

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson, Master-in-Equity

Appellate Case No. 2014-001487

Linda Gibson, formerly known as Linda Ann Avinger,
individually and as Trustee of the Paul William Gibson
Family Trust, and Heritage Seven, LLC,

Respondents,

v

Ameris Bank,

Appellant.

RECORD ON APPEAL – VOLUME I

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STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

LINDA A. GIBSON, formerly known as
LINDA ANN AVINGER, individually
and as Trustee of the Paul William Gibson
Family Trust, and HERITAGE SEVEN,
LLC,

Plaintiffs,

vs.

AMERIS BANK,

Defendant

IN THE COURT OF COMMON PLEAS

IN THE NINTH JUDICIAL CIRCUIT

Case No. 2010-CP-08-2134

ORDER

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CLERK OF COURT
BERKELEY COUNTY, S.C.

This matter came before this Court for trial on May 22 and 23, 2012 and August 14, 2012. Andrew K. Epting, Jr., George J. Kefalos, and John S. West appeared on behalf of Plaintiffs, Robert E. Stepp, William H. Jordan, and Tina Cundari appeared on behalf of Defendant, Ameris Bank.

I compliment all Counsel of record for ably presenting their case. During the course of this trial, I very carefully observed the demeanor and manner in which each witness testified. I noticed such things as their tone of voice, gestures, hesitation or readiness to answer questions, their sincerity, and other mannerisms, all of which assisted in my evaluation of their credibility. After a thorough review of the legal briefs and applicable law, the pleadings and considering the evidence presented, including three days of trial testimony, approximately 200 exhibits, and deposition testimony of several witnesses, and carefully listening to arguments from all Counsel, the Court expressly finds that Defendant (Ameris) is liable for the harm alleged. Judgment is entered in favor of Plaintiffs (Gibson) against Ameris Bank in the amount \$2,913,886.00.

PROCEDURAL HISTORY

This case began as a foreclosure action. On June 14, 2010, Ameris initiated foreclosure proceedings against Heritage Seven, LLC, an entity partially owned by Linda Gibson and of which Linda Gibson is the sole managing member, and Linda Gibson, individually and as Trustee of the Paul William

Gibson Family Trust, (collectively, "Gibson") for failure to pay two notes: one in the amount of \$2,810,164 50 and the other in the amount of \$50,071 96. Gibson personally guaranteed the loan. She borrowed the money to purchase and renovate a 48-unit apartment complex on Otranto Road, Berkeley County, South Carolina, and to pay property taxes that became due during the renovations.

On July 20, 2010, Gibson answered the foreclosure complaint and asserted counterclaims against Ameris for negligent misrepresentation, civil conspiracy, and equitable relief. On September 27, 2011, Gibson amended the counterclaim and asserted causes of action for negligent misrepresentation, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. These are the three causes of action that were tried before this Court

On July 14, 2010, a month after Ameris initiated foreclosure, Ameris sold the mortgage loan to Galt Valley, LLC. [Def.'s Ex. 115]. Galt Valley and Plaintiffs settled the foreclosure action on December 1, 2010 [Pl's Ex.7]. As part of the settlement, the borrower, Gibson, executed deeds in lieu of foreclosure conveying the apartment complex and other real property that served as collateral for the loan to Galt Valley. In exchange, the notes were deemed satisfied, the loan documents were canceled, and all litigation pending between Gibson and Galt Valley was dismissed. The counterclaims asserted against Ameris still remained. The counterclaims against Ameris were tried before this Court and the Court's findings of fact and conclusions of law are set forth below.

FACTUAL BACKGROUND

The key people in this case are Linda A Gibson (Gibson), Karl H Zerbst, Jr. (Zerbst) and Benjamin R Lanier (Lanier) However, others were also important players in this case and will be introduced later in this order. Gibson is a 63 year old widow with a high school education and limited business experience who inherited several properties from her parents and late husband. [Tr. 69-70, 72-73, 87-89] Until Gibson's husband died in 2003, he handled all the business and financial aspects of their assets Gibson's assets were primary real estate that was inherited from her husband and father. [Def.'s Exs 5, 7, 11,17]

Zerbst was employed in the banking business for 26 years. He first met Gibson in 2004-2005 when he was employed at First Reliance Bank (Reliance) in Charleston, S.C. Zerbst left Reliance on October 4, 2007 and was officially hired by Ameris on January 11, 2008. Lanier was also employed by First Reliance where he was a credit analyst. Zerbst was his superior. Lanier left First Reliance on October 9-10, 2007 and began work at Ameris on October 11, 2007. Both Zerbst and Lanier played a major role in Gibson's purchase of the apartment complex and the financing of the apartments while they were employed both at First Reliance and at Ameris. Zerbst was Lanier's superior when they were employed at Ameris.

In 2004 after her husband's death, Gibson met Rolando Villavicencio (Villavicencio) and his wife at church. [Tr 111] Villavicencio was a real estate agent at ReMax and knew of Ms. Gibson's inexperience in the real estate field and finance. He assured her of his experience and competence in real estate, and persuaded Ms. Gibson to allow him to manage her properties. She trusted him and he took advantage of her trust for his benefit. Villavicencio, Zerbst and Lanier all played major roles in the purchasing of the shopping center and apartment complex by Ms. Gibson.

In December 2005, Villavicencio convinced Gibson to purchase a shopping center in Moncks Corner, SC for \$2.4 million. [Def's Ex 3, Tr. 73:10-19; 160:12-20] Gibson hired ReMax and Villavicencio to manage the property for a ten-year term. [Def.'s Ex. 4; Tr. 179:1-7]. Villavicencio took Gibson to First Reliance Bank to arrange for the financing of the shopping center. Zerbst and Lanier both worked at First Reliance and assisted and advised Ms. Gibson in the financing of the shopping center. Mr. Lanier was the credit analyst for the shopping center transaction and Zerbst was his superior. In advising Ms. Gibson about this transaction, Zerbst and Lanier recommended to Gibson that she place a second mortgage on a home she owned on Isle of Palms for the down payment and she agreed. [Pl. Ex. 32]. At this point the shopping center was purchased with a hundred percent borrowed monies. It was during the time of the purchasing and financing of the shopping center that Ms. Gibson first began to seek advice from Zerbst and reposed her trust in him [Tr.75, 119] He accepted her trust and from this time forward

advised her in all of her investment transactions. In fact, at the time of the trial Gibson had only been involved in two investment purchases and Zerbst, Lanier and Villavicencio were the key players in giving her advice regarding the purchase and financing of these investments. Although the shopping center transaction is not directly connected with the case tried before me, it does afford considerable and credible insight into the relationship between Gibson, Villavicencio, Zerbst and Lanier

The case tried before me was a case against Ameris, the lender in Ms. Gibson's purchase of an apartment complex located on Otranto Road in Berkeley County. Gibson was informed by Villavicencio of the existence of the apartment complex. He was familiar with the apartment complex because he was the property manager and was the exclusive listing agent for the seller [Ct Ex 3, Gibson Dep. 35-22-36:31; Def.'s Ex. 9] Villavicencio represented to Ms. Gibson that the fair market value of the apartment complex was \$2 8 million. [Tr. pgs.182-83, 185-86, 188-89] Villavicencio also told Gibson that he would handle everything, from helping her obtain financing, to overseeing the construction, to leasing and selling the renovated apartments, to managing the property. [Ct. Ex. 3, Gibson Dep. 51:10-25] Gibson signed a contract to purchase the apartments for \$2 8 million.

In the fall of 2007, Villavicencio contacted Zerbst at First Reliance to have him assist in obtaining the loan for Gibson to purchase the apartment complex. As part of the loan application process, First Reliance ordered an appraisal which was completed on September 12, 2007 and showed the as-is value of the apartment complex as \$2.8 million and the as-renovated value as \$3.7 million. [Def.'s Ex 13] The loan at Reliance was for \$2.8 million and required \$700,000 as a down payment, as structured by Zerbst. Gibson had no money to make the \$700,000 down payment. Zerbst advised Gibson that if Reliance was going to finance the purchase she should get a loan on her beach house for the \$700,000 down payment. [Tr 123; Pl. Ex. 67]

As previously noted, Zerbst left First Reliance on October 4, 2007 and Lanier left First Reliance on October 9-10. Lanier became employed at Ameris on October 11, 2007. Between October 16th and October 22nd, Lanier received a call from Zerbst requesting a meeting because he was having Gibson

leave Reliance and get her loan from Ameris. Lanier met with Zerbst and Villavicencio at the apartment complex and received a "nearly complete package" of loan documents from Zerbst [Tr. 479] Ms. Gibson was not present at this "strange" meeting. Immediately after this meeting, Lanier submitted a loan committee application for Gibson which was approved the next day by the state president for Ameris, John Hipp. Lanier admitted that the loan at Ameris was very similar to the loan structured by Zerbst while he was at First Reliance. [404-406]

Ms. Gibson paid \$2.8 million in 2007 for the apartment complex which is double what the previous owner, AbesPro, paid for the property in 2003. [Tr. 525] The property sold on June 15, 2012 for \$650,000 after being completely rehabilitated. Geoffrey Southard, a commercial real estate sales expert, who was retained by Ameris Bank and their successor Galt Valley, LLC, which paid Ameris \$975,000 for the loan, testified that the property was never worth the price Ms. Gibson paid for it [Tr. 525] Economic times have changed from November 2007 to date, but the apartment complex was never worth anywhere near what Ms. Gibson paid for it. Gibson personally guaranteed all of the debt, including the borrowed down payment for the Ameris debt. She stood to lose everything and, except for her own efforts at mitigation, would have.

Ameris' role in Ms. Gibson's misfortunes harmed not only Ms. Gibson, but cast Ameris' upper management, bank policy and culture in a very poor light.¹ Ms. Gibson's financial plight darkened as a result of the events the subject of this lawsuit,

Ameris' Regional Credit Officer and Senior Vice President Don Snipes wrote:

As you may remember, we have some culpability in [Linda Gibson's] problems as we did not manage the construction loan as we should and have potentially aided in her former property manager at REMAX may have siphoned off some of the loan proceeds. She is currently in litigation with REMAX over this as the agent was representing them when this occurred, but we are a long way from any settlement. [Pl's Tr.Ex. 31]

¹ In 2007, Ameris sought to expand its operations in the then burgeoning Charleston real estate market in a number of ways. It hired employees and loan officers away from competitor banks, expecting and intending them to bring business and contacts to Ameris. It loosened its lending practices in order to make more loans; it ignored its own lending guidelines. It encouraged the excess that caused this problem.

Typically, suits against banks turn on whether the bank has legal duties to customers, and this is often a function of whether the bank is acting as a fiduciary. In this case, Ameris' own employees and former employees (whose conduct during the events was in a representative capacity) and Ameris' own expert testified to duties owed by the bank to the Plaintiff:

1. Ameris admitted a duty to tell Ms. Gibson that the project revenue would not carry the loan. [Tr. pg 612]²
2. Ameris admitted a duty to warn a customer if it has reason to know the customer's representative is misusing the customer's funds. [Tr. 607, 416, Dep Bogan pg 39]
3. Ameris admitted that, while it should not undertake to give investment advice because the bank has a vested interest in the transaction and that to do so creates lender liability, if the bank does so, the advice must be accurate. [Tr. Dep Bogan 36-38]
4. Ameris admitted that banks have a duty not to mislead their customers and to be honest, accurate, and complete in their representations and in their accounting. [Tr. 606, Court Exhibit 2, Barksdale Dep. 93-94]

Often times the degree of a customer's sophistication is a factual issue. The parties to this suit agree Ms. Gibson is unsophisticated in financial matters. It was apparent to me that Ms. Gibson did not understand apartment rentals, debt service, capitalization rates, construction budgets, or for that matter much beyond managing household finance, which Ms. Gibson's life experience and lack of financial experience confirm. Ameris acknowledged that Gibson was a neophyte and unsophisticated. Zerbst a primary mover in these events stated:

Q: It didn't take you long after meeting Linda Gibson to see that she was new at this, did it?

² A party is bound by its own evidence and that of his expert witness *Benford v. Berkeley Heating Co*, 258 S.C. 357, 365, 188 S.E 2d 841, 844 (1972)

A. I don't know if she was new, but she was not well experienced like many customers that I would meet with.

Q. I am going to hand you a copy of the deposition and ask you to turn to page 69 at line 8.

A. That was on line 10. Yes; I felt like Linda was new at this. That's correct. [Tr. 307-308]

Ameris Bank knew Linda Gibson was an unsophisticated investor (with millions of dollars of inherited real estate) who placed her trust in Ameris to advise her whether and how to purchase an apartment complex. Ameris breached this trust by encouraging Ms. Gibson to purchase the apartments with a financing structure doomed to fail.

While banks are not guarantors of an investment's success and while ordinarily they are not fiduciaries, Ameris concedes a duty not to mislead their customers or aid others in taking advantage of a customer. Ameris' actions here are a raw portrayal of what banking should not be. Berkeley County is not Wall Street and this Court is not so financially sophisticated as to understand the cause or extent of the financial upheaval of the last five years, but I do understand banking excess.³ Ameris' upper management created an environment that fostered excess at the expense of their customers.

Ameris knew, as Zerbst and Lanier advised Gibson to borrow the \$700,000.00 down payment needed to purchase the apartments, that the revenue generated by the apartments would not cover the borrowed down payment and the debt to Ameris. Lanier testified he did not know the down payment was borrowed and that had he known, it would have affected his recommendation of the loan.⁴ Zerbst testified that Lanier most certainly knew the down payment was borrowed. [Tr 349-350] Lanier and Zerbst participated in the structuring of this loan and recommended it to Gibson. From the testimony, it was

³ That Goldman Sachs might sell to its customers as sound investments subprime loans for transactional fees and at the same time short the investment believing in the investment's demise, is of the same quality as what happened here.

⁴ Q. -- did you take the repayment of the \$700,000 second mortgage into account when you did that cash flow analysis? A. No, sir, I did not. Q. If you had taken that repayment of the 700,000, it would have made a big difference in the landscape of the loan, wouldn't it? A. In the overall picture specific to the apartment complex, yes, sir [Tr 453-454]

obvious to me that Lanier and Zerbst understood Gibson's lack of sophistication, Villavicencio's overreaching, and the project's weakness.

Karl Zerbst testified that:

Q: And you knew that Linda Gibson was not a savvy real estate investor?

A: That is fair to say.

Q: And in fact you knew that Linda Gibson relied on the advice of others?

A: That's correct.

Q: And because of that you developed a personal relationship with her?

A: No, sir.

Q: Well, turn your attention to Page 69 where you were telling us at line 9—did you tell us: "I'm assuming certainly on this case, too, because Linda, I felt, was new at this and there was a personal connection I made with that. Maybe a bit more than the normal borrower?"

A: Because we had – to answer that, where I was coming from there is that she had borrowed money at First Reliance on the shopping center and I knew that she was borrowing that money as well as the apartment loan.

Q: So it is true that you made a personal connection with –

A: I made a personal connection because this request was similar to the others.

Q: But also knowing that she was new at this, she lacked experience and she relied on the advice of others

A: Yes, sir. [Tr 309]

A: When Rolando called me initially and said that he had an apartment complex that he wanted to bring to me for financing for Linda Gibson, my first question to him: Well, does Linda know about it? Because I knew Rolando really handled the affairs, if you will for Linda. I know that from a previous conversation and a previous loan that was made. [Tr 324]

Did Ameris want the loan to work? Yes. Did it have paperwork “justifying” its actions? Some. But it also had unencumbered collateral worth millions if the project failed. Did the bank believe that Ms. Gibson’s net worth had risen in a short time from \$15 million to over \$52 million or that Ms. Gibson’s net worth as of the date of the loan was over \$52 million? No. But if the loan failed, Ameris knew it was covered by other unimpaired collateral.

Ameris committed to this loan without an application and approved it in three days at its new branch in Charleston, a market it had just entered [Dep. Court Exhibit 2, 74 and 83]. Ameris used the bank’s grand opening in Charleston, a nighttime gala, to have Ms. Gibson sign documents that obligated her legally when she neither understood nor could perform them, and it was at the gala that Ms. Gibson first learned her Klister Lane property would serve as additional collateral for the apartment debt [Tr. 126-128, 476-477]. Gibson’s \$2,800,000 loan was a splash for Ameris and its new Charleston team. This loan was never in Gibson’s interest. The loan was structured by Zerbst and Lanier which required that she take two mortgages to purchase the apartments. This investment was not aided by the economic times that ensued following the purchase, but it failed because it was never viable and certainly not suitable for a 63 year old unemployed woman with no business experience.

Ameris “had a hand” in this project’s failure and it was substantial. The bank’s conduct was overreaching and egregious. Ameris violated its customer’s trust and took advantage of her lack of sophistication.

FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

The complaint contains the following causes of action: (1) negligent misrepresentation, (2) breach of fiduciary duty, and (3) aiding and abetting breach of fiduciary duty. The Court finds and concludes that Gibson has proven the elements of each of these causes of action. Accordingly, judgment is entered in favor of Plaintiffs.

I Zerbst was an agent of Ameris when Gibson purchased and financed the apartment complex.

As an initial matter, the Court will address the issue of whether Zerbst was an agent of Ameris Bank at the time that Gibson made the decision to purchase the apartment complex and obtained the financing of the loan from Ameris Bank. The Court finds that Zerbst was an agent of Ameris during that time, despite Ameris' claim that Zerbst did not officially start working for them until January 11, 2008. Accordingly, the Court concludes as a matter of law that Ameris is liable for the conduct of Zerbst leading up to the purchasing and financing of the apartment complex.

A. Law

"Agency" is a consensual, fiduciary relationship whereby a person, the agent, acts on behalf of another, the principal, subject to the principal's control, in such a manner as to affect the legal relationship of the principal with third parties *Restatement (Second) of Agency* § 1; *Peeples v. Orkin Exterminating Co.*, 244 S.C. 173, 135 S.E. 2d 845 (1964). The test to determine agency is whether the purported principal has the right to control the conduct of his alleged agent. *Fernander v. Thigpen*, 278 S.C. 140, 293 S.E.2d 424 (1982). "Creation of agency does not depend upon express appointment and acceptance; agency often arises from words and conduct of the parties that exhibit the characteristics of agency." *Bankers Trust of South Carolina v. Bruce*, 283 S.C. 408, 323 S.E. 2d 523 (Ct. App. 1984).

Agency may not be established solely by declarations and conduct of the alleged agent, but such declarations and conduct are evidence which can be considered in connection with other evidence that may establish the alleged agency *Muller v. Myrtle Beach Golf & Yacht Club*, 303 S.C. 137, 399 S.E.2d 430 (Ct. App. 1990), overruled on other grounds by *Myrtle Beach Hosp Inc v City of Myrtle Beach*, 341 S.C.1, 532 S.E.2d 868 (2000); *Fuller v. Eastern Fire & Cas. Ins Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962)

To establish an agency relationship, the relying party must show "(1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005)

"The relationship of agency need not depend upon express appointment and acceptance thereof." *Bankers Trust of South Carolina v Bruce*, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984) (citing *Crystal Ice Co. v. First Colonial*, 273 S.C. 306, 257 S.E.2d 496 (1979)). Agency may be implied from the words and conduct of the parties and the circumstances of the particular case. *Gathers v Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 317 S.E. 2d 748 (Ct. App. 1984). A party asserting agency as a basis of liability must prove the existence of the agency by the greater weight of the evidence and must be clearly established by the facts. *McCall v. Finley*, 294 S.C. 1, 362 S.E. 2d 26 (Ct. App. 1987).

Ratification, as it relates to the law of agency, means the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent " *Barber v Carolina Auto Sales*, 236 S.C. 594, 599, 115 S.E.2d 291, 294 (S.C. 1960) (quoting *Mebane v. Taylor*, 164 S.C. 87, 92-93, 162 S.E. 65, 67 (S.C. 1932)) Further, where there is evidence that an agent acted for the principal and the principal accepted the arrangements made on his behalf by the agent, the agency relationship was established. *See Jay Cee Fish Co v Cannarella*, 279 F. Supp. 67 (D.S.C. 1968).

B. Analysis

This case is unique in that the two major players, Zerbst and Lanier were employed with a competitor of Ameris, First Reliance Bank, but left and both became employed at Ameris. The conduct of Zerbst and Ameris' agents prior to his official hiring in January 2008 and the process of hiring Zerbst, are facts that led to my determining that an agency relationship existed between Ameris and Zerbst when Gibson finally decided to buy the apartment complex and the loan was structured and accepted by Ameris. Ameris argues that there was no proof that it had made any representations to a third party concerning Zerbst being an agent for the bank. The explanation for this is that Ameris would not represent to a third party that Zerbst was its agent because of the non-compete agreement between Zerbst and Reliance that it was trying to evade.

1. Transfer of Gibson's loan from Reliance to Ameris

Zerbst structured the loan for Gibson at Reliance early September 2007. [Pl. Ex. 67] While employed at Reliance Lanier was aware of the apartment loan for Gibson [Tr. 457] As set forth herein above, Zerbst left First Reliance on October 4, 2007 and was "officially" hired by Ameris on January 11, 2008 Lanier left on or about October 9/10, 2007 and began working at Ameris on October 11, 2007.

Zerbst began talking with Mr. Bogan of Ameris about employment before he left First Reliance After he left First Reliance and before he was "officially" hired, Zerbst was in constant contact with Ameris through Mr. Bogan and Lanier by email, phone calls and in person. Ameris suggests that the contacts between Ameris and Zerbst were not unusual but normal steps in the banks hiring process. When one takes into consideration the facts surrounding these contacts and other things Zerbst and Ameris were doing during this time frame, together with the entire hiring process of Zerbst by Ameris these communications are significant and consequential.

Prior to leaving Reliance, Zerbst spoke with an attorney about a covenant not to compete that he had given to Reliance. He tried to negotiate a resolution of the problem. [Tr. 328-331, Pl. Ex 38] During this time of negotiations with Reliance, Zerbst's email production shows he was actively corresponding with Mr. Bogan of Ameris who was keeping the bank's attorney informed. [Pl. Ex 39] Ameris' employee Lanier testified that Zerbst maintained an office in the Ameris building on Archdale Street and made calls and checked emails during the non-compete period [Deposition of Lanier, Court Exhibit 7, pg 216]

Of significance, it was also during this time that Zerbst was working diligently with Lanier (who was now employed with Ameris) to have Gibson's loan moved from Reliance to Ameris. He represented to Ms Gibson that Reliance was not going to give her a loan but assured her that Ameris would help her. He told her that he had given the loan documents from Reliance to Lanier at Ameris [Tr.129] Zerbst also assured Gibson that he would ultimately be handing the matter for her at Ameris. [Tr. 137] Both of these assurances by Zerbst came to be true.

The testimony of Villavicencio corroborates Gibson's testimony. Villavicencio testified that Zerbst told him he had already left Reliance and was in the process of moving to Ameris. Villavicencio further testified that there was "an understanding between Carl Zerbst and Benji Lanier" in getting Ms. Gibson's loan moved from Reliance where the application was first taken to Ameris where the loan was underwritten and closed. He stated that it was Zerbst who structured the loan to include Ms. Gibson's borrowing the down payment.

Shortly after Lanier began to work at Ameris on October 11, 2007 (within 5 to 10 days) he received a phone call from Zerbst. [Tr.399; 464] Zerbst told Lanier that he was sending Gibson to him to process the loan application for the apartments through Ameris [Tr.400; 401] Lanier was aware that the loan was initially being processed at Reliance when he and Zerbst were employed there. On the day or day after Lanier received the call, Zerbst made arrangements to have Lanier pick him up and travel to the apartment complex to meet with Villavicencio. As they traveled to the site, Zerbst was carrying a package with documents relating to Gibson's loan, but never handed the package to Lanier. When they arrived at the apartment complex, Zerbst made an elaborate show of delivering the package to Villavicencio who in turn told Lanier that he wanted Ameris to handle this transaction. [Tr.pgs 399-403] Gibson was not at this meeting.

Lanier never questioned the package transfer, despite the fact that he thought it seemed "staged." [Tr. 403; 9-14] He simply took the package from Zerbst and did as he requested. Lanier used information in that package as a guide for the loan application and the rental cash flow analysis at Ameris. [Tr 404] He admitted that the loan application he put together at Ameris was very similar to the one structured by Zerbst at Reliance. [Tr 406] In just under two weeks from this "staged" meeting, on November 2, 2007 Ameris made the loan as structured by Zerbst and Lanier. Zerbst's solicitation of Gibson's business for Ameris, his representations that he would take care of Gibson at Ameris, and his clear understanding with Lanier at Ameris regarding Gibson's loan are characteristic of Zerbst's agency relationship with Ameris.

It is without question that Lanier was an agent for Ameris during this time period. He knew Zerbst solicited Gibson's business for Ameris and he actively participated in the solicitation and conduct of Zerbst. From the time Lanier was hired at Ameris on October 11, it appears that Lanier followed the instructions of Zerbst as though he was Lanier's superior. Everything that Zerbst suggested to be done for Gibson was done by Lanier. It is noted that Zerbst was Lanier's superior at Reliance and after Zerbst was "officially" hired at Ameris. The evidence is overwhelmingly clear that Zerbst established this new contractual relationship between Ameris and Gibson with the direct help of Lanier, a loan officer at Ameris. Zerbst was working for and with Ameris on this transaction. Ameris through the actions of Lanier consciously or at least impliedly represented to Gibson and Villavicencio that Zerbst was an agent of Lanier. So with Ameris' collaboration and consent, Zerbst orchestrated the loan to be transferred to Ameris, and both he and Lanier were agents of Ameris when all of this occurred.

2. Gibson's loan structure, approval and closing at Ameris

Shortly after Lanier received the loan documents from Zerbst he began to prepare a loan committee application for Gibson's \$2.8 million dollar loan with a \$700,000 dollar down payment. The loan application was dated October 22, 2007 and submitted to Lanier's superiors including, John Hipp, who was at that time the state president for Ameris Bank. [Tr. 405-406] When Lanier submitted the loan application together with the apartment economic analysis on the 22nd to upper management at Ameris, it had not been signed or reviewed by Gibson. [Tr. 407] On October 23rd at 3:40 PM Lanier emailed Hipp about the Gibson loan in response to some question from Hipp. [Tr. 471] On the same day at 7:40 PM Hipp emailed Lanier stating "Thanks. I think we can draw a circle around this one quickly." [Pl. Ex. 29] Hipp made this quick approval of the \$2.8 million dollar loan from a new customer before he received the information he had requested from Lanier. On October 24, 2007, Lanier emailed Hipp at 5:37 PM sending him responses to his questions. [Def. ex. 24] When questioned about this quick approval Lanier stated.

Q. Did you get the impression that your supervisors at the bank knew about this loan before you brought it to them?

A I can't say for sure.

Q But that is the impression you got?

A Like I said, the loan got approved quickly.

Q You didn't get much resistance from these supervisors at the bank on this loan, did you?

A There wasn't a lot of questions asked in terms of rebuttals; . . .

Q Even with the growth mode you normally would have expected more questions on a loan of this size with a new customer; a new customer who hadn't even filed an application?

A I can't say that for sure, but if I was the approver I would have asked some questions [Tr. 408]

Based upon my observation of Lanier's demeanor when responding to these questions, his answers to the questions, together with the quick approval of this loan by his supervisors, this Court is convinced that his supervisors were aware of this loan and were ready to approve it before he submitted the loan application to them. Lanier testified that he had never handled a loan of this magnitude so quickly. He described it as a unique situation because he was given the loan documents by Zerbst that were nearly complete and because it was approved so quickly. [Tr 478, 479, 482]

The circumstances of the execution of the loan documents were also highly irregular. The execution occurred at a nighttime gala on October 25, 2007 to celebrate the opening of Ameris Charleston office. Gibson's loan was the flagship loan in getting the Charleston office up and running. At the gala, Gibson consumed alcoholic beverages, and she felt pressured to sign the documents. The signing took place around 9:30 to 10 PM in the lobby of the new bank. [Tr. 126-28;479-80]. Gibson had no knowledge of the need for the Klister Lane property to be additional collateral for the loan until the night of the grand opening of the bank. She agreed to encumber the Klister Lane property and sign the documents because of the unusual circumstances of that night and because of her trust in Zerbst and Lanier, and Villavicencio. [Tr 126-28, 476-77] In any event, the representations and actions put in

motion by Zerbst with respect to Ms Gibson's loan were accepted by Lanier. He understood Ms Gibson's inexperience and knew of Villavicencio's overreaching. Lanier pushed Ms. Gibson into signing loan documents at the after-hours grand opening of the bank in order to hurriedly move forward. Lanier was certainly Ameris' agent.

Further, South Carolina Courts have held that where there is evidence that an agent acted for the principal and the principal accepted the arrangements made on his behalf by the agent, the agency relationship was established. *See Jay Cee Fish Co. v. Cannarella*, 279 F. Supp. 67 (D S. C. 1968). Zerbst not only sent Ms. Gibson to Ameris, he participated in structuring the loan, including advising Gibson to fund the down payment for the purchase of the apartments by placing a mortgage on her beach house. Ameris accepted the arrangement made by Zerbst for Ms. Gibson's loan and welcomed her business.

It is significant that, when first asked in discovery (early in the case) about the documents Ameris reviewed in order to process Ms Gibson's loan, Ameris claimed it did not know, because "Karl Zerbst handled the processing of the loan applications relevant to this case. Mr. Zerbst is no longer an employee of Ameris Bank, and Ameris therefore cannot ascertain what documents he may have reviewed." At a later time, possibly when the significance of the above answer became apparent, Ameris amended the answer to the interrogatories by asserting "Ameris has since determined that this information was incorrect because Mr Zerbst did not begin working for Ameris until more than two (2) months after Gibson purchased the apartment complex..." I find the amendment to be disingenuous. Gibson has always maintained that Zerbst was acting as Ameris' agent before he became officially employed. The fact that Zerbst was not officially employed by Ameris until after the loan does not mean that he did not process the loan for Ameris before he formally joined its ranks. Ameris was unable to produce any witness to explain why the first answer was given or why the "mistake" was made.

3. Official hiring of Zerbst

I now turn to the process of hiring Zerbst by Ameris. Zerbst “officially” started working for Ameris Bank on January 11, 2008 but there is sufficient evidence that he was working for them well before that date. Zerbst was pushing clients from First Reliance to Ameris, including Ms. Gibson. Zerbst also admitted he had several conversations with Ameris about employment and that Ameris “had a positive response to me if I could help them open up the market. That is where they were going – that is what excited me.” The \$2.8 million loan was a large loan in the Charleston market, and Zerbst delivered that loan to Ameris which was quickly approved. Zerbst was in constant contact with Ameris Bank by email, phone, and in-person with Mr. Bogan and Mr. Lanier before his formal hiring.

In addition, the procedures for hiring new employees that Ameris Bank requires were not followed in the hiring of Zerbst. The manner in which Mr. Zerbst was “officially hired” strongly suggests that it was just that – a formalizing of employment that had already occurred but was not yet announced to avoid problems with the non-compete agreement. Mr. Sturm, the president of Ameris South Carolina testified that potential employees of Ameris Bank “would go through a series of interviews with various folks.” Such was not the case with Zerbst. He was interviewed by Bogan who remembered little to nothing about the hiring process. No other credible evidence was presented regarding any “series of interviews with various folks.”

Those responsible for hiring Zerbst avoided directly discussing the hiring process. Bogan stated that he spoke with Zerbst, but when asked about when, and the content of his conversations, he was evasive and could recall nothing about when he interviewed Zerbst or what was said. In response to questions about Zerbst’s hiring, Bogan most often responded “I don’t recall.” [Bogan deposition 23-26] When asked if he had any calendar or record that he could go back to help identify when he met with Zerbst, he stated: “No.” It is noted that at one time, Ameris was in possession of Zerbst’s 2007 day planner during the relevant times of this case but was claimed to be lost.

On January 9, 2008, Zerbst filled out and signed his application for employment. On the same day at 3.07 pm, Amy Bigham, executive assistant for Mr. Hipp, emailed Mr. Bogan that "Karl is good to go. I am working on the benefit summary sheet and can include it when I send the offer letter." Later that afternoon at 3.25 pm, Mr. Bogan responded to Ms. Bigham asking "will you please prepare an offer letter with the following terms...."

Although Mr. Sturm testified that a formal letter asking a potential employee to join Ameris Bank would not be issued until after a drug screening, this was not true for Zerbst. According to LacCorp's information, the date of collection of samples from Zerbst for screening was January 14, 2008. This was four days after Zerbst's employment letter was offered and three days after it was accepted on January 11, 2008. It is convincingly clear that Ameris and Zerbst were trying to keep Zerbst involvement with Gibson's loan under the radar in order to circumvent Zerbst's non-compete agreement.

Ameris argues that there is no evidence that Ameris had the right to control the activities of Zerbst at the time the loan originated and was approved and therefore he was not their agent until he was formally hired in January 2008. I reject that argument. Ameris had the ultimate control of this loan that was brought to them by Zerbst and structured by him and Lanier for its benefit. Ameris could have from the very beginning rejected the loan as structured. Instead, the representations and actions put in motion by Zerbst with respect to Ms. Gibson's loan were consented to, ratified, and accepted by Lanier, who was unquestionably an agent of Ameris during the relevant time period. As discussed above, that based on the testimony of Lanier and the other facts surrounding the loan, this Court finds that Lanier's superiors were aware of this loan prior to the loan commitment being presented to them. The greater weight of the evidence establishes that Ameris accepted and participated in Zerbst's solicitation and structuring of Gibson's loan with full knowledge of the facts and with little, if any, reviewing or questioning.

In a case styled *First Reliance Bank v Karl H. Zerbst and Ameris Bank*; case no. 2008-CP-21-785, First Reliance sued Zerbst and Ameris for stealing First Reliance clients and alleged that Zerbst was essentially a ghostwriter on several loans for clients which began at First Reliance and ended up with

Ameris. First Reliance alleged Zerbst was working for Ameris in the fall of 2007 and claimed Zerbst and Ameris were keeping Zerbst's involvement under the radar in order to circumvent Zerbst's non-compete agreement. The case was ultimately settled with First Reliance.⁵

Conclusion

The evidence clearly establishes from the totality of the circumstances surrounding Zerbst and Lanier leaving First Reliance; the transfer of Gibson's loan to Ameris; the structuring of the loan and the manner it was approved, and the process of the official hiring of Zerbst, that he was an agent of Ameris as early as October 11, 2007. Zerbst worked for and with Ameris to secure Gibson's business. Lanier was an agent of Ameris as of October 11th and he immediately followed Zerbst's instructions and demands relating to Ms. Gibson's loan. Lanier used the documents provided by Zerbst to prepare the loan committee application and the apartment economic analysis form that he submitted Bogan and Hipp for approval. It was very similar to the way the loan was structured at Reliance by Zerbst. Lanier never questioned anything that Zerbst asked of him. Ameris accepted and confirmed the actions of Zerbst all for the banks benefit. Mr. Lanier's actions support and justify Gibson's belief that Zerbst was an agent of Ameris

II. The evidence established that Ameris had a fiduciary relationship with Ms. Gibson.

Ameris argues that there is not a single appellate court decision in South Carolina in which the court has found a fiduciary relationship existed between the bank and its customer. In reviewing the cases supporting the position of Ameris, the facts of those cases are clearly different and are not even close to the circumstances and facts of this case. The relationship between Zerbst / Ameris and Gibson was much more than a mere creditor – debtor relationship. There was no credible evidence presented to establish

⁵ The parties' filings in the litigation between First Reliance and Mr. Zerbst and Ameris state that Ameris was in possession of Karl Zerbst's 2007 day planner, which presumably would have shown exactly when Karl Zerbst and Ameris met to discuss Mr. Zerbst employment. However, Ameris has failed to produce the 2007 calendar, claiming it has been lost (Trial Transcript pgs 332-333). Based on the other evidence presented, it is likely that the 2007 calendar would contain further evidence that Mr. Zerbst was acting as Ameris' agent before he was formally employed by Ameris. As Ameris has been unable to produce the 2007 calendar, I find the Plaintiff is entitled to a presumption that the evidence contained in the 2007 calendar would be damaging to Ameris. See *Stokes v Spartanburg Regional Medical Center*, 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006).

that Gibson ever negotiated any of the terms of the loan or the use of collateral to secure the loan. She simply followed the advice and recommendation of Zerbst, Lanier and Villavicencio. She learned of the additional collateral subject to the loan around 9:30 to 10 PM on the night of the Ameris' opening gala. Gibson imposed a special confidence and trust in Zerbst and Lanier which they induced and accepted. There is compelling evidence to establish this trust relationship. Because Zerbst and Lanier were agents of Ameris it had a fiduciary relationship with Gibson.

A. Law

"A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Island Car Wash, Inc. v Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). To be a fiduciary relationship, the relationship must be more than casual. *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 330, 574 S.E.2d 502, 507 (Ct. App. 2002) (citing *Steele v. Victory Sav. Bank*, 294 S.C. 290, 368 S.E.2d 91 (Ct. App. 1988)). "Courts of equity have carefully refrained from defining the particular instances of fiduciary relationship in such a manner that other and perhaps new cases might be excluded and have refused to set any bounds to the circumstances out of which a fiduciary relationship may spring." *Island Car Wash, Inc.*, 292 S.C. at 599, 358 S.E.2d at 152; see *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986) ("As a general rule, mere respect for another's judgment or trust in his character is usually not sufficient to establish such a [fiduciary] relationship. The facts and circumstances must indicate that one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party."). Thus, in order to determine whether a fiduciary relationship existed between Ameris Bank's agents, Mr. Lanier and Mr. Zerbst, and Ms. Gibson, this court must look to the particulars of the relationship between the parties.

The general rule in South Carolina is that a bank does not owe a fiduciary duty to its customers. *Burwell*, 288 S.C. at 40, 340 S.E.2d at 790; *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct.

App 2003); *Rush v. S.C. Nat'l Bank*, 288 S.C. 560, 562, 343 S.E.2d 667, 668 (Ct. App. 1986). However, if a bank undertakes to advise its customer as a part of the services the bank offers, then a fiduciary relationship may exist between the bank and its customer. *Id.* "Such a relationship charges the bank with a duty to disclose material facts which may affect its customers' interest." *Burwell*, 288 S.C. at 40-41, 340 S.E.2d at 790. Yet, no fiduciary relationship between a bank and its depositor exists when the bank is unaware of any special trust reposed in it. *Id.*; *Steele v. Victory Sav. Bank*, 295 S.C. 290, 294, 368 S.E.2d 91, 93 (Ct. App. 1988).

B. Analysis

Shortly after her husband died in 2003, Gibson began to engage in business with Zerbst at Reliance. She initially met with Zerbst several times seeking information about rates and investing her money in the bank [Tr 118]. This was the beginning of special relationship between Ms. Gibson and Zerbst. In December 2005, after Villavicencio convinced Gibson to purchase a shopping center, he took her to Reliance to arrange for the financing of the shopping center. Both Zerbst and Lanier were employed at Reliance at this time. Lanier was the credit analyst for the transaction and Zerbst assisted in structuring the loan package. Gibson talked with Zerbst about whether or not the shopping center was a good investment for her. She trusted what he told her [Tr 119]. Both Zerbst and Lanier recommended to Gibson that she place a second mortgage on a home she owned on Isle of Palms to finance the loan and she agreed to do so. [Pl Ex 32]. This credit memo, together with the testimony of Gibson, is persuasive evidence that Zerbst was giving her advice. Relying on her conversations with Zerbst and the recommendations by him and Lanier, she closed on the shopping center. At this stage of his relationship with Gibson, Zerbst knew that Gibson trusted him and that she would follow his advice. This shopping center transaction gives substantial and credible insight into the personal and fiduciary relationship between Gibson and Zerbst and Lanier which carried over to their employment at Ameris.

In early 2007, Villavicencio suggested to Gibson that she purchase the apartment complex for \$2.8 million. On May 7, 2007 Gibson signed a contract to purchase the apartments for the \$2.8 million so

that Villavicencio could try to put a deal together. The "contract" was unenforceable as it lacked consideration. And, while it was contingent on obtaining financing, it was silent on financing terms. The contract did not specify how much Ms. Gibson proposed to put as a down payment on the purchase nor how much she expected to finance and the financing terms. Villavicencio contacted Zerbst about the "contract" to discuss with him the financing of the apartments. At this time, Zerbst was still employed at First Reliance. He admitted that Gibson was inexperienced with real estate investments and relied on the advice of others and he had a personal connection with her. [Tr.309-310] When Villavicencio called Zerbst about Gibson buying the apartments Zerbst asked him if Gibson knew about it. He was concerned that Villavicencio might be doing something that Gibson did not know about. Knowing that Gibson was not a sophisticated investor and because of his prior relationship with Gibson [Tr. 310], Zerbst insisted that Villavicencio bring Gibson in for a meeting to discuss the purchase and financing of the apartments. [Tr.355]

At the time Gibson signed the contract she was not ready to close. She had doubts about borrowing the \$2.8 million dollars and how she was going to pay it back because she didn't have that amount of money available. [Tr. 124] Unsure of how to obtain financing to purchase the apartments including the substantial down payment and how she would pay back the money back, she once again sought the advice of Zerbst. He advised Gibson that purchasing the apartments was a sound financial decision for her and a suitable investment as the rents generated by the apartments would cover the debt on the property. [Tr. 124, 140-142] Zerbst advised and recommended to Ms. Gibson that she fund the substantial down payment of \$700,000 by placing a loan on her beach house and he structured the loan with this knowledge. Although, Zerbst denied that he recommended to Gibson that she refinance her beach house for the down payment, the testimony of Gibson was believable. Her testimony was supported by the fact that this was not the first time he recommended to her that she borrow money against this home for a down payment. [Pl Ex 32] It is entirely reasonable and believable that he recommended to

Ms. Gibson that she refinance the beach home for the down payment on the apartments, just as he did for the shopping center.

She applied for a loan with Reliance in September 2007. [Def. Ex. 11 -12] At this time, in the sequence of facts presented to this Court, the greater weight of the evidence is convincing that the relationship between Zerbst and Ms. Gibson was much more than a casual one and more than a creditor and debtor relationship. He knew she trusted him and he accepted that trust. There is more credible evidence which establishes that this is a fiduciary relationship founded on trust and confidence reposed by Gibson on Zerbst.

Gibson testified that Zerbst told her there were problems at Reliance and they would not handle her loan. He told Ms. Gibson that he had given the documents to Lanier at Ameris and that she would be better served at Ameris. [Tr. 129] This was not the truth. The loan was approved at Reliance. [286] She was also told that Zerbst would ultimately handle the loan for her at Ameris. [Tr. 137] Based on her relationship with Zerbst and Lanier, Gibson took her business to Ameris. They ended up handling Ms. Gibson's loan at Ameris. Zerbst's actions and words evidence his precognition that Ms. Gibson placed her trust in him and was relying on him, and he accepted that relationship of trust. If this was a mere debtor and creditor relationship, why would Zerbst take the actions and steps he took to get Ms. Gibson's loan to Ameris? He knew Ms. Gibson trusted him and Lanier. He accepted that trust and induced that confidence and used it to influence Ms. Gibson to move forward with her loan and to take it to Ameris.

Shortly before the closing of this loan with Ameris, Gibson again had a conversation with Zerbst concerning the purchase of the apartments and the loan. She was not sure this property was good for her and if she should invest in it. She asked him about the location of the apartments, the rent, and did he think it was a good sound investment for her. She wanted to make sure that she would not get into any financial problems. She made it clear that she was requesting financial advice from Zerbst. [Tr. 141-142; 220-224] The testimony of Gibson established the fact that she always had concern about the purchase and loan. It took from May of 2007 right up to the date of the closing for Villavicencio and Zerbst to

convince her that the apartments were a suitable investment for her. [124, 12-21] Zerbst admitted that he told Ms Gibson that the loan would be safe for her because it was structured in such a way that the projected rents would cover the debt service. He assured her the rent from the apartments would be able to support the mortgage on the beach house and would also pay the mortgage to Ameris. [Tr 317-318]

In responding to questions by Ameris' attorney about her asking Zerbst for financial advice Ms Gibson had this to say:

Q. Did you tell Mr. Zerbst: I'm relying on you, Karl, to let me know whether this is a good deal so I can make a final decision whether to go through with this purchase or not? Did you let him know that?

A. In so many words, yes.

Q. Well, did you say that expressly? Not necessarily in those words, but did you tell him. I am relying on you to make a decision to purchase?

A. Mr. Stepp, I do not recall verbatim what I said to Mr. Zerbst at that phone call or any other phone call. It was basically - - basically, yes, that's what I had expressed to him many times. [Tr 219-9-21]

This was not a situation where Ms. Gibson was determined to borrow the \$2 8 million and purchase these apartments. No credible evidence was presented to establish that Ms. Gibson negotiated any of the terms of the loan, or the collateral that was to be used to secure the loan. In fact, she did not even know extra collateral was to be given until faced with that at around 9.30 to 10 PM on the night time grand opening of the bank when Lanier told her. She was simply trusting in Zerbst, Lanier and Villavicencio for advice and followed their recommendations. All three of these men knew this and encouraged her trust and accepted her trust and gave her advice. There is no question in my mind that Ms. Gibson placed her trust in Zerbst and was justified in so doing. Evidence establishes that Zerbst knew she sought his advice and he gave her advice not just an opinion. She took his advice and closed the loan.

Ameris relying on *Trotter v. First Fed. Sav. & Loan Ass'n*, 298 SC 85, 89, 378 S.E.2d 267,269 (Ct. App. 1989), argues that the relationship Gibson and Ameris was governed by the loan documents. That case states that usually the relationship between a depositor and the bank was defined by the written contractual agreement. The relationship between Gibson and Ameris was much more than one of a depositor and bank. The fact that Ameris is trying to hide behind mountains of documents, disclaimers, and appraisals adds to the egregiousness of their actions. As Ameris argues that Ms. Gibson is governed by the loan documents, they argue that the bank was not governed by these same documents. Ameris did not follow the terms of those same loan documents. For example, the construction loan agreement required an AIA request form before Ameris was permitted to disburse. Ameris ignored this requirement. Ameris disbursed monies to the project manager who had no ownership in project/property. "To date, there is \$290,000 of advances that are not supported by invoices, AIA document or any other information in support of the work being completed." [Pl. Ex. 30]

Mr. Lanier's explanation was that this was a boilerplate agreement and the requirements of the agreement would only have to be followed at the banker's request. In other words, Ameris could pick and choose which portions of the documents would be enforceable to the detriment of Gibson. This explanation of the loan documents by Lanier is consistent with this Court's impression that some of the testimony of Ameris' witnesses was "boilerplate" testimony which Ameris would use whenever it needed to protect itself. This type of testimony was evident when several of Ameris' witnesses denied the agency relationship of Zerbst. It was evident when they denied the fiduciary relationship with Gibson and the pursuit of her loan and the structuring of the loan. This "boilerplate" type of testimony was evidenced when Ameris' witnesses described the hiring of Zerbst, and the referral of Ms. Gibson to the attorney they had chosen for her.

After being questioned about signing documents acknowledging that she did not rely on the bank in her decision making, Ms. Gibson's testimony is insightful and consistent with this court's view of the testimony: "I think when someone tells you what they feel about that situation and then, as you say, had

me sign papers releasing them of any obligation of anything they told me, that seems a little deceiving to me.” [Tr. 225; 14-18] Based on the demeanor and manner in which the witnesses testified, I find that Gibson’s testimony was much more sincere and credible than the rigid, matter of fact manner of testimony given by some of Ameris’ witnesses. Based on the evidence presented in this case, this court will not allow Ameris to hide behind the written loan documents

Zerbst was “officially” hired on January 11, 2008 and thereafter he continued to accept the trust and confidence Ms. Gibson reposed in him. In 2009, it became apparent that Ms. Gibson could not pay back her loan to Ameris. At the same time, Zerbst advised and convinced Ms. Gibson to hire his personal attorney to help her in her case against Villavicencio. Ms. Gibson followed Zerbst’s recommendation and hired his attorney and paid a non refundable \$20,000.00 retainer. [Tr. Pl. Ex. 14] and [Tr. 150; 338-340] Interestingly, Zerbst never told Ms. Gibson that her attorney was at that time also representing him as he and Ameris were being sued by Reliance over the alleged breach by Zerbst of his non-compete agreement with First Reliance.[Tr. 338-340]

Zerbst began to ask that Ms. Gibson put up additional collateral for the loan. She was hesitant and became suspicious of putting up more collateral for her loan with Ameris. Zerbst began talking with her lawyer and setting up meetings so he could be present with her and her attorney. [Tr. 152 -153] Several emails were presented to evidence this meeting. [Pl. Ex 51, 52] One of the attorneys in the firm representing Ms. Gibson and Zerbst was also opening accounts at Ameris. Zerbst sought to discuss, in advance of the meeting, Ms. Gibson’s “situation with the bank” when the attorney came in to open his accounts. [Tr. 53] The hiring of her attorney upon the advice of Zerbst further confirms that Gibson took his advice and Zerbst knew she trusted him and relied on him and would do virtually anything he recommended.

As was typical, Ms. Gibson followed Zerbst advice and went to the meeting with her attorney set up by Zerbst. The meeting took place in August of 2009. When Ms. Gibson arrived at the Richter Firm, Zerbst was present as well as a representative of Joe Bartone, a tenant of Ms. Gibson’s, who leased the

Klister Lane property. He had repeatedly sought to purchase the property from Ms. Gibson. Mr. Charpia, a member of the special assets branch of Ameris attended by speaker phone [Tr. 117, 152-154]

During the meeting Ms. Gibson was asked to sell her property to Mr. Bartone and to sign over to Ameris additional collateral. Ms. Gibson testified:

A: Well, as the conversation went in the meeting they had -- I think his name was Mr. Charpia, Special Assets. I believe Mr. Zerbst told me that he was on a speaker phone, and that was a conversation that all of us were listening to Mr. Charpia, and he was talking about my loan. And I felt all of these men that were sitting around that table -- I felt like they were requiring me to sell my property in order to pay that bank note, and I felt outnumbered and betrayed. That's what I felt

Q: Did you feel that your lawyer was representing you?

A: I thought that Mr. Richter was my lawyer. And I really didn't understand the relationship or what all was going on between him and Mr. Zerbst, but I felt like Mr. Zerbst knew him well enough and that whatever was going on -- that he used that relationship in that meeting to try to get me to do what he wanted me to do for the bank [Tr. 153-154]

As they were leaving the meeting, Zerbst told Ms. Gibson that the apartments were overpriced, the rents were not going to cover her payments, and that the loan was a mistake. [Tr. 157] The law firm withdrew from its representation of Ms. Gibson on or about November 13, 2009, claiming a conflict of interest [Pl. ex. 61] It was then that Ms. Gibson found out that her attorney also represented Zerbst in the lawsuit where he and Ameris were being sued by Reliance over the alleged breach by Zerbst of his non-compete agreement with Reliance.

Up until this meeting, Ms. Gibson had accepted and followed all the advice Zerbst had offered her since 2004. When Ms. Gibson obtained new counsel and refused to sign over additional collateral to Ameris, Mr. Zerbst wrote:

I met with Linda and her new attorney Robert Papa last Monday. He was to get back with me last week but did not although I did receive this email today. Larry Richter confirmed today that his firm no longer represents Linda. I wish he did for our benefit but I understand why he no longer does. [Pl. Ex. 35]

Zerbst testified that "our benefit" is the benefit of Ameris. It is reasonable to conclude that Zerbst knew Gibson would follow his advice and hire his attorney so that he could use his relationship with his attorney to help him persuade Ms. Gibson to sell or sign over additional unencumbered collateral to Ameris. [Tr. 348]

Conclusion

After carefully considering the demeanor and manner in which the parties testified regarding the relationship between Ms. Gibson and Zerbst together with the totality of the circumstances surrounding their relationship that began sometime in 2004 ended in 2009, the greater weight of the evidence establishes that this was a fiduciary relationship. It began when Zerbst was at Reliance and continued until the relationship was ended after the troubling meeting Gibson had with her attorney and employees of Ameris. This fiduciary relationship is founded on the trust and confidence Ms. Gibson reposed in Zerbst. He was aware of the special confidence Gibson placed in him. Therefore, in equity and good conscience, Zerbst was bound to act in good faith and with due regard to the interests of Ms. Gibson.

BREACH OF FIDUCIARY DUTY

One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation. *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004). If a bank undertakes to advise its customer as a part of the services the bank offers, then a fiduciary relationship may exist between the bank and its customer. *Id.* "Such a relationship charges the bank with a duty to disclose material facts which may affect its customers' interest." *Burwell*, 288 S.C. 40-41, 340 S.E.2d at 790. Ameris' expert witness admitted a duty to tell Ms. Gibson that the project revenue would not carry the loan. [Tr.612: 11-24] Ameris breached that duty. A party is bound by its own evidence and that of its expert witness. *Benford v. Berkeley Heating Co.*, 258 S.C.357, 365, 188 S.E.2d 841, 844 (1972).

Having assumed the duty of advising Ms. Gibson how to finance the project, Ameris, through its agents Zerbst and Lanier, was negligent and breached its duty in a number of ways. Zerbst admitted that

he told Ms. Gibson that the loan would be safe for her because it was structured in such a way that the projected rents would cover the debt service including the mortgage on the beach house. [Tr. 317-318] Ameris never should have recommended Ms. Gibson purchase the apartment complex. In fact, Zerbst later admitted to Ms. Gibson that he never should have made the loan because it was overpriced and the rents from the apartments would not cover the payments on the loan. [Tr. 157]

Ameris never should have recommended or permitted Ms. Gibson to borrow the down payment for the apartment complex which caused the purchase of the apartments to be with 100% borrowed money Zerbst knew the down payment was being borrowed and the evidence shows that he recommended that and structured the loan in that manner. Lanier testified that he did not know the \$700,000 was borrowed but if he had he known, it would have made a difference in this loan When asked when preparing the apartment cash flow analysis that he submitted for loan approval he said the following;

Q. Did you take the repayment of the \$700,000 second mortgage into account when you did that cash flow analysis?

A. No, sir, I did not.

Q. If you had taken that repayment of the \$700,000, it would have made a big difference in the landscape of the loan, wouldn't it?

A. In the overall picture specific to the apartment complex, yes sir. [Tr 453:15 – 454:2]

Zerbst testified that Lanier most certainly knew the down payment was borrowed [Tr. 349:19-350:2] Don Snipes (regional credit officer and senior vice president of Ameris) testified that if he had known that the \$700,000 cash injection / down payment was borrowed, he would have looked less favorable on the loan, it would have made a difference and he strongly doubted he would have made the loan. [Tr. 276:13-278.2] Zerbst later admits that he never should have made the loan because it was overpriced and the rents on the apartments would not cover the loan. [Tr. 157. 10-16] These bankers knew the loan as structured should not have been made and yet no one revealed this to Ms. Gibson.

Ameris' expert says the bank had the duty to tell Ms. Gibson that the project revenue would not carry the loan. Because of the fiduciary relationship with Gibson, Ameris had the duty to disclose this crucial material fact to her. Knowing that Ms. Gibson trusted and relied on their advice, instead of disclosing this fact to her, Zerbst and Lanier hid this material fact from her and advised her that this was a good investment. Ameris breached this duty to tell Ms. Gibson of this material fact which definitely affected her interest and thereby caused her damage.

Shortly after the loan closing, Ms. Gibson was admitted into the hospital and was ill for a period of four or five months. [Tr. 105] Following the purchase of the apartments, the renovation of the apartments began. Prior to Ms. Gibson being able to travel after her physical problems, she talked to Villavicencio who assured her everything was fine, on schedule and on budget. [Tr. 107; 1-6] She also talked to Lanier at Ameris. Based on this conversation, she believed everything was going fine with the renovations. When Ms. Gibson was able to view the progress of the work in late February early March 2008, she found that everything was completely opposite to what she had been told. [Tr. 107, 7-25] She called the bank about the accounting of the money and discovered that about half of the renovation money was gone and not one of the apartment buildings had been completed. [Tr. 108, 10-24] Ameris disbursed large sums to contractors or other vendors, including, ReMax. [Def. Ex. 42] Ms. Gibson was never made aware of the advances paid by Ameris, nor did Ameris ever request her approval before paying the draws. [Pl. Ex. 23, 22, 30]

Ameris failed to inspect the project to ensure the improvements and draw requests were consistent with the project costs. [Pl. Tr. Ex. 30, Tr. 383-394, 392-396]. Ameris never verified the contractor on the project and did not require a contract or AIA document or any other information in support of work being completed. [Pl. Ex. 30, Tr. 415] There are no disbursement requests in the Ameris

file as required by the loan agreement. Ameris' own records reflect that it paid \$290,000 in construction draws that are not supported by invoices⁶. [Pl. Ex. 30]

That Ameris undertook to act as Ms Gibson's fiduciary and breached its duty, is bolstered by Ameris' Regional Credit Officer and Senior Vice President Don Snipes' email of July 3, 2009 wherein he states

As you may remember, we have some culpability in her problems as we did not manage the construction loan as we should and have potentially aided in her former property manager at REMAX may have siphoned off some of the loan proceeds. She is currently in litigation with REMAX over this as the agent was representing them when this occurred, but we are a long way from any settlement [Pl. Ex. 31]

Normally, a bank who agrees to inspect the property assumes no duty to supervise construction. *Roundtree Villas Ass'n, Inc. v 4701 Kings Corp.*, 282 S.C. 415, 321 S.E 2d 46 (S.C 1984). The only exception to this rule is where there is an independent obligation, either by undertaking or virtue of the relationship of the parties *Id.* Again the Court finds this was not a simple debtor / creditor relationship Snipes' email, discussing "culpability" demonstrates that Ameris undertook and recognized a duty to Ms Gibson and a special relationship with her. Further, and merely cumulative as evidence, an internal memorandum placing Benji Lanier on probation for "lack in judgment" shows that Ameris recognized there had been a breach of the duties owed to Ms Gibson. The internal memorandum states:

The loan in the name of Heritage Seven, LLC was closed on November 2, 2007 for \$2,800,000, by Benjie Lanier...the owner was never made aware of the advances...The owner, Linda Gibson, should have agreed to the advances by signing off on the request or Benjie requesting her approval before each advance was made. Benjie failed to inspect project to ensure improvements were consistent with project costs. To date, there is \$290,000 of advances that are not supported by invoices, AIA document or any other information in support of work being completed. Benjie has knowledge that he must inspect the property when advances are made and request support by invoice or other information that work has been performed. Owner is questioning where the funds have been used

⁶ Ameris suggests that the project was viable and had the rehabilitation been successful, the building would have rented and carried the property. Were this so, Ameris by allowing \$290,000.00 to go unaccounted for, prevented the construction, the lease up, and payment of the mortgage and therefore, caused the resulting damages, *infra*.

prior to her taking over the project...Other weaknesses observed is there is no signed contract, assignment of contract or due diligence by the loan officer to verify the validity of the contractor. [Pl. Ex. 30]

Zerbst testified that Lanier/ Ameris had control over the money that was to be disbursed. He also agreed that Lanier did not exercise that control properly. [Tr. 392; 21- 393; 4] When questioned about his concern as to where the advances were going, Zerbst admitted that all the money advanced by Lanier did not go into the project.

A. . .I do have concern. . . because I was worried that the money didn't go into the project. In fact, it became apparent that not all the money did go into the project. [394, 15-19]

A. My concern, your Honor, was the money going into that project properly for the benefit of the bank and the borrower to get the project completed based on the dollars [395;1-4]

Zerbst also admitted that Ms. Gibson should have agreed to the advances by signing off on the requests. [Tr. 395, 14-21] When asked why he put in writing that Lanier lacked judgment because the owner was not made aware of the advances, he answered as follows;

A. Because whenever there is a problem in fact about the work being performed, the owner should be notified of that through, in this case, the project manager or the bank lender in the case, and I couldn't show, looking into the files, that that in fact was done. [Tr.395, 25- 396; 1-5]

A. You would hope that the borrower - - and yes; Benjie in this case, Mr. Lanier should probably have in fact contacted the borrower, Linder Gibson, just to ensure that she was absolutely completely aware of those funds [Tr 396; 14-19]

Both Lanier and Zerbst knew of Ms. Gibson's hospitalization and knew she was a novice in this type of investment. They knew she relied on their help and advice and acceptance that reliance. Yet, Ameris failed to properly control the advances and failed to notify her that the money was not going into

the project. Ameris admitted that they had control over the money that was being advanced and did not exercise that control properly. [392; 21-393; 4]

AIDING AND ABETTING MR. VILLAVICENCIO

Gibson alleges that Villavicencio breached fiduciary duties owed to Ms. Gibson and that Ameris aided and abetted the breach. The Court agrees.

“The elements for the cause of action of aiding and abetting a breach of fiduciary duty are (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant’s knowing participation in the breach; and (3) damages ” *Vortex Sports & Emtm’t, Inc. v Ware’s*, 378 S.C 197, 204, 662 S.E.2d 444, 448 (Ct App. 2008). “The gravamen of the claim is the defendant’s knowing participation in the fiduciary’s breach ” *Id.*

The Court finds that the relationship between Ms Gibson and Villavicencio was fiduciary in nature. Ms. Gibson testified that Villavicencio convinced her to purchase the apartment complex, that she was relying on him heavily, and that she regarded him as her financial advisor and her real estate agent. [Tr. 185:25-186:16]. Further, Villavicencio’s testimony establishes that he advised Ms Gibson in her real estate investments. He admitted that she trusted him and was justified in trusting him. He testified that she relied on his advice and her reliance was justifiable [Tr. 623:9-624:5]

There is sufficient evidence that Villavicencio breached his fiduciary duty to Ms. Gibson. Ms. Gibson’s testimony included a statement that said she discovered that Mr. Villavicencio stole “several hundred thousand dollars from her.” [Tr. 72:4-8, 112:20-23] Villavicencio also mismanaged the money he received from Ameris Bank because when Ms. Gibson got out of the hospital to check on the project, she found that it was way behind schedule and that Villavicencio had not followed the agreement. Further evidence that Villavicencio breached his fiduciary duty to Ms. Gibson is that he lied about the market value of the property to Ms. Gibson and the soundness of the investment and he participated in the staged transfer of the loan documents to avoid Zerbst’s non-compete agreement.

Courts have held that banks owe a duty of care to their customers. *See King v Long Island*

Savings Bank, 111 F.3d at 259 (affirming district court decision that “[c]onced[ed] that banks do, in fact, owe a duty of care to their customers . . .”), *Bank Brussels Lambert, S.A v Intermetals Corporation*, 779 F.Supp. 741, 747 (S.D.N.Y.1991)(“it is true without question that [Bank Brussels Lambert, S.A.] had a duty to exercise reasonable skill and care in carrying out its activities for its customer . . .”). *See also Long Island Savings Bank v. Savage*, 145 Misc.2d 731, 548 N.Y.S.2d 363 (N.Y. Sup.Ct.1988)

In a case with facts similar to the present case, the Court of Appeals for the Fifth Circuit held that banks owe its customers a duty to honest and complete information and to ensure that an individual purporting to act on the customer's behalf is actually authorized to do so *See Chaney v Dreyfus Serv. Corp.*, 595 F.3d 219, 235 (5th Cir. 2010) citing *Dubai Islamic Bank*, 126 F.Supp.2d at 667. The Fifth Circuit held that these duties exist separate and apart from any contractual obligations entered into by the parties. *Id.* In *Chaney*, the bank's customer, and insurance company, sued the bank for negligence after the bank allowed the customer's agent to make withdrawals from the customer's account without the customer's approval. The Fifth Circuit reasoned:

Having decided that DSC owed the insurance companies a duty to determine if the redemptions from its accounts were actually authorized, we must ask whether there is a triable issue of fact as to whether DSC breached that duty. We conclude that there is. DSC took no steps to verify that LNS was authorized to make such extraordinary redemptions from the insurance companies' accounts; it chose, instead, to rely exclusively on representations made by Frankel. Clearly, an agent's representations as to the scope of its authority are not determinative, and a third party proceeds on the basis of those representations at its own risk. *See Metro Aluminum Mfg. Co. v. Lau*, 61 Misc. 105, 112 N.Y.S. 1059, 1061 (N.Y. App. Term 1908) (“[T]hird parties dealing with an avowed agent ... do so at their own risk. They cannot rely upon the agent's assumption of authority, but are to be regarded as dealing with the power before them, and must at their peril observe that the act done by the agent is legally identical with the act authorized by the power”). DSC's insistence that Frankel's master contract authorized him to order the redemptions processed by DSC is similarly unavailing. Once the insurance companies are recognized as DSC's customers, a contract between DSC and LNS can hardly be used to satisfy tort duties owed from DSC to the insurance companies.

Chaney v Dreyfus Serv. Corp., 595 F.3d 219, 235-36 (5th Cir. 2010) *Ameris*, much like *Dreyfus Serv*

Corp., owed its customer, Linda Gibson, such duties. Ameris' representatives and expert agree such a duty exists. The bank concedes there is no written authorization allowing Villavicencio to receive her funds. [Tr. 386] Ameris took no steps to verify that Villavicencio had authority to receive Ms. Gibson's funds and did not require proper documentation of Villavicencio's draw requests. [Pl's Ex.30] In fact, Ameris' file does not even contain copies of the draw requests. It appears Villavicencio simply asked for checks to be written from Ms Gibson's account and Ameris complied.

Ameris' own internal documents show that Ameris disbursed \$378,000.00 out of Ms. Gibson's construction account without M. Gibson's knowledge or approval, and that of the \$378,000 00, \$290,000 00 was disbursed without any invoices or other backup documentation. [Pl's Ex.30] It seems incredible that Ameris would hand over Ms. Gibson's construction funds to Mr. Villavicencio without a written authorization signed by Ms. Gibson; however, Ameris conceded no such authorization exists [Tr.386] Ameris' complete lack of supervision of the construction funds and its issuance of checks without the written knowledge or approval of Ms. Gibson and without reviewing any backup documentation for Villavicencio's draw requests allowed Mr. Villavicencio to embezzle Ms Gibson's funds. Ameris concedes liability for its failure to supervise the loan in two internal memos; one written by Regional Credit Officer and Senior Vice President of Ameris, Don Snipes and the other written by Karl Zerbst himself. [See discussion above]

Consistent with the Fifth Circuit's holding in *Chaney v Dreyfus Serv. Corp.*, Ameris' own banking expert, Mr. Barksdale, testified to several duties Ameris owed to Ms Gibson. In particular, Mr. Barksdale testified that Ameris had a duty to tell Ms. Gibson that the project revenue would not carry the debt. [Tr. 612] He testified to several additional duties Ameris owed to Ms. Gibson: 1) not to lie; 2) not to steal; 3) not to mislead, 4) to give an accurate and complete accounting of funds; and 5) to warn Ms. Gibson if it had reason to know Villavicencio was misusing her funds or abusing her trust. [Tr. 607; Lanier pg 416, testimony of Bogan pg 39]

The project was not suitable for Ms Gibson. According to Geoff Southard, the individual hired

by Ameris' successor Galt Valley to testify to the value of the apartments (Trial Transcript pgs 509, 520-522), the property was overvalued and the financing structured in a way that the rents would never carry the debt Mr. Southard stated:

"It seems incredible that Linda paid twice as much as the people she bought the property from They paid \$1.4million and she [sic] \$2.8million. I'm certain that the rents didn't double."

"Again, there is **NO WAY** that this property, in this location, in it's condition at the time was worth anything near the price paid. A look at the income/expense statements will reveal this "

"My opinion, a 100% **BAD BUY!** At the price paid No recovery would help this property."

(Plaintiff's Trial Exhibit 37, emphasis in original)

Despite these admissions, Ameris claims it should not be held liable to Ms. Gibson for aiding and abetting the Villavicencio because it did not knowingly participate in the misappropriation of Ms. Gibson's funds. Mr. Barksdale stated that after he reviewed the entire file he concluded that Villavicencio was a con artist [Tr. 608] Zerbst admitted they had their suspicions about Villavicencio. [Tr. 324] Surely, they did. From the record it is apparent that Villavicencio excluded Ms. Gibson from much of the discussions with Ameris. Ameris obliged by dealing directly with Villavicencio in the transfer of the loan documents from First Reliance to Ameris, allowing the use of an appraisal meant for another bank at Villavicencio's request, and accepting a wildly inflated financial statement from Villavicencio. Lanier never contacted Ms. Gibson to verify her net worth as stated by Villavicencio, as he apparently suspended his judgment, despite the fact that he was the credit analyst on the loan Ms. Gibson obtained from Reliance less than two years prior to the application being submitted to Ameris. Her financial statement at that time showed her net worth to be around 15 million dollars.

These sophisticated bankers with the information available knew this low income housing project was inflated and should never have been purchased with 100% borrowed money. Villavicencio knew this and did not care for he was pursuing his own self-interest and Ameris aided and abetted him in

his endeavors. This was apparent to Ameris, and the exculpatory paper and disclaimers cannot be allowed to obscure this fact.

South Carolina law holds that one is liable for harm resulting to a third person from the tortious conduct of another if one "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself" or "gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." See Restatement (Second) of Torts § 876(b) and (c) (1979) as cited by the South Carolina Supreme Court in *Future Group, II v Nationsbank*, 324 S.C. 89, 97, 478 S.E.2d 45, 49 (S.C. 1996). Ameris gave Villavicencio substantial assistance in allowing this transaction to go forward and in the misguided decision to purchase and to purchase the property with 100% borrowed money and the misappropriation of Ms Gibson's funds.

Interestingly, Ameris argues there was no proof presented to support the finding that Villavicencio breached his fiduciary duty to Ms. Gibson. Yet, they also argue that the amount of money Ms. Gibson recovered from Villavicencio in her breach of fiduciary duty claim against him should be set-off from any judgment rendered against Ameris in this case. The elements of aiding and abetting breach of fiduciary duty have been met Villavicencio breached his duty to Ms Gibson Ameris Bank knowingly participated in the breach by disbursing funds without consent, as well as by their other actions described above. They went so far as to admit their "culpability." As for damages, Ms. Gibson has suffered over \$1 million in actual damages because of Ameris Bank's actions.

NEGLIGENT MISREPRESENTATION

"In a claim for the tort of negligent misrepresentation where the damage alleged is a pecuniary loss, the essential elements include: (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered

a pecuniary loss as the proximate result of his reliance upon the representation.” *Redwend Ltd. P’ship v. Edwards*, 354 S.C. 459, 473-74, 581 S.E.2d 496, 504 (Ct. App. 2003) (citing *Rickborn v Liberty Life Ins Co.*, 321 S.C. 291, 468 S.E.2d 292 (1996); *Koontz v Thomas*, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999)).

A claim for negligent misrepresentation may be made when the misrepresented facts induced the plaintiff to enter a contract or business transaction *Armstrong v Collins*, 366 S.C. 204, 621 S.E.2d 368, (Ct.App 2005).

“A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction ” *Redwend* , 354 S.C. 459, 473-74, 581 S.E.2d 496, 504 (Ct App 2003) (citing *Winburn v. Insurance Co N Am.*, 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct. App.)). Evidence that the statement at issue was made in the course of the defendant’s business, profession, or employment is sufficient to show the element of pecuniary interest, even though the defendant does not actually receive consideration for it. *Sauner v Pub Serv Auth of S.C.*, 354 S.C. 397, 581 S.E.2d 161 (2003). As a preliminary matter, I find Ameris had a pecuniary interest in making the representations charged by Ms. Gibson.

Ms Gibson charges Ameris with at least three material misrepresentations that she alleges induced her into purchasing the Otranto Apartments: (1) Karl Zerbst’s statement that the rents would cover the debt on the property, (2) Ameris’ structuring of the Gibson transaction to include borrowing the required down payment of \$700,000 against another property owned by Ms Gibson such that the purchase of the Otranto Apartments was purchased 100% borrowed money; and (3) Karl Zerbst’s statement that purchasing apartments would be a “good deal” for her.

As previously detailed, Ameris’ agents and expert have testified Ameris had a duty not to mislead and that if it undertook to give advice, the advice should be accurate, complete and honest [Tr pgs 607-612, Bogan deposition pgs 36-38;]. Ameris concedes it had a duty not to conceal a material fact so as to mislead its customer.

The first and most basic requirement of a claim for negligent misrepresentation is that the alleged misrepresentation must be false. *Carolina Chloride, Inc. v. Richland Cnty.*, 394 S.C. 154, 163-64, 714 S.E.2d 869, 873 (2011). Without falsity, the statement is not actionable and does not give rise to liability in tort. *See id.*

The misrepresentations made by Zerbst to Gibson that she would have no shortfall between rents and the debt on the apartments and beach house and that the apartments were a good and suitable investment for her were false and were predicated upon misstatements of fact. Zerbst testified that based on the facts at his disposal, the rents from the apartments would pay for the debt on the apartments and the beach house [Tr.317-318] However, Lanier and Snipes interpreted the same facts differently. Lanier stated if he knew Gibson borrowed the down payment it would have impacted his decision to move forward with the loan. Interestingly, Zerbst said Lanier did know about the borrowed down payment Snipes (regional credit officer and senior vice president of Ameris) said if he had been the loan officer on the deal and knew that the apartments were being purchase with 100% borrowed money, he “strongly doubted” that he would have given the loan to Gibson. [Tr. 276:13-278:2] Zerbst admits that he never should have made the loan because it was overpriced and the rents on the apartments would not cover the loan [Tr 157 10-16] Clearly these representations were false and were based on facts at the disposal of Ameris. The Court finds that Zerbst made these representations to induce Ms. Gibson to purchase the apartments and make the loan with Ameris.

Ameris claims that, independent of its agency argument, the misrepresentations claimed by Ms. Gibson are not actionable as they are statement of future events and/or opinions. Ordinarily, to be actionable, a statement must relate to a present or preexisting fact, and cannot be predicated on statements as to future events. *Davis v Upton*, 250 S.C. 288, 291, 157 S.E.2d 567, 568 (1967). The false representation must be predicated upon misstatements of fact rather than upon an expression of opinion. *Winburn v. Ins Co of N. America*, 287 S.C. 435, 339 S.E.2d 142 (Ct App.1985).

The distinction between a matter of fact and a matter of opinion is generally characterized by what is susceptible of exact knowledge when the statement is made. *Bishop Logging Co. v John Deere Indus Equipment Co* 317 S.C. 520, 527, 455 S.E.2d 183, 187 (S C App.1995). For example, in *Gilbert v. Mid-South Machinery Co, Inc*, 267 S.C. 211, 227 S E 2d 189 (1976), the South Carolina Supreme Court held that a statement about the profitability of business was actionable as a statement of fact given the existence of business records when the statement was made. Here, like in *Gilbert v Mid-South Machinery Co., Inc*, the statements made to Ms. Gibson were based on existing business records, including Ms. Gibson's financial statements, rental data from the project, and projected debt service.

Further, even if the statements *were* about future events, they are actionable if made to "induce the signing of a paper or to make one act, as he otherwise would not have acted, to his injury" *Bishop Logging Co. v John Deere Indus Equipment Co* 317 S.C. 520, 527, 455 S.E.2d 183, 187 (S.C.App.1995) quoting *Coleman v Stevens*, 124 S.C. 8, 15-16, 117 S.E. 305, 307 (S.C. 1923). I find the misrepresentations claimed by Ms. Gibson are statements relating to preexisting facts and existing business records and are therefore actionable. Further these statements were made to induce Ms. Gibson to act, and but for these statements, she would not have moved forward with this transaction.

The second element of negligent misrepresentation is that "the defendant had a pecuniary interest in making the statement." *Redwend*, 354 S.C. at 473-74, 581 S.E.2d at 504. Here, Ameris made the statements to Ms. Gibson in order to solicit her business and have her take out a multi-million dollar loan with them. The evidence established that Ameris had a pecuniary interest in making all three statements to Ms Gibson.

The third and fourth elements of negligent misrepresentation are the defendant must have owed a duty of care to communicate truthful information to the plaintiff and breach that duty. A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction *Redwend*, 354 S.C. at 473-74, 581 S.E.2d at 504. Having previously determined that Ameris

had a pecuniary interest in the transaction, it follows that Ameris owed Ms. Gibson a duty to give accurate information to her.

Zerbst knew Ms. Gibson was an inexperienced and unsophisticated investor (with millions of dollars of inherited real estate). He knew she had trusted him since 2005. He knew Gibson relied on the advice of others [Tr. 309; 1-11, 310; 4-11]. He knew that Villavicencio was involved in the transaction and had some concerns about his involvement. [Tr.324; 17-24] Gibson asked him direct questions about the purchase and the loan. She talked to him about the location, the rents and if this was a good sound investment for her. She discussed if it was a piece of property that suited her and could she pay for it. She was getting information so she could make a decision about the purchase. It is unconscionable that a banker with 26 years experience would not, at the very least, tell Ms. Gibson that he cannot give her investment advice and that she should speak to someone else. Ameris' witnesses were quick to say they gave her no advice, but with all of her questions, never once did anyone at Ameris tell her they could and would not advise her. Instead, knowing that Ms. Gibson was seeking his advice and that she would follow his advice, Zerbst told her it was a good deal for her. He told her the rents would cover the debt. He arranged for the loan to go Ameris with the cooperation and consent of Ameris. This loan was important to Zerbst and he saw it as an opportunity to curry favor with his new bosses at Ameris. It was also important for Ameris because they wanted to become a player in the Charleston market. Ameris had a pecuniary interest in getting Ms. Gibson's loan and it failed to exercise reasonable care in information to Ms. Gibson.

Further, in this case, as set forth more fully above, Ameris had a fiduciary relationship with Ms. Gibson. "Such a relationship charges the bank with a duty to disclose material facts which may affect its customers' interest." *Burwell*, 340 S.E.2d at 790, 288 S.C. at 40-41. It is not a stretch to say that someone acting as a fiduciary with the duty to disclose material facts must communicate truthfully to the other party in the relationship. Ameris' own banking expert, William Barksdale, Jr., testified to several duties that Ameris owed to Ms. Gibson as set forth herein above [Tr. 606, 612]. Ameris Bank conceded in its

testimony that it had a duty to communicate truthful information to the plaintiff I find these elements are fully satisfied by the facts and circumstances surrounding this transaction.

The fifth element of negligent misrepresentation is that a plaintiff must demonstrate that she justifiably relied on the statement *Carolina Chloride, Inc. v Richland Cnty.*, 394 S.C. 154, 714 S.E.2d 869 (2011) "A determination of justifiable reliance involves the evaluation of the totality of the circumstances, which includes the positions and relations of the parties." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 241, 692 S.E.2d 499, 508 (2010) "Reliance can be justified only if the relationship of the parties is such that the defendant occupies a superior position to the plaintiff with respect to knowledge of the truth of the statement made." *Harrington v Mikell*, 321 S.C. 518, 522, 469 S.E.2d 627, 629 (Ct. App. 1996)

"Where there is no confidential or fiduciary relationship and an arm's length transaction between mature, educated people is involved, there is no right to rely" *Florentine Corp. Inc. v PEDA I, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985). As previously discussed, I have carefully examined and evaluated the facts and circumstances in this case, including the positions and relations of the parties and determined that the greater weight of the evidence establishes that this was not an arm's length transaction and a fiduciary relationship exists between Ms. Gibson and Ameris. After seeing and hearing from the personalities involved in this case, it is very obvious to me who the dominant personalities were. Zerbst, Lanier and Villavicencio could easily persuade Ms. Gibson to purchase these apartments, make this loan and encumber her property. They did just that.

In an attempt to show that Gibson was not an unsophisticated or inexperienced investor, Ameris argues that this was not the first time she had been involved in a commercial transaction and the bank is correct. In March of 2005 she purchased a commercial shopping center. But the Court notes that Zerbst, Lanier and Villavicencio were also directly and influentially involved in that transaction. In fact, it was at this time that Ms. Gibson initially placed her trust in Zerbst, Lanier and Villavicencio. Again, Zerbst

testified that Ms. Gibson was new at borrowing money and that she did not have a lot of experience. He knew that she relied on others.

Additionally, Ameris argues that Ms. Gibson did not use diligence and reasonable efforts to protect her interests. She sought the advice of three different people whom she trusted, Zerbst, Lanier and Villavicencio. They persuaded her and misled her to invest in the apartments when she should not have. The representations of the transaction and the ability to service the debt in my estimation were recklessly made with the intent that they be relied upon, as they were. The inducement was self-serving, and Ms. Gibson was damaged in her reliance. Because there was a fiduciary relationship which creates a superior position, I find that Ms. Gibson was justified in relying on Ameris' statements.

Actual Damages

Ms. Gibson has asserted three causes of action, (1) negligent misrepresentation, (2) breach of fiduciary duty, and (3) aiding and abetting breach of fiduciary duty. Each of these causes of action sounds in tort. In a tort case "[a]ctual damages are such as will compensate the party for injuries suffered or losses sustained." *Mellen v. Lane*, 377 S.C. 261, 287, 659 S.E.2d 236, 250 (Ct. App. 2008) (citing *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964)). "Actual damages are awarded to a litigant in compensation for his actual loss or injury." *Id.* "The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred." *Id.* (citing *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000)). "The basic measure of actual damages is the amount needed to compensate the plaintiff for the losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position he would have been in if there had been no wrongful injury." *Id.* (citing *Rogers v. Florence Printing Co.*, 233 S.C. 567, 578, 106 S.E.2d 258, 264 (1958); *Hutchinson v. Town of Summerville*, 66 S.C. 442, 448, 45 S.E. 8, 10 (1903)).

1. The Beach House

To put Ms. Gibson in the position she would have been in had she never purchased the apartment complex, she is entitled to a return of the down payment for the apartment complex. Ms. Gibson's beach house is titled in the name of 3205 Palm Boulevard, LLC. This LLC refinanced the 3205 Palm Boulevard beach house to get the \$700,000 to make the down payment on the apartment complex based on the advice of Mr. Villavicencio and Mr. Zerbst. Ms. Gibson has a 50% interest in the LLC, and personally guaranteed the debt, and has repaid the debt. Ms. Gibson is also personally responsible for paying the interest on the deficiency and has paid monthly interest at 3% in the amount of \$1,125.00 per month since January of 2011 through September 30, 2012, totaling \$23,625.00 [Plaintiff's Exhibit 3]. Therefore, it is of no consequence that 3205 Palm Boulevard, LLC is not a party to this action because it lent Ms. Gibson the money to put a down payment on the apartment complex. Gibson personally guaranteed the debt and repaid it with interest. Therefore, Gibson is entitled to recover \$723,625 dollars to put her in a position she would have been in had she never purchased the apartment complex.

2. Klister Lane Property

Ms. Gibson pledged a piece of property located on Klister Lane, containing a cell tower lot, as additional collateral for the purchase of the apartment complex. [Def.'s Ex. 26, 33; Tr. 89.17-25]. Ms. Gibson testified that after Ameris sold the loans to Galt Valley, she deeded the Klister Lane property to Galt Valley in connection with the settlement of the foreclosure action. [Def.'s Ex. 107; Tr. 90.1-5]. Ms. Gibson's expert witness Tommy Hartnett testified as to the value of the Klister Lane property [Pl.'s Ex. 40; Tr. 247:25-248:5]. According to Mr. Hartnett, the appraisal performed by C. S. McCall & Co., LLC, dated March 8, 2010, which valued the Klister Lane property at \$355,000.00 was proper. [Tr. 247:25-248:3]. This is the best evidence in the record concerning the value of the property. Mr. Hartnett testified: "I found Mr. McCall's appraisal of the tower to be properly done and his conclusions based on the information within that report properly reached. So I concurred in his value of \$355,000." *Id.* The C. S. McCall appraisal is the only probative evidence before the Court concerning the value of the Klister Lane

property. Although Ms. Gibson introduced evidence that Galt valley sold the Klister Lane property in or around April of 2011 for \$510,000 [Pl. 's Ex. 10; Tr. 255:17-256-9], the amount that the property sold for in 2011 is not probative of its value in 2007. As Mr. Hartnett conceded, there is no information in the record about the parties to the 2011 transaction, the circumstances under which the sale occurred, or whether the transaction was a fair market value transaction. [Tr. 257:23-259 5].

Finally, although Ms. Gibson introduced evidence concerning lost rental income on the Klister Lane property, C.S. McCall used an income approach in appraising the property, which takes rental income into account. [Tr. 259 6-20]. Accordingly, Ms. Gibson is entitled to the value as stated in the C.S. McCall appraisal which is \$355,000.

3. Personal Funds Contributed by Gibson

Ms. Gibson is entitled to recover the funds she contributed to save the project because there is credible evidence that Mr. Zerst represented that the \$700,000 construction loan would be sufficient to complete the renovations and that Ms. Gibson would not have to use any of her own money to complete the project. Ms. Gibson testified that during the course of the apartment renovation, she injected \$75,000 of her own money into the project in an effort to avoid the collapse of the project. In observing Ms. Gibson, this Court was impressed with her sincerity, her demeanor and the manner in which she testified. Her credibility was not in doubt. This is sufficient evidence to entitle Ms. Gibson to recover the \$75,000 of her personal funds that she contributed to try to keep the project alive.

4. Attorneys' Fees

Ms. Gibson introduced a variety of evidence regarding attorneys' fees they allegedly incurred since 2008 [Pl. Ex. 5, 9, 11, 13, 15, 26; Tr. 85:13-88:1; 95:17-100:18; 101:7-102:2; 102 12-103 16; 104:4-16]. These fees fall into three separate categories: (1) attorneys' fees incurred in this case; (2) attorneys' fees incurred in other litigation; and (3) attorney fee paid to the Richter Law Firm.

a. This Case

It is well settled in South Carolina that “[a]ttorney’s fees are not recoverable unless authorized by contract or statute.” *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 436, 673 S.E.2d 448, 458 (2009). “Under the ‘American Rule,’ the parties to a lawsuit generally bear the responsibility of paying their own attorneys’ fees.” *Layman v. State*, 376 S.C. 434, 451, 658 S.E.2d 320, 329 (2008) (citing *Pennsylvania v. Del Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 561 (1986)).

Ms. Gibson seeks to recover \$566,000 in attorneys’ fee paid or owed pursuant to an agreement entered into between Plaintiffs and their attorneys in this case [Tr. 95:17-100.18; Pl. Ex. 9]. According to the agreement, Gibson hired the attorneys for representation “in the defense of and pursuit of a counterclaim in a foreclosure action brought by Ameris Bank presently pending in Berkeley County, South Carolina, Case No. 2010-CP-08-2134,” which is the present case. [Pl. Ex. 9]. Having introduced no evidence of any contract or statute that would entitle them to recover their attorneys’ fees in this case, Ms. Gibson may not recover the \$566,000 fee.

b. Other Cases

Ms. Gibson also seeks to recover attorneys’ fees allegedly incurred in the case against her property manager, Rolando Villavicencio, as well as fees incurred in defending a foreclosure action filed against 3205 Palm Boulevard, LLC.

Under South Carolina law, a plaintiff may under limited circumstances recover attorneys’ fees when the defendant’s wrongful conduct has forced the plaintiff to protect her interests by bringing or defending an action against a third person. *See, e.g., Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 129, 414 S.E.2d 118, 119 (1992); *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971). Although some states consider such a recovery to be an exception to the American Rule, South Carolina employs an equitable indemnity analysis in considering whether a plaintiff may recover attorneys’ fees when a defendant’s tortious conduct forces the plaintiff into separate litigation with a third party. *Town of*

Winnboro, 307 S.C. at 129, 414 S.E.2d at 119. In *Addy v Bolton*, the South Carolina Supreme Court noted

In order to recover attorneys' fees under this principle, the plaintiff must show: (1) that the plaintiff had become involved in a legal dispute either because of a breach of contract by the defendant or because of the defendant's tortious conduct, (2) that the dispute was with a third party-not with the defendant; and (3) that the plaintiff incurred attorneys' fees connected with that dispute.

257 S.C. 28, 33, 183 S.E.2d 708, 709-10 (1971).

Moreover, under an equitable indemnity analysis, a plaintiff's ability to recover damages from a tortfeasor incurred as a result of the defendant's actions "is subject to the proviso that no personal negligence of [the plaintiff's] own has joined in causing the injury." *First General Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994); *Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). As explained in one case:

Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not. If the second party is also at fault, he comes to court without equity and has no right to indemnity. The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault.

Vermee Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999) (citations omitted).

Here, Ms. Gibson meets all three requirements necessary for equitable indemnity. (1) The Plaintiffs were forced to sue Mr. Villavicencio and defend a foreclosure suit against 3205 Palm Boulevard, LLC because of Ameris' tortious conduct. (2) The disputes were with third party defendants and not Ameris Bank. (3) Gibson incurred attorneys' fees. Therefore, she would be entitled to the attorneys' fees from those cases under equitable indemnity had Ms. Gibson not been 20% at fault. As discussed below in the section entitled Comparative Negligence, I find that Gibson was 20% at fault, comparatively. Because of Ms. Gibson's comparative negligence, she is not entitled to recover the attorneys' fees under an equitable indemnity theory

c. Attorney's Retainer Fee

Even though Mr. Zerbst, as agent for Ameris, willfully and wrongly used the trust that Gibson had reposed in him and steered her to his personal lawyer, there is no contract or statute entitling Gibson to recover the \$20,000.00 attorney's fees. The request is denied.

Punitive Damages

Punitive damages are intended to “deter the wrongdoer and others from committing like offenses in the future.” *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 393, 134 S.E.2d 206, 210 (1964) (quoting *Bowers v. Charleston W.C. Ry. Co.*, 210 S.C. 367, 378, 42 S.E.2d 705, 709 (1947)). Punitive damages are allowed only when a defendant's conduct is so shocking that punishment is justified. *See, e.g., McGee v. Bruce Hosp. Sys.*, 344 S.C. 466, 545 S.E.2d 286 (2001); *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000). Stated differently, punitive damages are allowed when a defendant has acted in a “reckless, willful, or wanton” manner. *Clark*, 339 S.C. at 379, 529 S.E.2d at 534. A defendant acts willfully or with reckless indifference to the rights of others when the defendant acts in disregard of a high and excessive degree of danger about which he or she knows or which would be apparent to a reasonable person in his or her condition. *Carter v. R.L. Jordan Oil Co.*, 301 S.C. 84, 86, 390 S.E.2d 367, 368 (Ct. App. 1990). Also, there must be a present consciousness of wrongdoing to justify the assessment of punitive damages against the wrongdoer. *Martin v. Martin*, 262 S.C. 168, 174, 203 S.E.2d 385, 387 (1974). Lastly, punitive damages can only be awarded upon a finding of actual damages. *Carroway v. Johnson*, 245 S.C. 200, 204, 139 S.E.2d 908, 910 (1965) (citing *Cook v. Atlantic Coast Line R. Co.*, 183 S.C. 279, 190 S.E. 923 (1937)).

There are eight factors that the trial court may consider in order to ensure that a punitive damages award is proper, and they are: (1) the defendant's degree of culpability, (2) the duration of the defendant's conduct; (3) the defendant's awareness or concealment, (4) the existence of similar past conduct, (5) the likelihood the award will deter the defendant and/or others from like conduct, (6) whether the award is reasonably related to the harm likely to result from such conduct, (7) the defendant's ability to pay; and

(8) any other factors the court deems appropriate *Gamble v Stevenson*, 406 S.E.2d 350, 354, 305 S.C. 104, 111-112 (1991). "Upon completing its review, dedicated to the postulate that no award be grossly disproportionate to the severity of the offense, the trial court shall set forth its findings on the record." *Id* Also, the amount of damages, actual or punitive, remains mostly within the discretion of the jury, as reviewed by the trial judge. *Id.* 406 S.E.2d at 355, 305 S.C. at 112 (citing *Fennell v. Littlejohn*, 240 S.C. 189, 125 S.E.2d 408 (1962)). The United States Supreme Court noted that the due process clause usually limits punitive damage awards to less than ten times the size of the compensatory damages award *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 410 (2003).

This case does not involve the isolated conduct of individuals in the lower levels of management of Ameris. This case is about Ameris' culture, policy and the conduct of upper management or lack thereof. This is the prime determinant in the award and amount of punitive damages. In addition the steering of Ms. Gibson to a lawyer in order to control her decision making is egregious and corrupts the role of counsel in our system of justice. The following is my review / analysis of the factors set forth in *Gamble* as they apply to this case

1. Degree of Culpability

Ameris has a high degree of culpability. This was not an arms-length transaction. I repeat, I observed Ms. Gibson and all the other witnesses carefully. She was polite, sincere, gentle and credible. She has little to no business background or sophistication, a fact not seriously disputed by any witness to appear before the Court. She did not understand the financing, and had never run or managed construction or low income housing. Both Mr. Zerbst and Mr. Lanier knew that Ms. Gibson lacked experience in real estate and financial matters and relied on others to guide her. They clearly took advantage of her trust in them and together with Villavicencio convinced her that this deal and loan was good for her.

This disturbing meeting which was arranged by Mr. Zerbst, between Ms. Gibson, her attorney, to whom Mr. Zerbst referred her, and representatives of Ameris, confirmed the fact that Mr. Zerbst knew she

trusted and relied on him. Until this meeting, where Ms. Gibson felt out-numbered and betrayed, she had done everything suggested by Mr. Zerbst. [Tr. 154] However, this time she refused.

Mr. Zerbst knew that Mr. Villavicencio also had control and influence over Ms. Gibson and he was concerned that Villavicencio might do something that she didn't know about. [Tr. 324] Yet, Ameris did not even consult with Ms. Gibson when distributing funds for the project to Villavicencio. Ameris aided Mr. Villavicencio in causing harm to Ms. Gibson.

The fact that Ameris is trying to hide behind mountains of documents, disclaimers, and appraisals adds to the egregiousness of their actions. Ameris argues that Ms. Gibson is governed by the loan documents that she signed and yet Ameris did not follow the terms of those same loan documents. For example, the construction loan agreement required an AIA request form before Ameris was permitted to disburse. However, Ameris disbursed monies to the project manager who had no ownership in project/property. "To date, there is \$290,000 of advances that are not supported by invoices, AIA document or any other information in support of the work being completed (Plaintiff's Exhibit 30)." The construction loan agreement required this AIA payment form before Ameris was permitted to disburse funds on the project. Yet, Ameris ignored this requirement.

Mr. Lanier's explanation was that this was a boilerplate agreement the contents of which would only have to be followed at the banker's request. In other words, Ameris could pick and choose which portions of the documents would be enforceable to the detriment of Gibson. It is this Court's impression that some of the testimony of Ameris' witnesses was "boilerplate" testimony which Ameris would use whenever it needed to protect itself. This type of testimony was evident when discussing the fiduciary relationship with Gibson, the pursuit and construction of Gibson's loan, the hiring of Zerbst, and the referral of Ms. Gibson to her attorney.

After being questioned about signing documents acknowledging that she did not rely on the bank in her decision making, Ms. Gibson's testimony is insightful: "I think when someone tells you what they

feel about that situation and then, as you say, had me sign papers releasing them of any obligation of anything they told me, that seems a little deceiving to me.”

Banks should not be allowed to insulate themselves through artifice and to allow Ameris to do so here is to countenance conduct that is all too familiar in the most recent banking crisis

2. Duration of Defendant’s Conduct

Ameris moved Ms. Gibson’s loan over to them from Reliance in the fall of 2007. As late as November 2009, Ameris was attempting to solve their problem through a surrogate law firm, hoping to gain more influence over Ms. Gibson’s decision to turn over additional collateral to Ameris and / or have her sell some of her other property for the benefit of Ameris.

3. Awareness or Concealment

Ameris was not only aware of what was occurring with Ms. Gibson’s loan, it was the choreographer. Ameris also actively concealed the truth of Ms. Gibson’s situation from her to try to get more collateral for the failing loan.

4. Similar Past Conduct

I am confident that Mr. Zerbst and Ameris reached an accord prior to Ameris opening its Charleston bank in October 2007. What was not resolved was how to “get around” the non-compete agreement Mr. Zerbst had with Reliance. Ultimately, a Murrell’s Inlet office was used, yet Mr. Zerbst worked out of the Charleston office during the time of the non-compete. [Deposition of Lanier, Court Exhibit 7, pg 216] Ameris’ upper management and culture induced the causative events leading to Ms. Gibson’s loss.

In the case styled *First Reliance Bank v. Karl H. Zerbst and Ameris Bank- 2008 – CP-21-785*, Reliance Bank sued Mr. Zerbst and Ameris for stealing First Reliance clients and alleged that Mr. Zerbst was essentially a ghost writer on several loans for clients which began at First Reliance and ended up with Ameris. After hearing the testimony in this case, the allegations of First Reliance have a ring of truth.

5. Deterrance

Ameris' conduct is similar in character and quality to the conduct witnessed in the market generally over the past five/six years. It is excessive and not reasonably related to the pursuit of sound and stable business practices. Ameris' conduct champions greed and must be deterred. It is the hope of this court that the awarding of punitive damages in this case will deter Ameris and others from committing like offenses in the future.

6 Relation to Harm Resulting

The award of punitive damages is directly related to the harm that resulted from the bank's conduct. Ameris coerced Ms. Gibson to take out a loan to buy and renovate an apartment complex which it knew would ultimately fail. The punitive damages are awarded for this behavior. Ms. Gibson nearly lost everything and testified that but for her faith, she would have taken her own life.

7. Ability to Pay

Ameris Bank does business in South Carolina, Georgia, Florida, and Alabama. Dr. Oliver Wood's report, which was uncontroverted, shows Ameris Bank is a bank with \$3,000,000,000 in assets. Its stockholder equity in 2011 was \$293,770,000. Its net weekly cash flow in 2011 was \$887,808. Based on the Court's findings regarding Ameris Bank's conduct, the Court awards four weeks of Ameris Bank's net cash flow (\$3,551,232) as an appropriate punitive damage award. This is approximately 3 times the amount of actual damages and is within the guidelines set forth by the United States Supreme Court.

8 Other Factor

Ameris Bank's effort to steer Ms. Gibson to the Richter Law Firm with their representatives present, in order to influence her decision making, corrupts the role of counsel. This conduct was intentional and hostile to Ms. Gibson and represents Ameris' conduct throughout this entire transaction. This conduct justifies the award of punitive damages in amount of \$3,551,232.00.

intentional and hostile to Ms. Gibson and represents Ameris' conduct throughout this entire transaction. This conduct justifies the award of punitive damages in amount of \$3,551,232.00.

COMPARATIVE FAULT

"In 1991, South Carolina abolished the doctrine of contributory negligence and adopted comparative negligence as its tort standard in *Nelson v. Concrete Supply Co*, 303 S.C. 243, 399 S.E.2d 783 (1991)." *Berberich v Jack*, 709 S.E.2d 607, 611, 392 S.C. 278, 286 (2011). In *Nelson*, the South Carolina Supreme Court stated that, under comparative negligence "a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant." *Nelson*, 303 at 245, 399 S.E.2d at 784. "The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence." *Id.* South Carolina has adopted "a modified version of comparative negligence known as the 'less than or equal to' approach, by which the plaintiff in a negligence action could recover damages if his or her negligence is 50% or less or, stated another way, if the plaintiff's negligence does not exceed 50%." *Berberich*, 709 S.E.2d at 611, 392 S.C. at 286 (quoting *Singleton v Sherer*, 377 S.C. 185, 205, 659 S.E.2d 196, 206 (Ct. App. 2008)) The Supreme Court in *Berberich*, held that:

[U]nder our comparative negligence system, all forms of conduct amounting to negligence in any form, including, but not limited to, ordinary negligence, gross negligence, and reckless, willful, or wanton conduct, may be compared to and offset by any conduct that falls short of conduct intended to cause injury or damage. By this method, each party's relative fault in causing the plaintiff's injury will be given due consideration.

709 S.E.2d at 615, 392 S.C. at 293.

The Court finds that Ameris is 80% liable to Ms. Gibson and that Ms. Gibson is comparatively at fault for 20% of her damages. Ms. Gibson could have obtained her own appraisal prior to closing the loan but she did not. She simply relied on the appraisal accepted by Ameris. She did not independently determine if the rents from the apartment complex would pay for the loan and the loan on her beach house prior to purchasing the apartment complex. She just relied on the advice of Mr. Zerbst, Mr. Lanier, and Mr. Villavicencio. [Tr. 181:24-182:15; 185:12-18] Accordingly, the Court finds that Gibson contributed

to the damages that she has suffered. The Court must compare Ms. Gibson's negligence with Ameris' willful, wanton, and reckless conduct and reduce the total amount of damages, including punitive damages, by Ms. Gibson's comparative negligence. This Court will reduce Ms. Gibson's recovery by 20%.

SET-OFF

In July 2008, Ms. Gibson sued Rolando Villavicencio, RPV Investments, LLC, and Re/Max Professional Realty. [Def. Ex. 60]. In August 2010, Plaintiffs amended their complaint to assert causes of action for negligent misrepresentation and breach of fiduciary duty, among others. [Def. Ex. 65]. In response to written discovery served in this case and in the case against Mr. Villavicencio, Ms. Gibson listed the exact same injuries. [Compare Def. Ex. 62 and Plaintiffs' Supplemental Answers to Defendant's Interrogatories, attached hereto as Exhibit A]. By agreement dated February 16, 2012, Plaintiffs settled their claims against Mr. Villavicencio et al. for the sum of \$850,000. [Pl. Ex. 16].

South Carolina law provides that:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury...it reduces the claim against the other to the extent of any amount stipulated by the release of the covenant, or in the amount of the consideration paid for it, whichever is the greater.

S.C. Code Ann. § 15-38-50 (2005).

The rationale for providing credit to a non-settling defendant is to prevent a double recovery to the plaintiff. *Truesdale v. South Carolina Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 747 (1975) (internal citation omitted), *overruled on other grounds*, *McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). "When the settlement is for the same injury, the non-settling defendant's right to a setoff arises by operation of law." *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (2012) (citing *Ellis v. Oliver*, 335 S.C. 106, 112, 515 S.E.2d 268, 272 (Ct. App. 1999)). The statute requires a setoff when the claims against the joint tortfeasors arose out of the same factual scenario. *Ellis*, 335 S.C. at 112, 515 S.E.2d at 272. "Under this circumstance, [s]ection 15-38-50 grants the court no discretion...in applying a set-off." *Smith*, 397 S.C. at 472, 724 S.E.2d at 190 (internal quotation marks omitted).

Here, Ameris is entitled to a set-off in the amount of \$850,000. Ms. Gibson alleges that both Mr. Villavicencio and Ameris negligently misrepresented to her that the apartment complex was a suitable investment for her and that both Mr. Villavicencio's and Ameris' actions throughout the course of the renovation project caused Ms. Gibson's harm. The injury for which Ms. Gibson seeks to recover damages against Ameris is identical to the injury for which Plaintiffs recovered \$850,000 against Mr. Villavicencio. [Def.'s Ex. 65]. To deny a set-off would result in a windfall for Ms. Gibson, in direct contradiction to S.C. Code Ann. § 15-38-50.

TOTAL DAMAGES

Ms. Gibson is entitled to recover the \$700,000 down payment with \$23,625.00 interest, the \$355,000 for the Klister Lane property, and the \$75,000 for personal funds contributed by Ms. Gibson directly to the project. That is a total of \$1,153,625.00 actual damages. Ms. Gibson is also entitled to \$3,551,232.00 in punitive damages. This brings Ms. Gibson's total damages to \$4,704,857.00. This amount must be reduced by Ms. Gibson's 20% comparative fault which reduces the total by \$940,971.00, for a new total of \$3,763,886.00. Lastly, the total damages must be reduced by the \$850,000 set-off, for a grand total of damages amounting to \$2,913,886.00.

CONCLUSION

For the reasons stated above and based upon the testimony and evidence presented at trial, it is hereby ORDERED, ADJUDGED, AND DECREED that judgment in the amount of \$2,913,886.00 be entered in favor of Ms. Gibson against Ameris Bank as to her claims for breach of fiduciary duty, negligent misrepresentation, and aiding and abetting breach of fiduciary duty.

IT IS SO ORDERED.

On this 8 day of August, 2013
Monks Corner, SC

Robert E. Watson
The Honorable Robert E. Watson
Master In Equity

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Case No. 2010-CP-08-2134

Linda A. Gibson, formerly known as Linda)
Ann Avigner, Individually and as Trustee of)
the Paul William Gibson Family Trust and)
Heritage Seven, LLC,)

Plaintiffs,)

v.)

Ameris Bank,)

Defendant.)

**ORDER DENYING AMERIS BANK'S
MOTION TO ALTER OR AMEND**

2014 MAY 30 PM 3:13
CLERK OF COURT
BERKELEY COUNTY

This matter is before the Court on Defendant Ameris Bank's ("Ameris") motion to alter or amend the Court's order dated August 8, 2013 finding Ameris liable to Plaintiffs and awarding Plaintiff judgment in the amount of \$2,913,886.00, actual and punitive damages. After careful consideration of all the grounds raised by Ameris, I deny Ameris' motion and, with regard to certain of the evidentiary errors alleged by Ameris, find as follows:

- a) Evidence and Testimony concerning the Internal Loan Policies and Procedures of Ameris (Motion to Alter or Amend ¶ 122):

Ameris argues the Court erred in allowing Plaintiffs to introduce evidence and testimony concerning the internal loan policies and procedures of Ameris, claiming a bank's internal policies do not create a duty to a borrower and may not be used to support a claim for tort liability against Ameris. However, having found Ameris assumed a duty of care with regard to Gibson and that the relationship between Gibson and Ameris went beyond that of creditor/debtor, it is the further function of the court to determine and formulate the standard of conduct to which the duty requires the defendant to conform. *Doe ex rel Doe v Wal-Mart Stores, Inc.* 393 S.C. 240, 711 S.E.2d 908 (2011). The court may consider relevant standards of

care from various sources in determining whether a defendant breached a duty owed to an injured person. *Madison ex rel Bryant v Babcock Center, Inc*, 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006). “The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines.” *Doe ex rel Doe v. Wal-Mart Stores, Inc* 393 S.C. 240, 247, 711 S.E.2d 908, 912 (2011) (internal citations omitted) Accordingly, it was appropriate to allow Plaintiffs to introduce evidence of Ameris’ loan policies and procedures as evidence of the appropriate standard of care in this case and Ameris’ deviation from the same.

b) The May 22, 2009 Memorandum (Pl's Ex 30) Regarding Benjamin Lanier (Motion to Alter or Amend ¶ 123):

Ameris argues the Court erred in allowing Plaintiffs to introduce evidence and testimony concerning a May 22, 2009 internal memorandum regarding former Ameris employee, Benjamin Lanier. Ameris contends the memorandum reflects a disciplinary action taken against Lanier following the events at issue in this lawsuit and constitutes a subsequent remedial measure under Rule 407 of the South Carolina Rules of Evidence (“SCRE”) Rule 407, SCRE provides:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The parties were not able to proffer any South Carolina authority discussing disciplinary measures and whether they constitute subsequent remedial measures. However, even if the memo is considered a subsequent remedial measure, pursuant to Rule 407, the evidence may be

admissible to prove matters other than liability for negligence. *See e.g. Taylor v Nix*, 307 S.C. 551, 416 S.E.2d 619 (1992) (subsequent recall of an automobile), *see also* Trial Handbook for South Carolina Lawyers § 13.10 (updated August 2013) (recognizing evidence of subsequent remedial measures may be introduced: (1) to rebut or impeach a witness; (2) to explain measurements, maps, photographs, and the like, (3) to show the conditions existing at the time of the accident, (4) to prove the cause of the injury; (5) to establish the defendant's control of the premises or instrumentality involved; and (6) to demonstrate the feasibility of taking certain precautions.). Thus, the Lanier memo was properly admitted to show the conditions existing at the time of the harm to Gibson and to establish Ameris' control of the instrumentality involved – in this case, Ameris' control over the construction funds and disbursements. (See Tr. 489 discussing admitting the evidence to show the bank had control over the construction loan advances).

Further, as the memo was cumulative to other evidence on these topics, Ameris was not prejudiced by the memo's admission in the non-jury trial. (See e.g. Tr. 392, testimony of Karl Zerbst "Q Would you agree or disagree that Ameris Bank and in particular Mr. Lanier had control over the monies which were to be advanced? A Yes, sir. I do agree.")

c) The July 3, 2009 "culpability" Memo (Pl. Ex. 31) of Don Snipes (Motion to Alter or Amend ¶ 124):

Ameris argues the Court erred in allowing Plaintiffs to introduce e-mail correspondence between two Ameris employees, Don Snipes and Jon Edwards, dated July 3, 2009 in which Snipes wrote "we have some culpability in [Gibson's] problems." Ameris claims that because Snipes is not an attorney he may not offer testimony regarding whether Ameris is liable to Plaintiffs. Contrary to Ameris' contention, the Snipes memo was not introduced, nor did the

Court rely on it, as a legal opinion or an admission that Ameris is legally responsible for the harm suffered by Plaintiffs. At trial, Plaintiff's counsel proffered the evidence to prove:

MR. WEST: And if your Honor please, this, again, goes to the whole issue of whether or not there has been an assumption of a duty. (Tr.18)

And so, your Honor, this is not intended to be a legal opinion. (Tr.19)

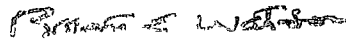
The memo was allowed as evidence of Ameris' recognition that it owed a duty to Plaintiffs. (See Tr. 20, Order pgs 4-5, 31).

Additionally, Ameris concedes the email "relates the failure of the bank to meet its own internal standards for how the loan should have been managed." (Ameris' Motion to Alter or Amend, pg 25). As is stated above, the standard of care may be established and defined by "a defendant's own policies and guidelines," and Ameris' admission that it deviated from its own policies and guidelines with regard to Plaintiffs' loan is evidence of Ameris' breach of the standard of care.

d) (Motion to Alter or Amend ¶ 35)

In regards to Ameris' alleged error number 35, I hereby amend my August 8, 2013 to remove the language "I find the amendment to be disingenuous" found on page 16 of the order. As I have expressed, I have great respect for the attorneys for the Defendants and have no intention of impugning their integrity.

IT IS SO ORDERED that Ameris' motion to alter or amend is denied.



The Honorable Robert E. Watson
Master in Equity

On this 30 day of May, 2014
Moncks Corner, SC

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

Galt Valley, LLC,)
Plaintiff,)

v.)

Linda A. Gibson, formerly known as Linda)
Ann Avinger, Individually and as Trustee of)
the Paul William Gibson Family Trust,)
Heritage Seven, LLC and Access Portable)
Toilets, Inc.,)

Defendants.)

Linda A. Gibson, formerly known as Linda)
Ann Avinger, Individually and as Trustee of)
the Paul William Gibson Family Trust and)
Heritage Seven, LLC,)

Counterclaimants,)

v.)

Ameris Bank,)

Counterclaim Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Case No. 2010-CP-08-2134

ORDER

FILED
2011 JAN 14 AM 8:59
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

This matter comes before me on Motion of the Plaintiff (Galt Valley, LLC) and with the consent of the Defendants, Linda A. Gibson, formerly known as Linda Ann Avinger, Individually and as Trustee of the Paul William Gibson Family Trust, and Heritage Seven, LLC. It appears that the claims against the Defendants on the obligations and notes sued upon by Ameris Bank and assigned to Plaintiff have been settled and that Galt and the Defendants have released each other; and

It further appearing that the Counterclaimants' claims against the Counterclaim Defendant, Ameris Bank, remain as stated by the Defendants in their pleading as filed on July 20, 2010.

Order
Case No.: 2010-CP-08-2134

It is ordered that the claims of the Plaintiff are dismissed with prejudice and that the claims of the Counterclaimant against the Counterclaim Defendant continue.

IT IS SO ORDERED.

Robert E. Watson
Robert E. Watson
Master-in-Equity

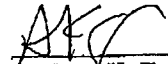
1/11 2010
Moncks Corner, South Carolina

Order

Case No.: 2010-CP-08-2134

WE SO MOVE:

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr.

3 State Street

Charleston, SC 29401

Ph.: 843-377-1871

Fx.: 843-377-1310

GEORGE J. KEFALOS, PA

George J. Kefalos

3 State Street

Charleston, SC 29401

Ph.: 843-722-6612

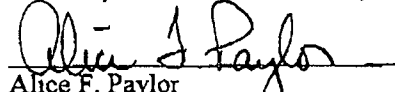
Fx.: 843-377-1310

Attorneys for Defendants Linda A. Gibson, formerly
Known as Linda Ann Avinger, Individually and as Trustee of the
Paul William Gibson Family Trust and Heritage Seven, LLC

Order
Case No.: 2010-CP-08-2134

I CONSENT:

ROSEN, ROSEN & HAGOOD, LLC



Alice F. Paylor
134 Meeting St., Suite 200
PO Box 893
Charleston, SC 29402
Ph.: 803-404-6900
Fx.: 803-404-6901
Email: apaylor@rrhlawfirm.com

Attorney for Plaintiff Galt Valley, LLC

Order
Case No.: 2010-CP-08-2134

I CONSENT:

SOWELL GRAY STEPP & LAFFITTE, LLC

Amy L. B. Hill
PO Box 11449
Columbia, SC 29211
Ph.: 803-929-1400
Fx.: 803-929-0300
Email: ahill@sowellgray.com

Attorney for Counterclaim Defendant Ameris Bank

TOTAL P.05

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY)

Ameris Bank,

Plaintiff,

vs.

Linda A. Gibson, formerly known as Linda Ann
Avinger, individually and as Trustee of the Paul
William Gibson Family Trust, Heritage Seven,
LLC, and Access Portable Toilets, Inc ,

Defendants

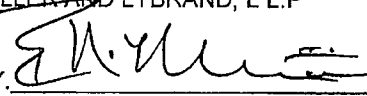
SUMMONS
(Non-Jury Foreclosure)

TO THE DEFENDANTS ABOVE NAMED

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer on the subscribers at their offices, 1704 Main Street, P O Box 58, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint. Your answer must be in writing and signed by you or your attorney and must state your address or the address of your attorney, if signed by your attorney.

This communication is an attempt to collect a debt, and any information obtained will be used for that purpose

McDONALD, McKENZIE, RUBIN,
MILLER AND LYBRAND, L L P

BY: 

BEN N MILLER III

Attorneys for the Plaintiff

P O. Box 58

Columbia, South Carolina 29202

(803) 252-0500

Columbia, South Carolina

June 14, 2010

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY) IN THE COURT OF COMMON PLEAS

Ameris Bank,

Plaintiff,

vs

Linda A. Gibson, formerly known as Linda Ann
Avinger, individually and as Trustee of the Paul
William Gibson Family Trust, Heritage Seven,
LLC, and Access Portable Toilets, Inc ,

Defendants.

COMPLAINT

The Plaintiff above named, complaining of the Defendants above named, herein alleges
that

AS TO BOTH CAUSES OF ACTION

1 Upon information and belief, the Defendant Linda A. Gibson, formerly known as
Linda Ann Avinger, is a resident of the County of Dorchester, State of South Carolina, and is named as
a defendant in this action both individually and in her capacity as Trustee of the Paul William Gibson
Family Trust; the Defendant Heritage Seven, LLC, is a limited liability company doing business in the
County of Charleston, State of South Carolina, the Defendant Access Portable Toilets, Inc. is a
corporation doing business in the County of Charleston, State of South Carolina, and the properties
subject of this action are real properties located in the County of Berkeley and in the County of
Charleston, in the State of South Carolina

2. If Plaintiff secures the premises being foreclosed herein, Plaintiff's costs of securing
said premises should be added to any judgment rendered on its behalf. If Plaintiff pays any utility
charges or real estate taxes which constitute liens on said premises, Plaintiff's costs should be added
to any judgment rendered on its behalf

3. The Plaintiff does not waive, but specifically demands judgment against the

B. Gibson

Defendant Linda A. Gibson, formerly known as Linda Ann Avinger, individually and as Trustee of the Paul William Gibson Family Trust, for the full amount found to be due to Plaintiff on the Notes and Mortgages held by Plaintiff, with the right to enter a personal deficiency judgment against the Defendant Linda A. Gibson, formerly known as Linda Ann Avinger, individually and as Trustee of the Paul William Gibson Family Trust, for any deficiency in this action remaining after sale of the mortgaged premises.

4. The foreclosure of the mortgage described in paragraph nine (9) infra is made subject to the terms of that certain lease dated April 12, 1991, by and between Linda Gibson and GTE Mobilnet of the Southeast, Incorporated, as evidenced by Memorandum of Lease dated April 12, 1991, and recorded April 12, 1991, in the Office of the Register of Deeds for Berkeley County in Miscellaneous Book C-297 at page 110, as extended and amended thereafter.

5 The Defendant Access Portable Toilets, Inc has or may claim to have some interest in or lien upon the subject property by virtue of that certain Notice and Certificate of Mechanic's Lien in the amount of \$235 00, against Heritage Seven, LLC, and Triton Construction, recorded by it on July 22, 2008, in Book J-665 at page 524 in the Office of the Register of Deeds for Charleston County, the interest or lien of the Defendant Access Portable Toilets, Inc , if any, is junior and subordinate to the lien of the Plaintiff's purchase money mortgage.

6. Ameris Bank has not agreed to participate in the Home Affordable Modification Program (HMP), further, the loans subject of this action are not subject to modification under HMP because they are not FHLMC or FNMA loans

FOR A FIRST CAUSE OF ACTION.

7 The allegations of paragraphs 1 through 6 supra , are incorporated herein as if fully restated

8. Heretofore, on November 2, 2007, the Defendant Heritage Seven, LLC, made,

Page 2

executed and delivered to Ameris Bank a certain Mortgage Note in writing, wherein and whereby by it promised to pay to the order of Ameris Bank the principal sum of \$2,810,164 50, together with interest at the initial rate of 7 75% per annum on the unpaid balance, said interest being payable in monthly installments commencing on the second day of December, 2007, and on the second day of each month thereafter, said principal being payable in monthly installments commencing on the second day of December, 2008, and both continuing until said note is fully paid; among other things the said Note provides as follows.

If you declare a default under the terms of the Loan, including for failure to pay in full at maturity, you may increase the Interest Rate payable on the outstanding Principal balance of this Note. In such event, interest will accrue on the outstanding Principal Balance at 16.000 percent until paid in full.

On or after Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Note or any other Loan Document. Expenses include, but are not limited to, attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of this Note. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interest in connection with any bankruptcy proceedings initiated by or against me.

9 In order to secure said note, the said Defendant Linda A. Gibson, formerly known as Linda Ann Avinger, did, on November 2, 2007, make, execute and deliver to Ameris Bank, its successors and assigns, a certain mortgage covering the premises located in the County of Berkeley, State of South Carolina, and described as follows.

All that certain piece, parcel or lot of land, with the improvements thereon, situate, lying and being in the County of Berkeley, State of South Carolina, being shown and delineated as "Residual Property of Linda Ann Gibson TMS 271-00-01-037" (now bearing TMS #271-00-01-129), on a "Plat Showing a 100' Right-of-Way Designated Parcels "A" & "B" and a 50' Right-of-Way Designated Parcels "C" & "D," "Parcels "B" and "D" Being Owned by Linda Ann Gibson, Parcels "A" & "C" Being Owned by Heirs of Ben Bellinger, Parcels "A" Thru "D" About to be Acquired by the South Carolina State Ports Authority, Parcels Located in Saint Thomas - Saint Dennis Parish, Berkeley County, South Carolina," prepared by Cornerstone Surveying & Engineering, Inc. on June 6, 1997, and recorded in the Office of the Register of Deeds for Berkeley County in Plat Cabinet N at page 86 TMS# 271-00-01-129.

Said property is a portion of the property conveyed to Linda A. Gibson, formerly known as Linda Ann

Page 3

Avinger, by Deed of Mary Ann Baptist Church, also known as Maryann Baptist Church, dated May 24, 1985, recorded September 12, 1985, in the Office of the Register of Deeds for Berkeley County in Deed Book A-616 at page 220, and by Deed of W.R. Detyens dated May 15, 1969, recorded September 28, 1973, in said Register's Office in Deed Book A-261 at page 40

10. Said mortgage constitutes a first lien on the subject property

11. On November 7, 2007, said Mortgage was recorded in the Office of the Register of Deeds for Berkeley County in Record Book 6975 at page 204

12. As additional security for the payment of said Note, an Assignment of Leases and Rents was given by Linda A. Gibson, formerly known as Linda Ann Avinger, to Ameris Bank, said Assignment being dated November 2, 2007, recorded November 7, 2007, in the Office of the Register of Deeds for Berkeley County in Record Book 6975 at page 212, and covering the real estate described in paragraph nine (9) supra.

13. As further security for the payment of said note, the Defendant Heritage Seven, LLC, did, on November 2, 2007, make, execute and deliver to Ameris Bank, its successors and assigns, a certain mortgage covering the premises located in the County of Charleston, State of South Carolina, and described as follows.

All those certain pieces, parcels or tracts of land containing in the aggregate 3.633 acres, more or less, with the improvements thereon, situate, lying and being in the County of Charleston, State of South Carolina, being shown and delineated as "Tract A" and "Tract B" on a plat prepared by Sigma Engineers, Inc., dated April 14, 1971, and recorded in the Office of the Register of Deeds for Charleston County in Plat Book AA at page 37. Said property has such size, shape and dimensions as will be shown by reference to said plat. TMS# 485-03-00-114

Said property is the same property conveyed to Heritage Seven, LLC, by Deed of ABESPRO, LLC, dated November 2, 2007, recorded November 6, 2007, in the Office of the Register of Deeds for Charleston County in Book L-643 at page 16.

14. Subject mortgage constitutes a first lien on the subject property and is a purchase money mortgage.

15. On November 6, 2007, said Mortgage was recorded in the Office of the Register of Deeds for Charleston County in Book L-643 at page 739

P. Page 4.

16 As further security for the payment of said note, an Assignment of Leases and Rents was given by Linda A Gibson, formerly known as Linda Ann Avinger, to Amens Bank, said Assignment being dated November 2, 2007, recorded November 6, 2007, in the Office of the Register of Deeds for Charleston County in Book O-643 at page 226, and covering the property described in paragraph thirteen (13) supra

17 On January 9, 2009, the Defendant Heritage Seven, LLC, executed a Renewal Note in the amount of \$2,809,681 86, with accrued interest at the initial rate of 6% per annum being payable monthly commencing February 2, 2009, and with the balance of principal and interest due on October 2, 2009

18. On December 26, 2008, the Defendant Linda A Gibson, formerly known as Linda Ann Avinger, individually guaranteed the payment of the renewal Note described in paragraph seventeen (17) supra

19 On December 26, 2008, the Defendant Linda A Gibson, formerly known as Linda Ann Avinger, as Trustee of the Paul William Gibson Family Trust guaranteed the payment of the renewal Note described in paragraph seventeen (17) supra

20 Among other things, said mortgages provide as follows:

On or after Default, to the extent permitted by law, Mortgagor agrees to pay all expenses of collection, enforcement or protection of Lender's rights and remedies under this Security Instrument or any other document relating to the Secured Debts. Mortgagor agrees to pay expenses for Lender to inspect and preserve the Property and for any recordation costs of releasing the Property from this Security Instrument. Expenses include, but are not limited to, attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. If not paid immediately these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of the Secured Data. In addition, to the extent permitted by the United States Bankruptcy Code, Mortgagor agrees to pay the reasonable attorneys' fees incurred by Lender to protect Lender's rights and interest in connection with any bankruptcy proceedings initiated by or against Mortgagor

21. The installment of principal and interest which became due on October 2, 2009, has not been paid although demand for the payment thereof has been made and the plaintiff, as the

D. Page 5

holder of the said note, mortgages, and guaranties, after giving all required notices, has and does hereby elect to declare the entire balance of said principal and interest due and payable at once, there is now due and owing and unpaid upon the said note, mortgages, and guaranties the sum of \$2,796,466.75, together with interest thereon at the rate of 6% per annum from September 2, 2009, to October 2, 2009, and thereafter at the rate of 16% per annum, together with a reasonable sum as attorney's fees and the costs of this action

FOR A SECOND CAUSE OF ACTION:

22 The allegations of paragraphs 1 through 21 supra , are incorporated herein as if fully restated

23 Heretofore, on October 1, 2009, the Defendant Heritage Seven, LLC, made, executed and delivered to Ameris Bank a certain Mortgage Note in writing, wherein and whereby it promised to pay to the order of Ameris Bank the principal sum of \$50,071.96, together with interest at the initial rate of 4 5% per annum on the unpaid balance, said principal and interest being payable on December 1, 2009, among other things the said Note provides as follows:

If you declare a default under the terms of the Loan, including for failure to pay in full at maturity, you may increase the Interest Rate payable on the outstanding Principal balance of this Note. In such event, interest will accrue on the outstanding Principal Balance at 16.000 percent until paid in full.

On or after Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Note or any other Loan Document. Expenses include, but are not limited to, attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of this Note. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interest in connection with any bankruptcy proceedings initiated by or against me.

24 By its terms, said Note is secured by the mortgages described in paragraphs nine (9) and thirteen (13) supra

B. Ray C.

25 The installment of principal and interest which became due on December 1, 2009, has not been paid although demand for the payment thereof has been made and the plaintiff, as the holder of the said note, mortgages, and guaranties, after giving all required notices, has and does hereby elect to declare the entire balance of said principal and interest due and payable at once; there is now due and owing and unpaid upon the said note, mortgages, and guaranties the sum of \$50,071.96, together with interest thereon at the rate of 6% per annum from October 1, 2009, to December 2, 2009, and thereafter at the rate of 16% per annum, together with a reasonable sum as attorney's fees and the costs of this action

WHEREFORE, Plaintiff prays judgment

(1) That the amount due upon said notes and mortgages held by the Plaintiff be ascertained and determined under the direction of this Court, together with attorney's fees and the costs of this action.

(2) That the said Plaintiff's mortgages be declared first liens on the subject properties and that the said Plaintiff have judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due, with a reasonable sum as attorney's fees, and for the costs of this action

(3) That the mortgaged premises be sold under the direction of this Court, the equity of redemption be barred, and that the proceeds of sale be applied as follows

First, to the costs and expenses of the within action and said sale

Second, to the payment and discharge of the amount due on Plaintiff's notes and mortgages, together with attorney's fees as aforesaid, and

Third, the surplus, if any, be distributed according to law.

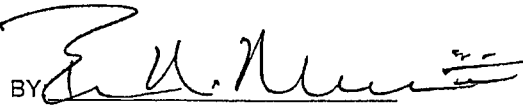
(4) Plaintiff have judgment against the Defendant Linda A Gibson, formerly known as Linda Ann Avinger, individually and as Trustee of the Paul William Gibson Family Trust, for the full

B. Page 7

amount found to be due Plaintiff on the notes and mortgages with the right to enter a personal judgment against the Defendant Linda A Gibson, formerly known as Linda Ann Avinger, individually and as Trustee of the Paul William Gibson Family Trust, for any deficiency in this action remaining after the sale of the mortgaged premises.

(5) For such other and further relief as may be just and proper

McDONALD, McKENZIE, RUBIN,
MILLER AND LYBRAND, L L P.

BY 

BEN N MILLER III

Attorneys for the Plaintiff

P. O Box 58

Columbia, South Carolina 29202

(803) 252-0500

Columbia, South Carolina

June 14, 2010

Page 8.

NOTICE REQUIRED BY THE FAIR DEBT
COLLECTION PRACTICES ACT
15 U.S.C. Section 1601, As Amended

1. The amount of the debt is stated in the Complaint attached hereto.
2. The Plaintiff as named in the attached Summons and Complaint is the creditor to whom the debt is owed.
3. If the original creditor is different from the current creditor, the creditor's law firm will provide the debtor with the name and address of the original creditor if requested by the debtor, in writing, within thirty (30) days of the receipt of this notice.
4. The debt described in the Complaint attached hereto and evidenced by the Note and Mortgage described therein will be assumed to be valid by the creditor's law firm unless the debtor, within thirty (30) days after the receipt of this notice, disputes, in writing, the validity of the debt or some portion thereof.
5. If the debtor notifies the creditor's law firm in writing within thirty (30) days of the receipt of this notice that the debt or any portion thereon is disputed, the creditor's law firm will obtain a verification of the debt, and a copy of the verification will be mailed to the debtor by the creditor's law firm.
6. Written requests should be addressed to Ben N. Miller III, Attorney at Law, Post Office Box 58, Columbia, South Carolina 29202-0058.

THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION
OBTAINED WILL BE USED FOR THAT PURPOSE.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	
Ameris Bank,	)	
	)	
Plaintiff,	)	
	)	
vs	)	LIS PENDENS
	)	
Linda A. Gibson, formerly known as Linda Ann	)	
Avinger, individually and as Trustee of the Paul	)	
William Gibson Family Trust, Heritage Seven,	)	
LLC, and Access Portable Toilets, Inc ,	)	
	)	
Defendants	)	

Notice is hereby given that an action has been commenced in the Court of Common Pleas for the County of Berkeley, State of South Carolina, by the Plaintiff above named against the Defendants above named to foreclose the following mortgages on properties located in the Berkeley and Charleston Counties:

Berkeley County

A. Mortgage given by Linda A Gibson, formerly known as Linda Ann Avinger, to Ameris Bank, dated November 2, 2007, recorded November 7, 2007, in the Office of the Register of Deeds for Berkeley County in Record Book 6975 at page 204, covering the property located in Berkeley County described as follows

All that certain piece, parcel or lot of land, with the improvements thereon, situate, lying and being in the County of Berkeley, State of South Carolina, being shown and delineated as "Residual Property of Linda Ann Gibson TMS 271-00-01-037" (now bearing TMS #271-00-01-129), on a "Plat Showing a 100' Right-of-Way Designated Parcels "A" & "B" and a 50' Right-of-Way Designated Parcels "C" & "D," "Parcels "B" and "D" Being Owned by Linda Ann Gibson, Parcels "A" & "C" Being Owned by Heirs of Ben Bellinger, Parcels "A" Thru "D" About to be Acquired by the South Carolina State Ports Authority, Parcels Located in Saint Thomas - Saint Dennis Parish, Berkeley County, South Carolina," prepared by Cornerstone Surveying & Engineering, Inc on June 6, 1997, and recorded in the Office of the Register of Deeds for Berkeley County in Plat Cabinet N at page 86 TMS# 271-00-01-129

Said property is a portion of the property conveyed to Linda A Gibson, formerly known as Linda Ann Avinger, by Deed of Mary Ann Baptist Church, also known as Maryann Baptist Church, dated May 24, 1985, recorded September 12, 1985, in the Office of the Register of Deeds for Berkeley County

B. J.
Page 2

in Deed Book A-616 at page 220, and by Deed of W R Detyens dated May 15, 1969, recorded September 28, 1973, in said Register's Office in Deed Book A-261 at page 40.

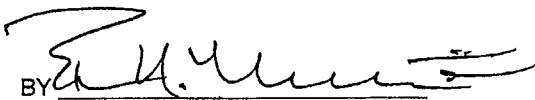
Charleston County

B Mortgage given by Heritage Seven, LLC, to Ameris Bank, dated November 2, 2007, recorded November 6, 2007, in the Office of the Register of Deeds for Charleston County in Book L-643 at page 739, covering the property located in Charleston County described as follows:

All those certain pieces, parcels or tracts of land containing in the aggregate 3.633 acres, more or less, with the improvements thereon, situate, lying and being in the County of Charleston, State of South Carolina, being shown and delineated as "Tract A" and "Tract B" on a plat prepared by Sigma Engineers, Inc., dated April 14, 1971, and recorded in the Office of the Register of Deeds for Charleston County in Plat Book AA at page 37. Said property has such size, shape and dimensions as will be shown by reference to said plat. TMS# 485-03-00-114.

Said property is the same property conveyed to Heritage Seven, LLC, by Deed of ABESPRO, LLC, dated November 2, 2007, recorded November 6, 2007, in the Office of the Register of Deeds for Charleston County in Book L-643 at page 16.

McDONALD, McKENZIE, RUBIN,
MILLER AND LYBRAND, L L P

BY 

BEN N. MILLER III

Attorneys for the Plaintiff

P. O. Box 58

Columbia, South Carolina 29202

(803) 252-0500

Columbia, South Carolina

June 14, 2010



STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Ameris Bank

Plaintiff,

vs.

Linda A. Gibson, formerly known as Linda
Ann Avinger, individually and as Trustee of
the Paul William Gibson Family Trust,
Heritage Seven, LLC and Access Portable
Toilets, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No.: 2010-CP-08-2134

ANSWER & COUNTERCLAIM

Defendants Linda A. Gibson, formerly known as Linda Ann Avinger, individually and as Trustee of the Paul William Gibson Family Trust and Heritage Seven, LLC, answering the Complaint of the Plaintiff, allege and say as follows:

1. Defendants admit the allegations contained in paragraph 1 of the Complaint.
2. The allegations contained in paragraphs 2 and 3 of the Complaint call for legal conclusions, and Defendants are not required to admit or deny said allegations.
3. In response to the allegations contained in paragraphs 4, 8, 9, 12, 13, 16, 17, 18, 19, 20, 23 and 24, Defendants crave reference to the documents themselves.
4. Defendants admit the allegations contained in paragraph 5, 6, 10, 11, 14, and 15 on information and belief.
5. In response to the allegations in Paragraph 7, Defendants re-allege Paragraphs 1 through 4 of its answer as repeated verbatim.
6. Defendants admit so much of the allegations of paragraph 21 as alleges that the principal and interest which became due on October 2, 2009 were not paid and demand was made

by Plaintiff. The rest of the allegations call for a legal conclusion and Defendants are not required to admit or deny said allegations.

7. In response to the allegations in Paragraph 22, Defendants re-allege Paragraphs 1 through 6 of its answer as repeated verbatim.
8. Defendants admit so much of the allegations of paragraph 25 as alleges that the principal and interest which became due on October 2, 2009 were not paid and demand was made by Plaintiff. The rest of the allegations call for a legal conclusion and Defendants are not required to admit or deny said allegations.
9. Each and every allegation not specifically admitted or otherwise explained is denied.

**FURTHER ANSWERING THE COMPLAINT AND
BY WAY OF FIRST COUNTERCLAIM
(Negligent Misrepresentation)**

10. Plaintiff had a pecuniary interest in making certain representations to Defendants as they were made in the course of the Plaintiff's business, profession, and/or employment, and they stood to gain financially from the transactions in question.
11. Plaintiff had a duty to be fair, complete, reasonable and accurate in their representations.
12. Plaintiff and its agents breached this duty by representing to the Defendants that the purchase price of the property was market value and that it was a suitable investment for Defendants when in fact it was not.
13. Plaintiff, experienced in matters such as these, knew or should have known of the falsity of the representations/omission made to the Defendants; or made said representations/omissions with reckless disregard for the truth and intended that the representations be acted upon.
14. Said representations/omissions were material.

15 Plaintiff induced Defendants into entering into a contract for the purchase of the Otranto property.

16. Defendants did not know that said representations were false, relied on the misrepresentations to their detriment, and had the right to so rely thereon. Defendants would not have undertaken the written agreements if they had known of the falsity of the representations of the Plaintiff.

17. As a direct and proximate result of the Plaintiff's fraudulent and/or negligent misrepresentations the Defendants' have been injured and suffered damages. Defendants are entitled to a judgment against the Plaintiff for actual, compensatory, consequential, incidental, and punitive damages, in an amount sufficient to deter similar conduct by these Defendants and others, in an amount determined by this Court.

**FURTHER ANSWERING THE COMPLAINT AND
BY WAY OF THIRD COUNTERCLAIM
(Civil Conspiracy)**

18. The foregoing paragraphs are incorporated herein by reference.

19. By and through the conduct alleged herein, the Plaintiff, together with others, formed a combination for the purpose of injuring the Defendant.

20. The conspirators committed overt acts in furtherance of the conspiracy as aforesaid.

21. In addition to the damages caused by the Plaintiff's fraudulent and other improper conduct as alleged herein, damage to the Defendants as a result of the overt acts done pursuant to the combination has caused the Defendants to have to incur substantial legal fees in defending this action, have caused Defendant Gibson physical manifestations of loss of sleep, stress, nervousness, and other physical manifestations, and such other special damages as the evidence may show.

22. As a direct and proximate result of the Plaintiff's civil conspiracy, the Defendants have been injured and suffered damage. Defendants are entitled to a judgment against the Plaintiff for actual, compensatory, consequential, incidental, and punitive damages, in an amount sufficient to deter similar conduct by this Plaintiff and others, in an amount determined by the trier of fact.

**FURTHER ANSWERING THE COMPLAINT AND
BY WAY OF THIRD COUNTERCLAIM
(Equitable Relief)**

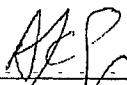
23. The foregoing paragraphs are incorporated herein by reference.

24. The Plaintiff's conduct toward the Defendants was inequitable so that this Court should relieve the Defendants of the obligations of the note and mortgage, and enter an award that is equitable considering the Plaintiff's and its agents conduct.

25. In conjunction with this claim the Defendants herein tender the deed to the Otranto property to the Plaintiff together with the advice that the Defendants will no longer insure the property, expressly reserving their claims herein, collect the rent, or pay the taxes. The Defendants will cooperate fully so that this transaction can be accomplished without detriment to the Plaintiff.

WHEREFORE, the Defendants **LINDA A. GIBSON** formerly known as **Linda Ann Avinger**, individually and as **Trustee of the Paul William Gibson Family Trust**, and **HERITAGE SEVEN, LLC** pray for judgment against the Plaintiff **AMERIS BANK** for actual, special, consequential, treble, and punitive damages to the fullest extent allowed by law in the amount determined by the trier of fact, for the costs of this action, for such equitable relief as the Court may deem appropriate, and for such other relief as this Honorable Court deems just, prudent, and proper.

Respectfully Submitted:



George J. Kefalos, Esquire
GEORGE J. KEFALOS, P.A.
3 State Street
Charleston, SC 29401
P: 843-722-6612
F: 843-377-1310
George@kefaloslaw.com

Andrew K. Epting, Jr., Esquire
ANDREW K. EPTING, JR., LLC
3 State Street
Charleston, SC 29401
P: 843.377.1871
F: 843.377.1310
ake@epting-law.com

On this 20 day of July 2010
Charleston, SC

STATE OF SOUTH CAROLINA

TITLE TO REAL ESTATE

COUNTY OF CHARLESTON

TITLE NOT EXAMINED

WHEREAS, HERITAGE SEVEN, LLC is a Limited Liability Company organized and existing under the laws of the State of South Carolina; and

WHEREAS, HERITAGE SEVEN, LLC elected to be managed by a Managing Member and the Operating Agreement provides that Managing Member may execute all documents on behalf of the LLC; NOW THEREFORE,

KNOW ALL MEN BY THESE PRESENTS, that, HERITAGE SEVEN, LLC, in the County and State aforesaid, for and in consideration of the sum of Five and 00/100 (\$5 00) Dollars, and other valuable consideration, to it in hand paid, at and before the sealing of these presents by AMERIS BANK, in the County and State aforesaid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release unto the said AMERIS BANK, its Successors and Assigns, the following described property, to-wit:

ALL that certain pieces, parcels or tracts of land, with the buildings and improvements thereon, situate, lying and being in Charleston County, State of South Carolina, shown and designated as Tracts A and B, Northwood Estates, containing 3 633 Acres, more or less, on a plat prepared by Sigma Engineers, Inc., dated April 14, 1971 and recorded in the RMC Office for Charleston County in Plat Book AA, Page 37, said tracts having such sizes, shapes, dimensions, buttings and boundings as will by reference to said plat more fully and at large appear.

BEING the same property conveyed to HERITAGE SEVEN, LLC by deed of ABESPRO, LLC dated November 2, 2007 and recorded in the RMC Office for Charleston County in Book L-643, Page 016.

SUBJECT TO RESTRICTIONS AND EASEMENTS OF RECORD

TMS #: 485-03-00-114

GRANTEE'S ADDRESS: 49 Archdale Street
Charleston, SC 29401

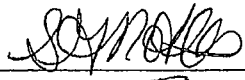
TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

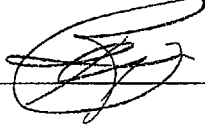
TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said AMERIS BANK, its Successors and Assigns forever.

AND it does hereby bind itself and its Successors to warrant and forever defend the said Premises unto the said AMERIS BANK, its Successors and Assigns, against itself and its Successors, lawfully claiming, or to claim the same or any part thereof.

WITNESS its Hand and Seal, this 18th day of June, 2010.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF





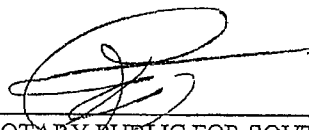
HERITAGE SEVEN, LLC

BY: Heritage Seven, LLC
Its: Linda Gibson

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

ACKNOWLEDGMENT

I hereby certify that HERITAGE SEVEN, LLC, by and through LINDA GIBSON, its MANAGING MEMBER, personally appeared before me this 18th day of June, 2010, and acknowledged the due execution of the foregoing instrument.



NOTARY PUBLIC FOR SOUTH CAROLINA
My commission expires 9/29/13

STATE OF SOUTH CAROLINA

AFFIDAVIT

COUNTY OF CHARLESTON

Date of Transfer of Title
Closing Date June _____, 2010

PERSONALLY appeared before me the undersigned, who, being duly sworn, deposes and says.

1 I have read the information on this Affidavit and I understand such information

2 The Property is being transferred by HERITAGE SEVEN, LLC to AMERIS BANK on June _____, 2010

3 Check one of the following The DEED is

(A) _____ subject to the deed recording fee as a transfer for consideration paid or to be paid in Money or money's worth

(B) _____ subject to the deed recording fee as a transfer between a corporation, a partnership or other entity and a stockholder, partner or owner of the entity, or is a transfer to a trust or as distribution to a trust beneficiary

(C) X EXEMPT from the deed recording fee because of Exemption # 13

4 Check one of the following if either item 3 (a) or item 3 (b) above has been checked

(A) X The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$0.00

(B) _____ The fee is computed on the fair market value of the realty which is \$ _____

(C) _____ The fee is computed on the fair market value of the realty as established for property Tax purposes which is \$ _____

5 Check YES X or NO _____ to the following A lien or encumbrance existed on the land, tenement or realty before the transfer and remained on this land, tenement or realty after the transfer If "YES", the amount of the outstanding balance of this lien or encumbrance is \$ 2,800,000.00/-

6 The deed recording fee is computed as follows:

(A) \$0.00 the amount listed in Item 4 above

(B) \$0 the amount listed in item 5 above (no amount place zero)

(C) \$0.00 subtract line 6 (b) from line 6 (a) and place the result

7 As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as closing attorney

8 Check if Property other than Real Property is being transferred on this Deed

(A) _____ Mobile Home

(B) _____ Other

9 I understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both

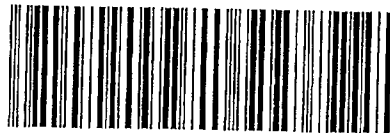
SWORN to before me this 18
day of June, 2010

Signed [Signature]
Grantor, Grantee or Attorney that prepared this form

[Signature] (SEAL)
Notary Public for S.C.
My Commission Expires 9/29/13



CHARLESTON COUNTY DELINQUENT TAX COLLECTOR
4045 BRIDGE VIEW DR B110
NORTH CHARLESTON SC 29405-7464



7184 9158 3733 0836 7397

CERTIFIED MAIL

FIRST-CLASS
MAIL
POSTAGE &
FEES PAID
LPP
29292

RETURN RECEIPT REQUESTED
RESTRICTED DELIVERY

IMPORTANT NOTICE

4850300114

006314

HERITAGE SEVEN LLC
C/O LINDA GIBSON
133 HORSE TRAIL RD
SAINT GEORGE SC 29477-8264

MARY M. SCARBOROUGH
Delinquent Tax Collector



DELINQUENT TAX COLLECTOR
4045 BRIDGE VIEW DR, 1ST FLOOR
NORTH CHARLESTON, SC 29405

MAY 24, 2010



OFFICIAL NOTICE OF LEVY

THIS IS TO CERTIFY THAT THE COUNTY OF CHARLESTON HAS LEVIED UPON THE PROPERTY IDENTIFIED BELOW TO SATISFY COUNTY TAX EXECUTIONS ISSUED AGAINST

Current Owner: HERITAGE SEVEN LLC

Total taxes, penalties and costs:

Amount Due After:

Total Taxes Due:

MAY 14, 2010

\$22,382.46

OCTOBER 01, 2010

\$22,422.46

OCTOBER 29, 2010

\$22,512.46 and 2010 Taxes

HERITAGE SEVEN LLC

PARCEL ID: 4850300114

FAILURE TO PAY YOUR TAXES WILL RESULT IN YOUR PROPERTY BEING ADVERTISED IN THE CHARLESTON POST & COURIER

ALL REAL PROPERTY TAXES MUST BE PAID ON OR BEFORE 5:00 P.M. OCTOBER 29, 2010 TO AVOID TAX SALE ON NOVEMBER 01, 2010. RETURN RECEIPT OF THIS NOTICE SHALL BE DEEMED EQUIVALENT TO "LEVYING BY DISTRESS"

PLEASE RETURN THIS NOTICE
WITH MONEY ORDER OR CASHIER'S CHECK TO THE BELOW ADDRESS

Delivery payment to:

Charleston County Treasurer - DT
4045 Bridge view Dr, 1st Floor
North Charleston, SC 29405

Mail payment to:

Charleston County Treasurer - DT
PO Box 878
Charleston SC 29402-0878

Business Hours:

8:30 AM to 5:00 PM
Monday - Friday
Delinquent Tax Phone
Number
(843) 202-6576

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) IN THE NINTH JUDICIAL CIRCUIT

GALT VALLEY, LLC,) Civil Action No. 10-CP-08-2134

Plaintiff,

vs.

LINDA A. GIBSON, FORMERLY
KNOWN AS LINDA ANN AVIGNER,
INDIVIDUALLY AND AS TRUSTEE
OF THE PAUL WILLIAM GIBSON
FAMILY TRUST, HERITAGE SEVEN,
LLC AND ACCESS PORTABLE
TOILETS, INC.,

Defendants.

AMERIS BANKS' REPLY TO
DEFENDANT'S GIBSON AND
HERITAGE SEVEN, LLC'S,
COUNTERCLAIMS

LINDA A. GIBSON, FORMERLY
KNOWN AS LINDA ANN AVIGNER,
INDIVIDUALLY AND AS TRUSTEE
OF THE PAUL WILLIAM GIBSON
FAMILY TRUST AND HERITAGE
SEVEN, LLC ,

Plaintiffs,

vs

AMERIS BANK,

Counterclaim Defendant.

FILED
2010 AUG 27 PM 1:02
HARRY P BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

Counterclaim Defendant, Ameris Bank, ("Ameris") responding to the Answer and
Counterclaim filed by Defendants Linda A. Gibson, formerly known as Linda Ann
Avinger, individually and as Trustee of the Paul William Gibson Family Trust and

Heritage Seven, LLC, denies each and every allegation thereof not hereinafter specifically admitted, qualified, or explained, and further alleges as follows:

FOR A FIRST DEFENSE

1. Ameris denies the allegations of paragraph ten of the Answer and Counterclaim.

2. The allegations of paragraph eleven of the Answer and Counterclaim are conclusions of law that Ameris neither admits nor denies. To the extent that these allegations are deemed to be allegations of fact, they are denied.

3. Ameris denies the allegations of paragraph twelve of the Answer and Counterclaim.

4. Ameris denies the allegations of paragraph thirteen of the Answer and Counterclaim

5. Ameris denies the allegations of paragraph fourteen of the Answer and Counterclaim.

6 Ameris denies the allegations of paragraph fifteen of the Answer and Counterclaim

7. Ameris denies the allegations of paragraph sixteen of the Answer and Counterclaim

8. Ameris denies the allegations of paragraph seventeen of the Answer and Counterclaim.

9 Ameris incorporates the allegations of paragraphs one through eight above in response to the allegations of paragraph eighteen of the Answer and Counterclaim.

10. Ameris denies the allegations of paragraph nineteen of the Answer and Counterclaim.

11 Ameris denies the allegations of paragraph twenty of the Answer and Counterclaim.

12 Responding to the allegations of paragraph twenty-one of the Answer and Counterclaim, Ameris denies that Defendants have suffered any damages for which Ameris is liable. Ameris lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph twenty-one, and therefore denies them.

13. Ameris denies the allegations of paragraph twenty-two of the Answer and Counterclaim.

14. Ameris incorporates the allegations of paragraphs one through thirteen above in response to the allegations of paragraph twenty-three of the Answer and Counterclaim.

15 Ameris denies the allegations of paragraph twenty-four of the Answer and Counterclaim.

16. Responding to the allegations of paragraph twenty-five of the Answer and Counterclaim, Ameris admits that Defendants have tendered a deed to the property to Plaintiff. Ameris lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph twenty-five and therefore denies them.

FOR A SECOND DEFENSE

17. The Answer and Counterclaim fail to state facts sufficient to constitute a cause of action.

FOR A THIRD DEFENSE

18. To the extent that Defendants have suffered any damages, they have failed to take steps to mitigate or offset any such damages.

FOR A FOURTH DEFENSE

19. Defendants have failed to exercise due diligence in their own behalf.

FOR A FIFTH DEFENSE

20. The damages suffered by Defendants, if they have been damaged, were caused by the intervening, and superseding negligence and conduct of others over whom Ameris has or had no control

21. Ameris is therefore informed and believes that it is not liable to Defendants as a result.

FOR A SIXTH DEFENSE

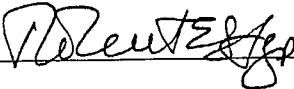
22. Ameris would show that if Defendants sustained any injury or damage as set forth in the Complaint, such injury or damage was due to the willful, wanton, reckless, careless and negligent acts and conduct of Defendants, which combined and concurred with any willful, wanton, reckless, or negligent acts or conduct on the part of Ameris, which is specifically denied, to bring about said injury and damage, if any, as a proximate cause thereof and without which the same would not have occurred, and therefore by reason and by virtue of the contributory negligence, carelessness, recklessness, willfulness and wantonness of Plaintiff, Plaintiff may not recover.

FOR A SEVENTH DEFENSE

23. To the extent that Defendants seek punitive damages, that claim is barred by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and related sections of the South Carolina Constitution. A claim for punitive damages also violates the federal doctrine of separation of powers and Article I, Section 8, of the South Carolina Constitution for the reason that punitive damages are a creation of the

judicial branch of government which invades the province of the legislative branch of government.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By  _____

Robert E. Stepp
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
Attorney for Ameris Bank

Columbia, South Carolina

August 25, 2010

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT

Civil Action No. 2010-CP-08-2134

AMENDED COMPLAINT

AMERIS BANK,

Defendant.

Trustee of the Paul-William Gibson Family Trust and Heritage Seven, LLC, complaining of

1. The Plaintiff, Linda A. Gibson, is a resident of the County of Dorchester, State of South Carolina, doing business in the County of Berkeley and is the sole shareholder of the Plaintiff, Heritage Seven, L.L.C., which in turn respectively own the apartment complex hereinafter described.
2. The Plaintiff, Heritage Seven, L.L.C., is a corporation organized under the laws of the State of South Carolina which is engaged in the business of renting and owning located in Moncks Corner, South Carolina 29461 in the County of Berkeley, State of South Carolina.
3. The Defendant Ameris Bank is a bank organized and existing under the laws of the State of George, licensed to business in the State of South Carolina, and doing business in Berkeley County, South Carolina

4. The Plaintiff Linda A Gibson, met her financial advisor, Rolando V. Villavicencio at church. Rolando V. Villavicencio knew of Plaintiffs' relative inexperience in the real estate field, assured the Plaintiffs of his experience and competence in the real estate field, held himself out as an agent for a well known broker, and persuaded the Plaintiffs to allow him to manage Plaintiffs' properties. As a result, the Plaintiffs reposed trust and confidence in all of the Defendants and reasonably believed they were acting in her best interests in all relevant matters and at all relevant times hereto.
5. Rolando V. Villavicencio acting by and through his company RPV Investments, L.L.C., and DPS of Charleston, Inc. d/b/a Re/Max Professional Realty, advised the Plaintiffs, to purchase an apartment complex in the Otranto community for \$2 8 million, which he represented was market price.
6. Because of her lack of experience, Plaintiff Linda Gibson turned to her banker, Karl Zerbst, who she thought she could rely on to advise her on the feasibility of the investment and the procedures of obtaining a loan.
7. Rolando Villavicencio was the real estate agent that Ms Gibson had previously used to purchase a shopping center and he was also managing the shopping center for Ms. Gibson. Karl Zerbst was the loan officer who had previously helped her close the loan for the shopping center and Benji Lanier of Ameris was the credit analyst for this transaction.
8. Before making the decision to purchase the apartments, Ms. Gibson called Karl Zerbst and asked if he thought that the apartments were a good investment for her and if the apartments would be profitable enough to cover the debt

9. Mr. Zerbst advised Linda that purchasing the apartments was a sound financial decision for her, that the rents would cover the debt, and that he could structure the loan such that she could obtain 100% financing.
10. Convinced that the purchase of the apartments will be a good deal for her, Linda applied for a loan with First Reliance Bank sometime in September 2007.
11. For a few weeks, Linda did not hear anything about the loan from First Reliance so she contacted Karl Zerbst to inquire into the status of the loan. Mr. Zerbst advised Linda that First Reliance would not approve her loan, but that Ameris Bank would approve the loan.
12. Mr. Zerbst represented that he had sent all of Linda's documents and loan papers to Benji Lanier at Ameris Bank and that he told Rolando to contact Mr. Lanier. Mr. Zerbst further assured Linda that Ameris would make the loan and that he too would be moving to Ameris Bank.
13. Mr. Lanier, at Karl's request, accepted Linda's application for a loan directly from Rolando and never contacted Linda about the loan or to verify her financial statement, which showed Linda's net worth at over 50 million dollars.
14. Mr. Lanier never questioned this document, despite the fact that he was the credit analyst on the loan Linda obtained from First Reliance less than two years prior to submitting the application to Ameris.
15. As the credit analyst on the First Reliance loan for the shopping center, Mr. Lanier reviewed Linda's financial statement, showing a net worth of 15 million dollars and participated in the drafting of the memo that lead to the approval of Linda's request for a loan in order to purchase the Moncks Corner Shopping Center.
16. On November 2, 2007, Ameris made the loan as structured by Mr. Zerbst and Mr. Lanier.

17. The loan was a construction loan with 2.1 million dollars used for the purchase of the apartments and the remaining balance to be used to complete renovations.
18. Prior to the closing, however, Ms. Gibson was required to agree to encumber a property she owned located in Berkley County on Klister Lane as additional collateral for the loan.
19. Linda had no knowledge of additional collateral needed for the loan, however due to the unusual circumstances under which the request for additional collateral was presented, and trusting her financial adviser and bankers, she agreed to encumber the Klister Lane property
20. Following the purchase of the apartments, the renovation of the apartments began.
Ameris disbursed large sums to contractors or other vendors, including, but not limited to Rolando and Re/Max, through "official checks "
21. In breach of its own policies and the loan agreement with Ms. Gibson, Linda was never made aware of the advances paid by Ameris, nor did Ameris ever request her approval before paying the draws.
22. In breach of its own policies and the loan agreement with Ms. Gibson, Ameris failed to inspect the project to ensure the improvements and draw requests were consistent with project costs.
23. Ameris never verified the contractor on the project and, in breach of its own policies and the loan agreement with Ms. Gibson, Ameris did not require a contract or AIA document or any other information in support of work being completed.
24. There are no draw requests in the Ameris file as required by the loan agreement.
25. Ameris' own records reflect that it paid \$290,000 in construction draws that are not supported by invoices.

NEGLIGENT MISREPRESENTATION

26. Ameris Bank had a pecuniary interest in making certain representations to Plaintiffs as they were made in the course of the Plaintiff's business, profession, and/or employment, and they stood to gain financially from the transactions in question.
27. Defendant Ameris Bank had a duty to be fair, complete, reasonable and accurate in their representations.
28. The Defendant breached this duty by representing to the Plaintiffs that the purchase price of the property was market value and that it was a suitable investment for Plaintiffs when in fact it was not, by advising Plaintiffs that the rents would cover the loan payments, and by structuring the loan in violation of bank policies, such that Ms. Gibson would be unable to repay the debt
-
29. Defendant Ameris Bank, experienced in matters such as these, knew or should have known of the falsity of the representations/omission made to the Plaintiffs; or made said representations/omissions with reckless disregard for the truth and intended that the representations be acted upon.
30. Said representations/omissions were materially significant and played the primary role in the Plaintiffs' decision to close on the property.
31. Defendant Ameris Bank induced Plaintiffs into entering into a contract for the purchase of the Otranto property at a substantially higher price than market value, thereby increasing their commission fee and damaging the Plaintiffs.
32. Plaintiffs did not know that said representations were false, relied on the misrepresentations to their detriment, and had the right to so rely thereon Plaintiffs

would not have undertaken the written agreements or closed on the loan if they had known of the falsity of the representations of the Defendant Ameris Bank.

33. As a direct and proximate result of the Defendant's fraudulent and/or negligent misrepresentations the Plaintiffs' have been injured and suffered damages. Plaintiffs are entitled to a judgment against the Defendant for actual, compensatory, consequential, incidental, and punitive damages, in an amount sufficient to deter similar conduct by these Defendants and others, in an amount determined by this Court.

BREACH OF FIDUCIARY DUTY

34. The foregoing paragraphs are incorporated herein by reference

35. Defendant Ameris Bank undertook and had a fiduciary relationship with the Plaintiffs.

36. By entering into a fiduciary relationship with the Plaintiffs, the Defendant Ameris Bank obligated itself to act only in the best interests of the Plaintiffs.

37. The Defendant's conduct constitutes a breach of this duty.

38. As a direct and proximate result of the Defendant Ameris Bank's actions, inactions, and breaches of fiduciary duties by the Defendant and through its agents, the Plaintiffs have been injured and suffered damage.

39. Ameris' conduct warrants equitable relief.

AIDING AND ABETTING THE BREACH OF FIDUCIARY DUTY

40. The foregoing paragraphs are incorporated herein by reference.

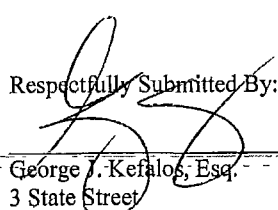
41. Rolando Villavicencio breached the fiduciary duties owed to Plaintiffs.

42. By and through the conduct alleged herein, the Defendant Ameris Bank, aided and abetted Rolando Villavicencio, in the breach of the fiduciary duties owed to Plaintiff.

43. As a direct and proximate result of the Plaintiff's aiding and abetting Plaintiff's financial advisor, Rolando Villavicencio's breach of fiduciary duty, the Plaintiffs have been injured and suffered damage.

WHEREFORE, the Plaintiffs **LINDA A. GIBSON and HERITAGE SEVEN, L.L.C.**, pray for judgment against the Defendant **AMERIS BANK** for equitable relief and/or for actual, special, consequential, and punitive damages to the fullest extent allowed by law in the amount determined by the trier of fact, for the costs of this action, for such equitable relief as the Court may deem appropriate, and for such other relief as this Honorable Court deems just, prudent, and proper.

Respectfully Submitted By:


George J. Kefalos, Esq.
3 State Street
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ATTORNEYS FOR PLAINTIFFS

On this 27 day of SEPT 2016
Charleston, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	IN THE NINTH JUDICIAL CIRCUIT
	)	
LINDA A GIBSON, formerly known as	)	C.A. No. 2010-CP-08-2134
LINDA ANN AVIGNER, individually	)	
and as Trustee of the Paul William Gibson	)	
Family Trust, and HERITAGE SEVEN,	)	
LLC ,	)	
	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
AMERIS BANK,	)	
	)	
Counterclaim Defendant	)	

**DEFENDANT'S ANSWER TO
AMENDED COMPLAINT**

FILED
2011 OCT 21 AM 11:55
HARRY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

Ameris Bank ("Ameris"), responding to the Amended Complaint filed by Plaintiffs Linda A. Gibson, formerly known as Linda Ann Avigner, individually and as Trustee of the Paul William Gibson Family Trust, and Heritage Seven, LLC (collectively "Plaintiffs"), denies each and every allegation thereof not hereinafter specifically admitted, qualified, or explained, and further alleges as follows:

FOR A FIRST DEFENSE

1. Ameris admits the allegations contained in paragraph 1, upon information and belief.
2. Responding to the allegations contained in paragraph 2, Ameris admits, upon information and belief, that Heritage Seven, LLC is organized under the laws of the State of South Carolina. Ameris lacks information sufficient to form an opinion or belief as to the remaining allegations contained in paragraph 2 and therefore denies them.
3. Responding to the allegations contained in paragraph 3, Ameris admits that it is a bank organized and existing under the laws of the State of Georgia, that it is authorized to

conduct business in South Carolina, and that it has conducted business in Berkeley County, South Carolina. Ameris denies any remaining allegations contained in paragraph 3.

4. Ameris lacks information sufficient to form an opinion or belief as to the truth of the allegations contained in paragraph 4 and therefore denies them

5. Ameris lacks information sufficient to form an opinion or belief as to the truth of the allegations contained in paragraph 5 and therefore denies them.

6. Ameris lacks information sufficient to form an opinion or belief as to the truth of the allegations contained in paragraph 6 and therefore denies them. By way of further response, Ameris asserts that, according to Ms. Gibson's own testimony in this matter, Mr Zerbst was an employee of another bank at the time she sought his advice concerning this project.

7. Ameris lacks information sufficient to form an opinion or belief as to the truth of the allegations contained in paragraph 7 and therefore denies them. By way of further response, Ameris specifically denies that Ameris had any involvement in Plaintiffs' purchase of the referenced shopping center. Upon information and belief, Mr. Zerbst and Mr. Lanier were employees of First Reliance Bank and First Reliance Bank loaned Ms. Gibson money for the purchase of the shopping center.

8. Ameris lacks information sufficient to form an opinion or belief as to the truth of the allegations contained in paragraph 8 and therefore denies them. By way of further response, Ameris asserts that, according to Ms. Gibson's own testimony in this matter, Mr. Zerbst was an employee of another bank at the time she sought his advice concerning this project. Ameris further states that, at the time she allegedly sought advice from Mr Zerbst, Ms Gibson had already signed a contract for the purchase of the apartment complex, had signed a contract with

an architect to perform architectural services on the project, and had refinanced other property to obtain funds to use as a down payment for the acquisition of the apartment complex.

9. Ameris lacks information sufficient to form an opinion or belief as to the truth of the allegations contained in paragraph 9 and therefore denies them. By way of further response, Ameris asserts that, according to Ms. Gibson's own testimony in this matter, Mr. Zerbst was an employee of another bank at the time she sought his advice concerning this project.

10. Ameris lacks information sufficient to form an opinion or belief as to the truth of the allegations contained in paragraph 10 and therefore denies them.

11. Ameris lacks information sufficient to form an opinion or belief as to the truth of the allegations contained in paragraph 11 and therefore denies them.

12. Ameris lacks information sufficient to form an opinion or belief as to the truth of the allegations contained in paragraph 12 and therefore denies them.

13. Ameris denies the allegations contained in paragraph 13.

14. Ameris denies the allegations contained in paragraph 14.

15. Ameris lacks information sufficient to form an opinion or belief as to the truth of the allegations contained in paragraph 15 and therefore denies them.

16. Responding to allegations contained in paragraph 16, Ameris admits that it made a loan to Plaintiffs in connection with the purchase and renovation of the apartment complex. Ameris denies the remaining allegations contained in paragraph 16.

17. Responding to the allegations contained in paragraph 17, Ameris admits that the loan consisted of approximately \$2,100,000 for the purchase of the apartments and the remainder for the renovation of the apartments. Ameris denies any remaining allegations contained in paragraph 17.

18. Ameris admits the allegations contained in paragraph 18.

19. Responding to the allegations contained in paragraph 19, Ameris admits only that Ms. Gibson agreed to provide property located on Klister Lane as additional collateral for the subject loan. Ameris denies the remaining allegations contained in paragraph 19.

20. Responding to the allegations contained in paragraph 20, Ameris admits that renovation of the apartments began after Plaintiffs' purchase of the apartments and that Ameris, pursuant to requests from Ms. Gibson and her construction manager, disbursed funds to contractors and vendors on Ameris checks. Ameris denies the remaining allegations contained in paragraph 20 and specifically denies any allegation or inference that it improperly disbursed funds.

21. Ameris denies the allegations contained in paragraph 21

22. Ameris denies the allegations contained in paragraph 22.

23. Ameris denies the allegations contained in paragraph 23

24. In response to the allegations contained in paragraph 24, Ameris asserts that the loan agreement speaks for itself and denies any allegations inconsistent therewith. By way of further response, Ameris denies any allegation or inference that it improperly disbursed funds. Ameris denies the remaining allegations contained in paragraph 24.

25. In response to the allegations contained in paragraph 25, Ameris asserts that any funds disbursed that were not supported by invoices were disbursed directly to Linda Gibson.

26. Paragraph 26 contains legal conclusions to which no response is required. To the extent a response is required, Ameris denies the allegations contained in paragraph 26.

27. Paragraph 27 contains legal conclusions to which no response is required. To the extent a response is required, Ameris denies the allegations contained in paragraph 27.

28. Ameris denies the allegations contained in paragraph 28.

29. Paragraph 29 contains legal conclusions to which no response is required. To the extent a response is required, Ameris denies the allegations contained in paragraph 29. Ameris specifically denies that it made any misrepresentations to Plaintiffs.

30. Paragraph 30 contains legal conclusions to which no response is required. To the extent a response is required, Ameris denies the allegations contained in paragraph 30. Ameris specifically denies that it made any misrepresentations to Plaintiffs.

31. Ameris denies the allegations contained in paragraph 31.

32. Paragraph 32 contains legal conclusions to which no response is required. To the extent a response is required, Ameris denies the allegations contained in paragraph 32. Ameris specifically denies that it made any misrepresentations to Plaintiffs.

33. Ameris denies the allegations contained in paragraph 33.

34. Paragraph 34 requires no response. To the extent a response is required, Ameris denies the allegations contained in paragraph 34.

35. Ameris denies the allegations contained in paragraph 35.

36. Responding to paragraph 36, Ameris denies that it entered into a fiduciary relationship with Plaintiffs. The remaining allegations contained in paragraph 36 consist of legal conclusions to which no response is required. To the extent a response is required, those allegations are denied.

37. Ameris denies the allegations contained in paragraph 37.

38. Ameris denies the allegations contained in paragraph 38.

39. Ameris denies the allegations contained in paragraph 39.

40. Paragraph 40 requires no response To the extent a response is required, Ameris denies the allegations contained in paragraph 40

41. Ameris lacks information sufficient to form an opinion or belief as to the truth of the allegations contained in paragraph 41 and therefore denies them.

42. Ameris denies the allegations contained in paragraph 42.

43. Ameris denies the allegations contained in paragraph 43.

44. Ameris denies Plaintiffs' prayer for relief.

FOR A SECOND DEFENSE
(Failure to State a Claim)

45. The Amended Complaint fails to state facts sufficient to constitute a cause of action against Ameris and therefore should be dismissed.

FOR A THIRD DEFENSE
(Lack of Proximate Cause)

46. Plaintiffs' claims against Ameris are barred, in whole or in part, because Ameris did not proximately cause Plaintiffs' damages, if any.

FOR A FOURTH DEFENSE
(Negligence of Third Parties)

47. Plaintiffs' claims against Ameris are barred, in whole or in part, because the damages suffered by Plaintiffs, if any, were caused by third parties who were not subject to Ameris's control.

FOR A FIFTH DEFENSE
(Lack of Agency)

48. Plaintiffs' claims against Ameris are barred, in whole or in part, because the individuals about whose acts or omissions Plaintiffs complain were not agents of Ameris at the time of those acts or omissions and Ameris is not liable for their conduct as a matter of law

FOR A SIXTH DEFENSE
(Intervening/Superseding Acts)

49. Plaintiffs' claims against Ameris are barred, in whole or in part, because any damages allegedly suffered by Plaintiffs were due to or caused by preceding, superseding, and/or intervening acts, omissions, or occurrences beyond the control of Ameris, such that the preceding, superseding, and/or intervening acts, omissions, or occurrences are the proximate cause of any damages allegedly suffered by Plaintiffs, as a matter of law.

FOR A SEVENTH DEFENSE
(Waiver, Estoppel, and Laches)

50. Plaintiffs' claims against Ameris are barred, in whole or in part, by the doctrines of waiver, estoppel, and laches.

FOR A EIGHTH DEFENSE
(Comparative Negligence – As Complete Bar)

51. Plaintiffs' claims against Ameris are barred, in whole or in part, because Plaintiffs' damages, if any, were caused by the comparative negligence, comparative fault, recklessness, assumption of the risk and/or other culpable conduct of Plaintiffs and thus Plaintiffs cannot recover anything against Ameris

FOR AN NINTH DEFENSE
(Comparative Negligence – As Offset)

52. Plaintiffs' claims against Ameris are barred, in whole or in part, because Plaintiffs' damages, if any, were caused, in whole or in part, by the comparative negligence, comparative fault, recklessness, assumption of the risk and/or other culpable conduct of Plaintiffs and the amount of damages recovered, if any, shall therefore be diminished in that proportion which said culpable conduct attributable to Plaintiffs bears to the culpable conduct which caused said damages

FOR A TENTH DEFENSE
(Failure to Mitigate)

53. Plaintiffs' claims against Ameris are barred, in whole or in part, because Plaintiffs failed to mitigate their damages.

FOR A ELEVENTH DEFENSE
(Unclean Hands)

54. Plaintiffs' claims against Ameris are barred, in whole or in part, by the doctrine of unclean hands

FOR AN TWELFTH DEFENSE
(Unconstitutionality of Punitive Damages)

55. Plaintiffs' claim for punitive damages against Ameris is barred because any award of punitive damages against Ameris would violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Constitution of the State of South Carolina.

56. Plaintiffs' claim for punitive damages against Ameris is barred because any award of punitive damages against Ameris would violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the corresponding provisions of the Constitution of the State of South Carolina.

FOR A THIRTEENTH DEFENSE
(Setoff)

57. After commencing the foreclosure action against Plaintiffs out of which the instant claims asserted by Plaintiffs against Ameris arise, Ameris sold the loans to third party Galt Valley, LLC ("Galt Valley").

58. Upon information and belief, Plaintiffs and Galt Valley entered into a settlement agreement by which Galt Valley agreed to waive certain of Plaintiffs' obligations in repaying the outstanding indebtedness.

59. Ameris claims as a setoff in this action the amount of Plaintiffs' indebtedness under the notes and mortgages at issue in this litigation that Galt Valley agreed to waive.

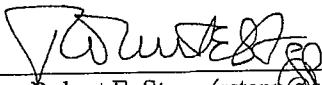
FOR A FOURTEENTH DEFENSE
(Reservation of Rights)

60. Ameris expressly reserves the right to assert additional defenses as such become known

CONCLUSION

Ameris requests that upon trial or other final hearing in this matter, Plaintiffs take nothing, that Judgment be entered against Plaintiffs, and that this Court grant such other and further relief to which Ameris may be justly entitled.

SOWELL GRAY STEPP & LAFFITTE, LLC

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Attorneys for Ameris Bank

 2011
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	IN THE NINTH JUDICIAL CIRCUIT
	)	
LINDA A. GIBSON, formerly known as	)	C.A No 2010-CP-08-2134
LINDA ANN AVIGNER, individually	)	
and as Trustee of the Paul William Gibson	)	
Family Trust, and HERITAGE SEVEN,	)	
LLC ,	)	
	)	
	)	MOTION TO ALTER OR
Plaintiffs,	)	AMEND JUDGMENT
	)	
vs	)	
	)	
AMERIS BANK,	)	
	)	
Counterclaim Defendant	)	

FILED
 2013 AUG 26 PM 12:35
 MARY P. BROWN
 CLERK OF COURT
 BERKELEY COUNTY, S.C.

Ameris Bank moves pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for an order altering or amending the Court's order dated August 8, 2013, finding Ameris liable on all causes of action and awarding actual and punitive damages to Plaintiffs in the amount of \$2,913,886 00 Ameris received written notice of entry of the order on August 13, 2013 This motion, filed within ten days thereof, is timely filed.

The Court's order should be altered or amended to conform to the evidence presented in this case, which portrays an arms-length, commercial transaction between an LLC and bank, governed by loan documents that were ultimately enforced by this Court in a foreclosure proceeding brought by Ameris against the borrower, Heritage Seven LLC Additionally, the Court's order should be altered or amended to omit any findings or conclusions that Ameris acted in bad faith or with the intent to deceive the borrower, when no such cause of action has been pled in the complaint, and Plaintiffs did not present any evidence, much less clear, cogent, and convincing evidence, to support such findings or conclusions

The specific grounds for this motion are as follows:

ERRORS REGARDING FINDINGS OF FACTS

1. The Court erred in disregarding the loan documents that govern the relationship between the parties in this case.
2. The Court erred in disregarding the loan documents, when the documents are lawful, binding contracts between the parties, and Plaintiffs have never contended that they are unenforceable.
3. The Court erred to the extent it found that the borrower, Heritage Seven LLC, was an unsophisticated party.
4. The Court erred in finding that the guarantor, Linda Gibson, was an unsophisticated party. Gibson was a member of the LLC that purchased the apartment complex. The other member was a Trust of which Gibson was the Trustee. Gibson was solely responsible for the formation of the LLC and the decision to guarantee the loan. Gibson assumed fiduciary duties to the LLC and to the Trust that required that she be able to independently evaluate and manage this investment.
5. The Court erred in finding that Ameris had knowledge of preexisting facts and information that it did not share with the borrower prior to the closing of the loan transaction.
6. The Court erred in finding that "at the time of the trial, Gibson had only been involved in two investment purchases ." (Order p. 4.) The record does not contain evidence of all investment purchases that Gibson was involved in up to the time of trial. Gibson is a multimillionaire. Plaintiffs presented evidence that as of November 29, 2005, Gibson had a net worth of \$15,519,175.00. [Pls.' Ex. 32.] Gibson received approximately \$215,175 annually in rental income. *Id.* She owned a running track for race horses that she leased for \$150 per month per horse and a 3-acre lot that she leased for cell phone tower use as \$1300 per month. *Id.* She also received income from leases to a marina and to Hidden Cove Boat and Yacht Sales. *Id.* By the time Gibson caused Heritage Seven LLC to purchase the apartment complex for \$2.8 million, Gibson had already been involved in a \$2.4 million commercial transaction in which Heritage Seven LLC purchased a shopping center with multiple tenants. She purchased the shopping center in part by selling one of the beach houses she owned at Isle of Palms and doing a 1031 exchange with the proceeds from the sale. Gibson testified that as of October 7, 2009, her net worth was \$18,341,915.18. [Tr. 170-19-22, Def.'s Ex. 98.]
7. The Court erred in finding that "the shopping center was purchased with a hundred percent borrowed monies" (Order p. 3.) The record reflects that

Gibson used \$775,000 in cash proceeds received from the sale of one of the beach houses she owned at Isle of Palms to purchase the shopping center. [Tr. 73:10-19, 161:22-162:6, Ct Ex. 3, Gibson Dep. 34 25-35:19, Pls ' Ex 32.] Gibson testified that she wanted to do a 1031 exchange with the proceeds from the sale to avoid paying capital gains taxes, and it was her idea to do this *Id*

- 8 The Court erred in finding that after Gibson purchased the shopping center, "[Karl Zerbst] accepted [Linda Gibson's] trust and from this time forward advised her in all of her investment transactions" (Order pp. 3-4.) There is no testimony in the record from Karl Zerbst to support this finding. Further, Gibson signed a contract indicating her intent to purchase the apartment complex for \$2.8 million on May 7, 2007, without speaking to or seeking advice from Karl Zerbst [Def.'s Ex. 6.] Additionally, Gibson refinanced the beach house in August 2007, without speaking to or seeking advice from Zerbst, who was employed by First Reliance at the time. Moreover, the record does not detail all the investment transactions that Gibson was involved in from 2005 forward.
9. The Court erred in finding that "Zerbst advised Gibson that if Reliance was going to finance the purchase [of the apartment complex] she should get a loan on her beach house for the \$700,000 down payment." (Order p. 4.) There is no evidence in the record to support this finding. The beach house was refinanced as of August 28, 2007 [Pl.'s Ex. 1.] Plaintiffs did not present any evidence that Gibson spoke to Zerbst about the loan structure for the apartment complex prior to August 28, 2007. Even if they had, Zerbst was an employee of First Reliance at that time, and was not an agent of Ameris. Additionally, Gibson testified that she refinanced the second beach house on the advice of Rolando Villavicencio and based on her own decision [Tr. 189:10-191:19, Tr. 195:15-196:1, 205:13-206:22, Def.'s Ex. 43.]
10. The Court erred in finding that the apartment complex "sold on June 15, 2012, for \$650,000 after being completely rehabilitated" (Order p. 5.) There is no evidence in the record to support this finding, nor does the Court cite to any
11. The Court erred in finding that Gibson "stood to lose everything, and except for her own efforts of mitigation, would have." (Order p. 5.) There is no evidence in the record to support this finding. As of October 7, 2009, Gibson had an admitted net worth of \$18,341,915.18. [Tr. 170:19-22; Def.'s Ex. 98.] Even if she had paid the money owed to Ameris, she would not have lost everything. Additionally, there is no evidence in the record to support a finding that Gibson mitigated her damages. Instead, the record reflects that Gibson did not complete the renovations on the apartment complex, stopped paying the notes even though she had the assets and ability to do so, and she allowed the property to go into foreclosure. [Tr. 168:8-18; 425:20-426:10;]

Ct. Ex. 3, Gibson Dep. 14.9-21; Ct. Ex. 10, Villavicencio Dep. 87:11-22]
[Def.'s Exs. 5, 11, 17, 98, 107.]

12. The Court erred in finding that "Ameris' role in Ms. Gibson's misfortunes harmed not only Ms. Gibson, but cast Ameris' upper management, bank policy and culture in a very poor light" (Order p. 5.) There is no evidence in the record to support this, nor does the Court cite to any. To the contrary, Ameris's expert witness testified that the loan was approved and made in accordance with general, standard banking practices and procedures; Ameris followed its internal procedures, the loan was documented appropriately, funds were disbursed appropriately and the loan was made properly; and nothing about the structure of the loan or the collateral or repayment terms was in any way unusual or out of the ordinary from normal banking standards. [Tr. 548.20 – 549.2] Plaintiffs did not present any evidence to contradict this testimony, nor did Plaintiffs prove that Ameris caused the harm allegedly suffered by Gibson.
13. The Court erred in finding "Ms. Gibson's financial plight darkened as a result of the events the subject of this lawsuit." (Order p. 5) There is no evidence in the record to support this, nor does the Court cite to any. Gibson is a multimillionaire. As of October 7, 2009, she had a net worth of \$18,341,915.18 [Tr. 170.19-22, Def.'s Ex. 98] There is no evidence in the record concerning suggesting that her "financial plight darkened" as a result of the events in this lawsuit.
14. The Court erred in finding that Ameris "loosened its lending practices in order to make more loans; it ignored its own lending guidelines[;]" and "[i]t encouraged the excess that caused this problem" (Order p. 5, n. 1) There is no evidence in the record to support this, nor does the Court cite to any. To the contrary, Ameris's expert witness testified that the loan was approved and made in accordance with general, standard banking practices and procedures; Ameris followed its internal procedures; the loan was documented appropriately, funds were disbursed appropriately and the loan was made properly, and nothing about the structure of the loan or the collateral or repayment terms was in any way unusual or out of the ordinary from normal banking standards. [Tr. 548.20 – 549.2.] Plaintiffs did not present any evidence to contradict this testimony. Additionally, the term "excess" is unexplained and undefined. No evidence was presented regarding "excess." Ameris did nothing more than approve a request for financing made by the borrower.
15. The Court erred in finding that "Ameris admitted a duty to tell Ms. Gibson that the project revenue would not carry the loan" (Order p. 6.) There is no evidence in the record to support this. The evidence cited by the Court to support this proposition comes from a hypothetical question posed by the Court to Ameris's expert witness. The question was "I'm asking you, should

they tell someone who is borrowing money from a project their opinion that the project would not support the loan; should they tell the borrower that?" (Tr. 612:18 – 613:3) The expert answered that the bank should *Id.* The expert was not asked, nor did he say, that the circumstances in this case were such that Ameris knew that the project would not support the loan but chose not to tell Heritage Seven LLC (the borrower) or Gibson that information, nor is there any evidence in the record to support such a conclusion. Indeed, the theory that a bank would make a loan that could not be repaid does not make sense. Plaintiffs did not present any evidence showing that the bank knew that the project would not carry the loan but failed to advise the borrower of that fact.

16. The Court erred in finding that "[t]he parties to the suit agree Ms. Gibson is unsophisticated in financial matters " (Order p. 6) This is no evidence in the record to support this. Karl Zerbst testified that Gibson was "not well experienced like many customers that I would meet with," and that he "felt like [she] was new at this " (Tr. 307:18 – 308:23.) This is not an admission by Ameris that Gibson was unsophisticated in financial matters. To the contrary, the record reflects that Gibson attended two years of college; is or has been a member of multiple LLC's; has been the trustee of the Paul William Gibson Family Trust since 2003, and has successfully managed the affairs of the trust since that time, caused Heritage Seven LLC to purchase a commercial shopping center in 2005 for \$2.4 million, doing a 1031 exchange with the proceeds from the sale of one of the two beach houses owned by other LLCs that Gibson controlled, after terminating Rolando Villavicencio as the property manager of the shopping center in 2008, she took over the management of the shopping center and continued to manage the property up to and through the trial in 2012 collecting collects all rents, paying the bills, taking care of the maintenance, and renewing leases as necessary; when she discovered that the renovations at the apartment complex were not going as planned, she took charge of the project, with assistance from her daughter; hired a new contractor, oversaw the construction, collected rents, negotiated with contractors and subcontractors, obtained draws from the bank and disbursed in excess of \$200,000 to contractors and others, and made decisions about how to pay the money and what documentation to require. Additionally, between 2005 and 2009, Gibson's net worth increased from \$15,519,175 to \$18,341,915.18 [Tr. 159:15-17, 166:1-11; Tr. 168:8-18, 170:19-22, 172:3 – 11; 177:12-19; 174:16-177:19.] [Pls.' Ex. 32, Def.'s Exs. 98, 109, 110, 111, 112, and 113.] Moreover, there is no evidence that even an unsophisticated person could not understand the risks inherent in this venture.
17. The Court erred in finding that "Ameris knew Linda Gibson was an unsophisticated investor (with millions of dollars of inherited real estate) who placed her trust in Ameris to advise her whether and how to purchase an apartment complex." (Order p. 7.) There is no evidence in the record to support this, nor does the Court cite to any. The evidence regarding Gibson's

sophistication is to the contrary as set forth in paragraph 16 above. Additionally, Gibson decided to purchase the apartment complex in May 2007, signing a contract indicating her intent months before she sought financing from Ameris. [Def 's Ex. 6.] She testified that she wanted to buy the property for investment purposes [Tr. 141:2-142:24.] Also in May 2007, prior to any conversation with Zerbst about the apartment project, Gibson signed an Exclusive Right to Buy Buyer Agency Contract appointing ReMax Professional Realty and Rolando Villavicencio as her broker, and a Dual Agency Agreement appointing ReMax and Rolando as her agent [Def 's Exs 6, 7, 8.]

18. The Court erred in finding that "Ameris breached this trust by encouraging Ms. Gibson to purchase the apartments with a financing structure doomed to fail" (Order p. 7.) There is no evidence in the record to support this, nor does the Court cite to any. This finding is contrary to the Court's finding that Ameris made the loan knowing that it would be repaid because it was secured by Gibson's other assets. These same assets were also available to Gibson to prevent a default. Additionally, the president of Ameris testified that that Ameris does not offer investment advice, does not act as a real estate broker, does not list properties for sale, does not advise people how much to pay for property or how much to sell property for, does not do appraisals, does not have an appraisal department, does not do any real estate development, does not offer rental management services, and does not manage construction projects or act as a contractor. [Tr. 636:5 – 638:14.] Ameris's expert witness testified that banks do not lend money for projects that they do not believe are going to be successful. [Tr. 555:13-20.] If a bank approves a loan, that means the bank "think[s] it's an acceptable and bankable risk" and there is no problem with telling that to the borrower. [Tr. 563:23 – 564:3.] The bank relies on the borrower's due diligence in making a decision whether to approve a loan. [Tr. 563:4-7.] In approving a loan, the bank is not guaranteeing that the project is going to perform in the way that the borrower thinks it is going to. [Tr. 556:14-17.] It does not make sense for a bank to make a loan on a project that it thinks is going to fail. [Tr. 559:6 – 560:18.] It costs the bank more to try to pursue other remedies than it does just to get repaid if the project's a success, it takes more time, and the bank generally does not come out ahead. [Tr. 559:6 – 560:18.] Further, a bank has no duty to keep a borrower from making a bad deal. [Tr. 563:8-10.] Plaintiffs did not present any evidence to contradict this testimony.
19. The Court erred in finding, "Ameris' actions here are a raw portrayal of what banking should not be." (Order p. 7.) There is no evidence in the record to support this, nor does the Court cite to any. It is unclear what the Court means by this finding. Ameris' expert witness testified that the loan to Heritage Seven LLC was approved and made in accordance with general, standard banking practices and procedures; Ameris followed its internal procedures, the loan was documented appropriately, funds were disbursed appropriately.

and the loan was made properly; and nothing about the structure of the loan or the collateral or repayment terms was in any way unusual or out of the ordinary from normal banking standards [Tr 548:20 – 549:2.] Plaintiffs did not present any evidence to contradict this testimony

- 20 The Court erred in finding that “Ameris’ upper management created an environment that fostered excess at the expense of their customers” (Order p 7.) Plaintiffs did not present any evidence about banking excess or harm to other customers. Further, the term “excess” is unclear and undefined. No evidence was presented regarding “excess.”
- 21 The Court erred in finding that “Zerbst and Lanier advised Gibson to borrow the \$700,000 down payment needed to purchase the apartments, that the revenue generated by the apartments would not cover the borrowed down payment and the debt to Ameris.” There is no evidence in the record to support this, nor does the Court cite to any. The beach house was refinanced as of August 28, 2007. [Pl.’s Ex. 1.] Plaintiffs did not present any evidence that Gibson spoke to Zerbst prior to August 28, 2007. Even if they had, Zerbst was an employee of First Reliance at that time, and was not an agent of Ameris. Additionally, Gibson testified that she refinanced the second beach house on the advice of Rolando Villavicencio and based on her own decision, not on the advice of Zerbst or Lanier. [Tr 189:10–191:19; Tr 195:15–196:1, 205:13–206:22; Def.’s Ex. 43.] There is no evidence in the record that Zerbst or Lanier knew that the revenue generated by the apartments would not cover the debt, nor is there any evidence in the record establishing that the revenue received from rents would not cover the debt. Further, it does not make sense as a practical matter that a bank would make a loan on a project that it thinks is going to fail. [Tr 559:6 – 560:18.] It costs the bank more to try to pursue other remedies than it does just to get repaid if the project is a success, it takes more time, and the bank generally does not come out ahead. [Tr 559:6 – 560:18.] Plaintiffs did not present any testimony to contradict this.
22. The Court erred in finding: “That Goldman Sachs might sell to its customers as sound investments subprime loan for transactional fees and at the same time short the investment believing in the investment’s demise, is of the same quality as what happened here.” (Order p. 7, n. 3.) There is no evidence in the record to support this, nor does the Court cite to any. The record does not contain any evidence that Ameris was motivated to make the loan because of the transaction fee, nor does it make sense for the bank to do so. Ameris lost \$1.8 million due to Gibson’s decision not to repay the debt. [Tr 648:21 – 649:8.] Plaintiffs did not present any evidence to contradict this testimony. Additionally, this finding ignores evidence of the actions taken by Ameris to try to help Gibson salvage the project, including the advance of additional funds to pay real estate taxes and other expenses. Ameris would not have taken these actions if its goal was to ensure the failure of the project so it could seize the other collateral supporting the loan.

23. The Court erred in finding that “[f]rom the testimony, it was obvious to me that Lanier and Zerbst understood Gibson’s lack of sophistication, Villavicencio’s overreaching, and the project’s weakness.” (Order pp 7-8.) The testimony cited by the Court does not support a finding that Lanier and Zerbst understood Gibson’s lack of sophistication. The fact that Zerbst testified that Gibson was a not a “savvy” real estate investor and relied on the advice of others does not mean that she was unsophisticated in financial matters. Additionally, there is no evidence in the record that Zerbst or Lanier understood Villavicencio’s overreaching or knew anything about the weaknesses of the project. There is no evidence that Zerbst or anyone at Ameris knew that the project was weak or was not going to work.
24. The Court erred in finding that Ameris had “some” paperwork “‘justifying’ its actions.” (Order p. 9.) This finding is error because it essentially sets aside the written agreements between the parties for one purpose—the finding of liability in this case—and yet at the time same time, the Court has previously enforced those agreements in the foreclosure. Additionally, this finding sets aside legally binding documents when Plaintiffs do not seek such relief in the complaint, and Ameris did not receive any notice that it was defending such a case. Moreover, it is improper for the Court to ignore enforceable contracts to which Plaintiffs were a party.
25. The Court erred in finding that Ameris “had unencumbered collateral worth millions if the project failed,” and that “if the loan failed, Ameris knew it was covered by other unimpaired collateral.” (Order p. 9) There is no evidence in the record to support this, nor does the Court cite to any. To the contrary, the record reflects that the loan was secured by the apartment complex and by a three-acre lot that Gibson leased for use as a cell phone tower. Ameris lost \$1.8 million on this transaction. Ameris was not “covered by other unimpaired collateral,” as found by the Court. Additionally, it does not make sense for the Court to find on the one hand that the project was not worth what Gibson paid for it and then on the other hand to find that Ameris was over-secured. Moreover, if Ameris had access to the other unimpaired collateral, so did Gibson, which is inconsistent with the Court’s finding that the project was “doomed to fail.”
26. The Court erred in finding that “Ameris committed to this loan without an application . . .” (Order p. 9) This is contrary to the evidence in the record. The loan application, which Gibson signed, was admitted into evidence as Defendant’s Exhibit 25. This finding is also contrary to the Court’s order, which discusses the loan application at page 14.
27. The Court erred in finding that “Ameris used the bank’s grand opening in Charleston, a nighttime gala, to have Ms. Gibson sign documents that obligated her legally when she neither understood nor could perform them . . .

.” (Order p. 9) There is no evidence in the record to support a finding that Gibson did not understand the documents and could not perform any obligations therein. The document that Gibson allegedly signed at the gala was a Letter of Intent from the bank [Def.’s Ex. 26] A signed copy has not been made a part of the record in this case. In any event, the letter did not legally obligate Gibson. The letter obligated the bank to make the loan if certain conditions were met. *Id.* The gala took place on October 25, 2007. The notes, mortgage, guaranty, and construction loan agreement were all signed days later, on October 31 and November 2. [Def.’s Exs. 29-34.] As to whether Gibson understood the documents she signed, Gibson testified that she understood that the promissory note obligated the borrower to repay the debt on the terms set out in the note [Tr. 210.2-5.] She understood that she owed the money regardless of whether the project was a success [Tr. 210 6-16.] She understood how much money she had, what her assets were, what her income was, the loan amount, and the terms of the loan. [Tr. 221.12-19, Tr. 222 11-15.] But she also testified that she did not read any of the documents she signed, and she did not ask any questions of the closing attorney about the documents. [Tr. 209.12-18]

- 28 The Court erred in finding that the “loan was structured by Zerbst and Lanier which required that she take two mortgages to purchase the apartments.” (Order p. 9) There is no evidence in the record to support this, nor does the Court cite to any. The loan was structured the way it was because Gibson chose not to sell any of her assets to purchase the apartment complex. She is the one who decided to mortgage another property owned by an LLC that she controlled. No one made Gibson do this. She made the decision to purchase the apartment complex, and she decided that she was going to mortgage rather than sell the remaining beach house to do it [Def.’s Ex. 43]
- 29 The Court erred in finding that the project “failed because it was never viable and certainly not suitable for a 63 year old unemployed woman with no business experience ” (Order p. 9.) There is no evidence in the record to support this, and the Court does not cite to any. The record reflects that there were several causes for the apartment project failing. Gibson testified that she agreed to purchase the property for \$2.8 million without negotiating the price and without obtaining an appraisal, even though she understood she could have gotten one. [Tr. 181.24 – 182.3; 183.1-13; 224 3-23; 624 6-625.11, Def.’s Ex. 6] Prior to the closing, she did not do any independent research or investigation to evaluate the property [Tr. 181 24-182.15] She did not consult with any other real estate agent or her accountant of 25 years [Tr. 181.24-182 15, 75.13-22] She did not review any cash flow statements or income statements for the property. [Tr. 181 24-182.15.] She never saw the rent rolls for the property. [Tr. 185.12-17] She inspected only one of 48 units [Tr. 181.12-20] She did not hire an architect or a contractor to inspect the property [Tr. 182.8 – 10] She did not ask anyone other than Rolando to prepare an estimate of the cost necessary to convert the apartments to

condominiums or to renovate them to generate higher rents [Tr 182:11-15, 185 19-23, 214:12-18.] Rolando, who was in charge of the project and who prepared the budget, had no prior experience with a project of this kind. [Ct. Ex. 10, Villavicencio Dep. 102:13-103:14.] The budget Rolando prepared showed the total cost of renovations as \$688,814 18, which did not include the cost of a licensed contractor, structural engineer, or architecture fees. [Def.'s Ex. 123.] Rolando began renovating three buildings at once, instead of one at a time, as he and Gibson had agreed, which prevented some of the units from being rented while the construction was taking place [Tr. 106 8-107:6.] The contractor that Gibson hired (Triton Construction) did not do the work it said it was going to do [Tr 452 20 – 453:14.] Further, the Court's finding that Gibson had no prior business experience is incorrect. By the time Gibson purchased the apartment complex, she had already purchased a \$2.4 million commercial shopping center. She received rental income on other property she owned in the amount of \$215,175 per year. [Pl.'s Ex. 32.] The leases she managed included a track for race horses, a cell phone tower lot, a lease to Hidden Cove Boat and Yacht Sales, and a marina lease. *Id.* Gibson is unemployed because she is independently wealthy

- 30 The Court erred in finding that "Ameris 'had a hand' in this project's failure and it was substantial" (Order p. 9.) There is no evidence in the record to support this, nor does the Court cite to any. To the contrary, there were many causes for the failure of the project, the vast majority of which were in the hands of Linda Gibson, as explained in paragraph 29 above.
31. The Court erred in finding that the "bank's conduct was overreaching and egregious." (Order p. 9.) There is no evidence in the record to support this, nor does the Court cite to any.
- 32 The Court erred in finding that "Ameris violated its customer's trust and took advantage of her lack of sophistication." (Order p. 9.) There is no evidence in the record to support this, nor does the Court cite to any. There is no evidence in the record to support a finding that Ameris acted with ill will, bad intent, or malevolence with respect to the borrower. There is no evidence to justify a fiduciary of improper motives. Plaintiffs did not plead such allegations in the complaint, nor did Ameris receive notice that it was defending such a case.
- 33 The Court erred in finding that the "circumstances of the execution of the loan documents were highly irregular." (Order p. 15.) To support this finding, the Court relies upon the testimony concerning the gala, which took place on October 25, 2007. But as explained in paragraph 27 above, the loan documents were not signed until a week later, and the record does not contain any documents signed by Gibson on October 25, 2007.
- 34 The Court erred in finding that Lanier "pushed Ms. Gibson into signing loan documents at the after-hours grand opening of the bank in order to hurriedly

move forward.” (Order p. 16.) Again, this finding is incorrect because there is no evidence in the record of loan documents signed on October 25, 2007, the date of the gala. Additionally, Plaintiffs did not present any evidence that Ameris pushed Gibson to do anything or that the bank moved hurriedly for any reason other than because Gibson and Rolando insisted that the bank do so. The complaint does not contain any allegations of duress or coercion.

35. The Court erred in finding that Ameris’s amendment of a discovery response was disingenuous (Order p. 16.) This finding impugns the integrity of counsel who prepared and signed the discovery responses, and does so without any evidentiary support whatsoever. The amended discovery response is consistent with the evidence. Ameris reserved the right to amend or correct the discovery responses as new information became available, and did so as it was entitled and obligated to do.
36. The Court erred in finding that “[s]hortly after her husband died in 2003, Gibson began to engage in business with Zerbst at Reliance. She initially met with Zerbst several times seeking information about rates and investing her money in the bank.” (Order p. 21.) This is contrary to the evidence in the record. Gibson testified that she met Zerbst “[i]n the latter part of 2004.” She opened a checking account and purchased a CD with the bank. She said that between 2004 and 2005, before the shopping center transaction, she met with Zerbst “probably two to three times.” [Tr. 118:6-20.]
37. The Court erred in finding that “[b]oth Zerbst and Lanier recommended to Gibson that she place a second mortgage on a home she owned on Isle of Palms to finance the loan and she agreed to do so.” (Order p. 21.) There is no evidence in the record to support this. The credit memo cited by the Court does not contain information about who recommended the second mortgage to Gibson.
38. The Court erred in finding that “[r]elying on her conversation with Zerbst and the recommendations by him and Lanier, [Gibson] closed on the shopping center.” (Order p. 21.) There is no evidence in the record to support this, nor does the Court cite to any. Gibson did not consult with Zerbst about whether she should purchase the shopping center.
39. The Court erred in finding “[a]t this stage of his relationship with Gibson, Zerbst knew that Gibson trusted him and that she would follow his advice.” (Order p. 21.) There is no evidence in the record to support this, nor does the Court cite to any. There is no testimony from Zerbst to this effect.
40. The Court erred in finding that Zerbst “was concerned that Villavicencio might be doing something that Gibson did not know about.” (Order p. 22.) There is no evidence in the record to support this, nor does the Court cite to any. There is no testimony from Zerbst to this effect.

41. The Court erred in finding that Zerbst insisted that Villavicencio bring Gibson in for a meeting to discuss the purchase and financing of the apartments because Gibson was not a sophisticated investor and because of his prior relationship with Gibson (Order p. 22) There is no evidence in the record to support this, nor does the Court cite to any Zerbst testified that he wanted Gibson to meet with him because he did not want to waste time and wanted to make sure the deal had "real meat" and "validity." He further testified that it is typical for the bank to meet with the borrower before proceeding with the financing [Tr. 355:5 – 356:7.] It would have been unusual not to meet the borrower. Plaintiffs did not present any evidence to refute this.
42. The Court erred in finding that "[a]t the time Gibson signed the contract she was not ready to close." (Order p. 22) The Court's finding misconstrues Gibson's testimony. Gibson testified that she was not ready to close in May 2007, at the time she signed the contract agreeing to purchase the property. This is because Gibson needed time to obtain the financing and conduct due diligence [Tr. 123:3-10] She did not testify that she was not ready to close on the apartment complex in November 2007, at the time of the actual closing.
43. The Court erred in finding that Zerbst "advised Gibson that purchasing the apartments was a sound financial decision for her and a suitable investment as the rents generated by the apartments would cover the debt on the property " (Order p. 22) The Court's citations to the record do not support this Gibson did not testify that Zerbst advised her that purchasing the apartment was a "sound financial decision for her," nor did she testify that Zerbst told her that the rents would cover the debt. She testified: "[Rolando and Zerbst] *seemed to think* that the rents would cover the debt." She further testified that in Zerbst's *opinion*, "he *thought* it was a good investment." [Tr. 124:18 – 125:1, 142:22-23.] This finding is also inconsistent with the fact that Ameris required the borrower to put up additional collateral for the loan, which is inconsistent with a representation that the project was a sound investment
44. The Court erred in finding that "Zerbst advised and recommended to Ms Gibson that she fund the substantial down payment of \$700,000 by placing a loan on her beach house and he structured the loan with this knowledge " (Order p. 22.) There is no evidence in the record to support this, nor does the Court cite to any. The beach house was refinanced as of August 28, 2007 [Pl.'s Ex. 1] Plaintiffs did not present any evidence that Gibson spoke to Zerbst about the structure of the loan to purchase the apartment complex prior to August 28, 2007 Even if they had, Zerbst was an employee of First Reliance at that time, and was not an agent of Ameris. Moreover, Gibson testified that she refinanced the second beach house on the advice of Rolando Villavicencio and based on her own decision, not on the advice of Karl Zerbst. [Tr. 189:10-191:19, Tr. 195:15-196:1; 205:13-206:22; Def.'s Ex. 43]

45. The Court erred in finding that this was not the first time Zerbst recommended that Gibson borrow money against the beach house (Order p. 22) There is no evidence in the record to support a finding that Zerbst recommended that Gibson borrow money against the beach house the first time or the second time. Gibson's own testimony does not support this finding.
46. The Court erred in finding that Zerbst knew Gibson trusted him and he accepted that trust. (Order p. 23.) There is no evidence in the record to support this, nor does the Court cite to any. There is no testimony from Zerbst to this effect.
47. The Court erred in finding that "Zerbst admitted that he told Ms Gibson that the loan would be safe for her because it was structured in such a way that the projected rents would cover the debt service " (Order p. 24) Zerbst testified that he told Gibson the loan would be safe *based on the loan package presented by the borrower*, not based on any other information or external factors. [Tr. 318:15-20.]
48. The Court erred in finding "[t]his was not a situation where Ms Gibson was determined to borrow the \$2.8 million and purchase these apartments." (Order p. 24.) There is no evidence in the record to support this, nor does the Court cite to any. To the contrary, the record reflects that Gibson, on behalf of Heritage Seven LLC, applied for financing with at least two different lending institutions to purchase the apartments. Additionally, Benji Lanier testified that the pressure to obtain financing and to quickly approve the loan application came from the borrower [Tr. 478 1-16] Plaintiffs did not present any evidence to refute this
49. The Court erred in finding that "Zerbst knew [Gibson] sought his advice and he gave her advice not just an opinion " (Order p. 24) There is no evidence in the record to support this, nor does the Court cite to any. There is no testimony from Zerbst to this effect.
50. The Court erred in finding that the "relationship between Gibson and Ameris was much more than one of a depositor and bank " (Order p. 25) There is no evidence in the record to support this, nor does the Court cite to any.
51. The Court erred in finding that Ameris tried "to hide behind mountains of documents, disclaimers, and appraisals . . ." (Order p. 25) This finding ignores the legally binding and enforceable nature of the documents that Plaintiffs signed. Ameris was entitled to rely upon the documents and their terms. Indeed, the Court enforced the terms against Gibson and Heritage Seven LLC by foreclosing upon the notes. Plaintiffs have never contested the enforceability of the documents, not in the complaint or at the trial

- 52 The Court erred in finding that “in 2009, it became apparent that Ms. Gibson could not pay back her loan to Ameris.” (Order p. 26.) There is no evidence in the record to support this, nor does the Court cite to any. Instead, Gibson testified that as of October 7, 2009, she had a net worth of \$18,341,915.18 [Tr. 170:19-22; Def.’s Ex. 98] Gibson had in excess of \$20 million in assets, and could have repaid the loan but chose not to.
- 53 The Court erred in finding “[t]hese bankers knew the loan as structured should not have been made and yet no one revealed this to Ms. Gibson.” (Order p. 29.) There is no evidence in the record to support that anyone at Ameris knew that the loan should not have been made at the time it was made. The testimony cited by the Court relates to observations made years after the fact, when it became apparent that the renovations were not going to be completed, and new opinions formed about whether the property was worth what was paid for it.
- 54 The Court erred in finding that Zerbst and Lanier knew that the project revenue would not carry the loan but “hid this material fact from [Gibson] and advised her that this was a good investment.” (Order p. 30.) There is no evidence in the record to support a finding that Ameris had any financial or other information related to the apartment complex or the loan that Gibson or the borrower, Heritage Seven LLC, did not know. Further, there are no allegations in the complaint to this effect.
- 55 The Court erred in finding that “Ms. Gibson was never made aware of the advances paid by Ameris, nor did Ameris ever request her approval before paying the draws.” (Order p. 30.) The exhibits cited by the Court do not support this finding. This finding also assumes that Rolando Villavicencio was not the agent of Linda Gibson, which is inconsistent with the Court’s finding that Rolando was Gibson’s fiduciary. It is also inconsistent with the multiple agency agreements that Gibson signed with Rolando. Based on the relationship, any knowledge of Rolando was imputed to Gibson. Further, the testimony in the record reflects that Gibson called Benji Lanier at the beginning of the project and told him that Rolando was going to be the project manager and that he was in charge. [Tr. 415.9-22; 436.20 – 437.9] Disbursements were made upon Rolando’s request with submitted invoices for work that had been performed. [Tr. 415.9-13] The record further reflects that all disbursements were supported by invoices, except for when Gibson took over the project. [Tr. 444:17-20, 447.4-8; Pl.’s. Ex. 30.] There is no evidence that Gibson made any contemporaneous complaint about how the disbursements were handled. Plaintiffs did not present any evidence showing that the advances were paid without supporting invoices or that the advances went anywhere except into the project.
- 56 The Court erred in finding that “Ameris failed to inspect the project to ensure the improvements and draw requests were consistent with the project costs.”

(Order p. 30.) This finding is not supported by the record and is contrary to the loan documents that Gibson signed. The construction loan agreement states that the borrower “will apply or cause Project contractors and suppliers to apply the Loan disbursement only to work actually done and materials actually incorporated in the Project . . .” [Def.’s Ex. 31, ¶ 14(N)] The agreement also states that the bank is “not obligated to inspect, supervise, prevent Construction Liens, or inform [the borrower] about the Project’s progress or performance . . .” [Def.’s Ex. 31, ¶ 14(V)] Plaintiffs did not present any evidence demonstrating that Ameris undertook duties to inspect the project.

57. The Court erred in finding that “Ameris never verified the contractor on the project and did not require a contract or AIA document or any other information in support of work being completed ” (Order p. 30.) This finding is contrary to the duties and responsibilities of the parties as outlined in the loan documents. Additionally the record reflects that all disbursements were supported by invoices, except for when Gibson took over the project [Tr. 444:17-20; 447:4-8, Pl’s. Ex. 30.] Plaintiffs did not present any evidence showing that the advances were paid without supporting invoices or that the advances went anywhere except into the project.
58. The Court erred in finding that “Ameris’ own records reflect that it paid \$290,000 in construction draws that are not supported by invoices ” (Order p. 31.) The Court erred in admitting Plaintiff’s Exhibit 30 into evidence and relying upon it to question Karl Zerbst prior to ruling on whether the exhibit was admissible in the first instance. Additionally, the Court erred in relying exclusively on this memo to make this finding, given that the actual invoices and draw checks were made a part of the record in this case and do not support a finding that draws were made without supporting invoices.
59. The Court erred in finding that “Ameris suggests that the project was viable and had the rehabilitation been successful, the building would have rented and carried the property. Were this so, Ameris by allowing \$290,000 to go unaccounted for, prevented the construction, the lease up, and payment of the mortgage and therefore caused the resulting damages, *infra* ” (Order p. 31, n.6.) There is no evidence in the record to support this finding, nor does the Court cite to any. There is no evidence in the record that the construction draws went anywhere other than into the project.
60. The Court erred in finding that “Ameris failed to properly control the advances and failed to notify her that the money was not going into the project.” (Order pp. 32-33) There is no evidence in the record to support this finding, nor does the Court cite to any.
61. The Court erred in finding that “Ameris admitted that they had control over the money that was being advanced and did not exercise that control.

properly.” (Order pp. 32-33.) The testimony cited by the Court does not support this finding. According to the loan documents, Ameris had the duty to disburse the money as requested, with supporting invoices, which Ameris did. Once the money was advanced, it became the responsibility of the borrower to ensure that it went into the project.

62. The Court erred in finding “Ms. Gibson’s testimony included a statement that she said she discovered that Mr. Villavicencio stole ‘several hundred thousand dollars from her.’” (Order p. 33.) The record does not contain any evidence to support a finding that Villavicencio stole any money with respect to the apartment complex.
63. The Court erred in finding that Ameris “took no steps to verify that Villavicencio had authority to receive Ms. Gibson’s funds and did not require proper documentation of Villavicencio’s draw requests.” (Order p. 35.) The exhibit cited by the Court does not support this finding. The record reflects that Gibson hired Rolando to be the project manager and authorized him to act on her behalf. The record further reflects that all draw requests from Villavicencio were supported by invoices. No checks were made payable to him.
64. The Court erred in finding that “Villavicencio simply asked for checks to be written from Ms. Gibson’s account and Ameris complied.” (Order p. 35.) There is no evidence in the record to support this finding, nor does the Court cite any. To the contrary, the record reflects that every check written for the renovations was supported by an invoice, except for when Gibson took over the project. [Tr. 444.17-20, 447.4-8.] Further, every check that was written for the project was either made payable to the vendor, as instructed by either Rolando or Gibson, or made payable to Gibson. Not a single check was made payable to Rolando Villavicencio. [Tr. 444.14-16; Def.’s Exs. 41, 42.]
65. The Court erred in finding that “Ameris’ own internal documents show that Ameris disbursed \$378,000.00 out of Ms. Gibson’s construction account without Ms. Gibson’s knowledge or approval, and that of the \$378,000.00, \$290,000.00 was disbursed without any invoices or other backup documentation.” (Order p. 35.) This finding is not supported by the evidence. To the contrary, the record reflects that every check written for the renovations was supported by an invoice, except for when Gibson took over the project. [Tr. 444.17-20; 447.4-8.] Further, every check that was written for the project was either made payable to the vendor, as instructed by either Rolando or Gibson, or made payable to Gibson. Not a single check was made payable to Rolando Villavicencio. [Tr. 444.14-16, Def.’s Exs. 41, 42.] Additionally, the Court’s finding assumes that Rolando was not Gibson’s agent, which is inconsistent with the Court’s finding that Rolando was Gibson’s fiduciary. Further, Plaintiffs never contended that Rolando was not Gibson’s agent.

- 66 The Court erred in finding that Villavicencio embezzled funds with respect to the apartment complex project. (Order p. 35.) There is no evidence in the record to support this finding.
67. The Court erred in finding that “[t]hese sophisticated bankers with the information available knew this low income housing project was inflated and should never have been purchased with 100% borrower money.” (Order p. 36.) There is no evidence in the record to support this finding, nor does the Court cite to any. The Court does not cite any evidence in the record of information that was available to Ameris showing that Ameris knew the price was inflated. Additionally, the project was not purchased with 100% borrowed money. Heritage Seven LLC made a \$700,000 cash down payment.
- 68 The Court erred in finding that Ameris admitted culpability in the present case. (Order p. 37.) There is no evidence in the record to support this finding. The email cited by the Court does not contain an admission that Ameris is liable for the causes of action in the complaint. The email relates the failure of the bank to meet its own internal standards for how the loan should have been managed, not with respect to any duty owed to the borrower. Additionally, admitting culpability with respect to how a loan is managed is not the equivalent of admitting legal liability.
- 69 The Court erred in finding that the apartment complex was purchased with 100% borrowed money. (Order p. 37.) This is contrary to the evidence in the record. The evidence in the record shows that a significant down payment of approximately \$700,000 was made with proceeds received from the refinance of the beach house owned by 3205 Palm Boulevard LLC. This injection of cash into the project establishes that it was not 100% financed. Gibson chose to leverage another asset to make the down payment. Bill Barksdale’s testimony confirmed this. [Tr. 583:22–584:18.]
- 70 The Court erred in finding that “the statements made to Ms. Gibson were based on existing business records, including Ms. Gibson’s financial statements, rental data from the project, and projected debt service.” (Order p. 40.) There is no evidence in the record of any existing business records, rental data, or projected debt service related to the project, nor is there any evidence that Ameris or Zerbst had any information that the borrower did not.

ERRORS REGARDING CONCLUSIONS OF LAW

- 71 The Court erred by finding and concluding that Ameris acted fraudulently with respect to the Plaintiffs because that conclusion is not supported by clear, cogent, and convincing evidence.

- 72 The Court erred by finding and concluding that Ameris acted fraudulently with respect to the Plaintiffs when Ameris' intent was not put in issue by Plaintiffs
73. The Court erred in finding and concluding that Ameris is liable for the harm alleged in the complaint when Plaintiffs' own negligence outweighed any negligence on the part of Ameris.
- 74 The Court erred in finding and concluding that Ameris caused the harm alleged in the complaint, when the evidence shows that the harm alleged was caused by Plaintiffs' own decisions, actions, and inactions, including the decision to purchase the apartment complex in the first instance, to entrust the renovation project to Rolando Villavicencio, and to walk away from the project and the loan obligations
- 75 The Court erred in finding and concluding that Ameris is liable for the harm alleged in the complaint when Plaintiffs assumed the risks associated with purchasing a \$2.8 million apartment complex with plans to renovate and rehabilitate the apartments and lease them to the public.
- 76 The Court erred in finding and concluding the Karl Zerbst was the agent of Ameris when Heritage Seven LLC purchased and financed the apartment complex because there is no evidence that Ameris as the alleged principal represented Zerbst to be its agent
- 77 The Court erred in finding and concluding the Karl Zerbst was the agent of Ameris when Heritage Seven LLC purchased and financed the apartment complex because there is no evidence that Plaintiffs relied on any communications from Ameris regarding the capacity in which Zerbst was acting
- 78 The Court erred in finding and concluding the Karl Zerbst was the agent of Ameris when Heritage Seven LLC purchased and financed the apartment complex because there is no evidence that Plaintiffs suffered any detriment as result of any representation from Ameris regarding the capacity in which Zerbst was acting
79. The Court erred in finding and concluding the Karl Zerbst was the agent of Ameris when Heritage Seven LLC purchased and financed the apartment complex because the Court mistakenly relied exclusively on evidence regarding Zerbst's conduct to conclude that an agency relationship with Ameris existed.
- 80 The Court erred in finding and concluding that Ameris ratified the conduct of Zerbst and thereby made Zerbst its agent because ratification may be used to authorize otherwise unauthorized acts of an agent, but may not be used to

create an agency relationship itself *Disney Enters., Inc v. Esprit Finance, Inc* , 981 S W 2d 25 (Tex App 1998)

- 81 The Court erred in basing its conclusion that Zerbst was the agent of Ameris when Heritage Seven LLC purchased and financed the apartment complex on the fact that Zerbst had contacted Ameris about a job because such contact does not create an agency relationship as a matter of law.
82. The Court erred in finding and concluding the Karl Zerbst was the agent of Ameris when Heritage Seven LLC purchased and financed the apartment complex because of the manner in which Ameris approved the loan because those facts do not establish or support even an inference that Ameris had authorized Zerbst to act as its agent and had expressly or implied represented to Plaintiffs that he was acting for Ameris.
83. The Court erred in finding and concluding the Karl Zerbst was the agent of Ameris when Heritage Seven LLC purchased and financed the apartment complex because there is no evidence that the approval was in any way improper and Plaintiffs lack standing to challenge the manner in which the loan request made by them was approved.
84. The Court erred in citing *Jay Cee Fish Co v. Cannarella*, 279 F. Supp 67 (D S.C 1968), for the proposition that an agency relationship can be established by the acceptance of benefits by the principal because the case does not so hold. The case instead points out that the purported agent was an employee of the plaintiff, that plaintiff had transacted business through its employee/agent for a number of years, and that the agent was "clothed with adequate authority to transact business on its behalf and to bind plaintiff in this regard." *Id.* at 70-71. None of these facts is present in the case at hand, and therefore the Court's reliance on *Jay Cee Fish Co* is erroneous.
85. The Court erred in finding and concluding the Karl Zerbst was the agent of Ameris when Heritage Seven LLC purchased and financed the apartment complex because of Ameris' subsequent approval of the loan application because the approval by Ameris of the loan does not establish any right to control the activities of Zerbst
- 86 The Court erred in finding and concluding that Ameris is liable to Plaintiffs for an alleged negligent misrepresentation by Zerbst to Linda Gibson because there is no evidence of any false statement of fact made by Zerbst to Gibson.
- 87 The Court erred in finding and concluding that Ameris is liable for negligent misrepresentation based upon Zerbst's statement about the adequacy of the rents to pay debt service on the loan because there is no evidence that the projected rents would have been inadequate.

88. The Court erred in finding and concluding that Ameris is liable for negligent misrepresentation based upon Zerbst's statement about the adequacy of the rents to pay debt service on the loan because that information was equally available to Plaintiffs and could have been discovered by them in the exercise of reasonable diligence.
89. The Court erred in finding and concluding that Ameris is liable for negligent misrepresentation based upon the supposed knowledge of Ameris that the project would fail because any such information was equally available to Plaintiffs and could have been discovered by them in the exercise of reasonable diligence.
90. The Court erred in finding and concluding that the opinions provided by Zerbst were actionable as misrepresentations based upon *Gilbert v. Mid South Machinery Co.*, 267 S C 211, 227 S E 2d 189 (1976), because the facts in Gilbert related to the profitability of an existing business that had already been determined, while in the present case the opinion related to uncertain future events.
91. The Court erred in finding and concluding that Ameris is liable to Plaintiffs for an alleged negligent misrepresentation by Zerbst to Linda Gibson because the purported reliance by Plaintiffs upon Zerbst's alleged statements was not reasonable as a matter of law.
92. The Court erred in finding and concluding that Ameris is liable to Plaintiffs for an alleged negligent misrepresentation by Zerbst to Linda Gibson because the undisputed evidence establishes Plaintiffs failed to use reasonable prudence and diligence to protect their own interests.
93. The Court erred in finding and concluding that Ameris is liable to Plaintiffs for an alleged negligent misrepresentation by Zerbst to Linda Gibson because there is no evidence that any statements made by Zerbst proximately caused any of the damages claimed to have been suffered by Plaintiffs.
94. The Court erred in finding that Plaintiffs had a right to rely on statements made by Zerbst because of the fiduciary relationship between them, because there was no fiduciary relationship and therefore no right to rely.
95. The Court erred in finding and concluding that Ameris owed and breached fiduciary duties to Plaintiffs because the relationship between Ameris and Plaintiffs was that of debtor and creditor, not fiduciary and ward.
96. The Court erred in finding and concluding that Ameris owed and breached fiduciary duties to Plaintiffs because there is no evidence in the record that Ameris offers business advice to customers as a part of its services.

97. The Court erred in finding and concluding that Ameris owed and breached fiduciary duties to Plaintiffs because such a relationship was necessarily precluded by the terms of written agreements between Plaintiffs and Ameris.
98. The Court erred in finding and concluding that Ameris owed and breached fiduciary duties to Plaintiffs to the extent that the Court's conclusion is based upon the fact that Ameris "structured" the loan terms and communicated them to Plaintiffs for their approval because such activity is inherent in the lender/borrower relationship and does not reflect any special advice that would signify a fiduciary relationship.
99. The Court erred in finding and concluding that Ameris owed and breached fiduciary duties to Plaintiffs because there is no evidence that Zerbst or anyone else at Ameris had any knowledge about the property or the transaction that was not communicated to Plaintiffs.
100. The Court erred in finding and concluding that Ameris owed and breached fiduciary duties to Plaintiffs to the extent that the Court based its finding of a breach of duty on the alleged failure of Ameris to follow its internal lending guidelines and policies because such internal policies do not create duties owed to borrowers as a matter of law.
101. The Court erred in finding and concluding that Ameris owed and breached fiduciary duties to Plaintiffs to the extent that the Court found that Ameris deliberately made a loan on property that it knew was too high and/or that Ameris knew that the project was destined to fail because there is no evidence in the record to support such conclusions.
102. The Court erred in finding and concluding that Ameris owed and breached fiduciary duties to Plaintiffs to the extent that the Court relied upon the alleged failure of Ameris to properly manage the loan disbursement process because there is no evidence that there was anything improper about the disbursements or that the manner in which the proceeds were disbursed proximately caused any damage to Plaintiffs.
103. The Court erred in failing to find that Plaintiffs were estopped to complain about the manner in which the loan proceeds were disbursed because the disbursements were made in accordance with instructions from Plaintiffs' agent or at Plaintiffs' direction.
104. The Court erred in finding and concluding that Ameris aided and abetted in the breach of fiduciary duties by Rolando Villavicencio because there is no evidence that Ameris was aware of any such breaches and knowingly participated in them.

105. The Court erred in finding and concluding that Ameris aided and abetted in the breach of fiduciary duties by Rolando Villavicencio by disbursing loan proceeds as directed by him because it is undisputed that he was Plaintiffs' agent for purposes of this loan and Plaintiffs had authorized him to act for them in obtaining loan proceeds.

ERRORS REGARDING ACTUAL DAMAGES

106. The Court erred in finding that Linda Gibson "is entitled to a return of the down payment for the apartment complex " (Order p 44) The record reflects that Gibson did not make the \$700,000 down payment for the purchase of the apartment complex 3205 Palm Boulevard, LLC—an entity that is not a party to this action—made the down payment [Def.'s Ex 10; Tr 191-20-192-10.] "A limited liability company is a legal entity distinct from its members," S C Code Ann. § 33-44-201, and a member of an LLC may not bring an individual action for a wrong committed to the LLC or its members. *Wasko v. Farley*, 947 A 2d 978 (Conn Ct App. 2008)
107. The Court erred in finding that Linda Gibson is entitled to recover damages relating to the refinance of the 3205 Palm Boulevard beach house in order to make the \$700,000 down payment (Order p. 44.) The record reflects that 3205 Palm Boulevard, LLC refinanced a beach house it owned in order for Gibson to make the \$700,000 down payment for the purchase of the apartment complex [Tr 194:15-19.] As stated above, damages relating to the refinance of the beach house are not recoverable because they represent harm to the LLC and not to Plaintiffs. Moreover, the refinance of 3205 Palm Boulevard is a transaction wholly unrelated to the transaction at issue in this case, and occurred months before Gibson ever approached Ameris to provide financing.
108. The Court erred in finding "Ms Gibson is entitled to recover the [\$75,000] she contributed to save the project because there is credible evidence that Mr. Zerbst represented that the \$700,000 construction loan would be sufficient to complete the renovations and that Ms. Gibson would not have to use any of her own money to complete the project." (Order p 45) Plaintiffs introduced no bank records or cancelled checks to support Linda Gibson's claims that she used her own money for the project. Moreover, there is no evidence in the record that Ameris guaranteed to Plaintiffs that the \$700,000 construction loan would be sufficient to complete the renovations or that Gibson would not have to use any of her own money to complete the project.

ERRORS REGARDING PUNITIVE DAMAGES

109. The Court erred in awarding Plaintiffs punitive damages because Plaintiffs are not entitled to an award of actual damages.

- 110 The Court erred in awarding Plaintiffs punitive damages because there is no evidence in the record that Ameris's conduct was "willful, wanton, or in reckless disregard of the plaintiff's rights "
111. The Court erred in awarding Plaintiffs punitive damages because the award of punitive damages violates the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Constitution of South Carolina.
- 112 The Court erred in awarding Plaintiffs punitive damages because the eight factors set forth in *Gamble v Stevenson*, 406 S.E.2d 350, 354, 305 S.C 104, 111-112 (1991), applied to the facts of this case do not support an award of punitive damages
113. The Court erred in finding that "Ameris has a high degree of culpability" (Order p. 49) for the following reasons:
- a. The record does not support the Court's finding that "[t]his was not an arms-length transaction." (Order p 49.)
 - b. The record does not support the Court's finding that "[Zerbst and Lanier] clearly took advantage of [Gibson's] trust in them." (Order p 49.)
 - c. Ameris's reliance on the express terms of the loan documents—the very documents that control the relationship between Ameris and Ms. Gibson—does not support the Court's finding that Ameris has a high degree of culpability (Order p. 50.)
114. The Court erred in finding that the duration of Ameris's conduct supports an award of punitive damages. (Order p. 51.) This case involves a single renovation project, the duration of which was approximately two years. The duration of Ameris's conduct does not support an award of punitive damages.
- 115 The Court erred in finding that Ameris "actively concealed the truth of Ms Gibson's situation from her to try to get more collateral for the failing loan " (Order p 51) There is no evidence in the record to support this finding
- 116 The Court erred in finding that Ameris has engaged in similar past conduct (Order p 51-52) for the following reasons.
- a The record does not support the Court's finding that "Zerbst and Ameris reached an accord prior to Ameris opening its Charleston bank in October of 2007." (Order p 51)
 - b The record does not support the Court's finding that the allegations of the case styled *First Reliance Bank v Karl H Zerbst and Ameris Bank* (2008-

CP-21-785) “have a ring of truth” (Order p 51) and therefore support a finding that Ameris engaged in past similar conduct. The First Reliance lawsuit was settled by the parties thereto without any admission of liability. The First Reliance lawsuit was not tried before this Court and the Court erred in using the allegations contained in the First Reliance complaint to support a finding of similar past conduct by Ameris.

117. The Court erred in finding that conduct similar to the conduct of Ameris in this case needs to be deterred (Order p 52) for the following reasons.
- a. The record does not support the Court’s finding that “Ameris’ conduct is similar in character and quality to the conduct witnessed in the market generally over the past five/six years.” (Order p 52.) There is no evidence in the record concerning the “market generally over the past five/six years.”
 - b. The record does not support the Court’s finding that Ameris’s conduct “is excessive and not reasonably related to the pursuit of sound and stable business practices.” (Order p 52.)
 - c. The record does not support the Court’s finding that “Ameris’s conduct champions greed and must be deterred.” (Order p 52.)
118. The Court erred in finding that “the award of punitive damages is directly related to the harm that resulted from the bank’s conduct” (Order p. 52) for the following reasons.
- a. The record does not support the Court’s finding that “Ameris coerced Ms Gibson to take out a loan to buy and renovate an apartment complex which it knew would ultimately fail.” (Order p. 52.)
 - b. The record does not support the Court’s finding that “Ms Gibson nearly lost everything.” (Order p 52.)
119. The Court erred in finding that Ameris’s ability to pay supports an award of punitive damages (Order p 52.)
120. The Court erred in finding that Ameris “steer[ed] Ms. Gibson to the Richter Law Firm . . . in order to influence her decision making.” (Order p. 52.) The record does not support such a finding and the Court erred in using the finding to support an award of punitive damages.

OTHER ERROR REGARDING DAMAGES

121. The Court erred in finding that “Ameris is 80% liable to Ms Gibson and that Ms. Gibson is comparatively at fault for 20% of her damages.” (Order p. 53.)

The record indicates that Linda Gibson did no due diligence prior to causing Heritage Seven LLC to purchase the apartment complex [Tr. 181 24-182 15; 185:12-18], did not read any of the loan documents or contracts prior to executing them [Tr. 299 12-15], and allowed the loans on the apartment complex and the beach house to go into default despite having substantial personal assets with which to satisfy her outstanding obligations [Tr. 234:19-235 16.] The Court erred in finding that Gibson was only 20% at fault for the harm allegedly suffered in this case.

EVIDENTIARY ERRORS

122. The Court erred in allowing Plaintiffs to introduce evidence and testimony concerning the internal loan policies and procedures of Ameris. A bank's internal policies and guidelines do not create a duty to a borrower and may not be used to support a claim for tort liability against Ameris.
123. The Court erred in allowing Plaintiffs to introduce evidence and testimony concerning a May 22, 2009 disciplinary memorandum regarding former Ameris employee, Benjamin Lanier (Pl's Ex. 30). The memorandum reflects disciplinary action taken against Lanier following the events at issue in this lawsuit, constitutes a subsequent remedial measure under Rule 407 of the South Carolina Rules of Evidence, and the Court should have excluded it.
124. The Court erred in allowing Plaintiffs to introduce e-mail correspondence between two Ameris employees, Don Snipes and Jon Edwards, dated July 3, 2009 in which Snipes wrote "we have some culpability in [Gibson's] problems." (Pl Ex. 31.) Plaintiffs introduced this e-mail and the Court relied upon it as an admission that Ameris is legally responsible for the harm allegedly suffered by Plaintiffs. Snipes is not an attorney and, as a lay witness, could not offer testimony regarding whether Ameris is liable to Plaintiffs. Additionally, the email relates the failure of the bank to meet its own internal standards for how the loan should have been managed, not with respect to any duty owed to the borrower. Admitting culpability with respect to how a loan is managed is not the equivalent of admitting legal liability.
125. The Court erred in allowing Linda Gibson to testify concerning what Karl Zerbst told her, when such testimony constitutes inadmissible hearsay.
126. The Court erred in allowing Plaintiffs to elicit testimony from lay witnesses concerning legal conclusions. For example, the Court erred in allowing Karl Zerbst to testify concerning the legal consideration for Heritage Seven LLC's contract to purchase the apartment complex and concerning the existence of a conflict of interest in attorney Larry Richter's representation of Linda Gibson personally.

- 127 The Court erred in admitting and relying upon the complaint from the action styled First Reliance Bank v. Karl H Zerbst and Ameris Bank, Case No 2008-CP-21-785 The allegations in that case were disputed and the case was resolved by settlement without any party admitting liability
- 128 The Court erred in admitting and relying upon Ameris's initial interrogatory responses in this case. (Pl. Ex. 71) The interrogatory answer upon which the Court relied was subsequently amended by Ameris
- 129 The Court erred in allowing Plaintiffs' expert witness Geoffrey Southard to testify and in allowing Plaintiffs to enter documents into evidence concerning Southard's valuation of the apartment complex. (Pl. Ex. 37.) The evidence in the record establishes that the only valuation conducted by Southard was in 2009, well after Heritage Seven LLC purchased the subject apartment complex.

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August 23, 2013

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF BERKELEY

LINDA A. GIBSON, formerly known as LINDA ANN
AVIGNER, Individually and as Trustee of the PAUL
GIBSON FAMILY TRUST and HERITAGE SEVEN, LLC,

Plaintiffs,

vs.

CASE NO. 10-CP-08-2134

AMERIS BANK,

Defendant.

MASTER-IN-EQUITY HEARING

BEFORE: The Honorable Robert E. Watson

DATE: May 22, 2012

TIME: 9:30 a.m.

LOCATION: 300-B California Avenue
Moncks Corner, SCREPORTED BY: PATRICIA T. MORRISON,
Registered Professional Reporter

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(INDEX AT REAR OF TRANSCRIPT)

25

1 abeyance.

2 Unless something else comes up I think
3 we can, defer, and the more time we can spend I
4 think the less things we'll have to talk about, but
5 I do want to be heard at some point.

6 THE COURT: Yes.

7 MR. WEST: If it please the Court, we
8 would propose a brief opening statement.

9 MR. EPTING: As a housekeeping matter,
10 this is a wonderful story happening here, Judge.
11 The young Romanian woman who practices law with
12 George Kefalos and I, who was raised under a
13 Communist regime, she has recently gotten her law
14 degree here. And it's a great story. She is as
15 smart as she can be. She's a wonderful help to us.
16 So we needed to announce to you she's here at the
17 very beginning.

18 THE COURT: Thank you. I look forward
19 to speaking to you about your personal experience.

20 MR. WEST: She may very well be the
21 smartest's lawyer on the plaintiffs' side, your
22 Honor.

23 THE COURT: I'm ready.

24 MR. WEST: If you are ready to proceed
25 with opening statements, your Honor.

1 If it please the Court, we've already
2 been identified, but for the purposes of the
3 record, John West, Drew Epting, and George Kefalos
4 for the plaintiff, Linda Gibson. You have been
5 introduced to Linda Gibson in an earlier hearing,
6 your Honor, but to my left and Mr. Epting's right
7 is the plaintiff, Linda Gibson, and we want to
8 formally introduce the plaintiff to you here this
9 morning.

10 Judge, I think you have captured the
11 essence of the case in your pretrial reading and in
12 hearing the motions this morning, but this case is
13 the story of how a bank officer led one of his
14 customers into making a very bad, costly and
15 negative life changing investment in an apartment
16 complex in North Charleston and then complicated
17 and magnified those losses by mismanaging the
18 renovation of the project.

19 Linda Gibson at the time these events
20 began to unfold was recently widowed when a real
21 estate broker she knew from her church by the name
22 of Rolando Villavicencio approached her with an
23 investment proposal that he said was a great deal
24 for her.

25 Linda knew Mr. Villavicencio as a

1 successful developer, so when he approached her
2 about the proposal to purchase the apartment
3 complex in North Charleston for \$2.8 million, she
4 was curious and interested. Mr. Villavicencio
5 declared that it was a great investment for Linda
6 and explained that the complex could be converted
7 into what was described as green condominiums --
8 and that will be explained in some detail a little
9 later -- and sold for a significant profit.

10 Now, your Honor, Linda was not a
11 sophisticated investor. Had no idea whether the
12 purchase of the apartment complex was a good deal
13 or not. She had inherited some land from her
14 father on Daniel Island, but she did not have the
15 cash or other liquidity for a down payment, and she
16 knew absolutely nothing about renovating apartment
17 complexes. So Linda went to Karl Zerbst. He was a
18 banker with whom she had had a long-standing
19 relationship and who had arranged a prior financing
20 transaction for Linda and a person whose advice and
21 counsel she trusted.

22 At this point Linda had already signed
23 an agreement to purchase the apartments, but the
24 contract was not legally enforceable because there
25 was no consideration; and as I previously pointed

1 out, Linda did not have the money to buy the
2 apartments. But Mr. Zerbst undertook to advise and
3 counsel Linda. He told her it was a good deal for
4 her. Not only did he recommend that she get
5 involved in the project, your Honor, he structured
6 the purchase and the financing for her and he told
7 her -- and this is a key point, your Honor. This
8 is a red flag point. He told her the rents would
9 cover the debt service. He told her the rents
10 would cover the debt service.

11 He then arranged for her to borrow
12 \$700,000 on a second mortgage to be used as the
13 down payment. He arranged for a \$2.8 million
14 acquisition and construction loan, and he arranged
15 to supervise the draws. Of course, you can hear
16 the theme developing here. He, Zerbst, was doing
17 all of these things in the context of advising and
18 counseling Miss Gibson, and of course one of the
19 things that he advised and counseled her to do was
20 100% financing, another key point for His Honor's
21 consideration as you hear the testimony unfold.
22 100% financing.

23 He calculated the interest she would
24 pay. He structured her payments, as I had
25 previously mentioned, and the repayment schedule.

1 He arranged for his bank to supervise the
2 construction and renovation of the apartment
3 complex. He assumed the duty of supervising the
4 construction and renovation of the apartment
5 complex.

6 Linda then went ahead and, following
7 Mr. Zerbst's direction, purchased the apartments.
8 Closed the deal.

9 The problem here, your Honor, was that
10 very little Karl Zerbst did or said was truthful or
11 accurate. The project was not a good deal for
12 Linda. The apartments were wildly overvalued. The
13 financing was structured in a way that the rents
14 would never, ever carry the debt, and the bank
15 wholly failed in its responsibility to supervise
16 the construction loan. As a result the project
17 failed. The bank foreclosed on the mortgages and
18 Linda Gibson lost a whooping amount of money.

19 Judge, after the bank brought its
20 foreclosure action Linda filed the action that is
21 before you today originally as a counterclaim
22 seeking damages from the bank for having lured her
23 into the project in the first instance. Her
24 damages include today the money she lost in the
25 purchase of the apartments, the money she paid in

1 interest and attorneys' fees defending herself, and
2 the value of the real estate she pledged at
3 Mr. Zerbst's urging and lost in the foreclosure.
4 Her damages exceed \$1.8 million in actual damages.

5 Now, your Honor, Miss Gibson will also
6 prove that she is entitled to punitive damages in
7 this case because of the conduct of Mr. Zerbst and
8 the representatives of Ameris Bank was willful,
9 wanton and reckless toward Mrs. Gibson's care.

10 The evidence will show in a clear and
11 convincing way that this story, your Honor, was
12 always about Zerbst and Ameris. Always about
13 Zerbst and Ameris and never what was right and
14 prudent for Linda Gibson.

15 There has been a good bit of discussion
16 about the law already, your Honor, and just in
17 quick summary this case is governed by one simple
18 but important rule of law. When a banker
19 undertakes to counsel and advise one of its
20 customers -- and I'm just repeating for emphasis.
21 When a banker undertakes to counsel and advise one
22 of its customers regarding the wisdom of their
23 investments, it then has the duty to do so
24 carefully, reasonably, and in good faith. That's
25 the law in South Carolina.

1 The banker normally -- this is also the
2 law -- does not get involved in investment
3 decisions its customers make. And honestly, your
4 Honor, I think we can all agree that a banker
5 generally has no business giving investment advice,
6 but when he does that the bank has the duty to give
7 reasonably sound advice, which of course we contend
8 was absolutely missing in this case.

9 In this case you will see that the bank
10 violated its own guidelines by giving advice to a
11 customer, by making a loan it should never have
12 made, by financing a project that could not pay for
13 itself, and in so mismanaging the construction loan
14 that hundreds of thousands of dollars went
15 unaccounted for.

16 Now, your Honor, the defendant has
17 entered an Answer in this case where it claims it
18 did nothing wrong and would have you believe it
19 should not be held responsible for the damages
20 experienced by our client, Linda Gibson. In its
21 Answer it has raised three primary defenses.

22 First, it claims it did not undertake
23 to advise Linda about the suitability of the
24 investment; however, your Honor, going to the
25 mosaic that I referred to earlier, you will see

1 that Mr. Zerbst will admit he knew Linda was not a
2 sophisticated investor and he undertook to give her
3 advice and counsel. He told her the purchase was a
4 good deal for her and he recommended she purchase
5 the apartment complex.

6 Beyond that he structured the entire
7 investment for her, telling her how much to put
8 down on the property and how to borrow the down
9 payment. He calculated the income and expense on
10 the project and mistakenly assured Linda that the
11 rents from the project would service the debt. A
12 very key point.

13 Second, your Honor, the bank in its
14 Answer claims even if Mr. Zerbst did undertake to
15 give Linda advice, he was not acting as its agent
16 when he did. There will be a lot of testimony
17 about that aspect of the case; however, when you
18 look at the whole picture, your Honor, through the
19 lens of common sense and experience, you will see
20 that he clearly was an agent of Ameris. In fact,
21 we contend that will scream out at you as the
22 testimony unfolds.

23 You will see that Mr. Zerbst was
24 originally working for a different bank, First
25 Reliance Bank, when Linda first contacted him.

1 Mr. Zerbst made the preliminary arrangements for
2 the loan to be made. In fact, through First
3 Reliance Bank. But then he changed jobs and went
4 with Ameris. And the Gibson loan at \$2.8 million
5 was a big deal for Mr. Zerbst, and he saw it as an
6 opportunity to carry favor with his new bosses at
7 Ameris, and it was also a big deal for Ameris
8 because they wanted to become a player in the
9 Charleston market.

10 So with Ameris's collaboration and
11 consent Mr. Zerbst orchestrated the loan to be
12 transferred to Ameris, and he did this all as
13 Ameris's agent.

14 Now, your Honor, briefly as a
15 parenthetical here and another one of the red flags
16 that I would encourage the Court to make a mental
17 note of, this October 2007 time frame where
18 Mr. Zerbst was in transition to Ameris, we say he
19 had already gone to work for Ameris. This October
20 2007 time frame is a key period on the issue of
21 agency.

22 The testimony and the record will
23 clearly show that there was a frenzy of
24 behind-the-scenes activities underway by Karl
25 Zerbst and his lawyers to work around and

1 circumvent a noncompete agreement he had with First
2 Reliance Bank. Those attempts were so overt that
3 First Reliance Bank sued Karl Zerbst for violation
4 of the noncompete agreement. A big old lawsuit.
5 And Linda Gibson was one of the customers, if the
6 Court please, Mr. Zerbst was parroting for the
7 benefit of Ameris.

8 This time frame that I alluded to is
9 very significant. Thirdly, the bank claims it had
10 no responsibility to Linda whatsoever and wants you
11 to believe it breached no duty to her. However,
12 your Honor, you will see from the record that will
13 unfold before you the issue we have previously
14 discussed in the pretrial motions.

15 I will bypass at this point but call
16 the Court's attention to the internal memo that is
17 now being considered by the Court, but there is
18 also the issue of the culpability memo. And this,
19 your Honor, is not the single piece of evidence.
20 This is not the smoking gun, the culpability memo.
21 It is part of the fabric of testimony and documents
22 that will establish the very point that the senior
23 vice-president, Mr. Snipes, conceded and admitted
24 we have culpability. We did not do what we were
25 supposed to do.

1 And in closing, your Honor, this is a
2 serious case and it's a big case, but at the end of
3 the day this is a simple case. And there is only
4 one issue before the Court. Did Ameris undertake
5 to counsel and advise Linda Gibson on how to buy,
6 finance and renovate the apartments and did Ameris
7 do so reasonably? Because if it did undertake to
8 advise and counsel Linda on these things and if the
9 bank failed Linda, then the bank cannot avoid
10 responsibility for the damages that it caused.

11 Thank you for your time, your Honor,
12 and look forward to being with you during the
13 course of this trial.

14 THE COURT: Thank you.

15 MR. STEPP: May it please the Court,
16 counsel. Your Honor, I'll put that up there. It's
17 not very bright. I'll put it up there anyway.

18 I'm Bobby Stepp, your Honor. As you
19 know, this is Will Jordan, who is in my office with
20 me, and Tina Cundari, who is my law partner. And
21 this is Kim Woodworth, who is our paralegal,
22 without which very little positively would happen
23 in the next couple of days. I wanted to introduce
24 you to those folks.

25 Sitting in the back there is Richard

1 Sturm. He is an officer with Ameris Bank, and he
2 or somebody will be here with us throughout the
3 trial because they take this, of course, very
4 seriously.

5 Your Honor, I really appreciate the
6 fact that we are finally to the stage in this case
7 where we're going to actually hear the evidence,
8 because we've been before you once -- I've been
9 before you once on a motion -- and I know that you
10 had proceedings in the foreclosure action -- and
11 there has been a lot said by counsel about what
12 happened in this case. And of course, counsel are
13 advocates, and I applause everybody's skill,
14 particularly those representing the plaintiffs in
15 this case. They are the finest caliber of lawyers
16 available.

17 But at the end of the day it's not what
18 we say that matters, of course; it is what the
19 evidence is going to be. So I would like to take a
20 little bit of time to tell you with some
21 specificity what the actual evidence is going to
22 be. Not what the argument is about, what it all
23 means, but what are you really going to hear from
24 the witness stand? What are the exhibits going to
25 tell you? What have the parties promised to each

1 other and what have they not promised to each
2 other? This is what will unfold, so let's proceed.

3 You've seen most of these names before
4 in the cast of characters. The borrower on the
5 loan in question is not Mrs. Gibson; it's Heritage
6 Seven, LLC. Mrs. Gibson is a member of that LLC.
7 She was also a guarantor of the loan. Rolando
8 Villavicencio was, as you will come to see, is a
9 person that played an extremely important and
10 pervasive role in the events that you're going to
11 hear about.

12 It's very interesting to me that the
13 story that the plaintiffs will tell in this case
14 focuses entirely on Ameris. They haven't mentioned
15 Rolando. The stories they have told other places
16 focuses entirely on Rolando, and for good reason.
17 Because you're going to hear a lot of evidence
18 about what his relationship was to the borrower,
19 what his role in this matter was, what his
20 responsibilities were, and how his own conduct has
21 contributed to some of the issues that the
22 plaintiffs confront.

23 Rolando at the time was associated with
24 RE/MAX Realty. So I tend to say "Rolando," but
25 sometimes I probably should say "RE/MAX," because

1 some of the contracts are actually with RE/MAX.

2 Benjie Lanier you heard Mr. West
3 discuss, and Karl Zerbst. Neither of them are
4 still with Ameris. We have them under subpoena to
5 be here and we really look forward to you hearing
6 directly from them what they have to say about
7 events.

8 So what sort of happened here? The
9 timeline of events -- Mr. West has gone through
10 this. I'm not going to spend a lot of time on it,
11 but it goes back to 2004 and Rolando and his wife
12 are attending the same church as Mrs. Gibson.
13 Mrs. Gibson at that point owned or had an interest
14 in two beach houses, and Rolando, being the
15 enterprising broker that he was, was trying to see
16 if she wanted to sell one of them. It turns out
17 she did sell one of them, but she didn't use
18 Rolando or his wife as the broker.

19 But Mrs. Gibson approaches Rolando
20 because she wants to do a 1031 exchange. This is
21 this very unsophisticated person that you just
22 heard about approaches her friend, real estate
23 adviser, financial adviser, and says: I want to do
24 a 1031 exchange because I want to defer capital
25 gains tax if I sell the beach house. So indeed

1 Rolando gets involved in that.

2 In December of 2005 Rolando shows
3 Mrs. Gibson a shopping center, commercial shopping
4 center, which Mrs. Gibson purchases for \$2.4
5 million as a part of the 1031 exchange, and then
6 Mrs. Gibson hires Rolando/Re/Max to be the property
7 manager for the shopping center.

8 Now I'm going to show you some
9 documents in the course of the case that will talk
10 about the financing there. This has got zero to do
11 with Ameris. I'm not even sure Ameris has an
12 office in South Carolina at this point. But at
13 that point the shopping center is a hundred percent
14 financed. She takes two mortgages out to buy the
15 shopping center at the suggestion of Rolando.

16 Then in 2007 we get to the apartment
17 complex, the Otranto Road apartment complex.
18 Rolando comes to Mrs. Gibson and suggests to her
19 that she purchase the apartment complex. You heard
20 Mr. West say he tells her it's a wonderful deal.
21 He tells her it's great.

22 Now, Rolando was already the property
23 manager for the apartments, and he was also the
24 listing agent for the sellers. By this time -- and
25 this is important. Mrs. Gibson has testified to

1 this -- and I'm sure she will say the same thing
2 again in front of your Honor in this case.
3 Mrs. Gibson considered Rolando to be her real
4 estate agent and her financial advisor. Not Karl
5 Zerbst, not Ameris Bank. Rolando is the person
6 she's relying on. She was relying on him heavily,
7 as she testified, and that reliance manifested
8 itself in many ways.

9 By example, I'm going to tell you a few
10 things that Ms. Gibson has testified to. She has
11 testified that: Rolando was advising me
12 financially ever since I approached him about the
13 1031. Not Karl Zerbst, not Ameris Bank, not even
14 First Reliance Bank. Rolando was advising her
15 financially. She called him her financial adviser,
16 the role that plaintiffs now seek to substitute
17 Ameris Bank as her financial adviser, but according
18 to Mrs. Gibson's sworn testimony it was Rolando,
19 and that she also said that she considered him my
20 financial adviser and real estate agent.

21 With respect to the apartments -- and
22 Mr. West candidly said this to your Honor.
23 Mr. Zerbst didn't tell her anything to go buy these
24 apartments. It was Rolando. And Mrs. Gibson has
25 testified that Rolando -- that's the key --

1 convinced me it was a good deal. Not Karl Zerbst,
2 not Ameris Bank. Rolando. She says: I didn't
3 know anything about condominiums, so I just let him
4 talk, and he painted this picture for me. That
5 "he" is Rolando, not Karl Zerbst, not Ameris Bank.
6 He was going to be doing this, not me. The "he" is
7 Rolando, not Karl Zerbst, not Ameris Bank.

8 Now, in April of 2007 Rolando submits a
9 financial statement of Mrs. Gibson to First
10 Reliance Bank that suggested she has a net worth of
11 \$53 million with assets, personal assets, of
12 2.3 million, liabilities of 2.3 million -- that
13 might be a mistake -- and a network of 53.7 with an
14 annual income of \$275,000.

15 Well, Mrs. Gibson answered: I didn't
16 sign that. I didn't know what it said. Rolando
17 did that for me, and I don't know anything about
18 it. But that's the picture that was presented to
19 First Reliance in 2007.

20 In May of 2007 Mrs. Gibson signs the
21 contract to buy the Otranto Road apartments for
22 \$2.8 million. Now, at this point she's only talked
23 to Rolando. We'll make that clear in her
24 testimony. She hasn't talked to Karl Zerbst. She
25 hasn't talked to anybody at First Reliance; and

1 most importantly, she hasn't talked to anybody at
2 Ameris Bank.

3 Now, they say: Well, but the contract
4 wasn't enforceable. There was no consideration.
5 Blah, blah, blah. But yet she had signed it. As
6 you will see, she has approached First Reliance
7 about financing the deal and made an application
8 before she ever had a conversation with Karl
9 Zerbst.

10 So we wanted to make that clear in her
11 deposition from December 30th. Question: It was
12 Rolando and Rolando alone who advised you to
13 purchase or thought it was a good idea anyway for
14 you to purchase the apartments?

15 Answer: Yes. And Portia talked to me
16 some about that too, but it was mostly Rolando that
17 I talked with.

18 Question: And you didn't check with
19 your bank, your accountant, anybody else to see
20 whether or not this could indeed be a good deal?

21 Answer: No, I did not.

22 Now, we've heard about this refinancing
23 the beach house and that this is a hundred percent
24 financing. We're going to explain that to your
25 Honor. But it was Rolando who suggested that

1 Gibson refinance the beach house for what he called
2 show money. Not Karl Zerbst, not Ameris. Rolando.

3 The beach house was refinanced. It was
4 not owned by Linda Gibson. It was owned by 3205
5 Palm Boulevard, LLC. She does a cash-out
6 refinancing in August of 2007. In August of 2007
7 she hasn't talked to Karl Zerbst, according to her
8 testimony. It's Rolando that suggested that she do
9 this, and she takes \$667,000 out of that refinance
10 and has it available to make an equity
11 contribution. For what? Because she wants to buy
12 the apartments. That's why she did it, but not
13 because we told her to.

14 We get a new financial statement or
15 First Reliance gets a new financial statement on
16 August 30th. This is after that loan has been
17 closed. The \$667,000, to the extent money is
18 identifiable, that money came from a refinance of a
19 beach house owned by an LLC, of which she was one
20 of -- I think she owned a 50% interest in it. But
21 even with that, according to this statement she
22 still had assets of \$56.1 million and a net worth
23 of \$53 million.

24 I think when we talk about a hundred
25 percent financing, we think about somebody that

1 makes an unsecured loan to make a down payment
2 requirement or something else. We'll talk about
3 whether there is anything wrong with that. But I
4 want the Court to understand that at the time, even
5 after that refinance is done, her net worth is
6 still being reported as \$53 million. So she had
7 plenty of assets, although perhaps not much
8 liquidity. But she didn't need to borrow money in
9 order to do this deal. She chose to borrow money
10 to do this deal, and we'll show you a document in
11 which she tells the Court why she chose to do it.

12 After that Rolando begins approaching
13 lending institutions. Mrs. Gibson suggested that
14 he contact First Reliance because of the shopping
15 center, and in September of 2007 Rolando approaches
16 First Reliance. At this point Zerbst and Lanier
17 worked for First Reliance. There is not any
18 evidence of any connection of any variety between
19 Zerbst and Ameris at this point.

20 First Reliance orders an appraisal
21 completed on September 12th, 2007, when the
22 suggestion seems to be -- and I guess we're going
23 to hear some testimony over this appraisal, but
24 that Zerbst should have known what the value of the
25 property was.

1 Well, there was an appraisal done by a
2 third-party appraiser valued at \$2.8 million. What
3 was the purchase price? \$2.8 million. Matched up.
4 A renovated value projected to be \$3.7 million. So
5 you put 2.8 in; you get 3.7 out, if it all
6 works. That was the information that was of record
7 in September of 2007. Now with hindsight maybe
8 that wasn't right.

9 Of course, I'm sure if there is anybody
10 in Berkeley County that understands the values in
11 2010 are different than what they were in 2007 I'm
12 talking to them right now, because I'm sure you are
13 confronted with that every day in your judicial
14 office.

15 Again, while that contract is pending,
16 the one that they said was not enforceable and
17 didn't mean anything, Mrs. Gibson signs a contract
18 with an architectural firm, and she agrees to pay
19 them \$20,000 to do green building analysis, and
20 under that contract Verdi Architects, contracted by
21 Mrs. Gibson or by Heritage Seven, agrees to visit
22 the site, become familiar with the progress and
23 quality of the work, endeavor to guard the owner
24 against defects and deficiencies and determine if
25 the work has been performed in a manner that the

1 work when completed will be in accordance with the
2 contract documents. That is Verdi Architects, not
3 Ameris Bank.

4 Now, this is where, I think, the
5 plaintiffs' sense of conspiracy becomes fine tuned.
6 In early October 2007 Benjie Lanier leaves First
7 Reliance and goes to work for Ameris. At that
8 point there is a loan application for this deal
9 pending at First Reliance. At about that same time
10 Mrs. Gibson says she calls Zerbst, who tells her,
11 according to Mrs. Gibson, that First Reliance is
12 not going to make the loan. Mr. Zerbst is going to
13 deny saying that, I believe -- so there is going to
14 be a square conflict of testimony there -- and
15 recommends that she contact Lanier and Ameris. She
16 does. There is nothing wrong with that. People
17 are shopping loans all the time, and at this point
18 there was a lot of competition. So I don't think
19 there is anything sinister and nefarious about the
20 fact that the loan application gets switched from
21 First Reliance to Ameris.

22 Later in October Zerbst resigns from
23 First Reliance. Here is going to be a major point
24 of disagreement. I just want your Honor to
25 understand where we're coming from.

1 Zerbst resigns from First Reliance in
2 October. He's hired by Ameris on January the 11th
3 of 2008. I'll show you those documents. He did
4 not go from First Reliance to Ameris. He spent
5 some time debating whether he even wanted to stay
6 in banking. Certainly he had some conversations
7 with Ameris, but he had a big problem, and that was
8 this noncompete with First Reliance. And there was
9 some consideration of: What do we do about that if
10 we were to hire you?

11 Well, the answer is they didn't do
12 anything about it until January, in which event
13 he's hired in a different geographic market.

14 So the plaintiffs want to tell you that
15 Mr. Zerbst -- they say the evidence will cry out
16 that he was working for Ameris, and yet there is a
17 pretty big gap there and the evidence is going to
18 have to be pretty compelling that Ameris had any
19 right to control his activities during that period
20 of time. As your Honor knows, the test of agency
21 is not whether I do something as a volunteer; it's
22 whether the principal has the right to control the
23 activities of the agent, and there is not going to
24 be any evidence to that effect.

25 Now we'll come to this conversation

1 with Zerbst upon which I think all of the
2 plaintiffs' case hangs. You just heard the
3 plaintiffs tell you that Zerbst assumed these
4 duties and he assumed them on behalf of her. Of
5 course, the first question is: When did this
6 conversation take place?

7 Well, according to Mrs. Gibson it's
8 while Zerbst is still at First Reliance. She says
9 she calls him in his office. Zerbst's recollection
10 is different and says: No. I had left. She
11 called me at my house. I was standing in my
12 kitchen. But he had not gone to work for Ameris
13 and was not Ameris's agent. So either way when
14 this conversation takes place there is no
15 connection between Zerbst and Ameris Bank.
16 So that's Point No. 1.

17 And then: What is the substance of it?
18 All Zerbst will say is that he thought she asked
19 him: Well, is this okay? Is this a good deal?
20 I think he's going to say that he understood her to
21 be asking about the interest rate and the repayment
22 terms and things like that. He said: Yeah. It's
23 okay.

24 Casual conversation. Hardly the sort
25 of interaction upon which a bank for whom Zerbst is

1 not working -- he's not working for any bank,
2 according to him -- undertakes to set aside its
3 interest and begin to act from that point forward
4 in the interest of the borrower to assume duties to
5 protect the borrower and to step outside of his
6 role as lender. You'll hear all that, and your
7 Honor can, of course, make your own decision about
8 the significance of that conversation.

9 The loan is finally closed on November
10 the 2nd. Gibson signs a loan application, note,
11 mortgage, construction loan agreement, two
12 guarantees. Cash from the borrower, \$471,432.

13 Now, the commercial loan application
14 has got some interesting recitations in it. These
15 are the agreements between the parties. This is
16 what is in writing. This is what Mrs. Gibson
17 promised us. She says first that the loan
18 applicant submits this application and the
19 information provided on all company financial
20 statements and schedules for the purpose of
21 obtaining credit and represents that the
22 information submitted is accurate and complete.

23 She now, of course, disclaims that
24 because much of the financial information was not
25 applicable. Then she says: Loan applicant

1 represents that none of the parties named in the
2 application have relied on advice from the lender
3 in applying for or receiving any credit.

4 Well, once again that's about as
5 squarely opposite from the position that the
6 plaintiffs are asserting in this case today as can
7 be. Contrary to what the signed writing says, she
8 says: I relied completely on what they said. So
9 your Honor is going to have to resolve this. This
10 is in writing. This is signed by her, and she's
11 bound by it, in our opinion.

12 The construction loan agreement was
13 signed on the same day. Note amount, \$2.8 million.
14 That says that the borrower will choose a
15 consulting architect, an independent architect, a
16 professional engineer or other construction
17 consultant to periodically inspect the project's
18 progress and follow it to protect your interests
19 exclusively. "Your" being the bank's.

20 What the plaintiffs' position in this
21 case is that this was a duty that was assumed by
22 Ameris, that Ameris undertook to manage the
23 construction. That's what I heard, and yet the
24 documents themselves say the borrower's
25 responsibility is to manage the construction.

1 Still in the construction loan agreement it says:
2 I'm not going to rely on you to inspect the
3 project. You are under no obligation to supervise,
4 inspect, or inform me of the progress of the
5 construction, and I will not rely upon you
6 therefore.

7 That's the written promise of the
8 borrower, and yet again the position in the case
9 today is that that somehow has been thrown out the
10 window and just the opposite has taken place so
11 that Ameris has promised to manage all this and
12 protect the borrower.

13 Again, a verification of the financial
14 statements. And then still in the construction
15 loan agreement: I -- that's the borrower -- will
16 cause the project's development, construction and
17 equipping and any off-site development to be done
18 diligently, continuously, on time, with high
19 quality labor and materials. I will cause the
20 project development, construction and equipping to
21 begin on November 2 and to be fully completed no
22 later than December 2nd. I, the borrower, and yet
23 the position in this case today is that no, that
24 was something that Ameris undertook to do for which
25 the borrower has no responsibility.

1 I will apply or cause the project's
2 contractors and suppliers to apply the loan
3 disbursements only to work actually done, and yet
4 the position in the case is no, that was not the
5 borrower's responsibility. That became the bank's
6 responsibility to make sure that was done.
7 Directly contrary to the written agreement between
8 the parties.

9 Paragraph 14B: I, borrower, agree that
10 you and your consulting architect are not obligated
11 to inspect, supervise, prevent construction delays
12 or inform me about the project's progress or
13 performance, and yet the position in the case, of
14 course, is that that is exactly what they claim we
15 undertook to do even though it's directly contrary
16 to the written promises and acknowledgements of the
17 borrower in the loan documents.

18 And of course, the merger clause that
19 the agreement is the final, complete expression of
20 the understanding between the borrower and the
21 lender, which would foreclose much of this other --
22 of the contention that there were other promises or
23 commitments and undertakings.

24 After the closing the borrower appoints
25 RE/MAX and Rolando as the exclusive leasing agent

1 for the project, and part of that agreement says
2 that construction shall be scheduled, coordinated
3 and supervised by broker on behalf of the owner.
4 The broker is Rolando.

5 Again, now what does this document say?
6 "Construction shall be coordinated and supervised
7 by the broker." But in this case the contention is
8 that Ameris undertook to manage the construction,
9 as I understood the plaintiff's statement,
10 And there was a consideration for that.
11 Mrs. Gibson agreed to pay RE/MAX 10% of the
12 construction costs to do exactly that.

13 Construction disbursements began
14 shortly after closing. Ameris does not hire an
15 inspecting architect. Wasn't obligated to hire an
16 inspecting architect. Contrary to what the
17 plaintiffs may suggest, Benjie Lanier does make one
18 or more visits to the site. Rolando submits
19 invoices and draw requests, and Ameris pays them at
20 the direction of the borrower acting through
21 Rolando, and that money is in turn disbursed to
22 contractors.

23 After closing Mrs. Gibson does not
24 visit the property for five months. So all this is
25 going on. She's not there. She did call Rolando

1 from time to time for updates. It's interesting
2 she didn't call Ameris for updates, but yet her
3 position is Ameris had undertaken to do all this.
4 But she's calling Rolando, and Rolando said
5 everything is fine. And no contact with Ameris.

6 At the end of May, though, Mrs. Gibson
7 visits the site and then she discovers: Well,
8 things are not going as she had hoped at that
9 point. So beginning in April 2008 Mrs. Gibson
10 takes over the disbursement process herself. The
11 final \$290,000 of the construction loan is
12 disbursed at her direction. She does not present
13 any invoices or anything to support these
14 disbursements, for the most part. She just calls
15 up the bank and has money put in her account and
16 she disburses it as she sees fit, but yet now she
17 complains somehow that the bank should have been
18 doing something else, even though that would be
19 contrary to what she asked us to do at the time.

20 The construction and conversion is
21 never completed, and you're going to hear some
22 evidence about that.

23 This is only one of two pieces of
24 litigation that has grown out of this loan, your
25 Honor, and this project. On July 28, 2008 our same

1 plaintiffs filed a separate action against Rolando
2 and RE/MAX and the appraiser. They sued them for
3 all these causes of action. We're going to put
4 that Complaint into evidence.

5 In that Complaint the plaintiffs, our
6 plaintiffs, allege that Rolando represented that
7 the apartment complex was a good opportunity and
8 that Rolando played the primary role in plaintiffs'
9 decision to enter into the contract to buy the
10 apartments. That was their position in that
11 litigation, which of course is consistent with
12 Mrs. Gibson's testimony.

13 Rolando represented to plaintiffs that
14 the purchase price of the property was market value
15 and that it was a suitable investment for
16 plaintiff. This is interesting because that's
17 exactly what they now contend Karl Zerbst
18 represented to her. So how interesting that two
19 different people on two different cases apparently
20 made exactly the same representations at different
21 times, unconnected to each other.

22 The loan is obviously not repaid on
23 time. There are some discussions back and forth
24 about trying to get something worked out. The
25 borrower, Mrs. Gibson, signed a new note in January

1 of 2009 and Ameris advances another \$50,000 in
2 December of 2009.

3 In October of 2009 we get -- this is
4 delivered to Ameris, a financial statement of
5 Mrs. Gibson that she has signed and that she
6 represents to be accurate as she understands it,
7 and it's different. It's not \$50 million of net
8 worth. It's 18.3. In October of '08 Mrs. Gibson
9 is still a person of substantial net worth with
10 some complicated and sophisticated holdings that
11 will show her annual income at that point was
12 \$478,775.

13 Because this loan was never repaid at
14 maturity a foreclosure was initiated. Of course,
15 that's the case that brings us together today. We
16 initiated foreclosure proceedings. Gibson and
17 Heritage Seven answered the Complaint and asserted
18 counterclaims. You've heard about those.

19 After the foreclosure was filed Ameris
20 assigned the loan to an entity called Galt Valley,
21 LLC. They take over the foreclosure, but Ameris is
22 still here as the defendant on the counterclaim.
23 So we sort of realigned the parties to be
24 consistent with reality. So I think we're sort of
25 considered the defendant, even though we started

1 out as the plaintiff.

2 The Galt Valley case has settled. A
3 part of that settlement agreement we'll put into
4 evidence is that the notes given to Ameris are
5 deemed satisfied. There is also a settlement with
6 Rolando, that other case that I showed your Honor
7 that was pending in Charleston. That case was
8 settled for \$850,000 in February of 2012, and she
9 also settled with the appraiser for \$20,000.

10 The counterclaim against Gibson and
11 Heritage Seven -- I mean against Ameris was
12 amended. The three claims pending are negligent
13 misrepresentation, breach of fiduciary duty, and
14 aiding and abetting breach of fiduciary duty by
15 Rolando.

16 Your Honor, there are a lot of issues.
17 Here are some of the ones that we think you're
18 going to have to consider, not necessarily all of
19 them. But the Zerbst statement of false
20 representation, was it an expression of opinion or
21 was it a representation? Was Karl Zerbst an agent
22 of Ameris at the time he made the statement? Did
23 Mrs. Gibson or Heritage Seven rely on it? Did she
24 have the right to rely, to the exclusion of all
25 other information available to her that she either

1 actually had or could have determined by the
2 exercise of reasonable diligence?

3 Was Zerbst in a superior position to
4 Gibson to know the value of the property? Was a
5 relationship between plaintiffs and Ameris ordinary
6 lender/debtor relationship, or did it become
7 fiduciary in nature? Did the bank throw off all of
8 its contractual rights to protect itself and
9 somehow assume a hundred percent of the duty to
10 protect Mrs. Gibson, or was it just an ordinary
11 arms length commercial transaction in which all
12 parties were expected to act in a way to preserve
13 and protect their own interests?

14 Was Ameris aware that some special
15 trust was being placed in it by Linda Gibson or by
16 the borrower? Did we accept or induce any special
17 trust? Did we do anything to provide the
18 plaintiffs with a foundation for believing that we
19 were not acting in our own behalf? Did we fail to
20 disclose any material facts? Did we knowingly
21 participate in a breach of fiduciary duty by
22 Rolando Villavicencio?

23 There is going to be a lot of debate
24 about damages in this case. I'm going to leave
25 most of that for our post trial comments, but the

1 questions are going to be: How have Heritage Seven
2 and Gibson been damaged, if at all, as a result of
3 any act or omission by the bank? And secondly,
4 though, is Ameris entitled to some kind of setoff?

5 Depending upon the damages' theory that
6 the plaintiffs pursue, it might be the amount of
7 the debt or it might be the amount of the prior
8 settlements, but I would suggest to the Court that
9 it's going to be one or the other.

10 So your Honor, the overall question in
11 the case -- and I think that I agree with the
12 plaintiffs. I think we're framing the issue in a
13 very similar way for you -- is: Did Ameris act or
14 omit to act in such a way that plaintiffs are
15 relieved of all liability and responsibility and
16 are entitled to be fully indemnified by Ameris?
17 And I think when your Honor hears the evidence you
18 will agree with us that the answer is no.

19 Thank you.

20 MR. EPTING: At this time we would like
21 to introduce into evidence the portions of
22 Mr. Barksdale's deposition, which we provided the
23 deposition designations in our trial brief, and I
24 would like to publish a few of them for your Honor.
25 But what I would like to do in order to shorten

1 time, Judge, is simply take the trial brief, give
2 the court reporter the designations that we want
3 submitted into evidence, and make them a part of
4 the record so that I don't have to publish all of
5 them.

6 THE COURT: Any objections?

7 MR. STEPP: Well, your Honor, I do
8 just for the record because we're going to call
9 Mr. Barksdale, but as long as I can
10 counter-designate. I haven't done that, but if the
11 Court would give me the opportunity to do that that
12 will be all right.

13 MR. EPTING: No objection. Should I
14 mark this Depositions Designations as Court's
15 Exhibit 1 just so the court reporter has a way to
16 identify it? How would you propose I proceed?

17 THE COURT: That would be fine.

18 (Court's Exhibit 1, Depositions
19 Designations, marked for identification.)

20 MR. EPTING: Judge, I have the original
21 of Mr. Barksdale's deposition, and I would provide
22 this to the Court. Would you like me to mark this
23 as Court's Exhibit 2?

24 THE COURT: That will be fine. Any
25 objection to that?

1 MR. STEPP: No, your Honor.

2 (Court's Exhibit 2, Deposition of
3 William C. Barksdale, Jr., marked for
4 identification.)

5 MR. EPTING: Judge, the first passage
6 that I would like to read into the record occurs at
7 Page 28 - Line 15 through Page 29 - Line 2.

8 One of my concerns is I always get a
9 little bit skittish about the condensed version and
10 do you have the right one and I have a condensed
11 version, but I would like to make sure that we've
12 got the pages straight before we start.

13 MR. STEPP: Your Honor, it seems to me
14 we just ought to put these in the record. You're
15 going to read it. I'm confident. I'm going to
16 counter-designate it. It seems to be no point in
17 publishing it out loud in a nonjury proceeding, so
18 I would suggest that we do that and then I'll have
19 my counter-designation before you at the same time.

20 MR. EPTING: I think it helps put our
21 case in context, and it's not going to take five
22 minutes.

23 THE COURT: I'll allow you to do it.

24 MR. EPTING: I'm at Page 28 - Line 15.
25 Judge, that should begin: Do you think that it is

1 good policy --

2 THE COURT: Yes.

3 MR. EPTING: Question: Do you think
4 that it is good policy for a bank to have a policy
5 and procedures manual? Answer: Of course.

6 MR. STEPP: Your Honor, I'm assuming
7 that my prior objection is preserved. I don't want
8 to pop up for every one of these questions, but to
9 the extent that we are talking about the policies
10 and procedures manual, I want to make sure my
11 record is protected.

12 THE COURT: Yes.

13 MR. EPTING: I will be willing to do
14 this. I know that the Court requires that
15 Mr. Stepp stand up and renew his objection and a
16 motion in limine is not sufficient, but as far as
17 I'm concerned Mr. Stepp's motion in limine can
18 continue throughout this trial and be considered as
19 if he objected, just in order to save time.

20 MR. STEPP: Suits me.

21 THE COURT: Yes.

22 MR. EPTING: "Of course. You have to."

23 Question: Do you think it is good
24 policy for the employees of the bank, no matter
25 what their levels are, to comply with the policies

1 and procedures?

2 Answer: They should be trained and
3 they should comply with the policies and
4 procedures. You know, you have policies and
5 procedures because the regulators say you have to
6 have policies and procedures. Having said that,
7 they will not tell you what your policies and
8 procedures are supposed to be.

9 The next designation, Judge, is at
10 Page 84 - Line 13 through Page 85 - Line 6.

11 Question: Okay. All right. Let me ask you a few
12 questions, Mr. Barksdale. Do you think that
13 bankers in their relationship with their customers
14 should be honest?

15 Answer: Why wouldn't they? Yes.

16 Question: Do you think they should be
17 accurate?

18 Answer: As accurate as human
19 experience allows them to be.

20 Question: Do you think they should be
21 complete?

22 Answer: That's an interesting
23 question. I mean, complete by what definition?

24 Reasonably complete in performing the
25 functions of their -- performing the

1 responsibilities of their job in their dealings
2 with their customers.

3 I think they ought to deal with their
4 customer's responsibly.

5 The next designation, Judge, is
6 Page 87 - Line 18 through 88 - Line 3.

7 Question: Well, I don't know the why,
8 but my question really is simple. Do you think
9 that a bank's employees and representatives have a
10 duty not to lie to their customers?

11 Answer: They should not lie to their
12 customers.

13 Question: Do you think that a bank's
14 representatives and employees have a duty not to
15 mislead their customers?

16 Answer: I would say that's a fair
17 statement.

18 The next designation, Page 91 - Line 6
19 through Line 12. Question: Why couldn't a
20 customer trust what is being told to him by a bank
21 representative? Whether it's what your bank
22 account is -- yes, your loan package is complete --
23 any number of things that banks routinely engage in
24 with customers.

25 Answer: I would say the general rule

1 would be people should be able to trust the bank or
2 the banker.

3 The next designation is Page 92 -
4 Line 13 through Page 93 - Line 3. Question: I'm
5 asking you to assume something. And we're going to
6 come back and talk about that for a moment, but I'm
7 saying if a bank representative undertakes to give
8 advice to a customer, do you think he should be
9 honest?

10 It depends on the facts but, yes,
11 advice is just exactly what it is. It's advice.

12 Question: Do you think --

13 Answer: But it shouldn't be in an
14 advisory capacity with its customers telling them
15 what to do and what not. I mean, that's one of the
16 lender liability defenses, is that you tell them
17 how they have to run their company.

18 The next designation, Judge, is
19 Page 93 - Line 20 through 94 - Line 18. Question:
20 In giving that advice, whatever the type of advice
21 it is, should the bank representative be truthful?

22 Yes.

23 Question: Should it be thorough?

24 Answer: I think people should tell the
25 truth and do their job to the best of their

1 ability.

2 Question: And should he attempt at all
3 times to be accurate in rendering the advice?

4 Answer: I think they ought to be --

5 Question. All right. And do you think
6 that they ought to be as complete as they should
7 be?

8 Answer: That's part of the
9 responsibility.

10 Question: So can we say that honest,
11 accuracy, completeness, truthfulness is part of
12 being responsible as a bank representative?

13 I mean, that's -- Answer: I mean,
14 that's -- yes.

15 The next designation is Page 99 -
16 Line 3 through Line 12. Question: And that is one
17 of the reasons that banks want to keep their
18 lending officers out of the role of advising
19 customers; right? In order not to create that kind
20 of liability?

21 Answer: They want to keep them out of
22 that arena of advising customers. They want them
23 to refer that business to the person that comes by
24 the branch once or two times a week or whatever.
25 If you go into a branch, they want to sell you as

1 many services as they can. They're cross-trained
2 in selling.

3 The next designation is 101 - Line 20
4 through 102 - Line 16. Actually 101 - Line 16,
5 Judge, through 102 - Line 16.

6 If they did do that, do you think they
7 would have a responsibility to do it accurately and
8 honestly?

9 You know, my whole career I've never
10 come up with that scenario. You are preparing the
11 financial statements for the customer.

12 Question: It would be highly
13 irregular, wouldn't it?

14 Answer: It would.

15 Actually, Judge, it's 102 through
16 Line 1, and the final designation is 118 - Line 20
17 through 119 - Line 11. And this is all a part of
18 the answer of Mr. Barksdale: But Rolando --
19 I guess the best way to describe him was pretty
20 much of a con artist. He was a crook, and I think
21 there has been a substantial settlement through
22 RE/MAX and insurance or whatever over there, and I
23 think she got took. And an additional opinion I
24 have, the bank got took.

25 Question: Do you think that Rolando,

1 in putting her in this apartment complex, put her
2 in something that was suitable for a woman who was
3 60 years old, effectively Section 8 housing?

4 Answer: That was between her and him.

5 Question: Yeah, but you said he was a
6 con artist.

7 Answer: I understand that, but I don't
8 think she knew he was a con artist and I don't
9 think the bankers knew he was a con artist.

10 With that, Judge, I would call
11 Miss Linda Gibson to the stand.

12 THE COURT: Good morning, ma'am.
13 Please give me your full name for the record.

14 LINDA GIBSON: Good morning. My name
15 is Linda Avigner Gibson.

16 LINDA AVIGNER GIBSON
17 being first duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. EPTING:

20 Q. Miss Gibson, are you a little nervous?

21 A. Yes, sir, I am.

22 Q. Have you ever done anything like this
23 before?

24 A. Just once.

25 Q. How old a woman are you, Miss Gibson?

1 A. I will be 64 in a few weeks.

2 Q. And where were you born?

3 A. I was born in Charleston, South
4 Carolina.

5 Q. And where have you lived?

6 A. I grew up in the Cainhoy - Wando area
7 here in Berkeley County and in my later years moved
8 to St. George.

9 Q. What is your education?

10 A. I finished high school. I graduated
11 from a design school in Atlanta, Georgia, and
12 attended two years at Charleston Southern.

13 Q. What sort of classes did you take at
14 Charleston Southern?

15 A. I took liberal arts classes.

16 Q. Were you married?

17 A. Yes, sir.

18 Q. And when were you married?

19 A. I got married in 1976.

20 Q. And is your husband now deceased?

21 A. Yes, he is.

22 Q. When did he die?

23 A. He died at Christmas of 2003.

24 Q. What did he do?

25 A. He was in the trucking business.

1 Q. What type of work have you done?

2 A. Well, my dad ran the local grocery
3 store there in Cainhoy, so starting out as a child
4 up through, I guess, my young adult years I helped
5 him in the grocery store. I helped him stock
6 shelves; waited on customers; did errands.
7 Whatever he asked me to do.

8 And then after that I worked for a few
9 years at North Charleston Police Department as a
10 radio dispatcher, and then I worked at Southeastern
11 Freight Lines doing clerical work.

12 Q. I think from time to time, Miss Gibson,
13 your dad might have used a lawyer and might have
14 had the good judgment in fact to use Mr. John West
15 as counsel.

16 A. Yes, sir. And I too had used Mr. West
17 at my mother's death.

18 Q. When is the last time you worked prior
19 to taking over and managing the apartments that
20 we're here for, that this lawsuit concerns?

21 A. When my first daughter was born in
22 1980.

23 Q. What did you do after 1980?

24 A. Well, I raised two daughters and took
25 care of my mother who became ill. She had

1 developed breast cancer as well as lung cancer.

2 Q. Speaking of work, when did you take
3 over managing these apartments that are the subject
4 of this litigation?

5 A. Officially I took over in July of '08.

6 Q. And how long did you attempt to manage
7 them?

8 A. I managed them from July '08 until I
9 gave them to Galt Valley on December the 1st, 2010.

10 Q. And what happened, then, on September
11 1, 2010?

12 A. Well, I was able to give them to Galt
13 Valley, so I didn't have to run them anymore.

14 Q. Until July of 2008 what experience did
15 you have in real estate?

16 A. Well, none really.

17 Q. But you did own some land and you owned
18 the house?

19 A. Yes, sir. My husband always handled
20 all the business and the financial aspects of
21 things up until his death in '03, and then after I
22 met Mr. Rolando Villavicencio and his wife they
23 handled things up until -- I guess you would say
24 July of '08.

25 Q. And did you terminate Mr. Villavicencio

1 in 2008?

2 A. Yes, sir, I did.

3 Q. Tell the judge why you did that.

4 A. Well, it was a result of the
5 mismanagement of properties, stealing --
6 I discovered that he had stole several hundred
7 thousand dollars from managing the shopping center
8 and the apartments.

9 Q. In your exposure to your husband and
10 Mr. Villavicencio did you learn anything,
11 Miss Gibson, or if anything what did you learn
12 about real estate, banking, business?

13 A. Well, I trusted both of them and,
14 really, my focus at that time was more my family.

15 Q. Prior to November of 2007 --

16 MR. EPTING: And Judge, the closing on
17 this apartment was November the 2nd, 2007.

18 Q. (Continued) So prior to November 2007
19 let's talk about what you did own.

20 A. I owned a home.

21 Q. And where was that?

22 A. That was in St. George.

23 Q. And is it the only home you ever owned?

24 A. No, sir. My husband and I lived in my
25 family's home in Cainhoy up until the time we moved

1 to St. George.

2 Q. Other than your home or your family
3 home and the home in St. George did you and your
4 husband own any other real estate?

5 A. We have bought two beach houses on the
6 Isle of Palms.

7 Q. What were their addresses?

8 A. One was 600 Carolina Boulevard and the
9 other was 3205 Palm Boulevard.

10 Q. Let's talk about 600 Carolina Boulevard
11 first. Do you own that property now?

12 A. No, sir.

13 Q. What happened to that property?

14 A. I sold that property and bought a
15 shopping center here in Moncks Corner.

16 Q. When was this?

17 A. That was in December of '05.

18 Q. And whose idea was the shopping center?

19 A. Mr. Villavicencio's.

20 Q. Now, Mr. Stepp was talking about you
21 directing a 1031 exchange, the beach houses for
22 shopping centers. Tell the judge what it is you
23 know about a 1031.

24 A. Well, I was dealing with the 1031
25 because I knew my husband had done that before in

1 another property. And I mean, I know the number
2 1031, but I don't know what that really represents,
3 and I know from what my husband explained on a
4 previous situation that he did it for some sort of
5 a tax devise.

6 Q. Did Mr. Villavicencio suggest that you
7 substitute the shopping center for 600 Carolina
8 Boulevard?

9 A. Yes. He advised me to see a tax
10 lawyer, which I did.

11 Q. Who financed the 1031 exchange of 600
12 Carolina Boulevard? Meaning the beach house for
13 the shopping center. Who was the bank?

14 A. The bank was First Reliance Bank.

15 Q. Who provided what was necessary to
16 First Reliance?

17 A. Mr. Villavicencio.

18 Q. Were you advised by anyone else on that
19 transaction?

20 A. Yes; Mr. Karl Zerbst with First
21 Reliance.

22 Q. Why Mr. Zerbst?

23 A. Well, Mr. Villavicencio was more the
24 realtor. He wasn't that familiar about banking and
25 closings. All they wanted to do was buy and sell.

1 But I was interested in talking to a banker that
2 would know about the transactions and also for his
3 advice on whether this was, you know, good for me.

4 Q. Did Mr. Zerbst do that for you?

5 A. Yes, sir, he did. We didn't talk a lot
6 about the transactions, but I always felt that I
7 could take them -- whatever to him to review and he
8 would give me his advice on it.

9 Q. Did you trust him?

10 A. Yes, sir, I did. I felt like
11 Mr. Zerbst liked me and that he really was looking
12 out for me.

13 Q. Now, in any of these transactions in
14 which Mr. Zerbst and Mr. Villavicencio were
15 involved, the shopping center, the closing on the
16 second beach house, the apartment, did you use a
17 CPA?

18 A. I have a CPA and I may have mentioned
19 it to the CPA, but I talked more with Mr. Zerbst
20 and Mr. Villavicencio. I didn't feel the need to
21 talk further with a CPA. He didn't ask me any
22 questions.

23 Q. Where did you meet Mr. Zerbst for the
24 first time?

25 A. At First Reliance Bank.

1 Q. Let's go back. You mentioned you had
2 two beach houses, and you talked about 600 Carolina
3 Boulevard. Let's talk about the other one, 3205
4 Palm Boulevard. Okay?

5 A. Yes, sir.

6 Q. Do you still own that beach house?

7 A. No, sir, I don't.

8 Q. Tell the judge what happened with that
9 beach house.

10 A. Well, when Mr. Villavicencio approached
11 me about buying the apartments, he and Mr. Zerbst
12 talked with me about the loan that I had at First
13 Citizens Bank on the first mortgage on the beach
14 house and the First Reliance second mortgage.

15 Q. Let me interrupt you there. Tell the
16 judge in this period of 2006 coming into 2007 -- so
17 you closed the shopping center and you owned the
18 beach house.

19 What was the debt that was on 3205
20 Carolina Boulevard before the shopping center?

21 A. Before the shopping center?

22 Q. Yes.

23 A. It was 400,000 at First Citizens.

24 Q. And ultimately with the shopping center
25 was there further debt put on it?

1 A. Yes. Mr. Zerbst suggested that I take
2 a second mortgage --

3 MR. STEPP: Objection, your Honor. At
4 this point that's hearsay. No connection to
5 Ameris. Not a party. So therefore it would be
6 hearsay, and I would object.

7 MR. EPTING: I'm not offering it to
8 prove that it's true. I'm just offering it to
9 prove what her state of mind is and how this
10 transaction developed. It's merely historical
11 information.

12 MR. STEPP: What they want to show is
13 Zerbst made suggestions to her about what to do.
14 That's what it's being offered for and that's what
15 is hearsay.

16 THE COURT: I'll sustain that
17 objection. She can't tell you what Mr. Zerbst
18 said. He's not a party to this transaction.
19 I think it's hearsay.

20 MR. EPTING: All right.

21 BY MR. EPTING:

22 Q. Ultimately, Miss Gibson, what happened
23 at the -- what was coming into the apartment
24 closing? What was the debt that existed on the
25 3205 Palm Boulevard property?

1 A. \$1.5 million.

2 Q. And what was that debt composed of?

3 A. It was composed of \$400,000 first
4 mortgage and a \$400,000 second mortgage.

5 Q. The second mortgage was to whom?

6 A. Well, originally it was to First
7 Reliance, because they required further equity in
8 the shopping center.

9 Now, I don't -- excuse me, but I don't
10 understand -- can I not -- Mr. Zerbst had me --

11 Q. Don't worry about it.

12 A. -- take that mortgage out.

13 Q. Don't worry about that.

14 What ultimately, Linda, was the debt on
15 the 3205 after the closing on the beach house in
16 August of 2007?

17 A. It was \$1.5 million.

18 Q. And what did you do with the \$1.5
19 million that you took out of the First Citizens
20 loan?

21 A. I paid off the First Citizens first
22 mortgage of \$400,000 and then I had to pay the
23 First Reliance second mortgage of \$400,000 that was
24 for the shopping center, and then it was suggested
25 to me to borrow the \$700,000 to put down as the

1 down payment on the apartments.

2 Q. And why did you put the \$1.5 million
3 mortgage on your house? Or the beach house.

4 MR. STEPP: Objection, your Honor.
5 That house is not owned by Mrs. Gibson. It's owned
6 by 3205, or was owned by 3205 Palm, LLC. Not a
7 plaintiff in this case, not a party to this action.
8 So I would think this is irrelevant because
9 whatever injury or damage 3205 may have sustained
10 is not anything that can be recovered in this case
11 because they're not a plaintiff.

12 MR. EPTING: Your Honor, 1, I'm
13 offering it to show what she did. No. 2, we're
14 trying to establish what the relationship she has
15 with Zerbst and that she has relied on him and that
16 these are things that he advised her to do, and
17 ultimately I think it's for the Court to determine
18 what the relationship was between Mrs. Gibson and
19 Mr. Zerbst and whether or not she historically had
20 put her confidence in him.

21 THE COURT: I will allow this
22 testimony. I will allow her to testify to this.
23 I'm not going to be giving the LLC -- Carolina --
24 whatever it is. They won't be receiving any
25 damages, but I'm going to allow her to testify.

1 MR. STEPP: Thank you, your Honor.

2 Q. (Continued) Where did the \$700,000,
3 more or less, Miss Gibson, that you received after
4 paying off the first mortgage to First Citizens and
5 the \$400,000 to First Reliance -- where did the
6 balance of the money go?

7 A. Into Mr. Zerbst's bank.

8 Q. Now, let me ask you to look at
9 Exhibit 1.

10 MR. STEPP: Can I just note an
11 objection? I don't want to interrupt, but this,
12 again, is a closing statement for 3205 Palm
13 Boulevard, LLC, so I want to make sure it's not
14 coming in to establish damages in any respect that
15 would be recoverable in this case. So that's my
16 objection.

17 MR. EPTING: It is coming in for that
18 purpose, Judge, and the reason is is because
19 Miss Gibson guaranteed all of this debt. She lost
20 every one of these properties and she became
21 personally responsible for it, as the Court is
22 getting ready to hear, having to basically pay off
23 debt because of advice that she got from
24 Mr. Zerbst.

25 THE COURT: Yes, sir?

1 MR. STEPP: We don't have that advice
2 in the record because that's the hearsay, your
3 Honor.

4 THE COURT: That's not in the record by
5 way of that hearsay at this time. I'm going to
6 allow this to come in. If she was a part owner of
7 this -- if she was involved with the 3205 Palm
8 Boulevard, LLC, and she guaranteed this loan and
9 she's lost everything, then I think she can testify
10 to this, as it goes towards damages.

11 Q. (Continued) Miss Gibson, we'll come to
12 it in a moment, but just to sort of clear this up,
13 you guaranteed this million and a half dollars debt
14 to First Citizens?

15 A. Yes, sir, I did.

16 Q. And ultimately you lost that property
17 because -- you lost the property?

18 A. Yes, sir, I did.

19 Q. What is Exhibit 1, Miss Gibson?

20 A. It's a settlement statement on the \$1.5
21 million debt.

22 Q. And what did you pay to close this loan
23 as appears from Exhibit 1?

24 A. \$18,608.50.

25 Q. Now, Miss Gibson, why couldn't you pay

1 the debt on the Isle of Palms house, the \$1.5
2 million?

3 MR. STEPP: Your Honor, I'll just renew
4 my objection. I'm sure you'll let her testify, but
5 I want to --

6 THE COURT: Yes. Go ahead.

7 A. The reason -- I paid it as long as I
8 could, but I was also putting my personal funds
9 into the apartment complex to try to keep it going,
10 and it came to a point to where I couldn't support
11 both of them, and I could no longer pay this debt
12 to First Citizens.

13 Q. Let me refer you to Exhibit 2 and ask
14 you if this is an agreement that you entered into
15 with First Citizens to resolve the debt on that
16 property.

17 A. Yes, sir, it is.

18 Q. Could I ask that you refer to Page 3 of
19 that document.

20 MR. STEPP: Your Honor, let me just
21 note my second objection.

22 THE COURT: Yes.

23 Q. (Continued) Miss Gibson, tell the
24 judge essentially what happened with this agreement
25 that you made with First Citizens and where it left

1 you. In other words, what happened in this
2 transaction?

3 A. Well, I could not pay the debt of that
4 1.5 million debt that I had put on that beach
5 house, so First Citizens sued me and -- I'm sorry.

6 Q. That's all right. Just relax.

7 So you got sued by First Citizens.

8 Did you ultimately work out an agreement with First
9 Citizens?

10 A. Yes, sir. I had to -- I had to buy or
11 sell the beach house. I mean, basically what I
12 understand about the bottom line on this is that
13 the beach house was worth 1.5 million, and because
14 they sued me I had to buy or sell the house and got
15 an offer of \$1,025,000.

16 When the sale proceeds from all of that
17 got to First Citizens it was about \$700,000 short
18 of what I owed them, so they agreed to take
19 \$450,000 with me giving them collateral, everything
20 else I owned. Then you and Mr. Kefalos negotiated
21 with their attorney to keep me from losing
22 everything else.

23 Q. So you structured a deal in which you
24 gave them the beach house. They forgave some of
25 the debt and you wound up having to obligate

1 yourself for \$450,000?

2 A. Yes. I obligated myself for two years.

3 Q. And have you been paying interest on
4 the \$450,000 to First Citizens on this \$450,000?

5 A. Yes, since January of 2011.

6 Q. I refer you to Exhibit 3, the interest
7 rate I see is 3%. Do you recognize Exhibit 3?

8 A. Yes, sir.

9 Q. And what is that?

10 A. It's the interest on the \$450,000 loan
11 that I owed to First Citizens.

12 MR. STEPP: Object to relevance, your
13 Honor.

14 BY MR. EPTING:

15 Q. Now, Miss Gibson, you borrowed \$700,000
16 on the beach house that ultimately went into the
17 shopping center.

18 Did you pay interest on the \$700,000?

19 A. Yes, sir, I did.

20 Q. Let me refer you to Exhibit 4 and ask
21 you to explain to the judge what you did with that
22 700,000.

23 A. Well, from October 7th until June of
24 '09 I paid an interest rate of 7.57%, which came to
25 a total of \$92,732.43. And then in July of '09 the

1 rate was reduced to 6.25%, and that total was
2 \$3,645.83.

3 Q. Miss Gibson, let me ask you this: The
4 rate was reduced to 6.25%, and it looks like you
5 paid only one month. What happened?

6 A. I believe they reduced the rate for me.
7 They were trying to, I guess, help me with the
8 rents. I was having difficulty paying the rents
9 and I was trying to get the apartments completed.

10 Q. Were you only able to pay one month
11 more?

12 A. Yes, sir.

13 Q. Now, in this litigation with First
14 Citizens, Miss Gibson, did you have to hire
15 lawyers? And who did you hire?

16 A. Yes, sir. I went through several
17 different lawyers. It started out with Mr. Holmes,
18 Kevin Holmes. I used Mr. Weeks as the closing
19 attorney on the properties and ended up with
20 Mr. Richter for a time.

21 Q. Now, how about who defended the suit
22 brought by First Citizens against you?

23 A. You and Mr. Kefalos and Mr. John West.

24 Q. And would you look at Exhibit 5 and
25 tell me if those are the legal bills that you paid

1 to defend that case.

2 A. Yes, sir.

3 MR. STEPP: Your Honor, I have an
4 objection to this. You know, a big component of
5 the damages that the plaintiffs are seeking are
6 legal fees paid in other matters, and we think it's
7 a matter of law those are not recoverable.

8 I will be heard at the end on what
9 standard it might be, but essentially they can only
10 be obtained under some sort of theory of equitable
11 indemnification, and in order to qualify at that
12 point they would have to show that whoever was
13 obligated to pay the plaintiffs in this case, to
14 the extent they were the plaintiffs in this case,
15 were without fault in the incurrence of those
16 costs.

17 So I want to note that objection. You
18 may want to hear the testimony -- I don't know what
19 you want to do -- and then decide that issue later,
20 but I don't want to just let this come in without
21 at least advising the Court that ultimately we
22 would contend that it's all irrelevant and
23 nonrecoverable.

24 MR. EPTING: Judge, here is why it's
25 admissible. If Miss Gibson had not gotten a lawyer

1 and she had lost this property at a foreclosure and
2 had received \$500,000, then Ameris Bank would be
3 sitting here being sued for a million dollars.

4 Miss Gibson has a duty to mitigate her
5 loss. Miss Gibson in this transaction was able to
6 sell the property in a private sale. And even
7 though she lost some money in the sale, she got the
8 \$700,000 debt reduced down to 450. And the cost of
9 mitigating that loss was she had to pay Mr. Kefalos
10 and I about \$25,000.

11 And so certainly the bank can't get the
12 benefit of the set-off that Mr. Stepp says he's
13 entitled to without there being some consideration
14 for what it cost Miss Gibson. It can't be that
15 they get the full set-off but don't have to pay the
16 costs, and that's what it's being offered for. We
17 think it's a legitimate damage.

18 THE COURT: I'm going to allow it in at
19 this stage, but I understand your argument about
20 what is recoverable.

21 MR. STEPP: When we break for lunch
22 I'll take -- I don't want to interrupt.

23 BY MR. EPTING:

24 Q. So you can identify those as the bills
25 that you actually paid?

1 A. Yes, sir.

2 Q. Other than the shopping center and
3 apartments did you purchase any other property
4 after your husband died?

5 A. No, sir.

6 Q. What else did you own on November 2007,
7 Miss Gibson?

8 A. I owned my home in St. George and I
9 owned some land that's affiliated with the home.

10 Q. In St. George?

11 A. Yes. About 87 acres.

12 Q. What did your dad leave you?

13 A. My dad left me seven tracts of land
14 here in Berkeley County.

15 Q. Is that the land that you pledged First
16 Citizens for this \$450,000 debt?

17 A. Yes, sir.

18 Q. Tell me about the land or tell the
19 judge about the land that your dad left you.

20 A. Well, there is a 17-acre tract in Huger
21 and then there is some property on Clements Ferry
22 Road near Daniel Island and then a separate tract
23 on Clements Ferry Road that has a cell tower on it.

24 Q. I'm going to leave the Huger land
25 aside.

1 The cell phone tower and the rest of
2 the land -- let's talk first about the rest of the
3 land. Do you land lease that?

4 A. Yes, sir, I do.

5 Q. And to whom?

6 A. Just before my husband died he had
7 negotiated a lease with Mr. Bartone around 40 --
8 about 40 acres that he set up a lease for about
9 \$15,000 a month.

10 Q. And how long was that lease for?

11 A. It's a lease for 50 years.

12 Q. And did you lease the cell phone tower
13 separately?

14 A. Yes, sir.

15 Q. And to whom?

16 A. That lease was with Crown Castle.

17 Q. Do you still own -- how much acreage
18 was that, the cell phone tower?

19 A. The cell phone tower was 1.25 acres.

20 Q. Do you still own that cell phone tract?

21 A. No, sir.

22 Q. What happened to it?

23 A. Ameris Bank had required that that be
24 put up as collateral, and when they sued me they
25 sued for the apartments and the cell tower tract.

1 Q. As part of the settlement that we'll
2 come to in a moment with Galt, did you have to give
3 that back to them?

4 A. I had to give the apartments and the
5 cell phone to Galt Valley.

6 Q. Were you paid rent on the cell phone
7 tower?

8 A. Yes, sir. About \$2,700 a month.

9 Q. I refer you to Exhibit 6 and ask you if
10 that's the period of time over which you have not
11 had the lease payments, and is the lease likewise
12 attached as Exhibit 6?

13 A. Yes, sir. That's correct.

14 Q. So you received the lease payments
15 until September of 2010?

16 A. Yes, sir.

17 Q. And it's then that you gave it back to
18 Ameris?

19 A. To Galt.

20 Q. Do you know who Galt is?

21 A. I know that they're an LLC in Las
22 Vegas, Nevada, and somehow they ended up with my
23 debt to Ameris.

24 Q. Who negotiated the settlement with
25 Ameris, Galt, for you to get you and Heritage Seven

1 out of the debt?

2 A. You and Mr. Kefalos and Mr. West.

3 Q. How much did you owe Ameris, Galt, at
4 the time you negotiated the resolution with them in
5 December of -- is it December of 2010?

6 A. Yes. It was somewhere between 3 and
7 3.2 million dollars.

8 Q. Heritage Seven, who owned Heritage
9 Seven?

10 A. That was the trust that my husband and
11 I had set up, but I'm the managing member of it.

12 Q. And were you a guarantor on all of
13 this --

14 A. Yes, sir, I was.

15 Q. You gave Ameris a cell phone tower.
16 You gave them the apartments. Did you give them
17 any money?

18 A. No, sir. I gave them the apartments,
19 which I had valued at around \$750,000, and the cell
20 tower for about -- I valued that around 500,000,
21 and they forgave me the rest of the debt.

22 Q. Why did you enter into such an
23 agreement?

24 A. Well, I agreed to pay, you know,
25 whatever you could save me from the amount of the

1 mortgage, and I had no money to pay except that
2 way.

3 Q. But you're talking about why you
4 entered into a fee agreement with us, but my
5 question is: Why did you enter into the settlement
6 with Galt to start with?

7 A. Why did I enter into the settlement
8 with them?

9 Q. Yes, ma'am.

10 A. I -- they had taken over the debt.
11 They were willing to forgive the balance of that if
12 I would give them the apartments and the cell
13 tower.

14 Q. At this time, Miss Gibson, when you
15 owned the shopping center, the \$1.5 million debt to
16 First Citizens and the debt to Ameris, what was
17 just your interest payments, approximately, a
18 month?

19 A. I think it was -- the debt with First
20 Citizens, First Reliance and Ameris?

21 Q. Yes. The total debt that you were
22 paying to all of them.

23 A. Per month was about \$37,000.

24 Q. Let me ask, Miss Gibson -- and I know
25 you didn't prepare this document, but I would like

1 you to explain it to orient the judge to it.

2 Do you know what Exhibit 8 is as
3 regards Otranto Road apartments?

4 A. Yes.

5 Q. Otranto Road apartments is Column B?

6 A. Yes. Okay.

7 Q. Line 9 is called Interest.

8 A. Yes, sir.

9 MR. STEPP: Objection, your Honor.
10 This document does not seem to be
11 self-authenticated. I don't even know what year or
12 years it is. It is not prepared by the witness.
13 So I'm not sure what it is, so I object to it.

14 MR. EPTING: Judge, it's not a big
15 deal. This is part of her tax return, and I was
16 merely offering it to show the amount of interest
17 that she was paying. And there are four separate
18 years, '07, '08, '09 and 2010. It's really to sort
19 of back up her generalized knowledge that she was
20 paying \$37,000 a month in interest.

21 THE COURT: I'll allow it.

22 BY MR. EPTING:

23 Q. The first page, Miss Gibson, of
24 Exhibit 8 under Interest, how much did you pay on
25 Otranto in that part year of '07?

1 A. I paid on the apartments \$38,304.

2 Q. And the second year?

3 MR. STEPP: Can I confer with
4 Mr. Epting?

5 THE COURT: Yes.

6 Q. (Continued) The next year you paid how
7 much in interest on the apartments?

8 A. \$149,430.

9 Q. The next year?

10 A. 106,818.

11 Q. And the next year?

12 A. The next year? Zero.

13 Q. You couldn't afford the payments in
14 2010?

15 A. No, sir.

16 Q. Didn't you have rents to help you cover
17 this interest that you were paying, these payments
18 that you were paying, Miss Gibson?

19 A. I had some rents coming in, but after
20 applying them to what I owed to Ameris for so long
21 I came up about \$75,000 short, paying the mortgage,
22 doing maintenance, upkeep, and trying to finish the
23 improvements.

24 Q. And where did this money come from?

25 A. It came out of my savings account.

1 Q. What kind of upkeep were you doing?
2 What were you trying to accomplish after 2008?

3 We'll spend a little more time with it,
4 but just generally what were you trying to
5 accomplish by putting your own funds in it?

6 A. Well, when I bought the apartments
7 they needed renovating, serious renovations. And
8 because of the situation with how it was managed,
9 when I took over about half of that money was
10 already spent. So after four or five months not
11 even one apartment was completed, and I had a
12 certain amount of funds left to try to get all six
13 buildings completed, and the money just wasn't
14 there. And I was trying -- my goal was to get
15 everything renovated and get it rented and to sell
16 it.

17 Q. You testified you got a release from
18 Galt and you testified you hired lawyers.

19 How did you hire your lawyers who
20 handled the release from the debt that Galt had
21 brought?

22 A. I agreed to a fee that was based on the
23 amount of money that was saved off of the amount of
24 that mortgage.

25 Q. And I show you Exhibit 9 and ask you if

1 that is the fee agreement that you entered into
2 with myself, Mr. Kefalos, Mr. Howell and Mr. West
3 for the savings on that -- the settlement over what
4 the property was worth.

5 A. Yes, sir. This is the agreement.

6 MR. STEPP: Your Honor, I have an
7 objection to this exhibit. As it reflects, it's a
8 fee agreement that is connected to this case. It
9 says on Page 1: Client hereby hires law firm to
10 represent client in the defense of and pursuit of a
11 counterclaim and the foreclosure action brought by
12 Ameris Bank presently pending in Berkeley County.

13 This is, therefore, different from
14 attorneys' fees that were incurred or at least
15 argued to have been incurred as some sort of
16 consequential damages. These were fees that were
17 incurred in this case and, therefore, would not be
18 recoverable absent an agreement or statutory
19 authorization. So I think this is irrelevant and
20 should not be admitted.

21 MR. EPTING: Your Honor, 1, this is a
22 different case. This is a foreclosure suit that
23 was brought by Galt. But more importantly, Judge,
24 we as counsel debated long and hard whether or not
25 we should be in here and just say that Ameris Bank

1 is responsible for the full \$3.2 million, and we
2 felt like that you would think that that was
3 disingenuous as a collateral source, if you will,
4 and so we thought the fair thing to do was to say:
5 Yes, we got released from the debt, but there was a
6 cost associated in mitigating the debt, and that
7 was that you had to pay your lawyers in order to
8 get you out from under the \$3.2 million, and we
9 think that is admissible for that reason.

10 THE COURT: This contract, does it
11 relate also to the claim that you're now making?

12 MR. EPTING: It's certainly, Judge,
13 related to the damages that we seek in this case,
14 yes.

15 THE COURT: But the contract -- what I
16 read and I understand, she signed this contract
17 with this law firm, as it's stated, to pursue this
18 counterclaim also; is that correct?

19 MR. EPTING: Judge, the fee agreement
20 was essentially to get her out of the Ameris --
21 this fee agreement was to get her out of the Ameris
22 Galt debt, not to pursue this counterclaim.

23 MR. STEPP: Well, that's not what it
24 says, your Honor.

25 THE COURT: I have a little bit of

1 trouble with what it says in the second paragraph:
2 To represent her in defense of and in pursuit of a
3 counterclaim. Is that not correct?

4 MR. EPTING: All I can tell you, Judge,
5 is perhaps it's inartfully worded in that way, but
6 the fee is clearly calculated on the savings of the
7 deficiency judgment, and it had nothing to do --
8 the deficiency judgment that she was relieved from
9 in this document had nothing to do with Ameris. In
10 fact, the suit is specifically preserved, and this
11 fee was for representing her in getting her out of
12 the Galt litigation.

13 MR. STEPP: Your Honor, this is all the
14 same case. I mean, this was a foreclosure brought
15 by Ameris in which triggered this counterclaim.

16 Now, the foreclosure issues have been
17 resolved and the parties have been realigned, but
18 it's the same case and the same action and the same
19 counterclaim. And even if there was some
20 understanding that this fee would be calculated on
21 the foreclosure part of it and some separate fee
22 agreement would be calculated on this, it's still
23 the same case. It's still an attempt to recover
24 fees incurred in the action that is before the
25 Court, which would therefore only be recoverable if

1 there is a statute of contract. At this point I'm
2 not aware of either. But at this point unless
3 there is some basis in law for which the fees in
4 the case could be recovered, then I think this is
5 objectionable and shouldn't be admitted.

6 THE COURT: I'll think over that over
7 lunch. But I have no problem with that. If these
8 fees which she's had to pay for the law firm are
9 related to the case -- I'm now hearing the only way
10 that she can testify is only by statute or by
11 contract relationship. Unless they can tell me
12 something different, I think Mr. Stepp is entirely
13 right. The only way I can award attorneys' fees is
14 by statute or by some contractual relationship
15 between the parties.

16 MR. EPTING: Judge, what we would ask
17 is if the fees of this mitigation loss are not
18 recoverable, the actual loss that she was saved
19 from would be recoverable against this filing,
20 because we don't see how they can have it both
21 ways.

22 We get out from under the debt that
23 they cause, and she incurs fees in that with
24 another company, Galt, to whom they have assigned
25 the mortgage. But if that's the case, then we

1 would ask to be allowed to pursue the full amount
2 of the difference in what she lost, which in this
3 case would be the \$1.7 million. But we don't think
4 it can be both ways.

5 THE COURT: Just thinking about this
6 -- I'll let you know about this. Go ahead with
7 your testimony and then I'll determine whether or
8 not I'm going to allow it in.

9 MR. EPTING: All right.
10 BY MR. EPTING:

11 Q. Did you seek legal counsel before
12 entering into this agreement, Miss Gibson?

13 A. Yes, sir. I sought legal counsel with
14 Mr. Paul Tecklenburg.

15 Q. Let me refer you -- before I refer you
16 to the -- have you paid this \$566,000 in attorneys'
17 fees?

18 A. Yes, sir, I have.

19 Q. And where did that money come from,
20 Miss Gibson?

21 A. That came from the insurance settlement
22 against Mr. Rolando Villavicencio, which I received
23 \$850,000.

24 Q. Now, you testified you gave back the
25 apartments and you gave back Klister Lane.

1 Let me refer you to Exhibit 10 and ask
2 you if you can identify that document.

3 A. Yes. This is a document where Galt
4 Valley sold the easement, cell tower easement, to
5 the Crown Castle, which was the tenant, and they
6 received \$510,000.

7 Q. Now, back to Mr. Tecklenburg -- and I
8 refer you to Exhibit 11. Did you pay him to
9 represent you and your interests with regard to the
10 settlement that you were entering into with Galt?

11 A. Yes, sir; I paid him.

12 MR. STEPP: The same objection.

13 BY MR. EPTING:

14 Q. Do you recognize Exhibit 11?

15 A. Yes, sir, I do.

16 Q. A lot of stuff is blacked out. You've
17 used Mr. Tecklenburg for other purposes?

18 A. Well, my husband had used
19 Mr. Tecklenburg for other things.

20 Q. Now, are there some entries on there,
21 Miss Gibson, that you paid him for related to this
22 Galt settlement?

23 A. Yes, sir.

24 Q. And how much?

25 A. It ended up being around \$1,500 total.

1 Q. So more than the 682.50 that is there?

2 A. Yes, sir.

3 Q. Let me refer you to Exhibit 12 and ask
4 you if you can identify that document.

5 A. Yes, sir.

6 Q. What is that?

7 A. That is the settlement closing on the
8 Otranto Road property.

9 Q. And what were your charges for the
10 closing on the apartments, Miss Gibson?

11 A. \$6,796.82.

12 Q. You indicated that you hired Mr. Holmes
13 to help you with the First Citizens problems, and I
14 refer you to Exhibit 13 and ask you if that's a
15 copy of his bill to you.

16 A. Yes, sir, it is.

17 Q. And how much --

18 MR. STEPP: Objection, your Honor.
19 This would be back, I think, to my first set of
20 objections. This wasn't in this case, I don't
21 believe, but I would object to it as being
22 nonrecoverable.

23 THE COURT: Overruled.

24 Q. (Continued) How much is Mr. Holmes'
25 bill, Miss Gibson?

1 A. \$5,453.

2 Q. Now, did you enter into an agreement
3 with Mr. Richter?

4 A. Yes, sir, I did.

5 Q. And did you pay Mr. Richter?

6 A. Yes, sir. I paid Mr. Richter a \$20,000
7 retainer fee.

8 MR. STEPP: The same objection.

9 BY MR. EPTING:

10 Q. And did you pay additional costs?

11 A. Yes, sir, I did.

12 Q. And I refer you to Exhibit 14. Can you
13 explain that to the judge.

14 A. This is a bill from Ellie Thomas, who
15 is a forensic accountant that Mr. Richter had me
16 talk with.

17 Q. Just one question, Miss Gibson. The
18 the \$20,000 that you paid to Mr. Richter, did you
19 ask to get that money back?

20 A. Yes, sir. When I retained Mr. Richter,
21 he started out to sue Mr. Villavicencio and several
22 months later resigned because of some sort of
23 conflict of interest.

24 Q. Was that a surprise that he had a
25 conflict?

1 A. Yes, sir. That was a surprise, yes,
2 sir. And I asked him for the \$20,000 back, and he
3 refused to give it to me.

4 Q. Let's look at the next exhibit, 15.
5 Who is Mr. Papa? Did you consult him about
6 bankruptcy?

7 A. Yes. Mr. Robert Papa, I consulted with
8 him when I could no longer pay my debts.

9 MR. STEPP: The same objection.

10 THE COURT: Yes.

11 BY MR. EPTING:

12 Q. How much have you paid him and how much
13 do you still owe him? Referring to Exhibit 15.

14 A. I have paid him \$4,465 and the total
15 bill is -- it's close to 7,000. So probably a
16 \$2,300 difference maybe.

17 Q. The apartments you managed for how
18 long?

19 A. I managed them from July of '08 until I
20 gave them to Galt Valley on December the 1st, 2010.

21 Q. What was it like?

22 Let me ask one question before I get
23 there. Mr. Stepp talked about how you closed this
24 in November of 2007 and you didn't go there for
25 five months. Tell the judge where you were and

1 what happened to you.

2 A. Yes. After the closing I had some
3 minor surgery that developed and some
4 complications, and they couldn't get the bleeding
5 stopped. So I was admitted into the hospital, and
6 my health wasn't so good for about four months.

7 Q. And Miss Gibson, did Rolando know about
8 your health problems?

9 A. Yes, sir.

10 Q. And did Ameris know about your health
11 problems?

12 A. Yes, sir.

13 Q. Is that the reason that you didn't go
14 to the complex for four or five months?

15 A. Yes, sir. My doctor did not want me to
16 drive. He had stitches in me. He was afraid that
17 if -- he didn't want me to lift anything. He
18 basically put me on bed rest because he didn't want
19 the bleeding to start again.

20 Q. I would ask the question: What was it
21 like managing? Had you ever done anything like
22 this before, manage apartments?

23 A. No, sir.

24 Q. What was it like? Tell the judge what
25 all you did. Did you move in?

1 A. Well, yes, sir. I could not make that
2 drive from St. George back and forth every day, so
3 I got a friend of mine to loan me a sleeper sofa.
4 I used the sofa in the office during the day and at
5 night I slept on that, and that's what I did for
6 the first five months because I did not have the
7 funds to hire a property manager.

8 I realized there was a lot of things
9 that had gone wrong with this project. Nothing
10 that Mr. Villavicencio and Mr. Zerbst had told me
11 -- it seemed like everything opposite was going
12 wrong. And when I got down there, after about --
13 it was late February, the first of March, Judge
14 Watson. I saw that three buildings -- there were
15 six buildings total that needed to be renovated,
16 and the plan was to renovate one building at a
17 time. Because I had tenants -- there were tenants
18 that were scattered throughout all six buildings.

19 In order to preserve what rent there
20 was coming in we were to do one building at a time.
21 When I got down there three buildings were
22 completely demolished. No windows, no doors in
23 them. Not one apartment had been completed. And
24 the projection was that they were to do one
25 building about every four to six weeks.

1 So after four months not even one
2 building, not even one apartment, was completed.
3 However, when I did talk with Mr. Villavicencio
4 during that time he assured me that everything was
5 fine, on schedule, on budget. In fact, he said
6 that he had even saved some money on some things.

7 Q. This is prior to your going there to
8 see him?

9 A. Yes. And I remember calling the bank
10 during that time and talking with Mr. Lanier just
11 to ask how things were going, and he told me that
12 they were working. So to my knowledge everything
13 was fine.

14 Q. Well, tell the judge what all
15 Mr. Lanier told you about the progress of the work.

16 A. Well, he said that they were starting
17 on the buildings and that they had gotten, you
18 know, so much done. He didn't give me any negative
19 report that anything was a problem. Neither did
20 Mr. Villavicencio. But when I got down there I
21 found otherwise, and really did not know what to
22 think. Why did they not tell me -- I mean, why
23 were they telling me what they were telling me and
24 when I get down there everything else is completely
25 opposite?

1 So I remember I went down there that
2 day unannounced, and on my drive back home to
3 St. George a wave of fear came over me because I
4 did not know what was happening, and I had to make
5 a decision to go down there eventually. That was
6 in May I moved down there with that sleeper sofa.
7 Fired the guys that they had hired, which was a
8 group of young people that I felt -- they didn't
9 seem to be competent construction people.

10 Mr. Villavicencio had hired a general
11 contractor, and my last conversation with him
12 before the closing was that we didn't need a
13 contractor, but he had spent \$30,000 with a
14 contractor and -- just a lot of things had gone
15 wrong, Mr. Epting. And then I called the bank
16 about the accounting on the money. I wanted to see
17 where the trail of money -- where all the money --
18 what had been spent, only to discover that about
19 half of the renovation money was gone and not one
20 apartment had been completed.

21 I was very -- I was scared and I did
22 not know what to do. I was trying to figure out
23 what to do. I decided to go down there and live
24 down there. I interviewed several people before I
25 hired a crew, got them to stay at one of the older

1 apartments, and took it on as a project of --
2 I mean, I knew how to renovate a house. I could do
3 one apartment. You know, just called and ordered
4 appliances and so forth. I did everything I could.
5 Reached out to the tenants. Tried to establish a
6 rapport with them.

7 Eventually I got one building completed
8 and started renting that out. I got the second
9 building completed with the money I had left.
10 I got as far as a half of a third building and the
11 money was gone. I tried desperately to talk with
12 other construction people to see if they could
13 possibly do the work and let me pay them later when
14 I got that building rented, but I could not find
15 any takers on that.

16 Q. Did you do the best you could?

17 A. I did everything I knew to do. I mean,
18 to the point that I did get one -- I got a
19 refrigerator that I had ordered for those
20 apartments. I put it in the office. I stayed in
21 that office for five months. A half bath. I made
22 due. I just did what I had to do. And eventually
23 I got a tenant that would go into one of the older
24 units that was livable. But that refrigerator was
25 bad, so I gave her my refrigerator, and I ended up

1 having to -- I lived off of tuna fish out of a can
2 and peanut butter out of a jar and protein bars,
3 and that's -- I mean, that was my existence and
4 that was my life for five months trying to maneuver
5 my way through a disastrous result that finally led
6 me to seek legal counsel, because I did not know
7 what else to do. And something was terribly wrong
8 with this project, because I was told that the
9 rents -- I could get \$900 a month in those rents.

10 MR. STEPP: Objection, your Honor.
11 That might be hearsay. I don't know who she's
12 saying told her.

13 THE COURT: I'll allow that.

14 THE WITNESS: The people that told me
15 were the people that structured the loan and sold
16 me the apartments, and those were the people that I
17 had to deal with to get where I was.

18 BY MR. EPTING:

19 Q. And who was that?

20 A. That was Mr. Zerbst and
21 Mr. Villavicencio, and they worked together on
22 this.

23 So I know Mr. Stepp in his opening
24 statements there did not mention Mr. Zerbst
25 throughout most of it, but I knew Mr. Zerbst from

1 '04 after my husband died. About the same time I
2 met Mr. Villavicencio, and I had a relationship
3 with both of them in a business sense from '04 up
4 until we parted company over this whole mess.

5 Q. How did you meet Rolando?

6 MR. EPTING: And Judge, I'm sort of
7 cueing. I think you mentioned 12:30 in chambers,
8 so I was going to carry on until then unless you
9 want to do it some other way.

10 THE COURT: No. You go ahead.

11 Q. (Continued) How did you meet
12 Mr. Villavicencio?

13 A. I met Mr. Villavicencio through my
14 church.

15 Q. And what church is that?

16 A. That was Northwood Assembly in North
17 Charleston.

18 Q. Do you go there now?

19 A. No, sir, I do not.

20 Q. Why don't you go to Northwood Assembly
21 anymore?

22 A. Well, I felt like Mr. Villavicencio and
23 his wife, Portia, had taken advantage of me. And
24 they were in sort of a role of leadership there at
25 the church. It was difficult for me to go there

1 each week and try to focus on why I was there. And
2 I knew it was going to be a process of my getting
3 through this, so I just thought for the time being
4 it's best that I go someplace else.

5 Q. Miss Gibson, you're a religious woman?

6 A. I don't know if you would say
7 "religious," Mr. Epting. Sometimes that word has a
8 connotation of many different things. But I can
9 tell you that I am a born again believer in Jesus
10 Christ. I am a follower of Christ and I try to
11 acknowledge him in all my ways. I stand amazed at
12 the grace and mercy of God, of how he deals with
13 us, and I know that God is a God of blessings.
14 I thank him for his goodness and his kindness, his
15 provisions, his blessings.

16 And yes, I believe in miracles.
17 Mr. Epting had asked me one time if I believed in
18 miracles, and I told him yes, I do, because I
19 believe in God.

20 Q. What did Rolando do to you in your
21 words, Miss Gibson?

22 A. Mr. Villavicencio stole hundreds of
23 thousands of dollars from me, Mr. Epting, and he
24 along with Mr. Zerbst put me into some investments
25 that were good for them but bad for me.

1 Q. Did you sue Rolando?

2 A. I did.

3 Q. Did you settle with him?

4 A. Yes, sir.

5 Q. Let me refer you to Exhibit 16 and ask
6 you if that's the settlement that you entered into.

7 A. Yes, sir, it is.

8 Q. The money that came out of that
9 settlement, Miss Gibson, of \$850,000, what did you
10 do with it?

11 A. Well, you and Mr. Kefalos had reduced
12 and postponed the amount that I owed you off of
13 that contingency, on that fee, in order that I
14 could pay the majority of it to Mr. West and
15 Mr. Howell and to you and Mr. Kefalos on the Galt
16 thing.

17 Q. So you still have some money. What
18 have you been doing -- what are you going to do
19 with the balance of the monies?

20 A. Well, in addition to the 566,000 that I
21 paid for the lawyers, I also paid around a little
22 over \$42,000 in litigation fees.

23 Q. You mean costs?

24 A. For the costs. So with the balance --
25 I'm in the process of giving the balance to First

1 Citizens on that \$450,000 debt to reduce that to, I
2 guess, around maybe \$230.

3 Q. 230,000?

4 A. 230,000.

5 Q. And why are you doing that,
6 Miss Gibson?

7 A. Well, because I'm trying to reduce that
8 debt to First Citizens and get them paid off, and
9 that was the balance that I had left out of that
10 850,000.

11 Q. And when is the First Citizens debt due
12 as it exists now?

13 A. Yes. They gave me -- for two years
14 they've had me on interest only, and that comes due
15 at the end of this year, December of 2012.

16 Q. And you are seeking to extend it for
17 how long?

18 A. I believe they offered five years to
19 extend it.

20 Q. Miss Gibson, you mentioned the costs
21 that you paid in the Villavicencio litigation that
22 were advanced by Mr. Kefalos and myself. Is that
23 on Exhibit 17?

24 MR. STEPP: Objection, your Honor. The
25 same objection as before to the extent it is

1 evidence of fees paid in connection with this
2 litigation. Also to the extent it's being
3 proffered to show that the set-off should be less
4 than the full amount of the settlement received,
5 because I would -- I don't think the deductions are
6 relevant to the credit that the defendant is
7 entitled to receive. So I would object to that
8 part of it on relevancy.

9 THE COURT: All right. Do you want to
10 respond to that?

11 MR. EPTING: Judge, these are costs
12 that Miss Gibson -- as we're just talking about
13 now, the costs in Exhibit 17 are the costs that she
14 incurred in pursuing Mr. Villavicencio, and she
15 mitigated her losses by entering into that
16 recovery, and I think these costs are the costs of
17 her mitigation.

18 THE COURT: I'm going to allow it to
19 come in, but I'm also -- so we understand each
20 other, if and when we come to the point of damages
21 I'm going to allow it.

22 MR. EPTING: All right, sir.

23 Q. (Continued) Let's talk a moment,
24 Miss Gibson. How was Mr. Villavicencio stealing
25 from you?

1 A. Mr. Villavicencio and RE/MAX were
2 property managers of my shopping center and the
3 apartments, and eventually Mr. Villavicencio
4 started writing checks to himself and to his wife
5 paying themselves on commissions we had not agreed
6 to.

7 Q. When you released Mr. Villavicencio,
8 did you release him for the tort of conversion, for
9 stealing?

10 A. Yes, sir.

11 Q. At the time that you were involved in
12 this whole escapade, Miss Gibson, you've described
13 generally what you went through. What was your
14 emotional state?

15 A. Well, this has been a very challenging
16 and interesting journey for me. I sometimes --
17 I did the best I could, but there were times that I
18 had bouts of depression, and I was tired. I just
19 got tired.

20 MR. STEPP: Your Honor, I object if
21 this is being offered as any sort of damages.

22 MR. EPTING: It is not, Judge, but it
23 is being offered in conjunction with the release
24 that she gave to Mr. Villavicencio, but it is not a
25 damage sought in this case.

1 THE COURT: I'll allow it.

2 A. (Continued) I mean, I had bouts of
3 depression. It was an emotional roller-coaster for
4 me, and I even considered sometimes suicidal
5 thoughts.

6 Q. And did you give Mr. Villavicencio
7 release from any mental distress claims that you
8 had?

9 A. Yes, sir.

10 Q. Now, we'll come back to the apartments,
11 but let's talk for a few minutes. How did you meet
12 Mr. Zerbst?

13 A. I met Mr. -- I was introduced to
14 Mr. Zerbst by Mr. Bartone.

15 Q. And Mr. Bartone is a name the judge
16 heard before. Who is he again?

17 A. Mr. Bartone is my tenant who rents
18 about 40 acres from me on Clements Ferry Road.

19 Q. Did you have an opportunity to meet
20 Mr. Bartone and his representatives in conjunction
21 with Mr. Richter's representation of you?

22 A. Yes. Mr. Bartone, I found out, was
23 also a client of Mr. Richter and also an investor
24 of properties with Mr. Richter.

25 Q. Now, Mr. Bartone recommended you to

1 Mr. Zerbst?

2 A. Yes.

3 Q. And when was this?

4 A. It was right after my husband died in
5 '03.

6 Q. Is this when your business with
7 Mr. Zerbst began?

8 A. Yes. In the latter part of '04.

9 Q. And he was working for what bank at the
10 time?

11 A. First Reliance Bank.

12 Q. What kind of business did you do with
13 him to start?

14 A. Initially I opened a couple of accounts
15 with him. I think a CD account and a checking
16 account.

17 Q. And how often did you meet with
18 Mr. Zerbst in 2004 - 2005 before the shopping
19 center transaction?

20 A. Probably two or three times.

21 Q. Did you seek Mr. Zerbst's advice?

22 A. Well, yeah. I would always ask him
23 about the rates and how to invest my money in the
24 bank, and we talked about basically that.

25 Q. Did he advise you on the purchase of

1 the shopping center?

2 A. Yes, he did.

3 Q. Whose idea was the shopping center?

4 Did Mr. Zerbst have anything to do with that?

5 A. He did not have any -- he didn't
6 suggest that I sell my beach house and buy the
7 shopping center. His role in the shopping center
8 was that he structured the whole loan mortgage
9 package.

10 Q. Did you ask him whether or not the
11 shopping center was a suitable investment for you?

12 A. Yes. We talked about that.

13 Q. As a result of what he told you did you
14 close on the shopping center?

15 A. Yes, sir.

16 Q. Did you trust him?

17 A. I trust -- I got to know Mr. Zerbst
18 over those couple of years, and I did trust him.
19 I felt that he liked me and that he really was
20 looking out for me.

21 Q. Do you know anything about banking?

22 A. I might know a little more than I knew
23 then.

24 Q. How about buying and selling real
25 estate?

1 A. No. Nothing now and nothing then.

2 Q. The shopping center closed when?

3 A. The shopping center closed in December
4 of '05.

5 Q. When is the next dealing you had with
6 Mr. Zerbst about a substantial transaction?

7 A. He came to me and wanted me to take out
8 a second mortgage --

9 MR. STEPP: Objection, your Honor.
10 That's hearsay.

11 MR. EPTING: I think it is our
12 obligation to establish this woman's relationship
13 with this man, and I think that she came to rely on
14 him, is evidence that the Court ought to hear.

15 MR. STEPP: Your Honor, it's still
16 hearsay. That was my objection. They want to show
17 that he recommended refinancing the beach house,
18 and for all this witness can say about that would
19 be hearsay.

20 He's going to testify. Mr. Epting can
21 ask him that. He's going to get a very different
22 answer. But that evidence can come in that way if
23 it is relevant at all to the case, but from this
24 witness it would be hearsay.

25 MR. EPTING: Judge, I don't see how it

1 is hearsay at all. It's not offered to prove that
2 the shopping center was a good deal or a bad deal.
3 It's simply being offered to prove that this woman
4 sought his advice and relied on his advice.

5 THE COURT: I'm going to allow it.
6 Overrule the objection.

7 MR. STEPP: Thank you.

8 MR. EPTING: Judge, actually I'm going
9 to start now on the next transaction. This is
10 probably a pretty good place to break. I've got
11 maybe another 20 minutes of examination.

12 THE COURT: That would be fine. We'll
13 take a lunch break here. Let's be back together
14 about 1:45.

15 (Lunch recess taken.)

16 THE COURT: You may proceed.

17 MR. EPTING: Thank you, your Honor.

18 BY MR. EPTING:

19 Q. Sort of a recap, Linda. I had asked
20 you what your next dealing with Mr. Zerbst was, and
21 I want to call your attention to this period in
22 which you borrowed money on your beach house. And
23 so tell me about your next dealing on the beach
24 house with Mr. Zerbst after buying the shopping
25 center.

1 A. Well, after buying the shopping center
2 he said that the bank required that --

3 MR. STEPP: Objection, your Honor.
4 That would be hearsay.

5 MR. EPTING: Your Honor, again, none of
6 this is being offered to prove the truth of the
7 matter but, rather, just to show the relationship
8 she had and that she relied; why she did what she
9 did.

10 THE COURT: I'll allow it today. Go
11 ahead.

12 A. (Continued) Well, the bank required me
13 to take a second mortgage on the beach house for
14 further equity in the shopping center.

15 Q. And how much was that that you
16 borrowed?

17 A. \$400,000.

18 Q. And that was from First Reliance?

19 A. That was, yes, from First Reliance.

20 Q. Why did you do it?

21 A. Well, he said that the bank required it
22 and that basically the shopping center would be
23 able to do for both of those payments, and that was
24 the best way to structure it.

25 Q. When did you pay off the second

1 mortgage to First Reliance?

2 A. When I was making the down payment for
3 the apartment complex.

4 Q. What occurred in August of 2007?

5 A. That was when I had the closing to
6 borrow the money from First Citizens, the \$1.5
7 million from First Citizens.

8 Q. Tell the judge about why you borrowed
9 the money from First Citizens and how that came
10 about.

11 A. Well, I did not have any money to
12 purchase these apartments and it was explained to
13 me that in order to purchase the apartments the
14 best way to -- well, Mr. Zerbst said in order -- if
15 First Reliance was going to finance the purchase of
16 the apartments, then I was going to have to pay off
17 that second mortgage on the beach house, and he
18 suggested that I go to First Citizens since they
19 had the first mortgage on the beach house and
20 borrow that money to do so.

21 Q. And that's how you became indebted for
22 a million and a half dollars to First Citizens?

23 A. That's right.

24 Q. When had you signed the contract -- and
25 when was this closing on the beach house loan, the

1 million and a half to First Citizens?

2 A. That was in August, August 28th of '07.

3 Q. When had you signed the contract to buy
4 the apartments? And I refer you to Exhibit 19.

5 A. That was on May the 7th of '07.

6 Q. When you signed this contract were you
7 ready to close?

8 A. Oh, no, sir. Not in May, no. No, sir;
9 I was not ready to close. I had doubts about a lot
10 of this because I didn't have any money.

11 Q. And what were your doubts?

12 A. Well, the doubts were about borrowing
13 millions of dollars and how I was going to pay it
14 back.

15 Q. Did you proceed?

16 A. Eventually I did.

17 Q. And why?

18 A. Well, I spoke with both
19 Mr. Villavicencio and Mr. Zerbst, and over that
20 period from May until we closed they had convinced
21 me that it was a suitable investment for me, that I
22 had already had the shopping center and I had the
23 land lease and that the apartments -- it wasn't as
24 big of a complex, but it was 48 units, and they --
25 they seemed to think that the rents would cover the

1 debt.

2 MR. STEPP: Objection, your Honor.
3 What they seemed to think. Continuing objection
4 about hearsay.

5 THE COURT: Overrule the objection
6 about hearsay.

7 BY MR. EPTING:

8 Q. Linda, let me refer you to -- first let
9 me ask you: When was the closing again on the
10 apartments?

11 A. On the apartments was November 2nd of
12 '07.

13 Q. Let me ask you to look at Exhibit 20.
14 Do you recognize that document?

15 A. Yes, sir.

16 Q. Did you sign this document?

17 A. Yes, sir. I recall -- yes, sir.
18 I recall seeing it.

19 Q. And is the version that we have as
20 Exhibit 20 actually signed?

21 A. No. This one is not.

22 Q. But you're certain you signed it?

23 A. Yes, sir. I think -- I'm pretty
24 certain I did.

25 Q. Now, what were the circumstances,

1 Linda, of you signing this document dated October
2 the 25th, 2007?

3 A. This was at the opening night
4 celebration of Ameris Bank downtown Charleston.

5 Q. And tell me a little more about -- tell
6 the judge about that, the opening night
7 celebration. Where was it? What was it about?
8 What was it like?

9 A. Well, it was the grand opening of the
10 bank on Archdale Street in downtown Charleston, and
11 they had it outdoors. It was at nighttime. And
12 not a whole lot of people were there, but it was a
13 lovely evening, lovely party, and I felt a little
14 like a celebrity.

15 Q. Tell the judge why you felt like a
16 celebrity.

17 A. Well, they were introducing me to
18 everyone.

19 Q. "They" being who in particular?

20 A. Well, Mr. Lanier was there and
21 Mr. Church.

22 Q. Who is Mr. Lanier?

23 A. Mr. Lanier is a banker that worked with
24 Mr. Zerbst at First Reliance Bank. He assisted
25 Mr. Zerbst in my loans. He was like working behind

1 the scenes. And he had left First Reliance to go
2 to Ameris Bank. And so they were having this
3 opening night party.

4 Q. So Mr. Lanier is taking you around --
5 and Mr. Church -- introducing you to people.

6 A. Yes.

7 Q. Why did you feel like a celebrity?

8 A. Well, they said that I was their first
9 run there in Charleston, and so they made me feel
10 kind of special about that and about the loan that
11 the bank was making to me.

12 Q. Were they serving alcohol?

13 A. Yes, sir.

14 Q. You had a couple of glasses of wine?

15 A. Yes. I don't normally drink, but it
16 was a special night and they had offered me at
17 least a couple of glasses. Maybe two or three
18 glasses of wine.

19 Q. So the party is winding down. Did they
20 take you some place?

21 MR. STEPP: Objection, your Honor.
22 This is leading.

23 Q. (Continued) The party is winding down.
24 What happened?

25 A. Yes. People were leaving. I guess it

1 was around 9:30. Between maybe 9:30 and 10
2 o'clock. And we were getting ready to leave and
3 Mr. Lanier and Mr. Church and a couple of other
4 ladies from the bank invited Mr. Villavicencio and
5 his wife and myself to come into the office. They
6 said since I lived in St. George and that I was
7 already there they didn't see any reason why I
8 shouldn't just go ahead and sign the documents
9 while I was there so I wouldn't have to come back,
10 I guess, the next day or the day after to sign
11 them. And so they showed me the documents --
12 I believe it was this same document -- and showed
13 me where to sign.

14 Q. Did you read the document?

15 A. I'm not saying that I would have
16 understood what I read, but I do try to read before
17 I sign something. But it was late at night and I
18 had some wine. I really wasn't focused on it.
19 I did glance over it and notice about the cell
20 tower tract.

21 Q. Tell the judge about the cell tower
22 tract.

23 A. I noticed that they had the cell tower
24 tract, Klister Lane, on there. And I asked him
25 what that was all about, and Mr. Lanier said that

1 the bank had required them to put that in as part
2 of collateral on that loan.

3 Q. Now, Linda, let me ask you this: We've
4 been talking about First Reliance, First Reliance.
5 So now you go into the opening night gala at Ameris
6 and you've been given this document and you've
7 signed it.

8 How did you ever get from First
9 Reliance to Ameris Bank? How did that happen?

10 A. Well, I had spoken with Mr. Zerbst, and
11 he explained to me that basically there was some
12 problems at First Reliance. I don't --

13 MR. STEPP: Continuing hearsay
14 objection, your Honor.

15 THE COURT: Tell me, ma'am, why did you
16 leave First Reliance? Tell me exactly what this
17 person said.

18 THE WITNESS: Well, Mr. Zerbst had
19 given -- he said First Reliance is not going to do
20 the loan and that I would be better served at
21 Ameris and that he had given the documents to
22 Mr. Lanier at Ameris Bank.

23 THE COURT: Thank you.

24 MR. STEPP: The same objection, your
25 Honor.

1 THE COURT: Overruled.

2 MR. STEPP: Thank you.

3 BY MR. EPTING:

4 Q. In that conversation -- who was
5 Mr. Zerbst officially employed by in this first
6 conversation, Linda, when he told you that?

7 A. He was at First Reliance.

8 Q. What did he tell you about where he was
9 going?

10 MR. STEPP: Now, your Honor, that
11 certainly is going to be offered for the truth, and
12 I object.

13 MR. EPTING: And it certainly is, your
14 Honor, because it's an admission against him
15 because of what he says. And what happens, your
16 Honor, when the question of agency is in dispute
17 and the role that someone is functioning in, the
18 admission comes in and the Court can consider it
19 depending on how the Court resolves the agency
20 question. But we think this is a critical
21 conversation and it also is offered to show how she
22 did wind up at Ameris Bank.

23 MR. STEPP: Your Honor, the testimony
24 is he is employed by First Reliance Bank, not that
25 he's employed by Ameris, and the statement -- as I

1 understand what the testimony would be over my
2 objection would be that he said he intended to go
3 there. So even if that were true, that wouldn't
4 create an agency relationship. He would have to
5 already have been there.

6 So this is being offered as a bootstrap
7 argument to say that because he said he might do
8 something in the future -- or even if he said he
9 would do something in the future, that it creates
10 some sort of agency at the moment it was said.

11 My objection is it can't come in
12 against Ameris because he was not an agent for
13 Ameris when he said it, despite the fact that the
14 subject matter might be about becoming an agent of
15 Ameris. So unless there is a foundation that he
16 was speaking for Ameris at that time it would be
17 hearsay and irrelevant and not chargeable to
18 Ameris.

19 THE COURT: So you're telling me that
20 she's going to be testifying potentially that he
21 told her that he was going to Ameris?

22 MR. EPTING: Yes, sir. And on the
23 basis of him going to Ameris and her relationship
24 with him she agreed for everything to go to Ameris.

25 THE COURT: He has a problem with

1 hearsay. It's a critical -- agency is a critical
2 issue. We all agree to that. And you are trying
3 to use this to establish the length of agency?

4 MR. EPTING: Yes, as well as to
5 establish why she went to Ameris and to establish
6 that she had a relationship with Mr. Zerbst,
7 followed Mr. Zerbst and wanted this loan at Ameris
8 because he was going to Ameris.

9 But Judge, the other thing that I am
10 saying to you is whenever the question of agency
11 and the role in which someone is speaking is in
12 dispute, the remark comes in and it usually would
13 be for a jury who would get a charge that would
14 say: If you believe that this person was or became
15 the agent for the charged party, then this would be
16 an admission against the charged party. But in
17 this case, Judge, we're having to establish agency,
18 and it's our burden of proof that this person said
19 I'm going with Ameris. I think it just becomes a
20 fact. The question is to what weight you want to
21 give Miss Gibson's credibility about the
22 conversation.

23 MR. STEPP: Your Honor, if I may, I'm
24 not familiar with that proposition of law, but I
25 have grave doubt that a statement by somebody who

1 was or subsequently became an agent -- that's the
2 way I understood Mr. Epting's question -- the
3 statement can come in and then you can decide later
4 whether he was an agent or not. No. That question
5 exists at the time the statement is made, not based
6 on what happens thereafter.

7 MR. EPTING: That's not the law, Judge.

8 THE COURT: Well, I'm not familiar --
9 do you have --

10 MR. EPTING: I can certainly provide
11 it, Judge. Absolutely.

12 THE COURT: I'm the fact finder and the
13 judge. It makes things a little more difficult.
14 I was reading whether or not a jury could --
15 I'm going to allow it, but I want to read some
16 cases on it, if there are any. I'll allow both
17 sides to provide me with some law on this issue.

18 Regarding the agency issue as to
19 whether or not I can receive this statement through
20 the agency -- well, we all agree that it eventually
21 went to Ameris Bank?

22 MR. STEPP: Yes.

23 MR. EPTING: Yes.

24 THE COURT: We all agree she eventually
25 went to Ameris; is that correct?

1 MR. STEPP: Yes, sir.

2 THE COURT: What we don't agree on is
3 the reason why she went to Ameris. Is that what
4 I'm hearing?

5 MR. STEPP: Well, I don't even know
6 about that. I think anybody is entitled to switch
7 banks. I don't know that the reason she went to
8 Ameris has any relevance.

9 THE COURT: Well, insofar as it relates
10 to her relationship with Zerbst.

11 MR. STEPP: Well, let me cite this law.
12 In South Carolina the clear law is to establish an
13 agency relationship the aligned party must show, 1,
14 that the purported principal consciously or
15 impliedly represented another to be his agent.

16 I note that is not a statement by the
17 purported agent of his relationship to the
18 principal. It requires a statement by the
19 principal.

20 2, that there was reliance on the
21 representation; and 3, that there was a change in
22 position --

23 THE COURT: I'm familiar with all of
24 that. I didn't understand what I was hearing about
25 the receiving -- it may be some exception to the

1 hearsay rule in regards to agency. Is that what I
2 was hearing, Mr. Epting?

3 MR. EPTING: Yes, Judge, because it's
4 the chicken or the egg. In other words, if you
5 can't get the statement in to prove the agency
6 because the person's status as an agent is not yet
7 resolved, the law says the statement comes in. And
8 if the finder of fact determines that an agency
9 relationship existed, then of course it would be an
10 admission against interest and would be admitted.
11 And if you found that at the time the person was
12 not an agent, then it would be excluded, but to
13 exclude it you can never prove agency.

14 THE COURT: What kind of admission
15 against interest is this statement from her going
16 to show at this point?

17 MR. EPTING: Well, Judge, they deny
18 that they had any relationship, and we're, of
19 course, going to offer quite a few documents that
20 show that this relationship started far before they
21 think it started.

22 MR. STEPP: Your Honor, there are two
23 different questions. And I think I'm getting
24 confused. Probably I'm the only one. But one
25 question is -- and I think the proposition of law

1 that Mr. Epting is addressing is where agency is in
2 dispute as to on a certain day was somebody an
3 agent or was he not. And the statement would be an
4 admission against the principal if the agency is
5 subsequently determined, then the statement could
6 come in subject to subsequent evidence or a finding
7 that the agency existed.

8 What we've got here is the statement is
9 being offered to prove the agency, and that's a
10 very different proposition. Because you can't use
11 a statement by a non-agent to prove the agency
12 relationship. You've got to have a statement by
13 the principal.

14 So my objection, just so I'll be clear,
15 is that this can't come in to establish whether or
16 not Mr. Zerbst was an agent of Ameris at the time
17 he made the statement, and it would continue to be
18 -- because it's acknowledged that he was working
19 for First Reliance at that point -- hearsay and
20 irrelevant.

21 THE COURT: Why can't Miss Gibson
22 testify what she believed at this point in time
23 without telling me exactly what he said? Can she
24 not do that?

25 MR. EPTING: I can ask the question.

1 THE COURT: Rephrase the question.

2 BY MR. EPTING:

3 Q. Miss Gibson, as a result of a
4 conversation that you had -- did you have a
5 conversation with Mr. Zerbst while he was at First
6 Reliance?

7 A. Yes.

8 Q. As a result of that conversation that
9 you had with Mr. Zerbst while he was at First
10 Reliance did you authorize this loan to go to
11 Ameris?

12 A. Yes, sir.

13 Q. Now, who did you understand was going
14 to handle this loan at Ameris as a result of that
15 conversation?

16 A. Mr. Benjie Lanier.

17 Q. Who did you understand as a result of
18 that conversation was ultimately going to handle
19 this transaction for you?

20 A. Mr. Zerbst.

21 Q. Now, on that basis did you move
22 forward?

23 A. Yes.

24 Q. Now, did you have a subsequent call
25 with Mr. Zerbst after Mr. Zerbst had left First

1 Reliance Bank?

2 A. Yes.

3 Q. And had Mr. Zerbst at the time of this
4 conversation joined Ameris?

5 A. I don't think so.

6 Q. When do you place this call?

7 Approximately. The closing was on November the
8 2nd.

9 A. I would say sometime in October. It
10 was just before the closing. Maybe a couple -- two
11 or three weeks before the closing.

12 Q. Did you have a conversation about the
13 wisdom of you closing the apartment transaction
14 with Mr. Zerbst in that conversation?

15 A. Oh, yes. Yes.

16 Q. How long was the conversation that you
17 had with Mr. Zerbst?

18 A. I imagine we probably talked 30 minutes
19 or a little longer.

20 Q. And what did you ask him and what did
21 he say to you?

22 MR. STEPP: Your Honor, I'm going to
23 object to what he said to her on the same basis.

24 MR. EPTING: Your Honor, there is no
25 other way -- I mean, because this is a pivotal

1 conversation, and it's being offered to establish
2 the relationship that she had that he became an
3 adviser to her, that she had a right to rely on
4 him. And we believe at the time -- and because of
5 the other evidence that is coming in, we believe
6 that his status at the time of this call is he's
7 already working for Ameris. And so we think that
8 what he told Miss Gibson in that call comes in as
9 an admission against Ameris.

10 MR. STEPP: Your Honor, this is the
11 crux of the matter and it's being offered,
12 I suspect, for more than Mr. Epting says. This is
13 what they're going to say was the breach of duty by
14 Karl Zerbst, that he negligently misrepresented to
15 Mrs. Gibson in this call that according to them the
16 cash flow -- the rents will cover the debt service
17 and that it was a good deal and she was suitable
18 and all the other stuff he's supposed to have told
19 her, and that's the very basis of their claim for
20 negligent misrepresentation.

21 So that can't come in against Ameris
22 unless your Honor finds that he was acting for
23 Ameris with the consent of Ameris and subject to
24 the direction and control of Ameris at the time he
25 made the statement. So once again, we're getting

1 this bootstrap, saying we're just putting it in to
2 show the relationship.

3 Well, if that's true, then it can't
4 come in to be evidence of the breach of some
5 fiduciary duty, and then they'll have to put
6 evidence of some subsequent breach in while he's
7 working for Ameris. So I think this is the very
8 heart of the issue, and unless there is some basis
9 to conclude that Ameris is bound by this statement
10 it absolutely should not come in for any purpose.

11 THE COURT: Didn't I hear her just say
12 she did not believe that Zerbst was working for
13 Ameris at that time?

14 MR. EPTING: He had not formally been
15 employed by Ameris. That's right, Judge. But
16 that's a different question.

17 THE COURT: I'm going to allow it to
18 come in, but understand that by allowing it to come
19 in I'm not establishing an agency relationship at
20 this time.

21 MR. EPTING: We certainly are going to
22 offer other documents, Judge, of his status at this
23 time.

24 BY MR. EPTING:

25 Q. So what did you ask Mr. Zerbst and what

1 did he say to you?

2 A. Well, it was just before the closing,
3 so I again asked him about the apartments.
4 I believe we talked a little bit about the
5 appraisal. We talked about the location, the
6 rents. Did he feel like this was a good -- a
7 property for me so that I could at least make a
8 little money on it, that it was a better cash flow
9 than that beach house that I had, and that I was
10 going to be able to pay for it.

11 That was my main concern, was whether
12 or not -- I was borrowing millions of dollars.
13 I'm not -- I don't know a lot about business, but I
14 do know that I cannot spend more money than I take
15 in, and that was the bottom line for me. Is this
16 going to be a suitable property where the rents
17 would cover my debt? And hopefully this thing
18 would -- once it was renovated, they assured me
19 that the rents were going to increase because of
20 the renovations.

21 I mean, even the appraisal showed that,
22 that they said it -- it went from 2.8 million to
23 3.7 million because of the renovations. So they
24 said that the rents would come in at almost double
25 and that would be taken care of. So that was my

1 main concern and that was what I talked about with
2 Karl.

3 Q. What did Mr. Zerbst tell you?

4 A. Well, he didn't disagree with that. He
5 never once said any negative thing about that
6 property, that it wouldn't fly, that it wouldn't do
7 me a service, that it was all -- he and
8 Mr. Villavicencio both assured me. And by this
9 time, a few weeks before the closing, I was
10 convinced -- I trusted what they said and I relied
11 on what they said, and that's why I closed on
12 November the 2nd and bought that apartment complex.

13 Q. What was his overall opinion of this
14 investment, Linda, as he expressed it to you?

15 A. Well, he knew that I had the shopping
16 center and had that land lease with Mr. Bartone,
17 and this was -- he thought it was good for my
18 portfolio, so to speak, and that it was -- he
19 thought a lot about Mr. Villavicencio. He never
20 said anything negative about -- that it was all --
21 we all had a good relationship, and he never said
22 anything negative about the apartments. He thought
23 it was a good investment. That's the bottom line
24 that I remember and that's why I went forward.

25 If there was anything wrong with it,

1 I wouldn't have done it.

2 Q. All right.

3 You told the judge a little bit about
4 getting sick. How much of this money was to be
5 disbursed for construction after closing, Linda?

6 A. I had a line of credit of \$700,000 for
7 six buildings.

8 Q. About \$120,000 a building?

9 A. Yes, sir.

10 Q. What happened to you? Just briefly.
11 You've already alluded to this.

12 A. Yes. I became ill and had to go in the
13 hospital, and for about four months my health was
14 not so good.

15 Q. Did you have conversations with
16 Mr. Lanier and with Mr. Villavicencio about what
17 was going on at the project?

18 A. Yes, sir, I did.

19 Q. And what did Mr. Lanier tell you about
20 what was going on at the project before you first
21 set foot there in March of --

22 A. I believe I had talked with Mr. Lanier
23 once and more with Mr. Villavicencio, and they both
24 assured me that the project was going fine, on
25 schedule, on budget.

1 In fact, like I said, Mr. Villavicencio
2 said he was able to get some things even at a
3 better price than what he had put in the appraisal.

4 Q. So you go to the site. You find things
5 are not quite as you expected, which you described
6 to the judge.

7 A. Yes, sir.

8 Q. Let me refer you to Exhibit 21. And I
9 should have done this earlier, Linda. What I
10 really wanted to do was ask you about 22.

11 Mr. Stepp asked you -- Mr. Stepp in
12 opening mentioned these financial statements that
13 you prepared. Do you recognize this as a financial
14 statement that was submitted on your behalf in
15 conjunction with this loan?

16 MR. STEPP: 21?

17 MR. EPTING: 21, yes.

18 A. I remember -- I remember seeing this.
19 I'm just not sure at what time frame I saw it.

20 Q. Have you ever provided a signed
21 financial statement, Linda, that represents that
22 you are worth \$52,000,000?

23 A. I don't remember signing this.

24 Q. Do you yourself, Linda -- just looking
25 at it now or when you first saw it, do you have any

1 concept of what the values of the properties were
2 that you owned, meaning do you know if any of these
3 numbers are right or wrong?

4 A. I don't know values. I just assumed
5 that if he -- that Mr. Zerbst and Mr. Villavicencio
6 worked on this loan package and --

7 MR. STEPP: Objection, your Honor, as
8 to what she was told.

9 A. (Continued) I have no --

10 THE COURT: Hold on. Repeat to me
11 what -- you're objecting to the fact that she
12 assumed they were working on the loan package?

13 MR. STEPP: Yes, sir. It's not part of
14 her knowledge. She's testifying about what her
15 assumptions were, which I think is not competent
16 testimony. If she's in a position to say she knows
17 Mr. Zerbst worked on her financial statement, that
18 would be one thing.

19 THE COURT: I heard her testimony to
20 say he was working on the loan documents. Did she
21 particularly say the financial statements?

22 Madam Court Reporter, would you read
23 her answer.

24 (The court reporter read the following
25 testimony from Page 145 - Line 4. Answer: I don't

1 know values. I just assumed that if he -- that.
2 Mr. Zerbst and Mr. Villavicencio worked on this
3 loan package and --

4 THE COURT: "On this loan package."
5 Mr. Stepp, she said that she knew they were working
6 on the loan package. She didn't say on this
7 financial statement.

8 MR. STEPP: Right.

9 THE COURT: Do you not assume that was
10 not part of the loan package?

11 MR. STEPP: Your Honor, I can't object
12 to what you assume. I can only object to what the
13 witness assumes. I don't want some inference based
14 upon noncompetent, non-firsthand knowledge
15 testimony that Mr. Zerbst had something to do with
16 these financial statements.

17 THE COURT: Are you saying that, ma'am?
18 Do you know -- are you saying that Mr. Zerbst had
19 something to do with the preparation of this
20 financial statement?

21 THE WITNESS: I know that he and
22 Mr. Villavicencio talked about my -- I don't know
23 how to do financial statements, and both of them
24 knew that. And so they worked --

25 THE COURT: So do you have any personal

1 knowledge as to where this financial statement came
2 from?

3 THE WITNESS: I'm trying to remember if
4 Mr. Zerbst told me if he -- you know, if he
5 actually said: Yes, I did the values or worked on
6 the values.

7 Well, I do know that -- I mean, they
8 had a financial statement when I did the shopping
9 center a few years ago, so he had knowledge of my
10 financial statement then.

11 THE COURT: I just want -- do you know
12 who prepared this financial statement? Did you
13 prepare it?

14 THE WITNESS: I did not prepare it.
15 I believe Mr. Zerbst and Mr. Villavicencio prepared
16 it.

17 THE COURT: How did you come to that
18 belief? Did they tell you or did they -- how did
19 you come to believe that they prepared this?

20 THE WITNESS: I believe they did --
21 yes; I believe they did tell me that they prepared
22 it.

23 THE COURT: I'll allow her to say that.
24 She can say that. She believes they prepared it.

25

1 BY MR. EPTING:

2 Q. Let me refer you, Linda, to Exhibit 23.
3 And I had forgotten about Exhibit 21, so let me
4 just put this in context.

5 You had gone to the site. You had seen
6 what happened. And Exhibit 22 is being addressed
7 to Elizabeth. Who is Elizabeth?

8 A. Elizabeth is my daughter.

9 Q. And you're writing him asking how much
10 is left and Mr. Lanier is advising her that as of
11 this date there is \$187,500 left?

12 A. Yes.

13 Q. As a result of that let me refer you to
14 Exhibit 23.

15 What did you do with regard to the
16 authority to disburse money out of the remaining
17 funds, Miss Gibson?

18 A. Well, at this point I was trying to
19 figure out what all was happening there, and it
20 looked like Mr. Villavicencio was taking money out
21 of my account. So I went to the RE/MAX office and
22 talked to the broker in charge and the finance
23 office there at RE/MAX and told them to put a
24 freeze on my account, that I did not want them to
25 write any more funds out of my account without my

1 authorization.

2 Q. Did you have a similar conversation
3 with anybody about Mr. Lanier and
4 Mr. Villavicencio?

5 A. I did the same thing with Ameris Bank
6 with Mr. Lanier.

7 Q. Let me refer you -- and so much of
8 this, Linda, you testified to earlier about the
9 problems at the site and having to seek legal
10 counsel. Let me refer you to Exhibit 30.

11 Let me ask you this, Linda, before I do
12 that.

13 MR. STEPP: Your Honor, this is the
14 exhibit -- I think you have my objection, my motion
15 in limine under advisement. I renew my objection.

16 MR. EPTING: Actually, Judge, I
17 completely misspoke in reading my handwriting
18 wrong. It's Exhibit 25.

19 Q. (Continued) Do you recognize this
20 document?

21 A. Exhibit 25?

22 Q. Yes.

23 A. Yes, sir.

24 Q. And what is that?

25 MR. STEPP: Your Honor, I would just

1 continue to note an objection on these legal fee
2 documents to relevancy.

3 THE COURT: I'm going to allow it to
4 come in over objection. Go ahead.

5 A. This is a document that I had signed
6 with the Richter law firm on the retainer fee.

7 Q. How, Miss Gibson, did you get to the
8 Richter law firm?

9 A. Well, Mr. Zerbst had highly recommended
10 Mr. Richter; said he was a very good lawyer.

11 Q. And for whom was Mr. Zerbst working at
12 the time that he recommended that you retain
13 Mr. Richter?

14 A. At this time it was Ameris Bank.

15 Q. At the time that he referred you to
16 Mr. Richter did Mr. Zerbst tell you anything about
17 Mr. Richter representing Mr. Zerbst?

18 A. No. I don't recall that.

19 Q. When did you find out -- first of all,
20 did you retain Mr. Richter?

21 A. Yes, sir, I did.

22 Q. When did you find out that
23 Mr. Richter's firm was representing Mr. Zerbst?

24 A. Well, it was after I had paid him the
25 retainer fee sometime near the latter part of our

1 relationship, my relationship with Mr. Richter,
2 that he had to resign because of a conflict of
3 interest, and it all came out with that conflict of
4 interest.

5 Q. Now, what was happening to your
6 relationship, Linda, with the bank in 2009 from the
7 beginning of the year toward October, November of
8 2009?

9 A. Let's see. My loan with Ameris was
10 interest only for the first year, so by the end of
11 December of '08 they wanted to go to principal and
12 interest, and that was a concern of mine.

13 I was already putting my personal money
14 in trying to pay the interest and I was not going
15 to be able to pay principal and interest. So I
16 talked with Mr. Zerbst, and they extended the
17 interest only for about the next six months into
18 '09. But they kept asking me -- requiring me to
19 put down some of my Daniel Island property as
20 collateral.

21 Q. Before we get there let me just go
22 back. You just referred to they changed your loan
23 and modified it so that after 2008 you weren't
24 paying principal and interest.

25 Would you look at Exhibit 24. Is that

1 the document that you're referring to?

2 A. Yes. Yes, sir.

3 Q. So the way it was going to be modified,
4 your payments would have been approximately
5 \$14,000?

6 A. Yes, sir.

7 Q. Tell the judge about being asked to put
8 down more collateral, Miss Gibson. What were you
9 being asked by Mr. Zerbst to do?

10 A. Well, they -- I had property on Daniel
11 Island that I had rents coming in on, and they
12 wanted me to put that up as collateral for this
13 loan, and I became suspicious of putting up more
14 collateral.

15 Q. Did there come a time, Miss Gibson,
16 that Mr. Zerbst insisted that you meet with him and
17 Mr. Richter?

18 A. Yes; probably by the summer of '09.
19 Yeah. He began talking with my lawyer,
20 Mr. Richter, and setting up meetings.

21 Q. Do you remember going to a meeting in
22 which Mr. Zerbst was present and you were present
23 along with some other people?

24 A. Yes. There were some other people
25 there that I didn't know were going to be there

1 that were interested in purchasing my property on
2 Daniel Island.

3 Q. And who was that?

4 A. Well, there was a representative from
5 Mr. Bartone's office, a realtor that he sometimes
6 uses.

7 Q. And before you went to that meeting,
8 Miss Gibson, did you understand that the subject of
9 the meeting was going to be you providing more
10 collateral or selling your property?

11 A. Mr. Zerbst called the meeting because
12 he said my loan was in trouble, and he told me that
13 he had arranged a meeting with Mr. Richter for the
14 next afternoon. Could I be there? And I told I
15 could, and I wasn't quite sure what all -- I knew
16 they were going to be talking about the loan
17 because he said the loan was in trouble.

18 Q. How did you feel at that meeting?

19 A. Well, as the conversation went in the
20 meeting they had -- I think his name was
21 Mr. Charpia, Special Assets. I believe Mr. Zerbst
22 told me that he was on a speaker phone, and that
23 was a conversation that all of us were listening to
24 Mr. Charpia, and he was talking about my loan.

25 And I felt all of these men that were

1 sitting around that table -- I felt like they were
2 requiring me to sell my property in order to pay
3 that bank note, and I felt outnumbered and
4 betrayed. That's what I felt.

5 Q. Did you feel that your lawyer was
6 representing you?

7 A. I thought that Mr. Richter was my
8 lawyer. And I really didn't understand the
9 relationship or what all was going on between him
10 and Mr. Zerbst, but I felt like Mr. Zerbst knew him
11 well enough and that whatever was going on -- that
12 he used that relationship in that meeting to try to
13 get me to do what he wanted me to do for the bank.

14 Q. Did Mr. Richter provide you a bill?
15 And I call your attention to Exhibit 26, and is
16 that a copy of the bill?

17 A. Yes, sir. Yes, sir.

18 Q. Now, Miss Gibson, one last question.

19 At a time that Mr. Zerbst was still
20 with the bank but at the time that this investment
21 was in trouble, did you have a conversation with
22 Mr. Zerbst about whether or not this was a good or
23 a bad investment for you?

24 A. The apartments?

25 Q. Yes.

1 A. Oh, yes.

2 Q. Tell the judge about that conversation.

3 A. Well, it's true that I had -- as
4 Mr. Stepp was saying, that I had talked with
5 Mr. Villavicencio about my financial dealings, but
6 I also -- because Mr. Zerbst was my banker. I also
7 looked at him as a financial adviser type in what I
8 was doing, because both he and Mr. Villavicencio
9 knew that I had not -- I was not experienced in
10 buying -- doing all of this.

11 In fact, that shopping center and the
12 apartments were the only two things that I had
13 done, and I had done both of them with these guys.
14 And so they -- I felt very comfortable with them.
15 My husband had always handled all of this up until
16 his death, and after he died I was looking for
17 someone that I felt good about and comfortable
18 with. And Mr. Zerbst took the time to talk with me
19 and explain to me things about the banking and the
20 structure of loans and so forth. And so that
21 conversation went along those lines, about that.

22 I felt comfortable in talking with Karl
23 about that. He was always courteous to me. I felt
24 we had a good rapport. I felt he liked me and I
25 always thought he was looking out for me, and so

1 that's -- we talked about that loan, the
2 apartments, the -- I just wanted to make sure that
3 I was doing the right thing. And he never said
4 anything negative about it. He always assured me
5 that the rents would cover the debt, that he
6 arranged what the mortgage rate was, the length of
7 time. So just like he did with the shopping
8 center, that those rents that came in -- and he
9 knew what the rents were coming in from the
10 apartments would cover all of that. And that's
11 what he had done for me at the shopping center, and
12 I -- this is what we were doing again. So I
13 trusted him.

14 Q. But after this got into trouble did
15 Mr. Zerbst say anything to you about whether this
16 really was a good investment for you?

17 A. I asked him was it good. Did he think
18 it was, you know, a suitable investment, a sound
19 investment for me, and he said yes.

20 Q. Did there come a time in which he
21 changed his mind?

22 MR. STEPP: This question has been
23 posed twice now. The same answer has been had many
24 times.

25 Q. (Continued) Well, Miss Gibson,

1 I'm trying to ask you and ask you to turn your
2 attention --

3 MR. STEPP: I object.

4 THE COURT: Hold on.

5 Q. (Continued) Not before this
6 transaction but after this transact in and about
7 the time of the meeting with Mr. Richter, et al,
8 did you have a conversation with Mr. Zerbst about
9 the suitability of this investment?

10 A. One of the last conversations I had
11 with Karl, it came as a result of that meeting, and
12 he said -- basically what he said was that I should
13 have never made this loan. It was overpriced and
14 the rents were not going to cover those payments.
15 That was my last -- probably the last conversation
16 that I had with Karl.

17 Q. Do you know how much longer -- this
18 meeting was sometime in the summer or fall of 2009.
19 Do you know how much longer Mr. Zerbst was with the
20 bank?

21 A. No, sir, because after that it was
22 turned over to somebody else. And Mr. Richter
23 resigned from representing me, and I didn't really
24 try -- I tried to avoid the bank as much as I
25 could.

1 Q. One last question.

2 After you bought the apartments did you
3 list the apartments for sale and try to sell them?

4 A. Yes, sir, I did.

5 Q. Do you remember who you listed them
6 with?

7 A. I listed them with -- I think it was
8 Carolina One at the time.

9 Q. And who was the person that you dealt
10 with at Carolina One?

11 A. It was a lady, and I was trying to
12 think of her name. Her name escapes me at the
13 moment, but it will come to me.

14 Q. Did you have any dealings with a
15 gentleman by the name of Southard?

16 A. Yes. Geoff Southard was also -- I had
17 spoken with him a couple of different times as
18 well.

19 MR. EPTING: Your Honor, no further
20 questions.

21 THE COURT: Thank you.

22 MR. STEPP: May it please the Court.

23 CROSS-EXAMINATION

24 BY MR. STEPP:

25 Q. Miss Gibson, I want to go back a little

1 bit through your background, if I may, and I'm
2 going to try to put a couple of documents up on the
3 screen.

4 I understood you to say in response to
5 Mr. Epting that after high school you went to an
6 interior design school and completed some course of
7 study in interior design; is that right?

8 A. Yes, sir.

9 Q. Did you have an interior design
10 business?

11 A. No, sir.

12 Q. Did you ever work for another interior
13 designer?

14 A. No, sir.

15 Q. Then you went two years to college at
16 Charleston Southern; correct?

17 A. Yes.

18 Q. Now, there has been some testimony
19 about the shopping center and your wanting to
20 replace the beach house with some other property;
21 correct?

22 A. Correct.

23 Q. And did I understand -- I've had all
24 your prior testimony, of course.

25 Did I understand you to say that you

1 thought the beach house had fairly low cash flow
2 and was high maintenance and you wanted something
3 with better cash flow and lower maintenance; is
4 that right?

5 A. Yes, sir.

6 Q. So you asked -- I'm just going to call
7 him Rolando.

8 So you asked Rolando to show you
9 something that would be in line with those
10 characteristics; correct?

11 A. Yes, sir.

12 Q. And he brought you the shopping center
13 at a listed price of \$2.4 million; correct?

14 A. Yes, sir.

15 Q. And as a result of that transaction you
16 sold the beach house, replaced it with the shopping
17 center, and had to do -- you took some of the money
18 from the beach house and applied it to the price of
19 the shopping center; correct?

20 A. That's right.

21 Q. And then you had to get a second
22 mortgage; correct?

23 A. That's right.

24 Q. Let's look at Exhibit 3. Can you see
25 that at all? Would you be better off with a hard

1 copy in front of you?

2 A. Yes, sir.

3 Q. Now, there were two mortgage loans
4 necessary to buy the shopping center; correct?

5 A. Yes, sir.

6 Q. And so as a result of that -- if you
7 look at the column on the left at the bottom, at
8 closing the cash due from borrower was zero;
9 correct?

10 A. Yes.

11 Q. And so that was -- Ameris didn't have
12 anything to do with that transaction, did it?

13 A. No, sir.

14 Q. And you understood at the time you did
15 this closing that you were borrowing all of the
16 money -- either applying or borrowing all the money
17 to buy the shopping center; correct?

18 A. I -- whatever they -- I really wasn't
19 -- I don't know that much about banking. Whatever
20 they suggested in order to buy it, that's what I
21 understood. Whatever they told me.

22 Q. But you completed this deal, and did
23 you understand that that helped to protect some of
24 the capital gains that you would have realized on
25 the beach house and you didn't have to pay as much

1 in taxes?

2 A. I guess. I don't really understand all
3 of that, Mr. Stepp. I remember that my husband had
4 done a 1031 exchange and that he had explained
5 something about tax -- not having to pay taxes.
6 And so that's the only thing I know about --

7 Q. You went to see a lawyer about this,
8 didn't you? Didn't you see a lawyer about --

9 A. Well, the lawyer, I think, did the
10 closing.

11 Q. Right. So you had some legal advice
12 about this transaction; correct?

13 A. Well, he just handled the paperwork.
14 I mean, he didn't talk with me about -- explain all
15 of this.

16 Q. Did you ask him any questions about it?
17 Was there anything about it that you didn't
18 understand that you thought you needed to ask
19 questions or have somebody explain to you?

20 A. No, sir. Mr. Zerbst and
21 Mr. Villavicencio had already talked with me about
22 how to do it.

23 Q. Now, you are a member of several LLCs;
24 is that correct? Do you know what an LLC is?

25 A. It's a limited liability corporation

1 that my husband had set up with the two beach
2 houses.

3 Q. Well, there is more than that, isn't
4 there? Maybe not.

5 Turn to Exhibit 110, if you would.

6 MR. STEPP: Your Honor, I don't know
7 how we're going to do this. I move Defendant's
8 Exhibit 3 into evidence.

9 MR. EPTING: What I suggest is that --
10 if you'll give me the CD I think we can do this,
11 but I don't object to Exhibit 3.

12 MR. STEPP: Then I move Exhibit 3 into
13 evidence.

14 MR. EPTING: I think it's already one
15 of our exhibits she's already testified to.

16 MR. STEPP: Sorry about the
17 duplication.

18 Q. (Continued) Have you made it to
19 Exhibit 110?

20 A. No, sir. Not yet. Okay.

21 Q. Are you there? This is a certified
22 copy of Articles of Incorporation for 600 Carolina
23 boulevard, LLC; correct? That was one of your two
24 beach houses?

25 A. Yes, sir.

1 Q. Does this show in Paragraph 3 that you
2 are the agent for service of process for 600
3 Carolina Boulevard, LLC?

4 A. Yes, sir.

5 Q. And you understand that means that if
6 anybody files a lawsuit against 600 Carolina
7 Boulevard, they would bring the suit papers to you
8 for service? You understand that?

9 A. As you say so I do.

10 Q. Well, when you became -- you understood
11 that at the time you agreed to become the
12 registered agent, did you not?

13 A. I suppose I did. I just don't
14 remember.

15 Q. Look at 111, which is the Articles of
16 Incorporation for Heritage Seven, LLC.

17 Now, let's talk about Heritage Seven a
18 little bit. You said that was something that was
19 set up by your husband; is that correct?

20 A. No. This was -- the two beach houses,
21 600 Carolina Boulevard, LLC and 3205 Palm
22 Boulevard, LLC, that's all that my husband and I
23 set up.

24 Q. I'm sorry. I misunderstood that. So
25 you formed Heritage Seven, LLC; correct?

1 A. Mr. Villavicencio formed it when -- or
2 he filled out the paperwork when I bought the
3 shopping center.

4 Q. So this was formed at the time you
5 acquired the shopping center; is that correct?

6 A. Yes.

7 Q. And are you a member of Heritage Seven,
8 LLC?

9 A. Yes.

10 Q. And how much of that do you own? 50%?

11 A. Yes, sir.

12 Q. And does the trust that your late
13 husband set up own the other 50%?

14 A. Yes.

15 Q. Are you the trustee of that trust?

16 A. Yes.

17 Q. And do you understand that as trustee
18 of that trust you have certain duties and
19 responsibilities to the trust and to the
20 beneficiaries of the trust?

21 A. Yes. I believe that's what the lawyers
22 told me.

23 Q. And you've been the trustee of that
24 trust since when?

25 A. For Heritage Seven, LLC?

1 Q. No. In the Paul Gibson Trust or
2 something like that.

3 A. Since '03.

4 Q. Paul William Gibson Family Trust.

5 A. Yes.

6 Q. So you've been the trustee of that
7 trust since 2003; correct?

8 A. Yes.

9 Q. And you have successfully managed its
10 affairs since then, I assume.

11 A. Yes.

12 Q. Let's look at 112. I think 112 --
13 these are amended Articles of Organization for 600
14 Carolina Boulevard; correct?

15 A. That's what it says at the top,
16 "Amended."

17 Q. And do you know what amendment was made
18 at the time these amended articles were filed?

19 A. No, sir.

20 Q. And let's finally look at 113. These
21 are Articles of Organization for Seven Oaks
22 Apartments, LLC. Do you see that?

23 A. Yes.

24 Q. And apparently, if I'm reading this
25 correctly, this was formed on your behalf by

1 Manning Unger at Moore & Van Allen in Charleston;
2 is that right?

3 A. Yes, sir.

4 Q. So you consulted Mr. Unger about
5 forming this LLC?

6 A. Well, I had consulted Mr. Paul Lynch,
7 and maybe he got Mr. -- maybe he had Mr. Unger to
8 do this.

9 Q. But as it turns out, however you got
10 there, Mr. Unger represented you in the formation
11 of this limited liability company; correct?

12 A. Yes, but it was never, I think, like
13 recorded or established. I assumed that it had,
14 but it was not. So the apartments remained --
15 I think Mr. Villavicencio lumped the apartments in
16 to the same Heritage Seven, LLC as the shopping
17 center.

18 Q. But once upon a time your intention was
19 to somehow put the apartments into the Seven Oaks
20 Apartments, LLC; correct?

21 A. That's what I was advised to do.

22 Q. But you think that never actually
23 happened?

24 A. No, it didn't.

25 Q. And you understood there would have

1 been some possible advantage to doing that had you
2 done so; correct?

3 A. That's what I was told.

4 MR. STEPP: Move the introduction of
5 110 through 115.

6 MR. EPTING: No objection.

7 BY MR. STEPP:

8 Q. Now, if you would, turn to Exhibit 98.
9 Are you with me?

10 A. Yes, sir.

11 Q. This is a personal financial statement
12 of yours dated October the 7th, 2009; correct?

13 A. Yes.

14 Q. And this bears your signature?

15 A. Yes, sir, it does.

16 Q. And you prepared this and submitted it
17 to Ameris Bank -- is that correct?

18 A. Yes, sir.

19 Q. -- in connection with your request for
20 some sort of modification relief or restructure on
21 the apartment loan; correct?

22 A. Yes, sir.

23 Q. Now let's take a look at this. At the
24 time as of October 7th of 2009 the information on
25 Exhibit 98 was correct as best you knew. Is that

1 also correct?

2 A. Yes, sir.

3 Q. You list under the category Personal
4 Assets various things: Automobiles, trailers,
5 personal items, your home, and then another piece
6 of property totaling \$782,000; is that right?

7 A. Yes, sir.

8 Q. And then cash you list \$18,475. Also
9 right?

10 A. Yes, sir.

11 Q. And then assets. The subcategory total
12 is \$23,320,800, if I'm reading that right.

13 A. Yes.

14 Q. And so that brings us to total assets
15 of 21,121,275.

16 A. Yes.

17 Q. And so on October 7th, 2009, as best
18 you knew that fairly represented the assets that
19 you either owned or controlled; correct?

20 A. Yes, sir.

21 May I add that this is probably the
22 first financial statement that I did, and I used
23 the previous financial statements that
24 Mr. Villavicencio and Mr. Zerbst had -- or that
25 Mr. Villavicencio -- I found a previous financial

1 statement in the discovery of the lawsuit. Because
2 I did not know how to make up financial statements,
3 and I think Mr. Lanier said that the bank was going
4 to require a financial statement in order to do the
5 loan, so I just used that as an example.

6 I have no knowledge of the values.
7 I called a couple of different realtors, asked them
8 about property on Daniel Island, what the acreage
9 -- how much was going for acreage. And so that's
10 how I did this financial statement.

11 Q. But it represented the best information
12 available to you on October 7th, 2009 concerning
13 your assets and liabilities?

14 A. Yes, sir.

15 Q. And you understood that you were
16 presenting it through a bank in connection with an
17 application for credit?

18 A. Yes, sir.

19 Q. And so you report here your net worth
20 on October the 7th, 2009 as \$18,341,915.18; is that
21 correct?

22 A. Yes, sir.

23 Q. And among the assets there are
24 different kinds of properties; correct?

25 You've got this Clements Ferry Road

1 property that you talked about. You've got 3205
2 Palm Boulevard. You've got the Moncks Corner
3 shopping center. Seven Oaks Apartments you list at
4 a million one; right?

5 A. You're talking about the shopping
6 center is a million?

7 Q. No. In the middle category under
8 Assets the last item Seven Oaks Apartments,
9 1.1 million.

10 A. I see that, yes.

11 Q. Here it says Seven Oaks Apartments, but
12 that's the same apartment complex we've been
13 talking about; correct?

14 A. Yes, sir.

15 Q. And some of these properties were
16 rented and you were receiving income as a result of
17 them; right?

18 A. Yes, sir.

19 Q. Including the Klister Lane site where
20 the cell tower is; correct?

21 A. Yes, sir.

22 Q. And including the shopping center at
23 that point; right?

24 A. Yes, sir.

25 Q. Now, who is managing the shopping

1 center in October of 2009?

2 A. I am.

3 Q. By that, you are collecting the rents
4 every month, paying all the bills, seeing to
5 maintenance, renewing leases when end they came up.
6 That sort of thing.

7 A. Yes, sir.

8 Q. Now, that was similar, I gather, to
9 what you did for a period of time with respect to
10 the apartments starting in 2008; right?

11 A. Yes.

12 Q. Now let me ask you to look at
13 Defendant's Exhibit 64, please.

14 MR. STEPP: I'm sorry, your Honor.
15 I move for the admission of 98.

16 MR. EPTING: Objection.

17 THE COURT: It's admitted.

18 (Defendant's Exhibit 98 in evidence.)

19 Q. (Continued) This is a collection of
20 documents. It's a lot of handwritten notes of
21 yours, and I think by and large they relate to
22 notes that you made or information that you
23 gathered during the period of time that you were
24 actively managing the apartments; is that correct?

25 A. This isn't my handwriting. Could I

1 look at just --

2 Q. Sure. Take your time. There is a lot
3 of different stuff in there.

4 A. Okay. This is not my handwriting, so
5 I'm not sure who wrote this.

6 Q. There is different handwriting. Is any
7 of this your handwriting?

8 A. The second page is my handwriting.

9 Q. And then let's turn -- there is some
10 copies of documents, building permits.

11 Did you gather building permits? Do
12 you have copies of them?

13 A. These were presented to me, I think, by
14 the general contractor.

15 Q. But you had copies of the building
16 permits at the time you took over or shortly
17 thereafter; correct?

18 A. Yes.

19 Q. And then there is some information
20 about hot water heaters and heat exchangers and
21 stainless steel sinks and refrigerators.

22 Keep turning. After the building
23 permits and after a copy of the check we get into
24 sort of page after page of notes. There is a
25 number at the bottom, 725. Do you see that?

1 A. 725?

2 MR. STEPP: May I approach?

3 THE COURT: Go ahead.

4 BY MR. STEPP:

5 Q. Is that your writing?

6 A. Yes, sir.

7 Q. And then would it also be your writing
8 from 725 through to the end of this document?

9 A. Yes, sir.

10 MR. STEPP: We move the introduction of
11 Defendant's 64, at least with respect to Pages 725
12 forward.

13 MR. EPTING: No objection.

14 (Defendant's Exhibit 64 in evidence.)

15 BY MR. STEPP:

16 Q. Now, at the time you were managing the
17 apartments, Miss Gibson, your daughter was helping
18 you some; is that right? Elizabeth.

19 A. Yes, sir.

20 Q. And she has a real estate license; is
21 that correct?

22 A. Yes, sir.

23 Q. And so what was her role in assisting
24 you in managing the apartments?

25 A. Whatever I needed help with, she did.

1 Q. And she in part corresponded with
2 Benjie Lanier about issues regarding the loan; is
3 that right?

4 A. She did somewhat.

5 Q. Part of what you did as well when you
6 took over management of the apartments was you took
7 over getting draws from the bank and disbursing
8 money to pay contractors or other expenses at the
9 apartments; correct?

10 A. Yes.

11 Q. And the way you would do that primarily
12 is you would call the bank -- you opened a checking
13 account with the bank; correct?

14 A. Yes.

15 Q. And you would from time to time call
16 the bank and ask them to advance money from the
17 loan into the checking account and then you would
18 write the checks; correct?

19 A. Yes.

20 Q. And at the time you took it over how
21 much of the loan proceeds did you disburse? Do you
22 know?

23 A. I don't remember the exact amount, no,
24 sir.

25 Q. Was it about \$290,000? Does that sound

1 about right?

2 A. It could have been that much. I'm not
3 quite sure.

4 Q. It was more than \$200,000. Would you
5 agree with me?

6 A. I believe it was.

7 Q. And so you made the decisions about how
8 to pay that and who to pay and what documentation
9 to require; correct?

10 A. Yes.

11 Q. You also during the time you were
12 managing the apartments negotiated with contractors
13 and subcontractors to try to get prices to complete
14 the work; correct?

15 A. Yes, sir.

16 Q. And I think I heard you say you
17 actually negotiated with some contractors to try to
18 get them to work now and be paid later; correct?

19 A. Yes. These were not like big-time
20 contractors that I was talking to; people that if
21 they had any kind of construction skills and if
22 they could help me out in any way. Because at that
23 point I was not able to pay top dollar for
24 anything, so . . .

25 Q. My only point is you were on point.

1 You had taken responsibility for that and you were
2 out there yourself dealing one on one with the
3 service providers to the property; correct?

4 A. I was trying to find someone to help
5 me, yes.

6 Q. And in fact you replaced the general
7 contractor at some point, the one that Rolando had
8 selected, and you replaced him with another one;
9 correct?

10 A. Well, he left. His permits had
11 expired, so he left.

12 Q. So you hired a new general contractor
13 to do some of the work? I think you told that to
14 Mr. Epting, didn't you?

15 A. Yes.

16 Q. And you entered into an agreement with
17 that contractor on behalf of the apartments
18 yourself; correct?

19 A. Yes.

20 Q. Did any mechanics liens ever get filed
21 against the apartments?

22 A. Not to my knowledge.

23 Q. Let's talk about Rolando a little bit.
24 You met him at church. We've established that. He
25 was not introduced to you by Mr. Zerbst; correct?

1 A. No.

2 Q. You knew him before you even met
3 Mr. Zerbst; is that right?

4 A. Yes.

5 Q. And with respect to the shopping center
6 deal, Rolando was acting for you; is that correct?
7 He was bringing you this property at your behest;
8 correct?

9 A. Yes. He found the property.

10 Q. And from the period of time from 2005
11 right on up through 2008 you had the right to tell
12 Rolando what to do or what not to do, did you not?

13 A. I suppose so.

14 Q. In fact, at some point in 2008 you told
15 him to stop working on the apartments because he
16 was fired; correct?

17 A. Yes.

18 Q. And you understood, particularly with
19 respect to the apartments, that he was out there
20 talking to contractors and talking to architects
21 and interviewing a lot of people and sort of taking
22 over whatever needed to be done to get these
23 apartments converted and renovated; correct?

24 A. Yes. He talked to a lot of different
25 people.

1 Q. And I believe if you would look at
2 Exhibit 4 -- and I'm going to ask you a question
3 while you look. You hired RE/MAX and Rolando to be
4 the management -- you entered into a management
5 agreement with them for the shopping center
6 property; correct?

7 A. Yes, sir.

8 Q. So take a look and tell me if Exhibit 4
9 is that document.

10 A. Yes, sir.

11 MR. STEPP: I move Exhibit 4 into
12 evidence.

13 MR. EPTING: No objection.

14 (Defendant's Exhibit 4 in evidence.)

15 BY MR. STEPP:

16 Q. I think I read this in your deposition.
17 Correct me if I'm wrong.

18 Before Rolando brought you the
19 apartments to buy you had actually been there one
20 time to meet him; is that right?

21 A. To meet him at the apartments?

22 Q. Yes, ma'am.

23 A. Yes.

24 Q. So this was back in the shopping center
25 deal days, but you had to meet him and he asked you

1 to meet him at these apartments; correct? Because
2 he was the manager.

3 A. Right.

4 Q. And I believe you said you thought they
5 looked a little run down; correct?

6 A. Yes. They needed renovating.

7 Q. And you were not, I think, entirely
8 sure about your welfare and safety while you were
9 there; is that right?

10 A. Well, I believe that was the first time
11 I had ever been down to the end of Otranto Road.
12 And they had asked me -- he and his wife managed
13 the apartments, and I think they told me sometimes
14 they set up their office there at that office, but
15 they also had an office at RE/MAX where I had met
16 them most of the time. But they had called me down
17 there to talk about something, not the apartment.
18 Yes.

19 Q. So you were just there -- it was a
20 casual visit? You weren't there to look at them or
21 inspect them because you were going to buy them at
22 that point?

23 A. Right. Yes.

24 Q. Now, after Rolando brought the
25 apartments to you for you to consider buying did

1 you ever go back to the apartments?

2 A. Yes.

3 Q. And did you go back before the closing
4 on November the 2nd?

5 A. Yes.

6 Q. And so you were able to observe the
7 condition of the apartments as they existed at the
8 time you bought them; correct?

9 A. Yes. He had taken me into one of the
10 units to show me the layout of the unit and what he
11 thought might look -- how to fix them up.

12 Q. You couldn't go into people's rented
13 apartments, but you had full access to the grounds
14 and any unoccupied apartments prior to your
15 purchase; correct?

16 A. He took me into one unit. I just only
17 went into one unit, yes.

18 Q. Well, did you ask to see any other
19 units?

20 A. No.

21 Q. Did you see the whole exterior and the
22 grounds and all that stuff?

23 A. Yes. I had observed all of that.

24 Q. Now, did you have any appraisal of the
25 apartments done for you before you applied for

1 finance?

2 A. No. I did not have a separate
3 appraisal.

4 Q. Prior to the First Reliance appraisal
5 did you ask Rolando if he had an appraisal done for
6 you?

7 A. No, sir.

8 Q. Did you have an architect or contractor
9 inspect the apartments prior to your acquisition?

10 A. No, sir.

11 Q. Did you have anybody prepare an
12 estimate of the cost necessary to convert the
13 apartments to condominiums or to renovate them to
14 generate higher rents?

15 A. No. I did not hire anyone to do that.

16 Q. Now, my understanding is that you had a
17 conversation with Rolando before you signed the
18 purchase contract.

19 MR. SPELL: And I think that was one of
20 your exhibits.

21 MR. EPTING: Yes.

22 Q. (Continued) Plaintiff's 26, I believe.
23 Look at it, if you want to, but let me ask you my
24 question. No; it is No. 6.

25 A. Okay.

1 Q. Now, my recollection of your prior
2 testimony is that you asked Rolando -- the list
3 price of the apartments was \$2.8 million; correct?

4 A. That's right.

5 Q. I think you asked Rolando whether you
6 ought to offer something less than that.

7 A. Yes.

8 Q. And he said no, they wouldn't take
9 anything less than that?

10 A. Yes.

11 Q. You made the full price offer at \$2.8
12 million; correct?

13 A. Yes.

14 Q. At that point you hadn't spoken to
15 Mr. Zerbst; correct? The contract is in May.

16 A. No; I don't believe I had spoken with
17 Mr. Zerbst.

18 Q. Now, originally, as I understand it,
19 the concept that Rolando presented to you was to
20 convert the apartments to condominiums and then
21 sell the individual condominiums and make a profit
22 that way; is that correct?

23 A. That was how he first proposed to do
24 the apartments.

25 Q. That's the first sort of idea that he

1 presented to you about how this deal would work;
2 correct?

3 A. That's right.

4 Q. But then that didn't come to pass
5 because he later told you that he couldn't get a
6 bank to finance the individual condominium units;
7 correct?

8 A. Yes. The ones that he had talked to
9 were not interested in that.

10 Q. Now, did you draw any conclusion from
11 that at all -- the fact that a bank might not be
12 interested in financing the individual condominiums
13 -- about the merits of the deal at that point?

14 A. No, I didn't.

15 Q. And at that point you just decided to
16 proceed and just renovate the apartments but leave
17 them as apartments; correct?

18 A. Yes. That was his suggestion.

19 Q. That was at Rolando's suggestion?

20 A. Yes.

21 Q. Now, I think I also understand from
22 your prior testimony that you didn't -- you asked
23 Rolando for rent roles. You know what I mean by
24 "rent rolls?"

25 A. Yes.

1 Q. The rental history on each of the
2 units.

3 A. Right.

4 Q. You asked him for that?

5 A. Yes. I asked him about -- well,
6 I don't know that that came up at that time.
7 Because in the beginning he talked about
8 condominiums, so we were going to go with
9 condominiums. At some point the rent came up
10 because he wanted to do the apartments.

11 Q. I guess the question I'm really asking
12 is: You never saw a rent roll for the apartments?

13 A. I never saw them, no.

14 Q. You never examined the books of the
15 existing owners to determine what their profit and
16 loss on the apartments was, did you?

17 A. No, I didn't. I think I just was going
18 by whatever it was he told me at the time.

19 Q. And if I've asked you this, forgive me,
20 but you also did not see or obtain any third-party
21 estimate of what it would cost to do the renovation
22 work; correct?

23 A. Correct.

24 Q. Now, you testified in your deposition
25 that when Rolando talked to you about the

1 apartments, he convinced you to do the deal and you
2 said he painted this picture for me. Do you
3 remember that?

4 A. Yes.

5 Q. And the "he" is Rolando; correct?

6 A. Yes.

7 Q. So Rolando painted this picture for you
8 and you were, quote, relying on him heavily; is
9 that correct?

10 A. Yes.

11 Q. And you have testified that you
12 regarded him as your financial adviser; correct?

13 A. Yes.

14 Q. And he was your real estate agent as
15 well; correct?

16 A. Yes.

17 Q. Now, you also testified that Rolando
18 was the only person you talked to about buying the
19 apartments. Do you remember that?

20 A. Not really.

21 Q. Let me show you your prior testimony
22 and see if I can refresh your recollection.

23 MR. STEPP: Here is the sealed
24 original.

25 MR. EPTING: Whatever is convenient,

1 Judge.

2 THE COURT: Do you want to put that in?

3 The Court: That will be Court's No. 3,
4 is my understanding.

5 (Court's Exhibit 3, Deposition of Linda
6 A. Gibson, marked for identification.)

7 MR. STEPP: I'm on Page 56, Line 11.

8 BY MR. STEPP:

9 Q. This is a copy of your deposition from
10 June 1, 2011. Do you remember you being present on
11 that date and being asked questions?

12 A. I remember.

13 Q. And on Page 56 the question at Line 8
14 was: All right. Was it Rolando who first told you
15 what they wanted? What the sellers wanted was \$2.8
16 million.

17 And your answer was: Yes. He was the
18 only one I ever talked to. I had met one of the
19 other doctors at Rolando's home, but we didn't talk
20 about -- that doctor didn't talk to me about
21 buying. He didn't talk to me about any of this.
22 Rolando was the only one I talked to.

23 Did I read that correctly?

24 A. Yes.

25 Q. Thank you.

1 Now, Rolando also told you that \$2.8
2 million he thought was a good price; correct?

3 A. Yes. Mr. Stepp, can I say something?

4 Q. Well, if it's responsive to my
5 question.

6 THE COURT: Does it have something to
7 do with this question?

8 THE WITNESS: Yes. The way he just
9 asked me about this question, about Rolando the
10 only one I talked to, from reading the little bit
11 of the deposition, I think in my mind what I
12 thought Mr. Jordan was asking me was that did I
13 ever talk to Rolando's friends who owned the
14 apartments about buying the apartments, and I did
15 not. I had only talked to Rolando.

16 Rolando was the property manager and
17 also their agent, and he approached me about buying
18 the apartments. So I only talked to Rolando and
19 not the owners of the apartments.

20 MR. STEPP: Thank you, your Honor.

21 BY MR. STEPP:

22 Q. Now, back to the question that I had
23 just asked you, Miss Gibson, was you asked Rolando
24 whether you ought to make a lower offer, and he
25 said that the sellers wouldn't take anything less.

1 That's part of what he said; correct?

2 He also said that 2.8 million was a
3 good price for the apartments; correct?

4 A. Yes.

5 Q. And you trusted him when he said that?

6 A. Yes. I took his word for it.

7 Q. I mean, you trusted Rolando completely
8 at this point, did you not?

9 A. Yes.

10 Q. Now I want to talk about the
11 refinancing of the beach house, which you answered
12 some questions about with Mr. Epting.

13 Isn't it true, Mrs. Gibson, that
14 Rolando is the only person that you relied on in
15 making a decision to refinance the beach house?

16 A. Well, no, that wouldn't have been
17 correct.

18 Q. Well, let me show you again from the
19 same deposition, June 1st, 2011. This time on Page
20 72 at Line 13.

21 Again, I'll share this with you, if I
22 may. Page 72 - Line 13. Question: Okay. Who did
23 you rely on in deciding to refinance the property
24 located at 3205 Palm Boulevard? And your answer
25 was: Rolando.

1 And the next question at Line 17 was:
2 All right. Did you rely on anyone else to make
3 that decision? And your answer at Line 19 is: No.
4 I mean, I don't recall the time frame here.
5 I don't. I spoke with Rolando mostly. Again, I'm
6 not sure when the -- I believe it was just Rolando
7 that told me about this.

8 Did I read that correctly?

9 A. You read it correctly, yes.

10 Q. So when you were deposed in June of
11 2011 your testimony was that it was Rolando is the
12 only person you spoke to, but today you said you
13 spoke to Mr. Zerbst about it as well?

14 A. Well, yes. I have spoken with
15 Mr. Zerbst. He is the bank officer that would
16 require me to speak with him about that.

17 Q. Well, you had to talk to the bank if
18 you wanted to get a loan; correct?

19 A. Yes.

20 Q. But when you were asked in June who did
21 you rely on in deciding to refinance, your answer
22 was Rolando alone; correct? That's what we just
23 read, is it not?

24 A. Yes, sir. That's what you just read to
25 me.

1 Q. Thank you.

2 Now, you said in response to Mr. Epting
3 that you were concerned about buying the apartments
4 because you didn't have the money; correct?

5 A. That's right.

6 Q. By that you meant you didn't have the
7 cash? You didn't have 2.8 million in cash sitting
8 around somewhere; right?

9 A. Right.

10 Q. Certainly you had assets that far
11 exceeded even by your own estimate at that point
12 far more than \$2.8 million; right?

13 A. Yes, sir.

14 Q. And so you had the option if you wanted
15 to buy the apartments or buy anything else to
16 liquidate one or more of those assets and then take
17 that cash to whatever investment you chose to make;
18 correct?

19 A. Yes, if I chose to do that.

20 Q. The beach house itself is owned by --
21 or it was owned by 3205 Palm Boulevard, LLC;
22 correct?

23 A. Yes.

24 Q. And if you'll look at Defendant's
25 Exhibit 10. You looked at this, Mrs. Gibson, with

1 Mr. Epting. It's a copy of the closing statement
2 for the refinance of the beach house at Palm
3 Boulevard; correct?

4 A. Yes.

5 Q. And it shows that the borrower is 3205
6 Palm Boulevard, LLC; correct?

7 A. Yes.

8 Q. And the beach house was in fact titled
9 in the name of 3205 Palm Boulevard, LLC; right?

10 A. Yes.

11 Q. And 3205 Palm Boulevard, LLC is an LLC
12 in which you own 50%; is that right?

13 A. Yes. I believe that's correct.

14 Q. And your children own the other 50%; is
15 that right?

16 A. Yes.

17 Q. So you are a 50% member?

18 A. Yes.

19 Q. Now, look down on the left-hand column
20 all the way at the bottom where it says: Cash from
21 or to borrowers, cash to borrower.

22 A. Yes.

23 Q. The amount there is 656 or 666,154.

24 A. Yeah. I can't make that out either.

25 Q. Your recollection is that you got

1 something just under \$700,000 as a result of that
2 beach house; right?

3 A. Yes.

4 Q. As a result of refinancing the beach
5 house.

6 And then if you look back -- I think
7 it's No. 98. That's your October financial
8 statement that we looked at, October of '09.

9 A. You said 98?

10 Q. 98.

11 A. Yes. Okay. Yes, sir.

12 Q. I'm sorry. That's the wrong one. Let
13 me back up. Defendant's Exhibit 10.

14 A. Yes, sir. I have it.

15 Q. I beg your pardon. It's 17. I do
16 believe that's what I'm trying to get to. Yes.

17 A. Okay. I'm there.

18 Q. And under Portfolio Assets on
19 Defendant's Exhibit 17 -- this is a personal
20 financial statement dated September 30 of 2007;
21 correct?

22 A. Yes, sir.

23 Q. And this shows under the label
24 Portfolio Assets, checking account 3205 Palm
25 Boulevard, LLC, \$667,800; correct? On the first

1 page.

2 A. Yes, sir.

3 Q. And September 30, '07 would have been
4 at the end of the month in which -- the
5 refinancing, I think, was in August and this was
6 the end of the following September; correct?

7 A. Yes. I believe that's correct.

8 Q. So that money from that refinance went
9 into an account of 3205 Palm Boulevard, LLC; is
10 that right?

11 A. I guess so. Yes, sir.

12 Q. Well, that's what this shows at least;
13 is that right?

14 A. Yes.

15 Q. You agree with me on that. And then
16 that's the money that was used by you for an equity
17 contribution to the purchase of the apartments;
18 correct?

19 A. Yes.

20 Q. Now, is there some sort of note? Did
21 you borrow that from 3205 Palm Boulevard, LLC? Did
22 you sign some sort of note back to 3205?

23 A. Not that I recollect.

24 Q. Again, I think I asked you this with
25 respect to the shopping center, but at this point

1 in August of 2007 if you thought you needed
2 \$700,000 -- and did Rolando tell you you needed
3 what he called show money?

4 A. He had mentioned show money at some
5 point in all of this, but I think that was back in
6 the beginning of when he first talked to me about
7 the apartments.

8 Q. And did you understand when he was
9 talking about show money that he was talking about
10 some liquid assets you could show to a bank to
11 suggest that you could do the financing?

12 A. I never really understood what all that
13 meant and I didn't understand what it was all
14 about, really.

15 Q. Okay. Well, in August or September of
16 2007 if you had wanted to come up with \$700,000 in
17 cash, you could have done so without borrowing the
18 money; correct?

19 A. I would have had to sell some other
20 property to do so, yes.

21 Q. Right. But you could have made the
22 decision to sell another asset and generated
23 however the value of that asset and used that money
24 instead of borrowing money on the beach house; is
25 that right?

1 A. Yes, sir.

2 Q. Now look at Exhibit 43, if you would,
3 please.

4 MR. STEPP: I offer 17 in evidence.

5 MR. EPTING: No objection.

6 (Defendant's Exhibit 17 in evidence.)

7 MR. STEPP: Your Honor, I also offer
8 Defendant's 6 and 10, both of which are also on the
9 plaintiffs' exhibit list. But I'm not sure where
10 we are, so let me just offer them as defendant's
11 exhibits.

12 MR. EPTING: No objection.

13 (Defendant's Exhibits 6 and 10 in
14 evidence.)

15 THE COURT: Okay.

16 BY MR. STEPP:

17 Q. 43. Look at the very last page, if you
18 would. Just for purposes of identification, this
19 is a collection of documents. This is an email
20 from Rolando to Benjie Lanier dated 5/21/08 to
21 which are attached various things, including as the
22 last attachment, according to the first page,
23 something called "Letter of Explanation," and I'm
24 directing your attention to that Letter of
25 Explanation.

1 A. Yes, sir.

2 Q. Are you with me?

3 A. Yes, sir.

4 Q. Now, did you write this?

5 A. I believe Mr. Villavicencio had written
6 it.

7 Q. You saw it and approved it, though;
8 correct?

9 A. I believe I did.

10 Q. And it's not signed by you, but it's
11 got your name at the bottom and this is something
12 you understood Rolando was going to be sending to
13 somebody to explain the financing of 3205 Palm
14 Boulevard; correct?

15 A. Yes, I think so.

16 Q. Now, let's look at what you say. You
17 say: I, Linda A. Gibson - Owner place 3205 Palm
18 Boulevard, Isle of Palms, South Carolina, multiple
19 listing service, et cetera, on the market from
20 July 17, 2006 to May 17, 2007.

21 Is that a correct statement?

22 A. I had it on the market several
23 different times. I'm not sure about the dates.

24 Q. Once upon a time you had elected to
25 sell it?

1 A. Yes.

2 Q. And then at some time in the spring of
3 2007 you decided no longer to offer it for sale?

4 A. Yes, sir.

5 Q. And that was at about the time that you
6 signed the contract to acquire the apartments;
7 right?

8 A. Yes, sir.

9 Q. You say in the next paragraph: This
10 was mainly because I wanted to sell the property
11 and take the cash proceeds from the sale to
12 purchase an income producing multifamily investment
13 property closer to my area of coverage.

14 Now, that multifamily investment
15 property closer to your area of coverage is the
16 Otranto apartments; correct?

17 A. Yes.

18 Q. So at one point apparently your
19 intention was to sell the beach house to raise the
20 money to complete the purchase of the apartments;
21 right?

22 A. That was not my intention at the
23 beginning of selling that beach house. I had
24 wanted to sell that prior to the apartments.

25 Q. But at least at some point you

1 considered the possibility of selling it and using
2 those proceeds to purchase the apartments. At
3 least that's what this says.

4 A. That's what Mr. Villavicencio
5 suggested.

6 Q. And which you adopted?

7 A. Yes. I don't remember this letter,
8 really.

9 Q. We're going to look through it, so
10 perhaps your recollection will be refreshed.

11 And then you say: At that time I did
12 not consider the possibility of a refinance and
13 just wanted to cash out, although once the
14 refinance opportunity was presented to me I found
15 it feasible and exciting and immediately took the
16 Isle of Palms property off the market as a
17 requisite to the process.

18 So this is telling us that a refinance
19 opportunity was presented to you, and that was
20 presented to you by Rolando; correct?

21 A. I suppose so. I don't remember.
22 I don't remember all of this.

23 Q. Then you go on to say: Now with all
24 the right pieces put together in place I no longer
25 wished to sell the property by the beach.

1 I further desire to pull out the equity built up
2 from this property through a cash-out refinance
3 transaction in order to continue to pursue the
4 purchase of the apartment complex income generating
5 investment property. Correct? That's what you
6 said?

7 A. I believe that Mr. Villavicencio and
8 Mr. Zerbst had spoken by this time in reference to
9 the apartments.

10 Q. Well, my question to you is: Did I
11 read that correctly?

12 A. You read that correctly, but I did not
13 write this letter.

14 Q. Well, it's got your name on it, does it
15 not?

16 A. It has my name on it.

17 Q. Now, you go on to say in the last page
18 of Exhibit 43: This way not only do I get to
19 achieve my multifamily investment purchase so I can
20 expand my real estate investment portfolio, but I
21 also get to keep the beach property, which will
22 benefit me through the continued appreciation and
23 value and more so to provide me with the income and
24 potential tax write-off.

25 So Mrs. Gibson, is it not correct that

1 sometime in the spring of 2007 when you were
2 confronted with the decision whether to sell the
3 beach house and raise the cash money to put in the
4 apartments, you instead made the decision to
5 refinance it so that you could have the beach house
6 and the apartments both? And that was your
7 decision, was it not?

8 A. Mr. Villavicencio had spoken to
9 Mr. Zerbst by this time, I'm sure, because I did
10 not -- I was not going to sell any of my other
11 property to purchase those apartments, and I had
12 told him that. I said I do not have any cash to
13 buy these apartments.

14 Q. You told Mr. Villavicencio that?

15 A. I had told Mr. Villavicencio, and at
16 some point Mr. Zerbst also was aware of that. So I
17 did not -- I was not going to sell any of my
18 property to buy those apartments. And the two of
19 them had talked, so they had come up with the
20 structure, as they explained it to me, on how I
21 could purchase -- get a down payment to purchase
22 those apartments.

23 Q. Well, Mrs. Gibson, if somebody else had
24 put all this together and just presented it to you,
25 why in the world would you write this letter and

1 say that you had once upon a time decided to sell
2 the apartments but now had decided, as you say in
3 the next paragraph, through Divine intervention to
4 refinance it so that you could keep the beach house
5 which will benefit me from the continued
6 appreciation and value and more so to provide me
7 with the income and potential tax write-off.

8 Is that a true statement or not?

9 A. I did not write this letter.

10 Q. Is it true or not?

11 A. Those were not my words and that was
12 not my intention to do so. This was presented to
13 me as an idea of how to do this.

14 Q. This Letter of Explanation wasn't
15 presented to you as an idea of how to do this.
16 I'm talking about your letter.

17 A. I did not write this letter.

18 Q. Well, it's got your name on it. You
19 knew Mr. Villavicencio was presenting it to the
20 bank, did you not?

21 A. I did not know that.

22 Q. What did you think --

23 A. I'm not sure how it got to the bank, if
24 it got -- I don't know what bank it went to.

25 Q. You just don't know anything about it?

1 A. I'm not aware -- Mr. Villavicencio
2 wanted me to buy those apartments. He had
3 suggested it many times. I told him I did not have
4 the money. He ultimately -- he and Mr. Zerbst and
5 I had talked about the apartments. He talked with
6 Mr. Zerbst on occasions when I was not there.

7 So the letter came -- I don't know.
8 This was not my words, so I don't -- I don't even
9 know what "cash-out," "refinance" terms -- I don't
10 understand any of those terms. I relied on
11 Mr. Zerbst and Mr. Villavicencio because I don't
12 know about this. I don't know about how to do all
13 of it. I don't know how to do any of this.

14 Q. Is this letter the truth or not?

15 A. It is the truth insomuch as this is
16 what they suggested I do, and I trusted what they
17 were telling me to do. So I did not devise this
18 letter. I did not come up with plans of
19 refinancing, cash-out, show money, green building,
20 condominiums. I did not come up with any of those
21 ideas. These were things that were presented to
22 me. And eventually over several months they
23 convinced me that it was a good sound investment,
24 and that's why I did what I did.

25 That's the bottom line. You can ask me

1 questions all day long. I've gone through hours
2 and hours of deposition and you've asked me these
3 questions over and over. My ultimate -- the reason
4 I did this was because these two gentlemen
5 presented me with investments that were good for
6 them and bad for me, and that's the bottom line.

7 You can ask me questions all day long,
8 but that is -- I did not come up with these
9 letters. I did not come up with these ideas.

10 Q. So you disclaim this? This letter is
11 not the truth? It was not your idea?

12 A. It was not my idea, no, sir.

13 Q. Did you understand in the spring of
14 2007 or any time prior to November the 2nd, 2007
15 that you didn't have to buy the apartments?

16 A. The apartments were owned by a
17 couple --

18 MR. STEPP: Your Honor, could you ask
19 her please to answer my question.

20 THE COURT: Please answer the question.
21 You can explain your answer.

22 A. (Continued) I didn't think I had to
23 buy the apartments.

24 Q. You knew you didn't have to buy them.
25 Nobody had a gun to your head to make you buy these

1 apartments; correct?

2 A. That's right.

3 Q. Nobody had a gun to your head to make
4 you refinance the beach house. That's something
5 you decided to do, was it not?

6 A. On the advice of people that I trusted
7 that knew these things.

8 Q. But you were a grown woman,
9 Mrs. Gibson. You could have said: No, thanks.
10 I'm not comfortable with that. I don't want to do
11 it. But that's not what you said; correct?

12 A. Correct.

13 Q. And isn't it true that you did in fact
14 in the spring of 2007 want to own both the
15 apartments and the beach house, and that's why you
16 elected to refinance the beach house? Just like
17 Exhibit 43 says.

18 A. That was the idea that was presented to
19 me.

20 Q. And that's what you wanted to do,
21 correct, own the apartments and the beach house?

22 A. Yes. That sounded like a good idea.

23 Q. Now, in November, November 2nd --

24 MR. STEPP: I'm offering 43.

25 MR. EPTING: No objection.

1 (Defendant's Exhibit 43 in evidence.)

2 Q. (Continued) November 2007, November
3 2nd, you were present at the closing of the loan
4 with Ameris to buy the apartments; correct?

5 A. November 2nd of '07 was the closing,
6 yes.

7 Q. And at that closing do you remember you
8 signed a construction loan agreement and two
9 guarantees and a promissory note and two mortgages?
10 Does that sound right?

11 A. I suppose so. I don't remember.

12 Q. Well, I'm sorry. I don't want you to
13 have to take my word for it. Let's look at
14 Exhibit 29.

15 Are you with me? This is a guarantee
16 of the Paul William Gibson Family Trust; correct?

17 A. Yes.

18 Q. And on the last page is that your
19 signature?

20 A. Yes.

21 MR. STEPP: Move 29 in evidence, your
22 Honor.

23 MR. EPTING: No objection.

24 (Defendant's Exhibit 29 in evidence.)

25

1 BY MR. STEPP:

2 Q. Look at 30. The same form of document,
3 but this is your personal guarantee; correct?

4 A. Yes. It has my name on it.

5 Q. And on the third page that is your
6 signature; correct?

7 A. Yes.

8 MR. STEPP: Move 30 into evidence.

9 MR. EPTING: No objection.

10 (Defendant's Exhibit 30 in evidence.)

11 BY MR. STEPP:

12 Q. 31 is a construction loan agreement.

13 A. Yes.

14 Q. And on the very last page -- well, on
15 the next to the last page you signed for Heritage
16 Seven, LLC and for the trust; correct?

17 A. Yes.

18 Q. And on the next page you signed
19 individually?

20 A. Yes.

21 Q. Also correct?

22 A. Yes, sir.

23 MR. STEPP: Move 31 into evidence.

24 (Defendant's Exhibit 31 in evidence.)

25

1 BY MR. STEPP:

2 Q. 32 is the mortgage. And I'll be honest
3 with you. I don't know which mortgage it is.
4 I think this is the mortgage on the apartments
5 since the property description references
6 Charleston County, and that's your signature on the
7 next to the last page; correct?

8 A. Yes, sir.

9 MR. STEPP: Move 32 into evidence.

10 MR. EPTING: No objection.

11 (Defendant's Exhibit 32 in evidence.)

12 BY MR. STEPP:

13 Q. 33, the same form of document with a
14 property description of property in Berkeley
15 County. This will be the cell tower site. And
16 three or four pages in from the back is your
17 signature as mortgagor; correct?

18 A. Yes, sir.

19 MR. STEPP: Move 34 into evidence.

20 (Defendant's Exhibit 34 in evidence.)

21 BY MR. STEPP:

22 Q. 35, promissory note.

23 MR. STEPP: I'm sorry. I skipped one.

24 34 is the promissory note. The last one is 33.

25 I should have moved 33 instead of 34.

1 BY MR. STEPP:

2 Q. Now look at 34.

3 MR. EPTING: No objections to either.

4 (Defendant's Exhibit 33 in evidence.)

5 Q. (Continued) Now look at 34, and that's
6 your signature on the promissory note, correct, for
7 Heritage Seven, LLC?

8 A. Yes, sir.

9 Q. And for the Paul William Gibson Family
10 Trust as trustee; correct?

11 A. Yes.

12 Q. Now, do I understand you to have said,
13 Mrs. Gibson, that you didn't read any of these
14 documents before you signed them?

15 A. I didn't.

16 Q. Did you ask any questions of the
17 closing attorney about any of these documents?

18 A. Not that I recall.

19 Q. Was Rolando present at closing?

20 A. I believe he was.

21 Q. Mr. Zerbst was not present at closing,
22 though, was he?

23 A. I don't think he was.

24 Q. Did you ask any questions of Rolando
25 about the implications of any of these documents?

1 A. No, sir, I didn't.

2 Q. Now, you understood that the promissory
3 note obligates the borrower to repay the debt on
4 the terms set out in the note; correct?

5 A. Yes, sir.

6 Q. And in this deal with respect to this
7 promissory note you understood on November 2, 2007
8 that you were obligating Heritage Seven, LLC to
9 repay this debt regardless of whether the apartment
10 project was a success or not?

11 A. Well, I never thought of it that way.
12 I've always thought it would be a success.

13 Q. But you understood that you were going
14 to owe this money regardless of what happened to
15 the apartments?

16 A. Yes, I guess -- yeah. Yes.

17 THE COURT: Why don't we take about a
18 10-minute break here.

19 MR. STEPP: Yes.

20 MR. EPTING: I see Mr. Zerbst is here.
21 I don't know how much longer, but maybe the thing
22 to do is excuse Mr. Zerbst. I'm not going to be
23 long with Mr. Hartnett. I don't know that we'll
24 get to everybody.

25 MR. STEPP: We invited Mr. Zerbst here

1 because you asked us to.

2 MR. EPTING: I thought we were going to
3 get them all up. Maybe we can get them both,
4 Judge.

5 THE COURT: We can start. If we don't,
6 we can finish it tomorrow.

7 (Short recess taken.)

8 THE COURT: Mr. Epting, are you ready?

9 MR. EPTING: We're trying to sort out
10 some of these things, Judge, to shorten things.

11 MR. STEPP: Judge, we've got --
12 I didn't give it to you earlier. We've got for you
13 your own personal notebook. I don't want you to
14 feel left out.

15 BY MR. STEPP:

16 Q. Mrs. Gibson, look at Defendant's
17 Exhibit 25, please. Can you identify this? Is
18 that your signature on the second page?

19 A. Yes, sir.

20 Q. And you signed this on November the
21 2nd, 2007; correct?

22 A. Yes, sir.

23 Q. And right above your signature in the
24 middle of that paragraph there is a sentence that
25 says as follows: Loan applicant acknowledges that

1 representations made in this application will be
2 relied on by lender in evaluating this application,
3 and if approved in extending credit loan applicant
4 represents that none of the parties named in this
5 application have relied on advise from the lender
6 in applying for or receiving any credit. Loan
7 applicant acknowledges that lender has not made any
8 commitment to approve this application and extend
9 credit unless otherwise agreed to in writing.

10 Do you see that?

11 A. Yes, sir.

12 Q. So on November 2nd when you signed this
13 document you made the statement that you had not
14 relied on any information from the lender with
15 respect to this loan; is that correct?

16 A. Well, you read that and that's what
17 that says.

18 Q. And that's your signature?

19 A. And that's my signature, but I did not
20 read this.

21 Q. You didn't know you were saying that,
22 but that's what you said?

23 A. Yes.

24 Q. Now, with that in mind I want to talk
25 to you a little bit about your conversation with

1 Mr. Zerbst or your conversations with Mr. Zerbst,
2 and particularly this phone conversation that you
3 had with him.

4 Now, did I understand you correctly now
5 to say that he was gone from First Reliance when
6 you had those conversations?

7 A. Well, I remember speaking with
8 Mr. Brazel at First Reliance when Karl was no
9 longer there.

10 Q. Well, did you testify earlier that you
11 called him in his office at First Reliance?

12 A. No. I believe I had called him on his
13 cell phone.

14 Q. All right.

15 Well, in any event, do you know where
16 he was when you had the telephone conversation,
17 this 30-minute telephone conversation that you
18 described?

19 A. I didn't ask him where he was.

20 Q. Now, can you give me a date that this
21 conversation took place?

22 A. No, sir.

23 Q. Well, it was prior to November 2nd,
24 2007?

25 A. Yes. It was prior to the closing. It

1 wasn't -- maybe a couple or two or three weeks,
2 I suppose.

3 Q. A couple or two or three weeks before
4 the closing.

5 Now, at that point you said, if I
6 understood you correctly, that you wanted to
7 rethink the deal; correct?

8 A. Well, I knew the closing was coming up,
9 but I wanted to make sure -- I just wanted --
10 I wanted confirmation again. I wanted to make sure
11 to close.

12 Q. But up until that point you hadn't
13 bothered to have anybody inspect the property or
14 give you an appraisal on it or give you an estimate
15 of the cost to convert or do anything else, had
16 you, except rely on what Mr. Villavicencio told
17 you?

18 A. Yes, sir.

19 Q. So you had up until that point relied
20 on what Rolando had told you, but all of a sudden
21 you decided you wanted to rethink it, and so you
22 called Mr. Zerbst. Is that what you're telling the
23 Court?

24 A. Well, over those several months I was
25 always rethinking it. I never thought I had to

1 close until I got ready to, and up until the time I
2 got ready to sign the papers I was always thinking,
3 rethinking, and wanted to make sure that -- to even
4 do it.

5 Q. Now, when you talked to Mr. Zerbst you
6 understood that -- well, strike that.

7 When you talked to Mr. Zerbst, was it
8 your understanding that he had inspected the
9 property?

10 A. Well, he had gone down to look at the
11 property. I assume he had inspected it. I'm not
12 sure.

13 Q. You assume he did it?

14 A. Well, he went to look at the property,
15 so he inspected it.

16 Q. Were you with him when that happened?

17 A. No, sir.

18 Q. He told you that, that he inspected
19 it --

20 A. Yes.

21 Q. -- or you just assumed he inspected?

22 A. No. He had looked at the property. He
23 told me he looked at the property. He knew where
24 the property was. He knew -- he had the appraisal.
25 He . . .

1 Q. And you and he talked about the
2 appraisal; correct?

3 A. Yes.

4 Q. And had you ever asked to see a copy of
5 the appraisal yourself?

6 A. I may have asked to see it, but I never
7 saw it until the following year.

8 Q. And you understood when you had the
9 conversation with Mr. Zerbst he didn't even have
10 the appraisal in front of him; correct?

11 A. I don't know if I asked him if he had
12 it in front of him. I'm not sure whether he had it
13 in front of him or not.

14 Q. Well, didn't you say you called him on
15 his cell phone?

16 A. Yes.

17 Q. And did you understand him to be in his
18 office?

19 A. I don't recall asking him where he was.

20 Q. Previously Rolando had told you what
21 the appraisal said; correct?

22 A. Yes.

23 Q. So you already had that information;
24 right?

25 A. Yes.

1 Q. And you didn't ask Rolando for a copy
2 of the appraisal either; right?

3 A. I don't remember asking him -- I don't
4 remember asking him about -- for a copy.

5 Q. Well, you certainly understood that
6 Mr. Zerbst didn't know everything there was to know
7 about the deal; correct?

8 A. I'm sorry. Say that again.

9 Q. You understood that Mr. Zerbst did not
10 know everything there was to know about this
11 transaction, about the apartments or the
12 transaction; correct?

13 A. No. I mean, I didn't know that he
14 didn't know anything about it.

15 Q. Well, did you think he knew more than
16 you did?

17 A. Yes.

18 Q. And why would you think the lender
19 would know more than you who was about to borrow
20 \$2.8 million and sign a note that you would have to
21 acknowledge you would have to repay regardless of
22 the success of the project?

23 A. Because he and Mr. Villavicencio had
24 talked and whatever Mr. Villavicencio had told me
25 he also -- the two of them talked together about

1 this.

2 Q. Were you ever in a conversation in
3 which you and Mr. Zerbst and Mr. Villavicencio were
4 all present together at the same time, either in
5 person or on the person?

6 A. I think at one meeting, yes.

7 Q. One time? So throughout -- when you
8 say Mr. Zerbst and Mr. Villavicencio had talked,
9 you're relying on what Rolando told you about that?

10 A. And what Mr. Zerbst told me.

11 Q. Well, what did Mr. Zerbst tell you
12 about in talking to Mr. Villavicencio?

13 A. About the property.

14 Q. Okay. Did you ask Mr. Zerbst -- when
15 you called him up for this financial advice, did
16 you ask him what work he had done on the deal, what
17 he had actually done, what he knew, what he looked
18 at, what he hadn't done, what he hadn't looked at?

19 A. I remember we talked about the
20 apartments. We talked about the location. We
21 talked about the appraisal. We talked about the
22 rent. I don't remember exactly what questions I
23 asked him or in what sequence, but we talked about
24 the property.

25 Q. Now, you said a couple of times in

1 response to questions from Mr. Epting that: Well,
2 Mr. Zerbst didn't say anything negative. He didn't
3 say anything negative.

4 Now, my question to you is: Is that
5 the basis upon which you concluded that he thought
6 it was a good deal, because he didn't say anything
7 negative?

8 A. Yes, sir.

9 Q. Did you tell Mr. Zerbst: I'm relying
10 on you, Karl, to let me know whether this is a good
11 deal so I can make a final decision whether to go
12 through with this purchase or not? Did you let him
13 know that?

14 A. In so many words, yes.

15 Q. Well, did you say that expressly? Not
16 necessarily in those words, but did you tell him:
17 I am relying on you to make a decision to purchase?

18 A. Mr. Stepp, I do not recall verbatim
19 what I said to Mr. Zerbst at that phone call or any
20 other phone call. It was basically -- basically,
21 yes, that's what I had expressed to him many times.

22 Q. Well, I'm talking about this 30-minute
23 phone call that you testified about, and my
24 question to you is simply this: Did you say to
25 Mr. Zerbst: I'm asking these questions because I'm

1 trying to make a decision whether to go forward or
2 not and my decision will be based on what you tell
3 me?

4 A. I don't recall saying exactly that.

5 Q. Well, did you say anything close to
6 that?

7 A. Yes, sir, I did.

8 Q. Well, tell me what you said.

9 A. I told -- I asked Karl -- I said:
10 Karl, I'm not sure whether this is a property that
11 is good for me, whether I should invest in it.

12 I asked him about the location, the
13 appraisal, the rents, and did he think that it was
14 a good sound investment for me. Was it -- did it
15 suit me to buy this piece of property? Was it
16 going -- I did not -- I did not want to get in
17 trouble with it. I wanted to make sure that I
18 could pay for it just like with the shopping
19 center. And the shopping center, he had arranged
20 the mortgage, the rates, everything, so that the
21 rents coming in took care of that payment to First
22 Reliance Bank. Those two payments to First
23 Reliance Bank. And I was counting on this to be
24 the same sort of -- the same transaction, the same
25 results.

1 Q. Well, you knew how much money you had,
2 didn't you, Mrs. Gibson? You didn't have to ask
3 Mr. Zerbst that, did you?

4 A. Mr. Stepp, I know you're a nice man and
5 I don't mean to be rude to you, but I bought that
6 shopping center --

7 MR. STEPP: Would you please instruct
8 her to answer my question. It's a pretty simple
9 question.

10 THE COURT: Repeat your question.

11 BY MR. STEPP:

12 Q. The question is: You knew how much
13 money you had and what your income was in November
14 or October of 2007? You didn't need to ask
15 Mr. Zerbst what your income was, did you?

16 THE COURT: You can answer that
17 question, please, ma'am. Then you can explain it.

18 A. No. I didn't need to ask Mr. Zerbst
19 what my income was.

20 Q. So you knew whether you could repay
21 this loan or not? You didn't have to ask
22 Mr. Zerbst?

23 A. If you're talking about that I had
24 other assets if the loan got in trouble, but I did
25 not think in those terms, that I'm going -- when

1 someone buys something or when I was purchasing
2 this I did not think that I was going to be in
3 trouble with this.

4 The reason for my talking with
5 Mr. Zerbst and Mr. Villavicencio is so that I would
6 not get in trouble with this. I wanted to make
7 sure that I would never be in this situation that
8 I'm in.

9 Q. But you could determine that for
10 yourself, could you not, Miss Gibson?

11 You knew how much money you had and you
12 knew what the loan amount was. You knew what the
13 payment terms were going to be.

14 A. I knew what they told me, but it did
15 not -- the rents did not cover that. That was very
16 evident when I got down there in four months, that
17 the rents were not covering any of this. From the
18 get-go I had to put money into this.

19 Q. Yes, ma'am. You did. And are you
20 telling this court that you couldn't figure out
21 what the rents were before you talked to Karl
22 Zerbst or before you closed the loan? Did you ask
23 anybody what the rents were?

24 A. I did ask what they were, I guess,
25 prior to the apartments being in the condition they

1 were in, but in order to get rents they were going
2 to have to be renovated, and once they were
3 renovated they told me that the apartments would
4 bring in at least \$900. They were only getting
5 five to six then, and even after renovation that
6 was all that they would get.

7 Q. And you thought Mr. Zerbst was an
8 expert in what renovated apartments would rent in
9 North Charleston? You thought he knew that better
10 than you?

11 A. Yes, sir, I did.

12 Q. Did you think that you had any
13 responsibility yourself, Mrs. Gibson, to look out
14 for your own interests in this deal, or did you
15 think that you could rely entirely on Mr. Zerbst
16 and Mr. Villavicencio to protect you from any
17 eventuality?

18 A. That is the reason that I would call
19 and talk and ask the questions that I asked, was I
20 was trying to get information so I could make that
21 decision, and they never once -- either one of them
22 -- said anything negative. They never once said:
23 You know, perhaps you need to go and speak with --
24 you know, get an appraisal from somebody else. No
25 one ever suggested anything other than what they

1 suggested, which was to buy the apartments and that
2 they thought it was good for me.

3 Q. Well, we've already gone through this.
4 I don't want to go back through it, but you
5 understood you could have gotten your own
6 appraisal, right, and you didn't?

7 A. I did not -- I never got -- well, after
8 -- no. I didn't get an appraisal except for
9 Mr. Hartnett.

10 Q. But you could have, but you elected not
11 to? You could have looked at the rent roll, but
12 you elected not to; is that right? You could have
13 asked the owners for a cash flow statement, but you
14 elected not to?

15 MR. WEST: Objection, your Honor. This
16 has already been asked and answered.

17 THE COURT: I understand. Ask the
18 questions one at a time.

19 Q. (Continued) You understood that you
20 could have gotten an appraisal, but you elected not
21 to; correct?

22 A. I didn't even think about getting
23 another appraisal.

24 Q. Now, in your conversations with
25 Mr. Zerbst prior to closing did Mr. Zerbst say to

1 you: Linda, I understand you are relying on me.
2 I'm putting aside any interest that the bank has
3 and I'm acting for your interests only? Did he say
4 anything like that?

5 A. No.

6 Q. Did he ever say anything like that to
7 you?

8 A. No, not that I recall.

9 Q. And did there ever come a time when you
10 drew the conclusion that Karl Zerbst had put aside
11 the interests of either First Reliance or Ameris
12 and was acting entirely for you and without regard
13 to the bank, the interests of the bank?

14 A. No, sir, but I think that when someone
15 tells you what they feel about that situation and
16 then, as you say, had me sign papers releasing them
17 of any obligations of anything that they told me,
18 that seems a little deceiving to me. And they
19 should have told me. They should have said: Well,
20 look. You know, I think this is a good property
21 investment; however, when you sign these papers
22 you're going to be obligated to -- they didn't tell
23 me any of that. They never said one negative thing
24 about this at all. They never suggested that I go
25 and talk with someone else. They never suggested I

1 get a separate appraisal. They never offered any
2 of that.

3 Q. Is it your testimony that they should
4 have told you that you should read the documents
5 that you were signing for a \$2.8 million loan?

6 A. Mr. Stepp, this really was the first --
7 they knew that I was inexperienced in buying --
8 doing this. And I trusted them, and they knew I
9 trusted them. In so many words they knew that I
10 did not know what I was doing, and both of those
11 boys knew that. And if they thought in any way
12 that this was not good for me, they should have
13 expressed that and not had me sign pages of
14 documents that I don't think anybody ever reads or
15 can understand with the verbiage.

16 I don't even know what half of this
17 stuff is that you're asking me about now that I've
18 signed it. I don't know any of these things.

19 THE WITNESS: Judge Watson, I just
20 don't -- they knew that I relied on their opinion
21 and their advice on this.

22 BY MR. STEPP:

23 Q. To the point that you didn't even have
24 to read the loan documents; is that right?

25 A. Well, I know from what you're telling

1 me that there are a lot of things in here that I
2 have guaranteed and signed off on and such, but I
3 don't understand those things, and they knew that.

4 Q. But you are a woman of your word, are
5 you not?

6 A. I am.

7 Q. So if you promised it, you're going to
8 stick to it, aren't you?

9 A. I have to.

10 Q. I want to talk a little bit about what
11 you encountered when you visited the site, I think
12 in March of 2008; correct? After you had
13 recuperated from your surgery.

14 A. Yes.

15 Q. And let's see what you found there.
16 You found on site an outfit called Honey Do It --

17 A. Yes.

18 Q. -- that was doing the work. Not Triton
19 Construction, but Honey Do It.

20 A. Yes.

21 Q. Did you know who Honey Do It was?

22 A. No, sir.

23 Q. Do you know how they came to be on the
24 site?

25 A. Well, I do now, but at that time I

1 didn't know any of those people then.

2 Q. When you encountered -- you didn't go
3 there expecting to find Honey Do It doing work on
4 the site; correct?

5 A. No.

6 Q. You discovered when you arrived that
7 Rolando and the contractor, Mr. Hieslet from
8 Triton --

9 A. VanPells.

10 Q. VanPells. They weren't even speaking;
11 right?

12 A. That's what I was told when they got
13 down there.

14 Q. So basically when you interviewed the
15 general contractor he said: I'm not speaking to
16 Rolando; right?

17 A. Basically, yes.

18 Q. And he told you -- the contractor told
19 you that he had received money to buy windows and
20 he had paid his fee out of that instead of buying
21 the windows; isn't that right?

22 A. Yes.

23 Q. And at that point five months into the
24 deal there is not even one -- the first problem was
25 that they were working on three buildings at once;

1 right?

2 A. Yes.

3 Q. And that was contrary to what you
4 thought was going to happen. You thought it was
5 going to be one at a time?

6 A. Correct.

7 Q. Now, Rolando lied to you about the
8 status of the project before you got there?

9 A. Yes, sir.

10 Q. When you took over the disbursements --
11 we touched on this briefly, but is it accurate to
12 say that you did not present Ameris with invoices
13 from contractors in order to obtain money under the
14 loan?

15 A. No, sir.

16 Q. That is not or -- it's a negative
17 question. Let me try it again.

18 When you were taking over the
19 disbursements, did you present Ameris with invoices
20 to support your request for draws under the loan?

21 A. In the very beginning I did.

22 Q. But then you did not for the bulk of
23 the money that you disbursed; correct?

24 A. Right. I spoke with Mr. Lanier about
25 that and we had an arrangement. Because the

1 apartments were located in North Charleston near
2 Trident Hospital and Ameris Bank was all the way
3 downtown, and every time I had to make a payment I
4 would have to run an invoice downtown. So we made
5 an arrangement.

6 Q. So you made an arrangement with
7 Mr. Lanier that you didn't have to do that?

8 A. Yes; to open an account, and whenever I
9 would need the funds I would just call and request
10 that they put that particular amount in the
11 checking account so I could write a check to
12 whomever.

13 Q. And they would transfer that money out
14 of the checking account without getting invoices or
15 supporting documents?

16 A. Right. I had to call each time because
17 I was paying interest on that money, so I did not
18 want to just put \$200,000 in my account and be
19 paying interest on it when I hadn't used it.

20 Q. And that suited you fine; right?

21 A. That suited me a lot better than having
22 to run down to Archdale Street every day.

23 Q. I think you testified -- but look at
24 Exhibit 14, if you would. It's a contract with
25 Verdi Architects, and if you look at the last page

1 of that document that's your signature?

2 A. That's correct.

3 Q. And I believe you testified that you
4 weren't aware that you had signed this document; is
5 that correct?

6 A. I don't remember signing this. This
7 was an architect that Mr. Villavicencio had hired
8 in reference to the green building, but my
9 understanding when I signed this is this was just
10 -- I think he had said something about applying for
11 a green building permit or whatever you would call
12 it. And so I didn't know that I was hiring an
13 architect.

14 Q. And I assume you also didn't know what
15 responsibilities the architect had to take on; is
16 that correct?

17 A. No, I did not.

18 Q. So if you look on -- I think at the
19 bottom it's Verdi 07 on the bottom right page.
20 Under Article 4 - Owners Responsibilities, this
21 contract says: The owner shall provide full
22 information in a timely manner regarding
23 requirements for and limitations on the project,
24 including a written program which will set forth
25 the owner's objective, schedule, constraints and

1 criteria. Do you see that?

2 A. Yes, sir.

3 Q. Did that ever happen?

4 A. I never submitted a . . .

5 Q. 4.2 says: The owner shall establish
6 and periodically update an overall budget. Did
7 that ever happen?

8 A. I never submitted it.

9 Q. And 4.3 says: The owner has designated
10 a representative authorized to act on the owner's
11 behalf with respect to the project. Is that
12 Rolando?

13 A. Yes, sir. It would have been Rolando.

14 Q. Now, you testified in response to
15 something Mr. Epting asked you that Karl Zerbst
16 advised you about the structure of the financing.
17 Do you remember that?

18 A. Yes, sir.

19 Q. And by that you mean Mr. Zerbst told
20 you what the down payment requirement was going to
21 be, what the interest rate was going to be, and
22 what the repayment terms on the loan were going to
23 be; correct?

24 A. Yes.

25 Q. Well, in your experience -- or do you

1 have any experience and even know what bankers do
2 all the time? Every time you apply for a loan
3 isn't that what they tell you?

4 A. Well, I've only applied for these
5 couple of loans, so I -- whatever they told me,
6 that's what I assumed they do.

7 Q. So when a bank says: Well, if we're
8 going to make the loan you've got to have X dollars
9 in down payment and it's going to be interest rate
10 of prime plus 1% and it's going to be payable in
11 five years, is that what you mean when you say he
12 advised you about the structure of the loan?

13 A. Well, that was part of it.

14 Q. What else was it?

15 A. Well, we talked about the rents and
16 covering the debt and perhaps even making extra
17 money. We also talked about once it was renovated
18 reselling; and hopefully it had appreciated in
19 value, so we would have made some money on it.

20 Q. You said that Mr. Zerbst -- you had a
21 conversation with Mr. Zerbst sometime in 2009 in
22 which he said this was a bad loan or something to
23 that effect; is that right?

24 A. Yes. Near the end.

25 Q. And at that point the loan had been in

1 default for how long? About a year and a half?

2 A. Yes. About that time.

3 Q. And you had -- Ameris had advanced
4 another \$50,000 at that point to help pay the
5 property taxes on the project?

6 A. I believe that's correct.

7 Q. And they had restructured the loan to
8 extend the period on the payments; is that right?
9 Yes.

10 Q. You certainly thought it was a bad loan
11 at that point, did you not?

12 A. Well, I thought -- at some point I
13 thought maybe it was me. Because I knew what they
14 had told me about the project to begin with and the
15 investment and that the rents could cover it, and I
16 was trying to make that happen. And it wasn't
17 happening, so I thought something was -- you know,
18 I was doing something wrong.

19 Q. Well, you hadn't repay the debt; right?

20 A. No.

21 Q. And the First Citizens foreclosure on
22 the beach house was because you didn't repay that
23 debt; correct?

24 A. That's right. Because the apartment --
25 that was so overwhelming, I couldn't -- I couldn't

1 pay anything else.

2 Q. Without selling another asset; right?

3 A. Right.

4 Q. But that was your decision to make;
5 correct?

6 A. I had already put a lot of money into
7 this project. It just did not make sense to throw
8 good money after bad, so to speak. It just didn't
9 seem like a good thing to -- it just didn't seem
10 like a wise thing to do.

11 Q. So you made the decision with respect
12 to this loan and to the First Citizens loan simply
13 to let them go in default and let events take their
14 course; correct?

15 A. Yes, because I thought that they had
16 given me bad advice.

17 MR. STEPPS: I offer Exhibit 40.

18 MR. EPTING: No objection.

19 (Defendant's Exhibit 40 in evidence.)

20 MR. STEPP: I need to offer 25. That's
21 the commercial loan application.

22 MR. EPTING: No objection.

23 (Defendant's Exhibit 25 in evidence.)

24 MR. STEPP: I would also like to offer
25 Defendant's 5, 7, 8, 9, 11. 14 we just did. 16,

1 25 and 26 I think we've covered. 30. 39.

2 MR. EPTING: No objection.

3 (Defendant's Exhibits 5, 7, 8, 9 and 11
4 in evidence.)

5 MR. EPTING: Could I make this
6 suggestion? I had thought that what Bobby and I
7 were going to do was figure all this out. I had
8 all my documents identified. I don't think we'll
9 have any problems with it, but rather than do that
10 I'll look at them tonight.

11 MR. STEPP: That's fine, your Honor.
12 I guess while Mrs. Gibson is on the stand --

13 MR. EPTING: If there is some issue
14 about that, we'll do that, but I don't anticipate
15 that.

16 MR. STEPP: With respect to the ones
17 I've proffered --

18 MR. EPTING: No problem.

19 MR. STEPP: Now can I have just one
20 minute. One more question, at least.

21 BY MR. STEPP:

22 Q. Mrs. Gibson, how was Rolando being
23 compensated for the services he was providing to
24 you?

25 A. You mean as property manager?

1 Q. Putting this deal together, property
2 manager, construction, supervising the renovations
3 at the apartments. How was he being paid?

4 A. Well, he was the property manager. So
5 I had agreed to pay him as property manager, but
6 that was the only agreement that I was aware of
7 with Mr. Villavicencio.

8 Q. And that was basically 10% of money
9 that came through; is that correct?

10 A. Yes, and then -- yes.

11 Q. 10% of the construction costs?

12 A. No. We had not made any agreement
13 according to -- he was property managing and I was
14 paying him on this, just like I was with the
15 shopping center. But we had never had any
16 agreement as to him taking construction --

17 Q. Look at Exhibit 39, please. Exhibit 39
18 is the residential management agreement between
19 Heritage Seven, LLC and RE/MAX Professional Realty;
20 correct?

21 A. Yes.

22 Q. And this is the agreement that relates
23 to the services that RE/MAX Professional Realty was
24 to provide in connection with the apartments;
25 correct?

1 A. That's what it says, but -- yes.

2 Q. And then look on the second page under
3 Paragraph 5, Broker's Compensation.

4 A. Yes, sir.

5 Q. Subparagraph F: Supervision of
6 restoration/improvements. Broker shall be paid 10%
7 of the cost of any and all new construction,
8 substantial repairs and capital improvements made
9 to the premises during the term of this agreement
10 in excess of -- blank. Do you see that?

11 A. I see that, but we never talked about
12 that, nor did I agree to that.

13 Q. Well, you signed this document, though;
14 correct?

15 A. Well, that's my signature, but I never
16 agreed to that.

17 Q. Look at Exhibit 50, if you would,
18 please. This is a document that relates to some
19 sort of loan transaction between you and Rolando;
20 is that right?

21 A. Yes.

22 Q. And it's kind of confusing. It says
23 today's date, May 25, 2008, but halfway down it
24 says: Origination date, 9/7/07. Do you see that?

25 A. Yeah.

1 Q. And on or about 9/7/07 did you lend
2 Rolando or RPV Investments \$30,000?

3 A. Yes, sir.

4 Q. Were you ever repaid that?

5 A. No, sir.

6 Q. You also used Rolando as an expert
7 witness in a case; is that correct?

8 A. He started out to be one but was never
9 used.

10 Q. Look at Defendant's 56.

11 MR. STEPP: And I would move the
12 admission of No. 50.

13 MR. EPTING: No objection.

14 (Defendant's Exhibit 50 in evidence.)

15 Q. (Continued) 56 is an invoice from
16 Rolando to Attorney Teresa Bulford and Attorney
17 Steven Epps for a deposition of April 10, 2008. Do
18 you see that?

19 A. Yes.

20 Q. So you paid him \$750 to be an expert on
21 your behalf?

22 A. No, sir, I did not.

23 Q. This was not paid?

24 A. It was not.

25 Q. It was submitted but not paid?

1 A. Right. He was never used as a witness.

2 Q. Well, his deposition was taken.

3 A. His deposition was taken, but he was
4 never used. I didn't --

5 Q. Let me amend my question.

6 You retained Mr. Villavicencio as an
7 expert for purposes of a deposition on April 10,
8 2008?

9 A. For a deposition, yes.

10 MR. STEPP: That's all I have. Thank
11 you.

12 MR. EPTING: Just one question.

13 REDIRECT EXAMINATION

14 BY MR. EPTING:

15 Q. Miss Gibson, you had some trouble with
16 the foundation on your house and there was a
17 lawsuit brought by Miss Bulford up in Dorchester
18 County.

19 A. Yes. Just before my husband died we
20 had moved up to St. George, and once we got him to
21 the home we realized there was a problem with the
22 foundation. And my husband had started talking
23 with the builder. He did not want to fix it. So
24 he went to an attorney. And then after his death
25 it was still unsettled, so I had to continue with

1 that.

2 MR. EPTING: Judge, subject, if there
3 is a problem with the exhibits, to recall I don't
4 have anything further, and Mr. Stepp and I will
5 work out the exhibits this evening.

6 THE COURT: All right.

7 EXAMINATION

8 BY THE COURT:

9 Q. I have one question, Miss Gibson, just
10 to help clarify my understanding of something.

11 There has been a letter dated
12 October 25, 2007, which was your agreement that you
13 signed with Ameris Bank on the night of their grand
14 opening. Do you recall that now?

15 A. Yes, sir.

16 Q. Now, was your conversation with
17 Mr. Zerbst -- your telephone conversation, was that
18 before October 25, 2007 or after, or do you know?

19 A. At the moment I don't recall whether it
20 was before or after that.

21 THE COURT: Thank you, ma'am. Any
22 questions as a result of my question?

23 MR. STEPP: No, your Honor.

24 THE COURT: You may step down.

25 MR. STEPP: Your Honor, at this point I

1 move Defendant's 34 and 56. That's the two things
2 I just --

3 MR. EPTING: No objection.

4 THE COURT: Yes.

5 (Defendant's Exhibits 34 and 56 in
6 evidence.)

7 MR. EPTING: Your Honor, at this time
8 we would call Mr. Tommy Hartnett to the stand.

9 THE COURT: Please give me your full
10 name.

11 THE WITNESS: My name is Tommy
12 Hartnett.

13 THOMAS HARTNETT
14 being first duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. EPTING:

17 Q. How old a man, are you?

18 A. Pardon me?

19 Q. How old a man are you?

20 A. How young a man I am?

21 Q. How young a man are you?

22 A. I'm 70.

23 Q. What is your education?

24 A. I'm a Catholic and I was educated in
25 the Catholic schools of Charleston, Bishop England

1 High School, and I attended the College of
2 Charleston for two years.

3 Q. What is your real estate experience?

4 A. I was licensed in 1959 and have
5 maintained that license since that time. I have
6 sold real estate, have managed real estate, and I
7 have appraised real estate since that time.

8 Q. And have you ever served on a bank
9 board?

10 A. Yes, sir, I have.

11 Q. Do you serve on any committees with
12 regard to the value of real estate?

13 A. I have previously served on a bank
14 called SunTrust board. When that closed a group of
15 us opened Harbor National Bank. I am chairman of
16 the board of Harbor National Bank. I serve on the
17 loan committee, I serve on the executive committee,
18 I serve on the audit committee, and I guess that's
19 it.

20 Q. In that capacity do you have occasion
21 to view real estate properties, income producing
22 producing for what their values are?

23 A. By virtue of my appraisal business
24 or --

25 Q. By virtue of both.

1 A. I appraise certain properties,
2 multifamily properties. We do review loan
3 applications by virtue of being a member of the
4 loan committee.

5 Q. Have you appraised apartment complexes
6 of the type that are like the Otranto complex that
7 is at issue here?

8 A. Yes, sir, I have.

9 Q. And how many in your many years,
10 Mr. Hartnett, would you estimate?

11 A. Probably of that size maybe more than a
12 dozen.

13 Q. Have you appraised income producing
14 land with improvements such as cell phone towers?

15 A. I have appraised cell phone towers,
16 yes, sir.

17 Q. What is your relationship with
18 Miss Gibson before you were engaged to appraise
19 the apartment and cell phone towers in this case?

20 A. I had never met Miss Gibson.

21 Q. Had your son done any work for
22 Miss Gibson?

23 A. My son did appraise a piece of property
24 for Mrs. Gibson in St. George, a farm.

25 Q. Any other involvement with Miss Gibson

1 until this assignment?

2 A. No, sir.

3 Q. When did you begin this assignment to
4 appraise the apartment and the cell phone tower?

5 A. It's probably been a year and a half
6 ago. In that area.

7 Q. What did you do?

8 A. Well, really, I met with you and
9 Mr. Kefalos on one or two occasions. I inspected
10 the properties -- the cell tower property only
11 once. The apartment property, I said three times
12 in my deposition, once in the company of
13 Mr. Kefalos and some of the ladies from your law
14 office, twice unaccompanied, I believe, and really
15 I didn't -- I talked with various people. I never
16 really did an appraisal of the property per se that
17 would be defined as a complete appraisal or a
18 limited appraisal.

19 I spoke with other people familiar with
20 the property and met with Mrs. Gibson subsequent to
21 my inspection of the property, and she gave me sort
22 of a handwritten copy of her income and expense
23 statement. I have never seen a complete income and
24 expense statement from these apartment units and,
25 from what I understand, Mrs. Gibson hadn't either,

1 from her testimony I heard just then. I didn't
2 even know whether one exists.

3 But the statements I looked at were
4 certainly unlike anything I've ever looked at
5 before relative to how you appraise income
6 properties. I viewed the listing -- I think it was
7 listed at the time on the Multiple Listing for
8 around a million dollars, I think. Something in
9 that neighborhood. But really, that's about all I
10 did, Mr. Epting.

11 Q. The records that Miss Gibson gave you,
12 did you have any reason to question her genuineness
13 in the records that she prepared and gave to you?

14 A. I had no reason to question them and no
15 reason -- other than they were handwritten notes
16 from a lady who looked like she was trying to
17 manage these apartments herself, I assumed that
18 what she had written was what the situation was at
19 the time.

20 Q. In coming to your conclusions as to the
21 value of the apartment complex and cell phone tower
22 what date you use?

23 A. I think it was like December -- it was
24 December of 2010. I can't remember the exact date.
25 I understand that's the date that Mrs. Gibson

1 actually lost control of or gave up ownership in
2 the property.

3 Q. Did you review any other appraisals
4 with regard to these pieces of property?

5 A. I did.

6 Q. And what appraisals did you review?

7 A. I think there was two appraisals done
8 by Paul Moore, and I think the dates of those
9 appraisals -- one was September 12, 2007, and one
10 was about a year after that. The date -- I think
11 they were both done at the same time, but he
12 appraised them in their as-in condition and in the
13 condition that they would be if the proposed
14 improvements were done to the units. And the date
15 of the cell tower appraisal -- that was done not by
16 Mr. Moore. That was done by two gentlemen that
17 signed the report, Mr. Curtis McCall, I think, and
18 Charles A. Jones, and they appraised the tower for
19 \$355,000 as of March the 8th, 2010.

20 Q. Now, did you rely on anything contained
21 in the McCall appraisal of the apartment complexes?

22 A. I'm sorry?

23 Q. In coming to your conclusions did you
24 rely on anything contained in the two appraisals?

25 A. I found Mr. McCall's appraisal of the

1 tower to be properly done and his conclusions based
2 on the information within that report properly
3 reached. So I concurred in his value of \$355,000.

4 Q. As to the cell phone tower?

5 A. Yes, sir.

6 Q. What about did you rely on the opinions
7 of Mr. Moore and Mr. McCall in reaching your
8 conclusions of value?

9 MR. STEPP: Of the apartment complex?

10 MR. EPTING: Of the apartments.

11 MR. STEPP: I have an objection, your
12 Honor. My understanding is this is being offered
13 for the purpose of establishing -- justifying the
14 attorneys' fees that I've already objected to, but
15 in that respect the only thing that would be
16 relevant would be as of the date that Mr. Hartnett
17 said that she lost control of the property.

18 So I would object to any testimony from
19 this witness if it's proffered to retroactively
20 establish the value or critiquing the Moore
21 appraisal, which was three years earlier.

22 So to the extent we are just going to
23 talk about what Mr. Hartnett's opinion of the
24 apartment was in December of 2010 for the purpose
25 of establishing some sort of baseline fair market

1 value against which the fee agreement can be
2 applied, I don't have a problem with that, but if
3 we're going to go back and revisit the Moore
4 appraisal or try to implicate the inference to
5 suggest it was inaccurate or doesn't reflect value
6 in 2007, I object.

7 MR. EPTING: I think his answer was
8 going to be I didn't rely on it and I wasn't headed
9 anywhere.

10 Q. (Continued) Did you in any way rely on
11 Mr. Moore and Mr. McCall in reaching your
12 conclusions as to the value of the apartment
13 complex in December of 2010?

14 A. You've asked me two questions. I did
15 rely on -- at least I did concur in Mr. McCall's
16 appraisal of the cell tower site as of March of
17 2010. I did not rely on Mr. Moore's appraisal of
18 the two appraisals that he did, one dated -- both
19 of them were done the same date, but the completed
20 date and as-is date, and I did not rely on any of
21 those figures.

22 Q. Mr. Hartnett, let me refer you to a
23 letter that you wrote concerning an opinion dated
24 October the 10th, 2011, and ask you if you altered
25 that document.

1 some baseline to apply the fee agreement, to which
2 we also objected, that is in the record.

3 So I'm just trying to be careful and
4 make sure I don't let something come in that's
5 going to be used for some other purpose. And I
6 don't know where this is headed. That's why I rose
7 before the horse got out of the barn. I was trying
8 to shut the door.

9 MR. EPTING: Why don't I do this,
10 Judge? I think I can ask Mr. Hartnett the
11 questions and we can --

12 THE COURT: Do that.

13 BY MR. EPTING:

14 Q. Mr. Hartnett, in reaching your
15 conclusions about the value of the apartment
16 complex in December of 2010 did you consult with
17 other people in the community about their views of
18 the value of these apartments?

19 A. I'll answer that. Explain.

20 Yes, I did. As I told you, the only
21 income stream I had seen for these apartments is
22 what was provided by Mrs. Gibson and some very
23 poorly handwritten documents which I probably have
24 in my file, and it would be the years 2008, nine
25 and ten.

1 When I looked at those figures, actual
2 figures -- I was told actual figures. I had no
3 verification by a certified public accountant or
4 any tax returns. They seemed pretty low to me.
5 Only two units, three acres or something. Whatever
6 the land was. And so to make myself more
7 comfortable with what I felt the value was
8 Mr. Jimmy Kerr, who owns a piece of property across
9 the street -- I went to high school with Jimmy
10 Kerr. We've been friends for 60 years. He knows
11 the apartment business. Buys, sells, and manages
12 apartments.

13 At a bank board meeting I asked Jimmy
14 about this property. He said yeah, he remembered
15 speaking -- I think what I say in here: I spoke
16 with Mr. Kerr and he said he remembers speaking
17 with Mr. Zerbst. And he said he felt the range was
18 somewhere \$850,000.

19 I then talked to Mr. Geoffrey
20 Southard -- he tried to market the property for a
21 couple of years. He's in the real estate business.
22 He handles multifamily apartment complexes -- to
23 ask him how was his listing coming. Had he had any
24 purchases? What did he think the value was?

25 MR. STEPP: Objection. That is going

1 to be a double hearsay at that point, and I've got
2 a second motion in limine on Mr. Southard's
3 opinion.

4 MR. EPTING: Your Honor, an expert can
5 rely on hearsay, and that's exactly what
6 Mr. Hartnett is doing. He's relying on people that
7 he talked to and whose opinions that he valued and
8 solicited in reaching his own conclusion.

9 THE COURT: I'm going to allow it. All
10 he's going to do is go back and give me a value of
11 December 2010.

12 THE WITNESS: Yes, your Honor. And
13 after speaking to the people, to do due diligence
14 myself, I did come up with a value. My value was
15 764,000. The value that others expressed to know
16 the business and know the property was 850,000.

17 So my range of values for the apartment
18 was from 764,000 to 850,000. It could fall
19 somewhere in between there as far as I was
20 concerned after the limited information I had from
21 Mrs. Gibson and my conversations with others who
22 are familiar with the property and familiar with
23 the apartment industry.

24 BY MR. EPTING:

25 Q. Let me ask you this, Mr. Hartnett: The

1 information that is in the matrix on Page 3 of your
2 report -- actually I guess it's Page 3 of your
3 report.

4 A. Yes, sir.

5 Q. Where did that information come from?

6 A. That is the typed copy of the
7 information that was provided to me by Mrs. Gibson.

8 Q. And on the basis of that information
9 and the basis of your discussions with Mr. Kerr and
10 Mr. Southard you came to an opinion of value of
11 what?

12 A. \$764,000.

13 Q. Now, Mr. Hartnett, I want to ask you if
14 you'll take the notebook in front of you -- and
15 that's as of December 2010?

16 A. Correct.

17 Q. I want you to look at Exhibit 10.

18 A. Yes, sir.

19 Q. Have you seen this document before?

20 A. Yes, sir, I have.

21 Q. And what do you understand this
22 document to concern insofar as what you appraised
23 in this case?

24 A. It's my understanding that the lessees
25 purchased the permit easement on this property, and

1 this was the easement granting that easement.

2 Q. And the seller was Galt Valley of the
3 easement to, in this case, Global Acquisitions?

4 A. Yes, sir.

5 Q. And what was the sales price of that
6 easement, Mr. Hartnett?

7 A. I believe it was \$550,000.

8 Q. Look at Page 1.

9 A. \$510,000.

10 Q. As a result of looking and
11 understanding the easement that was sold for
12 \$510,000 by Galt Valley to Global, would that in
13 any way influence your opinion of value of what the
14 cell phone tower was worth in --

15 A. First of all, the cell phone tower that
16 Mr. McCall did to Mr. Jones was dated 2010, if I'm
17 not mistaken, and this is two years later. A year
18 and a half later. And when Mr. McCall did this
19 appraisal the lease had a termination date. So you
20 would do a discount cash flow up to the termination
21 of that date.

22 This was in perpetuity, at least as I
23 read this document. This easement that was
24 purchased by Galt -- Global -- whatever -- isn't
25 forever. So it would certainly have no value than

1 one that had a termination state. So it doesn't
2 surprise me that it would be more than it was back
3 in 2008, but it was based on the terms of that
4 lease.

5 So yes; it would be 510,000. I would
6 have no argument with that. But I would still say
7 as of the date of Mr. McCall's appraisal, 2010,
8 that was an accurate estimate of the value of that
9 property without the easement.

10 Q. And the point you're making is that one
11 was based on the lease and this is based on an
12 easement in perpetuity?

13 A. Correct.

14 MR. EPTING: Nothing further of this
15 witness, your Honor.

16 THE COURT: You may cross-examine.

17 EXAMINATION

18 BY MR. STEPP:

19 Q. Good afternoon, Mr. Hartnett.
20 I appreciate your patience to stick with us this
21 afternoon. I'm not going to take up much of your
22 time.

23 Let me see if I've got this right. You
24 concur that the McCall determination of value of
25 the cell tower site as of March 8, 2010 of \$355,000

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF BERKELEY

LINDA A. GIBSON, formerly known as LINDA ANN
AVIGNER, Individually and as Trustee of the PAUL
GIBSON FAMILY TRUST and HERITAGE SEVEN, LLC,

Plaintiffs,

vs.

CASE NO. 10-CP-08-2134

AMERIS BANK,

Defendant.

MASTER-IN-EQUITY HEARING

VOLUME II

BEFORE: The Honorable Robert E. Watson

DATE: May 23, 2012

TIME: 9:30 a.m.

LOCATION: 300-B California Avenue
Moncks Corner, SCREPORTED BY: PATRICIA T. MORRISON,
Registered Professional Reporter

A. WILLIAM ROBERTS, JR. & ASSOCIATES
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(INDEX AT REAR OF TRANSCRIPT)

25

1 MR. KEFALOS: Thank you, sir. The
2 first witness would be Don Snipes by deposition.
3 We've previously exchanged some designations on
4 him. With the Court's permission I would like to
5 publish parts of the deposition.

6 MR. STEPP: Your Honor, if we're going
7 to publish part, we would like to publish our
8 counter designations as well, which Mr. Jordan has.

9 MR. KEFALOS: Your Honor, the
10 deposition that I handed up to you, can we make
11 that Court Exhibit 6.

12 THE COURT: That will be fine.

13 (Court's Exhibit 6, Video Deposition of
14 Don Snipes, marked for identification.)

15 MR. KEFALOS: Your Honor, this is a
16 deposition of Don Snipes taken May 17, 2011 in
17 Columbia. Beginning on Page 4 - Line 21,
18 Question: Good. Tell me a little bit about your
19 background. Can you give me a brief thumbnail
20 sketch of your bio. Where do you live, where are
21 you from, where did you go to school, are you
22 married, what is your job and what are your duties.
23 That sort of thing.

24 Answer: Okay. I live in Lexington,
25 South Carolina. I'm married with two children,

1 went to school at USC here.

2 Question: What degree did you get?

3 Answer: BA in finance. Been in
4 banking for 23 years, been with Ameris Bank since
5 January 2008. Anything else you --

6 Question: What is your position with
7 Ameris?

8 Answer: I'm a regional credit officer,
9 senior vice-president.

10 Question: Who were you with before
11 Ameris?

12 Answer: South Carolina Bank and Trust.
13 How long were you with South Carolina
14 Bank and Trust?

15 Answer: Six years.

16 And what was your position there?

17 Answer: Same, regional credit officer.

18 Question: Before that who were you
19 with?

20 Answer: Before that I was with BB&T as
21 a commercial lender.

22 Question: How long were you with them?

23 Answer: In total about seven years.

24 There was -- as bankers do, we took a break from
25 banking for a little while and came back.

1 Question: What do you do as regional
2 credit officer for Ameris?

3 Answer: In general I'm responsible for
4 maintaining the loan portfolio for certain markets
5 that I cover, and that includes credit approvals on
6 the front end and just kind of management of the
7 portfolio as -- you know, once the loan has been
8 approved, but not direct. Kind of as a third
9 party. Kind of as an overseer as an independent
10 kind of role.

11 And then to Page 7 -- I'm sorry.
12 Page 8 - Line 3. Question: Did you have that
13 position when Linda Gibson made her application to
14 Ameris?

15 Answer: This loan, the original loan,
16 predates my employment at Ameris Bank.

17 Question. Oh, really. When did you
18 come on?

19 Answer: January of 2008.

20 Question: And this loan was made in
21 November of '07?

22 Answer: Right.

23 Did you know anything about the loan
24 when you came on?

25 Answer: When I came onboard?

1 Question. Yes.

2 Answer: No, sir.

3 Question: Did you ever see a loan
4 commitment evaluation for this loan?

5 Answer: Not for a long time, and I
6 say --

7 Question: But this loan to Linda
8 Gibson was one of the loans in the portfolio that
9 you generally oversaw?

10 Answer: That's correct.

11 Question: So you would have had an
12 opportunity to see the loan committee initial
13 evaluation?

14 Answer: I would have had the
15 opportunity had there been -- had a cause arisen to
16 do so, you know.

17 Question: Take a look at what has been
18 marked Exhibit 36 in front of you.

19 Answer: Okay.

20 This is the loan committee application
21 from Ameris for Heritage Seven.

22 Answer: Uh-huh. (Affirmative
23 response.)

24 Question: Had you -- at some point had
25 you seen this application? And there's a loan

1 committee memo attached to the application.

2 Answer: I did not. I did not really
3 see this as an issue that I needed to get involved
4 with for quite some time. When I came onboard I
5 had all of South Carolina, coastal Georgia and
6 Jacksonville, and about 2008 we had a lot of --
7 obviously with coastal properties there were a lot
8 of other more critical urgent needs for my -- for
9 my attention. So this one, you know, was not past
10 due. There was no sign of problems for quite some
11 time, so no, I did not go back and study this. I
12 was aware of it. I knew, you know, kind of what --
13 -- it was a construction loan on an apartment
14 complex, but there was really no need for me to get
15 deeply involved.

16 Question: Looking back at the loan
17 committee memorandum dated October 22, 2007, which
18 is part of Exhibit 36, you've had an opportunity to
19 review the reasoning of this loan committee
20 memorandum, haven't you?

21 Answer: That's correct.

22 And looking at it and putting yourself
23 in the shoes of the loan committee at the time,
24 would you have believed that the apartments -- that
25 it was a good loan to make at the time?

1 Answer: I don't see anything in here
2 that would persuade me that it's not, that it was
3 not a good deal. But again, I was not here, you
4 know, so I'm just kind of looking at this making an
5 assumption or opinion.

6 Question: Yes. All I'm asking is: Is
7 there anything here that stands out to say: Whoa,
8 guys. You're making a mistake?

9 Answer: Not that's really apparent,
10 no, sir.

11 Question: And do you agree with the
12 logic that is contained in the loan committee memo
13 that the apartments, if property renovated, would
14 be able to carry this loan?

15 Answer: Based on the assumptions that
16 were being made at the time, it does appear that --
17 that it met the minimum standards of -- you know,
18 it met our minimum policy standards for this type
19 of loan.

20 And do you think that the apartments,
21 if property managed and renovated, would have been
22 able to carry this loan?

23 Answer: That's -- you know, we're --
24 based upon these assumptions, yes. I can't -- you
25 know, obviously.

1 Question: And also based on the loan
2 committee memo does it appear to you that the
3 project could succeed if it was properly managed?
4 That is, the apartment project.

5 Answer: Yes.

6 Question: Did you do anything in the
7 course of your work to look at how Linda Gibson
8 first came to make an application to Ameris to
9 purchase these apartments?

10 Answer: No, sir. You mean -- when you
11 say -- can you clarify that?

12 Well, discovery has revealed that
13 originally Linda Gibson went to Reliance, First
14 Reliance, to make an application for a loan for
15 these apartments.

16 Answer: Uh-huh.

17 Question: And somehow the loan got
18 transferred to Ameris.

19 Answer: Uh-huh.

20 Question: Do you know anything about
21 how it came to be that the loan went from Reliance
22 to Ameris?

23 Answer: No, sir. No, sir.

24 Do you know anything about how Ameris
25 came to have the contract to purchase in its file?

1 In other words --

2 Answer: No.

3 Then to Page 18. Back on Exhibit 36,
4 which is the loan committee application and the
5 loan committee memorandum, it refers to -- let's
6 see. If you'll look at the loan committee
7 memorandum, the first page of it, the next to the
8 last paragraph says: A current appraisal that
9 shows the property is worth 2.8 million.

10 Now, that's curious. This loan
11 committee memorandum is dated 10/22/07, which is a
12 little over a month after the mortgage appraisal.
13 Do you know whether the bank believed in fact that
14 the property was worth 2.8 million at the time?

15 Answer: Do I know for sure? I mean,
16 based upon the reliance on this appraisal, yes.
17 But I don't -- you know, banks do not get into this
18 kind of -- I mean, that's why we get appraisals.

19 Question: The next to the last
20 paragraph on the first page and the last
21 sentence --

22 Next to the last --

23 Question: We're still on Exhibit 36.
24 Okay.

25 Question: We're on the loan committee

1 memorandum, first page. Refer your attention to
2 the next to the last paragraph. The last paragraph
3 says: Linda Gibson will inject \$700,000 of her own
4 cash into this project at the time of the purchase.

5 Now, that 700,000 that Linda Gibson was
6 going to put in, that's sometimes called a cash
7 injection?

8 Answer: That's correct.

9 Question: It's also called free cash?

10 Answer: Not necessarily.

11 Question: Sometimes called free cash?

12 Answer: Usually it's called either
13 cash injection or equity.

14 Question: Does that typically mean
15 cash on hand?

16 Answer: Not necessarily because it's
17 just the amount of money, cash, that you're putting
18 into -- I mean, you may have \$10 million, but
19 you're putting 700 in this project. So it's not --
20 it's not the same. It's just how much cash you're
21 putting into this project.

22 Question: Okay. Free cash means her
23 own money? She is not borrowing it?

24 Answer: That's correct.

25 Question: Okay. So do the

1 calculations that were conducted as part of this
2 loan committee approval assume that she was putting
3 \$700,000 of her own money that she didn't borrow
4 into this project?

5 Answer: As I read this, yes.

6 Question: Okay. So if the property
7 was worth 2.8 million and Linda was putting in
8 \$700,000, that would mean that there was -- that
9 she had 25% interest in the property versus a 75%
10 loan.

11 Answer: I'll trust your math is right;
12 but yeah, that sounds about right.

13 Go to Page 21 - line 9. Question: Do
14 you think the bank would have made the loan it
15 made; that is, the 2.8 million, if it knew that
16 Mrs. Gibson had to borrow 700,000 to put into the
17 property?

18 Answer: I would think that would be
19 looked on less favorably.

20 Question: Yeah. That might make a
21 difference in the approval.

22 Answer: I think it would make a
23 difference.

24 Question: So if the bank had known
25 that Linda Gibson was borrowing 2.8 million from

1 Ameris but was also borrowing \$700,000 for the down
2 payment from another bank, it, Ameris, might have
3 made a different decision to loan the money to
4 Miss Gibson?

5 Answer: Possibly.

6 Question: Were you aware that
7 Miss Gibson borrowed the 700,000 to make the down
8 payment?

9 Answer: No. No.

10 Did you ever become aware of that?

11 Answer: No.

12 Question: You didn't know?

13 Answer: No.

14 Question: So I guess you didn't know
15 who arranged for Miss Gibson to borrow the
16 \$700,000 --

17 Answer: No.

18 -- to make the down payment.

19 Answer: I mean, this is the first time
20 I've actually heard that she borrowed the money.

21 Question: If you had been the loan
22 officer on the deal and the project was brought to
23 you asking Ameris to loan Miss Gibson 2.8 million
24 and you were told that she was borrowing the other
25 700,000 from another bank, would you have made the

1 loan?

2 Answer: I strongly doubt it.

3 The end of Page 25. Question: Do you
4 think the bank has a duty to supervise to make sure
5 the money is being used for -- the money which the
6 bank is releasing from the construction loan is
7 being used for construction purposes?

8 Answer: There is a duty on behalf of
9 the bank, but it's to protect the bank's assets.
10 I mean, again, the bank is there monitoring for the
11 protection of the bank.

12 The end of Page 28 - Line 20.

13 Question: And by monitoring the progress and the
14 quality of the construction you make sure that the
15 customer's money isn't stolen or wasted.

16 Answer: Again, it's the customer's
17 money. Only in the event -- only based upon
18 certain conditions. I mean, the bank says we'll
19 lend you money and, you know, under certain
20 conditions.

21 THE COURT: Excuse me. Hold on just a
22 minute. That's Page 28 - Line -- where did you
23 begin?

24 MR. KEFALOS: Page 28 - Line 20. We're
25 now at the top of 29.

1 The bank says we'll lend you money and,
2 you know, under certain conditions. And until the
3 monies are advanced the borrower is not obligated.

4 Question: Sure. But once the money is
5 advanced the bank is saying that those conditions
6 have been met?

7 Answer: Right. But that's not --
8 that's not certifying to the borrower that anything
9 -- it's saying that we feel comfortable releasing
10 these funds. It's not a guarantee or a
11 certification to anybody aside from the bank that
12 -- that the property is being improved in the
13 manner that -- that was originally prescribed.

14 Question: Do you think a customer like
15 Linda Gibson was justified in relying on the bank
16 to properly monitor the progress and quality of the
17 construction?

18 Answer: No, sir.

19 Question: Well, what is the bank's
20 role in monitoring for the progress and quality of
21 construction if not for the benefit of the
22 customer?

23 Answer: It's for the benefit of the
24 bank.

25 Question: Would you take a look at

1 Exhibit 33.

2 Answer: Sure.

3 Question: This is an email from you --

4 Answer: Uh-huh.

5 -- to John Edwards dated July 3, 2009.

6 Answer: Right.

7 Question: Who is John Edwards?

8 Answer: John Edwards is the senior
9 credit officer of the bank.

10 Question: And what role did he play in
11 Linda Gibson's loan?

12 Answer: He -- we have loan
13 authorities. So, like, I can approve a loan up to
14 2 million. John Edwards can approve a loan up to
15 3 million. So in this case it required his
16 approval to modify the interest rate as being
17 requested here.

18 Question. I see. So this is a fella
19 that is sort of above you --

20 . Answer: Right.

21 -- in the hierarchy of the bank?

22 Answer: Right. Right.

23 Question: And you're supervising
24 whoever the loan officer had been on this project
25 for overseeing --

1 Answer: At this point I'm -- I'm
2 moderately involved.

3 Question: Who was the loan -- I'm
4 sorry. I didn't mean to --

5 Answer: That's fine.

6 Question: Who was the loan officer on
7 this?

8 Benjie Lanier.

9 Question: Is he still with the bank?

10 Answer: No, sir.

11 Question: Where is he now?

12 Answer: I do not know.

13 Question: Do you know why he left?

14 Answer: I do not know.

15 Question: Okay. Now, on the second
16 paragraph do you tell John Edwards -- in the second
17 paragraph you actually allude to her problems. Do
18 you see that?

19 Answer: Yes, sir.

20 Your Honor, I would like to refer your
21 attention -- it's Exhibit 30 in our exhibit list.

22 MS. JOHNSON: 31.

23 MR. KEFALOS: 31 - Line 14. Question:
24 What problems did she have at the time that you
25 were referring to?

1 Answer: Well, specifically there was
2 -- she had not -- the renovations had not been
3 completed. She had not -- she had stabilized
4 rents, stabilized cash flow to get the loan to a
5 principal and interest payment as it was originally
6 proposed, so --

7 Question: And so you said she had not
8 stabilized rents and cash flow, and what was the
9 other thing that you referred to as her problem?
10 Something about projections?

11 Answer: Just that she had not
12 stabilized her cash flow, so we -- by now this loan
13 was supposed to have been on principal and interest
14 payments. And the rents had not stabilized. She
15 had not finished the renovations. The rents were
16 not stabilized and she was having collection
17 problems from her units that were completed, so her
18 cash flow was insufficient to receive the principal
19 and interest payment, and in this request it's
20 actually asking for a reduction of interest.

21 Question: I got you. You also say in
22 the same paragraph: We did not manage the
23 construction loan as we should have. Who are you
24 referring to when you say "we?" Is there somebody
25 that was supposed to supervise the construction

1 loan?

2 Answer: Well, the "we" is a general
3 for the bank. In this case it was really more
4 specific to the lender because the lender was the
5 only one involved.

6 Question: Who was -- that would have
7 been Benjie?

8 Answer: Right.

9 So when you say that we did not manage
10 the construction loan as we should have, you're
11 referring to Benjie Lanier did not manage?

12 Answer: When I wrote this, this -- the
13 second paragraph. And the concerns I had were as a
14 result of the conversation that I had with Karl
15 Zerbst about two months prior to this where he was
16 kind of alluding to some concerns he had, and at
17 the time I wrote this I had not validated the
18 comments that he had made. So that's -- so I was
19 relying on Karl's opinion of the management of the
20 construction loan.

21 Question: What had Karl told you about
22 the management of the construction loan?

23 Answer: Well, that he was concerned
24 that we may not have -- you know, that we may not
25 have been administering the draws properly. And he

1 further commented about, you know, that Linda was
2 contemplating or actually started litigation
3 against RE/MAX, and there was some appearance of
4 impropriety going on there. And then Karl was
5 concerned that we may have some -- you know, that
6 we may have -- that we may have been -- I don't
7 know how to say it. That we may have -- that he
8 was just concerned about how that looked. Maybe
9 that's the best way to say it.

10 Question: Well, in your sentence you
11 say that you have some -- we may have some
12 culpability. No. You say we have culpability.

13 Did Karl tell you that he thought
14 Ameris had contributed to the problems that she
15 had?

16 Answer: I can't really -- I mean, that
17 was -- I can't remember specifics of what Karl
18 said. I mean, the general concern he had was the
19 construction had not been completed, and he had
20 some concerns over the disbursements.

21 Question: All right. And the concerns
22 he had over the disbursements were what?

23 Answer: I really -- I don't --
24 I cannot remember exactly what he was saying.
25 I mean, in terms of this or that, but just kind of

1 high level -- just concerns.

2 Question: Generally speaking, Karl's
3 concerns were the disbursements for the
4 construction loan had not been handled properly?

5 Answer: Right. The management had not
6 been --

7 Question: Okay. Is that who you're --
8 you start this paragraph, the second paragraph, by
9 saying you may remember. So you had spoken with
10 Mr. Edwards about this before?

11 Answer: Right.

12 Question: Okay. And when you had
13 spoken with him about this -- when had you spoken
14 with him about this before?

15 Answer: Maybe a week prior.

16 Question: And you had spoken with him
17 as a result of the conversation you had with Karl?

18 Answer: Yes. Well, I mean, this -- we
19 talked about this reducing the rate. And to put
20 this in context, reducing this interest to four and
21 a quarter would -- there is a -- there is a phrase
22 called troubled debt restructure --

23 Uh-huh.

24 Answer: -- which by definition if you
25 convert a loan and you're having a troubled debt

1 restructure, it is a substandard -- you have to
2 grade it as a substandard credit, which means you
3 have to reserve 25% of the loan in our loan losses.
4 So essentially by doing what we're talking about
5 here we had to -- the bank had to expense about
6 \$750,000 to this. So any time something like this
7 comes up we have a -- just a front-end conversation
8 to talk about, you know, this is what we're -- this
9 is what we're doing. This is why we need to do it.
10 And really, what was going on is: Hey, it's -- you
11 know, the construction is not finished. You know,
12 she's having some collection problems from the ones
13 that are finished. We need to do this to try to
14 help her get through this and move forward.

15 Question: Sure. And when you say that
16 you might have some culpability in her problems --
17 do you see that sentence?

18 Answer: Yes.

19 -- does that mean that you think the
20 bank contributed to her problems?

21 Answer: I don't -- I don't -- at the
22 time I was concerned -- again, I have since gone
23 back and looked at those advances, and after
24 reviewing the advances they do not -- they appear
25 to be appropriate. And most of the advances again

1 were deposited into a checking account in the name
2 of Heritage Seven or Seven Oaks.

3 Question: Okay. Are you saying that
4 you think that you today don't have some
5 culpability in the problems?

6 Answer: I do not.

7 Question: You do not think the bank
8 has any culpability for her problems?

9 Answer: No.

10 Question: Well, that's what you wrote
11 back on July 3, 2009.

12 Answer: Right. That was based on
13 conversations with Karl, and since then I have
14 verified specifically the draws and disbursements.

15 Question: All right. Well, back then
16 you were aware that the money was being paid into
17 Mrs. Gibson's account, weren't you?

18 Answer: No.

19 Well, you knew the RE/MAX manager may
20 have siphoned off some of the loan proceeds from
21 her account, didn't you?

22 Answer: That, again, was based on Karl
23 Zerbst's commentary.

24 Question: Sure. Well, I'm just
25 saying --

1 Answer: Yeah. I mean --

2 Question: You knew about it. Karl
3 told you.

4 Answer: Yes.

5 Question: You felt that you had
6 potentially aided that former manager at RE/MAX
7 somehow. How did you think that you had
8 potentially aided him?

9 At the time I wrote that I had not
10 validated where the disbursements were. So, you
11 know, I'm hearing -- I'm hearing Karl go we might
12 have a problem, this may be occurring, and we
13 reacted accordingly. But since then I have
14 confirmed that those concerns that I had at that
15 point were unfounded.

16 Question: Oh. You've determined that
17 the manager, the property manager, did not siphon
18 off the loan proceeds?

19 Answer: Well, I don't know that
20 answer. I do know that the loans -- the
21 disbursements were deposited into a checking
22 account in the name of the borrower, which is
23 common.

24 And do you know whether you went ahead
25 -- I don't mean you personally, but anybody at

1 Ameris then went to determine whether those monies
2 were being used to properly construct --

3 Answer: I do not.

4 -- or whether they were being siphoned
5 off by the property manager?

6 Answer: Without seeing the file to
7 look at, the draw requests and the inspections, I
8 can't specifically answer where the funds went once
9 they were deposited into the checking account.

10 Question: Well, back then when you
11 wrote this memo you had the file.

12 Answer: But I had not looked at it. I
13 was -- I was basing this upon Karl's opinion.
14 Again, he was the -- he was Benjie's direct --
15 I mean, he was the bank president for Charleston.
16 30 -- I don't know what age. 35 year banking
17 veteran. I was relying on his experience, his
18 expertise, when he communicated this to me. Since
19 then we have gone back and verified the funds were
20 deposited into the checking account. So again,
21 this was based on hearsay and my reliance upon what
22 Karl was telling me. Since then we've gone back
23 and confirmed that the monies were deposited into
24 the checking account.

25 Question: Well, the fact that the

1 monies were deposited into the checking account
2 doesn't really answer the question of whether
3 Ameris properly supervised the construction that
4 was performed with those monies, does it?

5 Answer: Well, if I had the file to
6 look at the inspections and draw requests, I could
7 better answer that question.

8 Question: But you're not --

9 Answer: I'm going to make an
10 assumption that if we disbursed the funds the
11 inspections had been complete and the monies were
12 being put in the project. But again, I'm -- I have
13 not seen those records to be able to confirm that.

14 Question: Well, you say here that you
15 didn't manage the construction loan as we should.

16 Answer: Right. Again, that's -- this
17 is sort of -- this is off of Karl's opinion. We
18 had lunch and he said: I need to tell you about
19 something that is going on.

20 Karl told you you didn't manage the
21 property as -- manage the construction as you
22 should have?

23 Answer: In his -- right. In his
24 opinion we had not.

25 Then to Page 45 - Line 1. Question:

1 You're pretty specific. You say that the former
2 property management may have siphoned off some of
3 the loan proceeds and that you had potentially
4 aided him in doing this. Why did you think you had
5 -- what had you done that potentially aided this
6 former property manager in siphoning off some on
7 those loan proceeds?

8 Answer: I can't -- again, this was
9 based on the information concerning Karl Zerbst.

10 Question: That's it?

11 Answer: And he was just saying we
12 can't -- I don't know. You know, I can't see any
13 construction inspections or, you know, there is not
14 real documentation in the file as to where these
15 funds went.

16 Question: So Karl told you that there
17 was no construction documentation and no clear
18 record?

19 Answer: Based on what he could see,
20 there was not. And at the time of the -- you know,
21 again, I'm trying to think how engaged he was at
22 this point, but he had -- yeah.

23 Question: You know that's one of the
24 questions I wanted to ask you, is where the money
25 went. There is a document here -- maybe Exhibit

1 32. It's the last one in the package.

2 Answer: Uh-huh.

3 Question: It's from Benjie Lanier to
4 Elizabeth Gibson dated April 28, 2008 marked
5 Exhibit 32. It says: Currently the remaining
6 balance left to draw is \$187,499, and the back-up
7 documentation is there behind it. Do you have any
8 records to where that money went?

9 Answer: I do not.

10 Question: Does the bank have any
11 records where that money went?

12 Answer: I don't know. This
13 information would have been in the file.

14 Question: The file that was sold to
15 Galt?

16 Answer: Right.

17 When was the loan sold to Galt?

18 Honestly, I don't know. I mean, it was
19 -- I do not know.

20 Question: Take a look back at
21 Exhibit 36 again. I'm sorry 35. 35 is the loan.
22 The bank agreed to loan Miss Gibson 2.8 million.
23 And then look at Exhibit 36 on Page 5. The bank
24 does a cash flow analysis of expected -- it's
25 Exhibit 36, Page -- Exhibit 36. Yeah. The loan

1 committee application with the cash flow analysis
2 and apartment economic analysis form.

3 I think it's Exhibit 28 on our package.
4 It's either 27 or 28. But I'll read this.

5 So on Exhibit 36 the document entitled
6 Apartment Economic Analysis Form --

7 Answer: Uh-huh. (Affirmative
8 response.)

9 Question: Did the analysis show that
10 Linda could repay the loan with the expected rents
11 from the property?

12 Answer: Yes.

13 Question: And does this analysis take
14 into account the \$700,000 that Linda had to borrow
15 to put down on the property?

16 Answer: No.

17 And that concludes Mr. Snipes'
18 deposition. Your Honor, we would move -- I think
19 it's already been admitted, Mr. Snipes' email to
20 Mr. Edwards. It's Exhibit 31.

21 MR. STEPP: Admitted over objection.

22 THE COURT: Yes. Admitted over
23 objection.

24 (Plaintiff's Exhibit 31 in evidence.)

25 MR. WEST: May it please the Court,

1 reason to hold the record open. .

2 THE COURT: That's the only reason I'm
3 holding the record open at this point in time.

4 MR. WEST: We're going to excuse
5 Mr. Southard.

6 THE COURT: That would be fine. Yes?

7 MR. KEFALOS: The next witness will be
8 Karl Zerbst.

9 THE COURT: Please give me your full
10 name.

11 THE WITNESS: Karl H. Zerbst, Jr.

12 KARL H. ZERBST, JR.

13 being first duly sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. KEFALOS:

16 Q. Mr. Zerbst, you used to work for Ameris
17 Bank?

18 A. Yes, sir.

19 Q. And before that you worked for First
20 Reliance Bank?

21 A. Yes, sir.

22 Q. Before that you worked for South Trust
23 Bank?

24 A. Yes, sir.

25 MR. JORDAN: I'm going to object to the

1 leading questions. This is direct examination.

2 THE COURT: I'm going to allow that
3 part of leading. That is no problem. He can just
4 say where you've worked.

5 MR. STEPP: That's fine. We really
6 just want to flush the issue out. I don't mind
7 about the background, but we do object when he gets
8 to the meat of it.

9 THE COURT: You are certainly free to
10 do that, but testimony like this I'm going to allow
11 leading as far as work history.

12 BY MR. KEFALOS:

13 Q. How long have you been in the banking
14 business?

15 A. Approximately 26 years.

16 Q. And you were certainly a banker a long
17 time before you met Linda Gibson.

18 A. Yes, sir.

19 Q. You have a lot of experience in the
20 banking industry?

21 A. Is that a question?

22 Q. Yes, sir.

23 A. Yes.

24 Q. Now, is it true you've handled loans
25 over your course of your time in the banking

1 business, haven't you?

2 A. Yes, sir.

3 Q. And is it true that you don't normally
4 make a loan or a commitment without first getting
5 to know your customer?

6 A. Yes, sir.

7 Q. You normally take a financial statement
8 and you talk to your borrower?

9 A. I would not take a financial statement
10 unless there was a loan request.

11 Q. And you try to evaluate where the
12 borrower is with respect to their assets?

13 A. If there is a loan request, then I
14 would only get to the financial statement of that
15 borrower.

16 Q. And if there is a loan request, you try
17 to evaluate what the customer wants to do with
18 their assets?

19 A. As it relates to the loan request on a
20 piece of property? Yes.

21 Q. You try to evaluate what the customer
22 wants to do with their cash flow?

23 A. Generally.

24 Q. And what they want to do with the
25 investment?

1 A. Yes.

2 Q. You try to evaluate the level of their
3 experience?

4 A. That's correct.

5 Q. Now, it didn't take you long to see
6 that Linda Gibson was new at this?

7 A. Linda Gibson was another customer, just
8 like customers that would come into my office and
9 have a loan request to indicate what she may want
10 to do with a piece of property in terms of
11 purchasing it.

12 Q. It didn't take you long in talking to
13 Linda Gibson to realize that she was new at this
14 investment?

15 MR. JORDAN: Your Honor, I'm going to
16 object to the leading questions. He's getting into
17 the facts of the case.

18 THE COURT: Rephrase your question.

19 MR. KEFALOS: Your Honor, I believe
20 that we have the right to lead this witness. He is
21 formerly an officer with the bank. He is a witness
22 that is closely aligned with the defendant, and
23 under the rules counsel should be permitted to lead
24 him.

25 THE COURT: All right. Mr. Jordan?

1 MR. JORDAN: Mr. Zerbst is no longer an
2 employee of the bank. He is not under our control.
3 The questions he is being asked right now relate to
4 a time when he was not working for Ameris Bank.
5 And this is direct examination. I don't think they
6 can lead him.

7 THE COURT: He was under your control
8 at the time the lawsuit was filed; is that correct?

9 MR. JORDAN: I believe he had already
10 left the bank at the time the lawsuit was filed,
11 your Honor.

12 MR. STEPP: Are you talking about this
13 lawsuit?

14 THE COURT: Yes.

15 MR. STEPP: No. He was gone by the
16 time of this lawsuit.

17 THE COURT: And he was under the
18 control of Ameris Bank at the time the facts which
19 are in dispute were taking place? Is that right or
20 wrong?

21 MR. JORDAN: He was an employee during
22 a portion of the period that the loan at issue was
23 made.

24 MR. STEPP: But not, your Honor, in our
25 view -- and, of course, this is contested, but

1 Mr. Zerbst came to work for the bank in January of
2 '08, but this loan closed in November of '07.

3 They want him to be our agent before he
4 came to work for us. I understand that. But he
5 was certainly -- our position is he was certainly
6 not under our control until January of 2008.

7 THE COURT: That's the whole issue in
8 the case, really. One of the issues. I'm going to
9 allow him to lead. You all can take it up if you
10 want to, but Mr. Zerbst is an integral witness in
11 this case and he was employed by Ameris, who is the
12 defendant. And we've already had conversations by
13 way of deposition of Mr. Snipes, who was over
14 Mr. Zerbst about this loan, so I'm going to allow
15 him to lead the witness.

16 MR. KEFALOS: Thank you.

17 BY MR. KEFALOS:

18 Q. It didn't take you long after meeting
19 Linda Gibson to see that she was new at this, did
20 it?

21 A. I don't know if she was new, but she
22 was not well experienced like many customers that I
23 would meet with.

24 Q. Let me ask you to turn your
25 attention --

1 MR. KEFALOS: Your Honor, we didn't
2 take the deposition, so we don't have the original.
3 We have copies.

4 MR. STEPP: We don't object to the use
5 of a copy, your Honor. The only one we have has
6 kind of got our notes on it.

7 THE COURT: We don't want to do that,
8 but we can use a copy. Everybody knows the
9 deposition was taken.

10 MR. KEFALOS: Your Honor, with the
11 Court's permission I'm going to approach the
12 witness and hand him up --

13 THE COURT: That would be fine, unless
14 you have an objection.

15 MR. JORDAN: No objection.

16 Q. (Continued) I'm going to hand you a
17 copy of the deposition and ask you to turn to
18 Page 69 at Line 8.

19 Did you say at the sentence beginning
20 at Line 8 on Page 69 that Linda Gibson was new at
21 this?

22 A. That was on Line 10. Yes; I felt like
23 Linda was new at this. That's correct.

24 Q. And do you agree that Linda Gibson did
25 not have a lot of experience?

1 A. With what, sir?

2 Q. With banking, finance, and investment.

3 A. She was new at borrowing money.

4 Q. She did not have a lot of experience?

5 A. That's correct.

6 Q. And you knew that Linda Gibson was not
7 a savvy real estate investor?

8 A. That's fair to say.

9 Q. And you in fact knew that Linda Gibson
10 relied on the advice of others?

11 A. That's correct.

12 Q. And because of that you developed a
13 special relationship with her?

14 A. No, sir.

15 Q. Well, didn't you make a personal
16 connection with Miss Gibson?

17 A. I don't understand the question.

18 Q. Well, turn your attention to Page 69
19 where you were telling us at Line 9 -- did you tell
20 us: I'm assuming certainly on this case, too,
21 because Linda, I felt, was new at this and there
22 was a personal connection I made with that. Maybe
23 a bit more than the normal borrower?

24 A. Because we had -- to answer that, where
25 I was coming from there is that she had borrowed

1 money at First Reliance on the shopping center, and
2 I knew that she was borrowing that money as well as
3 the apartment loan.

4 Q. So it is true that you made a personal
5 connection with --

6 A. I made a personal connection because
7 this request was similar to the others.

8 Q. But also knowing that she was new at
9 this, she lacked experience and she relied on the
10 advice of others?

11 A. Yes, sir.

12 Q. You made a personal connection with
13 her.

14 Now, against this background of your
15 close personal relationship Linda called you after
16 you left First Reliance.

17 A. That's correct.

18 Q. Do you remember one call in particular
19 you were standing in your kitchen?

20 A. It is the famous kitchen call.

21 Q. She asked you about getting the loan
22 from Ameris Bank?

23 A. She asked me, when she shared with me
24 what the terms were, was it a good deal.

25 Q. She was talking about whether she

1 should go through with the purchase of these
2 apartments?

3 A. She spoke specifically about the
4 pricing of the loan.

5 Q. And you told her you thought it was a
6 good investment?

7 A. I thought it was a good deal.

8 Q. You told her that?

9 A. Yes.

10 Q. And you told her that you recommended
11 the loan?

12 A. I had already previously recommended
13 the loan at First Reliance, so yes, it was -- every
14 deal has risk. This deal certainly had hair on it,
15 as we say, but it was a good deal. I would not
16 have recommended it at First Reliance if I had
17 thought differently.

18 Q. In fact, you had talked to her about it
19 at First Reliance and you had told her it was a
20 good deal then, too.

21 A. We met specifically -- she applied for
22 this loan at First Reliance.

23 Q. You knew that Linda owned a house on
24 Palm Boulevard in the Isle of Palms?

25 A. Yes, sir.

1 Q. And you knew that Linda refinanced the
2 Palm Boulevard house to get \$700,000 to make the
3 down payment on these apartments?

4 A. That's correct.

5 Q. In fact, turn your attention to
6 Exhibit 30 in the exhibit book. There is a memo
7 from you to Jess Nance --

8 MR. JORDAN: Your Honor --

9 MR. KEFALOS: I'm sorry. It's 67.

10 Q. (Continued) It's the last exhibit in
11 the book. Do you see this as an email from you to
12 Jess Nance and Tom Urick?

13 A. Yes, sir.

14 Q. September 6, 2007. Item 2 on that --

15 A. That's right.

16 Q. -- you tell him that Linda Gibson has
17 paid off the beach house loan with you and
18 refinanced with First Citizens.

19 A. That is what she shared with me.
20 That's correct.

21 Q. She cashed out and was going to use
22 that money for down payment of the apartments?

23 A. That's what she had shared with me.

24 Q. In fact, you had recommended that she
25 refinance the Isle of Palms house to get the down

1 payment?

2 A. When Linda and Rolando visited me about
3 this purchase of the apartment complex, that's what
4 Rolando had outlined in the package that that is
5 where the money was going to come from, the equity.
6 Because Rolando and Linda knew that she obviously
7 had to have cash down on this purchase. That's
8 correct.

9 Q. Well, this isn't the first time that
10 you had recommended that Linda borrow money against
11 that Isle of Palms house for a down payment?

12 A. The recommendation was not from me. It
13 was the request that -- Linda knew she had to bring
14 money whenever we talked and discussed this loan in
15 particular in my office, and that -- when I asked
16 the question where the money was coming from,
17 that's what was told to me.

18 Q. Well, there was a question earlier
19 about -- remember the down payment? There was an
20 issue about the down payment for the shopping
21 center, and Mr. Stepp was asking Miss Gibson about
22 whose idea was it borrowing it, the down payment
23 against the Isle of Palms house and the shopping
24 center.

25 You were involved with the financing of

1 the shopping center, weren't you?

2 A. Yes, sir.

3 Q. And Miss Gibson got the down payment --
4 part of the down payment for the shopping center
5 from the Isle of Palms refinance?

6 A. That's correct.

7 Q. And that was because you recommended
8 it?

9 A. No, sir. We had conversations and
10 discussion about it. She shared with me that's
11 where the money was going to come from, and that
12 was a discussion that we had. It would have been a
13 question that I would have asked that borrower,
14 where was the cash equity going to come from?

15 Q. Let's take a look at Exhibit 32.

16 MR. KEFALOS: Your Honor, I would move
17 the introduction of 67.

18 MR. JORDAN: No objection.

19 THE COURT: Admitted.

20 (Plaintiff's Exhibit 67 in evidence.)

21 MR. JORDAN: Your Honor, with the
22 exception of Paragraphs 1 and 3, which do not
23 relate to Miss Gibson, they need to be redacted.

24 THE COURT: That would be fine. I'm
25 not interested in those comments.

1 BY MR. KEFALOS:

2 Q. Do you see Exhibit 32?

3 A. Yes, sir. The credit memo?

4 Q. Yes.

5 A. Yes, sir.

6 Q. This is a credit memo that you
7 authored?

8 A. Yes, sir.

9 Q. On the first page, the second paragraph
10 under Loan Background or Purpose -- now, remember,
11 what we're talking about is whether you recommended
12 that Linda get the down payment from refinancing
13 her beach house, and you said that you didn't. You
14 never did.

15 Take a look at the paragraph that you
16 wrote in that credit memo of November 29, 2005, and
17 read along with me and tell me if this is
18 incorrect.

19 "The structure of this financing is to
20 allow a certain portion of that debt be placed on
21 the center and the remaining be placed on another
22 asset in this case. We have recommended a second
23 mortgage on an investment home in the Isle of
24 Palms, and the borrower has agreed."

25 Did I read that right?

1 A. That's correct.

2 Q. Is that accurate?

3 MR. STEPP: He's entitled to finish his
4 answer.

5 A. That recommendation came as a result of
6 a conversation that I had with the borrower.
7 I would not have just arbitrarily picked that
8 particular piece of property for that borrower to
9 use as equity. She had many parcels of land that
10 she could use. And in that conversation it came
11 out that that was a piece of property that she,
12 yes, wanted to and was willing to, and that's my
13 recommendation to the senior loan committee in this
14 memo.

15 That is very common that you take the
16 information from the applicant, understand what the
17 request is, and I'm simply recommending that to the
18 senior loan committee.

19 Q. But it doesn't say that you recommended
20 it to the senior loan committee and the loan
21 committee agreed. It says you recommended it and
22 the borrower agreed; is that correct?

23 A. That's correct. Because we had
24 conversation, and she offered that as collateral.

25 Q. Why doesn't the memo say we had a

1 conversation and she offered one of her pieces of
2 property as collateral? Why does it say that you
3 recommended and she agreed?

4 A. Because I recommended it to the senior
5 loan committee based on my conversation with
6 Miss Gibson.

7 Any borrower has to come up with some
8 idea of how they want to structure the deal in
9 order for me to get a good feel if that is in fact
10 something that I would recommend to the senior loan
11 committee.

12 MR. KEFALOS: Your Honor, I move the
13 introduction of Exhibit 32 into evidence.

14 MR. JORDAN: No objection.

15 (Plaintiff's Exhibit 32 in evidence.)

16 BY MR. KEFALOS:

17 Q. You did speak with Linda Gibson about
18 the borrowing of the 700,000 on the beach house to
19 use as the down payment for the apartments, didn't
20 you?

21 A. Yes; when myself and Rolando and Linda
22 Gibson met in my office.

23 Q. And is it true that you figured the
24 additional cash flow in the apartments was able to
25 satisfy the second mortgage on the beach house?

1 A. I would probably have to look at the
2 exhibit, but I would -- I would think I would have
3 done that.

4 Q. All right. The way you figured it,
5 that the rents from the apartments should pay not
6 only the mortgage to Ameris or First Reliance, but
7 also going to be enough to pay the second mortgage
8 on the beach house?

9 A. I think it was an interest only on the
10 beach house, if I remember correctly.

11 Q. But that's the way you figured it?

12 A. Based on what I was told and the loan
13 package and based on what the appraiser ultimately
14 came up with, yes.

15 Q. You told her the way you figured it she
16 would be safe because there would be no shortfall
17 between the rents from the apartments and the debt
18 that she had for the apartments?

19 A. Based on the loan package presented,
20 yes, sir.

21 Q. Now, is it true that most customers,
22 when they come to you for a loan, have an idea of
23 what they want to do?

24 A. Yes, sir.

25 Q. Most customers when they come to you

1 for a loan already have a contract?

2 A. Excuse me. A contract?

3 Q. Yes.

4 A. Not necessarily. I guess more often
5 than not, yes.

6 Q. Well, don't you have to have a contract
7 in order to process the loan?

8 A. Absolutely. You're wasting your time
9 if you don't.

10 Q. Would you turn your attention to
11 Exhibit 19 in the exhibit book. Is this the
12 contract that you were given for these apartments?

13 A. It looks to be, yes.

14 MR. KEFALOS: I move Exhibit 19 in.

15 MR. JORDAN: No objection.

16 MR. KEFALOS: It's already in.

17 BY MR. KEFALOS:

18 Q. You know what consideration is in the
19 contract, don't you?

20 A. I do.

21 Q. Can you tell us what the consideration
22 was that made this contract binding?

23 MR. JORDAN: Objection, your Honor.

24 That calls for legal opinion, and Mr. Zerbst is not
25 a lawyer.

1 THE COURT: I'm going to allow him to
2 answer. You may answer the question.

3 A. Would you repeat your question, please.

4 Q. What is the consideration she gave?
5 What is the consideration the contract reflects?

6 A. It reflects the agreement between the
7 buyer and seller to purchase a piece of property
8 for that amount of money.

9 Q. Was there any earnest money put down?

10 A. I don't see a copy of the check and I
11 don't see where it's identified in the contract.

12 Q. You know that without an earnest money
13 deposit an agreement between two parties is not
14 enforceable?

15 MR. JORDAN: The same objection, your
16 Honor.

17 THE COURT: I'm not allowing him to
18 give an opinion on that. He can tell me whether or
19 not there was an earnest money deposit based on his
20 knowledge from this loan and this contract, and he
21 says there was none; is that correct?

22 THE WITNESS: I don't see any, your
23 Honor, here.

24 BY MR. KEFALOS:

25 Q. And are there any financing

1 contingencies in this contract?

2 A. There is -- no, there is not.

3 Q. No financing contingencies, and there
4 is no down payment. Anything about a construction
5 loan in this contract?

6 A. I don't see any when I looked through
7 it quickly.

8 Q. And is there a time for performance in
9 this contract? Look to the second page. "Closing
10 on or before May 31, 2007."

11 A. May 31, 2007?

12 Q. Yes.

13 A. Okay.

14 Q. And by the time you got around to
15 processing this in September of '07 the contract
16 was expired.

17 A. Okay.

18 Q. Is that true?

19 A. It appears so, yes.

20 Q. So you had a contract that had no
21 consideration, that was expired; had no financing
22 terms.

23 A. That's correct. Quite often that's not
24 unusual.

25 Q. And the contract --

1 A. Quite often they can be expired, but I
2 got a copy of this contract in that package, so
3 that borrower brought this contract to look -- to
4 seek financing for.

5 Q. Well, that's right. There was no
6 financing terms and somebody had to fill in how
7 much she was going to put down; right?

8 A. Assuming -- I wasn't a party to the
9 contract.

10 Q. Sure. I understand.

11 Linda Gibson didn't come to you and
12 say: I want to put \$700,000 down?

13 A. Linda Gibson knew in our conversation
14 when we met what the cash requirement was going to
15 be.

16 Q. You told her?

17 A. No. We discussed it. No. That's not
18 what took place.

19 Q. Well, I want to know -- we talked
20 earlier about how customers come to you and they
21 have an idea of what they want to do.

22 Miss Gibson came to you with a blank
23 contract. Somebody had to fill in the blanks.

24 A. No, sir. This contract was not
25 discussed when myself and the loan applicant and

1 Rolando visited each other in my office. This was
2 a copy that was part of the package. We did not
3 get into that.

4 This is a contract that needed -- we
5 weren't near down the road where there was a
6 contract where we had to act, because it had
7 already expired. This was in late August whenever
8 I met with them. So the contract was really not
9 that important. I felt like if there was a
10 legitimate request, that Miss Linda Gibson could
11 certainly go back to this seller and engage in an
12 updated or a new contract altogether if she wished
13 to.

14 Q. So at this point it was a blank slate?

15 A. More or less, yes.

16 Q. There was no deal?

17 A. Based on that contract. True.

18 Q. Somebody had to structure the terms?

19 A. No. The terms were already structured
20 when the loan applicant came into the office.

21 Q. Well, it certainly wasn't done on this
22 contract?

23 A. This is minor to the loan structure.

24 Q. Sure. So when Miss Gibson and
25 Mr. Villavicencio came into the office, they didn't

1 have a deal. They had to talk to you about how to
2 put it together?

3 A. That's not correct.

4 Q. Well, where were they going to find out
5 how much the bank was going to loan them?

6 A. Rolando and Linda had already talked
7 about that. That was a conversation that they
8 shared with me when they visited with me.

9 When Rolando called me initially and
10 said that he had an apartment complex that he
11 wanted to bring to me for financing for Linda
12 Gibson, my first question to him: Well, does Linda
13 know about it? Because I knew Rolando really
14 handled the affairs, if you will, for Linda.
15 I know that from a previous conversation and a
16 previous loan that was made.

17 Q. He tells you that she wants to buy a
18 property and the first thing you ask: Does she
19 know about it?

20 A. Is she aware of it. Absolutely.

21 Q. Because you were concerned that he
22 might be doing something that she doesn't know
23 about?

24 A. That would be absolutely right. But he
25 did come down and visit with me. He shared with me

1 the structure, what the apartments were, where they
2 were, and how they -- Rolando was savvy enough to
3 understand what was needed in terms of an equity
4 position of any purchase of real estate.

5 Q. So you talked to Rolando about how much
6 would need to be put down?

7 A. The package was already -- Rolando
8 already knew. It's pretty common in terms of a
9 standard purchase of real estate where there needs
10 to be at least a 20% cash injection in a particular
11 purchase.

12 Once that conversation took place and I
13 knew that Miss Linda Gibson was aware of it,
14 according to Rolando, Step 2 to Rolando was that I
15 asked him then to engage Miss Gibson and get on
16 their calendar and visit with me again. That's
17 what took place.

18 Q. So you and Rolando met and discussed
19 that you needed a 20% down payment.

20 Did you talk about what the interest
21 rate would be?

22 A. No. As a banker you don't get into the
23 interest rate. Rolando had an interest rate in his
24 mind as part of the package because he was so far
25 down the road with the package in terms of

1 ultimately servicing debt, which is --

2 Q. Did you talk to Rolando about
3 structuring this as a construction loan?

4 A. It wasn't a conversation -- it was
5 clear that it was going to be -- it was a rehab
6 loan.

7 Q. Did you ask him whether Miss Gibson
8 knew about the structure?

9 A. That is correct. But it placed the
10 importance to get the borrower in front of me. If
11 this was going to be something that I was going to
12 move forward with, then I needed the borrower in
13 front of me. And that is very common, Mr. Kefalos.

14 Q. So would it be fair to say that all of
15 the terms of this loan -- the down payment, the
16 financing, the interest rate, the notion that there
17 was going to be a construction loan -- came as a
18 result of a conversation you had with

19 Mr. Villavicencio and you wanted to know whether
20 Miss Gibson was even aware of what was going on?

21 A. Absolutely. That's what led to the
22 second meeting.

23 Q. Now let's go to 2007, October of '07.
24 Ameris is opening a new branch in Charleston.

25 A. Yes, sir.

1 Q. I think the street it was on was
2 Archdale Street.

3 A. That's where their office was.

4 Q. And they were hiring new employees for
5 this branch?

6 A. Correct.

7 Q. You began to talk to Ameris about
8 taking a job with them in early October 2007?

9 A. No, sir.

10 Q. Turn your attention to your deposition
11 on Page 146. I'm going to have you look on with
12 me.

13 MR. KEFALOS: May I approach, your
14 Honor?

15 THE COURT: Yes.

16 Q. (Continued) Did you begin speaking
17 with Mr. Bogan of Ameris in early October of 2007
18 about going to work with the bank?

19 A. I spoke to -- to answer that question
20 so you have a full understanding, I spoke to three
21 different banks prior to October the 4th before I
22 left First Reliance Bank. Ameris Bank was one of
23 three banks that I spoke to, generally speaking,
24 about banking and where they were and what they
25 wanted to do in the market.

1 Q. So the answer is yes, you did begin to
2 speak with Ameris early October 2007 about going to
3 work for them?

4 A. I couldn't go to work for them at that
5 point because I had a noncompete in front of me.
6 But I spoke to several banks about employment.
7 That's correct.

8 Q. Including Ameris?

9 A. Potentially, yes.

10 Q. In fact, you had multiple conversations
11 with Ameris about going to work for them?

12 A. I had several conversations with Ameris
13 and two other banks.

14 Q. And the problem was that you had to
15 work out this noncompete that you had with First
16 Reliance?

17 A. That's correct.

18 Q. You had given First Reliance a covenant
19 not to compete and you wanted out of it in order to
20 go to work for another bank?

21 A. I was leaving banking, and if I were to
22 get back into banking then I had to deal with the
23 noncompete.

24 When I had left First Reliance I had no
25 assurance that I was actually going to stay in

1 banking.

2 Q. You tried to resign from First Reliance
3 on October 4 of 2007, didn't you?

4 A. I went to go visit with the CEO.
5 I did.

6 Q. And they turned around and fired you?

7 A. The next day they said: Well, let's go
8 ahead and leave now. You don't have to wait until
9 May 12. Why don't you leave today?

10 Q. Would you turn your attention to
11 Exhibit 38, a series of emails between you and
12 officers at First Reliance.

13 A. That is my email to Rick Saunders the
14 day after I visited with him.

15 Q. And then the following day -- that was
16 the 4th and then on the 5th they terminated you?

17 A. I had suggested in this email to wait
18 until May 12th to give them time to make a smoother
19 transition with the bank employees and the
20 customers, and Rick decided no, that he needed the
21 last call and I needed to go that day. So I went.

22 MR. KEFALOS: I move the admission of
23 38.

24 MR. JORDAN: I have no objection to the
25 first email, but the second two pages of Exhibit 38

1 -- Mr. Zerbst is not copied on the email, and this
2 is some sort of First Reliance document. I don't
3 think there is a foundation for it.

4 THE COURT: Well, he's admitted that he
5 was terminated on October the 5th, the very next
6 day, so --

7 BY MR. KEFALOS:

8 Q. Right after your termination --

9 THE COURT: Hold on. So you object
10 even though he's admitted that he was terminated on
11 that day? Is that in dispute?

12 MR. JORDAN: Your Honor, I don't
13 dispute his testimony and I don't dispute --
14 I don't have a problem with his email, but the
15 following two documents I don't see a foundation
16 for it.

17 THE COURT: The following document is
18 from Linda Blue to some other people, Mr. McCall
19 and Carter and others, and it just says that Zerbst
20 is no longer employed. Do you have a problem with
21 that?

22 MR. JORDAN: No, your Honor.

23 THE COURT: It's admitted.

24 MR. KEFALOS: Thank you.

25 (Plaintiff's Exhibit 38 in evidence.)

1 BY MR. KEFALOS:

2 Q. After you got fired you got your lawyer
3 involved in the case?

4 A. I had conversation with Larry Richter
5 before October 4th.

6 Q. You talked to him about the problems
7 with the covenant not to compete?

8 A. The situation at First Reliance was
9 unhealthy for the bank and for me, and so I did the
10 prudent thing and went and spent time with
11 Mr. Richter.

12 Q. And you, through Mr. Richter, tried to
13 negotiate a resolution to the problem with the
14 covenant not to compete?

15 A. That's correct.

16 Q. And you worked closely with Ameris,
17 giving Ameris the updates on the progress that
18 Mr. Richter was making trying to get you out of the
19 covenant not to compete?

20 A. I had limited conversations with
21 Mr. Bogan; but yes, I did have conversations. Of
22 the three banks that I had spent time talking to
23 with the potential, if I got through the
24 noncompete, Ameris Bank, I guess you would say,
25 were the most favorable about considering hiring me

1 of the three that I spoke to.

2 Q. Let's turn your attention to Exhibit
3 39. Do you recognize these emails?

4 A. Yes, sir.

5 Q. These are the emails that you sent
6 Mr. Richter's correspondence on to Ameris to show
7 Ameris the progress in trying to get out of the
8 covenant not to compete?

9 A. We were looking to try to resolve the
10 issue, and that's exactly right. Ameris was
11 curious to know where I stood in my resolution.
12 Sure.

13 Q. So you sent them your lawyer's
14 correspondence, and I think one of these emails
15 shows that they're sending his correspondence on to
16 their lawyers.

17 A. Yes, sir. Sure.

18 Q. Talking about this time, you had a
19 calendar at one time, didn't you, that would have
20 shown a day timer that would have shown your
21 activities during this month?

22 A. Certainly. We've all got calendars.

23 Q. And that calendar was produced in
24 litigation you had later with First Reliance over
25 the violation of the covenant not to compete?

1 A. I think so.

2 Q. But you don't still have that calendar,
3 do you?

4 A. I really don't know. Do I still have
5 the calendar?

6 Q. Yes. We tried to get it from Ameris,
7 and they say it doesn't exist anymore.

8 A. Are you talking about a calendar?
9 That's a personal calendar?

10 Q. Yes.

11 A. Right. I don't know if I really have
12 it or not. When that got -- brought closure,
13 Mr. Kefalos, that calendar probably moved on.
14 I can't tell you whether I've got it somewhere in
15 my closet or not.

16 Q. So let's go back to October of 2007.
17 You're considering a new job with Ameris.

18 A. Sir, I was considering -- you know, the
19 truth of the matter is I wasn't employed. I wasn't
20 being paid through the noncompete and I was looking
21 to see what I wanted to do, and that was to be in
22 banking, to stay in banking, what banks might think
23 I could bring value, and I even solicited a job
24 outside of banking and was given an offer outside
25 of that.

1 So there was a lot of things moving,
2 but there was -- it's not fair to say that Ameris
3 was the only employer that I was considering,
4 because, first of all, I didn't know that I could
5 because of my noncompete at the time. That's why I
6 engaged Larry Richter.

7 Q. You were in October talking to Ameris
8 about the possibility of going to work for them?

9 A. If we worked out the noncompete, and
10 only if we worked out the noncompete. I couldn't
11 do anything to jeopardize that for myself or for
12 Ameris Bank.

13 Q. Ameris at that time was opening a new
14 branch in Charleston?

15 A. There were several employees -- if you
16 go back in time, if I may, there were several
17 employees that had gone to work for Ameris Bank
18 prior to October. The 14 people that originally
19 had come to work at First Reliance at my request
20 that really helped me start the bank in Charleston
21 had, quite frankly, all left. I was the only one
22 there still remaining at First Reliance. So some
23 of those employees went to First Reliance, some of
24 those employees went to Community First, and some
25 of those employees went to Harbor National.

1 So I didn't know where I was going, but
2 Ameris -- yes. To answer your question, they had a
3 positive response to me if I could help them open
4 up the market. But the branch had already opened
5 because those employees, to answer your question,
6 had gone way before me to open up the branch. The
7 branch was open way prior to my consideration.

8 Q. Sure. So the expression I think you
9 just said is you helped them open up the market.

10 A. That's what they were going -- that's
11 what excited me. Quite frankly, that's what I had
12 done with First Reliance, as opposed to maybe going
13 to the other two banks that I had some conversation
14 with.

15 Q. And Ameris was hoping that you would
16 help them open up the market?

17 A. Open up markets along the coastal
18 region, yes.

19 Q. A \$2.8 million loan is a big market?

20 A. I think it's a large loan in the
21 Charleston market.

22 Q. Would you agree that any loan officer
23 looking for a new job with a new bank would want to
24 create new business for his new employer?

25 A. Absolutely.

1 Q. And you ended up in litigation with
2 First Reliance over your move to Ameris, didn't
3 you?

4 A. That's correct.

5 Q. You got sued and accused of taking
6 customers from First Reliance to Ameris?

7 A. That is correct.

8 Q. And what had happened is a lot of
9 customers that you had at First Reliance went over
10 to Ameris?

11 A. A lot of the customers at First
12 Reliance not just left Ameris; they left to go to
13 Community First and Harbor National Bank because
14 that's where all the employees had gone. It wasn't
15 just Ameris getting the benefit of customers from
16 First Reliance.

17 Q. Of course, Linda Gibson was one of the
18 customers that had been at First Reliance and then
19 later went to Ameris.

20 A. That's correct.

21 MR. KEFALOS: I would like to move the
22 admission of Exhibit 39 into evidence.

23 MR. JORDAN: Your Honor, I don't have
24 an objection to the first two pages, which are
25 emails between Mr. Bogan and Mr. Zerbst. The third

1 page is apparently some sort of internal email
2 chain from the Richter law firm. Mr. Zerbst hasn't
3 identified that email, and I don't think there is
4 any foundation for it. He's not a party to the
5 email.

6 MR. KEFALOS: Pull the third page out.
7 I think it's identified as Bates No. 456. I don't
8 think it's important.

9 THE COURT: All right. I'm going to
10 take out this email from Richter's office Tuesday,
11 October the 9th, 2007 at 4:37 p.m. Is that
12 correct?

13 MR. KEFALOS: Yes.

14 MR. JORDAN: And the Tuesday, October
15 9th, 2007 email on the same page, your Honor.

16 THE COURT: Excuse me. Yes. That was
17 at 11:45 a.m.?

18 MR. JORDAN: Yes, sir. Thank you.

19 (Plaintiff's Exhibit 39 in evidence.)

20 BY MR. KEFALOS:

21 Q. Mr. Zerbst, there came a time in 2009
22 when it became clear that Linda Gibson's loan was
23 not working out.

24 A. Yes, sir.

25 Q. And is it true that Ameris tried in

1 many ways to solve the problems with the loan?

2 A. I think that's very fair, yes.

3 Q. It considered loaning Miss Gibson more
4 money?

5 A. We did so for protection.

6 Q. And considered taking additional
7 collateral on the loan?

8 A. It's very common.

9 Q. Convincing Linda to try to sell some
10 real estate?

11 A. We had conversations with Linda about
12 doing just that.

13 Q. But ultimately you and Ameris were
14 unable to convince Linda to make a decision?

15 A. Linda had the ability to make her own
16 decision in my opinion, and the one decision that
17 Linda did make is not make a decision.

18 Q. You had referred Linda to Larry Richter
19 for representation?

20 A. That is correct, to consider -- she
21 asked me who she should go see when she had
22 difficulty with Rolando. And she had fired
23 Rolando, and she asked me specifically who I
24 thought she could go see. I simply told her that
25 you ought to go down the street to see Larry

1 Richter.

2 Q. Mr. Richter represented you in the
3 litigation that Reliance brought against you for
4 stealing its customers?

5 A. Larry Richter is my personal attorney.
6 I think a lot of him. She asked for my opinion,
7 and that's simply what I told her, that she should
8 consider going to see Larry Richter. This was
9 because she told me that she was considering
10 bringing suit against Rolando, and she asked my
11 opinion.

12 Q. Sure. But you didn't tell her that
13 Larry Richter represented you?

14 A. She didn't ask. It didn't come up in
15 thought.

16 Q. Mr. Richter also represented a fella
17 named Joe Bartone.

18 A. I don't know that. I know they're
19 friends.

20 Q. Do you know Mr. Bartone wanted to buy a
21 piece of property that Linda owned?

22 A. Mr. Kefalos, I know Mr. Bartone and I
23 would tell you Mr. Bartone typically wants to buy a
24 lot of property from a lot of people.

25 Q. Well, Mr. Bartone rented on a long-term

1 lease a property from Miss Gibson?

2 A. That I do know.

3 Q. And you know that Mr. Bartone had been
4 trying for a long time to buy that property from
5 Miss Gibson?

6 A. If you say so. Probably. I wouldn't
7 doubt it.

8 Q. And you know that Linda Gibson did not
9 want to sell that property to Joe Bartone?

10 A. If you say so.

11 Q. There came a time when you arranged a
12 meeting between Linda and Larry Richter?

13 A. Linda had gone and seen Larry -- to
14 answer your question, Linda had gone to visit with
15 Larry -- retain Larry, as she told me. And
16 subsequent to that Linda had difficulty getting on
17 Larry's calendar. So she did maybe leverage my
18 recommendation to see if I could help get her in to
19 see Will Waring or Larry Richter.

20 So yes; I did at Linda's request see if
21 I could maybe allow Linda and me to find out more,
22 if I could, about her situation as it related to
23 Rolando and her lawsuit. Because I was needing at
24 this point to respond to the upper chain of the
25 bank because we had a problem loan, and it was, as

1 you said earlier, a very big loan. So yes; I was
2 wanting to try to see if there is something that
3 could be resolved for all parties.

4 Q. Would it be fair to say that you were
5 referring Linda Gibson -- setting up this
6 appointment with Linda Gibson and Larry Richter in
7 order to discuss the relationship with the bank?

8 A. Linda asked me to see if I could help
9 get a meeting with Larry Richter, and that's
10 exactly what I tried to do.

11 Q. She thought she was going to talk about
12 the case against Rolando, but you were setting up
13 the meeting to discuss the relationship with the
14 bank?

15 A. Oh, yeah. What -- in terms of me
16 keeping my up-chain updated on a credit that was in
17 bad shape, if you will, then yes, we wanted to get
18 a better understanding of -- what I knew at the
19 time was that they were hopeful to get some resolve
20 through the insurance company, and if that
21 insurance company was going to agree to the terms,
22 that maybe through Larry Richter's representation
23 -- and if that's information that I could help get
24 and ascertain to keep the bank more informed, that
25 was the reason for that meeting as far as I was

1 concerned.

2 Q. So Linda wanted to see Larry about her
3 claim against Rolando. You wanted her to see Larry
4 because of the problem loan that she had with the
5 bank?

6 A. Well, I wanted to see Larry, if I
7 could. You know, I was only trying to help at the
8 point to see if the bank's interest could be
9 protected, first off -- absolutely -- and to see if
10 she was -- if I was able to help her with respect
11 to meeting with Larry.

12 Q. Take a look at Exhibit 34. This is a
13 series of emails between you and Will Lewis at
14 Mr. Richter's firm.

15 A. That's correct.

16 Q. And on the second page at the bottom
17 it's sent Friday, August 14th, 2009 at 5:13 p.m.

18 Is it accurate there that Mr. Lewis
19 writes to you and says: Thanks for your note
20 yesterday and your concerns for Linda Gibson and
21 suggesting a meeting with you, her, Larry and me to
22 discuss her relationship with the bank? Is that
23 why you had set up the meeting?

24 A. As we just discussed, my interest was
25 the protection of the bank and to see if there was

1 going to be any resolve with respect to what I had
2 been told about recovering any of her funds through
3 the insurance company.

4 MR. KEFALOS: Your Honor, I move the
5 introduction of Exhibit 34.

6 MR. JORDAN: No objection.

7 (Plaintiff's Exhibit 34 in evidence.)

8 BY MR. KEFALOS:

9 Q. At this meeting there was a
10 representative for Mr. Bartone present, wasn't
11 there?

12 A. Mr. Bartone?

13 Q. Yes.

14 A. I don't believe Joe Bartone was there.

15 Q. A representative.

16 A. Yes. I think -- I don't know if he was
17 representing Mr. Bartone, but I think Tommy Grimes
18 was in attendance, a real estate agent. I don't
19 know that he represented anyone.

20 Q. So you arranged for Mr. Grimes to be
21 there, too?

22 A. No. Mr. Richter did.

23 Q. Mr. Richter did?

24 A. I did not call Tommy Grimes.

25 Q. Tommy Grimes was there to talk to

1 Miss Gibson about selling the property to
2 Mr. Bartone so that she could get the money to pay
3 off the bank?

4 A. That's news to me. Mr. Richter had --
5 I think. I don't know for sure. Mr. Richter
6 didn't confer with me, but he had -- I did not know
7 Tommy Grimes was going to be there. Tommy Grimes
8 was there and Larry asked Tommy to come -- I think
9 based on me being there -- to help evaluate and
10 determine several of Linda's assets and property
11 and the value of that property along Clements
12 Ferry.

13 Q. And Mr. Richter tried to convince
14 Miss Gibson at that meeting to sell the property to
15 Mr. Bartone and that that would solve her problems
16 with the bank?

17 A. I don't recall that being part of the
18 conversation, no, sir.

19 Q. And Linda refused to sell the property
20 to Joe Bartone?

21 A. Mr. Kefalos, maybe, but I don't know
22 that.

23 Q. Well, you do know that she refused to
24 sell the property to Joe Bartone?

25 A. I'll be honest with you. I don't --

1 maybe. I know she didn't want to sell any real
2 estate. I do know that. And if Mr. Joe Bartone --
3 I think, as we said earlier, Joe -- Joe was always
4 wanting to buy property, and I think that Linda had
5 a valuable piece of property.

6 Q. This meeting with Mr. Richter -- it was
7 after this meeting that Mr. Richter had to withdraw
8 from representation of Miss Gibson.

9 A. That was Mr. Richter's decision.

10 Q. There was a conflict of interest that
11 came at that point, wasn't there?

12 MR. JORDAN: Objection, your Honor.
13 Calls for a legal conclusion.

14 THE COURT: Do you know anything about
15 why Miss Gibson had to leave Mr. Richter? Do you
16 have personal knowledge of it?

17 THE WITNESS: I don't know if
18 Miss Gibson left because, your Honor, she couldn't
19 get any response from him or Mr. Richter -- I think
20 I heard yesterday that Mr. Richter chose to no
21 longer represent her. But I know that she was
22 having trouble and she wasn't pleased with her
23 attorney, so which took place first, I'm not sure.

24 THE COURT: He doesn't know about --
25 apparently he doesn't know about the conflict of

1 interest. Do you know anything about the conflict
2 of interest personally?

3 THE WITNESS: No, sir.

4 If I may, there was -- whenever Linda
5 approached me and asked who could she maybe call
6 for representation, in my mind it was all about her
7 issues with Rolando. It wasn't so much about
8 having issues with the bank. It wasn't -- I didn't
9 think it was for me to think if there was a
10 conflict of interest, because I had confidence in
11 Larry Richter.

12 BY MR. KEFALOS:

13 Q. Well, Mr. Richter told you there was a
14 conflict of interest, and that's why he had to
15 withdraw?

16 A. He told me after that.

17 Q. Okay. Turn your attention to Exhibit
18 35. Do you see Exhibit 35?

19 A. Yes, sir.

20 Q. This is an email from you to
21 Mr. Snipes, Mr. Charpia and Mr. Sturm; right?

22 A. It is an email from me to several
23 people, yes.

24 Q. And it reads: I met with Linda and her
25 new attorney, Rob Papa, last Monday. He was to get

1 back with me, but did not, although I did receive
2 this email today. Larry Richter confirmed his firm
3 no longer represents Linda. I wish he did for our
4 benefit, but I understand why he no longer does.

5 Now, you understood at that time what
6 the problem with the conflict of interest was?

7 MR. JORDAN: Objection, your Honor.
8 I believe he's testified that he doesn't know about
9 conflict of interest.

10 THE COURT: He can answer the question.

11 A. Mr. Kefalos, it was becoming apparent
12 that the issue was getting bigger and bigger; and
13 yes, at that point in time in November as opposed
14 to months earlier yeah, there was an issue that was
15 brewing, and we could not maybe reconcile the loan
16 from where it was.

17 Q. Well, the issue or conflict was that
18 Larry Richter was pressuring her to sell property
19 in order to satisfy the bank obligation.

20 A. Mr. Kefalos, I couldn't speak to that.
21 I never had a conversation with Larry -- Larry
22 never told me he was trying to do that.

23 Q. But you wished that Larry had remained
24 in the case for your benefit?

25 A. Well, I think -- yes, because I think

1 Larry Richter is a very good attorney and could
2 represent Linda. Absolutely. I feel that way
3 today.

4 Q. But your email doesn't say for Linda's
5 benefit. It says you wish he did for our benefit.
6 Let me ask you: "Our," does that mean Ameris?

7 A. Absolutely.

8 Q. So you wanted Larry Richter
9 representing Linda for Ameris's benefit?

10 A. I think she would have gotten great
11 representation with Larry Richter. That's what the
12 intent was when I said "our benefit."

13 MR. KEFALOS: Have I moved 35 into
14 evidence? If I haven't, I would like to do so at
15 this point.

16 THE COURT: You have not.

17 MR. KEFALOS: Your Honor, I would like
18 to move in the remaining exhibits that relate to
19 Mr. Zerbst, and I don't know that you have had a
20 chance to look at them.

21 MR. STEPP: Can we have a short break?

22 THE COURT: That would be good. Let's
23 take a short break.

24 (Short recess taken.)

25 MR. KEFALOS: Your Honor, I think we

1 have agreed on the exhibits, and I could read them
2 after or I could -- No. 34, 38, 39. It looks like
3 48, 51, 52, 53, 55 and 57, 58, 59, 60, 61, 62, 63,
4 64, 66 and 67.

5 THE COURT: Is that right?

6 MR. JORDAN: That's correct. Your
7 Honor, so the record is clear, Exhibit 39 was
8 previously admitted, and it has the one page
9 removed.

10 THE COURT: Yes.

11 MR. JORDAN: Thank you.

12 (Plaintiff's Exhibits 34, 38, 39, 48,
13 51, 52, 53, 55, 57, 58, 59, 60, 61, 62, 63, 64, 66
14 and 67 in evidence.)

15 MR. KEFALOS: There is one other
16 question I have of the witness.

17 THE COURT: All right, sir.

18 BY MR. KEFALOS:

19 Q. Mr. Zerbst, we talked earlier about a
20 memo that showed you knew that Linda Gibson was
21 borrowing the \$700,000 to be used for a down
22 payment as a second mortgage on her beach house.
23 Do you remember that?

24 A. Yes, sir.

25 Q. Is it true that Mr. Lanier also knew

1 she was paying the \$700,000 from borrowing money?

2 A. Yes, sir.

3 MR. KEFALOS: That's all the questions
4 I have.

5 CROSS-EXAMINATION

6 BY MR. JORDAN:

7 Q. Good morning, Mr. Zerbst.

8 A. Good morning.

9 Q. I want to start when you were employed
10 at First Reliance. Can you tell the Court when you
11 first joined First Reliance Bank.

12 A. September of '04.

13 Q. And when you were at First Reliance you
14 had an occasion to consider a loan application that
15 Heritage Seven and Miss Gibson made in connection
16 with the purchase of a shopping center; is that
17 correct?

18 A. That's correct.

19 Q. If you'll turn to the big notebook
20 that's Defendant's Exhibit 1. Is this a document
21 that you prepared, Mr. Zerbst?

22 A. It is.

23 Q. And if you flip to the last page, the
24 fifth page, I believe, you see that it's signed and
25 accepted by Miss Gibson. Do you see that?

1 A. Yes, sir.

2 Q. While you were assisting Miss Gibson
3 with the financing for the shopping center did you
4 come to meet a man named Rolando Villavicencio?

5 A. I did.

6 Q. Tell the Court what role Rolando played
7 in Miss Gibson's or Heritage Seven's purchase of
8 the shopping center.

9 A. It was very clear that Rolando was
10 instrumental in packaging the request and
11 representing Linda Gibson. In fact, Linda
12 introduced him as such.

13 Q. She introduced him as --

14 A. He represented her on real estate
15 matters.

16 Q. And once Heritage Seven purchased the
17 shopping center is it your understanding that
18 Mr. Villavicencio was managing the shopping center
19 for Miss Gibson?

20 A. That is correct.

21 Q. And did Rolando frequently deal with
22 First Reliance Bank on Miss Gibson's behalf?

23 A. Yes.

24 Q. Was there any question in your mind
25 that Miss Gibson had authorized Rolando as her

1 agent?

2 A. It was clear because he spoke in those
3 terms.

4 Q. In connection with Heritage Seven's
5 application for the purchase of the shopping
6 center, you didn't ever tell Mrs. Gibson that the
7 shopping center was a suitable investment for her,
8 did you?

9 A. Never spoke those words, no.

10 Q. Did she ever even ask you that
11 question?

12 A. I don't recall.

13 Q. Now, the application for financing for
14 the purchase of the apartment complex by Heritage
15 Seven first came to you while you were still at
16 First Reliance; correct?

17 A. That's correct.

18 Q. And initially that application was
19 brought by Rolando; correct?

20 A. That's correct.

21 Q. And you discussed some -- you referred
22 a couple of times when Mr. Kefalos was asking you
23 questions to a package that Rolando brought you.
24 What was contained in that package?

25 A. A lot of things. It was exactly what

1 the vision was with respect to these apartments.

2 These apartments were at best B
3 property. Rolando's vision was that he was going
4 to convert this to a green eco sustainable project,
5 which was maybe some of the literature in the day
6 about converting this and upgrading it, if you
7 will, to be more eco friendly and more green
8 oriented, if you will. That was -- I don't recall
9 getting the financials, the updated financials at
10 the time. We would have had certain financials of
11 Mrs. Gibson in our file as a result of her being an
12 existing customer. So it was specifically about
13 the deal and what his vision was in terms of how it
14 would get financed.

15 Q. Explain, if you can, for the Court what
16 Rolando's vision was for how this deal would be
17 financed.

18 A. Well, Rolando --

19 MR. KEFALOS: Objection; hearsay.

20 THE COURT: Objection to hearsay?

21 MR. KEFALOS: Hearsay.

22 THE COURT: What is your response to
23 that?

24 MR. JORDAN: Your Honor, there is no
25 question that at the time Mr. Villavicencio was

1 acting as Miss Gibson's authorized agent, and a
2 statement of an agent of a party is a statement of
3 that party and is not hearsay.

4 MR. KEFALOS: And that's true, but the
5 only evidence of the agency is Mr. Zerbst's
6 testimony that Mr. Villavicencio said he was her
7 agent.

8 THE COURT: I'll allow the testimony.
9 Go ahead.

10 A. (Continued) Can you repeat the
11 question, please.

12 Q. When Rolando approached you at First
13 Reliance regarding the financing of the apartment
14 complex, you discussed his vision of financing.
15 Can you tell me what his vision was.

16 A. Yes. He knew that there was a 20%
17 equity -- as I said earlier, Rolando in my opinion
18 was savvy enough to know what the banks require for
19 financing, and he knew and he shared with me with
20 respect to the equity that needed to go into any
21 purchase of real estate. He had a vision for that.
22 He had already gone so far as to understand in
23 pretty good detail as to what the income ultimately
24 was going to be or needed to be in order to make it
25 a good project, if you will, where it would service

1 its debts.

2 Q. And that was all information that
3 Rolando brought to you?

4 A. Yeah. Absolutely.

5 Q. Now, you testified in response to
6 Mr. Kefalos's questioning about when Rolando first
7 came to you you said: Well, let's get Linda in
8 here and meet with her; right?

9 A. Yes. Here is what typically happens;
10 and once again, this is no different for me as a
11 loan officer than any other customer coming into
12 the bank, particularly as it relates to it not
13 being the borrower. It does happen from time to
14 time where through a development there may be
15 someone in the office but not the true borrowers
16 coming and talking about it, and that's how it was
17 with Rolando.

18 So while Rolando represented Linda
19 Gibson, not only from what he said, but from what
20 Linda had prior told me in the shopping center
21 loan, I knew at that point if it had some real meat
22 to the deal, if it was looking like, at least in my
23 opinion initially, that it had some validity, then
24 automatically you want to get the borrower in front
25 of you so no one is wasting lot of time.

1 So Step 2 after our meeting was, here
2 again, to bring Rolando and Linda back in so I can
3 make sure that -- Rolando wasn't signing on the
4 note if it got to that point. I needed to get to
5 the borrower, and that was Linda. But that's very
6 natural. It wasn't anything special. You do that
7 with any loan request.

8 Q. And in fact, that's where you said that
9 to Rolando at the meeting between you and Rolando
10 and Miss Gibson; right?

11 A. Yes, sir.

12 Q. Which took place at First Reliance;
13 right?

14 A. Yes, sir. In my office.

15 Q. And during that meeting did you discuss
16 any potential weaknesses or concerns with the
17 project?

18 A. Well, yes, sir, I did. Once I -- once
19 the first meeting finished up I kept the
20 information that Rolando had given to me. I did
21 not go and see that property at that point, but I
22 knew of the property, having been a resident --
23 I knew where this property was. And the concern
24 that I had -- not in my conversation with Rolando
25 initially. But when we sat down and I had time to

1 process the request, I shared with Rolando and I
2 shared with Linda at that meeting -- I subsequently
3 shared my concern through the senior loan committee
4 credit memo that the rehabilitation on this
5 property was the weakness, meaning that this was a
6 B property, if you will, and what the request by
7 Linda and Rolando was is that they were going to
8 convert that, if you will, to more of a B plus or
9 an A property and trying to solicit the students of
10 Charleston Southern University.

11 The second thing that I had concern
12 with was the conversion, the conversion of the
13 tenant mix, because it was going from not
14 government housing but very close to that to
15 parents that might end up having to sign on the
16 leases. And to convert that property, if you will,
17 to the mindset to me was the weakness in the
18 credit.

19 Q. And you expressed that to Miss Gibson
20 and Rolando at that meeting?

21 A. Absolutely. I also put it in the
22 credit memo.

23 Q. Now, Rolando -- well, Heritage Seven
24 through Rolando was coming to you as the banker to
25 see whether or not you would give them money for

1 the project that they had put together; correct?

2 A. I was processing a loan.

3 Q. And as the loan officer you were
4 considering whether or not from the bank's
5 perspective it would be a deal that would be worth
6 financing; correct?

7 A. Correct.

8 Q. When Rolando approached you about the
9 potential financing of this deal, did you
10 understand or did you learn that Mrs. Gibson had
11 already signed a contract to purchase the property?

12 A. I would assume that would be part of
13 the package. I don't distinctly remember if he
14 provided at that time a copy of the contract.
15 I would have asked him to bring on, so I would have
16 subsequently had to see it, maybe at the meeting
17 that he -- when we met several days later.

18 Q. Throughout the course of meeting with
19 Miss Gibson and Rolando did you understand that
20 Miss Gibson had decided that this was a project
21 that she was interested in purchasing?

22 A. That is assumed, I think, for a loan
23 officer if a borrower is willing to coming to meet
24 about seeking financing. The question doesn't have
25 to be asked because it was quite clear because

1 Rolando had already put effort into this deal.
2 Linda and Rolando came because this was an asset
3 that Linda at least wanted to purchase and seek
4 financing for.

5 At that time in 2007 there was a lot
6 going on in the commercial financing world, and I
7 had six or seven or eight loans in the pipeline, if
8 you will. I really wasn't interested in it if
9 there wasn't any validity from the borrower's
10 perspective to pursue something, because I had
11 other things to do in terms of writing up credits
12 and seeking financing from customers.

13 So I try to make it very clear not to
14 waste everybody's time that it wasn't something to
15 come and chat a little bit about. If this is
16 something that you want to do, as it was outlined
17 to me, then -- she's a good customer. It looked
18 like a pretty good deal to me. Outside of doing
19 the underwriting, I started that package.

20 Q. When Rolando and Heritage Seven came to
21 you, were they seeking a specific amount of
22 financing for this project?

23 A. Yes.

24 Q. Do you remember how much that was?

25 A. Rolando knew that he needed to kick in,

1 in terms of the purchase price, 20% of that equity.
2 That's correct.

3 Q. So that's what Rolando brought to you?

4 A. That's correct.

5 Q. While you were employed at First
6 Reliance did you visit the apartment complex?

7 A. After my meeting with Rolando and Linda
8 and I had a firm understanding that, yes, the
9 borrower wanted to pursue this. This was a request
10 that they had for me to do what I needed to do
11 internally based on the information they had given
12 me. I did ride up and look at the apartments.

13 Q. Did you take anybody with you?

14 A. I don't know. I think I went myself.

15 Q. And you were going to look at the
16 apartments to make sure from the bank's perspective
17 it was something worth loaning money as requested
18 by Rolando and Heritage Seven; correct?

19 A. Yes. As I said earlier, I was familiar
20 with Otranto. I knew about this site, but I felt
21 like I needed to -- at least from a banker's
22 perspective you need to visit the property; and if
23 I was going to spend the time hence writing up the
24 credit, I needed to go take a picture of it in my
25 mind to see it.

1 Q. Mr. Kefalos showed you an email -- and
2 I think you might have referenced it, but from you
3 to Jess Nance at First Reliance where you kind of
4 seek some input or some advice about this deal, and
5 it referenced in there the fact that she was
6 refinancing the beach house and taking some money
7 out of it.

8 Was that part of the deal that Rolando
9 brought to you?

10 A. That's correct.

11 Q. Was it your idea to tell Linda to go
12 out and refinance her beach house and take money
13 out of it?

14 A. No. I didn't have to do that. It was
15 already done for me in the request.

16 Q. Did Linda even ask you whether or not
17 she should do that?

18 A. No. It was part of the package, so we
19 never -- we talked about it and we knew it was
20 coming, but it wasn't a request from her. It was
21 already put on paper, if you will.

22 Q. While you were at First Reliance you
23 ordered an appraisal from Paul Moore & Associates;
24 is that correct?

25 A. That's correct.

1 Q. If you want to look at it, it's Exhibit
2 13 in your binder. Are you there?

3 A. Yes, sir.

4 Q. If you flip to Bates labeled Moore
5 127 --

6 A. Yes, sir.

7 Q. -- it shows that there is an as-is
8 value of 2.8 million and an as-complete value of
9 3.7 million; is that right?

10 A. Yes, sir.

11 Q. And do you recall what the purchase
12 price of the property was that Mrs. Gibson was
13 buying?

14 A. Well, what was shared with me is
15 exactly what the contract called for at the time,
16 was \$2.8 million.

17 Q. Flip over to Defendant's Exhibit 15.

18 A. Yes, sir.

19 Q. Is this a document that you prepared?

20 A. Yes. This is the internal document
21 that I prepared based on the information given to
22 me to send to the senior loan committee at First
23 Reliance.

24 Q. So this is the credit memo for the
25 potential financing of the apartment complex --

1 A. Correct.

2 Q. -- at First Reliance?

3 A. Yes, sir.

4 Q. Look at the second page, and there is a
5 section that talks about income analysis.

6 A. Yes, sir.

7 Q. And in that paragraph you reference
8 Linda's 2006 tax return. Do you see that?

9 A. Yes, sir.

10 Q. And if you flip over to the third page,
11 do you see the section entitled "Guarantor Loan
12 Comments?"

13 A. I do.

14 Q. And you reference the value of various
15 assets owned by the borrower.

16 A. Correct.

17 Q. Had Mrs. Gibson or Rolando provided you
18 with financial information that you used in
19 preparing this memo?

20 A. Yes, sir.

21 Q. And if you look at the section entitled
22 "Contractor" at the bottom of the second page -- do
23 you see that?

24 A. Yes, sir.

25 Q. -- it identified Triton Group as the

1 contractor. Do you see that?

2 A. Yes.

3 Q. It identified Verdi as the architect?

4 A. Yes, sir.

5 Q. Did you have any involvement in
6 selecting the contractor or the architect for the
7 project?

8 A. No. This would have been -- this was
9 part of the package that Rolando brought to me, and
10 we discussed, all three of us, about who was going
11 to do what.

12 Q. And that same section talks about what
13 you referenced earlier, which is this green
14 building design.

15 Did you have any role in saying: Let's
16 do a green building design?

17 A. No, sir.

18 Q. That was part of the deal that Rolando
19 brought to you?

20 A. That was part of the package.

21 Q. I asked you a minute ago about some
22 personal financial information.

23 Have you ever prepared a personal
24 financial statement for Mrs. Gibson?

25 A. Not Miss Gibson. No borrower ever. 26

1 years.

2 Q. Have you ever been asked to prepare a
3 personal financial statement?

4 A. No, sir.

5 Q. Now, you left First Reliance before
6 this loan was ever approved; right?

7 A. That's correct.

8 Q. If you'll look at Exhibit 22.

9 Now, based on your experience as an
10 employee of First Reliance can you look at this
11 document and tell whether First Reliance in fact
12 approved this loan.

13 A. It certainly looks like it's approved
14 based on a date of 10/26/07, and it says: Approved
15 for 2.8 million.

16 Q. And you reached that conclusion based
17 on the numerous signatures on the top right portion
18 of the page?

19 A. Those would be senior loan committee
20 signatures.

21 Q. You might have answered this earlier,
22 but I don't remember if you did.

23 What was your date of departure from
24 First Reliance?

25 A. October 4th, 2007.

1 Q. And as you told Mr. Kefalos, your
2 departure from First Reliance was pretty sudden;
3 right?

4 A. I knew it was coming, but it did come
5 quicker than I thought.

6 Q. Fair enough.

7 When you left First Reliance -- let's
8 just be clear. You basically were given no notice
9 and you were told to leave First Reliance; right?

10 A. Right.

11 Q. When you left First Reliance, did you
12 take any documents relating to Heritage Seven's
13 loan application for the apartment complex?

14 A. No, sir.

15 Q. When you left First Reliance you didn't
16 have another job lined up, did you?

17 A. No, sir.

18 Q. And you didn't know where you were
19 going to work or even if you were going to stay in
20 the banking business; right?

21 A. That's true. I really didn't. I was
22 okay with that.

23 Q. As you told Mr. Kefalos, you were
24 considering a number of different banks; right?

25 A. I was.

1 Q. And you were also considering some jobs
2 or at least one job outside the banking industry;
3 right?

4 A. That did not come before I left, but
5 once I left and then that in that period of time
6 where I was truly unemployed I had several
7 customers of mine that approached me about coming
8 to work for them that was outside of banking, and
9 subsequently did get an offer.

10 Q. And who did that offer come from?

11 A. That was a company known as
12 Construction Services Group, Ron McCollum.

13 Q. When you left First Reliance -- you had
14 a noncompete agreement with First Reliance;
15 correct?

16 A. Yes, sir.

17 Q. And after you left First Reliance you
18 sought some advice from Mr. Richter regarding the
19 impact or your options under this agreement;
20 correct?

21 A. Yes. I needed -- I felt like I needed
22 some counsel as to how that was going to process.

23 Q. And you were talking with a number of
24 different banks and you knew that if you were going
25 to go to work for any of them you would need to

1 deal with this noncompete that you had with First
2 Reliance; correct?

3 A. Absolutely.

4 Q. If you'll turn to Exhibit 40, please.
5 Are you there?

6 A. Yes, sir.

7 Q. If you look at the first three pages of
8 this exhibit, is this a letter that you recall
9 receiving from Marc Bogan at Ameris Bank?

10 A. Yes, sir.

11 Q. This letter is dated January the 10th,
12 2008; right?

13 A. Yes, sir.

14 Q. And if you look over to the third page,
15 there is a section at the bottom that says: Offer
16 letter accepted, and it's dated the 11th of January
17 2008 and it's signed by you and Mr. Bogan; correct?

18 A. Yes, sir.

19 Q. Did you ever work for Ameris before you
20 signed this acceptance of the offer?

21 A. No, sir.

22 Q. Do you recall when your actual first
23 day of work was with Ameris?

24 A. It was -- I would say it was a few days
25 after the 11th.

1 Q. Tell the Court, if you will, when you
2 decided that you were going to go to work for
3 Ameris.

4 A. Well, through the -- most of my time
5 was taken up through the negotiations with Larry
6 Richter's office with First Reliance's attorneys.
7 And I had some intermittent conversations with
8 several different potential employers, and during
9 that time is when I really tried to assess what was
10 best for me in terms of getting outside of banking
11 or staying in banking. You know, I didn't have a
12 great taste in my mouth initially afterwards, but I
13 certainly enjoyed banking; and if there was an
14 opportunity for me to stay in banking and if we
15 could work through that noncompete, then that would
16 have been a great thing.

17 But to answer your question, it wasn't
18 really until the Christmas holidays that I felt
19 like that this was something that I wanted to
20 pursue, and that was to stay in banking.

21 Q. From the time that you left First
22 Reliance, October 4th of 2007, to the time that you
23 joined Ameris shortly after the 11th of January of
24 2008 did you do anything on Ameris's behalf during
25 that time period?

1 A. No, sir.

2 Q. Did anyone at Ameris during that time
3 period ever ask you to do anything on their behalf?

4 A. No, sir.

5 Q. You were asked some questions about
6 this kitchen telephone call with Miss Gibson.

7 Now, when you received that call where
8 were you employed?

9 A. I was not employed.

10 Q. And this is before you went to work for
11 Ameris?

12 A. Oh, yes.

13 Q. Tell me what you remember about that
14 conversation/call.

15 A. Well, there was -- first, there was a
16 lot of people calling me at the sudden departure,
17 customers. And Linda did call me, and it was after
18 that -- it wasn't immediately after that. She
19 wanted to know if it was a good deal if she went
20 forward with the purchase of the property, and more
21 specifically the pricing of it is what we talked
22 about.

23 I think it was a good deal. I would
24 have never recommended it to First Reliance.
25 I don't recall the commitment, if you will, or the

1 offer from Ameris, but I know we talked about the
2 pricing because she brought it up.

3 Q. Explain for me -- when you say "the
4 pricing," the pricing of what?

5 A. Of the loan, what Ameris was offering
6 her or what she had been offered through Ameris, as
7 opposed to the pricing of what the First Reliance
8 conversations had been with Rolando and Linda when
9 we met.

10 Rolando already had an idea of what he
11 wanted to be priced at. When I had submitted the
12 credit memo to the senior loan committee in
13 Florence, that was one of the conversations and the
14 topics. Here again, after October 4 -- up until
15 October 4th First Reliance had not approved that
16 commitment. So I never really knew what the
17 pricing was; and honestly speaking, with everything
18 going on I didn't know exactly what the pricing
19 turned out to be or what it was when I recommended
20 it. But based on what she told me she was getting
21 for a pricing, I told her that was pretty fair to
22 the market. I knew it was similar to what I had
23 said maybe in my write-up.

24 Q. So when you talk about the pricing,
25 you're talking about the interest?

1 A. The interest rate.

2 Q. You're not talking about the price of
3 the apartment complex?

4 A. No, sir. It was the interest rate.

5 Q. You didn't tell Miss Gibson anything
6 one way or another whether \$2.8 million was a good
7 price for that apartment complex, did you?

8 A. No. I didn't get asked that question.

9 Q. When you had that conversation with
10 Mrs. Gibson, did you have any documents in front of
11 you?

12 A. No, sir.

13 Q. You weren't looking at a copy of --

14 A. You're talking about the kitchen --

15 Q. Right.

16 A. No, sir.

17 Q. You didn't have Miss Gibson's personal
18 financial statements with you at your house?

19 A. No, sir.

20 Q. During that conversation did you ever
21 tell Mrs. Gibson that the rents from the apartment
22 complex would cover the debt?

23 A. Not specifically. The cash flow on the
24 loan has to do that, but it wasn't specific to
25 income being over the expenses as well as the debt

1 service.

2 Q. Did you see yourself as Miss Gibson's
3 financial adviser?

4 A. Mr. Jordan, I've never acted as a
5 financial adviser to Miss Gibson or to a hundred
6 other people that I've banked with in 26 years.

7 Q. And Mrs. Gibson didn't pay you any
8 money for any kind of financial advice, did she?

9 A. Well, I have a high regard for
10 financial advisers and I know they charge their
11 clients, because I have a financial adviser. But I
12 was never offered any payment, never got payment,
13 and never sought payment for being a financial
14 adviser by anybody.

15 Q. Did you consider yourself Miss Gibson's
16 real estate adviser?

17 A. No, sir.

18 Q. Did anything that Miss Gibson ever said
19 to you during this time period make you think that
20 she was relying on you as her financial adviser or
21 her real estate adviser?

22 A. No, sir. She had come to ask for a
23 loan, and I processed it.

24 Q. Was there anything different about
25 Miss Gibson and Heritage Seven's application for a

1 loan than any other customer that you had had?

2 A. No. I certainly didn't pick up on it
3 other than it was pretty well put together.

4 Q. By Rolando?

5 A. By Rolando.

6 Q. Now, when you joined Ameris in January
7 of 2008 you were working in the Murrells Inlet
8 market; correct?

9 A. To honor the noncompete, that's one of
10 the reasons -- the bank had a desire to go up the
11 coast, and I was able to fill that need and honor
12 the noncompete.

13 Q. So your placement in Murrells Inlet was
14 specific to the fact that you had a noncompete
15 specific to the Charleston market; right?

16 A. Right.

17 Q. And when your noncompete expired that
18 what would have been what, in October of '07?

19 A. I think during negotiations it actually
20 expired a little bit earlier, but I did not get
21 back to Charleston for an assortment of reasons.

22 Q. And you returned to the Charleston
23 market --

24 A. To Mount Pleasant specifically.

25 Q. What was your position with Ameris when

1 you returned?

2 A. Market president of Mount Pleasant.

3 Q. When you were in Murrells Inlet you
4 didn't have any involvement with this Otranto Road
5 complex project, did you?

6 A. I did not.

7 Q. You were asked some questions by
8 Mr. Kefalos about some discussions that you had
9 with -- I believe you were asked about Philip
10 Murphy potentially buying the apartment complex; is
11 that right?

12 A. I know about Mr. Murphy had
13 consideration, yes.

14 Q. If you'll look at Exhibit 99.

15 A. Yes, sir.

16 Q. You see that's an email stream between
17 Richard Sturm and yourself in October of '09; is
18 that correct?

19 A. Yes, sir.

20 Q. Did you have some discussions in
21 October of '09 with Richard Sturm about this deal?

22 A. According to this email, yes, sir.

23 Q. At this point is it fair to say that
24 your concern about the fact that the bank's
25 collateral -- the apartment complex is not in great

1 shape?

2 A. That is correct.

3 Q. And is it fair to say that you believe
4 that Mr. Murphy, if he could purchase the property,
5 would help to rehabilitate the bank's asset as well
6 as Mrs. Gibson's?

7 A. Yes, sir. Mr. Murphy was in this
8 business and he was willing to manage it or to
9 purchase it, if that was a possibility.

10 Q. Mr. Kefalos asked you some questions
11 about referring Miss Gibson to Larry Richter. Do
12 you remember those questions?

13 A. That is correct.

14 Q. Isn't it correct, Mr. Zerbst, that
15 Linda came to you and said that she needed a
16 recommendation for a lawyer?

17 A. Correct.

18 Q. And she expressed that she was
19 concerned about Rolando; correct?

20 A. That is correct.

21 Q. Did she say anything to you when she
22 approached you for a recommendation about not being
23 satisfied with the way that the bank had handled
24 this project?

25 A. No, sir.

1 Q. Did you have any inclination that she
2 was considering filing a lawsuit against the bank?

3 A. No, sir.

4 Q. And you thought Mr. Richter was a very
5 good lawyer; right?

6 A. I used him.

7 Q. Now, Mr. Kefalos asked you --
8 ultimately you learned that Mr. Richter had
9 withdrawn from representing Miss Gibson; correct?

10 A. That's correct.

11 Q. When you referred Miss Gibson to
12 Mr. Richter, you didn't have any inclination that
13 he would have a conflict of interest, did you?

14 A. No. I did not think -- she asked for
15 representation. Maybe I didn't give enough thought
16 to it. But it was her trying to satisfy her need
17 for an attorney against Rolando.

18 Q. If you'll flip to Exhibit 100. Do you
19 recognize this email?

20 A. It's an email that I sent to David
21 Charpia and Mr. Sturm.

22 Q. It discusses a meeting with Miss Gibson
23 where it discussed some options; is that correct?

24 A. Right.

25 Q. And if you'll just look at Exhibits 101

1 all the way through 106. It's a chain of emails.

2 A. Yes, sir.

3 Q. These are a number of emails in
4 November of 2009 between you and other individuals
5 at Ameris; correct?

6 A. That's correct.

7 Q. And they in general talk about your
8 discussions with Miss Gibson and her attorney, Rob
9 Papa, who has been hired to represent her about
10 trying to negotiate some resolution to the
11 apartment complex; correct?

12 A. Yes. As I recall, she was negotiating
13 with First Citizens as well as Ameris Bank, and she
14 was deciding how and when to possibly sell the
15 units, what to do with the units. And as these
16 emails allude to, she got to the point where there
17 was no decision and she was just incapable of
18 making a decision, and we were trying to see if we
19 could resolve the issue.

20 Q. And Mr. Papa represented Miss Gibson
21 after Mr. Richter had withdrawn; correct?

22 A. Correct.

23 Q. So these discussions that are
24 memorialized in your emails were referencing
25 negotiations where you were acting on behalf of the

1 bank and negotiating with Mr. Papa on behalf of
2 Miss Gibson; correct?

3 A. Yes. I was keeping my chain of
4 command, if you will, updated on the discussions
5 because we thought there was -- Linda had looked at
6 the proposals and said yes. You know, selling the
7 property was something that helped all parties, and
8 she understood that. And then that's what those
9 discussions were all about. I recall her doing the
10 same thing at First Citizens Bank.

11 Q. And you all were negotiating, and she
12 never made a decision about what she wanted to do
13 or not; correct?

14 A. Correct.

15 MR. JORDAN: Just one moment, your
16 Honor.

17 BY MR. JORDAN:

18 Q. Mr. Zerbst, in connection with Heritage
19 Seven's application for the loan that was brought
20 to you at First Reliance, did you have any
21 information about the apartment complex project
22 that you didn't share with Miss Gibson or with
23 Rolando?

24 A. No, sir.

25 Q. Did you have any information about the

1 value of that project for the apartment complex
2 that you didn't share with them?

3 A. No.

4 Q. Any information about who the architect
5 was or his credentials that you didn't share with
6 them?

7 A. No, sir.

8 Q. Any information about Triton
9 Construction or its credentials that you didn't
10 share?

11 A. Never heard of them.

12 Q. Any information about what the rents
13 would be on those apartments once the deal was done
14 that you didn't share with them?

15 A. No. They brought me that information.

16 Q. Did you have any information about
17 Miss Gibson's finances that they didn't have that
18 you didn't share with them?

19 A. No, sir.

20 Q. Would you be in a position to know more
21 about Miss Gibson's financial statement or would
22 she?

23 A. A financial statement would be known
24 best by the offerer of the financial statement.
25 Miss Gibson in this case.

1 Q. Did you have any information about
2 Miss Gibson's investments that you didn't share
3 with Rolando and Miss Gibson?

4 A. No, sir.

5 Q. Did you have any information that would
6 lead you to believe that this project wouldn't
7 succeed that you didn't share with Miss Gibson or
8 with Rolando?

9 A. No, sir.

10 Q. Mr. Kefalos asked you some questions
11 about Miss Gibson being inexperienced in real
12 estate, borrowing money.

13 Did the fact that Rolando was assisting
14 her and was her agent on this project help to
15 relieve those concerns for you?

16 A. It was a mitigant, no doubt.

17 Q. And in fact, you said that Rolando put
18 a pretty good package together for her; right?

19 A. He knew what he was doing. He did.

20 Q. Did you ever tell Miss Gibson: Look,
21 Miss Gibson, I'm working on your behalf and not on
22 the bank's?

23 A. No, sir.

24 Q. Did you ever make a statement to
25 Miss Gibson: Look, Linda. I will look out for

1 your interests and not the interests of the bank?

2 A. I never thought or said that.

3 MR. JORDAN: Nothing further.

4 THE COURT: Redirect?

5 MR. KEFALOS: Nothing, your Honor.

6 THE COURT: Just give me a moment.

7 I may have some questions.

8 EXAMINATION

9 BY THE COURT:

10 Q. Mr. Zerbst, when portions of
11 Mr. Snipes' deposition was being read you were here
12 this morning, were you not, sir?

13 A. Yes, sir.

14 Q. Did you have any concern -- you were
15 employed with Ameris. Did you have any concerns
16 about the way the money was being advanced?

17 A. Your Honor, when I was in Murrells
18 Inlet with the noncompete I was not a party to that
19 advanced portion. I did not find out, your Honor,
20 about the advances until October of '08, sir, when
21 I got back.

22 Q. Did you have any discussions with
23 Mr. Snipes regarding the advances and your concern
24 about the handling of the loan?

25 A. Only after I got back and all the

1 advanced were made.

2 Q. Did you have any conversations with
3 Mr. Snipes about the handling of the loan?

4 A. Yes, sir, I did.

5 Q. And what did you tell Mr. Snipes about
6 the handling of the loan by the bank?

7 A. The handling by the loan officer with
8 the draws in my opinion fell outside of bank
9 policy.

10 Q. In what way?

11 A. I felt like the loan officer had not
12 taken the bank's best interests in ensuring that
13 the advances were used to actually improve the
14 property based on the invoices.

15 Q. Was Mrs. Gibson aware of the way the
16 advances were being made on the loan, do you know?

17 A. No, sir, not at the time they were
18 being made. Afterwards in conversation with
19 Mr. Lanier the majority of the advances were made
20 to Rolando at Rolando's request until subsequently
21 later when he was no longer employed by Miss Gibson
22 and she actually called for those advances.

23 Q. So did you at some time in your
24 employment with Ameris determine that Miss Gibson
25 -- the advances being made on this loan were being

1 made to Rolando and not to Miss Gibson?

2 A. They were being -- the advances were
3 made, your Honor, based on Rolando's request, yes,
4 sir.

5 Q. And did you determine that she was not
6 aware of those advances?

7 A. I wasn't aware for sure. I don't know
8 that the bank corresponded or she corresponded.
9 Because of how the loan was structured, I found out
10 subsequent in terms of how those advances were made
11 in that Rolando had authorization by Miss Gibson to
12 enact those advances.

13 Q. While being employed with Ameris did
14 you determine whether or not the bank was properly
15 inspecting the project?

16 A. When I was employed at Ameris Bank
17 there were times when I thought the bank had not
18 properly inspected the property.

19 Q. Did you determine that the person,
20 Rolando in particular, was receiving the advances
21 -- did you know that he didn't have any ownership
22 interest in the property?

23 A. I knew that he did not have ownership.

24 Q. Did that cause you concern?

25 A. No. It's not uncommon that -- or how

1 this was being done that someone that acts on
2 behalf of the owner -- it is done on construction
3 projects.

4 Q. So you are now telling me it was no
5 concern of yours any time in your employment with
6 Ameris that the advances were not approved by
7 Miss Gibson and were given to Rolando?

8 A. They were approved from Rolando,
9 Miss Gibson's --

10 Q. That's not the question I asked you.
11 Are you telling me that you had no concern of the
12 fact that the advances were being made to
13 Mr. Rolando, who you knew had no ownership, and
14 that Miss Gibson did not know about those advances?

15 A. Yes, sir. That was not an overly
16 concern part on my part based on what I knew
17 between their relationship.

18 THE COURT: Any questions in regard to
19 my questions?

20 MR. JORDAN: No, your Honor.

21 MR. KEFALOS: I have one.

22 REDIRECT EXAMINATION

23 BY MR. KEFALOS:

24 Q. You talked about Miss Gibson gave
25 authority for Mr. Villavicencio to get the

1 advances.

2 Is there anything in the file that
3 shows that she signed an authorization allowing him
4 to get the advances or to withdraw money from her
5 account?

6 A. No, sir. I only knew that through
7 conversation between us.

8 MR. KEFALOS: Thanks.

9 EXAMINATION

10 BY THE COURT:

11 Q. Mr. Zerbst, were you Mr. Benjie
12 Lanier's supervisor when both of you were employed
13 with the bank?

14 A. Yes, sir.

15 Let me restate this, your Honor. I was
16 his supervisor when I came back to the Mount
17 Pleasant market with Ameris, not when I was in
18 Murrells Inlet.

19 Q. Do you agree or disagree that
20 Miss Gibson should have agreed on the advances by
21 signing off on the request?

22 A. I think it makes it much easier for the
23 lender to have the borrower to sign off. Yes, I
24 do.

25 Q. So you agree with that statement?

1 A. It's not always done, your Honor, in my
2 experience, but it's always better if they do, yes,
3 sir.

4 Q. Are those some of the things that you
5 told Mr. Snipes about your concern on this loan?

6 A. Yes, sir.

7 THE COURT: Any other questions now as
8 a result of my questions?

9 MR. JORDAN: I have one question, your
10 Honor.

11 RE CROSS-EXAMINATION

12 BY MR. JORDAN:

13 Q. Mr. Zerbst, is it necessary for the
14 bank to have a written authorization in your
15 opinion?

16 A. No, sir. We typically don't require
17 it.

18 MR. KEFALOS: I have a followup to
19 that.

20 EXAMINATION

21 BY MR. KEFALOS:

22 Q. Are you saying that the bank does not
23 typically require a written authorization to allow
24 one person access to a bank customer's checking
25 account?

1 MR. JORDAN: Objection, your Honor.
2 That's not a checking account.

3 A. No, sir. If there is someone acting,
4 if you will, as a project manager or if the
5 borrower has given notice to the bank that this
6 particular person is authorized to ask and request
7 advances based on a documentation presented, then
8 oftentimes that's exactly what takes place.
9 Normally it's not written.

10 Q. You don't require a written
11 authorization to allow somebody like
12 Mr. Villavicencio to access monies in Miss Gibson's
13 checking account?

14 A. I'm not sure that's the same question,
15 to be honest with you. It wasn't to do with a
16 checking account through these advances that are
17 being made from the loan to allow for disbursements
18 to be cut. Money is going into the checking
19 account at that time.

20 Q. Sure. So money is cut from the loan
21 into Miss Gibson's checking account. I'm asking
22 about access to that checking account.

23 Doesn't the bank require -- doesn't
24 banking regulation require that there be some kind
25 of signature authority before you allow someone to

1 draw money out of another person's checking
2 account?

3 A. Absolutely.

4 MR. JORDAN: I have a couple of
5 follow-ups.

6 EXAMINATION

7 BY MR. JORDAN:

8 Q. Mr. Zerbst, if you will look at your
9 exhibit notebook and flip to Tab 40. I'm sorry.
10 42. There is a number of -- you can kind of flip
11 through there, and there is a number of Ameris Bank
12 checks. Do you see that?

13 A. I only see one here made out for
14 13,000.

15 Q. You don't need to look at all of them,
16 but these are checks written -- for example, on
17 Page 00051 there is a check written out to the
18 Verdi Group. Do you see that?

19 A. I do.

20 Q. And these checks represent the
21 disbursements from the construction loan account to
22 the vendors?

23 A. For payment.

24 Q. That were working on this project?

25 A. Yes, sir.

1 Q. So at this point checks are being
2 written to the vendors who are doing the work on
3 the project, and they are not being put into
4 Rolando's checking account or Miss Gibson's
5 checking account; is that right?

6 A. That is correct.

7 Q. Now, you understand that later on when
8 Linda came in and took over the project herself she
9 established a checking account in the name of
10 Heritage Seven; correct?

11 A. That's correct.

12 Q. And upon her request to the bank the
13 bank would transfer money from the construction
14 loan account into her checking account; correct?
15 The Heritage Seven checking account.

16 A. That's correct.

17 Q. And at that point she was in control of
18 the construction loan funds; correct?

19 A. Correct.

20 Q. If you'll look at Exhibit 31, please.
21 If you'll turn to the fifth page in, Paragraph 12
22 of this construction loan agreement. Do you see
23 where it says: Disbursing loan proceeds?

24 A. Yes, sir.

25 Q. And in Subparagraph B it says:

1 Payments. Do you see that?

2 A. I do.

3 Q. And the second sentence of that --
4 well, it says: You may make advances payable to me
5 or jointly to me and the project general
6 contractor, the subcontractors, or the material
7 suppliers for amounts due on the construction
8 contract. Do you see that?

9 A. Yes, sir.

10 Q. The next sentence says: Alternatively,
11 you may make payments for the project construction
12 costs directly to my contractor, subcontractor,
13 material supplier. Do you see that?

14 A. I do.

15 Q. So Ameris was authorized to make
16 payments in the way that it was making them; right?

17 A. When payments are made to
18 subcontractors working on the job, typically this
19 is how it was done.

20 Q. To your knowledge, Mr. Zerbst, did
21 Miss Gibson ever tell you or anyone at the bank not
22 to disburse money according to Rolando's
23 instructions?

24 A. To my knowledge, she never did to me
25 and to my knowledge she never did to anyone else at

1 the bank during the construction phase.

2 MR. JORDAN: Thank you.

3 EXAMINATION

4 BY THE COURT:

5 Q. Mr. Zerbst, do you know how Miss Gibson
6 got to Ameris on the loan?

7 A. Rolando, your Honor --

8 Q. Do you have knowledge of how she did
9 that?

10 A. No, sir, not substantial knowledge.

11 Q. What kind of knowledge do you have?

12 A. Rolando called me subsequent to me
13 leaving First Reliance and wanted to know where
14 Benjie had gone to work, and I told Rolando that
15 Benjie had gone to Ameris Bank. I assume that's
16 how he found out.

17 Q. Did you at any time tell Miss Gibson or
18 Rolando that you were trying to go to Ameris Bank?

19 A. No, sir, not specifically going to
20 Ameris Bank at all.

21 Q. Would you agree or disagree that Ameris
22 Bank and in particular Mr. Lanier had control over
23 the monies which were to be advanced?

24 A. Yes, sir. I do agree.

25 Q. And do you believe that he exercised

1 that control properly?

2 A. Throughout the whole process I think
3 there was some weaknesses in the advances being
4 made by Mr. Lanier.

5 Q. And tell me those weaknesses.

6 A. When I reviewed the file, your Honor,
7 when I got back the fact that the loan was fully
8 advanced and not even completed -- obviously you
9 have concern there. Going back through the files
10 there were times where the advances were being
11 made, and the inspections in my judgment were not
12 being made specifically to those particular
13 advances to see that the work was being done.

14 Invoices, your Honor, were being
15 submitted. Money was going to those vendors, but
16 was the work really actually being performed, is
17 what I saw as a weakness on behalf of the bank.

18 Q. And at no time in your thought process
19 did you think that was damaging to Miss Gibson?

20 A. No, sir. My concern was the bank.

21 Q. You were not the least bit concerned
22 about her?

23 A. Well, your Honor, I wouldn't so much
24 say it as that.

25 Q. I haven't heard you say today you were

1 concerned about her at all. Were you or were you
2 not?

3 A. I think -- yes, sir. As a loan officer
4 I'm concerned, obviously. As a loan officer you
5 want the transaction and the construction or the
6 project to work out for both sides. Absolutely.

7 Q. Mr. Zerbst, I understand this from a
8 banker's perspective. Your bank, Ameris, loaned
9 Miss Gibson \$2.8 million. Do you understand that
10 to be true?

11 A. Yes, sir.

12 Q. And you didn't have any concern or you
13 don't think the bank should have any concern as to
14 where advances of that money were going?

15 A. No. I do have concern. That's what
16 caused the issue when I got back and saw that,
17 because I was worried that the money didn't go into
18 the project. In fact, it became apparent that not
19 all the money did go into the project.

20 Q. And yet knowing that somebody at the
21 bank was making advances that they should not have
22 been making in your opinion. Is that correct or
23 not?

24 A. Well, I think the advances were made
25 based on the requests by the invoices.

1 My concern, your Honor, was the money
2 going into that project properly for the benefit of
3 the bank and the borrower to get the project
4 completed based on the dollars.

5 Q. Well, it was also your concern that
6 Miss Gibson didn't approve some advances; is that
7 correct?

8 A. Well, she had given notice that -- in
9 this case Rolando was authorized, so when he
10 requested those funds from Mr. Lanier -- it's
11 common that that takes place in construction
12 projects. So I would assume that Rolando and Linda
13 knew of those requests.

14 Q. So then would you explain to me why you
15 would put in writing that Miss Gibson should have
16 agreed to the advances by signing off on the
17 requests.

18 A. Well, that would have probably come
19 subsequent. In realizing now that those funds
20 weren't used for the project, would have been the
21 basis for me to make that statement at that time.

22 Q. Why did you put in writing that Benjie
23 Lanier lacked judgment because the owner was not
24 made aware of the advances?

25 A. Because whenever there is a problem in