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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

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1 THE COURT: Where are we? Are we going to argue
2 about all the causes of action?

3 MR. WILLOUGHBY: Your Honor, he wants me to state
4 our motion for directed verdict.

5 THE COURT: Okay

6 MR. WILLOUGHBY: We have three reasons or motions
7 for directed verdict, Your Honor

8 First, on the breach of contract claim, it's been
9 admitted in evidence that the bank did not perform the
10 contract as written. There was an effort to reform the
11 contract, so I believe that effort -- there is no evidence
12 in the record that there was a mutual mistake, so we would
13 move for directed verdict on their counterclaim for
14 reformation.

15 We would move for directed verdict on our contract
16 claim based upon the fact that the bank has admitted that
17 they did not perform the contract as written.

18 And then third, Your Honor, we would move for
19 directed verdict on the securities claim based upon the
20 admission that BB&T was outside the bounds in their
21 discussions with Securities & Exchange Commission

22 So for those three reasons we believe the evidence
23 is admitted and clear that we should have a directed verdict
24 on the securities claim, on the contract claim, and on their
25 counterclaim for reformation.

1 MR. BROWN: Your Honor, I will go backwards

2 THE COURT: Okay.

3 MR. BROWN: On the securities claim, we think
4 there is ample evidence that, in fact, we did nothing wrong,
5 that the findings -- there were no adverse findings by the
6 SEC. He said that the evidence that on which he basis his
7 motion is the evidence of the dealings with SEC. We had
8 testimony from Mr. Fisher that said there was no findings by
9 the SEC, no problem with the SEC. We don't think that they
10 have established a securities claim at all.

11 THE COURT: Okay.

12 MR. BROWN: As to the contract, Your Honor, we
13 would contend that there was testimony from the stand that
14 everything that was required to be done under the contract
15 was done. So we think that there is not a basis for a
16 directed verdict on the merits of the contract whatsoever.

17 And on the reformation, Your Honor, that is an
18 equitable claim. That's for the court to determine. And if
19 the jury comes back and decides that, in fact, the contract
20 wasn't breached, it never has to be reached by the court, so
21 we don't think it's necessary for the court to reach that.

22 THE COURT: Okay. All right.

23 I respectfully deny your motions

24 MR. WILLOUGHBY: Thank you, Your Honor.

25 THE COURT: All right.

1 MR. BROWN: Your Honor, would you like us to --
2 THE COURT: Well, I want to see if we have had a
3 shedding process.

4 MR. WILLOUGHBY: Your Honor, we have had -- we are
5 going to reduce some of the claims.

6 We have already -- we are not going to move
7 forward on the negligence claim, so we will withdraw that.

8 THE COURT: Okay.

9 MR. WILLOUGHBY: We are not going to move forward
10 on the fraud and the inducement claim.

11 THE COURT: Okay.

12 MR. WILLOUGHBY: And I believe -- I believe those
13 were the two claims, Your Honor, that we will not move
14 forward on.

15 THE COURT: Okay. All right.

16 Okay. Yes, sir. I saw Mr. Johnson.

17 MR. JOHNSON: Well, would you like Mr. Brown to
18 reargue those before I address the remaining?

19 THE COURT: He hadn't argued them yet. It just
20 seems like he has.

21 Okay. All right.

22 MR. BROWN: Your Honor, we would renew our
23 directed verdict motion.

24 We believe that on each remaining cause of action
25 the plaintiffs evidence fails to establish sufficient --

1 present sufficient evidence to establish each of the causes
2 of action to establish liability.

3 In particular, with the breach of contract we
4 believe that the evidence from all of the witnesses,
5 including Mr. Maybank, was that all of the tasks required to
6 be done in the wealth management contract, which is the only
7 contract alleged in the complaint to be at issue, were, in
8 fact, satisfied, and, therefore, we believe that the
9 evidence is that they failed to establish their breach of
10 contract.

11 We would also contend, Your Honor, that the only
12 contract alleged in the complaint with the breach of
13 contract is the Wealth Management Agreement, and that as to
14 BB&T Corporation, a directed verdict is required because
15 they are not a party. There has been no evidence or
16 allegation that they are a party to that contract.

17 We would also contend that all of the claims for
18 breach of contract asserted by the Trust must be dismissed
19 because the Trust is not a party to the only cause of action
20 alleged, which was the Wealth Management Agreement. So we
21 would contend that we are entitled to a directed verdict in
22 that regard.

23 We would also contend that we are entitled to a
24 directed verdict on the breach of fiduciary duty claim.
25 Although there has been testimony that there were fiduciary

relationships in terms of the management of the managed account, there has been no allegation that any action with regard to the managed account was improper and that any duty owed under the managed account was ever breached.

There has also been evidence as a trustee there are fiduciary duties owed, but there has been no evidence whatsoever that any of the duties owed for trust administration to the Trust were ever breached. And without any allegation or evidence of that breach, we are entitled to a directed verdict.

We would additionally contend that as to BB&T Corporation, there has been no evidence whatsoever that a fiduciary duty existed between BB&T Corporation and any party, any plaintiff, and, therefore, we would be entitled to a directed verdict on that basis.

We would also contend, Your Honor, that negligence has been removed.

We also contend that under breach of contract accompanied by fraudulent act, we would be entitled to a directed verdict. The only conduct that they have discussed in terms of fraudulent conduct related to the formation of the contract, not in the breaching. A breach of contract accompanied by fraudulent act requires an act separate and distinct from the breach, which is a fraudulent act, and they have not established that in regard to any conduct by

1 BB&T Asset Management, by BB&T, and definitely not as to
2 BB&T Corporation, to whom they have not established a
3 contract. A contract between the parties so that the action
4 is an essential element and they have not established a
5 contract between BB&T Corporation and any of the plaintiffs

6 They have also not alleged or established a
7 contract to which the Trust would be a party and, therefore,
8 a directed verdict would be required as to the Trust's claim
9 under that theory as well, Your Honor:

10 We would also contend that a directed verdict is
11 required as to the Securities Act claim, and specifically
12 with regard to BB&T Corporation. In order for there to be a
13 Securities Act violation, there must be evidence of offering
14 or a sale of securities. There is no evidence whatsoever
15 that BB&T Corporation offered or sold any securities to
16 either of the plaintiffs. In fact, as to the Trust, there
17 is absolutely no evidence that any defendant offered or sold
18 any securities to the Trust

19 And we would also contend specifically with
20 regards to the Securities Act claim, that the Statute of
21 Repose would bar the claims in this case as to all the
22 defendants. That statute -- that five-year Statute of
23 Repose would bar any violation which occurred more than five
24 years prior to the bringing of the case, and that would
25 involve what the plaintiffs have described as the strategy

1 in this case, the Pre-paid Variable Forward strategy.

2 We would also contend that they have not presented
3 sufficient evidence of any scheme to defraud Mr Maybank
4 with regard to the sale of any securities.

5 We would also contend that as to the Unfair Trade
6 Practices Act, Your Honor, that under the Ward v. Dick Dyar
7 case, any action while there are any transactions related to
8 securities is not subject to the Unfair Trade Practices Act
9 under the regulated industry exception to that provision
10 and, therefore, as to all of the defendants the Unfair Trade
11 Practices Act a directed verdict is required.

12 We also believe that they have not provided
13 sufficient evidence to establish a pattern of unfair trade
14 practices which would support a claim under that, under the
15 merits as well, or a likelihood of repetition of any
16 conduct, even if it were alleged or established.

17 We would also contend that in terms of aiding and
18 abetting a breach of fiduciary duty, they were required to
19 identify a specific duty and an act by a defendant which
20 aided in the breach of that, and they have not presented any
21 testimony of an act aiding and abetting any breach of
22 fiduciary duty by any one of the defendants In particular,
23 they haven't presented any act by BB&T Corporation which
24 affected any fiduciary duty whatsoever

25 We would also contend that they have not presented

1 any breach of a fiduciary duty owed to the Trust, and,
2 therefore, without that they can't establish the aiding and
3 abetting either. But even if they have established a breach
4 of fiduciary duty, they haven't established any specific act
5 taken by one of the other defendants to aid in that breach.

6 The next cause of action is for fraudulent
7 misrepresentation. We would contend that they have not
8 presented a representation which is a falsity. That's a
9 necessary element of false representation.

10 They have also not established that there was a
11 disregard for the truth or intent that the representation be
12 acted on, or ignorance of the falsity, so we believe
13 multiple of the elements of fraud have not been established
14 under the evidence as presented in this case.

15 We also contend that the constructive fraud, the
16 same arguments would apply, Your Honor, and fraud and
17 inducement has been pulled as a negligent misrepresentation.

18 We would also contend that they have not
19 established a specific false representation that was made
20 and damages that flowed from it. And, therefore, the
21 negligent misrepresentation claim is improper.

22 We would contend, Your Honor, that as to the Trust
23 claims for sure, and as many of the other claims, the
24 Statute of Limitations would bar those claims, because the
25 parties were aware of what they contend to be the injury

1 more than three years prior to the assertion of those
2 claims

3 We would further assert the personal jurisdiction
4 has not been established as to BB&T Corporation. The only
5 evidence as to BB&T Corporation whatsoever is a single
6 letter responding to whether an employee can make a
7 transaction in BB&T stocks. There is nothing which
8 specifically avails itself of the laws of South Carolina in
9 doing that. It is a general act of dealing with an employee
10 of a subsidiary dealing in its stock, but that does not
11 necessarily establish that. In fact, the case law that we
12 handed up at summary judgment dealt with a very similar
13 situation where there was a single letter of communication
14 and the court said that was not sufficient to hold a bank
15 holding company subject to personal jurisdiction at the
16 trial stage. They have to take it a step further than just
17 showing a prima facie case of personal jurisdiction. They
18 bear the burden to prove personal jurisdiction. We believe
19 they have failed to do so.

20 We would also agree or assert that as to all of
21 the causes of action by the Trust, that they have not
22 established the duty owed to the Trust and that their sole
23 claims are that there was injury to Mr. Maybank, and,
24 therefore, the Trust is a separate entity can recover
25 damages it suffered for the conduct directed at Mr. Maybank.

1 That is insufficient under the law Under the law they must
2 establish their only legal duty, a separate legal entity
3 duties owed to it which were breached and they have not
4 presented evidence whatsoever to establish legal duties owed
5 to the Trust which were breached which caused the damage
6 that the Trust is now claiming

7 We would also contend that in terms of the
8 causation, they have not established any evidence In fact,
9 conduct by the defendants caused harm to the Trust .

10 We would further contend, Your Honor, that
11 specifically as to the contract claim, they have established
12 no contract with the Trust They have established no
13 representations ever made to the Trust, so that all of the
14 negligent and fraudulent misrepresentation claims fail
15 because they have to establish representations made directly
16 to the Trust and cannot rely upon representations made to
17 third parties to establish those claims-

18 We would also contend, Your Honor, that they have
19 failed to -- both plaintiffs have failed to establish
20 evidence sufficient to support an award of punitive damages
21 Punitive damages must be established by clear and convincing
22 evidence of willful conscious conduct and that simply
23 doesn't exist in this record. In particular, the Trust has
24 established no evidence of any direct contact to it, much
25 less willful conduct to it, and, therefore, punitive damages

1 as to the Trust would be inappropriate.

2 We would also contend that as to Mr. Maybank, the
3 Wealth Management Agreement expressly states that in any
4 action relating out of it, that punitive and consequential
5 damages are barred. That type of bar is appropriate and
6 legal under South Carolina, and, therefore, would prevent
7 consequential and punitive damages, as in this case.

8 Your Honor, we would also contend that the damages
9 plaintiff has asserted are speculative and aren't sufficient
10 to support an award.

11 And if I have missed anything, I further rely upon
12 what we have submitted to the court previously.

13 THE COURT: All right.

14 Mr. Johnson, yes, sir.

15 MR. JOHNSON: May it please the court, just
16 briefly, Your Honor.

17 As Your Honor is aware, the standard to overcome a
18 motion for directed verdict is very low. You are looking
19 for any evidence, all evidence and inferences, which can
20 reasonably be drawn should be drawn in the light most
21 favorable to the nonmoving party.

22 The directed verdict motion at this stage is an
23 improper stage to determine the issues related to
24 credibility. Any resolving of credibility issues should be
25 in our favor in this case. And if the evidence is

1 acceptable to more than one reasonable inference, the motion
2 should be denied as well.

3 Just to start out, on the Statute of Limitations
4 argument, under longstanding South Carolina law, the Brown
5 v. Finger case, which is 240 SC 102, the burden of
6 establishing a bar of Statute of Limitations rests solely
7 upon the party submitting the Statute of Limitations
8 defense. Your Honor, they haven't met their burden on
9 Statute of Limitations. They have elicited no testimony
10 from Mr. Maybank or Jane Maybank regarding when they knew or
11 should have known about these causes of action or suffered
12 damage. Even if Your Honor were to believe that there was a
13 conflicting evidence as to the Statute of Limitations, we
14 would submit, and, again, Brown v. Finger stands for the
15 proposition that conflicting evidence on the issue of
16 Statute of Limitations must be submitted to the jury.

17 Going in the order as I have them, on the breach
18 of contract issue, Your Honor, the elements of that, of the
19 breach of contract, or a binding contract, that breach or
20 unjustifiable failure to perform and damaged as a result
21 The element of a binding contract is unquestionably met here
22 with the Wealth Management Agreement between Mr Maybank,
23 the bank, BB&T Asset Management. We have Ross Walters
24 deposition and trial testimony where he plainly states that
25 the bank did not fulfill the duties and obligations set

1 forth in the Wealth Management Agreement for Mr Maybank and
2 that those obligations were actually delegated to BB&T Asset
3 Management.

4 Mr Maybank's testimony is clear Not all of the
5 obligations by the bank were actually met for him He
6 didn't -- BB&T did not receive Mr. Maybank's permission to
7 delegate the obligations to BB&T Asset Management, as
8 required by the contract, which demonstrates a further
9 breach of the contract

10 Mr. Walters testimony is also that no one told Mr.
11 Maybank that the duties and obligations of the bank would be
12 fulfilled other than as plainly written in the contract

13 Damages suffered by the plaintiff as a direct
14 result and proximate result of the breach, Mr. Maybank hired
15 the bank to do the things that were set forth in the Wealth
16 Management Agreement. Those things were not done and Mr
17 Maybank has suffered damages as a result.

18 Mr. Maybank and the Trust have been harmed by the
19 advice of the bank with respect to the Variable Pre-Paid
20 Forward Contract in the managed account as described by Dr.
21 McCann

22 We would assert that for all of the causes of
23 action, Your Honor, the Trust has at a minimum a third-party
24 beneficiary right to that We think there is evidence in
25 the record during this trial of that. And to the extent

1 that it is not pled, we would move to amend to conform to
2 the evidence presented at trial.

3 With respect generally to BB&T Corporation, 'Your
4 Honor, the general counsel disclosure letter, which you have
5 seen on the screen now twenty times, I'm sure, 'Your Honor,
6 this isn't just a random letter sent to client in South
7 Carolina This is the general counsel for the corporation
8 and they are seeking her approval for Mr. Maybank to enter
9 into the contract As far as the managed account, it
10 plainly states in the letter, Mr. Maybank will receive a
11 cash advance from the pre-paid to create a diversified
12 portfolio She's on notice that it's creating a diversified
13 portfolio and she approves of it, specifically says this
14 approval by general counsel, is conditioned on Mr. Maybank
15 not buying further shares of BB&T stock

16 We would submit that we have clearly met the
17 evidence necessary to survive a directed verdict motion as
18 to the breach of contract

19 With respect to the breach of fiduciary duty, the
20 elements are existence of a fiduciary relationship and the
21 breach of the duty imposed

22 With respect to Mr. Maybank, the bank owed Mr
23 Maybank a fiduciary duty in two respects They undertook
24 the responsibilities of being the corporate trustee of the
25 Family Trust on the sale of Southeastern to BB&T in 2001.

1 The trustee is a fiduciary under the laws of this state, as
2 admitted David Fisher in his deposition testimony

3 They also undertook an agency agreement with Mr.
4 Maybank to manage his investment assets under the Wealth
5 Management Agreement, which is also a fiduciary relationship
6 established by the testimony of Professor Freeman.

7 The breach of the duty imposed with respect to Mr.
8 Maybank, Professor Freeman's testimony was clear that BB&T's
9 actions to their fiduciary, Mr. Maybank, did not meet the
10 standards of care imposed

11 Your Honor, with respect to the Trust, the issue
12 here is that BB&T Bank is wearing two hats. It's a clear
13 conflict of interest. They owed a fiduciary duty to the
14 Trust and they owed a fiduciary duty to Mr. Maybank. The
15 problem is because of that conflict of interest they can't
16 take a position with respect to one, to Mr. Maybank or the
17 Trust, that would negatively impact the other. We submit
18 that the advice to Mr. Maybank, to their fiduciary Mr.
19 Maybank, negatively affected the Trust, which violated that
20 conflict of interest in wearing the dual hats

21 With respect to the breach of contract accompanied
22 by a fraudulent act, Your Honor --

23 THE COURT. What's the fraudulent act?

24 MR. JOHNSON Your Honor, in two respects

25 Fraudulent -- it requires fraudulent intent

1 relating to the breach and then fraudulent act accompanying
2 the breach.

3 Your Honor, Ross Walters testimony is clear that
4 everyone knew at the time the contract was presented to Mr.
5 Maybank that it was not going to be fulfilled in the manner
6 that it was written. Accordingly, it could be inferred that
7 BB&T did not intend to fulfill that contract as written.
8 The fraudulent act accompanying the breach is not telling
9 Mr Maybank that it was going to be fulfilled, other than as
10 written. And they illegally assigned and delegated the
11 duties to BB&T Asset Management without telling or giving
12 Mr Maybank's permission in writing, as required by the
13 contract.

14 You have fraudulent intent in presenting it to
15 him. You have a fraudulent act by doing directly what the
16 contract says you cannot do, and that's assign to another
17 entity without his written permission.

18 On the Securities Act claim, Your Honor, the
19 Statute of Repose we submit does not apply in this case with
20 respect to the 2006 pre-paid.

21 Dr. McCann's testimony, it's clear that the
22 embedded costs of first pre-paid, the puts and calls within
23 that pre-paid, still had value at the time that the rollover
24 was consummated in January of 2009.

25 Nate Deal's testimony yesterday confirmed this

1 fact. He said at the time of the rollover, the first
2 pre-paid still had value with it, and that when you disposed
3 of that contract early, that was a disposition for value of
4 the security.

5 Your Honor, we would submit that that qualifies
6 under South Carolina Code 35-1-102, Subsection 26, which is
7 the definition of a sale under the Securities Act. It's a
8 disposition for value, and we would submit that there is
9 ample evidence by both Dr. McCann and Nate Deal on that
10 fact.

11 Also, Your Honor, we would submit that when BB&T
12 refunded the fees to Mr. Maybank, that that was a partial
13 payment under South Carolina Code 15-3-130. That Code
14 states that suits on causes of action are safe from the bar
15 of Statute of Limitations by partial payment or written
16 acknowledgement. We would submit that when they refunded
17 the fees to Mr. Maybank, that that was an abatement under that
18 statute.

19 And, finally, we would submit that Mr. Maybank
20 approached BB&T on two occasions with a tendered settlement
21 offer with respect to the pre-paid. The testimony has been
22 clear in this case that Mr. Maybank approached BB&T directly
23 following the 2009 rollover and asked them to undo the
24 transaction. The pre-paid, Your Honor, is difficult to
25 unwind. It is -- when Mr. Maybank went to them and asked

1 them to do that, that is the best really you can do on an
2 tender for a Pre-Paid Variable Forward.

3 Later in 2010 he also approached Ross Walters and
4 said "you know what guys? I think you have done a bad job
5 on this, this whole deal, and I'm asking you to make me
6 whole "

7 Both of those, we would submit, were tender offers
8 and they were done within five years of the August 2006 sale
9 of the pre-paid, which qualifies Mr. Maybank here and meets
10 the Statute of Repose has no effect.

11 Your Honor, with respect to the merits of our
12 Securities Act claims, we submit three claims. 35-1-509(B).
13 Your Honor, BB&T recommended and sold Mr. Maybank a pre-paid
14 in 2006. And also in 2009, under a false representation
15 that they were authorized to do so, they were not
16 registered, Your Honor, as required and charging
17 broker-dealer fees for that. They have since refunded the
18 fees, which we would submit is a clear admission on that
19 point

20 The BB&T Asset Management employees were untrained
21 and falsely represented that the product was appropriate and
22 suitable for Mr Maybank That's clear from Professor
23 Freeman's testimony that that was inaccurate. They did not
24 fully explain the costs and the fees of the product, also
25 supported by Professor Freeman and Dr McCann's testimony.

1 And, Your Honor, general counsel disclosure letter
2 come back to it again, falsely represents that the product
3 was researched specifically for Mr. Maybank And what we
4 know now is that it was just a form letter.

5 Your Honor, that disclosure letter set out four
6 specific things. It said that doing a pre-paid would reduce
7 the risks to Mr. Maybank's concentrated position in BB&T
8 stock

9 It would also raise cash for a diversified
10 portfolio. It said protect -- it didn't say it might
11 protect. It said it would protect Mr. Maybank from an
12 extraordinary reduction in the value of his investment
13 portfolio and net worth

14 Third, it said it would help him achieve important
15 diversification goals that they had discussed throughout the
16 financial planning process.

17 And, fourth, that the Variable Pre-Paid was not
18 speculative.

19 Your Honor, all of those represent to Mr. Maybank,
20 that an analysis had been done specific to him. What we now
21 know, it wasn't. It was a form letter that they pulled out
22 of the drawer and handed to him because he was an employee
23 of BB&T.

24 We would submit that under 509(b) we have
25 satisfied that.

1 And, Your Honor, to cut to the chase on the
2 fraudulent misrepresentation, the presentation to Mr.
3 Maybank of that disclosure letter is the fraudulent
4 misrepresentation. It also supports our constructive fraud.
5 At a minimum it supports our negligent misrepresentation to
6 Mr. Maybank that those things had been done for him, when,
7 in fact, they were not.

8 Coming back to the Securities Act claim under
9 509(d), they were not registered as a broker-dealer. They
10 charged transaction-based fees, which is the hallmark of
11 broker-dealers. That's been clearly put forward by
12 Professor Freeman's testimony.

13 David Fisher's testimony regarding the SEC audit
14 is telling. What he said was that SEC was critical, called
15 it broker-esque, called it outside the bounds, Your Honor.
16 We would submit that that's sufficient to get past this
17 directed verdict on 509(d).

18 With respect to (f), Your Honor, charging the
19 advisory fee without being properly registered is employing
20 an device or scheme to defraud or engage in a course of
21 business that operates as a fraud or deceit on its
22 customers. Your Honor, Professor Freeman's testimony is
23 also that it was unfair and deceptive.

24 Quickly on the --

25 THE COURT: Did you cover everything?

1 MR JOHNSON: I have not, Your Honor. I have not
2 covered the Unfair Trade Practices Act.

3 THE COURT: Oh, yeah. Professor Freeman said it
4 was an unfair and deceptive act.

5 MR JOHNSON: He did, Your Honor. And --

6 THE COURT: There is evidence in the record,
7 right?

8 MR. JOHNSON: There is.

9 THE COURT: All right.

10 MR JOHNSON: Your Honor, I briefly covered the
11 fraudulent misrepresentation, but the presentation of that
12 letter, Mr. Maybank relied upon it. They should have known
13 that it was a material misrepresentation to him that those
14 acts -- that those things that they said in the letter had
15 not been done specific to Mr. Maybank. It's clear he
16 received a copy of that letter and acted upon it. He relied
17 upon the representations that they made to him, and he had a
18 right to. He had a right to rely upon the truth that was
19 put in there and advanced by BB&T through their own general
20 counsel, and he has been damaged as a result.

21 Your Honor, if I missed anything, if they would
22 bring it to my attention, but I think I have covered all of
23 the motions.

24 MR BROWN: Your Honor, very briefly.

25 THE COURT: All right.

1 MR. BROWN: In his statement as to the contract
2 claims, he referenced a single contract to which the Trust
3 is not a party and to which the BB&T Corporation is not a
4 party. We believe we are entitled to a directed verdict at
5 a minimum as to those two entities

6 He also raised an argument of a third-party
7 beneficiary as to the Trust. That has not been pled. It's
8 not been established. And, in fact, when the issue came up
9 about things beyond the pleadings as regards to the Trust, I
10 expressly objected to that under Rule 15. When it has not
11 been tried by consent or by implied or direct consent, it's
12 improper to allow it, and we would say that you cannot now
13 argue that a third-party beneficiary, when there has been no
14 evidence and we have objected pursuant to Rule 13.2 and
15 15(b) throughout the trial to that evidence -

16 We would also contend that on the fraudulent act
17 claim, the fraudulent act he said was, in fact, the act of
18 breach. And the law of breach of contract accompanied by
19 fraudulent act requires a separate and distinct act separate
20 from the act of breach. And the particular thing they said
21 was that the act of breach was not doing what the contract
22 required them to do. That is the breach. That's not a
23 separate act or fraudulent act.

24 We would contend that the statute of Repose does
25 apply. The act that they have said all along was done wrong

1 was the entering into the pre-paid. That would be barred by
2 the Statute of Repose, Your Honor.

3 I would contend, Your Honor, that also that there
4 has been no evidence whatsoever to get around the unfair
5 trade practices regulated industry provision

6 THE COURT: Okay.

7 MR. JOHNSON: Briefly, Your Honor, just to --

8 THE COURT: Yeah. What?

9 MR. JOHNSON: On the point of the fraudulent act
10 and the breach, if I was not clear, the fraudulent act that
11 we are alleging is that they, assigning and delegating the
12 duties under the contract, without telling Mr. Maybank, was
13 the fraudulent act

14 With respect to what Mr. Brown just raised on the
15 Unfair Trade Practices Act, Your Honor, South Carolina Code
16 39-5-40 clearly states that they have the burden of proving
17 that an exemption from the Unfair Trade Practices Act
18 applies. Your Honor, they have put in no evidence
19 whatsoever that an exemption applies. In fact, Robert
20 Thorne, their securities expert, when asked if this was a
21 security said "I haven't been hired to provide that
22 testimony"

23 THE COURT: Who was the last guy that testified?

24 MR. BROWN: Mr. Tulman

25 THE COURT: Well, he said that they were a

1 registered investment advisor.

2 MR. BROWN. Yes, Your Honor

3 THE COURT. Is that not a regulated industry?

4 MR. JOHNSON. Your Honor, our two causes of action
5 that we are alleging on the Unfair Trade Practice Act are
6 the presentation of the contract to Mr. Maybank when they
7 knew that they could not and did not -- would not fulfill
8 the contract.

9 And the second part is the presentation of that
10 general counsel disclosure letter, which clearly represented
11 that they were doing this, and it was a form letter.
12 Professor Freeman's testimony is clear that it was unfair
13 and deceptive.

14 THE COURT. Okay.

15 MR. WILLOUGHBY. Your Honor, there is one
16 additional piece of evidence that -- I know It's well
17 done

18 In addition to all of that, there are -- the Asset
19 Management is an RA, but not the bank. And Asset Management
20 we contend needed a securities -- a different registration
21 than they had. And by not securing the additional
22 registration that they needed to do this transaction, they,
23 in effect, did not have themselves regulated as they should
24 have been regulated, and, therefore, they have got two
25 violations going on. One is the Securities Act and the

1 other one is the Unfair Trade Practices Act. If they --

2 THE COURT: They ought to be worried about the
3 regulatory agency that they -- you know, that's -- I believe
4 that the regulated industry -- it survives. I'm going to
5 let you argue it. We are sending it to the uncle, okay?
6 Just let the jury figure it out.

7 You all are talking about one sort of act and have
8 cut it into so many pieces, I don't know how the jury can
9 put it back together, but I'm going to let them make that
10 decision. And then if I'm wrong about that, smarter people
11 in a higher court will fix it.

12 What about -- you know, this jury charge is going
13 to be exceedingly painful for everybody. I'm trying to
14 cobble something together up here.

15 The verdict form is going to be critical in this
16 case. And, you know, I'm looking at the two, the proposed
17 verdict form from the defense seems very appropo in this
18 matter. It lists out each individual party and each
19 individual claim, although it's going to have to be fixed
20 because there are two claims that are gone.

21 MR. BROWN. We have provided it to your clerk.

22 THE COURT: She knows how to fix it. I don't.

23 Yeah, do you want to talk about this verdict form?

24 MR. WILLOUGHBY. Your Honor, I would

25 May I inquire of the court the idea of let's

1 releasing the jury to go home and let's --

2 THE COURT Do you all just want to go ahead and
3 do your arguments and then we will charge and deliberate
4 tomorrow?

5 MR. WILLOUGHBY I would prefer to argue the first
6 thing in the morning, and let's get the jury verdict form
7 and the judge's charges complete this afternoon, so we will
8 know what those are when we are doing our argument, argue
9 the first thing

10 THE COURT You know, I would love to get the
11 arguments done, but that makes sense. I mean, how can I --
12 I just have been trying to do it during the trial and it's
13 very difficult to do.

14 MR. KRISTINIK Whatever you would like. Whatever
15 your preference is, I'm ready to argue right now. Whatever
16 the court prefers.

17 THE COURT: Do you want to let him argue and then
18 you argue tomorrow morning? Is that what you --

19 MR. WILLOUGHBY We can do it that way, Your
20 Honor.

21 THE COURT I do -- I mean, I would love to have
22 it over with, and I'm sure you all would too, but I think it
23 does make better sense to sort of do it, argue and charge at
24 the same time. They get the arguments fresh in their mind
25 when they hear the law. I don't know how much -- as you all

1 know, I don't -- there is -- the complexity of this is going
2 to -- is mind boggling and I don't think -- I mean, I
3 think -- well, I don't know I don't know

4 But, yeah, let's -- let's bring them in and --

5 MR. BROWN: Your Honor, just --

6 THE COURT: Yeah, hang on.

7 MR. BROWN: Just for the record, I'm not sure that
8 that you ever formally made a ruling on our directed verdict
9 on the record, although you said I'm going to let it go when
10 you were talking about that --

11 THE COURT: Well --

12 MR. BROWN: So just to make sure that it's clear,
13 I think we have to have a ruling on the record --

14 THE COURT: Yes.

15 MR. BROWN: -- in order to preserve our --

16 THE COURT: Okay

17 MR. BROWN: -- issues.

18 THE COURT: You lose. Mr. Johnson wins. Uncle.

19 Okay.

20 Does that make it up for all the other ones?

21 MR. JOHNSON: It does, Your Honor.

22 THE COURT: Okay. And I don't mean to be glib,
23 but I do think that there is a -- there is evidence or
24 inference from the evidence in the light most favorable to
25 the nonmoving party.

1 MR BROWN And technically, Your Honor, they also
2 moved to amend their complaint; to which we objected during
3 the trial I believe it's improper and I think we have to
4 have a ruling on that.

5 THE COURT: Yeah, let's get rid of them and let me
6 think about that first.

7 (The following takes place in the presence of the
8 jury panel)

9 THE COURT: Let me see you, just one
10 representative.

11 (Whereupon, the lawyers approached the bench for
12 an off-the-record discussion)

13 THE COURT. All right, warriors, we are -- if you
14 remember my opening comments to you, I broke the trial into
15 five parts. Does anybody remember that? And the first
16 part, opening statements; second part, presentation of the
17 testimony and the evidence. Well, we have completed the
18 first two parts of the trial. So what's left is the third
19 part, which would be the closing arguments of the attorneys.
20 The fourth part will be my charge to you on what the law is
21 And the fifth part will be when you all deliberate the case,
22 okay, and resolve this dispute. So that's where we are

23 And it's three o'clock, and I will tell you, I
24 need -- this is on me. The lawyers are ready to go. I need
25 some time to get the charge on the law ready, so what I'm

1 going to do, and I apologize it doesn't work out as a smooth
2 operating machine and we can't just keep right on rolling
3 but -- so I'm going to break for the day, because I need to
4 get these charges correct, and -- and so I apologize to you.
5 It's my fault, but I think in the long run it would work out
6 better so it won't be any confusion about what the law is.
7 So we are going to break.

8 I ask you all to be back -- is nine o'clock too
9 early? Okay. We will see you at nine o'clock and then we
10 will do the arguments and the charge and then this case
11 belongs to you all. Okay.

12 Y'all have a great night. See you tomorrow
13 Don't talk about it. You all know that.

14 (The following takes place outside the presence of
15 the jury panel)

16 THE COURT. All right. Mr. Brown, I'm going to
17 allow him to amend the pleadings, even though, you know, I
18 have read Rule 15(b), you know, and if evidence is objected
19 to at trial on the grounds not within the issues raised in
20 the pleadings, the court should freely allow the -- I'm not
21 reading it directly, but to allow it. So subject to your
22 objection, I'm going to allow it.

23 MR. BROWN. Just for the record, we would note
24 that the rule also specifically states that time should be
25 allowed for the parties to address that issue. They raised

1 MR BROWN Your Honor, we would agree with what
2 you stated was a proper statement of the law.

3 THE COURT: I don't know how many times I'm --
4 well, I'll think about it. I am not going to be ad nauseam
5 with that.

6 Okay. What else?

7 MR. WILLOUGHBY. Your Honor?

8 THE COURT. I know you all submitted a whole bunch
9 of other stuff. Well, other than damages, actual damages,
10 and --

11 MR. WILLOUGHBY. Punitive.

12 THE COURT. -- punitive damages, what else?

13 And actual damages is very simple. Make them
14 whole. You know, standard actual damages stuff.

15 MR. WILLOUGHBY. That's right.

16 Your Honor, the only thing, when I looked at their
17 charge on the Securities Act claims --

18 THE COURT. Yeah.

19 MR. WILLOUGHBY. -- they have references to
20 screener, which is not the law in South Carolina, so we
21 would certainly object to their --

22 THE COURT. I don't believe that's in there.

23 MR. WILLOUGHBY. It was in the copy that --

24 THE COURT. Well, I know, and we are --

25 MR. WILLOUGHBY. Okay. As long as it's not in.

1 your charge, Your Honor.

2 THE COURT: Well, my charge is evolving.

3 MR. BROWN: Your Honor, we would like -- we
4 believe what we submitted is the proper statement of the
5 law, but as to what they asserted, one of the things they
6 asserted was a separate damage provision within the
7 securities provision. We don't believe that would be
8 appropriate, and particularly in their damage provision in
9 their securities charges they specifically state that the
10 jury should award interest. As we raised previously in the
11 case, we believe that interest is an issue of law for the
12 court to apply, and a charge that the jury should apply
13 interest would be inappropriate.

14 THE COURT: Okay

15 MR. WILLOUGHBY: Well, Your Honor, under the
16 Securities Act it absolutely is submitted I think --

17 MR. BROWN: Your Honor, our position is to the
18 extent that it's permitted, that under the law it's an issue
19 for the judge to apply, not an issue for the jury. The jury
20 is not in the position to apply the facts to determine the
21 appropriate interest rate and apply that interest. That's
22 an issue for the court. Just as if there is an award of

23 attorneys fees, that's for the court, the same principle

24 MR. WILLOUGHBY: We would agree on -- we would
25 agree on -- we would agree on attorneys fees, but as to the

1 Securities Act, I think the trier of fact is able to get
2 evidence related to interest itself. That's one of the
3 statutory provisions, and we would certainly request the
4 court to charge it and permit the jury to receive that
5 information.

6 THE COURT Well, this is evolving, so let me read
7 to you what we have got so far.

8 And I tell you this, I think it would be
9 consistent with my rulings throughout the case, I'm not
10 going to submit the question of interest to the jury for
11 their consideration. That would be again a matter for the
12 court

13 Here we go. "Plaintiff next claims the defendants
14 violated the Securities Act, Section 35-1-501 and 509

15 To do this the plaintiffs must establish that the
16 defendants sold a security in violation of the South
17 Carolina Securities Act

18 The first way that the plaintiffs claim the
19 defendants violated the Securities Act is by engaging in the
20 business of effecting transactions in securities for people
21 or companies other than the defendants themselves without
22 being registered as a broker-dealer. The Act provides that
23 a person acting as a broker-dealer or agent that sells or
24 buys a security without registering as a broker-dealer is
25 liable to the customer. A broker-dealer is defined as a

1 MR. WILLOUGHBY Well, Your Honor, we -- I would
2 say again that we acknowledge that they are registered as an
3 RIA We just believe that that is inappropriate
4 registration for what they did and --

5 THE COURT Well, I know, but that -- and
6 that's -- that's a -- that's your argument.

7 MR. WILLOUGHBY: It's a dispute, no question about
8 it

9 THE COURT And the jury probably I thought ought
10 to -- I'm sure they are dying to know exactly what the
11 General Assembly says an investment advisor is.

12 I'll charge the first paragraph and -- okay,
13 All right What else that we have not spoken of?

14 MR. WILLOUGHBY: We want to talk about the jury
15 verdict form, Your Honor.

16 THE COURT. Okay. Well, are there any other
17 charges before we -- because y'all submitted a whole bunch
18 of stuff, so I just want to make sure that we are good on
19 that

20 MR. BROWN. Your Honor, the only other issue that
21 we already raised is within the securities charge you
22 charged the damages provision You took out the interest
23 statement We think that damages provision is more
24 confusing than helpful and that some of it is just a normal
25 damage result that you --

1 THE COURT Why don't I just give him the actual
2 damages one time?

3 MR. WILLOUGHBY. We have no objection to that,
4 Your Honor.

5 THE COURT All right Anything else that you can
6 think of?

7 (No response).

8 THE COURT Apparently not, but --

9 MR. BANNISTER. Whoever did their verdict form
10 should be pretty proud.

11 THE COURT. That's good, isn't it?

12 MR. BANNISTER. Number 14, I mean --

13 THE COURT. Wait a minute

14 All right, yeah.

15 MR. BANNISTER. On each of their listed matrixes,
16 for the defendants and plaintiffs, we would prefer that you
17 say breach of contract, we, the jury, find as to the
18 plaintiff's claim for breach of contract as follows:
19 instead of have they met their burden of proof, sort of a
20 "recharge"

21 THE COURT. Yeah, I mean, I guess that's -- well,
22 we don't. We, the jury, find as follows: I believe
23 that's -- that's fair and that's how I normally always do
24 it

25 What about -- I hadn't really looked at this.

1 MR. BANNISTER Let me say this - The verdict
2 form -- you are going to have the jury all trying to figure
3 out what all these things are. It seems easier to have a
4 simplistic verdict form that says we find for them or we
5 don't. I mean, this is really -- if you boil it down, it's
6 a fairly simple case.

7 THE COURT. Well, you got to do it --

8 MR. BANNISTER Either they find that they are
9 entitled to damages, or they don't, and there is a cause of
10 action that entitles them to damages, or they don't.

11 THE COURT. Well, you got to do it as to each
12 plaintiff and as to each claim and as to each defendant. I
13 mean, how else -- you know, I mean that's -- I think in
14 these -- how else would you suggest we do it? We can't just
15 have we find for the plaintiffs on the breach of contract.
16 I mean --

17 MR. BANNISTER Well, as you -- as you --

18 THE COURT. Preserve the issue for --

19 MR. BANNISTER Well, I was trying to get around
20 that.

21 Well, it's just a general verdict for punitive
22 damages and move on.

23 Your Honor, if you do that, we would like you to
24 put what those damages would be as it attaches to the cause
25 of action, because you may have them awarding -- we want to

1 include something that allows you to say what the punitive
2 damages --

3 (Off the record)

4 (Back on the record)

5 THE COURT Back on the record

6 MR. WILLOUGHBY: The form we tendered to Your
7 Honor does blend them all together. If you will look at
8 item section 2 as to the claims for both claims against all
9 defendants. Now, no question it just says tell us what your
10 verdict is, and we think that's simple. We think that's
11 clear.

12 If they -- if they don't -- if they agree that
13 there should be a separation, then they can go to section 3
14 and 4. The instructions tells them to do so, and then find
15 an individual claim as it relates to Mr. Maybank, an
16 individual claim as it relates to the Trust. We believe
17 that that is a simple verdict form. It gets the jury
18 focused on the claims.

19 If they find for the defendant, they mark the box
20 and the case is over. If they --

21 THE COURT: Well, yeah. The problem is if they
22 find for the plaintiff, we don't know what cause of action
23 they found on.

24 MR. BROWN. Your Honor, we would contend that
25 their first part of theirs is actually legally incorrect,

1 because it aggregates the conduct of the defendants, which
2 is improper legally. They can't have a verdict form
3 rendered against BB&T Corporation for conduct by BB&T Bank.
4 They are separate legal entities, and by aggregating them
5 they are asking for a legal error.

6 We think our form that specifically identifies
7 which the claims are and against which party they are
8 finding is a proper analysis

9 THE COURT Y'all don't disagree that you are only
10 entitled to one amount?

11 MR. WILLOUGHBY Sure. I mean, we -- we
12 wouldn't -- we wouldn't add -- we wouldn't add them up, Your
13 Honor, and that's the reason we believe that --

14 THE COURT But you can't distinguish them in your
15 form which cause of action they found for

16 MR. WILLOUGHBY. And --

17 THE COURT: And which means if -- let's say you
18 ring the bell and we use your verdict form. How are they on
19 appeal going to distinguish which cause of action?

20 They think it limits their ability to contest on
21 appeal the legality of the verdict.

22 MR. WILLOUGHBY Well, I think, Your Honor --

23 THE COURT: You are saying that they can find on
24 it one, they can find it --

25 MR. WILLOUGHBY That's right If they find it on

1 any If they find damages or if they find that we have
2 prevailed on any cause of action, and obviously they are
3 going to be making the decisions what are the damages, so
4 it's actual damages for Mr. Maybank; what are the damages
5 for the Trust, and they separate that out So you will know
6 that they are finding for Mr. Maybank. You will know that
7 they are finding for the Trust. And then if you find have
8 they made claims for clear and convincing, how much for Mr.
9 Maybank, how much for the Family Trust and against which
10 defendants.

11 So if, for example, they would have to write
12 out -- if, for example, they find that BB&T Corporation
13 didn't participate in the events, then there would be --
14 there would be no punitive damages awarded against them.

15 So I think this does everything.

16 If they find on causes of action that gives
17 punitive damages, the jury can then make that determination
18 and we would know then that they found a liability We know
19 that they would find punitive damages, and they may not
20 They may only decide -- they may again find for the
21 defendants. They may find for the plaintiffs actual
22 damages

23 THE COURT: Well, why wouldn't the -- on actual
24 damages the defendants are entitled to know.

25 MR. WILLOUGHBY: Well, we could put -- we could

1 then put a line, Your Honor, in here that would say against
2 which defendants. You could put what amount of damage do
3 you find necessary to make plaintiff Frank Maybank whole.
4 If so, against which defendants.

5 The same with the Trust.

6 It would be much simpler, kind of like we have for
7 the punitive damages. You could do a section there.

8 I don't think the jury needs to have to wade
9 through all of this information multiple times. This is a
10 nice simple jury form and it works.

11 MR. BROWN: Your Honor --

12 MR. WILLOUGHBY: We can -- I can get it to you
13 We can update it, get it to you electronically, and we can
14 make the changes at Your Honor's suggesting, but this is a
15 nice clear simple form.

16 MR. BROWN: Your Honor, we would disagree. It
17 invites jurors to award damages for which they may not be
18 entitled to as the particular parties by requiring the
19 jurors to say, okay, these are the causes of action. You
20 tell us against whom you found, if you find them. It makes
21 it a clear record and allows the jurors to take an action
22 which is within the law, instead of being blindly presented
23 with potentially awarding punitive damages on a thing for
24 which punitive damages aren't even supportable.

25 THE COURT: Well, he thinks he's got that solved,

1. but I --

2. MR. BROWN. I would disagree, Your Honor

3. THE COURT: We will have to make some adjustments
4. to -- we are not going to have presented after evidence
5. Just we, the jury, find, bam.

6. MR. BROWN. We are fine with that, Your Honor.

7. THE COURT: This way we know that they will fully
8. consider each cause of action. We will have their -- there
9. won't be any question.

10. You got that?

11. Okay, anything else?

12. MR. BANNISTER: Depending on which way you choose
13. to go, number 14 asks them to list the numbers which they
14. would like to use. I haven't looked at the numbers, and
15. they will obviously change, but I don't -- I think if they
16. answered yes to any of those questions, they don't have to
17. then turn around and go back and list out what numbers they
18. are saying yes to. Just if you have answered yes, are we
19. entitled to punitive damages against the three defendants

20. THE COURT: I'm sorry, I'm --

21. MR. BANNISTER: Number 14 asked them to list which
22. numbers apply to which defendants as it relates to punitive
23. damages. The jury is not going to have to do that. If they
24. answered yes to the questions that would entitle the
25. plaintiff to punitives, then just how much is that.

1 THE COURT. Well, they need to --

2 So 2, 3, 4, 7, 8, 9, 10, or 11, are the those the
3 ones that --

4 MR. BROWN. Those are the ones to which they have
5 alleged punitive damages, although they have now withdrawn 3
6 and 10. That's negligence and the fraudulent inducement.

7 THE COURT. Okay. So those numbers will have to
8 change anyway.

9 MR. BANNISTER. I'm just saying the jury doesn't
10 have to go back and list the numbers.

11 THE COURT. Yeah, you want -- I think -- I
12 think --

13 MR. BANNISTER. If they answered yes --

14 THE COURT. Where do you see -- they are just
15 saying if you answered yes to this --

16 MR. BANNISTER. If so, indicate the number of the
17 question to which you responded yes in the yes blank below
18 for the respective defendants.

19 I mean, if they found them all that, they would
20 have to put 2, 3, 4, 7, 8, 9, 10, 11.

21 MR. BROWN. We are fine. If they marked yes
22 above, we are fine they just put a check. We can twink
23 that.

24 THE COURT. Okay. Can y'all twink that?

25 MR. BROWN. We will twink that, Your Honor.

1 THE COURT: Just basically eliminate the
2 identification, you know, however that is.

3 MR. BROWN: We can twink that and e-mail it
4 around.

5 THE COURT: All right. You know, just put
6 negligent misrepresentation. We the jury find.

7 MR. BROWN: Right

8 MR. BANNISTER: The last thing, on line 15, we
9 would like a bigger space for the number to go.

10 THE COURT: Okay. All right. So can y'all do
11 that?

12 MR. BROWN: Yes, Your Honor, we will make these
13 edits and e-mail it to the court and to plaintiffs counsel
14 tonight

15 THE COURT: Okay

16 MR. WILLOUGHBY: Your Honor, I might add on
17 question 15, if you answered yes to question 14, what
18 amount, if any, of punitive damages do you--

19 THE COURT: Award.

20 MR. WILLOUGHBY -- award.

21 THE COURT: Yeah.

22 MR. WILLOUGHBY: Not proven

23 THE COURT: You are going to have to --

24 MR. BROWN: We'll change that language

25 THE COURT: All right. Anything else?

1 MR. BROWN No, Your Honor.

2 THE COURT: Okay. Anything from the plaintiffs?

3 MR. WILLOUGHBY: No, Your Honor. Thank you.

4 THE COURT: All right. Thank you all. Have a
5 good night.

6 (Whereupon, proceedings were recessed to June 27,

7 2014).

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COURTS EXHIBITS			
	NO.	DESCRIPTION	ID. EV
1	1	JURY NOTE 944	
2	2	VIDEOTAPED DEPOSITION OF RALPH BORELLO & VIDEOTAPE DESIGNATIONS	1249
3	3	DEPOSITION OF RALPH BORELLO	1249
4	4	VIDEOTAPED DEPOSITION OF DAVID FISHER AND VIDEOTAPE DESIGNATIONS	1249
5	5	DEPOSITION OF DAVID FISHER	1249
6	6	VIDEOTAPED DEPOSITION OF ROSS WALTERS AND VIDEOTAPE DESIGNATIONS	1249
7	7	DEPOSITION OF ROSS WALTERS	1249
8	8	JURY NOTE	1249
9	9	JURY NOTE	1374
10	10	DEPOSITION OF TRACY MEYERS	1616
11	11	DEPOSITION OF CRAIG MCCANN	1616
12	12	JURY NOTE	1616
13	13	VIDEOTAPED DEPOSITION OF SHAWN GIBSON AND VIDEOTAPE DESIGNATIONS	2029
14	14	DEPOSITION OF SHAWN GIBSON	2029
15	15	JURY NOTE	2029
16	16	JURY INSTRUCTIONS	2096
17	17	JURY NOTE	2029
18	18	JURY NOTE	2096
19	19	DEPOSITION OF KEITH GRAY	2096

1
2 (PROCEEDINGS, JUNE 27, 2014)

3 THE COURT How is everybody?

4 MR. KRISTINIK: Well.

5 MR. WILLOUGHBY: Good, Your Honor

6 THE COURT: As is my want, I went and got a cup of
7 coffee this morning at the Coffee Underground, which is on
8 the corner of Main and Coffee, and I left, was standing on
9 the corner talking to a friend when I felt a tap on my
10 shoulder and Mr Okwuazi, juror number 94, was standing
11 behind me He said he needed to talk to me I said I
12 couldn't really do that, and he put his hand up beside his
13 mouth and said "I lost my job." So I just wanted to put
14 that on the record. I told him that I would have to talk
15 with him later. So I want you all to be aware of that and
16 aware of sacrifices jurors make. We will try and see if we
17 can't help him out later.

18 All right Are you all ready to go?

19 We did the verdict form We made a couple of
20 changes to the much improved verdict form, which was already
21 very good, and then refined by Mr. Johnson, and do you all
22 want to take a look at that? Pass that down

23 MR. WILLOUGHBY. Your Honor, while we are looking
24 at it, I plan to review the verdict form with the jury in my
25 closing.

1 THE COURT All right.

2 MR. WILLOUGHBY: And I don't know if it's the
3 exact version. I'll tell them that whatever I --

4 THE COURT It's pretty close to what he sent, but
5 we do ask them to -- basically what we did was took out some
6 language so it didn't appear that any -- you know, it's
7 coming -- the law is coming to them in the charge and --

8 MR. WILLOUGHBY. That's right

9 THE COURT But the -- we are requiring numerical
10 and written computations -- or verdicts, if they give one

11 MR. BROWN: Your Honor, we are fine with the
12 changes

13 The one thing that we did note, the purpose of the
14 language in the first part was just that Mr. Johnson asked
15 to be taken out was just so that the jurors understood that
16 they need to answer questions 1 through 9 before they move
17 on to 10, 11, and 12.

18 THE COURT: Okay.

19 MR. BROWN It wasn't really to say you have to do
20 it specifically in those orders, but 1 through 9 have to be
21 answered before anything further

22 THE COURT Okay. I tell you what we will do We
23 will add a sentence, and you get to work on that right now,
24 which says "you must consider questions 1 through 9 before
25 you move to question 10."

1 MR. BROWN. And we will --

2 THE COURT Is that agreeable? I mean, that is
3 the correct, and that is the --

4 MR. WILLOUGHBY That's not a problem, Your Honor.

5 THE COURT Okay. Thank you very much.

6 MR. JOHNSON. Your Honor, one other brief issue,
7 that the parties were unable to agree on the stipulation of
8 fact relating to the broker-dealer, so the plaintiffs are
9 prepared to proceed on the oral representation that was made
10 on the record, that during the relevant period of this case,
11 neither BB&T Bank nor BB&T Asset Management were registered
12 as broker-dealers.

13 THE COURT Isn't that correct?

14 MR. BROWN Well, Your Honor, the issue that
15 caused the problems, we believe that this is an accurate
16 statement of what stipulation was, where we said that BB&T
17 Bank stipulates that it's not a registered broker-dealer and
18 that BB&T Asset Management stipulates that it is not a
19 registered broker-dealer, but that BB&T Asset Management,
20 the stipulation that it was a registered investment advisor
21 We believe that's the scope of what was agreed upon on the
22 record.

23 When we got the first proposal, it included the
24 time frames within which people were involved and with whom
25 they registered or with whom they didn't register We said

1 that if we are going to add all that, we need to make the
2 whole picture clear. They objected to those points.

3 We think that stipulation on the record is clear,
4 BB&T Asset Management is not a broker-dealer, but is a
5 registered --

6 THE COURT: Let me -- I think what he is saying is
7 correct.

8 MR. JOHNSON: Well, Your Honor --

9 THE COURT: And you all can argue the facts about
10 dates and times, but the court -- and I'll read this to
11 them.

12 MR. BROWN: This is what we believe to be --

13 THE COURT: Well, let's see.

14 MR. JOHNSON: Your Honor, the issue is they
15 request the stipulation be that they are currently not
16 registered, and we would submit that what is relevant here
17 is that during the period at issue in this case --

18 THE COURT: Well --

19 MR. JOHNSON: -- they were advising Mr. Maybank
20 that they were not registered

21 THE COURT: That's a correct statement.

22 MR. BROWN: And we are not saying that we were at
23 any given time, but what --

24 THE COURT: You don't want specific times.

25 MR. BROWN: We don't want specific times.

1 documents And since you all hadn't had any stipulations, I
2 thought we ought to get you one here. Actually the parties
3 agreed to this quite sometime ago and so before I let them
4 begin their arguments, I'm going to read this stipulation
5 into record

6 Plaintiffs Francis P Maybank and Jane H.P.
7 Maybank, as Trustee for the Francis P Maybank Family
8 Insurance Trust and defendants Branch Banking and Trust
9 Company and Sterling Capital Management stipulate to the
10 following facts. That during all times relevant to this
11 lawsuit defendant Branch Banking and Trust Company,
12 Successor in merger to Branch Banking and Trust Company of
13 SC, is not a registered broker-dealer

14 Secondly, during all times relevant to this
15 lawsuit defendant BB&T Asset Management, LLC, and its
16 Successor in merger Sterling Capital Management, LLC, is not
17 registered as a broker-dealer.

18 Defendant BB&T Asset Management, LLC, and its
19 Successor in merger Sterling Capital Management, LLC, is
20 registered as a registered investment advisor.

21 All right, ladies and gentlemen, you all are the
22 warrior jury. I'm really proud of you and you have paid
23 great attention throughout this trial We appreciate that
24 wholeheartedly and so I ask you to continue during the
25 arguments of these fine attorneys Okay?

1 trusted advice and expertise promised is not provided.

2 When I served in the Army there was a saying,
3 everybody's job is nobody's job. That statement fits here.

4 But while simple oversight violates the rules,
5 this case presents facts that show reckless or willful
6 misrepresentation.

7 The memorandum to Pat Oliver, you have seen it
8 several times. Make a note, it's Exhibit 7 in the documents
9 that you have here. You have seen it several times. A copy
10 was given to Mr. Maybank. It confirms that he had been led
11 to believe what he had been led to believe in his meetings
12 with Mr. Mahfood and Mr. Walters. Now they say they -- now
13 they say they gave no advice, but we know that can't be
14 true, because they told you from the witness stand that
15 Exhibit 7 was true and correct.

16 Review Exhibit 7 carefully. It states "Mr.
17 Maybank is endeavoring to reduce his investment and
18 retirement asset risk exposure through a Pre-Paid Variable
19 Forward. The implementation of the pre-paid strategy will
20 protect," magic words, "protect Mr. Maybank from an
21 extraordinary reduction in the value of this portfolio and --
22 resulting net worth. It will help achieve important
23 diversification goals discussed throughout the financial
24 planning process. This transaction is not speculative. It
25 will allow long-term ownership in line with the values put

1 forth in the Code of Ethics."

2 Now we know that none of the representations in
3 this letter are true. How can you know? Compare Exhibit 7
4 with Exhibit 91. Exhibit 91 is virtually identical, but
5 it's a form, a form from the general Counsel's office that's
6 used. Let's call it the Mr. Client letter.

7 So Mr Gibson sent the memorandum to Mr Walters
8 and Mr. Mahfood. They willingly signed it, although we now
9 know it was not true, and they knew then that it was not
10 true. The general counsel signed it, although she knew it
11 was not true. Mr Maybank is provided a copy, totally
12 unaware that the memorandum is a fabrication designed not to
13 protect his interests, but to pass muster with BB&T's Code
14 of Ethics.

15 You heard Professor Freeman say it was an
16 outrageous violation of fiduciary standards to pre-approve
17 anyone without taking into account the person's individual
18 needs and personal circumstances. And you did not hear a
19 single expert from BB&T that sat on that stand and said that
20 pre-approval was an acceptable process.

21 Bad fault. Way out of bounds.

22 So at the very inception of the strategy designed
23 to protect Mr Maybank, the rules were violated, and not in
24 a simple oversight way, but in a deliberate
25 misrepresentation of material facts. And it's just not more

1 likely than not. It's absolutely true You have the
2 letter

3 You have heard from eight different employees, and
4 former employees in some cases of the bank, who had a
5 responsibility to prudently advise Mr Maybank and the
6 Family Trust about an investment strategy that was prudent
7 for a senior citizen on the verge of retirement. What did
8 we hear? Wealth advisors are not permitted to give advice
9 or recommendations. They were not trained as to pre-paids.
10 Their boss, Mr. David Fisher, said their knowledge was a
11 mile wide and an inch deep. None of these employees
12 conducted an analysis to determine whether the pre-paid was
13 suitable, but there is an initiative in the wealth division
14 to sell pre-paids and the bonus matrix for each of those
15 individuals was credited with the fee income derived from
16 the sale of the pre-paids and insurance to Mr Maybank.

17 Lindsay, pull up, if you would, '89.

18 Mr Ross Walters personal development plan This
19 is at the end of 2006, after the sale to Mr Maybank and to
20 his friend Effie Bowers. "Ross took a leadership role in
21 the introduction and delivery of alternative investments and
22 closed some significant business in 2006."

23 We also heard the supposed experts at BB&T, Shawn
24 Gibson and Nate Deal. They were self taught, and Mr.
25 Maybank's pre-paid was one of the very first these

1 individuals ever were involved with

2 We also know that, neither Mr. Deal nor Mr. Gibson
3 ever had any direct communications with Mr. Maybank to talk
4 with him about the derivative product and how it worked, the
5 risks and the rewards

6 In 2006, Mr. Maybank had a concentrated position
7 in BB&T Corporation stock. It represented the vast majority
8 of his retirement assets. It needed to be addressed.
9 BB&T's recommended strategy to take a risky situation, pay
10 millions of dollars, 2.2 million in costs and fees, put him
11 in a riskier position than he was already in.

12 Professor Freeman explained BB&T's many breaches
13 of the rules as to fiduciaries

14 Dr. McCann, an expert in the field of pre-pays,
15 explained the technical aspects of why pre-paid increased
16 the risks, not reduced the risks of Mr. Maybank's situation.

17 Now, causes of action. The claims of fault are
18 called in our pleadings causes of action. We have several,
19 all of which are supported by the essential facts in this
20 case.

21 The first fault we identified is breach of
22 contract.

23 I'm going to also show you a form of the jury
24 verdict form that you will have back in the jury room with
25 you. And as I talk about these causes of action, I'll refer

1 to it. Now, I believe this will be very close to what you
2 will have in the jury room, but if there is any difference,
3 the judge will give you the one that you will have, but this
4 form will be very different. So one of the actions will be
5 breach of contract. BB&T promised prudent advice, but they
6 produced no one that said he advised Mr. Maybank. Not a
7 single soul. Everyone thought it was someone else's job.

8 Mr. Walters testified that the bank had not
9 performed its duties set forth in the Wealth Management
10 Agreement, could not, did not, lawyers drafted it wrong.

11 The judge will charge you that the contract is
12 entitled to be performed as written. It's their contract.
13 They drafted it. It's most strictly construed against them.

14 The failure of anyone involved in the pre-paid
15 transaction to conduct the required suitability analysis
16 demonstrates why clear lines of authority is important. If
17 it's everybody's job, it's nobody's job.

18 So when you come to these actions, they knew. So
19 check yes for plaintiff Frank Maybank against the
20 corporation; yes; and yes.

21 Sterling Capital is the successor for BB&T Asset
22 Management that was the name of the company at the time. So
23 breach of contract, clearly breached the contract, admitted
24 by Mr. Walters when he said well, it needed to be redrafted,
25 and you heard him from the witness stand try to say how he

1 would redraft it by adding some words to the contract. Not
2 after the fact. No contract would ever be performed if you
3 could change it whenever you breached it and say well, if I
4 add a few additional words, I wouldn't have breached the
5 contract.

6 So let's look at the others.

7 Second fault. Breach of contract. Correction,
8 breach of fiduciary duty.

9 A fiduciary duty is one of the highest duties
10 recognized by our law. Here BB&T was serving as a fiduciary
11 in two respects. They undertook the responsibilities of
12 being the corporate trustee of the Family Trust upon the
13 sale of Southeastern Trust to BB&T. A trustee is a
14 fiduciary under the laws of trust.

15 BB&T was also serving as Mr. Maybank's fiduciary
16 to manage his investment assets. You will recall the
17 testimony that the bank knew -- the bank knew that the funds
18 in the managed account would be used to fund the premium
19 payment. Because BB&T was wearing two fiduciary hats, there
20 was a conflict of interest with respect to their duties to
21 both Mr. Maybank and the Trust. The bank had an absolute
22 duty of loyalty to both Mr. Maybank and the Trust. The bank
23 had to make sure that their actions as to one of their
24 fiduciaries did not adversely affect the other.

25 Professor Freeman's testimony was clear. As a

1 fiduciary, you cannot do something to one client that will
 2 adversely affect the other. And what did they do here?
 3 They destroyed the very sources of income that both Mr.
 4 Maybank and the Trust were dependent upon. The bank's
 5 conduct did not live up to the rules to Mr. Maybank or the
 6 Family Trust and harmed both.

7 So yes, yes, yes, yes, yes for both the Trust.

8 And it would also be true, going back to this
 9 other form here on the breach of contract that you would do
 10 likewise on the breach of contract. You would find for the
 11 Trust as well.

12 Aiding and abetting breach of contract accompanied
 13 by fraud is the next one, and I have grouped a couple
 14 together. Breach of contract accompanied by fraudulent
 15 act -- I'll come back to the South Carolina Securities Act,
 16 but breach of contract accompanied by fraudulent act,
 17 fraudulent misrepresentation, negligent misrepresentation,
 18 and I'll treat those together. Now, you will see those in
 19 aiding and abetting breach of fiduciary duty, fraudulent
 20 misrepresentation. I'll come back to number five.

21 Constructive fraud and negligent misrepresentation
 22 and I'll discuss those. I'm grouping some of them together.

23 We have also alleged violations of the causes of
 24 action for breach of contract accompanied by fraudulent act,
 25 fraudulent misrepresentation, negligent misrepresentation,

1 and constructive fraud. These causes of action or these
2 claims all generally relate to misrepresentation and fraud.
3 And so the same essential facts proves all of them.

4 You will be asked today to make a determination
5 regarding whether the actions of BB&T have perpetrated a
6 fraud on Mr. Maybank and the Family Trust.

7 Fraud at its most basic level is taking advantage
8 of another person. It is the act of exploiting a superior
9 position to the disadvantage of the other person.

10 The evidence in this case demonstrates that BB&T
11 took advantage of Mr. Maybank and the Family Trust. BB&T
12 presented to Mr. Maybank their form Wealth Management
13 Agreement and required his signature as a basis for
14 executing the Pre-Paid Derivative transaction in managing
15 the money that was advanced. We know that there were errors
16 in the contract. BB&T's Corporate representatives admitted
17 that there were errors. He said his lawyer mis-drafted it.

18 Despite the language of the contract, BB&T has
19 signed and delegated the duties under the contract without
20 telling Mr. Maybank or asking his permission. The contract
21 makes promises to Mr. Maybank, which the bank obligated
22 themselves to perform as their trusted advisor. We have
23 looked at the contract many times. It's Exhibit 14 in your
24 box.

25 In advance of the 2006 derivative transaction,

1 Mr Maybank that were being done in his best interests were
2 performed He was -- he was led to believe that they were,
3 and those facts were hidden from him.

4 You have heard from all of Mr. Maybank's so-called
5 trusted advisors in this case. No one admits to providing
6 with Mr. Maybank any advice. No one testified that they
7 provide any analysis. The letter was designed and did
8 purposely mislead him. They took advantage of him and the
9 Family Trust. They had in trust that they had where they
10 had fiduciary responsibilities, their actions were
11 fraudulent.

12 So for all of these claims, constructive fraud,
13 negligent misrepresentation; those essential facts allow you
14 to find for the Trust and for Mr. Maybank against the
15 defendants for all of those causes of action, constructive
16 fraud, negligent misrepresentation, breach of contract
17 accompanied by fraudulent act, yes, yes. All of those
18 claims are covered.

19 Now let's talk about the Securities Act
20 Violation of the South Carolina Securities Act We have
21 also alleged violations of South Carolina Securities Act.
22 It was violated in three respects.

23 First, it's a violation of the Act to recommend
24 and sell to Mr. Maybank a strategy under the false
25 representations that BB&T was authorized to do so.

1 Neither BB&T nor BB&T Asset Management was
2 registered as a broker-dealer. BB&T has since refunded the
3 fees it charged to Mr. Maybank and other customers. A clear
4 admission of wrongdoing.

5 BB&T's employees were untrained and falsely
6 represented to Mr. Maybank that the product and strategy was
7 appropriate for him. BB&T did not fully explain the costs
8 of the fees of the product.

9 Fault -

10 The Securities Act requires a company effecting
11 transactions and securities for compensation to be
12 registered as broker-dealers. Mr.

13 Fisher said that he was out of bounds. And so it
14 is, when you are out of bounds, it's fault. It's a violation
15 of the Securities Act.

16 The general counsel letter saying that we are
17 doing all of these things, when, in fact, they are not doing
18 them, did not do them, misled Mr. Maybank, so there is a
19 clear violation of the South Carolina Uniform Securities
20 Act, and you know that because they have admitted that.

21 Unfair trade practices. The judge will charge you
22 that in the State of South Carolina it's in commerce that
23 unfair and deceptive practice is in violation of the law.
24 You heard Professor Freeman's testimony that BB&T's actions
25 were unfair and deceptive.

1 The Unfair Trade Practices Act requires that
2 violations affect more than just Mr. Maybank. The purpose
3 is protecting the public interests. We know that BB&T's
4 actions have already led to the refund of over a million
5 dollars to 130 customers. This is a clear admission of an
6 unfair and deceptive practice. Even as they refunded the
7 fees, they told everyone they were refunding the fees "based
8 upon our corporate values." Not a candid statement.

9 Fault

10 BB&T's practice of pre-clearing all employees for
11 pre-pays without conducting suitability and then
12 misrepresenting it is a clear violation of the rules

13 So violation of South Carolina Securities Act,
14 yes, yes

15 Aiding and abetting a fraudulent misrepresentation
16 I have already covered with you -

17 During deliberations if someone says that Mr
18 Maybank's spending is to blame for his losses, remind them
19 that no trusted advisor ever counseled Mr. Maybank about the
20 income that could be expected from BB&T's investment
21 strategy. Professor Freeman testified that a fiduciary
22 should provide such advice. It didn't happen, but now they
23 blame Mr. Maybank. They have examined every expenditure he
24 has made over the last fifteen years. Why didn't they do so
25 when they were his trusted advisors?

1 Also remind them that the damage calculation shown
2 to you by Dr. McCann removes every penny that Mr. Maybank
3 actually spent during this period of time. The damage
4 calculations only include the losses incurred by Mr. Maybank
5 and the Trust as a result of BB&T's failed investment
6 strategy.

7 If someone says that Mr. Maybank was too
8 sophisticated not to understand the risks associated with a
9 pre-paid derivative transaction, remind them that those
10 derivative transactions are a recent invention of Wall
11 Street. Mr. Maybank's experience was in plain vanilla
12 stocks and bonds. None of the wealth advisors understood
13 the product that they were recommending and selling.

14 If someone says that BB&T provided Mr. Maybank
15 with all of the information that he needed to figure out
16 those transactions on his own, remind them that a
17 fiduciary -- as a fiduciary BB&T had an absolute duty to
18 make sure that Mr. Maybank understood the risks associated
19 with this strategy. A fiduciary cannot stand silent and let
20 a client pursue an imprudent investment strategy.

21 If someone says that the financial prices is the
22 true cause of Mr. Maybank's losses, remind them that it was
23 the investment strategy developed and approved by BB&T
24 investment advisors that caused Mr. Maybank's retirement
25 savings to be unnecessarily exposed to the risk of losses in

1 the responsibility to anyone but itself. It was BB&T's
2 responsibility to manage the assets prudently. It's BB&T's
3 fault.

4 Damages - Your verdict form will ask how much
5 money will you award. If you answer yes to any part in
6 questions 1 through 9, what amount of actual damages do you
7 award.

8 Your goal here is a simple one. Assess the level
9 of harms and losses caused by defendants. Nothing else. We
10 ask that your verdict be designed to make whole. The law
11 will charge you -- the judge will charge you that that's the
12 standard. That's the rule. Mr. Maybank and the Family
13 Trust, make them whole for losses suffered as a result of
14 the bad advice provided by BB&T.

15 Remember Dr. McCann spent over 15 years studying
16 Pre-Paid Derivative transactions and developing the analysis
17 of how you assess losses caused by pre-pays. His method of
18 calculating damages on pre-pays has been accepted and
19 approved by other courts as an appropriate way to measure
20 the economic harm.

21 As opposed to an investment strategy including 100
22 percent equities aggressive growth, Dr. McCann's analysis
23 looked at two readily available and suitable investment
24 strategies for a senior citizen on the verge of retirement.
25 One was a 100 percent fixed income, and the other was a mix

1 of 30 percent equities and 70 percent fixed income.

2 Lindsay, if you will pull up --

3 Now, these numbers are a little different than you
4 saw with Dr. McCann's testimony. The reason they are
5 different, Dr. McCann had included the interest calculation.
6 The interest calculation will actually be performed by the
7 court, based upon your award. So what these numbers are --
8 and I would ask that you write these numbers down. These
9 would be Dr. McCann's calculations. And so for -- if you
10 used -- you get to choose. It's your choice as to which one
11 of these two alternatives that you get to use, 2,861,302, or
12 3,362,185, or some number in between those numbers. That's
13 the damages to Mr. Maybank, based upon -- those are the
14 direct or actual damages to him. So essentially in rough
15 numbers 2.9 million to 3.4 million.

16 You can pull that down, Lindsay.

17 So the range of numbers -- now, those are choices
18 that are available to you. Those were options.

19 You also remember Professor Freeman did a quick
20 calculation for you and he basically said, you know, one way
21 of looking at it is there were 2.2 million on the very first
22 pre-paid and 1.3 on the second one. That's \$3.5 million.
23 One thing that you can do is just return the cost of those
24 two pre-pays. That's another option available to you.

25 So Dr. McCann's analysis accounts for all of the

1 of the wrongful party In South Carolina punitive damages
2 are allowed in the interests of society in the nature of
3 punishment and as a warning and an example to deter the
4 wrongdoer and others from committing like offenses in the
5 future :

6 Moreover, they serve as a vindication of private
7 rights when it is proved that such had been wantonly,
8 willfully or maliciously violated.

9 Judge Miller will charge you on punitive damages.

10 If you find that BB&T's conduct was willful or
11 reckless by clear and convincing evidence, then you must
12 award punitive damages. The amount is in your discretion.

13 We submit that BB&T's conduct in this case is
14 reprehensible and warrants punitive damages. Consider
15 BB&T's actions in representing to Mr Maybank that a
16 pre-paid was an appropriate strategy, telling him that they
17 had done all of the things that they promised to do, when,
18 in fact, they had not, misleading him and hiding the truth
19 for over three years. Consider BB&T's actions in presenting
20 the same contract to all of its customers. Consider that
21 BB&T charged for advice that they now say they did not
22 provide. And consider that this was a sales-driven strategy
23 to generate fees for the bank, and nothing more.

24 You saw Dr Wood testify. Dr Wood has a Ph.d
25 in economics and he had done the analysis of the bank's

1 financial situation. And he essentially said that the
2 corporation, the bank, roughly had twenty-one and a half
3 billion dollars of assets. You will have Dr. Wood's
4 information available to you.

5 The courts in South Carolina has indicated that
6 you can award punitive damages based upon your award of
7 actual damages. If you award actual damages, you can award
8 punitive damages within your discretion from all the way to
9 a very small amount to a larger amount. Amounts in the
10 range of six and seven times the actual damages have been
11 approved.

12 I would recommend to you in this case, that it's
13 your call, that you look at some percentage of that net
14 worth, that \$21.6 billion.

15 You have heard testimony from the witness stand
16 about a basis point. A basis point is a thousandth of one
17 percent. So one basis point of \$21.6 billion is \$21
18 million. Those would be numbers that would be within the
19 range that you could consider in terms of awarding punitive
20 damages.

21 Yes, this case is about money damages, but it is
22 about much more. BB&T bought Mr. Maybank's business in 2001
23 for not one dollar in cash. It simply issued more shares of
24 stock. He entrusted the welfare of the Family Insurance
25 Trust to BB&T.

1 practicing in the field of securities regulations for over
2 forty years. He told you that the fee that's charged,
3 that's just one factor.

4 What are the others? What are the others. Well,
5 is it advice being given? Yes. BB&T Asset Management is
6 looking at these transactions. It's out pricing them. Nate
7 Deal is making decisions whether to go forward or not with
8 them. BB&T Asset Management is the advisor.

9 Paul Merolla pointed out another thing. He says
10 where is the stock? Who has custody of the custody of the
11 stock? Well, the stock is held at Scott & Stringfellow, a
12 broker-dealer. And where does it go? It goes straight to
13 Bear Stearns. It never goes into an account at BB&T Asset
14 Management. That's because Asset Management is not a
15 broker. The stock goes straight from one broker, Scott &
16 Stringfellow, to another, Bear Stearns. And when Deutsche
17 Bank got the stock, it had gone straight from Bear Stearns
18 to Deutsche Bank. It never goes through BB&T Asset
19 Management, because it's not a broker-dealer.

20 Well, the judge will charge you that the
21 definition of a broker-dealer is an entity that effectuates
22 transactions and sells securities. Well, that's legalese.
23 What does that really mean? Well, you can look at the
24 charge. He's going to let you have the charge when you
25 deliberate, and look at the definition of broker-dealer and

1 see if anywhere in there it mentions charging of a fee. No,
2 it doesn't. That's not any part of the legal definition of
3 what a broker-dealer is.

4 You know, the plaintiffs make much of the SEC
5 inquiry. There was one. There is a routine audit. The SEC
6 saw these fees and they started asking questions about it.
7 "Give us some more information about the fees." BB&T
8 cooperated with that.

9 Its executives sat back and they say "why don't we
10 just give the money back. Let's refund it. It's a little
11 over a hundred people, a little over a million dollars.
12 Let's just refund it instead of getting into a fight with
13 our regulator," and they did. Mr. Maybank got back his
14 fees, all his fees. BB&T made nothing off the pre-paids at
15 the end of the day. The 2.2 million and the 1.3 million
16 that he says are costs of these pre-paids, none of that went
17 to BB&T, Bear Stearns and Deutsche Bank. BB&T didn't make
18 anything. It gave the money back.

19 Is there any evidence of any finding from the SEC?
20 Is there any order from the SEC requiring that those fees be
21 returned?

22 I could bet you if the SEC had any negative
23 findings about BB&T, Mr. Willoughby would have presented
24 that. Absolutely. If it was there, you would have seen it.
25 It's a voluntary decision to refund that money.

1 BB&T is here being criticized for doing that At the end of
2 the day Mr. Maybank got those fees back.

3 Let's talk about damages.

4 They presented two experts to discuss damages with
5 you One was Professor Freeman His analysis was
6 incomplete. He said 2 2 million cost to the first pre-paid,
7 1 3 million from the second That's 3.5 million. 3.5
8 million in damages. Well, he didn't account for anything
9 else. What about the 1.5 million in dividends? What about
10 the over \$800,000 in tax savings? What about the 377,000
11 generated in the man's portfolio account that was first
12 managed by Kris Kapoor? What about the \$800,000 in
13 appreciation that ultimately came back to Mr. Maybank in
14 2012? Well, if you add up all the numbers I just gave you,
15 it's going to be about \$3 5 million. But Freeman, he
16 couldn't give you those numbers. If he does it, there is no
17 damages.

18 And McCann, the same thing. McCann didn't account
19 for everything.

20 Let's put some exhibits up.

21 McCann doesn't account for the capital gains tax,
22 1 6 million He doesn't account for the \$800,000 in
23 appreciation

24 But there is an even greater flaw in McCann's
25 analysis Let's pull up the footnotes. His entire analysis

1 is based on the assumption that Mr. Maybank is going to have
2 70 percent of his money in bonds. 70 percent bonds. Well,
3 we have already talked about how Mr. Maybank felt about
4 bonds. He never had them, didn't have them in 2012. Judy
5 Schoemer told you even with his own clients who were
6 retired, he wouldn't let them have bonds in their accounts.
7 That would never happen. He's not going to go 70 percent
8 bonds. And if you don't run McCann's calculations with that
9 assumption, you don't have any damages.

10 Thank you, Mandy.

11 They asked for punitive damages.

12 You award punitive damages when someone acts
13 recklessly or willfully disregards the rights of another.
14 Well, did any of the employees of BB&T, were they trying to
15 hurt Mr. Maybank? Was Kris Kapoor trying to hurt Mr.
16 Maybank? Was Nate Deal trying to hurt Mr. Maybank when he
17 advised against future rolls so quick in time? No. No, the
18 people at BB&T were trying to do what they thought was best
19 for Mr. Maybank. They were trying to help him, and they
20 did pre-paid. There is nothing here that would justify an
21 award of punitive damages.

22 The judge, Judge Miller, is going to charge you on
23 a lot of different aspects of the law and I just wanted to
24 give you a heads up for one thing he's going to talk about,
25 the Statute of Limitations and Statute of Repose. We really

1 haven't been relying on this. We don't think we have
2 liability, but he's going to educate you on time limits in
3 the law. You have to bring your case within three years of
4 the time that you learned that you believed that you have
5 been harmed. And with the Securities Act, you have to bring
6 your case within five years of the alleged violation.

7 So, for example, the August 2006 pre-paid, that
8 was five years before the suit was filed in December of
9 2012. So there can't be a Securities Act claim based on the
10 first pre-paid.

11 Well, the judge -- the judge will explain that to
12 you when he charges you and that will be back with you in
13 the jury room.

14 So we saw a lot of evidence about the Insurance
15 Trust. And as I get near the end of my comments, I want to
16 touch on that. The plaintiffs want to tell you that it was
17 BB&T's fault that the policies and the Trust, \$5 million
18 worth, face value, had to be dropped because Mr. Maybank
19 couldn't afford it any more. And they say that he couldn't
20 afford it any more because BB&T had done a lousy job with
21 his managed portfolio account and put him into some bad
22 pre-pays, so they are trying to blame BB&T for it.

23 Well, what's the real reason that those policies
24 were dropped? What is it? Well, Mr. Maybank's cash flow
25 took a big hit with the dividend cut. He went from over

1 400,000 a year down to 130,000 a year. If it weren't for
2 the dividend cut, he could have still paid the life
3 insurance premiums, but the dividend did get cut. BB&T had
4 to cut it in the middle of the financial crisis. He can't
5 sue BB&T for cutting the dividend, and they're not. That's
6 one reason, the dividend cut.

7 What's the second reason? Well, the children,
8 They are the beneficiaries to the life insurance policies
9 and to the Trust, and so he consulted with them and he wrote
10 out all these options. It says it's burdensome for him to
11 continue to pay the premiums. Yes, it was. The dividend
12 had been cut. He's only getting a \$130,000 a year now. And
13 here is the options, and the children chose option number
14 one, redeem the policies for \$235,000, divide the proceeds
15 four ways. Why do they decide to do that? Well, they
16 didn't want to profit from their father's death. They
17 weren't interested in that. Their father was healthy.
18 Still is. He'll be around a long time. It doesn't make
19 sense to keep paying in \$136,000 a year for insurance on
20 your father when he's healthy. If they kept paying over
21 twenty years, that could be \$2.7 million to get back 5
22 million. It doesn't make a whole lot of sense.

23 Now, the children said "go ahead and give it to us
24 now. We got college expenses for our kids, got living
25 expenses. Don't worry about funding these policies any

1 more, dad Let's just terminate the policies. Let's get
2 the settlement amounts and then let's disburse it " And
3 that's what happened. That's what happened

4 So Transamerica, there is a cash value built up
5 and that got redeemed Citizen Trust, that was \$65,000
6 And even more from Banner Life. That was \$107,000

7 And then out of that, 60,000 to Preston. And then
8 Ms Maybank, Jane, 142,000 went to her Now, there was I
9 think 80,000 that she came in that she put into consolidate-
10 it She took out about a net 60 for a total of 142 to pay
11 off her mortgage. The kids say "just give us the money now.
12 Don't worry about making us rich later We need the money
13 now," and they used it There is nothing wrong with that
14 decision Nothing wrong with it, but don't come back to
15 BB&T and say pay us \$4 million because we decided to
16 terminate these policies

17 Their expert, Scott Brawley, he said it would be
18 \$4 million, but there is something he didn't mention that's
19 very important. If Mr. Maybank and the children had
20 continued paying these premiums, they would have been paying
21 at least 136,000 a year. Well, if you pay that on twenty
22 more years, that's \$2.7 million. Well, shouldn't there be a
23 setoff against the 4 million for the 2.7 that's going to
24 have to be paid, no matter what? Shouldn't that 4 million
25 be reduced by the 2.7? Sure. If you give 4 million to Mr.

1 Maybank or the Trust, it's a windfall

2 THE COURT: Wrap it up, Mr. Kristinik.

3 MR. KRISTINIK: Yes. Two minutes, Your Honor.

4 I tell you the real reason for the lawsuit. The
5 real reason we are here today is because of the dividend
6 cut. If the dividend had never been cut, cash flow would
7 have continued, the premiums on the policies would continued
8 to be paid, Mr. Maybank could continue to help his children
9 and grandchildren, but it was cut. It had to be cut by
10 BB&T. The worst recession since the Great Depression. Even
11 BB&T could not continue to pay the dividend at the level it
12 did. That's why we are here. If it weren't for that, Mr.
13 Maybank could continue rolling, continue owning the stock,
14 continue to receiving the dividend, continue living the way
15 he had been.

16 How bad would it have been if it weren't for the
17 pre-paid? How bad would it have been? This is how bad it
18 would have been. 53 margin calls would have occurred,
19 according to Bryan Teachey's analysis.

20 In reality, what really happened in the Scott &
21 Stringfellow account, 22 margin calls. Even with
22 protection, he still got hit with 22 margin calls. It would
23 have been a lot worse.

24 Where would Mr. Maybank have been if he hadn't had
25 the pre-paid? Where would he have been if he hadn't had

1 people from BB&T helping him enter into the pre-paid?

2 Where is he now? Well, he still owns a million
3 dollar farm. We saw he had \$1.6 million in his Schwab
4 account in 2013. His children still have a house over a
5 million dollars on Meeting Street. They have another farm
6 worth a million dollars. Mr. Maybank lives in the house in
7 Shannan Clear here in Greenville. But where would he have
8 been if it weren't for the pre-paid? Where would he have
9 been?

10 BB&T stands behind what it did for Mr. Maybank.
11 BB&T stands behind its people, because it knows its people
12 did what was right for Mr Maybank.

13 BB&T wants you to look at all the evidence, to
14 consider all the testimony, apply your judgment and then
15 render a verdict that you think is right.

16 We would ask that at the end of your deliberations
17 you render a verdict, a verdict in favor of BB&T. Thank
18 you.

19 THE COURT: Any reply?

20 MR WILLOUGHBY: It will be one minute, Your
21 Honor.

22 Ladies and gentlemen, as you can imagine, we
23 agreed with very little that Mr Kristinik has just told
24 you. But what is true is we wouldn't be here if the bank
25 had done the things that they promised to do in the

1 disclosure letter and that they said they did in the
2 disclosure letter. That's your Exhibit 7. Look at the
3 disclosure letter.

4 And the final comment is this. When you go home
5 after your deliberations and you see that loved one that you
6 treasure most and they ask you what you did, tell them that
7 I saw wrong and I made it right. Thank you

8 THE COURT All right. Mr. Foreman, ladies and
9 gentlemen of the jury, how is everybody?

10 I have got a pretty -- I'm sure you ascertained
11 there is quite a bit of law involved in this, and so we will
12 get started. If we need to take a break in the middle, I
13 will be happy to do that, so you all just let me know.

14 (Whereupon, at 11:52 a.m., the Court charged the
15 jury panel)

16 THE COURT Now, during this trial you and I have
17 certain duties to perform. And as the trial judge, it is my
18 responsibility to preside over the trial of the case and to
19 rule on the admissibility of the evidence that's offered
20 during the trial.

21 It is also my duty to charge you the law
22 applicable to the case, and it is your duty as jurors to
23 accept and apply the law as I now state it to you. If you
24 think you have any idea as to what the law is or what the
25 law ought to be and it disagrees with what I now tell you

1 the law is, you have sworn an oath to set aside your own
2 opinions and apply the law precisely as I state it to you.

3 Also in every case tried in this court before a
4 jury, the jury is the sole and exclusive judge of the facts.
5 A trial judge by law is not allowed to comment on the facts
6 of the case. So please don't think about anything I may
7 have said or done throughout the course of the trial that I
8 have any opinion. I don't, and you are the sole judges of
9 the facts.

10 As I told you in my opening comments, the burden
11 of proof in this case is by a preponderance of the evidence.
12 And a preponderance of the evidence simply means the greater
13 weight of the evidence. It is evidence that as a whole
14 shows that the fact sought to be proved is more likely true
15 than not true.

16 This can be illustrated by imagining a set of
17 scales. When the case began, the scales were exactly even.
18 Now that after all of the evidence has been presented, if
19 the scales remain even, or if they tip even slightly in
20 favor of the defendant, then the plaintiff will have failed
21 to meet their burden of proof and would not be entitled to a
22 verdict. If, on the other hand, the scales tip even
23 slightly in favor of the plaintiff, the plaintiff will have
24 met the burden of proof and you should return a verdict for
25 the plaintiff.

1 Now, necessarily part of your job as jurors is to
2 determine the credibility or believability of the witnesses
3 who have testified. And it becomes your duty as jurors to
4 evaluate the evidence and determine which evidence convinces
5 you that it is true.

6 And in determining the believability of witnesses
7 who have testified in the case, you may believe one witness
8 over several, or several over one. You may believe a part
9 of the testimony of a witness and reject the remaining part.
10 You may believe the testimony of a witness in its entirety
11 or reject that same testimony in its entirety. And you may
12 consider whether the witness has an interest in the result
13 of the trial, whether the witness is prejudiced towards
14 either party, the opportunity for the witness to have seen
15 the matters and things about which the witness may testify,
16 and the way the witness acts on the witness stand or what we
17 call a witness' demeanor.

18 Now, our Rules of Evidence ordinarily do not
19 permit witnesses to testify to opinions or conclusions. An
20 exception to this rule exists for witnesses we call experts.
21 And a witness who, by education and experience, has become
22 expert in some art, science, or profession may give an
23 opinion as to relevant and material matter in which the
24 witness has been qualified as an expert, and may also give
25 the reasons for that opinion.

1 Now, you all should consider any expert opinion
2 given by any expert witness and, like all of the other
3 evidence, give it the weight that you think it deserves.

4 There are multiple parties in this action and each
5 party is entitled to have each of its claims or defenses to
6 be considered individually. In other words, the evidence
7 and the law of each claim of each plaintiff must be
8 considered separately and individually, as if it were a
9 separate and free standing lawsuit. Additionally, this
10 individual consideration of each claim requires
11 consideration of each defense to the claim by each separate
12 defendant on an individual basis

13 Your verdict as to each claim of each party must
14 be decided independently of all other claims or defenses.
15 Your verdict does not have to be the same for each plaintiff
16 or for each defendant, and you must decide each claim
17 independently, based on the evidence and the law as it
18 applies specifically to that claim. You will be asked to
19 write a separate verdict for each party on each claim.

20 Now, the plaintiff has asserted multiple causes of
21 action against the defendant. In other words, the plaintiff
22 believes that he is entitled to recover against these
23 defendants. And when I say defendant or plaintiff, please
24 know I'm speaking about all of them. The plaintiff believes
25 that he or they are entitled to recover against the

1 defendants under multiple different legal theories. And if
2 you find that the plaintiffs have met their burden of proof
3 as to more than one cause of action and you consider
4 awarding damages, you should not increase the amount of
5 actual damages simply based on the number of different
6 causes of action, if any, upon which you find the plaintiffs
7 prevailed. Okay, I hope that's clear.

8 In our courts I would tell you that no distinction
9 is made between corporations and individuals. A corporation
10 is a person in the eyes of the law and a corporation is
11 entitled to the same fair and impartial consideration and to
12 justice by the same legal standards as an individual.

13 Now, there are two types of evidence generally
14 presented during a trial, that is, direct evidence and
15 circumstantial evidence.

16 Direct evidence is the testimony of a person who
17 claims to have actual knowledge of a fact, such as an
18 eyewitness. It is evidence which immediately establishes
19 the main fact sought to be proved.

20 Circumstantial evidence is proof of a chain of
21 facts and circumstances indicating the existence of the main
22 fact. It is evidence which immediately establishes
23 collateral facts from which the main fact may be inferred.
24 Circumstantial evidence is based on inference and not on
25 personal knowledge or observation, and it is proof that does

1 not actually establish the fact in question, but that
2 asserts or describes something else from which you may
3 either reasonably infer the truth or at least reasonably
4 infer an increase in the probability that the fact is true.
5 For circumstantial evidence to be sufficient to warrant the
6 finding of a fact, the circumstances must lead to that fact
7 with reasonable certainty. And the facts and circumstances
8 should be considered in light of ordinary experience and
9 common sense. The existence of a fact cannot be based on
10 speculation, surmise, or conjecture.

11 The law makes absolutely no distinction between
12 the weight or the value to be given to either direct or
13 circumstantial evidence, nor is a greater degree of
14 certainty required of circumstantial evidence than of direct
15 evidence.

16 Now, I'm going to define clear and convincing
17 evidence to you, which is different from a preponderance of
18 the evidence, and comes into play with respect to certain
19 aspects of this case, which you will become apparent later.

20 Clear and convincing evidence is that degree of
21 proof which will give you a firm belief as to the facts
22 sought to be proved. Clear and convincing is more than just
23 a preponderance or greater weight of the evidence, which
24 requires only proof which persuades you that a party's claim
25 is more likely true than not true. On the other hand, clear

1 and convincing proof is not as high a standard as the burden
2 of proof in criminal cases, which is proof beyond a
3 reasonable doubt. Clear and convincing proof leaves no
4 substantial doubt in your mind. It means that the evidence
5 is not ambiguous, doubtful, equivocal or contradictory
6 Convincing means persuading by proof or argument causing one
7 to believe in the truth of what is asserted. Clear and
8 convincing proof establishes in your mind not only that the
9 fact is probable, but that it is highly probable.

10 Now, the plaintiffs have claimed that the
11 defendants breached a contract that existed between the
12 parties. In order to recover for a breach of contract, the
13 plaintiff must prove that claim by a preponderance or
14 greater weight of the evidence.

15 And the first thing they must prove by a greater
16 weight of the evidence is that the parties entered into a
17 binding contract.

18 Now, a contract is an agreement entered into by
19 two or more parties in which each party agrees to perform or
20 not perform certain acts. It may be shown by words, written
21 or oral, or by conduct. However, a contract is more than
22 the mere exchange of promises. For the agreement to be
23 considered a contract, the parties must have intended to
24 enter into a contract and must have reached a mutual
25 understanding of the terms of that contract. This is

1 sometimes called a meeting of the minds, and the parties
2 must intend to be mutually bound by the agreement.

3 When the contract is in writing, you must
4 determine the intention of the parties primarily from the
5 contents of the written document itself. And the intention
6 of the parties must be determined from the entire agreement
7 and not from any particular clause or provision. When the
8 written contract is clear, its meaning must be determined by
9 the contents of the document alone.

10 Now, to make a contract, there must be an offer
11 and acceptance. An offer is a proposal which is definite
12 and certain in its terms. The offer must be communicated to
13 the other party. The mere intention to do an act is not an
14 offer. And in addition, preliminary negotiations are not
15 offers. An offer may be withdrawn at any time before it is
16 accepted.

17 If you find that an offer was made, you must next
18 decide whether the offer was accepted. An offer can only be
19 accepted by the person to whom it was made and the
20 acceptance must be communicated to the person who made the
21 offer. Unless the offer specifically states that the
22 acceptance must be made at a certain place or time or in a
23 certain way, an offer may be accepted in any way which let's
24 the person making the offer know that the offer is accepted.
25 An acceptance does not have to be expressed. It may be

1 inferred from the acts or conduct of the party accepting the
2 offer. However, there must be some expression of the intent
3 to accept the offer, either by words, signing, or some act
4 communicated to the person making the offer or that person's
5 agent. And if you find that offer was rejected or was not
6 accepted, then there was no contract, okay?

7 Now, in addition, each party to the contract must
8 give some valuable consideration to the other. This means
9 that there must be something that benefits each party.

10 Consideration may be some right, interest, or
11 benefit given to a party. It may also be the failure to do
12 an act, a loss, or a responsibility which is undertaken by a
13 party. Consideration may be money, an act, a service, or a
14 promise to do something or not to do something in the
15 future. Mutual promises may constitute consideration.

16 For example, if I buy a loaf of bread from a
17 grocery store, the consideration the grocery store gives to
18 me is the bread. And the consideration I give to the
19 grocery store is money I paid for the bread.

20 Now, next the plaintiff must prove by a greater
21 weight of the evidence that the defendant unjustifiably
22 breached the contract. The word breach means the failure
23 without legal excuse to perform any promise that forms the
24 whole or a part of the contract. This includes the refusal
25 of a party to recognize the existence of the contract or the

1 doing of something inconsistent with the existence of the
2 contract. And a party breaches a contract when that party
3 does not perform as agreed under the contract by failing to
4 carry out a term, promise, or condition of the contract.

5 And then, finally, under this cause of action the
6 plaintiff must prove by a preponderance or greater weight of
7 the evidence that the plaintiff suffered damages which were
8 proximately caused by the breach of the contract. And the
9 plaintiff must prove damages by the greater weight of the
10 evidence. This does not mean that the plaintiff must prove
11 damages to a mathematical certainty or produce evidence of
12 the exact amount of damages suffered. However, the amount
13 of damages cannot be left to guess work or speculation.
14 Instead, the evidence presented by the plaintiff must be
15 enough to allow you to determine the amount of damages with
16 reasonable certainty and accuracy.

17 And damages for breach of contract are those that
18 may fairly and reasonably be considered to arise naturally
19 from the breach of the contract itself, or those that may be
20 reasonably supposed to have been in the minds of the parties
21 at the time the contract was made.

22 And the plaintiff may not recover damages for
23 breach of contract unless the plaintiff shows that he or she
24 has performed their part of the contract, or at least was
25 able, ready and willing to perform at the appropriate time.

1 And actual damages are damages to compensate a
2 plaintiff and put the plaintiff in the same position that
3 they were in before the breach of the contract. In other
4 words, actual damages are the actual losses and expenses
5 which a plaintiff had suffered because of the breach by the
6 defendant. And, generally, actual damages are the
7 out-of-pocket costs actually paid by the plaintiff as the
8 result of the breach of contract and the gain above the
9 costs that were have been realized if the contract had been
10 performed.

11 I would also tell you where the language of the
12 contract has more than one meaning, you may consider the
13 circumstances surrounding the making of the contract to help
14 you determine the real intention of the parties. However,
15 you may not use these circumstances to give the contract a
16 meaning which is not apparent on its face.

17 And a party to a contract has a duty to read it
18 and learn its contents before signing it. A party cannot
19 complain of misrepresentation in the contents of a contract
20 if the truth could have been discovered by reading the
21 contract, unless the party is ignorant and unwary.
22 Education, business experience, and intelligence are all
23 considered in determining whether a party may be considered
24 ignorant and unwary, so as to excuse a failure to read the
25 contract

1 And where a term of a contract can be given more
2 than one meaning, you should use the meaning least favorable
3 to the party who prepared the contract.

4 And I would tell you with respect to contract law,
5 there exists in every contract an unspoken but legally
6 enforceable promise of good faith and fair dealing.

7 Now, the plaintiff also claims that the breach of
8 contract in this case was accompanied by a fraudulent act
9 by the defendant. And to establish a breach of contract
10 accompanied by a fraudulent act, the plaintiff must first
11 show that the defendant breached the contract.

12 Next, the plaintiff must show that the defendant
13 had fraudulent intent as to the breach of the contract. And
14 fraudulent intent relating to the making of the contract is
15 not sufficient. The fraudulent intent is usually proven by
16 examining the circumstances surrounding the breach of the
17 contract.

18 And, finally, the plaintiff must prove that there
19 was a fraudulent act accompanying the breach of contract.
20 And a fraudulent act is any act characterized by dishonesty
21 in fact, unfair dealing, or the unlawful taking of another
22 person's property intentionally. And the fraudulent act may
23 be prior to, at the same time as, or after the breach of
24 contract. However, it must be connected with the breach of
25 contract itself. And the fraudulent act cannot be too

1 remote in time or character from the breach of contract.
2 And actual and punitive damages may be recovered for a
3 breach of contract accompanied by a fraudulent act.

4 Now, the plaintiff also has a cause of action for
5 breach of fiduciary duty. A fiduciary relationship is
6 founded on the trust and confidence reposed by one person in
7 the integrity and fidelity of another. A confidential or
8 fiduciary relationship exists when one imposes a special
9 confidence in another, who that other person accepts the
10 confidence, so that the latter person in equity and good
11 conscience is bound to act in good faith and with due regard
12 to the interests of the one imposing the confidence. And to
13 constitute a fiduciary relationship, the relationship must
14 be more than a casual relationship.

15 And parties in a fiduciary relationship must fully
16 disclose to each other all known information that is
17 significant and material.

18 Now, the normal bank-depositor arrangement creates
19 a creditor-debtor relationship rather than a fiduciary one.
20 In limited circumstances, a fiduciary relationship may be
21 created between a bank and a customer if the bank undertakes
22 to advise the customer as a part of the services the bank
23 offers. Such a relationship charges the bank with a duty to
24 disclose material facts that may affect its customer's
25 interests. On the other hand, no fiduciary relationship

1 between a bank and its depositor exists when the bank is
2 unaware of any special trust reposed in it. The term
3 fiduciary implies that one party is in a superior position
4 to the other and that such a position enables him to
5 exercise influence over one who reposes special trust and
6 confidence in him. The facts and circumstances must
7 indicate that the one reposing the trust has foundation for
8 belief that the one giving the advice is acting not in his
9 own behalf, but in the interests of the other party.

10 Now, one standing in a fiduciary relationship with
11 another is subject to liability to the other for harm
12 resulting from a breach of duty imposed by the relationship
13 In a breach of fiduciary duty case, the plaintiff is entitled
14 to damages for harm caused by a breach of a fiduciary duty
15 owed to him or her. Damages in an action for breach of
16 fiduciary duty are those proximately resulting from the
17 wrongful conduct of the defendant.

18 The plaintiffs also claim that some defendants
19 aided and abetted breaches of fiduciary duty by another
20 defendant. To succeed on this claim the plaintiffs must
21 prove three things: 1, a breach of a fiduciary duty owed to
22 the plaintiffs; 2, the nonfiduciary defendants knowing
23 participation in the breach, and 3, actual damages suffered
24 by the plaintiff as a result of the breach.

25 Okay. We are getting there, all right?

1. Next, the plaintiffs claims that the defendants
2. violated the South Carolina Securities Act, Sections
3. 35-1-501 and 509

4. The plaintiffs must prove that the defendants sold
5. a security in violation of the Act

6. Now, the plaintiffs first claim that the
7. defendants violated the Act by engaging in the business of
8. effecting transactions in securities for people or companies
9. other than the defendants themselves without being
10. registered as a broker-dealer. The Act provides that a
11. person acting as a broker-dealer or agent that sells or buys
12. a security without registering as a broker-dealer is liable
13. to the customer. A broker-dealer is defined as a person
14. engaged in the business of effecting transactions in
15. securities for the account of others or for the person's own
16. account

17. Next the plaintiffs claim that the defendants
18. violated this Act by employing directly or indirectly a
19. device, scheme, or artifice to defraud in connection with
20. the offer, sale, or purchase of a security. The Act
21. provides that a person that receives directly or indirectly
22. any consideration for providing investment advice regarding
23. securities to another person and employs a device, scheme,
24. or artifice to defraud the other person is liable to that
25. other person

1 Now, next the plaintiffs claim that the defendants
2 violated the Act by engaging in an act, practice, or course
3 of business that operated or would operate as a fraud or
4 deceit in connection with the offer, sale, or purchase of a
5 security. The Act provides that a person that receives
6 directly or indirectly any consideration for providing
7 investment advice regarding securities to another person and
8 engages in an act, practice, or course of business or would
9 operate as a fraud or deceit on the other person is liable
10 to that other person.

11 And, finally, the plaintiffs claim that the
12 defendants violated the Act by selling a security by means
13 of an untrue statement of a material fact, or by failing to
14 state a material fact necessary in order to make the
15 statement made, in light of the circumstances under which it
16 is made, not misleading.

17 The Act provides that a person is liable to the
18 purchaser if the person sells a security by means of an
19 untrue statement of a material fact or by failing to state a
20 material fact necessary in order to make the statement made,
21 in light of the circumstances under which it is made, not
22 misleading, the purchaser not knowing the untruth or
23 omission and the seller not sustaining the burden of proof
24 that the seller did not know and, in the exercise of
25 reasonable care, could not have known of the untruth or

1 omission.

2 If you find that the defendant violated the Act in
3 any one or more of these four ways, then you must determine
4 plaintiffs actual damages

5 Now, the Act also places time limits on the
6 ability of the plaintiffs to recover damages. Section
7 35-1-509(J) (2) reads, "a person may not be obtain relief
8 unless the action is instituted within the earlier of three
9 years after discovery of the fact constituting the
10 violation, or five years after the violation." In this case
11 the three year time period is called a Statute of
12 Limitations. And the five year absolute bar is called a
13 Statute of Repose. The discovery rule, and I'll explain
14 that to you shortly, is a doctrine that pauses the running
15 of or tolls a Statute of Limitations when the plaintiffs
16 have pursued their rights diligently but some extraordinary
17 circumstance prevents them from bringing a timely action.
18 The discovery rule can temporarily suspend Statutes of
19 Limitations, but not Statutes of Repose. Statutes of Repose
20 generally may not be tolled, even in cases of extraordinary
21 circumstances beyond a plaintiff's control.

22 Under the discovery rule, the Statute of
23 Limitations for violations of the South Carolina Securities
24 Act does not run from the date of the violation, but from
25 the date when the injury resulting from the wrongful conduct

1 complained of either is discovered or should have been
2 discovered by the exercise of reasonable diligence. One is
3 charged with discovery when the facts and circumstances of
4 an injury would put a person of common knowledge and
5 experience on notice that some claim against the defendant
6 might exist. The discovery date is not when a plaintiff
7 discovers a witness to support or prove their case. The
8 date on which discovery should have been made is an
9 objective, not a subjective question

10 And under the discovery rule, an action accrues
11 when the injury is discovered or reasonably ought to have
12 been discovered. The reasonably ought to have been
13 discovered requirement is the reasonable diligence
14 requirement. And the exercise of reasonable diligence means
15 simply that an injured party must act with some promptness
16 where the facts and circumstances of the injury would put a
17 person of common knowledge and experience on notice that
18 some right of his has been invaded or that some claim
19 against another party might exist. The Statute of
20 Limitations begins to run from this point and not when
21 advice of counsel is sought or a full-blown theory of
22 recovery is developed. The fact that the injured party may
23 not comprehend the full extent of the damage is immaterial.

24 Nevertheless, the five year absolute bar to
25 actions, also called a Statute of Repose, is contained in

1 the South Carolina Securities Act. This means that
2 regardless of when the violation was discovered by the
3 plaintiffs, they are prohibited from recovering any damages
4 on their Securities Act claim if they begin their action
5 after the five year absolute time bar. Remember, this five
6 year time bar is the equivalent to a cutoff or an absolute
7 bar to liability. In such situations both the discovery of
8 the violation and the three year Statute of Limitations are
9 immaterial.

10 Now, I would also define for you what an
11 investment advisor is. An investment advisor is a person
12 that, for compensation, engages in the business of advising
13 others, either directly or through publications or writings,
14 as to the value of securities or the advisability of
15 investing in, purchasing, or selling securities, or that,
16 for compensation, and as part of a regular business, issues
17 or promulgates analyses or reports concerning securities.
18 The term includes a financial planner or other person that,
19 as an integral component of other financially related
20 services provides investment advice regarding securities to
21 others for compensation as part of a business or that holds
22 itself out as providing investment advice regarding
23 securities to others for compensation.

24 The plaintiffs also has claimed that the defendant
25 committed unfair trade practices. A trade practice or act

1 is an unfair trade practice or act if it offends established
2 public policy or is immoral, unethical, oppressive,
3 unscrupulous, or substantially injurious to consumers. This
4 does not include acts, practices, or representations that
5 are nothing more than dealer talk or what might be called
6 puffing.

7 The plaintiff must prove that the plaintiff
8 suffered actual damages as a result of the defendant's unfair
9 trade practice or act

10 And, in addition, the plaintiff must prove that
11 the unfair trade practice or act affected persons other than
12 the parties to this transaction. The plaintiff must prove
13 that the unfair trade practice or act has an impact on the
14 public's interest. This may be shown by proof that the
15 unfair trade practice or act is capable of repetition.

16 Now, I would tell you that also under the Act, the
17 Unfair Trade Practices Act does not apply to actions or
18 transactions permitted under laws administered by any
19 regulatory body or officer acting under statutory authority
20 of this state or of the United States, or actions or
21 transactions permitted by any other South Carolina law.
22 Securities transactions are exempt from claims under the
23 Unfair Trade Practices Act.

24 Now, the plaintiff also claims that the defendant
25 committed fraud and deceit. The plaintiff must prove each

1 and every element of fraud and deceit by clear and
2 convincing evidence. It's a higher standard than a
3 preponderance or greater weight of the evidence. Fraud
4 cannot be presumed. Clear means evidence which is not
5 ambiguous, doubtful, contradictory. Convince means to cause
6 one to believe in the truth of what is asserted.

7 Fraud means bad faith and dishonesty, as opposed
8 to mistake, or neglect, or negligence. Deceit means a
9 fraudulent misrepresentation by which one person deceives
10 another.

11 In order to prevail on an action for fraud and
12 deceit, the plaintiff must prove all of the following nine
13 elements by clear, cogent, and convincing evidence.

14 First, the plaintiff must prove that a
15 representation was made by the defendant.

16 And representations may be made orally, in
17 writing, by acts and conduct, or by acts meant to deceive.
18 It is not necessary for the defendant to have made the
19 representation directly. And a false impression made by
20 words or conduct may constitute fraud.

21 And if the defendant made a fraudulent
22 representation, he is responsible for injury to the
23 plaintiff even though the representation may not have been
24 made directly to the plaintiff if the defendant made the
25 representation to a third party with reason to expect that

1 the third party would repeat the representation and that the
2 plaintiff's conduct would be influenced by that
3 representation.

4 The plaintiff must also prove that the
5 representation made by the defendant was false.

6 Next, the plaintiff must prove the representation
7 made by the defendant was material. And a representation is
8 material if it influenced the plaintiff in making the
9 decision to enter into the agreement with the defendant.

10 The plaintiff must prove that the defendant knew
11 that the representation was false or that the defendant made
12 the representation with a reckless disregard of its truth or
13 falsity. The representation must relate to a present or
14 pre-existing fact and cannot usually be based on an
15 unfulfilled promise or statement as to a future event.
16 However, if the defendant promised to do a certain thing
17 with no intention of keeping that promise at the time the
18 promise is made, the defendant has committed fraud. And a
19 mere breach of contract, however, is not fraud. The fact
20 that a promise was made but never fulfilled is not, in and
21 of itself, fraud.

22 The plaintiff must also prove that the defendant
23 intended for the plaintiff to act on the defendant's
24 representation.

25 Further, the plaintiff must prove that he did not

1 know that the defendant's representation was false.

2 And the plaintiff must also prove that he relied
3 on the truth of the defendant's representation

4 In addition, the plaintiff must prove that he had
5 the right to rely on the truth of the defendant's
6 representation And the plaintiff must use reasonable care
7 and diligence to protect himself If you find that the
8 plaintiff relied on the defendant's representation, you must
9 then decide whether the plaintiff should have done so And
10 in making this decision you may consider all of the
11 circumstances involved, including the form and materiality
12 of the representation, the respective intelligence,
13 experience, age, and mental and physical conditions of the
14 parties; the relation and respective knowledge and means of
15 knowledge of the parties, and any other factors which have
16 been shown during this trial which you feel are relevant
17 And even if the defendant made a false representation, if
18 you find that the plaintiff failed to use reasonable
19 ordinary care and diligence in protecting himself, then you
20 should return a verdict for the defendant However, where a
21 fiduciary relationship exists between the parties, the
22 plaintiffs have a right to rely upon the defendant's
23 representations even though the plaintiffs had the
24 opportunity to investigate the matter and ascertain the
25 truth or falsity of those representations.

1 And, finally, the plaintiffs must prove they
2 suffered damages which were proximately caused by a
3 defendant's representation.

4 Now, the plaintiff has also alleged constructive
5 fraud. And to establish constructive fraud, all elements of
6 actual fraud, all those nine elements, except the element of
7 the intent must be established. So the plaintiff must prove
8 each and every element of its case with respect to fraud by
9 clear, cogent, and convincing evidence. And constructive
10 fraud is distinguished from fraud by the absence of the
11 element of intent to deceive. So unlike actual fraud,
12 neither actual dishonesty of purpose nor intent to deceive
13 is an element of constructive fraud. Instead, it is
14 sufficient that it be alleged that the defendant ought to
15 have known the falsity of the misrepresentation. In a
16 constructive fraud case involving an arm's length,
17 transaction between mature, educated individuals, there is
18 no right to rely absent a confidential or fiduciary
19 relationship. And this is especially true in circumstances
20 where one should have used precaution and protection to
21 safeguard their interests.

22 If you find that the plaintiff is entitled to
23 actual damages on fraud and deceit, you must then consider
24 whether they would be entitled to punitive damages. And the
25 plaintiff may be awarded punitive damages on these causes of

1 action if you determine that a false representation was
2 recklessly made as a true assertion by the defendant without
3 the defendant knowing or caring whether the representation
4 was true or false.

5 We are closing in on it

6 The plaintiff also claims that a negligent
7 misrepresentation made by the defendant caused the plaintiff
8 to suffer a monetary loss. And in order to recover for
9 negligent misrepresentation, the plaintiff must first show
10 by a preponderance of the evidence that the defendant made a
11 false representation to the plaintiff.

12 Next, the plaintiff must prove that the defendant
13 had a monetary interest in making the false statement.
14 Proof that a statement was made in the course of the
15 defendant's business, profession, or employment is enough to
16 show that a monetary interest in making the statement, even
17 if no one receives anything in exchange for the statement.

18 The plaintiff must prove that the defendant owed
19 the plaintiff a duty to make sure that truthful information
20 was given to the plaintiff and that the defendant breached
21 that duty by failing to use due care. If the defendant had
22 a monetary interest in making the statement and the
23 defendant possessed expertise or special knowledge that
24 would ordinarily make it reasonable for another person to
25 rely on the defendant's judgment or ability to make careful

1 inquiry, then the defendant has a duty of care with respect
2 to the representations made to the plaintiff.

3 And the plaintiff must also prove that he
4 justifiably relied on the defendant's misrepresentation.
5 The plaintiff's reliance on the defendant's statement is
6 justified only if the defendant is in a superior position to
7 the plaintiff as to knowledge of the truth of the statement.
8 And the plaintiff's reliance on the misrepresentations must
9 have been reasonable. If the plaintiff knew the truth, the
10 reliance on the defendant's misrepresentation is not
11 reasonable. And the defendant will not be responsible for
12 information which is given with the clear understanding that
13 the defendant is not liable for its accuracy. The defendant
14 is not responsible for casual statements. Representations
15 as to matter of law or matters which the plaintiff could
16 determine the truth of by using due diligence.

17 And, finally, the plaintiff must prove that the
18 plaintiff suffered a monetary loss as a direct and proximate
19 result of the plaintiff's reliance on the defendant's
20 misrepresentation.

21 All right Now, when a party is injured or
22 damaged by the wrongful act of another person, it is the
23 duty of that injured person to reasonably try to avoid and
24 lessen damages. And those damages which may be avoided by
25 the use of reasonable efforts, care, and prudence by the

1 injured party cannot be the proximate result of the other
2 party's wrongful act. Therefore, the injured party cannot
3 recover for damages which reasonably might have been
4 avoided.

5 The efforts required by the injured party must be
6 determined by the rules of common sense and fair dealing and
7 what a person of ordinary reason and prudence would do under
8 the same circumstances. The injured party is not required
9 to use unreasonable efforts or great expense to avoid and
10 lessen the damages. The at fault party has the burden of
11 proving a failure to lessen damages on the part of the
12 injured party by a preponderance or greater weight of the
13 evidence.

14 Now, ladies and gentlemen, if you decide in this
15 case that the plaintiff or plaintiffs are entitled to a
16 verdict, your next step would be to decide how much money
17 the defendants should be required to pay.

18 Actual damages are to compensate a plaintiff for
19 the plaintiff's injury or loss and to put the plaintiff as
20 nearly as possible in the same position that the plaintiff
21 was in before the incident occurred. In other words, actual
22 damages would be the actual losses and expenses which a
23 plaintiff has suffered because of the defendant's wrongful
24 conduct.

25 And the existence, causation, or amount of damages

1 cannot be left to conjecture, guess work, or speculation.
2 However, proof of amount of loss with absolute or
3 mathematical certainty is not required. Damages must be
4 proven by a greater weight of the evidence with a reasonable
5 degree of certainty. And the evidence must enable you, the
6 jury, to determine what amount is fair, just and reasonable.

7 Now, if you award actual damages in any cause of
8 action except for breach of contract, violation of the
9 Securities Act, and the Unfair Trade Practices Act, and if
10 you award damages in any of the others, you may also
11 consider an award of punitive damages. Punitive damages are
12 intended to punish a defendant for extraordinary and
13 outrageous misconduct and to prevent a defendant and others
14 from committing similar acts in the future. Punitive
15 damages can only be awarded when conduct of the defendant
16 has been something more than mere negligence. The evidence
17 must establish that the defendant's acts were reckless,
18 willful and wanton, meaning there was a conscious failure to
19 exercise due care or a conscious indifference to the rights
20 and safety of others or a reckless disregard thereof.

21 Now, if you find that the defendant's conduct was
22 willful, wanton or reckless, you may award the plaintiff
23 punitive damages. And to support an award of punitive
24 damages, the plaintiff must prove by clear and convincing
25 evidence that the conduct complained of included a

1 consciousness of wrongdoing at the time of the conduct

2 Again, clear and convincing evidence is more than
3 just a preponderance or greater weight, which requires only
4 proof which persuades you that a party's claim is more
5 likely true than not true. On the other hand, clear and
6 convincing proof is not as high a standard as in criminal
7 court, which is proof beyond a reasonable doubt. Clear and
8 convincing proof leaves no substantial doubt in your mind.
9 It means that the evidence is not ambiguous, doubtful,
10 equivocal, or contradictory. Convincing means persuading by
11 proof or argument causing one to believe in the truth of
12 what is asserted. Clear and convincing proof establishes in
13 your mind, not only that the fact is probable, but that it
14 is highly probable.

15 And before awarding punitive damages, you must
16 consider and weigh elements which may be pertinent to the
17 facts of this case.

18 You must first consider the relationship between
19 any punitive damage award and the harm caused. Any penalty
20 imposed should take into account the reprehensibility of
21 conduct, the harm caused, the defendant's awareness of the
22 conduct's wrongfulness, the duration of the conduct, and any
23 concealment thereof. Thus, any penalty imposed should bear
24 a relationship to the nature and extent of the conduct and
25 the harm caused, including the compensatory or actual damage

1 award made by you.

2 Next, any penalty imposed should take into
3 account, as a mitigating factor, any other penalty that may
4 have been imposed or which may be imposed for the conduct
5 involved, including any criminal or civil penalty or other
6 punitive damage award arising out of the same conduct.

7 Next, you should consider whether the award of and
8 the amount of any punitive damages award may deprive the
9 defendant of any profits derived from the improper conduct
10 and whether the ill-gotten profits should be properly
11 awarded to the plaintiff.

12 And, finally, any award of punitive damages must
13 be limited to punishment and, thus, may not affect economic
14 bankruptcy. And to this end the defendant's ability to pay
15 any punitive damage award should be considered. I would
16 tell you, however, the economic bankruptcy factor is not an
17 absolute bar to an award of punitive damages.

18 Last page.

19 Ladies and gentlemen, we have prepared a verdict
20 form which we are going to send back into the jury room with
21 you and we think it is self-explanatory, but if it is
22 difficult to understand or you need to have it explained,
23 please let me know and we will clear it up for you. It
24 basically tracks the various causes of action. It goes
25 right through. And it also breaks out each party. Because

1 if you remember, each party is entitled to its own
2 individual consideration, both the plaintiffs and the
3 defendants. So it's a -- that's why this is such a long and
4 intricate verdict form. But I want to tell you, whatever
5 verdict you arrive at, your verdict must be unanimous. So
6 all twelve of you must agree.

7 And I want to tell you, you should consider the
8 evidence calmly and with measured reason, without passion,
9 prejudice, bias, or emotion. You have no friends to reward
10 and you have no enemies to punish.

11 Now, I'm going to excuse you all to your jury room
12 at this time. I ask you not to begin your deliberations,
13 but I'm going to ask the bailiffs to go ahead and get a menu
14 and let them pick out -- we will order lunch.

15 I need to go over my charge on the law with the
16 lawyers to make sure I did not misstate something or omit
17 something.

18 When the evidence comes back to you, along with
19 this verdict form, you all can begin your deliberations

20 Now, so with the exception of Mr. Connell and Mr
21 Miller, I excuse you all to your jury room.

22 This is hardest part for me, particularly after a
23 two week trial. You'll say good-bye to them

24 (Whereupon, at 12.39 p.m., the jury panel to the
25 jury room, awaiting instructions to begin deliberations)

1 THE COURT: Wow. You know, I wish I had a crystal
2 ball and I could have known that we would have fourteen
3 warriors. I wish I could let you go back in there with
4 them. You are just as qualified. You paid just as good of
5 attention, but the law only allows twelve, so I can't. So,
6 you know, I feel badly that I have taken two weeks out of
7 your life, but it happens. I mean, I'm just shocked that we
8 didn't lose some jurors along the way, to be perfectly
9 honest. People get sick. Things happen. So you all have
10 completed your service and you are free to go, or stay. I
11 do want to offer you lunch. We will order it from some
12 place. It takes some time to get here, so if you all want
13 to wait and get it, great. We would love to have you stay.
14 You are also free to talk about it with whoever
15 you want to, but I will also tell you that if you don't want
16 to talk about it, you don't have to. And if somebody
17 persists and bothers you, just find out who it is and tell
18 the clerk of court and I will fix it. Okay.

19 Thanks very much. All right.

20 (Whereupon, the alternate jurors were discharged)

21 THE COURT: Any exception or objection to the
22 charge, other than those previously noted?

23 From the plaintiff, anything?

24 (Off the record)

25 (Back on the record)

1 THE COURT Yes That's a big yes.

2 They want to smoke.

3 Well, let's keep the note. I guess we got to make
4 it part of the record.

5 MR. WILLOUGHBY: Your Honor, the burden of proof,
6 as far as the unfair trade practices claim, there was no
7 charge that they have the burden to prove any exception.

8 THE COURT Yeah, I think that's in there.

9 MR. WILLOUGHBY: And the only other issue, Your
10 Honor, was for the negligent misrepresentation, that the
11 fiduciary relationship would give someone the opportunity to
12 rely,

13 THE COURT: Which one?

14 MR. WILLOUGHBY: On negligent misrepresentation.
15 You said that on several charges, but I don't think you
16 included it on that one

17 THE COURT: Okay Anything from you all?

18 MR. BROWN: Yes, Your Honor, just briefly.

19 We had submitted a charge on the effect of both
20 consequential damages exclusion in the contract, and you
21 didn't charge that. We believe that because that exists, it
22 would be appropriate to charge that.

23 We also would take exception with the breach of
24 contract accompanied by fraudulent act. We had requested a
25 statement that the act has to be a separate and distinct act

1 from the breach and I don't believe that was charged.

2 THE COURT Oh, I said that twice.

3 MR. BROWN: Okay

4 THE COURT: You did not hear that?

5 MR. BROWN: And the broker-dealer, just as we had
6 noted yesterday, we take exception to the exceptions to the
7 definition not being charged.

8 THE COURT: Okay. Well, that came kind of right
9 out of that Act.

10 What was the first one?

11 MR. BROWN: We had sought a charge that --

12 THE COURT: No, no, not with that one.

13 I can't remember. All right.

14 Well, in this world nothing is perfect, so your
15 exceptions are noted for the record, you know, and it may
16 give you all something to --

17 Should I bring them back in here and charge them
18 about the fiduciary?

19 MR. WILLOUGHBY: No.

20 THE COURT: They know.

21 MR. BROWN: We would contend that the charge as a
22 whole is adequate in that regard, Your Honor

23 THE COURT: Okay. All right.

24 Okay. Well, Mike has got those exhibits laid out.
25 Do you all trust him to have it right?

1 (PROCEEDINGS, JUNE 30, 2014)

2 (Jury Note marked as Court's Exhibit No. 18 for
3 identification).

4 (Whereupon, at 9:00 a.m., proceedings were
5 reconvened).

6 (Whereupon, at 9:00 a.m., the jury panel resumed
7 its deliberations).

8 (Whereupon, at 9:00 a.m., proceedings were
9 recessed, pending the verdict of the jury panel)

10 (Whereupon, at 1:57 p.m., proceedings were
11 reconvened).

12 THE COURT: We have a verdict.

13 Anything before we bring the jury?

14 MR. WILLOUGHBY: Nothing from the plaintiff, Your
15 Honor?

16 MR. BROWN: No, Your Honor.

17 THE COURT: Okay.

18 (Whereupon, at 2:00 p.m., the jury panel returned
19 to open court to render its verdict)

20 THE COURT: I hope you all are well.

21 I understand that you have reached a verdict, is
22 that right?

23 JURY FOREPERSON: We have.

24 THE COURT: All right. Would you please hand it
25 to the bailiff?

1 THE BAILIFF Thank you.

2 THE COURT. All right If you would publish it
3 for us, please

4 THE CLERK Your Honor, this is case number
5 2011-CP-23-8578, in the matter of Francis P. Maybank and
6 Jane H P Maybank, as Trustee for the Francis P Maybank
7 Family Insurance Trust, plaintiffs, versus BB&T Corporation,
8 Branch Banking and Trust Company, Successor in merger to
9 Branch Banking and Trust Company of South Carolina, and
10 Sterling Capital Management, LLC, Successor in merger to
11 BB&T Asset Management, LLC, defendants.

12 "To the foreperson of the jury.

13 "Please mark the answers of the jury to the
14 following special interrogatories You are required to
15 consider questions 1 through 9 before you move to question
16 10. Each answer must be the unanimous answer of the jury

17 "1 Breach of contract

18 "On the claim of breach of contract we, the jury,
19 find as follows:

20 "For plaintiff Francis P. Maybank

21 "BB&T Corporation, yes

22 "Branch Banking and Trust Company, yes

23 "Sterling Capital Management, LLC, yes

24 "For plaintiff Jane H P Maybank, as Trustee for
25 the Francis P. Maybank Family Insurance Trust

1 "BB&T Corporation, no

2 "Branch Banking and Trust Company, no.

3 "Sterling Capital Management, LLC, no

4 "2. Breach of fiduciary duty.

5 "On the claim of breach of fiduciary duty, we, the
6 jury, find as follows:

7 "For plaintiff Francis P. Maybank

8 "BB&T Corporation, yes.

9 "Branch Banking and Trust Company, yes.

10 "Sterling Capital Management, LLC, yes.

11 "For plaintiff Jane H.P. Maybank, as Trustee for
12 the Francis P. Maybank Family Insurance Trust:

13 "BB&T Corporation, no

14 "Branch Banking and Trust Company, no.

15 "Sterling Capital Management, LLC, no.

16 "3. Breach of contract accompanied by a
17 fraudulent act:

18 "On the claim of breach of contract, accompanied by
19 a fraudulent act, we, the jury, find as follows:

20 "For plaintiff Francis P. Maybank:

21 "BB&T Corporation, no.

22 "Branch Banking and Trust Company, no.

23 "Sterling Capital Management, LLC, no.

24 "For plaintiff Jane H.P. Maybank, as Trustee for
25 the Francis P. Maybank Family Insurance Trust.

1 "BB&T Corporation, no.

2 "Branch Banking and Trust Company, no.

3 "Sterling Capital Management, LLC, no

4 "4. Violation of the South Carolina Uniform
5 Securities Act.

6 "On the claim of violation of the South Carolina
7 Securities Act, we, the jury, find as follows.

8 "For Francis P. Maybank.

9 "BB&T Corporation, no.

10 "Branch Banking and Trust Company, no.

11 "Sterling Capital Management, LLC, no.

12 "For plaintiff, Jane H P Maybank, as Trustee for
13 the Francis P. Maybank Family Insurance Trust.

14 "BB&T Corporation, no.

15 "Branch Banking and Trust Company, no.

16 "Sterling Capital Management, LLC, no.

17 "5. Violation of the South Carolina Unfair Trade
18 Practices Act.

19 "On the claim of violation of the South Carolina
20 Unfair Trade Practices Act, we, the jury, find as follows.

21 "For Francis P. Maybank

22 "BB&T Corporation, yes.

23 "Branch Banking and Trust Company, yes.

24 "Sterling Capital Management, LLC, yes.

25 "For plaintiff, Jane H.P. Maybank, as Trustee for

1 the Francis P Maybank Family Insurance Trust.

2 "BB&T Corporation, no

3 "Branch Banking and Trust Company, no.

4 "Sterling Capital Management, LLC, no.

5 "6. Aiding and abetting breach of fiduciary duty.

6 "On the claim of aiding and abetting a breach of
7 fiduciary duty, we, the jury, find as follows.

8 "For Francis P Maybank:

9 "BB&T Corporation, no

10 "Branch Banking and Trust Company, no.

11 "Sterling Capital Management, LLC, no

12 "For plaintiff Jane H P Maybank, as Trustee for
13 the Francis P. Maybank Family Insurance Trust.

14 "BB&T Corporation, no

15 "Branch Banking and Trust Company, no

16 "Sterling Capital Management, LLC, no.

17 "7 Fraudulent misrepresentation

18 "On the claim of fraudulent misrepresentation, we,
19 the jury, find as follows

20 "For the plaintiff Francis P Maybank.

21 "BB&T Corporation, no

22 "Branch Banking and Trust Company, no.

23 "Sterling Capital Management, LLC, no.

24 "For plaintiff Jane H P. Maybank, as Trustee for
25 the Francis P Maybank Family Insurance Trust.

1 "BB&T Corporation, no

2 "Branch Banking and Trust Company, no.

3 "Sterling Capital Management, LLC, no.

4 "8. Constructive fraud.

5 "On the claim of constructive fraud, we, the jury,
6 find as follows:

7 "For plaintiff Francis P. Maybank

8 "BB&T Corporation, yes.

9 "Branch Banking and Trust Company, yes

10 "Sterling Capital Management, LLC, yes

11 "For plaintiff Jane H.P. Maybank, as Trustee for
12 the Francis P. Maybank Family Insurance Trust.

13 "BB&T Corporation, no

14 "Branch Banking and Trust Company, no.

15 "Sterling Capital Management, LLC, no

16 "9. Negligent misrepresentation

17 "On the claim of negligent misrepresentation, we,
18 the jury, find as follows:

19 "For plaintiff Francis P. Maybank,

20 "BB&T Corporation, yes.

21 "Branch Banking and Trust Company, yes

22 "Sterling Capital Management, LLC, yes.

23 "For plaintiff Jane H P Maybank, as Trustee for
24 the Francis P Maybank Family Insurance Trust.

25 "BB&T Corporation, no

1 "Branch Banking and Trust Company, no
2 "Sterling Capital Management, LLC, no.

3 "10. If you answered no to all the parts in
4 questions 1 through 9, please sign the form and notify the
5 bailiff

6 "11. If you answered yes to any of the parts in
7 questions 1 through 9, what amount of actual damages do you
8 award?

9 "(A) For plaintiff Frank Maybank?

10 "\$3,100,000.

11 "(B) For plaintiff Maybank Family Insurance
12 Trust.

13 "Zero.

14 "12. If you answered yes to questions 2, 3, 6, 7,
15 8, or 9, do you find by clear and convincing evidence that
16 the acts of the defendant warrant payment of punitive
17 damages? If so, indicate yes in the yes blank below for the
18 respective defendants

19 "BB&T Corporation, yes.

20 "Branch Banking and Trust Company, yes.

21 "Sterling Capital Management, LLC, yes

22 "13. If you answered yes to question 12, what
23 amount, if any, punitive damages do you award?

24 "(A) For plaintiff Frank Maybank?

25 "\$5 Million

"(B). For plaintiff Maybank Family Insurance Trust?

"Zero."

Signed foreperson Patrick Moore.

Dated 6-30-2014.

If this is your verdict, so say you all, please signify by raising your right hand.

(Whereupon, all the jurors raised their right hand)

THE COURT: All right. Anything further of the jury from the plaintiffs?

MR. WILLOUGHBY: Nothing from the plaintiffs, Your Honor.

THE COURT: Anything from the defendants?

MR. BROWN: Nothing, Your Honor.

THE COURT: Okay.

All right Mr. Foreman, ladies and gentlemen of the jury, wow. You all go down as the famous warrior jury. You all have done an incredible job, hard, hard work, and it is really encouraging to all of us involved in the court system to see twelve people who didn't -- I don't think any of you knew each other. Maybe you might have, but who come together and make sacrifices that you have made. It's astounding. It's really a great thing.

"Guess what? You're all done. I know that makes

1 you happy.

2 You are free to talk about the case now with
3 anybody that you would like to, but you are also free not to
4 talk about it. And if anybody approaches you and you tell
5 them that you are not interested in talking about it and
6 they pursue it and bother you, just let the Clerk of Court
7 know who that person is and we will fix it, because we will
8 not have jurors harassed or intimidated in way for their
9 services.

10 So with that, ladies and gentlemen, thank you very
11 much. And I think we will have letters to give you back in
12 your room. Okay. Great.

13 (Whereupon, at 2 13 p m, the jury panel was
14 discharged).

15 THE COURT: Okay

16 Yes?

17 MR. BROWN: Your Honor, we would respectfully
18 request ten days to submit motions.

19 THE COURT: Oh, yeah, well, we will have every bit
20 of ten days. He's going to want to submit some stuff too,
21 since they prevailed on that unfair trade practices, I
22 presume, aren't you?

23 MR. WILLOUGHBY: Absolutely, Your Honor.

24 Three things for the court's consideration of
25 interest, will be attorneys's fees, and will be trebling and

1 so we would ask respectfully as well that we be permitted
2 within the ten day period of time.

3 THE COURT: Sure

4 MR. WILLOUGHBY: And we'll be --

5 THE COURT: Let me ask you, before you go any
6 farther and y'all haven't had a chance to catch your breath.
7 Do you want me to go back and talk to the jury a little bit
8 and see if they have got any comments they want to make?

9 MR. BROWN: Sure.

10 THE COURT: I wouldn't want --

11 Do you mind?

12 MR. WILLOUGHBY I do not mind, Your Honor.

13 THE COURT: Okay.

14 MR. WILLOUGHBY If they --

15 THE COURT: I will report back to you if they have
16 got good or bad, favorable, what -- you know, I like to ask
17 them what they would recommend you do or not do I think
18 it's always helpful.

19 If y'all don't want me to, I won't.

20 MR. WILLOUGHBY Well, what do you mean, Your
21 Honor, in terms of --

22 THE COURT: What you could have done better and
23 what you --

24 MR. WILLOUGHBY Oh, in terms of our --

25 THE COURT: Just their personal --

1 MR. WILLOUGHBY -- presentation and what they
2 have found to be --

3 THE COURT. Yeah, a little critique

4 MR. WILLOUGHBY: Well, that's good, Your Honor.
5 We would not --

6 THE BAILIFF: They are leaving

7 THE COURT. Okay, let me grab them real quick.

8 (Off the record)

9 (Back on the record)

10 THE COURT They said -- they said it was very
11 difficult.

12 And I said well, any suggestions for the lawyers
13 what they could do better, and they said tell them not to do
14 such a good job and make it so difficult. I think that's a
15 direct quote. So -- but they didn't really have a whole
16 lot -- you know, a lot of -- not too much else to add. I
17 think they are just ready to get out of here.

18 Okay, anything else?

19 Do y'all just want to submit it within ten days?

20 MR. WILLOUGHBY: Correct, Your Honor.

21 And we would also ask that Professor Freeman will
22 be our expert on attorneys fees, so we would ask for a brief
23 hearing when Your Honor is inclined to do so, to allow us to
24 present --

25 THE COURT. Oh, do you think they are going to

1 contest the attorneys fees?

2 MR. WILLOUGHBY: I don't think so, Your Honor.

3 We will say right now we will be willing, whatever
4 they bill their client, we will accept the same amount. No
5 questions asked.

6 THE COURT: Well, let's don't start, but -- okay,
7 well, you -- ten days.

8 And you get then ten days to respond -- I mean, if
9 you want to throw in some little motion to protect the
10 record, just in case, but I'll give you time afterwards to
11 respond to the plaintiffs' motion, and you can -- you know,
12 you can redo the directed verdict thing and we will be set
13 to go, but I just want to make sure that you all are covered
14 on the record, but I'm not going to hold anybody's feet to
15 the fire. So --

16 MR. WILLOUGHBY: I understand.

17 THE COURT: But if you want to move expeditiously.

18 MR. WILLOUGHBY: But, Your Honor, for any motions
19 that they have, such as JNOV, or something like that, they
20 have got to do that within ten days. But --

21 THE COURT. But what I'm saying is they can just
22 put in a form motion and then come follow up with the big
23 one. That's all I'm saying. You know, just protect
24 yourself, but you don't have to come out with guns blazing,
25 you know, right off the bat, but you can, if you want to. I

1 don't care.

2 All right, anything else?

3 MR. BROWN: Well, for one thing, I do note there
4 were a number of documents that were confidential within the
5 exhibits themselves

6 THE COURT. Yeah

7 MR. BROWN. And, you know, we would ask that some
8 steps be taken so that they not be made public in the
9 court's records. Exactly what those steps are, I don't know
10 logistically what is the best way to --

11 THE COURT. 'Y'all are going' -- I mean --

12 MR. BROWN. We -- we can take -- we were going to
13 take the exhibits and scan them and put them on discs and
14 bring the discs back to the court, but --

15 THE COURT. Is that agreeable?

16 MR. WILLOUGHBY: We have no objections, Your
17 Honor, as long as -- I mean, they are -- they are
18 trustworthy people. We have no reason to believe that they
19 will --

20 THE COURT. Yeah

21 Well, you know, the problem is you can't redact
22 stuff until the matter is fully resolved, so --

23 MR. WILLOUGHBY. Your Honor, they can scan them,
24 but we wouldn't want them taking any --

25 MR. BROWN. No, we --

1 MR. WILLOUGHBY. Doing anything with the
2 documents.

3 THE COURT: No, no.

4 MR. BROWN: We are not talking about altering the
5 documents in any way, but if we return the copy to the court
6 in the electronic form and then hold the originals, would be
7 custodians of the originals during the appeal, everyone
8 would have a copy, and the copy in the court would be a
9 disc, which would be harder to review and, therefore,
10 provide an extra layer of confidentiality, we believe.

11 THE COURT: I mean, do you want to think about
12 that?

13 MR WILLOUGHBY. Let us think about that, Your
14 Honor, and maybe talk with them.

15 THE COURT: Yeah, y'all come to some --

16 MR WILLOUGHBY: Because I think the originals
17 have to remain with the court for some reason.

18 THE COURT: I would think that that's probably
19 correct.

20 MR BROWN: We will do whatever Your Honor
21 provides.

22 THE COURT: Okay.

23 MR. BROWN: I will say I have had other judges
24 order me to maintain the originals during an appeal process.

25 THE COURT: Pendency of the appeal?

1 MR. BROWN: Yeah;

2 THE COURT: Well, let me -- yeah, let's look into
3 that and let me know. This is a -- you know, this is an
4 unusual case.

5 All right. Is that it?

6 MR. WILLOUGHBY Thank you, Your Honor.

7 MR. BROWN: Thank you, Your Honor

8 THE COURT: Okay

9 Congratulations to all the lawyers, and the
10 clients ought to be darn well pleased with the effort that
11 they put forward.

12 (Jury Instructions marked as Court's Exhibit No
13 16 for identification)

14 (Deposition of Keith Gray marked as Court's
15 Exhibit No 19 for identification).

16 (END OF REQUESTED TRANSCRIPT OF RECORD)
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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

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

2011-CP-23-08578

AUGUST 19, 2014

TRANSCRIPT OF RECORD

B E F O R E

THE HONORABLE EDWARD MILLER, JUDGE

A P P E A R A N C E S

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CIRCUIT COURT REPORTER

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PLAINTIFF'S EXHIBITS

NO	DESCRIPTION	ID	EV
	(NONE)		

DEFENDANT'S EXHIBITS

	(NONE)		

COURT'S EXHIBITS

	(NONE)		

1 **AUGUST 19, 2014**

2 (WHEREUPON, court convened with all parties
3 present and the following proceedings were had)

4 THE COURT Y'all got anything to say?

5 MR. WILLOUGHBY Your Honor, what I was going
6 to do is pass up to the Court ---

7 THE COURT Yeah, please

8 MR. WILLOUGHBY --- our responses in
9 opposition to a number of motions that the defendants
10 have filed. We filed these this morning. We served
11 them this morning on counsel.

12 THE COURT Okay

13 MR. WILLOUGHBY And just for you and your
14 law clerk, these are copies for your files. We can
15 send them to you electronically as well if you would
16 like them electronically.

17 There are other motions that have been filed
18 previously at the ten-day deadline of July 10. And I
19 was going to hand up to Your Honor a list of what we
20 see the things to be on the Court's agenda for
21 consideration at this time, a suggested list and, of
22 course, our view as to how we'd like to see the Court
23 rule on these documents. This list was prepared by Mr.
24 Bannister, Your Honor.

25 THE COURT Did y'all check the grammar and

1 spelling?

2 MR WILLOUGHBY We have We've checked it
3 very carefully, made sure that the -- all the issues
4 are included in our position

5 MR KRISTINIK And, Your Honor, we obviously
6 would like to go first since we filed our motions first
7 on the ten-day deadline And JNOV and new trial should
8 be considered first It could moot many of the other
9 motions

10 THE COURT Okay Yeah Mr Willoughby?

11 MR WILLOUGHBY Well, we would think, Your
12 Honor, that the other motion -- the only real issue
13 that's a threshold issue that they argue is whether or
14 not they're entitled to an exemption, which they didn't
15 prove under the Unfair Trade Practices Act Of course,
16 that's an issue that they've focused on because that
17 deals with the attorneys' fees That deals with the
18 trebling damages issue Those are issues that Mr
19 Bannister is prepared to argue But that's the only --
20 and those are all intertwined So you're going to get
21 to that issue when you consider the trebling and the
22 attorneys' fees issue that Mr Bannister is prepared to
23 argue

24 THE COURT Well, I think what Mr Kristinik
25 is saying that I don't get there if he wins his motion,

1 right?

2 MR. WILLOUGHBY Well, ---

3 THE COURT Isn't that what you're ---

4 MR. KRISTINIK That's correct, Your Honor

5 THE COURT Yeah

6 MR. WILLOUGHBY If you concluded that they
7 have proved an exemption, which I don't think you will,
8 then the attorneys' fees and trebling would not be an
9 issue for consideration

10 THE COURT Okay All right Well, let's
11 let them go first

12 MR. WILLOUGHBY Okay Your Honor, may I
13 give to the Court two things for consideration during
14 the -- the jury verdict form, I have a copy of that

15 THE COURT Sure Yeah

16 MR. WILLOUGHBY Do you need a copy of that?

17 MR. KRISTINIK Sure I do Thanks

18 MR. WILLOUGHBY Because that's going to be a
19 major part of the discussion today

20 THE COURT Thank you

21 MR. WILLOUGHBY And also a copy, because I
22 think it is terribly instructive, I think it's Exhibit
23 7 of the trial record, which is the general counsel
24 disclosure letter, and two copies of it, as well, Your
25 Honor

1 THE COURT All right

2 MR WILLOUGHBY Now the highlighting is a --
3 is certain my own, but the original doesn't have that

4 MR KRISTINIK Do we have a highlighted
5 copy?

6 MR WILLOUGHBY Yeah You do You have
7 exactly what I gave to Your Honor Okay

8 MR KRISTINIK Your Honor, to argue our
9 motion for a new trial and for JNOV first I'm not
10 going to cover every single ground in the motion The
11 motion itself is about fifty pages long, and we have a
12 seventy-page supporting brief What I want to do is
13 focus on a new arguments that are dispositive of many
14 other issues in the case And I want to start off with
15 the UTPA claim

16 South Carolina law is very clear in the Rhodes
17 decision and the Ward decision from the South Carolina
18 Supreme Court that if conduct is regulated, if
19 securities-related transactions and conduct is -- falls
20 within the securities act or falls under the
21 jurisdiction of the South Carolina Securities Division
22 or within the regulations promulgated by that division,
23 then it is exempted from the UTPA

24 Now, as we pointed out in my brief, we believe
25 that this is a question for the Court to decide And

1 if you look at the case law addressing the UTPA
2 exemptions, it is consistent -- you see consistent
3 rulings as a matter of law as to whether the exemptions
4 apply It really has to be that way Some of the
5 exemptions, it would be almost impossible to charge a
6 jury on the application of the exemptions Like many
7 other decisions, like the existence of a duty, it is a
8 unique question for the Court to decide whether an
9 exemption applies

10 So let's talk about the securities exemption The
11 Rhodes decision came out in 1980 applying the general
12 activity test And it says if the conduct is regulated
13 by the Securities and Exchange Commission or the State
14 Securities Act, then it falls within the exemption In
15 1991 in the Ward case, the Supreme Court narrowed that
16 particular -- the exemption for the general activities
17 test It did away with that test except for securities
18 transactions It kept it for securities transactions
19 because it recognizes how much regulation you have in
20 the securities industry

21 And then, again, in 2001, the Unisys case, the
22 South Carolina Supreme Court came back again and said
23 we continue -- even though we eliminated the general
24 activities test for everything else, we continue to
25 adhere to a broad application of the UTPA exemption for

1 securities regulated activities
2 This entire case was based on securities
3 transactions You have two prepaid variable forward
4 contracts and you have a managed portfolio account
5 All the damages in this case arise from the prepays and
6 from the managed portfolio account It just takes one
7 quick look at the report from Craig McCann, their
8 damages and securities expert, to see that All of his
9 damages calculations arise from the prepaid
10 transactions and from the managed portfolio account
11 The managed portfolio account clearly is related to
12 securities because it's an account that holds stocks
13 and bonds And it's managed by a portfolio manager
14 The prepaid transactions, they're securities Under
15 the definition of security in subsection 29 of section
16 102 of the Securities Act, investment contracts are
17 securities So are options, including puts and calls,
18 and those words are specifically used in the definition
19 of security in the Act And, as you heard during the
20 testimony at trial, a prepaid transaction is a
21 contract It's the sale -- it involves the sale of a
22 security and it has protected puts and calls options
23 creating a column for protection from a downside and it
24 caps the upside appreciation There can't be any
25 question that a prepaid transaction is a security

1 For Your Honor to hold that the securities
2 exemption does not apply to this case would essentially
3 be a declaration that prepaids can be sold without
4 regulation, that an unregistered person can go out in
5 the street and offer assistance with prepaid
6 transaction That any person can start opening
7 accounts, manage portfolio accounts, they don't have to
8 be registered, they don't have to be regulated That
9 is what holding -- accepting their position, that would
10 be a declaration of that You don't have to be
11 regulated to sell prepaids And that just can't be the
12 case And we know it because Tracy Meyers came all the
13 way here to Greenville from Columbia She's the Deputy
14 Securities Commissioner and she didn't come here unless
15 she thought she had jurisdiction over what was going on
16 in this case

17 THE COURT I thought she got subpoenaed

18 MR KRISTINIK She was subpoenaed, but she
19 certainly felt that she had relevant knowledge,
20 relevant to what was going on in this case, and she was
21 happy to offer it, Your Honor

22 The Securities Act is very broad It has a civil
23 liability provision for a lawsuit such as this It
24 also has enforcement powers for the securities
25 division It also allows the securities division to

1 promulgate regulations And the securities division
2 did It issued a regulation, and we cite this in our
3 brief It has over twenty sub-parts It requires
4 suitability analysis, requires a reasonable basis for
5 recommendations It, of course, prohibits deception
6 It requires the use of truthful statements All of the
7 activity that they complain about in this case is
8 contained within that regulation There's nothing in
9 this case that led to damages that wouldn't fall within
10 that regulation and within the jurisdiction of the
11 securities division or wouldn't fall under the
12 Securities Act But they didn't succeed on the
13 Securities Act claim and that's because they had to
14 prove fraud And they had to prove that we were acting
15 as unregistered broker/dealer and they didn't do that
16 And they didn't succeed on that claim But that
17 doesn't mean that they then can pursue a UTPA claim
18 As stated in Rhodes, if it's regulated, if it falls
19 within the jurisdiction of the securities regulators,
20 if it falls within the regulation of the Securities
21 Act, then it falls within the UTPA exemption
22 For that reason, Your Honor, we would ask that you
23 find as a matter of law that the securities exemption
24 applies and that you grant JNOV in favor of the
25 defendants on the UTPA claim And with that ruling,

1 that would moot their request for treble damages, the
2 request for attorneys' fees and costs It would also
3 moot our motion to postpone decision on attorneys'
4 fees, our motion for more information and our motion to
5 strike the affidavit of Professor Freeman

6 Your Honor, there's several other JNOV and new
7 trial arguments I'd like to make Would you like me to
8 continue on with ---

9 THE COURT What do y'all want to do?

10 MR WILLOUGHBY Judge, this is an important
11 issue and it's a threshold issue, so I would think that
12 it would be appropriate for Your Honor to hear ---

13 THE COURT Okay Let them respond We'll
14 do them individually Okay All right

15 MR BANNISTER Thank you, Your Honor, just
16 briefly, and we're going to handle the arguments kind
17 of like a racket ball game, we're going to go up and
18 down each issue But I just want to give the Court
19 just a reminder

20 THE COURT My children are older than that
21 Would you please describe that game for me I don't
22 know what you're talking about

23 MR BANNISTER We need a sledgehammer,
24 Judge

25 THE COURT Oh, okay All right Go ahead

1 MR BANNISTER Judge, just briefly because I
2 think it would make sense for the Court to sort of
3 appreciate where we are in terms of the facts of this
4 case

5 Up until the case started and through the opening
6 statements, the parties had very different ideas about
7 what the facts of the case would be And so we've now
8 had a jury trial and fortunately for Your Honor, you
9 don't have to decide the facts The facts were
10 determined by the jury And the facts that they
11 determined are these

12 BB&T, and I'll reference them as a group, because
13 all the findings were against all three BB&T had a
14 contract with Mr Maybank and they breached it They
15 had no excuse for breaching it They did not do what
16 they had contracted to do They had a fiduciary
17 relationship with Mr Maybank and they didn't do what
18 they were supposed to do as his fiduciary They didn't
19 give him the information they were supposed to And as
20 a result of that breach, he's had damages They
21 committed constructive fraud That is a bad-faith,
22 dishonest, false statement that they knew was material
23 to what was going on They knew he was going to rely
24 upon it And they knew it was going to cause him
25 damages and it did That's what the jury determined

1 that BB&T has done to Mr Maybank They determined

2 that he -- it was a negligent misrepresentation

3 What that means is they lied to him in a way that

4 they knew he would rely on it and that he did rely on

5 it and that he ended up suffering damages as a result

6 of their bad faith, their misstatements

7 Judge, they found that they violated -- the jury

8 determined that BB&T committed an unfair trade practice

9 act That means that they found, as a fact for Your

10 Honor, so you don't have to worry about it, they found

11 that they acted immorally or unethically or

12 oppressively or unscrupulously or injuriously to the

13 plaintiff, Mr Maybank And that they have done it to

14 other people in the public or could do it to other

15 people in the public And that's why they had -- they

16 returned a verdict on the Unfair Trade Practice Act

17 So Your Honor can kind of look at this case and

18 the arguments made by BB&T They say the facts are

19 like they want them to be, but as you consider the

20 different legal arguments, the facts were determined by

21 the jury and basically what I just gave you is sort of

22 where you are as a Judge, that's how this case is

23 That's the status of the facts today

24 So as we go through the different ones, just to

25 sort of make everybody aware of -- the facts aren't in

1 dispute from what -- we kind of have them by the jury

2 THE COURT Okay

3 MR JOHNSON Your Honor, may it please the
4 Court? I'd also like to start with kind of generally
5 ---

6 THE COURT Generally, you didn't tell me I
7 was going to get tag-teamed

8 MR BANNISTER This is whack-a-mole, Your
9 Honor

10 THE COURT Oh, okay All right All right,
11 Mr Johnson

12 MR JOHNSON Thank you, Your Honor I'd
13 like to start generally with just the JNOV standard
14 This governs all of their JNOV motions This standard
15 is very high that the defendants must overcome Your
16 Honor is required to view the evidence and all
17 reasonable inferences that were reasonably drawn in the
18 light most favorable to Mr Maybank You're basically
19 looking for any evidence, not looking for the existent,
20 not the weight of the evidence Where it yields more
21 than one inference, JNOV must be denied

22 It should also be granted if no reasonable jury
23 could have reached a verdict As this Court witnessed
24 first hand, this was a thoughtful, attentive,
25 deliberative jury who even asked to come back a second

1 day over the weekend. That fact weighs in favor of
2 continuing the jury verdict

3 Additionally, only the grounds that were raised in
4 defendants' motion for directed verdict may be
5 considered in this motion for JNOV. This rule is
6 substantially implicated here, Your Honor. The
7 defendants raised fifty-four grounds in their hundred-
8 plus pages of motion and memorandum. Forty-three of
9 those grounds were not raised in their motion for
10 directed verdict, which the Court will recall was a
11 thirty-page written directed verdict. This includes
12 grounds numbers twelve through fifty-four. Now, these
13 are mostly single-sentence stop phrases and conclusory
14 arguments, but they have no relevance here. None of
15 those grounds were raised in the directed verdict
16 motion and as a result are not proper for the Court's
17 consideration here.

18 Now, with respect to the exemption issue, the
19 defendants vastly overstate, with no supporting case
20 law, the breadth of this exemption under the Unfair
21 Trade Practices Act. The case defendants rely
22 principally upon for their argument that the entire
23 banking industry, as a regulated community, is exempt
24 from the Unfair Trade Practices Act, was abrogated over
25 twenty years ago. There is no industry exemption under

1 the Unfair Trade Practices Act that is applicable to
2 the facts of this case

3 Case law actually says that Your Honor has to look
4 at this on a case-by-case specific basis The standard
5 for an exemption is simple and it does not apply here
6 If an activity is explicitly authorized or required by
7 a regulatory agency or another statute, it is exempt
8 This makes sense if you think about it, the Court does
9 not want the party that is subject -- or the party to
10 be subjected to liability under the Unfair Trade
11 Practices Act for something that they are required to
12 do by another regulatory agency or by statute The
13 standard does not apply to the jury's findings of
14 unfair and deceptive acts by BB&T

15 Inducing individuals to become customers through
16 their own false misrepresentations about a form
17 contract is not authorized or required by any statute
18 or regulatory agency in this state Similar but
19 misrepresenting that individualized research and
20 suitability of an investment strategy to a client by
21 pre-clearing them for this risky strategy, that isn't
22 authorize or required by any regulatory agency or
23 statute in this state

24 Finally, misrepresenting the reasons behind the
25 refund of fees to Mr Maybank and other customers is

1 not authorized or required by any regulatory agency

2 The jury found that these actions of the bank were

3 unfair and deceptive None of those prongs involve

4 securities at all No exemption applies here

5 The defendants' exemption argument is based on the

6 false premise that Mr Maybank's Unfair Trade Practices

7 claim were based on the sale of securities Those are

8 not the facts that were argued and accepted by the

9 jury, Your Honor

10 At the close of evidence we moved to amend the

11 pleadings to conform to the evidence that was

12 presented Your Honor, granted that motion When

13 defendants made the argument that they are -- they are

14 misrepresenting the evidence of record and the jury's

15 findings on the unfair and deceptive conduct BB&T's

16 unfair and deceptive conduct, as I just told Your

17 Honor, was advanced on three grounds from which the

18 jury made its holding

19 The first is the bulk management agreement BB&T

20 presented that bulk management agreement to Mr Maybank

21 and other customers And they knew that it contained

22 errors and untruths That's based on Mr Walters'

23 testimony They knew at the time they presented the

24 contract that they could not fulfill it as written, had

25 no intention of fulfilling it as written, and then

1 purposely did not fulfill it BB&T did not inform Mr
2 Maybank of that deception

3 The second is the fee refund BB&T deceptively
4 refunded fees to over a hundred and thirty customers,
5 including Mr Maybank, representing that that refund
6 was the result of an internal audit of customer
7 accounts BB&T deceptively informed Mr Maybank and
8 others that that refund was done as a reflection of
9 their corporate values In reality the refund was
10 prompted by an SEC audit BB&T's letter was designed
11 to misrepresent the circumstances surrounding the
12 refund and encouraged complacency amongst Mr Maybank
13 and other customers Keep in mind that these were all
14 fiduciary clients of BB&T, that BB&T was lying to them
15 in that refund letter That's an unfair and deceptive
16 practice that does not involve a security

17 Finally, the form letter The general counsel
18 disclosure letter and approval letter, which Your Honor
19 has a copy in front of you, that constitutes an unfair
20 and deceptive act in commerce BB&T represented in
21 that letter that it had done individualized suitability
22 assessments of Mr Maybank's situation However, on
23 the eve of trial, the defendants produced to us a
24 document, which was basically a form, fill-in-the-blank
25 version, of that approval letter The language and

1 representations were the same in the form letter as
2 they were in the approval letter provided to Mr
3 Maybank

4 Plus, while Mr Maybank believed that all of these
5 things had been done specifically for him, that was
6 false BB&T had conducted no such analysis Promising
7 specialized and individualized services for treatment
8 while providing them with stock services has been found
9 to violate the Unfair Trade Practices Act That's the
10 Carlton Motors case, 342 S C 254

11 Now, the second part of this is, defendants'
12 argument is not based on good law, Your Honor They
13 rely exclusively on the Rhodes case and the general
14 activities test, which has been expressly overruled by
15 the Supreme Court The cases finding the securities
16 transactions to be exempt from the Unfair Trade
17 Practices Act relate specifically to the public
18 offering of securities, the initial public offering
19 That's the Rhodes case It dealt with the public
20 offering and sale of the stock from the company The
21 Supreme Court noted that the exemption was related
22 specifically to those securities in that case They
23 also adopted the Rhode Island General Activities Test
24 This is the test that defendants argue here, is
25 basically the regulated entity exception -- exemption,

1 excuse me And, again, it's no longer good law Ten
2 years later, in 1991, the Supreme Court overruled that
3 general activities test in the Ward case The Supreme
4 Court held that -- excuse the reading, but the Supreme
5 Court Held as follows After much research and
6 consideration of the events concerning the regulation
7 of businesses during the past ten years since the
8 Rhodes decision, we believe that a general activity
9 test would not fulfill the intent of the legislature in
10 preventing unfair trade practices We believe the
11 exemption is intended to exclude only those actions or
12 transactions which are allowed or authorized by a
13 regulatory agency or statute That's what I was
14 arguing to Your Honor earlier Notwithstanding,
15 defendants still argue -- their argument is based on
16 this general activities test, and they rely upon the
17 footnote, which is essentially vista, that said that
18 securities transactions continue to be exempt Well,
19 what they were referring to was the public offering
20 exemption that was discussed in the Rhodes case
21 That's further proof that this general activities test
22 has been rejected, Your Honor The Court also
23 expressly overruled the Court of Appeals decision in
24 Anderson v Citizens Bank case That's 294 S C 387,
25 which had applied the Unfair Trade Practices Act

1 exemption to all actions and general activity of the
2 bank The Ward case specifically overruled that
3 general activities test that defendants are arguing
4 here

5 The purpose of that exemption is not to exempt all
6 activity which may be subject to state or federal
7 regulation As held in Ward, if the court were to
8 accept that contention the Unfair Trade Practices Act
9 would essentially be rendered meaningless Almost ever
10 business is subject to some of form of regulation
11 This interpretation has also been followed by the
12 courts -- federal courts in this state

13 Now, finally, the defendants' Unfair Trade
14 Practices exemption argument should be rejected because
15 they've not met their burden in demonstrating that the
16 exemption applies As an initial matter, when
17 defendants rested, that was the close of evidence in
18 this case All of the attachments the defendants have
19 included to their motions, which consists of documents
20 and deposition transcript excerpts, those were not
21 presented or accepted as evidence in the trial and are
22 improper and should be redacted by the Court But
23 section 39-540 of the exemptions statute is clear that
24 the party seeking to prove the exemption has a burden
25 of proving it The defendants have not met their

1 burden Defendants presented no evidence during trial
2 that their actions in presenting this contract to Mr
3 Maybank and other customers, which it had no intention
4 of fulfilling, was subject to this exemption
5 Defendants presented no evidence whatsoever that a
6 variable prepaid forward contract is a security

7 Now, conveniently, without the benefit of any
8 evidence in the record, they're asking Your Honor to
9 decide that it is a security It is not There is no
10 evidence in the record from which the Court could make
11 that determination It would not be supported by the
12 evidence In fact, we asked their expert witness,
13 Robert Thorne, whether a prepaid is a security, on
14 cross examination His response, I'm not prepared to
15 testify on that issue Again, affirming that a prepaid
16 is a security would be incorrect and would be
17 unsupported by the evidence

18 Your Honor, that's all I have on the exemption

19 THE COURT Okay All right

20 MR KRISTINIK A few rebuttal points, Your
21 Honor They're taking the position a prepaid is not a
22 security, which is really quite surprising They
23 actually, for two and a half years, litigated a
24 securities act claim They brought in Dr Craig
25 McCann, a securities expert, who calculated all his

1 damages based on a market adjusted analysis, which are
2 calculations that you do in securities cases A
3 prepaid forward contract, there can be no question that
4 it's a security The testimony at trial was that
5 you're paying for puts and calls They called it an
6 expensive investment

7 THE COURT Well, here's something that sort
8 of -- I mean, we could argue about that all day But
9 what about the other factual findings of the jury with
10 respect to the breach of fiduciary duty, the other
11 hundred and thirty people, the breach of contract that
12 the -- and these are all things that the jury found
13 And, I mean, if I remember correctly, this is basically
14 the verdict form requested by the defendants, if I'm
15 not mistaken And, you know, it's a pretty specific
16 verdict form The jury found no violation of the
17 securities act They found these other violations

18 So are you asking me to conclude that even though
19 the jury found there was no securities violation, that
20 there are no other facts in the record from which they
21 could have found an unfair trade practices violation?
22 That's what I think the basis of their argument is I
23 believe that they're saying, hey, we've got all this
24 other stuff in the record The jury found liability,
25 but didn't find liability in securities And so that

1 their finding of a violation of the Trade Practices Act
2 is not based on a securities violation So where does
3 that -- how do you come back from that?

4 MR KRISTINIK Let me address those points,
5 Your Honor

6 THE COURT Okay

7 MR KRISTINIK We're not here to argue that
8 conduct could or could not support a finding of unfair
9 accepted conduct We're here arguing about whether the
10 securities exemption applies If the conduct they're
11 relying on involves securities, then under the
12 exemption, the UTPA just doesn't come into play They
13 can argue all day long ---

14 THE COURT Well, let me interrupt you again
15 What about the assertion that that exemption only
16 applies to initial offerings?

17 MR KRISTINIK If you take a look at Rhodes
18 and Ward, you will see that that is a gross distortion
19 of those opinions And that is far too narrow What
20 they're asking for is a dramatic change in the law
21 Broker dealers and registered investment advisers have
22 been operating in South Carolina since 1980, since the
23 Rhodes decision, exempt from the UTPA And if you give
24 the narrow, the narrow reading that they want, all of a
25 sudden you've added a UTPA claim that every suit, every

1 arbitration against a broker/dealer or registered
2 investment advisor If you look at the ---

3 THE COURT I mean, I think, you know, that
4 I'm a wise jurist, but I don't think the rest of the
5 state's going to go quite that far Go ahead, though

6 MR KRISTINIK But, in fact, that's what
7 they would want, that ruling But it may not have
8 brought implications, the practical effect of your
9 order, but if that were the law in our state it would
10 dramatically change the industry

11 THE COURT Yeah

12 MR KRISTINIK Everything that Mr Johnson
13 pointed to, ever act, where's the damage? Trace it to
14 the damage Let's talk about the rebate of the fees
15 They're saying it was made with a misrepresentation
16 Well, how was Mr Maybank harmed by that? He got his
17 money back Where are the damages? Well, the only
18 evidence of damages, the only damages calculations in
19 this case were by Dr McCann And guess what they
20 related to? Prepaid transactions and the managed
21 portfolio account He did detailed analysis of those
22 He compared it to a hypothetical situation with a
23 seventy percent bond, thirty percent equity mix
24 All the damages, no matter what the action is, the
25 wrongdoing that supposedly caused the damages, all the

1 damages are linked to securities transactions There's
2 just no way around that The wealth management
3 agreement, I'll get into later why we don't think
4 there's been a breach The wealth management agreement
5 is an advisory contract It's what investment advisors
6 use It set up the managed portfolio account It's
7 completely related to the managed portfolio account
8 And any damages that arise from the breach of it, how
9 would you calculate those? You would analyze the
10 managed portfolio account, which is made up of stocks
11 and bonds So to have any claim, whatever they point
12 to, you have to have damages And all the damages are
13 always going to be related at the end of the day to the
14 prepaid transactions

15 THE COURT All right Next

16 MR KRISTINIK Your Honor, we're going to
17 tag-team you, also And I'm going to turn it over to
18 my partner, William Brown, to argue about BB&T
19 Corporation

20 THE COURT Okay

21 MR BROWN Your Honor, my argument is
22 related to the particular party, BB&T Corporation
23 Throughout the case and even today, plaintiffs have
24 sought to lump all the defendants as if they were one
25 entity They're not We have attempted throughout the

1 case to demonstrate that they are not And, in fact,
2 my issues relate to BB&T corporation itself We raised
3 in our pleadings and we raised pre-trial a motion to
4 dismiss them on the grounds of lack of personal
5 jurisdiction

6 At pre-trial, all they were required to do was
7 make a prima facie showing Through trial, they're
8 required to prove by a preponderance of the evidence
9 that they have established at least one of the arms of
10 the long arm statute and due process, sufficient
11 minimum contact to establish personal jurisdiction as
12 to BB&T Corporation They have failed to do that The
13 evidence does not exist of any action which satisfies
14 any of the prongs of the long arm statute whatsoever

15 We would also contend that there's no evidence of
16 any conduct which would satisfy the minimum context
17 analysis And, in fact, we would again point the Court
18 to the Builder Mart of America case, which is at 562
19 S E 2d 352, a Court of Appeals opinion of 2002, which
20 dealt with this exact situation When a customer
21 enters into a transaction with a bank in the state of
22 South Carolina, can the parent corporation be brought
23 in? Our Court of Appeals said, no The parent
24 corporation being involved in that case with one
25 document, a letter, being sent by an officer They

1 said that's not enough Otherwise, the bank wasn't
2 involved at all Very analogous here Their only
3 allegation and their only argument is that that one
4 document, with the GC, is sufficient to establish
5 personal jurisdiction Builders Mart says expressly
6 that's not the case

7 There is no other conduct whatsoever in evidence
8 related to BB&T Corporation No representation to
9 support a constructive fraud claim or misrepresentation
10 claim and nothing in terms of personal jurisdiction or
11 in terms of merits to support the award

12 As we would point out, the jury's verdict related
13 to cause of action of breach of contract There is no
14 contract in evidence between BB&T Corporation and Mr
15 Maybank It simply doesn't exist However, the jury
16 found a breach of contract Without the establishment
17 of a contract, that's improper and a JNOV is required
18 on that

19 They also found a breach of fiduciary duty But,
20 again, there is no evidence whatsoever of a fiduciary
21 relationship between BB&T Corporation and Mr Maybank
22 Again, a JNOV is required because there's simply no
23 evidence in the record to support that verdict

24 Similarly, the UTPA, there is no evidence of any
25 conduct which resulted in damage to Mr Maybank, which

1 is required by the UTPA by BB&T Corporation And,
2 again, there's no evidence of any representation made
3 by BB&T Corporation or any of its agents that would
4 support a constructive fraud or a negligent
5 misrepresentation Therefore, in addition to the
6 personal jurisdiction being lacking, each and every
7 cause of action fails as a matter of law because there
8 is no evidence to support BB&T's conduct in regard to
9 those -- the elements required to establish those
10 And lastly, the jury found that punitive damages
11 were appropriate against BB&T Again, there's no
12 evidence of any willful or reckless conduct by BB&T
13 In order to support the punitive damages, you must have
14 reckless or willful conduct as to each individual
15 defendant And there's simply nothing in the record to
16 demonstrate that BB&T Corporation acted recklessly or
17 willfully, and much less enough to establish the clear
18 and convincing standard that is required to support
19 those damages
20 Therefore, in addition to the requirement of JNOV
21 for personal jurisdiction and for lack of establishment
22 of the elements as to BB&T, the fact that they're named
23 in the punitive damages award would require a new
24 trial, as well, Your Honor, because the evidence does
25 not support that And the jury was expressly presented

1 evidence of their net worth in arguing what the
2 appropriate award of punitive damages were Therefore,
3 that can't be undone without a new trial

4 So on those bases, as to BB&T Corporation, JNOV is
5 required and at a minimum, a new trial is required

6 THE COURT You want me to grant a new trial
7 to BB&T Corporation?

8 MR WILLOUGHBY We don't believe that the
9 law ---

10 THE COURT What if I don't grant any relief
11 to the other defendants and I make you go through
12 another trial?

13 MR BROWN Your Honor, we don't believe that
14 that's -- we believe that a complete new trial is
15 required A new trial is required on any element

16 THE COURT Okay All right Thank you very
17 much All right

18 MR JOHNSON Your Honor, the Court properly
19 exercised its jurisdiction over BB&T Corporation The
20 Court is now looking for any evidence to support this
21 motion to the jury of this issue Here clear evidence
22 of record indicates that BB&T Corporation was
23 critically involved in the approval of the doomed
24 investment strategy for Mr Maybank BB&T
25 Corporation's Secretary and General Counsel, Patricia

1 Oliver, in the document that you have in front of you,
2 specifically reviewed and approved the failed
3 investment strategy recommended to Mr Maybank The
4 investment strategy approved by Mr Maybank -- or
5 approved by Pat Oliver forms the basis of this
6 litigation Simply put, without Oliver's approval,
7 without the general counsel of BB&T Corporation's
8 approval of this strategy, the investment strategy
9 could not, could not have gone forward We would not
10 be here today Mr Maybank would not have become a
11 wealth management client without that approval
12 Therefore, BB&T Corporation played a critical role in
13 the case's core set of facts

14 Certain elements in this letter clearly
15 demonstrate lack of jurisdiction over the corporation
16 is proper Oliver approved a multi-million dollar
17 investment strategy for Mr Maybank Oliver received
18 this letter and disclosure from Anthony Mahfood and
19 Ross Walters, who were wealth advisors here in
20 Greenville Oliver approved this multi-million dollar
21 strategy to take place in South Carolina and thus
22 directed that business take place here in South
23 Carolina and in this state Oliver approved the
24 strategy as non-speculative on the use of BB&T
25 Corporation in the strategy in South Carolina The

1 fact that this strategy involved BB&T Corporation stock
2 is key here The strategy approved by Oliver approved
3 the recommendation to hold BB&T stock, a clear conflict
4 of interest The key component of strategy as
5 described by the approval letter was the continued
6 receipt of the BB&T dividend As Oliver's approval
7 approved the strategy that was premised on BB&T
8 continuing to pay Mr Maybank a dividend here in this
9 state

10 Moreover, Oliver directed her approval and the
11 strategy here to South Carolina to Mahfood and Walters
12 and to Mr Maybank The approval letter was provided
13 to Mr Maybank prior to his signing off on the
14 strategy, and the entire investment strategy took place
15 here in South Carolina

16 Also, the reason behind the requirement of
17 Oliver's approval was the BB&T code of ethics This
18 was promulgated by BB&T Corporation and required bank
19 employees to comply with it BB&T Corporation was a
20 knowing and full participant in the failed investment
21 strategy that was advised and recommended to Mr
22 Maybank

23 Now, beyond that, clear evidence of their
24 participation in this strategy, BB&T Corporation has
25 waived the right to assert personal -- a lack of

1 personal jurisdiction by this Court BB&T Corporation
2 meaningfully participated in this litigation The case
3 has been pending since December 2011 Not until the
4 summary judgment stage did BB&T Corporation move to be
5 dismissed The case law is clear here that a defense
6 of personal jurisdiction may be waived as a personal
7 privilege and it has been waived here BB&T
8 Corporation, plain and simple, failed to exercise
9 diligence here In fact, they did the opposite and
10 fully participated in this litigation BB&T
11 Corporation's answer gave nothing more than this
12 perfunctory defense to personal jurisdiction
13 Some of the examples of their meaningful
14 participation in this case include the following It
15 removed, along with the other defendants, the case to
16 federal court but did not raise a lack of personal
17 jurisdiction as a defense While in federal court, it
18 filed its corporate disclosure with the federal court
19 It opposed remand of the case to this court and upon
20 remand, it did not seek dismissal, which would have
21 been the opportune time to do so Since that time it
22 has actively participated in discovery and litigation
23 BB&T Corporation jointly filed twenty-six, not counting
24 the past month, twenty-six separate motions in this
25 court prior to trial Filed numerous responsive

1 memoranda Not once did it argue a lack of personal
2 jurisdiction BB&T Corporation also jointly noticed
3 fifteen depositions between February 14th and May 16th
4 of this year Just prior to trial, some two and a half
5 years into this litigation It jointly responded to
6 Mr Maybank's discovery requests, not once objecting on
7 the grounds of personal jurisdiction

8 And importantly, Your Honor, on two separate
9 occasions, BB&T Corporation filed its own answers,
10 separate and apart from the other defendants, to Mr
11 Maybank's interrogatories and requests for admission
12 In sum, BB&T Corporation specifically approved Mr
13 Maybank's investment strategy It also meaningfully
14 participated in this litigation

15 And if I may, Your Honor, I do want to clear up
16 one misrepresentation that was made in the JNOV with
17 respect to BB&T Corporation In their motion the
18 defendants misrepresent Mr Willoughby's arguments
19 during his closing statement to the jury Defendants
20 allege Mr Willoughby requested one percent of the BB&T
21 Corporation's net worth as a punitive damage award
22 That is demonstratively false BB&T Corporation was
23 not mentioned at all during the closing argument Mr
24 Willoughby did talk about the net worth evidence of
25 BB&T Bank, but it did not mention BB&T Corporation

1 This undercuts a substantial portion of the defendants'
2 arguments with respect to BB&T Corporation As Judge
3 Alex Sanders once said, what doesn't make a difference
4 doesn't matter Here, Your Honor heard the evidence
5 from Dr Oliver Wood that over -- all of BB&T
6 Corporation's net worth is actually made up of BB&T
7 Bank's net worth They didn't challenge this JNOV on
8 the basis of BB&T Bank's net worth being argued to the
9 jury So, therefore, defendants' argument is
10 unsubstantiated and improper

11 It's also untrue that the request was one percent
12 of twenty-one billion Also demonstratively false
13 One percent of twenty-one billion is two hundred and
14 ten million dollars Mr Maybank did not request the
15 jury to provide him two hundred and ten million dollars
16 as a punitive award He did suggest to the jury that
17 they provide twenty-one million, and would have been an
18 appropriate penalty here, thus defendants' argument on
19 this point is incorrect

20 THE COURT Okay

21 MR BROWN Your Honor, very briefly Again,
22 what you didn't hear there was any statement which
23 would support a personal jurisdiction analysis under
24 due process And you didn't hear anything that would
25 support personal jurisdiction under the long arm

1 statute because it simply doesn't exists Their
2 argument was simply, well, we have the approval memo,
3 which is an internal memo within BB&T Now, it does
4 nothing to create personal jurisdiction of BB&T
5 Corporation, an out-of-state entity with South
6 Carolina It simply doesn't And Builders Mart deals
7 with a letter which was specifically directed from the
8 holding corporation to the plaintiff And that was a
9 place where the letter intentionally reached out to the
10 plaintiff And Builders Mart says, that's not enough
11 That simple document is not enough Here, the
12 connection is even less than Builder's Mart It simply
13 doesn't exist

14 You also didn't hear anything which established
15 evidence that BB&T Corporation had a contract with Mr
16 Maybank, that BB&T Corporation had a fiduciary
17 relationship with Mr Maybank, that BB&T Corporation
18 made any representations which could support the
19 representation claim or that BB&T's conduct
20 specifically caused -- resulted in any harm to Mr
21 Maybank under the UTPA claims Without that evidence,
22 the claims can't stand as to BB&T

23 And in terms of the waiver arguments, we've raised
24 personal jurisdiction all along, Your Honor And, in
25 fact, what they say -- well, we responded to discovery

1 We're required to respond to discovery When they
2 initiate discovery, we're required to respond to it
3 To say that we can't -- that they can create personal
4 jurisdiction by us abiding by the rules simply isn't
5 the law They didn't find any situation where BB&T
6 served written discovery We responded to theirs
7 BB&T Corporation didn't do that at all in this case
8 The fact that we were required to join in a removal or
9 a removal wouldn't happen, doesn't mean we consent to
10 jurisdiction We had preserved our objection to
11 jurisdiction and we continued to do so We raised that
12 objection numerous times throughout the proceeding,
13 including throughout the trial There was no waiver of
14 personal jurisdiction whatsoever by BB&T Corporation
15 The simple fact that they want to lump BB&T Corporation
16 and the bank and BB&T Asset Management as one, and view
17 the acts of one as the acts of all, does not create
18 jurisdiction over BB&T Corporation

19 THE COURT Okay Well, let me just ---

20 MR WILLOUGHBY Your Honor, one point that I
21 would call to Your Honor's attention is the letter that
22 you have in your hands If you will note it has a
23 Maybank number on it as far as disclosure That letter
24 was provided to Mr Maybank before the transactions
25 were implemented And it served to confirm all of the

1 oral representations that had been made That it would
2 protect his assets, that it would allow him to retain
3 ownership of the stock, that it was not speculative
4 All of the things from the very corporate headquarters
5 The entire strategy is being approved, confirmed and
6 permitted to go forward So from the very tops of the
7 corporation, Mr Maybank is led to believe that all of
8 the suitability analysis is being done and the
9 corporation is deeply involved in making sure that this
10 transaction is suitable for his particular and specific
11 needs

12 So it's important -- you'll see the status line on
13 that document, Your Honor, the date of that is, I
14 think, the date -- either the date before or the date
15 of the initial prepaid variable forward transaction

16 THE COURT Okay I was wondering how long
17 it would take before he couldn't

18 MR BROWN Your Honor, but in essence what
19 he's saying is somehow Mr Maybank got it But in
20 order for them to establish jurisdiction, they've got
21 to say Ms Oliver or BB&T Corporation gave it to him
22 and made representations to him And that simply is
23 not in evidence What he says is somehow I got it
24 But the fact that he got an internal BB&T memo is not
25 evidence that BB&T Corporation purposely availed itself

1 of the laws of the state of South Carolina

2 THE COURT Okay All right Thank you

3 MR KRISTINIK The next issue, Your Honor,

4 deals with punitive damages, waiver provision and

5 wealth management agreement But to illustrate the

6 importance of the issue I'm getting ready to go into, I

7 need to close out one thing with what you just heard

8 You know, Mr Brown argued why BB&T Corp should

9 not have been in the case And it's our position that

10 because they are in the case, because they're -- the

11 punitive damages award was assessed against them as

12 well as the others, that a new trial absolute is

13 required And I would direct your attention to the

14 decision of our South Carolina Supreme Court in Gray

15 versus Green Construction Company, a 1975 decision,

16 where the Court says where the verdict awards punitive

17 damages the courts have taken the view that on reversal

18 of the judgment or setting aside of the verdict as to

19 one of several defendant tortfeasors, it must also be

20 set aside with the others So there's a presumption

21 from our South Carolina Supreme Court that if you have

22 multiple defendants and you have a punitive damages

23 award and one of those defendants should be out, you

24 end up having to retry the whole thing The punitive

25 damages verdict is tainted

1 And what I'm getting ready to argue to you, in as
2 much as you might like to spend another two weeks with
3 us in a new trial, I'm going to present to you a way to
4 clean up this issue and to eliminate the taint that we
5 are arguing was caused by the presence of BB&T
6 Corporation

7 And what it is, it's paragraph (f)(1) of the
8 wealth management agreement It's a limitation on
9 damages and remedies Mr Maybank, of course, signed
10 the wealth management agreement Of course is seeking
11 to enforce it They've argued adamantly that we
12 breached it There's no argument that the agreement is
13 unenforceable They certainly want to enforce parts of
14 it Well, they're not allowed to hide from parts that
15 are unfavorable to their position If they're going to
16 take some of it, they have to take all of it That
17 means paragraph (f)(1)

18 Paragraph (f)(1) tells Mr Maybank, you can sue
19 the BB&T entities if we're negligent or even if we have
20 willful misconduct You can sue us for your losses,
21 but you can't sue us for consequential damages,
22 indirect, special or punitive damages It's very
23 express And it uses the word punitive damages That
24 prevents a punitive damage award in this case And it
25 applies not just to the managed portfolio created by

1 the wealth management agreement, but it also applies to
2 prepaid contracts, as well Mr Maybank testified to
3 that on the stand during my cross examination He
4 testified -- he confirmed his belief that the wealth
5 management agreement applied to everything that BB&T
6 was doing for him, the prepaids and wealth management
7 agreement

8 But, also, if you look at the concentrated stock
9 risk management addendum, one was executed for each
10 prepaid transaction prior to the transaction It says
11 expressly in the very first sentence, this is an
12 addendum to the wealth management agreement Then on
13 one of them they had the wrong date handwritten in, but
14 there was only one wealth management agreement in
15 existence at the time This is just a pure contract
16 interpretation It's a function of the Court The
17 Court should rule that taking into account the
18 concentrated stock risk management addenda and wealth
19 management agreement, that the damages limitation
20 applies to all these investment related services
21 performed by BB&T at BB&T Asset Management in this
22 case

23 I would anticipate that opposing counsel will
24 argue that this provision is unenforceable, it's
25 violative of public policy Here's what violates

1 public policy, an exculpatory clause If we had an
2 agreement, this is probably what you -- what you
3 probably have to -- what you're agreeing to when you
4 buy a ticket for the state fair that's going to open in
5 October in Columbia, you can't sue the fair for any
6 reason at all No matter how bad the ferris wheel
7 falls apart, you can't sue us for actual losses or
8 punitives or anything else That's a pure exculpatory
9 clause And public policy does not favor those because
10 it allows a party to avoid any consequences from their
11 conduct But it's different here This is not an
12 exculpatory clause It's just a limitation on the
13 extraordinary remedies of consequential damages and
14 punitive damages This allows Mr Maybank to sue for
15 actual losses This provision does not affect the
16 three point one million dollar actual damages verdict
17 that's in place It would only affect the five million
18 dollar punitive damages verdict

19 The South Carolina Supreme Court has said, to
20 determine what the public policy is in our state we
21 look at what the legislature enactments are The most
22 analogous piece of legislation for this situation is
23 the South Carolina Securities Act It has no punitive
24 damages provision It has no trebling provision And
25 what the legislature has recognized there is that the

1 securities division has the power, the enforcement
2 power, to deter improper conduct, to assess penalties,
3 to direct proper conduct for entities falling within
4 its jurisdiction So the public policy in South
5 Carolina does not require the existence of punitive
6 damages when securities transactions are involved,
7 which is the situation that we have here

8 So, Your Honor, it's our position that under
9 paragraph (f)(1) of the wealth management agreement,
10 the Court should grant JNOV in favor of the defendants
11 and strike the punitive damages verdict And, again,
12 if that's done, it absolves the need for a new trial
13 based on the existing -- the presence of BB&T Corp in
14 the case at the time it was presented to the jury

15 THE COURT Okay

16 MR JOHNSON Thank you, Your Honor The
17 defendants continue to argue the application of the
18 securities act The jury didn't find a securities act
19 violation They continue to misunderstand the
20 allegations that were -- I mean, the evidence that we
21 presented to support the causes of action We aren't
22 seeking to enforce the wealth management agreement,
23 Your Honor Mr Maybank is no longer a customer of
24 BB&T The contract was one of many exhibits in
25 evidence that was presented to the jury The jury

1 sorted it out The jury reviewed the evidence and
2 found defendants in breach of the contract Call a
3 spade a spade This is an exculpatory clause
4 Defendants, prior to today, referred to it as an
5 exculpatory clause throughout this litigation

6 What is key here is that defendants failed to
7 present any evidence during trial that the clause
8 shields them from their own fraudulent conduct and
9 breaches of the fiduciary duty to Mr Maybank The
10 clause is ineffective to provide defendants blanket
11 protection from liability

12 Further, defendants have not met their burden in
13 demonstrating the applicability to the causes of action
14 from which the punitive damages were awarded In fact,
15 they argued to the jury that this clause should be
16 applied and it was rejected It is important for Your
17 Honor to consider that defendants seek to limit the
18 liability through this clause despite the fact that
19 they also seek to have the Court reform their own form
20 contract for a mutual mistake Thus, where it suits
21 the contract language is ambiguous, it should be
22 reformed, even though it's BB&T's own form contract
23 But here when it comes to the defendants' reckless and
24 intentional wrongdoing, they want the Court to strictly
25 construe their own form contract

1 The jury has already found that the defendants
2 breached the contract That, coupled with the fact
3 that the defendants themselves seem to reform the
4 contract, is sufficient reason for the Court to deny
5 this motion

6 Additionally, the exculpatory clause, by its own
7 language, does not apply to Mr Maybank's causes of
8 action that arise outside of the services covered under
9 the contract The clause limits liability but only
10 with respect to, quote, services under the contract
11 BB&T's actions, which the jury found breached -- were a
12 breach of fiduciary duty or constructive fraud and
13 negligent misrepresentation, those don't fall under the
14 services of BB&T under the wealth management agreement

15 In general, the contract provisions are construed
16 against the drafter Additionally, South Carolina
17 Courts are clear in this context that these types of
18 exculpatory clauses are disfavored and they are
19 construed narrowly The services that BB&T, under the
20 contract that they were obligated to provide to Mr
21 Maybank under the contract, are set forth in the first
22 three provisions of the wealth management agreement
23 Nowhere does it list the defendants' services then
24 permitting -- being permitted to misrepresent facts or
25 material omissions to Mr Maybank The defendants cite

1 no case law which would permit them from avoiding
2 liability for their intentional, reckless and
3 fraudulent conduct, because the actions which led to
4 the jury verdict on those three common law causes of
5 action were derived from the conduct of BB&T outside of
6 their services under the wealth management agreement
7 This clause is just -- it's not applicable This is
8 particularly true when the provision was not provided
9 to Mr Maybank prior to his entering into the failed
10 investment strategy
11 The evidence in trial demonstrated that Mr
12 Maybank entered the prepaid on BB&T's advice a full
13 week before he was presented with this contract So
14 this exculpatory clause that they seek to enforce
15 against Mr Maybank was not even provided to him prior
16 to him entering into the investment strategy It was
17 provided to him after the fact He was already hook,
18 line, and sinker in this investment strategy He had
19 no choice at that point to sign the wealth management
20 agreement There is no evidence that it was presented
21 to him, and this exculpatory clause was presented to
22 him prior to him entering the investment strategy But
23 as his fiduciary, BB&T had an obligation to fully
24 explain this exculpatory clause to him and make sure he
25 understood it prior to him entering into the strategy

1 They failed to do so Their failure to disclose the
2 provision renders it unconscionable Mr Maybank also
3 had a right to rely upon his fiduciary representations
4 to him No disclosure occurred here The Defendants
5 produced no evidence at trial to demonstrate that they
6 explained this provision to Mr Maybank As a result,
7 it has no applicability here And there's no evidence
8 that it was presented to him prior to him turning over
9 his life savings to them

10 Additionally, the parties are not on equal
11 bargaining terms here Mr Maybank was still an
12 employee of BB&T at the time the contract was signed
13 These facts weighed heavily in favor of the Court
14 finding the clause was unenforceable on the grounds of
15 public policy Courts in this state have held that
16 these clauses or addendum are unenforceable where the
17 parties have substantially differing bargaining power

18 So in sum, Your Honor, the exculpatory clause does
19 not cover defendants' intentional wrongdoing and falls
20 outside the scope of the services under the contract
21 Mr Maybank was not provided this contract or the
22 exculpatory clause until after the strategy was already
23 put in place It was never explained to him despite
24 the fact that BB&T was his fiduciary and owed him that
25 obligation to make sure he fully understood They were

1 not in equal bargaining positions All of these
2 factors weigh in favor of the finding First, that it
3 does not apply And, secondarily, that it would be
4 unconscionable for this type of policy to apply

5 Thank you, Your Honor

6 THE COURT All right

7 MR KRISTINIK A quick rebuttal, Your Honor
8 We're relying on the concept of freedom of contract and
9 the duty of the Court to enforce contracts It's a
10 high burden for them to overcome In this case --
11 well, I want to address three arguments in particular
12 raised by Mr Johnson

13 One, he raised the timing of the execution of the
14 first prepaid, which was before the wealth management
15 agreement, but that doesn't matter Under South
16 Carolina law, and this is a case cited in our brief,
17 the Klutts Resort Realty case The South Carolina
18 Supreme Court in 1977 made it clear that when you have
19 multiple writings that are part of the same contract,
20 the timing of the execution doesn't matter You still
21 read them together That was applied in 2004 by the
22 South Carolina Court of Appeals in the Ellie case where
23 the Court said, the date of the writings constituting
24 the transaction is not material Where one of the
25 contracts explains, amplifies or limits the other,

1 those provisions will be given effect between the
2 parties so that the whole agreement, as actually
3 contracted by the parties, may be effectuated

4 So, Your Honor should read the wealth management
5 agreement together with each concentrated stock risk
6 management addenda that was executed with respect to
7 each prepaid transaction Mr Johnson argues that the
8 provision (f)(1) does not apply to the core causes of
9 action But if you look at the language of (f)(1), it
10 speaks in terms of negligence, willful misconduct, and
11 punitive damages These concepts are tort concepts
12 These are concepts that don't apply to just breach of
13 contract They have to apply to tort causes of action
14 So the only reasonable interpretation of (f)(1) is that
15 it applies to any cause of action as long as the
16 underlying wrongdoing relates to the services of the
17 defendants And this gets to my last point

18 All of the damages relate to the services of the
19 defendants here As stated earlier, Craig McCann's
20 damages analysis calculates the damages based on the
21 prepaid contracts and the wealth management agreement
22 and nothing else It's based exclusively on the
23 prepaids and the managed portfolio agreement And
24 those transactions indisputably arose from services of
25 BB&T or BB&T Asset Management There's just no

1 question that the prepaids came as a result of services
2 of BB&T And there's no question that the managed
3 portfolio was related to BB&T and BB&T Asset
4 Management, who was Kris Kapoor, one of the employees
5 who was actually managing the portfolio Therefore,
6 the wrongdoing that actually resulted in damages arises
7 from the services of the defendants and, therefore,
8 falls within the provisions and limitations of
9 paragraph (f)(1)

10 THE COURT Okay

11 MR KRISTINIK Your Honor, moving ahead
12 And, again, let me say I'm not arguing every ground in
13 the motion I'm hitting some large items that I think
14 can be dispositive of other things

15 THE COURT All right

16 MR KRISTINIK Now, I want to turn my
17 attention to the breach of contract cause of action,
18 and in particular the wealth management agreement
19 They focus significantly on a provision on the first
20 page It's the third paragraph where it says, the bank
21 shall, and then there's three numbered paragraphs after
22 that The bank shall do one, two and three

23 And they argue that that means that only employees
24 of Branch Banking and Trust Company, the bank entity,
25 can perform those obligations And that is simply not

1 what it says It does not place that limitation on the
2 bank entity The bank entity is allowed to go out and
3 use people, use specialists with the right expertise to
4 fulfill its obligations in the agreement BB&T, the
5 bank, did not assign these obligations We're not
6 saying that we assigned any obligations to BB&T Asset
7 Management BB&T, the bank, continues to have the
8 responsibility to fulfill those obligations, but it's
9 allowed to do it with people that don't work for the
10 bank It can rely on specialists with BB&T Asset
11 Management, which is exactly what it did And so the
12 only way that this can be interpreted is to allow the
13 bank to rely on employees of other entities What they
14 want you to do is to read language into this provision
15 that does not exist It does not have a restriction as
16 to the specific people or employees that the bank can
17 rely on to fulfill its obligations under the contract
18 This situation is similar to a homebuilder A
19 homebuilder promises to build a house, he's going to go
20 out and find a plumber, he's going to find an
21 electrician There's not a restriction on the ability
22 of using others But he ultimately has the
23 responsibility for delivering the house
24 Well, here, BB&T, the bank, it's not saying it
25 doesn't have the obligation to make sure these are

1 performed It can still be sued if they are not
2 performed, but it is not a breach of contract for BB&T
3 to rely on Kris Kapoor or other employees of BB&T Asset
4 Management to perform this function

5 There are three defenses, one of which is a
6 counterclaim, that are related to this statute -- this
7 contract construction argument One is the waiver
8 Mr Maybank claims it was wrong for the bank to rely on
9 employees of BB&T Asset Management to perform these
10 obligations But he knew, from the day he signed this
11 contract, that an employee of BB&T Asset Management was
12 going to perform at least one of these duties And
13 that's because he was already working with Kris Kapoor
14 Even before he signed this agreement, he testified that
15 he had several meetings with Kris Kapoor about what the
16 managed portfolio was going to look like after the
17 prepaid transaction was executed and the proceeds were
18 paid He knew when he signed this that Kris Kapoor was
19 a representative of BB&T Asset Management And we know
20 that because if you look at the signature page, Kris
21 Kapoor has, in fact, signed on behalf of BB&T Asset
22 Management And Mr Maybank recognized, during cross
23 examination that that, in fact, was the signature of
24 Kris Kapoor He was there when Kris signed it
25 So Mr Maybank can't have not -- he's there in

(1 August of 2006 He has knowledge that Kris Kapoor is
2 assisting with the investment function and the
3 management of the portfolio account And then he
4 continues to accept the benefit of Kris Kapoor managing
5 that account for months and months He has waived any
6 ability to complain about that He never raised any
7 issue about the fact that Kris Kapoor, an employee of
8 BB&T Asset Management, was helping with his managed
9 portfolio account He never complained, not until this
10 lawsuit years later That is a waiver of any right to
11 complain about the bank using employees of other
12 entities

(13 There's also a statute of limitations issue here
14 He knew back in August of 2006 that employees of BB&T
15 Asset Management were assisting with these functions on
16 the first page of the agreement, well over three years
17 prior to the filing of the suit in 2011 So it would
18 also be barred by the statute of limitations

19 And then finally, we would argue in the
20 alternative, and only in the alternative, that Your
21 Honor should reform the contract so that it says the
22 bank and/or BB&T Asset Management It's our initial
23 position that that's not even necessary That Your
24 Honor can simply interpret this agreement as not
(25 restricting the bank to using its own employees But

1 in the alternative, Your Honor, under a reformation
2 claim, which is an equitable claim, you get to be the
3 fact-finder And you can be the one to determine
4 whether there's a mutual mistake here where the
5 drafting of this contract didn't capture the true
6 intent of the parties Well, clearly BB&T and BB&T
7 Asset Management intended for Kris Kapoor, an employee
8 of Asset Management, to assist with these functions
9 Well, Mr Maybank did, too He denied it on the stand,
10 but the facts are undeniable that he knew when he
11 signed this contract that Kris Kapoor was already
12 working with him on his managed portfolio account And
13 he knew because he saw Kris Kapoor sign the agreement,
14 he knew Kris Kapoor was a representative of BB&T Asset
15 Management at that time

16 And based on that evidence, we would argue to Your
17 Honor that in the alternative you should grant relief
18 under our counterclaim for reformation and change the
19 wording of the third paragraph of the contract to say
20 bank and/or BB&T Asset Management, which would also
21 require JNOV in favor of BB&T and all the defendants on
22 the breach of contract claim

23 THE COURT Okay

24 MR BANNISTER Thank you, Your Honor That
25 is exactly the argument they made in closing arguments

1 That is what was rejected by the jury. The jury found
2 that they had breached the contract and they awarded
3 Mr. Maybank damages. So that issue's already been
4 decided. They did or could have raised all of those
5 issues and all of them were rejected by the jury.

6 THE COURT All right.

7 MR. KRISTINIK Your Honor, the reason why I
8 wanted to give some attention to the breach of contract
9 claim because it does have a greater impact. They
10 relied significantly on the wording of the contract and
11 the defense alleged knowing breach of it to support
12 their negligent misrepresentation, breach of fiduciary
13 duty and constructive fraud claims. And we think that
14 if the fact that their breach of contract does not
15 exist because they're relying on a misinterpretation of
16 it, that that also undercuts the jury's verdict on
17 these other causes of action. So that is one of our
18 grounds for JNOV on the other three causes, common law
19 causes of action.

20 And we also believe that if there's JNOV on the
21 breach of contract claim, that that would require a new
22 trial as to all of the causes of action because of
23 their -- the significant reliance on this bank shall
24 argument. It taints the entire verdict on the other
25 causes of action.

1 Your Honor, I'm going to rest on our briefs on the
2 evidentiary errors. There were a number of them. We
3 think they're prejudicial. Certainly, and the key word
4 is, since although we do believe that any one of them
5 standing alone, the ones we pointed out should require
6 a new trial, but I would just rest on our briefs on
7 that in the interest of saving time.

8 THE COURT Okay

9 MR. KRISTINIK: I do want to jump ahead to
10 the Fortis review because there was a punitive damages
11 award. We've already argued that there should be JNOV
12 on the punitive damages based on paragraph (f)(1), but
13 we also have to go through the standard articulated in
14 Mitchell versus Fortis. This is not a sufficiency of
15 the evidence standard. This, as Your Honor well knows,
16 requires that -- the trial court to take a look at the
17 evidence and compare it to the three factors
18 articulated in Mitchell v. Fortis and then make a
19 decision as to whether the punitive damages award
20 survives Constitutional scrutiny.

21 The first of the three factors is the degree of
22 reprehensibility. If you look at Fortis and what it
23 says about that factor, it tells you to look at several
24 things. One is, was there physical harm? No. No
25 physical harm in this case. It's just economic

1 damages We did not disregard the health or safety of
2 others Again, this is not a physical harm situation
3 These play into whether or not there was reprehensible
4 conduct Was the plaintiff financially vulnerable?
5 Certainly not Back in August of 2006, he was a multi-
6 millionaire, highly sophisticated This is not someone
7 with little means who is forced to enter into a
8 transaction because of economic troubles Mr Maybank
9 had plenty of money He had millions of dollars in
10 real estate In August of 2006, he was not financially
11 vulnerable In addition to that, he was actually an
12 employee of BB&T and a wealth advisor and a senior vice
13 president of the company
14 Fortis asks, did the alleged conduct involve
15 repeated actions? Not here The testimony was that
16 there were very few of these transactions In fact,
17 that was a point the plaintiffs tried to make to show
18 that BB&T didn't have a lot of experience with these
19 They were very rare Very rare instances of prepaid
20 transactions being performed Then Fortis also asks
21 about whether there was intentional malice or trickery
22 We will actually point to the jury's verdict on this
23 It's interesting The jury refused to come back on a
24 cause of action that would have required a finding of
25 intentional deceit on the part of the defendants They

1 found for the defendants on the cause of action for
2 fraudulent misrepresentation, which requires intent to
3 deceive And they came back for the defendants on the
4 claim for breach of contract accompanied by a
5 fraudulent act, which also requires intent to deceive

6 Now, they found on constructive fraud Intent is
7 not a requirement for that cause of action They found
8 on breach of contract Intent's not required, not a
9 required element The other two causes of action,
10 intent is required So it's our argument, Your Honor,
11 that the jury, in fact, did not find the intent We
12 certainly don't think that there's any intent to
13 deceive Mr Maybank In fact, the testimony, repeated
14 testimony from the employees and former employees, that
15 they thought a prepaid was in the best interest of Mr
16 Maybank, that it would further his goals, that it was a
17 risk hedging mechanism

18 The second Fortis factor is disparity with actual
19 harm And I want to point to the language in State
20 Farm v Campbell case where the U S Supreme Court
21 recognized that we have a substantial actual damages
22 award, which we certainly have here, three point one
23 million dollars When you have a substantial actual
24 damages award, the ratio -- the mere ratio of one to
25 one might reach the outer limits of constitutionality

1 for punitive damages -- a punitive damage award This
2 award of five million goes over two million beyond the
3 amount of the actual damages award

4 And then the third and final Fortis factor is
5 compared with civil penalties The most analogous
6 penalty here would be penalties that can be imposed by
7 the South Carolina Securities Commission And under
8 the Securities Act, those penalties can be up to ten
9 thousand dollars per violation Here you've got two
10 prepaids, so you're looking at two potential violations
11 if their positions were accepted That would be twenty
12 thousand dollars, which, of course, is far, far less
13 than the five million dollar punitive damages award

14 Your Honor, applying those factors, the Court
15 should either vacate the award of punitive damages in
16 its entirety or significantly reduce it

17 THE COURT Okay

18 MR WILLOUGHBY May it please the Court On
19 the issue of punitive damages, it is true that the
20 Court must consider post-trial review of the punitive
21 damages award The Mitchell v Fortis case is the case
22 that directs the Court's attention to this point Our
23 review, of course, of the evidence is vastly different,
24 as you might imagine, from Mr Kristinik's The jury
25 heard it all Heard -- hundreds of exhibits are into

1 evidence Mr Kristinik argued for an hour and a half,
2 made many of the arguments to the jury as to why their
3 conduct should be viewed in a different fashion than
4 what the jury viewed it

5 But let's look at each one of the elements in the
6 Mitchell v Fortis case Reprehensibility is one
7 Degree of reprehensibility of defendants' conduct Was
8 the harm physical or economic? Here, it was economic
9 Tortuous conduct against and indifference to or a
10 reckless disregard for the health or safety of others
11 Yes The answer to that is yes here There was
12 reckless disregard for the safety of the retirement
13 assets of Mr Maybank Mr Kristinik talks about Mr
14 Maybank was not financially vulnerable It is true in
15 2006, before this reprehensible investment strategy was
16 embarked upon and recommended to him by the bank,
17 promised to him to reduced risks and protect his
18 assets, that he did have financial resources But
19 today his wealth has been destroyed and continues to be
20 destroyed by the activities of the bank in terms of a
21 scorched-earth defense that has been employed since the
22 very beginning

23 But here on financial vulnerability, you have a
24 retiree who entrusted the bulk of his assets to BB&T
25 BB&T mismanaged the investment, providing self-serving

1 advice that was nothing more than fee generating that
2 resulted in the loss of millions The Court heard the
3 fact that the bank -- we asked every bank employee who
4 did the suitability analysis and not one person has
5 acknowledged that they did it Everybody pointed to
6 someone else Nobody did any suitability analysis to
7 this vulnerable individual The jury determined that
8 BB&T caused Mr Maybank's financial losses And,
9 therefore, one of the -- and they made the finding that
10 their conduct in doing so, their actions in doing so,
11 was reprehensible

12 The conduct involved repeated actions that were
13 isolated It's amazing how everyone's story changes a
14 little bit Mr Kristinik now wants to acknowledged
15 that, well, we did just sell a few of these And one
16 of the points we made was you were inexperienced You
17 were uninformed And it is true But they did enough
18 of these, and it's clear from the evidence in the
19 record, their PowerPoint presentations, that one of
20 their goals was to seek out, identify people with
21 concentrated positions and sell this strategy to them
22 And we believe that the jury saw the repetitive action
23 If you'll recall the testimony of Ross Walters, that
24 BB&T presented their contract that he knew was wrong
25 and incorrect, that the bank knew was wrong and

Hearing

1 incorrect, and never -- they never intended to fulfill
2 it That they presented it to many people They
3 presented this same contract from 2006 to 2009 to
4 literally hundreds of customers We have in this
5 record one of the other customers, Ms Effie Bowers,
6 her contract is in the record It's virtually
7 identical to Mr -- not virtually, it is identical to
8 Mr Maybank's, other than the change of the names
9 Recommended and implemented a wholly inappropriate
10 strategy while misrepresenting it, that it was prudent,
11 that it was suitable, and that it protected him And
12 they recommended the roll-over of the inappropriate
13 investment, telling him that this will allow him to
14 maintain ownership and implying that through their
15 investment strategy they would be able to restore the
16 cost of participating in the prepaid variable forward
17 So all of those things the jury found could be
18 reprehensible

19 And then when Mr Maybank approaches them in
20 August of 2010, before he sought one contact with
21 counsel, and asked Mr Fisher to take a look at this
22 situation, what is he told? He's told, you're an
23 embarrassment to yourself and this will be very
24 expensive and it will end badly Those were the words
25 that they told him when they told him to go sue us if

1 you want relief

2 And so here we are We sued them The jury heard
3 the evidence and the jury -- they rolled the dice
4 They haven't accepted the fact yet that they lost the
5 case, but they did

6 Another issue in Mitchell v Fortis is harm was
7 the result of intentional malice, trickery or deceit
8 rather than mere accident You heard the testimony,
9 Your Honor, that we present the contracts to the
10 individual -- but really here, Judge, you have this
11 strategy that's developed And the strategy is that
12 we're going to use these investment vehicles And
13 that's the evil We're going to use these investment
14 vehicles to reach out to people that need these
15 services and this is the way that we're going to not
16 necessarily help them with their issues, we're going to
17 increase the revenue that we generate for the bank and
18 our subsidiaries So they present a contract that they
19 never intended to fulfill They purposely mislead by
20 falsely misrepresenting prepaid derivative transaction
21 as being prudent, even though the evidence shows that
22 it was a purely sales driven strategy You heard Dr
23 McCann say that rather than protecting the asset and
24 diminishing the risk, it actually substantially
25 increased the risk of loss A pattern of continuous

1 roll-over was designed to create continuous fees for
2 the bank And one of the great strategies here, you
3 saw it in the PowerPoint presentations, was that this
4 is a revenue opportunity for the bank

5 There's evidence that the defendants were not even
6 authorized to recommend these derivative products, that
7 they were out of bounds And then rather than
8 acknowledging that they were out of bounds, what they
9 did was lie to Mr Maybank and others about the return
10 of just a very small portion of the fees

11 Another analysis point, Your Honor, is the ratio
12 between actual and -- actual harm and punitive damages
13 In this case, the ratio was one point six one to one
14 Very reasonable, very proportionate and certainly
15 within the low end of the reasonableness spectrum In
16 one of the cases that we've cited in our documentation
17 is *Cody v Bank of New York -- Bank of America* And in
18 that case the Supreme Court upheld a ratio of seven
19 point six nine to one You know, a somewhat similar
20 case And likely to deter defendants from like conduct
21 and encourage better training of employees and improve
22 suitability of investment advice resulting in better
23 protection of clients' funds That's what this
24 punitive damages award will do

25 The award is reasonably related to the financial

1 harm We produced evidence in this particular case
2 that BB&T Bank and BB&T Corporation, you know,
3 documents that are presented that their net worth, the
4 net worth of the corporation, Judge, is slightly less
5 than -- the corporation and the bank, I want to say is
6 like twenty-one point two billion for the corporation
7 and twenty-one point six billion for the bank
8 Basically, the bank is the corporation and makes up the
9 bulk of the corporation's assets

10 We would certainly encourage the Court to find
11 that the one point six one to one ratio between
12 punitive and actual damages is both reasonable and
13 proportionate to the amount of the harm to the
14 plaintiff in this case

15 Finally, the comparative penalty awards We think
16 the like comparison is the Unfair Trade Practices Act
17 and if you -- the difference between punitive damages
18 award by a jury and civil penalties imposed, a
19 comparable case, you do have a finding here of a
20 violation of the Unfair Trade Practices Act And
21 notwithstanding Mr Kristinik still wants to draw the
22 Court's attention to the Securities Act, even though
23 the Securities Act was specifically excluded by the
24 Court So we would note that the Unfair Trade
25 Practices Act gives a two to one ratio So we're

1 certainly within that area

2 So we think all of the conditions for approval of
3 the punitive damages award of the jury have been met
4 here, and we'd so ask the Court to make those findings
5 and determination and confirm the jury's award

6 One final thing, Your Honor, Mr Kristinik
7 indicated that he was going to rest on their written
8 documents regarding a number of their requests for
9 JNOV We would likewise rest on that rather than argue
10 those points We'll rest on our written documentation
11 for anything that has not been argued here today

12 THE COURT Okay

13 MR KRISTINIK Your Honor, if I may offer
14 some rebuttal on the Fortis issue And then after
15 that, I really only have about two minutes left for the
16 rest of what I want to argue on our new trial JNOV
17 motion

18 THE COURT All right Get that done and
19 then we'll take a short break

20 MR KRISTINIK Okay Thank you, Your Honor

21 It's interesting that Mr Willoughby relies on two
22 things that he's not allowed to rely on One is Effie
23 Bowers He's talking about the conduct with respect to
24 Effie Bowers and prepaids Well, she's a Georgia
25 resident You can't rely on conduct that's outside the

1 state of South Carolina to support a punitive damages
2 award to be issued by a South Carolina Court

3 Also, he relies on a PowerPoint that described
4 prepaids and other solutions for concentrated stock
5 positions as a revenue opportunity Well, that
6 PowerPoint was not from BB&T It was not from any of
7 the three defendants It was created by Scott &
8 Stringfellow It was admitted into evidence over our
9 objection and it is an evidentiary error for which we
10 request a new trial But Mr Willoughby certainly
11 can't rely on the words of a third-party entity calling
12 this a revenue opportunity, attribute it to the
13 defendants and then ask for a five million dollar
14 punitive damages award

15 Profit was not the motive here The fees were
16 discounted back in 2006 It was cut down by over half
17 for the prepaid transaction in August of 2006 And
18 then the typical one percent fee for the managed
19 portfolio account was cut down to thirty-five basis
20 points If BB&T was interested only in profit, it
21 would not have discounted those fees Also, Nate Deal
22 testified that he refused to roll the prepaid again
23 Even though he knew there would be a one percent fee at
24 that time, he refused to roll it in response to three
25 separate requests in 2009 and 2010 He didn't care

1 about the one percent He didn't roll them, as he
2 testified, because he didn't think it was going to be
3 in the best interest of Mr Maybank to roll it again so
4 soon after he had just done so in January of 2009

5 It's also our position that the actual damages are
6 much less than three point one million dollars Dr
7 McCann came in and testified that they were in that
8 range, that three million dollar range, but his entire
9 analysis was based on the premise that Mr Maybank
10 would have been invested in at least seventy percent
11 bonds And that evidence of how Mr Maybank invested
12 in his brokerage accounts from 1997 through 2012 showed
13 that he never had more than two percent bonds in his
14 account The actual damages award is exaggerated,
15 greatly exaggerated, because that premise upon which
16 Dr McCann based his estimate and his range simply
17 could not have existed here

18 And if you look at what a more accurate comparison
19 is, the one done by Bob Thorne, our expert, the
20 difference is only four hundred sixty-eight thousand
21 dollars So if you look at the ratio compared to what
22 it -- to the amount of actual damages that should
23 actually have been entered, if any, it's much, much
24 greater than one to one or one to two

25 A couple of final points, Your Honor You heard

1 the testimony of Bryan Teachey, if nothing had been
2 done, Mr Maybank would have been hit with over fifty
3 margin calls beginning in 2008/2009 That's because he
4 had a two point four million dollar margin balance,
5 back in July of 2006, at no fault of BB&T, that was his
6 own doing If he had just continued to go forward,
7 just holding onto his BB&T stock, in light of that
8 margin balance when the stock price starts dropping,
9 margin calls start occurring He would have been left
10 with only a hundred thirty thousand dollars by December
11 of 2010 His situation would have been much worse if
12 he had not had prepaid contracts in place

13 And my final point on the Fortis factors is that
14 the defendants are regulated with respect to prepaids
15 and managed portfolio accounts They are heavily
16 regulated by the SEC and by the South Carolina
17 Securities Division And those regulatory entities are
18 fully capable of and are empowered to take corrective
19 action if they deem it necessary Punitive damages are
20 not required in a situation like this involving
21 securities because you have regulators with the powers
22 to make sure that if there actually is improper
23 conduct, that it is addressed

24 Your Honor, the final two points I want to make
25 This is now stepping away from the Fortis factors

1 Just reminding you, Judge, of our request for a new
2 trial nisi remittitur. It's our position that managed
3 portfolio damages, allowing those to be counted is, in
4 fact, double counting. That the only appropriate
5 damages analysis -- well, that it's inappropriate to
6 allow the jury to have been presented with the opinion
7 of Dr. McCann, that there was eight hundred seventy-
8 seven thousand, one point four million dollars in
9 managed portfolio damages. Dr. McCann provided a
10 damages figure of one point nine million for the
11 prepaid transactions. He's saying he should not have
12 entered into prepaid. Instead he should have done a
13 stock sale. And the difference in those scenarios is
14 one point nine million dollars. Well, analyze the
15 damages in the managed portfolio account, those damages
16 are mutually exclusive. And it's our opinion that a
17 nisi remittitur should be ordered that eliminates the
18 managed portfolio component of Dr. McCann's analysis.
19 And in fact, we would ask the Court to accept the
20 comparison by Bob Thorne where he showed through a cash
21 flow analysis that a prepaid would have underperformed
22 a stock sale by only four hundred sixty-eight thousand
23 dollars. And those figures are in our brief.
24 And, lastly, Your Honor, under the thirteenth
25 juror doctrine, you have complete discretion to step in

1 and undo the verdict in its entirety In fact, as Your
2 Honor had, in fact, declared a mistrial early in the
3 case based on events regarding Tracy Meyers ---

4 THE COURT Well, that's a little inaccurate
5 I was teetering on the brink, though Okay Go ahead

6 MR KRISTINIK Your Honor now has the power
7 to take a look at the entire situation, and with a
8 great degree of discretion, order a new trial When I
9 went back and read the case law of the thirteenth juror
10 doctrine, it says the judge is not even required to
11 give reasons for the ruling But as you'll see,
12 there's a lot of reasons in this case and we've briefed
13 a lot of it, but thinks, going back to the fact that
14 we're asking for a continuance related to our primary
15 expert, Ross Tulman, you know, having a heart attack a
16 few weeks before trial There's many, many issues like
17 that buried in this case, which Your Honor, in your
18 discretion, could correct simply by ordering a new
19 trial under the thirteenth juror doctrine

20 Your Honor, we rest -- for our other grounds, we'd
21 rest on the briefs and our motion for a new trial and
22 JNOV

23 THE COURT Okay All right

24 MR JOHNSON Briefly, on the nisi and the
25 thirteenth juror

1 THE COURT Okay

2 MR JOHNSON Your Honor, their argument on
3 the nisi remittitur was conclusory and presents really
4 no compelling evidence to justify reducing the jury's
5 verdict The jury's award of damages fell precisely at
6 the mid-point of ranges that Dr McCann testified to
7 and is evidence As a result, the jury's verdict could
8 not have been as a result of passion and caprice It
9 was directly within the evidence The jury agreed and
10 awarded damages in line with the evidence introduced at
11 trial Based on that reason alone, it cannot be said
12 that it was excessive Just because defendants don't
13 agree with the amount of damages awarded by the jury
14 isn't special grounds to reduce it

15 Additionally, the jury took to heart Your Honor's
16 clear instructions to them and found that defendants'
17 conduct warranted the imposition of the punitive
18 damages As already discussed, the ratio was only one
19 point six, which is on the conservative end of punitive
20 damages

21 With respect to the thirteenth juror doctrine,
22 briefly, Your Honor, the evidence of record fully
23 supports the jury's verdict The jury simply rejected
24 the defendants' version of the evidence The fact that
25 the jury found in defendant's favor demonstrates they

1 carefully reviewed the evidence And we would ask the
2 Court to deny their motion under the thirteenth juror
3 doctrine

4 THE COURT Okay I just kind of want to
5 clear up the record I do not remember what all was
6 put on the record about this reference to a mistrial,
7 but that related to the plaintiffs' request to present
8 a witness, which would have violated the discovery
9 deadlines The plaintiff withdrew that request after
10 consultation with their client And so that -- I mean,
11 that really didn't have any impact on the meat and
12 potatoes of the decision, if that makes sense I mean,
13 I just wanted to clear that up I don't remember what
14 we put on the record about that We had an in-chambers
15 discussion about that Does anybody remember that?

16 MR KRISTINIK Yes, Your Honor We had --
17 they had presented Tracy Meyers and they -- Mr
18 Willoughby, right before she started testifying -- this
19 is outside the presence of the jury

20 THE COURT Right

21 MR KRISTINIK Mr Willoughby alerted Your
22 Honor and William and I for the first time that she was
23 going to testify about a letter from 2010, for which we
24 had no prior knowledge Your Honor called us out into
25 the hallway and talked about the admissibility of that

1 type of evidence in light of the scheduling order
2 Your Honor asked counsel to -- while you took things
3 under advisement and asked us to consider settlement
4 You ---

5 THE COURT I did that?

6 MR WILLOUGHBY And it was not given very
7 serious consideration

8 THE COURT Okay Now, don't start all of
9 that

10 MR KRISTINIK Your Honor ultimately came
11 back and discussed on the record again -- this was all
12 outside the presence of the jury -- reasons why Ms
13 Meyers' testimony might be important to the case and
14 reasons why it would be unfair to have it in the case

15 THE COURT Okay

16 MR KRISTINIK And indicated an interest in
17 ---

18 THE COURT As long as we -- we did put it on
19 the record You agree that that substantially covers
20 what was -- I mean, what's in the record is in the
21 record I just want to make sure we put something in
22 there

23 MR WILLOUGHBY The point that's clear, Your
24 Honor, is the jury heard nothing from Ms Meyers,
25 didn't even know she was in the courtroom Didn't hear

1 -- she wasn't sworn She wasn't put on the witness
2 stand in front of the jury So the jury didn't --
3 could not have been prejudiced They objected We
4 withdrew her And it ended the prejudice issue that
5 they claimed she would present

6 THE COURT All right Let me just ask you,
7 how much longer do you all anticipate that this hearing
8 will last?

9 MR KRISTINIK Your Honor, I think it
10 can be over in five minutes because my next motion is
11 to postpone consideration of attorneys' fees
12 consideration and trebling damages because we think
13 Your Honor should first rule on the UTPA claim, as well
14 as the fact that our expert that we want to use is
15 unavailable

16 THE COURT Okay We're going to get it all
17 on the record today, okay? Whatever my decision So
18 how much longer do you anticipate?

19 MR BANNISTER At least five minutes for a
20 break

21 THE COURT Mr Bannister, all right, float
22 on down the hall Let's go Take five, ten minutes

23 (WHEREUPON, court stood at recess for a short
24 break)

25 THE COURT Okay

1 MR BANNISTER Thank you, Your Honor On
2 the issue of our motion for attorneys' fees and costs,
3 we would rely mainly on our brief But a few things
4 that are worth noting, the statute says the Court shall
5 apply or shall award fees and costs Fees So there's
6 not a question of whether you do or don't It's just
7 how much We're asking for three million three hundred
8 seventeen thousand eighty hundred sixty-eight dollars
9 and seventy cents in fees We're asking for three
10 hundred and six thousand two hundred sixty-four dollars
11 and ten cents in costs

12 What we ask for, Your Honor determines what is
13 reasonable There are legions of cases about how you
14 do that, the six factors, the lodestar I don't need
15 to go through all the factors, but it might be worth
16 noting a few, a few things for you to consider

17 John Freeman's affidavit, our expert, we declared
18 him our expert on the issue of attorneys' fees from the
19 very beginning He's presented an affidavit with a lot
20 of supporting information for Your Honor to consider as
21 you determine what is a reasonable fee He figures the
22 hours that lawyers have spent, actual hours they've
23 spent on this case He looks at the costs Mr
24 Willoughby's affidavit basically outlines how many
25 hours the lawyers have actually spent in this case and

1 what the costs have actually been that were necessary
2 for the prosecution of this action And Mr Freeman
3 compares those things to other cases and provides the
4 Court with a lot of basically expert opinion -- give it
5 as much or as little weight you want -- his expert
6 opinion about what would be a reasonable attorneys'
7 fees under the circumstances

8 As you look at attorneys' fees and the different
9 factors, I think it's worth noting a couple of things
10 that are argued by BB&T in opposition to the motion
11 which sort of beg the question, you should give a large
12 amount of attorneys' fees One of the factors is the
13 professional standing of counsel I would submit to
14 Your Honor that there are maybe two or three firms in
15 the state that could have handled a case like this
16 And I would suggest that those firms referred it to Mr
17 Willoughby because of his reputation and abilities in
18 this area of the law There are no other prepaid
19 variable forward contract litigation cases in the state
20 of South Carolina He is the only lawyer

21 But BB&T would take the position that his
22 professional standing is somehow a knock against him
23 because he took the case and didn't win on one of the
24 causes of action that was pled in the alternative to
25 the Unfair Trade Practices Act The amount of motion

1 practice and the discovery that was handled in this
2 case, Your Honor should consider when considering
3 what's an appropriate amount of attorneys' fees I
4 think there were seventy thousand documents -- sixty
5 thousand documents, thirty-two depositions, thirty-five
6 days of deposition testimony, seven thousand pages of
7 transcripts from those depositions, an unsuccessful
8 attempt to remove the case to federal court And sort
9 of the way the case has been handled by BB&T, who's
10 instructing their lawyer, this is what I want you to
11 do They spent thirty pages worth of exhibits arguing
12 over sixty-four thousand dollars in attorneys' fees
13 that were requested in the original removal action in
14 federal court Not to get into the issue of
15 preclusion, because we'll withdraw that sixty-four
16 thousand from our request to avoid talking about it
17 But the issue of preclusion would require the same
18 standard to be presented to the court In federal
19 court it is objectively unreasonable for Your Honor --
20 what is a reasonable fee So the standards of those
21 two are not the same and, therefore, wouldn't be an
22 issue of preclusion But frankly it's over sixty-four
23 thousand in a three -- a three million dollar request
24 But that's the sort of time and energy that has been
25 spent by BB&T in their defense of this case, which all

1 necessitated a tremendous amount of work on behalf of
2 Mr Maybank and his attorneys to get to the point that
3 we're asking for attorneys' fees, after what BB&T says
4 was an unsuccessful result at trial And I would say,
5 our view of it, it was very successful It was one of
6 the highest awards against a bank in the state of South
7 Carolina, ever

8 So while we differ on the six factors, I think if
9 you look at them as a whole and read the briefs, you
10 will find that a reasonable attorneys' fee in this case
11 under this circumstance and under the case law that's
12 required -- that you're required to review, that what
13 we've asked for is reasonable

14 As an alternative, we'll take whatever the Nelson
15 Mullins Firm has billed the defendants in this case as
16 an alternative amount, and we'll consent that that's a
17 reasonable amount of fees Thank you, Your Honor

18 THE COURT Is that in the record?

19 MR BANNISTER If they produce their billing
20 records, we'll take what they've billed their client
21 Yes, sir

22 THE COURT Well, okay All right

23 MR KRISTINIK And let's confirm that that's
24 what he said We'll put that -- that is on the record

25 Your Honor, we have several motions and requests

1 related to the attorneys' fee issue First, we would
2 request that Your Honor postpone consideration of this
3 issue for three reasons

4 One, so that Your Honor may first rule on whether
5 or not JNOV should be granted on the UTPA claim If
6 there's no UTPA claim, there's no other way for Mr
7 Maybank to recover attorneys' fees and costs in this
8 case

9 The second reason is the fact that the expert
10 witness that we would like to use on this issue, he was
11 out of the country at the time they filed their
12 petition He's now back, but traveling the U S In my
13 communications with him, he believes that if he's
14 provided the information that we need in a timely
15 manner, that he could complete his work and analysis by
16 the end of September Because of the size of the
17 attorney fee request here -- if they were asking for
18 thirty thousand dollars or even a hundred thousand
19 dollars, maybe we wouldn't need as much time But
20 because they're asking for over three million dollars,
21 we would ask for Your Honor to postpone consideration
22 and allow us the time to get the information we need
23 and the expert of our choice to take a look at that and
24 provide a rebuttal opinion to Professor Freeman

25 What information do we need? We've filed a motion

1 requesting for a further submission Their submission,
2 while it's very lengthy, actually has very little
3 detail in it Take a look at what's missing Where's
4 the fee agreement? Case law says you need to take into
5 account for determining reasonableness the risk that
6 Mr Willoughby and Mr Bannister have taken in this
7 case Well, we know it's a blended fee of some sort,
8 an hourly component and a contingency fee component,
9 but we don't know how much We want to see the fee
10 agreement We want to see billing records They
11 haven't provided any detail as to the tasks performed
12 or the amount of time performed on those tasks South
13 Carolina case law is clear, when you're analyzing
14 attorneys' fees, fees that are recoverable are the ones
15 that are related to the UTPA claim It's related to
16 the claim that can support an award of fees
17 For example, we cite the Laser Supply case in our
18 briefs In that case, there's two contracts One has
19 an attorney fee provision The other one, evidence
20 wasn't provided as to whether it had one or not The
21 Court said, look, you can't award fees related to the
22 prosecution of the claims on the second contract You
23 can only get fees for the claims on a contract that can
24 support an award of punitive damages -- an award of
25 attorneys' fees

1 Here in this case we have to be provided with
2 enough information so that we can look and see how much
3 time and effort was spent prosecuting the claims under
4 which they would be entitled to recover fees That
5 means the UTPA claim Claims that they cannot recover
6 fees on -- claims on behalf of the Maybank Family
7 Insurance Trust, failed on all the claims No relief
8 provided at all In fact, they concede they can't get
9 fees and expenses related to those claims because they
10 exclude their insurance expert's fees from the request
11 That was Scott Brawley Fees related to the abandoned
12 claims, prosecution of the abandoned claims for
13 negligence and fraudulent inducement claims, they
14 should not be allowed to be recovered in this case
15 But we have no way of analyzing how much of the hours
16 they've spent are related to the UTPA claim versus how
17 much is related to other claims which should be
18 excluded from the award We need that information
19 Our motion to compel more information asks for that
20 It lists out the categories of what we think that we
21 need to see and what our expert has told us he would
22 like to see for purposes of doing his work
23 Additionally, Professor Freeman makes reference to
24 what he deems to be fair market hourly rates What's
25 the information he's relying on to make that

1 determination? He also references, quote, unquote,
2 summaries of work by Mr Willoughby We haven't seen
3 that either These are the types of things that our
4 expert would like to review, that we would like to
5 review, so we can analyze it and then have time to
6 prepare our written rebuttal and potentially an expert
7 affidavit, as well, to properly respond to their over
8 three million dollar request for attorneys' fees and
9 costs

10 We've filed a motion to strike the affidavit of
11 Professor Freeman, just very briefly It is full of
12 legal conclusions It has unsupported facts that are
13 lacking factual basis For example, his statement
14 about what fair market rates are Where is the factual
15 basis for that? It looks like he's just making the
16 assertion unsupported His affidavit is also full of
17 hyperbole that really adds nothing to the analysis
18 His affidavit was stricken in the Dawkins versus Fields
19 case back in 2003 based on these same reasons because
20 his affidavit was full of legal opinions and
21 conclusions that should not be considered on that
22 basis

23 I'd like to spend a minute addressing their
24 request for attorneys' fees and costs Again, I can
25 only do this at a superficial level because we're

1 lacking the information that we need

2 First, under the Haley Nursery and Laser Supply
3 case, the fees that the -- if they're going to recover
4 fees and you give them a fee award, it must relate to
5 the UTPA claim It's the only claim that provides that
6 remedy

7 Also, under the Rice versus Multimedia and Spriggs
8 Group case, they can only recover fees related to the
9 claims they succeeded on They succeeded -- they
10 failed to succeed on all their claims for the Family
11 Insurance Trust and they failed to succeed on four of
12 the claims presented by Mr Maybank They also cannot
13 recover on the two -- fees related to the two abandoned
14 claims

15 They should not be allowed to recover fees related
16 to wasteful or unproductive litigation That would
17 involve dealings with Tracy Meyers That would involve
18 seeking the depositions of the former and current CEOs
19 of BB&T Corporation, which Your Honor denied their
20 requests to do that It would relate to their efforts
21 to win on the issue related to tax gross up damages,
22 for which Your Honor granted summary judgement It
23 would relate to the prosecution of claims against
24 Anthony Mahfood and Ross Walters They're included in
25 the case, we moved it to federal court and we were

1 remanded based on their presence And shortly before
2 trial, what happens, they're dismissed from the case
3 Fees related to those individual defendants should not
4 be a part of any award to Mr Maybank

5 Also, fees related to jurisdictional proceedings
6 in federal court, sixty-four thousand dollars If I
7 hear Mr Bannister right, they are foregoing those
8 fees, but we have an argument in our brief that they
9 would be barred regardless under res judicata and the
10 law of the case because they could have appealed Judge
11 Childs' order and they chose not to

12 They argue for a lodestar multiplier This is
13 very, very unusual -- a very rarely used remedy The
14 Lehman case was the first time that we've seen it used
15 in South Carolina The Supreme Court of South Carolina
16 applied lodestar multiplier of one point two five, but
17 it did so because there are extraordinary circumstances
18 and that's the standard laid out in the Lehman case
19 You had to have extraordinary circumstances

20 In that case, the entire case, which was a class
21 action on behalf of State Employees, was brought in the
22 original jurisdiction of the Supreme Court of South
23 Carolina It was handled under an expedited scheduling
24 order and resulted in a huge victory for the class,
25 thirty-seven million dollars Under the lodestar

1 analysis by -- calculated by a special referee, the
2 attorney fee award would have only been three hundred
3 fifty-two thousand dollars, which would have been about
4 one percent of recovery Those are exceptional
5 circumstance, which would justify a lodestar
6 multiplier Those don't exist here

7 Here, if you look at the case law that we've cited
8 that rejects multipliers, what the Courts say is you
9 can't duplicate the factors they've already taken into
10 account Here under the Jackson v Speed case, Your
11 Honor takes into account six factors You can't take
12 those factors into account to find the exceptional
13 circumstances to add a lodestar multiplier

14 For example, the time devoted to the case is one
15 of the Jackson versus Speed factors Well, it's not an
16 exceptional circumstance that it took two and a half
17 years of litigation where there were a lot of motions
18 filed That's already built into the number of hours
19 for which they're seeking recovery of their fee So
20 you can't use -- you can't duplicate those factors to
21 find exceptional circumstances to add on a multiplier

22 In this case, rather than considering a
23 multiplier, the Court should be considering reductions
24 of their requests for the reasons that I previously
25 stated

1 I'm not going to go through all six factors of
2 Jackson versus Speed, but I do want to point out a
3 couple of things The difficulty of the case and the
4 time devoted to the case If they may want to play --
5 blame BB&T for fighting hard, well, they were coming
6 for every dollar they could get out of BB&T They
7 brought eleven different claims They brought a four
8 million dollar claim on behalf of the Family Insurance
9 Trust, which we ultimately defeated in front of a jury
10 They raised issues for -- they overreached by trying to
11 bring in the testimony of Tracy Meyers They
12 overreached by seeking the deposition of our CEO and
13 former CEO To say that BB&T is at fault for making
14 this litigation difficult or time consuming is unfair
15 It takes two to tango

16 Our response was -- or our effort was in response
17 to the magnitude of the attack on the company and in
18 response to their numerous claims, Your Honor
19 Contingency of compensation is one of the elements, how
20 much risk was taken by opposing counsel Again, we
21 can't do a proper analysis of this We don't have
22 their fee agreement What we do know is that there was
23 an hourly component, which means the risk goes down
24 Lower risk means it should be a lower fee

25 Beneficial results obtained, they sought three

1 point one million in -- or they sought a total of seven
2 million dollars in actual dollars They recovered
3 three point one on that A four million dollar claim
4 they did not recover on

5 And then one of the factors is customary legal
6 fees for similar services And they simply have not
7 met their burden for showing that They've not come in
8 to show what the market rates are in the community,
9 meaning here in this case, Greenville and Columbia
10 They've not shown what the market rates are There's
11 just an unsupported statement in the affidavit of
12 Professor Freeman that their rates are in line with
13 market rates Also, they haven't provided comparison
14 to analogous cases to show that the overall request of
15 fees and costs that they want is in line with similar
16 litigation The cases pointed to by Professor Freeman
17 are all distinguishable in other parts of the country
18 They involve greatly distinguishable facts

19 And lastly, Your Honor, on expenses, they're not
20 allowed to recover expert witness fees in this case
21 You can't get that We've cited both the Oliver case
22 from the South Carolina Supreme Court in 1992 and the
23 Black case from the Court of Appeals in 1993 which says
24 that the statute under which you're trying to recover
25 fees and expenses has to expressly allow recovery of

1 attorney fees If it doesn't, then you're limited to
2 Rule 45 of the Rules of Civil Procedure, which is
3 twenty-five dollars a day So all their requests for
4 recovery of expert witness fees should be disallowed

5 And finally, Your Honor, with respect to
6 depositions, because that was a high expense, they
7 should not be allowed to recover fees related to
8 depositions they did not use That is special video
9 depositions of several Raleigh witnesses, Raleigh,
10 North Carolina witnesses, none of which was used at
11 trial And they also should not be allowed to use
12 depositions -- recover deposition costs for depositions
13 that are related to unsuccessful claims

14 THE COURT Okay

15 MR BANNISTER If I could briefly respond
16 The good news is, Your Honor, this is your issue It's
17 not the defendants' issue They don't get to ask for
18 another round of discovery, another trial on the issue
19 of attorneys' fees This is in the sound discretion of
20 the Court We have presented to you the evidence we
21 think you need to make a decision about reasonable
22 fees The fee agreements referenced in the affidavit
23 of Mr Freeman, the actual fee isn't relevant That's
24 the point of the analysis You take the actual hours,
25 the reasonable hours that were expended in the

1 prosecution and litigation, then you take a reasonable
2 rate and that's sort of the basis that you start from.
3 And then you go through the factors to determine if it
4 should be more or less. And then if there are unique
5 factors like this case has never been tried before and
6 it's unique, that it's more than just a complicated
7 case. It's a complicated case and it's unique. And if
8 it is a new -- not a cookie-cutter type case. If it's
9 a class action that has extraordinary circumstances
10 like a compressed schedule where the original
11 jurisdiction was in the Supreme Court. Those are the
12 things that take you outside of the nature and
13 complexity of the case.

14 So Your Honor is to look at -- we've presented you
15 with the hours we've spent. If the defendants wanted
16 to present to you some evidence that the hours could be
17 broken down, they have, I would guess -- or the Court
18 ought to take notice that Nelson Mullins would have the
19 billing record for themselves. And they'd be very
20 capable of looking at their own billing records to see
21 what they responded to, to determine what percentage of
22 what hours we spent on what different issues. They
23 don't need our billing records and our trial prep
24 strategy to go mount a defense to our attorneys' fee
25 request. They could have done that on their own.

1 They never named an expert on attorneys' fees We
2 would say, similar to Tracy Meyers, they don't to get
3 to come after the trial and name new experts and ask
4 for new discovery to get in a new contested issue over
5 that They had that opportunity They didn't take it
6 I kept waiting for the name of the expert to be
7 mentioned We still don't know and they haven't
8 mentioned who their expert is I think that's a fair
9 question if they actually have one or if they're still
10 looking

11 And just to go down, this was a common set of
12 facts and we pled a lot of causes of action, some in
13 the alternative It's either this or that, it's either
14 actual fraud or constructive fraud It's either breach
15 of contract or breach of contract with a fraudulent
16 act Those are claims that we made, but they all
17 relate to the common set of facts, which required all
18 of the work, regardless of whether we were successful
19 on the Unfair Trade Practices Act or the breach of
20 contract, or the breach of fiduciary duty We still
21 had to take those depositions We still had to review
22 the documents We still had to go through a ten-day
23 trial to its conclusion They talk about the summary
24 judgment motions, you know, the two we filed, we were
25 ultimately successful at trial in winning on those

1 The eight they filed, you know, they were successful in
2 defending two of the eight So does that cut for us or
3 against us? It really just shows you, Your Honor, that
4 this was a very difficult case to handle and that a
5 substantial award of attorneys' fees is justified And
6 with that I would move on to the treble damages

7 The statute also says, Your Honor, to consider
8 that treble damages if you find a reasonable person
9 could have ascertain that their conduct violated the
10 South Carolina Fair Trade Practice Act, that's sort of
11 the standard We believe that we've met that And on
12 a whole, looking at the record, and with the jury
13 findings on the other causes of action, we believe that
14 we have -- the Court should find that they absolutely
15 should have known that the things they were doing and
16 the representations they were making and the
17 information they were not giving Mr Maybank, would all
18 be a violation of the Unfair Trade Practices Act

19 So we would ask that you treble the damages, and
20 that you award the reasonable attorneys' fees we've
21 asked for in this case

22 THE COURT All right Yes, sir, Mr Brown

23 MR BROWN Your Honor, I will respond to the
24 treble damages issues We will start by noting that we
25 would reiterate the position under the Rhodes case and

1 the Dick Dyer case, that Unfair Trade Practices should
2 not be allowed at all And, therefore, treble damages
3 should not be permitted But we would also contend
4 that the Court, under the Unfair Trade Practices Act,
5 must make an independent analysis based on its own view
6 of the evidence of whether there was a knowing or
7 willful violation of the act And we would contend,
8 Your Honor, that there is not evidence to support a
9 knowing or willful conduct in violation of the act

10 We have cited numerous cases within our brief
11 where courts have found that there was a violation of
12 the Unfair Trade Practices Act, but it was not willful
13 and it declined to grant treble damages We think that
14 the same result is due here

15 In fact, we, as I believe Mr Kristinik pointed
16 out earlier, we think that the verdict itself is
17 indicative of the fact that there's not a knowing or
18 willful violation here Because the Court -- I mean,
19 the jury refused to find fraud where they did find
20 constructive fraud The difference there is intent,
21 knowingly doing it You can have the wrong for
22 constructive fraud without specific intent, but that is
23 willfulness The plaintiffs contend that since
24 punitive damages were awarded, therefore, there must be
25 willfulness But the standard for punitive damages

1 includes recklessness, which is a lesser standard than
2 willfulness. And so the fact that punitive damages was
3 awarded has no bearing whatsoever on the Court's
4 determination as to whether willfulness should be found
5 and whether the punitive damages -- or excuse me -- the
6 damages should be trebled. Your Honor, we contend that
7 they should not.

8 We would also contend that treble damages are, as
9 a matter of law, a punitive damage. And, therefore --
10 and we cite several cases in our memo for that

11 position, on page nine of our memo. But we would
12 contend that the wealth management agreements provision
13 prohibiting punitive damages would also prohibit treble
14 damages. And, therefore, we believe that treble
15 damages should be denied in this case, Your Honor.

16 THE COURT All right. Yeah.

17 MR. BANNISTER Just briefly, Judge. You
18 charged the jury and we agree that to prove fraud, we
19 would have had to prove that the defendants intended
20 for the plaintiff to act on the defendants'
21 representation. So it's not that they didn't act
22 intentionally. It's not that they didn't -- the jury
23 didn't find that there was an intentional act. They
24 just found that they didn't intend that that element of
25 intent for the defendant to act on their false

1 representation They didn't find that But they found
2 that it was an intention deceit, it was an intentional
3 misleading, that they knew what they were doing, that
4 it was willful They went through that analysis on
5 punitive damages The conduct of the defendant was
6 knowing and willful and reckless, all those things
7 That's all you have to find to treble the damages The
8 jury's found it for you The facts in this case are
9 they have determined that BB&T recklessly and willfully
10 did the things that they were accused of

11 And so it's not a stretch for you to say, yeah,
12 the jury got this right, despite the continued
13 arguments by BB&T that the jury's findings of fact
14 don't count They do And that's where we are in this
15 case, is the defendants' actions were knowingly done,
16 they were willful and you should treble damages Thank
17 you

18 MR BROWN Your Honor, again, plaintiffs'
19 counsel wants to pick and choose findings of the jury
20 and say, okay, these favor me, those count These
21 don't favor me, those don't count The fact is to find
22 punitive damages, they don't have to find willfulness
23 and there's nothing in the verdict that says they, in
24 fact, did find willfulness The consistency of the
25 findings on breach of contract, but not breach of

1 contract accompanied by fraudulent act, says that they
2 found the contract breach, but they didn't find
3 intentional wrongdoing, deceit, intentional deceit,
4 which is required for the breach of contract to become
5 a fraudulent act, as well

6 So, in fact, the jury's verdict is more consistent
7 with our position. But nonetheless, the Court in this
8 situation is required to make an independent analysis
9 and not simply defer to the jury. So deferring to the
10 jury is actually error in this situation.

11 THE COURT: Okay. All right. Anything else?

12 MR. WILLOUGHBY: Your Honor, the next issue
13 we'd call to Your Honor's attention is our motion for
14 prejudgment. The amount of prejudgment interest that
15 we seek, and that's through June 30th, 2014, the day of
16 the jury's verdict, is one million sixty thousand four
17 hundred and seventy-five dollars. And it's in our
18 motion, Your Honor. This motion is made under South
19 Carolina Code Annotated, Section 34-31-20. And
20 basically the statute reads, in all cases of accounts
21 -- and that's not us here, but then in all cases
22 wherein any sum or sums of money shall be ascertained
23 and being due shall draw interest according to law, a
24 legal interest rate at eight and three quarters
25 percent. And essentially -- and the Spriggs Group case

1 is instructive on the standard It requires either a
2 sum certain or one that is capable of being reduced to
3 a certainty
4 Judge, I've been litigating cases forever And
5 I've never had a case in which there was not some
6 dispute Even if you've got a promissory note,
7 someone's disputing how much interest has been paid,
8 was there some reduction of the principal amount, how
9 you calculate it, all of those things always happen
10 Just because you dispute the amount doesn't mean that
11 you don't award prejudgment interest The real issue
12 -- and you have testimony from Dr McCann and Professor
13 Freeman -- is that the measure of Mr Maybank's damages
14 was fixed at the time he realized and began to
15 understand that he'd been damaged When he approached
16 the bank and made demand on them in August of 2010 and
17 said, look, I've been harmed I want you to evaluate
18 the harm that you've caused me And there was some
19 dispute about what the numbers were Three point five
20 million dollars is what Mr Walters testified that he
21 recalled Mr Maybank saying to him that he had been
22 damaged And then he said that it may have been more
23 than that at one point But the jury determined that
24 his damages was three point one million dollars And
25 it was essentially the mid-point between the range of

1 damages that Dr McCann had given So it's a number
2 that is capable of being determined with certainty It
3 was determined with certainty And so what we did then
4 was calculate from the time that Mr Maybank made his
5 demand, August 3rd of 2010 We then calculated on
6 three point one million times eight point seven five
7 percent, yielded two hundred and seventy-one thousand
8 two hundred and fifty dollars per annum or seven
9 hundred and forty-three dollars and fifteen cents per
10 day And then you just add the number of days

11 Now, I will say, Your Honor, that we are where we
12 are today, which is fifty days since the hearing, so
13 the interest rate continues to grow But what we think
14 is that when Your Honor enters your judgment
15 ultimately, that judgment should begin to run from the
16 jury verdict of June 30, 2014 And so what we did was
17 calculate the prejudgment interest rate through June
18 30, 2014 of one million sixty thousand four hundred and
19 seventy-five dollars with the understanding then when
20 the judgment is finalized and filed, that post-judgment
21 interest will begin to accrue on July 1 and thereafter
22 If, for some reason Your Honor views that differently,
23 we would ask you to take that daily rate of seven
24 hundred and forty-three dollars and fifteen cent and
25 continue to apply that daily rate until such time as

1 Your Honor determines that the judgment, the final
2 judgment will apply and the post-judgment interest rate
3 will begin to run thereafter

4 That's how we calculated it And we would,
5 therefore, respectfully request that pre-judgment
6 interest be awarded in the amount of one million sixty
7 thousand four hundred seventy-five dollars Thank you

8 THE COURT That is a novel argument, in my
9 opinion There are several causes of action upon which
10 you prevailed, some of which are not capable of
11 assigning a liquidated damage amount to So ---

12 MR. WILLOUGHBY And everyone -- I mean, the
13 underlying damages and, of course, certainly not on
14 punitive damage, there's no calculation of interest on
15 punitive damages because you can't determine it But
16 on each one of these causes of action, the same basic
17 core of facts and the damages calculation ---

18 THE COURT Well, there's no way that any of
19 us can determine how much damage this jury assigned to
20 a negligent misrepresentation claim versus a breach of
21 contract claim

22 MR. WILLOUGHBY Sure we can I mean, they
23 determined, Your Honor, if you look at the jury verdict
24 ---

25 THE COURT I am looking at it

1 MR WILLOUGHBY They determined that the
2 three point one million dollars, if you'll look at --
3 and this is the jury verdict form that the defendants
4 prepared

5 THE COURT Right Right

6 MR WILLOUGHBY If you answered yes to any
7 of the parts in questions one through nine, what part
8 of actual damages -- what amount of actual damages do
9 you award? Three point one million dollars So they
10 found for plaintiff on the causes of action of one,
11 breach of contract On two, breach of fiduciary duty

12 THE COURT Negligent misrepresentation

13 MR WILLOUGHBY Unfair Trade Practices

14 THE COURT Unfair trade practices and
15 constructive fraud

16 MR WILLOUGHBY Constructive fraud and
17 negligent misrepresentation So they made the
18 determination that three point one million was the
19 actual damages for each one of those causes of action
20 Now, we don't recover five times three point one But
21 they made the determination of the actual damages for
22 each one of those ---

23 THE COURT For the combination of those five
24 -- four or five causes of action is three point one

25 MR WILLOUGHBY No, not a combination, Your

1 Honor On each one Each one of those causes of
2 action was supported by the actual damages in the
3 testimony And the actual damages in the testimony was
4 that those -- the losses that Mr Maybank suffered was
5 three point one million dollars

6 THE COURT Well, I -- you know, this
7 document is pretty clear and straightforward And
8 there is no, in my estimation, no way to discern which
9 cause of action the three point one was assigned to or
10 what portion of it

11 MR WILLOUGHBY Your Honor, and if there's a
12 failing in the form, then that obviously goes to the
13 defendants who drafted it

14 THE COURT Okay

15 MR WILLOUGHBY But what I would say to Your
16 Honor is that when you look at the evidence, the
17 evidence was clear that the jury selected the damage
18 calculations based upon the harms that were caused to
19 Mr Maybank that were presented by Dr McCann

20 THE COURT Well, that is your interpretation
21 of it

22 MR WILLOUGHBY And if you ---

23 THE COURT You know, I just grew up learning
24 as a lawyer that you either -- there are two ways to
25 get attorneys' fees One, it's in the contract And

1 two, it's authorized by statute

2 MR WILLOUGHBY True I think that's still
3 true on the attorneys' fees

4 THE COURT And the same is basically true of
5 prejudgment interest

6 MR WILLOUGHBY No, sir

7 THE COURT Now, in a car wreck, okay --
8 let's say we take the analogy of an automobile accident
9 where someone -- it goes to a jury trial Someone has
10 a scar on their face They go to the -- when they're
11 treated they go to the hospital They get treated for
12 the scar There's some whiplash involved They go to
13 the emergency room They do all the test, whatever
14 And then after that initial treatment they start going
15 to a chiropractor The total medical bills turn out to
16 be ten thousand dollars And the jury awards ten
17 thousand dollars, even though there's a claim for
18 disfigurement, even though there's a claim for pain and
19 suffering So you would be asking, in those
20 circumstances, that the Court award prejudgment
21 interest on that claim

22 MR WILLOUGHBY No, sir It's totally
23 different

24 THE COURT Huh?

25 MR WILLOUGHBY Totally different This is

1 an economic loss I mean, I would agree with you, Your
2 Honor, in the example that you just gave, that this
3 statute does not apply

4 THE COURT Well, then plug in lost wages I
5 mean they got -- in the ten thousand award they got a
6 certain amount of lost wages And they give the ten
7 thousand dollars, which equals the amount of
8 discernable -- you know, the lost wages, the medical
9 bills How do you know that the jury is not awarding
10 something for the disfigurement of the face and nothing
11 for the chiropractor? I will tell you up here in
12 Greenville County, that's not unusual to see that
13 chiropractor bill just get thrown right out the window

14 MR WILLOUGHBY Right

15 THE COURT But there's no way the Court can
16 go back and read the minds of those jurors to
17 determine, well, this was a liquid -- this was the
18 amount, and so I'm going to give prejudgment interest

19 MR WILLOUGHBY I think in this case you
20 can I think because what you've got is everybody
21 agrees that it's only economic damages that we --
22 there's been no personal injury claim, certainly So
23 all you've got is economic loss And you've got one
24 set of economic damages that have been presented And
25 those economic damages were accepted by the jury

1 THE COURT Well, you never know if that jury
2 just, as you painted Mr Maybank as this -- I forget
3 how you described him, but that he suffered greatly
4 because of his -- the loss of his life savings So how
5 do you know that the jury didn't throw a little money
6 in there to make him feel better

7 MR WILLOUGHBY Well, I don't think so, Your
8 Honor, because the numbers that they accepted are
9 identical to the numbers that the expert witness
10 testified to That's the reason you know that they
11 used the economic ---

12 THE COURT Mr Willoughby, let me interrupt
13 you and ask -- do you want me to ask the defense if
14 they agree that those are the exact numbers?

15 MR WILLOUGHBY They will ---

16 THE COURT Do you think they would agree
17 with you on that?

18 MR WILLOUGHBY I think they would probably
19 agree that the numbers are something within the range
20 of what Dr McCann testified to, but they don't accept
21 those numbers, of course

22 THE COURT Well, a liquidated amount is not
23 really a range, is it?

24 MR WILLOUGHBY A liquidated amount is
25 ultimately determined -- the jury didn't select the

1 range The jury made a determination as to what the
2 amount was What Dr McCann did was gave them -- said
3 this would be a choice that you could make, this would
4 be a choice that you could make or it could be
5 somewhere in between these two choices Those would be
6 appropriate and reasonable ways that the investments
7 could have been done

8 THE COURT Okay All right

9 MR WILLOUGHBY Thank you, Your Honor

10 MR BROWN Your Honor, can I briefly address
11 that?

12 THE COURT Briefly, okay All right

13 MR BROWN Just very quickly Your Honor,
14 the point you made, I think, is dead-on But in
15 addition to that point the Sundown case specifically
16 talks about when a measure of damages is fixed to be
17 liquidated They have -- to be liquidated it must be
18 fixed And the Sundown case says that it's fixed by an
19 agreement or by operation of law to a sum that cannot
20 be changed by proof And so when an expert gets up
21 there and says, I calculated that after the wrong,
22 these things happened, and, therefore, the damages are
23 X That means proof is being applied to what happened
24 after the wrong It's only at the time of the wrong
25 that it can be fixed In a breach of contract where --

1 and then the two cases they relied upon are mechanic's
2 lien cases So at the time that non-payment was made
3 in those cases, X amount of work had been done They
4 put in the bills for that amount of work Nothing
5 changes after that point At the time of the wrong,
6 nothing changes after that point In this situation,
7 their allegation is the wrong happened when he was
8 given bad advice on the prepaids and when he was given
9 bad advice on the investment portfolio, and all of the
10 damages accrued after that point Therefore, it's
11 clearly not fixed under the law

12 THE COURT Okay All right Is that it?
13 That's all you got?

14 MR BROWN Your Honor, we have a motion for
15 election of remedies

16 THE COURT Yeah Go ahead

17 MR BROWN We would contend that the
18 plaintiff must elect remedies in this situation In
19 fact, twice within the last ten minutes both Mr
20 Bannister and Mr Willoughby have said that all the
21 causes of actions are based on the same set of facts
22 The same basic core facts support all their claims In
23 that situation, if all the facts are supported by the
24 same core facts, then they are only entitled to one
25 remedy And the nature of the actual damages the jury

1 awarded a single remedy But they awarded punitive
2 damages in terms of potential trebling and punitive
3 damages, as well You can't recover both punitives and
4 treble damages, Your Honor, because they're both
5 punitive in nature We cited the Strickland case and
6 we cited the Adamson case, which both clearly say you
7 cannot recover both That multiple recovery is
8 improper So they aren't allowed to have treble
9 damages and punitive damages and they must elect
10 between those remedies We cited other things, but
11 that's the primary basis of our argument Otherwise,
12 we rest on our brief

13 THE COURT Okay

14 MR JOHNSON Your Honor

15 THE COURT Yeah How do you get both?

16 MR JOHNSON You can And we've cited case
17 law for that fact But I would also stress at the
18 outset that this is premature, that no election of
19 remedies is required until the Court goes through the
20 analysis and confirms the punitive damages award and
21 orders treble damages Otherwise, there is no election
22 issue in this case

23 Your Honor, we would submit that you would need to
24 confirm both of those on the record in an order and
25 then if Your Honor decides an election is in order,

1 then that would be the appropriate time to undertake
2 this motion

3 However, we have cited case law that when the
4 facts supporting the common law causes of action or
5 supports punitive damages are different from the facts
6 supporting the Unfair Trade Practices Act claim, in
7 fact, they are both recoverable And here we would
8 suggest that the professional negligence that was in
9 this case, recommending to Mr Maybank a strategy, a
10 failed investment strategy, was different than the
11 three situations that I argued this morning, Your
12 Honor, about the Unfair Trade Practices Act under the
13 exemptions That case is the Taylor v Medenica case
14 And I think it's instructive for the Court -- it's a
15 situation where the trial court actually forced an
16 election below It was appealed and the Supreme Court
17 said, no, in fact, you're not required to elect There
18 was punitive damages awarded and they reinstated the
19 trebling damage request to the appellate, the plaintiff
20 in that case In that case, they found that it was not
21 double recovery because they were supported by separate
22 facts It was also a professional negligence case A
23 doctor was providing care to a cancer patient Was
24 also recommending tests be done on the patient And
25 the doctor also owned the testing company where those

1 tests were being conducted But the Court found that
2 they're separate and apart from the professional
3 negligence that was being shown by the doctor/patient
4 responsibility, that also recommending these test that
5 were unnecessary, to his own company were an unfair and
6 deceptive practice And they found that it was
7 supportive of both punitive damages and treble damages

8 We would suggest that we have met that burden here
9 -- and there is case law to support it in addition to
10 that Taylor case -- where BB&T was presenting a
11 contract to Mr Maybank and other customers, that they
12 knew that they couldn't fulfill That's evidence of an
13 unfair and deceptive practice that is separate and
14 apart from the unsuitable recommendations, the
15 investment strategy, that they were also recommending
16 to Mr Maybank Professional negligence and also an
17 unfair and deceptive practice We put that evidence in
18 the record The jury so found And we would submit
19 that there is evidence to support both

20 Again, we don't think an election is required
21 until the Court, on the record, confirms the punitive
22 damages analysis and then also awards treble damages
23 under the Unfair Trade Practices Act

24 THE COURT So you're suggesting that I'm
25 going to have another hearing Is that what you're

1 suggesting?

2 MR JOHNSON No, Your Honor I made an
3 argument on the issue of elections and ---

4 THE COURT You just meant in a written
5 order Is that what you're saying?

6 MR JOHNSON That's correct, Your Honor

7 THE COURT Okay

8 MR BROWN Your Honor, just briefly On the
9 issue of prematurity, in Harper versus Ethridge, our
10 Court of Appeals has specifically said the decision is
11 the time of an election rests at the sound discretion
12 of the trial judge as part of his general supervisory
13 authority over the conduct of litigation So you can
14 require an election of remedy at any time And it's
15 within your sound discretion to do so It is not
16 premature It's a matter of law

17 THE COURT Okay

18 MR BROWN We would also contend his comment
19 that the facts are different is -- like I said before,
20 just five minutes ago, Mr Bannister and Mr Willoughby
21 each said this is the same core set of facts This is
22 the same core set of facts to support all these causes
23 of actions or these damages They can't have it both
24 ways In fact, we're talking about the same set of
25 core facts They can't have both punitive -- there are

1 two types of punitive damages based on the same set of
2 core facts

3 THE COURT Okay Have y'all heard that
4 story about Abraham Lincoln arguing one side in the
5 morning and the other side in the afternoon I think
6 there's a little bit of that That's a real high
7 compliment to all you lawyers

8 MR WILLOUGHBY Judge, just to conclude it,
9 to make sure that there's no doubt about our position
10 Our position is we don't have to elect We're entitled
11 to both remedies And what the defendants continue to
12 ignore or overlook is that the strategy, the investment
13 strategy that was proposed, that was represented to do
14 all of these things, that was supposed to be good and
15 protect Mr Maybank, the jury found them false,
16 reprehensible, all of the things that are found in the
17 award of punitive damages What they also found was
18 that assisting the bank, that the bank used deceptive
19 and unfair business practices in advancing those
20 strategies The contract that they advanced to say
21 that this contract is not going to perform The
22 letter, basically the refund letter, the -- also, the
23 strategy suggesting that they had looked at and
24 specifically looked at this situation for Mr Maybank
25 When, in fact, we now know that they had not

1 All of those were business practices that the bank
2 undertook to advance their strategy And, yes, we
3 didn't know the scope of all of those facts We had to
4 discover all of those facts and elicit all of those
5 facts Didn't understand some of them until the very
6 eve of trial, but those were the issues that were
7 presented to the jury There are two separate set of
8 facts, even though there's a big umbrella of facts,
9 from which the jury concluded that there was both
10 unfair and deceptive business practices underway here,
11 employed by the bank, in addition to the deceit and the
12 constructive fraud that was done under common law
13 clause

14 THE COURT Okay

15 MR BROWN Your Honor, our last motion is a
16 motion to seal certain of the exhibits which contain
17 confidential information We had said at the start of
18 the case we would withhold that until afterwards We
19 have presented a list of exhibits, which we believe is
20 a subset of all the exhibits, but not a complete set
21 We'd ask whether they would agree to it and we didn't
22 hear a response back So we went ahead and filed a
23 motion

24 THE COURT Y'all agree to that?

25 MR WILLOUGHBY I think it's consistent with

1 what we talked about at the outset is a ---

2 THE COURT So it sounds like they agree

3 You agree?

4 MR WILLOUGHBY We don't have any

5 objections

6 THE COURT Okay

7 MR WILLOUGHBY I mean, I don't -- we need

8 to look at the documents and I will talk with them

9 about that, but I don't think there's any ---

10 THE COURT All right Well, see if there's

11 some you object to, but I hope not

12 MR WILLOUGHBY We don't have a problem,

13 Your Honor

14 THE COURT Okay All right So

15 MR BROWN So we'll prepared a proposed

16 order on that particular issue

17 THE COURT To seal those Okay All right

18 MR BROWN And make sure that they're in

19 accordance with that order

20 THE COURT All right I know it's

21 disappointing to you all, but I'm not going to rule

22 from the bench Okay Thank y'all very much

23

24 [END OF REQUESTED TRANSCRIPT OF RECORD]

1 CERTIFICATE OF REPORTER

2 I, the undersigned Danette P Hanks, Official
3 Court Reporter for the Tenth Judicial Circuit of the
4 State of South Carolina, do hereby certify that the
5 foregoing is a true, accurate, and complete transcript
6 of record of all the proceedings had and evidence
7 introduced in the trial/hearing of the captioned case,
8 relative to appeal, in the Court of Common Pleas for
9 Greenville County, South Carolina, on the 19th day of
10 August, 2014

11 This transcript may contain quoted material Such
12 material is reproduced as read by the speaker

13 I do further certify that I am neither of kin,
14 counsel, nor interest to any party hereto

15 March 9, 2015

16

17

18

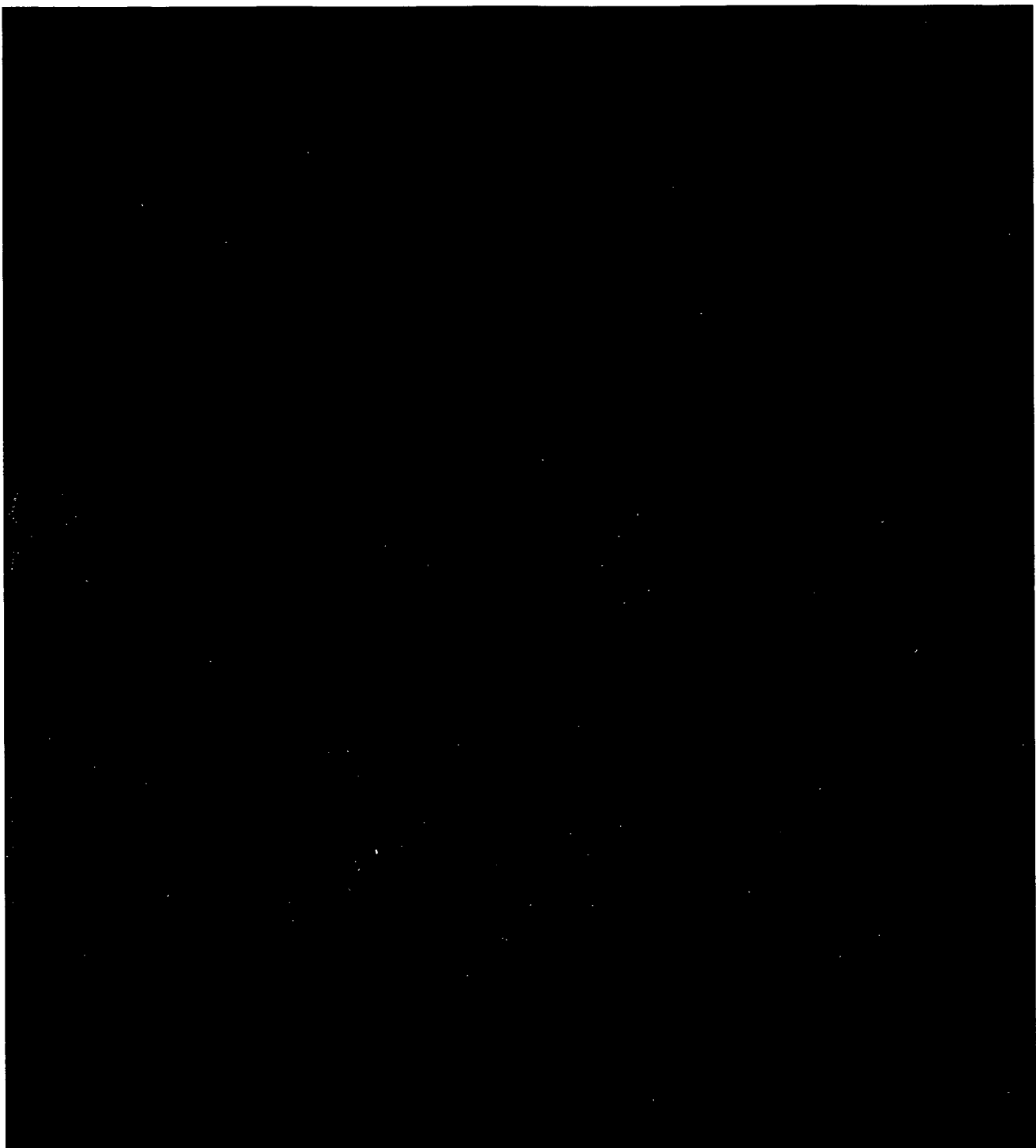
19

Circuit Court Reporter

State of South Carolina	)	
	)	
County of Greenville	)	
Francis P Maybank,	)	2011-CP-23-8578
	)	
Plaintiff,	)	
	)	
vs	)	Video Deposition
	)	
BB&T Corporation, Branch	)	of
Banking and Trust Company,	)	
Successor in merger to	)	Ralph Borrello
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	)	

Video deposition of Ralph Borrello, taken before Sandra J Ayers, a notary public in and for the State of South Carolina, commencing at the hour of 1 18 p m , Wednesday, January 9, 2013, at the office of Nelson Mullins Riley & Scarborough, LLP, 1320 Main Street, 17th Floor, Columbia, South Carolina

Reported by
Sandra J Ayers



22 Q Good afternoon, Mr Borrello My name is Mitchell
23 Willoughby Would you please state your full name
24 for the record?
25 A Ralph Thomas Borrello

1 Q And where are you employed?

2 A I'm employed by BB&T

3 Q And in what capacity are you employed?

4 A I am the sales and service director of the Wealth
5 advisor line of business

6 Q And when you say "BB&T," are you referring to the
7 entity that's the banking institute?

8 A I am Branch Banking and Trust

9 Q Okay There is a BB&T Corporation that issues
10 publicly-traded shares of stock Do you have any
11 position with BB&T Corporation?

12 A Yes

13 Q And what is that position?

14 A I -- I'm a senior vice-president

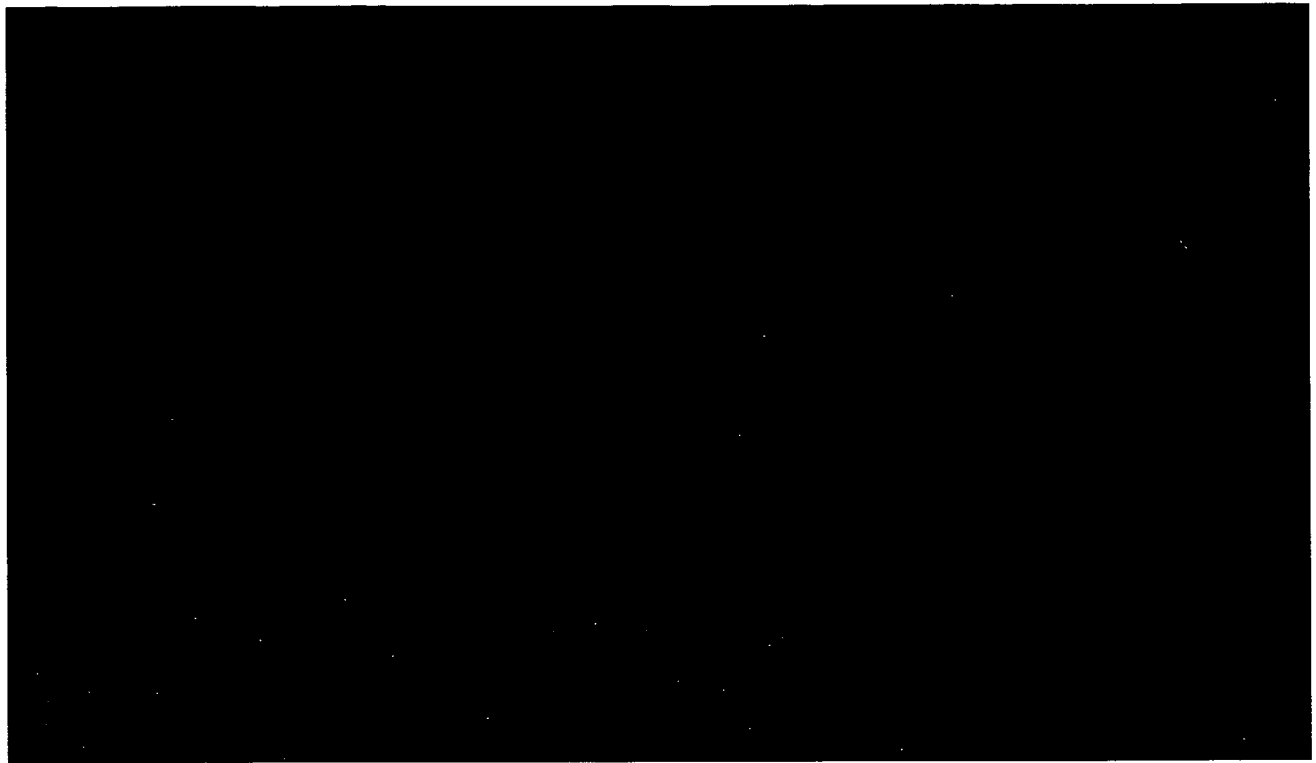
15 Q And that's an officer level position?

16 A Officer level position Correct

17 Q And so you -- you hold dual positions? You hold a
18 position for the corporation -- BB&T Corporation
19 You also hold a position for BB&T bank, both senior
20 level officer positions?

21 A Yes





12 Q I have had pre-marked a, Mr Borrello, a letter
13 dated November 29, 2012, and it's been marked as
14 Plaintiff's Exhibit 1 Let me hand that to you

15 MR WILLOUGHBY And, Larry, here's a copy for
16 you

17 Q Is that your signature on this letter?

18 A Yes

19 Q And I'm going to ask a few questions about it
20 It's dated November 29, 2012, and it indicates
21 that, "Recently, as a part of a review of client
22 accounts" -- the second paragraph Do you see
23 that?

24 A I do

25 Q Now, who initiated the review of client accounts?

1 A Mr Willoughby, I cannot state who reviewed the
2 accounts in connection with this matter It -- it
3 was brought to my attention that, as a result of
4 the review, we were going to be rebating some fees
5 that were charged, but that was not within my scope
6 of responsibility in connection with this specific
7 review

8 Q Who brought that -- the fact that refunds were
9 going to be made to your attention?

10 A My immediate manager, David Fisher





10 Q So Mr Fisher brought to your attention that a
11 refund was going to be made About when did he
12 have this conversation with you?

13 A I think it was in September/October time frame

14 Q What else did he tell you about the reason for
15 making the refund?

16 A He -- he -- just as is contained in the letter,
17 that the decision was made to refund these sums,
18 that these fees were inconsistent with our current
19 pricing mechanism, and that, while not required to
20 do so, we chose to do so, and asked me to execute
21 on the project

22 Q So as -- as your superior, he directed that you
23 complete the -- the decision that had been made,
24 that you -- you -- you accomplish the execution of
25 making the refunds?

1 A Correct

2 Q Now, do you know why Mr Fisher didn't sign the
3 letter himself?

4 A Because this is -- this pertained to the group I
5 manage, and so the decision was made actually by
6 myself to sign these letters --

7 Q Okay

8 A -- as heading up the Wealth advisor group

9 Q Now, how many letters did you issue?

10 A I believe that the refund applied to -- I don't
11 know the exact number, Mr Willoughby, but around
12 130 clients were affected

13 Q And so were all of those clients clients who had
14 been sold variable prepaid forward contracts by
15 BB&T?

16 A I -- I don't know that to be the case I'm not
17 certain I think there were a number of
18 transactions that occurred that were subject to
19 this rebate, but I can't -- I can't state that they
20 were all variable prepaid forwards I'm not sure

21 Q Do you know what the consideration was for
22 evaluating and making a determination as to who
23 would be entitled to a refund?

24 A I do not

25 Q And do you know who would have made that

1 determination as to who would be entitled to the
2 refunds?

3 A I do not I -- I -- as I stated previously, Mr
4 Fisher communicated the decision to me, and I was -
5 - we were provided with a listing of clients that
6 would be receiving a refund But I -- I have no
7 knowledge of who made the decision, when the
8 decision was made, or what specific clients were
9 included in that group

10 Q So while you were provided with a listing of
11 clients, you were not involved with the decision as
12 to whose name got put on the list?

13 A That is correct

14 Q So when the matter is presented to you, the
15 decision has been made to make the refund and the
16 clients to whom the refund would be made has
17 already been identified?

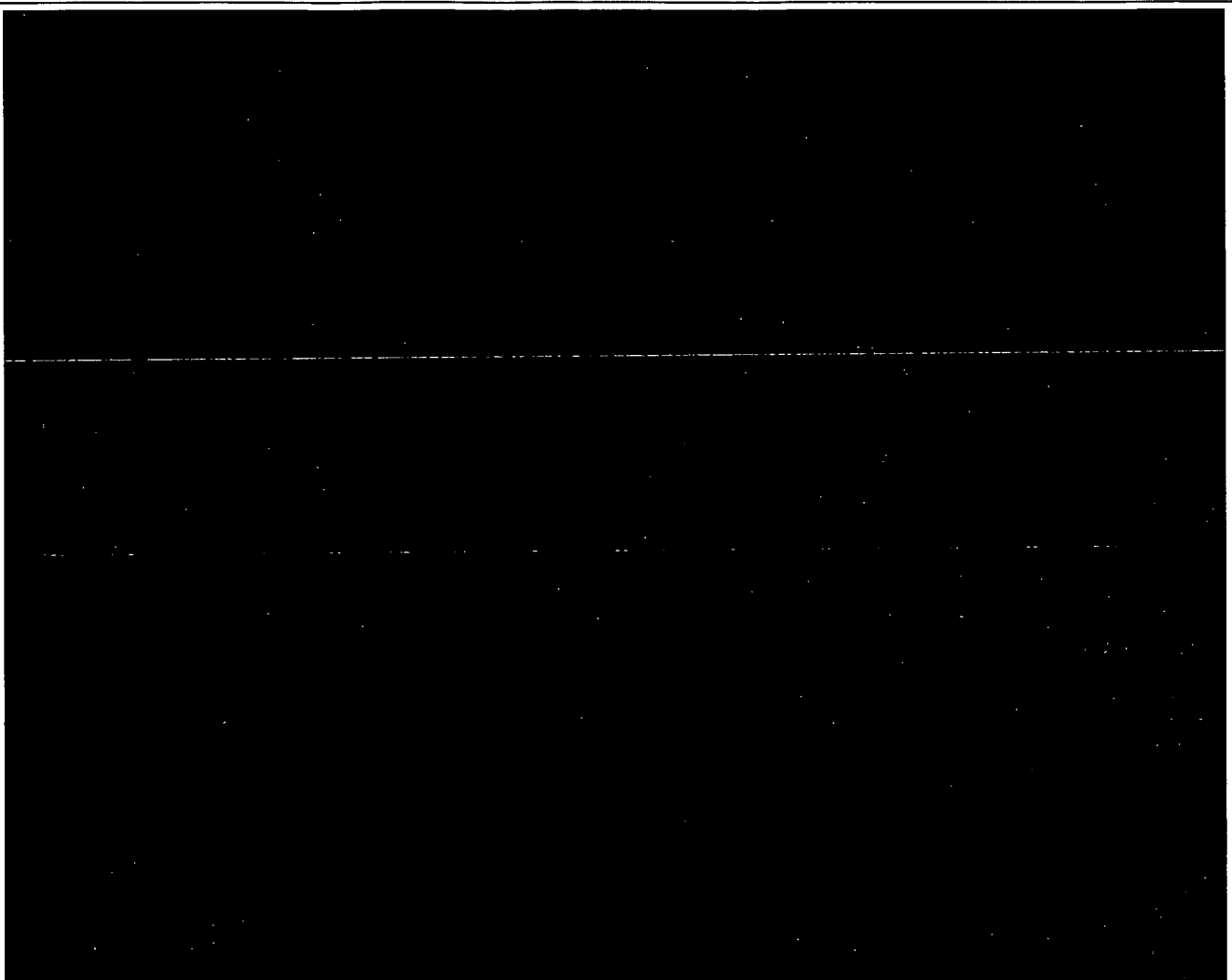
18 A That is correct

19 Q And you were given the mission to execute on those
20 instructions?

21 A That is correct

22 Q And that execution entailed you issuing letters to
23 those 130 or so clients similar to the letter that
24 Mr Maybank received?

25 A Yes -- yes, sir That is correct



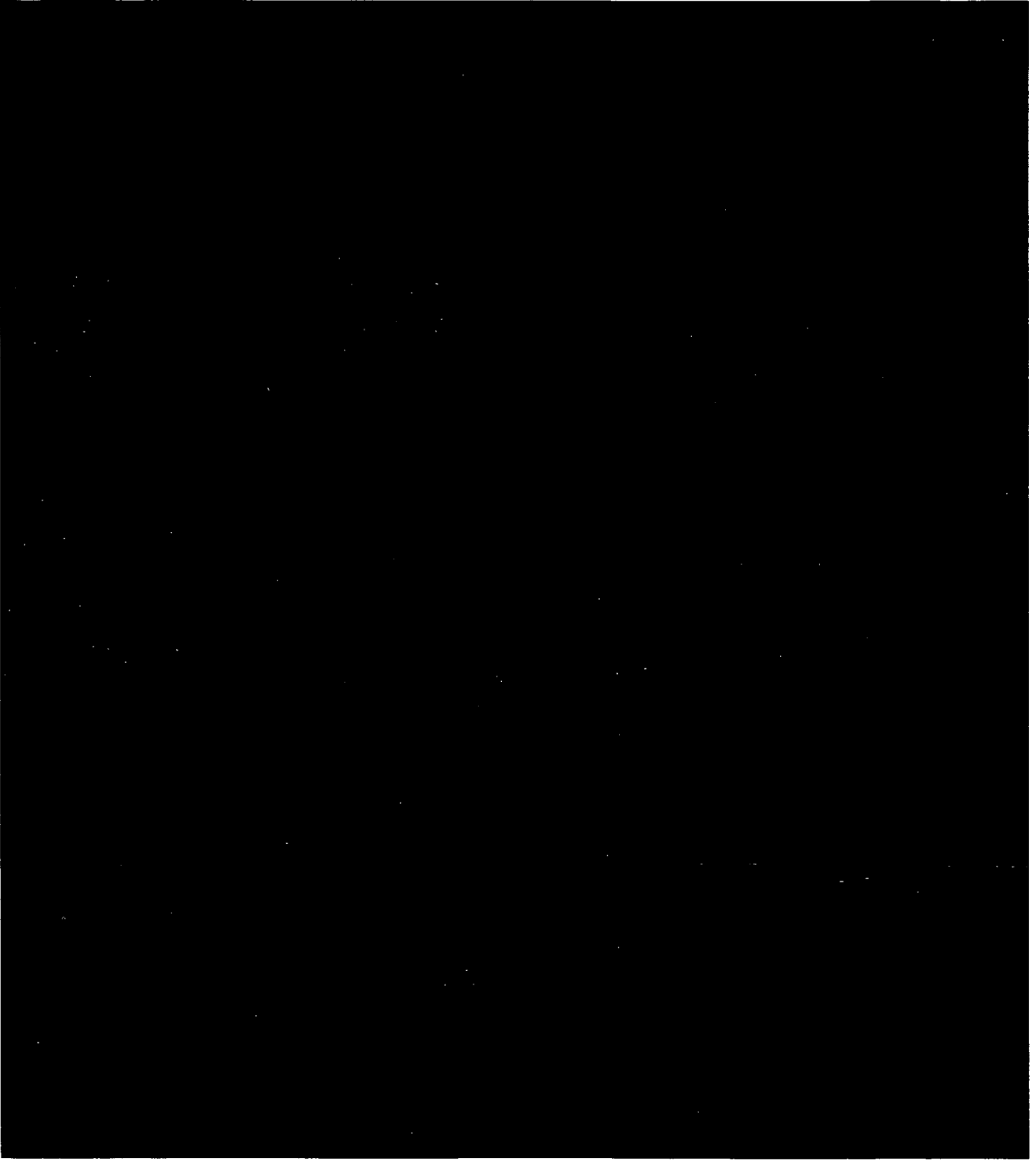
16 Q In your communications with Mr `Fisher, where he `
17 instructed you to execute on the decision, did he
18 provide you with information about the reason for
19 the refunds being made? `

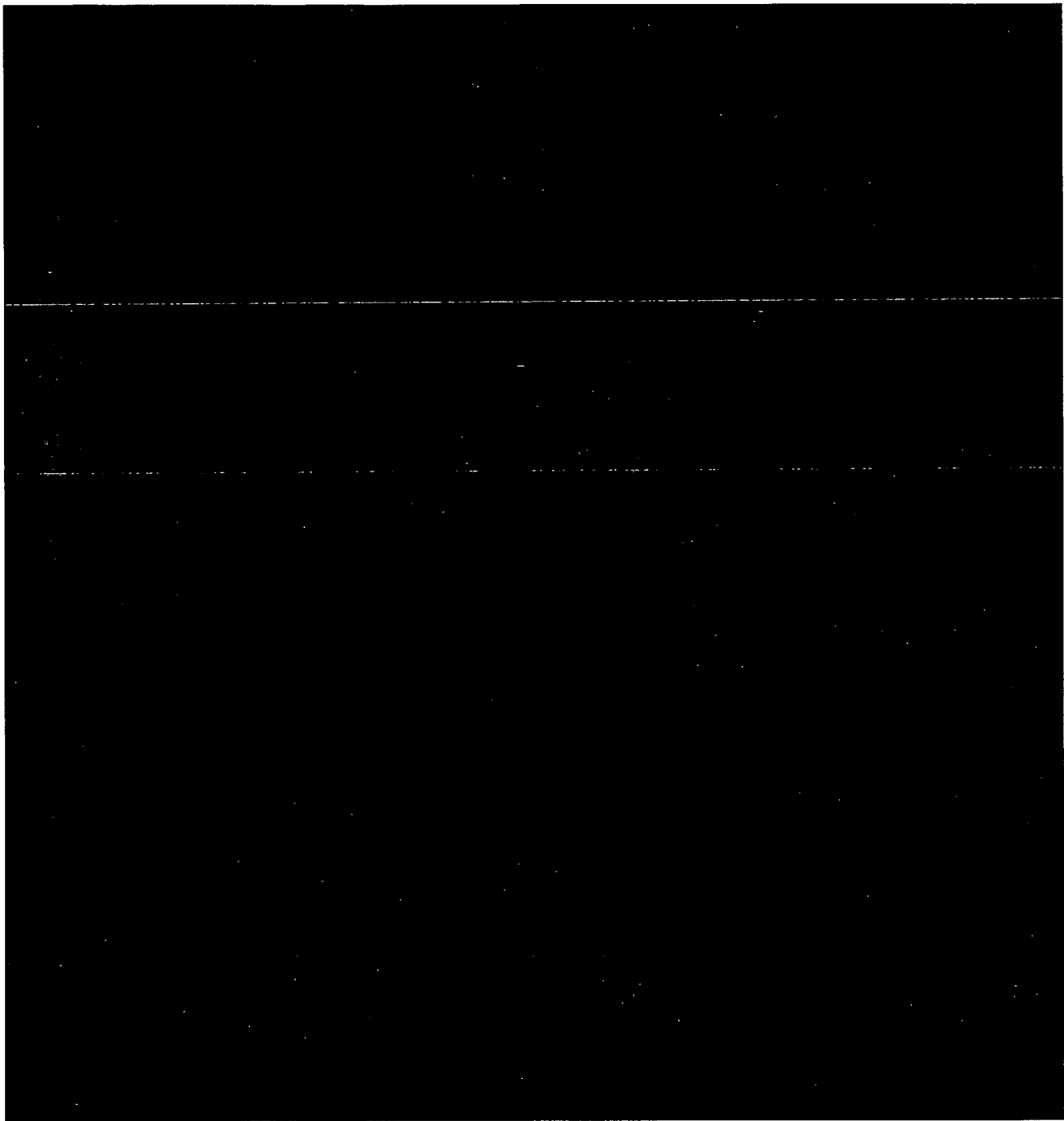
20 `A He did

21 Q And what did he tell you the reason was?

22 A We incorporated it into the letter that, while we
23 were not required to make this refund, we felt it
24 was the right thing to do and that it was due to
25 the inconsistence -- the -- the -- the fact that

1 ,our current billing practices would not in -- in --
2 in contemplate such a fee being taken And the
3 decision was made that we wanted to make these fee
4 rebates and asked me to execute on that decision



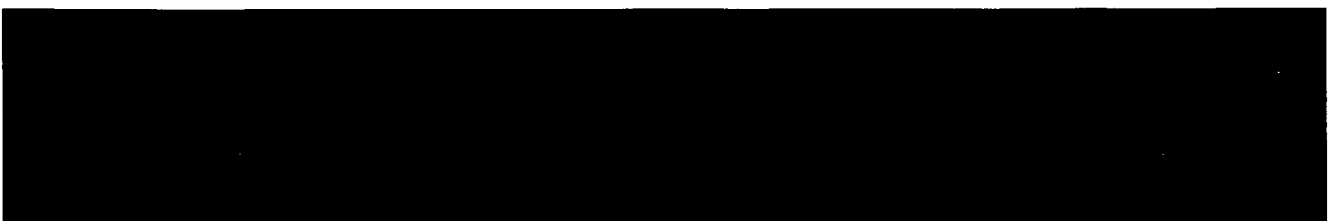


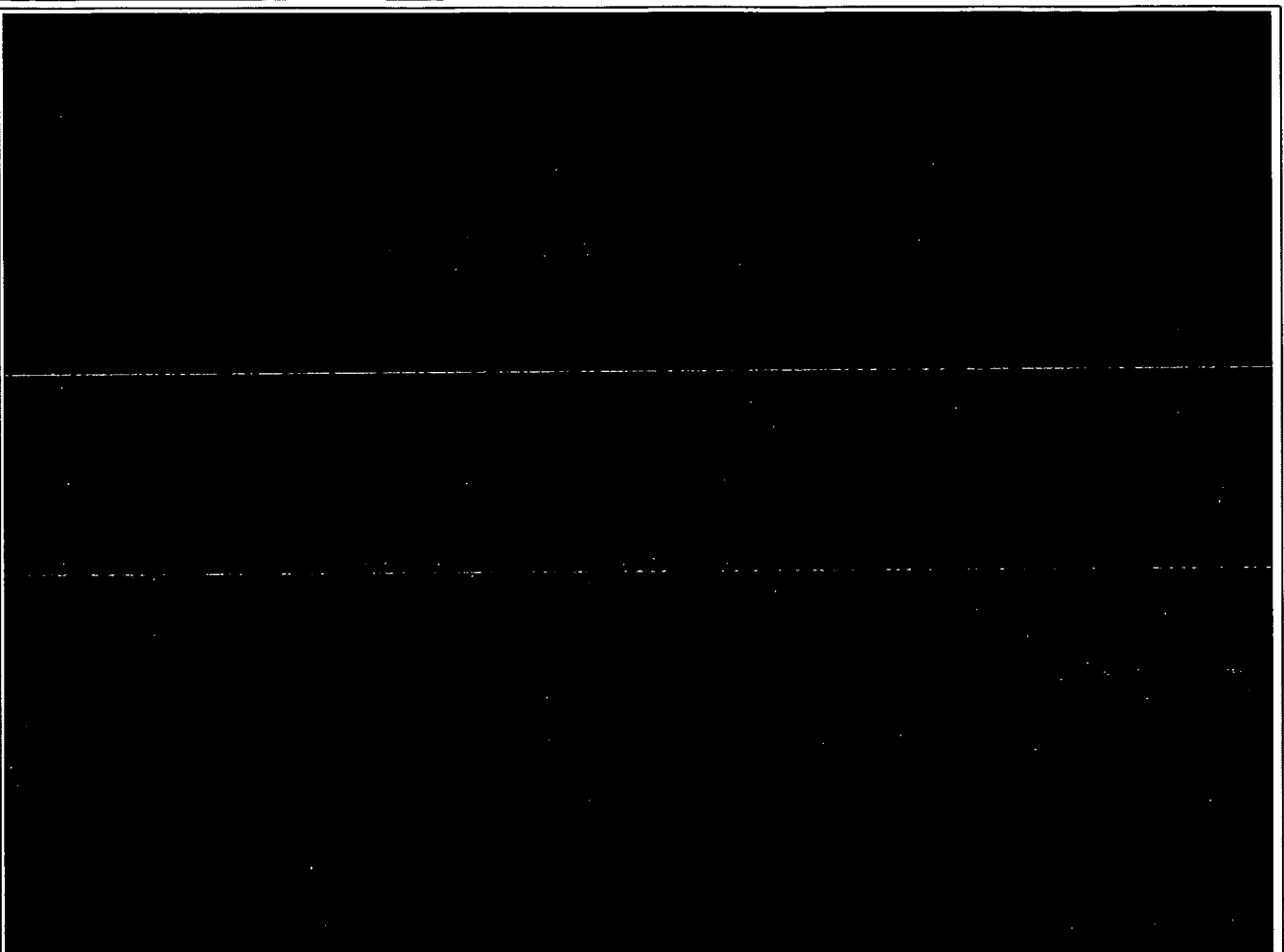
21 Q Second paragraph of Exhibit 1, you state,
22 "Recently, as a part of a review of client accounts
23 we discovered that a fee was charged to your
24 account that we wish to refund to you " Explain to
25 me the reason BB&T wishes to refund the fee

1 A At -- as indicated in the letter, Mr Willoughby,
2 we made a business decision to refund these sums --
3 we're not required to refund the sums -- to the 130
4 or so clients that were affected We decided that
5 it was the right thing to do, you know, as
6 indicated Based upon our corporate values, we
7 felt it was the right thing to do That it was --
8 that -- that the collection of that fee was
9 inconsistent with our current billing practices,
10 although it was consistent with the billing
11 practices that -- that were -- that were in effect
12 in 2006, and, therefore, our management or whoever
13 made the decision -- it was communicated -- made
14 the decision that it was the right thing to do to
15 refund these sums

16 Q The decision was made by -- by someone above you?

17 A I don't know who, someone above me, a different
18 department BB&T's a big company The decision
19 was made, and all I can share with you is when it
20 was communicated to me, who it was communicated by,
21 and -- and what they told me So essentially, I
22 executed on the project





15 Q In the third paragraph of your letter, you state in
16 the second full sentence "In connection with the
17 account outlined below, BB&T Asset Management
18 charged a one-time fee This fee would not have
19 been charged under our current billing practices "
20 Tell me what the current billing practices are and
21 why the fee would not be charged under the current
22 billing practices

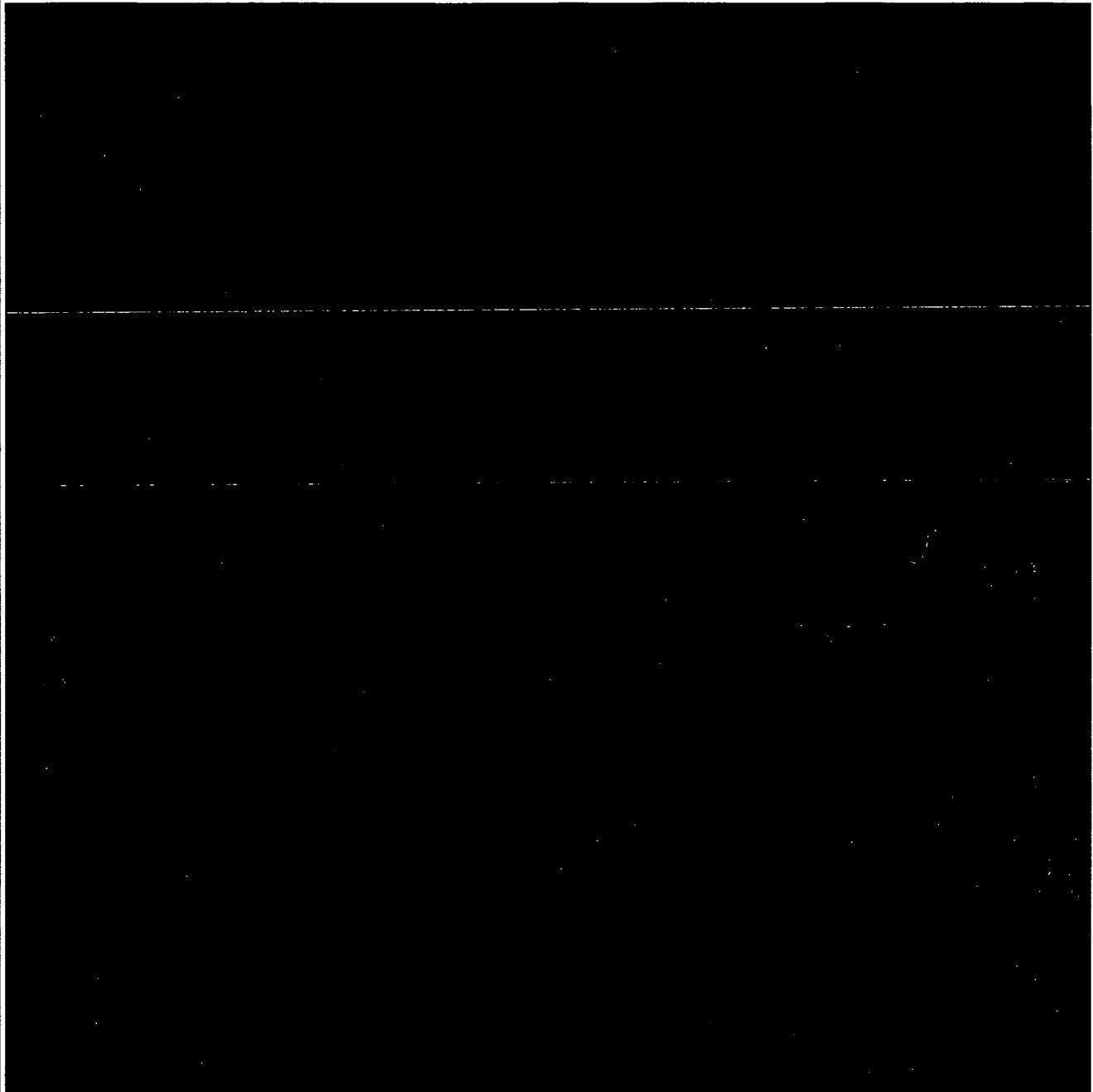
23 A We charge an asset-management fee Now, there --
24 there's provision for some extraordinary fees that
25 could be charged, but -- but -- but our billing

1 philosophy and approach is to charge an asset-
2 management fee based upon the value of the account
3 And so it's a percentage of the value of the
4 account based upon the type of investments
5 contained in the account So equities, stocks are
6 charged a -- a fee, as specified in our standard
7 published fee schedule, and fixed income is charged
8 a -- a fee based upon a percentage of the fixed
9 income position in the account It's aggregated
10 and -- and billed to the account And that's how
11 we're compensated for our -- for the advice and the
12 investment advice and services that we deliver



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20 Q How much total amount of money was refunded to all
21 of the 130 people?

22 A Don't hold me to the penny, but I think the total
23 refund amounted to slightly north of a million
24 dollars, like 1 1, something like that

25 Q So if Mr Maybank gets a -- a refund of just a

1 little less than 80,000, then he would have
2 received roughly 8 percent or so of the total
3 amount of money refunded?

4 A Correct Correct



12 Were there any amounts refunded greater than -
13 - than \$79,682 19?

14 A I -- I`do not recall I'd -- without referring to
15 the specific document, I -- I -- I would be
16 speculating to answer This is clearly a -- a -- a
17 large -- one of the larger refunds



1 Q You mentioned in your letter, in the second
2 paragraph, Exhibit 1 again, "While we are not
3 required to rebate these fees, we choose to do so
4 as a reflection of our corporate values " Did I
5 read that correctly?

6 A Yes

7 Q And your corporate values can be found, frankly, in
8 a number of locations, is that correct?

9 A That is correct

10 Q One of those location is BB&T's code of ethics?

11 A Well, the code of ethics and the corporate values
12 are two separate documents

13 Q Is there a corporate values document?

14 A There is

15 Q And about how many pages is the corporate values
16 document?

17 A I think the -- the -- the corporate values document
18 is -- is one page, maybe two pages

19 Q And do you know if that's on your Web site?

20 A I don't know It wouldn't surprise me if it -- if
21 it were on our Web site I -- I think there've
22 been a number of public -- it's -- publications
23 that include our -- our -- our corporate values

24 MR WILLOUGHBY Let's mark this as Exhibit 4

25 Exhibit 4 is the BB&T Code of Ethics

3 Q Are you familiar with Exhibit 4, Mr Borrello?

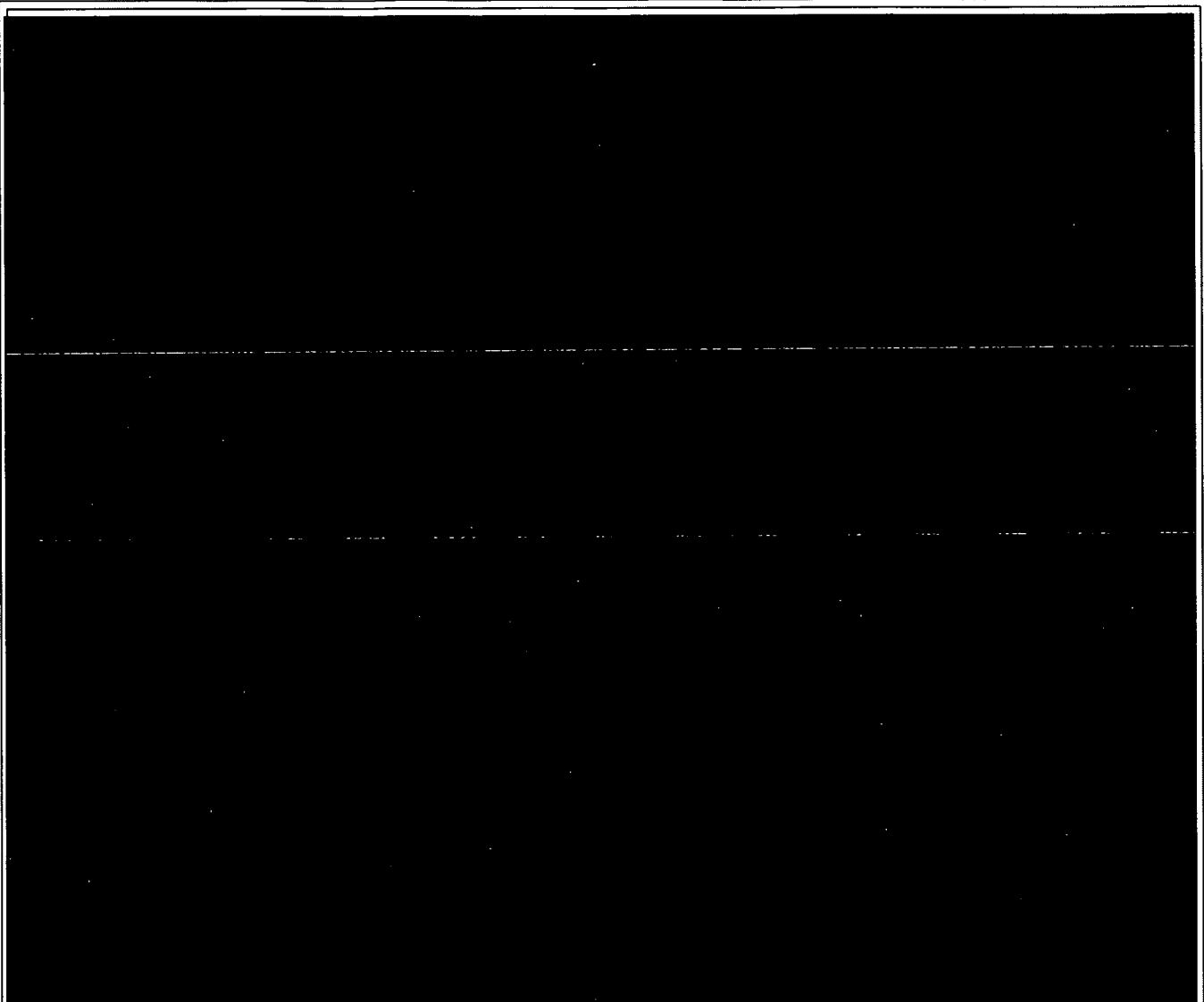
4 A Yes, sir

5 Q And is it a document that you and other bank
6 employees receive training on on an annual basis?

7 A It is Yes, sir

8 Q And I think you actually have to -- to sign a
9 representation that you have received such training
10 on an annual basis, do you not?

11 A That is correct



17 Q And would it be true that this BB&T code of ethics
18 is a document that is designed to inform employees
19 of the bank and explain to them about how they may
20 adhere to those corporate values?

21 A Yeah I mean, I think this document provides our
22 corporate values reinforced and are the keystone of
23 our code of ethics The next -- the next sentence
24 -- correct -- they reinforce and are aligned with
25 our -- our values The -- the code of ethics are

1 aligned with our -- our -- our -- our values --
2 corporate values



11 Of the values that are set forth here in this
12 very first paragraph, of the code of -- of ethics,
13 is there any one of those values that you were
14 relying upon in making the refund, or were you
15 relying upon them all?

16 A All of them All of them

17 Q So it's the interaction and interplay between these
18 corporate values that led BB&T to say, This is the
19 right thing to do?

20 A Yes, sir And it's -- it's doing the right thing
21 for the -- for our -- for our clients

22 Q And -- and would it be true that at the essence or
23 the essential foundation of your code of ethics and
24 your corporate values is what you just said, "doing
25 the right thing"?

1 A Yes, sir

2 Q Doing the right things when no one's inspecting,
3 correct?

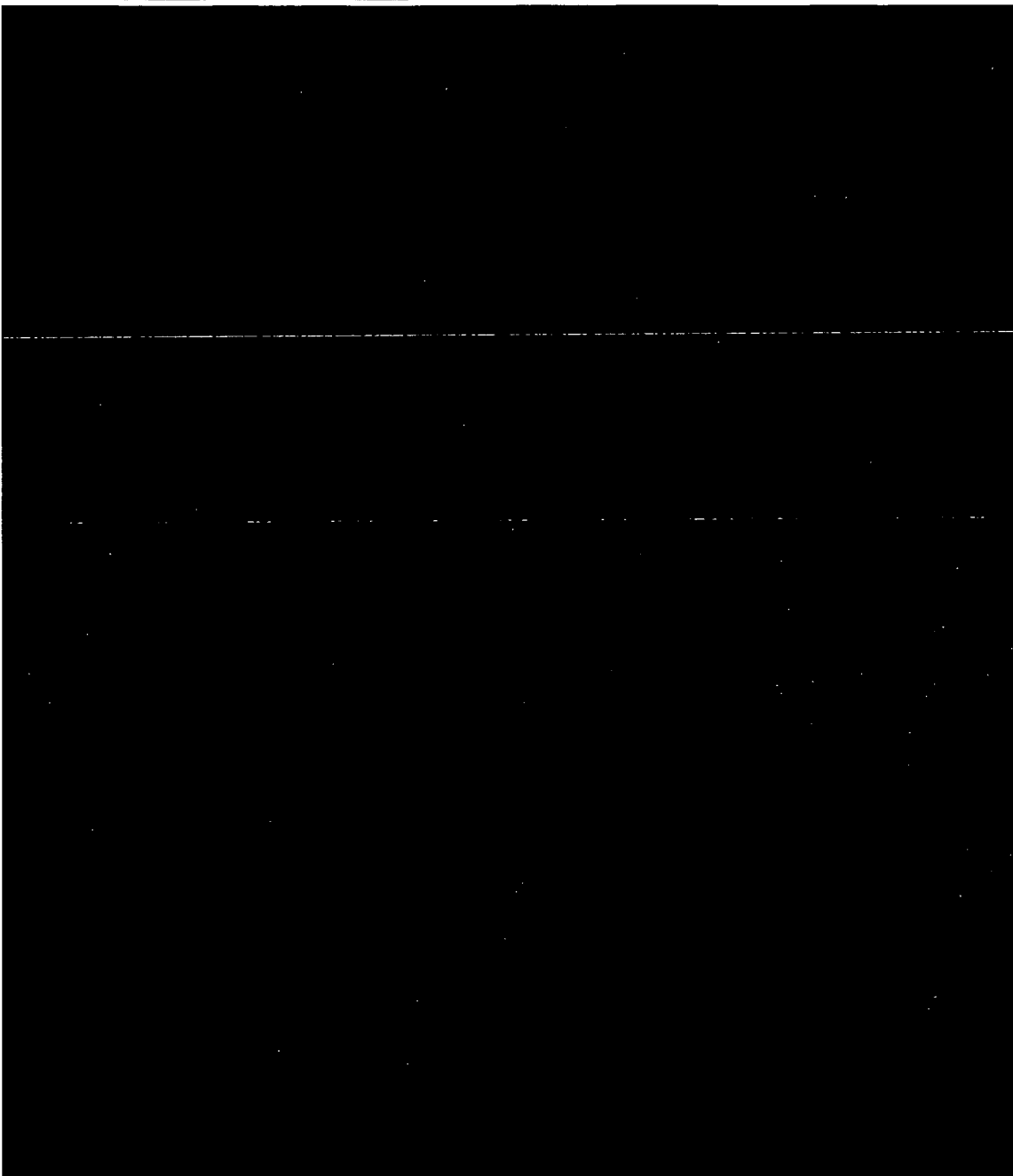
4 A That's correct

5 Q Doing the right thing when you know that nobody may
6 observe you otherwise?

7 A That's correct

1 State of South Carolina)
2 County of Greenville)
3) C/A no 2011-CP-23-8578
4 Francis P Maybank,)
5 Plaintiff,)
6 vs) Video Deposition of
7) David W Fisher
8 BB&T Corporation, Branch)
9 Banking and Trust Company,)
10 Successor in merger to)
11 Branch Banking and Trust)
12 Company of SC, Sterling)
13 Capital Management, LLC,)
14 Successor in merger to BB&T)
15 Asset Management LLC, Ross)
16 Walters, and Anthony)
17 Mahfood,)
18 Defendants)
19)
20)
21)
22)
23)
24)
25)

15 Video Deposition of David W Fisher, taken
16 before Carolyn M Beam, a notary public in and for
17 the State of North Carolina, commencing at the hour
18 of 10 23 a m , Wednesday, November 20, 2013, at the
19 office of Nelson Mullins Riley & Scarborough, LLP,
20 Bank of America Corporate Center, 42nd Floor, 100
21 North Tryon Street, Charlotte, North Carolina
22 Reported by
23 Carolyn M Beam
24
25



20 Q Would you please state your full name for the
21 record?

22 A David Ward Fisher, F-I-S-H-E-R

23 Q And Mr Fisher, where are you employed?

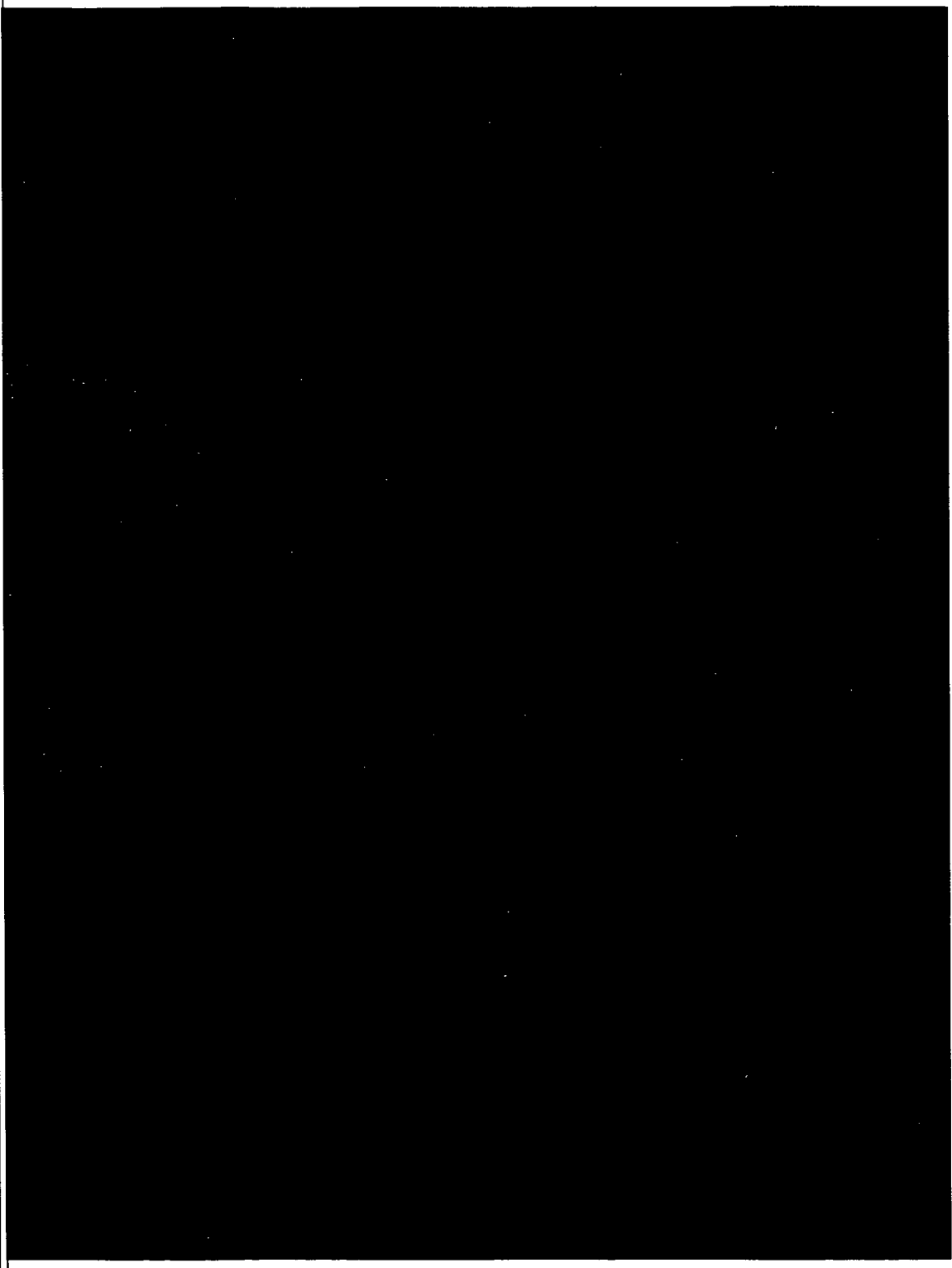
24 A Employed in Charlotte, North Carolina

25 Q With whom?

1 A BB&T

2 Q And in what capacity?

3 A I'm manager of the wealth division



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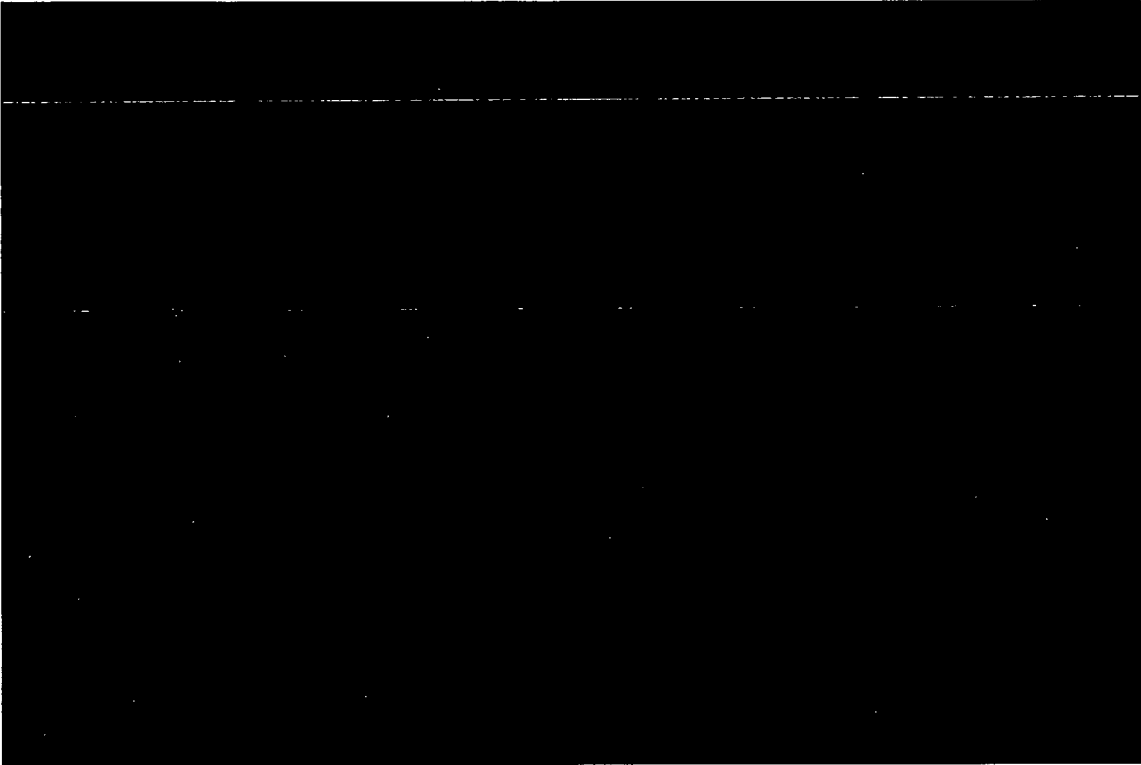
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16 Q I'm handing you what has been marked as
17 Plaintiff's Exhibit 1, Mr Fisher And ask if
18 you are familiar -- not with this specific
19 document I'm going to ask you about that
20 But are you generally familiar with BB&T's
21 wealth management agreement?

22 A This is -- you know, this is a document that
23 our legal department would either draft or
24 have someone outside, legal counsel, draft
25 It changes from time to time I'm familiar

1 with it in a sense, I know we have to have an
2 agreement between us and our clients, and it
3 has to be written and documented But that's
4 about the extent of it



16 A That's correct

17 Q At least the initial contract period I want
18 to ask you a general question about the
19 authority of the wealth management folks The
20 wealth management folks, I understand -- at
21 the time, I'm talking about wealth management
22 division, when you first came --

23 A Yeah

24 Q -- in 2007 Did you have any understanding as
25 to the limitations on the wealth management

1 advisor's ability to advise customers, like
2 Mr Maybank, about their account, strategies
3 in their account, or otherwise provide a
4 customer with any advice about their
5 investments?

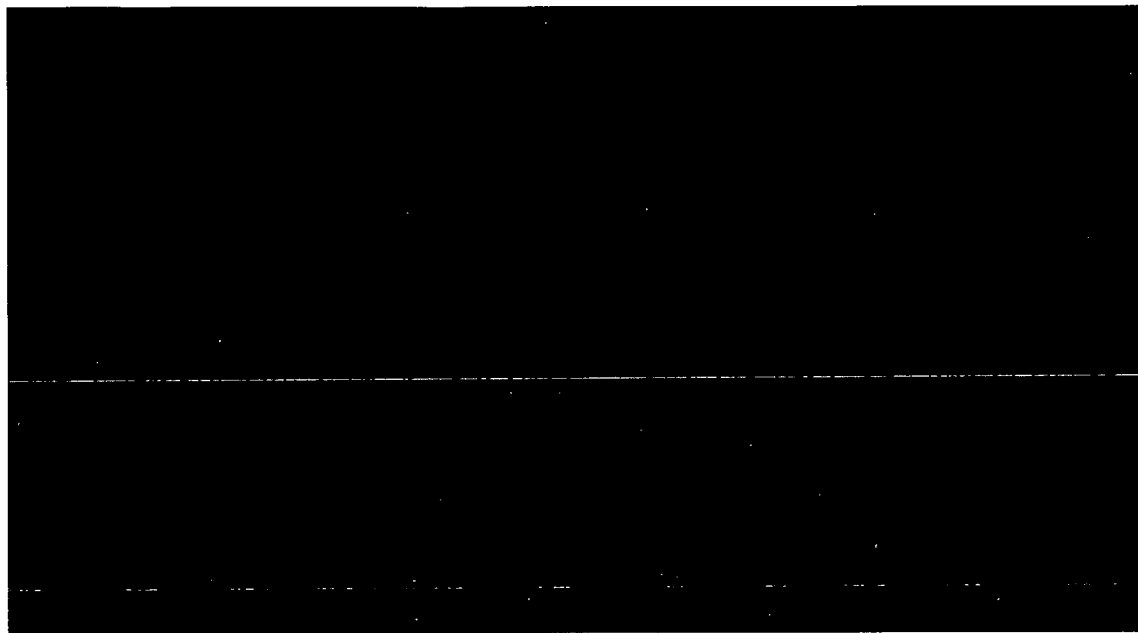
6 A Well, you know, wealth advisor, again, is a
7 relationship manager, not a specialist and not
8 an expert in any one field I like to say
9 their knowledge is a mile wide and an inch
10 deep They are not to be offering investment
11 advice, they are to bring into their team a
12 portfolio manager that would deliver that
13 advice

14 Q And so would it be true then that a wealth
15 management advisor, or today I think they're
16 called wealth advisors?

17 A That's correct

18 Q But previously a wealth management advisor
19 So a wealth management advisor, when you came
20 into BB&T, would be restricted against
21 providing any investment advice to a customer?

22 A Yes, that's correct They would bring in a
23 portfolio manager who had the expertise and
24 the capability to do that



10 Q And let me read the first sentence to you As
11 wealth manager, Bank shall gather information
12 from the client regarding the client's
13 investment objectives, risk tolerance and
14 investment horizon, tax status, financial
15 situation and needs Little two-1, make
16 recommendations to the client regarding the
17 investment program and investment guidelines
18 for the account And little three-1,
19 coordinate and supervise the services of the
20 investment advisor and the custodian for the
21 account

22 Now if you'll look at little two-1,
23 make recommendations to the client regarding
24 an investment program and investment
25 guidelines for the account Is, based upon

1 the answer that you've just given me, would it
2 be true that the wealth management advisors,
3 at the time you came and joined the bank in
4 2007, were restricted against doing the
5 activities that I just read to you?

6 A They facilitate it by bringing in a portfolio
7 manager to do that, yeah

8 Q They may facilitate it, but they themselves
9 are restricted against making recommendations
10 to the client regarding an investment program,
11 correct?

12 A We would not want them doing that

13 Q And they are, in fact, restricted against
14 doing that, correct?

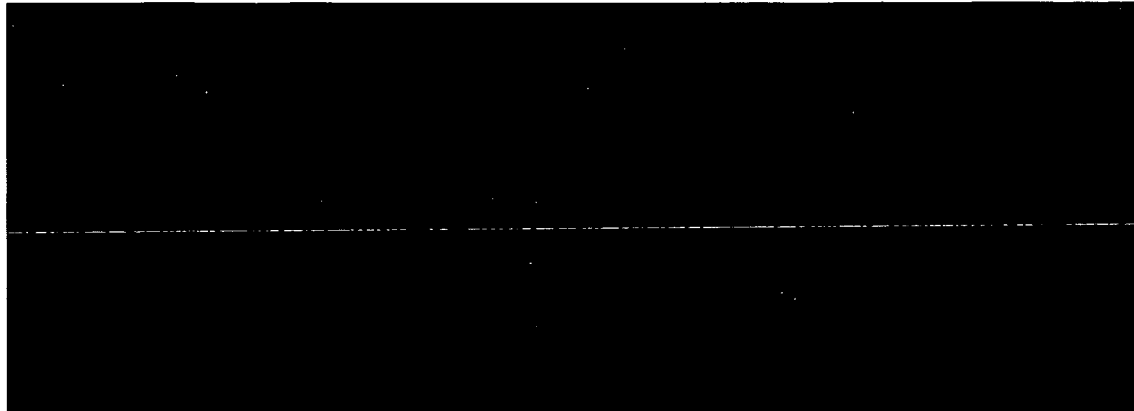
15 A I'm not sure what the word restricted -- how
16 are you -- how are you using the term
17 restricted?

18 Q Well, they are, by your policies and
19 procedures, are instructed that they should
20 not make those kinds of recommendations?

21 A That's correct

22 Q And if they then made such a recommendation,
23 they would be in violations of the policies
24 and procedures that BB&T wealth management
25 division had in place?

1 A We would not want them giving investment
2 advice



9 Q -- I'm talking about the corporate
10 organization So I'm going to be more careful
11 with my wording Would it be true, then, that
12 BB&T Bank, through its wealth management
13 division, in 2007, when you joined the bank,
14 restricted its wealth advisors, wealth
15 management advisors, against providing
16 recommendations regarding investment
17 guidelines for customer accounts?

18 A Right We would -- well, when I was -- when I
19 arrived, my instruction to my team was, we
20 were not to be giving investment -- advisors
21 were not to be giving investment advice They
22 were to associate either a -- someone from the
23 broker-dealer or someone from portfolio
24 management, which was then BB&T Asset
25 Management, to deliver that advice

24 Q You and I were talking before the break about
25 the wealth advisors I have come to learn

1 that wealth advisors may have securities
2 license, of one designation or another Are
3 you aware that the wealth advisors do hold
4 securities license?

5 A Yeah Our business model, in -- in
6 collaboration with FINRA, requires that they
7 have a Series 7

8 Q Okay Why, if the wealth advisors are limited
9 or restricted against providing investment
10 advice, would your business model require them
11 to have a securities license?

12 A It's one of those little quirks in the way our
13 government people think The part of the
14 compensation that goes to an advisor comes
15 from -- if he refers an account to Scott &
16 Stringfellow and -- and he doesn't get -- he
17 doesn't share in the fees that go to that
18 broker, but the revenue is shadowed back and
19 it's part of his fee-based -- fee-based credit
20 against his grid, and because they consider it
21 more than nominal, they have to be licensed
22 So it really has to do with their receipt of
23 credit for incentive compensation

24 Q So would that also be true, where they are
25 referring matters to BB&T Asset Management,

1 for example?

2 A No Just the -- just the broker-dealer for --
3 that's what drives it Because FINRA -- FINRA
4 has responsibility over broker-dealer, not
5 over a registered investment advisor, like
6 BB&T Asset Management

7 Q So today, where the asset managers or
8 portfolio managers' managers are part of the
9 wealth division, do you know whether or not
10 those portfolio managers are required to be
11 licensed?

12 A They are not They operate under the trust
13 exemption

14 Q And the wealth advisors today, are they still
15 required to be licensed?

16 A They are Because of that little piece of
17 compensation credit that comes from referring
18 business to one of the broker-dealers

19 Q And that would be true whether with Scott &
20 Stringfellow or BB&T Investments?

21 A Correct



16 Q I'm handing to you what has been marked as
17 Plaintiff's Exhibit 3 and representing to you
18 that this appears to be a BB&T person --
19 personal development plan for one of your
20 wealth advisors and former team director,
21 Mr Ross Walters A -- are you familiar with
22 this document?

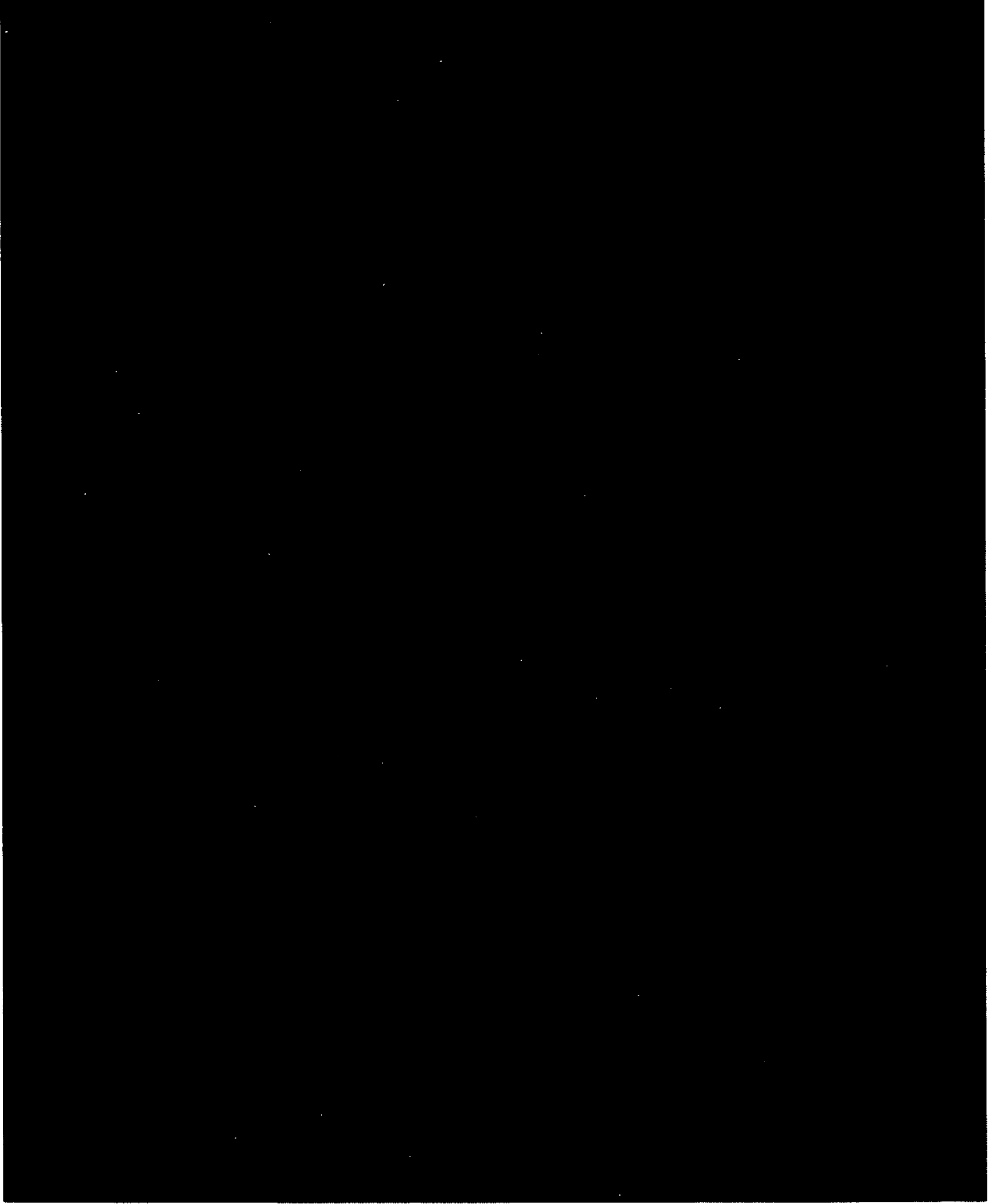
23 A I am

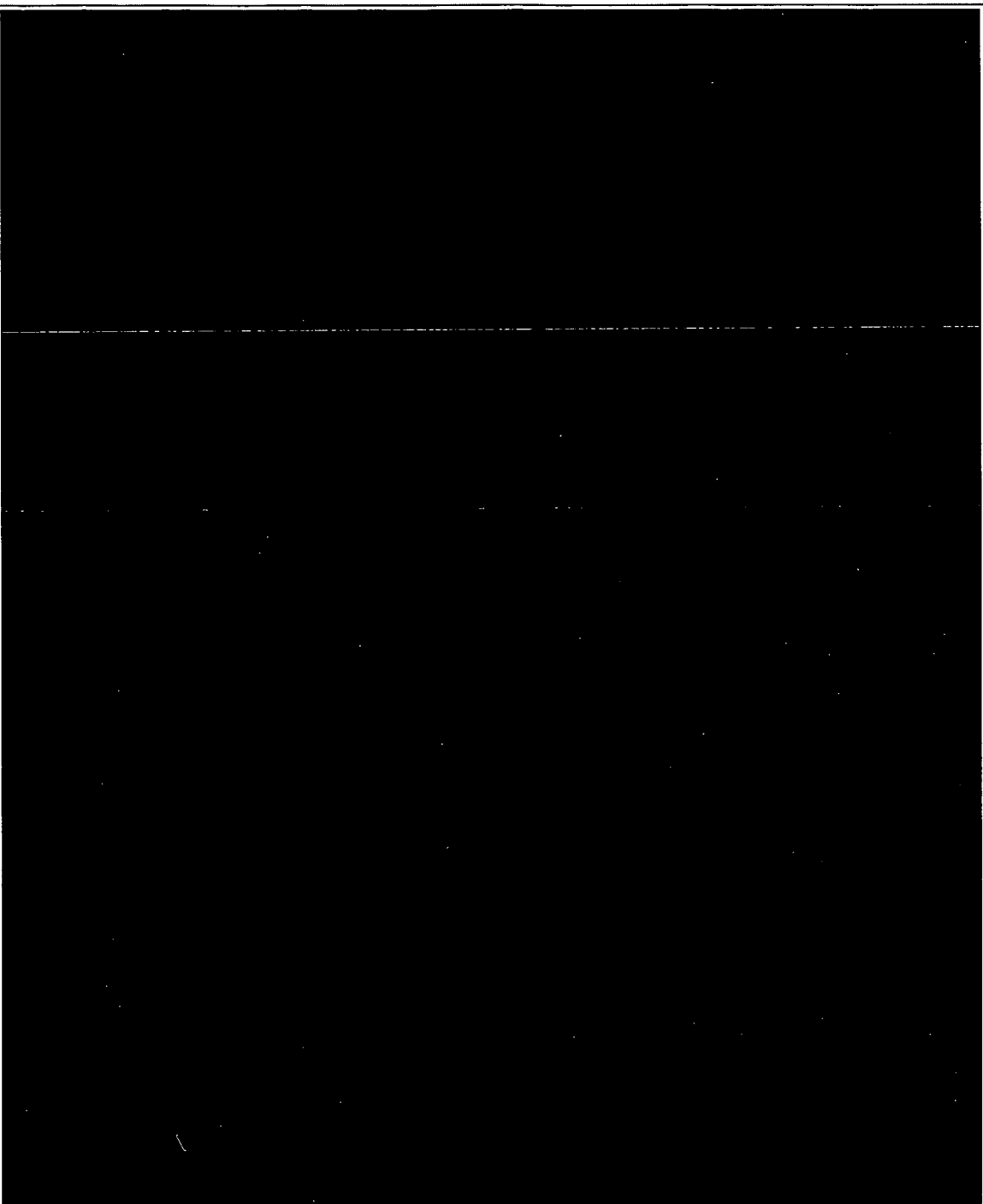
24 Q And are you familiar Mr Ross Walters?

25 A I am

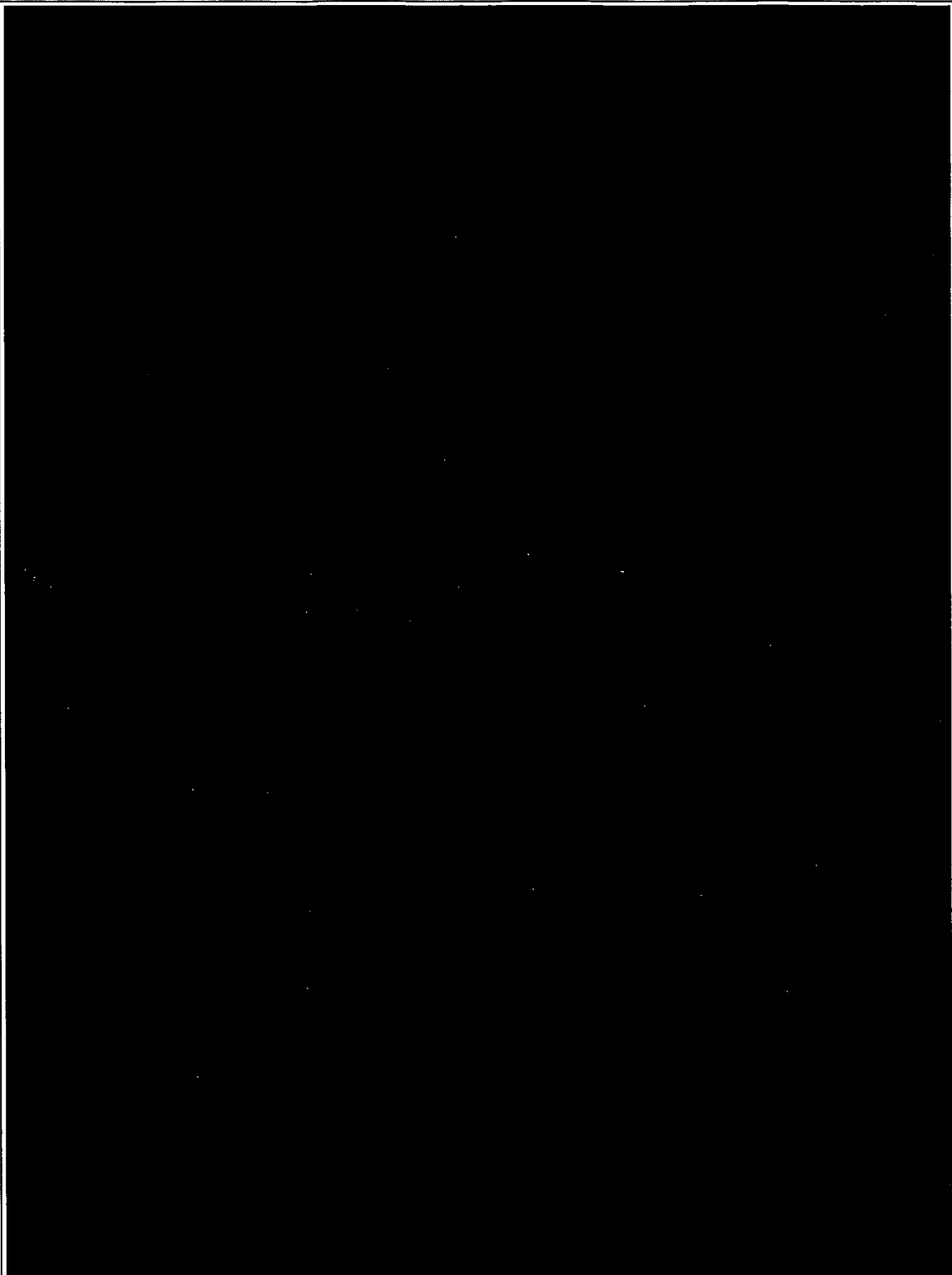
1 Q I -- I have come to learn that -- well,
2 Mr Ross Walters used to be the team leader of
3 the wealth division in Greenville, is that
4 correct?

5 A That's correct





21 Q Now, if you would look at this Exhibit 3 that
22 I've given to you And I want to direct your
23 attention to the page that bears Bates number
24 22116
25 A Okay



23 reviewed But I want to turn your attention,
24 then, to page 22116 And if you'll look about
25 two-thirds of the way down the page, there is

1 an objective three Do you see objective
2 three?

3 A I do

4 Q Now, if you would look into -- five lines
5 down, let me read a sentence to you Ross can
6 be counted on to support division initiatives,
7 such as the introduction of alternative
8 investments, as well as develop and implement
9 many on his own team

10 Did, at the time you arrived, in 2007,
11 did you come to understand that the wealth
12 division had a -- had an initiative for the
13 introduction of alternative investments?

14 A In -- in appropriate cases, where the
15 portfolio manager and the client came to an
16 agreement, that was the right strategy, yes

17 Q So the portfolio manager and the customer or
18 client would have to conclude that it was the
19 right strategy, then you would promote --

20 A That's --

21 Q -- alternative investments?

22 A That's correct A person in the advisory role
23 would -- remember the mile-wide inch-deep?
24 That inch deep would be -- be able to
25 recognize, I'm talking to a client that, for

1 instance, has a large concentration in a
2 stock, he would recognize that I need to get
3 my PM in here to talk to this fellow about how
4 to protect that concentration

5 Q Would it be true then, because of their
6 limitation, that knowledge a mile-wide and an
7 inch -- inch-deep, which is, as I understand
8 it, a way of saying that they have general
9 knowledge about a lot of things an in-depth
10 knowledge about very little

11 A Yeah

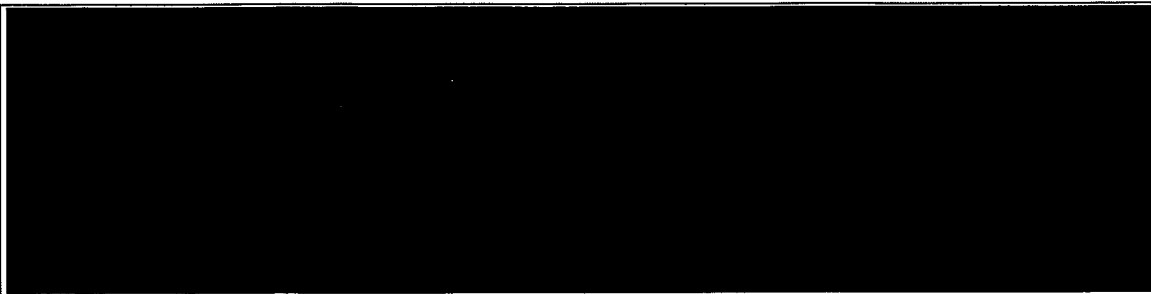
12 Q Is that fair?

13 A Right Be able to recognize an opportunity
14 for what it's worth and then bring to bear the
15 bank to help that client

16 Q So would it be true then, because of the role
17 of the wealth advisor, that the bank, BB&T
18 Bank, would not be looking to train the wealth
19 advisor about the details of a -- of an
20 alternative investment, is that correct?

21 A They would want to be fluent in understanding
22 what investment products we have on our
23 platform Because we want them to be
24 knowledgeable in conversation with -- with
25 someone, to demonstrate competence and

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5 Q And when you arrived at BB&T Bank in 2007, did
6 you come to understand that there was a push
7 within the bank for advancing or selling
8 alternative investments?

9 A There was -- there was a -- the push is always
10 there and it's all about serving client needs
11 And so what we want people to do is be
12 proficient and -- and -- and -- and aggressive
13 about helping clients understand how the bank
14 can help them and then bring product and
15 service to bear to deliver on that

16 Q What would you --

17 A Or as we call it, consultative selling We
18 consult with the client, understand what their
19 goals, objectives and needs are, and then
20 bring the full power of the bank to bear on
21 that client

22 Q What would you interpret the words
23 introduction of alternative investments to be?
24 Would that -- would I be correct to interpret
25 that to be that the introduction of

1 alternative investments would be a new product
2 offering that the bank is now trying to
3 advance to its customers?

4 A No I think what -- what's being said here is
5 -- is do what I just offered our -- our
6 business model calls for is -- is be on your
7 toes, be knowledgeable, be on your toes, see
8 those opportunities to help clients and then
9 bring professionals in to deliver Whether it
10 be lending, insurance, investments, that they
11 have all those specialists behind [REDACTED]

12 Q Now, you had indicated that -- before, that
13 alternative investments were something that a
14 bank needed to be able to offer, in order to
15 provide --

16 A Be competitive

17 Q Be competitive with other -- with other --

18 A Investment --

19 Q -- banking

20 A Banking -- providing -- banks and registered
21 investment advisors, you know, it's -- it's
22 quite common now for alternatives be a part of
23 the package

[REDACTED]

1 Q Do you know, of your own knowledge, what
2 standard the bank holds itself to, in terms of
3 managing a trust relationship like exists in
4 Plaintiff's Exhibit 10?

5 A I don't know that I know, you know, in a sense
6 of -- I don't know it's written anywhere in
7 BB&T policy what that standard is But it
8 would be the standard that would be in the law
9 of trust -- laws of trust, the trustee has a
10 fiduciary responsibility to the beneficiary

11 Q And that would be to discharge all
12 responsibilities with undivided loyalty to the
13 trust and the beneficiaries, correct?

14 A Correct

15 Q To ensure that there is no conflict of
16 interest, where the trustees' interest are
17 placed above that of the beneficiary of the
18 trust, correct?

19 A Correct We would always act in the -- in the
20 best interest of the beneficiary

21 Q Would it also be true, Mr Fisher, that for
22 agency accounts that you carry in wealth
23 division -- in the wealth division, where the
24 firm exercises discretion over the investments
25 made in the account that, likewise, the firm

1 places the best interest of the client as
2 paramount in that relationship?

3 A The relationship between the portfolio manager
4 and the client would be a fiduciary
5 relationship, right

6 Q And all of those requirements, undivided
7 loyalty, placing the client's interest first,
8 would be applicable to that relationship?

9 A Correct

10 Q And it would also be true that, if there was a
11 potential conflict between the interest of the
12 client and the interest of the corporation,
13 either BB&T Corporation or BB&T Bank, then
14 that conflict has to be resolved in the best
15 interest of the client?

16 A Or, resolved through disclosure

17 Q Would -- would you expect that disclosure to
18 be in writing and fully acknowledged by the
19 client?

20 A It all would -- it would all depend on the
21 situation. I -- disclosure is a way around a
22 conflict

23 Q Well, disclosure would be not a way around the
24 conflict, but would be a way of discussing
25 fully --

1 A Resolve it --

2 Q -- and --

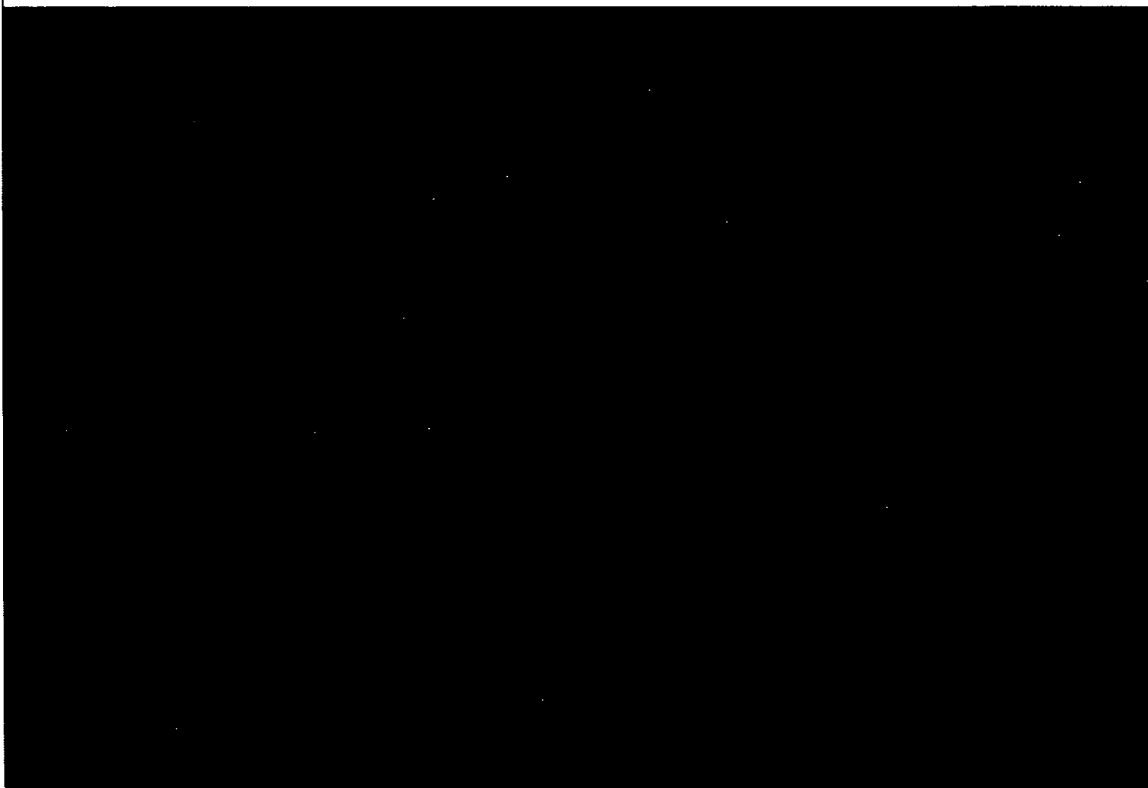
3 A -- so you could move on In fact, if the
4 client wanted to go that route --

5 Q Not --

6 A -- that -- that'd be a way to do it

7 Q And -- but if you were going to disclose that
8 conflict, you would need to disclose all of
9 the aspects of the conflict and secure the
10 client's clear and knowledgeable and informed
11 consent to the conflict, correct?

12 A In a -- just a -- we're talking a hypothetical
13 here In a general sense, yes, you'd want to
14 do that



7 Q Do you know whether or not it is a conflict of
8 interest for BB&T Bank to make a
9 recommendation to a customer about BB&T
10 Corporation stock?

11 A As a practice, we wouldn't do that, shouldn't
12 do that There's inherent conflict there

13 Q So, as a general rule, as a practice

14 A The SEC would take issue with that, if you
15 were going about touting your own stock to --

16 Q The SEC would take issue Wouldn't the New
17 York Stock Exchange also take issue with it?

18 A I don't know that for a fact I -- I just
19 think of the SEC as being out to protect
20 investors

21 Q But you would agree that it would be a
22 conflict for BB&T Bank to recommend to a
23 customer or to make a recommendation to a
24 customer about BB&T Corporation stock?

25 A Yeah, we wouldn't do that

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3 Q Are you aware of a Securities and Exchange
4 investigation that was initiated against BB&T
5 at sometime in the 2010/'11/'12 timeframe?

6 A I think you're referring to a regularly
7 scheduled SEC examination Yes, I am

8 Q And what year was that?

9 A I'm thinking it's the end of '11, early '12

10 Q And it's my understanding that the SEC was
11 critical of some function or fee that BB&T was
12 charging, is that correct?

13 A Right They raised an issue that offered to
14 us that some of the fees we had been taking on
15 providing this kind of advice were
16 broker-esque, like a broker-dealer would
17 charge And that -- and they didn't say you
18 can't charge them But they said it's a gray
19 area And so we took that under advisement,
20 had conversation with counsel

21 Q Did -- did the SEC's gray area criticism lead
22 BB&T to refund fees?

23 A Yes Well, after advice from counsel That's
24 what really triggered it

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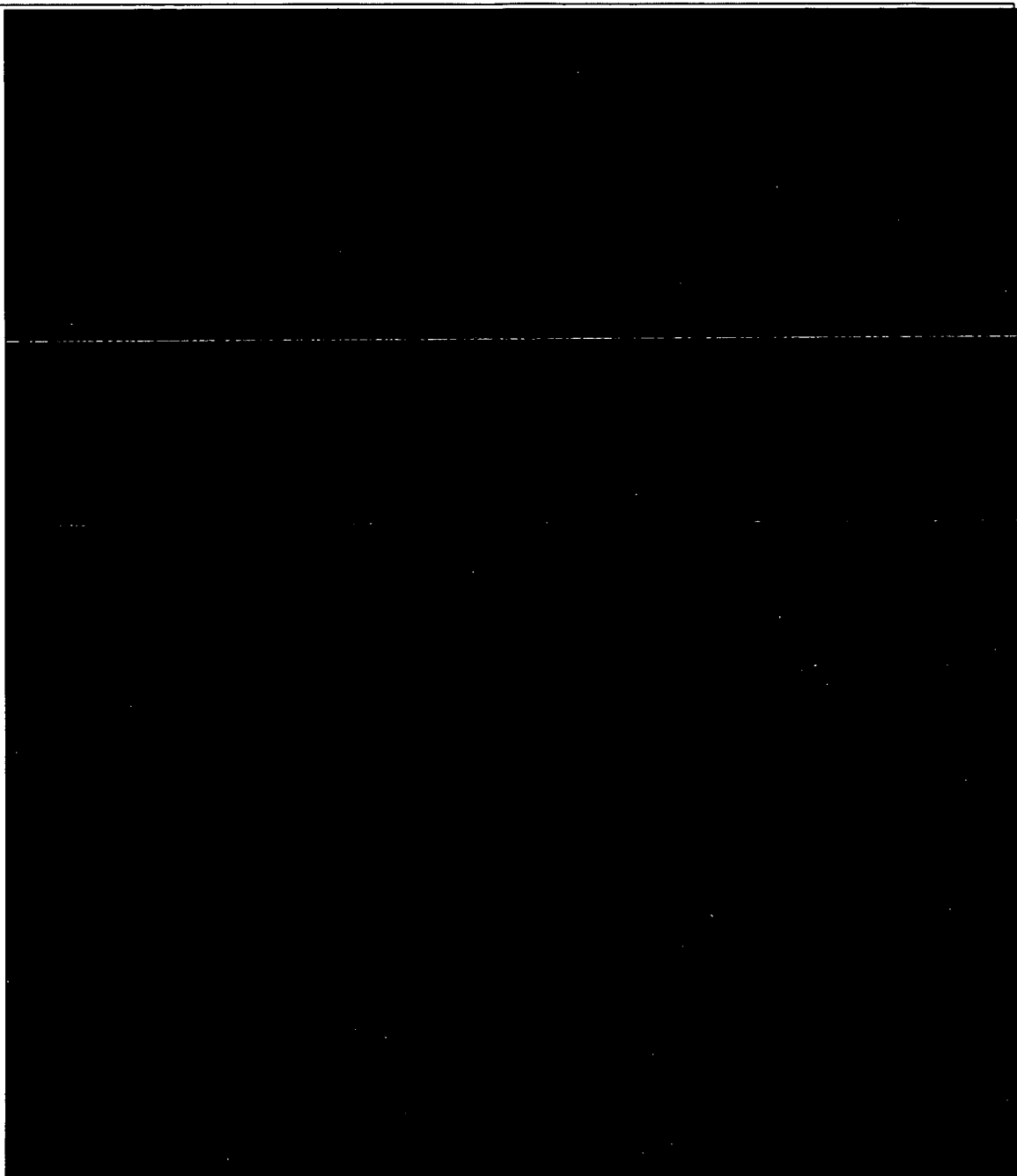
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1 State of South Carolina)
2 County of Greenville)
3) C/A no 2011-CP-23-8578
4 Francis P Maybank,)
5 Plaintiff,)
6 vs) 30(b)(6) Video
7) Deposition of
8) BB&T Bank
9) (David W Fisher)
10 BB&T Corporation, Branch)
11 Banking and Trust Company,)
12 Successor in merger to)
13 Branch Banking and Trust)
14 Company of SC, Sterling)
15 Capital Management, LLC,)
16 Successor in merger to BB&T)
17 Asset Management LLC, Ross)
18 Walters, and Anthony)
19 Mahfood,)
20 Defendants)
21)
22)
23)
24)
25)

30(b)(6) Video Deposition of BB&T Bank
(David W Fisher), taken before Carolyn M Beam, a
notary public in and for the State of North
Carolina, commencing at the hour of 4 46 p m ,
Wednesday, November 20, 2013, at the office of
Nelson Mullins Riley & Scarborough, LLP, Bank of
America Corporate Center, 42nd Floor, 100 North
Tryon Street, Charlotte, North Carolina
Reported by
Carolyn M Beam



20 Q Would you state your full name for the record,
21 please?

22 A David Ward Fisher

23 Q And by whom are you employed, Mr Fisher?

24 A BB&T

25 Q And is that BB&T Bank?

1 A BB&T Bank

2 Q And Mr Fisher, we've just completed your
3 personal deposition I'm not gonna go through
4 the background All of the information you
5 gave me in the other deposition is still true
6 and accurate as of this time --

7 A That is correct

8 Q -- correct? We served on BB&T Bank a rule
9 30(b)(6) deposition notice And one of the
10 questions that was on that notice was this
11 question The review of client accounts which
12 led to the discovery that fee refunds should
13 or would be made to clients, including --
14 including but not limited to Mr Maybank on or
15 about November 29, 2012, as a reflection of
16 the BB&T's corporate values, including but not
17 limited to when the review commenced, the
18 event which triggered the review, the scope of
19 the review and the decision-making process
20 which led to the refunds, as well as each
21 alternative investment strategy product for
22 which refunds were made And I understand
23 you've been designated to respond on behalf of
24 BB&T Bank to this single question?

25 A I have

1 Q And you are prepared to respond on behalf of
2 the bank today?

3 A That's correct

4 (PLF EXH 1, Letter dated November 30,
5 2012 and enclosures, Bates stamp Maybank
6 000001 through 000007, marked for
7 identification)

8 BY MR WILLOUGHBY

9 Q I would hand to you, Mr Fisher, what has been
10 marked as Plaintiff's Exhibit 1, and ask you
11 if you are familiar with those documents

12 A I am

13 Q Now, the first document's a letter from
14 Mr Kristinik But the second document, or
15 the second page of that exhibit, is a letter
16 from Mr Borrello Do you have that in front
17 of you?

18 A I do

20 Tell me what led to the -- what event
21 led to the decision to refund, to Mr Maybank
22 and others, certain fees that had been charged
23 on alternative investments at previous times?

24 A A regularly scheduled SEC examination of, at
25 that time, probably be BB&T Asset Management

1 During the course of that examination, which
2 any number of matters were looked at, this --
3 this -- the matter of these fees came into --
4 came into question by the examiner, that they
5 were -- and the term I was told that was used
6 was -- was broker-esque, and more familiar
7 with a broker-dealer world than registered
8 investment advisors

9 And our registered investment advisor,
10 upon hearing that, took that -- that comment
11 into -- for consideration And then, after we
12 looked at it, well, that -- that's how --
13 that's how it came about

14 Q So that was the impetus for you to take -- for
15 the company to take a look at the issue?

16 A Right

17 Q Who was the registered investment advisor that
18 was having the communications with the
19 Securities and Exchange Commission?

20 A I'm pretty sure, at this time, it was BB&T
21 Asset Management I think Sterling and BB&T
22 probably came together in '11 or '12 I'm not
23 sure exactly what the date was on that But
24 at the same time the examination was going on,
25 I think it was BB&T Asset Management

1 Q Do you remember who -- or do you know the name
2 of the individual with BB&T Asset Management
3 who was actually communicating with the
4 Securities and Exchange Commission?

5 A Pretty sure it would have been the Clint Ward,
6 who's the chief compliance officer

7 Q And so would -- would Mr Ward be the
8 individual, then, that communicated the
9 concerns of the SEC to others at BB&T Bank and
10 BB&T Asset Management?

11 A Yeah He would bring -- he'd bring that kind
12 of concern forward for management to consider
13 options

14 Q And when did you personally become informed
15 about the SEC's concern?

16 A In preparation for this

17 Q And when you say this, you are referring --

18 A This -- this deposition Preparation of this
19 deposition

20 Q The deposition today?

21 A Right In order to serve in the 30(b)(6), to
22 speak on behalf of the company, I then reached
23 out to people who would have been familiar
24 with this so I could speak today at this
25 deposition

1 Q Now, were you involved in the preparation of
2 the letter or the format of the letter that
3 was signed by Mr Borrello, that's part of
4 Exhibit 1 in front of you now?

5 A I instructed him to prepare the letter and to
6 execute on the implementation of the plan to
7 rebate the fees

8 Q At the time that you were preparing the
9 letter, along with Mr -- with Mr Borrello,
10 were you the person in charge of ensuring that
11 the fees were rebated?

12 A I was instructed by my immediate superior, Lee
13 Youngblood, to implement a plan to rebate
14 these fees And I -- this is in
15 Mr Borrello's world, his -- his area of
16 responsibility, his clients So I instructed
17 him to form a team and lead that team in
18 determining who it was that needed their fee
19 rebated, which accounts were on the list And
20 that team did that And then the -- these
21 were rebated

22 Q Who would be -- who's Mr Youngblood's boss?

23 A He's my -- Chris Henson, the chief operating
24 officer of BB&T Bank

25 Q Chris Henson And when you were informed by

1 Mr Youngblood who -- who is your boss,
2 correct?

3 A Correct

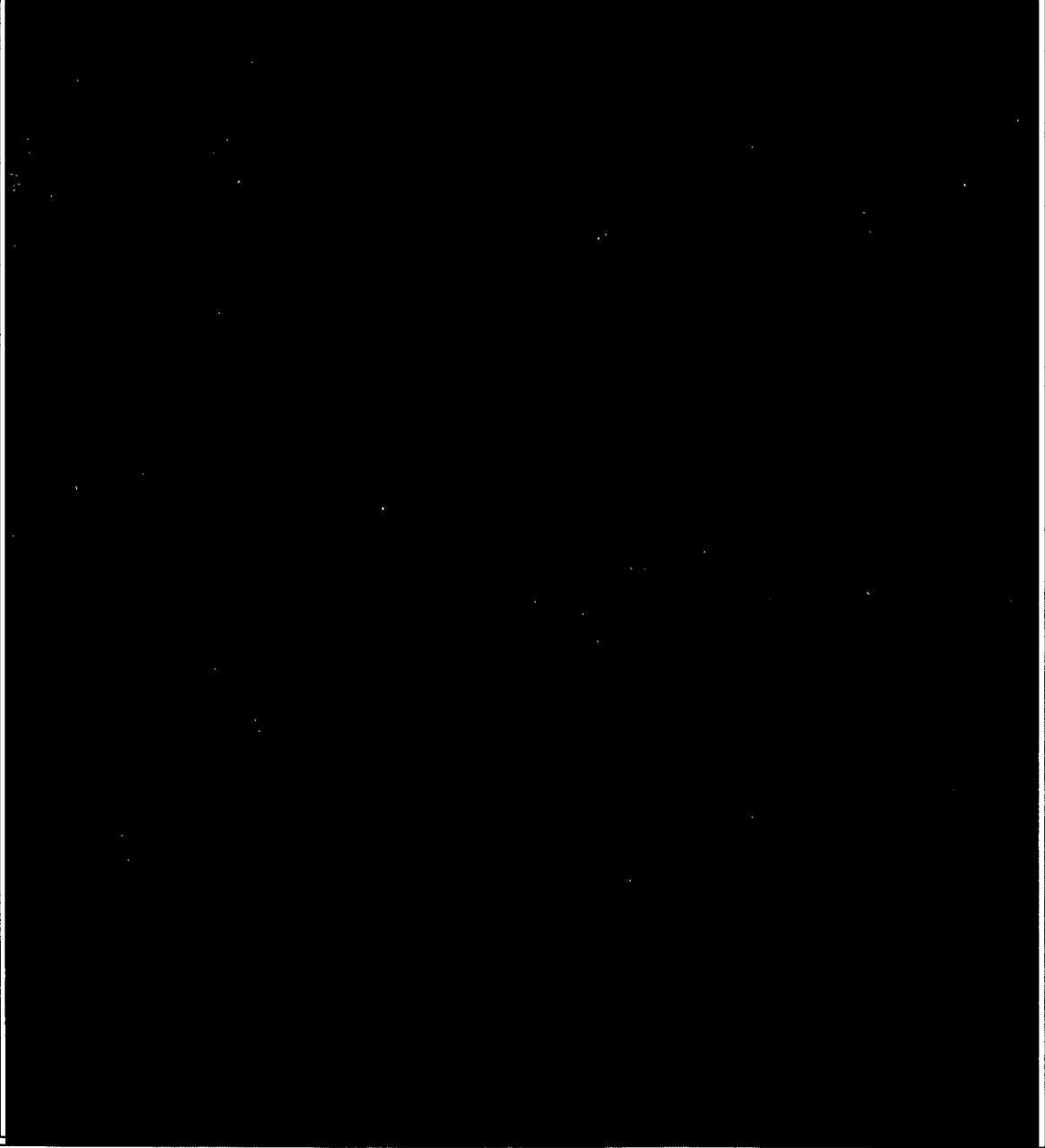
4 Q When you were informed by him to take this
5 action, were you informed, at that time, that
6 the reason you were taking this action or
7 being directed to take the action of refunding
8 fees that had been charged on alternative
9 investments over a period of time, was that
10 there had -- was an SE -- SEC investigation
11 that had criticized those fees?

12 A I wouldn't use the term investigation It was
13 a regular scheduled exam in which this came to
14 light It was part of a -- a comment My
15 first knowledge of it came recently, when I
16 reached out to them to prepare myself for this
17 deposition When he called me, he said,
18 David, we have decided we're gonna rebate
19 these fees And I'd like you to take charge
20 of it, which I did

21 Q So the initial information that you received
22 or the -- the initial instruction that you
23 received was, we've decided -- "we" being the
24 corporation or "we" being the bank?

25 A I would say out -- we at that -- we -- we -- I

1 -- what I've learned later, since then, by --
2 by asking Lee, that Alex McAlister, who is the
3 manager of -- or president and CEO of Sterling
4 Capital Management and Lee and another -- I
5 think Clint Ward was involved, that when this
6 came up, it was decided by that group that we
7 would rebate the fees



[REDACTED]

strike that

19 Who did you reach out to, once you were
20 directed by Mr Youngblood to make the
21 refunds? Who do you reach out to and assign
22 the responsibility to get it done?
23 A Ralph Borrello
24 Q And did you participate in any discussions or
25 approval of things, as this process is

1 evolving?

2 A I -- I -- I don't recall being involved at
3 all He formed a team of operations-type
4 people that would be able to gather the
5 information necessary to execute

6 Q And tell me what fees you were directed by
7 Mr Youngblood to refund?

8 A He didn't give me detail on that That was
9 developed during the course of this,
10 preparation of this letter

11 Q So Mr Borrello is assigned the responsibility
12 to accomplish the mission of refunding the
13 fees And as part of that, he's actually
14 given the mission to identify, to some degree,
15 what fees are to be refunded, correct?

16 A Right We -- we would have to go in and
17 review the accounts, in the sense of, you
18 know, all accounts, when you have a -- any
19 kind of a transaction account, there's a code
20 associated with it You have to pull those
21 codes to find out who all was due for a
22 rebate

23 Q And but it all related to the bank's, BB&T
24 Bank's, sale of prepaid variable forward
25 contracts or other alternative investments?

1 A Yeah, I think you -- you shared a list a
2 minute ago -- or not a minute ago, before we
3 broke You shared a list of all the fees that
4 were rebated So I would just refer you to
5 that to know which ones I think prepaid was
6 one of them

7 Q One of them Do you -- do you have an
8 understanding, based upon your preparation to
9 do the 30(b)(6) deposition on behalf of BB&T
10 Bank today, that the fees were all associated
11 with that broad category of products that
12 y'all define as alternative investments?

13 A I'd rather say it this way It was -- it was
14 one-time fees That -- that's the issue that
15 the SEC raised, where you have one-time fees
16 that are broker-esque, not appropriate for a
17 registered advisor the takes ongoing fees of
18 giving advice to a client That was the
19 distinction

20 And so, I'm not gonna -- you've got --
21 you know, you've got the list of all --
22 rebated, all the different types So you --
23 actually, you're in a better position to know
24 that than I am

25 Q Well, true enough But the general -- what I

1 was really asking is the answer you just gave
2 So the general category of fees that were to
3 be rebated were those fees where you had
4 charged, that BB&T Bank had charged a one-time
5 fee for the sale of a product, and in addition
6 was also charging monthly or quarterly fees
7 for the management of an account?

8 A Well, we'd connect the two What -- what we
9 were looking for is fees that are sense -- in
10 a sense, transactional, which is -- in the
11 SEC's view, gray area, contrary to what a
12 registered investment advisor should be doing



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4 Q -- correct? If you would, look at the letter
5 from Mr Borrello The first paragraph
6 states Thank you for being a client of BB&T
7 wealth At BB&T wealth, we take very
8 seriously our commitment to bring exceptional
9 value and service to our clients These high
10 standards of service encompass comprehensive
11 scrutiny to ensure absolute accuracy in our
12 processes and procedures

13 Did I read that correctly?

14 A You did

15 Q And then the next paragraph states Recently,
16 as a part of a review of client accounts, we
17 discovered that a fee was charged to your
18 account that we wish to refund to you While
19 we are not required to rebate these fees, we
20 choose to do so as a reflection of our
21 corporate values

22 Did I read that correctly?

23 A That's correct

24 Q Do you agree with me that the implication
25 between these two paragraphs is that the

1 company's comprehensive scrutiny to ensure
2 absolute accuracy in its processes, would be
3 the conclusion that someone would draw as to
4 what led to the refund?

5 A Ask the question again

6 Q Sure When you read the first two paragraphs
7 together, do you agree with me that the
8 paragraphs imply to the reader that the fee
9 that is being rebated was a fee that was
10 identified by BB&T as a result of a
11 comprehensive scrutiny of --

12 A No I --

13 Q -- its processes?

14 A No What -- what -- what -- what's going on
15 here is -- is -- SEC raised it We as a
16 company, in consultation with counsel and a
17 reflection of our corporate values that we are
18 not gonna get in an argument with the
19 regulator over it And that what we want to
20 do is get on the right side of the regulator
21 So we -- and again, reflection of our
22 corporate values that we want our -- we want
23 to be above reproach And so we decided to
24 rebat the fees It just wasn't that
25 important

1 Q So the -- would it be fair to say that BB&T
2 Bank felt some pressure from the SEC to take
3 some step to resolve the concern that they
4 expressed?

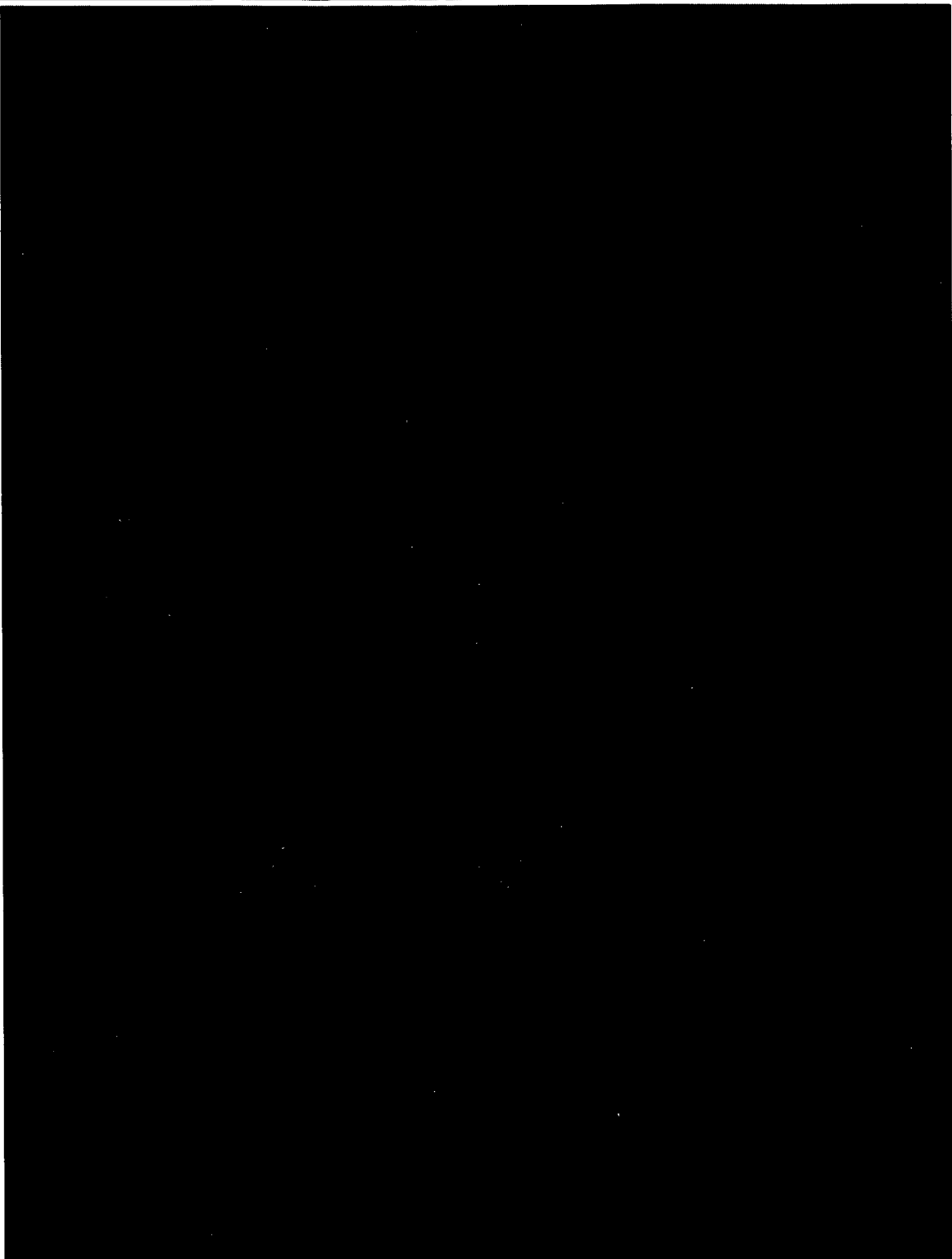
5 A Well, not pressure. But they raised it as a
6 gray area. We're not gonna get caught in that
7 -- that world. And -- and we saw it as, let's
8 give the money back to our clients and let it
9 go. It's not -- it's not -- not gonna make or
10 break the bank. And we'll -- we'll be --
11 we'll all feel better.

12 Q And of course you didn't know what was going
13 on with the SEC at the time you were directed
14 to make these refunds, correct?

15 A That's correct.

16 Q And so you would not have passed on to
17 Mr. Borrello that the bank is having these
18 discussions with the SEC about this gray area
19 and these broker-esque-type fees?

20 A No. He wouldn't have had knowledge of that.
21 He would've -- he would've just been
22 responding to our request to rebate the fees.
23 And that's what he executed on.



23 A Lee could have shared with me that -- nothing
24 more than, I want you to rebate these fees and
25 it's because this is -- this is the kind of

1 company that we run

2 Q We want to do --

3 A The right thing

4 Q We want to do the right thing, even if we
5 don't have to do the right thing?

6 A Correct We were not compelled to do this,
7 but decided it was the right thing to do for
8 clients

9 Q And did you also decide it was the right thing
10 to do -- and this is based upon your
11 preparation for this deposition Do you now
12 understand that the bank, BB&T Bank, also came
13 to believe it was the right thing for the bank
14 to do to maintain a good relationship with its
15 regulator?

16 A We weren't being forced by the regulator to do
17 it We weren't gonna get in a fight over it,
18 wasn't worth it If they think it's a gray
19 area, we'll just clean that up

20 Q Do you -- you -- you were not involved with
21 the discussions with the SEC Do you know at
22 what point in the discussions the
23 representative of the bank may have said,
24 well, if it's a gray area, we'll take that
25 concern off your mind, we'll just rebate the

1 fees?

2 A No I don't --

3 Q You don't know --

4 A No

5 Q -- at what point --

6 A Yeah

7 Q -- that conversation --

8 A I don't even know if the SEC knows we've been
9 rebated the fee

10 Q Would you -- would it be -- would it come as a
11 surprise to you that, whoever the
12 representative for the company may have been,
13 would not have communicated to the SEC that
14 this is what we're going to do to resolve that
15 concern in your mind?

16 A I -- it wouldn't be -- necessarily be a
17 surprise I just, again, we didn't have to do
18 it So

19 Q But you would agree with me that, if the
20 impetus behind making the choice to do the
21 refund was this SEC examination, then this
22 letter could be viewed as being less than
23 candid to the customer, couldn't it?

24 A No This -- this was a corporate values
25 decision, not an SEC push or demand It was a

1 corporate values decision

2 Q But the impetus for that corporate value was
3 not some internal investigation but was an
4 examination by an external regulator that says
5 we've noticed that --

6 A Raised an issue

7 Q Raised an issue, an issue of concern to them?

8 A Gray area

9 Q A gray area that said, this looks more like a
10 broker-esque-type transaction, and you're not
11 licensed as a broker, and therefore we
12 question whether or not this charge is
13 appropriate?

14 A I -- I can't go as far as saying, you're not
15 licensed as a broker What I would say is
16 that they felt it was not representative of
17 the type of ongoing advisory fee that a RIA
18 typically charges

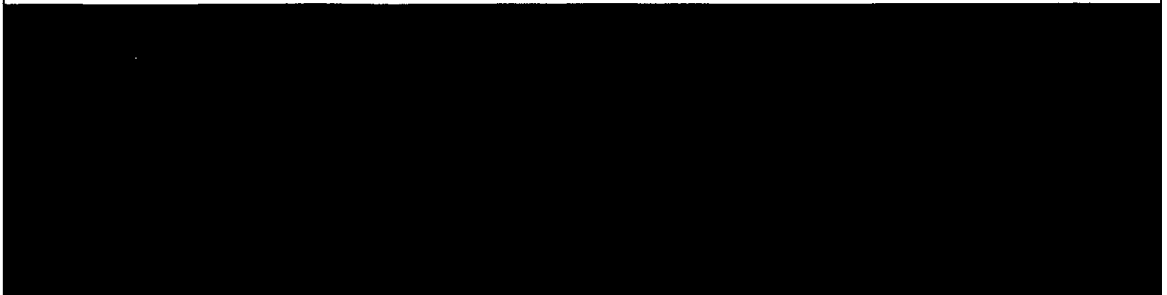
19 Q Well, in fact --

20 A So it's sort of outside the bounds a little
21 bit And so we say, okay, hear you, we're
22 going to rebate the fees as a result of our
23 evaluation of the situation and -- and our
24 corporate values

25 Q Do you -- do you know the total amount of

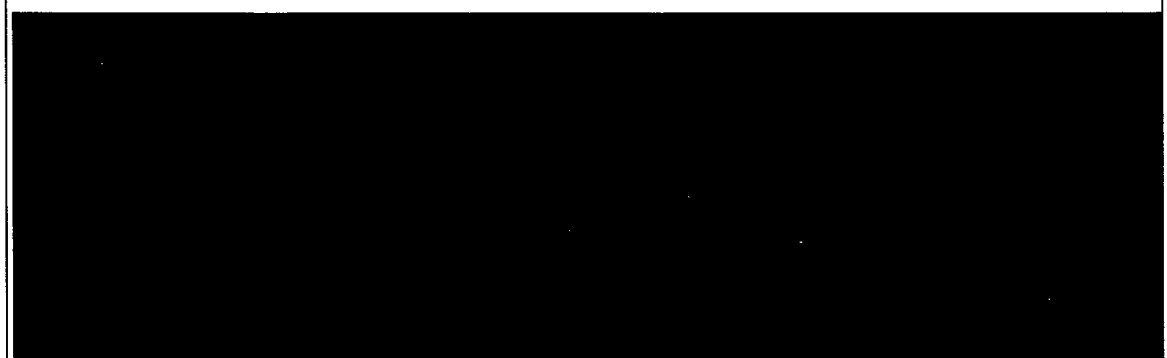
1 money that was rebated?

2 A I do not I -- I think I heard a number of --
3 in the neighborhood of a million-two I think
4 it's probably totalled in your reports there
5 but --



10 Q Let me hand to you what has been marked as
11 Plaintiff's Exhibit 2, which includes material
12 identified by BB&T as Bates number 2801
13 through Bates number 2906, which purports to
14 be documents related to the refund of -- of
15 the fees Can you take a quick look at that
16 and confirm for me that that's what these
17 documents are?

18 A That's what's been represented to me and
19 that's what I -- looking at them, that's what
20 I see



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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

- - -

FRANCIS P MAYBANK,
Plaintiff,

Civil Action No.
2011-CP-23-8578

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

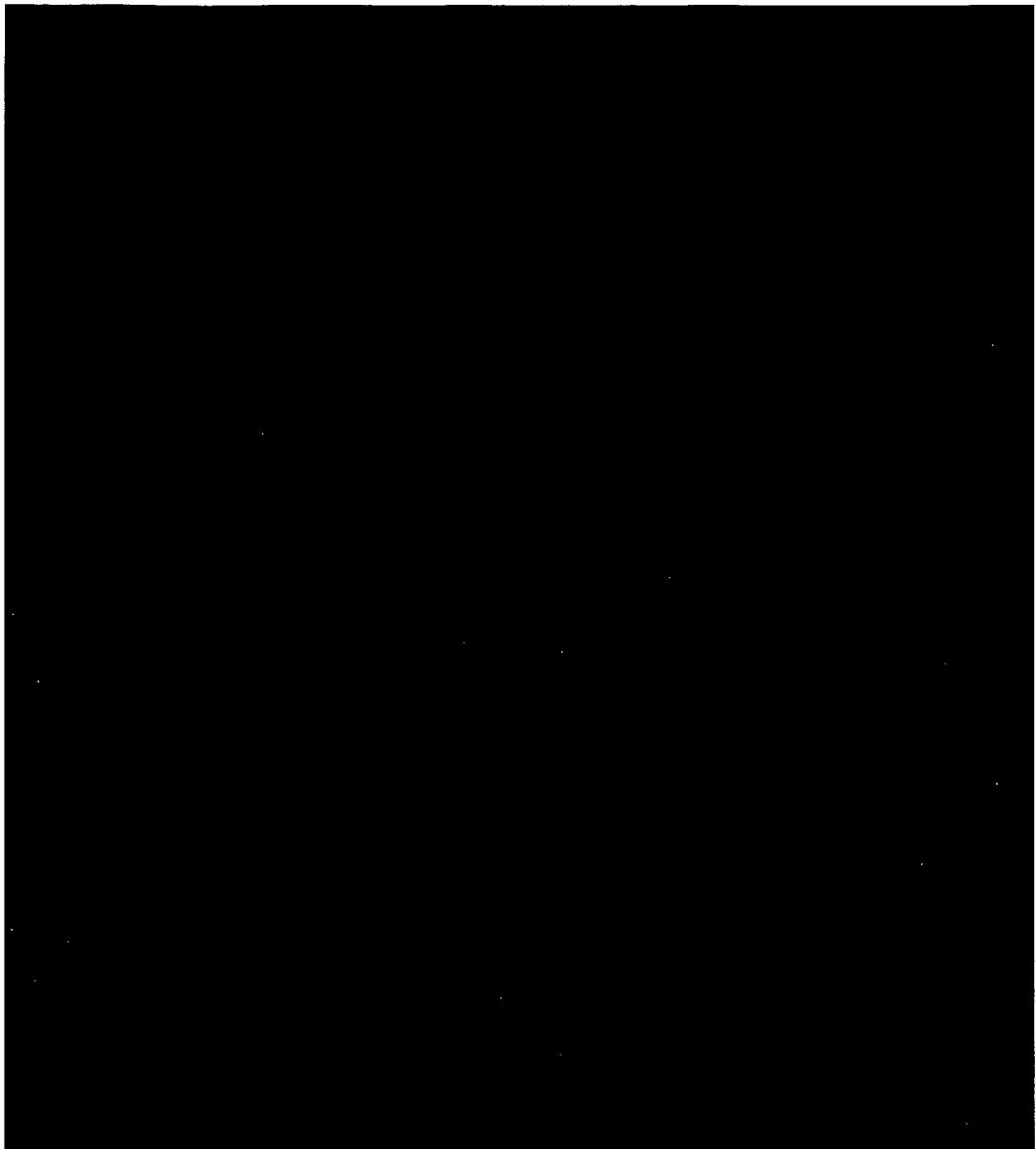
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Videotaped deposition of CLAYTON SHAWN
GIBSON, taken at Regus Offices, 1055 Westlakes
Drive, Suite 300, Berwyn, Pennsylvania, on Monday,
March 10, 2014, beginning at approximately 9 30
a.m., before Maureen E. Broderick, Registered
Professional Reporter and Notary Public in and of
the Commonwealth of Pennsylvania.

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CLAYTON SHAWN GIBSON

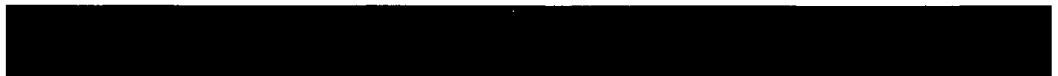
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Q Would you please state your full name for
the record?

A Clayton Shawn Gibson

Q Where do you reside, Mr Gibson?



Q And who is your current employer?

CLAYTON SHAWN GIBSON

1 A Perimeter Capital Management out of
2 Atlanta.

3 Q Where is your office located?

4 A It's in this office, 1055 Westlakes Drive,
5 Berwyn, Pennsylvania.

6 Q And that's just outside of Philadelphia?

7 A Correct

8 Q Where did you go to college, Mr. Gibson?

9 A University of Virginia

10 Q And when did you graduate?

11 A 1994

12 Q What was your degree in?

13 A Marketing.

14 Q Have you ever served in the military?

15 A Yes. I was in the U.S Navy reserves for
16 eight years.

17 Q What were those years during which you
18 served?

19 A 1990 to 1998

20 Q And what was your rank?

21 A I don't recall the exact rank I don't
22 recall

23 Q And how were you discharged?

24 A Honorably

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CLAYTON SHAWN GIBSON

1 the aspects of kind of, you know, if you do certain
2 option trades, if the world changes, what that
3 means, that sort of thing, as well as mock trading.

4 Mock trading was basically after the
5 market closed, we would go and basically recreate
6 the floor-trading environment and have people come
7 in and do hypothetical trades And we would have to
8 make quick decisions as to whether or not we'd do
9 those trades.

10 So, in general, I mean, the job was
11 very -- you had to make quick decisions relating to
12 trading options Because an order would come into
13 the crowd and basically you had competition within
14 the crowd, so you needed to be well-versed and have
15 a deep understanding of options and be able to use
16 that knowledge to make quick decisions as to what
17 trades that you wanted to do and which trades you
18 wanted to step away from

19 Q During your time with Timber Hill, did you
20 feel that you had enough training and experience to
21 where you were comfortable working the floor at the
22 options exchange?

23 A Absolutely.

24 Q What was your next employer after Timber

CLAYTON SHAWN GIBSON

1 Hill?

2 A The next employer after Timber Hill was
3 Scott & Stringfellow And I believe I started with
4 them in June of 2000

5 Q How long did you work for Scott &
6 Stringfellow?

7 A Until January of 2006, at which time I
8 went over to BB&T Asset Management.

9 Q And how long were you employed at BB&T
10 Asset Management?

11 A Until -- I don't know the exact date that
12 I left, but it was summer of 2008

13 Q We're going to come back later and talk in
14 greater detail about your experience at Scott
15 Stringfellow and BB&T Asset Management, but I first
16 want to talk about your jobs after BB&T Asset
17 Management.

18 First, let me ask you, why did you
19 leave BB&T Asset Management?

20 A I've always wanted to start my own
21 business and had an opportunity to do that, and
22 that's what I decided to do

23 Q So what was your first employment after
24 you left BB&T Asset Management?

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CLAYTON SHAWN GIBSON

1 of Perimeter Capital management

2 Q Okay. And that's who -- and you
3 current -- so you currently work for Liquid
4 Strategies today?

5 A Correct

6 Q Which is part of Perimeter Capital?

7 A Exactly.

8 Q Can you tell us in simple terms what an
9 option is and also what a put is versus a call?

10 A Sure. An option is, basically gives an
11 investor the right to either buy or sell a security
12 at a certain price for a certain period of time.
13 And the difference between a call and a put, a call
14 option gives an investor the right to purchase a
15 security, a specific security at a certain price
16 during that certain period of time

17 Conversely, a put option gives the
18 investor the right to sell a security at a specific
19 price for a specific period of time.

20 Q If an investor is holding stock and they
21 would like a put option, are they going to have to
22 pay money for a put option or do they sell a put
23 option?

24 A If an investor's goal is to hedge or

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1 protect an existing equity position, they would buy
2 a put option, which would give -- and pay a premium
3 for that put option, which would give them the right
4 to sell that stock at the strike price, between now
5 and the expiration date of that option.

6 Q And then with a call, would the investor
7 holding the stock, would they buy a call or sell a
8 call?

9 A They would typically sell a call option.
10 If they already own the underlying stock, they would
11 typically sell a call option. They would typically
12 do it above the current price of the stock, which
13 would give the buyer of that call option the right
14 to purchase that security from the investor who sold
15 the covered call at the price, at the strike price,
16 from now until the expiration date of the option.

17 Q Let's talk about your employment with
18 Scott & Stringfellow First of all, where were you
19 located while employed there?

20 A Richmond, Virginia

21 Q And you began that job in the year 2000?

22 A Correct I believe June of 2000.

23
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CLAYTON SHAWN GIBSON

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Q Did you later become the head of options
strategy at Scott & Stringfellow?

A Yes

Q Were you given the title of senior vice
president while there?

CLAYTON SHAWN GIBSON

1 A Yes.

2 Q Tell me about your training at Scott &
3 Stringfellow

4 A There really was no formal training around
5 options because I came in there with what I believed
6 to be more options knowledge than anybody else at
7 the firm. So they relied really on my expertise
8 from the time that I spent on the floor really
9 learning what I thought were the ins and outs of
10 options

11 Q Did you work with alternative investments
12 when you were at Scott & Stringfellow?

13 A Alternative -- options, I guess, could be
14 considered alternative investments, in my mind
15 Most people define "alternative investments" as
16 anything outside of stocks and bonds. So by that
17 definition, I did for the entire time in my role of
18 dealing with options.

19 Q Did you work with variable pre-paid toward
20 transactions while you were with Scott &
21 Stringfellow?

22 A Yes.

23 Q And for purposes of brevity during this
24 deposition, I'll probably be referring to a variable

CLAYTON SHAWN GIBSON

1 pre-paid forward contract as simply a pre-paid.

2 Do you understand that?

3 A Okay Sure

4 Q Did you assist clients at Scott &
5 Stringfellow with analyzing and entering into
6 pre-paid transactions?

7 A Well, I worked with the advisors to those
8 clients to analyze transactions for their clients
9 But I was not the one directly recommending
10 transactions to clients

11 Q Let me go back to your work experience.
12 You mentioned that you had at one point a Series 7
13 license. Did you have any other licenses?

14 A I can't -- I can't recall which ones. I
15 can't recall the -- yes, I have had other licenses
16 and I do currently It's the registered investment
17 advisor licensing I can't recall what the numbers
18 are.

19 Q So currently you carry the license to
20 serve as a registered investment advisor?

21 A Rep, I believe

22 Q Representative?

23 A Correct

24 Q Did you ever have a CFA or CFP

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1 designation?

2 A I passed level one of the CFA exam and
3 never took level two.

4 Q And CFA is certified financial analyst?

5 A Correct.

6 Q Are there any other designations or
7 licenses that you've had that we haven't mentioned
8 today?

9 A No.

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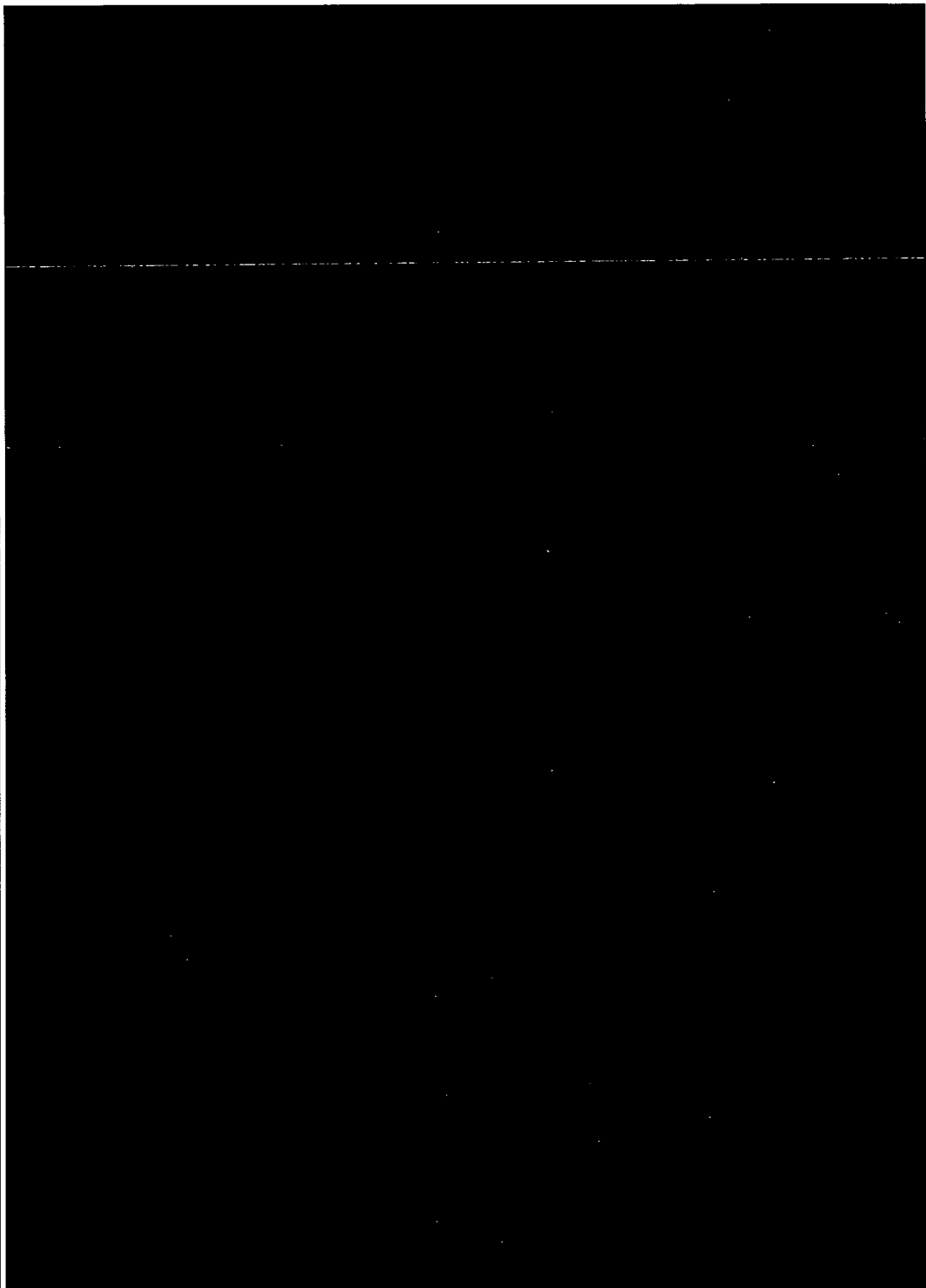
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CLAYTON SHAWN GIBSON

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Q Mr Gibson, we're talking -- Mr. Gibson, I

CLAYTON SHAWN GIBSON

1 want to talk with you about your experience with
2 Scott & Stringfellow

3 Did you assist -- did you assist
4 clients with pre-paid transactions while you were
5 with Scott & Stringfellow?

6 A Yes

7 Q Tell us a little bit about what you were
8 doing for clients when you were helping with
9 pre-paids.

10 A Well, really, my role in that process is
11 anytime we had a client with a concentrated stock
12 position, my job was to work with the advisor to
13 educate them, first of all, and to educate the
14 client, when necessary, with the help of the broker
15 as to the various alternatives

16 And those could include covered call
17 writing, buying put options, collars, pre-paid
18 variable forward. Selling the stock was always part
19 of the conversation. So my role was really more
20 around walking through the various choices

21 Q Where did you gain your knowledge about
22 the various options for hedging a concentrated
23 position for a client?

24 A It really comes from my options knowledge

CLAYTON SHAWN GIBSON

1 that I gained with Timber Hill. These were all
2 pretty straightforward strategies. When you're
3 talking about selling a covered call, buying a
4 protected put, a collar is just the combination of
5 those two, what I feel are simple transactions
6 Even a pre-paid variable forward, I was aware of
7 those even at my time in Timber Hill just by
8 relationships that I had in the business, you hear
9 about various types of derivative transactions and
10 trades that are in the marketplace.

11 And even a pre-paid variable forward,
12 the way I've always thought about them, is still a
13 simple combination of a collar with a cash advance.
14 So kind of the core components of it are still very
15 simple A covered call, a protected put, and cash
16 being advanced It just happens to be packaged in
17 kind of a unique way So the core aspects of all of
18 these trades or strategies are actually, you know,
19 very simple option transactions.

20 Q Did you perform any independent study of
21 pre-paid transactions and other hedging strategies
22 while you were employed at Scott & Stringfellow?

23 A I did I can't point to specific research
24 I did or articles I read or websites I visited.

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1 But, yes, I mean, part, part of my role throughout
2 all of my -- I guess all of my career, I've always
3 looked to educate myself on different ideas,
4 different transactions, things I'm not aware of or
5 learning more about things I already know to become
6 more proficient

7 Q Between 2000 and 2006 while you were with
8 Scott & Stringfellow, what would be some examples of
9 outside resources that you would have studied to
10 help educate yourself about options for hedging
11 concentrated positions?

12 A I can't point to specifics All I can
13 point to are more generalities There are various
14 research papers that are provided by major
15 broker-dealers, and the website has a significant
16 number of white papers and other materials available
17 on the topics. But I can't point to anything
18 specific

19 Q Can you list for us the hedging strategies
20 that were available for clients with concentrated
21 positions back in the 2000 to 2006 time frame?

22 A Yeah It was primarily covered call
23 writing, which I never really viewed as an effective
24 hedging strategy, per se There was just protective

CLAYTON SHAWN GIBSON

1 put buying. There were collars. There was --
2 selling the shares is always as an option. There
3 were pre-pays And exchange funds would be another
4 one.

5 Q At the heart of Mr Maybank's lawsuit is a
6 variable pre-paid transaction he entered into in
7 August of 2006 So we're going to be talking a lot
8 about pre-pays today Can you tell us in simple
9 terms how a pre-paid transaction works for the
10 client?

11 A Yes. So in, I guess, in simple terms is
12 the client sets up a transaction whereby they set a
13 protective floor on the price of their stock; they
14 set a ceiling on the price of their stock, and they
15 receive a cash advance up front. And the cash
16 advance essentially represents really the worst-case
17 scenario.

18 So if a stock were to drop
19 significantly, they still have the right to retain
20 that cash advance And then the settlement of the
21 contract has, you know, various mechanics, which I'm
22 sure we'll go through, through one of the exhibits.

23 But the basic idea is they have
24 protection in the form of the cash advance that they

CLAYTON SHAWN GIBSON

1 receive, but one of the benefits is they still
2 retain appreciation potential on the stock So as
3 the stock goes higher, they're still, they're now
4 able to retain a portion of the shares that they
5 initially contributed into the contract

6 So they have protection on the
7 downside in the form of the cash advance they got.
8 They have appreciation in the form of the
9 possibility for retaining shares at the end of the
10 transaction And during the time they still had the
11 ability, if the company pays dividends, they still
12 have the ability to collect those dividends. That's
13 kind of the simple explanation, the strategy

14 Q The up-front proceeds, is the client free
15 to invest those how they -- any way they would like?

16 A Yes.

17 Q So they can create a diversified portfolio
18 if they wanted to?

19 A That was always the concept, is that you
20 would take the proceeds from the pre-paid variable
21 forward. The whole idea was to get more diverse
22 in --

23 (Reporter clarification.)

24 THE WITNESS The proceeds from the

CLAYTON SHAWN GIBSON

1 pre-paid variable forward, the idea was that
2 the clients would take those proceeds and use
3 those to purchase a diversified portfolio, so
4 shifting the risk from a concentrated position
5 into a well-diversified portfolio. I mean,
6 that was the idea

7 BY MR KRISTINIK

8 Q Did you consider pre-paids to be a high
9 risk or speculative transaction?

10 A No.

11 Q Why not?

12 A I viewed it as a long-term hedging
13 solution, not a short-term transaction. It was
14 typically -- the maturity on these were typically
15 three years, sometimes they were shorter, which if
16 it was speculative in nature, it would be a much
17 shorter term type of transaction

18 So I view it as very long term, as a
19 solution to helping a client shift the risk from a
20 concentrated position into, once again, what I would
21 assume would be a well-diversified portfolio

22 Q Can you explain a little bit more about
23 the hedging value of a pre-paid transaction?

24 A In what way?

CLAYTON SHAWN GIBSON

1 Q In how it protects an investor who has an
2 over-concentrated position from a dramatic drop in
3 value.

4 A Yeah. The idea would be, once again, the
5 cash advance, if reinvested prudently -- and
6 obviously that's a wild card into how the funds get
7 reinvested -- would be there for the investor,
8 regardless of how far the concentrated position
9 fell

10 So the idea would be that is the
11 protection. It's the cash they got up front and
12 that that would be, response -- that would be
13 invested in a prudent manner

14 Q Have you heard of the concept that
15 leveraging a concentrated position by borrowing and
16 then creating a diversified portfolio with the
17 borrowed money creates more risk for the investor?
18 Have you heard of that concept?

19 A Describe that to me one more time

20 Q So if someone had \$10 million in stock --

21 A Okay

22 Q -- and they simply borrowed \$5 million --

23 A Okay.

24 Q -- and used the stock as collateral and

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CLAYTON SHAWN GIBSON

1 Management?

2 A January of 2006

3 Q And why did you change jobs and begin
4 working for BB&T Asset Management?

5 A I had an opportunity to expand my role,
6 where at Scott & Stringfellow, it was primarily
7 dealing with option-related strategies. At BB&T
8 Asset Management, my role was to help build the
9 entire alternative investments platform, which was
10 not only option strategies but also looking at other
11 alternative investments, such as hedge funds and
12 private equity and that sort of thing

13 Q In what city did you work when you worked
14 for BB&T Asset Management?

15 A Richmond, Virginia

16 Q What was your job title at BB&T Asset
17 Management?

18 A I believe director of alternative
19 investments and, I believe, senior vice president.

20 Q And can you describe for us generally your
21 responsibilities while you were employed there?

22 A Sure To basically help build the
23 platform of various alternative investments. So,
24 one, working with the wealth management advisors and

CLAYTON SHAWN GIBSON

1 the regional portfolio managers to help educate them
2 on concentrated stock strategies as well as building
3 out various options for alternative investments.

4 So we were in the process of building
5 out hedge fund alternatives, private equity
6 investment alternatives, also structured products
7 We were creating equity-linked notes for the
8 portfolio managers So really helping them get a
9 wider variety of alternative investments available
10 to them

11 Q When you were working at BB&T Asset
12 Management, did you continue to work with pre-paids?

13 A Yes.

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CLAYTON SHAWN GIBSON

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19 Q Let me show you what's been marked as
20 Exhibit No 5, and it's entitled "Alternative
21 Investments Educational Forum " Can you please tell
22 us what that is?

23 A So it appears to be an educational
24 presentation that I would have given to internal

CLAYTON SHAWN GIBSON

1 BB&T employees, which appears to give an overview of
2 all of the capabilities of BB&T Asset Management,
3 which included alternative investments and
4 single-stock portfolio risk management separately.

5 And then discussed alternative
6 investments in more detail, specifically relating to
7 what's more commonly thought of as alternative
8 investments, including hedge funds, private equity,
9 commodities in real estate.

10 Q Let's go back to the front page

11 A Okay

12 Q It has the date March 21, 2006. What does
13 that date represent?

14 A I would assume it means that that's the
15 date that this presentation was given.

16 Q And you created this presentation, is that
17 correct?

18 MR WILLOUGHBY If he knows.

19 THE WITNESS. It looks like something I
20 would have created, but I can't say with total
21 certainty that it was me that created it
22 BY MR. KRISTINIK.

23 Q Was it your regular practice at BB&T Asset
24 Management to create presentations like this?

CLAYTON SHAWN GIBSON

1 A Yes

2 Q Does this look like something that you
3 would have created?

4 A Yes

5 Q Was this in, this presentation in your
6 area of expertise?

7 A Yes

8 Q If you'll please turn to Bates page 11028,
9 you'll see that number in the lower right-hand
10 corner

11 A (Witness complies)

12 Q This slide is entitled, "Why not just
13 sell?"

14 Do you see that slide?

15 A Yes

16 Q What was the purpose of this slide?

17 A It was to express an understanding that
18 there -- why people don't sell. And these were --
19 in my conversations with various advisors or
20 investors, these were often the reasons given for
21 not just selling a position

22 Q Can you go through and explain these
23 reasons that are listed on this slide?

24 A Sure So emotional connections,

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1 oftentimes somebody worked for a company for a
2 significant period of time, so they had an emotional
3 connection Sometimes there is a family company
4 that was acquired by another company, and this stock
5 represented kind of the heritage of the family, for
6 lack of better words.

7 Loss of future share appreciation.
8 Oftentimes these investors have concentrated
9 positions, are optimistic about the company, the
10 future of the company, so they believe that the
11 stock over the long term will go higher, and they
12 want to be able to participate in that

13 Tax deferral is straightforward.
14 They -- many of these investors have a low cost
15 basis, so they're concerned that selling the
16 position today could generate a significant tax
17 event

18 Investors often enjoy, if it's a
19 dividend-paying stock, they enjoy receiving the
20 dividends. They also enjoy having a voice in the
21 company oftentimes in the way of voting rights So
22 oftentimes investors would like to retain those
23 benefits.

24 And then I guess the final point is

CLAYTON SHAWN GIBSON

1 just, I think a lot of investors view selling as a
2 very -- what's the word? -- maybe a drastic measure.
3 So I think because of all of these other issues that
4 I laid out, I think they would often look for
5 solutions that weren't quite as drastic that still
6 gave them a -- some -- allowed them to keep some of
7 these benefits.

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11 Q I now want to talk specifically about
12 Frank Maybank's situation and your work with him
13 So let's spend some time doing that.

14 First of all, let me ask a basic
15 question: Did you assist Frank Maybank with a
16 pre-paid transaction back in 2006?

17 A Yeah I worked with him and the other
18 advisors, I believe, in the Greenville South
19 Carolina office to help him with that transaction.

20 Q Prior to helping with Mr Maybank's
21 pre-paid, had you handled other pre-paid
22 transactions for clients of BB&T Asset Management or
23 Scott & Stringfellow?

24 A Yes.

CLAYTON SHAWN GIBSON

1 Q About how many?

2 A I would only be guessing, but I did do
3 transactions prior to that.

4 Q Was it several, many?

5 A I'd rather not just give a general answer

6 Q Would it have been more than five?

7 A Yes.

8 Q More than ten?

9 A I don't know

10 Q How was it that you first became involved
11 in Mr Maybank's transaction?

12 A I don't recall -- I mean, what I will say
13 just as a general statement, part of my role was
14 routinely traveling to educate advisors, either
15 going to those individual offices or giving
16 presentations, such as the one we discussed before

17 , So I know that other members in the
18 Greenville office were aware of some of these
19 concentrated stock solutions, and I assume that the
20 introduction probably came as they were aware that
21 Frank had a concentrated stock position But I
22 don't remember the specific introduction to Frank

23 Q Do you have any recollection of who may
24 have first contacted you about this, about --

CLAYTON SHAWN GIBSON

1 A About the concentrated stock position
2 specifically for Mr. Maybank?

3 Q Yes

4 A I do not recall.

5 Q Did you solicit a pre-paid transaction?

6 A No

7 Q From Mr Maybank?

8 A No

9 Q Do you know what I mean by that?

10 A I did not approach Mr Maybank about doing
11 a pre-paid variable forward, if that's the question

12 Q That's the question

13 A I did not

14 Q So someone approached you about the
15 transaction?

16 A Yes

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CLAYTON SHAWN GIBSON

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Q Do you have any recollection of
Mr Maybank expressing the level of involvement he
wanted in the analysis of the transaction?

A I do not

Q Do you have a recollection of him wanting
to be involved in the analysis?

A Yes. Just my general recollection is that
he was involved in guiding how the transaction would
be structured. I don't know that the conversations
were with me specifically, but I do remember him
being involved in those conversations with at least
other people at the firm, or at least that's what I
was made aware of

Q Did Mr Maybank ever indicate to you that
he was turning over complete discretion for the
decision of how to handle his concentrated position
to you?

A No

CLAYTON SHAWN GIBSON

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Q Based on what you knew about Mr Maybank's situation back in July of 2006, did you believe that he was a good candidate for a hedging strategy?

A Yes

Q Why?

A Because he had such a large concentrated position in BB&T And, once again, I don't remember specific conversations But these would be designed for investors who were optimistic about the future of BB&T and the possibility that the share price could increase and for people who wanted to continue to collect the dividends and potentially defer out a taxable event

CLAYTON SHAWN GIBSON

1 So based on those kind of general --
2 I would assume that he would have been a candidate
3 for it.

4 Q Let's specifically talk about pre-paid.
5 Did you believe that a pre-paid would be a good
6 strategy for Mr Maybank to pursue back in 2006?

7 A I, once again, I would assume yes, based
8 on the fact that he did the transaction But based
9 on what I see today in terms of concentration, you
10 know, he's overly concentrated in BB&T

11 Q What are some of the other factors that
12 would have made a pre-paid a good strategy for
13 Mr Maybank?

14 A If he were optimistic on BB&T, that he
15 thought the stock would go higher, that he thought
16 BB&T would continue to pay the same dividend or
17 increase the dividend; and if he, if one of his
18 goals was the possibility of deferring a taxable
19 event, those would have all made him a good
20 candidate.

21 Q In your opinion, was a pre-paid a suitable
22 financial option for Mr Maybank back in August of
23 2006?

24 A That would have been determined by his

CLAYTON SHAWN GIBSON

1 wealth advisor and the regional portfolio manager
2 who would work on the account So my role is really
3 to support them It would be their job to look at
4 really suitability for the transaction and to make
5 the final recommendation to the clients.

6 Q Looking at Mr Maybank's situation today,
7 in your opinion, did you believe that a pre-paid
8 transaction was a suitable financial option for the
9 plaintiff back in August of 2006?

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THE WITNESS Once again, based on looking
at this single account statement and the fact
that 96 percent of the value of the equities is
in one position, he was certainly a candidate
for a hedging strategy. And if he were bullish
on BB&T, wanted to keep the dividends, wanted
the possibility of deferring taxes, pre-paid
variable forwards would have been a viable
option.

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ROA 3008

CLAYTON SHAWN GIBSON

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[REDACTED]

Q For any calls that you may have had with Mr Maybank, do you recall if there were any other individuals on those phone calls?

A I would assume that there would have been, but I don't recall specific phone calls or who specifically would have been on any calls

Q Do you recall whether Mr Maybank was just sitting and listening on those calls or whether he would actually have been engaged in the conversations?

A My recollection of any conversations I had with Mr Maybank, once again, not a specific conversation, was that he was engaged in the discussions.

Q What are the types of things that you would cover during phone calls with clients

CLAYTON SHAWN GIBSON

1 considering a pre-paid variable as an option to
2 handle a concentrated position?

3 A Essentially walk through the various
4 advantages and disadvantages of the transaction,
5 walk through the mechanics in terms of the
6 settlement, make sure they understand what the
7 options are, and make sure that really they, you
8 know, to the best possible, understand what they're
9 getting into

10 Q During conversations with clients
11 considering pre-pays, would you discuss or compare
12 the alternative of an outright stock sale?

13 A Yes

14 Q And is that something that you would
15 always cover during phone calls with clients
16 considering pre-pays?

17 A At some point in the process with --
18 whether it's an advisor or broker, wealth management
19 advisor, or an end client, the option of selling the
20 shares was always discussed as a possible
21 alternative

22 Q As part of your conversations with clients
23 considering pre-pays, would you explain the options
24 available at the time of maturity of the pre-paid?

CLAYTON SHAWN GIBSON

1 A Yes

2 Q And what are some of the things you would
3 tell clients about that?

4 A Well, first, I would make sure they
5 understand what happens in terms of their rights to
6 retain appreciation, retain shares, and then walk
7 through specifically if the stock is at various
8 price levels, what the requirement at settlement
9 would be, either in the form of the number of shares
10 they'd have to deliver or the amount of cash they
11 would have to deliver.

12 Q Would you mention the possibility of tax
13 consequences during phone calls with clients
14 considering pre-paids?

15 A On a big picture, yes, with the emphasis
16 during the call that they -- basically insist that
17 they would talk to a tax advisor to get guidance
18 from them

19 Q Would you discuss potential risks of a
20 pre-paid with customers, including risk of share
21 value going up but then falling back to the floor or
22 the risk of losing out on some appreciation above
23 the ceiling?

24 A Yes

CLAYTON SHAWN GIBSON

1 Q Would you discuss the potential risk of
2 the diversified portfolio created with the up-front
3 proceeds not performing as anticipated?

4 A Yes

5 Q These are all things that you would try to
6 cover with every client with whom you worked who was
7 considering a pre-paid?

8 A Yes

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CLAYTON SHAWN GIBSON

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17 here: Based on your observations while you worked
18 on Mr Maybank's pre-paid transaction, what was your
19 impression as to whether he understood the -- how
20 the pre-paid transaction worked?

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ROA 3013

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A My general recollection of Mr. Maybank was that he was very smart, sophisticated, and understood the pre-paid variable forward.

CLAYTON SHAWN GIBSON

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20 Q Based on your review of the terms of
21 Mr Maybank's pre-paid transaction, was there a
22 rising dividend structure as part of that contract?

23 A It appears to be the case, yes.

24 Q What does that indicate to you?

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ROA 3015

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1 A It indicates that the investor who is
2 doing it wants to maximize any dividends retained
3 and also believes that BB&T's -- in this case BB&T's
4 dividend would continue to increase at a certain
5 rate.

6 Q Is it your understanding that
7 Mr. Maybank's pre-paid terms set a ceiling of
8 132.5 percent?

9 A Unless, unless I looked at the wrong --
10 based on the exhibit I saw last night, that appeared
11 to be the case

12 Q What does that indicate to you?

13 A It indicates, A, someone who is more
14 optimistic on the future increase in the share value
15 of the stock Someone who is less optimistic would
16 have the ceiling price lower And also that it is
17 possibly someone more sophisticated that, once
18 again, would target such a specific strike price,
19 such as 32 and a half percent above the current
20 market

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CLAYTON SHAWN GIBSON

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16 Q Mr Gibson, if you would please look at
17 Exhibit No 8, entitled Concentrated Stock Risk
18 Management Addendum, can you tell us what this is?

19 A This was an internal BB&T Asset
20 Management-created document that would be given to
21 clients entering into any concentrated stock risk
22 management strategy, not just pre-paid variable
23 forwards, that would disclose the various risks,
24 that would give a basic explanation of the

CLAYTON SHAWN GIBSON

1 strategies, and a disclosure of the fees And they
2 would be signed by the client.

3 Q Do you require all your
4 alternative-investment clients to sign this type of
5 a concentrated stock risk management addendum?

6 A Any clients entering into concentrated
7 stock risk management strategies while I was at BB&T
8 Asset Management would sign this.

9 Q And you would have had Mr. Maybank sign
10 this?

11 A Yes

12 Q If you look down at the bottom of page 1,
13 it has a heading Alternative Investment Funds
14 Disclosure. Underneath that it says, While the
15 following list may not apply to all such strategies,
16 it does provide a broad overview of some of the
17 common risks that potential investors should be
18 aware of

19 Did I read that correctly?

20 A Yes

21 Q Is that part of this disclosure intended
22 to provide an overview of the common risks of these
23 transactions?

24 A Yes

CLAYTON SHAWN GIBSON

1 Q If you turn to page 2 and you look at the
2 second bullet point, it says, Some strategies may
3 have limited liquidity, making it difficult,
4 impossible, or expensive to dispose of the
5 securities and unwind the position prior to its
6 contractual maturity

7 Does that bullet point warn the
8 reader that it can be expensive if they want to
9 unwind a pre-paid early?

10 A Yes.

11 Q If you'll please take a look at the fifth
12 bullet point, it says, Investors may not receive
13 dividends from the contributed shares.

14 Does that warn that expected
15 dividends may actually not be paid?

16 A Yes

17 Q Why is that warning needed?

18 A Because part of the analysis of whether
19 it's more appropriate to do this as opposed to
20 selling the shares, the dividends are a key
21 assumption, and if the dividends are no longer
22 available or provided to the investors, it could
23 make it dramatically more expensive for them.

24 Q If you go further down on page two, it

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CLAYTON SHAWN GIBSON

1 related to the unwind of Ms. Bowers' original
2 pre-paid transaction?

3 A Based on the fact that Mrs Bowers was
4 referenced in point number one, question one, I
5 would assume that's the case And the subject line
6 says Bowers pre-paid variable forward.

7 Q When it says, "Frank wanted these specific
8 questions answered," what did that cause you to
9 believe?

10

11 THE WITNESS Well, I would assume, based
12 on this email, that Frank was interested in
13 finding out the details of what the economic
14 impact would be of rolling this position into a
15 new contract

16 BY MR KRISTINIK:

17 Q Do you believe that these are good
18 questions to ask if a client was considering the
19 unwind of a pre-paid and the roll into a new one?

20 A Yes, I think they're reasonable questions
21 in this situation

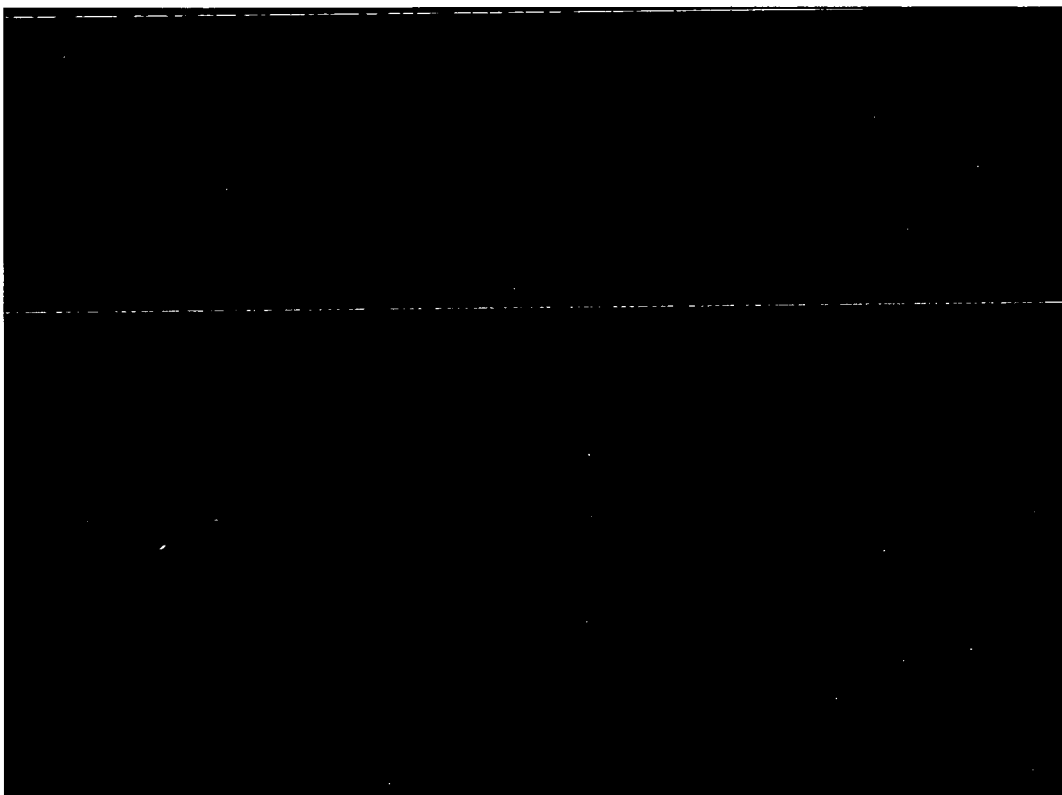
22 Q Do you believe these questions show a
23 level of sophistication?

24 A Yes

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CLAYTON SHAWN GIBSON

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When you left Timber Hill, Timber Hill, you worked with Timber Hill when you were in -- I think you were located in San Francisco; is that right?

A Initially, correct

Q And how long were you in San Francisco?

A I don't remember the exact date that I moved to Greenwich, Connecticut, with the same firm. I don't recall the exact date.

Q How long were you with Timber Hill altogether?

A From about June of '97, I believe, to

CLAYTON SHAWN GIBSON

1 March of 2000. So almost three years.

2 Q Okay. And so during that period of time,
3 there was a period that you were a trader, correct?

4 A Correct. Yes.

5 Q But when you moved to Greenwich, you were
6 not -- no longer a trader, correct?

7 A I was no longer on the floor directing
8 trades, but still involved on a full-time basis with
9 managing options portfolios.

10 Q But I believe you indicated that during
11 the period of time that you were at Timber Hill, you
12 never were involved in a pre-paid variable forward
13 transaction?

14 A That is correct

15 Q And so when you came to Scott &
16 Stringfellow in 2000, you come to Scott &
17 Stringfellow without having been involved with the
18 execution of a single pre-paid variable forward?

19 A Correct.

20 Q And I think you indicated when you got to
21 Scott & Stringfellow that the training that you
22 received from Scott & Stringfellow was
23 self-training?

24 A Correct

CLAYTON SHAWN GIBSON

1 Q They had no formal training program that
2 you participated in, correct?

3 A That is correct

4 Q So at some point at Scott & Stringfellow,
5 you may have done a pre-paid variable forward; is
6 that correct?

7 A Yes

8 Q Do you remember when approximately the
9 first --

10 A I do not.

11 Q And I think you indicated that you may
12 have done in your total career working at Scott &
13 Stringfellow and BB&T Asset Management, you may have
14 done somewhere between five and ten pre-paid
15 variable forwards?

16 A I think I said that it was probably at
17 least five, but I'm not sure of the exact number
18 And I didn't want to speculate

19 Q So Mr. Maybank's would have been one of
20 those, correct?

21 A That is correct

22 Q And Mr

23 [REDACTED]

24 [REDACTED]

CLAYTON SHAWN GIBSON

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Q How many would you have done before or participated in before the execution of Mr Maybank's pre-paid variable forward?

6

A I can't just guess a number

7

Q One or two?

8

A More.

9

Q Less than five?

10

A I don't think so, but I'm not for certain

11

Q And the very first one you did, you had to do based upon self-educating yourself, correct?

13

A Sure, yes

14

Q You had to explore pricing?

15

A Yes

16

Q With the brokers, correct?

17

A Yes.

18

Q And at the time, the first one you did or the first one that you would have been involved with would have been while you were at Scott & Stringfellow?

22

A Yes.

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ROA 3041

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1 BY MR. WILLOUGHBY:

2 Q And the discount from what you tender
3 versus what you actually get when the transaction is
4 completed or is executed is part of the prepayment
5 of all of the interest charges related to the money,
6 the cash that you're given?

7 A Can you repeat the question

8 Q Sure Let's use -- let's use Mr
9 Maybank's example He tenders \$9 3 million in
10 stock, roughly He gets \$7 1 million in cash,
11 roughly, \$2 2 million in terms of cost, up front, to
12 enter the product. He has to tender the 220,000
13 shares And he's lost those shares, subject to his
14 right to redeem them under certain circumstances,
15 correct?

16 A Well, we walked through the settlement
17 example It depends on what the stock is, how much
18 he needs to tender, and how much cash

19 Q But if he's unable to respond with the
20 cash then he's got to tender the stock, correct?

21 A Some portion of it

22 Q Or maybe all of it?

23 A Or maybe all of it, depending on where the
24 stock finishes

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CLAYTON SHAWN GIBSON

1 Q Depending where the stock is?

2 A Correct

3 Q So in that 2.2 million in Mr. Maybank's
4 example, there is the cost of the put, correct?

5 A Mm-hmm

6 Q There is the cost of the call, correct?

7 A Yes

8 Q There is all of the interest charges on
9 the money that the bank -- or Bear Stearns is
10 providing to Mr. Maybank, correct?

11 A Correct

12 Q Do you know if that's Bear Stearns' money
13 or if they go out and borrow the money from some
14 other lender?

15 A I'm not sure of that nuance.

16 Q But somebody is earning interest on
17 \$7 1 million, right?

18 A Well, yeah, and to be fair, I'm not sure
19 how they characterize that, if they characterize it
20 as interest I don't know how they characterize it.

21 Q They can call it a discount They can
22 call it a prepayment

23 A Sure

24 Q But at the end of the day, it's a cost to

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ROA 3048

CLAYTON SHAWN GIBSON

1 the client, correct?

2 A That's a fair statement

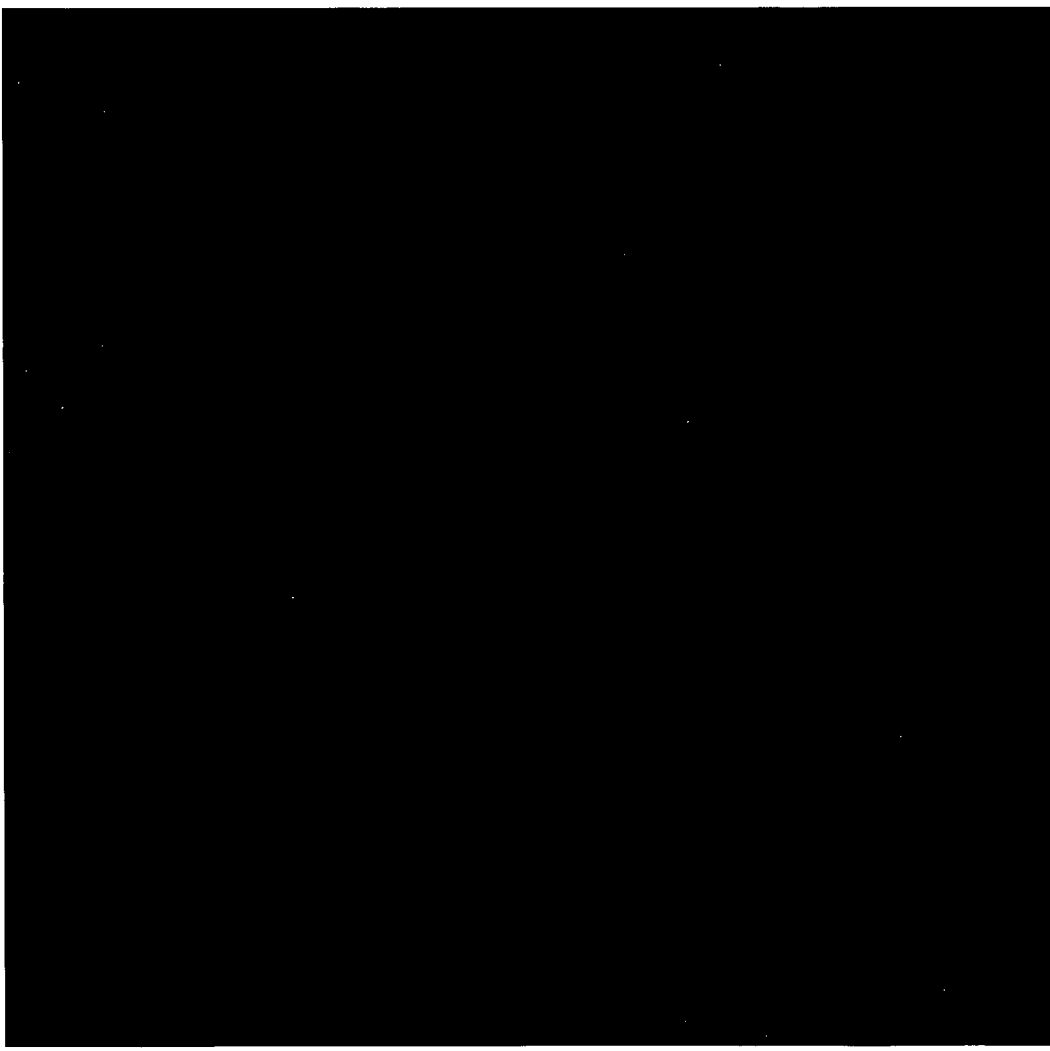
3 Q And that cost is pre-paid day one for
4 three years, correct?

5 A Correct

6 Q The fact that you're going to use somebody
7 else's money for three years, you're paying for it
8 on August 11 of 2006, correct?

9 A Correct.

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CLAYTON SHAWN GIBSON

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10 Q It would be true, would it not,
11 Mr Gibson, that it was not your responsibility in
12 the role that you had either at BB&T Asset
13 Management or before that at Scott & Stringfellow
14 that you didn't do the standard gathering of
15 information, so-called "know your customer" type
16 information on customers? For example, you didn't
17 gather information about the client's investment
18 objectives, correct?

19 MR KRISTINIK. Object to the form of the
20 question. Vague and ambiguous and use of
21 certain terminology within the question may not
22 be accurate.

23 THE WITNESS. I was not involved in
24 determining the suitability or looking at the

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ROA 3050

CLAYTON SHAWN GIBSON

1 overall investment profile of a client outside
2 some of the primary features, such as how
3 concentrated the position was, what is the goal
4 of the client, that sort of thing.

5 BY MR WILLOUGHBY

6 Q So let me ask my question again So you
7 didn't have the responsibility and didn't perform
8 the following functions Gathering information
9 about the client's investment objectives, correct?

10 A I would say that that was part of the
11 conversation that I would have with the brokers and
12 the advisors, depending on --

13 Q That would be information that you
14 would -- conversations you would have with the
15 wealth advisors or the portfolio --

16 A Correct

17 Q -- managers?

18 A Correct.

19 Q And they may have gathered the information
20 from the customer?

21 A Correct

22 Q But I'm asking you as a primary function,
23 did you reach out to the customer at the outset of
24 the relationship and determine the customer's

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ROA 3051

CLAYTON SHAWN GIBSON

1 investment objectives?

2 A No I did not view that as my
3 responsibility

4 Q And you didn't review -- see it as your
5 responsibility to gather information about the
6 customer's risk tolerance?

7 A Not directly from the client.

8 Q I'm talking about directly from the
9 client

10 The client's investment horizon?

11 A Not directly from the client.

12 Q The client's tax status?

13 A Not directly from the client Now, that's
14 not to say I never had those conversations directly
15 with a client, but that was not what I felt was part
16 of my responsibility

17 Q And, in fact, you expected that the wealth
18 advisors -- strike that.

19 Clients were referred to you,
20 correct?

21 A Correct

22 Q Wealth advisors and portfolio managers
23 would bring their clients to you, correct?

24 A Yes

CLAYTON SHAWN GIBSON

1 Q And you would support them in their
2 efforts to provide effective investment advice to
3 the customer, correct?

4 A Yes

5 Q And that was your role?

6 A Yes.

7 Q But the wealth advisor and the portfolio
8 manager were the ones that were collecting the
9 information or gathering the information from the
10 client initially, correct?

11 A That is my understanding

12 Q And it was not your responsibility to make
13 recommendations to the client regarding an
14 investment program, correct?

15 A I would say that that's correct, yes

16 Q And it was not your responsibility to make
17 recommendations to the client regarding investment
18 guidelines for the assets about which BB&T was hired
19 to advise the client?

20 A I would say that's fair, yes

21 Q And, finally, it was not your
22 responsibility to coordinate and supervise the
23 services of the investment advisor and the
24 custodian?

CLAYTON SHAWN GIBSON

1 A Correct

2 Q It would then be fair to say, wouldn't it,
3 Mr. Gibson, that when a client was referred to you,
4 they never came to you -- they didn't drive up to
5 Richmond and sit down and meet in your office, did
6 they?

7 A No, they did not.

8 Q In fact, nobody ever did that, did they,
9 in terms of a pre-paid variable forward?

10 A I don't believe so.

11 Q So you viewed the client as a BB&T Bank
12 client or BB&T Asset Management client, and you
13 viewed the wealth advisor and the portfolio manager
14 that were working with that client to be essentially
15 the people that you were advising and supporting?

16 A Yes

17 Q So when a client was referred to you, that
18 client generally came and the interface with that
19 client was the wealth advisor and/or the portfolio
20 manager, correct?

21 A Yes

22 Q And in most cases you were always
23 discussing the issues related to a particular client
24 with the wealth advisor and/or the portfolio manager

CLAYTON SHAWN GIBSON

1 to try to develop the strategy that all of you
2 together believed was appropriate, correct?

3 MR. KRISTINIK. Object to the form
4 Leading.

5 THE WITNESS. I think that's the case,
6 yes

7 BY MR. WILLOUGHBY

8 Q Did you value the opinion of the wealth
9 advisors?

10 A Yes

11 Q Did you value the opinions of the
12 portfolio managers?

13 A Yes

14 Q And you valued their opinions because they
15 were the ones that had direct contact with the
16 client and had elicited information from the client
17 about what their investment objectives, their risk
18 tolerance, their investment horizon, their tax
19 status, their financial situation, and what their
20 needs were; is that correct?

21 A That's certainly part of it.

22 Q And you expected them -- strike that

23 For you to do your job effectively in
24 supporting the wealth advisor and/or the portfolio

CLAYTON SHAWN GIBSON

1 manager, you had to rely upon the wealth advisor and
2 the portfolio manager to correctly do their job and
3 provide you with relevant material and accurate
4 information, correct?

5 MR KRISTINIK: Object to the form
6 Leading

7 THE WITNESS I think that's the case,
8 yes.

9 BY MR WILLOUGHBY

10 Q So when a wealth advisor or portfolio
11 manager or both brought a client to you for the
12 purpose of selling the client a pre-paid variable
13 forward, it would be fair to say that you believed
14 that a suitability analysis for the client had
15 already occurred, in essence, that client had been
16 precleared for you to consider selling them a
17 pre-paid variable forward?

18 MR KRISTINIK Object to the form of the
19 question Also leading.

20 THE WITNESS Or I would say at some point
21 during the process of educating that client,
22 that suitability analysis of some sort would
23 have been done. I think that that's fair Not
24 necessarily before, you know, the -- an advisor

CLAYTON SHAWN GIBSON

1 contacted me regarding a specific client. But
2 I don't have any sort of information as to
3 exactly when any sort of analysis was done,
4 whether it was before, during -- or during the
5 process.

6 BY MR. WILLOUGHBY

7 Q All you know is, as you've already
8 testified to, is that you did not do the suitability
9 analysis, that was the wealth advisor's
10 responsibility and the portfolio manager's
11 responsibility?

12 A As I understood it, yes

13 Q Did you understand that the wealth advisor
14 for a client that was BB&T Bank's client was
15 generally the first person that would do an analysis
16 for the client and assist the client in determining
17 what their needs might be?

18 A I didn't -- I guess I never thought of
19 that, but that sounds reasonable

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CLAYTON SHAWN GIBSON

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Q Is it also true that you don't recall having a direct conversation with Mr Maybank about his specific situation, his specific pre-paid variable forward that you were involved in selling to him?

A I just -- I don't recall any conversations directly with him

Q So as you sit here today, your best recollection is that the transaction with Mr. Maybank followed many of the other transaction protocols where your communications was with a wealth advisor and the portfolio manager and

CLAYTON SHAWN GIBSON

1 supporting their efforts in advising in this case
2 Mr. Maybank?

3 A In most situations, the clients were also
4 participating in various conversations, whether it's
5 a phone call, in some cases face-to-face meetings
6 That was typical protocol that I would speak
7 directly as the expert in the strategy to walk them
8 through how it works, the risks, the benefits

9 Q But in Mr. Maybank's situation, you have
10 no recollection of having such a direct conversation
11 where he was on the phone?

12 MR. KRISTINIK Object to the form.
13 Leading.

14 THE WITNESS: I don't recall a specific
15 conversation with him The nature of it, I
16 should say

17 BY MR WILLOUGHBY

18 Q Would it be true also that you don't
19 recall having a face-to-face meeting with him where
20 there was a discussion about a pre-paid variable
21 forward contract for his personal situation?

22 A I don't, I don't recall if that was the
23 purpose of any of our face-to-face interactions I
24 just don't recall.

CLAYTON SHAWN GIBSON

1 Q Do you remember having more than one
2 face-to-face interaction with Mr. Maybank?

3 A I can't say for sure

4 Q Do you recall having any personal contact
5 with Mr Maybank, or was it like you make a
6 presentation and he happened to be in a group?

7 A I don't recall specifically.

8 Q So as you sit here today, you have a
9 recollection that you've met Mr Maybank at some
10 point, correct?

11 A Correct

12 Q And you believe that you would have met
13 him on one of your travels to the Greenville office,
14 correct?

15 A Correct

16 Q You don't know whether it was when you
17 were at Scott & Stringfellow, correct?

18 A That's fair Yes.

19 Q Or whether it was when you were at BB&T
20 Asset Management, correct?

21 A Correct

22 Q And you don't have any recollection as to
23 how that meeting occurred, whether it was just a
24 general meeting, you're being introduced around the

CLAYTON SHAWN GIBSON

1 office: Hey, here is Mr. Shawn Gibson He's our
2 alternative investment strategy guy from Richmond.
3 He's in town He's going to be making a
4 presentation Say hello to Mr Gibson.

5 Could have been that kind of meeting,
6 correct?

7 A It's possible

8 Q You have, as you sit here today, no
9 recollection that it was not that kind of meeting?

10 A I do not have any recollection, no

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State of South Carolina	)	
	)	
County of Greenville	)	
	)	
Francis P. Maybank,	)	2011-CP-23-8578
	)	
Plaintiff,	)	
	)	
vs.	)	Video Deposition
	)	
BB&T Corporation, Branch	)	of
Banking and Trust Company,	)	
Successor in merger to	)	Ross Walters
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.	)	

Video deposition of Ross Walters, taken before
Susan A. Wyant, a notary public in and for the State of
South Carolina, commencing at the hour of 10:09 a.m.,
Monday, September 30, 2013, at the office of Nelson
Mullins Riley & Scarborough, LLP, 104 South Main Street,
Suite 900, Greenville, South Carolina.

Reported by
Susan A. Wyant

18 Q Please state your full name for the record

19 A My first -- I go by my middle name, It's Melton

20 Rosser Walters.

21 Q And you go by Ross?

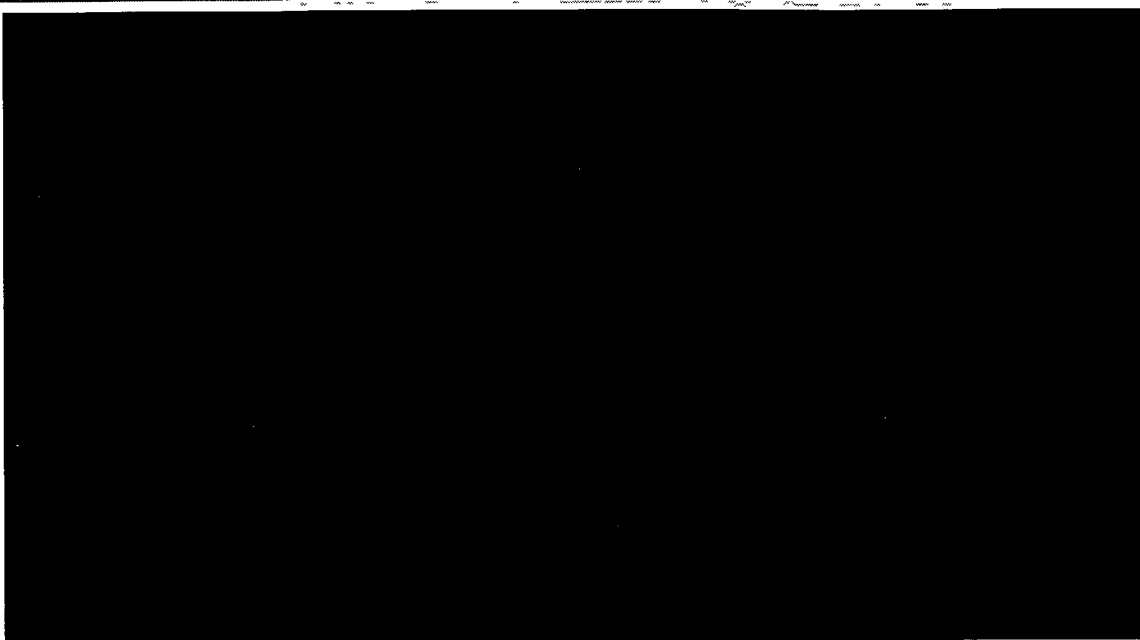
22 A Ross.

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10 Q And how long did -- did this initial structure
11 continue?

12 A Approximate, one to two years

13 Q So we're in 2003 or so?

14 A Yeah. 2003 to 2004, somewhere in that time frame,
15 it changed.

16 Q And what happened to change it?

17 A The bank made the decision to merge the trust
18 division with the private financial services and
19 call it "wealth management."

20 Q And that occurred approximately when?

21 A Late 2003/early 2004. Probably early 2004, I
22 imagine

23 Q So up until then, you had been working entirely
24 with the financial -- Private Financial Services?

25 A Uh-huh

10 Q So wealth management, then, as it's created, has
11 two sides of the bank that used to be separated
12 merged into one?

13 A Correct

14 Q The trust department and the private financial
15 services now under the umbrella title of "wealth
16 management division"?

17 A Correct

18 Q And you in Greenville are the most senior guy of
19 the wealth management division?

20 A Correct

21 Q So everybody else is working underneath you?

22 A Correct.



22 Q Well, do you have a responsibility, when you
23 undertake to provide advice to a client, to make
24 recommendations that are in their best interest?
25 A Who?

1 Q Wealth management.

2 A Wealth management is a big division I mean, are
3 you asking me specifically?

4 Q I'm asking --

5 A I -- I do not make advice -- give investment advice
6 or make recommendations --

7 Q So --

8 A -- advise.

9 Q So what -- now, tell me Why do you not personally
10 make --

11 A It's --

12 Q -- a -- make these -- make -- provide advice to
13 clients?

14 A It's a part of our licensing that BB&T -- in order
15 to license us, we are forbidden to make any kind of
16 investment advice.

17 Q And who -- who -- what is your understanding of why
18 you are forbidden to provide investment advice?

19 A I -- I don't know the particulars of that.

20 Q Have --

21 A It's part of our licensing

22 Q Have you had any training to explain why you
23 can't --

24 A We have --

25 Q -- provide investment advice?

1 A We have training on a annual -- regular basis, but
2 it's all said that, "You're not allowed to provide"
3 -- the biggest thing they tell us is, "You're not
4 allowed to do investment advice."

5 Q What kind of advice are you able to give?

6 A I can advise on loans, deposits, banking services.

7 Q So if I come to you with an investment account and
8 you -- you sell me on BB&T's services, do you ever
9 say to that client, "Now, Mr. Client, I can't
10 provide you -- even though you've got this big
11 portfolio I want to bring here into our wealth
12 management division for us to manage, I can't
13 provide any advice to you about what you ought to
14 do with that portfolio"? Do you tell them that?

15 A Sure All the time.

16 Q And they still come to you with you --

17 A Because -- because --

18 Q -- telling them you can't provide any advice?

19 A Sure. Because I'm not the person advising them.

20 They are -- they've been introduced to an
21 investment advisor -- I mean, a portfolio manager
22 that or -- or a Scott & Stringfellow broker --

23 Q Yeah.

24 A -- or a BB&T Investment Services broker And
25 they're always positioned as they're the ones that

1 are experts in investments.

2 Q So what usefulness, then -- strike that.

3 Why do you need a Series 7, Series 63, and a
4 Series 24?

5 A For compensation only.

6 Q So the only reason you need those licenses is
7 because the compensation matrix you have allows
8 earnings from the investment or the portfolio group
9 to be put into the compensation matrix?

10 A That's my understanding

11 Q Do you tell clients that?

12 A I've never had a client ask. I don't --

13 Q Do -- do you ever tell them?

14 A I don't -- I don't know that it's in their -- no
15 I -- I don't -- I've never told them, I don't
16 think.

17 Q You don't think they need to know, in other words?

18 MR KRISTINIK. Object to the form of the
19 question

20 A Yeah. I -- I don't

21 Q Is that the answer? You don't -- you don't think
22 they need to know?

23 A Well, rephrase the question, please.

24 Q You --

25 A I'm not --

1 Q You've indicated that you never tell clients that
2 your compensation is partly based upon the earnings
3 from the portfolio managers and that's the reason
4 you have this Series 7 and Series 63 and Series 24
5 license. But even though you're going to earn
6 money from portfolio management, you yourself not
7 only have no responsibility to provide any
8 investment advice, are restricted within your
9 organization against providing any investment
10 advice; is that correct?

11 A It's a long question. I'm not sure I -- I mean, we
12 -- we're -- we're restricted from providing
13 investment advice.

14 Q You're restricted against --

15 A Yeah

16 Q -- providing investment advice.

17 A Right

18 Q This is an internal policy, correct?

19 A Correct.

20 Q And do you know why -- why that policy --

21 A No.

22 Q -- was created?

23 A You need to ask BB&T Investment Services.

24 Q So no one has ever explained to you the reason
25 you're given this hard stop?

1 A I don't know the details at all

2 Q But back to my question You do not share with
3 clients that a part of your compensation comes from
4 the earnings generated by the portfolio managers?

5 A No

6 Q Let's talk about the matrix Tell me how the
7 matrix -- the compensation matrix works. And I
8 guess use you as an example. You have a salary,
9 correct?

10 A Correct.

11 Q And your salary today for 2013 is how much?

12 A It's a hundred and -- I believe it's 130,000

13 Q Okay

14 A I believe

15 Q It's set at \$130,000?

16 A I believe. That's correct.

17 Q Now, your bonus is dependent upon earnings from
18 where?

19 A It's a lot of different factors. It includes
20 loans, deposits, fee-based revenue that's
21 generated, insurance sales, retention of existing
22 clients, trust -- making sure that we meet audit
23 requirements of trusts -- our internal and external
24 compliance exams I may be leaving some --
25 something out

1 Q Asset management fees?

2 A That was fee-based revenue, I said

3 Q Fee -- fee-based revenue. And --

4 A Fee-based -- fee-based revenue is broad. It

5 includes a lot of different things.



23 So we get to the end of a year -- say, 2012,

24 for example. So we get to the end of 2012 and, by

25 tracking all of these various pools of money,

1 there's some, I presume, formula in which money
2 gets put into a pot that can be distributed for
3 bonuses?

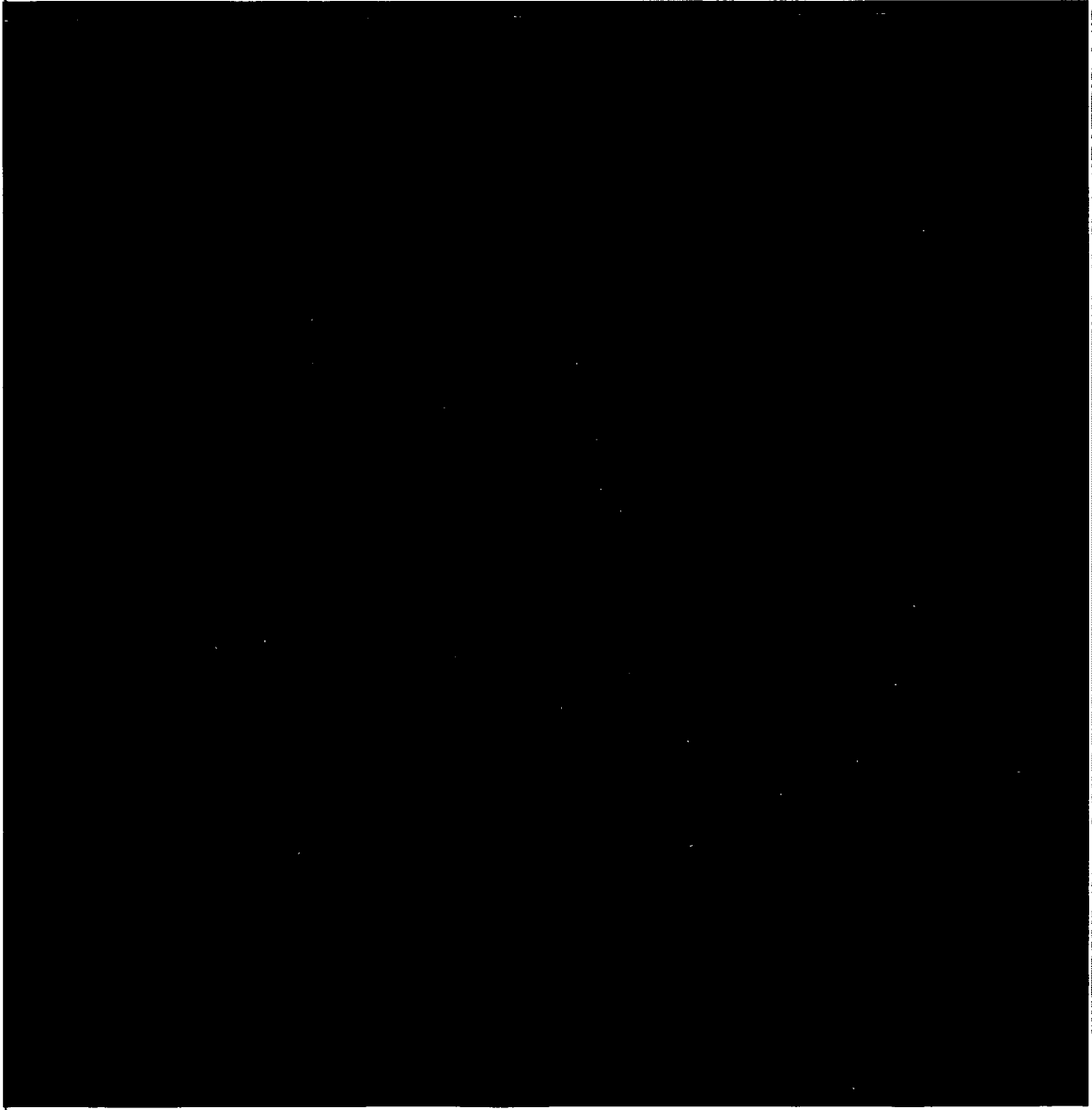
4 A I -- I assume.

5 Q Well --

6 A I don't know.

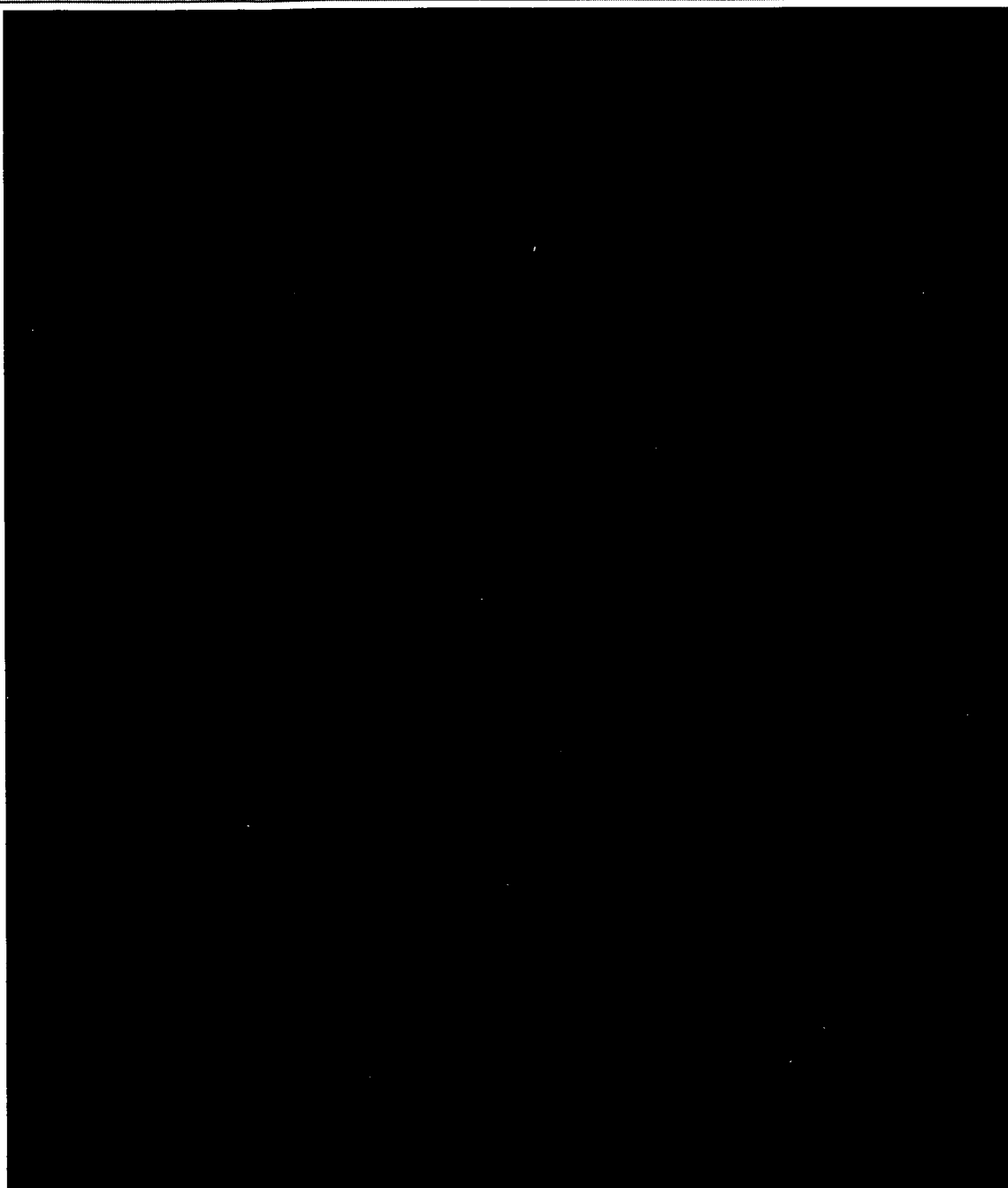
7 Q You don't know how it works?

8 A No.



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20 A -- repeat the question?

21 Q The fee that was charged to Mr. Maybank --

22 A Uh-huh.

23 Q -- for the bank's services in connection with

24 selling Mr. Maybank the 2009 prepaid variable

25 forward have been part of the matrix that was used

1 to determine bonuses for the various employees in
2 wealth management?

3 A Again, I -- you -- you used the term "selling him "
4 I -- I don't think we sold him the prepaid variable
5 forward contract.

6 Q Well, you used --

7 A I believe that was sold to him by Bear Stearns
8 It's my recollection

9 Q Well, change the word, then BB&T charged a fee
10 for being involved in the transaction, correct?

11 A To advise him, BB&T Asset Management charged them a
12 fee, I believe

13 Q And would it be true that your folks were involved
14 in that transaction? Your folks being you and Mr.
15 Mahfood were involved in that transaction, correct?

16 A No We --

17 Q You were not involved at all?

18 A We do not give investment advice.

19 Q I'm -- I'm not asking -- I'm not debating the point
20 of investment advice

21 Y'all were involved in facilitating that
22 transaction?

23 A No I don't -- I don't believe we were. I -- I
24 personally was not at all I don't believe Mr
25 Mahfood was; you'd have to ask him.

1 Q The bank was involved, though, correct?

2 A Again, I don't believe the bank was. I believe
3 that was BB&T Asset Management.

4 Q So for -- for the compensation matrix, was any part
5 of the fee that was paid by Mr. Maybank included
6 within the matrix that determined the compensation
7 for you or any member of your team?

8 A Yes.

9 Q And explain how that worked

10 A It's the way the compensation matrix was set up.
11 Any fee-based revenue generated on any of our
12 clients was passed down to the advisor.



22 Q And the fee that BB&T Bank charged to Mr. Maybank,
23 for the 2009 prepaid variable forward transaction,
24 did that fee get credited to the matrix that you
25 described -- the compensation matrix and your

1 wealth management division get credit for those
2 fees?

3 A Yes.

4 Q And would those -- who within the wealth management
5 division, specifically, was the advisor noted for
6 this transaction?

7 A Again, the term "advisor" -- tell me what you --
8 define that -- what you mean

9 Q Well, what I'm using the term is -- you call your
10 people "wealth advisors "

11 A Uh-huh.

12 Q I'm using the term. Who was the wealth advisor --
13 the human being that --

14 A Okay.

15 Q -- was assigned to --

16 A That was Anthony Mahfood

17 Q So would Mr. Mahfood have been credited, for bonus
18 purposes in 2009, with this transaction so that his
19 bonus would've been positively influenced by this
20 transaction being successful --

21 A Yes.

22 Q -- and completed?

23 A Yes.

17 Q Would it be true that the fee that BB&T charged to
18 Mr. Maybank in 2006 would've also been credited to
19 the matrix -- to the compensation matrix so that
20 the wealth management advisor and others that may
21 have been involved with the transaction would have
22 received benefit from that transaction being
23 successfully completed and the fees being
24 successfully charged by BB&T?

25 A Yes.

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4 Q Let's turn to the Exhibit 3. If you'll turn to
5 Page 2 of Exhibit 3 and look at Paragraph 5. Read
6 Paragraph 5 -- the first sentence of Paragraph 5
7 into the record, please.

8 A "Under the BB&T wealth advisor's division policies
9 and procedures, wealth advisors, including myself
10 and Mr. Mahfood are not permitted to: (a) offer
11 investment advice to customers, (b) open brokerage
12 accounts for customers; (c) review or approve any
13 client brokerage accounts for suitability or
14 otherwise, (d) execute a transaction for the
15 purchase or sale of any security, and (e) induce or
16 attempt to induce the purchase or sale of any
17 specific security Since the beginning of 2006,
18 these policies and procedures have not had material
19 changes with respect to the above prohibitions "

20 Q Would it be true, Mr. Walters, that you -- in
21 addition to being restricted against reviewing or
22 approving any client brokerage accounts for
23 suitability or otherwise, would it also be true
24 that you do not have the training or the expertise
25 to provide that sort of review and approval?

1 A You know, I'm -- I'm -- I'm a Series 7 broker, I'm
2 a Series 24 broker. Obviously, I have some general
3 knowledge of investments. I'm a certified
4 financial planner. But I had -- I do not have the
5 expertise to -- to do these things that are stated
6 on here.

7 Q So to the extent, if anyone said that you, in fact,
8 provided advice and recommendations about any
9 particular strategy, then -- because you don't have
10 the expertise, if that were in fact true, then it
11 would be improper advice because you don't have the
12 expertise to provide it, correct?

13 A Yeah I -- I don't have the expertise to advise on
14 certain strategies, and we don't

15 Q So you don't have the capability or knowledge to
16 advise someone about what they should do with a
17 concentrated stock position, correct?

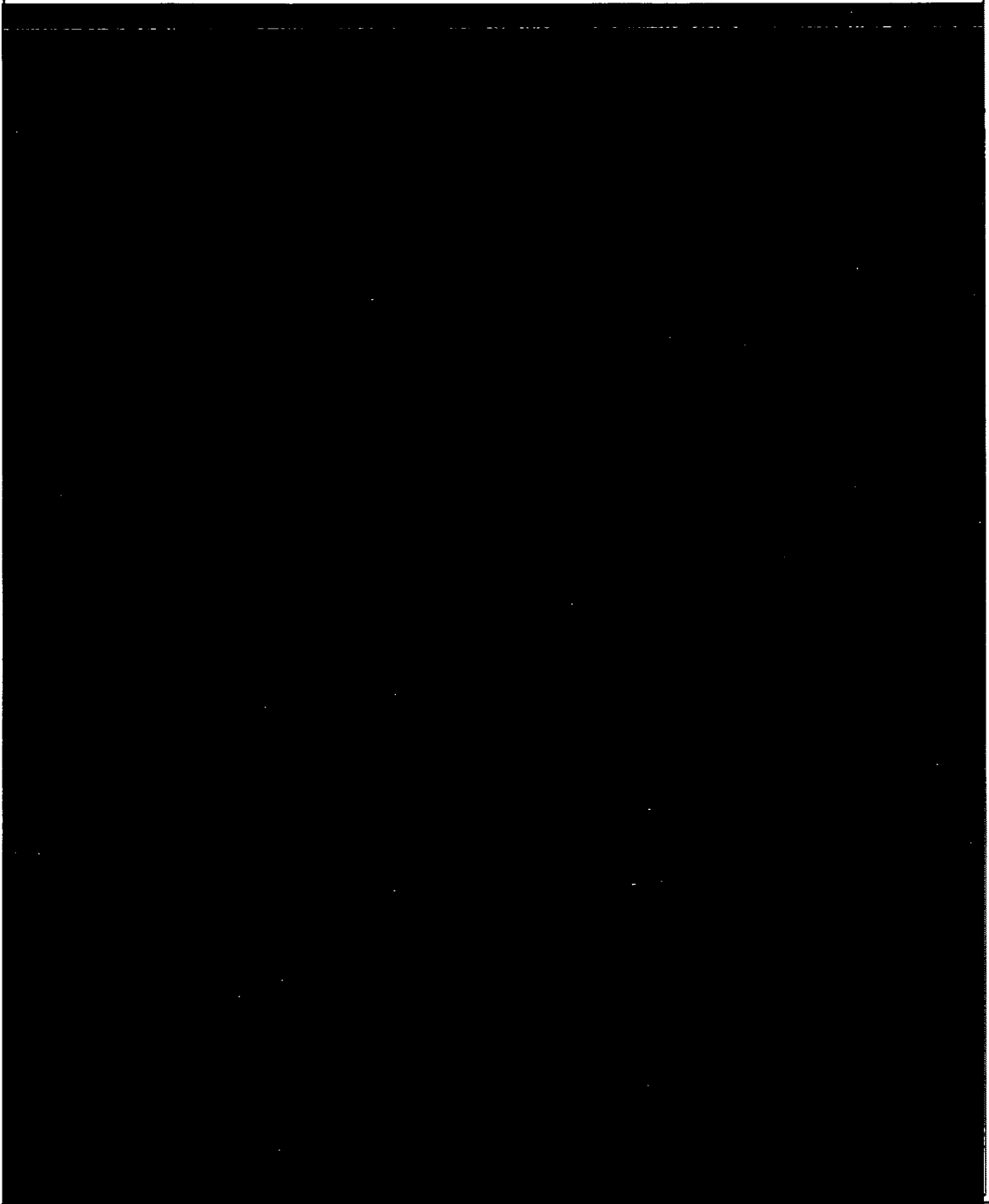
18 A Correct

19 Q You don't have the advice and -- you don't have the
20 experience, knowledge, and expertise to advise them
21 about how to construct a well-managed, balanced
22 portfolio, correct?

23 A Correct.

24 Q You would not have the capability, experience of
25 expertise to advise someone about the wisdom or

1 prudence of holding, selling, or otherwise a --
2 taking action to address a concentrated position.
3 and a sale of stock, correct?
4 A I do not personally have that. I would -- I do
5 have people on our team that have that expertise.



11 Q I hand to you what has been marked as Plaintiff's
12 Exhibit 11 to your deposition, a document entitled
13 "BB&T Wealth Management Agreement," bearing Bates
14 Number Maybank 8 through 17, and ask you if you're
15 familiar with that document.

16 A Yes. I am.

17 Q And, tell me, what is that document?

18 A It's our agreement when a client chooses to hire us
19 to be their investment agent for their account.

20 Q And is this a standard agreement?

21 A In 2006 it was

22 Q And so this agreement was not created especially
23 for Mr. Maybank? It was --

24 A Correct

25 Q -- a standard agreement that you gave to any wealth

1 management client, who had a wealth management
2 agreement with you as of this time?

3 A For agency accounts.

4 Q And tell me what you mean by "agency" --

5 A Trust accounts would've been different.

6 Q Well, tell me what you mean by "agency accounts."

7 A Where the client is hiring BB&T Asset Management to
8 manage their discretionary investment funds.

9 Q This is a discretionary account, correct?

10 A Correct.

11 Q BB&T, under the terms of this agreement, has total
12 discretion to trade in the account?

13 A Correct.

14 Q To sell, to buy, correct?

15 A That's my understanding.

16 Q Did you have any involvement in the preparation of
17 this document or securing the execution of it?

18 A No



21 Q Let's look at a -- this agreement is made among
22 Branch Banking and Trust Company, the bank, BB&T
23 Asset Management, the investment advisor, and the
24 client? Three parties, correct?
25 A Correct.

1 Q And it says -- look at the second paragraph --
2 "Bank," meaning BB&T Bank, "through its Wealth
3 Management Division" -- that's you, correct?

4 A Correct

5 Q -- "will act as wealth manager of those assets of
6 Client designated to be subject to this agreement.
7 Investment Advisor will act as Client's investment
8 advisor, with full investment discretion over the
9 account And the Bank, through its Trust Division,
10 will act as custodian of the Account," correct?

11 A Correct.

12 Q So you've got the bank, meaning, in this case, you,
13 as the Wealth Management Division head?

14 A Uh-huh

15 Q As the wealth manager, the bank, through its trust
16 division, has custody of the assets in the account?

17 A Uh-huh

18 Q And the investment advisor will be the investment
19 advisor with full investment discretion, correct?

20 A Correct

21 Q Now, let's see what the bank -- "Service of Bank as
22 Wealth Manager: As Wealth Manager, Bank shall" --
23 first item -- "gather information from the Client
24 regarding the Client's investment objectives, risk
25 tolerance and investment horizon, tax status,

1 financial situation, and needs." Did you do that?

2 A No We did not That was done by the advisor.
3 Even though that says it's our responsibility, it's
4 my belief that when we changed this agreement in
5 early 2006, that it was an oversight on our
6 attorney's part.

7 Q But, in any event, when this -- when you opened
8 this account for Mr. Maybank, Item 1 of gathering
9 the information -- and it's got a laundry list --
10 that was not done by the wealth manager?

11 A No. That was done by asset management

12 Q But it was not done by the wealth manager?

13 A Correct

14 Q So the wealth management division did not gather
15 the information from the client that the contract
16 says it would -- that it -- that it would do?

17 A Correct

18 Q Now, the second item, "Make recommendations to the
19 Client regarding an investment program and
20 investment guidelines for the Account " Did you
21 make any recommendations?

22 A We -- we do not give advice or make recommendations
23 regarding investments.

24 Q Well, now, your contract says you agreed to do so.

25 A That's why I said that when they changed this in

1 early 2006, I believe there was -- we -- we went
2 from one -- well, one mode of operations to a
3 second to a third. Changed three times. And, even
4 though the contract says that, our -- our standard
5 operating procedures was that we never did this.

6 Q So this --

7 A Asset management was doing that

8 Q So this contract states that the wealth manager
9 will take action to do an item, the bank agreed to
10 do so, but you're acknowledging that the bank did
11 not do as stated here in this contract?

12 A I'm acknowledging that the wealth manager did not
13 do this, that BB&T Asset Management did it

14 Q Well, I'm going to ask Did you sit there and
15 watch asset management?

16 A No. I did not.

17 Q Have you talked with anyone to interrogate them to
18 see whether or not this function was actually --

19 A I did not.

20 Q And you have not?

21 A I -- I have not

22 Q And, in preparation for your deposition today,
23 other than your lawyer, have you talked with
24 anybody in the bank about your deposition?

25 A About -- specifically about this? 

6 Q In Charlotte. And then the third item is, "The
7 Wealth Manager shall coordinate and supervise the
8 services of the Investment Advisor and the
9 Custodian for the Account." Did you do that?

10 A I -- that's sort of a vague statement. I'm not
11 sure what that means, to be honest with you.

12 Q So you didn't do it, then?

13 A Well, I mean, it depends upon what "coordinate and
14 supervise" means. If you could define it a little
15 bit more, I -- I might say yes or no.

16 Q Well, I would suggest, Mr. Walters, that it's your
17 contract.

18 A Okay

19 Q And that, if you don't know what it means, then
20 it's very likely that you didn't do it?

21 A Okay

22 MR. KRISTINIK: Object to that statement.
23 It's inaccurate.

24 Q You may answer.

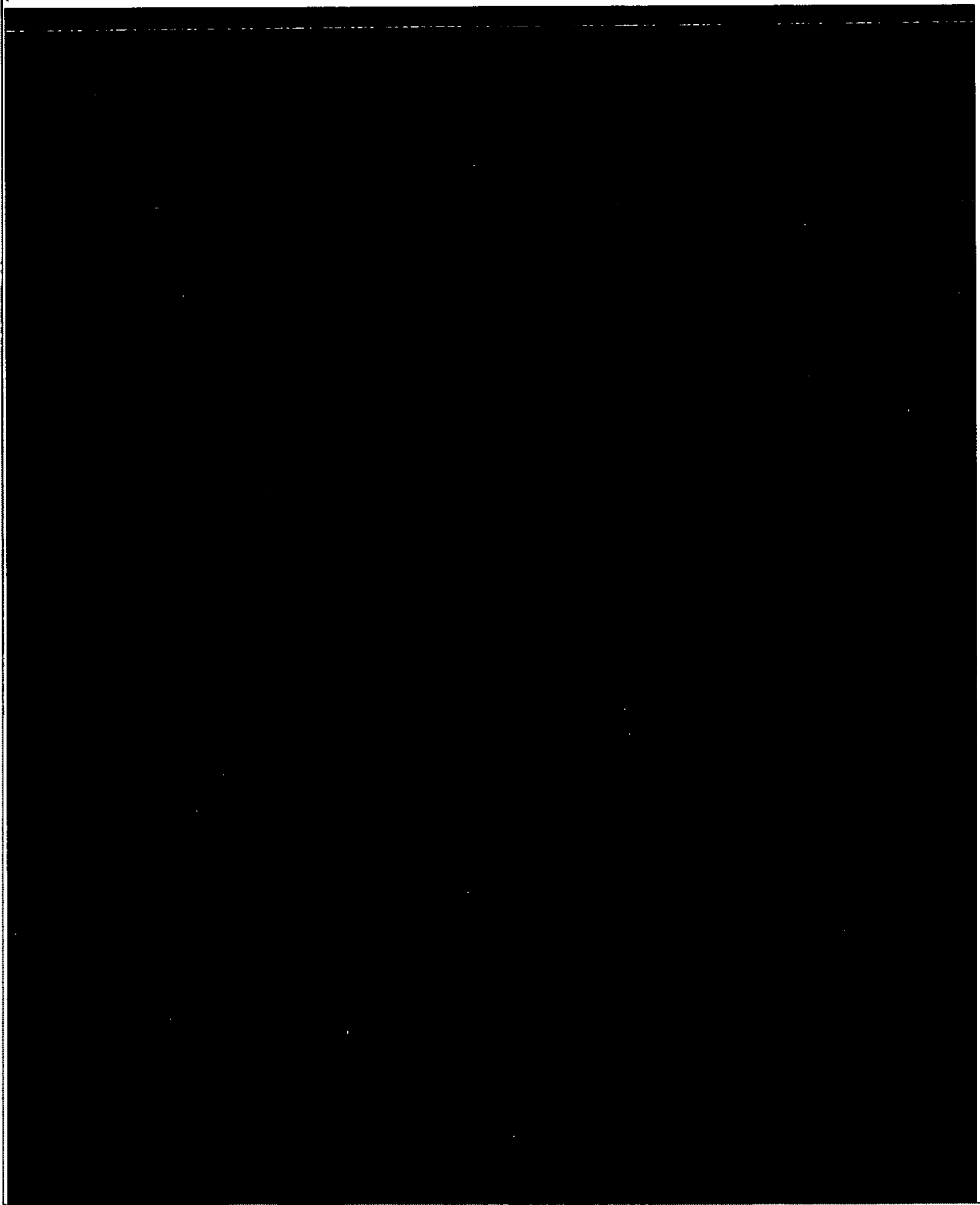
25 A You know, did we coordinate things between the

1 investment advisor and the custodian at some times?

2 Yes.

3 Q Did you supervise the services of the investment
4 advisor?

5 A No.



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1 State of South Carolina)
2 County of Greenville)
3) 2011-CP-23-8578
4 Francis P Maybank,)
5)
6 Plaintiff,)
7 vs)
8)
9 BB&T Corporation, Branch)
10 Banking and Trust Company,) Videotaped Rule 30(b)(6)
11 Successor in merger to)
12 Branch Banking and Trust) Deposition Of
13 Company of SC, Sterling)
14 Capital Management, LLC,) BB&T Bank
15 Successor in merger to)
16 BB&T Asset Management,) (Ross Walters)
17 LLC, Ross Walters, and)
18 Anthony Mahfood,)
19 Defendants)
20)

21 Videotaped Rule 30(b)(6) deposition of BB&T Bank
22 (Ross Walters), taken before Vickie M Hester, a notary
23 public in and for the State of South Carolina, commencing
24 at the hour of 11 16 a m , Thursday, March 20, 2014 at
25 Nelson, Mullins, Riley & Scarborough, Poinsett Plaza,
104 South Main Street, Suite 900, Greenville, South
Carolina

Reported by
Vickie M Hester



3 Look at Exhibit 2 Now, that's BB&T's Wealth
4 Management Form Agreement, correct?

5 A Correct

6 Q And you've indicated that the bank could not
7 perform the functions that are represented in the
8 very -- in the paragraph that says under Roman
9 Numeral I, "Service of bank as wealth manager,"
10 correct? You remember that?

11 A Yes

12 Q And it says, "As wealth manager, bank shall gather
13 information, shall make recommendations to the
14 client regarding an investment program and
15 investment guidelines for the account and shall
16 coordinate and supervise the services of the
17 investment advisor and the custodian for the
18 account "

19 A Uh-huh

20 Q And you've indicated that the bank itself though
21 its wealth advisors could not make recommendations
22 to the client regarding an investment program and
23 investment guidelines, correct?

24 A Correct

25 Q And I think you indicated that the lawyer who

1 drafted the contract got it incorrect

2 A I -- I said my personal opinion was either there
3 was a mistake made or else the bank realized that
4 they delegated that responsibility to BB&T Asset
5 Management

6 Q But you yourself saw this contract be used day
7 after day, time after time with clients, correct?

8 A Correct

9 Q And never once did you go and say, "Look, this
10 contract is incorrect, it's giving the incorrect
11 information to our customers and we need to make it
12 correct and accurate?" You never did that, did
13 you?

14 A No, I did not

15 Q And you continued to allow the contract to be used
16 day after day with new customer after new customer,
17 isn't that correct?

18 A Again, I -- I probably -- I didn't open new
19 accounts So I didn't see this on a day-to-day
20 basis You know, we were using it in our division
21 It was sent to us from our senior management above
22 I didn't review it and I didn't question it

23 Q So why would you think if you, the team leader,
24 didn't question it, didn't think that there was
25 anything wrong with it, why would you that Mr

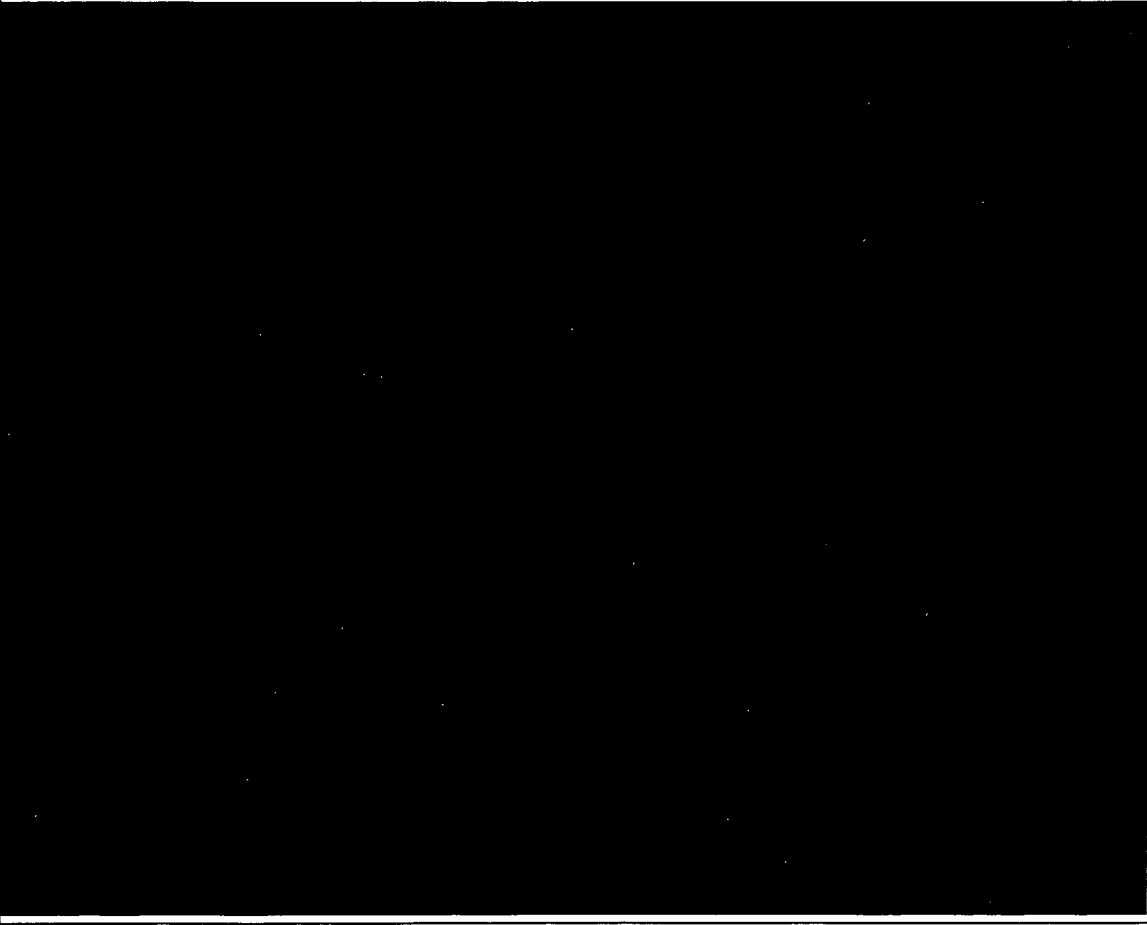
1 Maybank should have known that it is a problem and
2 that the contract is wrong?

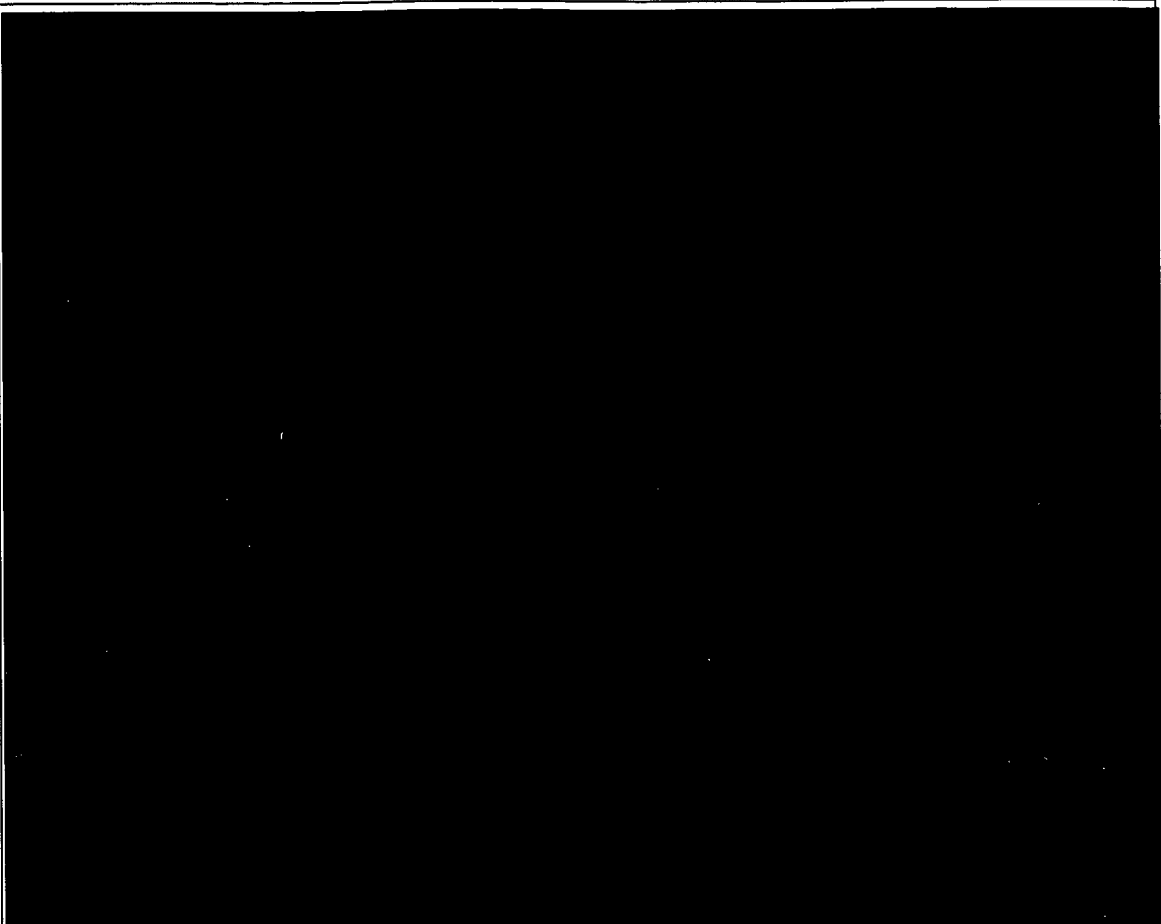
3 A Again, --

4 MR KRISTINIK Object to the question It's
5 inconsistent with witness's prior testimony

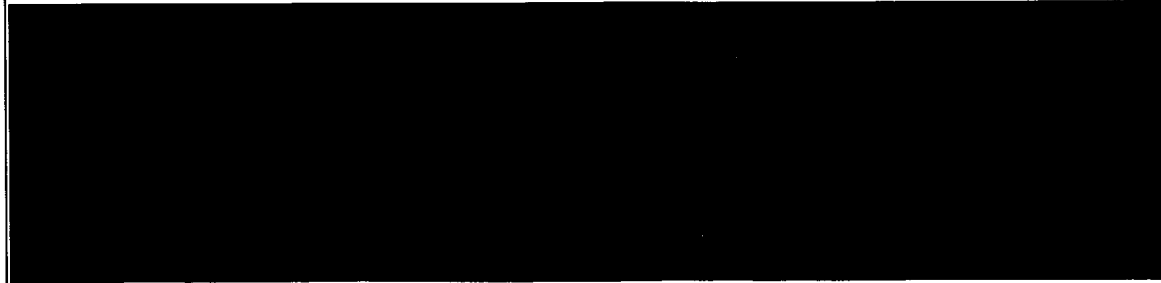
6 WITNESS CONTINUES

7 A Again, he was aware That -- that had nothing --
8 this contract had nothing to do with your questions
9 earlier which you asked me before was he aware that
10 BB&T Asset Management was managing his money And,
11 yes, he was aware of BB&T Asset Management was the
12 division running his money





14 A He was a wealth advisor He had to know that
15 That was his job So if he did not know it, he was
16 incompetent So I -- I believe he knew it He
17 heard it over and over again He was trained on
18 that He was, you know, in meetings where
19 compliance people talked about it So for him not
20 to know would -- I can't fathom how he would not
21 know



1 Q Well, let me ask the question again Well, let me
2 ask this way Did you ever tell Mr Maybank that
3 the contract would not be followed as written?

4 A That's a damned if I do and damned if I don't
5 answer I think

6 Q Well, did you ever tell him?

7 A I believe the contract was written -- fulfilled as
8 written

9 Q So you think that -- you think that the bank did
10 the things that are depicted in the contract that
11 was going to perform?

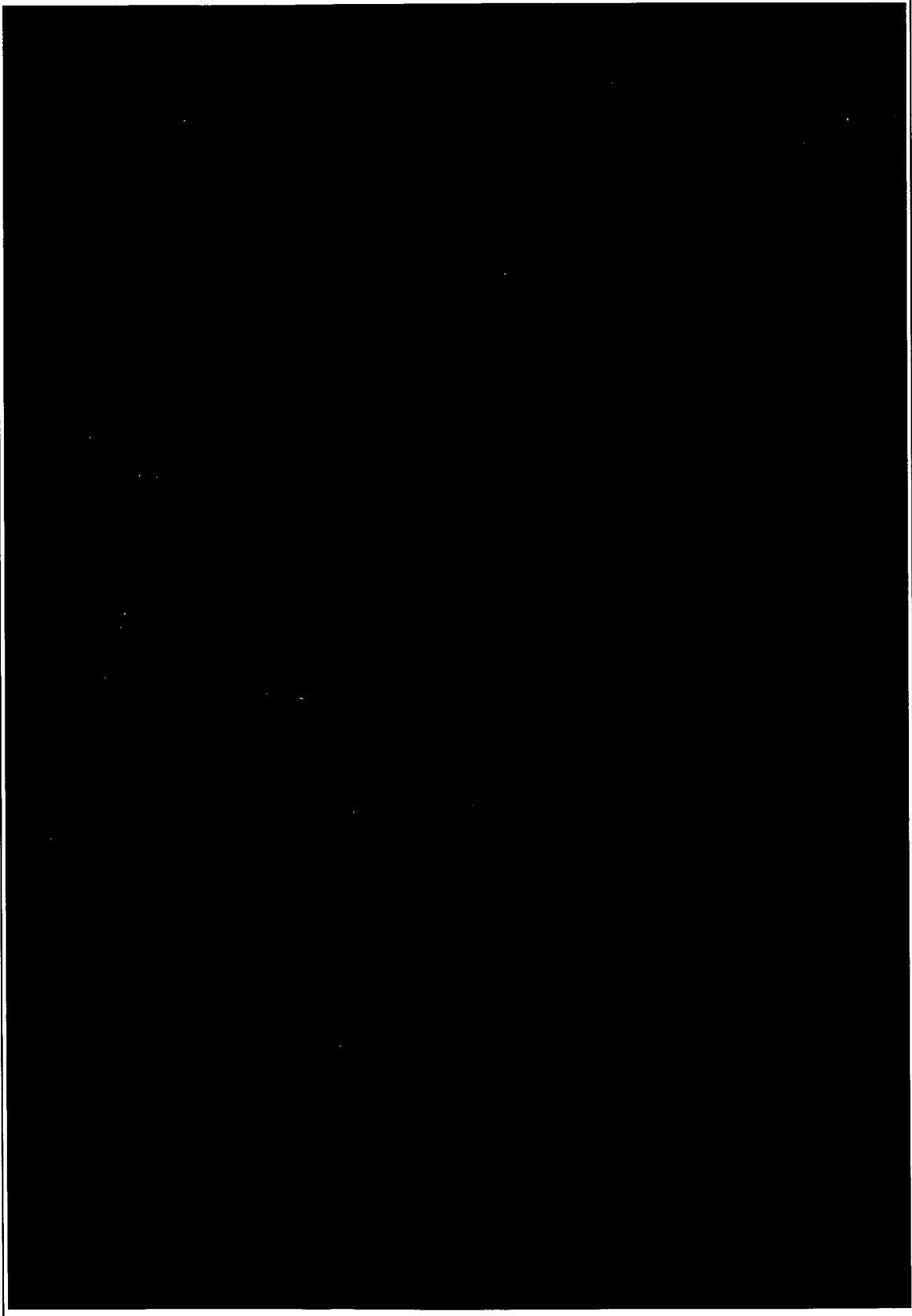
12 A I believe either the bank -- I believe either there
13 was an error in the name using the bank term or I
14 believe they delegated that responsibility to BB&T
15 Asset Management But I believe that this contract
16 was fulfilled in principal

17 Q Well, I'm not talking about what you believe might
18 have been done But I'm talking about as written
19 If -- do you agree with me that you never advised
20 Mr Maybank that the contract would not be
21 fulfilled just as it's written?

22 A I never spoke to Mr Maybank about the contract

23 Q So the easy answer is you never advised him that
24 the contract would not be fulfilled just as it's
25 written, correct?

1 A I'm not going to answer that



1 Q And my -- my question to you is --

2 A The bank did not do it



9 Q But my -- my question to you is this Did you
10 advise Mr Maybank that the bank would not fulfill
11 the contract as the contract is written?

12 A I did not talk to Mr Maybank about the contract --

13 Q And so the --

14 A -- one way or the other

15 Q So the answer is you did not advise him it would
16 not be fulfilled as written, right?

17 MR KRISTINIK Object to the form of the question

18 WITNESS ANSWERS

19 A I -- I'm not going to answer that

20 REEXAMINATION BY MR WILLOUGHBY RESUMED

21 Q And -- well, why aren't you going to answer it?

22 A Because you're putting words in my mouth



[REDACTED]

6 Q You said you've never spoke to him about the
7 contract, correct?

8 A Correct

9 Q And to your knowledge no one else told him that
10 certain functions and duties under the contract
11 could not be performed by the bank and would be
12 performed by BB&T Asset Management, correct? You
13 don't know if anyone else --

14 A Did you -- was that a -- was that a negative or --
15 I'm sorry You phrased the question -- rephrase
16 the question

17 Q So you didn't talk with him about the contract,
18 correct?

19 A Correct Correct

20 Q And you don't know if anyone else talked with him
21 about the contract, correct?

22 A I don't know that That's correct

[REDACTED]