UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 9:08-cv-81575-DIMITROULEAS

JEROME L. RICH, and JODI L. RICH,

Plaintiffs,
vs.

WACHOVIA BANK, N.A.,
A National Banking Association,

Defendant.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came for a non-jury trial before this Court from Monday, March 22, 2010, through Friday, March 26, 2010. The Court has carefully considered the arguments of counsel, the evidence presented, and the live testimony of John Christian, Jerome Rich, Jodi Rich, David Fox, Kenneth Kerr, Eric Smith, Marybeth Gordish, and George Rusnak. The Court has also determined the credibility of the witnesses and is otherwise fully advised in the premises.

Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court makes the following Findings of Fact and Conclusions of Law. To the extent, if any, that the Findings of Fact as stated may be deemed Conclusions of Law, they shall be considered Conclusions of Law. Similarly, to the extent the matters expressed as Conclusions of Law may be deemed Findings of Fact, they shall be considered Findings of Fact.

FINDINGS OF FACT

Background

1. Plaintiffs Jerome L. Rich and Jodi L. Rich (the "Riches") are married individuals residing in Boca Raton, Palm Beach County, Florida.

2. Defendant Wachovia Bank, N.A. ("Wachovia") is a national banking association with its principal place of business in Charlotte, North Carolina. Wachovia does business in the State of Florida.

3. The Riches are real estate developers who have developed rental apartment projects throughout the State of Florida.

4. Plaintiffs filed the instant action against Wachovia in the Circuit Court of the Fifteenth Judicial Court in and for Palm Beach County, Florida, which Wachovia removed to federal court on December 30, 2008.

5. The Court dismissed the Plaintiffs' Complaint with Leave to Amend on June 19, 2009. Thereafter, on July 2, 2009 Plaintiffs filed their Amended Complaint [DE-30].

6. On September 16, 2009, this Court granted in part, denied in part Wachovia's Motion to Dismiss the Amended Complaint [DE-45], dismissing count III and Plaintiffs Palm Bay West Development, LLC and Rich Capitol, LLC from the action. As such, the Amended Complaint contains only three counts against Wachovia: count I is a claim for breach of fiduciary duty, count II is a claim for negligent misrepresentation, and count IV is a claim for negligence.

7. On March 5, 2010, the Court granted summary judgment as to Count IV for negligence as being barred by the economic loss rule to the extent the claim relates to allegations that

Wachovia owed and undertook a continuing duty to thoughtfully, carefully, reasonably, and diligently provide investment advice, analyze their current portfolio, understand their investment goals, make recommendations to achieve these goals, provide consistent monitoring of the portfolio, and make ongoing recommendations for changes as needed. [DE-89].

Banking and Investment Relationship

8. Beginning in approximately 1999, Jerome and Jodi Rich began a banking relationship with Wachovia's predecessor, First Union, which continues at the present time.

9. Wachovia has financed certain of Plaintiffs' real estate projects. In 2006, the Riches sold a real estate project known as the Ibis Club Apartments for which they received a substantial sum of money. Wachovia was aware of this liquidity event.

10. Wachovia representatives invited the Riches to invest their sale proceeds or other funds with Wachovia and introduced the Riches to the "Wealth Management Group."

11. There was no express requirement in the Riches' loan documents or personal guarantees with Wachovia that required the Riches to invest their personal funds with Wachovia's Wealth Management Group.

12. The Wealth Management Group is a division of Wachovia which markets itself to affluent bank clients for their investment needs. Wachovia and its Wealth Management Group represented themselves as having knowledge and expertise in investment and the investment products that it recommends.

13. On or about May 5, 2006, the Riches met with Lynne Stephenson, a relationship manager, and Jack Christian, an investment strategist in the Wealth Management Group, to discuss

a potential investment relationship. Mr. Christian has been with Wachovia or its predecessors for twenty-four years. He had been a Certified Financial Planner since 2005.

14. The Riches advised Mr. Christian that they were only interested in safe, highly liquid investments of a short-term nature.

15. After being told of these investment requirements, Mr. Christian recommended that the Riches invest in the STIM program, which involved short-term, enhanced-cash types of investments, including "weekly floaters" or auction rate securities ("ARS"). The STIM program was vetted by the Wachovia research team which conducted credit research and due diligence.

16. This program was represented to provide higher than money-market returns, with short-term fixed income and explained as being safe, highly liquid, and insured from which cash could be withdrawn without a loss with 7 to 35 days notice.

17. ARS are long-term bonds and/or preferred stock with interest rates or dividend yields that are reset through periodic auctions, typically held every 7, 14, 28, or 35 days. ARS were widely-considered short-term investments because of the liquidity feature created by the periodic auctions. ARS were also a widely-used investment asset with a $350 billion market.

18. Mr. Christian explained neither the possible liquidity risks of ARS nor did he explain the ARS auction process to the Riches.

19. At the time of the Riches' investment with Wachovia, an ARS auction had never failed. In 2000 through 2007, ARS were considered safe, liquid and short-term investments, and were considered the appropriate investment for the Riches.

20. The Riches had no prior experience investing in ARS and, based upon a profile conducted by Mr. Christian, were not considered to be sophisticated investors or investment professionals. However, in June of 2007, the Riches signed a document suggesting that they considered themselves to be sophisticated investors. On June 2, 2007, they indicated that they had an aggressive risk tolerance. [Def. Ex. 6]. Nevertheless, Jodi Rich relied upon her husband to take care of their investments. However, she had previously worked in a bank as a loan officer. She still holds a real estate license. The Riches were more sophisticated than they let on to Mr. Christian.

21. The Riches relied upon Wachovia's representations in making their investments.

22. The Riches each executed an Investment Management Agreement ("Agreements") with Wachovia. [Pls. Ex. 65, 66]. The Agreements provided that Wachovia, as a Wealth Management Manager, was authorized and empowered to invest, at Wachovia's sole discretion and without prior consultation. [*Id.*].

23. The Agreements continued until modified or terminated, and upon termination the assets held by Wachovia for the Riches were to be delivered, as the Riches directed in writing, and Wachovia had no further responsibility for the accounts. [*Id.*].

24. The Agreements also provided that Wachovia's rights, powers, and duties were limited to those specifically listed in the Agreements with respect to the assets in the Wachovia accounts. [*Id.*].

25. Further, the Agreements provided that Wachovia had no duty, responsibility, or liability in connection with the investment or management of other assets of the Riches. [*Id.*].

26. Upon establishing the accounts with Wachovia's Wealth Management Group, the Riches each also executed a Wachovia Ratification of Current Investment Policy Statement ("Ratifications") which included Floating Rate Municipal Bonds and ARS as security types Wachovia was authorized to invest in on their behalf. [Pls. Ex. 3, 4].

27. The Ratifications also provided that investment decisions were to be made by Wachovia with sole authority and no advance notice was needed on trades. [*Id.*].

28. On May 9, 2006, each of the Riches opened discretionary investment accounts with Wachovia's Wealth Management Group, making a combined initial deposit of $6.5 million. In May of 2006, after these accounts were opened, Wachovia purchased around $6 millions of ARS and Variable Rate Demand Notes ("VRDN") for the Riches.

29. Wachovia earned a fee for managing the Riches' Wachovia investment accounts. The Riches were sensitive to the fees relative to the yield they were receiving.

30. On May 31, 2006, the Securities and Exchange Commission issued a cease and desist order against a number of broker-dealers of ARS ("SEC Order"). [Pls. Ex. 6]. The SEC Order related to unlawful practices of a number of broker dealers in bidding on ARS auctions and required them to disclose certain practices to investors and refrain from certain other practices. [*Id.*].

31. Wachovia did not advise the Riches of the existence or terms of the SEC Order.

32. Mr. Christian did not know of the existence or terms of the SEC Order.

33. There is no evidence that any Wachovia representative that was involved with the Riches' investment account was aware of the SEC investigation into the ARS market at the time the Riches' were Wealth Management Group clients.

34. At various times after the Riches' initial investment in ARS, the Wachovia Wealth Management Group continued to purchase ARS for the Riches.

35. The Riches received monthly account statements from Wachovia which showed how their money was invested. [Pls. Ex. 48]. The monthly statements indicated the broker-dealer from where the ARS were purchased in the month the ARS were purchased, identified the CUSIP number of each ARS, the coupon and the maturity.

36. The Riches were able to obtain cash and have access to liquid assets at all times while they maintained their Wachovia Wealth Management Account.

Transfer to Smith Barney

37. In early 2007, the Riches entered into an investment relationship with Smith Barney through David Fox and opened nondiscretionary investment accounts. They were unhappy with the fees being charged by Wachovia and with the low interest being realized.

38. As a result, on or about March 7, 2007, with the assistance of Mr. Fox, the Riches directed Wachovia by letters and transfer orders to transfer their entire accounts in kind to Smith Barney. [Pls. Exs.10, 11, 12, 13]. The Riches had the option to liquidate their Wachovia accounts prior to transfer but elected, in consultation with Smith Barney, to transfer their entire accounts in kind.

39. Mr. Fox reviewed the investments owned by the Riches prior to recommending the transfer and he determined that the investments could be transferred. Mr. Fox did not recommend that the Riches liquidate the Wachovia assets before transfer and the Riches did not request liquidation.

40. The Riches relied upon Mr. Fox's recommendation to transfer the assets in kind.

41. Mr. Fox considered ARS to be an appropriate investment for the Riches until February of 2008, and recommended that the Riches continue to purchase ARS in their Smith Barney account into early 2008. Mr. Fox is a Certified Financial Planner with twenty years experience with Smith Barney or its predecessors.

42. Mr. Fox was not aware of the 2006 SEC Order relating to ARS auctions.

43. The Riches did not discuss the transfer or contact Mr. Christian prior to issuing the transfer letters and transfer orders to Wachovia. Wachovia did not provide any advice at that time as to how the account and assets should be transferred.

44. Wachovia complied with the transfer letters and transfer orders and transferred the Riches' accounts in kind to Smith Barney. [Pls. Exs. 10, 11, 12, 13].

45. In order to transfer the accounts, Kenneth Kerr, a Wachovia employee, ran a transaction report for the securities and notified the broker-dealers of the ARS that the ARS were transferred from Wachovia to Citi/Smith Barney. [Def. Ex. 48].

46. By June of 2007, Wachovia had notified all the relevant broker-dealers at the next auction date that the Riches' ARS were transferred to Citi/Smith Barney, thereby transferring the ability to place orders. [*Id.*].

47. Wachovia did not have any further involvement after March 31, 2007, regarding the Riches' investments or purchase any additional ARS for the Riches.

48. After the transfer of their investment accounts from Wachovia to Smith Barney, the Riches and entities owned by the Riches continued to maintain other accounts at Wachovia.

Liquidation of ARS

49. Beginning in June 2007 and continuing through February 2008, Smith Barney recommended to Jerome Rich and Jodi Rich that they liquidate the ARS purchased for them by Wachovia, and the Riches directed Smith Barney to do so.

50. While the Riches attempted to liquidate the ARS transferred from their Wachovia accounts, the Riches continued to purchase additional ARS through Smith Barney.

51. In June of 2007, the Riches first started to liquidate the transferred ARS. The Riches were able to immediately liquidate some of the ARS transferred from Wachovia to their Smith Barney account. [Smith Barney June 1 - June 30, 2007 Statement, Philadelphia PA REGL PT AU sold on June 6, 2007].

52. A CUSIP is a unique identifier for each security. Mr. Fox never used the CUSIP number of the ARS or the Riches' monthly statements from Wachovia to determine where the ARS were bought.

53. Through the use of a computer program such as Bloomberg, the CUSIP number for each ARS could be used to identify the broker-dealer who made the market in the ARS. [Castelli Depo., pg. 93]. By then contacting the broker-dealer, one could determine if they could sell the ARS through them. [*Id.* at pg. 187].

54. Mr. Fox believed that Smith Barney could not sell the ARS transferred from Wachovia without bidding rights and without identification of the broker-dealers where the ARS were purchased.

55. Citi/Smith Barney cannot hold bidding rights for ARS that it does not maintain a market in. [*Id.* at 81-82; Pls. Ex. 31].

56. In July of 2007, Jerome Rich and Smith Barney contacted Wachovia for assistance in liquidating the ARS transferred from Wachovia. Mr. Christian advised that the assets should have been liquidated before transferring. [Pls. Ex. 17].

57. Mr. Christian also indicated that he would attempt to assist the Riches in obtaining the information they requested. It is industry standard and common practice for brokers and institutions to provide such information for former clients.

58. Mr. Fox contacted Wachovia again in December of 2007 for assistance in liquidating the ARS, but there is no evidence of any attempts to contact Wachovia regarding liquidating the ARS between July of 2007 and December of 2007.

59. In December of 2007, Wachovia liquidated all of the ARS held by its Wealth Management Group customers. Wachovia made the decision to liquidate their ARS positions based upon the increasing spread in the ARS market, causing Wachovia to believe that there might be changes in the market. Wachovia's decision to leave the ARS market was controversial and most institutions and individuals stayed in the market.

60. Wachovia did not advise the Riches to sell their ARS.

61. Mr. Fox and other Smith Barney representatives attempted to obtain bidding right information and the identification of the broker-dealer from whom Wachovia purchased the ARS in December of 2007. [Pls. Exs. 18, 19].

62. In January of 2008, Wachovia indicated to Smith Barney that the bidding rights for the ARS were already transferred and that the ARS brokers would already know the positions were with Citi/Smith Barney. [Pls. Exs. 20, 21].

63. In February of 2008, Smith Barney continued to request information relating to the bidding rights from Wachovia. [Pls. Exs. 22- 29]. The Riches also requested that Wachovia take the ARS back, but Wachovia refused, indicating that their Wachovia accounts were now closed, that Wachovia had provided the necessary information as to the process to trade on the ARS months ago and cautioned the Riches that the ARS market was experiencing liquidity problems. [Pls. Ex. 30].

64. On February 25, 2008, Wachovia provided the requested information such as where the ARS were bought. [Pls. Ex. 33, 35].

65. This information was also contained in the monthly statements that had been provided by Wachovia to the Riches and was readily obtainable through Bloomberg.

66. On or about February 12, 2008, the ARS market failed. Prior to this failure, there was no known failure of ARS auctions, and the ARS auctions were successful in 2006 and 2007.

67. Prior to February of 2008, the Riches had access to and were readily able to obtain liquidity as desired.

68. Mr. Fox had never heard of an ARS auction failing in 2007 or 2008 or in his 17 years in the industry. Even as late as December of 2007, their was nothing in the ARS market that

gave Mr. Fox concern that the ARS auctions would fail. George Rusnak testified that the ARS was a $350 billion market before it failed.

69. Mr. Fox continued to buy ARS even after the ARS market failed.

70. Smith Barney has been able to sell some of the Riches' ARS that were transferred from Wachovia after the ARS markets failed, but the Riches continue to hold approximately $450,000 in four ARS purchased for them by Wachovia that have failed auction.

71. Mr. Fox continues to attempt to sell the ARS that have failed auction.

72. The Riches entered into a settlement with Smith Barney related to the ARS purchased for them by Smith Barney. Via the settlement, the Riches had access to a low or no interest loan from Smith Barney, but the Riches never made use of the loan.

73. It is possible that the ARS that the Riches currently hold could be redeemed or sold at any time, as evidenced by the fact that additional ARS were sold shortly before trial.

74. The Riches ultimately transferred the remaining ARS to an account held by Meridian 03, LLLP ("Meridian"), which is a partnership.

75. The Riches are majority owners of Meridian's general partner, Northstar 03, LLC, with the remaining shares being owned by a revocable trust in which Mr. Rich is the sole beneficiary.

76. Two revocable trusts, of which the Riches are respectively the sole beneficiaries, are the only limited partners of Meridian.

CONCLUSIONS OF LAW

1. Jurisdiction in the United States District Court for the Southern District of Florida is proper pursuant to 28 U.S.C. § 1332 in that there exists diversity jurisdiction between the

Plaintiffs and the Defendant as citizens of different states and the amount in controversy exceeds $75,000.00, exclusive of interests and costs. Plaintiffs are citizens of Florida and Defendant is a national banking association with its principal place of business in Charlotte, North Carolina.

2. The Court reaffirms its previous conclusion [DE-89, at pg. 9] that the Riches are the real parties in interest in this action as the Riches were the objects of the purported conduct by Wachovia and suffered the injuries at issue, not Meridian.[1]

Count I Breach of Fiduciary Duty

3. To state a claim for breach of fiduciary duty, plaintiff must allege: (1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) damages that were proximately caused by the breach. *Gracey v. Eaker*, 837 So. 2d 348, 353 (Fla. 2002).

4. A fiduciary relationship is based on trust and confidence between the parties where "confidence is reposed by one party and a trust accepted by the other . . ." *Taylor Woodrow Homes of Fla., Inc. v. 4/46-A Corp.*, 850 So. 2d 536, 541 (Fla. 5th DCA 2003) (internal citations omitted).

5. "[I]n the usual creditor-debtor relationship, a fiduciary duty does not arise and allegations of superior knowledge of a party's financial condition are generally insufficient to transform the creditor-debtor relationship into a fiduciary relationship." *Id.*

[1] At trial, Wachovia raised its concern that the Riches would take an inconsistent position in regard to their interest in Meridian in subsequent litigation. However, this argument does not persuade the Court to alter its previous conclusion that the Riches are the real parties in interest in this litigation. If the Riches indeed take an inconsistent position on this issue, then their sworn testimony from trial can be impeachment for any future lawsuit.

6. A fiduciary relationship is created when a party undertakes the role of investment manager for another and is given sole discretion to invest that person's funds. *Maliner v. Wachovia Bank, N.A.,* Case No. 04-60237CIV, 2005 WL 670293, at *11 (S.D. Fla. Mar. 1, 2005).

7. Although the parties' debtor-creditor relationship did not create a fiduciary relationship, a fiduciary relationship existed between Wachovia and the Riches while Wachovia had discretionary authority over the Riches investments. *See Taylor Woodrow Homes of Fla., Inc.*, 850 So. 2d at 541; *Maliner,* No. 04-60237, 2005 WL 670293 at *11.[2]

8. The Riches allege that Wachovia breached its fiduciary duty to the Riches by: engaging in self-dealing and placing its own interests before those of the Riches; failing to make appropriate investment recommendations; failing to analyze and understand their investment goals, failing to provide consistent monitoring or make ongoing recommendations; taking unfair advantage and not acting in the best interest of the Riches; failing to disclose the risks associated with ARS; failing to disclose the SEC Order; failing to disclose that ARS were neither safe, liquid, nor suitable investments; failing to cooperate with Smith Barney in selling the ARS; failing to facilitate the liquidation of the ARS; and failing to fulfill its duty of loyalty to the Riches. [DE-30, ¶ 77].

9. As such, based upon the arguments and evidence presented at trial, the Riches' breach of fiduciary duty claim is broken into two parts: (1) that Wachovia breached its fiduciary

[2] There is no credible evidence that the Riches were coerced or required to invest with Wachovia. On the contrary, the Court found Marybeth Gordish's testimony to be credible that the Riches were not required to invest in the Wealth Management Group, but merely an introduction may have been made between the Riches and the Wealth Management Group.

duty by failing to recommend and assist the Riches in liquidating the ARS after their Wachovia accounts were transferred to Smith Barney, and (2) that Wachovia breached its fiduciary duty by investing in and recommending the ARS while the Riches had their investment accounts at Wachovia.

10. "When contractual language is clear and unambiguous, courts cannot indulge in construction or interpretation of its plain meaning" and "where a contract is silent as to a particular matter, courts should not, under the guise of construction, impose on parties contractual rights and duties which they themselves omitted." *BMW of North Amer., Inc., v. Krathen,* 471 So. 2d 585, 587 (Fla. 4th DCA 1985).

11. The Agreements provided that upon termination Wachovia had no further responsibility for the accounts and that Wachovia had no duty, responsibility, or liability in connection with the investment or management of other assets of the Riches. [Pls. Ex. 65, para. 14; 66].

12. Upon terminating the Agreements and thereby the discretionary investment relationship, the Court concludes that Wachovia no longer had a fiduciary relationship with or any fiduciary duties to the Riches since Wachovia no longer had discretionary authority over the Riches' accounts after that point. Instead, the Riches assets thereafter became the responsibility of the Riches and Smith Barney.

13. The transfer orders and letters clearly indicated that the Riches now had an investment relationship with Smith Barney, and the Riches decision to transfer their accounts was based upon advice from Smith Barney, without any consultation with Wachovia.[3] Upon

[3] The Riches seem to take issue with the fact that Wachovia did not attempt to advise the Riches to liquidate their assets prior to transferring to Smith Barney upon receiving the transfer

receiving the transfer orders and letters which terminated the discretionary investment relationship, Wachovia had no duty to the Riches beyond delivering the ARS in-kind pursuant to the written instructions provided by the Riches.

14. Thus, to the extent the Riches' fiduciary duty claim is based upon the allegation that Wachovia breached its fiduciary duty by failing to recommend and assist the Riches in liquidating the ARS after their Wachovia accounts were transferred to Smith Barney, such a claim fails as Wachovia had no fiduciary relationship or fiduciary duties after the Agreements and Wachovia's discretionary authority were terminated.[4]

15. In addition, to the extent the Riches' fiduciary duty claim is based upon the allegation that Wachovia breached its fiduciary duty by investing in and recommending the ARS while the Riches had their investment accounts at Wachovia, such a claim also fails.

16. There is no evidence that Wachovia's selection and recommendation of ARS as an appropriate investment for the Riches was a breach of its fiduciary duty.

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orders and letters from the Riches. However, the Riches clearly indicated in their transfer orders and letters how they wanted their assets handled and identified that they now had an investment relationship with Smith Barney. Indeed, the Riches testified that they executed the transfer orders and letters based upon the advice received from Smith Barney, without any prior consultation with Wachovia. Wachovia simply followed their express written instructions contained in the transfer letters and orders. Any attempt by Wachovia to interfere with the Riches' relationship with Smith Barney or object to the advice given by Smith Barney may have subjected Wachovia to the risk of a suit for interference. As such, the Court will not impose a burden on Wachovia to attempt to undermine the clear instructions from the Riches based upon the advice given by Smith Barney when considering that there was no such requirement imposed by the Agreements and where any such attempts by Wachovia could have subjected Wachovia to a claim of interference from Smith Barney.

[4] The Court further notes that even if the fiduciary relationship were to somehow survive the termination of the Agreements, given the fact that the possibility of the ARS market failing was deemed to be highly remote and speculative, the mere fact of a fiduciary relationship would not transform Wachovia into an ultimate insurer for any unforseen event affecting the Riches' investments.

17. On the contrary, the testimony and evidence presented at trial demonstrated that ARS were widely-used as short-term investments, and were widely-recognized as safe, liquid and appropriate investments.

18. Evidence was presented that no ARS auction had ever failed prior to February of 2008. Further, there was no evidence that any representatives of Wachovia were aware of any risk that the Riches' investments in ARS were not safe, liquid and appropriate while the Riches' maintained their discretionary accounts at Wachovia. In fact, Mr. Fox of Smith Barney confirmed that Wachovia's investment in the ARS was an appropriate investment for the Riches and continued to purchase ARS for the Riches into 2008.

19. There was also no evidence presented that any representatives of Wachovia that were involved in the Riches' investment accounts were aware of any SEC investigation into the ARS market at the time the Riches had their investment accounts with Wachovia. Even Mr. Fox testified that he was not aware of the 2006 SEC Order.

20. Thus, while there may have been a highly remote possibility at the time that Wachovia recommended and invested the Riches in ARS that the ARS market could fail or that the ARS purchased by the Riches could become long-term investments, the Court is not persuaded that Wachovia's investment in and recommendation of ARS resulted in a breach of fiduciary duty to the Riches.[5]

21. Instead, at the time the investment advice was provided by Wachovia, while the Riches maintained their accounts at Wachovia, and in fact even after the Riches transferred their

[5] To hold otherwise, would impose a fiduciary duty upon Wachovia to be clairvoyant in its investment recommendations and require Wachovia to be an insurer of all of the Riches' investments even after the Riches voluntarily elected to terminate the investment relationship. The Court declines to impose such a duty upon Wachovia.

accounts to Smith Barney, the ARS were considered appropriate investments for the Riches based on the Riches' investment needs.

22. Wachovia is entitled to judgment in its favor on Count I for breach of fiduciary duty.

Count II Negligent Misrepresentation

23. Under Florida law, to establish a claim for negligent misrepresentation, a plaintiff must prove the following elements: "(1) [a] misrepresentation of a material fact; (2) the representor … ma[d]e the representation without knowledge as to its truth or falsity, or … under circumstances in which he ought to have known of its falsity; (3) the representor … intend[ed] that the misrepresentation induce another to act on it; [and] (4) injury must result to the party acting in justifiable reliance on the misrepresentation." *Souran v. Travelers Ins. Co.*, 982 F. 2d 1497, 1503 (11th Cir. 1993) (internal citations omitted).

24. The Riches allege that Wachovia misrepresented that the investment in ARS was an investment that was safe, liquid and appropriate given the Riches' need for immediate access to their funds.

25. The Court finds that such representations were true at the time they were made and, thus, this claim fails.

26. The testimony elicited at trial indicated that at the time of the Riches' investment with Wachovia an ARS auction had never failed and between the period of 2000 through 2007, ARS were widely-considered safe, liquid and short-term investments.

27. Indeed, the Wachovia representatives and Mr. Fox agreed that prior to the ARS market failure in February of 2008, the ARS purchased by Wachovia for the Riches were in fact safe, liquid and appropriate investments.

28. There was no evidence presented by the Riches that any Wachovia representatives involved with the Riches' investment accounts were aware of any SEC investigation into the ARS market. Even Mr. Fox of Smith Barney was not aware of the 2006 SEC Order.

29. Further, the Riches were able to obtain cash and have access to liquid assets at all times while they maintained their Wachovia Wealth Management Account.

30. As such, there was no evidence presented by the Riches that the ARS were not in fact safe, liquid and appropriate investments at the time Wachovia provided the investment advice to purchase the ARS, while the Riches maintained their accounts at Wachovia and even after the Riches transferred their accounts to Smith Barney prior to the unforseen ARS market failure in February of 2008.

31. The fact that Wachovia did not fully explain the auction process or the highly remote and speculative possibility that the auctions could fail, does not mean that Wachovia made a misrepresentation of a material fact, particularly when considering that an ARS auction had never failed before and ARS were widely-considered and used as short-term investments.

32. Notably, even if Wachovia had warned of the remote possibility of the ARS market failing or explained the auction process, it is speculative at best whether such knowledge would have prevented the Riches from investing in the ARS given the Riches desire for better than money-market returns and the fact that the Riches continued to purchase ARS through their Smith Barney accounts.

33. Additionally, even assuming Wachovia had made a material misrepresentation, the Riches' purported injuries and damages are highly speculative. The Riches seek interest

at varying rates that they claim they would have been charged if they had borrowed money to cover their illiquidity. However, the Riches did not borrow any money and the Riches provide no basis for this Court to determine what interest rate should be applied. And, there was no evidence presented that they attempted to sell the ARS on a secondary market. If the Riches had in fact sold their ARS at a loss on a secondary market or borrowed money at a set interest rate, at least under those circumstances there would be some basis for the Court to consider a measure of damages.

34. Finally, the Riches had a duty to mitigate their damages but there is no evidence that they did so. The Riches argue that they were damaged when they experienced illiquidity as a result of the ARS that failed auction, yet there was no evidence presented that the Riches borrowed money or attempted to sell the ARS on a secondary market in order to mitigate the purported illiquidity issue.

35. Wachovia is entitled to judgment in its favor on Count II for negligent misrepresentation.

Count IV Negligence

36. Under Florida law, the elements of a negligence claim are as follows: "(1) the duty requiring the defendant to adhere to a standard of conduct, (2) a breach of that duty, (3) a 'reasonably close causal connection' between the breach of the duty and the ensuing injury, and (4) demonstration of actual harm to the claimant." *Michaud v. Seidler*, No. 08-80288-CIV-RYSKAMP/VITUNAC, 2008 WL 4927015, *3 (S.D. Fla. 2008)(citing *Williams v. Davis*, 974 So.2d 1052, 1056 (Fla. 2007)).

37. "When anyone undertakes to do a particular act for another, the act undertaken must be done with reasonable care so as not to injure the other person by reason of the act performed." *Buscemi v. Intachai,* 730 So. 2d 329, 330 (Fla. 2d DCA 1999).

38. The remaining portion of the Riches' negligence claim[6] is based upon the allegation that Wachovia owed a continuing duty to provide all necessary assistance in order to enable the Riches to sell their ARS.

39. While Wachovia may have undertook a professional courtesy to assist the Riches in liquidating the ARS after the investment relationship was terminated, Wachovia did not assume any continuing duty to the Riches. The Court will not impose broad and undefined duties upon Wachovia for the mere fact that Wachovia gratuitously offered to help the Riches when the Riches terminated the relationship and the Agreements expressly provided that Wachovia would have no further duties, responsibilities or liabilities in connection with the investment or management of the Riches' assets upon termination. [Pls. Ex. 65, 66].

40. The Riches contend that Wachovia should have recommended liquidation prior to transfer, yet Wachovia was under no obligation to do so once the Riches terminated the Agreements and sent the transfer orders and letters. The Riches elected to terminate the Agreements based upon the recommendation of Smith Barney, without prior consultation or advice from Wachovia, and indicated to Wachovia that they were now represented by

[6] The Court granted summary judgment as to the negligence claim as being barred by the economic loss rule to the extent the claim related to allegations that Wachovia owed and undertook a continuing duty to thoughtfully, carefully, reasonably, and diligently provide investment advice, analyze their current portfolio, understand their investment goals, make recommendations to achieve these goals, provide consistent monitoring of the portfolio, and make ongoing recommendations for changes as needed. [DE-89, at pg. 16].

Smith Barney. Thus, upon terminating the Agreements and providing Wachovia with the transfer orders and letters, Wachovia had no duty to the Riches beyond delivering the ARS in-kind pursuant to the written instructions provided by the Riches.

41. Further, even if the Court were to assume that Wachovia was under a continuing duty, there was no breach of that duty by Wachovia and no evidence that Wachovia was the proximate cause of the Riches damages.

42. Wachovia transferred the assets in kind to Smith Barney as requested by the Riches. Then, after transferring, the testimony at trial indicated that Wachovia notified the broker-dealers of the ARS that the ARS were transferred from Wachovia to Citi/Smith Barney by June of 2007. As such, the broker-dealers were informed of the transfer in order to make any necessary sales.

43. While Smith Barney was under the impression that it needed additional information from Wachovia to liquidate the ARS, the Riches and Smith Barney had all the information needed to liquidate the ARS.

44. Mr. Fox indicated that he needed information from Wachovia as to the identity of the broker-dealers in order to liquidate the ARS, however, the monthly statements provided by Wachovia to the Riches identified the broker-dealers where the ARS were purchased and the CUSIP numbers of the ARS. Even if the monthly statements had not included the identification of the broker-dealers, Mr. Fox could have readily used the CUSIP numbers for the ARS to identify the broker-dealers in order to liquidate the ARS.

45. In addition, while Mr. Fox may have initially believed that Smith Barney needed the bidding rights information from Wachovia to liquidate the ARS, this belief was

subsequently found to be erroneous as Mr. Fox acknowledged that Citi/Smith Barney cannot hold bidding rights for ARS that it does not maintain a market in [Castelli Depo. at 81-82; Pls. Ex. 31] and Wachovia notified all the relevant broker-dealers that the ARS had been transferred to Citi/Smith Barney.

46. Mr. Fox's contention that he needed additional information from Wachovia is further undermined by the fact that Smith Barney was able to sell some of the Riches' ARS shortly after being transferred from Wachovia.

47. Thus, although there may have been some confusion and delay in obtaining the additional requested information from Wachovia, Smith Barney already had the requested information in its possession and Wachovia ultimately provided this information again to the Riches and Smith Barney. As such, even if Wachovia undertook a duty to provide additional information, by providing such information to the Riches and Smith Barney there was no breach of any duty by Wachovia.

48. On the contrary, the evidence and testimony demonstrated that Wachovia repeatedly attempted to assist the Riches and Smith Barney in obtaining any additional information.

49. Mr. Christian indicated in July of 2007 that he would attempt to assist the Riches in liquidating the ARS, but there is no evidence of further communication between the Riches or Smith Barney and Wachovia until December of 2007. Yet, there was no evidence presented that any delay in obtaining the information was the fault of Wachovia, but rather it appears that any delay was due to the Riches and Smith Barney's failure to follow-up, contact the appropriate individuals, or direct clear questions to Wachovia.

50. Over the course of several months, Wachovia repeatedly provided Smith Barney with the contact information for the individuals that could best answer Smith Barney's questions and indicated to Smith Barney and the Riches that the bidding rights for the ARS had been transferred such that by contacting the broker-dealers the broker-dealers would know the positions were with Citi/Smith Barney.

51. Thus, even if the Court were to conclude that Wachovia somehow breached a duty to the Riches, any purported negligence by Wachovia would pale in comparison to the negligence by Smith Barney and the Riches in failing to compile the necessary information, failing to contact the appropriate individuals, and failing to use readily available means to obtain the information to sell the ARS prior to the market failure.

52. Moreover, as discussed above, the Riches damages are speculative at best and the Riches have failed to demonstrate that they attempted to mitigate any purported damages.

53. Wachovia is entitled to judgment in its favor on Count IV for negligence.

54. A separate final judgment will be entered herein consistent with the Court's Findings of Fact and Conclusion of Law.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 7th day of April, 2010.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Counsel of record