

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay, Circuit Court Judge

Case Nos. 2010-CP-04-1845 and 2012-CP-04-1433
Appellate Case No. 2012-213385

JAMES ROBERT MALLOY..... PLAINTIFF,

v.

SWAIN N. THOMPSON, JR. DEFENDANT,
In the matter of: ESTATE OF ROBERT L. CHAMBLEE.

JAMES ROBERT MALLOY RESPONDENT,

v.

SWAIN N. THOMPSON, JR., MERRILL LYNCH,
PIERCE, FENNER & SMITH, INC., JOSEPH T.
ARGO, and GREENE AND COMPANY, L.L.P. DEFENDANTS,
Of whom MERRILL LYNCH is the APPELLANT,
In the matter of: ESTATE OF ROBERT L. CHAMBLEE.

REPLY BRIEF OF APPELLANT

Christopher A. Ogiba (S.C. Bar No. 70666)
E. Brandon Gaskins (S.C. Bar No. 73274)
MOORE & VAN ALLEN PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
Telephone: (843) 579-7000

Charles B. Goodwin
Tara A. LaClair
Rodney J. Heggy
CROWE & DUNLEVY, P.C.
20 North Broadway, Suite 1800
Oklahoma City, OK 73102
Telephone: (405) 235-7700

ATTORNEYS FOR APPELLANT

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INTRODUCTION

In the Initial Brief of Respondent, Plaintiff-Respondent James Robert Malloy (“Respondent” or “Mr. Malloy”) is unable to point to a single State that has adopted the claim of tortious interference with an expectancy of inheritance that has not *also* held that an element of such claim is that the alleged act of interference be *independently* tortious. Accordingly – as Merrill Lynch has consistently argued, both to the Trial Court and in this appeal – given that Mr. Malloy acknowledges that no duty was owed to him by Merrill Lynch, Mr. Malloy must allege duties derived from Merrill Lynch’s agreements with Decedent in order to have any hope of recovery. *See* Defendant Merrill Lynch, Pierce, Fenner and Smith, Inc.’s Memorandum in Support of Motion to Dismiss and Compel Arbitration, at p. 6. Because those agreements contain arbitration provisions, to the extent Mr. Malloy has stated any valid claims against Merrill Lynch, his claims should be compelled to arbitration.

ARGUMENT

I. RESPONDENT’S ARGUMENT REGARDING PRESERVATION OF ERROR RELIES ON A MISTAKEN CONSTRUCTION OF THE ISSUES ON APPEAL.

In Respondent’s Brief, Mr. Malloy misconstrues – whether erroneously or to muddy the waters – the issues raised in this appeal. This is an appeal from a denial of a motion to compel arbitration. However, the “elephant in the room” is that the claims Mr. Malloy asserts against Merrill Lynch, all involving tortious

interference with an expectancy of inheritance, have never been recognized by South Carolina. Although that novelty presents this Court with discretion as to what matters it chooses to rule upon now, the fundamental issue on appeal is whether arbitration is required.

In Respondent's Brief, Mr. Malloy faults Merrill Lynch for not having challenged, in a Rule 12(b)(6) motion to dismiss, the legal sufficiency of his tortious interference with expectancy of inheritance claim. Thus, says Mr. Malloy, that issue was waived and should not be heard on appeal. *See* Respondent's Brief at pp. 10-16.

To be clear, under South Carolina rules of civil procedure, the jurisdictional question of arbitration precedes Rule 12(b) motions, and thus Merrill Lynch has not yet had the opportunity to file a Rule 12(b)(6) motion. What Merrill Lynch has consistently argued, both to the Trial Court and in this appeal, is that – upon actual legal analysis of a tortious interference with expectancy of inheritance claim – Mr. Malloy must allege duties derived from Merrill Lynch's agreements with Decedent in order to have any hope of recovery. *See* Defendant Merrill Lynch, Pierce, Fenner and Smith, Inc.'s Memorandum in Support of Motion to Dismiss and Compel Arbitration, at p. 6 (“Plaintiff must claim to be a third party beneficiary of the CRAs, under whatever theories he alleges, to have any hope of recovery. Otherwise, Merrill Lynch would have no duty to Plaintiff under any theory.”). Accordingly, because those agreements with Decedent contain arbitration provisions, to the extent Mr. Malloy has stated any valid claims against

Merrill Lynch, his claims – pursuant to well established law – should be compelled to arbitration.

Of course, implicit in this argument is the suggestion that one response that was available to the Trial Court, and is now available to this Court, is to exercise judicial discretion and find that the difficult question of arbitrability presented by this case need not be confronted *because tortious interference with an expectancy of inheritance is not even a recognized claim under South Carolina law*. Courts are on occasion required to touch on “merits” questions as a means of deciding arbitrability. See *Rite Aid of Penn. v. United Food and Comm. Workers Union, Local 1776*, 595 F.3d 128, 136 (3d Cir.), *cert denied*, — U.S. —, 131 S.Ct. 187, 178 L.Ed.2d 43 (2010) (“[W]here the merits and arbitrability questions are inextricably intertwined, a court’s arbitrability decision may, of necessity, touch incidentally on the merits.”); *Indep. Lift Truck Builders Union v. Hyster Co.*, 2 F.3d 233, 235-236 (7th Cir. 1993) (“[T]he rule that courts must decide arbitrators’ jurisdiction takes precedence over the rule that courts are not to decide the merits of the underlying dispute. If the court must, to decide the arbitrability issue, rule on the merits, so be it.”). Indeed, courts have recognized that they may, in rare appropriate circumstances, dismiss baseless claims rather than refer them to arbitration. See *National R.R. Passenger Corp. v. Missouri P.R. Co.*, 501 F.2d 423 (8th Cir. 1974) (court need not refer baseless claim to arbitration); *Hennemann v. Ameritrade Holding Corp.*, 2000 WL 1859007 (D.V.I. Dec. 1, 2000) (same). Merrill Lynch acknowledges that this is a rare tact – generally, courts deciding a

motion to compel arbitration are to refrain from intruding on the merits – but in this case Mr. Malloy should not be heard to complain on that point because he, after all, denies that his claims are subject to arbitration.

II. IN DECIDING A MOTION TO COMPEL ARBITRATION, A COURT SHOULD ASSESS THE NATURE OF THE CLAIMS AT ISSUE.

If the Court decides to address the question of arbitrability – by finding or presuming that tortious interference with an expectancy of inheritance is a valid claim under South Carolina law – the answer to that question will turn on what the elements of the claim are to be. As set forth in Appellant’s Initial Brief, and argued to the Trial Court, Merrill Lynch contends that: (a) such claim requires proof of conduct that is tortious separate and apart from whether it interfered with an expectancy of inheritance, (b) given that Mr. Malloy acknowledges that no duty was owed by Merrill Lynch to him, the only possible tortious conduct he could complain of would be a breach of a duty derived from the Client Relationship Agreements between Merrill Lynch and Decedent; and (c) as a result, to the extent Mr. Malloy has asserted any valid claims against Merrill Lynch, those claims should be compelled to arbitration. The Trial Court in this case erred by failing to engage in even the first step of this analysis: deciding what proof would be required to state a claim of tortious interference with an expectancy of inheritance against Merrill Lynch.

To determine a motion to compel arbitration, a court must evaluate the arbitration agreement being relied upon and the claims being asserted.

Arbitrability is decided by the court before which the claims are pending. *See Zabinski v. Bright Acres Assocs.*, 553 S.E.2d 110, 118 (S.C. 2001) (“The question of the arbitrability of a claim is an issue for judicial determination.....”).¹

Once a court determines that there is a valid agreement to arbitrate that *could* apply to a dispute, it must assess the plaintiff’s claims to determine whether in fact they are subject to the agreement. The South Carolina Supreme Court, like other jurisdictions, cautions that this assessment must be made on the basis of the factual underpinnings of a complaint. “To decide whether an arbitration agreement encompasses a dispute a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim.” *S.C. Pub. Serv. Auth. v. Great W. Coal*, 437 S.E.2d 22, 26 (S.C. 1993). *See also Zabinski*, 553 S.E.2d at 118; *Hinson v. Jusco Co.*, 868 F.Supp. 145, 149 (D.S.C.1994) (“It is not the legal label assigned to a claim but the substance of the underlying allegations that determine whether claims are arbitrable.”). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Zabinski*, 553 S.E.2d at 118.

Here, that analysis is complicated by two factors: (1) Mr. Malloy’s claims against Merrill Lynch are ones that have never been recognized under South

¹ Because arbitrability affects the court’s jurisdiction, that question, no matter how novel, may not – contrary to Mr. Malloy’s suggestion at page 19 of his Initial Brief – be deferred or avoided.

Carolina law; and (2) the agreement to arbitrate at issue was not signed by Mr. Malloy, but applies to his claims because, to the extent they are valid at all, they are premised on duties owed to Decedent, who did sign the agreement to arbitrate. As a result of the novelty of Mr. Malloy's claims, and the question of whether those claims must necessarily be premised on duties owed to Decedent, this Court – in order to determine arbitrability – should analyze what the elements of a tortious interference with expectancy of inheritance claim would be assuming that claim were adopted by South Carolina.

What the Court should not do is what the Trial Court did and what Mr. Malloy now urges this Court to do: rely on the legal labels Mr. Malloy assigned to his claims, fail to analyze the factual proof that would be required for such claims, and simply accept without analysis that arbitration is not required because Mr. Malloy did not personally sign the arbitration agreement. In *Chelsea Family Pharmacy, PLLC v. Medco Health Solutions*, 567 F.3d 1191, 1197-1198 (10th Cir. 2009), the Tenth Circuit Court of Appeals explained why, in deciding a motion to compel arbitration, a court should carefully “define” what claims are asserted.

The court stated:

Focusing on the facts rather than on a choice of legal labels prevents a creative and artful pleader from drafting around an otherwise-applicable arbitration clause. This rationale applies with the same force to our initial discernment of a party's claims as to the application of an arbitration clause to each claim. By relying on the factual allegations to determine what claims are asserted in the complaint, we make explicit what has previously been implicit.

Chelsea Family Pharmacy, 567 F.3d at 1198.

In this case, Mr. Malloy, alleging himself to be a wrongfully displaced beneficiary of Decedent, might have been expected to assert claims that directly allege that duties owed to him as a third-party beneficiary of the agreements between Merrill Lynch and Decedent were breached by Merrill Lynch. Under well-established case law, such claims would indisputably be subject to the arbitration provisions in those agreements. Mr. Malloy, however, has chosen to pursue claims previously unrecognized under South Carolina law. Merrill Lynch submits that is not an accident. Mr. Malloy should not be permitted to artfully plead around the arbitration agreements.

III. ANY CLAIMS THAT MR. MALLOY MIGHT VALIDLY STATE AGAINST MERRILL LYNCH WOULD DEPEND UPON A DUTY DERIVED FROM THE CLIENT RELATIONSHIP AGREEMENTS, AND THEREFORE SHOULD BE COMPELLED TO ARBITRATION.

Upon a full analysis of the facts as alleged by Mr. Malloy in his Complaint, and what the elements of a claim of tortious interference with expectancy of inheritance would be *if* such claim were adopted by South Carolina, what emerges is that Mr. Malloy must – to have any hope of recovery – premise his claims on alleged breaches of duties owed to Decedent.

A. The Claim Of Tortious Interference With An Expectancy of Inheritance Requires *Independently* Tortious Conduct.

As set forth in Appellant's Initial Brief, the States that have adopted the tort of interference with an expectancy of inheritance have relied on Section 774B of the Restatement (Second) of Torts, which defines it as follows:

One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.

RESTATEMENT (SECOND) OF TORTS (1979), § 774B. Comment c to the Restatement explains that, unlike other tortious interference claims, the tort of interference with an expectancy of inheritance is limited to circumstances where the act of interference is tortious *by some measure beyond the interference itself*.

That comment states:

Unlike the liability stated in § 766B [interference with prospective contractual relations], the liability stated in this Section is limited to cases in which the actor has interfered with the inheritance or gift by means that are independently tortious in character.

Id.

In his Initial Brief, Mr. Malloy attempts to evade this requirement by arguing that Comment c “simply explains that some interference may be tortious and other interference may not be.” *See* Initial Brief of Respondent, at p. 22, n. 4. That could not be farther from the truth. Aside from the plain language of Comment c (“liability ... *is limited* to cases in which the actor has interfered ... by means that are independently tortious”) (emphasis added), § 774B itself states that the interference must be “by fraud, duress or other tortious means.”

Mr. Malloy further suggests that, in *Douglass v. Boyce*, the South Carolina Supreme Court, when reciting typical elements of a tortious interference with expectancy of inheritance claim, omitted the requirement of independently tortious conduct. *See* Initial Brief of Respondent, at p. 22, n. 4. That is likewise not true.

The elements listed in *Douglass* expressly include: “an intentional interference with [an] expectancy [of inheritance] *through tortious conduct.*” *Douglass v. Boyce*, 542 S.E.2d 715, 717 n. 4 (S.C. 2001) (emphasis added). Moreover, all of the cases cited in *Douglass* as support for the Court’s description of the claim’s elements require independently tortious conduct. *See Nemeth v. Banhalmi*, 425 N.E.2d 1187, 1191 (Ill.Ct.App. 1981); *Morrill v. Morrill*, 712 A.2d 1039, 1041-1042 (Me. 1998); *Doughty v. Morris*, 871 P.2d 380, 387 (N.M.Ct.App. 1994); *Firestone v. Galbreath*, 616 N.E.2d 202, 203 (Ohio 1993); *Wickert v. Burggraf*, 570 N.W.2d 889, 890 (Wis.Ct.App. 1997). This is not surprising: Mr. Malloy is unable to cite, and Merrill Lynch is unaware of, any State that has adopted the tort of interference with an expectancy of inheritance that does *not* require that the alleged act of interference be independently tortious. *See, e.g., Clark v. Wells Fargo Bank, N.A.*, 2010 WL 2306418 (Tex.App.-Houston Jun. 10, 2010).

B. Mr. Malloy Is Unable To Point To Any Act By Merrill Lynch That Would Constitute Independently Tortious Conduct.

In Appellant’s Initial Brief, Merrill Lynch explains that Mr. Malloy has failed to allege any act by Merrill Lynch that would constitute independently tortious conduct, *i.e.* any act by Merrill Lynch that would support tort liability *separate and apart from its alleged interference with Mr. Malloy’s expectation to inherit*. In his Initial Brief, Mr. Malloy does not offer any substantive response to this contention, other than to say – in a footnote – that “the record shows

numerous independent tortious acts committed by Merrill Lynch.” *See* Initial Brief of Respondent, at p. 22, n. 4.

At page 20 of his Initial Brief, Mr. Malloy lists the alleged acts by Merrill Lynch that he contends amounted to interference. However, Mr. Malloy does not attempt to explain how these acts were independently tortious. Mr. Malloy alleges that Merrill Lynch was directly involved in achieving the transfer of Decedent’s assets from other institutions to the Trust’s Merrill Lynch account, and that Mr. Malloy was harmed by those transfers. But he cannot explain how the facilitation by a brokerage firm of transfers of funds into and out of an account would be independently tortious. Mr. Malloy alleges that Merrill Lynch originated the idea of having certain transfers be done as tax-free rollovers, and that he was harmed by those transfers. But he cannot explain how ensuring tax protection would be independently tortious. Mr. Malloy further mentions the use of what he contends are false signatures and a false address on documents, including the Thompson Powers of Attorney and the agreement establishing the Trust. But he expressly alleges that it was Mr. Thompson, not Merrill Lynch, who improperly obtained Decedent’s signatures on those documents (Complaint at ¶¶ 31, 45, 107) and gave the false address (*id.* at ¶ 40). In short, despite his best efforts to sensationalize the description of the alleged acts of interference, and their effect on him, Mr. Malloy is unable to point to any such act that would constitute tortious conduct independent of the effect on him.

Although he never attempts to connect it to his tortious interference claim, Mr. Malloy at one point argues that – contrary to Appellant’s cited authority from other jurisdictions – South Carolina law imposed on Merrill Lynch a duty to independently assess Decedent’s mental competence before relying on powers of attorney and other documents signed by Decedent. As support for this argument, Mr. Malloy cites S.C. Code Ann. § 62-2-503. But that statute describes the requirements for a self-proving will. The fact that a witness to a will is supposed to affirm that the testator is of sound mind has absolutely no relevance to the question of whether Merrill Lynch should have examined Decedent’s competence before relying on powers of attorney and other documents signed by him.

Again, there are clear policy reasons to not impose on brokers and brokerage firms a duty to ascertain a client’s mental competence. *See Edward D. Jones & Co. v. Fletcher*, 975 S.W. 2d 539, 545 (Tex. 1998) (“A service provider should not be put to choosing between refusing to assist an elderly person with legitimate transactions and incurring liability for providing such assistance when the provider lacks any qualifications for determining competence. A stock broker’s fiduciary obligation does not include the duty to ascertain the client’s mental competence.”); *Anton v. Merrill Lynch*, 36 S.W.3d. 251, 256 (Tex. App. 2001) (“We ... reject appellant’s argument that the appellees had to ascertain [decedent’s] competence before letting him change beneficiaries [on a retirement account].”). For all of Mr. Malloy’s sensationalizing, Merrill Lynch was entitled

to accept the documents presented to it as legally binding and required by law to act on the instructions communicated to it in accordance with those documents.

C. Mr. Malloy's Admissions Affirmatively Refute A Finding Of Independently Tortious Conduct: He Acknowledges That Merrill Lynch Owed No Duty To Him And Disclaims Any Breach Of A Duty Owed To Decedent.

Mr. Malloy has stated both: (a) that his claims against Merrill Lynch are *not* premised on an allegation of a breach of a duty owed to *him* (see Initial Brief of Respondent, at p. 20); and (b) that his claims against Merrill Lynch are *not* premised on an allegation of a breach of a duty owed to *Decedent* (*id.* at p. 23).² Accepting both of those statements as true, it is impossible for Mr. Malloy to satisfy the element of independently tortious conduct. How could Merrill Lynch have engaged in any independently tortious conduct if there is no one to whom Merrill Lynch breached a duty?

D. The Only Possible Independently Tortious Conduct Alleged By Respondent In His Complaint Was A Breach Of A Duty Owed To Decedent.

Setting aside Mr. Malloy's disclaimers, the only possible way for Mr. Malloy to establish an independently tortious act by Merrill Lynch would be for him to allege that Merrill Lynch breached a duty to Decedent. Absent such an

² See also Plaintiff's Response to Defendant Merrill Lynch, Pierce, Fenner and Smith, Inc.'s Memorandum in Support of Motion to Dismiss and Compel Arbitration, at p. 5, where Mr. Malloy states that he *is* "suing Merrill Lynch for its acts committed against him directly."

allegation, he simply has no claim for tortious interference with an expectancy of inheritance.

E. To The Extent That Mr. Malloy Asserts Claims That Depend On A Duty Derived From The Client Relationship Agreements, Such Claims Should Be Compelled To Arbitration.

At this point, it appears that Mr. Malloy has disclaimed any legal theory that could possibly support a claim against Merrill Lynch, even under his view of the facts.³ Regardless, if the Court entertains the theory that Merrill Lynch breached a duty to Decedent, any such duty would be governed by the Client Relationship Agreements between Merrill Lynch and Decedent. This subjects Mr. Malloy's claims to the mandatory arbitration provisions contained in the CRAs.

As set forth in Appellant's Initial Brief, a nonsignatory may be bound by an agreement to arbitrate if his claims seek a direct benefit from an agreement containing an arbitration provision or otherwise are derived from the rights of a party to an agreement containing an arbitration provision. *See Int'l Paper Co. v Schwabedissen Maschinen & Anlagen GMBH*, 206 F. 3d 411, 417-18 (4th Cir.

³ Citing Comment a to § 774B of the Restatement, Mr. Malloy argues that "a duty to the plaintiff is not one of the elements of tortious interference with an inheritance." *See* Initial Brief of Respondent, at pp. 19-20. Without any support, Mr. Malloy argues that such claim "was designed to cover those situations when the tortfeasor does not owe a duty to the victim, as in this case." *Id.* This is both incorrect and irrelevant. Comment a merely states that § 774B "does not purport to cover liability for negligence when the actor, in attempting to effectuate an inheritance or gift, breaches a duty to use reasonable care that he owed to the donee as well as the donor." RESTATEMENT (SECOND) OF TORTS (1979), § 774B. Regardless, Merrill Lynch's argument is that there can be no independently tortious conduct absent a duty to someone. Below, Mr. Malloy disclaimed that he was premising his claims on a breach of a duty owed to Decedent. In this appeal, Mr. Malloy disclaims that he is premising his claims on a breach of a duty owed to him.

2000) (nonsignatories may be compelled to arbitrate if their claims implicate a “direct benefit” received from an agreement containing an arbitration clause); *Smith Barney, Inc. v. Henry*, 775 So.2d 722 (Miss. 2001) (compelling decedent’s beneficiary to arbitrate claim for negligent management of decedent’s funds); *Jansen v. Salomon Smith Barney, Inc.*, 776 A.2d 816 (N.J. App. Div. 2001) (compelling decedent’s beneficiaries to arbitrate claims that were derivative of the decedent’s rights).

If Mr. Malloy is found to be pursuing a claim that asserts tortious conduct by means of a breach of a duty owed to Decedent, that claim is necessarily derived from the CRAs between Merrill Lynch and Decedent. Because those agreements contain arbitration provisions, they are binding on Mr. Malloy’s claims, which should be compelled to arbitration.

IV. RESPONDENT’S REQUEST FOR SANCTIONS SHOULD BE SUMMARILY DENIED.

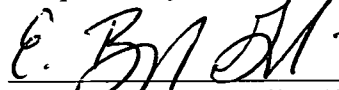
Respondent is pursuing claims that have not been recognized by South Carolina, dragging a brokerage firm that merely serviced an elderly man’s accounts into an inheritance dispute. His Initial Brief is rife with misstatements of law, most importantly regarding what the Restatement and every State to adopt the claim of tortious interference with an expectancy of inheritance say the elements of that claim should be. Nevertheless, he accuses Merrill Lynch of filing a frivolous appeal. For the reasons stated in Appellant’s Initial Brief and this Reply Brief, the appeal should not just be heard but granted.

CONCLUSION

This case presents an unfounded effort to assign legal liability to a brokerage firm for its provision of ordinary financial services for funds that are now the subject of an inheritance dispute. If the Court adopts (or presumes for now) the claim of tortious interference with an expectancy of inheritance, it must decide whether Mr. Malloy's claims against Merrill Lynch are premised upon a duty derived from Merrill Lynch's duty to Decedent. If not, given the lack of any allegation of a violation of any other duty, the claims are invalid and should be dismissed. If they are, the claims against Merrill Lynch should be compelled to arbitration. In other words, to the extent Mr. Malloy has stated any valid claims against Merrill Lynch, those claims should be compelled to arbitration.

Dated: June 10, 2013

Respectfully submitted,



Christopher A. Ogiba (S.C. Bar # 73274)

E. Brandon Gaskins (S.C. Bar # 73274)

Moore & Van Allen PLLC

78 Wentworth Street

P.O. Box 22828

Charleston, SC 29413-2828

Phone: (843) 579-7000

Fax: (843) 579-7099

Email: brandongaskins@mvalaw.com

Charles B. Goodwin
Tara A. LaClair
Rodney J. Heggy
Crowe & Dunlevy, P.C.
20 North Broadway, Suite 1800
Oklahoma City, OK 73102
Telephone: (405) 235-7700
Email: charles.goodwin@crowedunlevy.com
Admitted Pro Hac Vice

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

This certifies that on this 10th day of June, 2013, a true and correct copy of the above and foregoing was mailed with postage fully prepaid, to:

James R. Gilreath, Esquire
William M. Hogan, Esquire
110 Lavinia Avenue
PO Box 2147
Greenville, SC 29602
Attorneys for Respondent

S. Alan Medlin, Esquire
1713 Phelps Street
Columbia, SC 29205
Attorneys for Plaintiff

Harold P. Threlkeld, Esquire
P.O. Box 1385
Anderson, SC 29622
Attorneys for Defendant Swain N. Thompson, Jr.

John M. O'Rourke, Esquire
P.O. Box 1190
Anderson, SC 29622-1190
Attorney for Defendant Swain N. Thompson, Jr.

Michael T. Smith, Esquire
Logan, Jolly & Smith, LLP
P.O. Box 259
Anderson, SC 29622
Attorney for Defendants Joseph T. Argo and Green and Company, L.L.P.



E. Brandon Gaskins

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