute. Although the jury found in favor of Maybank on his claim for violation of the South Carolina Unfair Trade Practices Act, Maybank is not entitled to prejudgment interest under that claim because it is not provided for under the statute. *See* S.C. Code § 39-5-10 *et seq.* Similarly, although the South Carolina Uniform Securities Act does provide for prejudgment and post-judgment interest, *see* S.C. Code § 35-1-603 (b)(2)(D), Plaintiffs did not recover under this claim. Therefore, there is

no statute that enables Maybank to recover prejudgment interest and the Court should deny Maybank's Motion.

III. Maybank Waived his Right to Collect Prejudgment Interest Through the Limitation of Damages Provision of the Wealth Management Agreement.

Maybank's Motion should be denied because Maybank cannot collect prejudgment interest under Paragraph II F.1 of the Wealth Management Agreement, which expressly waives any right of Mr. Maybank to recover incidental, indirect, special, consequential, or punitive damages from Defendants. Specifically, Paragraph II F.1 provides:

> F. Limitation of Liability and Indemnification. Client agrees:
>
> 1. Bank and Investment Advisor shall not be liable with respect to their services under this Agreement except for any loss attributable to their negligence or willful misconduct. *In no event shall Bank or Investment Advisor be liable for any incidental, indirect, special, consequential or punitive damages.*

The only remedy allowed is "any loss" attributable to negligent or willful misconduct. All other monetary remedies are barred. Accordingly, Mr. Maybank has waived his right to recover prejudgment interest as a measure of damages.[2] There is no agreement between Mr. Maybank and any of the Defendants which would allow the recovery of prejudgment interest or which otherwise provides for that remedy.

CONCLUSION

Therefore, Defendants respectfully request this Court deny Maybank's Motion for an Award of Prejudgment Interest.

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[2] The Defendants make reference to their memorandum in support of their motion for judgment notwithstanding the verdict and for a new trial for a full discussion as to the enforceability of Paragraph F.1. of the Wealth Management Agreement.

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Greenville, South Carolina

August 15, 2014

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified via electronic mail and by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Pleadings:

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PREJUDGMENT INTEREST

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 AUG 15 PM 3 54

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August 15, 2014

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS 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-23-8578 **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR AN ORDER AWARDING ATTORNEYS' FEES AND COSTS**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL D. WICKENSIMER
2014 AUG 15 PM 3 54

The Defendants, BB&T Corporation,[1] Branch Banking and Trust Company ("BB&T"), and Sterling Capital Management, LLC ("BB&T Asset Management") (collectively "Defendants"), hereby submit their Memorandum in Opposition to Plaintiff's Motion for an Order Awarding Attorneys' Fees and Costs.

I. INTRODUCTION

The Plaintiff, Frank Maybank, has filed a request for an award of attorneys' fees and costs after prevailing at trial on his claim based on the Unfair Trade Practices Act ("UTPA"). This request is premature. First, the Court should consider and rule on the Defendants' motion for JNOV and for a new trial, as a ruling in the Defendants' favor on the UTPA claim would

[1] BB&T Corporation continues to assert and does not waive its position that the court lacks personal jurisdiction over it.

moot the request for fees and costs. Second, the Defendants have filed a motion to postpone consideration of the request for fees and costs for several reasons, including the fact that their expert witness on the issue is out of the country and currently unavailable. Finally, Mr. Maybank's submission in support of his fee request was grossly inadequate and lacks the detail necessary for the Defendants to meaningfully respond to the request and for the Court to correctly apply the applicable standards. For these reasons, the Court should defer consideration of the request for attorneys' fees and costs.

Mr. Maybank's total request of fees and costs exceeds $3.6 million. This figure is a gross exaggeration of the fees actually recoverable under the UTPA and fails the test of reasonableness for a number of reasons. Mr. Maybank seeks all of his attorneys' fees in this case, without regard to the claim to which they are related. For example, the submission in support of the fee request makes no deductions for fees relating to the claims of the Maybank Family Insurance Trust, none of which were successful. Nor does the submission deduct for fees wasted on unnecessary litigation maneuvers, for example, Mr. Maybank's unsuccessful attempt to depose the current and former CEOs of BB&T or opposing counsel's attempt to present surprise testimony of Tracy Meyers, which led to a temporary mistrial declaration. The submission also seeks recovery of attorneys' fees related to the federal court proceedings, but a request for those fees has already been rejected by the federal court. That decision acts as res judicata with respect to those fees, and Mr. Maybank cannot now recover them from this Court. The Court must take into account the above deductions and others discussed below when it comes time to consider Mr. Maybank's request for attorneys' fees and costs.

II. ARGUMENT

A. The Court Should Deny Mr. Maybank's Request for Attorneys' Fees and Costs Because the UTPA Claim Falls Within the Securities Exemption.

Mr. Maybank's request for attorneys' fees and costs is dependent on his succeeding on his UTPA claim. However, the UTPA claim is subject to the exception for securities related matters. *See State ex rel. McLeod v. Rhoades*, 275 S.C. 104, 267 S.E.2d 539 (1980). As explained more fully in the Defendants' memorandum in support of its post trial motion, the Court should grant JNOV in favor of the Defendants. Doing so would require the denial of Maybank's request for attorneys' fees and costs.

B. Mr. Maybank Has Failed to Provide Adequate Documentation of His Request for Attorneys' Fees and Costs.

The submission provided with Mr. Maybank's fee request was grossly inadequate and lacked the detail necessary for the Defendants to meaningfully respond and for the Court to properly assess whether the fee request is reasonable. These deficiencies were pointed out in the Defendants' recent motion seeking additional information related to the fee request. Among other things, Mr. Maybank failed to provide a copy of his fee agreement, nor did he provide the detailed billing statements of his counsel or any information about the market rates in Columbia or Greenville, South Carolina. Under South Carolina law, it is the party seeking the fee award that has the burden of coming forward with sufficient evidence to support the request. *See Gainey v. Gainey*, 279 S.C. 68, 301 S.E.2d 763 (1983). On this basis alone, the Court should deny Mr. Maybank's request for attorneys' fees and costs. *See 4 Amigos, LLC v. Carolina Bueno, LLC*, 2011 WL 1979720, *5 (D.S.C. May 20, 2011) ("There is no indication of the number of hours billed, by whom the hours were billed, at what rate, or for what purpose. Neither is there any support for the reasonableness of the rates or other factors routinely

considered in making awards of attorneys' fees. Thus, the court will not award the amounts sought even though they are unopposed."); *Laser Supply & Servs. v. Orchard Park Assocs.*, 382 S.C. 326, 341-42, 676 S.E.2d 139, 148 (Ct. App. 2009) (reversing award of attorneys' fees as unsupported by the evidence where the affidavit submitted by counsel failed to properly address the work done on a particular claim in the case). At a minimum, the Court should postpone ruling on Mr. Maybank's fee request until after such time that adequate detailed information has been provided and after the Defendants and their expert witness have had sufficient time to analyze and respond to the information.

C. Only Those Fees Incurred in Furtherance of the UTPA Claim Can Be Awarded.

In *Haley Nursery Co., Inc. v. Forrest*, 298 S.C. 520, 381 S.E.2d 906 (1989), the South Carolina Supreme Court recognized that parties seeking a fee award under a UTPA claim can recover only those fees incurred in pursing the UTPA claim. The court recognized that fees related to the handling of non-UTPA claims could not be recovered and, on that basis, approved the trial court's reduction of the $115,000 fee request to only $50,000. *Id.* at 524, 381 S.E.2d at 909. This rule was applied more recently in *Laser Supply & Services. v. Orchard Park Associates*, 382 S.C. 326, 676 S.E.2d 139 (Ct. App. 2009), where the court reversed an award of attorneys' fees because the record did not permit the court to discern the amount of fees attributable to a claim for which there was no contractual basis for the recovery of attorneys' fees. The Court of Appeals made it clear that the only fees recoverable where those fees related to the contract that did have an attorneys' fee provision. *Id.* at 432, 676 S.E.2d at 148.

Here, the Plaintiffs were pursing a total of eleven claims, only one of which was the UTPA claim. Accordingly, the Plaintiffs can recover only those fees and costs related to efforts to prove that claim. Any fees and costs related to efforts to establish any of the other ten claims

cannot be awarded to Mr. Maybank under the UTPA fee provision. As explained above and in the motion for more information, Mr. Maybank has failed to provide adequately detailed information that would allow the Court to properly apply the mandate in *Haley Nursery* that only those fees and costs related to the UTPA claim be included in the fee award. At a minimum, a substantial reduction in the fee request is required to comply with *Haley Nursery*.

D. Fees Incurred in the Pursuit of Unsuccessful Claims or Claims that Were Abandoned Should Be Deducted from the Award.

It is well established under South Carolina law that a fee award cannot include fees relating to claims under which the requesting party did not prevail. *See, e.g., Rice v. Multimedia, Inc.*, 318 S.C. 95, 100, 456 S.E.2d 381, 384 (1995) (affirming award reducing fee request by half where plaintiff prevailed on only four of the seven contracts on which he brought suit); *Spriggs Group, P.C. v. Slivka*, 402 S.C. 42, 55, 738 S.E.2d 495, 503 (Ct. .App. 2013) ("[T]he trial court surely did not award fees for the two causes of action it dismissed"). This same principle would logically hold true for fees related to any claims abandoned by a plaintiff.

Here, the jury returned a verdict in favor of the Defendants on all nine claims asserted by the Maybank Family Insurance Trust. The jury also returned a verdict in favor of the Defendants on four of the claims asserted by Mr. Maybank, including breach of contract accompanied by a fraudulent act, fraudulent misrepresentation, the South Carolina Securities Act, and aiding and abetting breach of fiduciary duty. Moreover, just before the case was presented to the jury, the Plaintiffs abandoned their claims based on negligence and fraudulent inducement and also dropped Anthony Mahfood and Ross Walters as defendants in the case. Of the total twenty-two claims being asserted by both Plaintiffs at the beginning of trial, they prevailed on only five.

Mr. Maybank tacitly concedes that he is not entitled to recover fees related to the unsuccessful claims of the Maybank Family Insurance Trust. This is demonstrated by the July

10, 2014 affidavit of Mitch Willoughby, which states in Paragraph 6 that costs associated with the claims of the Maybank Family Insurance Trust are not being included in the request for costs. The expert fees of Scott Brawley are part of these voluntarily excluded costs.

Fees associated with the claims of the Maybank Family Insurance Trust that should be excluded from any fee award would relate to, among other things, the motion to amend the complaint, attorney time spent working with Scott Brawley and defending his deposition, efforts to investigate the BB&T trust department, the review of documents produced by the trust department, the accounting for Mr. Maybank's life insurance policies, the termination of the trustee relationship, and written discovery relating to the damages sought by the trust. The Court should also deduct any fees associated with responding to the Defendants' summary judgment motion as to the claims of the Maybank Family Insurance Trust.

There is a great deal of attorney work that would have been related to the Plaintiffs' unsuccessful claim based on the South Carolina Securities Act. Mr. Maybank should not be permitted to recover any fees relating to the use of Tracy Meyers as a witness, including meetings with her, defending her deposition, or presenting her at trial. He also should not be awarded fees relating to his claim that BB&T Asset Management was acting as an unregistered broker dealer. This would include fees for attorney time working on this issue with Professor Freeman and deposing Paul Merolla, the Defendants' expert on this issue. Finally, the Court should deduct from any fee award the fees associated with researching any aspect of the Securities Act and the fees associated with the Plaintiffs' summary judgment motion as to this claim and opposition to the Defendants' summary judgment motion for this claim.

The above listing of fees that should be deducted is not exclusive and there are likely many additional efforts related to unsuccessful or abandoned claims for which fees should not be

awarded. Only by receiving from Mr. Maybank's counsel the detailed billing records requested could the Court and the Defendants make a meaningful effort to accurately identify unrecoverable fees.

E. Fees Incurred in Unproductive Litigation Efforts Should Not Be Awarded.

As with fees related to unsuccessful claims, Mr. Maybank also should not be permitted to receive an award of fees related to either unsuccessful or unproductive litigation efforts. There are numerous examples of litigation steps taken in this case that were unfounded, unsupported, or otherwise unnecessary:

- The Plaintiffs filed two motions for summary judgment, both of which were denied.
- The Plaintiffs pursued a claim for tax gross up damages, for which the Court granted summary judgment in favor of the Defendants.
- Professor Freeman offered early in the case an opinion that Rule 312 of the NYSE had been violated. This allegation was later abandoned, and Professor Freeman did not offer any opinion on this issue at trial.
- The Plaintiffs were unsuccessful in their attempts to depose the current and former CEOs of BB&T.
- The Plaintiffs vigorously litigated two discovery motions relating to privileged documents and communications. One issue related to questioning about litigation reports to management during the Jim Willis deposition and the other related to the Nate Deal memorandum which was subject to a clawback request.
- The Plaintiffs served requests to admit that mirrored the statements made in privileged Nate Deal memorandum that was the subject of a clawback request. This was impermissible under the provisions of the Court's Confidentiality Order because the Plaintiffs were making use of a document subject to a clawback request.
- The Plaintiffs filed several motions and briefs in an effort to have the Court waive the Defendants' right to maintain the confidentiality of thousands of documents, including documents with customer information.
- The Plaintiffs prosecuted claims against Anthony Mahfood and Ross Walters for over two years, then shortly before trial dropped them from the case.

This list is not exclusive, and there are likely many other examples of unproductive litigation steps taken during the case and for which fees should not be awarded. Only after a review of detailed billing records can the Court and the Defendants perform a complete analysis.

F. Mr. Maybank Is Barred from Again Seeking to Recover Fees Relating to the Jurisdictional Proceedings in Federal Court Because that Fee Request Has Already Been Denied.

Another category of fees and costs which Mr. Maybank cannot recover are those fees and costs related to the jurisdictional proceedings in federal court. During 2012, this action was removed to federal court on the basis that the nondiverse defendants, Anthony Mahfood and Ross Walters, had been fraudulently joined. After many months in federal court and after a motion to remand and extensive briefing, Judge Michelle Childs made the decision to remand the case back to the Greenville County Court of Common Pleas, noting the presence of novel legal issues. This case was litigated and tried in state court, and, just before trial began, Mr. Maybank dropped the nondiverse Defendants from the case.

In his motion to remand, Mr. Maybank requested an award of fees and costs under 28 U.S.C. § 1447(c), arguing that there was no objectively reasonable basis for seeking removal. Judge Childs denied this request. (8/3/12 Childs Order at 12-13) [Exh. "A"]. Mr. Maybank then filed a motion asking Judge Childs to reconsider her decision. With that motion, Mr. Maybank submitted affidavits from himself and his counsel indicating that attorneys' fees and costs in the amount of $65,338.13 had been incurred with respect to seeking remand and making the fee request. (8/31/12 Willoughby Aff. ¶ 6; 8/31/12 Maybank Aff. ¶ 8) [Exhs. "B" and "C"]. By order dated August 20, 2013, Judge Childs denied the request to reconsider, rejecting in its entirety Mr. Maybank's request for an award of fees and costs. (8/20/13 Childs Order) [Exh.

"D"]. Mr. Maybank did not appeal any of the federal court orders.[2] The rulings of Judge Childs thus became the law of the case and have *res judicata* effect. Mr. Maybank cannot now relitigate his entitlement to those fees and costs, and they should be deducted from any fee award by this Court.

The decision in *Houden v. Todd*, 324 P.3d 1157 (Mont. 2014), illustrates how federal court proceedings addressing fee requests under 28 U.S.C. ¶ 1447(c) act to bar further consideration of the issue by the state court. In *Houden*, the plaintiffs successfully obtained the remand of the action to state court, though they were successful only in recovering about $21,000 of the $56,000 they requested under § 1447(c). *Id.* at 1165. Following a favorable jury verdict, the plaintiffs requested attorneys' fees, including a request for the additional $35,000 incurred during the jurisdictional proceedings and which had previously been denied by the federal court. *Id.* The trial court granted the plaintiffs' request for these fees. *Id.* On appeal, the Montana Supreme Court held that the inclusion of that amount in the fee award was an abuse of discretion. *Id.* at 1165-66. The Montana Supreme Court reasoned:

> The amount of reasonable attorneys' fees attributed to the improper removal already was adjudicated. Concerns of comity and judicial economy invoke the law of the case doctrine here. The law of the case doctrine is the practice of courts "generally to refuse to reopen what has been decided." A decision "made at one stage of litigation which is not appealed when the opportunity to do so exists, becomes the law of the case for the future course of that litigation . . . ." Contrary to the [trial court's] assertion, the

[2] While remand orders typically are not appealable, there is an exception for orders addressing requests for fee awards, including orders that remand and deny fee awards. *See Bauknight v. Monroe Cnty.*, 446 F.3d 1327, 1328 (11th Cir. 2006) (affirming denial of attorneys' fees under § 1447(c)); *Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 291 (5th Cir. 2000) (reviewing district court's denial of attorneys' fees under § 1447(c) and holding the denial to not be an abuse of discretion); *Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co.*, 940 F.2d 550, 555 (9th Cir. 1991) (affirming denial of attorneys' fee request under § 1447(c)).

> law of the case doctrine applies to coordinate courts, including between state and federal courts on removal and remand. The [plaintiffs] litigated their fee claim for improper removal and received the fees to which the federal court determined they were entitled under federal law for a federal proceeding.

Id. 1166 (citations omitted).

The same rationale is applicable here. Judge Childs has already considered and rejected twice Mr. Maybank's request for fees and costs related to the jurisdictional proceedings in federal court. Under either the law of the case doctrine or principles of *res judicata*, this Court should refuse to award those same fees and expenses. *See Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 334 S.C. 244, 245-46, 513 S.E.2d 96, 96-97 (1999) (per curiam) (holding that where the propriety of an attorney's withdrawal has been litigated and decided in prior federal antitrust suit and was not appealed, it is *res judicata* and cannot be re-litigated in suit against former counsel for legal malpractice); *Smith v. Volunteer State Life Ins. Co.*, 201 S.C. 291, 302, 22 S.E.2d 885, 889 (1942) (holding "judgment of the federal Court is entitled to the same conclusiveness as is accorded the judgment of a State tribunal.").

G. Mr. Maybank's Fee Request Is Unreasonable.

There are six factors for the trial court to consider when determining the reasonableness of a request for an award of attorneys' fees: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). While beneficial results are one of the factors considered by the Court, a beneficial result, standing alone, will not entitle a party to attorneys' fees if the remaining factors weigh against an award of fees. *See Gartside v. Gartside*, 383 S.C. 35, 47, 677 S.E.2d 621, 627 (Ct. App. 2009). Instead, the Court should give

equal weight to each factor because none alone are controlling. *See Allen v. Pinnacle Healthcare Sys., LLC*, 394 S.C. 268, 277, 715 S.E.2d 362, 367 (Ct. App. 2011). A review of these factors in this case compels the conclusion that the fee request of Mr. Maybank is not reasonable and should be rejected. Notably, the below review of factors is preliminary in light of the fact that Mr. Maybank has failed to submit adequate information providing the detail necessary for a proper analysis and determination.

1. The Nature, Extent, and Difficulty of the Case.

What was a straight forward case of alleged professional negligence was grossly distorted and made overly complicated. At its core, this was a case about whether a prepaid contract was one of the reasonable alternatives for Mr. Maybank to consider in August of 2006. Instead of litigating this issue, Mr. Maybank sought to bring in his trust as a plaintiff and seek $4 million in damages for the loss of life insurance policies that his children had decided to surrender. To the extent the Defendants fought tenaciously, it was only because of the overreaching attack in efforts to grow the claims far beyond the real issue regarding the suitability of the prepaid contract.

2. The Time Necessarily Devoted to the Case.

Without detailed billing records, the Defendants are prevented from meaningfully addressing the amount of time that Mr. Maybank's counsel spent on particular tasks or stages of the litigation, nor can their be any allocation of fees to those efforts which were unnecessary or which related to abandoned or unsuccessful claims. This factor will need to be revisited after adequate information is provided by Mr. Maybank. However, there were numerous parts of the case for which Mr. Maybank should not be permitted a fee recovery. Some of the general

categories of claims and areas of the case for which there should be no fee recovery are outlined above.

3. Professional Standing of Counsel.

A supporting affidavit touts Mr. Maybank's counsel as being experienced and competent in the area of investor litigation. (Freeman Aff. ¶ 32) ("unique skills in litigating investment-related cases"). Notably, Mr. Maybank did not prevail on his claim based on the South Carolina Securities Act, one of the most common claims that an investor would assert. This factor does not weigh in favor of a fee award any more than it would with counsel who had no expertise in investor related litigation.

4. Contingency of Compensation.

Mr. Maybank's counsel was not exposed to the high risk of a pure contingency fee arrangement. Instead, that risk was muted by a blended fee arrangement involving an hourly billing component. This factor weighs in favor of a reduction in the fee request. Because Mr. Maybank has failed to submit the details of his fee arrangement nor produced his fee agreement, a full assessment of this factor cannot be performed at this time.

5. Beneficial Results Obtained.

This factor weighs heavily in favor of a steep reduction in the fee request. Of the twenty-two claims asserted by both Plaintiffs, they prevailed on only five claims. Of the over $7 million in actual damages sought, Mr. Maybank was awarded $3.1 million. Because the Defendants' post trial motion for JNOV and new trial has not been decided, it is possible that Mr. Maybank may prevail on even fewer claims and perhaps no claims at all. It is also possible that the actual damages and punitive damages awards may be reduced or vacated in their entirety. As explained

above, there should be at a minimum a deduction from the fee request for any fees related to efforts to pursue the unsuccessful or abandoned claims.

6. Customary Legal Fees for Similar Services.

Mr. Maybank has failed to provide any meaningful data that would show the customary legal fees for similar services. No information about the prevailing market rates in either Columbia or Greenville, South Carolina were provided. Moreover, no comparison to the total fees and expenses incurred in similar litigation was provided. The cases identified in the Affidavit of Professor Freeman are greatly dissimilar and offer no guidance as to the proper level of fees and expenses that should be incurred in this type of litigation.

H. The Court Should Reject Mr. Maybank's Attempt to Enhance the Fee Award Through the Use of a Lodestar Multiplier.

Mr. Maybank requests that a lodestar multiplier of 1.5 be used to enhance his fee request. He cites to the decision in *Layman v. South Carolina*, 376 S.C. 434, 658 S.E.2d 320 (2008), as support for the application of the multiplier. The court in *Layman*, however, made it clear that the multiplier was to be considered only when there were "exceptional circumstances." *Id.* at 460, 658 S.E.2d at 334. In *Layman*, those exceptional circumstances included obtaining a recovery of over $37 million on behalf of an entire class of plaintiffs and the termination of the further breach of contract by the State. *Id.* at 461, 658 S.E.2d at 334. Additionally, the entire case was litigated in the original jurisdiction of the South Carolina Supreme Court and was handled under an extraordinarily expedited schedule. Despite the enormous recovery obtained for the class, the court found that a fee of only $445,226 was reasonable. The court applied a lodestar multiplier of 1.25 because, without it, the fee would have been only $352,402. The court rejected the fee award of over $8 million set by a specially appointed circuit court judge.

The exceptional circumstances necessary to support the use of a lodestar multiplier cannot duplicate the factors already to be considered under *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). To do so would result in impermissible double counting. *See, e.g., City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) ("[A]n enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar."); *Black v. SettlePou, P.C.*, 732 F.3d 492, 502 (5th Cir. 2013) ("The lodestar may not be adjusted due to a *Johnson* factor that was already taken into account during the initial calculation of the lodestar."); *Millea v. Metro-N. R.R. Co.*, 658 F.3d 154, 167 (2d Cir. 2011) ("[A] court may not adjust the lodestar based on factors already included in the lodestar calculation itself because doing so effectively double-counts those factors."); *Anchondo v. Anderson, Crenshaw & Assocs., LLC*, 616 F.3d 1098, 1103 (10th Cir. 2010) (same).

Here, Mr. Maybank has failed to point to any purported exceptional circumstances that could support the use of a lodestar multiplier. His submission is replete with general conclusions about the difficulty of litigating the case, but that factor is already well subsumed by the number of hours to be taken into account in the base lodestar analysis. There is no aspect of this case not already taken into account in the six *Jackson* factors upon which the Court could rely to find exceptional circumstances justifying a lodestar multiplier. Accordingly, the Court should refuse to apply any lodestar multiplier to the fee request. *See, e.g., Dish Network Serv. L.L.C. v. Myers*, 87 So. 3d 72, 80 (Fla. Dist. Ct. App. 2012) (reversing multiplier under fee-shifting statute in light of United States Supreme Court precedent prohibiting contingency fee agreements as basis for enhancing lodestar award); *Covington v. McNeese State Univ.*, 118 So. 3d 343, 353 (La. 2013) (affirming trial court's denial of multiplier in suit under Americans with Disabilities Act because of lack of "rare and exceptional circumstances" sufficient to overcome "strong presumption" that

pre-multiplier figure is reasonable); *Williams-Pyro, Inc. v. Barbour*, 408 S.W.3d 467, 484 (Tex. App. 2013) ("Likewise, we do not find any indication that Barbour's counsel ever identified which factors supported the use of a multiplier, separate and distinct from those use to calculate the base lodestar."); *Era Aviation, Inc. v. Lindfors*, 17 P.3d 40, 51 (Alaska 2000) (affirming denial of enhancement in gender discrimination case because plaintiff's counsel failed to produce evidence of exceptional circumstances establishing a strong public interest involved, or that they would receive no compensation other than the fees granted by the court); *Kadish v. Arizona State Land Dep't*, 177 Ariz. 322, 333, 868 P.2d 335, 346 (Ct. App. 1993) (affirming denial of multiplier in constitutional attack to state statute on the basis that enhancing the fee would duplicate factors subsumed in the lodestar calculation because of the contingent nature of the attorneys' agreement with the client); *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 624 (Minn. 2008) ("[B]ecause the results obtained, the complexity of the litigation, and the duration of the litigation should be fully reflected in the lodestar amount, these factors should not be used again in determining whether a multiplier is warranted.").

I. Mr. Maybank's Requests for Expert Fees and Other Costs Is Unreasonable and Should Be Reduced.

Mr. Maybank seeks an award of cost totaling $306,264.10. This amount is unreasonable and deductions are required. "Circumstances justifying denial of costs to the prevailing party or the assessment of partial costs against him may exist where the amount of taxable costs actually expended were unnecessarily or unreasonably large; or, where the judgment recovered was insignificant in comparison to the amount actually sought." 10 Wright & Miller, *Federal Practice and Procedure* § 2668 (3d ed. 2006). "The same considerations that apply to awarding attorney's fees also apply to awarding litigation expenses." *Reed v. Pieper*, 393 S.C. 424, 436, 713 S.E.2d 309, 316 (Ct. App. 2011). While UTPA allows a party to recover "reasonable

attorney's fees and costs", S.C. Code Ann. § 39-5-140(a), the courts of South Carolina strictly construe statutes when awarding costs. As stated in *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 422 S.E.2d 128 (1992), "costs have always been regarded in this state as in the nature of penalties; hence statutes allowing them are strictly construed[.]" Id. at 318, 422 S.E.2d at 131

Mr. Maybank has failed to point to any statutory authority allowing him to recover the fees of his expert witnesses. Unless specifically authorized by statute, expert witness fees are not a recoverable cost. Nothing in the UTPA mentions expert witness fees as being an element of a fee and cost recovery. The South Carolina Supreme Court stated in *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 422 S.E.2d 128 (1992), "Fees for expert witnesses, beyond the ordinary fees authorized for witnesses generally, are not taxable as costs unless there is a statute specifically allowing such an expense." *Id.* at 132, 422 S.E.2d at 319. The court reversed the trial court's award of expert fees, noting that the only costs that could be recovered with respect to experts were those allowed by Rule 45 of the South Carolina Rules of Civil Procedure ($25.00 per day plus mileage). Citing to Oliver, the South Carolina Court of Appeals has similarly held that litigants cannot recover expert fees absence specific statutory authority. *Black v. Roche Biomedical Labs.*, 315 S.C. 223, 230, 433 S.E.2d 21, 25 (Ct. App. 1993) ("Rule 45(g) limits witness fees to $25.00. No exception is made for expert witnesses. Because statutes permitting the recovery of costs must be strictly construed, the trial court did not abuse its discretion in refusing to award the costs related to Frank's expert witnesses.") (citation omitted).

Here, the UTPA does not provide for the recovery of expert fees. Accordingly, that part of Mr. Maybank's request must be denied. Notably, even if the UTPA did permit such costs, much of the expert fee request relates to unsuccessful claims or unnecessary litigation and are

therefore not recoverable. Mr. Maybank recognizes this when he states that he is not including any fees of Scott Brawley. But this would also be true for, among other things, the fees of Professor Freeman relating to NYSE Rule 312 and his analysis of whether BB&T Asset Management was acting as an unregistered broker dealer as well as Oliver Wood's analysis of financial matters that were never admissible under South Carolina case law limiting financial information of a defendant to net worth.

Mr. Maybank also seeks $62,220.85 in witness deposition transcripts and videotape versions of same. Although § 15-37-40 permits "the reasonable compensation of commissioners in taking depositions," the "exact application of this language to modern discovery depositions in civil litigation remains uncertain." 7 S.C. Jur. *Costs* § 31. Other jurisdictions have held that courts may decline to tax the costs of depositions where those depositions are unnecessary or are not used at trial. 20 C.J.S. *Costs* § 113 ("The expense of taking depositions may be allowed by some courts as an item of costs unless it appears that the depositions were unnecessary"); 20 Am. Jur. 2d *Costs* § 50 ("Depositions, whether taken for the proof or the defense of a claim, or for discovery purposes, are taxable as costs only if they are used at the trial in a meaningful way . . . ."); *see also Dixon, Odom & Co. v. Sledge,* 59 N.C. App. 280, 286, 296 S.E.2d 512, 516 (1982) ("As a general rule, recoverable costs may include deposition expenses unless it appears that the depositions were unnecessary"). This is especially true for video depositions because they tend to be more costly than traditional depositions. *See Cherry v. Champion Int'l Corp.*, 186 F.3d 442, 449 (4th Cir. 1999) (affirming trial court's rejection of request for videotaped deposition costs where transcription costs were already awarded).

"[C]osts 'have always been regarded in this state as in the nature of penalties; hence statutes allowing them are strictly construed, and the party who claims the right to tax them

against another must be able to point to some statute which allows him to do so.'" *Oliver*, 309 S.C. at 318, 422 S.E.2d at 131. Accordingly, the Court should take a restrictive view of the recoverability of the expenses of depositions and disallow any costs related to (a) unnecessary depositions, (b) depositions taken to support unsuccessful or abandoned claims, or (c) depositions that were not used at trial in a meaningful way. By way of example, even though Mr. Maybank did not initiate the deposition, he should not be awarded the expense of his copy of the deposition transcripts for Tracy Meyers (because the Securities Act claim failed) or Tom Miller (because it was not used during trial).

As for any other costs which Mr. Maybank seeks, he must come forward with specific statutory authority allowing those costs. He has failed to do so, and, accordingly, those other costs should be denied. See *Black v. Roche Biomedical Labs.*, 315 S.C. 223, 230, 433 S.E.2d 21, 26 (Ct. App. 1993) ("As to the additional costs in excess of $10,000.00 that Frank claims as reimbursement for travel, lodging, car rentals, meals, parking, mailings, telephone calls, publications, and mileage, he did not bring to the trial court's, and has not brought to this court's attention, a rule of court or statute that authorizes these reimbursements. We therefore affirm the trial court's denial of these costs.").

J. The Wealth Management Agreement Limits Mr. Maybank's Recovery.

As explained in depth in the Defendants' memorandum in support of its motion for JNOV and new trial, Paragraph F.1. of the Wealth Management Agreement limits the recovery of Mr. Maybank in this action to only his losses attributable to the negligence or willful misconduct of the Defendants. Attorneys' fees and costs are not included within that provision of the contract and are therefore barred.

III. CONCLUSION

Based on the foregoing reasons, the Defendants respectfully request that the Court deny the request of Mr. Maybank for an award of attorneys' fees and costs.

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Greenville, South Carolina

August 15, 2014

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified via electronic mail and by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Pleadings:

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR AN ORDER AWARDING ATTORNEYS' FEES AND COSTS

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 AUG 15 PM 3 54

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Exhibit A

8/3/12 Order

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

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

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

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

FACTUAL AND PROCEDURAL BACKGROUND

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

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

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

LEGAL STANDARD

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

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

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

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

DISCUSSION

Fraudulent Joinder of Walters and Mahfood

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

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

A. Breach of Fiduciary Duty

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

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

[1] Defendants do not argue that Maybank committed any fraud in pleading any jurisdictional facts concerning Walters and Mahfood.

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

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

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

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

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

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

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

B. South Carolina Uniform Securities Act

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

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

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

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

S.C. Code Ann. § 35-1-509(b).

Section 509(f) provides that

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

S.C. Code Ann. § 35-1-509(f).

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

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

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

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

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

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

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

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

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

Plaintiff's Motion for Costs and Expenses

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

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

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

Martin, 546 U.S. at 140.

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

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

CONCLUSION

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

IT IS SO ORDERED.

J. Michelle Childs

United States District Judge

August 3, 2012
Greenville, South Carolina

Exhibit B

8/31/12 Willoughby Affidavit

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

FRANCIS P. MAYBANK, Plaintiff, v. BB&T CORPORATION, BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, STERLING CAPITAL MANAGEMENT, LLC, Successor in merger to BB&T ASSET MANAGEMENT LLC, ROSS WALTERS, and ANTHONY MAHFOOD, Defendants,	No. 6:12-cv-00214-JMC **AFFIDAVIT OF MITCHELL WILLOUGHBY**

PERSONALLY APPEARED BEFORE ME, Mitchell Willoughby, who first being duly sworn, deposes and states as follows:

1. I am over 18 years of age, and I am qualified and competent to make this affidavit.

2. I make this affidavit based upon my personal knowledge, except as to those matters stated upon information and belief and, as to those matters, I believe them to be true.

3. I am a shareholder in the law firm of Willoughby & Hoefer, PA and an attorney of record in this case for Plaintiff Francis P. Maybank.

4. The representation contained in Mr. Maybank's Affidavit dated August 31, 2012 accurately summarizes the fee arrangement we have with Mr. Maybank for legal services in this matter.

5. This firm has billed and received payment from Mr. Maybank pursuant to the fee arrangement for the legal services that it has provided in pursuing this matter, including those services rendered in obtaining the remand of this action to state court.

6. I and others under my supervision reviewed the firm's billing statements to Mr. Maybank. I represent that the attorneys' fees billed to and paid by Mr. Maybank to date for this firm's work related to seeking remand of BB&T's removal action, including Mr. Maybank's request for costs and attorneys' fees, is $57,078.75. Additionally, the amount of $8,259.38 in attorneys' fees have been devoted to preparing Mr. Maybank's Motion to Alter or Amend that portion of the Court's Order on Remand denying his request for cost and attorneys' fees, which amount will be billed to Mr. Maybank for payment. In sum, the total amount of at least $65,338.13 in attorneys' fees have been incurred by Mr. Maybank directly related to the meritless removal of his case by the corporate Defendants.

FURTHER AFFIANT SAYETH NOT.

Mitchell Willoughby

Mitchell Willoughby

SWORN TO AND SUBSCRIBED BEFORE ME
This 31th day of August, 2012.

Cathy D Caldwell

Notary Public for the State of South Carolina
My Commission Expires: 1/28/2015

Exhibit C

8/31/12 Maybank Affidavit

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

FRANCIS P. MAYBANK, Plaintiff, v. BB&T CORPORATION, BRANCH BANKING AND TRUST COMPANY, Successor in merger to BRANCH BANKING AND TRUST COMPANY OF SC, STERLING CAPITAL MANAGEMENT, LLC, Successor in merger to BB&T ASSET MANAGEMENT LLC, ROSS WALTERS, and ANTHONY MAHFOOD, Defendants,	No. 6:12-cv-00214-JMC **AFFIDAVIT OF FRANCIS P. MAYBANK**

PERSONALLY APPEARED BEFORE ME, Francis P. Maybank, who first being duly sworn, deposes and states as follows:

1. I am over 18 years of age, and I am qualified and competent to make this affidavit.

2. I make this affidavit based upon my personal knowledge, except as to those matters stated upon information and belief and, as to those matters, I believe them to be true.

3. I am the plaintiff in this action filed against BB&T Corporation, Branch Banking and Trust Company, Sterling Capital Management, LLC, (collectively, "BB&T"), Ross Walters and Anthony Mahfood (BB&T, Walters and Mahfood are collectively referred to as "Defendants").

4. In 2011, I secured the legal services of the law firm of Willoughby & Hoefer, P.A., to pursue claims against the Defendants as set forth in the complaints filed in this case.

5. Under our agreement, the Willoughby & Hoefer law firm provides legal services to me [redacted]

6. I have been billed by Willoughby & Hoefer for all legal services provided to me through July 31, 2012.

7. I have paid Willoughby & Hoefer, in full, for all legal services billed to date.

8. Under this fee arrangement, I have incurred and paid $57,078.75 in legal fees and costs as a result of defendants' improper removal. This sum was calculated based on the firm's review of its billing statements for work performed in connection with the motion to remand and related motion for costs and attorneys' fees. This amount does not include any time devoted by my lawyers to the amended complaint or discovery matters. Further, my law firm advises me that I have incurred additional charges of $8,259.38 devoted to the Motion to Alter or Amend, for a total cost to me of $65,338.13 as a result of BB&T's removal of this case to federal court.

9. I understand that my counsel explained to defense counsel that my BB&T wealth managers and advisors had been joined as individual defendants because they were key developers of the failed strategy that harmed me. As a result of BB&T's decision to

remove this case despite this forewarning, this litigation has been significantly delayed and my costs substantially increased, all to my great harm, detriment, and prejudice.

FURTHER AFFIANT SAYETH NOT.

Francis P. Maybank

SWORN TO AND SUBSCRIBED BEFORE ME
This 31st day of August, 2012.

Notary Public for the State of South Carolina
My Commission Expires: 1/28/2015

Exhibit D

8/20/13 Order

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

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

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

PROCEDURAL BACKGROUND

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

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

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

STANDARD

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

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

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

DISCUSSION

Clear Error of Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Manifest Injustice

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

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

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

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

New Evidence

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

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

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

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

[4] Borello was not employed by BB&T at the time of the relevant events in this case.

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

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

Section 35-1-509(f) provides:

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

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

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

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

such violation was possible under the statute since neither Walters nor Mahfood gave investment advice or received compensation for it.[6]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

IT IS SO ORDERED.

J. Michelle Childs

United States District Judge

August 20, 2013
Greenville, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)))	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT
FRANCIS P. MAYBANK and JANE H.P. MAYBANK, as TRUSTEE for the FRANCIS P. MAYBANK FAMILY INSURANCE TRUST, Plaintiff, 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-23-8578 **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S REQUEST FOR TREBLE DAMAGES**

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GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 AUG 15 PM 3 55

The Defendants, BB&T Corporation, Branch Banking and Trust Company, and Sterling Capital Management, LLC (collectively "the Defendants"), hereby submit their memorandum in opposition to the motion of the Plaintiff, Frank Maybank, requesting the trebling of damages under the South Carolina Unfair Trade Practices Act ("UTPA").

I. INTRODUCTION

Mr. Maybank has requested that the Court treble his award of actual damages pursuant to § 39-5-140(a) of the UTPA. As an initial matter, this request should be denied because the activities and conduct in this case fall within the securities exemption to the UTPA. At a minimum, the Court should defer consideration of the motion to treble damages until after it has ruled on the motion of the Defendants for JNOV and new trial. Moreover, trebling is not warranted in this case because the alleged conduct of the Defendants was not a "willful or

knowing violation" of the UTPA. This is a determination to be made by the Court separate and apart from any findings of the jury in this case. For these reasons, discussed more fully below, Mr. Maybank's motion should be denied.

II. ARGUEMENT

A. An Award of Treble Damages Is Not Permitted Because the UTPA Claim Falls Within the Securities Exemption.

Mr. Maybank's request for treble damages is dependent on his succeeding on his UTPA claim. South Carolina law, however, is well established that securities related transactions cannot be the subject of a UTPA claim. *See Ward v. Dick Dyer & Assocs., Inc.*, 304 S.C. 152, 155 n.1, 403 S.E.2d 310, 312 n.1 (1991) ("[W]e choose to follow the vast majority of jurisdictions in holding that securities transactions remain exempt from claims under the UTPA."). As explained more fully in the Defendants' memorandum in support of its post trial motion, the Court should grant JNOV in favor of the Defendants as to the UTPA claim. Doing so would require the denial of Mr. Maybank's request for treble damages.

B. The Alleged Conduct of the Defendants Does Not Constitute a "Willful or Knowing Violation" of the UTPA, Which Is a Necessary Finding by the Court Before Damages Can Be Trebled.

The damages award should not be trebled because the Defendants' alleged conduct does not constitute a "willful or knowing violation" of the UTPA. Treble damages are an extreme and highly punitive form of relief, and are therefore available for a UTPA violation only if the court first determines that the alleged violation was "willful or knowing." *See* S.C. Code Ann. § 39-5-140(a) (noting treble damages are available "[i]f the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of § 39-5-20"). This is a determination to be made by the Court, not the jury. The statute states clearly that treble damages can be award only if "the court finds" willfulness. *Id.*

The UTPA defines a "willful" violation as one in which the party knew or should have know the act violated that statute. *Id.* § 39-5-140(d) ("[A] willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of § 39-5-20."); *see also* 28 S.C. Jur. Unfair Trade Practices Act § 10 ("Under the UTPA, conduct is willful where a party should have known that his or her conduct violates the UTPA.") (citing *State ex rel. Medlock v. Nest Egg Soc. Today, Inc.*, 290 S.C. 124, 348 S.E.2d 381 (Ct. App. 1986)).[1]

Applying the standards in § 39-5-140, it is not enough for a plaintiff to show that the defendant was intentionally unfair or deceptive. Rather, a plaintiff must show the defendant knew the alleged deception *violated the UTPA*. Here, the record is devoid of any evidence that the Defendants' knew or should have known that their conduct was violative of the UTPA. As noted above and in the Defendants' post trial motion, South Carolina's courts have held that the UTPA does not apply to securities related transactions. Accordingly, the Defendants would have had no expectation that the UTPA would apply to Mr. Maybank's prepaid transactions or to his managed portfolio account, all of which involves securities. At the time the Defendants were working with Mr. Maybank back in the 2006 to 2010 timeframe, they could have had no reasonable way of anticipating that a court four years later would apply the UTPA to Mr. Maybank's situation. Accordingly, the Defendants could not have had a belief that any of their conduct with respect to Mr. Maybank's securities transactions could have been violating the UTPA.

Due to the extreme nature of an award of treble damages, courts should apply a high threshold for the required determination of willfulness under § 39-5-140(a). To give meaning to

[1] Copies of cited provisions of treatises and unpublished cases are attached as Exhibit A.

the phrase "willful or knowing," the Court must find the presence of conduct different from and more egregious than the mere conduct necessary for a finding of "unfair or deceptive acts or practices" under § 39-5-20(a). For purposes of the UTPA, "[a]n act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive." *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013). "An act is 'deceptive' when it has a tendency to deceive." *Id.* Accordingly, alleged activities and conduct on the part of the Defendants which would qualify under the above definitions would not necessarily support an award of treble damages. Indeed, South Carolina courts routinely refuse to award treble damages under the UTPA even after a finding that there has been unfair or deceptive conduct. *See, e.g., 4 Amigos, LLC v. Carolina Bueno, LLC*, No. 0:10-0112, 2011 WL 704542 (D.S.C. May. 20, 2011) (declining to treble UTPA damages); *Collins Holding Corp. v. Defibaugh*, 573 S.C. 446, 646 S.E.2d 147 (Ct. App. 2007) (noting that trial court found a UTPA violation but refused to treble the damages); *Fanczi Screw Co. v. Orix Fin. Servs.*, No. 6:02-198, 2005 WL 5679739, *3 (D.S.C. July 26, 2005) (noting that in prior ruling, the court had declined to treble the UTPA damages award); *Raco Car Wash Sys., Inc. v. Smith*, 730 F. Supp. 695, 706 (D.S.C. 1989) (ruling the plaintiff was entitled to judgment on its UTPA claim, but was not entitled to treble damages); *InMed Diagnostic Servs., LLC v. MedQuest Assocs., Inc.*, 358 S.C. 270, 594 S.E.2d 552 (Ct. App. 2004) (noting the trial court refused to treble the UTPA damages awarded by the jury); *Top Value Homes, Inc. v. Harden*, 319 S.C. 302, 307, 460 S.E.2d 427, 430 (Ct. App. 1995) (affirming trial court's refusal to award treble damages in the absence of evidence that the UTPA violation was willful and knowing); *Haley Nursery Co., Inc. v. Forrest*, 298 S.C. 520, 525, 381 S.E.2d 906, 909 (1989) (affirming trial court's refusal to treble damages awarded under the UTPA).

Although the Court must make an independent evaluation of willfulness, in the present case, the lack of an intent to violate the UTPA is supported by the findings of the jury, namely, the jury's refusal to find intentional conduct on the part of the Defendants. The jury rejected Mr. Maybank's claims of fraudulent misrepresentation and breach of contract accompanied by fraudulent act, but found in favor of Mr. Maybank on his claims for negligent misrepresentation and constructive fraud. The difference between the claims for which Mr. Maybank prevailed and for which he did not is *intent*. It is apparent that the jury did not find any intent to deceive Mr. Maybank because that is the one element that differs between fraud and constructive fraud. *See Armstrong v. Collins*, 366 S.C. 204, 219, 621 S.E.2d 368, 375 (Ct. App. 2005) ("To establish constructive fraud, all elements of actual fraud *except the element of intent* must be established. . . . Actual fraud is distinguished from constructive fraud by the presence or absence of the intent to deceive."). Similarly, the jury found in favor of Mr. Maybank on his claim for negligent misrepresentation but not on his claim for fraudulent misrepresentation, which would have required a finding of intent. *Compare Carolina Chloride, Inc. v. Richland Cnty.*, 394 S.C. 154, 164, 714 S.E.2d 869, 873 (2011) (noting that negligent misrepresentation involves merely "failing to exercise due care") *with Redwend Ltd. Partnership v. Edwards*, 354 S.C. 459, 473, 581 S.E.2d 496, 503-04 (Ct. App. 2003) (noting that fraudulent misrepresentation involves "knowledge of the falsity or a reckless disregard of its truth or falsity"). Also, even though the jury found for Mr. Maybank on the breach of contract claim, it refused to find for him on his claim for breach of contract accompanied by a fraudulent act, which requires a finding of intent to deceive. Accordingly, the jury's verdict on the claims of Mr. Maybank supports the conclusion that the evidence did not show any intent to deceive or otherwise harm Mr. Maybank.

This weighs heavily in favor of a finding that there is no willful conduct to support the trebling of damages.

Mr. Maybank is simply incorrect when he asserts that the jury's award of punitive damages means the jury "already determined Defendants' conduct to be willful and/or knowing." (Pl.'s Mot. for Treble Damages ¶ 10). It is well established that an award of punitive damages may be based on a finding of *reckless* conduct, which must necessarily be something less than willful conduct. *See Duncan v. Ford Motor Co.*, 385 S.C. 119, 137, 682 S.E.2d 877, 886 (Ct. App. 2009) ("Under South Carolina law, punitive damages may be awarded to punish tortfeasors who have acted in a 'reckless, willful, or wanton' manner."). Accordingly, the jury's award of punitive damages does not imply a finding that the Defendants intentionally violated the UTPA.

In his supporting brief, Mr. Maybank relies heavily on the alleged breach of the Wealth Management Agreement by the performance of certain obligations by BB&T Asset Management. This argument fails for numerous reasons. First, the mere breach of a contract, even if intentional, cannot support a UTPA claim and, therefore, cannot support the trebling of damages under the UTPA. *See D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 549, 730 S.E.2d 340, 351 (Ct. App. 2012) ("A mere breach of contract, without more, does not constitute a violation of the unfair trade practices act, even if done intentionally."). Second, the agreement allows the performance of the subject obligations to be performed by employees of other entities. Nothing in the agreement required that the obligations be performed only by employees of the Bank entity. Third, the evidence demonstrated that the subject obligations actually were performed. Fourth, Mr. Maybank was fully aware that Kris Kapoor was performing investment related functions under the agreement, and Mr. Kapoor had signed the agreement on behalf of BB&T Asset Management. Accordingly, Mr. Maybank knew an

employee of BB&T Asset Management was performing some of the obligations, and Mr. Maybank, after accepting that performance for years, waived any complaint he may have had. Finally, there is no evidence that the performance of any of the obligations by employees of BB&T Asset Management, as opposed to BB&T bank employees, caused any damages to Mr. Maybank.

In his brief, Mr. Maybank also relies on the August 11, 2006 memorandum from Anthony Mahfood to Pat Oliver. Mr. Maybank describes this memorandum as "an individualized assessment of his financial situation." (Pl.'s Brief at 5). This is an inaccurate characterization of the memorandum. As made clear by the evidence at trial, the purpose of the memorandum was to satisfy a requirement in the BB&T Code of Ethics which ensured that company employees were not engaged in speculative trading. Indeed, the memorandum was directed to Ms. Oliver, not Mr. Maybank. There was no evidence that anyone with BB&T made any direct representation to Mr. Maybank about the quality or thoroughness of assessments of his financial situation. The memorandum from Mr. Mahfood certainly cannot support a finding of willfulness when it was not even addressed to Mr. Maybank's attention.

Mr. Maybank offers no other arguments in support of his request to treble damages. Nor could he. The testimony from numerous current and former employees demonstrated that they believed that the prepaid transactions and the investments in the managed portfolio account where in Mr. Maybank's best interests. The good faith on the part of the Defendants was demonstrated by the fact that they discounted the fees charged to Mr. Maybank as well as the fact that they refused to participate in any additional rolls of the prepaid contract, even though more fees could have been generated. Moreover, Mr. Maybank was financially sophisticated, and was himself an employee and Senior Vice President of the Wealth Division of BB&T, and

was therefore familiar with the investing products and the policies of BB&T. Under these circumstances, the requisite showing of willfulness is not supported by the evidence. The Court should deny Mr. Maybank's motion to treble damages in this case.

C. The Actual Damages Verdict Includes Impermissible Damages Relating to the Managed Portfolio Account.

As explained in the Defendants' post trial motion requesting JNOV and a new trial (and supporting brief), the jury was improperly allowed to consider evidence relating to alleged managed portfolio damages. Such damages should never be permitted because they are mutually exclusive from and cannot coexist with damages related to the prepaid contracts. Accordingly, it would be improper to treble the full actual damages verdict of $3.1 million because that amount contains a component of damages that Mr. Maybank is not entitled to recover.

D. An Award of Treble Damages Is Barred by the Wealth Management Agreement.

As explained in detail in the Defendants' memorandum in support of its post trial motion, an award of punitive damages is barred by Paragraph F.1. in the Wealth Management Agreement, which express waives any right of Mr. Maybank to recover punitive damages. That provision likewise waives his right to seek statutory treble damages.

In the Wealth Management Agreement Mr. Maybank entered with BB&T and BB&T Asset Management on August 23, 2006, paragraph F.1 contains a provision limiting Mr. Maybank to the recovery of actual damages and prohibiting an award of special or punitive damages:

> F. Limitation of Liability and Indemnification. Client agrees:
>
> 1. Bank and Investment Advisor shall not be liable with respect to their services under this Agreement except for any loss attributable to their negligence or willful misconduct. *In no event shall Bank or Investment Advisor be liable for any incidental, indirect, special, consequential or punitive damages.*

(Wealth Mgmt. Agr. at 5) (emphasis added) [Agreed Exh. 14]. This contractual waiver bars Mr. Maybank from recovering treble damages, which are a type of punitive or penal damages. *See Smith v. Strickland*, 314 S.C. 192, 197, 442 S.E.2d 207, 210 (Ct. App. 1994) (noting that treble damages are "punitive in nature") (citations omitted); *see also Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000) (holding that the federal False Claims Act's treble damages and penalties "are essentially punitive in nature"); *Austin v. United States*, 509 U.S. 602, 609-610 (1993) ("'[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment.'") (citation omitted).

The jury awarded actual damages sufficient to compensate Mr. Maybank for his injuries, and the trebling of damages is therefore punitive in nature. When a plaintiff is contractually limited to specific damages and has waived the right to punitive damages, the contractual provision waives the ability to recover both punitive and treble damages. *See Liss v. Exel Transp. Servs.*, 2007 WL 1040691 (D. Ariz. April 3, 2007).

III. CONCLUSION

Based on the foregoing reasons, the Defendants respectfully request that the Court deny the motion of Mr. Maybank requesting an award of treble damages under the UTPA.

SIGNATURE PAGE ATTACHED

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Attorneys for Defendants BB&T Corporation, Branch Banking and Trust Company, and Sterling Capital Management, LLC

Greenville, South Carolina

August 15, 2014

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified via electronic mail and by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Pleadings:

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S REQUEST FOR TREBLE DAMAGES

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August 15, 2014

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,	) Civil Action No. 2011-CP-23-8578
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	) **FRANCIS P. MAYBANK'S RESPONSE TO DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL ABSOLUTE, OR, IN THE ALTERNATIVE, FOR NEW TRIAL *NISI REMITTITUR***
Defendants.	)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 AUG 19 AM 9 07

Plaintiff Francis P. Maybank opposes the Motion for Judgment Notwithstanding the Verdict, New Trial Absolute, or, in the alternative, New Trial *Nisi Remittitur* filed by Defendants. Defendants seek relief from the Jury's verdict based on the same arguments the Court has considered and rejected two or, in some cases, three times. Because the Jury's verdict is fully supported by and consistent with the evidence presented at trial, Mr. Maybank respectfully requests the Court affirm the findings of the Jury; confirm the award of punitive damages pursuant to the governing case law; enter an award of treble damages based on a finding of willfulness; award attorneys' fees and costs under the South Carolina Unfair Trade

Practices Act ("SCUTPA" or "Act"); and enter prejudgment interest in the amounts requested in his motions dated July 10, 2014.

ARGUMENT

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants' motion should be denied because the evidence supports the Jury's verdict in favor of Mr. Maybank on the causes of action of breach of contract, breach of fiduciary duty, constructive fraud, negligent misrepresentation, and a violation of the SCUTPA.

JNOV STANDARD

In ruling on a motion for Judgment Notwithstanding the Verdict ("JNOV"), the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. *RTF Management Co., LLC v. Tinsely & Adams LLP*, 399 S.C. 322, 732 S.E.2d 166 (2012); *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "A motion for a judgment notwithstanding the verdict is a renewal of the directed verdict motion and cannot raise grounds beyond those raised in the directed verdict." *Roland v. Palmetto Hills*, 308 S.C. 283, 286, 417 S.E.2d 626, 628 (Ct. App. 1992); *see also, e.g., In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001); *Gov't Emps. Ins. Co. v. Mackey*, 260 S.C. 306, 195 S.E.2d 830 (1973); *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006). A JNOV motion "should be denied where either the evidence yields more than one inference or its inference is in doubt." *McMillan*, 367 S.C. at 564, 626 S.E.2d at 886. Moreover, "[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). "In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight. When considering a JNOV, neither an appellate court, nor the trial court has

authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (citation omitted). "[An] issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror." *Parrish v. Allison*, 376 S.C. 308, 319-20, 656 S.E.2d 382, 388 (Ct. App. 2007).

I. South Carolina Unfair Trade Practices Act

A. *The exemption discussed in* Ward *is limited to public offerings and sales of securities and the general activity test is no longer good law.*

As demonstrated by the lack of evidence in the record and the dearth of analysis in their motion, Defendants' argument is that all of BB&T's activities are exempt from the Act because securities are generally regulated and the VPFC is a security. Again, Defendants are not entitled to an exemption because they have never proved that the VPFC is a security. Moreover, their securities-based argument is based upon the general activity test rejected by the Supreme Court:

> After much research and consideration of the events concerning the regulation of businesses during the past ten years since the *Rhoades* decision, we believe that a "general activity" test would not fulfill the intent of the Legislature in prohibiting unfair trade practices. We believe that the exemption is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes.

Ward v. Dick Dyer, 304 S.C. 152, 155, 403 S.E.2d 310, 312 (1991).[1] Thus, the exemption "exclude[s] 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*). As demonstrated by the rejection of the general activity test, the exemption does not have the broad application ascribed to it by Defendants.

[1] *Ward* involved an exemption to the SCUTPA, 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) that the general activity test applied in determining whether an exemption applied.

Defendants' actions were not regulated under any federal or state securities acts because none of them—certainly not the bank or the corporation—were registered as a broker-dealer. Defendants argue that because they were Mr. Maybank's fiduciary investment advisor and purchased stocks on his account, each and every interaction, misrepresentation, and deception that Defendants used to mislead Mr. Maybank should be viewed as occupying the general activity and relationship to securities transactions. *See* Motion at 8, Item (3)(a) (arguing for applying exemption to "investments and transactions ... are either securities themselves or are intimately *related* to securities transactions"). Defendants' actions in presenting and sending contracts and letters to its clients—especially false and misleading ones—are not allowed or authorized by the Securities Act or any other regulatory body, so those actions do not fall under an exemption to the SCUTPA. *Taylor*. 324 S.C. at 218, 479 S.E.2d at 44 ("[The defendant]'s" conduct which is alleged to violate the UTPA is neither an action nor a transaction which is specifically authorized by a regulatory agency. Accordingly, [defendant] is not exempt from the UTPA."); *see also Beattie v. Nations Credit Fin. Servs. Corp.*, 65 F. App'x 893, 895-96 (4th Cir. 2003) ("There is no indication that a statute or agency regulation requires or permits Nations Credit to pursue collection and foreclosure activities on accounts purportedly satisfied by an LMS affidavit. Therefore, Nations Credit is not exempt from liability under the SCUTPA.").

Defendants' argument to apply the general activity test relies on a single footnote in *Ward*. But that footnote states that the initial public offering of securities—like those addressed in *Rhoades*—is exempt from the Act. Based on this plain language, especially when read in the context of the transactions at issue in *Rhoades*, the exemption applies to the initial public offering and the sale of securities under that offering, not to all securities transactions subsequent

to that initial offering.[2] *See McTeer v. Provident Life & Acc. Ins.*, 712 F. Supp. 512, 516 (D.S.C. 1989) ("In other words, [the South Carolina Supreme Court] considered [in *State v. Rhoades*] not whether the securities business in general is regulated but whether the challenged acts themselves are regulated."). Construing that footnote to exempt all subsequent securities transactions from the Act is inconsistent with *Ward's* rejection of the general activity test in *Rhoades*. It furthermore is inconsistent with the statutory language that the remedies in the Act are supplemental to other remedies. And it fails to acknowledge that, in this case, Defendants were not registered to sell securities and that the Jury found in their favor on the Securities Act cause of action.

Moreover, this contextual reading of the Court's reference to "securities transactions" fits within the plain language of the SCUTPA exemption. Because a person offering a security for sale must register and provide information about that security pursuant to a host of federal and state statutory and regulatory requirements, a transaction involving the registration, initial public offering, and sale of a security are subject to direct regulatory oversight under the Securities Act. Because almost every business is subject to regulation at some level, Defendants' theory would subsume the rule and would reinstitute the now rejected general activity test for determining the scope of an exemption. *See Ward*, 304 S.C. at 154-55, 403 S.E.2d at 311 ("If we were to accept this contention, however, the UTPA would be rendered without meaning. Almost every business is subject to some type of regulation."). Defendants' contention that the securities business in

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[2] *Ward*, 304 S.C. at 155 n.1, 403 S.E.2d at 312 n.1 ("We note that the sale of securities is a unique transaction. *Each public offering is subject to strict regulation and must comply with stringent requirements*. Very few, if any, other business transactions are subject to the strict scrutiny which is placed upon securities. Therefore, we choose to follow the vast majority of jurisdictions in holding that securities transactions remain exempt from claims under the UTPA.") (emphasis added).

general is highly regulated, is not dispositive of the exemption's application and must be rejected.

Finally, Defendants' argument that either BB&T Asset Management or BB&T Bank operate in regulated industries and thus are exempt from the SCUTPA should be rejected. Defendants' argument that BB&T Asset Management and BB&T Bank are regulated entities is improperly made for the first time in this motion for JNOV. *See* Motion at 9, Item (3)(d). Because Defendants did not move for a directed verdict on this ground, it is unpreserved for Defendants' motion for JNOV and should be summarily rejected. *Compare* June 23, 2014 Motion for Directed Verdict *with* July 7, 2014 Motion for JNOV; *see also In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001) (holding that only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion). Moreover, Defendants misrepresent the record and stipulated fact that the Court read to the Jury, *i.e.*, that during the time in question, neither BB&T Asset Management nor BB&T Bank were registered as a Broker Dealer with either the SEC or the State of South Carolina. Consequently, even under Defendants' theory of general regulation of the banking industry, Defendants' actions in conducting unlawful activities demonstrates that the purpose of a regulated activity exemption was not fulfilled in this case and no one was overseeing Defendants' actions.

B. ***Defendants are not entitled to claim an exemption from the SCUTPA because the claim was not based on the sale of a security to Mr. Maybank.***

The evidence presented to the Jury in support of Mr. Maybank's SCUTPA cause of action was supported by three separate and distinct theories, factual circumstances, and deceptive acts by Defendants, none of which involved the public offering, registration, or sale of a security. The Court also granted Mr. Maybank's motion to amend his pleadings and causes of action to conform to the evidence presented during trial. Thus, the claims considered and decided by the

jury are based on the evidence presented at trial and considered by the Jury with respect to these theories and circumstances. There is substantial evidence to support the Jury's verdict and only some of the more notable unfair and deceptive acts and practices are discussed here. In support of this response, Mr. Maybank respectfully would draw the Court's attention to the whole record.

The Act was violated by Defendants' admitted use of their form Wealth Management Agreement. They knew at the time they presented it to Mr. Maybank that BB&T Bank could not fulfill the duties and obligations in the contract as written. Not only did they have no intention of fulfilling the terms as written, BB&T Bank and its representatives were, in fact, restricted from fulfilling the duties and obligation which they contracted to perform as written. Notwithstanding the fact that Defendants knew of the errors contained in the contract, they presented the agreement to all Wealth Management customers during the period from at least 2006 until November of 2009 as a condition of their provision of fiduciary wealth management services to their clients. Most damaging, however, despite knowledge of the misrepresentations contained in the Wealth Management Agreement, Ross Walters, BB&T Bank's corporate representative in his Rule 30(b)(6) deposition, testified that Defendants did not provide Mr. Maybank, or any other customer, with notice that the Wealth Management Agreement would not be fulfilled as written.

Defendants also engaged in unfair and deceptive business practices in refunding to Mr. Maybank and approximately 130 other customers the transaction-based fees Defendants charged for their services. In refunding those fees, Defendants represented to Mr. Maybank and other customers that the refund was a result of an error caught by BB&T during a routine review of customer accounts. *See* Trial Exhibit 50. Not only that, Defendants represented to Mr. Maybank and other customers that they were under no obligation to refund the charged fees but were doing so as a reflection of their corporate values. *Id.* In other words, BB&T liked and misrepresented to

its customers that they were being good corporate citizens and fiduciaries when the truth behind those deceptive statements was something altogether different. In reality, the impetus for the fee refund was the criticism of BB&T Asset Management's fee practices by the Securities and Exchange Commission ("SEC") following the discovery of these practices during an SEC audit. By hiding the ball, BB&T's motivation was to mislead their customers regarding the refund and thereby hide the nature of their business practices. Were it not for this pending lawsuit and the revelations of the true reasons behind the fee refund which were revealed through discovery, Defendants' unfair and deceptive statements to Mr. Maybank and other customers would remain hidden from view and the rights of many customers would recede or disappear with the passage of time. Even more, the lie may lull most customers into without conducting a due diligence review of BB&T's representations.

Finally, evidence presented at trial showed other unfair and deceptive acts by Defendants which violate the SCUTPA. At the beginning of their fiduciary relationship, Defendants presented Mr. Maybank with what purported to be an individualized assessment of his financial situation. *See* Trial Exhibit 7 (August 11, 2006 General Counsel Approval Letter). However, unbeknownst to Mr. Maybank until the eve of this trial, that document was merely a "fill-in-the-blank" form letter purporting to assess the suitability of Variable Prepaid Forward Contracts (VPFC) for many clients *en masse*. *Cf.* Trial Exhibit 91 (February 2006 "Mr. Client" version of Approval Letter). Promising specialized or individualized treatment while actually providing only stock services has been found to constitute a SCUTPA violation. *See deBondt v. Carlton*

Motorcars, Inc., 342 S.C. 254, 270-71, 536 S.E.2d 399, 407 (Ct. App. 2000) (car dealer who promised special status to potential buyers while submitting only stock order).[3]

C. ***Perhaps in part because they have conveniently changed their position, Defendants never proved that the VPFC was a security.***

In defending Mr. Maybank's causes of action under the South Carolina Uniform Securities Act, Defendants were adamant that the Securities Act had no application to their activities because they were not involved in the sale of the VPFC to Mr. Maybank. *See* Defendants' 1st Motion for Summary Judgment, filed May 7, 2014. Now that a verdict was returned on the SCUTPA cause of action and not on the Securities Act cause of action, they assert that, "as matter of law, there is no question that the prepaid forward contracts that form the basis of Mr. Maybank's claims qualify as securities ...." This convenient change in position ignores the requirement in section 39-5-40 that "the burden of proving exemption from the provisions of this article shall be upon the person claiming the exemption." Thus, whether a VPFC is a security was a question of fact, left for the trier of fact. No evidence was produced by Defendants on this point except for a cross examination of their own expert witness, Mr. Thorne, who said that the VPFC was not a security. Further, Defendants did not take any steps to have the Jury answer that question; because it was their burden to prove an exemption and they failed to do so, their motion must be denied.

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[3] Defendants also assert arguments in support of their respective positions on the willfulness of Defendants' actions under the SCUTPA—related to trebling damages—and their assertion that Mr. Maybank should be forced to elect between remedies. *See* Motion at 18, ¶¶12-14. Neither of these arguments was advanced in support of Defendants' motion for a directed verdict and, thus, may not be used in the motion for JNOV. *See In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (holding that only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion). Moreover, Defendants offer no explanation or support for why the issues of willfulness under the SCUTPA or the election of remedies supports granting JNOV. To the extent a response is required, Mr. Maybank denies that either topic is a proper ground for JNOV and expressly incorporates by reference his motion for treble damages and his response opposing Defendants' motion to require election of remedies.

Defendants did not present any evidence during the trial that their actions were exempt under the SCUTPA. They also never argued that point to the jury. They certainly never proved that the VPFC is a security, a conclusion demonstrated by the complete lack of analysis of any evidence in the record to support their claim of exemption from SCUTPA. The only inquiry about the nature of the VPFC as a security came from Mr. Maybank's counsel, who asked Defendants' expert witness, Robert Thorne, whether a VPFC is a security. Mr. Thorne demurred, explaining that he had not been asked to provide expert testimony on the subject, even though he acknowledged that he had testified in his deposition that a VPFC is *not* a security. Defendants' citation to a single New York case which applied different securities laws, and without accompanying analysis, for the proposition that a VPFC is a security is insufficient to sustain Defendants' burden in proving an exemption. Therefore, there is nothing in the record that would support exempting Defendants from the SCUTPA.

II. BB&T Corporation

A. *The Court has and properly exercised jurisdiction over BB&T Corporation, as BB&T Corporation, through its Executive Secretary and General Counsel, expressly approved the sale of the VPFC and the failed investment strategy devised by BB&T and recommended to Mr. Maybank.*

This Court properly exercised personal jurisdiction over the Corporate entity, as clear evidence demonstrated that BB&T Corporation Executives specifically reviewed and approved the sale of the VPFC to and the failed investment strategy for Mr. Maybank. BB&T Corporation's participation in the actions forming the basis of this litigation are far more than just the mere exercise of jurisdiction over a parent by virtue of its ownership of a subsidiary's stock. "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). In turn, "[t]he Due Process Clause is satisfied for personal jurisdiction purposes if a defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,' by establishing sufficient 'minimum contacts' such that maintenance of the suit does not offend traditional notions of 'fair play and substantial justice.'" *Luberda*, 2014 WL 1315558 at *2 (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 475-76 (1985)). South Carolina courts summarize the minimum contacts or "power prong" as requiring that "the defendant directed his activities to residents of South Carolina and that the cause of action arises out of or relates to those activities." *Cribb v. Spatholt*, 382 S.C. 490, 499, 676 S.E.2d 714, 719 (Ct. App. 2009). Further, to evaluate the "fairness prong", "the court must consider the following factors: (1) the duration of the defendants' activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the State's interest in exercising jurisdiction." *Id.*

Here, BB&T Corporation directed its activities to this state and specifically to Mr. Maybank and the failed investment strategy. The very first document shown to the Jury in this case was a letter from Mr. Maybank's fiduciary Wealth Management Advisor, Anthony Mahfood, to BB&T Corporation Executive Vice President, Secretary and General Counsel, Patricia Oliver, requesting the Corporation's approval of the investment strategy devised and recommended to Mr. Maybank. *See* Trial Exhibit 7. BB&T Corporation, through its General Counsel Patricia Oliver, sanctioned the investment strategy recommended to Mr. Maybank, including a handwritten note with her signature in return to Mr. Mahfood stating that "[t]his approval by General Counsel is conditioned on Mr. Maybank not purchasing additional shares of BB&T Corporation with proceeds from the prepaid variable forward transaction."

Incredibly, Defendants maintain in their motion that BB&T Corporation was "a mere holding company for other BB&T entities, and none of its employees had any direct involvement with Mr. Maybank. Mr. Maybank failed to offer any evidence showing involvement by BB&T Corporation with the events at issue."[4] That statement is a clear misrepresentation of the facts and is directly belied by the General Counsel Approval Letter, *see* Trial Exhibit 7, and the Code of Conduct. In that letter to BB&T Corporation General Counsel Patricia Oliver, Mr. Mahfood stated that, "[f]or purposes of BB&T's Code of Ethics, please accept this memo as formal disclosure of the prepaid variable forward transaction we intend to execute with your approval." *Id.* He further represented that "[n]either we nor Mr. Maybank consider this transaction to be 'speculative' as outlined in BB&T's Code of Ethics." *Id.* In closing, Mr. Mahfood stated that, '[f]urthermore, we feel that this transaction allows Mr. Maybank to maintain long-term share ownership, in line with the values put forth in the Code of Ethics." *Id.* The General Counsel for BB&T Corporation, presumptively after her own independent determination and exercise of due diligence, approved the failed investment strategy on the same date, "contingent upon Mr. Maybank not purchasing additional shares of BB&T Corporation with proceeds from the prepaid variable forward transaction." *Id.* Far more than mere involvement, the General Counsel

[4] Defendants' continue to maintain that a parent is not liable for the activities of its subsidiaries, while ignoring the Corporation's own critical role in establishing duties to clients and customers of its subsidiaries generally and approving the VPFC strategy for Mr. Maybank specifically. As part of furthering and advancing its business activities, BB&T Corporation promulgated a Code of Ethics governing the activities of all of its subsidiaries. *See* Second Amended Complaint, Exhibit 2, BB&T Code of Ethics, § I ("The Code applies equally to all employees of BB&T and its subsidiaries."). The Code of Ethics required by federal law is intended to enhance the business operations of BB&T Corporation and its subsidiaries by ensuring that all of these entities "continue to earn our client's trust and response by always upholding the highest standards of ethical and professional conduct in all that we do." BB&T Corporation, through the Code of Ethics, encourages its employees to fulfill these standards and expectations of their clients by ensuring that BB&T representatives "must always put the client's interests ahead of [their] own and that of BB&T." Code of Ethics, § IV.C, ¶3 "Fiduciary Obligations."

Disclosure Approval demonstrates that the strategy devised and recommended to Mr. Maybank was reviewed and approved at the very highest levels of the Corporation.

In sum, Mr. Mahfood and Mr. Walters were required pursuant to the Code of Ethics to obtain approval of the investment strategy devised for Mr. Maybank and was required to make certain disclosures to BB&T Corporation as part of the Code of Ethics. In turn, BB&T Corporation was required to approve the investment strategy and, in fact, did so approve through its General Counsel. That this approval was more than just a perfunctory notification is evidenced by the requirement that the General Counsel sign the disclosure and, importantly, by the conditions placed on the approval by the General Counsel. The August 11, 2006 General Counsel Disclosure far exceeds the "existence of evidence" standard required to defeat a JNOV motion, fully demonstrating that BB&T Corporation was more than just a passive out-of-state corporation wholly removed from the activities of its subsidiaries; it was, instead, a full participant in the relationship between Mr. Maybank and all of the Defendants.[5]

[5] There is more. As evidenced by the condition on the General Counsel Disclosure, the extent of Mr. Maybank's holding of BB&T Corporation stock was a key element and term of his investment in the investment strategy. The entire investment with BB&T Corporation and its subsidiaries was in fact predicated on Mr. Maybank's prior holdings and ownership of BB&T Corporation stock. Thus, Mr. Maybank's continued ownership of BB&T Corporation stock was a fundamental element of the investment relationship that was authorized and approved by BB&T Corporation in the General Counsel Disclosure even though it was a conflict of interest for BB&T Corporation to make representations and give advice regarding its own stock. BB&T Corporation regularly paid dividends on its stock and, thus, paid dividends to Mr. Maybank, a South Carolina resident, as a part of the investment relationship that it approved and authorized. In short, BB&T Corporation knowingly and willingly authorized, approved, and facilitated an investment relationship with a South Carolina resident, part of which involved that resident's ownership of BB&T Corporation stock and his receipt of BB&T Corporation dividends. That alone is sufficient to establish BB&T Corporation's minimum contacts with South Carolina in this instance to support the Court's exercise of personal jurisdiction over that entity. *See 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"); *see also* S.C. Code Ann. § 36-2-803(A)(1), (7).

C. ***Defendants' claim regarding Mr. Maybank's punitive damages request during closing argument is both absurd and an outright misrepresentation of the argument made.***

Much of Defendants' argument for relief in this case hinges upon the wholly erroneous assertion that Mr. Maybank's counsel "expressly requested during closing argument that the jury award 1% of the $21 billion net worth of BB&T Corporation." *See* Motion at 3, 25, 33. The Court will recall that Dr. Wood testified as to the net worth of both BB&T Corporation and BB&T Bank during his direct examination. Dr. Wood's testimony demonstrated that BB&T Corporation serves as the parent company to BB&T Bank. Importantly, BB&T Corporation's net worth is comprised almost exclusively of the net worth of its subsidiary, BB&T Bank.[6] Because BB&T Corporation's stockholders' equity is comprised almost exclusively by its subsidiary BB&T Bank, reference to one is reference to either. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). At bottom, Defendants' contention is wholly beside the point because they neither dispute BB&T Bank's net worth nor argue that reference to it during the closing was improper.

Second, Defendants' contention that Mr. Maybank's counsel requested the Jury award 1% of BB&T Corporation's $21 billion net worth as an appropriate punitive damage in this case is just wrong.[7] Counsel referenced *basis points* in his closing, which derived from the discussion of basis points throughout the case in reference to the amount of fees charged Mr. Maybank by BB&T for their imprudent and risky investment advice. Counsel argued to the Jury that one way

[6] Dr. Wood's testimony showed that BB&T Bank's total net worth is $21.6 billion, while BB&T Corporation's net worth is $21.2 billion.

[7] It is important to note that 1% of $21 billion is $210 million. While Defendants' actions towards Mr. Maybank and other customers in this case was reprehensible and warranted the imposition of punitive damages. However, Mr. Maybank made no such request. Defendants' failure even to cite to the accurate testimony and argument presented to the Jury, provides the Court with an appropriate representation of the consideration these meritless motions are due. The award of $5 million is completely justified and supported by the record.

to arrive at an appropriate amount of punitive damages in this case—based on BB&T's use of basis points to charge Mr. Maybank for the inappropriate advice that it provided to him—would be to assess a damages amount equal to a small number of basis points of BB&T *Bank's* net worth. The figure requested by counsel on the record was $21 million, a far cry from the $210 million which Defendants falsely allege counsel requested of the Jury during the closing. Even if the request had been $210 million, the Jury's award of $5 million renders the request irrelevant. Defendants' failure to understand the argument actually made is not a basis for rejecting the Jury's verdict.

C. ***Regardless, Defendants' objections to the Court's jurisdiction over BB&T Corporation were waived based on the Corporation's participation in the litigation over the course of three years and a complete failure to pursue dismissal.***

Defendants' waived their right to seek dismissal of BB&T Corporation by failing to do so until a mere month before the scheduled trial and after the corporation meaningfully participated in the defense of the litigation for almost two and a half years. The defense of personal jurisdiction is a personal privilege that "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). Thus, unlike subject matter jurisdiction, which pertains to the court's power to hear a case, personal jurisdiction pertains to the litigant's convenience and can be waived. *Id.*; *see Eaddy v. Eaddy*, 283 S.C. 582, 584, 324 S.E.2d 70, 72 (1984) ("*In personam* jurisdiction may be waived ...."); *see also Ex parte Cannon*, 385 S.C. 643, 658, 685 S.E.2d 814, 822 (Ct. App. 2009) ("A defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to the lack of personal jurisdiction and by appearing to defend his case.") (internal quotation marks omitted). Because the defense of personal jurisdiction can be waived, "'[a] litigant [must] exercise great diligence in challenging personal jurisdiction.'"

Luberda v. ex rel. Luberda v. Purdue Frederick Corp., No. 4:13-cv-00897-RBH, 2014 WL 1315558, *1 n.1 (D.S.C. Mar. 28, 2014) (quoting 5 Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure*, § 1391). The South Carolina Rules of Civil Procedure make clear that the defense of lack of personal jurisdiction must be timely asserted. *See* Rule 12(b)(2), (h)(1), SCRCP.

BB&T Corporation did not seek dismissal from this case in either a diligent or timely manner. Although Rule 12(h) provides that failing to raise the defense of lack of personal jurisdiction in either a pre-answer motion or in an answer waives such defense, that rule 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) ("It does not follow, however, that a party's failure to satisfy those minimum steps [of Rule 12(h)(1)] constitutes the only circumstance under which the party will be deemed to have waived a defense."); *Hager v. Graham*, CIV.A. 5:05CV129, 2010 WL 753242, *1 (N.D.W. Va. Mar. 2, 2010) ("Rule 12(h), however, sets only the outer limits of waiver; it does not preclude waiver by implication.") (citation and internal quotation marks omitted). Simply articulating the defense of personal jurisdiction in an answer without promptly advancing it can result in a waiver or forfeiture of that defense. *Yeldell v. Tutt*, 913 F.2d 533, 539 (8th Cir. 1990) (defense of personal jurisdiction waived because, "[w]hile the [defendants] literally complied with Rule 12(h) by including the jurisdictional issue in their answer, they did not comply with the spirit of the rule, which is 'to expedite and simplify proceedings in the . . . [c]ourts.'"). Therefore, even if timely stated, the defense of personal jurisdiction is waived through extensive participation in litigation, which is precisely what occurred here. *See Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 62 (2d Cir. 1999) (holding that defendant forfeited defense of personal jurisdiction when it

"participated in pretrial proceedings but never moved to dismiss for lack of personal jurisdiction despite several clear opportunities to do so during the four-year interval after filing its answer").

BB&T Corporation made nothing more than a perfunctory defense under Rule 12(h), SCRCP, by stating in the Answer that it "reserves its objection based on the Court's lack of *in personam* jurisdiction," *See* Ans. First Am. Compl. p.1. Since that time, Defendants have fully participated in litigating this case, while taking no further steps to advance their objection or otherwise move for dismissal from the action. *See Datskow v. Teledyne, Inc., Continental Products Div.*, 899 F.2d 1298, 1303 (2d Cir. 1990) (defendant's attendance at conference with magistrate, participation in scheduling discovery, and motion practice waived lack of personal jurisdiction defense, based on defective service, even where defense was asserted in timely answer). Most notably, BB&T Corporation and the other Defendants initially removed this case to federal court, during which time BB&T Corporation answered the First Amended Complaint, filed its corporate disclosure, opposed remand, and opposed Plaintiffs' motion for attorneys' fees. Not once during this time, though, did BB&T Corporation advance its claim that the Court lacked personal jurisdiction over it, either in federal court or—at what would seem to have been an opportune moment—upon remand to state court on August 3, 2012.

BB&T Corporation's active participation in the litigation of this matter did not stop on remand. Since that time, Defendants, including BB&T Corporation, vigorously litigated this case through the filing some 26 motions, in addition to numerous responsive memoranda, in defense of their litigation positons. Not once before BB&T Corporation's motions for summary judgment did BB&T Corporation seek to protect itself by arguing a lack of *in personam* jurisdiction. Although BB&T Corporation's extensive motion practice in this case is enough by itself to waive its putative defense, that is not the whole of its participation in this litigation. Discovery

was extensive and time-consuming in the case. BB&T Corporation and the other Defendants noticed 15 depositions between February 14, 2014 and May 16, 2014.[8] In addition to these depositions, BB&T Corporation and the other Defendants have filed corporate disclosures, answered Mr. Maybank's Local Rule 26.01 interrogatories, answered Mr. Maybank's other interrogatories, and responded to five sets of Mr. Maybank's requests for production. In point of fact, on April 14, 2014, BB&T Corporation submitted its own responses to Mr. Maybank's first set of requests to admit and third set of interrogatories, separately from the other defendants in this case. Significantly, although BB&T Corporation's response asserted several general objections, nowhere did it argue that the Corporation did not have to make the admissions or answer the interrogatories on the grounds that there is no *in personam* jurisdiction. Subsequently, on April 22, 2014, BB&T Corporation provided its own, separate responses to Mr. Maybank's second set of interrogatories, again failing to object to any alleged lack of personal jurisdiction. Although articulating a defense in the various discovery responses would have come too late, the fact that BB&T Corporation provided its own discovery responses separate and apart from the other Defendants without once also claiming lack of personal jurisdiction demonstrates that the defense[9] has long since been waived.

In sum, BB&T Corporation has waived its defense of personal jurisdiction. It "provided 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. *See Yeldell*, 913 F.2d at 539. Having long since waived any defense on that ground, personal jurisdiction may not be revived as a defense in post-

[8] Defendants conducted 11 of the noticed depositions.

[9] This assumes but does not concede that the defense ever had merit. As explained below, *see* discussion *infra* Part b., it does not.

trial motions, and Defendants' motions for JNOV, new trial, and new trial *nisi remittitur*, to the extent based on this faulty ground, should be denied.

III. Breach of Contract

Defendants' request that the Court enter JNOV on Mr. Maybank's breach of contract claim should be denied. A party alleging a breach of contract must prove the existence of a binding contract, its breach or unjustifiable failure to perform the contract, and damages suffered by the party as a direct and proximate result of the breach. *See, e.g., Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962) ("This being an action for the breach of contract, the burden was upon the [plaintiff] to prove the contract, its breach, and the damages caused by such breach."). Here, it is conceded by all parties that a contract—the Wealth Management Agreement—existed between Mr. Maybank and Defendants. Based on the evidence presented at trial, the Wealth Management Agreement presented to Mr. Maybank was Defendants' form contract that was used with all customers from at least August 2006, when Mr. Maybank and at least one other customer[10] signed the contract, through November 2009, when Defendants revised their form Wealth Management Agreement. Mr. Maybank presented far more than the "any evidence" standard required in order to defeat a motion for JNOV with respect to Defendants' breach of the Wealth Management Agreement. *See Hennes v. Shaw*, 397 S.C. 391, 398, 725 S.E.2d 501, 505 (Ct. App. 2012) (holding that an appellate court will reverse the denial of a JNOV motion only where there is no evidence to support the ruling) (citing *Austin v. Stokes–Craven Holding Corp.*, 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010).

[10] Evidence introduced at trial demonstrates that Defendants were presenting the identical contract to other customers during the relevant time period as they presented to Mr. Maybank. *See* Trial Exhibits 101 & 102 (Two versions of the Wealth Management Agreement between Defendants and Mrs. Effie Bowers, dated August 17, 2006).

Defendants admitted, through the trial and sworn deposition testimony of Ross Walters, head of the Wealth Management Department in Greenville, that Defendants knew at the time they presented the form Wealth Management Agreement to Mr. Maybank that they could not fulfill the express terms of the contract and were restricted from fulfilling those terms. Specifically, Mr. Walters testified that:

> Q: "But, in any event ... when you opened this account for Mr. Maybank, Item 1 of gathering the information ... that was not done by the wealth manager?"
> A: "No. That was done by asset management."
> Q: "So the wealth management division did not gather the information from the client that the contract says it would ... do?"
> A: "Correct."
> Q: "Now, the second item, 'Make recommendations to the Client regarding an investment program and investment guidelines for the Account.' Did you make any recommendations?"
> A: "We – we do not give advice or make recommendations regarding investments."
> Q: "Well, now, your contract says you agreed to do so."
> A: "That's why I said that when they changed this in early 2006, I believe ... we went from one ... mode of operations to a second to a third. Changed three times. And, even though the contract says that, our – our standard operating procedures was that we never did this."
> Q: "So this contract states that the wealth manager will take action to do an item, the bank agreed to do, but you're acknowledging that the bank did not do as stated here in this contract?"
> A: "I'm acknowledging that the wealth manager did not do this ...."

Deposition of Ross Walters, pgs. 193-94.[11] Later, Walters admitted that, despite knowing of the errors in the Wealth Management Agreement, he did not provide Mr. Maybank (or any other customer) with notice that BB&T did not intend on fulfilling the contract as written.

> Q: And you've indicated that the bank could not perform the functions [in the Wealth Management Agreement] that are represented in the very — in the paragraph that says under Roman Number I, "Service of bank as wealth manager," correct? You remember that?
> A: Yes.

[11] The excerpts of Mr. Walters' personal and Rule 30(b)(6) depositions were part of the video deposition excerpt played for the Jury during trial.

Q: And it says, "As wealth manager, bank shall gather information, shall make recommendations to the client regarding an investment program and investment guidelines for the account and shall coordinate and supervise the services of the investment advisor and the custodian for the account."
A: Uh-huh.
Q: And you've indicated that the bank itself though its wealth advisors could not make recommendations to the client regarding an investment program and investment guidelines, correct?
A: Correct.
Q: And I think you indicated that the lawyer who drafted the contract got it incorrect.
A: I — I I said my personal opinion was either there was a mistake made or else the bank realized that they delegated that responsibility to BB&T Asset Management.
Q: But you yourself saw this contract be used day after day, time after time with clients, correct?
A: Correct.
Q: And never once did you go and say, "Look, this contract is incorrect, it's giving the incorrect information to our customers and we need to make it correct and accurate?" You never did that, did you?
A: No, I did not.

Rule 30(b)(6) Deposition of Ross Walters pp. 223-24.

In sum, Mr. Walters testified that he understood there to have been a mistake in the drafting of the contract by Defendants' lawyers. Mr. Walters further testified that at the time they presented the contract to Mr. Maybank, Defendants knew and fully intended on delegating certain duties and responsibilities expressly assigned to BB&T Bank under the contract, to BB&T Asset Management. Thus, Defendants admitted to breaching the Wealth Management Agreement as written, which constituted testimonial evidence from which the Jury could (and did) reach the reasonable conclusion that a breach of the contract had occurred.

Moreover, the defenses advanced by BB&T at trial in in their motion are insufficient to support overturning the Jury verdict. Contrary to Defendants' assertions, the testimony adduced at trial demonstrated that the duties and responsibilities undertaken by BB&T Bank in the Wealth Management Agreement were not, in fact, accomplished in the supposed delegation of those

duties to BB&T Asset Management.[12] Indeed, the error of Defendants' position was demonstrated by reference to the language of the contract, wherein, *inter alia*, BB&T Bank contracted with Mr. Maybank to "coordinate and supervise the services of [BB&T Asset Management]" in the investment of his retirement assets. *See* Trial Exhibit 14. Translated under Defendants' delegation theory, BB&T Asset Management was thus responsible for coordinating and supervising its own services. Mr. Maybank did not hire the Bank to subsequently relinquish all control and supervision over the investment advisor's activities; Mr. Maybank hired the Bank because of its stability and the sort of checks and balances that can only be achieved through the supervision of a wholly separate fiduciary entity. Of course, we know from the testimony of each and every BB&T employee who was responsible for evaluating and managing Mr. Maybank's assets, *no one* conducted a suitability analysis to determine whether this complex derivative strategy was appropriate for Mr. Maybank.[13] Thus, Defendants' contention in their motion that all duties and obligations delegated by BB&T Bank were actually performed is belied by the testimony of Defendants' own employees, who clearly testified to the contrary.

Mr. Maybank also presented expert testimony demonstrating that he suffered damages from Defendants' systemic failures in devising an investment strategy and managing his money. Unchecked by any supervisorial oversight, Mr. Maybank's wealth "advisors" presided over a

[12] Similarly, Defendants' argument that Mr. Maybank waived an ability to claim breach of contract against BB&T Asset Management is without merit. Defendants do not cite to any case law for the proposition they now claim, as none exists. Moreover, Defendants continue to advance suppositions of Mr. Maybank's knowledge and understanding of the contractual relationship at the time the Wealth Management Agreement was signed that is directly contradicted by Mr. Maybank's own testimony at trial. Defendants may not create a new legal defense simply by manufacturing false testimony of their opponent.

[13] Testimony demonstrated that none of Mr. Maybank's advisors—Anthony Mahfood, Ross Walters, Kris Kapoor, or Judy Schoemer—evaluated the suitability of the VPFC strategy for Mr. Maybank, and the supposed Bank expert in these alternative investment strategies, Shawn Gibson, likewise testified that he conducted no such analysis and further believed that Mr. Maybank had be pre-cleared by Mahfood and Kapoor with respect to suitability.

catastrophic loss of Mr. Maybank's retirement assets. The damage suffered from Defendants' breach of contract was demonstrated by the expert testimony of Dr. Craig McCann. As but one, of many, examples represented by his analysis, Dr. McCann testified regarding the imprudent advice provided to Mr. Maybank under the Wealth Management Agreement to investment the proceeds of the upfront cash loan advanced to Mr. Maybank as a part of the VPFC in 100% equities, aggressive growth. Such a risky and imprudent selection was inappropriate under any circumstances for a man Mr. Maybank's age and on the verge of retirement. The failure of BB&T Bank to supervise and oversee the recommendation and selection of such an imprudent investment strategy, required under the plain language of the Wealth Management Agreement, resulted in substantial loss to Mr. Maybank. This loss would not have occurred had BB&T Bank provided the proper recommendations and oversight to the investment strategy implemented for Mr. Maybank.

Finally, Defendants' contention that the Court should enter judgment in their favor on their counterclaim for reformation of the Wealth Management Agreement is wholly without merit. Defendants put forward *zero* evidence during the trial to support their counterclaim for reformation, as evidenced by their failure to cite in the motion to any trial testimony or documentary evidence admitted that would support their claim of reformation. However, a party claiming reformation has the burden of proving mutual mistake by clear and convincing evidence. *See Crosby v. Protective Life Ins. Co.*, 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct. App. 1987) (citing *Sims v. Tyler,* 276 S.C. 640, 281 S.E.2d 229 (1981)). Having failed to introduce *any* evidence of reformation by mutual mistake, Defendants have fallen well short of the high clear and convincing evidence standard. Moreover, Defendants' counterclaim for reformation has absolutely no merit, as Mr. Maybank has continually asserted—and testified at

trial—that he expected BB&T to perform their duties and obligations under the contract as written.[14] However, "[a] contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it." *Crosby*, 293 S.C. at 206, 359 S.E.2d at 300.

At best, the evidence demonstrates that Defendants knowingly intended to breach their own form contract by delegating certain duties and obligations undertaken by BB&T Bank to BB&T Asset Management. However, a mistake by one of the parties is insufficient to satisfy reformation, and in the broader context of any claim for breach of contract, such an illogical position would permit a breaching party to claim reformation of the contract to suit its needs and desires following their breach of the terms mutually entered into between the parties. That is not the standard for reformation by mutual mistake. *See Sims*, 276 S.C. at 642, 281 S.E.2d at 230 (holding that mutual mistake cannot be proven by the claim of mistake on the part of one of the parties). Because there was no mistake on Mr. Maybank's part in entering into the Wealth Management Agreement as written, there is no mutuality of mistake and Defendants' claim for reformation of the contract fails. *Id.* ("A mistake is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended.").[15]

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[14] Defendants choose to ignore Mr. Maybank's sworn statements and testimony in favor of an unsupportable claim for reformation of BB&T's own form contract, which deliberately ignores the fact that Defendants used this same Wealth Management Agreement with all of its Wealth Management clients for at least three years.

[15] As a final ground for Defendants' JNOV motion on the breach of contract claim, Defendants contend that the Jury's verdict against BB&T Corporation may not stand because it was not a party to the contract. *See* Motion at 6, Item (1)(G). However, because Defendants did not move for a directed verdict on this ground, it may not serve as a ground for Defendants' motion for JNOV. *Compare* June 23, 2014 Motion for Directed Verdict *with* July 7, 2014 Motion for JNOV; *see also In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001) (holding that only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion).

IV. Breach of Fiduciary Duty

Despite serving as the investment adviser to Mr. Maybank for his retirement assets and having complete discretionary investing authority over the purchase and sale of investments held in the Wealth Management Account, Defendants now erroneously assert there is no evidence to establish a fiduciary relationship with Mr. Maybank. "A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another." *Regions Bank v. Schmauch*, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003) (quoting *Steele v. Victory Sav. Bank*, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988). "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Cowburn v. Leventis*, 366 S.C. 20, 41, 619 S.E.2d 437, 449 (Ct. App. 2005); *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). As a general rule, a relationship must be more than casual to equal a fiduciary relationship. *See Steele*, 295 S.C. at 293, 368 S.E.2d at 93. Moreover, under normal circumstances, a fiduciary relationship may not be established by the unilateral action of one party. *Brown v. Pearson*, 326 S.C. 409, 423, 483 S.E.2d 477, 484 (Ct. App. 1997); *Steele*, 295 S.C. at 295, 368 S.E.2d at 94. The other party must have actually accepted or induced the confidence placed in him. *Id.*

Defendants admitted they were serving as Mr. Maybank's fiduciary. Although the normal relationship between a bank and its customer is creditor-debtor and not fiduciary in nature, a bank may be held to a fiduciary duty if it undertakes to advise a depositor as part of services the bank offers. *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986); *see also Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 497, 220 S.E.2d 116, 119 (1975);

Johnson v. Serv. Mgmt., Inc., 319 S.C. 165, 167–68, 459 S.E.2d 900, 902 (Ct. App. 1995); *Rush v. South Carolina Nat'l Bank*, 288 S.C. 560, 562, 343 S.E.2d 667, 668 (Ct. App. 1986). In fact, based on several different accounts and relationships, Defendants were actually serving as Mr. Maybank's fiduciary in multiple ways. First, the Court will recall the evidence at trial demonstrating the existence of the Francis P. Maybank Family Insurance Trust. *See* Trial Exhibit 2. Mr. Maybank's company, Southeastern Trust, was serving as the Corporate Trustee to the Francis P. Maybank Family Insurance Trust, *see* Trial Exhibit 2, at the time Southeastern was acquired by BB&T in 2001. Under the terms of the Family Trust, BB&T Bank assumed the role as Corporate Trustee upon the execution of the merger and served in that capacity until it resigned in December, 2010. Under the law of trusts, a Trustee serves as a fiduciary to the Trust and owed Mr. Maybank and the beneficiaries of the Trust a fiduciary duty.

Second, Defendants agreed to serve as a wealth manager and investment advisor to Mr. Maybank and did, in fact, provide investment advice to him for compensation. A relationship between an investment advisor and a client is one in which a client reposes their trust in the advisor and is unquestionably fiduciary in nature, as the client must have a good faith belief that the advisor will act not in his or her own behalf, but in the interest of the client. *See, e.g., Burwell*, 288 S.C. at 40, 340 S.E.2d at 790.[16] This is the relationship established under the

[16] Other courts and jurisdictions have reached the same conclusion. *See McGraw v. Wachovia Securities, L.L.C.*, 756 F. Supp. 2d 1053, 1078 (N.D. Iowa 2010) (noting that "a fiduciary duty exists between a broker or financial advisor and a customer or other individual if the individual entrusts the broker/advisor to select and manage his or her investments") (citations omitted); *Pension Comm. of the Univ. of Montreal Pension Plan v. Bank of America Sec., LLC*, 716 F. Supp. 2d 236, 242 n.26 (S.D.N.Y.2010) (commenting that "under New York law, a defendant's fiduciary duty to a plaintiff is often inferred from a contract between the two parties. However, once that fiduciary duty is established, the relationship the contract establishes imposes 'a duty to act with care and loyalty independent of the terms of the contract.'"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cheng*, 697 F. Supp. 1224, 1227 (D.D.C. 1988) (finding that a stockbroker may be held to a level of trust and confidence sufficient to establish a breach

Wealth Management Agreement. Indeed, each of Defendants' employees who testified at trial confirmed that they believed they were fiduciaries to Mr. Maybank. Indeed, BB&T's Code of Ethics, promulgated by BB&T Corporation, confirms that BB&T employees involved in a client relationship whereby investment advice is provided to a client, are fiduciaries. *See* Trial Exhibit 6 at __.

Having established a clear fiduciary relationship existed, the evidence is clear that Defendants breached the industry standards of due care and appropriate conduct in their development and recommendation of an investment strategy to Mr. Maybank that was imprudent, reckless, and entirely unsuitable. As a fiduciary, the bank had the duty to disclose material facts that might affect Mr. Maybank's interests. *Burwell*, 288 S.C. at 40–41, 340 S.E.2d at 790. Moreover, as discussed in more depth below, representation made to Mr. Maybank regarding the suitability of the strategy and the efforts made on his behalf, when no such analysis was conducted, constituted a breach of the standards of care that are imposed on fiduciaries under the law. These breaches were evident in, *inter alia*, the General Counsel Approval Letter, *see* Trial Exhibit 7; Plaintiff's Exhibit 91, and in the testimony provided at trial by both Mr. Maybank, as well as his expert witnesses, Professor Freeman and Dr. McCann. In particular, Professor Freeman testified that Defendants' failure to conduct the proper suitability analysis for Mr. Maybank – the so-called "know your customer" analysis – constituted a failure to meet the industry standards for fiduciary conduct.

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of fiduciary duty claim); *Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 337 F. Supp. 107 (N.D. Ala. 1971) (recognizing that "[w]here the broker-dealer is also an investment advisor" the broker "does occupy a fiduciary relationship" with the client); *Johnston v. CIGNA Corp.*, 916 P.2d 643, 647 (Colo. Ct. App.1996) ("In general, an investment advisor owes a fiduciary duty to his or her customers.").

Finally, the evidence adduced at trial demonstrated that Defendants' breaches of their fiduciary obligations to Mr. Maybank proximately caused the damages that he suffered. Mr. Maybank hired a trusted advisor—a fiduciary—to manage the fruits of his lifetime's worth of hard work and ingenuity. Rather than suitable, appropriate, and prudent advice from a trusted advisor, Mr. Maybank received conflicted and reckless advice that put the interests of his fiduciaries ahead of his own. As described Mr. Maybank's expert witnesses, Defendants' so-called investment strategy, which Mr. Maybank faithfully followed, caused great harm and diminution in value to Mr. Maybank's retirement assets. Consequently, the evidence and all reasonable inferences presented at trial demonstrate that Defendants breached the fiduciary duty they owed to Mr. Maybank, and Defendants' motion for JNOV on this ground should be denied.

V. Constructive Fraud

Defendants' request that the Court enter judgment on Mr. Maybank's constructive fraud cause of action is similarly without merit and should be denied. The elements of constructive fraud, which Defendants do not list, are: 1) a representation; 2) its falsity; 3) speaker ought to have known of the falsity; 4) materiality; 5) intent that the representation be acted upon; 6) hearer's ignorance of its falsity; 7) hearer's reliance on its truth; 8) hearer's right to rely thereon; and 9) hearer's consequent and proximate injury. *See Woods v. State*, 314 S.C. 501, 341 S.E.2d 260 (Ct. App. 1993).[17] Here, the testimony and documentary evidence presented at trial demonstrated numerous representations to Mr. Maybank regarding the suitability and

[17] Incidentally, Defendants repeatedly refer to a lack of evidence of a "fraudulent act" as proof that Mr. Maybank has failed to sustain the cause of action for constructive fraud. *See* Motion at 11, Item 4(b)-(d). However, the existence of a fraudulent act is not an element of constructive fraud. Further, constructive fraud differs from actual fraud or a fraudulent misrepresentation in that it does not require an intent to deceive or actual dishonesty in making the representation. *See Armstrong v. Collins*, 366 S.C. 204, 219, 621 S.E.2d 368, 375 (Ct. App. 2005).

appropriateness of the investment strategy that were proven false. The existence of constructive fraud is most concisely demonstrated by the General Counsel Approval Letter. *See* Trial Exhibit 7. In addition, however, Defendants advised Mr. Maybank that holding the BB&T Stock would decrease his investment risk but, in fact, that advice increased the investment risk and moreover was an improper representation regarding BB&T's own stock. The Bank also failed to disclose the cost of the investment strategy to Mr. Maybank. Together, these misrepresentations resulted in a financial death spiral for Mr. Maybank that he could not escape.

In the General Counsel Disclosure Letter, Mr. Maybank's Wealth Advisors provided information to BB&T Corporation's General Counsel, Patricia Oliver, regarding the investment strategy that was devised and recommended to Mr. Maybank. *Inter alia*, the Approval Letter made the following representations:

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

See Trial Exhibit 7. Defendants did not, however, disclose the increased risk that Dr. McCann made clear. Moreover, they caused that increased risk through their improper advice and strategy to hold BB&T Corporation's own stock.

The letter was drafted in a manner that seemed specifically tailored to Mr. Maybank and his retirement needs. Consistent with the oral promises made to Mr. Maybank, the representations contained in the letter caused Mr. Maybank to believe that the VPFC product and strategy was researched and prepared with Mr. Maybank's retirement needs in mind and would achieve both his diversification and income needs as he transitioned into retirement. In fact, the letter leads Mr. Maybank—and any other reader—to believe that the Bank is diligently and prudently providing all of the required services that it expressly undertook to perform for Mr. Maybank in the Wealth Management Agreement. *See* Trial Exhibit 14, ¶ I. The Approval Letter signed by Mr. Mahfood and BB&T's General Counsel was executed and provided to Mr. Maybank prior to the VPFC trade, as evidenced by the dated copy in Mr. Maybank's files and introduced at trial. *See* Trial Exhibit 7 (Maybank Bates Nos. 001746-47). According to his testimony, Mr. Maybank relied upon Defendants' advice, including the representations contained in the Approval Letter, in deciding to enter the VPFC. Mr. Maybank testified that he believed BB&T had thoroughly researched these products and determined that this investment strategy was prudent for his specific situation, as represented to him in the Approval Letter.

Of course, the testimony and documents introduced at trial demonstrated that the representations contained in the Approval Letter were false. The supposed authors of the letter, Mr. Mahfood and Mr. Walters, testified that they did not draft the letter and were unsure who did, but understood that it was simply a necessary part of the paperwork required to execute the recommended strategy because Mr. Maybank was an employee of BB&T at the time and his concentrated position was in BB&T Corporation stock. Notwithstanding the representations Mr. Mahfood made in the letter he signed, he testified that he had not conducted the sort of suitability analysis that the Approval Letter says was done for Mr. Maybank. Further, Mr. Mahfood

testified that by sending the Approval Letter to BB&T General Counsel, he intended for Patricia Oliver to act upon the representations contained in the letter and approve the VPFC strategy for implementation with Mr. Maybank. Additionally, in providing a copy of the signed Approval Letter to Mr. Maybank, Defendants' intention that Mr. Maybank act on the representations in the letter was made clear.

Astoundingly, late on the afternoon of Friday, June 13, 2014, one business day before the trial was set to begin on the following Monday, Defendants made a supplemental production of an 100 documents.[18] Among these documents produced on the eve of trial was a generic copy of the General Counsel Approval Letter, dated February 1, 2006 ("Form Approval Letter"). *See* Pls.' Trial Ex. 91. This copy was not specific to any customer, let alone Mr. Maybank, but was a form letter that had been drafted in order to pre-clear the use of VPFCs with BB&T employees who owned BB&T Corporation common stock. The Form Approval Letter is a verbatim copy of the General Counsel Approval Letter supposedly written specifically for Mr. Maybank, except that there are "Mr. Client" placeholders for the client's name, and other blanks for the information related to the client's holding of BB&T stock. However, the representations regarding the reasonableness and the suitability of a VPFC for "Mr. Client" are the same as what was represented to Mr. Maybank; essentially, Defendants had determined VPFCs were appropriate for *every* holder of a concentrated position of BB&T Corporation stock and were using these Form Approval Letters to market VPFCs as the preferred solution to concentrated positions.

[18] Under the longstanding Scheduling Order, dating back to the First Amended Scheduling Order on January 10, 2014, all responsive documents to the parties' respective discovery requests should have been served by May 23, 2014.

Thus, up until the very eve of trial, Mr. Maybank was under the false impression that Mr. Mahfood and BB&T had actually done the things that they represented in the Approval Letter to have done for him in advance of his acceptance of their advice and the failed investment strategy centered around a VPFC. BB&T was already serving as Mr. Maybank's fiduciary, as Trustee of the Francis P. Maybank Family Insurance Trust. In providing Mr. Maybank investment advice regarding his concentrated position in BB&T stock, out of which the recommendation to enter a VPFC was born, BB&T undertook further fiduciary responsibilities to Mr. Maybank. Because BB&T and Mr. Mahfood were serving as his fiduciary, Mr. Maybank had an absolute right to rely upon the representation they made to him in the Approval Letter as true. *See Regions Bank v. Schmauch*, 354 S.C. 648, 672-74, 582 S.E.2d 432, 444-46 (Ct. App. 2003) (holding that fiduciaries have an absolute obligation of disclosure of material facts to their clients and, conversely, clients have a right to rely upon the representations made to them by their fiduciaries). Finally, Mr. Maybank suffered significant damages, as presented by his expert witnesses Dr. McCann and Professor John Freeman, related to his reliance on Mr. Mahfood and BB&T's recommendation of the VPFC strategy, as evidenced by the representations made in the Approval Letter.

Consequently, the General Counsel Approval Letter and the Form Approval Letter demonstrate that the elements of constructive fraud were met in this case: misrepresentations were made by Mr. Mahfood and BB&T to Mr. Maybank; Mr. Mahfood should have known that the analysis described in the letters was not conducted for Mr. Maybank; the Approval Letter was written with the intent that it be acted upon by both the General Counsel and Mr. Maybank; Mr. Maybank did not know that the contents of the Approval Letter were untrue. He relied upon the representations of both the Bank's representatives and the corporate general counsel. Because

they were his fiduciaries, Mr. Maybank had a right to rely upon those representations and did so. His reliance upon the false representations of his fiduciaries caused him great injury.[19]

VI. Negligent Misrepresentation

Defendants' request that the Court enter judgment on Mr. Maybank's negligent misrepresentation cause of action is also without merit and should be denied. The elements of negligent misrepresentation are: 1) the defendant made a false representation to the plaintiff; 2) the defendant had a pecuniary interest in making the statement; 3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; 4) the defendant breached that duty by failing to exercise due care; 5) the plaintiff justifiably relied on the representation; and 6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation. *Brown v. Stewart*, 348 S.C. 33, 42, 557, 680-81 S.E.2d 676 (Ct. App. 2001). Significantly, "[a] claim for negligent misrepresentation may be made when the misrepresented facts induced the plaintiff to enter a contract or business transaction." *Id.* (citing *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 474, 581 S.E.2d 496, 504 (Ct. App. 2003)).

As with the constructive fraud claim, the General Counsel Approval Letter and the Form Approval Letter demonstrate that the elements of negligent misrepresentation were also met in this case, and the Court should deny Defendants' meritless motion for JNOV.[20] The General

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[19] Similar to other causes of action, and as a final ground for Defendants' JNOV motion on the constructive fraud claim, Defendants attempt to slip in a supplemental argument that was not a part of their motion for directed verdict, contending that the Jury's verdict against BB&T Corporation may not stand. *See* Motion at 12, Item (4)(f). Because Defendants did not move for a directed verdict on this ground, it is unpreserved for Defendants' motion for JNOV and should be summarily dismissed. *Compare* June 23, 2014 Motion for Directed Verdict *with* July 7, 2014 Motion for JNOV; *see also In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001) (holding that only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion). In any event, the motion should be denied as to the corporation for the same reasons.

[20] Defendants' once again insert an unpreserved argument with respect to BB&T Corporation that was not made in their directed verdict motion. For the reasons already

Counsel Approval Letter,[21] *see* Trial Exhibit 7, was signed by Mr. Mahfood and transmitted to the General Counsel, contained representations regarding the analysis conducted by BB&T into the doomed VPFC strategy for Mr. Maybank which were false. Mr. Mahfood testified that he conducted no such analysis. In fact, each of Defendants' employees who had anything to do with the development and implementation of the VPFC strategy testified at trial that they did not conduct the specific suitability analysis for Mr. Maybank that is described in the Approval Letter. Thus, neither the Bank nor any other Defendant did anything specifically analyzing Mr. Maybank's personal situation and status.

The Bank also had a clear pecuniary interest in seeing that the VPFC strategy was implemented. BB&T charged Mr. Maybank $32,614 for the advice in recommending and facilitating the 2006 VPFC. *See* Trial Exhibits 11-12. Additionally, BB&T established a managed, fiduciary investment account with the upfront loan proceeds generated by the VPFC and charged Mr. Maybank an annual management fee based on the assets under management in the account. *See* Trial Exhibit 17. With respect to the recommended 2009 VPFC Roll-over, BB&T charged an additional $43,655 for its advice and recommendation. *See* Trial Exhibits 38, 40. Of course, BB&T continued to charge the annual management fee on Mr. Maybank's account until it was closed in 2010. *See* Trial Exhibit 45. Moreover, as he admitted in trial testimony, for each of the fees generated as a result of the VPFC investment strategy and Mr. Maybank's accompanying wealth management account, Mr. Mahfood received credit in his incentive matrix bonus pool, which determined and directly contributed to performance bonuses

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discussed, this argument is improper to make for the first time in this motion for JNOV. *See In re McCracken, supra.*

[21] Rather than re-state the representations made by the Bank and Mr. Mahfood to the BB&T Corporation General Counsel in the Approval Letter, Mr. Maybank incorporates by reference that discussion from above. Mr. Maybank will focus on how the Approval Letter and Form Approval Letter far exceed the burden of proof required to defeat Defendants' JNOV.

received by Mr. Mahfood on an annual basis. *See* Exhibits 10, 37, 52-53, & 104. Thus, the Bank and its lead advisors had a pecuniary interest in making the representations in the Approval Letter and thereby inducing Mr. Maybank to enter into the VPFC investment strategy.

Moreover, the Bank owed a duty of care to Mr. Maybank. Mr. Mahfood, the Bank's agent and representative, admitted that the Bank was acting as a fiduciary to Mr. Maybank in providing investment advice related to his concentrated position in BB&T stock. However, as discussed above, a fiduciary has an absolute obligation to disclose material facts to their principals, while Mr. Maybank had an absolute right to rely upon the representation they made to him in the Approval Letter as true. *See Shmauch*, *supra*. By failing to disclose to Mr. Maybank that the General Counsel Approval Letter was merely a form letter, and that no such analysis specific to Mr. Maybank had been conducted on the recommended strategy, the Bank and the other Defendants breached their fiduciary duty to Mr. Maybank. Finally, Mr. Maybank suffered significant damages, as presented by his expert witnesses Dr. McCann and Professor Freeman, related to his justifiable reliance on the advice—through, *inter alia*, the Approval Letter—of his fiduciary BB&T to enter into this imprudent VPFC strategy.

VII. Statute of Limitations

Defendants' motion for judgment as a matter of law on the question of whether the statute of limitations should act to bar all of Mr. Maybank's causes of actions is conclusory and should be summarily denied. Defendants' argument simply declares, without support, that "Mr. Maybank was aware.... more than three years before filing suit." However, "[t]he burden of establishing the bar of the statute of limitations rests upon the one interposing it." *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). Defendants failed to meet their burden. They did not elicit any testimony from Mr. Maybank that would suggest he had knowledge of Defendant's wrongful

conduct in or around December 22, 2008, three years prior to the filing of the lawsuit. This fact is confirmed by Defendants' failure to cite to any evidence on that point.

Even if the Court were disposed to look behind Defendants' conclusory arguments, at most a question of fact would exist as to the applicability of the limitation. However, "where the testimony is conflicting upon the question [of whether a statute of limitations applies], it becomes an issue for the jury to decide." *Id.* Consequently, the Court was correct to deny Defendants' motion for directed verdict on the question of applicability of the statute of limitations. The Court should now decline Defendants' invitation to invade the Jury's province in this motion for JNOV because Defendants have failed to meet their burden or identify *any* evidence in support of the limitations defense.

VII. Insufficient Evidence of Damages

In numbers 8, 9, and 11 of the motion, Defendants advance several variations of an argument that Mr. Maybank failed to present sufficient evidence to sustain the Jury's verdict. Based on the reasoned and competent testimony of Mr. Maybank's expert witnesses Dr. McCann, Professor Freeman, and Dr. Oliver Wood, Defendants' motion in this respect is entirely without merit and unworthy of serious consideration by the Court. Defendants' disagreement with the conclusions reached by Plaintiffs' experts and the Jury's verdict do not equate to conclusion that no evidence exists to sustain the verdict. Dr. McCann, a noted expert in in VPFCs, testified as to the lack of suitability of the VPFC investment strategy devised and recommended to Mr. Maybank. Dr. McCann has provided analysis and testimony in numerous scholarly articles and cases regarding the proper way to calculate damages on VPFCs. Dr. McCann's manner of calculating damages on VPFCs, which has been evaluated and admitted in

other courts, was employed in this case to calculate the damages in this case, which were admitted into evidence and about which Dr. McCann provided expert testimony.

Defendants continue to assert that Dr. McCann's analysis presents two separate and mutually-exclusive alternatives and improperly combines the results into the damages calculations presented to the Jury. *See* Motion at 16-17, Item (11)(a). Nothing could be further from the truth. As explained during trial, Dr. McCann performed an analysis to determine the amount of losses sustained as a result of the VPFC transactions and also on the improper and overly aggressive managed portfolio. The basis for Dr. McCann's analysis includes the actual and original amounts of investment, costs, and fees paid by Mr. Maybank and ultimately lost by Defendants' wrongful conduct. *See* Plaintiff's Trial Exhibit 93 at 4; 56; 67 (Maybank 010689; 010721; 101752).

VIII. Punitive Damages barred under the Wealth Management Agreement

Defendants failed to present any evidence during trial that the exculpatory clause contained in the Wealth Management Agreement to shields Defendants from their own fraudulent actions and breaches of fiduciary duties to Mr. Maybank. Notwithstanding, Defendants attempt to have the Court rescue their shortcomings and limit their liability for the egregious conduct they exhibited toward their former colleague, client and customer. However, the exculpatory clause is ineffective to provide Defendants with the blanket protection from liability that they seek, and Defendants have not met their burden in proving its applicability to the common law causes of action on which the Jury returned an award of punitive damages.

First and foremost, the Court should consider the fact that the exculpatory clause through which Defendants seek to limit their liability comes from the very same form BB&T Wealth Management Agreement which Defendants seek to reform by mutual mistake. Thus, where it

suits, Defendants contend the contract is unambiguous and its terms are derived from the clear intent of the parties. However, when it comes to Defendants' admitted breach of those same terms and conditions, Defendants' contend the Court should disregard the contract and supplant its terms with Defendants' favored construction.

Moreover, the exculpatory clause is inapplicable to Mr. Maybank's claims, which arose outside the terms of the Wealth Management Agreement. The exculpatory clause attempts to limit liability, but only "with respect to [Bank and Investment Advisor's] services under this Agreement." *See* Trial Exhibit 14 at 5. Thus the operative word in the exculpatory clause is "services," as any actions of the Defendants that do not fall within the services designated by the Wealth Management Agreement do not fall within the exclusion by the exculpatory clause's plain language. In South Carolina, clauses which purport to limit liability are narrowly construed, and, in fact, "South Carolina law on exculpatory clauses in contracts makes clear that such clauses are disfavored." *Cooke v. Allstate Management Corp.*, 741 F. Supp. 1205, 1207 (D.S.C. 1990); *see also South Carolina Elec. and Gas Co. v. Combustion Engineering, Inc.*, 283 S.C. 182, 322 S.E.2d 453 (Ct. App. 1984) (finding that clause exculpating for negligent manufacture did not include negligent design, the court noted that exculpatory clauses are disfavored and are to be strictly construed).

Here, the "services" defined under the Wealth Management Agreement are clearly delineated in Sections I, II, and III of the contract. *See* Trial Exhibit 14 at 1 ("Service of Bank as Wealth Manager"); ("Service of Investment Advisor"); ("Service of Bank as Custodian"). However, the Wealth Management Agreement does not list Defendants' services as permitting fiduciary employees of BB&T to make misrepresentations or material omissions of relevant information to their clients. Thus, the common law causes of action of breach of fiduciary duty,

constructive fraud, and negligent misrepresentation derive from claims outside of the "services" set forth in the Wealth Management Agreement and even under Defendants' expansive view of the exculpatory clause, may proceed and receive an award of punitive damages. Defendants point to no authority for the proposition that they may be relieved from intentional, reckless, and fraudulent conduct, particularly where the source of the supposed immunity is far from an arms-length transaction and instead a form agreement presented by an employer (BB&T) to an employee (Mr. Maybank) who are clearly not in equal bargaining positions. The rules of contract construction require exclusionary clauses to be narrowly interpreted, inuring to the benefit of the client and against the Bank, who drafted the contract. *See generally McPherson By & Through McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993).

Further, the exculpatory clause contained in the Wealth Management Agreement is unenforceable, because it is against public policy. The non-contractual, common law causes of action returned by the Jury were based on negligent misconduct, misrepresentations, and fraud. What makes Defendants' conduct all the more unreasonable is the fact that they were serving as Mr. Maybank's fiduciary at the time the misconduct occurred and the contracts were executed. As noted above, Courts in this state have held exculpatory clauses to be unenforceable on public policy grounds where the parties have substantially different bargaining power. Examples of such situations include: "attempts to exculpate 'for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty, or *when the parties are not on roughly equal bargaining terms.*'" *Cooke*, 741 F. Supp. at 1207 (quoting *Pride v. Southern Bell Telephone and Telegraph Co.*, 244 S.C. 615, 138 S.E.2d 155 (1964) (emphasis added)). In *Cooke*, the court determined that the exculpatory clause at issue did not bar the plaintiff's claims noting, *inter*

alia, that the clause was contained in a form contract and that the plaintiff did not have equal bargaining power.

The court in *Cooke* further noted the "extremes to which the South Carolina courts have gone to avoid enforcing a broad reading of an exculpatory clause." *Id.* at 1208; *see also Anthony v. Atlantic Group, Inc.*, 909 F. Supp. 2d 455 (D.S.C. 2009) (recognizing that public policy prohibits a party from contracting against liability for negligence when parties are not on equal bargaining terms and finding that conditioning employment on execution of release created unequal bargaining situation so that waiver did not bar claims). Notably, in *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013), on which Defendants primarily relied in support of their motion for summary judgment as to consequential and punitive damages, the Supreme Court pointed out that buyers are protected by the law in transactions with builders because buyers have inherently unequal bargaining power, and that, through the Residential Property Condition Disclosure Act, the South Carolina General Assembly imposed liability on "the party with the greatest access to information," which, in the instant case, is clearly BB&T. *Gladden*, 402 S.C. at 144, 739 S.E.2d at 884.

In this case, BB&T drafted the form Wealth Management Agreement it presented to Mr. Maybank as a condition of BB&T *expanding* its role as fiduciary to Mr. Maybank through the provision of wealth management and investment advisory services. The key distinction in this case is that Defendants were already serving as Mr. Maybank's fiduciary, dating back to 2001, as Trustee of the Francis P. Maybank Family Insurance Trust. Consequently, Defendants had an absolute duty of disclosure and obligation to ensure that Mr. Maybank understood the terms of the exculpatory clause, and Mr. Maybank had an absolute right to rely upon the representations Defendants made to him. *See Regions Bank v. Schmauch*, 354 S.C. 648, 672-74, 582 S.E.2d 432,

444-46 (Ct. App. 2003) (holding that fiduciaries have an absolute obligation of disclosure of material facts to their clients and, conversely, clients have a right to rely upon the representations made to them by their fiduciaries). No such explanation was provided. Based on the fiduciary relationship that existed, the Court should decline to enforce the exculpatory clause as against public policy.

IX. Defendants remaining arguments in support of the Motion for JNOV are unpreserved, as they were not made in support of Defendants' motion for directed verdict.

In addition to the issues raised and addressed above, Defendants argue an additional 43 grounds in their motion for JNOV. *See* Motion at 18-24, Item Nos. 12-54. However, "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., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012). None of these 43 grounds were made in support of Defendants' written, 31 page motion for directed verdict or argued orally to the Court at the close of evidence. Consequently, numbers 12-54 of Defendants' motion are improperly before the Court, as they constitute arguments made for the first time in this motion for JNOV and may be ignored. *Id.* (holding that an argument included in a motion for JNOV on which the party did not move for a directed verdict "is not properly before the Court.") (citing *Roland v. Palmetto Hills*, 308 S.C. 283, 286 & 287 n. 2, 417 S.E.2d 626, 628 & n. 2 (Ct. App. 1992) (stating that "[a] motion for judgment notwithstanding the verdict is a renewal of the directed verdict motion and cannot raise grounds beyond those raised in the directed verdict" motion).

Moreover, most of the additional 43 grounds are single-sentence, stock exhortations of conclusory argument that have no connection to the arguments or facts at issue in this case. For this reason alone, these additional grounds for JNOV should be ignored by the Court. To the

extent a response to these improper arguments is required, Mr. Maybank denies that Defendants' additional grounds have any merit based on the analysis presented above, which exhaustively covers the substance of Defendants' arguments in these motions.

CONCLUSION

In sum, Defendants' motion for JNOV is without merit and should be denied.

MOTION FOR NEW TRIAL ABSOLUTE

Defendants move for a new trial in the alternative to their motion for JNOV under Rule 50(b), SCRCP. However, many of the grounds included in Defendants' new trial motion are identical to the grounds advanced in Defendants' motion for JNOV. Therefore, Mr. Maybank expressly incorporates by this reference those arguments set forth above.[22] A substantial portion of Defendants' motion for a new trial relates to the Jury's award of punitive damages on the common law causes of action.[23] One remarkably pertains to the denial of a continuance.[24] While Mr. Maybank agrees that a post-trial review of the punitive damages award by the Court is required, that review reveals the Jury's award to be supported by the evidence and entirely reasonable. As a result, Defendants' motion for a new trial absolute should be denied.

NEW TRIAL ABSOLUTE STANDARD

A circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993). "The jury's determination of damages, however, is entitled to substantial deference." *Id.* The circuit court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives. *Id.* at 379-80, 426 S.E.2d at 805. The grant or denial of new trial motions rests within the discretion of the circuit court and its decision will not be disturbed on appeal unless its

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[22] In particular, argument numbers (2) – (4), related to BB&T Corporation, Dr. McCann's damages analysis, and the SCUTPA claim, are verbatim to the arguments advanced by Defendants in support of their motion for JNOV, as address above.

[23] Argument numbers (19) and (27) – (44)

[24] Challenge (16) complains about the Court not postponing the trial. However, "reversals of refusal of continuance are about as rare as the proverbial hens' teeth." *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957).

findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989). In deciding whether to grant a new trial motion, the Court must consider the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Welch v. Epstein*, 342 S.C. 279, 302-03, 536 S.E.2d 408, 420 (Ct. App. 2000).

I. Challenges to the Court's evidentiary rulings

Recognizing that none of the Court's evidentiary rulings is, by itself, sufficient grounds to warrant the granting of a new trial, Defendants cite to the "cumulative" and "prejudicial impact of numerous evidentiary and legal rulings by the Court" and "improper and/or inadequate charges to the jury." However, "[t]he admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Swafford*, 375 S.C. 637, 640, 654 S.E.2d 297, 299 (Ct.App.2007) (citation omitted). "To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice." *State v. Douglas*, 367 S.C. 498, 508, 626 S.E.2d 59, 64 (Ct. App. 2006); *see also Hanahan v. Simpson*, 326 S.C. 140, 156, 485 S.E.2d 903, 911 (1997). Defendants have not established that any of the challenged evidentiary rulings were erroneous because, in each case, the evidence was relevant and Defendants failed to establish that the evidence would be unfairly prejudicial or that it was inadmissible under the rules of evidence. Defendants also fail to demonstrate how the challenged rulings were prejudicial other than their characterization of the ruling as such. See *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was

influenced by the challenged evidence or the lack thereof."). Based on the evidence and the Jury verdict taken as a whole, Defendants cannot establish a reasonable probability the evidence admitted or examination allowed pursuant to the challenged rulings—either separately or as a whole—influenced the jury's verdict. Accordingly, challenges (5) – (12) are without merit and challenge (13)[25] simply is too vague to warrant relief.

II. Challenges to the Court's jury instructions.

In arguments 14, 15, and 47, Defendants assign varying error to the Court's compilation of the parties' respective charge requests and delivery of same to the Jury following the close of evidence. Having failed to contemporaneously object to the Court's jury charges, Defendants cannot now challenge those charges. *Murray v. Bank of Am., N.A.*, 354 S.C. 337, 346, 580 S.E.2d 194, 199 (Ct. App. 2003) (holding that a party who fails to object to a jury charge when it is given may not later complain about the charge). In fact, following the Court's charge to the Jury, the Court inquired of the parties whether or not they had specific objections to the charges and desired for the Court to re-charge the Jury. Importantly, Defendants expressly stated that they had no objection and felt that the charges accurately represented their requests. Accordingly, having failed to contemporaneously object or request a curative charge, Defendants' have waived any argument as to the sufficiency of the jury charges.

III. Challenges to damages award as grossly excessive and unsupported by the evidence.

There is no basis for concluding that the verdict was so grossly excessive that it shocked the conscience, that it was "influenced by matters outside the evidence," or that it was excessive and unsupported by the evidence and inconsistent with the controlling law. As discussed above,

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[25] "The Defendants assert as a further basis for a new trial all other evidentiary rulings by the Court before or during the trial of the case that were adverse to the positions of the Defendants." Motion p.30.

the actual damages found by the Jury was consistent with the testimony regarding Mr. Maybank's losses as a result of Defendants' misconduct. Moreover, the award was entirely consistent with this Court's instructions. And, as discussed above, the expert testimony introduced by Mr. Maybank more than adequately supported the verdict reached by the Jury. Accordingly, challenges (20)-(26) should be rejected.

IV. Challenge to the Jury's punitive damages award

In reviewing a punitive damages award, a court should consider: (1) the degree of reprehensibility of the defendant's 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 awarded by the jury 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) (simplifying analysis of factors from *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991) and *BMW of North America v. Gore*, 517 U.S. 559 (1996)).

A. *Reprehensibility.*

In evaluating reprehensibility, courts 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. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185 (holding that reprehensibility is "'perhaps the most important indicium of the reasonableness of a punitive damages award'") (quoting *Gore*, 517 U.S. at 565). With respect to the first two prongs, Defendants demonstrated indifference and a reckless disregard for Mr. Maybank's financial well-being. Although the harm in this case was not physical, Defendants'

conduct negatively impacted the financial well being of others in addition to Mr. Maybank; thus these factors weigh in favor of finding Defendants' conduct reprehensible.

Mr. Maybank had financial vulnerability through his age and his concentrated position in BB&T Corporation stock that he entrusted to Defendants. As Mr. Maybank's fiduciary and trustee, Defendants were well aware of this financial vulnerability but they nevertheless acted in such a way as to destroy his retirement savings. Specifically, Mr. Maybank entrusted Defendants with his business, Southeastern Trust, as well as his retirement savings. Defendants mismanaged Mr. Maybank's investments, providing self-serving, imprudent advice wrought with conflicts of interest that the Jury found constituted constructive fraud, breach of fiduciary duty, and negligent misrepresentation. As a result, Defendants caused Mr. Maybank—who was 79 years old when he filed the original complaint in December 2011—to lose millions of dollars. Those facts more than sufficiently support a finding that Mr. Maybank was financially vulnerable and that Defendants recklessly disregarded his financial security.

Moreover, Defendants' conduct was not an isolated incident but involved repeated acts of indifference. Ross Walters, the head of the Wealth Management Department in Greenville, South Carolina, testified that Defendants knew at the time they presented their form Wealth Management Agreement to Mr. Maybank that they could not fulfill, and were even restricted from fulfilling, the express terms of the contract.[26] Defendants then recommended and implemented a wholly inappropriate investment strategy for Mr. Maybank in 2006 while at the same time misrepresenting to him that the strategy was prudent and appropriate. They continued their pattern and practice of wrongful conduct by recommending that he roll over the variable

[26] Defendants continued to present the same form contract—without correcting or even disclosing the infirmity—to their customers from at least August 2006, when Mr. Maybank signed the form contract, through November 2009, when Defendants finally revised the contract.

prepaid contract investment in 2009. During this time, they also charged transaction fees for recommending the unsuitable investments while at the same time disavowing involvement with the recommendation of the strategy.[27] There was trial testimony that when Mr. Maybank approached Defendants about his concerns and issues, Mr. Fisher told him that he was an "embarrassment" to himself and refused to accept or acknowledge any responsibility to Mr. Maybank for placing him in an untenable and financially challenging position.

The evidence also demonstrates that the harm was the result of intentional malice, trickery, or deceit rather than mere accident. As noted above, Defendants entered into contracts with Mr. Maybank, as well as other customers, that, from the outset, they never intended to fulfill, and, in fact, did not fulfill.[28] And in light of Mr. Walters' testimony, the presentation of this same contract to others demonstrates the existence of malice, trickery, or deceit rather than mere accident. Defendants purposely misled Mr. Maybank by falsely misrepresenting that the prepaid derivative transaction was a prudent and appropriate investment strategy crafted especially for him even though, based on the evidence, that the recommended strategy was a purely sales driven strategy to generate fees for Defendants. Mr. Maybank also presented evidence that Defendants were not even authorized to recommend and sell the prepaid derivative products at issue. And, as noted, Defendants admitted they were "out of bounds" with regard to transaction fees they charged to Mr. Maybank. The existence of intentional malice, trickery, or

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[27] Furthermore, in the testimony of David Fisher, the Division Executive of the Wealth Division at BB&T Bank, Defendants expressly admitted that they were "out of bounds" when BB&T charged transaction based fees to Mr. Maybank and to more than 130 other customers. In fact, Defendants ultimately refunded over $1 million in such fees to its customers. It is appropriate to consider harm to others in determining reprehensibility. *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007). But rather than fully explain the situation, Defendants simply told customers that the refund was an implementation of their corporate values.

[28] The presentation of the same contract to others is evidence that Defendants intended to deceive Mr. Maybank, especially in light of Mr. Walters' testimony.

deceit is further evidenced by the fact that, rather than accept responsibility, Mr. Fisher tried to blame Mr. Maybank, even calling him "an embarrassment."

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

The level of punitive damages also is appropriate. 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 level of this ratio supports finding that the punitive damages are reasonable. *See, e.g., Cody P. v. Bank of America, N.A.*, 395 S.C. 611, 720 S.E.2d 473 (Ct. App. 2011) (upholding a 7.69 to 1 ratio of punitive to actual damages against Bank of America, N.A. and noting few awards exceeding a single digit ratio will satisfy due process); *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 593, 686 S.E.2d 176, 188 (2009) ("South Carolina courts have most often upheld verdicts on the low end of the single-digit spectrum, but have frequently deviated from this norm in cases involving particularly egregious conduct.").

Ratios which fall on the low end of the single digit spectrum have been most often upheld by South Carolina courts. *Mitchell*, 385 S.C. at 593, 686 S.E.2d at 188; *see also, e.g., Jenkins v. Few*, 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2012) (affirming a 3.6 to 1 ratio pursuant to *Mitchell* analysis where jury found for plaintiff on conversion, trespass, and civil conspiracy); *Mackela v. Bentley*, 365 S.C. 44, 614 S.E.2d 648 (Ct. App. 2005) (affirming a 3.75 to 1 ratio in a conversion case). South Carolina courts also have upheld punitive damages awards in cases involving economic harm which fall on the high end of the single digit spectrum, as well as ratios exceeding single digits. *See, e.g., Mitchell*, 385 S.C. at 594, 686 S.E.2d at 188 (ratio of 9.2 to 1 satisfied due process where insurer rescinded health insurance policy even after learning that the basis for rescission was incorrect, exposing insured to a greater risk of physical danger); *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 Entertainment 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 in a breach of contract and bad faith failure to pay insurance claim case).

Moreover, a $5,000,000 punitive damages award is likely to deter Defendants from similar conduct and will likely encourage better training of employees and improved suitability of investment advice, resulting in better protection of client funds. *See Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185 (requiring consideration of "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.") The award also is reasonably related to the financial harm likely to result from such conduct and Defendants certainly have the ability to pay the award because BB&T Bank alone has a net worth of approximately $21.6 billion.

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

The award of punitive damages is less than but very comparable to the civil penalty available under the South Carolina Unfair Trade Practices Act, which would impose a penalty of $6.2 million ($6,200,000) in trebling the actual damages to a total of $9.3 million upon appropriate findings. *See Mitchell*, 385 S.C. at 588, 686 S.E.2d at 186 (requiring analysis of "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."). Trebling results in a ratio of 2 to 1 between the civil penalty of $6.2 million and the actual damages of $3.1 million. This ratio is within the range of reasonableness as discussed above but is higher than the ratio of punitive to actual damages.

A consideration of punitive damages imposed in comparable cases supports finding that the punitive damages award in this case is reasonable. *See, e.g., Cody P. v. Bank of America, N.A.*, 395 S.C. at 632-33, 720 S.E.2d at 484-85; *see also Mitchell*, 385 S.C. at 588-89, 686 S.E.2d at 186 ("When identifying 'comparable cases' a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant."). In *Cody P.*, improper safeguards by Bank of America, N.A. ("BOA") permitted a co-conservator for a minor child to withdraw the minor's funds and deposit them into her personal bank account. A jury found BOA negligent in, *inter alia*, "fail[ing] to set up Cody's accounts with the proper safeguards to protect his funds." *Id.* at 629, 720 S.E.2d at 629-30. The court further noted that "[w]hile BOA's conduct did not evince an indifference to or a reckless disregard for Cody's health or safety, it exposed Cody to the possibility he might not be able to afford his medical expenses." *Id.* The court also noted that "[a]lthough the harm Cody suffered was not the result of intentional malice, trickery, or deceit on BOA's part," the court was "surprised by the ease with which [a co-conservator for Cody P., a minor child] was able to circumvent BOA's safeguards." *Id.* Additionally, BOA allowed a co-conservator to open a CD account, despite BOA's Platform Manual's provision stating that a CD is not an eligible product for a conservatorship or guardianship account. *Id.*

Like *Cody P*, this case involves economic harm caused by a bank's failure to follow proper safeguards to protect a client's funds. In fact, the reprehensibility of the conduct is greater in this case based on the evidence demonstrating that Defendants intentionally engaged in deceit and misconduct, including presenting Mr. Maybank with a form contract that they drafted but never intended to fulfill. As discussed above, there was evidence demonstrating imprudent, fee-

generating investment advice, egregious conflicts of interest, improper transaction fees, and degrading insults from a division executive of BB&T Bank to his client, Mr. Maybank. Additionally, while the jury found BOA negligent in *Cody P.*, the Jury in this case found that Defendants perpetrated constructive fraud, breached their fiduciary duty, committed violations of the Unfair Trade Practices Act, and breached their contract with Mr. Maybank. In sum, they acted deceitfully. Finally, In *Cody P.*, the Court of Appeals upheld a jury verdict awarding actual damages in the amount of $205,737.37 and punitive damages in the amount of $1.583 million, a 7.69 to 1 ratio. Notably, *Cody P.* involved solely economic damages and, unlike this case, lacked any findings of intentional malice, trickery, or deceit on the part of BOA, and contained factually similar circumstances of a bank's mismanagement of client funds. Thus, based on a comparison of this case with *Cody P.*, in which the Court of Appeals affirmed a much higher ratio between punitive and actual damages – 7.69 to 1 – than the 1.61 to 1 ratio in this case, as well as to other comparable cases and the civil penalty available pursuant to UTPA, the difference between the punitive damages awarded by the jury in this case and in other comparable cases is reasonable.

D. ***Conclusion.***

Especially when viewed as a whole, the evidence more than supports the conclusion that the Jury followed the Court's instructions and the verdict form substantially drafted by Defendants and awarded punitive damages based on a "find[ing] by clear and convincing evidence that the acts of the defendant(s) warrant payment of punitive damages." Verdict Form p.5 ¶12. Accordingly, the evidence demonstrates that the award of punitive damages is appropriate. Contrary to Defendants' hyperbole, following the analysis applied by the United States Supreme Court and the South Carolina Supreme Court demonstrates that the level of damages is not excessive, let alone so much so as to violate the constitution. There is no

violation of the Due Process or Equal Protection Clauses and no basis for overturning the Jury's award. Accordingly, Defendants' arguments against the punitive damages award should be rejected.

V. Challenges to the jury verdict form.

In arguments 46, and 48-50, Defendants assign error to various parts of the Jury Verdict Form. These arguments are not preserved and are without merit. Additionally, the Court will recall that the Verdict Form that was ultimately adopted by the Court and submitted to the Jury was almost verbatim the form Verdict Form that Defendants submitted for the Court's consideration. Any error in the contents of the Verdict Form is therefore due to Defendants' own actions and may not serve as an appropriate ground for Defendants' motion for a new trial. Moreover, Defendants failed to make a timely objection to the contents of the Verdict Form, prior to its submission to the Jury. As a result, Defendants have failed to preserve any objection or issue related to the Verdict form, and the Court should disregard any of Defendants' arguments thereon. *See Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding that by failing to object to a verdict form until after the verdict had been reached, a party failed to preserve any issue relating to the verdict form).

VI. Thirteenth Juror Doctrine

In challenges (45) and (51), Defendants seek to have this Court grant a new trial as the thirteenth juror. "The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict." *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). However, as explained by Mr. Maybank in this and other motions, the record fully supports the jury's verdict in this case. The Jury simply rejected the evidence identified by Defendants in favor of finding in Mr. Maybank's favor on

several causes of action. Contrary to Defendants' assertion, the Jury's finding in favor of Defendants on some causes of action demonstrates that it carefully weighed the evidence in rendering its verdict. There is more than sufficient evidence of misconduct and misrepresentations by Defendants to support the Jury's verdict. And, as discussed above, the award of punitive damages is supported by the evidence and is reasonable in the circumstances of this case. Accordingly, there is no basis for this Court granting a new trial as the thirteenth juror.

VII. Other challenges.

The evidence fully supports the Jury's verdict and, based on the evidence, was not the product of bias, passion, prejudice, or other improper motive. There was evidence that all three Defendants were involved in the misconduct that resulted in harm to Mr. Maybank. The verdict was not against the greater weight and preponderance of the evidence; was not wrong or manifestly unjust. Accordingly, challenges (17)-(18), (48)-(50), and (52)—which are in any event conclusory and lack sufficient information to warrant a response—are without merit and should be denied.

Conclusion

For these reasons, the Motion for a New Trial Absolute should be denied.

MOTION FOR NEW TRIAL *NISI REMITTITUR*

NISI REMITTITUR STANDARD

"A motion for new trial *nisi remittitur* asks the trial court to reduce the verdict because the verdict is merely excessive." *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006). "The denial of a motion for a new trial *nisi* is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion." *Id.* While the circuit court may not impose its will on a party by substituting its judgment for that of the jury, it may give the party an option in the way of *additur* or *remittitur*, or, in the alternative, a new trial. *Jones v. Ingles Supermarkets, Inc.*, 293 S.C. 490, 493, 361 S.E.2d 775, 776 (Ct. App. 1987). The circuit court has wide discretionary power to reduce the amount of a verdict which, in its judgment, is excessive. *Daniel v. Sharpe Const. Co.*, 270 S.C. 687, 690, 244 S.E.2d 312, 314 (1978). "Compelling reasons, however, must be given to justify invading the jury's province in this manner." *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995).

Defendants' brief motion for new trial *nisi remittitur* presents no compelling reasons to justify reducing the Jury's verdict. As before, Defendants' persist in making the untenable argument that the Jury's award of damages is unsupported by any evidence in the record and should therefore be reduced. Although the award of actual damages fell precisely at the midpoint of the range of damages demonstrated by Dr. McCann's analysis, Defendants argue that it was "manifestly contrary to the evidence" and that the Jury must have been motivated by passion or caprice. Additionally, although the ratio of the Jury's award of actual to punitive damages, as discussed above, was a mere ratio of 1.6, Defendants contend that the award of punitive damages was excessive, bears no relationship to the alleged harm, exceeds the limitations of law and is unconstitutional.

However, the evidence demonstrates that Mr. Maybank suffered substantial injury and damages due to the imprudent and unsuitable investment strategy devised and recommended by his fiduciaries, BB&T. Dr. McCann, a noted Ph.D in economics and finance provided testimony and documentation that Mr. Maybank's damages were ascertainable within a range of $2.8 to $3.4 million. The Jury's award of actual damages fell in the middle of this range, thus belying Defendants' unsupported argument that the actual damage award contains punitive damages in disguise. Where the Jury awards damages in an amount that comports with the demonstration of evidence at trial, it may not be said that the award of actual damages is excessive, and no compelling reasons exist for the Court to invade the Jury's province.

Moreover, the Jury found Defendants' conduct to be willful and/or with reckless disregard for the truth, which more than supports the award of punitive damages. The Jury's determination as to punitive damages is, as explained above, fully supported by the testimony and documentary evidence presented at trial, which demonstrated deliberate misrepresentations of material facts to Mr. Maybank from his trusted advisors and fiduciaries. Defendants' actions were financially motivated and violated the standards of care imposed on fiduciaries, the highest duty and level of care imposed under the law. Accordingly, the Jury was justified in awarding punitive damages. Further, the amount of punitive damages is entirely reasonable based on the amount of actual damages sustained. As described above, a ratio of 1.6 is not only sustainable under these facts, it is on the very conservative end of appropriate awards, given Defendants' conduct. Accordingly, no reasonable basis exists for reduce the Jury's award of actual or punitive damages.

Conclusion

Defendants' motion for new trial *nisi remittitur* should be denied.

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August 19, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

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.

IN THE COURT OF COMMON PLEAS

FOR THE THIRTEENTH JUDICIAL CIRCUIT

Civil Action No. 2011-CP-23-8578

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL D. WICKENSIMER
2014 AUG 19 AM 8

FRANCIS P. MAYBANK'S RESPONSE TO DEFENDANTS' MOTION FOR ELECTION OF REMEDIES

Plaintiff Francis P. Maybank opposes Defendants' Motion for Election of Remedies. No election is required because the unfair and deceptive business practice forming the basis for the Jury's verdict on the South Carolina Unfair Trade Practices Act ("SCUTPA" or "Act"), *see* S.C. Code Ann. § 39-5-10 *et seq.*, claim is distinct from the unsuitable and reckless investment advice given to Mr. Maybank. Because the Jury made a specific determination to award punitive damages with respect to the three common law causes of actions regarding that conduct, Mr. Maybank is entitled to both treble and punitive damages. Because there was a single remedy of $3.1 million in actual damages imposed by the Jury for all of the harm caused by Defendants, no

election among the causes of action that demand censure of Defendants' reprehensible conduct is required. Consequently, Defendants' motion for election should be denied.

I. The Jury's verdict under the SCUTPA is supported by facts independent of the common law causes of action.

This case does not require an election among punitive and treble damages because each of those remedies is supported by independent facts. *Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44-45 (1996) ("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.")). In *Taylor*, the Supreme Court reversed the trial court and reinstated an award of treble damages on a SCUPTA claim in addition to actual and punitive damages on certain common law causes of action. As was true in *Taylor*, Defendants' motion here is without merit.

A. Factual background.

The Jury found for Mr. Maybank on the common law causes of action of breach of fiduciary duty, constructive fraud, and negligent misrepresentation and also awarded punitive damages in the amount of $5 million on those claims.[1] Each of these common law causes of action was based on a breach of the professional duties and trusted advisor status undertaken by

[1] It is important to note that the Jury verdict form explicitly segregated the causes of action for which punitive damages could be awarded, from those, including the SCUPTA cause of action for which punitive damages were not an appropriate remedy. Specifically, the Jury verdict form provided, in pertinent part: "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 ...." Additionally, the Jury was instructed as to the possibility of imposing punitive damages on those causes of action and the specific standard required to do so. Thus, while its findings on punitive damages are instructive, the jury was not asked to award and, thus, did not decide to award punitive damages for the SCUTPA claim.

Defendants. The Jury found that Defendants conduct was reprehensible and warranted punishment as Defendants provided imprudent, unsuitable, uninformed, deceitful, fraudulent, and reckless advice and made negligent misrepresentations to Mr. Maybank. These duties, and the unsuitable and deceitful investment advice that ensued, arose only after the fiduciary relationship was established.

In contrast, the statutory SCUTPA claim involves the provision of BB&T's form Wealth Management Agreement, and inducement of customer relationships and additional business thereby, to Mr. Maybank and other bank customers even though Defendants knew that agreement was unfair and deceptive and that they had no intention of honoring the agreement. At trial, the testimony demonstrated that Defendants presented the Wealth Management Agreement to Mr. Maybank, and required his agreement, as a condition of their provision of fiduciary wealth management services to him. However, Defendants knew at the time they presented the Wealth Management Agreement to Mr. Maybank that the contract was false. According to BB&T Bank's Corporate Representative, Ross Walters, who also served as Team Leader of the Wealth Management Division in Greenville, Defendants' lawyers mis-drafted the contract. Despite knowing of its falsity and deception, Defendants presented the Wealth Management Agreement to Mr. Maybank and others for the sole purpose of acquiring new fee generating accounts for Defendants. Based on the evidence presented at trial, the Wealth Management Agreement presented to Mr. Maybank was Defendants' form contract that was used with *all customers* from at least August 2006, when Mr. Maybank and at least one other customer[2] signed the contract, through November 2009, when Defendants yet again restructured

[2] Evidence introduced at trial demonstrates that Defendants were presenting the identical contract to other customers during the relevant time period as they presented to Mr. Maybank.

the Wealth Management Division and revised their form Wealth Management Agreement. Notwithstanding Defendants' knowledge of the falsity and deception in their form Wealth Management Agreement at the time they were presenting it to Mr. Maybank and other customers, they failed to correct or even disclose the infirmity to Mr. Maybank and other customers to whom they owed a fiduciary duty. This evidence, along with the record as a whole, supports the Jury's finding that Defendants engaged in an unfair and deceptive business practice affecting commerce in violation of SCUTPA.

B. Analysis.

Based on these facts, *Taylor v. Medenica* requires rejecting Defendants' motion and finding that Mr. Maybank is entitled to recover both treble and punitive damages. In *Taylor*, a patient brought a medical malpractice action against her doctor and the doctor's medical laboratory alleging, *inter alia*, negligence and unfair trade practices. The jury returned a verdict in favor of the patient for actual and punitive damages under the common law negligence claim and for actual damages for violation of the SCUTPA. The trial court granted the patient's request to treble damages and for attorneys' fees and costs under the SCUTPA. However, the trial court also required the patient, over her objection, to elect between recovery for common law negligence or the SCUPTA. The patient elected to recover under her negligence claim.

On appeal, the Supreme Court held the trial court had erred in forcing the patient to elect between the common law and statutory remedies. *Taylor*, 324 S.C. at 218-20, 479 S.E.2d at 44-45. The Supreme Court held that independent facts supported the distinct causes of action alleged for negligence and unfair trade practices. *Id.* at 218, 479 S.E.2d at 44-45 ("Election of

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See Trial Exhibits 101 & 102 (Two versions of the Wealth Management Agreement between Defendants and Mrs. Effie Bowers, dated August 17, 2006).

remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action. It is the act of choosing between inconsistent remedies allowed by law on the same set of facts. Its purpose is to prevent *double recovery for a single wrong*." (citing *Thompson v. Watts*, 281 S.C. 504, 316 S.E.2d 393 (1984)) (emphasis added). Similar to this case, the Supreme Court held that double recovery was not at issue where the allegations of common law negligence (there, a Doctor providing reckless medical advice and treatment in violation of the duties imposed) were separate and apart from the allegations of SCUTPA violations (which was based on the unfair and deceptive business practice by the Doctor in ordering and performing useless and unnecessary lab tests). *Taylor*, 324 S.C. at 219, 479 S.E.2d at 45; *see also Freeman v. A. & M. Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532, 536 (Ct. App. 1987) (upholding an award of punitive damages based on common law fraud and of treble damages pursuant to the SCUTPA); *Toyota of Florence v. Lynch*, 314 S.C. 257, 442 S.E.2d 611, 616 (1994) (holding that plaintiff could recover *both* doubled damages under the state "Regulation of Manufacturers, Distributors and Dealers Act" and punitive damages in connection with the common law claim because the Act allows both types of damages); *Columbia Teachers Federal Credit Union v. Newsome Chevrolet-Buick*, 303 S.C. 162, 399 S.E.2d 444 (Ct. App. 1990) (same).

Mr. Maybank's allegations of wrongdoing by Defendants in this case mirror those alleged in *Taylor*. The common law causes of action sustained by the Jury and for which punitive damages were awarded—breach of fiduciary duty, constructive fraud, and negligent misrepresentation—were based on the facts demonstrating that Defendants' provided imprudent, unsuitable, fraudulent, deceitful, uninformed and risky investment advice to Mr. Maybank, representing to him that the strategy it devised and recommended would protect his assets and

was well-researched and tailored to his specific investment needs when it was not. In contrast, Defendants' practice of presenting a false and deceptive form contract to Mr. Maybank and other customers, inducing their agreement for the provision of fiduciary wealth management services through representations that it knew that it could not, and was restricted from performing as written, is an unfair and deceptive business practice that stands on its own. Moreover, the Defendants' misleading and deceitful refund letter to Mr. Maybank and 130 other customers compounded the original sin of presentation of a false and deceptive contract to Mr. Maybank in the first place.

In sum, the SCUTPA cause of action is separately supported by facts independent of the breaches of Defendants' common law duties. Moreover, the remedies provided by the SCUTPA are "cumulative and supplementary to all powers and remedies otherwise provided by law." S.C. Code Ann. § 39-5-160. Accordingly, the Jury's verdict awarding punitive damages under the common law causes of action and a violation of the SCUTPA, which is subject to trebling under Mr. Maybank's pending motion for treble damages, filed July 10, 2014, are not mutually exclusive.[3] Because they are based on separate facts and elements and because SCUTPA is

[3] 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 SCUTPA violation. The Jury's award of a single amount of actual damages is dictated by the verdict form, it is not indicative of a finding that no distinct damages flow from the Jury's determination of a violation of the SCUTPA. 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 support each of the treble and punitive damage awards. As explained in the text, Mr. Maybank is entitled to recover both. Defendants drafted the verdict form, which was adopted with minor alterations by the Court. Defendants' failure to request a special interrogatory in the form they drafted with respect to damages for the SCUTPA violation constitutes a waiver of the issue. *See Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 191, 708 S.E.2d 787, 797 (Ct. App. 2011) (holding that an appellant waived appellate review of an issue relating to the jury verdict by failing to request a special interrogatory when the deciding jury was available and in place to review such a matter). Fundamentally, a party should not be permitted to propose a course of

cumulative to other remedies, no election between punitive and statutory treble damages is required.[4]

Instead of *Taylor*, which directly supports the award of treble and punitive damages in this case, Defendants cite to two other cases: *Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 391 S.E.2d 249 (1990); and *Smith v. Strickland*, 314 S.C. 192, 442 S.E.2d 207 (1994). However, in both of these cases, the Supreme Court simply cited the general proposition that where the harm alleged concerns a single wrong, a party may not collect both punitive damages under common law causes of action and treble damages under the SCUTPA. *See Smith*, 314 S.C. at 197-98, 442 S.E.2d at 210 ("As with actual damages, a plaintiff can recover damages that are punitive in nature only once, either as expressly-designated punitive damages or as trebled damages, where their recovery concerns a single wrong. In these two cases, the defendants committed but a single wrong."). In contrast, the Court held in *Taylor* that, if common law and statutory remedies are based on separate facts, the plaintiff is not required to elect between punitive and treble damages. Mr. Maybank therefore is entitled to recover both.

II. Defendants' contentions regarding the inconsistency of causes of action and the economic loss rule are waived; alternatively, even if not waived, these contentions are without merit or support in case law.

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conduct which is ultimately adopted, sit idly by during the execution of the course of conduct, and thereafter claim an appealable error based on the course of conduct proposed and implemented. *See Ex parte McMillan*, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (finding a party cannot acquiesce to an issue at trial and then complain on appeal).

[4] Even if the Court requires an election, Mr. Maybank is entitled to an award of attorneys' fees and costs under the SCUTPA because attorneys' fees and costs are not "subject to the limitations of the doctrine of election of remedies." *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010) (holding that a plaintiff may recover attorneys' fees and costs under a statutory claim in addition to punitive damages under a common law claim, even if he is forced to elect between remedies and elects to proceed with the common law claim).

Defendants have waived any argument regarding the economic loss rule. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) ("A party may not use a post-trial motion to raise an issue that could have been raised at trial."). Although raising it as a defense in their Answer, Defendants did not timely raise the economic loss rule before, such as in one of their eight summary judgment motions, or during trial, such as in their 38 page motion for directed verdict, when this Court could have acted on the motion before the case was submitted to the jury. Having failed to do so, they have waived that argument.[5]

At any rate, Defendants' arguments regarding the economic loss rule and the inconsistency of the causes of action are meritless. The rule, as applied in this state, has been limited to the products liability realm and stands for the proposition that, where damage is suffered only to the product itself, no tort claim is permitted. *See Kennedy v. Columbia Lumber Mfg. Co., Inc.*, 299 S.C. 335, 345-46, 384 S.E.2d 730 (1989); *see also Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*, 110 So.3d 399 (Fla. 2013) (wherein the Florida Supreme Court expressly limited the economic loss rule to the product liability context).

Defendants' motion on this issue contains a conclusory argument at best[6] and cites only a single case, *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.* 320 S.C. 49, 463 S.E.2d 85 (1995), without explanatory analysis, to support the contention that the breach of contract claims are inconsistent with the constructive fraud and negligent

[5] Although appellate courts of this state have not addressed whether the economic loss rule is subject to waiver and issue preservation, other courts have found the arguments waived under similar circumstances. *Just In Case Bus. Lighthouse, LLC v. Murray*, 2013 WL 3778184 (Colo. Ct. App. 2013) (argument that economic loss rule applied held unpreserved for appellate review where, although made at the summary judgment stage, the argument was not renewed at the directed verdict stage and was only resurrected in post-trial motions); *JW Const. Co., Inc. v. Elliott*, 253 P.3d 1265, 1271 (Colo. Ct. App. 2011) (economic loss rule unpreserved where included as a defense in the answer, but not raised again before or during trial).

[6] Defendants in fact fail even to define the rule and its application to this case.

misrepresentation claims. However, *Griffin* holds that the economic loss rule does not prevent a party from asserting purely economic loss under tort theories where there is a "breach of a duty arising independent of any contract duties." *Griffin*, 320 S.C. at 54-56, 463 S.E.2d at 88-89 (citing *Mitchell v. Holler*, 311 S.C. 406, 429 S.E.2d 793 (1993) (legal malpractice); *Beachwalk Villas Condominium Ass'n v. Martin*, 305 S.C. 144, 406 S.E.2d 372 (1991) (architect liability); *Georganne Apparel v. Todd*, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990) (accountant malpractice dismissed for failure to prosecute)). *Griffin* expressly rejects the economic loss rule when there is an independent—*e.g.*, fiduciary—duty. *Griffin*, 320 S.C. at 56, 463 S.E.2d at 89 (holding that "the trial judge erred in finding the doctrine of 'economic loss' prohibited the plaintiff from maintaining a suit in tort for purely economic losses"). Defendants owed Mr. Maybank a fiduciary duty in the management of the Family Insurance Trust dating back to 2001, and then solicited and assumed further fiduciary financial management duties in overseeing Mr. Maybank's retirement assets.[7] Consequently, the economic loss rule has no application here.

Defendants also are incorrect that the claims for constructive fraud and negligent misrepresentation are inconsistent. Although they cite to *Brown v. Stewart*, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001), for this proposition, the issue of electing remedies was not even

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[7] Although no appellate court of this state has addressed the economic loss rule in the context of a fiduciary relationship, courts in other states have determined that the rule does not bar claims arising under a fiduciary duty. *See, e.g., Derkevorkian v. Lionbridge Techs., Inc.*, 2007 WL 638717, at *4 (D. Colo. Feb. 27, 2007) (finding that the economic loss rule did not bar a "breach of fiduciary duty claim based on a confidential or trust relationship independent of the parties' contractual relationship"); *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, 2001 WL 1249303, at *4-5 (Mass. Super. Ct. July 26, 2001) (stating that a claim for breach of fiduciary duty was not barred by the economic loss rule); *Carran v. Morgan*, 510 F. Supp. 2d 1053, 1060-61 (S.D. Fla. 2007) (stating that the economic loss rule is inapplicable to breach of fiduciary duty, constructive trust, fraud, and conversion claims); *see also Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 873 (9th Cir. 2007) ("Many courts have explicitly refused to extend the economic loss doctrine beyond the product liability context or beyond claims for negligence and strict liability.").

before the Court of Appeals in that case. Moreover, the trial court had required an election because the jury in that case returned separate verdicts of $50,000 in actual damages on *each* of the causes of action of breach of fiduciary duty, constructive fraud, and negligent misrepresentation (for a total actual damages award of $150,000). *Id.*, 348 S.C. at 40, 557 S.E.2d at 679-80. Neither the trial court nor the Court of Appeals in *Brown* determined that the causes of action of constructive fraud and negligent misrepresentation are inconsistent, as represented by Defendants' in their motion.[8] Defendants' motion for election on this ground should be denied because the jury in this case returned a single verdict against Defendants for $3.1 million on all causes of action on a verdict form proposed by Defendants.

Mr. Maybank is not required to elect a single cause of action on which to proceed. The Court 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 returned a single award of $3.1 million in actual damages in favor of Mr. Maybank. Because a prevailing plaintiff is only required to elect among *remedies*, not *causes of action*, Mr. Maybank is not required to choose a single cause of action on

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[8] Common sense dictates otherwise because both constructive fraud and negligent misrepresentation remove the *scienter* element from the respective claims of actual fraud and fraudulent misrepresentation and both are routinely submitted to the jury. *See, e.g., Armstrong v. Collins*, 366 S.C. 204, 219, 621 S.E.2d 368, 375 (Ct. App. 2005). *Compare Woods v. State*, 314 S.C. 501, 341 S.E.2d 260 (Ct. App. 1993) (elements of constructive fraud) *with Brown*, 348 S.C. at 42, 557 S.E.2d at 680-81 (elements of negligent misrepresentation).

which to proceed. *Creach v. Sara Lee Corp.*, 331 S.C. 461, 464, 502 S.E.2d 923, 924 (Ct. App. 1998). 331 S.C. at 464, 502 S.E.2d at 924 ("Here, while the complaint stated three different causes of action, only one recovery was sought and only one recovery was awarded. Under these circumstances, no election was required.") (citing *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); *Harper v. Ethridge*, 290 S.C. 112, 121, 348 S.E.2d 374, 379 (Ct. App. 1986) (no election is required where a complaint states different causes of action but only one recovery is sought). Because there is no possibility of double recovery of actual damages in this case because the jury returned a single verdict on all of the causes of action, Defendants' motion to choose among the causes of action should be denied.

Conclusion

For these reasons, Defendants' motion to elect should be denied.

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August 19, 2014
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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE CIRCUIT	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL
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-23-8578 **FRANCIS P. MAYBANK'S RESPONSE TO DEFENDANTS' MOTION TO POSTPONE CONSIDERATION OF REQUEST FOR ATTORNEYS' FEES, COSTS AND FOR TREBLE DAMAGES**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 AUG 19 AM 9 03

Plaintiff Francis P. Maybank opposes the Defendants' Motion to Postpone Consideration of his motion for attorneys' fees, costs and for treble damages under the South Carolina Unfair Trade Practices Act (SCUTPA). There is no reason to further delay resolution of this case, beyond Defendants' desire to inflict further financial harm on Mr. Maybank. Defendants have had ample notice and time to prepare for and proceed with the scheduled hearing, especially in view of the fact that they consented to the scheduled hearing date. Further, judicial economy would not be served by bifurcating the post-trial motions hearing and postponing the resolution

of this case by several months.[1] Moreover, the fact that Defendants chose as their expert witness on post-trial matters someone that would be unavailable immediately following the trial provides no basis for further delay. Finally, Mr. Maybank has submitted sufficient information to the Court for it to exercise its discretion in considering his request for attorneys' fees and costs under the method adopted by the Supreme Court for calculating and determining the reasonable amount to be awarded Plaintiff.

ARGUMENT

Defendants' motion for further delay of this case is noteworthy only in its continuation of Defendants' strategy of delay and infliction of maximum expense against their former client and fiduciary. Defendants provide the Court no support, and there is none, for their argument that Mr. Maybank's motions under SCUTPA should not proceed concurrently with all other post-trial motions. Because the jury found that the Defendants violated the SCUTPA, the award of reasonable attorneys' fees and costs is mandated under the statute. S.C. Code Ann. § 39-5-140. There exists no legal determination in this respect; all that is left is the Court's consideration of the evidence of record supporting Mr. Maybank's request.

Mr. Maybank is further entitled to treble damages under the SCUTPA, based on the clear knowing and willful conduct of Defendants. Accordingly, Mr. Maybank submitted his formal requests for attorneys' fees and costs and for treble damages, with supporting memoranda and

[1] Additionally, the time for Defendants to have named an expert witness on the issue of attorneys' fees and costs has already passed; therefore, Defendants have waived the ability to do so now. The deadline for Defendants to name expert witnesses in this case was April 30, 2014. Although Defendants knew attorneys' fees were an issue in this case—Mr. Maybank named Professor John Freeman on the issue of attorneys' fees in their December 3, 2013 expert disclosure—Defendants failed to name an expert witness on the issue. Accordingly, Defendants have waived the ability to present expert witness testimony on the issue, and their attempt to do so now (and further postpone consideration of Mr. Maybank's pending motions) is untimely and should be rejected by the Court on that ground.

affidavits, on July 10—the date ordered by the Court for filing of all post-trial motions. Defendants also submitted their first round of post-trial motions. On July 18, after consultation with the parties, the Court set the hearing for all post-trial motions for August 19, some 40 days after the parties' post-trial motions were filed and 50 days after the jury returned its verdict. Defendants' did not object, either during the consultation period, or after the Court set the hearing, to a hearing on August 19. This late-filed motion is therefore unavailing, and Defendants have not articulated any sufficient reason for delaying consideration of Mr. Maybank's requests.[2]

I. Judicial economy is served by going forward with the hearing as scheduled.

Defendants' contention that judicial economy will be served by having two hearings, instead of one, and postponing the resolution of this case by several months warrants only brief response. In short, the exact opposite of Defendants' contention is true: because the Court already has all of the necessary information before it, judicial economy would actually be served by ignoring Defendants' request for an additional and unnecessary hearing, while proceeding with consideration of all of the motions at one time. This point is reinforced by the fact that Defendants' JNOV and new trial motions related to the Jury's verdict on the SCUTPA claim consist of the same meritless distortion of the exemption argument which the Court has already rejected twice before.

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[2] At the outset of the Delay Motion, Defendants also suggest there are "due process" implications if the Court does not postpone consideration of the Plaintiff's requests. Delay Mot. ¶1. Simply put, there is no risk that Defendants' due process rights will be harmed by going forward with the scheduled hearing. Given that SCUTPA and attorneys' fees have been at issue since the case was initially filed and the significant advance notice of the August 19 hearing provided by the Court, Defendants' due process rights are not being violated because they have had more than ample notice as well as an opportunity to be heard before a fair and impartial tribunal. *See Blanton v. Stathos*, 351 S.C. 534, 542 (2002).

Further, Defendants' own dilatoriness weighs in favor of denying this motion for further delay. As the Court will recall, it scheduled the forthcoming hearing after consultation with the parties. On July 18—the day the Court set August 19 as the hearing date—Defendants' counsel were involved in communications with the Court's Chambers regarding Plaintiff's counsel's request for a scheduling accommodation, due to a conflict of Mr. Maybank with the scheduled hearing date. Defendants represented that they could not be available at any time earlier than August 19, but expressed no concern with the August 19 hearing date. Not wishing to delay consideration of these important matters, Mr. Maybank altered plans to make August 19 work, and the Court confirmed this date for the hearing.

At no point during those discussions did Defendants inform Mr. Maybank or the Court of its desire to bifurcate the post-trial motions proceedings. Moreover, Defendants anticipated Mr. Maybank's motions for attorneys' fees, costs, and prejudgment interest, *see* Motion for JNOV, New Trial, New Trial *Nisi Remittitur* at 2-3 (arguing that "dismissal of the Unfair Trade Practices Act claim would eliminate the need for the Court to consider Mr. Maybank's request for treble damages as well as Mr. Maybank's petition for attorneys' fees and costs), filed July 10, 2014. Notwithstanding, Defendants' failed to notify the Court of its desire to bifurcate, waiting an additional month to file their motion for delay.

Accordingly, Defendants' motion for delay impedes judicial economy and is nothing more than Defendants' continuing strategy to delay resolution of this case at every turn and increase Mr. Maybank's costs and burden in recovering from the Defendants what a jury has already decided is due. Accordingly, the motion should be denied.

II. The Defendants' puzzling decision to select as their expert witness on *post-trial* issues someone that is unavailable *post-trial* is not a valid reason to delay consideration of Plaintiff's motions.

Defendants waited until almost three weeks after the Court set the hearing date and almost four weeks after the post-trial motions were filed to inform the Court and Mr. Maybank that their "selected," albeit undisclosed, expert witness will be unable to work on this matter until possibly late September because the expert is out of the country and has been since before the start of the trial. However, Defendants' failure to act with due diligence in these circumstances is unavailing as an excuse to delay the Court's consideration of Mr. Maybank's motion. Moreover, in claiming that "it is critical that the Defendants be allowed the *opportunity* to present the evidence and establish the record *they believe* is necessary for a fair determination," Defendants' misapprehend the standard applicable to Mr. Maybank's request for attorneys' fees. Based on the Jury's verdict on the SCUTPA cause of action, Mr. Maybank's entitlement to attorneys' fees and costs, as a matter of law, has already been determined. The amount of reasonable attorneys' fees and costs is the only issue that remains; a determination solely within the discretion of the Court, rather than subject to the whims and "beliefs" of Defendants. Notwithstanding Defendants' casual assertion that "a delay of just a little over a month" is requested, Defendants' convenient selection of an unavailable witness does not justify further delay, especially in light of the fact that the alleged critical need for that expert's assistance apparently did not exist on the date the hearing was set.[3]

Indeed, attorneys' fees and costs have been at issue in this case from the beginning, as Mr. Maybank pled for same in his initial complaint in December 2011. Without question, Defendants had plenty of time and ample *opportunity* to secure an expert witness on these issues

[3] Moreover, as discussed above, because Defendants failed to name an expert witness on the issue of attorneys' fees at the time of their expert disclosure, Defendants have waived and are not permitted to offer expert testimony on this issue.

that would be available during the appropriate time period—*i.e.*, post-trial. They did not and failed to name an expert witness on the issue. Even assuming it was reasonable of Defendants' to wait until after trial to engage the services of an expert on the issue, they still have had 50 days to do so. The Court should decline to reward Defendants' failure to diligently protect its rights, particularly where Defendants' indolence will only inflict further financial harm on Mr. Maybank and waste more of this Court's time and resources. Therefore, the unavailability of the Defendants' "selected" expert witness is not a sufficient reason to postpone consideration of the Plaintiff's motions for attorneys' fees and costs.

III. Plaintiff has submitted more than adequate information for the Court to determine the amount of reasonable attorneys' fees and costs due under SCUTPA.

As their final reason for delay, Defendants contend that Plaintiff should be required to provide additional information in support of his request for attorneys' fees and costs and then Defendants' currently-unavailable expert should be allotted sufficient time to review this information. As fully explained in Mr. Maybank's Response to Defendants' Motion to Compel, the information Defendants seek would not assist *the Court* in determining the amount of reasonable attorneys' fees and costs to award Plaintiff. *See Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008) (holding award of reasonably attorneys' fees and costs is left to the sound discretion of the trial court) (citing *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1987)).

The documentation Mr. Maybank submitted in support of his motion, including sworn affidavit testimony, provides the Court with substantial justification for the Court to determine the amount of reasonable attorneys' fees and costs to award Plaintiff using the applicable standards and methods adopted by the Supreme Court. *See Layman, Jackson, supra.* Defendants' Motion to Compel, on the other hand, ignores these standards and seeks information that is irrelevant to the Court's required analysis. Accordingly, Defendants are not entitled to this

extraneous information, and therefore, there is no need to further delay consideration of the Plaintiff's request for attorneys' fees and costs.

Conclusion

Defendants' Delay Motion should be denied, and the Court should proceed to hear all post-trial matters at the August 19 hearing.

Respectfully submitted,

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August 19, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE CIRCUIT	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL
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-23-8578 **FRANCIS P. MAYBANK'S RESPONSE TO DEFENDANTS' MOTION TO COMPEL FRANK MAYBANK TO SUBMIT ADDITIONAL INFORMATION RELATING TO REQUEST FOR ATTORNEYS' FEES AND COSTS**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL D. WICKENSIMER
2014 AUG 19 AM 9 08

Plaintiff Francis P. Maybank opposes the Defendants' motion to compel additional information relating to his request for attorneys' fees and costs. The information sought by Defendants is irrelevant and unnecessary for the Court's factual determination as to the amount of reasonable attorneys' fees and costs to award Mr. Maybank under the South Carolina Unfair Trade Practices Act (SCUTPA).

ARGUMENT

The amount of attorneys' fees and costs awarded pursuant to a statute authorizing reasonable attorneys' fees and costs, like the SCUTPA, is left to the sound discretion of the

Court. *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008) (citing *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997)). The Supreme Court has instructed that a "lodestar" analysis should be employed in the exercise of that discretion. *Id.* at 457, 658 S.E.2d at 332. "A lodestar figure is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a reasonable hourly rate by the reasonable time expended." *Id.* Using this calculation as a starting point, courts may then consider "other factors justifying an enhancement of the lodestar figure with a 'multiplier' before arriving at a final amount." *Id.*

In determining the "reasonable hourly rate" and the "reasonable time expended," trial courts must consider and make factual findings as to the following six factors of reasonableness: "(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 ("[A]n award of attorneys' fees will be affirmed so long as sufficient evidence in the record supports each factor.")). In making these findings, the Court is vested with the discretion to admit or exclude evidence and may regulate the manner in which the evidence is offered. *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 242, 616 S.E.2d 431, 436 (Ct. App. 2005) (affirming trial court's decision to limit defendant's challenge to plaintiff's request for attorneys' fees and costs to argument by defendant's counsel and submission of defendant's affidavit subsequent to the hearing).

Cognizant of the United States Supreme Court's admonition that "a request for attorneys' fees should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), and the fact that the Court is already quite familiar with this litigation, Mr. Maybank has provided the Court ample documentation and testimony by way of sworn affidavits supporting

his request for reasonable attorneys' fees and costs under his meritorious SCUTPA cause of action. The information provided is specifically targeted to assist the Court in addressing the "six factors of reasonableness" and applying "lodestar" analysis. *See* Pl.'s Mem. in Supp. of Motion for Attorneys' Fees and Costs, Exhibits 1, 2 & 3. Nevertheless, seeking to turn Mr. Maybank's request into a second full litigation and inflict further financial harm and delay on their former client, Defendants now request that the Court compel the disclosure of information that is neither relevant to the required analysis nor necessary for the Court to make factual findings as to the six factors described above. Rather, Defendants' motion is predicated almost entirely on what the Defendants' undisclosed and currently unavailable expert witness views as pertinent, *see* Mot. ¶8, and makes only passing reference to, but provides no discussion of, the actual required analysis.

Therefore, as specifically addressed below, when viewed in light of the applicable standard to be employed by the Court in determining the amount of reasonable fees and costs to award Plaintiff under the SCUTPA, Defendants' request for additional information lacks merit, it is untimely, and the motion should be denied.

I. The fee agreement between Mr. Maybank and his counsel and the amount of attorneys' fees and costs paid to date by Mr. Maybank to counsel are irrelevant to the required analysis.

Ignoring Supreme Court precedent, Defendants first ask the Court to order Mr. Maybank to produce the fee agreement with his counsel and any documentation showing the amount of attorneys' fees and costs he has paid to date pursuant to the fee agreement. *See* Mot. ¶(7)(a), (b). However, in *Jackson*, the Supreme Court made clear that the agreement between the client and his counsel is irrelevant to determining the reasonable hourly rate and that it is the application of the six factors of reasonableness that control. 326 S.C. at 308, 486 S.E.2d at 759-60 (affirming

award of attorneys' fees based on an hourly rate higher than the rate agreed to by the client and their attorney); *see id.* at 307, 486 S.E.2d at 759 ("The award of attorney's fees is made to the party, not his lawyer."). Mr. Maybank therefore is not seeking an award based on his fee agreement with counsel and has instead submitted sufficient information for the Court to make a determination applying the six factors of reasonableness set forth in *Jackson* and the interrelated "lodestar" analysis.

Unsurprisingly, Defendants have not provided sufficient reasons for the Court to proceed contrary to the Supreme Court's precedent requiring an analysis of a reasonable amount of compensation for attorneys' fees. Rather, with respect to the fee agreement, Defendants have stated only that "*they are entitled* to review this fee arrangement and the hourly rates actually charged." Mot. ¶(7)(a). Defendants' subjective belief as to what they are entitled to review is not a sufficient reason to compel production of the fee agreement; the amount of reasonable attorneys' fees and costs awarded is left to the sound discretion of *the Court*, not the Defendants. Moreover, because the fee schedule agreed to by Mr. Maybank and his counsel included a reduced hourly rate, with a contingency fee component, it would provide no guidance as to a reasonable *full* hourly rate in today's market for the type and level of legal services provided and thus would not assist the Court in making a determination even if, despite *Jackson*, the Court considered the fee agreement.

Likewise, the amounts paid to date at the reduced hourly rate pursuant to the fee agreement would not assist Court in determining the *full* "reasonable hourly rate." And, contrary to the single-sentence contention in Defendants' motion, this information would not assist the Court in applying the "contingency of compensation" factor. Mot. ¶7(b). The risk-sharing fee arrangement between Mr. Maybank and his counsel is relevant only because it reflects the

acknowledgement by Mr. Maybank and his counsel as to the considerable difficulty and risk associated with this case from the very beginning. Both Mr. Maybank and his counsel bore substantial risks in seeking to hold Defendants accountable for their actions, and the Court should certainly take this into consideration when determining the amount of reasonable attorneys' fees to award Mr. Maybank. The fact that Mr. Maybank made payments at a reduced hourly rate throughout this litigation did not eliminate the exposure to this "contingency of compensation" risk because amounts received by counsel merely helped defray counsel's operating costs and did not provide counsel with profit. To earn a profit, counsel had to achieve a settlement or verdict to receive incentive compensation above the hourly rate fees. Thus, although the risk was allocated differently, the *level* of risk remained substantial. Consequently, the actual amount of fees paid to date by Mr. Maybank is similarly irrelevant to the application of "contingency of compensation" factor.

Therefore, Defendants' requests for the fee agreement between Mr. Maybank and his counsel and for documentation showing the amounts paid by Mr. Maybank pursuant to that agreement should be denied.

II. Mr. Maybank has already provided sufficient information regarding the hourly rates currently charged by his counsel for similar matters.

Defendants also seek documentation showing the hourly rates charged to other clients by Mr. Maybank's counsel. Mot. ¶7(c). However, Mr. Maybank has already submitted the testimony of his counsel, by way of sworn affidavit, regarding the hourly rates for investment/banking related matters currently charged by Willoughby & Hoefer, P.A. and the hourly rates for litigation matters currently charged by Bannister, Wyatt & Stalvey, LLC. Willoughby Aff. ¶¶5-7, 9-19, Exhibits A & B; *see Layman*, 376 S.C. at 459, 658 S.E.2d at 333 (holding that "*current rates* constitute a reasonable hourly rate for purposes of a lodestar

calculation.") (emphasis added). Defendants have not articulated a legitimate reason why additional "documentation showing the hourly rates charged to other clients" would be relevant or would add anything that would be helpful to the Court's analysis. *See* S.C.R. Evid. 403. In fact, the motivating factor behind Defendants' request appears to be to question the veracity of the sworn testimony of Mr. Maybank's counsel. However, Defendants could submit an affidavit of its counsel asserting that the fees and costs sought by Mr. Maybank exceed the charges made to Defendants, if, in the unlikely event such an assertion is true. Without such an affidavit, and none has been provided, Defendants' request should be summarily denied.

III. Mr. Maybank has provided sufficient information regarding the amount of time and costs expended in this litigation.

Defendants also seek additional information regarding the amount of time expended by Mr. Maybank's counsel, including "billing invoices," and the costs incurred in pursuing this litigation. Mot. ¶7(d), (e). These requests should be denied as well.

First, because most of the information contained within Mr. Maybank's counsel's billing invoices or statements would "reveal the motive of [Mr. Maybank] in seeking representation, litigation strategy, or the *specific* nature of the services provided, such as researching particular areas of law," or would "reveal something about the advice sought or given," it falls within attorney-client privilege and thus is not subject to disclosure. *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402-03 (1999) (internal quotations and citations omitted). When this information is excluded from the billing records and expense reports, what is left is exactly what Mr. Maybank has provided to the Court and Defendants already: the amount of time and costs expended and the description of the work performed. *See* Willoughby Fee Aff. ¶3 & Exs. A & B; Willoughby

Cost Aff. Ex. A.[1] Moreover, granting Defendants' request would essentially lead to the re-opening of discovery, would impose significant additional expenses on Mr. Maybank, and would require the Court's determination of attorney-client privilege issues through *in camera* review. In essence, granting Defendants' request would lead to the "second major litigation" discouraged by the United States Supreme Court. *See Hensley*, 461 U.S. at 437.

In any event, for the reasons discussed below, the Court need not delve into these issues or flyspeck Mr. Maybank's counsel's billing records to determine the appropriate amount of reasonable attorneys' fee and costs. Mr. Maybank has provided ample documentation and testimony by way of affidavit to support the amount of time and costs incurred in this litigation. The reasonableness of the total amount of hours expended[2] and costs incurred should be beyond reproach because, unlike in contingency-fee only cases in which attorneys may not keep close tabs on the total amount of time spent, the time expended and costs incurred in this case were actually billed to Mr. Maybank pursuant to the fee arrangement and in accordance with Mr. Maybank's counsel's billing obligations under the Rules of Professional Conduct. *See* Rule 1.5(a), RPC; *see Hensley*, 461 U.S. 434 (discussing attorney's obligation when requesting attorneys' fees from adversary under statute to exercise the same "billing judgment" used in

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[1] Defendants' request to audit counsel's billing records "to assess whether a task itself was necessary and ... whether a reasonable amount of time was expended with respect to each task," *see* Motion at ¶7.d, is the height of absurdity and smacks of disrespect and disdain towards Mr. Maybank's counsel and the manner in which they have litigated this case. Apparently not deterred by the Jury's stern rebuke, Defendants have the audacity to contend that they are entitled to look behind and second-guess counsel's litigation strategy and daily tasks which led to Mr. Maybank's victory at trial.

[2] The amount of hours devoted to this litigation by Mr. Maybank's counsel is directly correlated with the scorched earth defense employed by Defendants, whereby they challenged every detail and fact of this case, ceding no ground. As articulated by Professor Freeman, Defendants had every right to employ such a defense strategy; however, the flip side of their approach is that the defense strategy becomes a factor weighing heavily in favor of a generous fee award based on Mr. Maybank's perseverance and victory at trial. Defendants need only look to the amount of time that they devoted to this case for a comparison of reasonableness.

charging clients under fee agreement). Therefore, at bottom, the implication of Defendants' motion is that Mr. Maybank is misrepresenting the content of his billing records to the Court.

Moreover, there is no need to reduce the amount of hours or amount of costs because all of the causes of action in this case were based on "a common core of facts" and all work performed was interrelated with the SCUTPA claim.[3] *Hensley*, 461 U.S. at 424, 435, 438, & 440. Additionally, even if there is a *de minimis* amount of time or costs not related to the SCUTPA claim, this is properly taken into consideration by the Court in the application of the six *Jackson* factors, specifically through "the time necessarily devoted to the case" and "beneficial results obtained" factors.

Additionally, the cases cited by Defendants in their motion are all distinguishable from the facts before the Court, and none require the level of disclosure of information regarding the amount of hours expended or costs incurred in this case, nor the ability of opposing counsel to retroactively carp on the tasks performed. For example, neither *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993), nor *Smith v. Strickland*, 314 S.C. 192, 442 S.E.2d 207 (Ct. App. 1994), are applicable here. In both cases, the courts merely affirmed the use of the six factors of reasonableness and recited the general rule announced in *Jackson* that the trial court should make findings of fact for each of these *factors*. *Blumberg*, 310 S.C. at 494, 427 S.E.2d at 661 ("When an award of attorney's fees is requested and authorized by contract or statute, the court should make specific findings of fact on the record for each *factor*...") (emphasis added); *Smith*, 314 S.C. at 198, 442 S.E.2d at 210 ("[The trial court] shall make specific findings of fact on the relevant *factors* to be considered by a court in making an attorney fees award") (emphasis

[3] Mr. Maybank has already excluded his costs exclusively associated with the claims of the Maybank Family Insurance Trust that were not interrelated to the SCUTPA claim, which primarily consisted of the time and fees of insurance expert Scott Brawley. *See* Willoughby Cost Aff. ¶6.

added). The circumstances of the attorney's request of fees in *Blumberg* consisted only of "testimony that the petitioners were seeking reasonable fees." *Blumberg* 310 S.C. at 492, 427 S.E.2d at 660. The situation before this Court is inapposite, as Mr. Maybank has provided sworn testimony and itemization detailing the work completed on his behalf. Because the Court already has sufficient information before it to make these factual findings, the Court's award of reasonable attorneys' fees and costs will be consistent with the holdings of *Blumberg* and *Smith.*

Similarly, the cases of *Rice v. Multimedia, Inc.*, 318 S.C. 95, 456 S.E.2d 381 (1995), *Haley Nursery Co., Inc. v. Forrest*, 298 S.C. 520, 381 S.E.2d 906 (1989), and *Laser Supply and Services, Inc. v. Orchard Park Associates*, 382 S.C. 326, 676 S.E.2d 139 (Ct. App. 2009), cited by Defendants, do not support the request for the additional information required for opposing counsel to audit Mr. Maybank's counsel's work. In particular, none of these decisions stand for the proposition that Defendants' extraordinary request for attorney-client privileged billing invoices and records is warranted.

Both *Rice* and *Haley* involve the appellate court affirming the trial court's exercise of discretion in considering a request for attorneys' fees and costs. In *Rice*, the Supreme Court, deciding cross-appeals, affirmed the trial court's exercise of its discretion in reviewing and ultimately reducing the prevailing party's request for attorneys' fees. *Rice*, 318 S.C. at 100, 456 S.E.2d at 384. The *Rice* opinion provides no analysis of the trial court's decision and is of no import to the Court's consideration of Mr. Maybank's request. The Supreme Court merely noted the trial court's compliance with its mandate to address the relevant factors in consideration of a fee request, and affirmed the court's decision without comment.[4] *Id.* Here, a reduction is neither

[4] What *is* relevant from the *Rice* opinion is the fact that the award of attorneys' fees sustained by the Supreme Court on appeal was more than both the award of actual damages and the amount the prevailing party's attorney was due under his contingency fee contract. *Rice*, 318

warranted nor required because all of the causes of action are interrelated and the work performed supported all claims. Meanwhile, the *Haley* decision was decided pre-*Jackson* and involved the reduction of attorneys' fees in a case in which the party that was awarded attorneys' fees for prevailing on their claims also spent time defending against the other party's counterclaims. *Haley*, 298 S.C. at 524, 381 S.E.2d at 909. Once again, the Supreme Court merely affirmed the trial court's fee award after consideration of the proper factors. *Id.*[5]

Finally, the principal case relied upon by Defendants—*Laser Supply*—is also easily distinguishable from this case. In *Laser Supply*, the party awarded attorneys' fees initially brought an action consisting of two breach of contract claims. Prior to trial, the party abandoned all claims related to one of the contracts and proceeded on claims related to the other. *Laser Supply*, 382 S.C. at 332-33, 676 S.E.2d at 142-43. The circuit court conducted a trial and awarded the party damages and attorneys' fees and costs pursuant to the terms of the contract litigated. On appeal, the Court of Appeals determined that, while the requested hours and rates appeared reasonable, neither the party's fee request nor the trial court order indicated whether the amount of time attributable to the discarded contract claims were included in the request. *Id.* at 340, 676 S.E.2d at 147. As a result, the Court of Appeals remanded the case to the trial court for a limited determination of whether any portion of the award was "attributable solely" to the claims related to the abandoned contractual claims. *Id.* at 341, 676 S.E.2d at 147.

S.C. at 101-02, 456 S.E.2d at 385. Therefore, the *Rice* opinion actually supports Mr. Maybank's contention that the Court's consideration of the fee agreement with counsel is irrelevant to a determination of reasonable attorneys' fees and costs under the SCUTPA.

[5] Moreover, the fact that some of the fees may be attributable to defending a counterclaim is not dispositive of whether recovery of those fees is appropriate, where, as here, the facts are interrelated. *See generally Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 318 S.C. 471, 483-84, 458 S.E.2d 431, 438-39 (1995) (finding such a distinction "specious" and explaining that no reduction was needed because "the facts and issues surrounding [the prevailing claim] were *intertwined* with those of the counterclaims") (emphasis added).

Again, this case presents a very different situation, where all of the causes of action arose from a "common core of facts." Mr. Maybank conducted exhaustive and extensive, not to mention expensive, discovery in developing the facts surrounding Defendants' wrongful actions. The Court will recall that one of the factual bases for Mr. Maybank's SCUTPA cause of action,[6] as argued to the Jury, was not disclosed through discovery until the *day before the start of trial*, over two and a half years after the case was filed. Consequently, the entirety of Mr. Maybank's discovery in this case—all the way up to the eve of trial—is justifiably attributable to his pursuit of the grounds supporting the SCUTPA cause of action. Moreover, on remand, the Court of Appeals in *Laser Supply* only required the plaintiff to provide a "rough estimate" to determine if there was any portion of the fees and costs requested that was solely attributable to the abandoned and unrelated claims. *Laser*, 382 S.C. at 342, 676 S.E.2d at 148. Here, Mr. Maybank is not asking the Court to "resort to rough estimates" to determine the amount of reasonable attorneys' fees and costs to award him. As stated above, Mr. Maybank's request consists of actual hours billed to Mr. Maybank. Accordingly, Mr. Maybank is asking the Court to apply the six factors of reasonableness and the lodestar analysis, and Mr. Maybank has provided more than enough information for the Court to conduct an appropriate review. Therefore, there is no need for the Court to require the disclosure of Mr. Maybank's "billing invoices" or additional information regarding the costs incurred in this litigation.

IV. Professor Freeman's opinions are fully supported by the record and his extensive knowledge on these matters.

[6] On Friday, June 13, 2014, one business day before the trial was set to begin on the following Monday, Defendants made a supplemental production of 100 documents. Among these documents produced on the eve of trial was a generic copy of the General Counsel Approval Letter, dated February 1, 2006. *See* Pls.' Trial Ex. 91. This copy was not specific to any customer and demonstrated Defendants' unfair and deceptive practice of pre-clearing the use of Variable Prepaid Forward Contracts with BB&T employees who owned BB&T Corporation common stock, like Mr. Maybank.

As their final request, Defendants seek "[i]nformation regarding the assertions of Professor Freeman in his affidavit." Mot. ¶7(f). In his affidavit, Professor Freeman describes in great detail the bases for his opinion and underlying analysis as to reasonableness of the amount of attorneys' fees and costs to award Mr. Maybank. Freeman Aff. ¶4, 5, 7, 10-15, 54. Any materials specific to this case that Professor Freeman relied on are included in the record or were attached to his affidavit. *See* Freeman Aff. Exs. 2 (Willoughby Cost Affidavit and attached exhibits) & 3 (Willoughby Fee Affidavit and attached exhibits). In addition to these materials, Professor Freeman's opinion was based on his direct knowledge from his involvement in this litigation and his extensive "knowledge, background, training, and experience in fee-related matters." Freeman Aff. ¶55. Defendants challenge the basis for Professor Freeman's opinion as to "fair market hourly rates," but, as demonstrated by Professor Freeman's testimony in his deposition and in his affidavit, this opinion is based on his "technical[ ] or other specialized knowledge" with respect to complex investment-related litigation and fee-related matters. *See* Freeman Aff. ¶¶1-2 & Ex. 1; *see also* Rule 702, SCRE. Defendants also seek the "summaries of work" referenced by Professor Freeman. As stated above, the majority of that information has already been provided, *see* Willoughby Fee Aff. ¶3 & Exs. A, B, while the remaining summary is expressly detailed in the affidavit, *see* Freeman Aff. ¶4 (detailing the number of depositions, pages of deposition testimony, documents produced in discovery, etc.). Accordingly, Defendants' final request should be denied for the simple reason that there is nothing else to provide.[7]

[7] Defendants also cite the need of their undisclosed, world-traveling expert to review the requested documents in support of this motion to compel. *See* Motion at ¶8 ("The Defendants' expert views these materials as essential to a proper analysis of Mr. Maybank's request."). As thoroughly discussed in the response to Defendants' motion to delay consideration of Mr. Maybank's fee and cost request, Defendants' selection of an unavailable expert witness is

CONCLUSION

Defendants' motion to compel the production of additional and unnecessary information should be denied.

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Attorneys for Francis P. Maybank

August 19, 2014
Columbia, South Carolina

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insufficient grounds to support further delay in the consideration of Mr. Maybank's motion. Moroever, Defendants have yet to disclose an expert witness prepared to testify on the issue of attorneys' fees and costs, despite Mr. Maybank's provision of notice immediately following the Jury verdict that he would seek attorneys' fees under the SCUTPA cause of action. Therefore, Defendants' dilatory approach to Mr. Maybank's motion means that Defendants have waived the right to name an expert witness on the issue of attorneys' fees and costs.

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,	) Civil Action No. 2011-CP-23-8578
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	) **FRANCIS P. MAYBANK'S RESPONSE TO DEFENDANTS' MOTION TO STRIKE AFFIDAVIT OF JOHN FREEMAN**
Defendants.	)

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Plaintiff Francis P. Maybank opposes the Motion to Strike Affidavit of John Freeman filed by Defendants. Defendants' motion is a hodgepodge of conclusory challenges to Professor Freeman's affidavit without any substantial support. The motion should be denied.

ARGUMENT

The grant of a request for attorneys' fees pursuant to statutory authorization is reviewed for an abuse of discretion. *See, e.g., Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008); *Diamond Star Bldg. Corp. v. Freed*, 30 F.3d 503, 506 (4th Cir. 1994). The exercise of that discretion requires the trial court to make factual findings in support of the required analysis. *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997) ("Further, on appeal, an award

for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor."). Because the decision to grant attorneys' fees requires the trial court to make supporting factual findings, expert testimony is admissible to "assist the trier of fact ... to determine a fact in issue." S.C. R. Evid. 702.

As demonstrated by Professor Freeman's testimony in his deposition and at trial, as well as by the affidavit submitted in this case, he has "technical[ ] or other specialized knowledge" with respect to the litigation of lawsuits involving complex financial issues. *See* Freeman Aff. ¶¶1-2 & Ex. 1. He therefore is qualified to testify as an expert in this matter. S.C. R. Evid. 702. Because the lodestar analysis that the Court must apply in considering Plaintiff's request for attorneys' fees requires appropriate factual findings, it is entirely appropriate for Professor Freeman to provide expert testimony that may assist and inform the Court's factual findings in its determination of a reasonable award of fees. The fact that Professor Freeman may render an opinion on some of the ultimate issues does not change this conclusion because an expert can testify as to the "ultimate issue to be decided by the trier of fact." S.C. R. Evid. 704.

In seeking to strike Professor Freeman's affidavit, Defendants ignore the fact that he has been permitted to testify in Court as an expert on attorneys' fees on numerous occasions and that the admission of his testimony has been specifically approved by the Court of Appeals. *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (Ct. App. 2008). Defendants instead start their challenge by completely ignoring all of this and insinuating that *Dawkins v. Fields*, 354 S.C. 58, 63-67, 580 S.E.2d 433, 436-37 (2003), requires excluding the Professor Freeman's affidavit because the Supreme Court affirmed the trial court's decision *in that case* not to consider an affidavit from Professor Freeman. *Vortex* was of course decided after *Dawkins*. And, unlike the affidavit characterized in *Dawkins* as containing mostly legal

argument, the affidavit submitted in this case is submitted to assist the Court in assessing the factual basis supporting the reasonableness of Plaintiff's fee request. While it is true that opinion testimony on purely legal issues generally is not permitted,[1] *Vortex* fully demonstrates that an expert—including Professor Freeman—may testify as to factual matters that pertain to legal issues. 378 S.C. at 207-08, 662 S.E.2d at 450. Moreover, the Supreme Court even recognized in *Dawkins* that the affidavit at issue in that case "contained 'some helpful, factual information,'" thus recognizing that Professor Freeman is qualified to provide testimony on factual matters. *Id.*, 378 S.C. at 207, 662 S.E.2d at 450 (quoting *Dawkins*, 354 S.C. at 66, 580 S.E.2d at 437).

A review of Professor Freeman's affidavit demonstrates that, consistent with the parameters of expert testimony established by these opinions, he renders expert opinion testimony only as to the factual nature of the analysis. In fact, he expressly recognizes that his role is to testify as to "relevant comparisons and empirical data." Freeman Aff. ¶3 (quotation marks and citation omitted). And he expressly notes that the "ultimate decision [to grant attorneys' fees] belongs to the Court." *Id.* (quotation marks and citation omitted); *see, e.g., id.* at ¶56 ("If the Court deems it necessary to select an appropriate lodestar multiplier ...."). While Professor Freeman references state law standards, Freeman Aff. ¶¶12-15, he does so to place his

[1] This point is crucial because it demonstrates the error of Defendants' motion when viewed in proper context. Defendants' exhortations that Professor Freeman's affidavit offers only legal conclusions ignores the plain fact that Mr. Maybank's motion for attorneys' fees under the Unfair Trade Practices Act *does not require a legal conclusion*. Under S.C. Code Ann. § 39-5-140, the award of attorneys' fees is mandated upon a finding of a violation of the Act. Because the Jury returned a verdict against Defendants under the Act, Mr. Maybank's motion requires only a *factual* determination by the Court regarding the reasonable amount of attorneys' fees and costs that are appropriate based on the pertinent *facts* in the context of the factors dictated by case law. In this respect, the Court's consideration of Professor Freeman's affidavit mirrors the situation in *Vortex*, where the trial court had already ruled on the pending legal issue (the existence of a fiduciary relationship), and Professor Freeman was permitted to opine as to whether the facts present in that case supported the court's consideration of the standard of care. Similarly, the nature of an award of statutory attorneys' fees uniquely lends itself to the Court's consideration of expert testimony regarding reasonableness of Mr. Maybank's request.

opinion testimony in the appropriate context and base his factual analysis on the appropriate analytical framework. After identifying the analytical framework, Professor Freeman provides opinion testimony to assist the trier of fact regarding the factual findings and context necessary for each of the pertinent factors to determining the reasonableness of an attorneys' fees request:

- The nature, extent, and difficulty of the case, ¶¶16-28;
- The time devoted to the case, ¶¶29-30;
- The professional standing of counsel, ¶¶31-39;
- The contingency of compensation, ¶40;
- The beneficial results obtained, ¶¶41-45; and
- The customary legal fees for similar services, ¶¶46-59.

See Freeman Aff. ¶*14; Layman*, 376 S.C. at 458, 658 S.E.2d at 333 (identifying six factors). Thus, the affidavit itself refutes the contention that Professor Freeman's testimony lacks a sufficient factual basis because the underlying facts pertaining to the case are identified throughout the affidavit.

The remainder of Defendants' objections to Professor Freeman's affidavits may be rejected as a matter of course. For example, the propriety of applying a loadstar multiplier, Mot. ¶(4)(b), is based on the factual circumstances of the case, *see Layman*, 376 S.C. at 460, 658 S.E.2d at 334, not the fact that a SCUTPA claim is involved. Defendants' complaints about alleged hyperbole, Mot. ¶(7), also do not impact the admissibility of Professor Freeman's testimony. His discussion of various issues such as the public interest and the zeal and vigor of defense counsel are made within the context of the six factors delineated in *Layman*. Mot. ¶4(c); Freeman Aff. ¶¶17-18. Although he referenced the degree of success as a consideration, Professor Freeman's opinion pertains simply to the results obtained and not to whether the degree of success is the most important factor. Mot. ¶4(d); *see* Freeman Aff. ¶41. It is unnecessary to reduce the fees for the Jury's finding in Defendants' favor on some claims because all of the causes of action were based on "a common core of facts." *Hensley v.*

Eckerhart, 461 U.S. 424, 435, 438, & 440 (1983); Mot. ¶4(e). And it is well-recognized that attorneys' fees may be awarded for work performed on an appeal. *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 199, 750 S.E.2d 78, 84 (2013); *Taylor v. Medenica*, 332 S.C. 324, 326, 504 S.E.2d 5901, 591 (1998); Mot. ¶(4)(f); Freeman Aff. ¶61.

Many of their challenges go to the weight and not the admissibility of Professor Freeman's affidavit. *E.g.*, Mot. ¶¶(4)(a), (e). (6)(a), (b), (c), (d), (e), (f), (g), (h). *See, e.g.*, *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 762 (7th Cir. 2010) (criticisms of the quality of an expert's testimony go to the weight of that testimony, not its admissibility). Testimony about the "magnitude and scope of the litigation" is a factual assessment based on Professor Freeman's knowledge, skill, experience, training, and education, S.C. R. Evid. 702, and thus is admissible. Mot. ¶6(a); Freeman Aff. ¶5.. Professor Freeman's affidavit explains the basis of his underlying analysis of the rates and the fee agreement, and explained in his deposition the appropriate hourly rates and prevailing market rates. Mot. ¶6(b)-(d); Freeman Aff. ¶¶10, 54. Professor Freeman fully explains that the nature of this case supported the hours devoted to its litigation; any challenge to that testimony goes to its weight and not its admissibility. Mot. ¶6(e); Freeman Aff. ¶29. He fully explains that his assessment of this case as delivering one of the largest verdict generated in this state is based on his knowledge. Mot. ¶4(f); Freeman Aff. ¶42. It is unnecessary to reduce the fees for the Jury's finding in Defendants' favor on some claims. *Hensley,* 461 U.S. at 435, 438, & 440; *see* Mot. ¶6(g); Freeman Aff. ¶44. Similarly, any challenge to his discussion of the factual context of other cases as a basis for informing his opinion in this case—which is a perfectly appropriate process of informing his factual assessment—goes to the weight of the affidavit, not to its admissibility. Mot. ¶6(h);

Freeman Aff. ¶¶46-52. Moreover, such analysis is entirely appropriate for an expert to undertake to inform his expert opinion.

Conclusion

Defendants' motion to strike Professor Freeman's affidavit should be denied.

Respectfully submitted,

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August 19, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
	)	
FRANCIS P. MAYBANK, and JANE H.P. MAYBANK, as TRUSTEE for the FRANCIS P. MAYBANK FAMILY INSURANCE TRUST,	)	Civil Action No. 2011-CP-23-8578
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.	)	

Attached hereto is Mr. Maybank's proposed Order and Final Judgment that excludes an award of prejudgment interest.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
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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	)	**ORDER AND FINAL JUDGMENT**
Defendants.	)	

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 for two weeks beginning June 16, 2014 before a jury of Greenville County citizens. The jury began deliberations on Friday, June 27 and, after a recess over the weekend, returned to its deliberations on Monday, June 30, following which the jury awarded

actual damages in the amount of $3,100,000 and punitive damages in the amount of $5,000,000 in favor of Mr. Maybank on the causes of action of breach of contract, breach of fiduciary duty, constructive fraud, negligent misrepresentation, and for violation of the South Carolina Unfair Trade Practices Act ("UTPA").[1] The jury did not return a verdict on any claims in favor of Plaintiff Jane H.P. Maybank, as Trustee for the Francis P. Maybank Family Insurance Trust. I observed the jury during the trial and found the panel to be attentive, thoughtful, diligent, and deliberate in its consideration of the evidence presented during this lengthy trial.

Following the verdict, the parties filed post-trial motions on July 10, 2014. Plaintiff moved for an award of attorneys' fees and costs and to treble the jury's award of actual damages under the UTPA, as well as for prejudgment interest on the actual damages.[2] Defendants moved for judgment notwithstanding the verdict ("JNOV"), new trial absolute, or, in the alternative, new trial *nisi remittitur*. Additionally, Defendants moved that the Court should require Mr. Maybank to elect a remedy for recovery.

A hearing was held regarding these motions on Tuesday, August 19, 2014, after which the Court 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 jury's award of punitive damages in the amount of $5,000,000 is appropriate. I also find that the jury was not precluded from awarding punitive damages. I further 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 therefore treble the jury's actual damage award of $3,100,000 to $9,300,000. Additionally, I find Defendants' unfair and deceptive conduct, which the jury determined to violate the UTPA, was

[1] *See* S.C. Code Ann. §§ 39-5-10 *et seq.* (as amended).

[2] *See* S.C. Code Ann. § 34-31-20.

separate and distinct from the conduct which supports the common law causes of action for which punitive damages were assessed against Defendants by the jury. Consequently, I hold that no election is required, and Plaintiff is entitled to both treble damages under the UTPA and the jury's punitive damages award. I find that Plaintiff's request for attorneys' fees and costs is mandated and that an award of $2,654,295 in fees, and $245,011 in costs, is reasonable and is therefore taxed upon Defendants. Finally, I deny Mr. Maybank's motion for prejudgment interest.

Analysis

Motion for Judgment Notwithstanding the Verdict

I have fully reviewed Defendants' motion for JNOV and I deny that motion because, for the reasons explained below, I find the evidence supports the jury's verdict in favor of Mr. Maybank on the causes of action of breach of contract, breach of fiduciary duty, constructive fraud, negligent misrepresentation, and violation of the UTPA. To the extent a ground for relief in the JNOV is not addressed below, I expressly deny the JNOV motion on that ground.

JNOV Standard

In ruling on a JNOV motion, this Court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. *RTF Mgmt. Co., LLC v. Tinsely & Adams LLP*, 399 S.C. 322, 732 S.E.2d 166 (2012); *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "A motion for a judgment notwithstanding the verdict is a renewal of the directed verdict motion and cannot raise grounds beyond those raised in the directed verdict." *Roland v. Palmetto Hills*, 308 S.C. 283, 286, 417 S.E.2d 626, 628 (Ct. App. 1992); *see also, e.g., In re McCracken*, 346 S.C. 87, 93, 551 S.E.2d 235, 238 (2001); *Gov't Emps. Ins. Co. v. Mackey*, 260 S.C. 306, 315-16, 195 S.E.2d 830, 834 (1973); *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486,

496 (Ct. App. 2006). A JNOV motion "should be denied where either the evidence yields more than one inference or its inference is in doubt." *McMillan*, 367 S.C. at 564, 626 S.E.2d at 886. Moreover, "[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 considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight. When considering a JNOV, neither an appellate court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (citation and internal quotation marks omitted).

I. South Carolina Unfair Trade Practices Act.

Defendants contend that they are entitled to JNOV on Mr. Maybank's UTPA cause of action because BB&T's activities and actions are exempt from the UTPA. I find that there was evidence of actions taken by Defendant with respect to Plaintiff that did not involve the sale of a security, that Defendants' activities are not exempt from the UTPA, and that Defendants in any event did not meet their burden to prove they were entitled to any exemption under the UTPA.

A. *Legal background.*

S.C. Code Ann. § 39-5-40(a) provides that the prohibitions contained within the UTPA 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." Considering whether the exemption applies requires a case-by-case analysis of the alleged misconduct, not a broad, sweeping, industry exemption like that advocated by Defendants. *See Ward v. Dick Dyer*, 304 S.C. 152, 155, 403 S.E.2d 310, 312 (1991) ("We believe that the exemption is intended to

exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes."). Moreover, § 39-5-40 requires that "the burden of proving exemption from the provisions of this article shall be upon the person claiming the exemption."

B. ***Discussion.***

I find that, viewed in the light most favorable to the nonmoving party, the evidence supporting a violation of the UTPA was supported by at least three separate and distinct theories of unfair and deceptive acts by Defendants, none of which involved a public offering, registration, or sale of a security, and all of which are separate from the basis of liability for the common law causes of action. I find that any one of these three theories supports the jury's finding of unfair and deceptive conduct in commerce.

I first find that Plaintiff presented evidence from which the jury reasonably could conclude that the Act was violated by Defendants' admitted use of their form Wealth Management Agreement ("WMA"). There was evidence that Defendants knew at the time they presented the WMA to Mr. Maybank that there were errors, misstatements, and deliberate misrepresentations in the contract and that BB&T would not fulfill the duties and obligations promised as written. These duties and obligations that BB&T Bank could not perform were the basis of the bargain and constituted the crux of the fiduciary relationship that the bank induced Mr. Maybank to enter into with it. Nonetheless, the evidence was clear that BB&T Bank and its representatives were restricted from fulfilling the duties and obligations which it agreed to perform as an integral part of that fiduciary relationship, although there was also disputed testimony that the restricted representatives often disregarded the restriction or "honored it in the

breach."[3] The evidence further showed that Defendants presented the same form document to all clients of the Wealth Management Division during the period from at least 2006 into 2009 as a condition of their provision of fiduciary wealth management services to such clients. Further, Mr. Ross Walters, BB&T's corporate representative, admitted that Defendants did not provide Mr. Maybank, or any other customer, with notice that the WMA would not be fulfilled as represented and promised in the language of the agreement. I therefore find the verdict was supported by evidence that Defendants knowingly and deliberately presented a false, unfair, and deceptive form WMA to Mr. Maybank and other clients and that this conduct did not involve a security or securities transaction and was not permitted under laws administered by any regulatory body or permitted by any other South Carolina law.

I further find that the jury verdict on the UTPA claim is supported by evidence that Defendants engaged in unfair and deceptive business practices by misleading Mr. Maybank and approximately 130 other customers through misrepresentations contained in a letter from Ralph Borrello, Senior Vice President of BB&T Wealth Advisors Sales and Service, stating as follows in pertinent part:

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

Ex. 50. Although Mr. Borrello's letter to Mr. Maybank and other customers claims that Defendants' refund was "a reflection of [BB&T's] corporate values," BB&T's corporate representative testified that, in truth, the impetus for the fee refund was the criticism of BB&T

[3] BB&T designated its wealth managers with the title of "Wealth Management Advisors" in their dealing with the public but then restricted them against providing wealth advice to their clients. This restriction was not disclosed to the public.

Asset Management's fee practices by the Securities and Exchange Commission ("SEC") staff following the discovery of these practices during a routine SEC audit. The evidence further showed that the SEC criticized the practice of charging transaction-based "broker-esque" fees for selling derivative products including variable prepaid forward contracts ("VPFC"), because BB&T Asset Management was not registered as a broker-dealer when the transactions occurred. The jury reasonably could have found a UTPA violation based on a finding that BB&T deliberately and deceptively misled their clients regarding the refund to obscure the nature of their business practices. The jury also reasonably could have concluded that Defendants' statements to Mr. Maybank and other clients unfairly, deliberately, and deceptively operated to hide the truth about BB&T's actions, thereby allowing the rights of clients to recede or disappear with the passage of time, and also operated to otherwise lull clients into complacency, so that due diligence reviews of BB&T's business practices would not be conducted, resulting in clients remaining unaware of the truth and BB&T therefore avoiding civil liability. I therefore find the verdict was supported by evidence that Defendants knowingly and deliberately engaged in unfair and deceptive practices by misrepresenting the truth when refunding these fees and that this conduct did not involve a security or securities transaction and was not permitted under laws administrated by any regulatory body or permitted by any other South Carolina law.

I also find that the jury verdict on the UTPA claim is supported by evidence that Defendants knowingly and deliberately engaged in unfair and deceptive conduct by misrepresenting the truth to Mr. Maybank about conducting an individualized assessment of his financial situation. *See* Ex. 7 (August 11, 2006 General Counsel "Approval Letter"). The Approval Letter was written as though specifically tailored for Mr. Maybank's retirement needs. In truth, the letter was merely a "fill-in-the-blank" form letter extolling the suitability of VPFCs

for clients with concentrated positions in BB&T stock, no matter their financial situation, station in life, or financial goals and needs. *Cf.* Ex. 91. Mr. Maybank was provided the letter, and relied upon its representations, prior to proceeding with Defendants recommended strategy. I find Defendants' use of the Approval Letter deliberately, unfairly, and deceptively misrepresented the services they were providing to Mr. Maybank and other customers. Promising specialized or individualized treatment while actually providing only stock services is a violation of the UTPA. *See deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 270-71, 536 S.E.2d 399, 407 (Ct. App. 2000) (car dealer who promised special status to potential buyers while submitting only stock order). I therefore find the jury verdict was supported by evidence that Defendants knowingly and deliberately engaged in unfair and deceptive practices by presenting Mr. Maybank with a purported individualized financial assessment that in fact was a stock form letter and that this conduct did not involve a security or securities transaction and was not permitted under laws administered by any regulatory body or permitted by any other South Carolina law.

I further find that Defendants' exemption argument is based on the rejected theory that a banking industry exemption to the UTPA exists, which is unsupported by the law and contrary to the *Ward* case's explicit repudiation of the general activities test. 304 S.C. at 155, 403 S.E.2d at 312.[4] At its core, Defendants' exemption argument is based on the erroneous assumption that all of BB&T's activities are exempt from the Act because, according to their incorrect assertion, securities are generally regulated and the VPFC sold to Mr. Maybank is a security. However, the Supreme Court in *Ward* interpreted the UTPA exemption to only exclude "from the UTPA those actions or transactions which are allowed or authorized by a regulatory agency or other statutes."

[4] *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), that the general activity test applied in determining whether an exemption was available.

See Taylor v. Medenica, 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996) (citing *Ward*). I find that the UTPA exemption does not have the broad application ascribed to it by Defendants.

I also find that Defendants' unfair and deceptive practices were not regulated under any federal or state securities acts. Defendants argue that, because they were Mr. Maybank's fiduciary investment advisor and purchased stocks for his managed account at BB&T Asset Management, each and every interaction with, misrepresentation to, and deception of Mr. Maybank is inextricably connected to securities or securities transactions and thus exempt from the UTPA. I reject this assertion, finding instead that Defendants' actions in presenting and sending false, unfair, and deceptive contracts and letters to its clients are not required, permitted, or authorized by the Securities Act, any regulatory body, or other South Carolina law. *Taylor*, 324 S.C. at 218, 479 S.E.2d at 44 ("[The defendant]'s conduct which is alleged to violate the UTPA is neither an action nor a transaction which is specifically authorized by a regulatory agency. Accordingly, [defendant] is not exempt from the UTPA."); *see also Beattie v. Nations Credit Fin. Servs. Corp.*, 65 F. App'x 893, 895-96 (4th Cir. 2003) ("There is no indication that a statute or agency regulation requires or permits Nations Credit to pursue collection and foreclosure activities on accounts purportedly satisfied by an LMS affidavit. Therefore, Nations Credit is not exempt from liability under the UTPA.").

Defendants' argument relies at bottom on a single footnote in *Ward*, which states only that the initial public offering of securities—like those addressed in *Rhoades*—is exempt from the UTPA.[5] Based on this plain language, especially when read in the context of the transactions

[5] *Ward*, 304 S.C. at 155 n.1, 403 S.E.2d at 312 n.1 ("We note that the sale of securities is a unique transaction. *Each public offering is subject to strict regulation and must comply with stringent requirements*. Very few, if any, other business transactions are subject to the strict scrutiny which is placed upon securities. Therefore, we choose to follow the vast majority of

at issue in *Rhoades*, the exemption applies to the initial public offering and the sale of securities under that offering, not to all transactions subsequent to that initial offering that might involve securities, however tangentially. *See McTeer v. Provident Life & Acc. Ins.*, 712 F. Supp. 512, 516 (D.S.C. 1989) ("In other words, [the South Carolina Supreme Court] considered [in *State v. Rhoades*] not whether the securities business in general is regulated but whether the challenged acts themselves are regulated."). I find that construing the *Ward* footnote to exempt all business dealings between a customer and companies offering financial advice is wholly inconsistent with *Ward's* rejection of the general activity test and with the statutory language that the remedies in the UTPA are supplemental to other remedies. *See Ward*, 304 S.C. at 154-55, 403 S.E.2d at 311 ("If we were to accept this contention, however, the UTPA would be rendered without meaning. Almost every business is subject to some type of regulation."). I also find that Defendants' argument fails to acknowledge that they were not registered to sell securities as a broker dealer; that they presented absolutely 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.

I further reject Defendants' argument that BB&T Asset Management and BB&T Bank are exempt from the UTPA because they operate in regulated industries. As an initial matter, Defendants' argument that BB&T Asset Management and BB&T Bank are regulated entities and therefore exempt is improperly made for the first time in the motion for JNOV. Because Defendants did not move for a directed verdict on this ground, it is unpreserved for the JNOV motion. *Compare* June 23, 2014 Motion for Directed Verdict *with* Motion for JNOV; *see also In re McCracken*, 346 S.C. at 93, 551 S.E.2d at 238 (holding that only the grounds raised in the

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jurisdictions in holding that securities transactions remain exempt from claims under the UTPA.") (emphasis added).

directed verdict motion may properly be reasserted in a JNOV motion). I further find that Defendants' argument is based upon an erroneous interpretation of the record and the stipulated fact that was entered into the record, *i.e.*, that during the time in question, neither BB&T Asset Management nor BB&T Bank were registered as a broker dealer with either the SEC or the State of South Carolina. I also find that, even under Defendants' theory of general regulation of the banking industry, Defendants' conduct of engaging in unfair and deceptive business practices as exposed in this case was outside the regulatory oversight of banking regulations. I therefore deny their motion on this ground.

Finally, in addition to the reasons discussed above, I find Defendants failed to meet their burden in proving an exemption from the UTPA. S.C. Code Ann. § 39-5-40 states that "the burden of proving exemption from the provisions of this article shall be upon the person claiming the exemption." The Defendants failed to present any evidence during the trial that their actions were exempt under the UTPA. In addition, to the extent any argument that Defendants were entitled to an exemption was advanced to the jury, it was rejected and liability found against Defendants. I further find that Defendants made no attempt to prove and in fact presented no evidence that the two variable prepaid forward contracts sold to Mr. Maybank were initial public offerings of securities or were even securities. In summary, because the Defendants failed to offer evidence to support their claim of exemption from the UTPA, their motion on that ground is also denied.

II. Punitive Damages.

Defendants assert that the exculpatory clause contained in the WMA bars the jury's award of punitive damages on Mr. Maybank's common law claims. However, prior to addressing this issue, 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. I will then return to the Defendants' arguments regarding the so-called exculpatory clause.

A. ***Common Law Causes of Action.***

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

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

Under the law, I must consider whether punitive damages are warranted and, if so, whether the amount of damages 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) (simplifying analysis of factors from *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991); *see BMW of N. Am. v. Gore*, 517 U.S. 559 (1996)). I find, based on this analysis, that the punitive damages award is both constitutional and proper.

1. ***Reprehensibility.***

Reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185 (quoting *Gore*, 517 U.S.

at 565). In evaluating this prong, courts 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 that there is ample, clear and convincing evidence in the record to support the jury's finding that Defendants' conduct was reprehensible. With respect to the first two prongs, I find that the nature of the harm in this case was economic, and that 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 further find that the third prong was also clearly and convincingly demonstrated. As Mr. Maybank's advisor and fiduciary, Defendants had full and complete knowledge of Mr. Maybank's financial vulnerability. In 2006, Mr. Maybank was a 74-year old, soon-to-be retiree who entrusted the vast majority of his retirement assets to BB&T, seeking their services as trusted fiduciary to safely and prudently manage his irreplaceable retirement assets, all of which they promised to do. The jury found that Mr. Maybank was substantially damaged due to Defendants' reprehensible, deceitful, reckless, and grossly negligent actions. In sum, I find that clear and convincing evidence supports a finding that Mr. Maybank entrusted his financial well-being to Defendants and was therefore financially vulnerable to them.

I find that the evidence also demonstrates that Defendants' conduct was not an isolated incident but instead involved repeated acts of indifference to Mr. Maybank and others. The evidence demonstrates that certain of Defendants' representatives were financially incentivized to sell these alternative investment strategies, and that Defendants viewed VPFCs as a "revenue

opportunity" for BB&T on which they could expect to earn substantial fees, both up-front as well as recurring annual fees.[6] This was particularly true in Mr. Maybank's case because he had a large, concentrated position in BB&T Corporation stock as a result of the sale of his company, which constituted the bulk of his retirement assets. BB&T evaluated Mr. Maybank's heavily concentrated position and then sold this soon-to-be retired, 74-year-old client a VPFC and the associated strategy. While BB&T represented that this strategy would protect Mr. Maybank's retirement savings, in reality the strategy was highly risky, speculative, imprudent, costly, and unsuitable, and was anchored by a VPFC, a complex derivative product that actually increased risk, rather than minimizing it, according to the testimony of expert witness Dr. Craig McCann, which I find to be probative. Then, with cash generated from the VPFC, BB&T further increased the risk of their strategy, establishing a managed account with an investment objective of "Aggressive Growth" and invested in 100% equities. Defendants' self-serving strategy was to move Mr. Maybank's concentrated BB&T Corporation stock position from a non-fee generating account to an account that provided Defendants and their incentivized employees with an up-front fee as well as a stream of annual management fees. In the process, they charged him

[6] Defendants' internal sales practices were demonstrated through exhibits and testimony introduced at trial. For example, Exhibits 55, 89, 92, 100,103, 104, and 106, taken together, show clearly that Defendants initiated a sales program to generate revenue for Defendants 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

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.

$32,614 in fees for selling the VPFC. I find that Defendants executed perfectly the fee generating strategy they had touted to their representatives of charging an "up-front fee" initially and then using the cash from the VPFC to generate additional fee revenues during the life of the VPFC. In short, although Defendants were Mr. Maybank's fiduciary, they acted in faithless, self-serving ways, putting their own interests first to the detriment of Mr. Maybank's.

Based on the testimony of Mr. Maybank's experts, Defendants' recommended investment strategy, anchored by a VPFC, was a wholly inappropriate, imprudent, flawed, ill-advised, speculative, and excessively risky scheme for Mr. Maybank. Furthermore, Defendants misrepresented to Mr. Maybank that the strategy was developed based on his individual circumstances and situation and was designed to protect his irreplaceable assets. The evidence further supports a finding that, in 2009, Defendants compounded this initial flawed and self-serving advice by recommending that Mr. Maybank roll over the first VPFC into a second VPFC. Internal presentation documents confirmed that Defendants told representatives, who lacked training and expertise in the strategy and the product, to recommend that clients roll-over these VPFCs as being the "ideal choice." A roll-over, of course, generated additional fees to Defendants and bonuses for their representatives, along with the assurance of continuing annual management fees. Consistent with this sales training, Defendants' representatives advised Mr. Maybank that rolling over the VPFC was appropriate for him. For their faithless and self-serving advice, Defendants charged Mr. Maybank a fee of $43,655. In retrospect, the goal of the recommended strategy is clear according to Mr. Maybank and his expert witnesses. The client is literally locked into Defendants' costly and self-serving scheme of fee-producing, costly roll-overs that over time deplete the client's savings. Defendants benefit through enhanced revenue generation, but at the expense and to the detriment of clients like Mr. Maybank. I find that,

based on the record, Defendants' conduct was not isolated, but part of a scheme to generate fees and bonuses for Defendants and its representatives without regard to the client's best interest.

Based on these examples and the record as a whole, I find that the evidence supports a determination that Defendants acted with malice, trickery, or deceit rather than mere accident. BB&T served as Mr. Maybank's trusted fiduciary. From the evidence admitted at trial, the jury could have reasonably found that Defendants, notwithstanding this position of high trust, breached their duties to Mr. Maybank in at least one or more of the following ways, and perhaps others not enumerated here:

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 and develop a comprehensive financial plan;

iii. By failing to advise Mr. Maybank about the significant conflict of interest that should have prevented Defendants from 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 with these findings. In sum, based on the evidence and the specific findings made above, I 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 of punitive to actual damages against Bank of America, N.A.); *Mitchell*, 385 S.C. at 593, 686 S.E.2d at 188 ("South Carolina courts have most

often upheld verdicts on the low end of the single-digit spectrum, but have frequently deviated from this norm in cases involving particularly egregious conduct.").[7] Based on the conduct of Defendants detailed above, and guided by the cases cited herein, 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." *Mitchell*, 385 S.C. 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. Moreover and importantly, 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

[7] A review of decisions in this state reveals that ratios which fall on the low end of the single digit spectrum have been upheld by South Carolina courts. *Mitchell*, 385 S.C. at 593, 686 S.E.2d at 188; *see also, e.g., Jenkins v. Few*, 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2012) (affirming a 3.6 to 1 ratio pursuant to *Mitchell* analysis where jury found for plaintiff on conversion, trespass, and civil conspiracy); *Mackela v. Bentley*, 365 S.C. 44, 614 S.E.2d 648 (Ct. App. 2005) (affirming a 3.75 to 1 ratio in a conversion case). South Carolina courts have also upheld punitive damages awards in cases involving economic harm, even though the ratio falls on the high end of the single digit spectrum or even exceeding single digits. *See, e.g., Mitchell*, 385 S.C. at 594, 686 S.E.2d at 188 (ratio of 9.2 to 1 satisfied due process where insurer rescinded health insurance policy even after learning that the basis for rescission was incorrect, exposing insured to a greater risk of physical danger); *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 failure to pay insurance claim).

dependency in an elderly person's twilight years. Thus, corporate citizens managing money for South Carolina's aged and retiring 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.[8]

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

Lastly, I analyze "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 186. The award of punitive damages is less than the civil penalty authorized under the UTPA, which in this case imposes a penalty of $6.2 million in trebling the actual damages to a total of $9.3 million. Trebling necessarily results in a ratio of 2 to 1 between the civil penalty of $6.2 million and the actual damages of $3.1 million. This civil penalty ratio is well within the range of reasonableness as discussed above, and is actually higher than the ratio of punitive to actual damages awarded in this case.

I further consider punitive damages imposed in comparable cases. *See, e.g., Cody P.*, 395 S.C. at 632-33, 720 S.E.2d at 484-85; *see also Mitchell*, 385 S.C. at 588-89, 686 S.E.2d at 186 ("When identifying 'comparable cases' a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant."). In *Cody P.*, improper safeguards by Bank of America permitted a

[8] The testimony of Mr. Maybank's expert witness, Dr. Wood, was limited to BB&T Corporation's net worth of $21.229 Billion, and BB&T Bank's net worth of $21.630 Billion. I further note that Defendants have not challenged the propriety of the admittance of evidence of BB&T Bank's net worth and ability to pay the punitive damages award.

co-conservator for a minor child to withdraw the minor's funds and deposit them into her personal bank account. I find that, like *Cody P.*, this case involves economic harm caused by a bank's failure to follow proper safeguards to protect a client's funds. However, I find that the reprehensibility of the conduct is greater here. In *Cody P.*, the bank merely failed to prevent misconduct by a third party; here, the evidence demonstrated that the harm was caused by Defendants' intentional and deliberate misconduct. Additionally, while the jury found Bank of America negligent in *Cody P.*, the jury in this case found that Defendants not only acted grossly negligent but also perpetrated constructive fraud, breached their fiduciary duty, committed violations of the UTPA, and breached their contract with Mr. Maybank. Finally, in *Cody P.*, the Court of Appeals upheld punitive damages resulting in a 7.69 to 1 ratio even though there were no findings of intentional malice, trickery, or deceit on the part of Bank of America. I therefore find that the award of punitive damages by the jury in this case is reasonable, especially when this award is compared with the awards made in comparable cases.

4. *Conclusion*.

After careful review of the evidence presented at trial in light of the parameters set forth by the Supreme Court in *Mitchell*, I find that the punitive damages award by the jury in this case is supported by clear and convincing evidence. I find that the conduct is reprehensible. I further find that the award is not grossly disproportionate to the severity of the offense, but is, in fact, directly proportionate to the harm caused by Defendants. I therefore affirm the jury's 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 to Mr. Maybank for several, independent reasons. In pretrial proceedings,

particularly the motions hearings on Plaintiff's motion for partial summary judgment for breach of contract under the terms of the WMA, evidence was produced that Defendants admitted, through the testimony of their corporate representative, Mr. Ross Walters, that the Defendants' WMA was erroneous and had been incorrectly drafted by their lawyers, that it had been tendered to Mr. Maybank knowing that it was erroneous, and that no one had explained or disclosed the errors to Mr. Maybank, even though Defendants were then his fiduciary. The erroneous nature of the contract was also admitted by Defendants when they amended their answer to seek reformation of the WMA. I denied Plaintiff's motion for partial summary judgment because it was clear that the real terms of the parties' agreement were in doubt based on Defendants' own admissions and actions. The evidence adduced at trial on the interpretation of the contract remained consistent with that argued during the preceding motions' hearings, and 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 agreement between the parties 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. As part of its verdict, the jury also awarded punitive damages and therefore determined that the exculpatory clause did not preclude an award of such damages under the common law tort claims.

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. The jury's verdict supports this finding. At the outset, I note that the exculpatory clause is in the very same form agreement which

Defendants sought to reform by mutual mistake.[9] Defendants contended the contract is unambiguous and its terms are derived from the clear intent of the parties but, when it came to their admitted breach of this same agreement, Defendants contended that certain language in the contract should be amended to support their favored construction even though they drafted the erroneous contract. As I noted above, Defendants' own actions demonstrate that the contract terms and applications are in doubt. 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).

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 to clients or failing to disclose or concealing material information. Thus, as a matter of law, I find that the common law causes of action of breach of fiduciary duty, constructive fraud, and negligent misrepresentation derive from claims 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, particularly where the source of the supposed relief is language in a form agreement drafted and presented by a multi-billion dollar fiduciary to an

[9] 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) ("A contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it.") (citing *Sims v. Tyler,* 276 S.C. 640, 281 S.E.2d 229 (1981) (holding that mutual mistake cannot be proven by a claim of mistake by only one of the parties)).

individual client, parties clearly not in equal bargaining positions. Courts in this state have held exculpatory clauses to be unenforceable on public policy grounds where the parties have substantially different bargaining power, including situations such as "attempts to exculpate 'for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty, or *when the parties are not on roughly equal bargaining terms.*'" *Cooke v. Allstate Management Corp.*, 741 F. Supp. 1205, 1207 (D.S.C. 1990) (quoting *Pride v. Southern Bell Tel. & Tel. Co.*, 244 S.C. 615, 138 S.E.2d 155 (1964) (emphasis added)); *id.* at 1208 (noting "extremes to which the South Carolina courts have gone to avoid enforcing a broad reading of an exculpatory clause"); *see also Anthony v. Atlantic Group, Inc.*, 909 F. Supp. 2d 455 (D.S.C. 2009) (recognizing that public policy prohibits a party from contracting against liability for negligence when parties are not on equal bargaining terms and finding that conditioning employment on execution of release created unequal bargaining situation so that waiver did not bar claims). 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, based on the jury's findings, BB&T was acting as Mr. Maybank's fiduciary when the misconduct occurred and the WMA was executed. I find that, because exculpatory clauses are routinely rejected in conditions of unequal bargaining power, the clause does not operate to shield BB&T against punitive damages for misconduct while acting as Mr. Maybank's fiduciary. 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 the representations BB&T made to him and to

expect that his fiduciary would fully disclose any terms adverse to his interests, which they admitted they failed to do. *See Regions Bank v. Schmauch*, 354 S.C. 648, 672-74, 582 S.E.2d 432, 444-46 (Ct. App. 2003) (holding that fiduciaries have an absolute obligation of disclosure of material facts to their clients and, conversely, clients have a right to rely upon the representations made to them 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. Even when Defendants presented the written agreement to Mr. Maybank, they failed to disclose that the agreement contained errors, yet attempted to limit liability for any misconduct through an exculpatory clause. When presented with the full contract, and all of the evidence and circumstances surrounding the execution of the WMA, the jury nevertheless found that punitive damages were warranted. In summary, I find, based on the jury's findings and my own weighing of the evidence, that the exculpatory clause is unenforceable.

III. BB&T Corporation.

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

As explained below, I find that 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). In turn, "[t]he Due Process Clause is satisfied for personal jurisdiction purposes if a defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,' by establishing sufficient 'minimum contacts' such that maintenance of the suit does not

offend traditional notions of 'fair play and substantial justice.'" *Luberda ex rel. Luberda v. Purdue Frederick Corp.*, No. 4:13-cv-00897-RBH, 2014 WL 1315558, *2 (D.S.C. Mar. 28, 2014) (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 475-76 (1985)). South Carolina courts summarize the minimum contacts or "power prong" as requiring that "the defendant directed his activities to residents of South Carolina and that the cause of action arises out of or relates to those activities." *Cribb v. Spatholt*, 382 S.C. 490, 499, 676 S.E.2d 714, 719 (Ct. App. 2009). Further, to evaluate the "fairness prong", "the court must consider the following factors: (1) the duration of the defendants' activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the State's interest in exercising jurisdiction." *Id.*

I find that BB&T Corporation specifically directed its activities into South Carolina, and Mr. Maybank's claims arise out of those activities. I find the evidence demonstrated that BB&T Corporation senior executives specifically reviewed and approved the sale of the VPFC to and the failed investment strategy for Mr. Maybank. BB&T Corporation's participation in the actions forming the basis of this litigation are far more than just the mere exercise of jurisdiction over a parent by virtue of its ownership of a subsidiary's stock.[10] BB&T Corporation, through its General Counsel Patricia Oliver, expressly approved and authorized the investment strategy recommended to Mr. Maybank, a key component of which was BB&T Corporation stock. In her authorization, Ms. Oliver even included a handwritten note with her signature stating that "[t]his approval by General Counsel is conditioned on Mr. Maybank not purchasing additional shares of

[10] In arguing the general rule that a parent is not liable for its subsidiaries, Defendants ignore the Corporation's critical role in establishing duties to clients and customers of its subsidiaries generally and approving the VPFC strategy for Mr. Maybank specifically. BB&T Corporation promulgated a Code of Ethics governing its subsidiaries that was intended to enhance the business operations of BB&T Corporation and its subsidiaries by ensuring that all of 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.").

BB&T Corporation with proceeds from the prepaid variable forward transaction." Without the approval of BB&T Corporation, the strategy would not have been implemented and the fee opportunity would have been lost for Defendants.

Defendants seek to evade jurisdiction, arguing that BB&T Corporation was "a mere holding company for other BB&T entities and that none of its employees had any direct involvement with Mr. Maybank." That statement simply ignores the facts of this case. Without the approval of BB&T Corporation, the strategy, purportedly designed to protect Mr. Maybank's retirement assets, could not have proceeded, and Mr. Maybank would not have become a Wealth Management client of BB&T. The Approval Letter demonstrates that the strategy devised and recommended to Mr. Maybank was reviewed, validated, and approved at the very highest levels of the Corporation. Mr. Maybank's continued ownership of BB&T Corporation stock was a fundamental element of the strategy authorized and approved by BB&T Corporation in the Approval Letter.[11] The General Counsel's approval and validation of the strategy 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. The approval by BB&T Corporation was more than just a perfunctory notification; it was a necessary prerequisite to the strategy's implementation and the charging of the fees that Defendants expected to collect from the strategy both initially and over several years.

[11] BB&T Corporation knowingly and willingly authorized, approved, and facilitated an investment relationship with a South Carolina resident, part of which involved that resident's continued ownership of BB&T Corporation stock and his receipt of BB&T Corporation dividends. That alone is sufficient to establish BB&T Corporation's minimum contacts with South Carolina in this instance to support the Court's exercise of personal jurisdiction over that entity. *See 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"); *see also* S.C. Code Ann. § 36-2-803(A)(1), (7).

I therefore also find that the character and circumstances of the corporation's actions and the State's interest weigh in favor of exercising personal jurisdiction. Further, given BB&T Corporation's participation in this litigation, as explained below, I find that there is no inconvenience to the parties by exercising jurisdiction here. And the duration of the activity extended over the entire term of Mr. Maybank's investment strategy that could not have occurred but for BB&T Corporation's authorization, which expressly involved BB&T Corporation stock. I therefore find that the exercise of personal jurisdiction in this case is appropriate.

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

Defendants' waived their right to seek dismissal of BB&T Corporation by failing to do so until a mere month before the scheduled trial and only after the corporation meaningfully participated in the defense of the litigation for almost two and a half years. The defense of personal jurisdiction is a personal privilege that "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). Unlike subject matter jurisdiction, personal jurisdiction can be waived. *Id.*; *see Eaddy v. Eaddy*, 283 S.C. 582, 584, 324 S.E.2d 70, 72 (1984) ("*In personam* jurisdiction may be waived ...."). Consequently, "'[a] litigant [must] exercise great diligence in challenging personal jurisdiction.'" *Luberda*, 2014 WL 1315558 at *1 n.1 (quoting 5 Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure*, § 1391). Simply articulating a personal jurisdiction defense in an answer without promptly advancing it may waive or forfeit that defense. *Yeldell v. Tutt*, 913 F.2d 533, 539 (8th Cir. 1990) (personal jurisdiction defense waived because, "[w]hile the [defendants] literally complied with Rule 12(h) by including the jurisdictional issue in their answer, they did not comply with the spirit of the rule, which is 'to expedite and simplify proceedings in the ... [c]ourts.'").

I find that BB&T Corporation did not seek dismissal from this case in either a diligent or timely manner. BB&T Corporation made nothing more than a perfunctory defense under Rule 12(h)[12] 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. Since that time, BB&T Corporation, along with all Defendants, fully participated in litigating this case—during removal to federal court, remand of the matter, extensive discovery, and early motions practice—without advancing their objection or otherwise moving for dismissal from the action until shortly before trial. *See Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 62 (2d Cir. 1999) (holding that defendant forfeited defense of personal jurisdiction when it "participated in pretrial proceedings but never moved to dismiss for lack of personal jurisdiction despite several clear opportunities to do so during the four-year interval after filing its answer"). I find that, for these reasons, BB&T Corporation waived its defense of personal jurisdiction 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. *See Yeldell*, 913 F.2d at 539. I therefore deny Defendants' motions for JNOV, new trial, and new trial *nisi remittitur*, to the extent such motions are based on this ground.[13]

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[12] Although providing that failing to raise the defense of lack of personal jurisdiction in either a pre-answer motion or in an answer waives such defense Rule 12(h), SCRCP, 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) ("It does not follow, however, that a party's failure to satisfy those minimum steps [of Rule 12(h)(1)] constitutes the only circumstance under which the party will be deemed to have waived a defense.").

[13] Defendants also moved for JNOV as to the breach of contract, constructive fraud, and negligent misrepresentation claims on the basis that BB&T Corporation was not a party to the WMA and was not involved in the allegations of fraud or misrepresentations to Mr. Maybank. These grounds cannot be raised in the motion for JNOV because they were not raised in Defendants' motion for directed verdict. *Compare* June 23, 2014 Motion for Directed Verdict *with* Motion for JNOV; *see also In re McCracken*, 346 S.C. at 93, 551 S.E.2d at 238 (holding

IV. Statute of Limitations

Defendants also moved for judgment as a matter of law on the question of whether the statute of limitations bars all of Mr. Maybank's causes of actions. Defendants' motion simply declares, without support, that "Mr. Maybank was aware ... more than three years before filing suit." However, "[t]he burden of establishing the bar of the statute of limitations rests upon the one interposing it." *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). Defendants failed to meet their burden. There was no evidence or testimony from any witness that would suggest Mr. Maybank had knowledge of Defendants' wrongful conduct in or around December 22, 2008, three years prior to the filing of the lawsuit. This fact is confirmed by Defendants' failure to cite to any evidence on that point. Moreover, even "where the testimony is conflicting upon the question [of whether a statute of limitations applies], it becomes an issue for the jury to decide." *Id.* I therefore find that submission of the issue to the jury was appropriate, and I deny Defendants' motion for JNOV on this ground.

V. Insufficient Evidence of Damages

In numbers 8, 9, and 11 of their motion, Defendants advance several variations of an argument that Mr. Maybank did not present sufficient evidence to sustain the jury's verdict. However, the jury clearly found that Mr. Maybank suffered damages based on all of the evidence, including but not limited to the testimony of Mr. Maybank as well as his expert witnesses, Dr. McCann, Professor Freeman, and Dr. Wood. Defendants' argument, at bottom, is a disagreement with the weight to be given to the evidence of record including, without limitation, Dr. McCann's analysis. Weighing the evidence is left to the jury; my responsibility is

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that only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion). Even assuming that these issues were preserved, I further deny the motion on these grounds for the reasons discussed above with respect to the exercise of jurisdiction over BB&T Corporation.

to determine if there was evidence to support the jury's verdict and I find the damages awarded by the jury are fully supported by ample competent evidence. Defendants' motion on this ground is therefore denied.

VI. Grounds for JNOV

Defendants argue over 40 additional grounds[14] in their motion for JNOV, *see* Motion at 18-24, Nos. 12-54, that were not advanced in their written, 31 page motion for directed verdict and were not argued orally to the Court at the close of evidence. "[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.*, 399 S.C. at 332, 732 S.E.2d at 171. However, I have considered each of these issues to the extent it can be gleaned from what generally are single-sentence, conclusory arguments and I find that they do not warrant granting JNOV. I therefore deny Defendants' motion on all additional grounds because the issues have not been preserved (to the extent they have not been preserved) and, further, do not warrant granting the motion for JNOV.

Motion for New Trial Absolute

Defendants move for a new trial in the alternative to their motion for JNOV under Rule 50(b), SCRCP. This Court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993). "The jury's determination of damages, however, is entitled to substantial deference." *Id.* A court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly excessive so as to shock the conscience of the court and clearly indicates the figure

[14] My count reveals 43 additional grounds which were not included in their written motion for directed verdict. Regardless of the number, I find each of the additional grounds to be meritless and deny same.

reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives. *Id.* at 379-80, 426 S.E.2d at 805. The grant or denial of new trial motions rests within the discretion of this Court. *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989). I have considered the testimony and reasonable inferences therefrom in the light most favorable to Mr. Maybank, as the nonmoving party. *Welch v. Epstein*, 342 S.C. 279, 302-03, 536 S.E.2d 408, 420 (Ct. App. 2000). 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.[15]

I. Challenges to the Court's evidentiary rulings.

Defendants allege that evidentiary rulings of the court warrant the granting of a new trial, citing the cumulative nature of what they assert to be numerous prejudicial evidentiary and legal 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) ("To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice."); *see also Hanahan v. Simpson*, 326 S.C. 140, 156, 485 S.E.2d 903, 911 (1997). I further find that Defendants do not show how the challenged rulings were unfairly prejudicial other than simply characterizing the rulings as such. *See Fields*

[15] 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. In ground (1), Defendants incorporate their arguments from the motion for JNOV and I deny the motion on that ground for the same reasons set forth above. 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. I deny grounds (2) – (4) regarding BB&T Corporation, a challenge to the damages award, and dismissal of the UTPA claim for the same reasons set forth above with respect to the motion for JNOV.

v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."). I therefore find that, based on the entire body of evidence in the record and the Jury verdict taken as a whole, Defendants have not and cannot establish a reasonable probability the evidence admitted or examination allowed pursuant to the challenged rulings—either separately or as a whole—influenced the jury's verdict. I therefore find that the evidentiary challenges identified as grounds (5) – (12) of Defendants' motion are without merit, and the catch-all challenge identified as ground (13)[16] also is denied.

II. Challenges to the Court's Jury Instructions.

Defendants also assign error[17] to the Court's compilation and delivery of jury charges following the close of evidence. I deny Defendants' motion on this ground because I first find that they did not make a contemporaneous objection. *See Murray v. Bank of Am., N.A.*, 354 S.C. 337, 346, 580 S.E.2d 194, 199 (Ct. App. 2003) (holding that a party who fails to object to a jury charge when it is given may not later complain about the charge). To the extent any statement by Defendants' counsel could be construed as a challenge to any charge, or lack thereof, 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.

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[16] "The Defendants assert as a further basis for a new trial all other evidentiary rulings by the Court before or during the trial of the case that were adverse to the positions of the Defendants." Such a motion is nothing more than a belated effort to either preserve, or perhaps a feeble attempt to revive, anything that Defendants could not think of at the moment when preparing its motions and challenges. Mot. p.30.

[17] Including grounds (14), (15), (47), and any other references to the instructions given by the Court.

III. Challenges to the Jury Verdict Form.

I find that Defendants' challenge to various parts of the jury verdict form[18] is unpreserved and without merit. The verdict form I ultimately adopted and submitted to the jury was, with very minor exception, verbatim to the verdict form submitted by Defendants. Moreover, Defendants failed to make a timely objection to the verdict form prior to its submission to the jury. And 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 did not preserve 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) (holding that by failing to object to a verdict form until after the verdict had been reached, a party failed to preserve any issue relating to the verdict form).

IV. Thirteenth Juror Doctrine.

Defendants also seek[19] to have this Court grant a new trial as the thirteenth juror. *See Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) ("The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict."). I decline to interfere with the jury's verdict because I find that the record fully supports the verdict. The jury rejected the multitude of arguments and defenses advanced by Defendants in favor of finding that Defendants engaged in misconduct toward, made misrepresentations to, and otherwise deceived Mr. Maybank. I further find that, contrary to Defendants' assertion, the verdict in favor of Defendants on some but not all of Mr. Maybank's claims reflects that the jury carefully weighed the evidence. I observed the jury to be

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[18] Including ground (46) and any other arguments regarding the verdict form.

[19] Including grounds (45) and (51) and any other arguments regarding the thirteenth juror doctrine.

very diligent, thoughtful and attentive in its work. In sum, this was an excellent Greenville County jury which carefully considered all of the evidence and arguments that Defendants advanced. Notwithstanding that evidence and arguments, the jury found Defendants at fault. The sworn jury in this case, empaneled as mandated by the United States and South Carolina Constitutions to resolve a civil dispute, worked perfectly in accordance with its constitutional and statutory design and mandate. After two weeks of receiving testimony and documentary evidence, listening attentively to arguments of counsel and jury charges, and deliberating over a period of two days, the jury found Defendants' conduct was in violation of law, reprehensible, and otherwise deserving of punishment. I therefore further find, as stated previously, that the award of punitive damages is supported by the record and reasonable in this case because there was ample evidence allowing a reasonable jury to find Mr. Maybank to have met the higher burden of proof of clear and convincing evidence of reckless, willful, or wanton conduct evidencing a conscious disregard or reckless indifference to Mr. Maybank.[20] Defendants' motion for a new trial under the thirteenth juror is therefore denied.[21]

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. "A motion for new trial *nisi remittitur* asks the trial court to reduce the verdict because the verdict is merely excessive." *James v. Horace Mann*

[20] The award of punitive damages is discussed above. *See* discussion *supra* pp.11-20.

[21] Again, 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, including but not limited to the contention in ground (16) that a continuance of the trial should have been granted. I deny the relief on grounds (17)-(44), (48) – (50), and (52) – (54) for the reasons set forth with respect to the denial of the motion for JNOV, to the extent applicable, or because I find the grounds simply lack merit or are too vaguely stated to ascertain the asserted basis for relief.

Ins. Co., 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006). "The denial of a motion for a new trial *nisi* is within the trial court's discretion ...." *Id.; Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) ("Compelling reasons ... must be given to justify invading the jury's province in this manner."). Based on the evidence presented at trial, the 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 further find the verdict was based on neither emotion nor improper sentiment and was clearly 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 for the Court to treble the jury's award of actual damages on the UTPA verdict. S.C. Code Ann. § 39-5-140(a) ("If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of Section 39-5-20, the court ***shall*** award three times the actual damages sustained and may provide such other relief as it deems necessary or proper.") (emphasis added). 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). Consideration of Mr. Maybank's trebling request is ripe because the jury returned a verdict in favor of Mr. Maybank against all Defendants on the UTPA cause of action. For the reasons explained below, I find that Defendants conduct was willful and knowing, and find that the award of $3,100,000 in actual damages must be trebled to $9,300,000.

I find that, based on the evidence presented to the jury, Defendants' conduct in employing an unfair or deceptive method, act, or practice in commerce was both willful and knowing. My finding in this regard is based on the record as a whole, including but not limited to evidence that Defendants knew when the form WMA was presented to Mr. Maybank that it could not be fulfilled according to its express terms and that they intended to delegate duties and responsibilities contrary to the terms of the contract; that Defendants failed to correct or disclose these infirmities to Mr. Maybank and other customers to whom they owed a fiduciary duty; that notwithstanding the known misrepresentations in the agreement, Defendants insisted Mr. Maybank and other customers sign the WMA as a condition of their provision of fiduciary wealth management services; that the WMA presented to Mr. Maybank was Defendants' form contract used with all customers from at least August 2006, when Mr. Maybank and at least one other customer signed the contract, into 2009, when Defendants revised their form WMA; that, at the beginning of their fiduciary relationship, Defendants presented Mr. Maybank with what purported to be an individualized assessment of his financial situation, but that was in fact, unbeknownst to Mr. Maybank until the eve of this trial, merely a "fill-in-the-blank" form letter purporting to assess the suitability of VPFCs for many clients *en masse*.

I further find the circumstances surrounding Defendants' refund of improperly charged transaction fees to their clients reflects a willful and knowing practice to deceive. In the letter, Defendants falsely and self-servingly misrepresented that BB&T was refunding those fees as a "reflection of our corporate values," even though David Fisher admitted that Defendants acted "outside the bounds" when charging those fees to Mr. Maybank and others in the first place and even though the fees were characterized in a routine audit by the SEC as "broker-esque" and improper given Defendants were not licensed as a broker dealer. Thus, based on the findings

made by the jury, the evidence demonstrates that Defendants willfully and knowingly deceived Mr. Maybank along with at least 130 other customers regarding the circumstances surrounding the refund in an effort to conceal their potential liability for having charged the fees.

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 discussed above, the jury had evidence submitted to it on at least three theories under the UTPA claim 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) the use of a form letter that purported to provide Mr. Maybank with personalized research and analysis of the failed 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 was drafted to obscure its legal liability for having charged those fees at all.

By 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.[22] Each of these causes of action was based on a

[22] I note that the jury verdict form explicitly segregated the causes of action for which punitive damages could be awarded, from those, including the UTPA cause of action for which punitive damages were not an appropriate remedy. Specifically, the jury verdict form provided 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 ...."

breach of the professional duties, trusted advisor status, and fiduciary duties undertaken by Defendants as Mr. Maybank's fiduciary. In brief, the evidence admitted at trial demonstrated that the breaches of those common law duties set forth *supra,* pp.16-17, fully support the jury's verdict under the common law tort claims advanced by Mr. Maybank in this case. 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.

I find that Mr. Maybank is not required to elect between the recovery of treble and punitive damages. Although an injured party may recover damages which are punitive in nature only once where the recovery concerns a single wrong, *see Smith v. Strickland*, 314 S.C. 192, 198, 442 S.E.2d 207, 210 (Ct. App. 1994) (citing *Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 391 S.E.2d 249 (1990)), I find Defendants' conduct supported multiple but separate findings of wrongdoing by the jury. Taken in the light most favorable to the non-moving party, the record supports a reasonable conclusion by the jury that the basis for liability under the UTPA is separate and distinct 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.")).[23]

Additionally, the jury was instructed as to the standards for imposing punitive damages on those causes of action.

[23] Instead of *Taylor*, which directly supports the award of treble and punitive damages in this case, Defendants cite to two other cases: *Adamson*, 301 S.C. 204, 391 S.E.2d 249; and *Smith*, 314 S.C. 192, 442 S.E.2d 207. However, in both of these cases, the Supreme Court simply cited

I find double recovery for the same wrong is not present here. The common law causes of action sustained by the jury and for which punitive damages were awarded—breach of fiduciary duty, constructive fraud, and negligent misrepresentation—were based on facts demonstrating that Defendants' provided imprudent, unsuitable, and risky investment advice to Mr. Maybank, representing to him that the strategy it devised and recommended would protect his assets and was well-researched and tailored to his specific investment needs, when, in fact, no individualized suitability analysis was performed. In contrast, Defendants' practice of presenting the false and deceptive form WMA to Mr. Maybank, while deliberately hiding the falsity, is an independent unfair and deceptive business practice that stands on its own.

I therefore find that, based on the facts and Defendants' actions in this case, Mr. Maybank is entitled to recover both treble and punitive damages. *Taylor*, 324 S.C. at 218, 479 S.E.2d at 44-45 ("Election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action. It is the act of choosing between inconsistent remedies allowed by law on the same set of facts. Its purpose is to prevent *double recovery for a single wrong*.") (citing *Thompson v. Watts*, 281 S.C. 504, 316 S.E.2d 393 (1984) (emphasis added)).[24] The UTPA cause of action is separately

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the general proposition that where the harm alleged concerns a single wrong, a party may not collect both punitive damages under common law causes of action and treble damages under the UTPA. *See Smith*, 314 S.C. at 197-98, 442 S.E.2d at 210 ("As with actual damages, a plaintiff can recover damages that are punitive in nature only once, either as expressly-designated punitive damages or as trebled damages, where their recovery concerns a single wrong. In these two cases, the defendants committed but a single wrong.") (emphasis added). In contrast, the Court held in *Taylor* that, if common law and statutory remedies are based on separate facts, the plaintiff is not required to elect between punitive and treble damages. I find that Mr. Maybank therefore may recover both.

[24] *See also Freeman v. A. & M. Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532, 536 (Ct. App. 1987) (upholding an award of both punitive and treble damages); *cf. Toyota of Florence v. Lynch*, 314 S.C. 257, 442 S.E.2d 611, 616 (1994) (holding that plaintiff could recover *both* doubled damages under the state "Regulation of Manufacturers, Distributors and

supported by facts independent of the breaches of Defendants' common law duties. 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. Accordingly, the jury's verdict awarding punitive damages under the common law causes of action and this Court's award of treble damages for violations of the UTPA are not mutually exclusive.[25] I therefore deny Defendants' motion to require Mr. Maybank to elect between punitive and treble damages.

Defendants' motion for election of remedies includes other arguments that are largely unpreserved, but even if they were preserved, they are without merit and therefore denied.[26] For instance, Defendants have waived any argument regarding the economic loss rule. *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).[27] Although raising it as a defense in their Answer,

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Dealers Act" and punitive damages in connection with the common law claim because the Act allows both types of damages); *Columbia Teachers Fed. Credit Union v. Newsome Chevrolet-Buick*, 303 S.C. 162, 399 S.E.2d 444 (Ct. App. 1990) (same).

[25] 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 dictated by the verdict form; it 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.

[26] To the extent any of Defendants' arguments are not expressly addressed in this Order, those arguments are denied.

[27] Although our appellate courts have not addressed the issue, courts in other states have found that the economic loss rule is subject to waiver and issue preservation in similar circumstances. *Just In Case Bus. Lighthouse, LLC v. Murray*, 2013 WL 3778184 (Colo. Ct. App. 2013) (argument that economic loss rule applied held unpreserved for appellate review where, although made at the summary judgment stage, the argument was not renewed at the directed verdict stage and was only resurrected in post-trial motions); *JW Const. Co., v. Elliott*,

Defendants did not timely raise the economic loss rule either in any of their eight summary judgment motions, or during trial in their 38-page motion for directed verdict. Having failed to do so, they have waived this argument.

Notwithstanding Defendants' failure to preserve this issue, I have carefully considered and hereby deny Defendants' arguments regarding the economic loss rule. As applied in this state, the rule is primarily limited to the area of products liability and stands for the proposition that, where damage is suffered only to the product itself, no tort claim is permitted. *See Kennedy v. Columbia Lumber Mfg. Co.* 299 S.C. 335, 345-46, 384 S.E.2d 730 (1989); *see also Tiara Condominium Ass'n, v. Marsh & McLennan Cos.*, 110 So.3d 399 (Fla. 2013) (Florida Supreme Court expressly limited the economic loss rule to the product liability context). Defendants' motion on this issue is conclusory and cites only a single case, *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995), without explanatory analysis, to support the contention that the breach of contract claims are inconsistent with the constructive fraud and negligent misrepresentation claims. However, even *Griffin* expressly rejects the economic loss rule when there is an independent duty owed by Defendants. 320 S.C. at 56, 463 S.E.2d at 89 (holding that "the trial judge erred in finding the doctrine of 'economic loss' prohibited the plaintiff from maintaining a suit in tort for purely economic losses"). Here, Defendants were Mr. Maybank's fiduciary. In 2006, Defendants solicited and agreed to provide fiduciary services as the trusted advisor and manager of Mr. Maybank's irreplaceable retirement assets.[28] Defendants knew that there would be economic losses suffered

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253 P.3d 1265, 1271 (Colo. Ct. App. 2011) (economic loss rule unpreserved where included as a defense in the answer, but not raised again before or during trial).

[28] Although no appellate court of this state has addressed the economic loss rule in the context of a fiduciary relationship, courts in other states have determined that the rule does not bar claims arising under a fiduciary duty. *See, e.g., Derkevorkian v. Lionbridge Techs., Inc.*,

by Mr. Maybank if they breached their duties to him. I therefore find that the economic loss rule has no application here.

I also reject Defendants' argument that the claims for constructive fraud and negligent misrepresentation are inconsistent. Although Defendants cite to *Brown v. Stewart,* 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001), for this proposition, the issue of electing between those causes of action was not even before the Court of Appeals in that case. Moreover, the trial court had required an election because the jury in that case returned separate verdicts of $50,000 in actual damages on *each* of the causes of action of breach of fiduciary duty, constructive fraud, and negligent misrepresentation (for a total actual damages award of $150,000). *Id.* at 40, 557 S.E.2d at 679-80. Here, the jury in this case returned a single verdict against Defendants for $3.1 million on all causes of action on a verdict form proposed by Defendants. Moreover, neither the trial court nor the Court of Appeals in *Brown* determined that the causes of action of constructive fraud and negligent misrepresentation were inconsistent, as represented by Defendants in their motion. I therefore deny Defendants' motion on this ground.

Further, Mr. Maybank is not required to elect a single cause of action on which to proceed. *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). The Court

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2007 WL 638717, at *4 (D. Colo. Feb. 27, 2007) (finding that the economic loss rule did not bar a "breach of fiduciary duty claim based on a confidential or trust relationship independent of the parties' contractual relationship"); *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, 2001 WL 1249303, at *4-5 (Mass. Super. Ct. July 26, 2001) (stating that a claim for breach of fiduciary duty was not barred by the economic loss rule); *Carran v. Morgan*, 510 F. Supp. 2d 1053, 1060-61 (S.D. Fla. 2007) (stating that the economic loss rule is inapplicable to breach of fiduciary duty, constructive trust, fraud, and conversion claims); *see also Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 873 (9th Cir. 2007) ("Many courts have explicitly refused to extend the economic loss doctrine beyond the product liability context or beyond claims for negligence and strict liability.").

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 returned a single award of $3.1 million in actual damages in favor of Mr. Maybank for each cause of action. Therefore, because I find that there is no possibility of double recovery of actual damages in this case, I deny Defendants' motion to require Mr. Maybank to choose among the causes of action.

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

Having prevailed on his UTPA claim, Mr. Maybank is entitled to an award of reasonable attorneys' fees and costs. S.C. Code Ann. § 39-5-140(a) ("Upon the finding by the court of a violation of this article, the court ***shall*** award to the person bringing such action under this section reasonable attorney's fees and costs.") (emphasis added).[29] Mr. Maybank has moved for an award of attorneys' fees of $3,317,868.70, and costs of $306,264.10. In rendering my decision, I have relied upon my own knowledge and observations in the case as well as the affidavits submitted by Mr. Maybank, including the affidavit of Professor Freeman.[30] Although I

[29] This is so regardless of whether Mr. Maybank is required to elect remedies. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010) (holding that attorneys' fees and costs are not "subject to the limitations of the doctrine of election of remedies"). As stated previously, I find, however, that Plaintiff is not required to elect remedies. *See* discussion *supra* pp.37-43.

[30] 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 based on his years of experience in evaluating the appropriateness of

find that Plaintiff's request for attorneys' fees and costs is reasonable, I nevertheless find it appropriate to reduce the total hours expended on the case and the cost by 20% in order to limit the fees to the UTPA claim alone. I therefore find it reasonable and appropriate to award to Mr. Maybank attorneys' fees in the amount of $2,654,295 and costs in the amount of $245,011.

I. Introduction and background.

Although Mr. Maybank is entitled to attorneys' fees and costs by statute in this case, the specific amount of any award pursuant to the Act is left to the discretion of this Court. *See Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008) (citing *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997)). The Court must apply a lodestar analysis in determining a reasonable award of attorneys' fees and costs. *Layman*, 376 S.C. at 457-58, 658 S.E.2d at 332-33 ("A lodestar figure is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a reasonable hourly rate by the reasonable time expended.") (citing *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 652 (4th Cir. 2002)). This analysis requires the reviewing Court to determine a reasonable hourly rate and hours worked and then consider additional factors that may justify enhancement of the lodestar figure with a "multiplier" that reflects exceptional circumstances of a particular case. *Id.* at 458-61, 658 S.E.2d at 33-35. The determination of reasonable attorneys' fees and costs requires an evaluation of the following six factors: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4)

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attorneys' fees in complex litigation. Moreover, because the Court is guided in its assessment of the request for fees and costs by evaluating the facts underlying the reasonableness of the request, expert testimony is admissible to "assist the trier of fact ... to determine a fact in issue." Rule 702, SCRE. The remaining arguments in Defendants' motion to strike simply challenge the quality or weight of Professor Freeman's testimony, rather than the affidavit's admissibility. *State v. Morris*, 376 S.C. 189, 203, 656 S.E.2d 359, 367 (2008). I therefore deny the motion to strike Professor Freeman's affidavit.

the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services. *Layman*, 376 S.C. at 458, 658 S.E.2d at 333. (citing *Jackson,* 326 S.C. at 308, 486 S.E.2d at 760).

My starting point in evaluating the reasonableness of this request is one of 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 to be of the highest of quality. The trial itself lasted two weeks, during which time I had the opportunity to closely observe Mr. Maybank's counsel first-hand. Finally, the parties appeared before me on August 19 to argue the post-trial motions. Additionally, Mr. Maybank submitted two affidavits of counsel. In the fee affidavit, Plaintiff's counsel details the number of hours worked by each attorney litigating this case and submits the current hourly rates of each attorney based on their respective market rates for the specialized legal services provided. In the cost affidavit, Plaintiff's counsel details the costs and expenses actually paid and advanced in pursuit of the litigation. Mr. Maybank also submitted the Affidavit of Professor John Freeman, who provided the Court with his expert opinion as to the reasonableness of the hours, rates, and costs requested and the costs and expenses incurred, carefully analyzing the parameters established by the South Carolina Supreme Court for a court's review of a request for attorneys' fees and costs in a case like this one.

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 an award of attorneys' fees. This case was extremely difficult to litigate. I concur in the analysis of

Professor Freeman that both sides were represented by excellent attorneys who were strong advocates for their clients. This case dealt with complex investment products and strategies. Investment litigation is often hard-fought and protracted. 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 a single 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 to the jury if success is to be achieved. The UTPA claim was based upon the same set of intertwined facts as all of the other claims. Due to these factors, litigating this jury trial required substantial experience, knowledge, and expertise by Mr. Maybank's counsel. Mr. Maybank's counsel were faced with the complex task of knowing and understanding the complicated legal and factual issues involved as well as presenting the issues in a manner comprehensible to lay persons. I note that Mr. Maybank's counsel were excellent in this regard.

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

Mr. Maybank's counsel submitted an affidavit in support of the request for attorneys' fees which provided the number of hours worked by each member of Mr. Maybank's legal team on this case. This action was originally filed on December 22, 2011. Advancing this case to trial was an immense and time-intensive task. This case involved successfully gaining remand to this court following removal to federal court by Defendants, extensive discovery that included 32 depositions, review of 60,000 pages of discovery, and responding to eight substantive motions for summary judgment. 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. According to Mr.

Willoughby's affidavit, almost 6,700 hours have been devoted to handling Mr. Maybank's case through June 30, 2014, which excludes time spent on post-trial issues. This total is indicative of the comprehensive, challenge every issue defense employed by Defendants, which I observed firsthand. As was their right, Defendants vigorously defended each point and issue in this case. In light of the vigorous manner of the defense employed by Defendants through their outstanding lawyers, I find Mr. Maybank's counsel were required to respond effectively; therefore, I find the time devoted by Mr. Maybank's counsel in litigating this case was necessary, essential, and reasonable. In summary, Mr. Maybank's counsel produced a successful result, which 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 that the amount of fees allocable to this cause of action cannot be determined because all of the causes of action are based upon a core set of intertwined facts and, thus, the work performed was necessary to developing the UTPA cause of action as well as the common law causes of action. *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"). Plaintiffs' counsel also points to the testimony of Professor Freeman, who opined that these claims were intertwined and no deduction to the fee request is warranted based on the amount of time expended by Mr. Maybank's counsel. *See 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 based on the same body of evidence underlying the claims for fraud and constructive fraud) (citing *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992) (finding award of

attorney fees under the Dealer's Act was warranted even though fee affidavit was not itemized for time spent for the claim under the Act and that spent for the non-statutory cause of action)).

Based on my observation of counsel and the arguments on all issues and my knowledge of the case developed before, during, and after presentation to the jury, I find that the causes of action are based upon a core set of common and intertwined facts. As I stated above, I am well familiar with this case, the complex issues involved, the defense mounted,[31] the amount of time expended in discovery, and the development of the underlying facts. The parties appeared before me to argue motions on four occasions, in addition to a two week trial, during which time I observed the time and energy necessarily expended in developing the core facts. I therefore find that the UTPA cause of action is supported by a body of intertwined evidence that supported all of the causes of action, fully developed through the long path of discovery and motions hearings in this case.

However, I find that the amount of fees that Plaintiffs can recover must be limited to the UTPA claim. And while I recognize that many of the actions taken were based on a set of intertwined evidence, I find it appropriate to adjust the amount of fees claimed in order to limit the amount of compensable fees to those incurred with respect to the UTPA claim. Therefore, out of an abundance of caution, I find it appropriate to reduce the total hours expended by 20%. *See Layman*, 376 S.C. at 460, 658 S.E.2d at 333 (reducing total hours by multiplier). Based on my informed discretion developed through my observation of and experience with the entire case, 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

[31] 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

at the same time protecting Defendants against being charged for work that did not serve to develop the UTPA claim. The implementation of this reduction is set forth below.

C. ***Professional standing of counsel.***

Mr. Maybank's attorneys are respected members of the South Carolina Bar and the Richland and Greenville County Bars, respectively. Both Mr. Willoughby's firm and Mr. Bannister's firm have high standing and regard in the legal community. 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 the professional standing of Mr. Maybank's counsel militates heavily in favor of the award of attorneys' fees.[32]

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. The blended fee arrangement recognizes the significant risk and difficulty associated with litigating such a complex case. Mr. Maybank agreed to a reduced hourly fee arrangement that required him to bear a significant burden of ongoing litigation expenses, but not the entire burden which was shared by the law firms. As explained by the Supreme Court, the standard for evaluating the "contingency of compensation" factor is *not* a check to see if the plaintiff and counsel have a contingency contract in place,

[32] I note that, as with all issues in this case, Defendants were unwilling to concede the issue of Mr. Maybank's counsel's professional standing in this State.

although one exists here, but rather whether the plaintiff will be able to pay the incurred attorneys' 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.") (citation omitted). Because this case involved substantial financial losses by Mr. Maybank, there was a substantial risk that Mr. Maybank would reach a point in this litigation where he could no longer pay even the reduced rate.[33] Consequently, Plaintiff's counsel bore a significant risk in light of the complexity of the issues and the uncertainty of success, combined with the vigorous, contest every issue defense put forward by BB&T. Plaintiff's counsel also incurred a significant opportunity risk because they devoted substantial time and effort to this case at rates less than those that could have been earned by those same attorneys on other work. I find that the risk to Plaintiffs' counsel of not being fully and fairly compensated for this complex lawsuit 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 in this litigation, 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) (internal quotes omitted). As previously stated, the success achieved for Mr. Maybank was a direct result of the facts developed and the legal theories advanced by seasoned and experienced counsel with expertise in investment

[33] In fact, 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.

strategies and products. In addition, 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. Consequently, I find an exceptionally beneficial result was obtained for Mr. Maybank; thus, I find that the fifth factor, like the first four, 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.

Mr. Maybank's counsel submitted a fee affidavit in support of the request for attorneys' fees. Mr. Willoughby's affidavit provides the number of hours worked by each member of Mr. Maybank's legal team, as well as the current hourly billing rate for each of those attorneys in investment-related cases. As described above, 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, as well as the defense mounted in opposition. With respect to the current hourly rates, Mr. Willoughby asserts through a sworn affidavit that these are the current billable rates in investment cases for the attorneys who performed work on Mr. Maybank's behalf. 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 testified as to his first-hand knowledge of the quality of Mr. Maybank's counsel both in prosecuting this case to a successful result, as well as the professional standing of counsel in complex, investment-related litigation. I am also cognizant and mindful of Professor Freeman's testimony that, in his expert opinion, 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 fee in this case as follows:

	Hourly Rate	Hours Expended	20% Reduction	Adjusted Hours	Totals
Willoughby & Hoefer, P.A.					
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
Bannister, Wyatt & Stalvey, LLC					
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

Using the lodestar calculation of $1,769,530 in attorneys' fees as a starting point of a reasonable fee in this case, I find that enhancing this figure through a multiplier is necessary in

order to reflect the exceptional circumstances in recovering damages under UTPA in this case. *See Layman,* 658 S.E.2d at 334 (citing *Blum v. Stenson,* 465 U.S. 886, 897 (1984) (recognizing that an enhanced lodestar award may be justified "in some cases of exceptional success"); *see also Hyatt v. Apfel,* 195 F.3d 188, 192 (4th Cir. 1999) (affirming a multiplier of 1.333 applied to a lodestar calculation of attorneys' fees to be paid by the defendant government entity on account of the "exceptional results" obtained by plaintiffs' counsel); *Edmonds v. United States*, 658 F. Supp. 1126, 1144 (D.S.C. 1987) (applying a multiplier of 1.15 to 1.25 to the lodestar fees for the plaintiffs' various attorneys to account for the "exceptional circumstances" surrounding the amount of money involved and the results obtained in the case); *Sauders v. S.C. Pub. Serv. Auth.*, 2011 WL 1236163 (D.S.C. 2011).

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, 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. Finally, as detailed above, there was substantial risk involved in litigating this case. I find all of these factors constitute significant and exceptional circumstances that warrant applying a multiplier to the current hourly rates submitted by counsel in order to provide a reasonable fee in this case. I find it appropriate in the exercise of my discretion to adjust the calculation of the lodestar amount by applying a multiplier of 1.5 to reflect the difficulty and exceptional circumstances of this case. Applying the multiplier leads to the following result:

Base Attorneys' Fees:	$1,769,530.00
Multiplier:	x 1.5
Total Attorneys' Fees:	$2,654,295.00

I therefore find, based on the exercise of my informed discretion, that Plaintiff is entitled to recover attorneys' fees in the amount 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.

Additionally, under S.C. Code Ann. § 39-5-140(a), Mr. Maybank is entitled to costs reasonably incurred in litigating and trying the UTPA claim. Mr. Maybank's counsel submitted a cost affidavit detailing the costs and expenses actually paid and advanced in pursuit of the litigation, requesting costs in the amount 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). Costs may be imposed on the losing party when permitted by statute. *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 318, 422 S.E.2d 128, 131 (1992).[34] 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,[35] online research, electronic document hosting fees, and trial preparation expenses are common, if not required, in cases of this size and complexity. In addition, the copying charges, while substantial, are reasonable given that this case involved more than 60,000 pages of documents. As before, because the facts supporting the substantive claims were largely intertwined and developed throughout the lengthy discovery

[34] The imposition of fees and costs is mandatory upon a finding of a violation of the UTPA.

[35] Defendants engaged five expert witnesses, including one who billed BB&T between $50,000 to $60,000 for his time and testimony.

process, I find that no reduction of the costs and expenses is required due to Mr. Maybank's failure to win on every single contention advanced. I do note, however, that Mr. Willoughby's cost affidavit specifically excludes the costs of the expert witness of the Maybank Family Insurance Trust, based on the lack of success in recovering damages for the trust. However, I further find, for the reasons expressed above, that the total amount should be reduced by 20% to limit costs to the UTPA claim alone. Accordingly, I therefore award $245,011 ($306,264 * (1 - .20)) in costs and expenses as reasonable and appropriate under S.C. Code Ann. § 39-5-140(a).

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) ("In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum."). The law permits the award of prejudgment interest when a monetary obligation is a sum certain, or is capable of being reduced to certainty, accruing from the time payment may be demanded either by the agreement of the parties or the operation of law. *Spriggs Group, P.C. v. Slivka*, 402 S.C. 42, 56, 738 S.E.2d 495, 503 (Ct. App. 2013) (citing *Butler Contr., Inc. v. Court St., LLC,* 369 S.C. 121, 133, 631 S.E.2d 252, 258 (2006)). Defendants argue in part that Mr. Maybank is not entitled to recover prejudgment interest because the amount of damages is not a sum certain or capable of being reduced to certainty at the time the claim arose. 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 in the amount 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 _____ day of October, 2014

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)))	IN THE COURT OF COMMON PLEAS 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-23-8578 **DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED ORDER AND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' POST-TRIAL MOTIONS**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL D. WICKENSIMER
2014 OCT 16 PM 4 21

The Defendants, BB&T Corporation, Branch Banking and Trust Company ("BB&T"), and Sterling Capital Management, LLC ("BB&T Asset Management") (collectively "Defendants"), hereby submit their Objections to Plaintiffs' Proposed Order and Supplemental Memorandum in Support of Defendants' Post-Trial Motions.

I. INTRODUCTION

The Defendants file this written submission to address certain arguments first raised by Plaintiffs' counsel either in the proposed order provided to the Court or in briefs handed to the Defendants' counsel at the post-trial hearing held on August 19, 2014. Additionally, this submission addresses defects in the proposed order which the Court should correct before entering the order and judgment and before the anticipated appeal of this matter. This submission should also be considered as a supplemental memorandum in support of the

Defendants' post-trial motions. All references herein to the proposed order are to the version of the proposed order transmitted to the Court via email by Plaintiffs' counsel on October 9, 2014. A copy of this proposed order is attached hereto as Exhibit "A."

The proposed order includes a critical legal error by allowing Maybank to recover both punitive damages and treble damages and by not requiring an election of remedies. This would present an unprecedented double recovery for Maybank and would dramatically increase the amount of the judgment by $5 million. The beginning of the argument section of this brief addresses this issue and explains why there is only one wrong and one injury, as reflected by the fact that the only evidence of damages was Craig McCann's analysis of the prepaid contracts and managed portfolio account and the jury's verdict making one award of actual damages in the amount of $3.1 million. The Defendants are submitting to the Court contemporaneously with the filing of this brief a proposed order requiring Maybank to elect his remedies so that there is only one recovery of exemplary damages.

The Court should expressly rule on all motions and all grounds presented by the Defendants. For example, on pages 43-44 of the proposed order, there is a ruling denying the Defendants' motion to strike the affidavit of Professor Freeman. There is no ruling, however, on the Defendants' motion to postpone consideration of Maybank's request for attorneys' fees and for treble damages, nor is there any ruling on the Defendants' motion to compel Maybank to submit additional information relating to his request for attorneys' fees and costs. There is also no statement providing that the Court has considered and ruled on the grounds asserted by the Defendants for opposing the amount of attorneys' fees and costs requested. The Court should specifically state in the order that it has fully considered all of the issues and arguments raised or asserted by the Defendants in their post-trial motions and opposing the Plaintiffs' motions,

including the arguments of counsel at the August 19, 2014 hearing and the matters contained in all filings, and that those issues and arguments are expressly ruled upon and rejected. The proposed order does this in some instances, but the Court should ensure that it has stated expressly in response to each and every motion filed by the Defendants that it has considered and, if it decides not to grant, rejected the grounds asserted.

The proposed order submitted by Maybank is also flawed in that it contains inaccurate and unnecessary characterizations of the events in an effort to prejudice the Defendants on appeal. For example, Maybank would have this Court state that the Defendants "made sure it was most expensive to litigate this case." (Proposed Order at 50). This is a mischaracterization of the events and suggests that the Defendants were intentionally trying to increase the expense of litigation. Maybank also includes a statement that the jury was attentive, thoughtful, and diligent, (Proposed Order at 2), but that is contradicted by the fact that the jury provided a note to the Court complaining about one of the jurors who was sleeping during trial. Similar characterizations that the jury was "excellent" and "worked perfectly," (Proposed Order at 34), are also unsupported and unnecessary for the order. Another example is on page 17 of the proposed order addressing punitive damages in which it is said, "I concur with these findings," but the preceding statements are not findings of the jury, but are mere argument from Maybank's counsel. The proposed order improperly states that certain arguments are not "preserved" or that a "contemporaneous objection" was not made, (Proposed Order at 30, 32, 33, 40, 41), which is an improper assumption of the function of the appellate court. The Court should reject Maybank's efforts to use the proposed order in the above manner and delete these unnecessary characterizations of the events.

The Defendants incorporate herein by reference all prior arguments, made both orally at hearings and in writing, in the Defendants' summary judgment motions, directed verdict motions, motion for JNOV and new trial, and other post trial motions as well as all arguments asserted in the supporting memoranda for those motions.

II. ARGUMENT

A. Election of Remedies

With regard to its rulings on the issue of election of remedies, Maybank's proposed order is erroneous in multiple respects. Specifically, the proposed order seeks to re-characterize the common underlying basis for all of Maybank's claims so as to allow this Court to impose a ***double*** recovery of exemplary damages in the form of both a $5,000,000 punitive damages award, as well as statutorily "trebled" damages constituting and additional $6,200,000 in damages which are punitive in nature. As Maybank acknowledges, damages that are punitive in nature may only be recovered once where they concern a single wrong. *Smith v. Strickland*, 314 S.C. 192, 197-98; 442 S.E.2d 207, 210 (Ct. App. 1994) (applying election of remedies to require an election between two different punitive damages awards based on the same wrong). This rule applies with equal force where the exemplary damages are in the form of a punitive damages award and statutory trebled actual damages. *See Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 208, 391 S.E.2d 249, 251 (1990) (holding that an award of both punitive damages and treble damages constitutes an impermissible double recovery). Maybank's proposed order seeks to avoid this rule by improperly attempting to allocate the Defendants' conduct into two separate categories: (1) one category that would support only the UPTA claim; and (2) a different category that would support only the common law claims that allow punitive damages. This mischaracterization of the existence of multiple "wrongs" is not supported by either the record in

this case or the jury's verdict. Additionally, this position is wholly inconsistent with Maybank's assertions with regard to the award of attorneys' fees, which Maybank contends in his proposed order cannot be limited to only the UTPA claim "because all of the causes of action are based upon a core set of intertwined facts." (Proposed Order at 47).

An election of remedies between "trebled" damages under the UTPA claim and punitive damages under the common law claim is required here for multiple reasons. First, Defendants' alleged wrongful acts constitute but one course of conduct, and, therefore, constitute only one "wrong" in an election of remedies analysis. In his pleadings and his presentation of his case, Maybank did not seek to allocate certain specifications to the UTPA claim and others to the common law claims, nor did he request the jury make such a specific allocation. The alleged wrongful conduct supporting Maybank's various claims was essentially the same, and Maybank admits as such when seeking an attorney fee award

Second, the fact that only one "wrong" occurred is evidenced by the fact that Maybank's actual damages for his various claims are identical. Maybank did not present his damages evidence in a manner which separated it between the UTPA and common law claims and Maybank did not request that the jury make separate damages findings as to those categories of claims. That is because there is no difference between the damages or the "wrong" allegedly suffered.

Third, contrary to the assertions in the proposed order, the jury did not make separate findings of wrongdoing that independently support both the UTPA and common law claims. Rather, the jury was presented with multiple causes of action that were based on the same course of conduct and was asked to render but one damages award – because the damages resulting from that course of conduct were the same under all theories presented.

Finally, under the reasoning of the proposed order, the "trebled" damages would not be limited to damages related only to the supposed UTPA "wrongs." Rather all damages, including those the proposed order "allocates" to the common law claims, are trebled. This illustrates the inconsistency with Maybank's positions. Only if the damages are considered related to a single wrong, thus requiring an election of remedies, could the trebling of the entire $3.1 million actual damages verdict be proper.

1. Defendants' alleged course of conduct constituted only one "wrong."

It is a fundamental rule of law in South Carolina, that there can be no double recovery for a single wrong. *Inman v. Imperial Chrysler-Plymouth*, 303 S.C. 10, 13, 397 S.E.2d 774, 776 (Ct. App. 1990). The doctrine of election of remedies serves the purpose of preventing multiple recoveries for the same conduct. *Brown v. Felkel*, 320 S.C. 292, 294, 465 S.E.2d 93, 95 (Ct. App. 1995). Under this doctrine, a plaintiff must chose between different remedies allowed by law on the same set of facts. *Inman*, at 13, 397 S.E.2d at 776. "Modern procedure generally permits a plaintiff to assert all viable causes of action, consistent or not. The restriction is not on the potential ***theories*** of recovery a plaintiff might pursue, but instead, on the recovery itself." *Id.* (emphasis added). It does not matter if the various causes of action or theories are against different defendants. *Collins Music Co. v. Smith*, 332 S.C. 145, 503 S.E.2d 481 (Ct. App. 1998) (applying election of remedies to two different causes of action against two different defendants to avoid double recovery of the same damages). Nor does it matter if the various causes of action asserted have different elements. *Smith v. Strickland*, 314 S.C. 192, 442 S.E.2d 207 (Ct. App. 1994) (election of remedies applied to four different causes of action with different elements). Moreover, it does not matter if the different claims had different measures of damages. *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66 (Ct.

App. 1994) (noting that there were different measures of damages for the three claims asserted and that the trial court required the plaintiff to elect one recovery from the three different damages verdicts awarded).

The essential determination in an election of remedies analysis is whether the claims are based on the same conduct and involve damages that are the natural consequence of that same conduct. Where claims are based on essentially the same set of facts and the damages flow from the same conduct, election of remedies applies.

Here, there is but one set of facts or one course of alleged conduct that gives rise to Maybank's varying claims. All of the claims for which the jury rendered a verdict for Maybank focus on the Defendants' recommendation and implementation of an allegedly inappropriate investment strategy to address Maybank's concentrated position in BB&T stock. Maybank's proposed order seeks to separate out this one set of facts into separate and distinct categories that can now be allocated to separately support both the UTPA and common law claims. Such after-the-fact separation is improper.

Significantly, Maybank's effort to obtain attorneys' fees pursuant to the UTPA claim belies his attempt to separate out the conduct relating to the UTPA claims from the conduct relating to the common law claims. Specifically, the proposed order asserts that the attorney fees cannot be allocated between the causes of action "because all of the causes of action are based upon a core set of intertwined facts and, thus, the work performed was necessary to developing the UTPA cause of action as well as the common law causes of action." (Proposed Order at 47). The proposed order also asserts that Maybank's expert witness, Professor Freeman, opined that "these claims were intertwined." (*Id.*) Thus, on the issue of attorneys' fees, Maybank would have this Court conclude that "the causes of action are based upon a core set of common and

intertwined facts" and that "the UTPA cause of action is supported by a body of intertwined evidence that supported all of the causes of action." (*Id.* at 48). In contrast, on the issue of the double recovery of both punitive damages and trebled actual damages, Maybank would have this Court conclude that the "theories under the UTPA claim ... were separate and distinct from the theories supporting the common law claims" and that "the basis for liability under the UTPA is separate and distinct from that for the common law causes of action." (*Id.* at 37-38). These two positions ate diametrically opposed to each other. If all of the claims are "intertwined" and based on the same "core set of facts" then election of remedies must apply. *Inman*, 303 S.C. at 13, 397 S.E.2d at 776 (holding that plaintiff could not recover both multiple damages under a UTPA claim and punitive damages under a fraud claim where the conduct that served as the basis for both claims was the same). Thus, Maybank's position on the award of attorneys' fees establishes Defendants' argument that all of the claims were based on the same set of core and intertwined facts and, therefore, constitute only a single wrong that does not allow two separate recoveries of exemplary damages.

Maybank's proposed order asserts that the UTPA claim and the common law claims are supported by multiple theories that are "separate and distinct" from each other. However, the same underlying facts apply to all of the claims, regardless of the different "theories" asserted. For example, Maybank asserts that his common law claims were based on the breach of the professional and fiduciary duties allegedly owed by Defendants, and that the UTPA claim was based on the "separate and distinct theories" that focus on specific actions or omissions by Defendants. However, those same actions or omissions that Maybank asserts separately to support the UTPA claim are part and parcel of how Maybank contends the common law duties were breached. Maybank is attempting to allocate certain actions or omissions to just the UTPA

claim when they are part of the same facts that were asserted for all claims. Such allocation of facts is improper and is directly contrary to the purpose of the doctrine of election of remedies.

Maybank's assertion that there are "theories" or facts applicable to the UTPA claim that are separate and distinct from the "theories" or facts applicable to the common law claims does not render election of remedies inapplicable. Election of remedies still applies even where the varying causes of action have different elements, are asserted against different defendants, or have different measures of damages – which would necessarily make different facts relevant to different causes of action. In *Smith v. Strickland*, 314 S.C. 192, 442 S.E.2d 207 (Ct. App. 1994), election of remedies was applied to four separate causes of action (fraud, constructive fraud, a statutory claim, as well as a UTPA claim). Those claims all had varying elements which were established by varying facts established at trial. However, election of but one remedy was still required because, ultimately, the defendants entire course of conduct constituted only one wrong. In this matter, while Maybank's varying "theories" may draw on different facts, all of those facts arise from the same course of conduct surrounding the allegedly inappropriate investment strategy recommended and implemented by the Defendants.

Maybank's proposed order relies heavily, if not exclusively, on the case of *Taylor v. Medencia*, 324 S.C. 200, 479 S.E.2d 35 (1996), wherein our Supreme Court allowed the recovery of both punitive damages under a common law claim and trebled actual damages under a UTPA claim. This reliance is misplaced, as the facts in *Taylor* are distinguishable, and its holding is inapplicable to this matter. Specifically, *Taylor* involved two separate "wrongs" that were based on separate conduct and which caused separate damages. That is not the case here, and Maybank's efforts to re-characterize the jury's verdict do not remedy this distinction.

Taylor was a medical malpractice case where the plaintiff brought claims for negligence and UTPA against a doctor and a laboratory that was wholly owned and operated by that doctor. The jury returned a verdict against the doctor alone on the negligence claim awarding $1,000,000 in actual damages and $10,000,000 in punitive damages. The jury also returned a verdict against both the doctor and the laboratory on the UTPA claim awarding a separate $1,000,000 in actual damages. The trial court reduced the UTPA award (while leaving the negligence actual damages award unchanged), and then ordered that it be trebled. The trial court then required the plaintiff to elect between the negligence and UTPA claims. The issue on appeal was whether this election was properly required.

The *Taylor* court correctly noted that "[e]lection of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action" and that "[i]ts purpose is to prevent double recovery for a single wrong." *Taylor*, at 218, 479 S.E.2d at 44-45. The *Taylor* Court further noted that this doctrine was inapplicable where there are "two separate causes of action, each based on different facts." *Id.* at 218, 479 S.E.2d at 44-45.

The *Taylor* court concluded that election should not have been required because the negligence claim was based on conduct that was wholly separate from the conduct that was the basis for the UTPA claim. Significantly, this separate conduct resulted in *separate injuries* to the plaintiff. The negligence claim was based on the doctor's medical malpractice in utilizing the drug MMC in his treatment of the plaintiff for her breast cancer, which resulted in the patient contracting a potentially fatal blood disease. This disease, in turn, caused the plaintiff significant physical injuries which left her with permanent kidney damage, impaired vision and limited stamina. Additionally, the negligent treatment resulted in the plaintiff being unable to undergo

normal treatment when her breast cancer returned, making that returning cancer a terminal condition. Thus, the "wrong" that served as the distinct basis for the negligence claim was the improper treatment that resulted in the severe physical injury to the plaintiff. In contrast, the UTPA claim was based upon the fact that, separate and apart from the negligent use of MMC in the treatment of the breast cancer, the doctor and his laboratory performed and billed her, at inflated prices, for numerous tests and lab studies that were unnecessary, unwarranted, and of questionable value. Thus the "wrong" that served as the basis for the UTPA claim was not the improper medical treatment that resulting in the blood disease and other serious physical injuries, but, rather, was the separate conduct of performing costly tests that were unnecessary and unjustified. Thus, *Taylor* involved wholly separate conduct that caused separate harm. Significantly, in *Taylor*, the jury rendered two separate actual damages awards for the two wrongs, and these separate damages awards ultimately were held to each separately support their respective exemplary damages.

Unlike the *Taylor* case, this matter does not involve two wholly separate wrongs that caused separate damages. Maybank's claims all ultimately focus on the allegedly inappropriate investment strategy recommended and implemented by the Defendants. Maybank's proposed order improperly seeks to "shoehorn" this case into the facts presented in *Taylor* by having this Court "allocate" different aspects of that same course of conduct between the UTPA and the common law claims.

In addition to the *Taylor* case, Maybank's proposed order attempts to support the double recovery of both treble and punitive damages by citing to the cases of *Freeman v. A. & M. Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987), *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994), and *Columbia Teachers Fed. Credit Union*

v. Newsome Chevrolet-Buick, 303 S.C. 162, 399 S.E.2d 444 (Ct. App. 1990). Those cases, however, are wholly inapplicable to this situation. In *Freeman*, the plaintiff asserted claims for fraud as well as under the UTPA and the Consumer Protection Code, and the jury awarded the plaintiff separate actual damages awards on all three claims as well as punitive damages on the fraud claim. The trial court then trebled the UTPA damages. **Significantly, the defendant in Freeman did not make a motion for election of remedies.** *Freeman*, 293 S.C. at 259, 359 S.E.2d at 535. **Thus the propriety of the award of both punitive and trebled damages was neither raised nor addressed in that opinion.** Additionally, both *Toyota of Florence* and *Columbia Teachers* involved the Motor Vehicle Dealers Unfair Trade Practices Act and whether the plaintiff can recover both punitive damages and double actual damages pursuant to that Act. The propriety of the dual award of punitive damages and statutory double damages in those cases was entirely dependent upon the fact that the Motor Vehicle Dealers Unfair Trade Practices Act specifically allows such a dual recovery. These holding are wholly inapplicable to this case as the UTPA does not contain such a provision.

2. The actual damages sought by and awarded to Maybank are the same for all claims, illustrating there was only one "wrong."

The fact that Maybank only sought, and was only awarded, one actual damages award illustrates that there was only one alleged "wrong" committed by the Defendants or suffered by Maybank. Maybank's Second Amended Complaint seeks the same damages for each of the claims that went to the jury. Additionally, Maybank made no attempt at trial to differentiate or categorize his alleged damages among his various claims. Finally, the verdict form agreed to without objection by Maybank provided the jury with only the ability to award actual damages that would be applicable to all of the claims for which they found in his favor. That is because

his actual damages were identical for all claims – the losses resulting from the investment strategy.

Maybank now seeks to obtain a double recovery of exemplary damages by categorizing this universal "wrong" as separate and distinct wrongs. The case of *Collins Music Co., Inc. v. Smith*, 332 S.C. 145, 503 S.E.2d 481 (Ct. App. 1998), illustrates the fallacy with this position. In *Collins*, the plaintiff brought a breach of contract claim against Smith, and a tortious interference claim against a competitor who had displaced plaintiff's business with Smith. The plaintiff prevailed on both claims and received separate $10,000 damages awards against both defendants. The trial court, however only allowed a single $10,000 judgment. On appeal, the *Collins* court held that "there can be no double recovery for a single wrong" and that it was not error to limit the plaintiff to only one $10,000 judgment. The *Collins* court quoted the case of *Ross v. Holton*, 640 S.W.2d 166 (Mo. Ct. App. 1982), which explained that although the different claims of breach of contract and tortious interference involved separate and distinct wrongful acts committed by different parties, and those different claims allowed for different measures of recovery, the damages under both were co-extensive to a certain extent, and a double recovery of co-extensive damages would not be permitted. *Collins*, at 147-48, 503 S.E.2d at 482, citing *Ross*, 640 S.W.2d at 173. The *Collins* court held that the plaintiff neither pleaded nor proved any damages other than the contract damages, and, therefore, it was proper to restrict the plaintiff to just one $10,000 damages award. *Collins*, at 148, 503 S.E.2d at 482.

As in the *Collins* case, here Maybank neither pled nor proved damages that were applicable to only the UTPA claim. Rather, the claimed damages were the same for all causes of action. Thus, as in *Collins*, even though there may have been "separate and distinct" wrongful acts that applied to the different claims, the ultimate "wrong" actually suffered was identical and

constitutes but one recoverable "wrong." Thus, as Maybank's damages are not distinguishable between his claims, it is improper to allow both an award of punitive damages and the trebling of actual damages for the very same wrong.

3. The Jury's verdict does not constitute a finding of "separate wrongs" allowing the double recovery of exemplary damages.

The jury's verdict found in favor of Maybank on five claims. The jury was not asked to make, nor did it make, any findings whatsoever on individual specifications within each claim. Rather, the verdict rendered was that the Defendants' course of conduct supported those five claims. Despite there being no specific findings by the jury of separate and distinct "wrongdoings," Maybank's proposed order seeks to have this Court read such specific findings into that verdict. Specifically, it seeks to have this Court conclude that the jury found that the Defendants engaged in separate and distinct wrongful acts that applied solely to certain claims. That is not what the jury's verdict reflects and it would be improper for this Court to make any such ruling.

If specific factual findings of separate and distinct wrongful acts were actually possible under the circumstances of this case, Maybank should have requested that the jury complete interrogatories on such factual issues pursuant to Rule 49(b), SCRCP. Maybank did not do so, nor did he object to the verdict form. Thus, this issue has been waived. *S.C. DOT v. First Carolina Corp.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (holding that "it is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error"); *see also Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002). Maybank suggests that it was incumbent on the Defendants to either seek to have interrogatories submitted to the jury on these issues or to object to the verdict form. However, the verdict form was proper given the fact that all of Maybank's

claims stem from the same core set of facts. From the Defendants' perspective there was no reason to seek interrogatories and no basis for an objection to the form on this point. It is Maybank who had the interest in pursuing such interrogatories in an effort to create factual findings specific to only the UTPA claim. The opportunity to raise this issue has now passed, and it is improper for Maybank to suggest that the Court can now invade the province of the jury to create specific factual findings where none exist. Even if this Court could now modify the verdict to create findings of wrongdoing specific only to the UTPA claim, which it cannot under these circumstances, such a modification could occur only if it was coupled with the option of a new trial. *Camden v. Hilton*, 360 S.C. 164, 173, 600 S.E.2d 88, 93 (Ct. App. 2004) (holding that the trial court's authority to correct, modify, amend, or interfere with the jury's verdict is embraced in and limited to the power to grant new trials).

Additionally, Maybank's proposed order seeks to apply a wholly inapplicable standard to this issue. Specifically, the proposed order has this Court finding that, when viewed "in a light most favorable to the non-moving party, the record supports a reasonable conclusion by the jury that the basis for liability under the UTPA is separate and distinct from that for the common law causes of action." Such a ruling would be in error. The standard of "light most favorable" applies to how evidence is viewed when considering dispositive motions. It has no bearing on a motion for election of remedies. Moreover, what a jury "reasonably concludes" on factual issues is ultimately for the jury to decide. Maybank seeks to have this Court enter the province of the jury and make factual findings for the sole purpose of supporting his argument for the double exemplary recovery. However, if Maybank wished for such findings, it was incumbent on Maybank to seek that the jury make such specific findings. He did not. Having failed to obtain findings that would possibly support his theory of double exemplary damages recovery, he

cannot now seek to have this Court unilaterally create such findings, and it would be improper for this Court to do so.

4. Maybank's theory that separate "wrongs" can be now allocated among the claims necessarily results in damages related to the common law claims being improperly included in the UTPA trebling process.

In order to avoid an impermissible double recovery, Maybank must argue that he suffered separate injuries or "wrongs." If this Court orders the trebling of actual damages under the UTPA claim, then only the damages relating to the purported injury resulting from the UTPA violation should be trebled. However, Maybank is requesting that all $3.1 million of the actual damages awarded in this case – regardless of the cause of action to which they are attributable - be trebled. To support his claim that he is entitled to ***both*** punitive damages ***and*** treble damages, Maybank contends that certain wrongful acts are separate and distinct from others and apply only to the UTPA claim. Maybank, however, makes no attempt to segregate or allocate the actual damages award between the common law and UTPA claims. Instead, Maybank acknowledges that the damages for all of the claims are the same.

It is this last point that illustrates the inconsistency of Maybank's position and how an impermissible double award of exemplary damages will result. If the damages for all of the claims are the same, and are trebled under the UTPA, then there is only one injury or "wrong" suffered. In that circumstance, Maybank cannot recover two separate exemplary damages awards for that same injury. If there were in fact two separate wrongs and two separate injuries (which is denied), and thus the double exemplary damages award were permitted, not only would Maybank receive the benefit of a $5,000,000 punitive damages award based on the actual damages related to the common law claims, but his trebled damages would be calculated on those very same actual damages (*i.e.*, damages related to the common law claims would be

improperly included in the trebling calculation). Because the jury returned only one actual damages verdict, the only means of avoiding this inconsistency is to conclude that there is only one wrong and require an election of remedies.

B. Punitive Damages Waiver Provision

The proposed order rejects the Defendants' request that the punitive damages verdict be stricken based on Paragraph F.1. of the Wealth Management Agreement, which bars Maybank's recovery of punitive damages. The proposed order refers to this provision as an "exculpatory clause." It is not an exculpatory clause. Exculpatory clauses attempt to bar any and all liability against a party. Paragraph F.1. makes no attempt to bar all liability against the Defendants. Instead, it limits Maybank to his actual losses and bars certain types of relief, including punitive damages. While public policy disfavors exculpatory clauses, there is no South Carolina precedent disfavoring a mere limitation on damages recoverable against a defendant when the provision allows the recovery of action losses.

The proposed order also erroneously attempts to blend the dispute over the phrase "Bank shall" on page one of the Wealth Management Agreement with the application of Paragraph F.1. While the parties may have been debating the meaning of language on page one of the agreement, there is no dispute or ambiguity with respect to the language in Paragraph F.1. The Defendants have never taken the position that there is any ambiguity as to Paragraph F.1., nor does any part of the reformation counterclaim affect the operation or interpretation of Paragraph F.1. There is no question of fact for the jury to decide with respect to this contract provision. It is a pure question of law for the Court, and, in this instance, the Court is required to enforce and apply the plain language of Paragraph F.1. and rule that the Defendants are entitled to JNOV on the issue of punitive damages. Because the language is clear and unambiguous, there is no need

for the Court to apply rules of contract construction or to narrowly construe the provision against the Defendants.

The proposed order states that Paragraph F.1. is limited to services provided under the agreement, but then states that services do not include misrepresentations. There is no question, however, that Maybank based all of his tort claims on the services provided by the Defendants. All of the alleged misconduct, either negligence, misrepresentations, or other conduct, all allegedly occurred as part of the services that the Defendants provided. Without the Defendants having provided their services, Maybank would have had no tort claim, or any claim whatsoever, against the Defendants.

The proposed order also states that Paragraph F.1. is unenforceable because there was unequal bargaining power and because the Defendants were purportedly fiduciaries of Maybank. There is no law to support this assertion. Under South Carolina law, to show unconscionability, a party must demonstrate both inequality in bargaining power *and* an inability to read or other reason obscuring the provision. *See Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013). Maybank admitted during his testimony that he read the entire Wealth Management Agreement. He was Harvard educated and highly sophisticated. Under these facts, Maybank cannot satisfy the elements of unconscionability. Moreover, there is no South Carolina law that makes unenforceable contract provisions merely because one party stands in the position of a fiduciary to another. There is also no basis for a finding of unenforceability based on the assertion that the Wealth Management Agreement was executed after the first prepaid contract. Parties certainly have the power to contract to limit their rights with respect to events or transactions that have already occurred. Maybank has failed to offer any legal precedent to support his position.

Finally, the proposed order includes a statement that the Court bases its finding of unenforceability on "my own weighing of the evidence." (Proposed Order at 24). There is no part of the analysis of the application or enforceability of Paragraph F.1. that requires the Court to weigh any evidence. Because the language of Paragraph F.1. is plain and unambiguous, the Court is required by South Carolina law to enforce the provision without the need to apply rules of contract construction and without weighing the evidence.

C. BB&T Corporation

BB&T Corporation has briefed and presented to the Court the binding authority regarding personal jurisdiction and the claims against BB&T Corporation, including *Builder Mart of America, Inc. v. First Union Corp.*, 349 S.C. 500, 562 S.E.2d 352 (Ct. App. 2002), as well as the lack of allegations or evidence of activity by BB&T Corporation. BB&T Corporation will not repeat all of those positions, but does rely upon them in objecting to the portions of the proposed order which are contrary to the law, the allegations, and the evidence. BB&T Corporation herein raises three particular points regarding BB&T Corporation in response to the proposed order and/or Plaintiffs' briefing handed up to the Court at the hearing.

First, the proposed order makes a conclusion that "there is no inconvenience to the parties by exercising jurisdiction . . . ." (Proposed Order at 27). However, there is no basis for this proposed finding. The party seeking to invoke personal jurisdiction over a nonresident defendant bears the burden of proving the existence of personal jurisdiction. *See Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 723 S.E.2d 835, 839 (Ct. App. 2012). There was no evidence presented at trial by the Plaintiffs related to the inconvenience of BB&T Corporation, much less which would support the proposed conclusion.

Second, the proposed order states "the duration of the activity extended over the entire term of Mr. Maybank's investment . . . ." (Proposed Order at 27). This wished-for conclusion is not supported by the prior analysis in the proposed order, much less the evidence in the case. The single item cited by Maybank in the proposed order to demonstrate activity by BB&T Corporation is what they call the "Approval Letter." A single act of reviewing a letter does not support the asserted conclusion regarding "duration." In fact, no evidence supports it.

Third, the proposed order seeks to taint the appeal process by asking the trial court to make determinations on preservation of issues regarding BB&T Corporation. (Proposed Order at 28-29, n. 13). Nevertheless, the issues regarding the lack of evidence to support the claims against BB&T Corporation were presented as part of the directed verdict motion. The oral presentation of the directed verdict motion stated that the operative Complaint contained no allegations of wrongdoing by BB&T Corporation. The oral presentation also included the lack of evidence to support the claims against BB&T Corporation, including that there was no contract in evidence to which BB&T Corporation was a party, there was no evidence of a fiduciary relationship between the Plaintiffs and BB&T Corporation, and there was no evidence of misrepresentation on the part of any BB&T Corporation employee. The assertion that issues regarding BB&T Corporation were not submitted to the court for consideration at directed verdict is without merit and improper for inclusion in the proposed order.

D. Unfair Trade Practices Act

As explained in the Defendants' motions for Directed Verdict and JNOV and the supporting memoranda, securities-related transactions such as the Wealth Management Agreement, prepaid forward contracts, investment advisory fees, and related communications cannot be the subject of a UTPA claim. The proposed order, however, misstates the standard that

brings securities-related transactions within the scope of the UTPA's regulated activity exemption. Specifically, the proposed order wrongly states that the regulated activities exemption applies only to the public offering, registration, and sale of securities. (Proposed Order at 5). This, however, is not the law. The Supreme Court's statement in *State ex rel. McLeod v. Rhoades*, 275 S.C. 104, 267 S.E.2d 539 (1980), and *Ward v. Dick Dyer and Associates, Inc.*, 304 S.C. 152, 403 S.E.2d 310 (1991), that securities-related transactions are exempt from the UTPA was not narrowly limited to public offerings, sale, and registration of securities.

Rather, *Rhoades* and *Ward* expressly relied on and adopted the reasoning of other jurisdictions—jurisdictions that have held that *any* securities-related transaction is exempt from the state's UTPA. These cases have held that the provision of investment advice, communications related to investments, and any investment-related or securities-related conduct governed or regulated by state or federal securities laws, regulations, or agencies is exempt from state UTPAs. The Fourth Circuit, for example, has expressly refused to apply a state UTPA to transactions that touch even tangentially on securities, and has noted that no state court—including South Carolina—has applied its UTPA to securities transactions:

> We find it significant that no state court has held that its Unfair Trade Practices Act applies to securities transactions. In fact, courts in three states, Rhode Island, South Carolina, and Washington, have held that their state Unfair Trade Practices Act has no application to securities transactions.
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> We do not believe that the North Carolina legislature would have intended § 75-1.1, with its treble damages provision, to apply to securities transactions which were already subject to pervasive and intricate regulation under the North Carolina Securities Act.

Lindner v. Durham Hosiery Mills, 761 F.2d 162, 167 (4th Cir. 1985); *see also Harrah v. J.C. Bradford & Co.*, 37 F.3d 1493 (4th Cir. 1994) (table opinion) (holding plaintiffs could not bring

a state UTPA claim against brokerage firm because the allegedly unfair and deceptive practices were "plainly securities-related activities"). Similarly, the courts of North Carolina have refused to apply its UDTPA to securities-related transactions:

> Relevant here, our Supreme Court has explicitly held that 'securities transactions are beyond the scope' of the UDTPA. According to the Court . . . the UDTPA does not apply to securities transactions because such application would create overlapping supervision, enforcement, and liability in an area of law that is already pervasively regulated by state and federal statutes and agencies.

Sterner v. Penn, 583 S.E.2d 670, 675 (N.C. Ct. App. 2003) (citing *Skinner v. E.F. Hutton & Co.*, 333 S.E.2d 236, 241 (N.C.1985)). The courts of numerous other jurisdictions have held similarly. *See, e.g., Spinner Corp. v. Princeville Dev. Corp.*, 849 F.2d 388 (9th Cir. 1988) (applying Hawaii law and holding that Hawaii Trade Commission Act does not apply to securities transactions, notwithstanding the absence of a specific exclusion in the statute, because fraud and deceit by investment advisors was prohibited and regulated by other state statutes and agencies); *In re Evergreen Mut. Funds Fee Litig.*, 423 F. Supp. 2d 249, 264 (S.D.N.Y. 2006) (ruling that state UTPA "does not apply to securities-related claims," even where the alleged wrongdoing was unrelated or only tangentially related to a public offering or sale of a security); *Caraluzzi v. Prudential Sec., Inc.*, 824 F. Supp. 1206, 1215 (N.D. Ill. 1993) (dismissing Connecticut Unfair Trade Practices Act Claim as inapplicable to a securities transaction) (citing *Russell v. Dean Witter Reynolds, Inc.*, 510 A.2d 972, 977 (Conn. 1986)); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 675 (N.D. Ga. 1983) ("[I]n a situation where a consumer remedy exists, with no need to fill in a legal gap or create a consumer right, and where the industry which is the subject matter of the situation explicitly defines wrongful conduct or unfair and deceptive practices, the [Fair Business Practices Act] has no application.").

In addition, the proposed order incorrectly conflates the binding precedent that exempts securities-related transactions from the UTPA with the separate holdings (found in that same binding precedent) rejecting the "general activity" test. (Proposed Order at 8-9). That these two concepts are distinguishable is made clear by the fact that the very cases rejecting the general activity test specifically note that securities, which are exhaustively regulated and supervised by state and federal law and regulatory agencies, are exempt from the UTPA.

Furthermore, the absence of any securities-related rulings by the Federal Trade Commission ("FTC") in interpreting and applying the Federal Trade Commission Act ("FTCA") is strongly persuasive guidance that securities-related transactions are not subject to the UTPA. The South Carolina legislature has expressly instructed our courts to look to FTC and federal case law for guidance when interpreting the UTPA. *See* S.C. Code Ann. § 39-5-20(b) ("It is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to Section 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended."). As noted by other courts, the fact that the FTCA has not been applied to securities transactions in nearly a century indicates that state UTPAs should similarly not be applied to securities transactions:

> [Defendant] points to the provision of the statute requiring that it be construed in accordance with the judicial interpretation of similar federal antitrust statutes. [] As noted above, the Hawaii Act is almost identical to § 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1982). The Federal Trade Commission Act has not been applied in a securities context since 1923. [] [Defendant] concludes this is because such questions have been governed by the SEC since its creation in the 1930s. It also points to the absence of any federal judicial decision after that time that applied the Federal Trade Commission Act to a securities transaction. Dismissal by the district court in this case is in

> accordance with judicial interpretations of similar federal antitrust statutes.

Spinner Corp. v. Princeville Dev. Corp., 849 F.2d 388, 390-91 (9th Cir. 1988); *see also Lindner v. Durham Hosiery Mills*, 761 F.2d 162, 167 (4th Cir. 1985) ("[T]he fact that no federal court decision has applied § 5(a)(1) of the FTC Act to securities transactions is additional evidence of the scope of [the North Carolina UDTPA]"); *Wyman v. Prime Disc. Sec.*, 819 F. Supp. 79, 86 (D. Me. 1993) (holding that "as a matter of law, the Maine Unfair Practices Act does not apply to securities transactions," in part because "section 207(1) encourages Maine courts to look to the federal courts' interpretation of the Federal Trade Commission Act for guidance when interpreting the state statute" and "[n]o federal court decision, of which this Court is aware, has applied section 5(a)(1) of the Federal Trade Commission Act to securities transactions"); *Conkling v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 575 F. Supp. 760 (D. Mass. 1983) (noting that because section 5(a)(1) of the FTCA had never been applied to securities transactions, the Massachusetts legislature had, by implication, excluded securities transactions from the coverage of the state UTPA); *Russell v. Dean Witter Reynolds, Inc.*, 510 A.2d 972, 976-77 (Conn. 1986) ("This court has repeatedly held, in accordance with this statutory instruction, that Federal Trade Commission (FTC) rulings and cases under the Federal Trade Commission Act (FTC Act) serve as a lodestar for interpretation of the open-ended language of CUTPA. . . . Application of the FTC lodestar to this case leads us to conclude that CUTPA does not apply to deceptive practices in the purchase and sale of securities. The FTC has never undertaken to adjudicate deceptive conduct in the sale and purchase of securities, presumably because such transactions fall under the comprehensive regulatory umbrella of the Securities and Exchange Commission.").

In contrast to the proposed order's erroneous, narrow view of the exemption, the proper breadth of the exemption for securities-related conduct is analogous to the scope of the exemption found in the same statute for insurance-related conduct. *See* S.C. Code Ann. § 39-5-40(c) ("This article does not supersede or apply to unfair trade practices covered and regulated under Title 38, Chapter 57, Sections 38-57-10 through 38-55-320 [sic]."). Investment-related and securities-related transactions, like the insurance industry, are governed and exhaustively regulated by state law. Accordingly, like the exemption for insurance practices, any investment or securities-related practice or transaction that is governed and regulated by the state Securities Act or other state or federal law, regulations, or agencies, should be exempt from the UTPA.

Furthermore, the proposed order fails to acknowledge and rule upon the numerous bases raised by the Defendants arguing that Maybank has not established the elements of a UTPA claim. The Defendants previous motions and supporting memoranda explained there is no evidence of deceptive or unfair conduct unrelated to securities and there is no evidence that any such act or practice caused damages to Maybank. The supposed violations relied upon in the proposed order do not provide a basis for a UTPA violation. For example, the August 11, 2006 letter to Pat Oliver contains no misrepresentations, was delivered to someone other than Maybank, there is no evidence it induced reliance by Maybank and, even if there were such evidence, there is no evidence of any resulting damages. Similarly, the supposed misstatements in the Wealth Management Agreement cannot support a UTPA claim because it is well settled that a breach of contract cannot constitute a UTPA violation and, even if the supposed errors in the agreement could constitute a violation, there is no evidence of any damages caused by the use of BB&T Asset Management employees to assist with the performance of certain duties imposed by the agreement. Finally, the letter from Ralph Borrello accompanying a refund of

certain fees to BB&T customers cannot constitute a violation of the UTPA because, contrary to opposing counsel's unsupported assertion in the proposed order, this letter contains no misrepresentation of fact and, even if it did, there is no evidence that this letter was the proximate cause of any damages to Maybank himself.

E. Trebling of Damages Under the UTPA

The proposed order erroneously trebles the actual damages awarded by the jury. This part of the proposed order is premised on the mistaken assertion that the Defendants' conduct was a willful and knowing violation of the UTPA. (Proposed Order at 2, 35). This assertion is incorrect and ignores the Defendants' prior arguments that (a) the jury rejected Maybank's causes of action that included the element of intent, thus indicating no finding of willfulness on the part of Defendants, (b) the jury's award of punitive damages does not indicate a finding of intent to violate the UTPA and, in any event, prohibits the simultaneous recovery of treble damages, (c) the alleged breach of the Wealth Management Agreement cannot form the basis for a UTPA claim or treble damages, (d) the actual damages amount contains impermissible damages relating to the managed portfolio account, and (e) an award of treble damages is barred by the Wealth Management Agreement's clause limiting special or punitive damages. The Court should ensure that it has considered and ruled upon each of these grounds.

In addition, the grounds relied upon in the proposed order to supposedly establish a willful and knowing violation of the UTPA do not establish such knowledge and intent. (Proposed Order at 36-37). For example, the August 11, 2006 to Pat Oliver discussing a individualized assessment of Maybank's financial situation is not a willful and knowing violation because the letter was not directed to a consumer (and thus could not violate the UTPA, much less be an intentional violation of the UTPA) and because it was related to securities and

investment transactions that, as explained above, are not subject to the UTPA. There is no evidence nor is there any basis to believe or infer that the sending of this letter was a knowing or willful violation of the UTPA.[1] Similarly, the letter from Ralph Borrello accompanying a refund of certain fees to BB&T customers does not establish a willful and knowing violation because it contains no misrepresentation of fact and, even if it did, there is no evidence or even plausible speculation that the drafter or sender of that letter intended, knew, or should have known that the drafting and sending of that letter violated the UTPA. There also has been no showing that Mr. Borrello's letter caused any damages, thereby preventing it from being a basis for a UTPA claim. Finally, any purported misrepresentations in the Wealth Management Agreement cannot support a finding of willfulness or knowing violation of the UTPA because, for reasons discussed above and argued in other briefs, the Wealth Management Agreement cannot support a UTPA claim. Among other reasons, Maybank failed to offer evidence of any damages related to the alleged improper use of BB&T Asset Management employees to perform certain functions under the agreement.

F. Attorneys' Fees

The Court has indicated that the fees awarded will be limited to those associated with the UTPA claim. In the proposed order submitted by Plaintiffs' counsel, a reduction of only 20% is provided. No factual support whatsoever is offered to support such a small reduction for a claim that Plaintiffs' counsel concedes in Paragraph 120 of the Second Amended Complaint was pled in the alternative in the event the prepaid contracts were deemed not to be securities. There is no logical correlation between an award of 80% of the fees and expenses when the UTPA claim was pled in the alternative and was only one of eleven claims included in the Complaint and one of

[1] Moreover, the letter does not even contain any misrepresentations, nor did Maybank show any reliance on or damages related to the letter.

only five claims that Maybank prevailed on at trial. This is especially true since the damages proffered for the UTPA claim were far less than the over $4 million in damages the Plaintiffs were seeking for the alleged loss of insurance policies by the Maybank Family Insurance Trust.

Maybank failed to submit any additional affidavits, invoices, detailed time entries, or other factual support for the requested 80% fee and expense award. He instead merely asks the Court to accept the word of his lawyers without any opportunity for scrutiny or rebuttal from the Defendants. As held in *Laser Supply and Services, Inc. v. Orchard Park Associates*, 382 S.C. 326, 676 S.E.2d 139 (Ct. App. 2009), it is reversible error for attorneys' fees to be awarded without adequate factual support being submitted which would allow the trial court to segregate those fees relating to those claims which permit a fee recovery. Maybank should be required to submit detailed information about how the attorney hours were spent so that a proper assessment as to the recoverability of those fees can be made. Additionally, the Court should require the production of the fee agreements between Maybank and the law firms he retained. The Court simply has no factual basis for assessing the "contingency of compensation" factor in the absence of knowledge of the precise blended fee arrangement agreed to by Maybank. For example, the proposed order includes on page 50 the statement that "there was a substantial risk that Mr. Maybank would reach a point in this litigation where he could no longer pay even the reduced rate." (Proposed Order at 50). The Court has been presented with no information about Maybank's current finances or other factual basis to use to assess the purported risk, nor has the "reduced rate" been disclosed by Maybank.

It would be a denial of due process for the Court to accept the fee award included in the proposed order without requiring further information from Maybank to support the award. Additionally, it would be a denial of due process to refuse to give the Defendants the opportunity

to review that information and have an opportunity to present their own expert testimony in rebuttal. The current record offers no basis by which the Court could apply the standards set by the South Carolina appellate courts for the determination of an attorney fee award, nor does it allow either the Court or the Defendants to properly scrutinize the bald assertions made in the proposed order in an attempt to justify a multimillion fee award.

The Court should also reject the use of a multiplier to enhance the award. In an attempt to justify a multiplier, the proposed order suggests that this case has presented exceptional circumstances. However, the purported exceptional circumstances identified on page 54 of the proposed order are all already addressed in the six factors under the test in *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). To accept this part of the proposed order would be tantamount to double counting since the factors upon which the multiplier are based have already been used to determine the loadstar amount. *See Millea v. Metro-N. RR. Co.* 658 F.3d 154, 167 (2d Cir. 2011) ("[A] court may not adjust the loadstar based on factors already included in the loadstar calculation itself because doing so effectively double-counts those factors.").

The proposed order awards $245,011 in costs and expenses. The proposed order fails, however, to address the arguments of the Defendants' regarding costs that are not recoverable under South Carolina law. For example, the South Carolina Supreme Court has specifically rejected awarding expert witness fees to the prevailing party unless the statute allowing a recovery of costs specifically references expert fees. *See Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 422 S.E.2d 128 (1992). For the same reason, the costs associated with depositions transcripts and videotaping depositions are not recoverable. The Court should only award costs and expenses specifically authorized by statute and which are specifically related to the pursuit of the UTPA claim.

The part of the proposed order addressing the attorney fee award also demonstrates a patent inconsistency in Maybank's positions. To support an award of 80% of the fees and expenses, the proposed order states that "the causes of action are based upon a core set of common and intertwined facts." (Proposed Order at 48). The purpose of this statement is to show that the basis for the UTPA claim is essentially the same as the basis for the other claims. But on page 38 of the proposed order, Maybank argues that "the basis for liability under the UTPA is separate and distinct from that for the common law causes of action claims." (*Id.* at 38). Maybank asserts in the proposed order that the UTPA claim was different from the other claims and was based on different evidence. Maybank cannot have it both ways. The Court should not enter an order that has such internal inconsistencies.

G. Statute of Limitations

In addressing the three-year statute of limitations, the proposed order overlooks substantial evidence that would have put Maybank on notice of his claims prior to December 22, 2008. For example, the evidence established that Maybank's managed portfolio account experienced sharp declines in value during the Fall of 2008. These sharp declines in value were revealed to Maybank in his monthly managed portfolio account statements. Maybank admitted during cross examination that he would review all account statements he received for the managed portfolio account. When he saw a sharp decline in value, that would have put Maybank on notice that his alleged retirement funds were not safely and conservatively invested as he claimed at trial they should have been.[2]

[2] The Defendants established at trial that Maybank, who had over 40 years of investing experience in the stock market, specifically instructed his portfolio manager, Kris Kapoor, to invest the proceeds of the prepaid contract in only stocks and that he wanted a 100% equity portfolio.

Additionally, the proposed order makes numerous references to alleged misrepresentations and breaches related to the Wealth Management Agreement. Specifically, Maybank takes the position that the term on page one providing that "Bank shall" perform certain obligations was erroneous and untrue. Significantly, however, the evidence establishes that Maybank absolutely knew that BB&T Asset Management was performing some of those functions and he would have known this both before and immediately after the execution of the agreement. This is because Maybank was working with Kris Kapoor on the selection of stock positions for the managed portfolio account. Maybank, who was an employee of BB&T, knew that Mr. Kapoor was an employee and representative of BB&T Asset Management, not the Bank. This is confirmed by the fact that Mr. Kapoor signed the Wealth Management Agreement in August of 2006 on behalf of BB&T Asset Management. Accordingly, Mr. Maybank had knowledge back in 2006 of the alleged misrepresentation and/or breach of the agreement, and the alleged misrepresentation and/or breach cannot form the basis of any cause of action due to the three-year statute of limitations.

Other evidence of Maybank's knowledge prior to December of 2008 relates to the letter from Anthony Mahfood to Pat Oliver in August of 2006 seeking approval of the first prepaid transaction. Maybank contends that the letter made a misstatement when it purportedly indicated that an individualized assessment was made of Maybank's financial situation. Maybank of course was fully aware of whether an assessment was made of his financial situation. Such an assessment could not have been made without consulting with him. Since Maybank takes the

position that no such discussions with him occurred, he would have had reason to believe back in August of 2006 that the assessment was not performed.[3]

All of the above evidence demonstrates the applicability of the three-year statute of limitations. Under South Carolina law, "[t]he statute of limitations begins to run when a cause of action ought to have reasonably been discovered" and it is "'an objective, rather than a subjective, question.'" *Estate of Livingston v. Livingston*, 404 S.C. 137, 146, 744 S.E.2d 203, 208 (Ct. App. 2013). As explained by the South Carolina Supreme Court in *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996):

> The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial.

Id. at 363–64, 468 S.E.2d at 647 (citations omitted). Here, the evidence shows that Maybank was on notice of his purported claims well prior to December of 2008. At a minimum, the undisputed facts in the record establish that a reasonably prudent person would have been on notice prior to December of 2008 of the claims that Maybank asserted in this lawsuit.

H. Fortis Review of Punitive Damages Award

The proposed order errs in the manner in which it conducts the post-judgment review under *Fortis* of the punitive damages verdict in this case. Specifically, it mischaracterizes a

[3] As explained in other briefs and as shown by the evidence presented by Defendants during trial, all necessary information about Maybank's situation was known prior to the execution of the prepaid contract in August of 2006, and it was readily apparent that the transaction was a prudent and suitable transaction that greatly reduced his risk in his overconcentrated stock position. This is especially true in light of the fact that the proceeds paid off Maybank's margin account with Scott & Stringfellow that exceeded $2 million.

reprehensibility factor in an effort to support such a finding. Additionally, rather than compare the punitive damages award to comparable *civil* penalties - which show the punitive award to be excessive - it instead compares it to other awards which are purely punitive in nature.

In conducting the reprehensibility analysis outlined by our Supreme Court in the case of *Mitchell v. Fortis Ins. Co.*, 385, 570, 587-89, 686 S.E.2d 176, 185-86 (2009), the proposed order mischaracterizes the factors to be considered in this analysis. The second factor in that analysis is whether "the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others." *Id.* at 587, 686 S.E.2d at 185. This factor focuses solely upon ***physical*** health or safety. However, the proposed order mischaracterizes the factor and has this Court evaluating it based upon the "***financial*** health" of Maybank, and the "safety of his irreplaceable retirement ***assets***." The second *Fortis* reprehensibility factor does not concern finances, nor is it concerned with the safety of assets. Rather, "financial vulnerability" is specifically addressed in the third *Fortis* reprehensibility factor. *Id.* (taking into consideration whether "the target of the conduct had financial vulnerability"). Thus, by mischaracterizing the nature of the second *Fortis* reprehensibility factor, the proposed order incorrectly overemphasizes the financial nature of Maybank's purported harm so that it results in two factors weighing in favor of a reprehensibility finding. In fact, the non-physical nature of the alleged injury and the fact that it in no way affected Maybank's physical safety weigh in favor of a finding that the Defendants' conduct **was not** reprehensible.

In addition to evaluating the reprehensibility of the Defendants' conduct, *Fortis* requires this Court to "consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Fortis*, 385 S.C. at 588, 686 S.E.2d at 186. The proposed order fails to conduct this analysis. Rather, it compares the punitive

damages award to the trebling of actual damages allowed under the UTPA claim. This is not a proper comparison as trebled damages under the UTPA are exemplary in nature and are not a "civil penalty." The UTPA itself belies this incorrect characterization. The UTPA provides a separate mechanism for the imposition of a "civil penalty" for a violation of the Act. Specifically, it allows the imposition of "a civil penalty ... not exceeding five thousand dollars per violation." S.C. Code Ann. § 39-5-110(a). Thus, the "civil penalty" that potentially arises from the violation of the Act is not the potential trebling of actual damages. It is instead a $5,000.00 penalty. The proposed order then goes on to compare the punitive damages award in this case to other punitive damages awards – a consideration that is not present in the *Fortis* analysis. The proper analysis is to compare the punitive damages award in this case to civil penalties in comparable cases. As illustrated in the Defendants' post-trial motions, such a comparison illustrates the excessive nature of the punitive damages award in this case.

Finally, in the Proposed Order, Maybank relies on Exhibit 92, arguing that the document shows that the Defendants viewed prepaid forward contracts as a "revenue opportunity." (Proposed Order at 13-14). Exhibit 92, however, is not a document created by the Defendants. It is a Scott & Stringfellow document. It is highly improper to attempt to justify a punitive damages award by relying on the document of a third party, and one that should never have been admitted at trial due to its lack of relevance and highly prejudicial nature.

III. CONCLUSION

The Defendants respectfully request that, in making its rulings and in the drafting and entering of its order on the parties' post trial motions, the Court take into account the above considerations.

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Greenville, South Carolina

10/16, 2014

CERTIFICATE OF SERVICE

I, the undersigned of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy via U.S. Mail, postage prepaid, to the following address(es):

Pleadings:

Defendants' Objections to Plaintiffs' Proposed Order and Supplemental Memorandum in Support of Defendants' Post-Trial Motions

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Oct. 16, 2014

EXHIBIT A

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,	)	Civil Action No. 2011-CP-23-8578
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	)	**ORDER AND FINAL JUDGMENT**
Defendants.	)	

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 for two weeks beginning June 16, 2014 before a jury of Greenville County citizens. The jury began deliberations on Friday, June 27 and, after a recess over the weekend, returned to its deliberations on Monday, June 30, following which the jury awarded

actual damages in the amount of $3,100,000 and punitive damages in the amount of $5,000,000 in favor of Mr. Maybank on the causes of action of breach of contract, breach of fiduciary duty, constructive fraud, negligent misrepresentation, and for violation of the South Carolina Unfair Trade Practices Act ("UTPA").[1] The jury did not return a verdict on any claims in favor of Plaintiff Jane H.P. Maybank, as Trustee for the Francis P. Maybank Family Insurance Trust. I observed the jury during the trial and found the panel to be attentive, thoughtful, diligent, and deliberate in its consideration of the evidence presented during this lengthy trial.

Following the verdict, the parties filed post-trial motions on July 10, 2014. Plaintiff moved for an award of attorneys' fees and costs and to treble the jury's award of actual damages under the UTPA, as well as for prejudgment interest on the actual damages.[2] Defendants moved for judgment notwithstanding the verdict ("JNOV"), new trial absolute, or, in the alternative, new trial *nisi remittitur*. Additionally, Defendants moved that the Court should require Mr. Maybank to elect a remedy for recovery.

A hearing was held regarding these motions on Tuesday, August 19, 2014, after which the Court 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 jury's award of punitive damages in the amount of $5,000,000 is appropriate. I also find that the jury was not precluded from awarding punitive damages. I further 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 therefore treble the jury's actual damage award of $3,100,000 to $9,300,000. Additionally, I find Defendants' unfair and deceptive conduct, which the jury determined to violate the UTPA, was

[1] *See* S.C. Code Ann. §§ 39-5-10 *et seq.* (as amended).

[2] *See* S.C. Code Ann. § 34-31-20.

separate and distinct from the conduct which supports the common law causes of action for which punitive damages were assessed against Defendants by the jury. Consequently, I hold that no election is required, and Plaintiff is entitled to both treble damages under the UTPA and the jury's punitive damages award. I find that Plaintiff's request for attorneys' fees and costs is mandated and that an award of $2,654,295 in fees, and $245,011 in costs, is reasonable and is therefore taxed upon Defendants. Finally, I deny Mr. Maybank's motion for prejudgment interest.

Analysis

Motion for Judgment Notwithstanding the Verdict

I have fully reviewed Defendants' motion for JNOV and I deny that motion because, for the reasons explained below, I find the evidence supports the jury's verdict in favor of Mr. Maybank on the causes of action of breach of contract, breach of fiduciary duty, constructive fraud, negligent misrepresentation, and violation of the UTPA. To the extent a ground for relief in the JNOV is not addressed below, I expressly deny the JNOV motion on that ground.

JNOV Standard

In ruling on a JNOV motion, this Court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. *RTF Mgmt. Co., LLC v. Tinsely & Adams LLP*, 399 S.C. 322, 732 S.E.2d 166 (2012); *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "A motion for a judgment notwithstanding the verdict is a renewal of the directed verdict motion and cannot raise grounds beyond those raised in the directed verdict." *Roland v. Palmetto Hills*, 308 S.C. 283, 286, 417 S.E.2d 626, 628 (Ct. App. 1992); *see also, e.g., In re McCracken*, 346 S.C. 87, 93, 551 S.E.2d 235, 238 (2001); *Gov't Emps. Ins. Co. v. Mackey*, 260 S.C. 306, 315-16, 195 S.E.2d 830, 834 (1973); *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486,

496 (Ct. App. 2006). A JNOV motion "should be denied where either the evidence yields more than one inference or its inference is in doubt." *McMillan*, 367 S.C. at 564, 626 S.E.2d at 886. Moreover, "[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 considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight. When considering a JNOV, neither an appellate court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (citation and internal quotation marks omitted).

I. South Carolina Unfair Trade Practices Act.

Defendants contend that they are entitled to JNOV on Mr. Maybank's UTPA cause of action because BB&T's activities and actions are exempt from the UTPA. I find that there was evidence of actions taken by Defendant with respect to Plaintiff that did not involve the sale of a security, that Defendants' activities are not exempt from the UTPA, and that Defendants in any event did not meet their burden to prove they were entitled to any exemption under the UTPA.

A. *Legal background.*

S.C. Code Ann. § 39-5-40(a) provides that the prohibitions contained within the UTPA 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." Considering whether the exemption applies requires a case-by-case analysis of the alleged misconduct, not a broad, sweeping, industry exemption like that advocated by Defendants. *See Ward v. Dick Dyer*, 304 S.C. 152, 155, 403 S.E.2d 310, 312 (1991) ("We believe that the exemption is intended to

exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes."). Moreover, § 39-5-40 requires that "the burden of proving exemption from the provisions of this article shall be upon the person claiming the exemption."

B. ***Discussion.***

I find that, viewed in the light most favorable to the nonmoving party, the evidence supporting a violation of the UTPA was supported by at least three separate and distinct theories of unfair and deceptive acts by Defendants, none of which involved a public offering, registration, or sale of a security, and all of which are separate from the basis of liability for the common law causes of action. I find that any one of these three theories supports the jury's finding of unfair and deceptive conduct in commerce.

I first find that Plaintiff presented evidence from which the jury reasonably could conclude that the Act was violated by Defendants' admitted use of their form Wealth Management Agreement ("WMA"). There was evidence that Defendants knew at the time they presented the WMA to Mr. Maybank that there were errors, misstatements, and deliberate misrepresentations in the contract and that BB&T would not fulfill the duties and obligations promised as written. These duties and obligations that BB&T Bank could not perform were the basis of the bargain and constituted the crux of the fiduciary relationship that the bank induced Mr. Maybank to enter into with it. Nonetheless, the evidence was clear that BB&T Bank and its representatives were restricted from fulfilling the duties and obligations which it agreed to perform as an integral part of that fiduciary relationship, although there was also disputed testimony that the restricted representatives often disregarded the restriction or "honored it in the

breach."[3] The evidence further showed that Defendants presented the same form document to all clients of the Wealth Management Division during the period from at least 2006 into 2009 as a condition of their provision of fiduciary wealth management services to such clients. Further, Mr. Ross Walters, BB&T's corporate representative, admitted that Defendants did not provide Mr. Maybank, or any other customer, with notice that the WMA would not be fulfilled as represented and promised in the language of the agreement. I therefore find the verdict was supported by evidence that Defendants knowingly and deliberately presented a false, unfair, and deceptive form WMA to Mr. Maybank and other clients and that this conduct did not involve a security or securities transaction and was not permitted under laws administered by any regulatory body or permitted by any other South Carolina law.

I further find that the jury verdict on the UTPA claim is supported by evidence that Defendants engaged in unfair and deceptive business practices by misleading Mr. Maybank and approximately 130 other customers through misrepresentations contained in a letter from Ralph Borrello, Senior Vice President of BB&T Wealth Advisors Sales and Service, stating as follows in pertinent part:

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

Ex. 50. Although Mr. Borrello's letter to Mr. Maybank and other customers claims that Defendants' refund was "a reflection of [BB&T's] corporate values," BB&T's corporate representative testified that, in truth, the impetus for the fee refund was the criticism of BB&T

[3] BB&T designated its wealth managers with the title of "Wealth Management Advisors" in their dealing with the public but then restricted them against providing wealth advice to their clients. This restriction was not disclosed to the public.

Asset Management's fee practices by the Securities and Exchange Commission ("SEC") staff following the discovery of these practices during a routine SEC audit. The evidence further showed that the SEC criticized the practice of charging transaction-based "broker-esque" fees for selling derivative products including variable prepaid forward contracts ("VPFC"), because BB&T Asset Management was not registered as a broker-dealer when the transactions occurred. The jury reasonably could have found a UTPA violation based on a finding that BB&T deliberately and deceptively misled their clients regarding the refund to obscure the nature of their business practices. The jury also reasonably could have concluded that Defendants' statements to Mr. Maybank and other clients unfairly, deliberately, and deceptively operated to hide the truth about BB&T's actions, thereby allowing the rights of clients to recede or disappear with the passage of time, and also operated to otherwise lull clients into complacency, so that due diligence reviews of BB&T's business practices would not be conducted, resulting in clients remaining unaware of the truth and BB&T therefore avoiding civil liability. I therefore find the verdict was supported by evidence that Defendants knowingly and deliberately engaged in unfair and deceptive practices by misrepresenting the truth when refunding these fees and that this conduct did not involve a security or securities transaction and was not permitted under laws administrated by any regulatory body or permitted by any other South Carolina law.

I also find that the jury verdict on the UTPA claim is supported by evidence that Defendants knowingly and deliberately engaged in unfair and deceptive conduct by misrepresenting the truth to Mr. Maybank about conducting an individualized assessment of his financial situation. *See* Ex. 7 (August 11, 2006 General Counsel "Approval Letter"). The Approval Letter was written as though specifically tailored for Mr. Maybank's retirement needs. In truth, the letter was merely a "fill-in-the-blank" form letter extolling the suitability of VPFCs

for clients with concentrated positions in BB&T stock, no matter their financial situation, station in life, or financial goals and needs. *Cf.* Ex. 91. Mr. Maybank was provided the letter, and relied upon its representations, prior to proceeding with Defendants recommended strategy. I find Defendants' use of the Approval Letter deliberately, unfairly, and deceptively misrepresented the services they were providing to Mr. Maybank and other customers. Promising specialized or individualized treatment while actually providing only stock services is a violation of the UTPA. *See deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 270-71, 536 S.E.2d 399, 407 (Ct. App. 2000) (car dealer who promised special status to potential buyers while submitting only stock order). I therefore find the jury verdict was supported by evidence that Defendants knowingly and deliberately engaged in unfair and deceptive practices by presenting Mr. Maybank with a purported individualized financial assessment that in fact was a stock form letter and that this conduct did not involve a security or securities transaction and was not permitted under laws administered by any regulatory body or permitted by any other South Carolina law.

I further find that Defendants' exemption argument is based on the rejected theory that a banking industry exemption to the UTPA exists, which is unsupported by the law and contrary to the *Ward* case's explicit repudiation of the general activities test. 304 S.C. at 155, 403 S.E.2d at 312.[4] At its core, Defendants' exemption argument is based on the erroneous assumption that all of BB&T's activities are exempt from the Act because, according to their incorrect assertion, securities are generally regulated and the VPFC sold to Mr. Maybank is a security. However, the Supreme Court in *Ward* interpreted the UTPA exemption to only exclude "from the UTPA

[4] *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), that the general activity test applied in determining whether an exemption was available.

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 find that the UTPA exemption does not have the broad application ascribed to it by Defendants.

I also find that Defendants' unfair and deceptive practices were not regulated under any federal or state securities acts. Defendants argue that, because they were Mr. Maybank's fiduciary investment advisor and purchased stocks for his managed account at BB&T Asset Management, each and every interaction with, misrepresentation to, and deception of Mr. Maybank is inextricably connected to securities or securities transactions and thus exempt from the UTPA. I reject this assertion, finding instead that Defendants' actions in presenting and sending false, unfair, and deceptive contracts and letters to its clients are not required, permitted, or authorized by the Securities Act, any regulatory body, or other South Carolina law. *Taylor,* 324 S.C. at 218, 479 S.E.2d at 44 ("[The defendant]'s conduct which is alleged to violate the UTPA is neither an action nor a transaction which is specifically authorized by a regulatory agency. Accordingly, [defendant] is not exempt from the UTPA."); *see also Beattie v. Nations Credit Fin. Servs. Corp.*, 65 F. App'x 893, 895-96 (4th Cir. 2003) ("There is no indication that a statute or agency regulation requires or permits Nations Credit to pursue collection and foreclosure activities on accounts purportedly satisfied by an LMS affidavit. Therefore, Nations Credit is not exempt from liability under the UTPA.").

Defendants' argument relies at bottom on a single footnote in *Ward*, which states only that the initial public offering of securities—like those addressed in *Rhoades*—is exempt from the UTPA.[5] Based on this plain language, especially when read in the context of the

[5] *Ward*, 304 S.C. at 155 n.1, 403 S.E.2d at 312 n.1 ("We note that the sale of securities is a unique transaction. *Each public offering is subject to strict regulation and must comply with stringent requirements*. Very few, if any, other business transactions are subject to the strict

transactions at issue in *Rhoades*, the exemption applies to the initial public offering and the sale of securities under that offering, not to all transactions subsequent to that initial offering that might involve securities, however tangentially. *See McTeer v. Provident Life & Acc. Ins.*, 712 F. Supp. 512, 516 (D.S.C. 1989) ("In other words, [the South Carolina Supreme Court] considered [in *State v. Rhoades*] not whether the securities business in general is regulated but whether the challenged acts themselves are regulated."). I find that construing the *Ward* footnote to exempt all business dealings between a customer and companies offering financial advice is wholly inconsistent with *Ward's* rejection of the general activity test and with the statutory language that the remedies in the UTPA are supplemental to other remedies. *See Ward*, 304 S.C. at 154-55, 403 S.E.2d at 311 ("If we were to accept this contention, however, the UTPA would be rendered without meaning. Almost every business is subject to some type of regulation."). I also find that Defendants' argument fails to acknowledge that they were not registered to sell securities as a broker dealer; that they presented absolutely 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.

I further reject Defendants' argument that BB&T Asset Management and BB&T Bank are exempt from the UTPA because they operate in regulated industries. As an initial matter, Defendants' argument that BB&T Asset Management and BB&T Bank are regulated entities and therefore exempt is improperly made for the first time in the motion for JNOV. Because Defendants did not move for a directed verdict on this ground, it is unpreserved for the JNOV motion. *Compare* June 23, 2014 Motion for Directed Verdict *with* Motion for JNOV; *see also*

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scrutiny which is placed upon securities. Therefore, we choose to follow the vast majority of jurisdictions in holding that securities transactions remain exempt from claims under the UTPA.") (emphasis added).

In re McCracken, 346 S.C. at 93, 551 S.E.2d at 238 (holding that only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion). I further find that Defendants' argument is based upon an erroneous interpretation of the record and the stipulated fact that was entered into the record, *i.e.*, that during the time in question, neither BB&T Asset Management nor BB&T Bank were registered as a broker dealer with either the SEC or the State of South Carolina. I also find that, even under Defendants' theory of general regulation of the banking industry, Defendants' conduct of engaging in unfair and deceptive business practices as exposed in this case was outside the regulatory oversight of banking regulations. I therefore deny their motion on this ground.

Finally, in addition to the reasons discussed above, I find Defendants failed to meet their burden in proving an exemption from the UTPA. S.C. Code Ann. § 39-5-40 states that "the burden of proving exemption from the provisions of this article shall be upon the person claiming the exemption." The Defendants failed to present any evidence during the trial that their actions were exempt under the UTPA. In addition, to the extent any argument that Defendants were entitled to an exemption was advanced to the jury, it was rejected and liability found against Defendants. I further find that Defendants made no attempt to prove and in fact presented no evidence that the two variable prepaid forward contracts sold to Mr. Maybank were initial public offerings of securities or were even securities. In summary, because the Defendants failed to offer evidence to support their claim of exemption from the UTPA, their motion on that ground is also denied.

II. Punitive Damages.

Defendants assert that the exculpatory clause contained in the WMA bars the jury's award of punitive damages on Mr. Maybank's common law claims. However, prior to addressing this issue, 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. I will then return to the Defendants' arguments regarding the so-called exculpatory clause.

A. ***Common Law Causes of Action.***

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

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

Under the law, I must consider whether punitive damages are warranted and, if so, whether the amount of damages 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) (simplifying analysis of factors from *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991); *see BMW of N. Am. v. Gore*, 517 U.S. 559 (1996)). I find, based on this analysis, that the punitive damages award is both constitutional and proper.

1. ***Reprehensibility.***

Reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185 (quoting *Gore*, 517 U.S.

at 565). In evaluating this prong, courts 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 that there is ample, clear and convincing evidence in the record to support the jury's finding that Defendants' conduct was reprehensible. With respect to the first two prongs, I find that the nature of the harm in this case was economic, and that 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 further find that the third prong was also clearly and convincingly demonstrated. As Mr. Maybank's advisor and fiduciary, Defendants had full and complete knowledge of Mr. Maybank's financial vulnerability. In 2006, Mr. Maybank was a 74-year old, soon-to-be retiree who entrusted the vast majority of his retirement assets to BB&T, seeking their services as trusted fiduciary to safely and prudently manage his irreplaceable retirement assets, all of which they promised to do. The jury found that Mr. Maybank was substantially damaged due to Defendants' reprehensible, deceitful, reckless, and grossly negligent actions. In sum, I find that clear and convincing evidence supports a finding that Mr. Maybank entrusted his financial well-being to Defendants and was therefore financially vulnerable to them.

I find that the evidence also demonstrates that Defendants' conduct was not an isolated incident but instead involved repeated acts of indifference to Mr. Maybank and others. The evidence demonstrates that certain of Defendants' representatives were financially incentivized to sell these alternative investment strategies, and that Defendants viewed VPFCs as a "revenue

opportunity" for BB&T on which they could expect to earn substantial fees, both up-front as well as recurring annual fees.[6] This was particularly true in Mr. Maybank's case because he had a large, concentrated position in BB&T Corporation stock as a result of the sale of his company, which constituted the bulk of his retirement assets. BB&T evaluated Mr. Maybank's heavily concentrated position and then sold this soon-to-be retired, 74-year-old client a VPFC and the associated strategy. While BB&T represented that this strategy would protect Mr. Maybank's retirement savings, in reality the strategy was highly risky, speculative, imprudent, costly, and unsuitable, and was anchored by a VPFC, a complex derivative product that actually increased risk, rather than minimizing it, according to the testimony of expert witness Dr. Craig McCann, which I find to be probative. Then, with cash generated from the VPFC, BB&T further increased the risk of their strategy, establishing a managed account with an investment objective of "Aggressive Growth" and invested in 100% equities. Defendants' self-serving strategy was to move Mr. Maybank's concentrated BB&T Corporation stock position from a non-fee generating account to an account that provided Defendants and their incentivized employees with an up-front fee as well as a stream of annual management fees. In the process, they charged him

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[6] Defendants' internal sales practices were demonstrated through exhibits and testimony introduced at trial. For example, Exhibits 55, 89, 92, 100,103, 104, and 106, taken together, show clearly that Defendants initiated a sales program to generate revenue for Defendants 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

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.

$32,614 in fees for selling the VPFC. I find that Defendants executed perfectly the fee generating strategy they had touted to their representatives of charging an "up-front fee" initially and then using the cash from the VPFC to generate additional fee revenues during the life of the VPFC. In short, although Defendants were Mr. Maybank's fiduciary, they acted in faithless, self-serving ways, putting their own interests first to the detriment of Mr. Maybank's.

Based on the testimony of Mr. Maybank's experts, Defendants' recommended investment strategy, anchored by a VPFC, was a wholly inappropriate, imprudent, flawed, ill-advised, speculative, and excessively risky scheme for Mr. Maybank. Furthermore, Defendants misrepresented to Mr. Maybank that the strategy was developed based on his individual circumstances and situation and was designed to protect his irreplaceable assets. The evidence further supports a finding that, in 2009, Defendants compounded this initial flawed and self-serving advice by recommending that Mr. Maybank roll over the first VPFC into a second VPFC. Internal presentation documents confirmed that Defendants told representatives, who lacked training and expertise in the strategy and the product, to recommend that clients roll-over these VPFCs as being the "ideal choice." A roll-over, of course, generated additional fees to Defendants and bonuses for their representatives, along with the assurance of continuing annual management fees. Consistent with this sales training, Defendants' representatives advised Mr. Maybank that rolling over the VPFC was appropriate for him. For their faithless and self-serving advice, Defendants charged Mr. Maybank a fee of $43,655. In retrospect, the goal of the recommended strategy is clear according to Mr. Maybank and his expert witnesses. The client is literally locked into Defendants' costly and self-serving scheme of fee-producing, costly roll-overs that over time deplete the client's savings. Defendants benefit through enhanced revenue generation, but at the expense and to the detriment of clients like Mr. Maybank. I find

that, based on the record, Defendants' conduct was not isolated, but part of a scheme to generate fees and bonuses for Defendants and its representatives without regard to the client's best interest.

Based on these examples and the record as a whole, I find that the evidence supports a determination that Defendants acted with malice, trickery, or deceit rather than mere accident. BB&T served as Mr. Maybank's trusted fiduciary. From the evidence admitted at trial, the jury could have reasonably found that Defendants, notwithstanding this position of high trust, breached their duties to Mr. Maybank in at least one or more of the following ways, and perhaps others not enumerated here:

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 and develop a comprehensive financial plan;

iii. By failing to advise Mr. Maybank about the significant conflict of interest that should have prevented Defendants from 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 with these findings. In sum, based on the evidence and the specific findings made above, I 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 of punitive to actual damages against Bank of America, N.A.); *Mitchell*, 385 S.C. at 593, 686 S.E.2d at 188 ("South Carolina courts have most

often upheld verdicts on the low end of the single-digit spectrum, but have frequently deviated from this norm in cases involving particularly egregious conduct.").[7] Based on the conduct of Defendants detailed above, and guided by the cases cited herein, 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." *Mitchell*, 385 S.C. 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. Moreover and importantly, 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

[7] A review of decisions in this state reveals that ratios which fall on the low end of the single digit spectrum have been upheld by South Carolina courts. *Mitchell*, 385 S.C. at 593, 686 S.E.2d at 188; *see also, e.g., Jenkins v. Few*, 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2012) (affirming a 3.6 to 1 ratio pursuant to *Mitchell* analysis where jury found for plaintiff on conversion, trespass, and civil conspiracy); *Mackela v. Bentley*, 365 S.C. 44, 614 S.E.2d 648 (Ct. App. 2005) (affirming a 3.75 to 1 ratio in a conversion case). South Carolina courts have also upheld punitive damages awards in cases involving economic harm, even though the ratio falls on the high end of the single digit spectrum or even exceeding single digits. *See, e.g., Mitchell*, 385 S.C. at 594, 686 S.E.2d at 188 (ratio of 9.2 to 1 satisfied due process where insurer rescinded health insurance policy even after learning that the basis for rescission was incorrect, exposing insured to a greater risk of physical danger); *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 failure to pay insurance claim).

dependency in an elderly person's twilight years. Thus, corporate citizens managing money for South Carolina's aged and retiring 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.[8]

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

Lastly, I analyze "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 186. The award of punitive damages is less than the civil penalty authorized under the UTPA, which in this case imposes a penalty of $6.2 million in trebling the actual damages to a total of $9.3 million. Trebling necessarily results in a ratio of 2 to 1 between the civil penalty of $6.2 million and the actual damages of $3.1 million. This civil penalty ratio is well within the range of reasonableness as discussed above, and is actually higher than the ratio of punitive to actual damages awarded in this case.

I further consider punitive damages imposed in comparable cases. *See, e.g., Cody P.*, 395 S.C. at 632-33, 720 S.E.2d at 484-85; *see also Mitchell*, 385 S.C. at 588-89, 686 S.E.2d at 186 ("When identifying 'comparable cases' a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant."). In *Cody P.*, improper safeguards by Bank of America permitted a

[8] The testimony of Mr. Maybank's expert witness, Dr. Wood, was limited to BB&T Corporation's net worth of $21.229 Billion, and BB&T Bank's net worth of $21.630 Billion. I further note that Defendants have not challenged the propriety of the admittance of evidence of BB&T Bank's net worth and ability to pay the punitive damages award.

co-conservator for a minor child to withdraw the minor's funds and deposit them into her personal bank account. I find that, like *Cody P.*, this case involves economic harm caused by a bank's failure to follow proper safeguards to protect a client's funds. However, I find that the reprehensibility of the conduct is greater here. In *Cody P.*, the bank merely failed to prevent misconduct by a third party; here, the evidence demonstrated that the harm was caused by Defendants' intentional and deliberate misconduct. Additionally, while the jury found Bank of America negligent in *Cody P.*, the jury in this case found that Defendants not only acted grossly negligent but also perpetrated constructive fraud, breached their fiduciary duty, committed violations of the UTPA, and breached their contract with Mr. Maybank. Finally, in *Cody P.*, the Court of Appeals upheld punitive damages resulting in a 7.69 to 1 ratio even though there were no findings of intentional malice, trickery, or deceit on the part of Bank of America. I therefore find that the award of punitive damages by the jury in this case is reasonable, especially when this award is compared with the awards made in comparable cases.

4. ***Conclusion.***

After careful review of the evidence presented at trial in light of the parameters set forth by the Supreme Court in *Mitchell*, I find that the punitive damages award by the jury in this case is supported by clear and convincing evidence. I find that the conduct is reprehensible. I further find that the award is not grossly disproportionate to the severity of the offense, but is, in fact, directly proportionate to the harm caused by Defendants. I therefore affirm the jury's 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 to Mr. Maybank for several, independent reasons. In pretrial proceedings,

particularly the motions hearings on Plaintiff's motion for partial summary judgment for breach of contract under the terms of the WMA, evidence was produced that Defendants admitted, through the testimony of their corporate representative, Mr. Ross Walters, that the Defendants' WMA was erroneous and had been incorrectly drafted by their lawyers, that it had been tendered to Mr. Maybank knowing that it was erroneous, and that no one had explained or disclosed the errors to Mr. Maybank, even though Defendants were then his fiduciary. The erroneous nature of the contract was also admitted by Defendants when they amended their answer to seek reformation of the WMA. I denied Plaintiff's motion for partial summary judgment because it was clear that the real terms of the parties' agreement were in doubt based on Defendants' own admissions and actions. The evidence adduced at trial on the interpretation of the contract remained consistent with that argued during the preceding motions' hearings, and 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 agreement between the parties 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. As part of its verdict, the jury also awarded punitive damages and therefore determined that the exculpatory clause did not preclude an award of such damages under the common law tort claims.

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. The jury's verdict supports this finding. At the outset, I note that the exculpatory clause is in the very same form agreement which

Defendants sought to reform by mutual mistake.[9] Defendants contended the contract is unambiguous and its terms are derived from the clear intent of the parties but, when it came to their admitted breach of this same agreement, Defendants contended that certain language in the contract should be amended to support their favored construction even though they drafted the erroneous contract. As I noted above, Defendants' own actions demonstrate that the contract terms and applications are in doubt. 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).

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 to clients or failing to disclose or concealing material information. Thus, as a matter of law, I find that the common law causes of action of breach of fiduciary duty, constructive fraud, and negligent misrepresentation derive from claims 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, particularly where the source of the supposed relief is language in a form agreement drafted and presented by a multi-billion dollar

[9] 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) ("A contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it.") (citing *Sims v. Tyler,* 276 S.C. 640, 281 S.E.2d 229 (1981) (holding that mutual mistake cannot be proven by a claim of mistake by only one of the parties)).

fiduciary to an individual client, parties clearly not in equal bargaining positions. Courts in this state have held exculpatory clauses to be unenforceable on public policy grounds where the parties have substantially different bargaining power, including situations such as "attempts to exculpate 'for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty, or *when the parties are not on roughly equal bargaining terms.*'" *Cooke v. Allstate Management Corp.*, 741 F. Supp. 1205, 1207 (D.S.C. 1990) (quoting *Pride v. Southern Bell Tel. & Tel. Co.*, 244 S.C. 615, 138 S.E.2d 155 (1964) (emphasis added)); *id.* at 1208 (noting "extremes to which the South Carolina courts have gone to avoid enforcing a broad reading of an exculpatory clause"); *see also Anthony v. Atlantic Group, Inc.*, 909 F. Supp. 2d 455 (D.S.C. 2009) (recognizing that public policy prohibits a party from contracting against liability for negligence when parties are not on equal bargaining terms and finding that conditioning employment on execution of release created unequal bargaining situation so that waiver did not bar claims). 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, based on the jury's findings, BB&T was acting as Mr. Maybank's fiduciary when the misconduct occurred and the WMA was executed. I find that, because exculpatory clauses are routinely rejected in conditions of unequal bargaining power, the clause does not operate to shield BB&T against punitive damages for misconduct while acting as Mr. Maybank's fiduciary. 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 the representations BB&T made to him and to

expect that his fiduciary would fully disclose any terms adverse to his interests, which they admitted they failed to do. *See Regions Bank v. Schmauch*, 354 S.C. 648, 672-74, 582 S.E.2d 432, 444-46 (Ct. App. 2003) (holding that fiduciaries have an absolute obligation of disclosure of material facts to their clients and, conversely, clients have a right to rely upon the representations made to them 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. Even when Defendants presented the written agreement to Mr. Maybank, they failed to disclose that the agreement contained errors, yet attempted to limit liability for any misconduct through an exculpatory clause. When presented with the full contract, and all of the evidence and circumstances surrounding the execution of the WMA, the jury nevertheless found that punitive damages were warranted. In summary, I find, based on the jury's findings and my own weighing of the evidence, that the exculpatory clause is unenforceable.

III. BB&T Corporation.

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

As explained below, I find that 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). In turn, "[t]he Due Process Clause is satisfied for personal jurisdiction purposes if a defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,' by establishing sufficient 'minimum contacts' such that maintenance of the suit does not

offend traditional notions of 'fair play and substantial justice.'" *Luberda ex rel. Luberda v. Purdue Frederick Corp.*, No. 4:13-cv-00897-RBH, 2014 WL 1315558, *2 (D.S.C. Mar. 28, 2014) (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 475-76 (1985)). South Carolina courts summarize the minimum contacts or "power prong" as requiring that "the defendant directed his activities to residents of South Carolina and that the cause of action arises out of or relates to those activities." *Cribb v. Spatholt*, 382 S.C. 490, 499, 676 S.E.2d 714, 719 (Ct. App. 2009). Further, to evaluate the "fairness prong", "the court must consider the following factors: (1) the duration of the defendants' activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the State's interest in exercising jurisdiction." *Id.*

I find that BB&T Corporation specifically directed its activities into South Carolina, and Mr. Maybank's claims arise out of those activities. I find the evidence demonstrated that BB&T Corporation senior executives specifically reviewed and approved the sale of the VPFC to and the failed investment strategy for Mr. Maybank. BB&T Corporation's participation in the actions forming the basis of this litigation are far more than just the mere exercise of jurisdiction over a parent by virtue of its ownership of a subsidiary's stock.[10] BB&T Corporation, through its General Counsel Patricia Oliver, expressly approved and authorized the investment strategy recommended to Mr. Maybank, a key component of which was BB&T Corporation stock. In her authorization, Ms. Oliver even included a handwritten note with her signature stating that "[t]his approval by General Counsel is conditioned on Mr. Maybank not purchasing additional

[10] In arguing the general rule that a parent is not liable for its subsidiaries, Defendants ignore the Corporation's critical role in establishing duties to clients and customers of its subsidiaries generally and approving the VPFC strategy for Mr. Maybank specifically. BB&T Corporation promulgated a Code of Ethics governing its subsidiaries that was intended to enhance the business operations of BB&T Corporation and its subsidiaries by ensuring that all of 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.").

shares of BB&T Corporation with proceeds from the prepaid variable forward transaction." Without the approval of BB&T Corporation, the strategy would not have been implemented and the fee opportunity would have been lost for Defendants.

Defendants seek to evade jurisdiction, arguing that BB&T Corporation was "a mere holding company for other BB&T entities and that none of its employees had any direct involvement with Mr. Maybank." That statement simply ignores the facts of this case. Without the approval of BB&T Corporation, the strategy, purportedly designed to protect Mr. Maybank's retirement assets, could not have proceeded, and Mr. Maybank would not have become a Wealth Management client of BB&T. The Approval Letter demonstrates that the strategy devised and recommended to Mr. Maybank was reviewed, validated, and approved at the very highest levels of the Corporation. Mr. Maybank's continued ownership of BB&T Corporation stock was a fundamental element of the strategy authorized and approved by BB&T Corporation in the Approval Letter.[11] The General Counsel's approval and validation of the strategy 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. The approval by BB&T Corporation was more than just a perfunctory notification; it was a necessary prerequisite to the strategy's implementation and the charging of the fees that Defendants expected to collect from the strategy both initially and over several years.

[11] BB&T Corporation knowingly and willingly authorized, approved, and facilitated an investment relationship with a South Carolina resident, part of which involved that resident's continued ownership of BB&T Corporation stock and his receipt of BB&T Corporation dividends. That alone is sufficient to establish BB&T Corporation's minimum contacts with South Carolina in this instance to support the Court's exercise of personal jurisdiction over that entity. *See 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"); *see also* S.C. Code Ann. § 36-2-803(A)(1), (7).

I therefore also find that the character and circumstances of the corporation's actions and the State's interest weigh in favor of exercising personal jurisdiction. Further, given BB&T Corporation's participation in this litigation, as explained below, I find that there is no inconvenience to the parties by exercising jurisdiction here. And the duration of the activity extended over the entire term of Mr. Maybank's investment strategy that could not have occurred but for BB&T Corporation's authorization, which expressly involved BB&T Corporation stock. I therefore find that the exercise of personal jurisdiction in this case is appropriate.

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

Defendants' waived their right to seek dismissal of BB&T Corporation by failing to do so until a mere month before the scheduled trial and only after the corporation meaningfully participated in the defense of the litigation for almost two and a half years. The defense of personal jurisdiction is a personal privilege that "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). Unlike subject matter jurisdiction, personal jurisdiction can be waived. *Id.*; *see Eaddy v. Eaddy*, 283 S.C. 582, 584, 324 S.E.2d 70, 72 (1984) ("*In personam* jurisdiction may be waived ...."). Consequently, "'[a] litigant [must] exercise great diligence in challenging personal jurisdiction.'" *Luberda*, 2014 WL 1315558 at *1 n.1 (quoting 5 Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure*, § 1391). Simply articulating a personal jurisdiction defense in an answer without promptly advancing it may waive or forfeit that defense. *Yeldell v. Tutt*, 913 F.2d 533, 539 (8th Cir. 1990) (personal jurisdiction defense waived because, "[w]hile the [defendants] literally complied with Rule 12(h) by including the jurisdictional issue in their answer, they did not comply with the spirit of the rule, which is 'to expedite and simplify proceedings in the ... [c]ourts.'").

I find that BB&T Corporation did not seek dismissal from this case in either a diligent or timely manner. BB&T Corporation made nothing more than a perfunctory defense under Rule 12(h)[12] 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. Since that time, BB&T Corporation, along with all Defendants, fully participated in litigating this case—during removal to federal court, remand of the matter, extensive discovery, and early motions practice—without advancing their objection or otherwise moving for dismissal from the action until shortly before trial. *See Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 62 (2d Cir. 1999) (holding that defendant forfeited defense of personal jurisdiction when it "participated in pretrial proceedings but never moved to dismiss for lack of personal jurisdiction despite several clear opportunities to do so during the four-year interval after filing its answer"). I find that, for these reasons, BB&T Corporation waived its defense of personal jurisdiction 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. *See Yeldell*, 913 F.2d at 539. I therefore deny Defendants' motions for JNOV, new trial, and new trial *nisi remittitur*, to the extent such motions are based on this ground.[13]

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[12] Although providing that failing to raise the defense of lack of personal jurisdiction in either a pre-answer motion or in an answer waives such defense Rule 12(h), SCRCP, 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) ("It does not follow, however, that a party's failure to satisfy those minimum steps [of Rule 12(h)(1)] constitutes the only circumstance under which the party will be deemed to have waived a defense.").

[13] Defendants also moved for JNOV as to the breach of contract, constructive fraud, and negligent misrepresentation claims on the basis that BB&T Corporation was not a party to the WMA and was not involved in the allegations of fraud or misrepresentations to Mr. Maybank. These grounds cannot be raised in the motion for JNOV because they were not raised in Defendants' motion for directed verdict. *Compare* June 23, 2014 Motion for Directed Verdict *with* Motion for JNOV; *see also In re McCracken*, 346 S.C. at 93, 551 S.E.2d at 238 (holding

IV. Statute of Limitations

Defendants also moved for judgment as a matter of law on the question of whether the statute of limitations bars all of Mr. Maybank's causes of actions. Defendants' motion simply declares, without support, that "Mr. Maybank was aware ... more than three years before filing suit." However, "[t]he burden of establishing the bar of the statute of limitations rests upon the one interposing it." *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). Defendants failed to meet their burden. There was no evidence or testimony from any witness that would suggest Mr. Maybank had knowledge of Defendants' wrongful conduct in or around December 22, 2008, three years prior to the filing of the lawsuit. This fact is confirmed by Defendants' failure to cite to any evidence on that point. Moreover, even "where the testimony is conflicting upon the question [of whether a statute of limitations applies], it becomes an issue for the jury to decide." *Id.* I therefore find that submission of the issue to the jury was appropriate, and I deny Defendants' motion for JNOV on this ground.

V. Insufficient Evidence of Damages

In numbers 8, 9, and 11 of their motion, Defendants advance several variations of an argument that Mr. Maybank did not present sufficient evidence to sustain the jury's verdict. However, the jury clearly found that Mr. Maybank suffered damages based on all of the evidence, including but not limited to the testimony of Mr. Maybank as well as his expert witnesses, Dr. McCann, Professor Freeman, and Dr. Wood. Defendants' argument, at bottom, is a disagreement with the weight to be given to the evidence of record including, without limitation, Dr. McCann's analysis. Weighing the evidence is left to the jury; my responsibility

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that only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion). Even assuming that these issues were preserved, I further deny the motion on these grounds for the reasons discussed above with respect to the exercise of jurisdiction over BB&T Corporation.

is to determine if there was evidence to support the jury's verdict and I find the damages awarded by the jury are fully supported by ample competent evidence. Defendants' motion on this ground is therefore denied.

VI. Grounds for JNOV

Defendants argue over 40 additional grounds[14] in their motion for JNOV, *see* Motion at 18-24, Nos. 12-54, that were not advanced in their written, 31 page motion for directed verdict and were not argued orally to the Court at the close of evidence. "[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.*, 399 S.C. at 332, 732 S.E.2d at 171. However, I have considered each of these issues to the extent it can be gleaned from what generally are single-sentence, conclusory arguments and I find that they do not warrant granting JNOV. I therefore deny Defendants' motion on all additional grounds because the issues have not been preserved (to the extent they have not been preserved) and, further, do not warrant granting the motion for JNOV.

Motion for New Trial Absolute

Defendants move for a new trial in the alternative to their motion for JNOV under Rule 50(b), SCRCP. This Court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993). "The jury's determination of damages, however, is entitled to substantial deference." *Id.* A court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly excessive so as to shock the conscience of the court and clearly indicates the figure

[14] My count reveals 43 additional grounds which were not included in their written motion for directed verdict. Regardless of the number, I find each of the additional grounds to be meritless and deny same.

reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives. *Id.* at 379-80, 426 S.E.2d at 805. The grant or denial of new trial motions rests within the discretion of this Court. *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989). I have considered the testimony and reasonable inferences therefrom in the light most favorable to Mr. Maybank, as the nonmoving party. *Welch v. Epstein*, 342 S.C. 279, 302-03, 536 S.E.2d 408, 420 (Ct. App. 2000). 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.[15]

I. Challenges to the Court's evidentiary rulings.

Defendants allege that evidentiary rulings of the court warrant the granting of a new trial, citing the cumulative nature of what they assert to be numerous prejudicial evidentiary and legal 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) ("To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice."); *see also Hanahan v. Simpson*, 326 S.C. 140, 156, 485 S.E.2d 903, 911 (1997). I further find that Defendants do not show how the challenged rulings were unfairly prejudicial other than simply characterizing the rulings as

[15] 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. In ground (1), Defendants incorporate their arguments from the motion for JNOV and I deny the motion on that ground for the same reasons set forth above. 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. I deny grounds (2) – (4) regarding BB&T Corporation, a challenge to the damages award, and dismissal of the UTPA claim for the same reasons set forth above with respect to the motion for JNOV.

such. *See Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."). I therefore find that, based on the entire body of evidence in the record and the Jury verdict taken as a whole, Defendants have not and cannot establish a reasonable probability the evidence admitted or examination allowed pursuant to the challenged rulings—either separately or as a whole—influenced the jury's verdict. I therefore find that the evidentiary challenges identified as grounds (5) – (12) of Defendants' motion are without merit, and the catch-all challenge identified as ground (13)[16] also is denied.

II. Challenges to the Court's Jury Instructions.

Defendants also assign error[17] to the Court's compilation and delivery of jury charges following the close of evidence. I deny Defendants' motion on this ground because I first find that they did not make a contemporaneous objection. *See Murray v. Bank of Am., N.A.*, 354 S.C. 337, 346, 580 S.E.2d 194, 199 (Ct. App. 2003) (holding that a party who fails to object to a jury charge when it is given may not later complain about the charge). To the extent any statement by Defendants' counsel could be construed as a challenge to any charge, or lack thereof, 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.

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[16] "The Defendants assert as a further basis for a new trial all other evidentiary rulings by the Court before or during the trial of the case that were adverse to the positions of the Defendants." Such a motion is nothing more than a belated effort to either preserve, or perhaps a feeble attempt to revive, anything that Defendants could not think of at the moment when preparing its motions and challenges. Mot. p.30.

[17] Including grounds (14), (15), (47), and any other references to the instructions given by the Court.

III. Challenges to the Jury Verdict Form.

I find that Defendants' challenge to various parts of the jury verdict form[18] is unpreserved and without merit. The verdict form I ultimately adopted and submitted to the jury was, with very minor exception, verbatim to the verdict form submitted by Defendants. Moreover, Defendants failed to make a timely objection to the verdict form prior to its submission to the jury. And 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 did not preserve 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) (holding that by failing to object to a verdict form until after the verdict had been reached, a party failed to preserve any issue relating to the verdict form).

IV. Thirteenth Juror Doctrine.

Defendants also seek[19] to have this Court grant a new trial as the thirteenth juror. *See Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) ("The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict."). I decline to interfere with the jury's verdict because I find that the record fully supports the verdict. The jury rejected the multitude of arguments and defenses advanced by Defendants in favor of finding that Defendants engaged in misconduct toward, made misrepresentations to, and otherwise deceived Mr. Maybank. I further find that, contrary to Defendants' assertion, the verdict in favor of Defendants on some but not all of Mr.

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[18] Including ground (46) and any other arguments regarding the verdict form.

[19] Including grounds (45) and (51) and any other arguments regarding the thirteenth juror doctrine.

Maybank's claims reflects that the jury carefully weighed the evidence. I observed the jury to be very diligent, thoughtful and attentive in its work. In sum, this was an excellent Greenville County jury which carefully considered all of the evidence and arguments that Defendants advanced. Notwithstanding that evidence and arguments, the jury found Defendants at fault. The sworn jury in this case, empaneled as mandated by the United States and South Carolina Constitutions to resolve a civil dispute, worked perfectly in accordance with its constitutional and statutory design and mandate. After two weeks of receiving testimony and documentary evidence, listening attentively to arguments of counsel and jury charges, and deliberating over a period of two days, the jury found Defendants' conduct was in violation of law, reprehensible, and otherwise deserving of punishment. I therefore further find, as stated previously, that the award of punitive damages is supported by the record and reasonable in this case because there was ample evidence allowing a reasonable jury to find Mr. Maybank to have met the higher burden of proof of clear and convincing evidence of reckless, willful, or wanton conduct evidencing a conscious disregard or reckless indifference to Mr. Maybank.[20] Defendants' motion for a new trial under the thirteenth juror is therefore denied.[21]

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. "A motion for new trial *nisi remittitur* asks the

[20] The award of punitive damages is discussed above. *See* discussion *supra* pp.11-20.

[21] Again, 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, including but not limited to the contention in ground (16) that a continuance of the trial should have been granted. I deny the relief on grounds (17)-(44), (48) – (50), and (52) – (54) for the reasons set forth with respect to the denial of the motion for JNOV, to the extent applicable, or because I find the grounds simply lack merit or are too vaguely stated to ascertain the asserted basis for relief.

trial court to reduce the verdict because the verdict is merely excessive." *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006). "The denial of a motion for a new trial *nisi* is within the trial court's discretion ...." *Id.; Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) ("Compelling reasons ... must be given to justify invading the jury's province in this manner."). Based on the evidence presented at trial, the 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 further find the verdict was based on neither emotion nor improper sentiment and was clearly 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 for the Court to treble the jury's award of actual damages on the UTPA verdict. S.C. Code Ann. § 39-5-140(a) ("If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of Section 39-5-20, the court ***shall*** award three times the actual damages sustained and may provide such other relief as it deems necessary or proper.") (emphasis added). 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). Consideration of Mr. Maybank's trebling request is ripe because the jury returned a verdict in favor of Mr. Maybank against all Defendants on the UTPA cause of action. For the reasons

explained below, I find that Defendants conduct was willful and knowing, and find that the award of $3,100,000 in actual damages must be trebled to $9,300,000.

I find that, based on the evidence presented to the jury, Defendants' conduct in employing an unfair or deceptive method, act, or practice in commerce was both willful and knowing. My finding in this regard is based on the record as a whole, including but not limited to evidence that Defendants knew when the form WMA was presented to Mr. Maybank that it could not be fulfilled according to its express terms and that they intended to delegate duties and responsibilities contrary to the terms of the contract; that Defendants failed to correct or disclose these infirmities to Mr. Maybank and other customers to whom they owed a fiduciary duty; that notwithstanding the known misrepresentations in the agreement, Defendants insisted Mr. Maybank and other customers sign the WMA as a condition of their provision of fiduciary wealth management services; that the WMA presented to Mr. Maybank was Defendants' form contract used with all customers from at least August 2006, when Mr. Maybank and at least one other customer signed the contract, into 2009, when Defendants revised their form WMA; that, at the beginning of their fiduciary relationship, Defendants presented Mr. Maybank with what purported to be an individualized assessment of his financial situation, but that was in fact, unbeknownst to Mr. Maybank until the eve of this trial, merely a "fill-in-the-blank" form letter purporting to assess the suitability of VPFCs for many clients *en masse*.

I further find the circumstances surrounding Defendants' refund of improperly charged transaction fees to their clients reflects a willful and knowing practice to deceive. In the letter, Defendants falsely and self-servingly misrepresented that BB&T was refunding those fees as a "reflection of our corporate values," even though David Fisher admitted that Defendants acted "outside the bounds" when charging those fees to Mr. Maybank and others in the first place and

even though the fees were characterized in a routine audit by the SEC as "broker-esque" and improper given Defendants were not licensed as a broker dealer. Thus, based on the findings made by the jury, the evidence demonstrates that Defendants willfully and knowingly deceived Mr. Maybank along with at least 130 other customers regarding the circumstances surrounding the refund in an effort to conceal their potential liability for having charged the fees.

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 discussed above, the jury had evidence submitted to it on at least three theories under the UTPA claim 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) the use of a form letter that purported to provide Mr. Maybank with personalized research and analysis of the failed 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 was drafted to obscure its legal liability for having charged those fees at all.

By 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.[22] Each of these causes of action was based on a

[22] I note that the jury verdict form explicitly segregated the causes of action for which punitive damages could be awarded, from those, including the UTPA cause of action for which punitive damages were not an appropriate remedy. Specifically, the jury verdict form provided

breach of the professional duties, trusted advisor status, and fiduciary duties undertaken by Defendants as Mr. Maybank's fiduciary. In brief, the evidence admitted at trial demonstrated that the breaches of those common law duties set forth *supra,* pp.16-17, fully support the jury's verdict under the common law tort claims advanced by Mr. Maybank in this case. 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.

I find that Mr. Maybank is not required to elect between the recovery of treble and punitive damages. Although an injured party may recover damages which are punitive in nature only once where the recovery concerns a single wrong, *see Smith v. Strickland*, 314 S.C. 192, 198, 442 S.E.2d 207, 210 (Ct. App. 1994) (citing *Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 391 S.E.2d 249 (1990)), I find Defendants' conduct supported multiple but separate findings of wrongdoing by the jury. Taken in the light most favorable to the non-moving party, the record supports a reasonable conclusion by the jury that the basis for liability under the UTPA is separate and distinct 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

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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 ...." Additionally, the jury was instructed as to the standards for imposing punitive damages on those causes of action.

remedies] has no application where two separate causes of action, each based on different facts, exists.")).[23]

I find double recovery for the same wrong is not present here. The common law causes of action sustained by the jury and for which punitive damages were awarded—breach of fiduciary duty, constructive fraud, and negligent misrepresentation—were based on facts demonstrating that Defendants' provided imprudent, unsuitable, and risky investment advice to Mr. Maybank, representing to him that the strategy it devised and recommended would protect his assets and was well-researched and tailored to his specific investment needs, when, in fact, no individualized suitability analysis was performed. In contrast, Defendants' practice of presenting the false and deceptive form WMA to Mr. Maybank, while deliberately hiding the falsity, is an independent unfair and deceptive business practice that stands on its own.

I therefore find that, based on the facts and Defendants' actions in this case, Mr. Maybank is entitled to recover both treble and punitive damages. *Taylor*, 324 S.C. at 218, 479 S.E.2d at 44-45 ("Election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action. It is the act of choosing between inconsistent remedies allowed by law on the same set of facts. Its purpose is to prevent *double recovery for a single wrong*.") (citing *Thompson v. Watts*, 281

[23] Instead of *Taylor*, which directly supports the award of treble and punitive damages in this case, Defendants cite to two other cases: *Adamson*, 301 S.C. 204, 391 S.E.2d 249; and *Smith*, 314 S.C. 192, 442 S.E.2d 207. However, in both of these cases, the Supreme Court simply cited the general proposition that where the harm alleged concerns a single wrong, a party may not collect both punitive damages under common law causes of action and treble damages under the UTPA. *See Smith*, 314 S.C. at 197-98, 442 S.E.2d at 210 ("As with actual damages, a plaintiff can recover damages that are punitive in nature only once, either as expressly-designated punitive damages or as trebled damages, where their recovery concerns a single wrong. In these two cases, the defendants committed but a single wrong.") (emphasis added). In contrast, the Court held in *Taylor* that, if common law and statutory remedies are based on separate facts, the plaintiff is not required to elect between punitive and treble damages. I find that Mr. Maybank therefore may recover both.

S.C. 504, 316 S.E.2d 393 (1984) (emphasis added)).[24] The UTPA cause of action is separately supported by facts independent of the breaches of Defendants' common law duties. 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. Accordingly, the jury's verdict awarding punitive damages under the common law causes of action and this Court's award of treble damages for violations of the UTPA are not mutually exclusive.[25] I therefore deny Defendants' motion to require Mr. Maybank to elect between punitive and treble damages.

Defendants' motion for election of remedies includes other arguments that are largely unpreserved, but even if they were preserved, they are without merit and therefore denied.[26] For instance, Defendants have waived any argument regarding the economic loss rule. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (post-trial motion cannot be used to raise an

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[24] *See also Freeman v. A. & M. Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532, 536 (Ct. App. 1987) (upholding an award of both punitive and treble damages); *cf. Toyota of Florence v. Lynch*, 314 S.C. 257, 442 S.E.2d 611, 616 (1994) (holding that plaintiff could recover *both* doubled damages under the state "Regulation of Manufacturers, Distributors and Dealers Act" and punitive damages in connection with the common law claim because the Act allows both types of damages); *Columbia Teachers Fed. Credit Union v. Newsome Chevrolet-Buick*, 303 S.C. 162, 399 S.E.2d 444 (Ct. App. 1990) (same).

[25] 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 dictated by the verdict form; it 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.

[26] To the extent any of Defendants' arguments are not expressly addressed in this Order, those arguments are denied.

issue that could have been raised at trial).[27] Although raising it as a defense in their Answer, Defendants did not timely raise the economic loss rule either in any of their eight summary judgment motions, or during trial in their 38-page motion for directed verdict. Having failed to do so, they have waived this argument.

Notwithstanding Defendants' failure to preserve this issue, I have carefully considered and hereby deny Defendants' arguments regarding the economic loss rule. As applied in this state, the rule is primarily limited to the area of products liability and stands for the proposition that, where damage is suffered only to the product itself, no tort claim is permitted. *See Kennedy v. Columbia Lumber Mfg. Co.* 299 S.C. 335, 345-46, 384 S.E.2d 730 (1989); *see also Tiara Condominium Ass'n, v. Marsh & McLennan Cos.*, 110 So.3d 399 (Fla. 2013) (Florida Supreme Court expressly limited the economic loss rule to the product liability context). Defendants' motion on this issue is conclusory and cites only a single case, *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995), without explanatory analysis, to support the contention that the breach of contract claims are inconsistent with the constructive fraud and negligent misrepresentation claims. However, even *Griffin* expressly rejects the economic loss rule when there is an independent duty owed by Defendants. 320 S.C. at 56, 463 S.E.2d at 89 (holding that "the trial judge erred in finding the doctrine of 'economic loss' prohibited the plaintiff from maintaining a suit in tort for purely economic losses"). Here, Defendants were Mr. Maybank's fiduciary. In 2006, Defendants

[27] Although our appellate courts have not addressed the issue, courts in other states have found that the economic loss rule is subject to waiver and issue preservation in similar circumstances. *Just In Case Bus. Lighthouse, LLC v. Murray*, 2013 WL 3778184 (Colo. Ct. App. 2013) (argument that economic loss rule applied held unpreserved for appellate review where, although made at the summary judgment stage, the argument was not renewed at the directed verdict stage and was only resurrected in post-trial motions); *JW Const. Co., v. Elliott*, 253 P.3d 1265, 1271 (Colo. Ct. App. 2011) (economic loss rule unpreserved where included as a defense in the answer, but not raised again before or during trial).

solicited and agreed to provide fiduciary services as the trusted advisor and manager of Mr. Maybank's irreplaceable retirement assets.[28] Defendants knew that there would be economic losses suffered by Mr. Maybank if they breached their duties to him. I therefore find that the economic loss rule has no application here.

I also reject Defendants' argument that the claims for constructive fraud and negligent misrepresentation are inconsistent. Although Defendants cite to *Brown v. Stewart,* 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001), for this proposition, the issue of electing between those causes of action was not even before the Court of Appeals in that case. Moreover, the trial court had required an election because the jury in that case returned separate verdicts of $50,000 in actual damages on *each* of the causes of action of breach of fiduciary duty, constructive fraud, and negligent misrepresentation (for a total actual damages award of $150,000). *Id.* at 40, 557 S.E.2d at 679-80. Here, the jury in this case returned a single verdict against Defendants for $3.1 million on all causes of action on a verdict form proposed by Defendants. Moreover, neither the trial court nor the Court of Appeals in *Brown* determined that the causes of action of constructive fraud and negligent misrepresentation were inconsistent, as represented by Defendants in their motion. I therefore deny Defendants' motion on this ground.

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[28] Although no appellate court of this state has addressed the economic loss rule in the context of a fiduciary relationship, courts in other states have determined that the rule does not bar claims arising under a fiduciary duty. *See, e.g., Derkevorkian v. Lionbridge Techs., Inc.*, 2007 WL 638717, at *4 (D. Colo. Feb. 27, 2007) (finding that the economic loss rule did not bar a "breach of fiduciary duty claim based on a confidential or trust relationship independent of the parties' contractual relationship"); *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, 2001 WL 1249303, at *4-5 (Mass. Super. Ct. July 26, 2001) (stating that a claim for breach of fiduciary duty was not barred by the economic loss rule); *Carran v. Morgan*, 510 F. Supp. 2d 1053, 1060-61 (S.D. Fla. 2007) (stating that the economic loss rule is inapplicable to breach of fiduciary duty, constructive trust, fraud, and conversion claims); *see also Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 873 (9th Cir. 2007) ("Many courts have explicitly refused to extend the economic loss doctrine beyond the product liability context or beyond claims for negligence and strict liability.").

Further, Mr. Maybank is not required to elect a single cause of action on which to proceed. *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). The Court 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 returned a single award of $3.1 million in actual damages in favor of Mr. Maybank for each cause of action. Therefore, because I find that there is no possibility of double recovery of actual damages in this case, I deny Defendants' motion to require Mr. Maybank to choose among the causes of action.

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

Having prevailed on his UTPA claim, Mr. Maybank is entitled to an award of reasonable attorneys' fees and costs. S.C. Code Ann. § 39-5-140(a) ("Upon the finding by the court of a violation of this article, the court ***shall*** award to the person bringing such action under this section reasonable attorney's fees and costs.") (emphasis added).[29] Mr. Maybank has moved for an award of attorneys' fees of $3,317,868.70, and costs of $306,264.10. In rendering my decision, I have relied upon my own knowledge and observations in the case as well as the

[29] This is so regardless of whether Mr. Maybank is required to elect remedies. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010) (holding that attorneys' fees and costs are not "subject to the limitations of the doctrine of election of remedies"). As stated previously, I find, however, that Plaintiff is not required to elect remedies. *See* discussion *supra* pp.37-43.

affidavits submitted by Mr. Maybank, including the affidavit of Professor Freeman.[30] Although I find that Plaintiff's request for attorneys' fees and costs is reasonable, I nevertheless find it appropriate to reduce the total hours expended on the case and the cost by 20% in order to limit the fees to the UTPA claim alone. I therefore find it reasonable and appropriate to award to Mr. Maybank attorneys' fees in the amount of $2,654,295 and costs in the amount of $245,011.

I. Introduction and background.

Although Mr. Maybank is entitled to attorneys' fees and costs by statute in this case, the specific amount of any award pursuant to the Act is left to the discretion of this Court. *See Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008) (citing *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997)). The Court must apply a lodestar analysis in determining a reasonable award of attorneys' fees and costs. *Layman*, 376 S.C. at 457-58, 658 S.E.2d at 332-33 ("A lodestar figure is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a reasonable hourly rate by the reasonable time expended.") (citing *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 652 (4th Cir. 2002)). This analysis requires the reviewing Court to determine a reasonable hourly rate and hours worked and then consider additional factors that may justify enhancement of the lodestar figure with a "multiplier" that reflects exceptional circumstances of a particular

[30] 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 based on his years of experience in evaluating the appropriateness of attorneys' fees in complex litigation. Moreover, because the Court is guided in its assessment of the request for fees and costs by evaluating the facts underlying the reasonableness of the request, expert testimony is admissible to "assist the trier of fact ... to determine a fact in issue." Rule 702, SCRE. The remaining arguments in Defendants' motion to strike simply challenge the quality or weight of Professor Freeman's testimony, rather than the affidavit's admissibility. *State v. Morris*, 376 S.C. 189, 203, 656 S.E.2d 359, 367 (2008). I therefore deny the motion to strike Professor Freeman's affidavit.

case. *Id.* at 458-61, 658 S.E.2d at 33-35. The determination of reasonable attorneys' fees and costs requires an evaluation of the following six factors: (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. *Layman*, 376 S.C. at 458, 658 S.E.2d at 333. (citing *Jackson,* 326 S.C. at 308, 486 S.E.2d at 760).

My starting point in evaluating the reasonableness of this request is one of 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 to be of the highest of quality. The trial itself lasted two weeks, during which time I had the opportunity to closely observe Mr. Maybank's counsel first-hand. Finally, the parties appeared before me on August 19 to argue the post-trial motions. Additionally, Mr. Maybank submitted two affidavits of counsel. In the fee affidavit, Plaintiff's counsel details the number of hours worked by each attorney litigating this case and submits the current hourly rates of each attorney based on their respective market rates for the specialized legal services provided. In the cost affidavit, Plaintiff's counsel details the costs and expenses actually paid and advanced in pursuit of the litigation. Mr. Maybank also submitted the Affidavit of Professor John Freeman, who provided the Court with his expert opinion as to the reasonableness of the hours, rates, and costs requested and the costs and expenses incurred, carefully analyzing the parameters established by the South Carolina Supreme Court for a court's review of a request for attorneys' fees and costs in a case like this one.

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 an award of attorneys' fees. This case was extremely difficult to litigate. I concur in the analysis of Professor Freeman that both sides were represented by excellent attorneys who were strong advocates for their clients. This case dealt with complex investment products and strategies. Investment litigation is often hard-fought and protracted. 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 a single 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 to the jury if success is to be achieved. The UTPA claim was based upon the same set of intertwined facts as all of the other claims. Due to these factors, litigating this jury trial required substantial experience, knowledge, and expertise by Mr. Maybank's counsel. Mr. Maybank's counsel were faced with the complex task of knowing and understanding the complicated legal and factual issues involved as well as presenting the issues in a manner comprehensible to lay persons. I note that Mr. Maybank's counsel were excellent in this regard.

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

Mr. Maybank's counsel submitted an affidavit in support of the request for attorneys' fees which provided the number of hours worked by each member of Mr. Maybank's legal team on this case. This action was originally filed on December 22, 2011. Advancing this case to trial was an immense and time-intensive task. This case involved successfully gaining remand to this court following removal to federal court by Defendants, extensive discovery that included

32 depositions, review of 60,000 pages of discovery, and responding to eight substantive motions for summary judgment. 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. According to Mr. Willoughby's affidavit, almost 6,700 hours have been devoted to handling Mr. Maybank's case through June 30, 2014, which excludes time spent on post-trial issues. This total is indicative of the comprehensive, challenge every issue defense employed by Defendants, which I observed firsthand. As was their right, Defendants vigorously defended each point and issue in this case. In light of the vigorous manner of the defense employed by Defendants through their outstanding lawyers, I find Mr. Maybank's counsel were required to respond effectively; therefore, I find the time devoted by Mr. Maybank's counsel in litigating this case was necessary, essential, and reasonable. In summary, Mr. Maybank's counsel produced a successful result, which 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 that the amount of fees allocable to this cause of action cannot be determined because all of the causes of action are based upon a core set of intertwined facts and, thus, the work performed was necessary to developing the UTPA cause of action as well as the common law causes of action. *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"). Plaintiffs' counsel also points to the testimony of Professor Freeman, who opined that these claims were intertwined and no deduction to the fee request is warranted based on the amount of time expended by Mr. Maybank's counsel. *See 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 based on the same body of evidence underlying the claims for fraud and constructive fraud) (citing *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992) (finding award of attorney fees under the Dealer's Act was warranted even though fee affidavit was not itemized for time spent for the claim under the Act and that spent for the non-statutory cause of action)).

Based on my observation of counsel and the arguments on all issues and my knowledge of the case developed before, during, and after presentation to the jury, I find that the causes of action are based upon a core set of common and intertwined facts. As I stated above, I am well familiar with this case, the complex issues involved, the defense mounted,[31] the amount of time expended in discovery, and the development of the underlying facts. The parties appeared before me to argue motions on four occasions, in addition to a two week trial, during which time I observed the time and energy necessarily expended in developing the core facts. I therefore find that the UTPA cause of action is supported by a body of intertwined evidence that supported all of the causes of action, fully developed through the long path of discovery and motions hearings in this case.

However, I find that the amount of fees that Plaintiffs can recover must be limited to the UTPA claim. And while I recognize that many of the actions taken were based on a set of intertwined evidence, I find it appropriate to adjust the amount of fees claimed in order to limit the amount of compensable fees to those incurred with respect to the UTPA claim. Therefore, out of an abundance of caution, I find it appropriate to reduce the total hours expended by 20%. *See Layman*, 376 S.C. at 460, 658 S.E.2d at 333 (reducing total hours by multiplier). Based on my informed discretion developed through my observation of and experience with the entire

[31] 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

case, 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. The implementation of this reduction is set forth below.

C. ***Professional standing of counsel.***

Mr. Maybank's attorneys are respected members of the South Carolina Bar and the Richland and Greenville County Bars, respectively. Both Mr. Willoughby's firm and Mr. Bannister's firm have high standing and regard in the legal community. 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 the professional standing of Mr. Maybank's counsel militates heavily in favor of the award of attorneys' fees.[32]

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. The blended fee arrangement recognizes the significant risk and difficulty associated with litigating such a complex case. Mr. Maybank agreed to a reduced hourly fee arrangement that required him to bear a significant burden of ongoing litigation expenses, but not the entire burden which was shared by the law firms. As

[32] I note that, as with all issues in this case, Defendants were unwilling to concede the issue of Mr. Maybank's counsel's professional standing in this State.

explained by the Supreme Court, the standard for evaluating the "contingency of compensation" factor is *not* a check to see if the plaintiff and counsel have a contingency contract in place, although one exists here, but rather whether the plaintiff will be able to pay the incurred attorneys' 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.") (citation omitted). Because this case involved substantial financial losses by Mr. Maybank, there was a substantial risk that Mr. Maybank would reach a point in this litigation where he could no longer pay even the reduced rate.[33] Consequently, Plaintiff's counsel bore a significant risk in light of the complexity of the issues and the uncertainty of success, combined with the vigorous, contest every issue defense put forward by BB&T. Plaintiff's counsel also incurred a significant opportunity risk because they devoted substantial time and effort to this case at rates less than those that could have been earned by those same attorneys on other work. I find that the risk to Plaintiffs' counsel of not being fully and fairly compensated for this complex lawsuit 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 in this litigation, 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) (internal quotes omitted). As

[33] In fact, 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.

previously stated, the success achieved for Mr. Maybank 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. In addition, 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. Consequently, I find an exceptionally beneficial result was obtained for Mr. Maybank; thus, I find that the fifth factor, like the first four, 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.

Mr. Maybank's counsel submitted a fee affidavit in support of the request for attorneys' fees. Mr. Willoughby's affidavit provides the number of hours worked by each member of Mr. Maybank's legal team, as well as the current hourly billing rate for each of those attorneys in investment-related cases. As described above, 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, as well as the defense mounted in opposition. With respect to the current hourly rates, Mr. Willoughby asserts through a sworn affidavit that these are the current billable rates in investment cases for the attorneys who performed work on Mr. Maybank's behalf. 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 testified as to his first-hand knowledge of the quality of Mr. Maybank's counsel both in prosecuting this case to a successful result, as well as the professional standing of counsel in complex, investment-related litigation. I am also cognizant and mindful of Professor Freeman's testimony that, in his expert opinion, 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 fee in this case as follows:

	Hourly Rate	Hours Expended	20% Reduction	Adjusted Hours	Totals
Willoughby & Hoefer, P.A.					
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
Bannister, Wyatt & Stalvey, LLC					
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

Using the lodestar calculation of $1,769,530 in attorneys' fees as a starting point of a reasonable fee in this case, I find that enhancing this figure through a multiplier is necessary in order to reflect the exceptional circumstances in recovering damages under UTPA in this case. *See Layman,* 658 S.E.2d at 334 (citing *Blum v. Stenson,* 465 U.S. 886, 897 (1984) (recognizing that an enhanced lodestar award may be justified "in some cases of exceptional success"); *see also Hyatt v. Apfel,* 195 F.3d 188, 192 (4th Cir. 1999) (affirming a multiplier of 1.333 applied to a lodestar calculation of attorneys' fees to be paid by the defendant government entity on account of the "exceptional results" obtained by plaintiffs' counsel); *Edmonds v. United States,* 658 F. Supp. 1126, 1144 (D.S.C. 1987) (applying a multiplier of 1.15 to 1.25 to the lodestar fees for the plaintiffs' various attorneys to account for the "exceptional circumstances" surrounding the

amount of money involved and the results obtained in the case); *Sauders v. S.C. Pub. Serv. Auth.*, 2011 WL 1236163 (D.S.C. 2011).

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, 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. Finally, as detailed above, there was substantial risk involved in litigating this case. I find all of these factors constitute significant and exceptional circumstances that warrant applying a multiplier to the current hourly rates submitted by counsel in order to provide a reasonable fee in this case. I find it appropriate in the exercise of my discretion to adjust the calculation of the lodestar amount by applying a multiplier of 1.5 to reflect the difficulty and exceptional circumstances of this case. Applying the multiplier leads to the following result:

Base Attorneys' Fees:	$1,769,530.00
Multiplier:	x 1.5
Total Attorneys' Fees:	$2,654,295.00

I therefore find, based on the exercise of my informed discretion, that Plaintiff is entitled to recover attorneys' fees in the amount 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.

Additionally, under S.C. Code Ann. § 39-5-140(a), Mr. Maybank is entitled to costs reasonably incurred in litigating and trying the UTPA claim. Mr. Maybank's counsel submitted a cost affidavit detailing the costs and expenses actually paid and advanced in pursuit of the litigation, requesting costs in the amount 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). Costs may be imposed on the losing party when permitted by statute. *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 318, 422 S.E.2d 128, 131 (1992).[34] 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,[35] online research, electronic document hosting fees, and trial preparation expenses are common, if not required, in cases of this size and complexity. In addition, the copying charges, while substantial, are reasonable given that this case involved more than 60,000 pages of documents. As before, 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 single contention advanced. I do note, however, that Mr. Willoughby's cost affidavit specifically excludes the costs of the expert witness of the Maybank Family Insurance Trust, based on the lack of success in recovering damages for the trust. However, I further find, for the reasons expressed above, that the total amount should be reduced by 20% to limit costs to the UTPA claim alone. Accordingly, I therefore award $245,011 ($306,264 * (1 - .20)) in costs and expenses as reasonable and appropriate under S.C. Code Ann. § 39-5-140(a).

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[34] The imposition of fees and costs is mandatory upon a finding of a violation of the UTPA.

[35] Defendants engaged five expert witnesses, including one who billed BB&T between $50,000 to $60,000 for his time and testimony.

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) ("In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum."). The law permits the award of prejudgment interest when a monetary obligation is a sum certain, or is capable of being reduced to certainty, accruing from the time payment may be demanded either by the agreement of the parties or the operation of law. *Spriggs Group, P.C. v. Slivka*, 402 S.C. 42, 56, 738 S.E.2d 495, 503 (Ct. App. 2013) (citing *Butler Contr., Inc. v. Court St., LLC,* 369 S.C. 121, 133, 631 S.E.2d 252, 258 (2006)). Defendants argue in part that Mr. Maybank is not entitled to recover prejudgment interest because the amount of damages is not a sum certain or capable of being reduced to certainty at the time the claim arose. 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 in the amount 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 _____ day of October, 2014

rec'd 10/17/2014
04490/01520

WILLOUGHBY & HOEFER, P.A.

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**ALSO ADMITTED IN THE DISTRICT OF COLUMBIA

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October 17, 2014

VIA HAND DELIVERY

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

RE: *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-23-8578

Dear Larry:

Enclosed is a copy of the Proposed Order and Form 4 which is being hand delivered to Judge Miller's office this morning, and which I hereby serve upon you as counsel for all of Defendants.

If there are any questions, please advise.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.

Mitchell Willoughby

Mitchell Willoughby

MW/lag
enclosure

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-23-8578

FRANCIS P. MAYBANK, and JANE H.P. MAYBANK, as TRUSTEE for the FRANCIS P. MAYBANK FAMILY INSURANCE TRUST,	**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**
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: Submitted by Mitchell Willoughby of Willoughby & Hoefer, P.A. and Bruce Bannister of Bannister, Wyatt & Stalvey, LLC	**Attorney for :** ☒ Plaintiff ☐ Defendant Or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** Post-trial motions were heard before the Court and the attached order reflects the Court's decision and entry of judgment. ☒ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order ☐ Statement of Judgment by the Court

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : This judgment to be filed in the Judgment Index.

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
FRANCIS P. MAYBANK	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	Seventeen Million, One Hundred Ninety Nine Thousand, Three Hundred Six and 00/100ths dollars ($17,199,306.00)
If applicable, describe the property, including tax map information and address, referenced in the order:		

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

Edward W. Miller, **Circuit Court Judge** **Judge Code** **Date**

For Clerk of Court Office Use Only

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

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ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

This action came to hearing before the court on post trial motions. The issues have been heard and a decision rendered.

This case was tried to a jury from June 16 through June 30, 2014. Following a hearing on all post-trial motions, the Court rules on such post-trial motions as set forth in the attached order and orders entry of judgment as set forth in the attached Order and this Form 4.

****

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE

(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.

2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

   The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).

4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.

5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.

6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.

7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.

8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.

10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.

11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.

12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.

13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.

14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

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,	)	Civil Action No. 2011-CP-23-8578
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	)	**ORDER AND FINAL JUDGMENT**
Defendants.	)	

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.

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[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.

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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), SCRCP, 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 grounds[8] 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.

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[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.

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[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 litigation[20] 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 fee[21] in this case as follows:

	Hourly Rate	Hours Expended	20% Reduction	Adjusted Hours	Totals
Willoughby & Hoefer, P.A.					
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
Bannister, Wyatt & Stalvey, LLC					
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:	$2,654,295.00

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 x (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 _____ day of October, 2014

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,	)	Civil Action No. 2011-CP-23-8578
Plaintiffs,	)	
vs.	)	**DEFENDANTS' OBJECTIONS TO PLAINTIFF'S REVISED PROPOSED ORDER AND MOTION FOR HEARING ON PLAINTIFF'S REQUEST FOR ATTORNEYS' FEES AND COSTS**
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.	)	

FILED IN THE OFFICE OF THE CLERK OF COURT
GREENVILLE CO. S.C.
2014 OCT 21 PM 4:56

The Defendants, BB&T Corporation, Branch Banking and Trust Company ("BB&T"), and Sterling Capital Management, LLC ("BB&T Asset Management") (collectively "Defendants"), hereby submit their Objections to Plaintiffs' Revised Proposed Order and Motion for Hearing on Plaintiff's Request for Attorneys' Fees and Costs.

I. ARGUMENT

In the revised proposed order submitted by counsel for Maybank on October 17, 2014, Plaintiff's counsel included a statement in footnote 16 on page 23 that certain motions filed by the Defendants were filed "beyond the deadline of July 10, 2014." These motions were (1) the Defendants' motion seeking to compel the submission of additional documentation from Maybank in support of his request for attorneys' fees and costs under the UTPA, and (2) the Defendants' motion to postpone consideration of the motion for attorneys' fees, costs, and treble

damages. There was no set deadline for these two motions, nor would it have been proper to require them to be filed by July 10, 2014. Maybank did not file his petition for attorneys' fees and costs and request for treble damages under the UTPA until July 10, 2014. The Defendants could not have known the relief they needed until after seeing these filings from the Plaintiff. Accordingly, the Defendants' motions necessarily had to be filed after July 10, 2014. At no time was there any indication from the Court that the motions at issue would have to be filed by July 10, 2014.

The proposed order from the Plaintiff erroneously allocates 80% of his fees and costs to the UTPA claim. There is no factual basis in the record to support an allocation at this level. As held in *Laser Supply and Services, Inc. v. Orchard Park Associates*, 382 S.C. 326; 676 S.E.2d 139 (Ct. App. 2009), it is reversible error for attorneys' fees to be awarded without adequate factual support being submitted which would allow the trial court to segregate those fees relating to those claims which permit a fee recovery. The Defendants therefore request that the Court schedule a hearing to address the inadequacies in the record and to provide the Defendants with the opportunity to address those inadequacies as well as the relief requested in their pending motions addressing the Plaintiff's request for attorneys' fees and costs.

II. CONCLUSION

The Defendants respectfully request that the Court delete from the proposed order the statement that certain motions of the Defendants were filed after a deadline and that the Court schedule a hearing to address the matters set forth above.

SIGNATURE PAGE ATTACHED

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Attorneys for Defendants BB&T Corporation, Branch Banking and Trust Company, and Sterling Capital Management, LLC

Greenville, South Carolina

Oct. 21, 2014

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,	)	Civil Action No. 2011-CP-23-8578
Plaintiffs,	)	
vs.	)	CERTIFICATE OF SERVICE
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.	)	

FILED-CLERK OF COURT
GREENVILLE CO. SC
PAUL B. MCGINNISS
2011 OCT 21 PM 4 42

I, the undersigned of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy via U.S. Mail, postage prepaid, to the following address(es):

Pleadings:

Defendants' Objections to Plaintiff's Revised Proposed Order and Motion for Hearing on Plaintiff's Request for Attorneys' Fees and Costs

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Susan Zeigler
Administrative Assistant

Oct. 21, 2014

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)))	IN THE COURT OF COMMON PLEAS 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-23-8578 **DEFENDANTS' MOTION FOR LEAVE TO DEPOSIT AMOUNT OF JUDGMENT WITH THE COURT**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL F. WICKENSIMER
2014 NOV 18 PM 4:30

YOU WILL PLEASE TAKE NOTICE that, pursuant to Rule 67 of the South Carolina Rules of Civil Procedure, the Defendants, by and through their undersigned attorneys, move the Court for an Order granting leave to the Defendants to deposit with the Court the amount of the Judgment entered by the Court on November 10, 2014. This motion is based on the following grounds:

(1) On November 10, 2014, the Court entered Judgment against the Defendants in the amount of $17,199,306.00 (hereinafter, the "Judgment Sum").

(2) The Defendants intend to appeal the Judgment. The relief to be requested on appeal will include, among other things, an Order vacating the Judgment in its entirety.

(3) Defendants now seek to deposit the Judgment Sum with the Court pursuant to Rule 67 to prevent the further accrual of post-judgment interest. *See Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995).

(4) The Judgment Sum to be paid will include accrued interest at the statutory rate continuing through the date of payment into Court, in addition to a sum representing possible recoverable costs.

(5) Rule 67 provides that "[i]n an action in which any part of the relief sought is a judgment for a sum of money . . . , a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing." S.C. R. Civ. P. 67.

(6) As recognized by the South Carolina Supreme Court, allowing judgment debtors to deposit the amount of the judgment with the court "encourages the debtor to pay the judgment and assures the judgment creditor the funds will be available at the conclusion of the appeal." *Russo*, 317 S.C. at 444, 454 S.E.2d at 896.

(7) South Carolina appellate courts have often approved the practice of depositing judgment sums with the clerk of court under Rule 67 as a means of preventing the continued accrual of post-judgment interest. *See, e.g., Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995); *Duval v. Heritage Life Ins. Co.*, 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000); *Small v. Pioneer Machinery, Inc.*, 330 S.C. 62, 496 S.E.2d 884 (Ct. App. 1998).

(8) As held by the Honorable Howard P. King, the trial court judge in *Small v. Pioneer Machinery, Inc.*, 330 S.C. 62, 496 S.E.2d 884 (Ct. App. 1998), when a defendant complies with the requirements of Rule 67, "it would be an *abuse of discretion* to refuse to allow the funds to be deposited." *Id.* at 64, 496 S.E.2d at 885 (emphasis added).

(9) As explained in the Defendants' post-trial motions, there are numerous grounds upon which the Defendants rely in disputing both liability and the amount of damages. Accordingly, the Judgment Sum is genuinely disputed by the parties. This dispute is ongoing, and shall continue to be until the conclusion of the appeal of the Judgment.

(10) Once the Judgment Sum is deposited into the Court, the Plaintiff will be assured that funds will be available for the satisfaction of the Judgment if upheld (or for such part of the Judgment that may be upheld). The Plaintiff will further be assured of timely payment of funds in the event the Judgment is upheld, as the Defendants will have already made payment to the Court, and there would be no need for supplementary proceedings or an execution on the Judgment.

(11) There is no bad faith on the part of the Defendants in seeking to deposit the Judgment Sum. Once the Judgment Sum is deposited into the Court, the Defendants will be deprived of the use of such funds and will obtain no benefit by the making of the deposit other than the prevention of further accrual of post-judgment interest and, if the judgment is reversed, the interest earned by the deposited funds.

(12) The Defendants further request that the Order granting leave to deposit the Judgment Sum with the Court instruct the clerk of court not to distribute any funds until further order of the Court specifically authorizing the same.

(13) The deposit of the Judgment Sum with the Court has the same effect as a supersedeas bond, and, accordingly, under Rule 62(d), the Court should also order the stay pending appeal of the execution on the Judgment or the enforcement of the Judgment.

(14) Counsel for the Defendants have consulted with counsel for the Plaintiff regarding the subject of this motion, and Plaintiff's counsel has informed counsel for the

Defendants that the Plaintiff does not oppose the request that leave be granted to the Defendants to deposit the amount of the judgment plus all accrued interest into the court.

Based on the foregoing reasons, the Defendants respectfully request that the Court grant them leave to deposit the Judgment Sum with the clerk of court, with such sum to be deposited with a reputable bank into an interest bearing account.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Greenville, South Carolina

November 18, 2014

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,	)	Civil Action No. 2011-CP-23-8578
Plaintiffs,	)	
vs.	)	CERTIFICATE OF SERVICE
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.	)	

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. MOKERSIMER
2014 NOV 18 PM 4:30

I, the undersigned of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy via U.S. Mail, postage prepaid, to the following address(es):

Pleadings:

Defendants' Motion for Leave to Deposit Amount of Judgment with the Court

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Susan Zeigler
Administrative Assistant

November 18, 2014

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS 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-23-8578 **DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT**

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL D. BROCKINGTON
NOV 20 PM 2:59

YOU WILL PLEASE TAKE NOTICE that, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, the Defendants, by and through their undersigned attorneys, hereby move for an Order altering or amending the Judgment entered by the Court on November 10, 2014. This motion is based on the following grounds:

(1) On November 10, 2014, the Court entered Judgment against the Defendants. The Judgment included *inter alia* an award of treble damages under the Unfair Trade Practices Act ("UTPA") as well as an award of $2,899,306 in attorneys' fees and costs. The Court should reconsider these parts of its Judgment and vacate both the award of treble damages and the award of attorneys' fees and costs. With respect to attorneys' fees and costs, after vacating the award, the Court should order the production of additional information from the Plaintiff specified below and provide the Defendants with time to allow an expert to review this information and

render opinions prior to the Court's determination of the proper amount of the award of attorneys' fees and costs.

(2) It is unnecessary for the Defendants to file a Rule 59(e) motion on the other claims and issues addressed in the Court's November 10, 2014 Order. The Defendants reserve the right to challenge all other claims, damages, and forms of relief on appeal, and the omission of discussion herein addressing any other claims, damages, or forms of relief should not be construed as a waiver by the Defendants of any of their arguments. Moreover, the Defendant, BB&T Corporation, continues to object to the Court's exercise of personal jurisdiction over it in this action.

(3) To recover treble damages, the Plaintiff must show a "willful" violation of the UTPA. Under Section 39-5-140(d), "[A] willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of § 39-5-20." S.C. Code Ann. § 39-5-140(d) (Law. Co-op. 1985). It is not enough for the Plaintiff to show that the Defendants were intentionally unfair or deceptive. Rather, the Plaintiff must show the Defendants knew the alleged deception *violated the UTPA*. There is no such evidence in this case. This is especially true because it was reasonable for the Defendants to believe that the securities exemption would have been applicable to the Plaintiff's situation, thereby rendering the UTPA inapplicable.

(4) The lack of an intent to violate the UTPA is supported by the findings of the jury, namely, the jury's refusal to find intentional conduct on the part of the Defendants. The jury rejected Mr. Maybank's claims of fraudulent misrepresentation and breach of contract accompanied by fraudulent act, but found in favor of Mr. Maybank on his claims for negligent misrepresentation and constructive fraud. The difference between the claims for which Mr.

Maybank prevailed and for which he did not is *intent*. It is apparent that the jury did not find any intent to deceive Mr. Maybank because that is the one element that differs between fraud and constructive fraud.

(5) Because a lower standard of recklessness can support an award of punitive damages, the jury's award of punitive damages does not imply a finding that the Defendants intentionally violated the UTPA.

(6) The alleged breach of the Wealth Management Agreement cannot support an award of treble damages. A mere breach of contract, even if intentional, cannot support a UTPA claim and certainly cannot support a finding of a willful violation of the UTPA. Moreover, there was no breach because the agreement does not prevent BB&T from relying on the skills and efforts of employees of its affiliated companies to satisfy its obligations under the agreement.

(7) The August 11, 2006 memorandum from Anthony Mahfood to Pat Oliver cannot support a finding of willfulness under the UTPA. There were no misrepresentations within it, nor was it even addressed to Mr. Maybank.

(8) The testimony from numerous current and former employees of BB&T and BB&T Asset Management demonstrated that they believed that the prepaid transactions and the investments in the managed portfolio account were in Mr. Maybank's best interests. This evidence rebuts any potential finding of willfulness necessary to treble damages under the UTPA.

(9) The amount of actual damages trebled was improperly calculated. The Court should first have granted judgment notwithstanding the verdict in favor of the Defendants disallowing the alleged damages relating to the managed portfolio account. As explained in the Defendants' motion for judgment notwithstanding the verdict filed on July 10, 2014,

incorporated herein by reference, the Plaintiff's damages methodology with respect to the variable prepaid transactions necessarily requires the exclusion of any damages related to the managed portfolio account. Thus, if any damages were to be trebled, such damages should have been limited only to those associated with the variable prepaid transactions.

(10) Paragraph F.1. of the Wealth Management Agreement limits the Plaintiff's recovery to only his losses attributable to the alleged negligence or willful misconduct of the Defendants and expressly prohibits the recovery of punitive damages. Treble damages are punitive in nature nor do they qualify as "losses" and, therefore, such relief is barred by Paragraph F.1.

(11) The Defendants further assert, and incorporate herein by reference, as a basis for reconsideration of the part of the Judgment awarding treble damages all arguments and grounds for denying this relief as set forth in the Defendants' memorandum in opposition to the Plaintiff's request for treble damages filed on August 15, 2014.

(12) The award of attorneys' fees and costs should be vacated for numerous reasons. As explained below, Court did not appropriately reduce the requested award, nor did the Plaintiff provide sufficient factual support for the award. Additionally, the process employed by the Court for making the determination was improper and denied the Defendants due process as required by the U.S. and South Carolina Constitutions.

(13) The factual basis offered by the Plaintiff in support of the award of fees and costs is inadequate and cannot support the Court's award. Among other things, the Plaintiff has failed to produce the fee agreements with his lawyers and detailed time entries showing each task performed and the amount of time spent on each task. This information is critical to assessing the reasonableness of the fee request under the applicable factors and standards. The Defendants

incorporate herein by reference the arguments raised in their motion to compel Frank Maybank to submit additional information relating to request for attorneys' fees and costs filed on August 5, 2014.

(14) In addition to ordering the Plaintiff to produce additional information, the Court should also postpone its determination of the appropriate award of fees and expenses until after the Defendants have had sufficient time to meaningfully review new information provided and offer rebuttal arguments or facts, including, among other things, having an expert witness review and render opinions based on the additional information provided. The Defendants incorporate herein by reference the arguments raised in their motion to postpone consideration of Frank Maybank's request for attorneys' fees and costs and for treble damages filed on August 5, 2014.

(15) The Court should hold a hearing regarding the determination of the reasonableness of the Plaintiff's request for fees and costs. The Defendants filed a motion requesting such a hearing on October 21, 2014, and the Defendants incorporate herein by reference all arguments raised in that motion. The Court should grant that motion and hold a hearing to provide the Defendants with the opportunity to challenge the inadequacies with the Plaintiff's request for fees and costs.

(16) In its Order dated November 10, 2014, the Court referenced and relied on the affidavit of Professor John Freeman, the Plaintiff's purported expert witness. The affidavit of Professor Freeman should be stricken for numerous reasons and should not be considered in the determination as to the reasonableness of the request for fees and costs. Among other things, the affidavit includes inadmissible legal conclusions, it is unreliable because it lacks an adequate factual basis, and it is replete with useless and unsupported hyperbole. The Defendants

incorporate herein by reference the arguments raised in their motion to strike affidavit of John Freeman filed on August 6, 2014.

(17) In its Order dated November 10, 2014, the Court concluded that an award of attorneys' fees and costs in the amount of $2,899,306 was appropriate. This amount is far in excess of an amount that would be reasonable under the applicable standards and the circumstances of this case. The Court should vacate its award and reconsider the proper amount that should be awarded after requiring additional information to be included and providing sufficient time for the Defendants' to review this information and offer rebuttal arguments or facts. Some of the reasons supporting the Defendants' position are included below. The Defendants also rely on all arguments set forth in, and incorporate herein by reference, their memorandum in opposition to Plaintiff's motion for an order awarding attorneys' fees and costs filed on August 15, 2014.

(18) In its November 10, 2014 Order, the Court properly recognized that only those reasonable attorneys' fees and costs necessary to pursuing the UTPA claim can be included in the award. The Court, however, attempted to comply with this limitation by merely reducing the total request of fees and costs by 20%. This deduction is far too small to account for the fees and costs unrelated to the UTPA claim or which are otherwise unrecoverable.

(19) The two Plaintiffs in this case pursued a total of eleven claims each and succeeded on five, only one of which was the UTPA claim. Of the two Plaintiffs, only one succeeded on any claims, and the other, the Maybank Family Insurance Trust, failed to persuade the jury on any of its claims. The Court should make a detailed assessment as to the fees and costs that are related solely to the non-UTPA claims so that those fees and costs can be deducted from the Plaintiff's request.

(20) The Court should deduct from the Plaintiff's request any fees and costs related to the two abandoned claims as well as the claims for which the Defendants prevailed at trial.

(21) The Court should deduct from the Plaintiff's request any fees and costs related to pursuing claims against Anthony Mahfood and Ross Walters, both of whom were dismissed as defendants prior to trial.

(22) The Court should deduct from the Plaintiff's request any fees and costs related to the Plaintiff's unsuccessful or unproductive litigation efforts. Among other things, the Court should not allow the recovery of any fees or costs relating to (a) the Plaintiff's summary judgment motions, both of which were denied, (b) the Plaintiff's unsuccessful pursuit of tax gross-up damages and prejudgment interest, (c) the Plaintiff's failed efforts to depose the CEO and former CEO of BB&T, and (d) the Plaintiff's failed arguments seeking to defeat the Defendants' claims of attorney-client privilege and seeking the waiver of confidentiality protections to all of the Defendants' documents, including, among other things, the private financial information of third party customers. There are additional examples of unproductive or unsuccessful efforts by Plaintiff's counsel noted in the Defendants' prior briefs, and those additional examples are incorporated herein by reference.

(23) The Court should deduct all fees and costs related to the Plaintiff's efforts to seek the remand of the case after it was removed to federal court. Judge Michelle Childs of the U.S. District Court for the District of South Carolina already ruled on and denied the request for the Plaintiff to recover those fees and costs. The ruling of Judge Childs is the law of the case and has *res judicata* effect.

(24) The Court attempted to apply the factors set forth in *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). However, sufficient information was not provided that would allow the Court to meaningfully analyze and apply these factors. For example, it is impossible to assess the level of risk purportedly accepted by Plaintiff's counsel because the fee agreements were not produced to the Court for review. The Court was provided with no information as to what amount of the fees were contingent and what amount were being paid based on hourly rates during the litigation.

(25) In its November 10, 2014 Order, the Court applied a loadstar multiplier of 1.5, thereby significantly increasing the award of attorneys' fees. This was in error. Under the circumstances of this case, a loadstar multiplier is inappropriate. As explained in *Layman v. South Carolina*, 376 S.C. 434, 658 S.E.2d 320 (2008), a multiplier can be considered only when there are "exceptional circumstances." *Id.* at 460, 658 S.E.2d at 334. No such circumstances are present in this case. The circumstances cited by the Court in its November 10, 2014 Order to justify the multiplier were already taken into consideration as part of the analysis of the *Jackson v. Speed* factors. It is improper to base a multiplier on factors already considered, and to do so amounts to double counting. *See, e.g., Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 624 (Minn. 2008) ("[B]ecause the results obtained, the complexity of the litigation, and the duration of the litigation should be fully reflected in the lodestar amount, these factors should not be used again in determining whether a multiplier is warranted."). Additionally, even if a loadstar multiplier were appropriate, 1.5 is far too high. In *Layman*, the multiplier was set at only 1.25. There is no South Carolina precedent for the use of a multiplier higher than 1.25.

(26) The Court's award of expert witness fees and other costs was improper for a number of different reasons. First, none of the Plaintiff's expert witness fees are recoverable because neither the UTPA nor any other statute allows for the recovery of such fees. *See Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 422 S.E.2d 128 (1992). Additionally, expert witness fees for work unrelated to the UTPA claim should be disallowed, for example, the work of Professor Freeman in opining that there was a violation of NYSE Rule 312 and that BB&T Asset Management was acting as an unregistered broker dealer. The costs of court reporter fees, video taping, and transcripts for the depositions in this case also are not a recoverable cost. There is no statute specifically authorizing the recovery of these costs, and some of the depositions were either not used or were for testimony related only to claims unrelated to the UTPA claim. For these reasons, the Cout should hold that costs associated with depositions are not recoverable. Moreover, the Court should require the production by the Plaintiff of additional detailed information about the costs incurred so that those costs unrelated to the UTPA claim can be identified and excluded from the award. The Court's discounting of 20% is insufficient to account for this, especially in light of the fact that the UTPA claim was one of only eleven claims asserted and because only one of the two Plaintiffs succeeded on any of the claims.

(27) Paragraph F.1 of the Wealth Management Agreement limits the Plaintiff's recovery to only his losses attributable to the alleged negligence or willful misconduct of the Defendants. This provision bars the recovery of attorneys' fees and costs by the Plaintiff.

(28) The Defendants assert as additional grounds in support of this motion, and incorporate herein by reference, all arguments and grounds set forth in their Objections to Plaintiffs' proposed order and supplemental memorandum in support of Defendants' post trial

motions filed on October 16, 2014 as well as their Objections to Plaintiff's revised proposed order and motion for hearing on Plaintiff's request for attorneys' fees and costs filed on October 21, 2014.

(29) Counsel for the Defendants certify that consultation with Plaintiff's counsel as to the subject of this motion would serve no useful purpose.

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Greenville, South Carolina

November 20, 2014

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-23-8578

CERTIFICATE OF SERVICE

FILED-CLERK OF COURT
GREENVILLE CO., S.C.
PAUL B. MCKENSIMER
2014 NOV 20 PM 2:59

I, the undersigned of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy via U.S. Mail, postage prepaid, to the following address(es):

Pleadings:

Defendants' Motion to Alter or Amend Judgment

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November 20, 2014

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,	Civil Action No. 2011-CP-23-8578
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	**FRANCIS P. MAYBANK'S RESPONSE TO DEFENDANTS' MOTION TO ALTER OR AMEND**
Defendants.	

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GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 DEC 2 PM 1 25

Plaintiff Francis P. Maybank opposes Defendants' Motion to Alter or Amend (Reconsideration) this Court's Final Order and Judgment, entered and served on November 10, 2014. Defendants' Reconsideration Motion is nothing more than a recapitulation of the arguments and issues that Defendants have raised and argued before in numerous post-trial filings. The Court has already considered and rejected these arguments.[1] Moreover, while the

[1] Importantly, Defendants' Reconsideration Motion does not contend that an argument was raised but not ruled upon by this Court. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 774 (2004) (describing when a party "must" file a Rule 59(e), SCRCP motion in order to preserve an issue for appeal). Because the Court has considered each of these issues and the arguments of the parties on multiple occasions, Mr. Maybank does not intend to burden the Court with duplicative filings. Instead, Mr. Maybank expressly incorporates by this reference the

Reconsideration Motion seeks reversal of the Order, it provides no additional and/or persuasive assertions of fact or argument of law to support their Reconsideration Motion.

Even before the Court entered the Final Order and Judgment in this case, Defendants stated their belief that the Court's rulings at trial and afterwards were in error and stated their intention to continue this litigation through the appellate process. *See* October 16, 2014, Defs' Objections to Proposed Order and Supplemental Memo in Support of Defs' Post-Trial Motions ("Additionally, this submission addresses defects in the proposed order which the Court should correct before entering the order and judgment and before the anticipated appeal of this matter.") (emphasis added). Because the Court has already considered the arguments made by Defendants in their motion, in some cases by way of three and four separate and successive post-trial filings,[2] Mr. Maybank respectfully requests that the Court deny Defendants' Reconsideration Motion.

Conclusion

For the reasons set forth herein and in Mr. Maybank's previously-filed post-trial motions and memoranda opposing Defendants' post-trial motions, Defendants' Reconsideration Motion should be denied.

[SIGNATURE PAGE FOLLOWS]

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arguments made in support of his respective motions for treble damages and attorneys' fees under the South Carolina Unfair Trade Practices Act, and against the motions and arguments advanced post-trial by Defendants.

[2] Defendants have filed, by Mr. Maybank's count, no less than seven (7) post-trial motions and/or requests for supplemental proceedings on the same issues raised in the Reconsideration Motion.

Respectfully submitted,

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December 2, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

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 BRANK BANKING AND TRUST COMPANY OF SC, and STERLING CAPITAL MANAGEMENT, LLC, Successor in merger to BB&T ASSET MANAGEMENT LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

CP

CASE NUMBER: 2011-DR-23-8578

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PAUL B. WICKENSIMER
2014 DEC 2 PM 1 26

AFFIDAVIT OF SERVICE BY HAND-DELIVERY

The undersigned certifies that a true copy of the foregoing:

FRANCIS P. MAYBANK'S RESPONSE TO DEFENDANTS' MOTION TO ALTER OR AMEND

was this 2nd day of December, 2014, Hand-Delivered to:

William S. Brown, Esq.
Nelson Mullins Riley & Scarborough, LLP
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Greenville, SC 29601

SWORN TO before me this 2nd day of December 20 14

NOTARY PUBLIC for South Carolina
My Commission Expires: 12/17/2017

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